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# Church-State: A Legal Survey--1966--1968

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# SURVEY

## CHURCH-STATE: A LEGAL SURVEY — 1966-68

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## I. INTRODUCTION

In this Survey, the *Notre Dame Lawyer* presents an analysis of selected Church-State legal problems of contemporary importance. Its purpose is two-fold: to delineate the nature and extent of these problems, and to contribute in some way to their solution.

## II. ABORTION

### A. Introduction

Until the past several years there has been little said and done about abortion. The great debate now in progress seems to have gained impetus from the wide publicity surrounding Mrs. Sherri Finkbine's attempt to procure an abortion in 1962.<sup>1</sup> In the same year the American Law Institute adopted its new Model Penal Code which, *inter alia*, proposed changes in the existing abortion

<sup>1</sup> Brody, *Abortion: Once a Whispered Problem, Now a Public Debate*, N.Y. Times, Jan. 8, 1968, at 28, col. 4. For Sherri Finkbine's own account of her abortion, see Finkbine, *The Lesser of Two Evils*, in *THE CASE FOR LEGALIZED ABORTION NOW 15* (A. Guttmacher ed. 1967).

laws.<sup>2</sup> This too seems to have been an important factor in bringing about the present debate.<sup>3</sup>

In this section of the Survey, the debate and the changes that already have occurred in some states will be reported and analyzed. Special attention will be given to the attitudes of individual Catholics and to the organized Catholic opposition to reform.

## B. Abortion Laws in the United States

### 1. Background

Like almost all other laws, the present abortion laws in the United States have their roots in English law. In the thirteenth century, Bracton reported that abortion by blow or by poison was homicide if the fetus is formed.<sup>4</sup> Several centuries later, however, Sir Edward Coke demonstrated an important difference between abortion and murder in English law:

If a woman be quick with childe, and by a potion or otherwise killeth it in her wombe; or if a man beat her, whereby the childe dieth in her body, and she is delivered of a dead childe, this is a great misprision, and no murder: but if the childe be born alive, and dieth of the potion, battery, or other cause, this is murder: for in law it is accounted a reasonable creature, *in rerum natura*, when it is born alive.<sup>5</sup>

The first book of Blackstone's *Commentaries* states that life "begins in contemplation of law as soon as an infant is able to stir in the mother's womb."<sup>6</sup> Nevertheless, he reported that abortion was still only a "heinous misdemeanor":<sup>7</sup>

To kill a child in its mother's womb, is now no murder, but a great misprision: but if the child be born alive, and dies by reason of the potion or bruises it received in the womb, it seems, by the better opinion, to be murder in such as administered or gave them.<sup>8</sup>

In 1803 Parliament codified a stricter version of this common-law rule. The first English abortion statute made it a felony to

wilfully, maliciously, and unlawfully administer to, or cause to be administered to or taken by any of his Majesty's subjects, any deadly poison, or other noxious and destructive substance or thing, with intent . . . to cause and procure the miscarriage of any woman, then being quick with child . . . .<sup>9</sup>

This offense was punishable by death. If the woman was not yet "quick," the punishment prescribed was one or more of several penalties such as fine, imprison-

2 MODEL PENAL CODE § 230.3 (Official Draft 1962).

3 Brody, *supra* note 1.

4 BRACTON, LAWS AND CUSTOMS OF ENGLAND, cited in Quay, *Justifiable Abortion — Medical and Legal Foundations*, 49 GEO. L.J. 173, 431 (1960).

5 3 COKE, INSTITUTES \*50.

6 1 BLACKSTONE, COMMENTARIES \*129.

7 *Id.* at \*130.

8 4 BLACKSTONE, COMMENTARIES \*198.

9 43 Geo. 3, c. 58, § 1, at 204 (1803).

ment, whipping, or banishment.<sup>10</sup> This first act was slightly amended in 1828,<sup>11</sup> and the 1837 version omitted the requirements of quickening and pregnancy.<sup>12</sup>

Connecticut was the first American state to enact an abortion statute. In 1821 it passed an act based on the English act of 1803.<sup>13</sup> Soon afterwards other states followed suit.<sup>14</sup> There is some authority that the purpose of these statutes "was not to prevent the procuring of abortions, so much as to guard the health and life of the mother against the consequences of such attempts."<sup>15</sup> However, the language of some statutes<sup>16</sup> and other authority<sup>17</sup> shows that protecting the life of the fetus was also a major purpose of these laws.

## 2. Present Laws

Today abortion is regulated in every state by statute. The overwhelming majority of states<sup>18</sup> and the District of Columbia<sup>19</sup> expressly permit abortion, at least where it is necessary to preserve the life of the mother.<sup>20</sup> Only four states<sup>21</sup> have statutes that prohibit abortion generally. However, since these prohibitions are against "illegal" abortions, in three of these four states an abortion would be allowable to save the life of the mother, either because of judicial

10 *Id.*, § 2, at 205.

11 Offenses Against the Person Act of 1828, 9 Geo. 4, c. 31, § 13.

12 Offenses Against the Person Act of 1837, 7 Will. 4 & 1 Vict., c. 85, § 6. The first case construing this act to not require actual pregnancy was *The Queen v. Goodhall*, 169 Eng. Rep. 205 (1846). For the development of English law on abortion until its recent change see Quay, *supra* note 4, at 430-35. England's new abortion law is examined in note 105 *infra*.

13 Quay, *supra* note 4, at 435.

14 *Id.* at 435-38.

15 *State v. Murphy*, 27 N.J.L. 112, 114 (1858). In the nineteenth century an abortion was a much more dangerous operation than it is today. Guttmacher, *Medical Considerations and Genetic Hazards Posed by Present Laws*, 23 NEW YORK MEDICINE v (March 1967).

16 *E.g.*, Mo. REV. STAT. § 559.100 (1953); NEV. REV. STAT. § 201.120 (1965).

17 *E.g.*, *Gleitman v. Cosgrove*, 49 N.J. 22, 41, 227 A.2d 689, 699 (1967) (concurring opinion).

18 ALA. CODE tit. 14, § 9 (1959); ALASKA STAT. § 11.15.060 (1962); ARIZ. REV. STAT. ANN. § 13-211 (1956); ARK. STAT. ANN. § 41-301 (1964); CONN. GEN. STAT. REV. §§ 53-29 to 30 (1960); DEL. CODE ANN. tit. 11, § 301 (1953); FLA. STAT. ANN. § 782.10 (1965); GA. CODE ANN. § 26-1101 (1953); HAWAII REV. LAWS § 309-4 (1955); IDAHO CODE ANN. § 18-601 (1948); ILL. REV. STAT. ch. 38, § 23-1(b) (1967); IND. ANN. STAT. § 10-105 (1956); IOWA CODE ANN. § 701.1 (1950); KAN. STAT. ANN. § 21-410 (1964); KY. REV. STAT. § 436.020 (1963); ME. REV. STAT. ANN. tit. 17, § 51 (1965); MD. ANN. CODE art. 27, § 3 (1967); MICH. STAT. ANN. § 28.204 (1962); MINN. STAT. ANN. § 617.18 (1964); MO. REV. STAT. § 559.100 (1953); MONT. REV. CODES ANN. § 94-401 (1949); NEB. REV. STAT. § 28-405 (1965); NEV. REV. STAT. § 201.120 (1965); N.H. REV. STAT. ANN. § 585:13 (1955); N.M. STAT. ANN. § 40A-5-3 (1964); N.Y. PENAL CODE § 125.05 (McKinney 1967); N.D. CENT. CODE § 12-25-01 (1960); OHIO REV. CODE ANN. § 2901.16 (Page 1954); OKLA. STAT. tit. 21, § 861 (1967); ORE. REV. STAT. § 163.060 (1967); R.I. GEN. LAWS ANN. § 11-3-1 (1957); S.C. CODE § 16-82 (1962); S.D. CODE § 13.3101 (1939); TENN. CODE ANN. § 39-301 (1955); TEX. PEN. CODE ANN. art. 1196 (1961); UTAH CODE ANN. 76-2-1 (1953); VT. STAT. ANN. tit. 13, § 101 (1958); VA. CODE ANN. § 18.1-62 (1960); WASH. REV. CODE § 9.02.010 (1961); W. VA. CODE ANN. § 61-2-8 (1966); WIS. STAT. ANN. § 940.04 (1958); WYO. STAT. ANN. § 6-77 (1959).

19 D.C. CODE ANN. § 22-201 (1967).

20 The reform legislation, adopted by California, Colorado, Mississippi, and North Carolina, which expands the justification for abortion beyond the grounds of preserving the mother's life, is examined at text accompanying notes 72-77 *infra*.

21 LA. REV. STAT. ANN. § 14:87 (Supp. 1967); MASS. GEN. LAWS ANN. ch. 272, § 19 (1956); N.J. REV. STAT. ANN. § 2A:87.1 (1953); PA. STAT. ANN. tit. 18, §§ 4718-19 (1963).

construction<sup>22</sup> or because of statutory inconsistency.<sup>23</sup> In the fourth state, there are no clues as to how "unlawfully" is interpreted,<sup>24</sup> but it seems that it would include at least the exception for saving the life of the mother. If it does not, this state would have the unique distinction of not permitting abortions for any reason.

Besides the three states<sup>25</sup> that have recently amended their abortion laws along the lines of the American Law Institute's Model Penal Code,<sup>26</sup> six other states, three by statute,<sup>27</sup> one by statutory inconsistency,<sup>28</sup> and two by judicial decision,<sup>29</sup> and the District of Columbia<sup>30</sup> allow abortions to protect the health of the mother. The statutes of two other states, which prohibit only "unlawful" abortions, might also be so interpreted.<sup>31</sup>

In general, then, the only ground for legal abortion in all but a few states is preservation of the life of the mother.

### 3. Practice under Present Laws

An examination of the practice under the present abortion laws has led one commentator to characterize illegal abortions as the "third largest racket" in the United States.<sup>32</sup> This appellation of "racket" is correct in the sense that many abortionists are organized into abortion rings and mills.<sup>33</sup> However, there appears to be no connection between these "organizations" and organized crime.<sup>34</sup>

22 *Commonwealth v. Wheeler*, 315 Mass. 394, 395, 53 N.E.2d 4, 5 (1944); *Gleitman v. Cosgrove*, 49 N.J. 22, 31, 227 A.2d 689, 694 (1967).

23 Louisiana's law has an inconsistency between its criminal statute, LA. REV. STAT. ANN. § 14:87 (Supp. 1967), and its medical license revocation statute, LA. REV. STAT. ANN. § 37:1285 (1964). The latter provides an exception to save the life of the mother, while the former does not. For a discussion of this inconsistency and other differences among the laws of many states, see George, *Current Abortion Laws: Proposals and Movements for Reform*, in ABORTION AND THE LAW 1, 5-20 (D. Smith ed. 1967).

24 Trout, *Therapeutic Abortion Laws Need Therapy*, 37 TEMPLE L.Q. 172, 185 (1964) (discussing Pennsylvania).

25 The recent amendments to the laws of California, Colorado, and North Carolina will be examined at text accompanying notes 73-77 *infra*.

26 MODEL PENAL CODE § 230.3 (Official Draft 1962). This section of the Model Penal Code will be examined at text accompanying notes 68-71 *infra*.

27 ALA. CODE tit. 14, § 9 (1959); MD. ANN. CODE art. 27, § 3 (1967); N.M. STAT. ANN. § 40A-5-3 (1964) (serious and permanent *bodily* injury).

28 The Oregon penal code, ORE. REV. STAT. § 163.060 (1967), allows abortion only to save the mother's life; however, the Oregon medical license revocation statute, ORE. REV. STAT. §§ 677.190 (1967), provides an exception where the mother's health appears to be in peril.

29 *Commonwealth v. Wheeler*, 315 Mass. 394, 395, 53 N.E.2d 4, 5 (1944); *State v. Dunkleberger*, 206 Ia. 971, 980, 221 N.W. 592, 596 (1928) (peril to life need not be imminent).

30 D.C. CODE ANN. § 22-201 (1967).

31 PA. STAT. ANN. tit. 18, §§ 4718-19 (1963); N.J. REV. STAT. ANN. § 2A:87.1 (1953). For differing opinions among the justices of the Supreme Court of New Jersey as to the interpretation of the New Jersey statute, see *Gleitman v. Cosgrove*, 49 N.J. 22, 277 A.2d 689 (1967).

32 D. LOWE, ABORTION AND THE LAW 6 (1966).

33 For an analysis of abortion mills and rings, see Bates, *The Abortion Mill: An Institutional Study*, 45 J. CRIM. L.C. & P.S. 157 (1954).

34 LOWE, *supra* note 32, at 77, states, without supporting citations, that some authorities believe that organized crime is responsible for many illegal abortions. This seems erroneous for several reasons. Hopefully, doctors, who perform most illegal abortions (see text accompanying note 35 *infra*), are not controlled by organized crime. These are also several reasons why organized crime would not desire to organize an abortion market:

What about abortions? Why are they not organized? The answer is not easy,

Most illegal abortions are performed clandestinely by physicians.<sup>35</sup> Since abortions are considered safe when properly performed,<sup>36</sup> the fact that a substantial number of people die from illegally obtained abortions indicates that many abortions are performed by the unskilled. Estimates of the total number of illegal abortions performed yearly vary widely. However, a reasonably accurate figure would be one million.<sup>37</sup> Estimates of yearly fatalities usually run between 5,000 and 10,000.<sup>38</sup> Any such estimates must be taken *cum grano salis*, since there has apparently been no comprehensive nationwide survey taken. One statistical expert, Dr. Christopher Tietze, has called the above estimates of yearly fatalities "unmitigated nonsense."<sup>39</sup> He estimates that the yearly figure is from 500 to 1,000.<sup>40</sup> In any event, there is evidence that a substantial, although uncertain, number of women die as a result of abortions poorly performed, either by the woman herself or by an unskilled layman.<sup>41</sup>

It is important to note that most abortions are sought, not by young unmarried women, but by married women who already have children.<sup>42</sup> Doctor Edwin Gold, Director of Obstetrics and Gynecology at Brooklyn Hospital in New York City, has stated:

If we were to give a profile of the most common situation in which a woman requests termination of pregnancy, we should describe a married woman with two or three children, at the height of child-bearing, between 28 and 40.<sup>43</sup>

Of course, this does not mean that the number of unmarried women or girls who seek abortion is insubstantial. This figure could be as high as 200,000

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and there may be too many special characteristics of this market to permit a selection of the critical one. First, the consumer and the product have unusual characteristics; nobody is a regular consumer the way a person may regularly gamble, drink, or take dope. A woman may repeatedly need the services of an abortionist, but each occasion is once-for-all. Second, consumers are probably more secret about dealing with this black market, and secret especially among intimate friends and relations, than are the consumers of most banned commodities. Third, it is a dirty business and too many of the customers die; and while organized crime might drastically reduce fatalities, it may be afraid of getting involved with anything that kills and maims so many customers in a way that might be blamed on the criminal himself rather than just on the commodity that is sold. Schelling, *Economic Analysis and Organized Crime*, in TASK FORCE REPORT: ORGANIZED CRIME 114, 124 (The President's Comm'n on Law Enforcement and Administration of Justice ed. 1967).

35 Rosen, *A Case Study in Social Hypocrisy*, in ABORTION IN AMERICA 299, 307 (H. Rosen ed. (1967)); Guttmacher, *Abortion — Yesterday, Today and Tomorrow*, in THE CASE FOR LEGALIZED ABORTION NOW 1, 8-9 (A. Guttmacher ed. 1967).

36 Rosen, *supra* note 35, at 307.

37 J. BATES & E. ZAWADZKI, CRIMINAL ABORTION 3 (1964).

38 South Bend Tribune, Sept. 7, 1967, at 3, cols. 7-8.

39 *Id.* For a critical history of the sources used to reach these estimations, see Hellegers, *Law and the Common Good*, 86 COMMONWEAL 418, 422 (1967).

40 Brody, *supra* note 1, at col. 3.

41 *E.g.*, New York Assemblyman Albert H. Blumenthal, sponsor of New York's proposed reform law, has stated that illegal abortions are the largest cause of pregnancy-related deaths in New York City. South Bend Tribune, Sept. 7, 1967, at 3, col. 7. Hellegers, *supra* note 39, at 422, states that there are about four hundred reported abortion deaths per year in the United States.

42 Kummer, *A Psychiatrist Views Our Abortion Enigma*, in THE CASE FOR LEGALIZED ABORTION NOW 114, 115 (A. Guttmacher ed. 1967); Lowe, *supra* note 32, at 8, estimates that 80% of all illegal abortions are performed on married women.

43 Gold, cited in Lowe, *supra* note 32, at 8.



yearly.<sup>44</sup> The report of a recently organized abortion service, composed of a group of Protestant and Jewish clergymen in New York City, shows that many unwed females seek abortions. The purpose of this service is to "offer advice and counsel" to any woman seeking an abortion. A primary purpose of the "advice and counsel" is to provide "the best medical advice to take care of the problem pregnancy," *i.e.*, to set up appointments with doctors who will perform illegal abortions. In its first five months of operation, the service has counseled over 800 women, half of whom were unmarried, and 90 percent of whom chose to have an abortion.<sup>45</sup>

Illegal abortions are not performed solely by unskilled laymen, private doctors, or abortion mills and rings. Many hospitals perform abortions that are illegal under a literal reading of the applicable statute.<sup>46</sup> For example, the meaning of "life" in statutes permitting abortions only to preserve the life of the mother is sometimes stretched to include "health."<sup>47</sup> Accordingly, abortions have been performed to prevent serious injury, both physical and emotional, and to prevent the advance of serious organic and emotional disease.<sup>48</sup> Under typical procedure, the physician of the woman seeking the abortion brings her case before a board that the hospital has set up to hear and determine abortion requests.<sup>49</sup> This procedure apparently gives the abortion an air of legality, since, until recently, no physician using it has been prosecuted for violating the state's abortion law.<sup>50</sup> Such practices, however, are probably not widespread, because

44 Assuming there are 1,000,000 illegal abortions yearly (*see* text accompanying note 37 *supra*), 20% of this figure (*see* note 42 *supra*) produces an estimated 200,000 illegal abortions performed on single women.

45 Brody, *supra* note 1, at col. 4.

46 In a California survey conducted in 1958-59, 75% of the 26 hospitals polled felt that their abortion practices did not strictly conform to the law. Packer and Gampell, *Therapeutic Abortion: A Problem in Law and Medicine*, 11 STAN. L. REV. 417, 430 (1959). Dr. H. Rosen believes the same can presently be said for the leading hospitals throughout the country. Rosen, *supra* note 35, at 305.

47 Rosen, *supra* note 35, at 300-01.

48 *Id.* at 301. Dr. Rosen feels that socio-economic factors are often the real reasons for seeking abortions. *Id.* at 302.

49 Dr. A. Guttmacher describes a typical abortion board proceeding:

The [abortion board system] was introduced at the Mount Sinai Hospital in New York City in 1952. The director of the obstetrical and gynecological service is chairman of its permanent abortion committee. The other members are the chief, or a senior attending, from the departments of medicine, surgery, neuropsychiatry and pediatrics. The board has a scheduled weekly meeting-hour, and convenes routinely whenever a case is pending. No case is considered unless the staff obstetrician-gynecologist desiring to carry out the procedure presents affirmative letters from two consultants in the medical field involved. Five copies of each letter must be filed at least 48 hours in advance of the meeting, so that each committee member may have an opportunity to study the problem in advance. The obstetrician-gynecologist whose case it is, and one of the two consultants who made the recommendation, must make themselves available at the committee meeting for further information when desired. In addition, if the chairman feels that an expert from some other department, hematology or radiotherapy for instance, would be helpful in arriving at a proper decision, this specialist is requested to attend as a non-voting member. The case is then carefully discussed and if any member of the five on the committee opposes therapeutic interruption, the procedure is disallowed. Guttmacher, *The Shrinking Non-Psychiatric Indications For Therapeutic Abortion*, in ABORTION IN AMERICA 12, 15 (H. Rosen ed. 1967); *cf.* Wilson, *The Abortion Problem in the General Hospital*, in ABORTION IN AMERICA 189, 190-91 (H. Rosen ed. 1967).

50 The single prosecution currently pending is discussed in Leavey & Charles, *California's New Therapeutic Abortion Act: An Analysis and Guide to Medical and Legal Procedure*, 15 U.C.L.A. L. REV. 1, 25 (1967).

the procedure is strict<sup>51</sup> due to a fear of prosecution,<sup>52</sup> and because the poor usually cannot afford the relatively high cost of a hospital abortion.<sup>53</sup> It is doubtful that any Catholic hospital uses such a procedure. Under the Code of Ethical and Religious Directives to Catholic Hospitals, promulgated by the Catholic Hospital Association of the United States and Canada, abortion is not permitted: "Direct abortion is the direct killing of an unborn child and it is never permitted, even when the ultimate purpose is to save the life of the mother."<sup>54</sup>

Although the flouting of present abortion laws is rampant, prosecutions are not. Besides the normal difficulties encountered in prosecuting any criminal case,<sup>55</sup> prosecutions under abortion statutes present unique problems. Assuming that a particular prosecutor desires to prosecute,<sup>56</sup> he is faced with the problem that most women will not report receiving an illegal abortion. There is an important reason for this. Since abortions are now generally considered to be as safe as a tonsillectomy if performed by a competent person,<sup>57</sup> women who have received such an abortion have no reason to complain against the abortionist. Indeed, their most earnest desire would be to keep the abortion a secret because they fear either damage to their reputation or prosecution as accessories.<sup>58</sup> Without the aid of these women, the prosecution can hardly establish a case unless the police arrest the abortionist during the act or can find other competent witnesses. It seems, however, that most abortionists are wise enough to make sure that the only witnesses are themselves and the patient.<sup>59</sup> Some doctors have their assistants conduct preliminary negotiations and preparations and perform the abortion itself hidden behind a screen.<sup>60</sup> Even the use of policewomen decoys has not been entirely successful in gaining convictions for attempted abortion either because of insufficient proof of attempt,<sup>61</sup> or perhaps, because extensive

51 In the board described in note 49, *supra*, if one member opposes a petition, it is dismissed. Empirical studies show that this procedure is one of the factors causing a decrease in the number of hospital-performed abortions. Wilson, *supra* note 49, at 191.

52 Some hospital boards use quotas because of this fear. *Time Essay, The Desperate Dilemma of Abortion*, TIME Oct. 13, 1967, at 32, 33 [hereinafter cited as *Time Essay*]. If the hospitals bend the abortion law "too often or too far, it will snap, which may arouse community censure or legal reprisals like we are witnessing in San Francisco where nine ethical physicians have been indicted for performing rubella abortions." Guttmacher, *supra* note 15, at vii.

53 Brody, *Abortion: Once a Whispered Problem, Now a Public Debate*, N.Y. Times, Jan. 8, 1968, at 28, cols. 2-3.

54 Quoted in ABORTION: LEGAL AND ILLEGAL; A DIALOGUE BETWEEN ATTORNEYS AND PSYCHIATRISTS 9 (J. Kummer ed. 1967) [hereinafter cited as DIALOGUE].

55 The difficulties of burden of proof, presentation of evidence, etc. encountered in prosecutions under abortion statutes are discussed in 1 C.J.S. *Abortion* §§ 15-35 (1936), Supp. (1967).

56 Some prosecutors may not want to prosecute because of sympathy for reforming present abortion laws; e.g., some district attorneys of New Jersey have stated that grounds additional to the justification for saving the life of the mother will be accepted as "lawful justification" within the meaning of the New Jersey statute, N.J. REV. STAT ANN. § 2A:87-1 (1953). They recommend that this statute be interpreted to permit abortion on the basis of a physician's good faith determination when made in accordance with accepted medical standards. Report of the Prosecutors' Comm. Concerning the Validity and Enforceability of 2A:87-1 (Abortion Law) 4. Also, the taking of bribes by prosecutors is not unprecedented. See Bates, *supra* note 33, at 164-67.

57 Rosen, *supra* note 35, at 307.

58 Lowe, *supra* note 32, at 75.

59 *Id.*

60 Bates, *supra* note 33, at 164.

61 *People v. Gallardo*, 41 Cal. 2d 57, 257 P.2d 29 (1953); *Commonwealth v. Willard*, 179 Pa. Super. 368, 116 A.2d 751 (1955).

use has not been made of policewomen in this area.

Another source of evidence and information that a prosecutor might use is hospital records of patients who have had a miscarriage or abortion. Some cities have ordinances requiring hospitals to divulge such information to the prosecutor.<sup>62</sup> The utility of these ordinances, however, is questionable. New York City's ordinance has not fared well because it is inconsistent with a state statute prohibiting a doctor from disclosing "any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity."<sup>63</sup> The district attorney of Kings County believed that the ordinance nullified the application of the general statutory prohibition<sup>64</sup> *pro tanto* and that it allowed the grand jury full access to the records of *every* case on abortion so that it could decide which cases involved criminal abortions and which did not.<sup>65</sup> The superintendent of Kings County Hospital refused to honor a grand jury subpoena requiring the production of all the hospital's records of abortion cases, contending that the general statutory prohibition forbade such a disclosure. The district attorney then moved the Kings County Court to hold the superintendent in contempt. In affirming the denial of this motion, the appellate division held that the ordinance limited the general statute only as to "cases currently being treated by doctors in which a criminal abortion practice is discovered or suspected."<sup>66</sup> Consequently, the grand jury could engage in no fishing expeditions in violation of the statutory privilege.

Even when the prosecutor builds a strong case, there still remains the difficulty of selecting an impartial jury, *i.e.*, one not overly sympathetic<sup>67</sup> for the defendant doctor (a layman probably would receive no sympathy) and persuading it against the defense counsel's pleas to emotion.

62 See Rosen, *supra* note 35, at 307.

63 N.Y. CIV. PRAC. LAW § 4504(a) (McKinney 1963).

64 At the time the action was brought the applicable statutory provision covering the physician-patient privilege was § 352 of the Civil Practice Act.

65 In re the Investigation into Alleged Commission of Criminal Abortions in the County of Kings, 286 App. Div. 270, 274, 143 N.Y.S.2d 501, 506 (1955).

66 *Id.* at 274, 143 N.Y.S.2d at 506.

67 The following survey, taken by the National Opinion Research Center on 1,482 adult Americans, shows the attitudes of the public on abortion.

Question asked: "Please tell me whether or not you think it should be possible for a pregnant woman to obtain a legal abortion . . ."

	Yes	No	Don't Know
1. if the woman's own health is seriously endangered by the pregnancy .....	71	26	3
2. if she became pregnant as a result of rape .....	56	38	6
3. if there is a strong chance of serious defect in the baby .....	55	41	4
4. if the family has a very low income and cannot afford any more children .....	21	77	2
5. if she is not married and does not want to marry the man .....	18	80	2
6. if she is married and does not want any more children .....	15	83	2

Quoted from Rossi, *Public Views on Abortion*, in *THE CASE FOR LEGALIZED ABORTION NOW* 26, 36 (A. Guttmacher ed. 1967). The first question asked has been criticized as ambiguous since "health" can mean "survival," avoiding a threat of serious but non-fatal sickness, or "mental health." Drinan, *Strategy on Abortion*, 116 *AMERICA* 177, 178 (1967).

### C. Proposals for Reform

Out of this background of widespread violation of present abortion laws by doctors, public dissatisfaction, and extreme hardship and even death in certain cases, have come proposals for reforming these laws. These reform proposals and the reform legislation already adopted will now be examined.

#### 1. *Model Penal Code*

Some advocate repealing all existing prohibitions on abortion.<sup>68</sup> However, the most famous and most successful proposal is that of the American Law Institute's Model Penal Code.<sup>69</sup> Basically, under this proposal an abortion is justified under three circumstances: (1) if a licensed physician believes there is substantial risk that continuance of the pregnancy would "gravely impair the physical or mental health of the mother," or (2) that the child would be born with a "grave physical or mental defect," or (3) if the "pregnancy resulted from rape, incest, or other felonious intercourse." These justifiable abortions must be performed in a hospital except in the event of an emergency. Before performing the abortion, two physicians must certify in writing the circumstances that justify the abortion. The certificate must then be submitted to the appropriate hospital, and in the case of abortion following felonious intercourse, to the prosecuting attorney or the police. In no event is abortion justified after the twentieth week of pregnancy.

Since the official adoption of this proposal by the American Law Institute in 1962, four states have enacted reform legislation. In a fifth state, the legislature passed a reform act that was vetoed by the governor.<sup>70</sup> Legislation is now pending in twenty-six states.<sup>71</sup>

#### 2. *State Legislation*

Mississippi has passed the mildest of the recent acts.<sup>72</sup> It allows abortion on only one new ground: when the pregnancy is a result of rape. This act differs from the Model Penal Code in that "rape" alone is the only ground, and that the abortion apparently can be performed anywhere.

Colorado was the first state to enact an abortion law along the lines of the Model Penal Code.<sup>73</sup> All three grounds are adopted, but the defective offspring ground is stricter than that of the Model Penal Code, since there must be a likelihood of a "grave *and permanent* physical deformity or mental retardation." (Emphasis added.) Each hospital that performs abortions must set up a special board of three physicians to meet regularly to rule upon abortion requests. The statute presumably allows the performance of an abortion at any time prior to birth.

North Carolina has legalized abortion on the same grounds as the Model

68 This approach is examined at text accompanying notes 198-203 *infra*.

69 MODEL PENAL CODE § 230.3 (Official Draft 1962).

70 Both houses of the Indiana General Assembly passed a reform act in 1967 which was vetoed by Governor Roger D. Branigin. South Bend Tribune, May 12, 1967, at 1, col. 8, at 13, col. 1.

71 N.Y. Times, Feb. 7, 1968, at 36, col. 6 (city ed.).

72 MISS. CODE ANN. § 2223 (Supp. 1966).

73 COLO. REV. STAT. ANN. § 40-2-50 (added by H.B. No. 1426 (1967)).

Penal Code but has varied the Code's language and has adopted more stringent procedures: a residency requirement of four months except when the woman's life is in danger; a certificate of three doctors stating the circumstances why the abortion should be performed; mandatory performance in a hospital, without exception; reporting of a rape to a law-enforcement agency or court official within seven days.<sup>74</sup> Like Colorado's act, the North Carolina legislation also presumably allows the performance of an abortion at any time prior to birth.

California's new act<sup>75</sup> legalizes abortion on two of the grounds recommended by the American Law Institute: (1) where there is substantial risk to the physical or mental health of the mother, or (2) where the pregnancy results from rape or incest. Like the North Carolina act, the abortion must be performed only in a hospital with the approval of at least two physicians (three physicians after the thirteenth week of pregnancy). In no event will an abortion be approved after the twentieth week of pregnancy.<sup>76</sup> In case of rape or incest, a well-defined procedure has been established in which the hospital must report the case to the appropriate district attorney. It must then await his answer that there is probable cause that the pregnancy results from rape or incest before the abortion may be performed. If he does not answer within five days, the abortion may be performed. If he answers that probable cause is lacking, the applicant for abortion may appeal to the appropriate trial court. One additional aspect of the California Act is worthy of note. It defines the evasive term "mental health" as "mental illness to the extent that the woman is dangerous to herself or to the person or property of others, or is in need of supervision or restraint."<sup>77</sup>

## D. The Abortion Debate

### 1. *Arguments for these Reforms*<sup>78</sup>

The American Law Institute advocates a policy of "cautious expansion of the categories of lawful justification of abortion,"<sup>79</sup> based upon four principles:

(A) Indiscriminate abortion must be adjudged a secular evil since the procedure involves some physical and psychic hazards.

(B) Abortion, at least in early pregnancy, and with consent of the persons affected, involves considerations so different from the killing of a living human being as to warrant consideration not only of the health of the mother but also of certain extremely adverse social consequences

74 N.C. GEN. STAT. § 14-45.1 (Adv. Pamphlet No. 3, 1967).

75 CAL. HEALTH & SAFETY CODE §§ 25950-54 (West 1967).

76 Although an abortion is considered medically safe (*see* text accompanying note 57 *supra*), the chances of injury increase as the pregnancy continues. Also the fetus comes closer and closer to becoming a human being.

77 CAL. HEALTH & SAFETY CODE § 25954 (West 1967).

78 In this section arguments in favor of reform are presented. Due to the obvious limitation of space and a desire to concentrate on the arguments of the American Law Institute and state legislators, some of the numerous arguments must, of necessity, not be fully developed. For a comprehensive treatment of the arguments in favor of reform, see D. LOWE, *ABORTION AND THE LAW* (1966); *ABORTION AND THE LAW* (D. Smith ed. 1967) (most of the essays collected in this work favor reform); *THE CASE FOR LEGALIZED ABORTION NOW* (A. Guttmacher ed. 1967).

79 MODEL PENAL CODE § 207.11, at 150 (Tentative Draft No. 9, 1959).

to her or the child, *e.g.*, bastardy resulting from rape; prospective gross physical or mental defect in the child.

(C) The criminal law in this area cannot undertake or pretend to draw the line where religion or morals would draw it. Moral demands on human behavior can be higher than those of the criminal law precisely because violations of those higher standards do not carry the grave consequence of penal offenses. Moreover, moral standards in this area are in a state of flux, with wide disagreement among honest and responsible people. The range of opinion among reasonable men runs from deep religious conviction that any destruction of incipient human life, even to save the life of the mother, is murder, to the equally fervent belief that the failure to limit procreation is itself unconscionable and immoral if offspring are destined to be idiots, or bastards, or undernourished, mal-educated rebels against society. For many people sexual intercourse divorced from the end of procreation is a sin; for multitudes of others it is one of the legitimate joys of living. Those who think in utilitarian terms on these matters can differ among themselves as widely as moralists. Voluntary limitation of population can be seen as national suicide in a world-wide competition for numerical superiority, while to others uncontrolled procreation appears equally suicidal as tending to aggravate the pressure of population on limited natural resources and so driving nations to mutually destructive wars. To use the criminal law against a substantial body of decent opinion, even if it be minority opinion, is contrary to our basic traditions. Accordingly, here as elsewhere, criminal punishment must be reserved for behavior that falls below standards generally agreed to by substantially the entire community.

(D) Criminal liabilities which experience shows to be unenforceable because of nullification by prosecutors or juries should be eliminated from the law. Such nullification usually points to a situation of divided community opinion. Also, "dead letter" laws, far from promoting a sense of security in the community, which is the main function of penal law, actually impairs [sic] that security by holding the threat of prosecution over the heads of people whom we have no intention to punish.<sup>80</sup> (Footnote omitted.)

The ALI offers relatively brief and, at times, unclear reasons for suggesting legalization of abortion on each of the three specific grounds previously mentioned. After noting that at least six jurisdictions allowed therapeutic abortions (one that is performed to preserve the health of the mother) in 1959,<sup>81</sup> the Institute gives the following reasons for allowing such abortions:

The advance of medicine has in recent years reduced the number of situations where abortion is necessitated by physical conditions of the mother. There has been increased reliance on diagnosis or prediction of impairment of mental health. Psychiatric justifications for abortion are harder to classify and verify, and psychiatrists themselves have expressed concern at the shadowy line between medical and social justification. When a woman threatens suicide unless her pregnancy is terminated, it is difficult to segregate the factor of "illness" from such rational and social elements as her desire to avoid disgrace or excessive child-bearing, or to save a job which she would lose upon maternity. The problem is further complicated by the recognition that there are mental health hazards for some patients in having an abortion, as well as in continuing with the pregnancy.

80 *Id.* at 150-51.

81 *Id.* at 152.

Despite these difficulties, we have no alternative but to rely upon professional opinion on mental health questions, with the safeguards of certification and hospital or other supervision . . . .<sup>82</sup> (Footnotes omitted.)

The 1959 draft of the Model Penal Code recognized the lack of precedent for the second proposed ground of legalized abortion—abortion to prevent gravely deformed offspring. It therefore relied upon the fact that such abortions are “regularly performed by responsible physicians in hospitals throughout the country.”<sup>83</sup> The Institute reasoned that

The criminal law should speak unambiguously on the authority of the physician to act where he believes that continuance of the pregnancy entails substantial risk that the offspring will be a physical or mental casualty. The prospective birth of a seriously defective child may even constitute a threat to the mental health of the apprehensive mother, but it seems preferable to rest the matter directly on scientific prognostication of the child’s state of health rather than on the more uncertain prediction of the mother’s reaction.<sup>84</sup> (Footnote omitted.)

A “grave” defect is not confined to an irremedial defect. A grave defect can be remedial in part, the chances for curing it may be high or low, or an attempt to cure it may involve high risk to the child’s life.<sup>85</sup> The term is intended to be elastic so that the decision in a particular case is “left to the prospective parent, counselled by the physician, once it has been established that there is occasion for a conscious decision to terminate the pregnancy due to substantial risk of a grave defect in the child.”<sup>86</sup>

The third proposed ground for legalizing abortion is pregnancy resulting from rape, incest or other criminal intercourse. The Institute concedes that this ground is an innovation, but in order to show that it is not regarded as an antisocial act, relies upon the following authority: (1) the dearth of American prosecutions in situations where abortions are performed on women pregnant from felonious intercourse;<sup>87</sup> (2) the acquittal of a doctor, in the famous case of *Rex v. Bourne*,<sup>88</sup> who performed an abortion upon a girl who was raped; (3) an account of a married woman impregnated by rape who could not obtain a legal abortion and thus had to give birth.<sup>89</sup> The ALI feels that the case for incest is even stronger because there is some basis for believing that inbreeding involves the chance of producing defective offspring, and because there is no hope for legitimizing such offspring by marriage of the parents.<sup>90</sup>

82 *Id.* at 153.

83 *Id.* at 154.

84 *Id.*

85 *Id.* But see COLO. REV. STAT. ANN. § 40-2-50 (1967), which requires “permanent” injury.

86 MODEL PENAL CODE § 207.11, at 154 (Tentative Draft No. 9, 1959).

87 *Id.*

88 [1939] 1 K.B. 687 (1938). This case actually held that the doctor could be acquitted under the then existing English statute which provided an exception only for saving the mother’s life, if he reasonably believed that continuance of the pregnancy would make the rape victim a physical or mental “wreck.” *Id.* at 694.

89 MODEL PENAL CODE § 207.11, at 155 (Tentative Draft No. 9, 1959).

90 *Id.*

Senator Anthony C. Beilenson, the sponsor of California's new act,<sup>91</sup> feels that it is "a most conservative and reasonable approach"<sup>92</sup> to the abortion problem. Senator Beilenson begins his argument by reviewing some of the practices under traditional abortion laws, *e.g.*, over one million abortions performed yearly,<sup>93</sup> resulting in 5,000 to 10,000 deaths.<sup>94</sup> Relying on this background, he contends that California's old law was "inadequate, discriminatory, hypocritical, [and] that it often [led] knowingly and premeditatively and unnecessarily to tragedy . . . ."<sup>95</sup>

The new law remedies this situation by adding two new grounds<sup>96</sup> for legal abortion, which are now accepted as proper and humane by the vast majority of the medical profession,<sup>97</sup> by many organizations,<sup>98</sup> and apparently by the vast

91 CAL. HEALTH & SAFETY CODE §§ 25950-54 (West 1967).

92 Statement by Anthony C. Beilenson on the Therapeutic Abortion Act (Delivered at a Hearing of the Assembly Procedure Committee of the California Legislature, 1967) 6 [hereinafter cited as Beilenson].

93 *Id.* at 1.

94 *Id. Contra*, text accompanying notes 39-40 *supra*.

95 *Id.* at 2-3.

96 See text accompanying notes 75-77 *supra*.

97 Most members of the medical profession seem to favor reform. The American Medical Association adopted reform proposals in 1967 similar to those adopted by the American Law Institute. Chicago Daily News, June 21, 1967, at 1, col. 4. In 1966 a survey was taken among selected California obstetricians and gynecologists. The following table shows the strong support given for reform.

	DO YOU BELIEVE THAT THERAPEUTIC ABORTION IS JUSTIFIED			
	Yes	No	Uncertain	†
1. For imminent risk of maternal death? .....	91% (682)*	7% (51)	2% (13)	60%
2. For definite risk of shortened maternal life? .....	87% (646)	9% (69)	4% (31)	68%
3. For psychiatric certification of suicidal risk? .....	67% (501)	18% (132)	15% (113)	61%
4. For risk or material impairment of maternal health, physical or mental? .....	72% (535)	16% (116)	12% (89)	49%
5. For material risk of significant fetal abnormality? .....	77% (574)	14% (104)	9% (67)	64%
6. For proved forcible rape or incest? .....	83% (616)	12% (90)	5% (40)	10%
7. For purely socio-economic reasons? .....	21% (157)	60% (447)	18% (136)	4%

\* Percent quoted is that of total respondents to each question; figure in parentheses is actual number of replies; not all questions were answered by all respondent[s].

† Percentage of respondents who had actually performed therapeutic abortions for these indications.

Quoted from DIALOGUE, *supra* note 54, at viii-ix.

Surveys also indicate that most New York obstetricians favor liberalization. See Jakobovits, *Jewish Views on Abortion*, in ABORTION AND THE LAW 124 n.1 (D. Smith ed. 1967).

Psychiatrists also favor reform. In California 91%, in New York 93%, and throughout the nation 86% favor it. DIALOGUE, *supra* note 54, at ix. It seems, however, that with one small exception, no organized group of psychiatrists has thus far come out in favor of reform. *Id.* at ix-x.

98 The following organizations and individuals supported the passage of Senator Beilenson's bill:

California Medical Association, State Department of Public Health, Los Angeles Obstetrical and Gynecological Society. Obstetrical and Gynecological Assembly of Southern California, Northern California Obstetrical and Gynecological Society, Senior Staff of the Department of Obstetrics and Psychology at the University of California School of Medicine, State Junior Chamber of Commerce, American Association of University Women, Conference of California State Bar Delegates. Beilenson, *supra* note 92, at 5.



majority of the citizens of the state of California.<sup>99</sup> Senator Beilenson's argument stresses two main points. First, the act is not "intended to permit abortion as a method of birth control, and that it has absolutely nothing to do with the great majority of abortions which are now being illegally performed in California and elsewhere."<sup>100</sup> Rather it is intended only to avoid threats to the mother's health and to terminate the pregnancy "in those outrageous instances of rape or incest . . ."<sup>101</sup> Second, the new law is entirely voluntary. Thus,

[n]o one whose moral, religious or philosophical beliefs are offended by this bill or are different from the indications for abortion set forth in this bill need avail herself — nor would she avail herself — of the protection of this law.<sup>102</sup>

This statement accords with the Senator's philosophy of criminal law:

I believe . . . that the State has a right to regulate individual behavior only to a certain point and no further. I believe that the State has satisfied its own interest by prescribing reasonable, acceptable indications in sets of circumstances under which an abortion may legally be performed. Beyond that, and within these prescribed sets of circumstances, it is my belief that the individual must make her own judgment. She must make this decision with herself, her husband, her family, her own doctor, her own friends or whomever else she may rely upon, and her *own* clergyman.<sup>103</sup>

The principal sponsor of New York's proposed abortion law,<sup>104</sup> Assemblyman Albert H. Blumenthal, relies on the passage of the new acts in California, Colorado, North Carolina, and England<sup>105</sup> to show that liberalization has gained greater acceptance.<sup>106</sup> He also cites the support of the American Medical Association and *America*,<sup>107</sup> as well as Governor Nelson Rockefeller, Senators Javits and Kennedy, and Mayor Lindsay.<sup>108</sup> In addition to stating many of the argu-

99 *Id.* at 4.

100 *Id.* at 6.

101 *Id.*

102 *Id.*

103. *Id.* at 10.

104. In addition to the three grounds previously mentioned, the New York bill would allow abortion where the pregnancy occurs while the woman is declared to be mentally disabled or incompetent. S.B. 529-A.B. 761, § 2950(b) (5). This bill was killed in the Codes Committee in the 1967 session of the New York Legislature. *N.Y. Times*, Dec. 14, 1967, at 42, col. 1 (city ed.). In the 1968 session it was reintroduced with the co-sponsorship of forty-three Senators and Assemblymen. This year it was reported out of committee and was debated. *N.Y. Times*, Feb. 7, 1968, at 1, col. 1. Assemblyman Blumenthal had expressed "cautious optimism" as to its chance for passage. *Id.* at 36, col. 4 (city ed.). Nevertheless, on April 3, 1968, the bill was once again sent to the Codes Committee. *N.Y. Times*, April 4, 1968 at 1, col. 2.

105. England's new law is broader than the reform legislation enacted in the United States. Besides expressly allowing abortion for two of the three grounds adopted by the ALI, it adds a fourth ground: an abortion is legal if any of the mother's *existing* children might be injured mentally or physically by the continuance of the pregnancy. *N.Y. Times*, Oct. 26, 1967, at 1, col. 1 (city ed.). In effect, this act allows abortion on request for married women with families.

106. Statement by Assemblyman Albert H. Blumenthal, Overseas Press Club, New York City, Dec. 13, 1967, at 2 [hereinafter cited as Blumenthal].

107. In an editorial statement, *America* shows that it not only favors liberalization of abortion laws but also active engagement in such reform by the Catholic Church. 117 *AMERICA* 706 (1967).

108. Blumenthal, *supra* note 106, at 2.

ments expressed by the American Law Institute and Senator Beilenson, Assemblyman Blumenthal concentrates on addressing the opposition. Like Senator Beilenson, he regrets the feelings of those who oppose reform on religious grounds and adds that the purely voluntary procedure preserves a woman's religious freedom.<sup>109</sup> In answer to those who regard the fetus as human, Assemblyman Blumenthal states that

One's view of the nature of prenatal life need not dictate one's view of this bill. The bill merely preserves the existing rights in the Penal Law which all of us, men and women, have to protect ourselves from harm; and the criteria used in the Dominick-Blumenthal bill are at least as strict as those used to justify self-defense.<sup>110</sup>

He discounts the fear that reform will lead to abortion on request, euthanasia, infanticide, or genocide by pointing out that those who supported the legalization of bingo in churches are not now advocating licensing of bookies and legalization of gambling.<sup>111</sup> His view of the function of criminal law is similar to that of the American Law Institute and Senator Beilenson:

We believe that in a plural society, the Penal Law should not be used to set moral standards that are unenforceable and that discriminate against the economically deprived. Such use of the law merely decreases society's ability to regulate itself and substantially diminishes the respect for the public law that is essential to its enforcement.<sup>112</sup>

The American Civil Liberties Union has also spoken out in favor of reform. The ACLU argues that most of the existing abortion laws should be changed because they are unconstitutional in one or more of the following respects:

(1) they are unconstitutionally vague, (2) they deny to women in lower economic groups the equal protection of the laws guaranteed by the Fourteenth Amendment, since abortions are now freely available to the rich but forbidden to the poor, (3) they infringe the constitutional right to decide whether and when to have a child, as well as the marital right of privacy and the privacy of the relationship between patient and physician, (4) they impair the constitutional right of physicians to practice in accordance with their professional obligations, in that they require doctors to refrain from a medical procedure whose failure to perform would, except for the abortion laws, amount to malpractice in many cases, and (5) they deprive women of their lives and liberty, in the sense of deciding how their bodies are to be used, without due process of law.<sup>113</sup>

Two additional constitutional arguments have been posed. It has been suggested that many of the present abortion laws violate the first amendment rights of free speech and press, as well as that amendment's establishment and

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<sup>109</sup> *Id.* at 3.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> Memorandum by Alan Reitman & Trudy Hayden, Abortion Policy and the Question of the Viable Fetus 1 (1967) (on file with the ACLU).

free exercise clauses.<sup>114</sup> In short, proponents of reform feel that the practice under most present laws, *i.e.*, their widespread violation and the resulting inconvenience and even death in some cases, warrant liberalization of abortion laws along the general lines of the Model Penal Code.

## 2. *Arguments against these Reforms*

### a. The Composition of the Opposition

The present abortion debate has been characterized as Catholics versus non-Catholics by many people who feel that Catholics are trying to impose their views on abortion on the rest of society.<sup>115</sup> This characterization is, in one sense, absurd; yet, in another sense, it is absolutely correct. It is absurd for several reasons. First, a recent poll shows that almost one-half of California's Catholics were in favor of reform of some kind.<sup>116</sup> Another poll indicates that forty-nine percent of Catholic doctors favor reform.<sup>117</sup> Indeed, the last needed vote in the California Senate to pass that state's new law was supplied by a Catholic.<sup>118</sup> Second, there has been some urging for a reconsideration, on the theological and philosophical levels, of the Catholic Church's view of the fetus.<sup>119</sup> Third, such a characterization of this debate can lead only to name calling and clouding of the real issues.<sup>120</sup> Fourth, it is erroneous to assume that the Catholic Church's position is radically different from that of other religions. Orthodox Jewish teaching is opposed to abortion on any grounds except to save the mother's life.<sup>121</sup> Protestant teaching favors only a very limited reform, if any. Most Protestant denominations favor abortion to save the life or to preserve the health of the mother; however, they do not generally espouse it where the child would be born defective, or where the pregnancy is a result of felonious intercourse.<sup>122</sup> Finally, a moral philosophy that regards a fetus as a human being and gives absolute value to life need not be confined to Catholicism.

However, in another sense, the characterization of the current debate as Catholic versus non-Catholic is quite correct. It is a hard political fact that the only organized opposition to the reform movement comes from the Catholic Church, especially from the Catholic hierarchy. Unsuccessful attempts at reform as early as 1961 in New Hampshire and Illinois were opposed virtually only by Catholics.<sup>123</sup> More recently, the Catholic bishops of California opposed re-

114 Pilpel, *The Abortion Crisis*, in *THE CASE FOR LEGALIZED ABORTION NOW* 97, 113 (A. Guttmacher ed. 1967).

115 See, e.g., Hall, *Commentary*, in *ABORTION AND THE LAW* 224, 231 (D. Smith ed. 1967); Pilpel, *supra* note 114, at 103.

116 *DIALOGUE*, *supra* note 54, at vii.

117 *Time Essay*, *supra* note 52, at 33.

118 Letter from Senator Anthony C. Beilenson to the *Notre Dame Lawyer*, Jan. 2, 1968 [hereinafter cited as Beilenson Letter].

119 Pleasants, *A Morality of Consequences*, 86 *COMMONWEAL* 413 (1967); Wassmer, *Questions About Questions*, 86 *COMMONWEAL* 416 (1967).

120 See Drinan, *The Inviolability of the Right to Life*, in *ABORTION AND THE LAW* 107, 108 (D. Smith ed. 1967); Neuhaus, *The Dangerous Assumptions*, 86 *COMMONWEAL* 408, 409 (1967).

121 Jakobovits, *supra* note 97, at 129.

122 Drinan, *Contemporary Protestant Thinking*, 117 *AMERICA* 713 (1967).

123 Lowe, *supra* note 78, at 84.

form there,<sup>124</sup> and the bishops of New York are presently opposed to the proposed New York legislation.<sup>125</sup>

It seems fair to infer from such activity that there is a Catholic lobby. However, this lobby is no more an attempt to impose Catholic morality on the rest of society than it would be if the Catholic Church were campaigning to outlaw murder. It is only because that Church believes that a fetus is fully human and, thus, views the direct killing of a fetus as murder that it opposes abortion reform. Rather than being an attempt to impose Catholic morality on society, the Catholic position is a call for the Catholic layman to become a responsible and active member of society. This role of the laity has been reaffirmed in a recent pastoral letter by the Catholic Bishops of the United States.

A Catholic becomes responsible when he realizes that his own dignity and destiny are bound up with the dignity and destiny of all men. . . .

Therefore, indignity, injustice, and inhumanity at any time, in any place, toward any man should arouse in us a deep and burning concern. . . . A Catholic must be one who truly believes that as one of us suffers, all suffer, as one of us is healed, all are healed, when one of us is denied justice, all are threatened.<sup>126</sup>

The Catholic opposition to abortion reform is merely an attempt to insure that justice is not denied to that portion of humanity of which the fetus is a member. Thus, while it is fair to doubt the Catholic Church's major premise that a fetus is a human being, it is not fair to criticize that Church or anyone else for proselytizing this argument. A statement made by the Cuyahoga County Legal Committee for the Protection of the Unborn at a legislative hearing considering an Ohio reform bill makes this point forcefully:

Mr. Chairman and Members of the Committee: You have the right under our laws to believe whatever you choose to believe, so long as you do not infringe upon the rights of others. May we respectfully point out that these proposed changes in the Ohio abortion law would most certainly infringe upon the rights of the unborn. It thus becomes the moral and legal obligation of each and every member of the Ohio General Assembly, and particularly you gifted members of this committee, regardless of religious belief or lack of belief, to protect those least able to protect themselves — the unborn.<sup>127</sup>

Indeed, the Catholic Church's position seems desirable from a secular point of view since it directs the debate to its central issue: What is the nature of a fetus and what rights does it have?

#### b. Catholic Views on the Nature of the Fetus

A look at the history of the Catholic Church's stand on abortion shows

124 Beilenson Letter, *supra* note 118. The California Bishops continued their opposition even after the bill was passed by the legislature. About 200,000 signatures were collected at Sunday masses to influence Governor Reagan to veto the act. *Id.*

125 N.Y. Times, Dec. 14, 1967, at 42, col. 1 (city ed.).

126 N.Y. Times, Jan. 11, 1968, at 24, col. 2.

127 Statement by the Cuyahoga County Legal Committee for the Protection of the Unborn In Opposition to Ohio House Bill No. 408, June 14, 1967, at 4.

that abortion was condemned from the beginning.<sup>128</sup> However, the present official teaching, that the fetus is an ensouled human being at the moment of conception, has been promulgated relatively recently. In 1588 Pope Sixtus V issued a papal bull stating that abortion was homicide at any stage of pregnancy.<sup>129</sup> This seems to have been the first official denunciation of abortion without regard to the age of the fetus. Before, and even long after this pronouncement, there was disagreement as to when a fetus becomes ensouled. In 1591, Pope Sixtus' bull was modified by Pope Gregory XIV to apply only to abortions performed on an ensouled fetus.<sup>130</sup> This official position continued until 1869 when Pope Pius IX, in the constitution *Apostolica Sedis*, disregarded the distinction between abortion of an ensouled and a nonensouled fetus.<sup>131</sup> This change implied the acceptance of the notion of immediate animation,<sup>132</sup> *i.e.*, that a fetus is ensouled immediately upon conception. The former distinction between an ensouled fetus and an unensouled fetus has been explained as being

a false one . . . . Today, and indeed for a very considerable period, it has been accepted by biologists that there is no qualitative difference between the embryo at the moment of conception and at the moment of quickening. Life is fully present from the moment of conception. It follows that if there is a soul, it, too, must be present from the time of conception.<sup>133</sup>

The present Church position has been stated by Pope Pius XII in an address to the Italian Catholic Society of Midwives in 1951.

The baby in the maternal breast has the right to life immediately from God. — Hence there is no man, no human authority, no science, no medical, eugenic, social, economic or moral "indication" which can establish or grant a valid juridical ground for a direct deliberate disposition of an innocent human life, that is a disposition which looks to its destruction either as an end or as a means to another end perhaps in itself not illicit. — The baby, still not born, is a man in the same degree and for the same reason as the mother.<sup>134</sup>

It is on this premise, that abortion is homicide, that the Catholic Church opposes abortion.

### c. Criticism of Reform in General

Arguments for reform based upon the existence of social evils<sup>135</sup> under present abortion laws can be criticized, since the new acts will not solve most of these problems. Even their sponsors admit this.<sup>136</sup> Moreover, since the over-

128 See Noonan, *The Catholic Church and Abortion: A Summary History*, 12 NATURAL L.F. 85, 89-97 (1967).

129 *Id.* at 110.

130 *Id.*

131 *Id.* at 115.

132 *Id.*

133 N. ST. JOHN-STEVAS, *THE RIGHT TO LIFE* 32 (1964).

134 Quoted in Noonan, *supra* note 128, at 120.

135 See text accompanying notes 32-67 *supra*.

136 Estimates with regard to the percentage of women these new laws will affect run from 5%, *DIALOGUE*, *supra* note 54, at 22 (remarks of Dr. J. Kummer), to 20% or 30%, *South Bend Tribune*, Sept. 7, 1967, at 3, col. 6 (remarks of Assemblyman Blumenthal). The American Law Institute admits its proposal "will not solve all the problems." *Id.*, col. 3.

whelming majority of women who seek abortions are married with families,<sup>137</sup> the reform movement has been criticized as merely a movement for an additional method of birth control.<sup>138</sup> There is also a plausible argument that liberalizing abortion laws may lead to an increase, rather than a decrease, in illegal abortions.

What the American Law Institute ignores is that law itself is one of the greatest educating and civilizing forces. The moment that our law in America says that abortion is permissible under certain circumstances, many more people will avail themselves of legal abortions. Many people, however, would be reluctant to go and make a public record of what they're doing. They would say, in their conscience, that if the law permits abortion, then abortion can't be morally wrong: Therefore, I am free to go somewhere to get an underground operation, to an illegal abortionist.<sup>139</sup>

A similar argument has been suggested to the Ohio legislature.<sup>140</sup>

Today, there is little or no argument against abortion based on the premise that it is medically unsafe. Physical aftereffects, such as sterility and inability to enjoy sexual intercourse and achieve orgasm, seem very rare.<sup>141</sup> Psychological aftereffects such as guilt feelings, also seem rare.<sup>142</sup>

The constitutional arguments against the traditional laws on abortion<sup>143</sup> are premised on the idea that the fetus has little or no rights. On the other hand, a strong constitutional argument has been made against reforming these laws, based on the premise that a fetus is a human being. Walter L. Trinkhaus, legal representative of the California Conference of Catholic Hospitals, employed such an argument against Senator Beilenson's bill:

[A]ll of these bills [based] on the suggestions by the American Law Institute are unconstitutional. They are unconstitutional because they are in violation of the 14th Amendment to the United States Constitution — the due process clause — both procedurally and substantively. Procedurally: Because the hearings which Mr. Beilenson proposes would be held in secret. There would be no representative for the unborn child. There would be no way for this child to gain an appeal or review of his case. Substantively: Because it is plainly unreasonable to take the life of an existing person for something so ethereal as a risk of impairment to mental health. Certainly, physical health is a vague enough term. But, "mental" health is far vaguer.<sup>144</sup>

Trinkhaus believes that the same violation of substantive due process occurs when a fetus is aborted because the pregnancy results from rape or incest, or because there is substantial risk that the fetus will be born deformed.<sup>145</sup> Of

137 See text accompanying notes 42-43 *supra*.

138 Shaffer, *Abortion, The Law and Human Life*, 2 VAL. U.L. REV. 94, 100-02 (1967).

139 Fr. Robert F. Drinan quoted in LOWE, *supra* note 78, at 83.

140 Statement, *supra* note 127, at 5.

141 DIALOGUE, *supra* note 54, at 18; Hardin, *Abortion and Human Dignity*, in THE CASE FOR LEGALIZED ABORTION NOW 69, 75 (A. Guttmacher ed. 1967).

142 DIALOGUE, *supra* note 54, at 18.

143 See text accompanying notes 113-14 *supra*.

144 Walter R. Trinkhaus, quoted in LOWE, *supra* note 78, at 88.

145 Statement by Walter R. Trinkhaus, Legal Objections to Pending Bill Authorizing Abortions, Hearing on California A.B. 2310, at 2 (1964).

course, the validity of this legal argument depends on the legal status accorded the unborn child.<sup>146</sup>

Mr. Trinkhaus also makes a good general criticism of abortion reform:

The proponents of liberalized abortion recite real and hypothetical situations of stress and difficulty. Notwithstanding our sympathy and concern for the unfortunate, it should be pointed out that the truly difficult situations are rare. Of the estimated million of illegal abortions in the United States each year, only a minute fraction constitutes the hard and difficult cases. If 90% of the abortions are on married women, which has been estimated, most of these are performed for reasons of convenience. And even if the inconvenience to be occasioned by a birth is a serious one, it must be weighed on the scales of justice against the taking of a human life.<sup>147</sup>

#### d. Criticism of Each Proposed Ground

In this section arguments against the three proposed (or enacted) new grounds for legal abortion will be considered. Most of these arguments are based on the philosophy that a fetus is a human being and therefore has all the rights of a human.

The first new ground for permitting abortion expands the old exception, to preserve the life of the mother, to include her health also. One critic feels that this may be the "most appealing and compelling reason for a justifiable abortion," but goes on to ask how the law should balance the mother's right to safety against the fetus' right to life.<sup>148</sup> He seems to doubt the validity of the proposition that the mother's health is paramount to the life of the fetus and that the state has no duty to speak for, or to protect, the fetus.<sup>149</sup> Even the broadest reading of *Griswold v. Connecticut*,<sup>150</sup> which struck down the Connecticut statute banning the use of contraceptives as an unconstitutional invasion of marital privacy, applies only to the right to conceive or not to conceive children. Once children are conceived or born, the state has an interest in their welfare.<sup>151</sup>

Another critic, in examining the work of a physician discussing medical indications for abortion, which shows that such indications are uncommon or unreal,<sup>152</sup> argues that "medical indications" are not medical at all. "These are

146 For an examination of the legal status of a fetus see text accompanying notes 163-89 *infra*.

147 Statement, *supra* note 145, at 10.

148 Drinan, *supra* note 120, at 117.

149 *Id.*

150 381 U.S. 479 (1965). For a good discussion of this landmark case, see Katin, *Griswold v. Connecticut: The Justices and Connecticut's "Uncommonly Silly Law,"* 42 NOTRE DAME LAWYER 680 (1967).

151 Drinan, *supra* note 120, at 117-19.

152 Niswander, *Medical Abortion Practices in the United States*, in ABORTION AND THE LAW 37 (D. Smith ed. 1967). In examining the medical indications for a therapeutic abortion, Dr. Niswander finds that the danger of cardiovascular disease "has decreased substantially," that ulcerative colitis (inflammation of the large bowel characterized by ulceration of its lining membrane) is "not a common" disease, that renal diseases do not "significantly affect the risk of maternal death," that multiple sclerosis and epilepsy do not increase "the risk of death during pregnancy," that tuberculosis is "no longer as important as it used to be" as an indication of risk of life or health, that diabetes increases the risk to the fetus, "but this would seem to have little to do with the 'health' or 'life' of the mother," that there is "no convincing evidence . . . which shows that subsequent pregnancy affects adversely the prognosis in extra-

now, under 'danger to life' statutes — as they will be under 'danger to health' statutes — fictions (or *hypocrisies*, to use the medical term).<sup>153</sup> This seems supported by a statement made by this same doctor: "[S]ocial factors often seem to be a prominent consideration in the decision to abort."<sup>154</sup>

The second new ground for legal abortion is where a danger exists that the fetus will be born with a grave physical or mental defect. Advocates of this ground must

concede either (1) that the non-viable fetus is really *not* the repository of any inviolable rights or (2) that the strong and dominant members of society may extinguish or terminate the life of those individuals whose physical or mental development may, in the judgment of society, be so substantially arrested that they cannot attain a life worth living.<sup>155</sup>

These alternatives have been criticized as propounding euthanasia, a practice repugnant to an absolute principle of Anglo-American Law — the principle that the life of an innocent human being may not be taken away simply because, in the judgment of society, non-life for this particular individual would be better than life.<sup>156</sup>

The strongest argument against this ground stems from speculation as to how a fetus would decide if it were faced with the decision of choosing birth with deformity or no birth at all.

The fear and risk of a deformed child are real, but require an informed medical profession for evaluation. With an acknowledged risk of 60 percent for a deformed child to be born to a mother with rubella in the first few weeks of gestation, the odds may be more than most parents and society can bear. If an abortion is performed, it in fact is done for the family and society, not for the unborn child. Although some parents and physicians have indicated a desire to abort out of compassion for the child who would bear these defects, this is a difficult moral line to follow. People ask, "How would you like to be born deformed?" The child might reply, "If it is a choice of that or no life at all, I might choose life." One prominent gynecologist made a plea for "someone to speak for the fetus." If someone is speaking for the fetus, he must realize that it might say, "Let me live."<sup>157</sup> (Footnotes omitted.)

The life of Helen Keller shows that a person endowed with substantially less than all talents can be fruitful. "A classic statue by a supreme master is no less priceless for being made defective, even with an arm or a leg missing."<sup>158</sup>

The third proposed ground for legal abortion is where the pregnancy

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uterine malignancy," that it is difficult to prove that other diseases "actually threaten the life of the pregnant patient . . ." *Id.* at 41-45. *Accord*, Rosen, *A Case Study in Social Hypocrisy*, in *ABORTION IN AMERICA* 299, 302-03 (H. Rosen ed. 1967).

153 Shaffer, *supra* note 138, at 96.

154 Niswander, *supra* note 152, at 45.

155 Drinan, *supra* note 120, at 114-15.

156 *Id.* at 115. The status of the fetus in American law is discussed in the text accompanying notes 163-89 *infra*.

157 Ryan, *Humane Abortion Laws and the Health Needs of Society*, in *ABORTION AND THE LAW* 60, 66 (D. Smith ed. 1967).

158 Jakobovits, *Jewish Views on Abortion*, in *ABORTION AND THE LAW* 124, 143 (D. Smith ed. 1967).



results from rape or incest. One critic concedes that a young girl who is raped, and must then bear the product of such an awful act, pays a bitter price.<sup>159</sup> However, he adds that "nothing short of the preservation of innocent life would justify it."<sup>160</sup> Thus, assuming that a fetus is a human being, it deserves to live despite any inconveniences the mother may experience. Also, there is no certainty that abortion will solve many of the social ills resulting from impregnation through rape or incest. Consider the following case.

[A] 14-year-old mentally retarded girl . . . was impregnated by her father. A public hospital in Denver was unable to perform an abortion, and she had to have her baby. What happened? The father is in prison. The family is on relief. The girl is under a psychiatrist's care. God knows where the baby is.<sup>161</sup>

Now suppose an abortion had been performed.

The father would still be in prison and the family still on welfare. Abortion won't prevent sex crimes or produce wealth. The girl—who was mentally retarded—might well be under psychiatric care in any event (and abortion might have made her worse). It is possible that the *only* difference abortion would have produced in this case is that everybody would know where the baby is, because he would be dead.<sup>162</sup>

#### E. Can this Debate Be Resolved?

It is obvious that this whole debate boils down to one essential issue: What is the legal status of the fetus? In this section the present theories defining the legal status of the fetus are examined. Next, an attempt will be made to resolve the debate. Finally, the probable future course of abortion laws will be delineated.

##### 1. *Legal Status of the Fetus*

An unborn child has always been recognized as having some legal status in English law, as the above quotations from Bracton, Coke, and Blackstone show.<sup>163</sup> The oldest legal recognition of a fetus is probably its right to inherit.

An infant *in ventre sa mere*, or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate, made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born. And in this point the civil law agrees with ours.<sup>164</sup>

The writ *de ventre inspiciendo* issued to a presumptive heir to inspect a mother who claimed she was with a child who when born would cut off the claim of the heir. The purpose of this writ was not only to safeguard the rights of the

159 Shaffer, *supra* note 138, at 100.

160 *Id.*

161 Star, *We'll be the Abortion Mecca for the Nation Next*, LOOK, July 11, 1967, at 67, 69.

162 Shaffer, *supra* note 138, at 100.

163 See text accompanying notes 4-8 *supra*.

164 1 BLACKSTONE, COMMENTARIES \*130.

living heir but also to safeguard the rights of the unborn heir.<sup>165</sup> A stay of execution *ex necessitate legis*, granted to a condemned woman who was pregnant, is another instance of the common law recognizing an unborn child.<sup>166</sup> That this stay was granted "out of the necessity of law" indicates that the law took an interest in the birth of an unborn child.

It should be noted, however, that the common law never viewed a fetus as completely human. This is evidenced by the fact that at common law abortion was not a felony but only a "heinous misdemeanor."<sup>167</sup> Indeed, a series of cases as recent as the 1830's held that a woman would not be guilty of murder for killing what would now be considered a newborn baby unless it could be shown that the baby was "born alive."<sup>168</sup> Even the fact that the child breathed was held not sufficient proof.<sup>169</sup> Fortunately, this result was soon overruled in a similar case involving the killing of a newborn child who had breathed.<sup>170</sup>

In this country, the most obvious example of legal recognition of the fetus is found in both traditional and reform abortion laws. That a legal abortion can be performed only under exceptional circumstances indicates that the fetus has a legal right to be born.

Another great contribution of American law in recognizing the existence of legal rights in the unborn is in the area of tort litigation.<sup>171</sup> After an unsuccessful beginning,<sup>172</sup> and later travail,<sup>173</sup> the fetus is now recognized in most states that have decided the question as having standing to sue for damages in tort.<sup>174</sup> Indeed, the trend now seems to be toward recognizing this right without regard to whether the fetus is viable or not.<sup>175</sup> There is some controversy over whether birth is a condition precedent to recognizing the legal personality of an unborn child for the purposes of allowing the parents to maintain an action for wrongful death.<sup>176</sup> However, the policy considerations behind this controversy concern compensation to the parents rather than the legal rights of the fetus.<sup>177</sup>

This law of tort damages demonstrates that a fetus, *when born*, has a right to be compensated for any deformities it must bear. Moreover, another area of the law explicitly states that a fetus has a *right to be born*. In *Fitkin Memorial Hospital v. Anderson*<sup>178</sup> a pregnant mother refused a blood transfusion because it was contrary to her religious convictions as a Jehovah's Witness. The hospital

165 *Id.* at \*456.

166 2 HALE, PLEAS OF THE CROWN \*413.

167 See text accompanying note 7 *supra*.

168 *Rex v. Sellis*, 173 Eng. Rep. 370 (1837); *Rex v. Brain*, 172 Eng. Rep. 1272 (1834); *Rex v. Crutchley*, 173 Eng. Rep. 355 (1833); *Rex v. Enoch*, 172 Eng. Rep. 1089 (1833); *Rex v. Poulton*, 172 Eng. Rep. 997 (1832).

169 *Rex v. Poulton*, 172 Eng. Rep. 997 (1832).

170 *Regina v. Trilloe*, 174 Eng. Rep. 674 (1842).

171 For an excellent survey of an unborn child's right to damages in tort, see Gordon, *The Unborn Plaintiff*, 63 MICH. L. REV. 579 (1965); see generally, W. PROSSER, TORTS § 56 (3d ed. 1964).

172 *Dietrich v. Inhabitants of Northhampton*, 138 Mass. 14 (1884).

173 See Gordon, *supra* note 171, at 583-85.

174 *Id.* at 585.

175 *Id.* at 590. "There is no doubt but that this end result is proper and just, and it may be confidently asserted that in the future the courts will lift the bar of viability." *Id.*

176 See cases cited in *id.* at 592, nn.80-81.

177 See *id.* at 594-95.

178 42 N.J. 421, 201 A.2d 537, cert. denied, 377 U.S. 985 (1964), noted in 40 NOTRE DAME LAWYER 126 (1964).

brought an action seeking authority to administer transfusions in the event that they might be necessary to save the defendant mother's life and the life of the unborn child. The Chancery Division of the Superior Court of New Jersey held that the judiciary could not so intervene in the case of an adult or an unborn child. Although the question became moot when the defendant left the hospital, the Supreme Court of New Jersey honored the request of both parties to decide the case, since it felt that such an issue was likely to arise again. In a brief *per curiam* opinion, the court relied on only two precedents: (1) the State's concern for the welfare of a *living* child justifies blood transfusions despite the objection of its parents,<sup>179</sup> and (2) a child can sue for prenatal injuries.<sup>180</sup> On this basis the court held: "We are satisfied that the unborn child is entitled to the law's protection and that an appropriate order should be made to insure blood transfusions to the mother . . . ."<sup>181</sup> Such a decision is probably not an unconstitutional encroachment on religious freedom. The United States Supreme Court has spoken on this issue with respect to a living child. No doubt, its rationale applies to an unborn child as well:

Acting to guard the general interest in the youth's well being, the state as *parens patriae* may restrict the parents' control . . . . Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.<sup>182</sup> (Footnotes omitted.)

In a more recent case, *Gleitman v. Cosgrove*,<sup>183</sup> the New Jersey Supreme Court again expressly stated that "[t]he right to life is inalienable in our society."<sup>184</sup> In this case, plaintiffs — mother, father, and child — brought a malpractice suit against the defendant doctors, alleging negligence in the doctors' failure to inform the parents of the possibility that the child might be born with defects due to the mother's German measles. The plaintiffs' theory was that, had the parents been so informed, they might have sought an abortion. Their complaint alleged three claims: claim one, on behalf of the child for birth defects; claim two, by the mother for effects on her emotional state caused by the child's condition; claim three, by the father for costs incurred in caring for the child. In deciding the case, the court *assumed* that the parents could have obtained a legal abortion, but that they did not do so because they relied on the advice of defendants.<sup>185</sup> Recovery on claim one was denied. "By asserting that he should not have been born, the infant plaintiff makes it logically

179 *State v. Perricone*, 37 N.J. 463, 181 A.2d 751 (1962); *accord*, *Application of President and Directors of Georgetown College, Inc.*, 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964).

180 *Smith v. Brennan*, 31 N.J. 353, 157 A.2d 497 (1960).

181 *Fitkin Mem. Hosp. v. Anderson*, 42 N.J. 421, 423, 201 A.2d 537, 538, *cert. denied*, 377 U.S. 985 (1964).

182 *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944).

183 49 N.J. 22, 227 A.2d 689 (1967).

184 *Id.* at 30, 227 A.2d at 693.

185 *Id.* at 27, 227 A.2d at 691.

impossible for a court to measure his alleged damages because of the impossibility of making the comparison required by compensatory remedies.<sup>186</sup> Claims two and three were also denied in an alternative holding:

Though we sympathize with the unfortunate situation in which these parents find themselves, we firmly believe the *right of their child to live is greater than and precludes their right not to endure emotional and financial injury*. We hold therefore that the second and third counts of the complaint are not actionable because the conduct complained of, even if true, does not give rise to damages cognizable at law; and even if such alleged damages were cognizable, a claim for them would be *precluded by the countervailing public policy supporting the preciousness of human life*.<sup>187</sup> (Emphasis added.)

Two things must be pointed out about this case. First, the opinion of the court concluded with the following dicta which seems inconsistent with the holding.

It may well be that when a physician performs an abortion because of a good faith determination in accordance with accepted medical standards that an abortion is medically indicated, the physician has acted with lawful justification within the meaning of our statute and has not committed a crime. See § 207.11 Model Penal Code, comment 4, 153-154 (Tent. Draft No. 9, 1959).<sup>188</sup>

Second, this was a four-to-three decision. The three dissenting justices felt that the claims of the parents should be permitted.

If the duty [to tell the mother of the possibility of the birth of an abnormal child] had been discharged, Mrs. Gleitman could have been safely and lawfully aborted and have been free to conceive again and give birth to a normal child. Instead she was told, according to her testimony which the majority assumes for present purposes to be true, that her child would not be at all affected. In reliance on that she permitted the pregnancy to proceed and gave birth to a child who is almost blind, is deaf and mute and is probably mentally retarded. While the law cannot remove the heartache or undo the harm, it can afford some reasonable measure of compensation towards alleviating the financial burdens.<sup>189</sup>

## 2. *Is Reform Consistent with the Legal Status of the Fetus?*

The right of recovery in tort for prenatal injury seems incongruous with the three new grounds for legal abortion. In other words, a person cannot lawfully injure a fetus, but he can lawfully kill it under certain circumstances.<sup>190</sup>

186 *Id.* at 28, 227 A.2d at 692. The court mentioned two other cases that denied recovery in "wrongful life" actions: *Williams v. State*, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (App. Div. 1966); *Zepeda v. Zepeda*, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied*, 379 U.S. 945 (1964).

187 *Gleitman v. Cosgrove*, 49 N.J. 22, 31, 227 A.2d 689, 693 (1967).

188 *Id.* at 31, 227 A.2d 689, 694. Two dissenting justices felt that New Jersey's statute prohibiting abortion "without lawful justification," N.J. REV. STAT. ANN. § 2A:87-1 (1953), allowed an abortion in this case. *Gleitman v. Cosgrove*, 49 N.J. 22, 52-55, 227 A.2d 689, 704-06 (1967) (dissenting opinion). The majority left this question open.

189 *Gleitman v. Cosgrove*, 49 N.J. 22, 49, 227 A.2d 689, 703 (1967) (dissenting opinion).

190 This argument was presented to the California legislature. Statement, *supra* note 145, at 7.

The only way to reconcile this inconsistency is that in the former case, the mother wants the child to be born, while in the latter, she does not. Yet, this means that the mother can decide whether or not the unborn child will be born. Even assuming that the right to recover in tort does not imply a right to be born, such a proposition is definitely opposed to the holdings of the *Fitkin* and *Gleitman* cases. In effect, this means that abortion on any grounds other than to preserve the life<sup>191</sup> of the mother is unconstitutional, either procedurally, or substantively, or both.<sup>192</sup>

If a court finds *Gleitman* persuasive, there seem to be three possible ways to avoid this conclusion. The fact that the majority in *Gleitman* failed even to hint that abortion for grounds other than preserving the health of the mother is unconstitutional or contrary to its holdings might well indicate that the Supreme Court of New Jersey does not reach the same conclusion. However, it would be an excellent example of change within stare decisis if that court were now to hold that abortion for any reason other than to preserve the mother's life satisfies procedural due process. It would be only a little less difficult for the court to find that substantive due process was satisfied.<sup>193</sup> The second way to escape this conclusion is suggested by the fact that three dissenting justices in *Gleitman* disagreed with the majority's view that "the right of their child to live is greater than and precludes their right not to endure emotional and financial injury."<sup>194</sup> This may foreshadow a split of judicial opinion on this vital issue when the question arises in other courts. Third, the recognition of the right to life by the majority in *Gleitman* might be confined to a viable fetus.<sup>195</sup>

These possible evasions of *Gleitman*'s irresistible conclusion and the narrow margin of the *Gleitman* decision itself suggest that no reliable prediction can now be made as to how the liberalized abortion laws will fare in their first constitutional test. If the majority of a court feels that the right to life of a fetus, whether viable or not, is absolute, then the reform law in question will be unconstitutional. If a majority feels that the right to life of a fetus is inferior to the mother's health, to its own health, or to the right of a rape victim not to bear the product of rape, then the law in question will be constitutional. In short, this issue will turn on the American judiciary's personal philosophy of the nature of a fetus. The chances of passage of future reform bills will turn on the personal philosophies of legislators and of the public who influence them. It is a matter of balancing the rights of human beings to comfort, health, and other needs against the rights of potential human beings to life.<sup>196</sup>

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191 Abortion to preserve the life of the mother is clearly constitutional on a theory of self-defense.

192 See text accompanying notes 144-45 *supra*.

193 *Id.*

194 *Gleitman v. Cosgrove*, 49 N.J. 22, 31, 227 A.2d 689, 693 (1967).

195 The California law prohibits abortion after the twentieth week of pregnancy. CAL. HEALTH & SAFETY CODE § 25953 (West 1967). New York's bill would prohibit abortion after the twenty-fourth week. N.Y. Times, Dec. 14, 1967, at 42, col. 3 (city ed.).

196 This statement may be a bit naive because it assumes that all proponents of reform will give some consideration to the rights of the fetus.

## F. Perspective for the Future

### 1. Goals of Reformers

The ultimate goals of the reformers are often unclear. The legislators sponsoring reform legislation wisely state that their ultimate goals are simply those contained in their bills.<sup>197</sup> Perhaps the most active proponent of reform, Dr. Alan F. Guttmacher, admits that his ultimate goal is the elimination of all legal restrictions on abortion. However, he believes that this transformation should come "by evolution" rather "than revolution," since an abrupt change would cause bitter dissension.<sup>198</sup> One psychiatrist favors abortion on request, but with the requirement that the woman be given medical, psychiatric, and spiritual advice before making the decision to abort.<sup>199</sup> Other advocates of reform,<sup>200</sup> including the American Civil Liberties Union,<sup>201</sup> desire abortion on request.

The advocates of abortion on request have at least one persuasive argument. Such an abortion procedure would do away with the social ills that many proponents of reform argue are due to traditional abortion laws. While the proposals previously discussed will do little to alleviate these problems, abortion on request will solve them almost completely. This may be the law of the future, if most Americans consider the solution to these problems to be superior to a fetus' right to life. Oddly enough, Fr. Robert F. Drinan, one of the most active critics of the reform proposals based on the three grounds discussed above, would prefer no law regulating abortion over any of the recent reform acts. He feels that repeal of existing laws has at least the merit of not involving law and society in the business of selecting those persons whose lives may be legally terminated.<sup>202</sup> Another critic of reform, Professor Thomas L. Shaffer, feels that abortion on request has at least the advantage of being "candid," as opposed to present reform laws which he calls "phony."<sup>203</sup>

### 2. Future Developments

Two future developments may cause the abortion debate to become almost<sup>204</sup> moot.

#### a. Abortifacient Pills

There are two types of abortifacient pills now being developed. One is

197 Beilenson, *supra* note 92, at 6; Blumenthal, *supra* note 106, at 3.

198 Guttmacher, *Abortion — Yesterday, Today and Tomorrow*, in *THE CASE FOR LEGALIZED ABORTION NOW* 12-13 (A. Guttmacher ed. 1967).

199 *DIALOGUE*, *supra* note 54, at 17-20 (remarks of Dr. Aaron).

200 E.g., Hardin, *Abortion and Human Dignity*, in *THE CASE FOR LEGALIZED ABORTION NOW* 69 (A. Guttmacher ed. 1967); California Comm. to Legalize Abortion, Stanford, Calif.; Illinois Citizens for the Medical Control of Abortion, Chicago, Ill.

201 *N.Y. Times*, March 25, 1968, at 35, col. 1.

202 Drinan, *The Right of the Fetus to Be Born* 8 (unpublished paper prepared for the International Conference on Abortion, Washington, D.C., Sept. 6-8, 1967).

203 Letter from Prof. Thomas L. Shaffer to Alan Reitman, Associate Director of the ACLU, Nov. 6, 1967, on file with the *Notre Dame Lawyer*. Professor Shaffer is a member of a special ACLU committee to study abortion of the viable fetus. This letter is part of his report to the ACLU Board.

204 Abortion will always be needed as a "backstop." Hardin, *supra* note 200, at 80.

popularly known as the "morning after" pill;<sup>205</sup> the other is popularly known as the "month after" or "once-a-month" pill.<sup>206</sup> Although these pills are not yet fully perfected,<sup>207</sup> if and when they are, the difficulty of detection will make abortion a matter of private conscience. This is so even though such pills come under the ban of most existing abortion statutes.<sup>208</sup> Obviously, it would be easy to create a market for these pills with a minimum of risk. Yet, this in turn may create bigger problems than that of the widespread flouting of present laws by illegal operations. While there are reasons why organized crime does not want to be involved in abortion by operation,<sup>209</sup> there is no reason why it would not want to market abortifacient pills. There is also a possibility that counterfeit or unsafe pills, that could cause damage to the user's health, may be put on this future "black market." Such possibilities suggest future campaigns to legalize these pills. When this occurs, a new but similar debate will arise since the same objections to abortion by operation apply to abortion by pill.<sup>210</sup>

### b. Contraceptives

Advances are being made in creating totally reliable contraceptive devices,<sup>211</sup> and their use is becoming more widespread. It has even been suggested that "women may some day become essentially infertile and thus free to decide precisely when they wish to become fertile."<sup>212</sup> However, there still remain some legal barriers to the dissemination of both contraceptive information and contraceptives themselves. While only one state completely bans the sale of contraceptives,<sup>213</sup> a large number of states regulate their sale and distribution<sup>214</sup> and prohibit their advertisement.<sup>215</sup> Thus, widespread dissemination of contra-

205 This pill, technically known as diethylstilbestrol, prevents the implantation of the fertilized ovum on the wall of the uterus. *TIME*, May 6, 1966, at 60.

206 This pill kills the fetus by depriving it of an essential hormone, progesterone. *South Bend Tribune*, Nov. 7, 1967, at 3, cols. 1-2.

207 *Time Essay*, *supra* note 52, at 33.

208 See the statutes collected in notes 18-21 *supra*.

209 See note 34 *supra*.

210 *E.g.*, one member of Pope Paul's birth control commission has already stated that the Pope will never approve of such pills because of their purpose. *South Bend Tribune*, Nov. 7, 1967, at 3, cols. 1-2.

211 *E.g.*, the Ford Foundation has granted 15.7 million dollars to various institutions to seek better contraceptive devices. Also, birth control pills for men are now being studied. *Chicago Daily News*, Nov. 7, 1967, at 3, cols. 3-8, at 4, cols. 1-3.

212 *Time Essay*, *supra* note 52, at 33.

213 *MISS. CODE ANN.* § 2289 (1956).

214 *E.g.*, *ARK. STAT. ANN.* § 82-944 (1960); *N.Y. EDUC. LAW* § 6804-b (McKinney Supp. 1967); *S.D. CODE* § 13.1726 (Supp. 1960).

215 The following states prohibit all advertizing of contraceptive devices: *ARIZ. REV. STAT. ANN.* § 13-213 (1956); *ARK. STAT. ANN.* §§ 82-944-950 (1943); *IDAHO CODE ANN.* § 18-603 (1947); *IOWA CODE ANN.* § 725.5 (1946); *LA. REV. STAT. ANN.* § 14:88(2) (1950); *MASS. ANN. LAWS* ch. 272, § 20 (Supp. 1966); *MISS. CODE ANN.* § 2289 (1956); *MONT. REV. CODES ANN.* § 94-3609 (1947); *NEV. REV. STAT.* § 202.190 (1960); *N.J. REV. STAT. ANN.* § 2A:170-76 (1952); *ORE. REV. STAT.* § 435.010 (1967) (*But cf.* text accompanying notes 221-22 *infra*); *PA. STAT. ANN.* tit. 18, § 4525 (1963); *S.D. CODE* § 13.1726 (Supp. 1960); *WASH. REV. CODE* § 9.68.030 (1961); *WIS. STAT. ANN.* § 151.15(1)-(2) (1957); *WYO. STAT. ANN.* § 6-105 (1957).

In one state, it seems that only "obscene" advertisement of contraceptives is illegal, *MICH. STAT. ANN.* § 28.229 (1962). Other states ban advertizing only of those contraceptive devices that are used to prevent venereal disease, *e.g.*, *COLO. REV. STAT. ANN.* § 66-10-3 (1963); *NEB. REV. STAT.* § 28-923 (1964).

ceptives and advice on contraceptives may well be illegal in these states.<sup>216</sup> However, the constitutional validity of such statutes may be doubted in light of *Griswold v. Connecticut*.<sup>217</sup> Yet, since *Griswold* dealt with a statute banning the use of contraceptives as applied to a married couple, it leaves open the question of the constitutionality of statutes banning and regulating the sale<sup>218</sup> and advertisement of such devices, as well as the constitutionality of statutes banning the use of contraceptives as applied to unmarried persons. The narrowness of the decision warns against making an absolute statement of law on this point.

Much more certain for those who wish to disseminate contraceptive information is the recent legislative trend toward making such proselytizing legal. Within the last few years, five states have repealed<sup>219</sup> or amended<sup>220</sup> their laws to allow such practices. Another state, while continuing its former ban,<sup>221</sup> has enacted enabling legislation to allow county health agencies to disseminate contraceptive information and devices.<sup>222</sup>

While there may have been some Catholic opposition to this trend in the past, there is none noticeable now. Indeed, that a majority of Catholics under the age of thirty-five presently use contraceptives<sup>223</sup> makes the future appearance of such opposition extremely remote. While the last Church-State Survey<sup>224</sup> cited some strong opposition by Catholics to government-administered birth control programs,<sup>225</sup> there seems to be very little opposition now. The last official statement on such programs by the Bishops of the Catholic Church in the United

216 *E.g.*, in a declaratory judgment action the Arizona supreme court said that the Arizona statute banning the advertisement of contraceptive devices would be violated if the Planned Parenthood Committee would "aggressively solicit" to gain its objectives. The court also upheld the constitutionality of this statute. *Planned Parenthood Comm. v. Maicopa County*, 92 Ariz. 231, 375 P.2d 719 (1962).

217 381 U.S. 479 (1965). The following dicta of Justice White seems typical of the Supreme Court's attitude toward these laws:

The anti-use statute, together with the general aiding and abetting statute, prohibits doctors from affording advice to married persons on proper and effective methods of birth control. . . . And the clear effect of these statutes, as enforced, is to deny disadvantaged citizens of Connecticut, those without either adequate knowledge or resources to obtain private counseling, access to medical assistance and up-to-date information in respect to proper methods of birth control. . . . In my view, a statute with these effects bears a substantial burden of justification when attacked under the Fourteenth Amendment. *Id.* at 503 (concurring opinion).

218 *See* *People v. Baird*, 47 Misc.2d 478, 262 N.Y.S.2d 947 (1965), where the court appears to distinguish bans on the use of contraceptives from bans on their sale.

219 ME. REV. STAT. ANN. tit. 17, § 53 (Supp. 1967); MO. REV. STAT. § 563.300 (Supp. 1967); OHIO REV. CODE ANN. §§ 2905.32 to .34 (Page Supp. 1966).

220 CAL. BUS. & PROF. CODE § 601 (West Supp. 1967); MINN. STAT. ANN. § 617.251 (Supp. 1967).

221 ORE. REV. STAT. § 435.010 (1967).

222 ORE. REV. STAT. § 435.205 (1967).

223 *How U.S. Catholics View Their Church*, NEWSWEEK, March 20, 1967, at 68, 71.

224 *Religious Institutions and Values: A Legal Survey (1964-66)*, 41 NOTRE DAME LAWYER 681 (1966) [hereinafter cited as *1964-66 Church-State Survey*]. The four other previous surveys are: *Religious Institutions and Values: A Legal Survey (1955-57)*, 33 NOTRE DAME LAWYER 416 (1958) [hereinafter cited as *1955-57 Church-State Survey*]; *Religious Institutions and Values: A Legal Survey (1958-60)*, 35 NOTRE DAME LAWYER 405 (1960) [hereinafter cited as *1958-60 Church-State Survey*, part I], 35 NOTRE DAME LAWYER 537 (1960) [hereinafter cited as *1958-60 Church-State Survey*, part II]; *Religious Institutions and Values: A Legal Survey 1960-62*, 37 NOTRE DAME LAWYER 649 (1962) [hereinafter cited as *1960-62 Church-State Survey*]; *Religious Institutions and Values: A Legal Survey (1963-64)*, 39 NOTRE DAME LAWYER 427 (1964) [hereinafter cited as *1963-64 Church-State Survey*].

225 *1964-66 Church-State Survey*, *supra* note 224, at 749-50.



States was made in November of 1966.<sup>226</sup> Although parts of this statement might indicate that the Bishops are opposed to the use of public funds for contraception under any circumstances,<sup>227</sup> it has been suggested that the whole statement bears the inference that the Bishops are opposed only to those government-administered programs of birth control that are "coercive and violative of the right to privacy . . . ."<sup>228</sup> Even if the former inference is true, there has been little or no recent clamor from the Catholic Church on this issue. Even Pope Paul's recent encyclical, *On the Development of the Peoples*, might be interpreted to suggest the possibility of Catholic cooperation in birth control programs.<sup>229</sup>

It is interesting to note that the present abortion debate may have had some effect on the apparent change in the Catholic position on the use of contraceptives by society. Realizing that birth control may solve or at least minimize many of the problems emphasized by proponents of abortion reform, Catholics would seem to prefer prevention of conception of a fetus to termination of its life.

### III. ARTIFICIAL INSEMINATION

#### A. Introduction

As predicted,<sup>230</sup> increased utilization of artificial insemination has had its inevitable impact on the law.<sup>231</sup> This Survey is therefore treating the problem in more depth than has been done in the past.<sup>232</sup> Artificial insemination, unheard of at common law, is a new concept developed by the scientific and medical professions.<sup>233</sup> Basically, there are two types of artificial insemination being utilized in contemporary practice: artificial insemination of the husband's semen,

226 N.Y. Times, Nov. 15, 1966, at 25, col. 4.

227 *E.g.*:

It should be obvious that a full understanding of human worth, personal and social, will not permit the nation to put the public power behind the pressures for a contraceptive way of life. . . .

We call upon all — and especially Catholics — to oppose, vigorously and by every democratic means, those campaigns already underway in some states and at the national level toward the active promotion, by tax-supported agencies of birth prevention as a public policy, above all in connection with welfare benefit programs. *Id.*

228 Sirilla, *Family Planning and the Rights of the Poor*, 13 CATHOLIC LAW 42, 44 (1967).

229 Neuhaus, *The Dangerous Assumptions*, 86 COMMONWEAL 408, 412 (1967) has so interpreted this encyclical. The encyclical states, in part:

It is true that too frequently an accelerated demographic increase adds its own difficulties to the problems of development: the size of the population increases more rapidly than available resources, and things are found to have reached an apparent impasse. From that moment the temptation is great to check the demographic increase by means of radical measures. It is certain that public authorities can intervene, within the limit of their competence, by favoring the availability of appropriate information and by adopting suitable measures, provided that these be in conformity with the moral law and that they respect the rightful freedom of married couples. POPE PAUL VI, *ON THE DEVELOPMENT OF THE PEOPLES* 50 (B. Ward ed. 1967).

230 1964-66 *Church-State Survey*, *supra* note 224, at 749.

231 *See generally* text accompanying notes 307-13 *infra*.

232 *E.g.*, Compare 1966-68 *Church-State Survey with 1964-66 Church-State Survey*, *supra* note 224, at 749, and 1963-64 *Church-State Survey*, *supra* note 224, at 464-65.

233 Holloway, *Artificial Insemination: An Examination of the Legal Aspects*, 43 A.B.A.J. 1089, 1090 (1957).

usually termed A.I.H., and artificial insemination of the semen of a third-party donor, usually termed A.I.D.<sup>234</sup> No one perceives legal difficulties in an A.I.H. situation.<sup>235</sup> In the A.I.D. situation, however, the legal difficulties are multitudinous.<sup>236</sup> It has been estimated that there may be as many as 250,000 people in the United States who were conceived by artificial insemination,<sup>237</sup> and that this figure increases by 20,000 annually.<sup>238</sup> Almost invariably, these conceptions occur with the consent of the husbands.<sup>239</sup>

## B. Theoretical Problems

The theoretical problems of artificial insemination seem to fall into four broad areas: medical, legal, religious, and social. Artificial insemination advocates must, therefore, produce solutions that reconcile and coordinate these problem areas.

### 1. Medical

#### a. Procedure

Succinctly stated, "[a]rtificial insemination is the introduction of semen (or at least spermatozoa) into the female reproductive tract otherwise than by sexual intercourse."<sup>240</sup> But before this simple act is performed, the physician spends long hours counseling the couple, pointing out the difficulties — moral, legal, psychological, and technical — that they may have failed to realize.<sup>241</sup> The physician then subjects the couple to psychological testing and a thorough background investigation<sup>242</sup> — similar to the procedures used by adoption agencies. Consent forms are usually required by the physician.<sup>243</sup> Both partners generally sign these forms<sup>244</sup> in order to avoid possible legal problems, e.g., charges of

234 *Id.* at 1089. The most common reasons for utilizing A.I.H. is external hindrance to conception or deficiency of sperm in the semen (oligozoospermia). The motive for using A.I.D. is most commonly sterility, an incompatible Rh factor, or hereditary disease. Verkauf, *Artificial Insemination: Progress, Polemics, and Confusion — An Appraisal of Current Medico-Legal Status*, 3 HOUS. L. REV. 277, 282 (1966). See also Weisman, *Symposium on Artificial Insemination: The Medical Viewpoint*, 7 SYRACUSE L. REV. 96, 97 (1955).

235 Rice, *A.I.D.—An Heir of Controversy*, 34 NOTRE DAME LAWYER 510, 513 (1959). The author's only exception to this rule is whether A.I.H. constitutes legal consummation of the marriage. *Id.*

236 See text accompanying notes 260-64 *infra*.

237 Corbett, *The Artificially Inseminated Child*, 40 WIS. BAR BULL. 39, 44 (Oct. 1967).

238 W. FINEGOLD, *ARTIFICIAL INSEMINATION* 111 (1964).

239 88 SCI. NEWSLETTER 135 (1965).

240 O'Rahilly, *Artificial Insemination: Medical Aspects*, 34 U. DET. L.J. 383, 383-84 (1957).

241 *Id.* at 385.

242 *Id.*

243 *Id.* at 386.

244 A typical consent form:

I, \_\_\_\_\_, residing at \_\_\_\_\_, of my own free will and volition have requested Dr. \_\_\_\_\_ to inseminate my wife artificially with the sperm of a male selected by Dr. \_\_\_\_\_. This request has been made with the full knowledge and consent of my wife, whose authorization is hereto annexed. I am making this request because it is not possible for me to procreate and because both my wife and I are extremely anxious to have a child and because our mutual happiness and the well-being of my wife will be best served by this artificial insemination.

On this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_\_, before me came \_\_\_\_\_,

adultery, grounds for divorce, etc.<sup>245</sup> In the case of oligozoospermia,<sup>246</sup> the physician may mix the husband's semen with that of the donor in order to incite hope into the couple that the father of the child might really be the husband.<sup>247</sup>

Perhaps the most difficult problem facing the physician is an ethical one, *i.e.*, whether to attend the birth of the child himself, or whether to direct the couple to another physician, who is unaware of the artificial insemination, in order to give the child a birth certificate that fraudulently certifies the child to be the natural child of both the mother and the husband. If no explicit legislation is enacted to rectify this difficulty, the physician will have to content himself with only his own conscience.<sup>248</sup>

#### b. Donors

One of the prime concerns of the physician is the selection of a competent donor. Some of the recommended characteristics of such a donor are:

The donor should not be a relative. His identity should remain unknown to the couple and vice versa. He should be more than 35 years of age, so that latent hereditary conditions may be excluded. He should be married and have at least two healthy children but unmarried donors have been used.<sup>249</sup> (Footnotes omitted.)

This selection procedure should, of course, guard against incompatible Rh factors, venereal disease, tuberculosis, and congenital disease. But for one exception, New York City,<sup>250</sup> the selection procedure is not regulated in the United States. Elementary safeguards similar to those enacted in New York City should be instituted wherever artificial insemination is practiced.

Current donor selection procedures commonly include a payment to the donor for his services. Where artificial insemination is widely practiced, regular donors receive a remuneration varying from twenty-five dollars in New York City to fifteen dollars in Pittsburgh.<sup>251</sup> Compensated donors usually supply semen about once a week.<sup>252</sup> Although it is claimed that students and other donors are matter-of-fact about the process and ask no questions about the ultimate

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to me known and known to me to be the person described herein and who acknowledged to me that he executed the foregoing consent.

Notary

I, \_\_\_\_\_, join in my husband's request above stated and hereby authorize Dr. \_\_\_\_\_ to inseminate me artificially with the sperm of a male selected by Dr. \_\_\_\_\_

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Koerner, *Medicolegal Considerations in Artificial Insemination*, 8 LA. L. REV. 484, 499-500 (1948).

245 O'Rahilly, *supra* note 240, at 386.

246 See note 234 *supra*.

247 G. WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* 119 (1957).

248 Address by C. J. Stetler, Director of Law Department of American Medical Association, Headline Club, Chicago, Feb. 25, 1955.

249 O'Rahilly, *supra* note 240, at 387.

250 NEW YORK CITY HEALTH CODE, art. 21 (1959). For the text of this code, see note 306 *infra*.

251 W. FINEGOLD, *supra* note 238, at 36.

252 *Id.*

use of their sperm,<sup>253</sup> the process is nonetheless criticized on the ground that it is, in fact, nothing more than onanistic prostitution.<sup>254</sup> One author's reaction to this aspect of the donor selecting process is repulsion; he classifies it with prostitution<sup>255</sup> — although he admits that the social problems are obviously different.<sup>256</sup>

### c. Sperm Banks

Sperm banks are special repositories where sperm is stored and classified according to the donor's hereditary characteristics. This process of selectivity is a giant stride toward the scientific age of the future.<sup>257</sup> Indeed, one gynecologist, Dr. Samuel Behrman of the University of Michigan, has reported conception in a woman by artificial insemination of sperm that had been stored for two and one-half years.<sup>258</sup> At least one sperm bank may have some practical appeal: "[T]o protect the issue of the astronauts from mutations resulting from ionizing radiation in space, a technique has been developed for them to deposit their sperm in a sperm bank and to preserve it indefinitely . . ."<sup>259</sup> With such a federally sponsored sperm bank in existence, it appears certain that the trend will be toward wider use.

## 2. Legal

As stated above,<sup>260</sup> few legal problems attend the A.I.H. situation because the offspring is the child of the husband of the mother.<sup>261</sup> Hence, its legal rights seem clear.<sup>262</sup> But in the A.I.D. situation, a question exists whether the child is legitimate (with all the related problems of succession, support, custody, inheritance, etc.) and whether the act of artificially inseminating the woman constitutes adultery.<sup>263</sup> These legal problems are explored in more detail below.<sup>264</sup>

253 *Id.*

254 Marcel, *Psychological and Moral Incidences*, 2 *NEW PROBLEMS IN MEDICAL ETHICS* 20, 21 (D. Flood ed. 1954).

255 G. WILLIAMS, *supra* note 247, at 140, where he states:

The position is, then, that these donors masturbate themselves in order to sell their bodily secretions. It is a natural reaction to regard this as not only repulsive but wrong. The parallel easily suggests itself between the donor — or rather vendor — of semen and the prostitute: both sell the use of their bodies in respect of their sexual or reproductive functions.

256 *Id.*

257 *Cf.*, A. HUXLEY, *BRAVE NEW WORLD* (1932); G. ORWELL, 1984 (1950). Indeed, one writer has bluntly stated that this "[a]esthetic finesse on the human stud farm is a novelty which ought to be encouraged." O'Rahilly, *supra* note 240, at 387 n.32.

258 *NEWSWEEK*, April 18, 1966, at 101. This same article reports that the sperm is stored in liquid nitrogen deep freezes.

259 Leach, *Perpetuities in the Atomic Age: The Sperm Bank and the Fertile Decedent*, 48 *A.B.A.J.* 942, 943 (1962). Will this be a violation of the Rule Against Perpetuities? See Leach, *Perpetuities: The Nutshell Revisited*, 78 *HARV. L. REV.* 973, 979 (1965).

260 See text accompanying note 235 *supra*.

261 Goldfarb, *Symposium on Artificial Insemination: The Legal Viewpoint*, 7 *SYRACUSE L. REV.* 108, 109 (1955).

262 *Id.*

263 *Id.* at 109-13; Holloway, *supra* note 233, at 1090-91; Comment, *Artificial Insemination: The Law's Illegitimate Child?* 9 *VILL. L. REV.* 77, 80-81 (1963). But see Bartholomew, *Legal Implications of Artificial Insemination*, 21 *MODERN L. REV.* 236, 255-56 (1958).

264 In this section only the issues are raised. Whatever answers do exist will be treated in the discussion of cases, text accompanying notes 282-300 *infra*, and in the discussion of legislation, text accompanying notes 301-13 *infra*.

### 3. Religious

#### a. Roman Catholic

The Roman Catholic Church has taken a firm position against A.I.D.<sup>265</sup> based on the following principles: "[I]t is contrary to the divine plan for marriage; it is the product of a false philosophy of life; it generally involves the immoral procurement of sperm; and its consequences on social life are apt to be disastrous."<sup>266</sup> The Catholic Church's condemnation of artificial insemination focuses upon the arguments of illegitimacy,<sup>267</sup> masturbation,<sup>268</sup> and adultery.<sup>269</sup> Pope Pius XII has spoken twice on the topic and has given the Church's definite stand. The first mandate was given in an address to the Fourth International Congress of Catholic Doctors on September 29, 1949, in which he stated that it "is for the spouses alone who have a mutual right over their bodies for generating a new life, and this right is exclusive, nontransferable [and] inalienable."<sup>270</sup> In an allocution to the Italian Catholic Midwives on October 29, 1951, he again condemned artificial insemination for reducing the conjugal act into "nothing more than a biological laboratory."<sup>271</sup>

#### b. Protestant

It is difficult to state a definitive or up-to-date Protestant position because there are "few, if any, official announcements on this subject . . . [and] [e]ven if there were, their authority would be distinctly limited."<sup>272</sup> But the general view of the Protestant faiths is much more liberal than that of the Catholics, although it is by no means a blanket endorsement of artificial insemination.<sup>273</sup> One Protestant commentator favors continuance of research in order to allow artificial insemination on a voluntary basis for those couples who comply with proper safeguards for its use.<sup>274</sup> Complementing this view is that of another author who does not believe that laws should prevent artificial insemination for those people who wish to make it a part of their marriage.<sup>275</sup> Given progress in research and medical and legal safeguards, the Protestant position appears

265 Kelly, *Artificial Insemination: Theological and Natural Law Aspects*, 33 U. DET. L.J. 135, 138-39 (1956).

266 *Id.* at 139.

267 Hassett, *Freedom and Order Before God: A Catholic View*, 31 N.Y.U.L. REV. 1170, 1180-81 (1956).

268 Ryan, *Symposium on Artificial Insemination: The Religious Viewpoints—Catholic*, 7 SYRACUSE L. REV. 99, 99-100 (1955). For this reason, some physicians refuse to perform the impregnation on members of the Catholic faith and, of course, refuse to employ Catholic donors. W. FINEGOLD, *supra* note 238, at 79-80.

269 Ryan, *supra* note 268. "Adultery is adultery whether or not the husband consents to his wife's having sexual relations with another man. It is not rendered less adulterous by nature of the fact that the semen has been artificially introduced." Hassett, *supra* note 267, at 1179.

270 3 CANON L. DIG. 433 (T. Bouscaren ed. 1963). For the complete, untranslated, official text, see 41 ACTA APOSTOLICAE SEDIS 557 (1949).

271 3 CANON L. DIG. 434 (T. Bouscaren ed. 1963). For the complete, untranslated, official text, see 43 ACTA APOSTOLICAE SEDIS 835 (1951).

272 Noble, *Symposium on Artificial Insemination: The Religious Viewpoints—Protestant*, 7 SYRACUSE L. REV. 101 (1955).

273 *Id.* at 103.

274 *Id.*

275 Ramsey, *Freedom and Responsibility in Medical and Sex Ethics: A Protestant View*, 31 N.Y.U.L. REV. 1189, 1198 (1956).

to be amenable to a prospective general acceptance of artificial insemination.

### c. Jewish

The trend of the Protestant faiths is the accepted view of the Jewish faith. One Jewish Rabbi states that "[i]n this connection Jewish law is exceedingly liberal. A woman is not guilty of adultery when she is impregnated artificially with the sperm of a donor and the child is legitimate, whether or not the mother is married."<sup>276</sup> Jewish civil law is also flexible enough to accommodate the inheritance and support problems — even to the extent of relieving the father-donor of all liability for support.<sup>277</sup>

### 4. Social

One author contends that the most dangerous effect of A.I.D. is not a religious one, but is rather a devastating sociological catastrophe.<sup>278</sup> A.I.D. is seen to be nothing more than a wedge that is forced "into the monolithic structure of marriage."<sup>279</sup> Indeed, by the marriage contract itself, a woman vows to exclude sexual relations with all but her husband. It is therefore argued that a woman's commitment is just as strong to bear only children that are conceived by her husband.<sup>280</sup>

The introduction of a child into a crumbling marriage may help to save it. But it may also be that a child conceived by artificial insemination might actually accelerate the destruction of the marriage. The mother may not see in the child a mirror of her husband, but instead, she may see a child whose father is the type of person "who will masturbate for a price and assume the function of parenthood with neither the love nor the responsibility that parenthood normally entails."<sup>281</sup>

### C. Case Law

Decisional law is still trying to establish a direction in this tumultuous area.<sup>282</sup> With no express guidelines, judges have based their decisions on a number of factors.<sup>283</sup> One author has praised the decision in an early Canadian case, *Orford v. Orford*,<sup>284</sup> as the only case that really reached the basic issue, *i.e.*, the exclusiveness of the reproductive function.<sup>285</sup> In *Orford*, an action for alimony, the court stated that the act of artificial insemination was adulterous.

276 Rackman, *Morality in Medico-Legal Problems: A Jewish View*, 31 N.Y.U.L. REV. 1205, 1208 (1956).

277 *Id.* at 1210.

278 LoGatto, *Artificial Insemination: Ethical and Sociological Aspects*, 1 CATHOLIC LAW 267, 273 (1955).

279 *Id.*

280 Tesson, *Artificial Insemination and the Moral Law*, in 2 NEW PROBLEMS IN MEDICAL ETHICS 38, 52 (D. Flood ed. 1954).

281 Kelly, *supra* note 265, at 145.

282 1963-64 *Church-State Survey*, *supra* note 224, at 464.

283 Compare *Orford v. Orford*, [1921] 58 D.L.R. 251 (1921), with *Strnad v. Strnad*, 190 Misc. 786, 78 N.Y.S.2d 390 (Sup. Ct. 1948), and *Gursky v. Gursky*, 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963). See also *Anonymous v. Anonymous*, 41 Misc. 2d 886, 246 N.Y.S.2d 835 (Sup. Ct. 1964).

284 [1921] 58 D.L.R. 251 (1921).

285 LoGatto, *Artificial Insemination: Legal Aspects*, 1 CATHOLIC LAW 172, 180 (1955).

In my judgment, the essence of the offense of adultery consists, not in the moral turpitude of the act of sexual intercourse, but in the voluntary surrender to another person of the reproductive powers or faculties of the guilty person; and any submission of those powers to the service or enjoyment of any person other than the husband or the wife comes within the definition of "adultery."<sup>286</sup>

The most recent case dealing with artificial insemination is *People v. Sorensen*.<sup>287</sup> As opposed to earlier cases, which were usually civil cases,<sup>288</sup> *Sorensen* was a criminal prosecution for failure to support a child.<sup>289</sup> Folmer Sorensen and his wife had consented to the process of artificial insemination which was performed by a San Francisco physician. In 1964, the Sorensens were separated and subsequently divorced.<sup>290</sup> In a lower California court,<sup>291</sup> Judge James E. Jones, Jr., relied on an estoppel theory and on the presumption of legitimacy in ruling that Sorensen was the child's father and therefore guilty as charged.<sup>292</sup> Before the court of appeals, the issue was whether "the husband of a woman who, with his consent, was artificially inseminated may . . . be found guilty of the crime of failing to support a child who is the product of such insemination . . . ." <sup>293</sup> In reversing the conviction, Judge Devine emphasized that it was a criminal case, and that estoppel, when used in a criminal case, could not be used "in order to prove an essential element [fatherhood]<sup>294</sup> of the crime of which appellant is charged."<sup>295</sup> The Supreme Court of California, sitting en banc, reversed the appellate court and affirmed Sorensen's conviction.<sup>296</sup> Judge McComb, speaking for the court, changed the emphasis from "natural father" to "lawful father."<sup>297</sup>

The anonymous donor of the sperm cannot be considered the "natural father," as he is no more responsible for the use made of his sperm than is

286 Orford v. Orford, [1921] 58 D.L.R. 251, 258 (1921).

287 254 Cal. App. 2d 869, 62 Cal. Rptr. 462 (1967), *rev'd*, 36 U.S.L.W. 2536 (Feb. 26, 1968).

288 *E.g.*, Gursky v. Gursky, 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963), Strnad v. Strnad, 190 Misc. 786, 78 N.Y.S.2d 390 (Sup. Ct. 1948).

289 *People v. Sorensen*, 254 Cal. App. 2d 869, 62 Cal. Rptr. 462, 463 (1967), *rev'd*, 36 U.S.L.W. 2536 (Feb. 26, 1968). The charge was violation of California's child support statute, Section 270 of the Penal Code:

A father of either a legitimate or illegitimate minor child who willfully omits without lawful excuse to furnish necessary clothing, food, shelter or medical attendance or other remedial care for his child is guilty of a misdemeanor and punishable by a fine not exceeding one thousand dollars (\$1,000) or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment. CAL. PENAL CODE § 270 (West Supp. 1967).

290 *People v. Sorensen*, 254 Cal. App. 2d 869, 62 Cal. Rptr. 462, 463 (1967), *rev'd*, 36 U.S.L.W. 2536 (Feb. 26, 1968).

291 The municipal court, or more properly, the Appellate Department of the Superior Court in the County of Sonoma, California. *Id.*

292 *Id.* at 465; TIME, April 14, 1967, at 80.

293 *People v. Sorensen*, 254 Cal. App. 2d 869, 62 Cal. Rptr. 462, 463 (1967), *rev'd*, 36 U.S.L.W. 2536 (Feb. 26, 1968).

294 "Because section 270 of the Penal Code places criminal responsibility only upon the father of a child, whether the child be legitimate or illegitimate, the prosecution has the absolute burden of proving that the person charged is the father." *Id.* at 464.

295 *Id.* at 466.

296 36 U.S.L.W. 2536 (Feb. 26, 1968).

297 *Id.*

the donor of blood or a kidney. . . . Since there is no "natural father," we can only look for a lawful father.<sup>298</sup>

The court went on to rule that the presumption of legitimacy is satisfied beyond a reasonable doubt when a husband consents to the creation of a child through the means of third-party donor artificial insemination.

Therefore, since the word "father" is construed to include a husband who, unable to accomplish his objective of creating a child by using his own semen, purchases semen from a donor and uses it to inseminate his wife to achieve his purpose, proof of paternity has been established beyond a reasonable doubt.<sup>299</sup>

This case is inconsistent with earlier artificial insemination cases.<sup>300</sup> In order to achieve clarity in this judicial enigma, a frontal attack must be made by the courts, hopefully with the aid of clear and comprehensive legislation.

## D. Legislation

### 1. Introduction

Notwithstanding the obstacles of indifference and religious opposition,<sup>301</sup> legislation, either pro<sup>302</sup> or con,<sup>303</sup> has been consistently urged in order to attain legal certainty. "Public policy on [such] important and controverted issues should be formulated and declared so that individuals may conduct their lives accordingly, avoiding needless hardship."<sup>304</sup>

### 2. Implied Statutory Authority

Some states have treated the problem of artificial insemination on an implied or peripheral statutory basis. For example, an Arizona statute<sup>305</sup> declares a broad policy of legitimacy — presumably broad enough to encompass a child conceived by artificial insemination. The City of New York, while silent on the actual practice of artificial insemination, appears to approve of it indirectly by establishing regulations for the physician, donor, and recipient and

298 *Id.*

299 *Id.* at 2537.

300 See cases cited in note 283 *supra*.

301 *TIME*, April 14, 1967, at 80.

302 *E.g.*, Koerner, *Medicolegal Considerations in Artificial Insemination*, 8 *LA. L. REV.* 484, 503 (1948). For an examination of the drastic change in Oklahoma, see text accompanying note 308 *infra*.

303 Rice, *A.I.D. — An Heir of Controversy*, 34 *NOTRE DAME LAWYER* 510, 528-29 (1959). He states that a "rule of illegitimacy would seem to be dictated by the inherently extramarital nature of AID . . . ." *Id.* at 529. See also Comment, *Natural Law and Artificial Insemination*, 5 *CATHOLIC U.L. REV.* 189 (1955), in which the author, without a development of natural law on relevant public policy or morality, summarily concludes that a statute prohibiting A.I.D. is the only possible natural law solution to the problem. *Id.* at 191.

304 Note, *Social and Legal Aspects of Human Artificial Insemination*, 1965 *WIS. L. REV.* 859, 883.

305 *ARIZ. REV. STAT. ANN.* § 14-206 (1956) states in pertinent part:

A. Every child is the legitimate child of its natural parents and is entitled to support and education as if born in lawful wedlock . . . .

C. This section shall apply although the natural father of such child is married to a woman other than the mother of the child, as well as when he is single.



by providing for confidentiality of the records.<sup>306</sup> If a New York statute were enacted to provide for the legitimacy of the offspring, the New York coverage of the problem would appear to be complete.

### 3. *Legitimacy Statutes*

Oklahoma has become the first state to provide for statutory legitimacy of children born as a result of heterologous artificial insemination, *i.e.*, A.I.D.<sup>307</sup>

The technique of heterologous artificial insemination may be performed in this State by persons duly authorized to practice medicine at the request and with the consent in writing of the husband and wife desiring for the utilization of such technique for the purpose of conceiving a child or children.

Any child or children born as the result thereof shall be considered at law in all respects the same as a naturally conceived legitimate child of the husband and the wife so requesting and consenting to the use of such technique.

No person shall perform the technique of heterologous artificial insemination unless currently licensed to practice medicine in this State, and then only at the request and with the written consent of the husband and wife desiring the utilization of such technique. The said consent shall be executed and acknowledged by both the husband and wife and the person who is to perform the technique, and the judge having jurisdiction over adoption of children, and an original thereof shall be filed under the same rules as adoption papers. The written consent so filed shall not be open to the general public, and the information contained therein may be released only to the persons executing such consent, or to persons having a legitimate interest therein as evidenced by a specific court order.<sup>308</sup>

The principal arguments against the law's passage were its immorality and the

306 NEW YORK CITY HEALTH CODE, art. 21 (1959):

No person other than a licensed physician shall perform an artificial insemination or collect, offer for sale, sell or give away human seminal fluid for the purpose of causing artificial insemination.

A proposed donor of seminal fluid shall have a standard serological test for syphilis and a smear and culture for gonorrhea within one week before his seminal fluid is taken and, immediately prior to taking his seminal fluid, he shall be given a complete medical examination with particular attention to his genitalia.

A proposed donor and a proposed recipient of seminal fluid shall each have a blood test to establish their respective Rh factors before artificial insemination is attempted. Such test shall be made by a laboratory operated pursuant to Article 13 and classified for hematology, including blood grouping and Rh typing. If the proposed recipient is negative for the Rh factor, only seminal fluid from a donor who is also negative for the Rh factor shall be used.

A person who is affected with a venereal disease, tuberculosis, brucellosis or who has any congenital disease or defect shall not be used as a donor of seminal fluid for artificial insemination.

A physician who performs an artificial insemination shall keep a record of (1) the names and addresses of the physician, donor, and recipient, (2) the results of the medical examination and serological and all other tests, and (3) the date of artificial insemination.

Records kept by a physician pursuant to this section shall not be subject to inspection by persons other than authorized personnel of the Department. A person who has access to these records shall not divulge any part thereof so as to disclose the identity of the persons to whom they relate.

307 TIME, April 14, 1967, at 80.

308 OKLA. STAT. ANN. tit. 10, §§ 551-53 (Supp. 1967).

"personal consideration[s]" of the legislators.<sup>309</sup> After some debate in the House and very little in the Senate,<sup>310</sup> the bill passed both houses by May 4, 1967.<sup>311</sup> Governor Dewey Bartlett accepted it as sound legislation and approved it on May 11, 1967.<sup>312</sup>

Thus, Oklahoma has been the innovator. In enacting the statute, it has solved the problems of adultery and legitimacy. However, no provision is made to establish regulations for the donor as are provided in New York City.<sup>313</sup> Either other states will follow Oklahoma's example, hopefully with a comprehensive law, or Oklahoma will become a mecca for those desirous of this controversial and novel means of procreation.

#### 4. Perspective for the Future

The issue can no longer be ignored. A failure to legislate might be interpreted as a delegation by the legislature of its policy-making function to the judicial branch.<sup>314</sup> Some states have considered this type of bill in the past, but have rejected it.<sup>315</sup> Now the states must re-evaluate their position. There is a necessity for every state to thoroughly examine the problem and to produce legislation — *comprehensive* legislation — both as a means of ensuring that A.I.D., if practiced, will be practiced with high standards for all parties concerned, and as a means of ensuring the legitimacy of the A.I.D. child.<sup>316</sup> These steps are necessary to protect the overall interest of society.<sup>317</sup>

#### E. Conclusion

More and more donor inseminations are performed each year.<sup>318</sup> Dr. Wilfred Finegold, Head of the Division of Sterility of the Pittsburgh Planned Parenthood Center, has made an excellent and timely observation on the overall problem:

The lawyer who claimed that the law's response to artificial insemination will be perfect horror, skepticism, curiosity and then acceptance has diagnosed

309 Questionnaire accompanying a letter from Representative George Camp to Merle F. Wilberding, Feb. 1, 1968, on file with the *Notre Dame Lawyer*. Once it was realized that this bill was merely permissive legislation for those needing it and rationally desiring it, passage was assured.

310 *Id.*

311 Copy of Official Enrolled House Bill No. 707, on file with the *Notre Dame Lawyer*.

312 *Id.*

313 See note 306 *supra*.

314 Corbett, *The Artificially Inseminated Child*, 40 WIS. BAR BULL. 39, 44 (Oct. 1967).

315 E.g., Illinois, Indiana, Minnesota, New York, Ohio, Virginia and Wisconsin. Hager, *Artificial Insemination: Some Practical Considerations for Effective Counseling*, 39 N.C.L. REV. 217, 230 n.46 (1961); Note, *supra* note 304, at 881 n.117.

316 See Note, *supra* note 304, at 883-84. For a general set of requirements for a comprehensive A.I.D. bill, see Note, *Artificial Insemination—Legal and Related Problems*, 8 U. FLA. L. REV. 304, 315-16 (1955). An excellent and comprehensive model statute, governing all actors, phases, and procedures is incorporated into a student article. See Comment, *Artificial Insemination: The Law's Illegitimate Child?* 9 VILL. L. REV. 77, 90-93 (1963).

317 The author does not personally advocate the use of artificial insemination, but he does urge legislation as a safeguard for those who do wish to practice it. "The prohibition imposed by a religious belief should not be applied by law to those who do not share the belief, where this is not required for the worldly welfare of society generally." G. WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* 312 (1957).

318 W. FINEGOLD, *ARTIFICIAL INSEMINATION* 69 (1964).

the situation correctly. We believe the "horror" stage has passed and that the public and the legislatures are moving in the area of skepticism and curiosity. Before long, there will be acceptance.<sup>319</sup>

This statement was made in 1964. Now, the "acceptance stage" exists in one state. It will undoubtedly be created in others. Legal acceptance is not, however, moral and social acceptance. A long evolutionary period is necessary before the public generally accepts artificial insemination as a part of its mores.

#### IV. ANTI-MISCEGENATION

On June 12, 1967, the Supreme Court tolled the death knell for anti-miscegenation statutes in *Loving v. Virginia*.<sup>320</sup> Although the trend was toward the eradication of these deplorable statutes,<sup>321</sup> as of the decision date, sixteen states had not yet done so.<sup>322</sup>

The history of *Loving* goes back to June, 1958, when two Virginia residents, Richard Loving, a white man, and Mildred Jeter, a Negro woman, traveled to the District of Columbia and were married.<sup>323</sup> The Lovings returned to their home in Caroline County, Virginia and were indicted by the grand jury for violating Virginia's statutory bar against interracial marriages.<sup>324</sup> After pleading guilty, the Lovings were sentenced to one year in prison, suspended upon condition that they remain outside Virginia for a twenty-five year period.<sup>325</sup> A subsequent motion in the trial court to vacate the judgment "on the ground that the statutes which they had violated were repugnant to the Fourteenth Amendment,"<sup>326</sup> was denied on January 22, 1965.<sup>327</sup> The Virginia Supreme Court of Appeals upheld the constitutionality of the anti-miscegenation statute and affirmed the Lovings' convictions.<sup>328</sup> An appeal to the United States Supreme Court was successful and the opinion of the Court provoked no dissenters.<sup>329</sup> According to Chief Justice Warren, the issue was "whether a statutory scheme

319 *Id.*

320 388 U.S. 1 (1967).

321 1964-66 *Church-State Survey*, *supra* note 224, at 752-53.

322 388 U.S. at 6 n.5.

323 *Id.* at 2.

324 *Id.* at 3. The Lovings were indicted and sentenced under a combination of these two sections of the Virginia law:

§ 20-58 If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in § 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage.

§ 20-59 If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years. VA. CODE ANN. §§ 20-58 to 59 (1950).

For a historical discussion of Virginia's anti-miscegenation statutes, see Wadlington, *The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189 (1966).

325 388 U.S. at 3.

326 *Id.*

327 *Id.*

328 206 Va. 924, 147 S.E.2d 78 (1966), *rev'd*, 388 U.S. 1 (1967).

329 Justice Stewart concurred, expressing his belief that it is inconceivable that the criminality of an act could depend upon the race of the actor. 388 U.S. at 13 (concurring opinion).

adopted by the State of Virginia to prevent marriage between persons solely on the basis of racial classification violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment.<sup>330</sup> The Court first noted that there was "patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification,"<sup>331</sup> and, hence, there was no doubt but that the statute's classification constituted unequal protection of law. The Court also held that the fundamental freedom to marry, if restricted solely on the basis of racial classification, is a deprivation of liberty without due process of law.<sup>332</sup> The Lovings' conviction was therefore void and their marriage valid.<sup>333</sup>

In Delaware, a similar case was decided two weeks later.<sup>334</sup> William Davis, a Negro, and Sandra Drummond, a white woman, sought a marriage license in New Castle County.<sup>335</sup> The clerk refused to process their application<sup>336</sup> because of a Delaware statute outlawing interracial marriages.<sup>337</sup> The plaintiff sought a declaration of the statute's invalidity and an injunction against its enforcement.<sup>338</sup> The federal district court, in striking down the statute, based its decision completely on *Loving*. "The ruling of the Supreme Court clears the board of all racial barriers to marriage."<sup>339</sup> The *Loving* case ends the problem completely. The anti-miscegenation statutes are now a dead issue.

## V. THE STUDY OF RELIGION IN THE STATE UNIVERSITY

### A. Introduction

The study of religion in a state university is a topic that has not been previously treated in the biennial Church-State Survey. But this subject has now risen to major importance and must be examined.

The dialogue of an intellectual community is not complete without the participation of theology. We cannot afford to leave its voice indefinitely muted or to hear it at most only tangentially and indirectly. Ideally, this discipline overtly and forthrightly should resume its historic university role.<sup>340</sup>

330 *Id.* at 2.

331 *Id.* at 11.

332 *Id.* at 12.

333 Richard Loving and his wife, Mildred, now "legally married," have returned to Central Point (Caroline County, Virginia) to rear their three children. Booker, *The Couple that Rocked Courts*, EBONY, Sept., 1967, at 78-79.

334 *Davis v. Gately*, 269 F. Supp. 996 (D. Del. 1967).

335 *Id.* at 997.

336 *Id.*

337 DEL. CODE ANN. tit. 13, § 101 (1953), provides in pertinent part:

(a) A marriage is prohibited and void between—

(2) A white person and a Negro or mulatto.

§ 102 The guilty party or parties to a marriage prohibited by section 101 of this title shall be fined \$100, and in default of the payment of the fine shall be imprisoned not more than 30 days.

338 *Davis v. Gately*, 269 F. Supp. 996, 998 (D. Del. 1967).

339 *Id.* at 999.

340 Louisell & Jackson, *Religion, Theology, and Public Higher Education*, 50 CALIF. L. REV. 751, 792 (1962).

This dialogue, however, must be reconciled with a very formidable obstacle, the first amendment. The contentions are strong on both sides: "Religion is essential to any understanding of human nature that reaches beyond the most restricted laboratory experiment;"<sup>341</sup> and, the establishment clause is "a wall of separation between church and State."<sup>342</sup> This dialectic has been stimulated because of the accelerated trend of religious instruction in tax-supported universities:

In many parts of the country, religious studies are being given a larger place in tax-supported colleges and universities. Until very recently the trend was gradual, but it has greatly accelerated in the nineteen sixties. This development is apparently due to a wider recognition of several facts: that religion is an important aspect of culture, that religion can be studied in ways which meet the highest academic standards, and that religious studies in state universities are not prohibited by law. There is increased recognition, also, that public education has an obligation to contribute to the interfaith understanding which is essential for a healthy religious pluralism.<sup>343</sup>

## B. Constitutionality

In *Calvary Bible Presbyterian Church v. Board of Regents*,<sup>344</sup> one of the few cases to reach the merits on this question,<sup>345</sup> the Supreme Court of Washington upheld the constitutionality of a University of Washington English course, "The Bible as Literature." The court found that the course

was taught in a completely objective manner; had no effect on religious beliefs; was not slanted toward any particular theological or religious point of view; did not indoctrinate anyone; did not enter into the realm of belief or faith; and was not taught from a religious point of view.<sup>346</sup>

The court believed that these findings were sufficient to justify its conclusion that the Bible literature course was not violative of the constitutional mandate of separation of church and state.<sup>347</sup>

The United States Supreme Court has faced the problem only peripherally thus far.<sup>348</sup> The Court's initial position was that the first amendment wall

341 White, *What Place Has Religion in State University Education?*, in *Religion and the State University* 89, 91 (E. Walter ed. 1958).

342 *Reynolds v. United States*, 98 U.S. 145, 164 (1878). See also *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947).

343 Katz, *Religious Studies in State Universities*, 1966 Wis. L. Rev. 297.

344 436 P.2d 189 (1967).

345 *E.g.*, in a taxpayer suit, a complaint to enjoin the use of university facilities by student religious groups was dismissed—without reaching the merits—by the Supreme Court of Minnesota for the taxpayer's failure to have first presented the issue to the governing board of the institution. *State ex rel. Sholes v. University of Minn.*, 236 Minn. 452, 54 N.W.2d 122 (1952). See also *North v. Board of Trustees of the Univ. of Ill.*, 137 Ill. 296, 27 N.E. 54 (1891); *Hanauer v. Elkins*, 217 Md. 213, 141 A.2d 903 (1958); D. BOLES, *THE BIBLE, RELIGION, AND THE PUBLIC SCHOOLS* 158-61 (1965).

346 436 P.2d at 194.

347 *Id.*

348 *E.g.*, *School Dist. v. Schempp*, 374 U.S. 203, 225 (1963); *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 336 (1948) (concurring opinion).

between church and state must remain "high and impregnable."<sup>349</sup> But a modification began in 1947 in *Illinois ex rel. McCollum v. Board of Education*.<sup>350</sup> In concurring, Mr. Justice Jackson stated:

And I should suppose it is a proper, if not an indispensable, part of preparation for a worldly life to know the roles that religion and religions have played in the tragic story of mankind. . . . One can hardly respect a system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society. . . .<sup>351</sup>

The strongest dicta in support of the study of religion in a state university are found in *School District of Abington v. Schempp*.<sup>352</sup> Mr. Justice Clark, writing for the majority, made this appealing observation:

[I]t might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.<sup>353</sup>

The strength of this comment should be sufficient to uphold the right to objectively study religion in a tax-supported university. The academic analysis of religion — for example, the philosophy of religion in a pluralistic society — broadens the overall knowledge of the citizenry and, hence, raises the intellectual level of the country. This is definitely a secular purpose, and it has a primary effect "that neither advances nor inhibits religion."<sup>354</sup>

Mr. Justice Brennan, in a concurring opinion in *Schempp*, added strength to the dicta of the majority:

The holding of the Court today plainly does not foreclose teaching *about* the Holy Scriptures or about the differences between religious sects in classes in literature or history. Indeed, whether or not the Bible is involved, it would be impossible to teach meaningfully many subjects in

349 "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach." *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947); cf. Louisell & Jackson, *supra* note 340, at 756.

350 333 U.S. 203 (1948). The Court held that the utilization of public school buildings for religious instruction of public school pupils violates the first amendment.

351 *Id.* at 236. For a general review of the Supreme Court cases in this area, see McCloskey, *Principles, Powers, and Values: The Establishment Clause and the Supreme Court*, in 1964 RELIGION AND THE PUBLIC ORDER 3 (D. Giannella ed. 1965). In light of the *McCollum* case, the State University of Iowa School of Religion revised its articles of incorporation in order to clarify its strictly educational position. As revised article II reads as follows:

1. To provide courses that will help students gain an understanding of the history and literature of religion and a thoughtful insight into its nature and meaning.
2. To foster through the study of religion an appreciation of the spiritual values in human culture. M. LAMPE, *THE STORY OF AN IDEA* 10 (1963).

See also text accompanying notes 385-92 *infra*.

352 374 U.S. 203 (1963). This case held that the Commonwealth of Pennsylvania cannot require reading of the Bible or recitation of the Lord's Prayer in a public school.

353 *Id.* at 225.

354 *Id.* at 222.

the social sciences or the humanities without some mention of religion.<sup>355</sup>

Mr. Justice Goldberg, in another concurring opinion, reemphasized this point by stating that current judicial thought would uphold the propriety of "teaching *about* religion, as distinguished from the teaching *of* religion"<sup>356</sup> in tax-supported institutions.

Beginning with *Schempp*, separation of church and state has not meant mutually exclusive isolation. Rather, it means freedom from government sponsorship and government restraint,<sup>357</sup> *i.e.*, "neutrality." But, it has been said that neutrality has about it a "deceptive simplicity,"<sup>358</sup> since absence of religion is, in fact, the promotion of nonreligion. Absence of religion would therefore

make the public [university] a sectarian institution — promoting an atheistic faith. This identification of the public [universities] with a minority religion, namely atheism, would be no more justified than its advocacy of the religious consensus. Yet whenever the school acts as if religion did not exist, it allies itself, willingly or not, with this esoteric sectarianism.<sup>359</sup>

One writer has formulated a test, within constitutional limits, that is neutral, yet not ignorant of the problem:

Stated briefly, the test, at least in theory, is this: any study of religion whose purpose it is to inculcate religious belief — sectarian or non-sectarian — is constitutionally forbidden; a study of religion whose purpose is to attain understanding of religion is permitted.<sup>360</sup>

The extreme flexibility of the Constitution allows current policy considerations and current competing interests to shape it through judicial decisions into a sculptured model of contemporary public opinion. This concept of historical interpretation<sup>361</sup> is an initial necessity in upholding the constitutionality of academic evaluation of theological philosophies in state universities. The rightful role of the university must be reconciled within the context of the Constitution. This should be no problem in the university since it differs from the elementary or secondary school in many essential respects.<sup>362</sup> Some writers who attack the constitutionality of these programs at lower levels would uphold them at the university level.<sup>363</sup>

I do not believe the objective teaching of religion is today practicable at the elementary school level, or that violation of the Constitution can be

355 *Id.* at 300 (concurring opinion).

356 *Id.* at 306 (concurring opinion).

357 Katz, *supra* note 343, at 298.

358 P. FREUND & R. ULICH, *RELIGION AND THE PUBLIC SCHOOLS* 12 (1965).

359 G. Forell, *The Illusion of Neutrality* 5 (unpublished paper available from the Iowa School of Religion, Iowa City, Iowa).

360 Pfeffer, *Constitutional Aspects of Religion in State Universities*, in *RELIGION IN THE STATE UNIVERSITY* 44, 48 (H. Allen ed. 1950).

361 Kauper, *Law and Public Opinion in Religion and the State University* 69, 71 (E. Walter ed. 1958).

362 *Id.* at 79-80. See also Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 *MINN. L. REV.* 329, 383 (1963). But see Littell, *Church, State, and University*, in 1963 *RELIGION AND THE PUBLIC ORDER* 78, 79 (D. Giannella ed. 1964).

363 Kauper, *supra* note 361 at 80; Pfeffer, *supra* note 360, at 49-50.

avoided otherwise than by excluding the content of religion from the curriculum. However, this is not necessarily true of colleges or universities. . . . The college student has received his basic religious training in his home or church and is thus ready for exploration of other religious or even non-religious beliefs. Moreover, unlike the elementary school child, he no longer accepts as incontrovertible truths all he hears from his teacher or reads in a textbook.<sup>364</sup>

The language of the courts and of the writers indicates that the Constitution does not forbid the existence of theology in a state university. One writer has suggested that the state university's responsibilities and limitations can be put into focus by answering these two political questions: "Does the policy or act proposed contribute to the strengthening of voluntary religion and its free exercise?"<sup>365</sup> and "Does the decision duly respect the integrity of conscience and dignity of person of citizens of other persuasions . . . ?"<sup>366</sup> Given the flexibility of the Constitution, the tax-supported university, in fulfilling its proper function, must be free to include the study of religion as a proper academic discipline.

### C. Theoretical Justification — The Function of a University

Since a university is essentially a place for communication and development of thought,<sup>367</sup> it should be a forum for the expression of the community's values and ideas.<sup>368</sup> Religion must be considered an inseparable part of this expression and should, therefore, be a part of the education that incites the ideas within the students.<sup>369</sup> To do less would be to make the state university "the supreme leader of the secularization of life and education."<sup>370</sup>

Once a state university recognizes its responsibilities to help students understand society<sup>371</sup> through the development of pluralistic religious perspectives, it must program the study of religion into its existing framework of curricula. "[R]eligion, theoretically and practically, is inseparable from education; hence it should be taught, even in a tax-supported university, not indirectly or surreptitiously, but unapologetically, comprehensively, and in line with the best educational procedures."<sup>372</sup>

364 Pfeffer, *supra* note 360, at 49-50.

365 Littell, *Religious Liberty in a Pluralistic Society*, 8 J. CHURCH & STATE 430, 443 (1966).

366 *Id.*

367 J. NEWMAN, *THE IDEA OF A UNIVERSITY* 464 (1927).

368 Haas, *Theology at the State University*, 40 THOUGHT 506, 509 (1965).

369 Miller, *Responsibility, Not Immunity*, in RELIGION IN THE STATE UNIVERSITY 84, 87 (H. Allen ed. 1950).

370 *Id.* at 84. Secularism has been described as follows:

Secularism is the assumption that sense experience is our sole proof of truth, that material reality is the only reality, and that the only values are pragmatic enjoyments of a this-worldly, immediately experienced, hedonistic type. Secularism is reinforced by a mistaken view of science. Because natural science studies phenomena which are verified through the senses and neglects other aspects of life, it is falsely assumed that no other aspects exist. Neglect, methodological omission, means denial of spiritual reality, of God-values. *Id.* at 88.

371 See Pollock, *Our Heritage of Religious Values and Basic Issues of Higher Education*, 50 RELIGIOUS EDUC. 298, 299 (1955).

372 M. LAMPE, *supra* note 351, at 3.



#### D. Practical Problems

Given its place within the curricula of the university, the program of religious instruction must be objective. The usual pronouncement is that the courses must be *about* religion and not be the instruction *of* religion.<sup>373</sup> For this to be achieved, the instructor must rigidly follow a plan of scholarly objectivity and comprehensiveness.<sup>374</sup> "He . . . [must] lift the whole religious tradition of mankind to the level of analytical, historical, and comparative discourse."<sup>375</sup> Objective instruction is a key item in the success of this program. It is possible in a university where students can maturely meet competing spiritual and intellectual aspects of conflicting religious dogmas.<sup>376</sup>

Professor Kauper, of the University of Michigan Law School, compares the distinction between the study about religion and the instruction of religion to the distinction between the study of political science and the indoctrination of political values:

No state university can have a theological position any more than it can have a political position. But just as freedom from a political position does not preclude a study of political science, so lack of commitment to a theological position does not preclude a study of theology. What is important is that the state should not promote a particular theology for purposes of religious indoctrination, but that rather it should afford opportunity for study of religious ideas, religious behavior, and religious institutions at the hands of competent scholars.<sup>377</sup>

The last obstacle on the practical level is the formulation of a plan consistent with the proper role of the university and with the concept of "neutrality" as required by the Constitution.<sup>378</sup> The latter requirement is no small obstruction. "Fear of violating the First Amendment to the U. S. Constitution has sometimes acted as a barrier to the development of a distinctive curricular program in religion."<sup>379</sup> Primary consideration must therefore be given to three conditions that comprise the sine qua non to the establishment of theology as an intellectual discipline: (1) Participation must be on a purely voluntary basis; religion courses cannot be made a requirement for graduation.<sup>380</sup> (2) There must be no discrimination of one religion over another;<sup>381</sup> neither should ad-

373 *E.g.*, *School Dist. v. Schempp*, 374 U.S. 203, 306 (1963) (concurring opinion); P. FREUND & R. ULICH, *supra* note 358, at 43; Greene, *Religion and the Humanities*, in RELIGION AND THE STATE UNIVERSITY 120, 128 (E. Walters ed. 1958); *cf.* Phenix, *Religion in American Public Schools*, in 1965 RELIGION AND THE PUBLIC ORDER 82, 100-09 (D. Giannela ed. 1966).

374 P. FREUND & R. ULICH, *supra* note 358, at 43.

375 *Id.*

376 Shedd, *Religion in the American State Universities: Its History and Present Problems*, in RELIGION IN THE STATE UNIVERSITY 13, 27 (H. ALLEN ed. 1950).

377 P. KAUPER, RELIGION AND THE CONSTITUTION 99 (1964). *See also* Haas, *supra* note 368, at 510-11.

378 *See* text accompanying notes 361-66 *supra*.

379 4 RELIGION 2 (April, 1967) (Bulletin of The Kansas School of Religion at the University of Kansas).

380 62 THE UNIV. OF KAN. NEWSLETTER No. 33, March 30, 1963, at 6 [hereinafter cited as NEWSLETTER]; Kauper, *supra* note 361, at 82-83; Louisell & Jackson, *supra* note 340, at 766.

381 NEWSLETTER, *supra* note 380 at 6.

herence to a particular creed be a criterion for admission into the program.<sup>382</sup>  
 (3) The goal of instruction must be an increase in understanding, not an aid to propagandizing.<sup>383</sup>

It is a proper function of the state university to inject knowledge and understanding; it is not a proper function to seek commitment and indoctrination.<sup>384</sup> Compliance with these elementary conditions is a threshold requirement in preserving the constitutionality of this instructional program.

## E. Existing Practice

### 1. Classification of Programs

State universities have, in fact, instituted programs of instruction in religion. The curricula of the various universities are not identical, however. These programs have been classified into the following six categories:

1. An independent school of religion adjacent to the campus, independently financed, but with faculty status at the university such as the Indiana School of Religion.<sup>[385]</sup>
2. Courses taught by local clergymen accredited by the university, as at the University of Illinois.<sup>[386]</sup>
3. Courses about religion taught in various departments of the university, as at the University of Michigan.
4. Separate departments of religion as at Michigan State University, and the State University of Iowa, where courses are taught in particular religious doctrines by representatives of those religions.<sup>[387]</sup>
5. Extension courses offered by a sectarian university with transferable credits, as at the University of New Mexico.
6. Televised courses offered for credit by a sectarian university such as the Bible Telecourse sponsored by DePauw University in Indiana.<sup>388</sup>

382 Kauper, *supra* note 361, at 81-82.

383 NEWSLETTER, *supra* note 380, at 6.

384 Kauper, *supra* note 361, at 82.

385 On January 24, 1968, Indiana University announced that it became the fourth state university to offer a master of arts degree in religion, joining the Universities of Iowa, California at Santa Barbara, and the Pennsylvania State University. South Bend Tribune, Jan. 24, 1968, at 16, col. 4. It is reported elsewhere, however, that The Kansas School of Religion also offers a master of arts degree in religion, 4 RELIGION 3 (April, 1967) (Bulletin of The Kansas School of Religion at the University of Kansas).

386 A similar program is offered at the University of Texas at El Paso. Letter from Ray Small, Dean, College of Liberal Arts, University of Texas at El Paso to Merle F. Wilberding, Dec. 1, 1967, on file with the *Notre Dame Lawyer*.

387 At Michigan State University, the Department of Religion is fully integrated into and supported by the university. Letter from Harry Kimber, Chairman of the Department of Religion at Michigan State University, to Merle F. Wilberding, Jan. 23, 1968, on file with the *Notre Dame Lawyer*. At the University of Iowa, the university provides a large part of The School of Religion's budget, but considerable additional support comes from denominational grants and private contributions, The School of Religion, 1967-68 (leaflet available from The Iowa School of Religion, Iowa City, Iowa).

388 Haas, *supra* note 368, at 507-08. For a slightly different breakdown of the categories, see Bean, *Historical Developments Affecting the Place of Religion in the State University Curriculum*, 50 RELIGIOUS EDUC. 275, 283-84 (1955). Other state universities, in addition to those listed in the text, that offer religion courses are Alabama, California at Santa Barbara, Florida State, Missouri, North Carolina, Penn State, Tennessee, and Western Michigan, 4 RELIGION 1-2 (April, 1967) (Bulletin of The Kansas School of Religion at the University of Kansas).

## 2. *Specific Examples*

These state universities recognize the need for the development of the whole man: "Since religion, personal and institutional, is an important aspect of life, it should be given its rightful place in the training of a fully educated man whether he enrolls in a private or tax-supported school."<sup>389</sup> Indicative of this attitude is language found in statements of the purposes and goals of the religion departments of some of the schools that have instituted such programs. The Missouri School of Religion states that its purpose "is to round out the educational program of undergraduate University students preparing for vocations and professions by providing for them instruction in the field of religion."<sup>390</sup> Short and explicit is a similar statement of The Kansas School of Religion: "The purpose of the school is to inform students in an atmosphere of free inquiry rather than to evangelize."<sup>391</sup> The final example is that of The Iowa School of Religion. Its stated goal is

to present the facts of religion sympathetically but without indoctrination, to reveal both differences and likenesses among historic and contemporary religions, and to provide for the study of the whole role of religion in human culture without obscuring any essential element—least of all its significance in the life of those who teach it, yet with no appeal for response from students except the appeal of all good education to broader and deeper understanding, to integrity and to self-fulfillment.<sup>392</sup>

## F. Perspective for the Future

The success<sup>393</sup> of these programs will undoubtedly lead to their expansion to other universities. Notwithstanding this fact, it appears doubtful that the Supreme Court need speak on the issue of their constitutionality. If a proper case comes before the Court, it is almost axiomatic that it will uphold the validity of these programs. Their present general acceptance is indicated by the recommendations of the Church-State Committee of the American Civil Liberties Union.<sup>394</sup> The Committee recommends adoption by the ACLU of a policy that the study of religion in state universities is not a church-state conflict. The Committee specifically recommends:

- a. That the curriculum and personnel for such programs [study of religion in state universities] be administered exclusively by the university and be governed by standards which apply to all other academic departments and

<sup>389</sup> NEWSLETTER, *supra* note 380, at 6.

<sup>390</sup> Catalogue, The Missouri School of Religion 15 (1963).

<sup>391</sup> NEWSLETTER, *supra* note 380, at 3.

<sup>392</sup> M. LAMPE, *supra* note 351, at 10.

<sup>393</sup> For example, The Missouri School of Religion had 857 students enrolled in its courses in 1967. Letter from Thomas R. Shrouf, Dean, Missouri School of Religion, to Merle F. Wilberding, Dec. 1, 1967, on file with the *Notre Dame Lawyer*. The Kansas School of Religion reported registrations in 1966-67 of 915 — an increase from 306 in 1962-63. At the same time, the University of Kansas' enrollment increased from 10,509 to 14,600 students. 4 RELIGION 3 (April, 1967) (Bulletin of The Kansas School of Religion at the University of Kansas).

<sup>394</sup> Submission of these recommendations regarding public universities will not occur until the committee constructs its recommendations for a proposed position on the teaching of religion in public elementary and secondary schools. Hence, it is necessary to refer to these as recommendations and not as ACLU policy. Letter from Susan Harkins to Merle F. Wilberding, Dec. 19, 1967, on file with the *Notre Dame Lawyer*.

disciplines in the university. A broad representation of approaches and philosophies should be employed with respect to religious subject matter, just as it should be employed with respect to all subject matter. Such a representation should include traditions, expressions, and viewpoints which are skeptical towards religion, and anti-religious as well as those which are affirmative towards religion.

b. That courses in religion shall not be required of students although a course in religion may be elected from among a number of offerings in related disciplines in order to satisfy a general education or humanities requirement.

c. That no funds be accepted from any source that presumes or expects the university to make any religious commitment.

d. Nothing in this statement commits the Union [ACLU] to a position on the question of public universities or schools granting credit for courses taken at sectarian institutions.<sup>395</sup>

## G. Conclusion

The practices of the state universities, the legal opinions, and the authorities' views and recommendations indicate the essential differences between university study of religion and the study of religion on the elementary or secondary level.<sup>396</sup> A program of religious instruction in a state university is not a proposal for indoctrination; rather, it is an objective approach to the topic for university students who have the maturity to accept it as an analytical study.<sup>397</sup> As long as there is no denominational favoritism or any element of compulsion,<sup>398</sup> it is "reasonably safe to conclude that the federal Constitution in no way prohibits the treatment of theology or religion in public institutions of higher learning . . . ."<sup>399</sup>

## VI. GOVERNMENTAL AID TO ELEMENTARY AND SECONDARY EDUCATION

### A. Introduction

A consideration of governmental aid to private elementary and secondary education necessarily involves many factors. The first question to be considered is whether such aid is constitutionally permissible. If aid from the federal government is contemplated, the first amendment to the United States Constitution must be reckoned with. If aid from state government is desired, not only is the first amendment pertinent,<sup>400</sup> but state constitutional provisions on the separation of church and state must be considered as well. Although a legislature may often refuse to pass a bill because of foreseeable constitutional difficulties, the determination of constitutionality is ultimately and finally decided by the judiciary. The peculiar province of the legislature is in determining

395 Working Paper, ACLU Church-State Committee, Oct. 24, 1967.

396 Haas, *supra* note 368, at 506-07.

397 83 CHRISTIAN CENTURY 620 (1966).

398 J. MORRILL, *THE ONGOING STATE UNIVERSITY* 68 (1960).

399 Louisell, *Constitutional Limitations and Supports for Dealing With Religion in Public Higher Education*, 50 RELIGIOUS EDUC. 285, 289 (1955).

400 The due process clause of the fourteenth amendment has generally been credited with absorbing the religious guarantees of the first amendment. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). For a discussion of the desirability of applying the religious freedom aspects of first amendment to the states, see Sky, *The Establishment Clause, The Congress and the Schools: An Historical Perspective*, 52 VA. L. REV. 1395, 1429-30 (1966).

whether granting aid to private institutions is advisable. Thus, legislatures are prone to consider such policy reasons as the availability of funds, the desirability of either encouraging or discouraging private education, and the political and religious complexion of the community wherein the aid is contemplated. Since each of these factors involves substantially different problems, they are treated separately below.

### 1. *The Constitutionality of Governmental Aid*

#### a. Federal Constitution

When presented with church-state issues, the Supreme Court has been successful in avoiding broad holdings, perhaps well aware of the sensitivity of the subject matter. Accordingly, it has confined itself to a bits-and-pieces approach to the question of governmental aid to private education.<sup>401</sup> However, in view of the increasing amount of such aid, on both the state<sup>402</sup> and federal<sup>403</sup> levels, it is apparent that the Supreme Court will have to face squarely the constitutional question in the near future.<sup>404</sup>

Numerous legal theories supporting or attacking aid to private education have received the attention of some court at some time. But there has been no consistency in the application of these theories, and any attempt to utilize past decisions to create a legal framework within which all future decisions can be placed is virtually impossible.

The "child benefit" theory has provided the strongest support for the advocates of aid to private education. A particularization of the secular purpose doctrine, which allows aid to privately owned institutions serving a public need, the child benefit theory is based on the presumption that an indirect benefit to a religiously oriented school is not unconstitutional so long as the primary and direct benefit goes to the *child* attending that school.<sup>405</sup> This theory has been sanctioned by the Supreme Court in *Everson v. Board of Education*<sup>406</sup> and *Cochran v. Louisiana State Board of Education*.<sup>407</sup> However, the precedent value of both decisions in the church-state area is certainly suspect. Mr. Justice

401 *E.g.*, *Zorach v. Clauson*, 343 U.S. 306 (1952) (allowing public school children to attend religion classes off public school premises); *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948) (conducting religion classes on public school premises ruled unconstitutional); *Everson v. Board of Education*, 330 U.S. 1 (1947) (school bus transportation for private school children allowed as a public welfare measure).

402 *E.g.*, MICH. STAT. ANN. § 15.3622 (1968) (auxiliary services); N.Y. EDUC. LAW § 701 (McKinney Supp. 1967) (textbooks); PA. STAT. ANN. tit. 24, § 13-1361 (Supp. 1967) (transportation).

403 The Elementary and Secondary Education Act of 1965 (codified in scattered sections of 20 U.S.C. Supp. II, 1967) is the most recent and controversial federal aid program that affects private schools.

404 For a historical analysis of what the framers of the first amendment intended it to mean see Sky, *supra* note 400.

405 The child benefit theory has been defined as "the concept that the state may extend certain welfare aid to students attending church-related schools in situations where general aid to the parochial schools themselves would be unconstitutional." LaNoue, *The Child Benefit Theory Revisited: Textbooks, Transportation and Medical Care*, 13 J. PUB. L. 76, 79 (1964). See generally Cushman, *Public Support of Religious Education in American Constitutional Law*, 45 ILL. L. REV. 333, 339-42 (1950).

406 330 U.S. 1 (1947).

407 281 U.S. 370 (1930).

Douglas, who concurred in the 5-4 *Everson* decision, has more recently admitted that "[t]he *Everson* case seems in retrospect to be out of line with the First Amendment."<sup>408</sup> As pointed out by an advocate of aid to private education, "the history of *Everson* does not encourage one to employ it as a firm foundation for a case for federal aid to Catholic schools."<sup>409</sup> The *Cochran* decision, handed down in 1930, was decided before the first amendment's religion clauses were specifically made applicable to the states and rested on the fourteenth amendment's due process clause.<sup>410</sup> Thus, there is no clear judicial sanction of the child benefit theory in relation to the first amendment.

Closely akin to the child benefit theory is the broader "secular purpose" theory. Proponents of aid to private education argue that the secular purpose of such aid is to make education available to *all* students regardless of *where* this education is obtained.<sup>411</sup> The secular purpose theory derives support from the judicial determination that Sunday closing laws are valid.<sup>412</sup> In *McGowan v. Maryland*<sup>413</sup> the Supreme Court, speaking through Mr. Chief Justice Warren, held that a state statute that forbids the sale of certain goods on Sunday does not violate the establishment clause of the first amendment. The Court noted:

The present purpose and effect of most of [the Sunday closing laws] is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals. To say that the States cannot prescribe Sunday as a day of rest . . . solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State.<sup>414</sup>

However, the validity of the secular purpose theory cannot rest solely on the fact that a private institution is serving a public purpose. "Some showing of public necessity is required before financial aid will be given, and even then, the government still has the discretion to reject the organization's request for money."<sup>415</sup> Further, to be constitutional under the secular purpose theory, a statute granting aid to a private institution must be religiously neutral in its

408 *Engel v. Vitale*, 370 U.S. 421, 443 (1962).

409 Drinan, *The Constitutionality of Public Aid to Parochial Schools*, in *THE WALL BETWEEN CHURCH AND STATE* 55, 60 (D. Oakes ed. 1963).

410 "The appellants . . . brought this suit . . . upon the ground that the legislation violated specified provisions of the constitution of the State and also section 4 of Article IV and the Fourteenth Amendment of the Federal Constitution." 281 U.S. at 373. See Note, *Textbooks Loans to Parochial Schools*, 32 *BROOK. L. REV.* 362, 377 n.93 (1966).

411 *Symposium—The First Amendment and Financial Aid to Religion: Limits on the Government's Conduct*, 61 *NW. U.L. REV.* 777, 782 (1966); cf. Gordon, *The Unconstitutionality of Public Aid to Parochial Schools*, in *THE WALL BETWEEN CHURCH AND STATE* 73, 90 (D. Oakes ed. 1963).

412 See *Braunfeld v. Brown*, 366 U.S. 599 (1961); *McGowan v. Maryland*, 366 U.S. 420 (1961). In analyzing the Sunday closing law cases, Dean Robert F. Drinan has concluded:

[I]t is clear that the establishment clause has *not* been interpreted by the Supreme Court to mean that the secular aims of the state must be achieved in a manner deliberately designed to preclude any incidental aid to religion.

Drinan, *supra* note 409, at 62. See also Drinan, *State and Federal Aid to Parochial Schools*, 7 *J. CHURCH AND STATE* 67, 70 (1965).

413 366 U.S. 420 (1961).

414 *Id.* at 445.

415 *Symposium, supra* note 411, at 780-81.

effect. In *School District of Abington v. Schempp*<sup>416</sup> the Supreme Court held that the Bible cannot be read and the Lord's Prayer cannot be recited in public schools since this practice violates the establishment clause. In formulating the test for government neutrality in the sensitive area of religion, Mr. Justice Clark stated: "[T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."<sup>417</sup> Thus, it is not sufficient to look only at the purpose of the legislation; the *effect, i.e.*, whether the primary though unintended result of the legislation is assistance to religion, must also be considered. Therefore, it may be closer to the truth to say that secular purpose is not enough; there must be a secular effect as well.

A third line of reasoning, based on *Pierce v. Society of Sisters*,<sup>418</sup> regards private schools as quasi-public in nature since they perform a secular function (education of the child). In *Pierce* the Supreme Court struck down a state statute that required all children in the state to attend public schools. The Court noted that the statute infringed on the rights of parents to send their children to private schools. It is argued, therefore, that since the private schools are public for the purpose of compulsory attendance laws, they should be designated as public for the purpose of receiving governmental aid.<sup>419</sup> From this premise, it is argued that the private schools have a *right* to governmental aid. Aside from the fact that a court or legislature is likely to take a dim view of any proposition that a government *must* support a non-governmental institution, this theory assumes too much in the way of a duty for the state. Every right has a correlative duty, and the right of a parent to send his child to a private school is no exception. The fallacy in the compulsory education argument is an assumption that it is the affirmative duty of the state to provide a choice between public and private schools by financially assisting both. The duty of the state in this situation is merely to *refrain* from infringing upon the right of the parents. Consequently, the compulsory education theory does not appear to support the position that governmental aid to private schools would be constitutionally required.

Opponents of governmental aid to private education, besides attacking the child benefit and secular purpose theories, have affirmatively argued that aid to private education is unconstitutional. Their attack is two-pronged. First is the "permeation" argument; that is, any course taught in a sectarian institution, anything associated with a sectarian institution, is necessarily permeated with sectarian ideology.<sup>420</sup> Thus, if a subject taught in a private school is per-

416 374 U.S. 203 (1963).

417 *Id.* at 222.

418 268 U.S. 510 (1925).

419 Drinan, *supra* note 409, at 56.

420 Gordon, *supra* note 411, at 90. G. R. LaNoue, conducting research on the "secular" subjects taught in religious schools, found that religious symbols permeated textbooks on such subjects as science and mathematics. See LaNoue, *Religious Schools and "Secular" Subjects*, 32 HARV. EDUC. REV. 255 (1962). Dean Drinan counters with a distinction "between the factitious and indefensible insertion of sectarian symbols or teaching into secular subjects and the conclusions or judgments based on religious values which are properly found in texts in the area of the social sciences." Drinan, *supra* note 409, at 64. He goes on to note that public school texts "can be fairly and properly criticized as being permeated with an excessive emphasis on the secular, with a resulting failure to give adequate treatment to the sacred,

meated with a sectarian orientation, any aid that facilitates the teaching of that subject violates the establishment clause. Such an argument ignores the fundamental fact that religious permeation, if it does exist, still does not change the secular character of the subject taught. Further, all courses are permeated with the thoughts and philosophy of the teacher. Thus, in a public school, where the teacher is bound to ignore the existence of religion, the subjects taught are permeated with a secularistic outlook as much as the same subjects are permeated with a sectarian outlook in a private school. As stated by Dr. Luther A. Weigle, former Dean of Yale Divinity School, "[t]he ignoring of religion by the schools inevitably conveys to the children a negative suggestion . . . it is natural for them to conclude that religion is negligible, or unimportant, or irrelevant to the main business of life."<sup>421</sup> Thus, if the permeation argument is applied to its logical extent, governmental aid to secular (public) schools without such aid to private schools not only possibly hinders the "free exercise" of religion, but arguably promotes an "establishment" of religion (*i.e.*, secularism).<sup>422</sup>

Perhaps a more serious constitutional objection to governmental aid to private schools is that even indirect aid, such as furnishing public transportation for private school children, results in a pecuniary benefit to the private institution because it frees funds normally used for such purposes. Essentially, this argument rejects the distinction between direct and indirect aid,<sup>423</sup> and proposes that even indirect aid is an unconstitutional appropriation of public funds. It is undeniable that indirect aid will, in some circumstances, result in a financial benefit to the private school, but a total repudiation of the direct-indirect aid distinction is untenable. For example, who would deny police and fire protection to a church simply on the ground that the church is receiving a benefit by such protection?<sup>424</sup> Accordingly, the Supreme Court has upheld

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the sectarian, or the spiritual elements in the life of man and of society." *Id.* Pope Pius XI in his encyclical, *On the Christian Education of Youth*, declared: "It follows that the so-called 'neutral' or 'lay' school, from which religion is excluded, is contrary to the fundamental principles of education. Such a school, moreover, cannot exist in practice; it is bound to become irreligious." The quoted statement is found in 1 T. BOUSCAREN, *THE CANON LAW DIGEST* 679 (1958).

<sup>421</sup> Quoted in Blum, *Freedom and Equality*, in *FEDERAL AID AND CATHOLIC SCHOOLS* 43, 46 (D. Callahan ed. 1964).

<sup>422</sup>

If the state therefore cannot constitutionally give public money for instruction in secular subjects if religious values are commingled in the instruction, the state is equally disabled from financing instruction in secular subjects where the orientation of the instruction is, by silence or by implication, permeated with a secularistic outlook. Drinan, *supra* note 409, at 64.

<sup>423</sup> Though most legal scholars who have addressed the church-state issue support the distinction between direct and indirect aid, Professor Kurland finds the distinction of little merit. He feels that even direct aid is valid. Kurland, *Politics and the Constitution: Federal Aid to Parochial Schools*, 1 *LAND AND WATER L. REV.* 475, 493-94 (1966).

<sup>424</sup>

It is thus clear beyond cavil that the Constitution does not demand that every friendly gesture between church and State shall be discontinued. The so-called "wall of separation" may be built so high and so broad as to impair both State and church, as we have come to know them. *Zorach v. Clauson*, 303 N.Y. 161, 172, 100 N.E.2d 463, 467 (1951), *aff'd*, 343 U.S. 306 (1952).

"It would, of course, be unthinkable to suggest that the establishment clause requires churches and church schools to go without benefit of public police or fire protection, even if religion is aided thereby." Gordon, *supra* note 411, at 91.



indirect aid in certain cases.<sup>425</sup> The problem is drawing the line between direct and indirect aid.

## b. State Constitutions

Even if governmental aid to private education is permissible under the Federal Constitution, it is necessary to determine whether such aid is permissible under the state constitutions. Most state constitutions have provisions that prohibit state support of private sectarian institutions, including schools,<sup>426</sup> and many of these provisions are much more strict and are interpreted more broadly than the first amendment.<sup>427</sup> There is an endless variety of state constitutional provisions which can affect state aid to private schools.<sup>428</sup> Even federal aid to education programs are not free from restrictive state constitutions if the federal programs provide for matching grants or for cooperation of state officials.<sup>429</sup>

## 2. *Advisability of Governmental Aid*

Assuming that some forms of governmental aid to private education are constitutional, it is necessary to consider the advisability of granting such assistance. The fact that governmental action is constitutionally possible does not make it mandatory,<sup>430</sup> and the granting or withholding of aid is discretionary

<sup>425</sup> See *Zorach v. Clauson*, 343 U.S. 306 (1952); *Everson v. Board of Education*, 330 U.S. 1 (1947).

<sup>426</sup> *E.g.*, ALA. CONST. art. XIV, § 263: "No money raised for the support of the public schools shall be appropriated to or used for the support of any sectarian or denominational school." ALASKA CONST. art. VII, § 1: "No money shall be paid from public funds for the direct benefit of any religious or other private educational institution." ARIZ. CONST. art. IX, § 10: "No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation." CAL. CONST. art. XIII, § 24:

Neither the Legislature nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any [sectarian] school, college, [or] university . . . .

See generally C. ANTEAU, P. CARROLL & T. BURKE, *RELIGION UNDER THE STATE CONSTITUTIONS* 173-239 (1965).

<sup>427</sup> "Many of the states have adopted very specific constitutional language which appears to preclude any public aid to institutions or organizations which are characterized as 'sectarian.'" C. ANTEAU, P. CARROLL & T. BURKE, note 426 at 1. See Katz, *Note on the Constitutionality of Shared Time*, in 1964, *RELIGION AND THE PUBLIC ORDER* 85, 89-94 (D. Giannella ed. 1965); W. KATZ, *RELIGION AND AMERICAN CONSTITUTIONS* 4-5 (1964).

<sup>428</sup> C. ANTEAU, P. CARROLL & T. BURKE, *supra* note 426, at 23. Among the examples listed are clauses to the effect that no one shall be compelled to support any church, bans upon grants of public funds or property to educational institutions not under state control, bans upon the use of public funds to aid educational institutions under sectarian control, and prohibitions on spending public funds in aid of any school where sectarian doctrine is taught.

<sup>429</sup> The draftsmen of the Elementary and Secondary Education Act of 1965 were faced with this problem. They circumvented it in the following manner:

In any State . . . in which no State agency is authorized by law to provide library resources, textbooks, or other printed and published instructional materials for the use of children and teachers in any one or more elementary or secondary schools in such State, the Commissioner shall arrange for the provision on an equitable basis of such library resources . . . and shall pay the cost thereof . . . out of that State's allotment. 20 U.S.C. § 824(b) (Supp. II, 1967).

Thus, in a situation where state officials are prevented by the state constitution from distributing benefits to private schools, a federal official, in effect, cuts off state participation. See text accompanying notes 528-29 *infra*. However, the federal official is still limited by any restrictions in the Federal Constitution.

<sup>430</sup> However, some would argue that the combination of the compulsory education laws and *Pierce* make state aid a *right*. This view is untenable unless one admits that the privilege

on the part of the government involved. Thus, policy factors come under consideration when the legislature determines whether to exercise its power. Foremost among the policy factors are the effects of such aid on the private and parochial school system, and on the public school system.

#### a. Necessity of Private Schools

The first question likely to be asked is whether private schools are necessary. Consideration of this question involves the compulsory attendance laws and, for Catholics at least, the Canons of the Catholic Church. Every state has compulsory attendance laws, requiring school attendance by every child under a certain age.<sup>431</sup> In 1925, in *Pierce*, the Supreme Court held that parents have a right to educate their children in private schools if they so desire. Since *Pierce*, it has not been seriously argued that the compulsory attendance laws may be satisfied only by attendance at public schools.

Further, attendance at private schools is sometimes an *obligation* placed on parents. Canon 1374 of the Roman Catholic Church forbids Catholic parents from allowing their children to attend public schools except under special circumstances.<sup>432</sup> In his encyclical, *On the Christian Education of Youth*, Pope Pius XI declared:

[T]he frequenting of non-Catholic schools, whether neutral or mixed, those, namely, which are open to Catholics and non-Catholics alike, is forbidden for Catholic children, and can be at most tolerated, on the approval of the Ordinary alone, under determined circumstances of place and time, and with special precautions . . .<sup>433</sup>

Thus, upon Catholics at least, there is an obligation to send their children to parochial schools. And since this obligation is given judicial recognition by virtue of *Pierce*, there is a necessity for private schools, at least from the standpoint of Catholic and similarly situated religious groups.

#### b. Necessity of Aid

Granting the necessity of private schools to certain groups, the discretionary nature of governmental aid requires an inquiry into its need by these private schools. That is, do private schools need governmental aid to survive and to provide an adequate education for their pupils? From the Catholic standpoint, such aid is not only necessary for improving the quality of education, but is necessary for the survival of the parochial school system. In 1960, the value of Catholic school plants across the country totalled 7 billion dollars, and the annual cost of maintaining and operating these plants was 1.8 billion dollars.<sup>434</sup> Almost 90 percent of all private school children attend Catholic schools.<sup>435</sup>

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of existence granted by the state necessarily confers a right to continue in existence with state assistance. See text accompanying notes 418-19 *supra*.

431 *E.g.*, MASS. ANN. LAWS ch. 76, § 1 (Supp. 1966).

432 For a consideration of Canon 1374, see T. BOUSCAREN & A. ELLIS, CANON LAW 704-07 (1946).

433 Quoted in 1 T. BOUSCAREN, *supra* note 420, at 679.

434 CONGRESSIONAL QUARTERLY SERVICE, FEDERAL ROLE IN EDUCATION 60 (1965).

435 A. FRIEDLANDER, THE SHARED TIME STRATEGY 4 (1966).

Whatever one's views on aid to private education, it cannot be denied that "[a]s an achievement . . . the Catholic educational system certainly witnesses to the zeal and determination of American Catholics."<sup>436</sup> And yet, with all this effort, Catholic parochial schools are able to teach only 55 percent of Catholic students on the elementary level, and 45 percent on the high school level.<sup>437</sup> As stated by one authority:

[T]he Catholic school system must gain public support if it is to be extended or even maintained. Because of rising costs, and expanding school population, the shortage of teachers, and the raising of standards for teachers, as well as for buildings and equipment, it will soon be practically impossible for unaided Catholic efforts to continue to handle the proportion of young people now being served.<sup>438</sup>

From the viewpoint of the Catholic educator, therefore, governmental aid appears necessary for survival.

### c. Taxpayer Savings

From the viewpoint of the taxpayer, such aid may likewise be desirable. If aid is denied, it appears likely that the great majority of private schools will not continue in operation. Since it cost 7 billion dollars to build Catholic school plants, and since an additional 1.8 billion dollars is needed yearly to maintain them, the cost of duplicating and operating these facilities would be at least as great for the taxpayer. Moreover, the cost of staffing an equal number of public schools with higher-paid public school teachers would greatly increase taxes. Clearly, the existence of private school systems in our country not only performs a public function, but results in a substantial tax saving to the general public as well.

If aid were granted the state would not be assuming the full cost of educating the private school child. Private elementary and secondary schools are not asking for total subsidization, *e.g.*, for construction grants or for teacher subsidies; they are asking for *some* aid in areas where they are financially incapable of supplying the need and where the primary beneficiary is the student.<sup>439</sup> Whether the state is willing to assume the full cost of educating all children as a consequence of refusing to give any aid to some children is therefore a factor to be weighed when considering aid to private education.

### d. Effect on Public Schools

The economic benefit to the community and the necessity of private schools are only a part of the picture. The effect of aid, or lack of aid, on private schools must be measured against its effect on public schools. Thus, if state aid to

436 M. RYAN, ARE PAROCHIAL SCHOOLS THE ANSWER? 9 (1964).

437 *Id.*

438 *Id.* at 5.

439 In the context of federal aid, Dean Drinan has stated:

What then is the claim being made by Catholic parents and Catholic officials? The claim is a very small one: the Catholic contention is that, if federal aid is to be enacted, *some* recognition should be given to Catholic schools. Drinan, *supra* note 409, at 57.

private schools "threatens the survival of the secular common schools,"<sup>440</sup> this policy consideration would necessarily outweigh the benefits of granting the aid.

Critics of governmental aid to private education point to many evils that would result if aid were granted. The primary concern of the critics is the preservation of the public school as a unifying principle in American life. Mr. Justice Frankfurter, concurring in *Illinois ex rel. McCollum v. Board of Education*,<sup>441</sup> stated:

The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools . . . .<sup>442</sup>

Opponents of aid to private education fear that such aid will result in a proliferation of private schools and a consequent weakening of the unifying principle, the public school.<sup>443</sup> It is argued that unpopular minority groups, such as the John Birch Society or the Black Muslims, encouraged by the possibility of governmental aid, might set up schools to teach their own peculiar doctrines.<sup>444</sup> So long as governmental aid does not amount to a total subsidization of private schools, however, the danger of a proliferation of private schools to the extent of weakening public schools is rather remote.<sup>445</sup> As pointed out by Dean Drinan:

The assumption behind such a prediction [that government aid to private institutions would result in their proliferation] seems to be that church groups and religious parents are now deterred from establishing a system of church-related schools only by the lack of any tax support.<sup>446</sup>

On the other hand, it is alleged that governmental aid to private education would have a positive effect on the public schools. Parents of private school students, particularly Catholics, would be more sympathetic to appropriations and bond issues for the support of public schools, since their children would also share in the benefits of public education.<sup>447</sup> But the effect of such support may be negligible, depending of course upon the size of the Catholic population in a particular locality, and the extent to which the benefit will affect Catholic school children.

440 Gordon, *supra* note 411, at 74.

441 333 U.S. 203 (1948).

442 *Id.* at 231.

443 Pfeffer, *Second Thoughts on Shared Time*, 79 CHRISTIAN CENT. 779, 789 (1962). See also Gordon, *supra* note 411, at 74-78.

444 *Hearings on S. 370 Before The Subcomm. on Education of the Senate Comm. on Labor and Public Welfare*, 89th Cong., 1st Sess., at 2898 (1965); G. LANOUE, PUBLIC FUNDS FOR PAROCHIAL SCHOOLS? 36-38 (1963). See also Gordon, *supra* note 411, at 76; Note, *Constitutional Law — Church and State — Shared Time: Indirect Aid to Parochial Schools*, 65 MICH. L. REV. 1224, 1225 (1967).

445 In regard to the Elementary and Secondary Education Act of 1965, it has been stated: Although some increase in the number of parochial schools might be anticipated as a result of the Elementary and Secondary Education Act, the increase should be marginal since the parochial school would still have to finance the construction and operation of its educational facilities and comply with minimum state educational standards. Note, *supra* note 444, at 1225-26.

446 Drinan, *supra* note 412, at 73.

447 Stearns, *Shared Time: A Proposal for the Education of Children*, 57 RELIGIOUS EDUC. 5, 6 (1962).

### e. Effect on Integration

In considering the advisability of aid to private education, the effect such aid would have on school integration policies must not be overlooked. The federal government, and a good many state governments, are committed to a policy of racial integration. In *Brown v. Board of Education*,<sup>448</sup> the landmark school segregation case, the Supreme Court rejected the "separate but equal" test of *Plessy v. Ferguson*,<sup>449</sup> as it applied to *public* schools.<sup>450</sup> However, despite the efforts of the federal government to implement the ruling in *Brown*,<sup>451</sup> progress is slow.<sup>452</sup> Therefore, the possibility that governmental aid to private education may be aimed at creating a state supported "private" school system in order to promote segregation is a very real one. In this sense, aid to private education may not be advisable.

There are indications, however, that the courts may be formulating their own solutions to this facade. In 1962, the State of Louisiana created the Louisiana Financial Assistance Commission<sup>453</sup> "for the purpose of providing financial assistance to students attending private nonsectarian elementary schools in this state . . ."<sup>454</sup> This was Louisiana's second attempt<sup>455</sup> to provide aid to children attending "private" schools instead of the "integrated" public schools. In 1966, the constitutionality of the enabling statute was attacked by Negro public school children and their parents in the case of *Poindexter v. Louisiana Financial Assistance Commission*.<sup>456</sup> The plaintiffs asserted that the grant-in-aid program "was created and is presently being administered as a scheme to allow pupils to avoid attending desegregated schools and to assist in the maintenance of a separate, racially segregated school system."<sup>457</sup> The subsequently convened three-judge district court, agreeing with this allegation, struck down the Louisiana statute as violative of the equal protection clause of the fourteenth amendment.<sup>458</sup> In so doing, the court noted that "[a]ny affirmative and purposeful state aid

448 347 U.S. 483 (1954).

449 163 U.S. 537 (1896).

450 The Supreme Court stated the issue thusly: "Does segregation of children in *public* schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities?" 347 U.S. at 493 (emphasis added).

451 *E.g.*, Civil Rights Act of 1964, 28 U.S.C. § 1447 (1964), 42 U.S.C. §§ 1971, 1975a-d, 2000a-h-6 (1964).

452 For example, the target date for complete desegregation in the South has been changed to September, 1969, two years later than originally planned. See Leeson, *Desegregation: A New Approach, A New Deadline*, SOUTHERN EDUC. REPORT Jan./Feb., 1968, at 14, 17. It is estimated that in the 1965-66 school year only 6% of Negro children in the South attended school with white children. Dorsen, *Racial Discrimination in "Private" Schools*, 9 WM. & MARY L. REV. 39-40 (1967). The situation is little better in the North, where 72% of all Negro first-graders attend schools which have a majority of Negroes. *Id.* at 40.

453 LA. REV. STAT. § 17:2952 (1963).

454 LA. REV. STAT. § 17:2955 (1963). A private, non-sectarian elementary or secondary school was defined in the Act as "a school whose operation is not controlled directly or indirectly by any church or sectarian body or by an individual or individuals acting on behalf of a church or sectarian body." *Id.*

455 In the first attempt, public school buildings were used for the operation of "private" schools. This grant-in-aid program was invalidated in *Hall v. Saint Helena Parish School Bd.*, 197 F. Supp. 649 (E.D. La. 1961), *aff'd*, 368 U.S. 515 (1962).

456 258 F. Supp. 158 (E.D. La. 1966).

457 *Id.* at 162.

458 *Poindexter v. Louisiana Financial Assistance Comm'n*, 36 U.S.L.W. 2150 (E.D. La. Aug. 26, 1967).

promoting private discrimination violates the Equal Protection Clause. There is no such thing as the State's legitimately being just a little bit discriminatory."<sup>459</sup> The effect of *Poindexter* is to make every private school that receives governmental aid a quasi-public school, potentially subject to *Brown*. However, this does not mean that every private school receiving governmental aid must integrate. *Poindexter* looks at the *purpose* of the aid; if the purpose is promotion of segregation, it violates the equal protection clause.<sup>460</sup> As one authority has noted, "If not disturbed by a higher court, [*Poindexter*] could mark the end of circumvention of the *Brown* decision by southern states through the use of phony private schools."<sup>461</sup> It is submitted that *Poindexter* could also remove the objection that governmental aid to education may conflict with the federal government's policy of abolishing segregation.

### 3. Types of State Aid

It is quite possible that the constitutionality of aid to private education may rest in part on the type of aid envisioned. One type of aid may be more direct than another; another may be justifiable in terms of secular purpose or benefit to the child. In this context then, the type of aid involved may shed light on a court's or legislature's decision as to its constitutionality.

#### a. Textbooks

In 1966, the New York legislature enacted a statute which, *inter alia*, provides:

[B]oards of education . . . shall have the power and duty to purchase and to loan upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law, textbooks. (Emphasis added.)<sup>462</sup>

Described by one of its sponsors as "merely an extension of the library system of loaning books to all children,"<sup>463</sup> the statute was quickly attacked as violative of both the state<sup>464</sup> and federal constitutions, and a court test was called for to determine its validity.<sup>465</sup> The test was not long in coming, for in early July of

459 *Id.*

460 The decision refers to "affirmative and purposeful state aid promoting private discrimination . . ." *Id.*

461 Dorsen, *supra* note 452, at 45-46.

462 N.Y. EDUC. LAW § 701 (McKinney Supp. 1967).

463 See N.Y. Times, May 29, 1965, at 26, col. 8.

464 N.Y. CONST. art. XI, § 3 (formerly § 4) provides:

Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught . . . ."

465 In an editorial, the New York Times said: "[A] test there certainly should be, because if this law is constitutional the State Constitution doesn't mean what it appears to say." N.Y. Times, June 3, 1965, at 34, cols. 3-4. Another commentator expressed the same sentiment: "In passing the textbook statute, the Legislature has failed in its solemn duty to legislate within the confines of New York's Constitution. The duty to preserve the integrity of the state constitution now falls upon the judiciary." Note, *Textbook Loans to Parochial Schools*, 32 BROOK. L. REV. 362, 385-86 (1966).

1966, an action that sought to have the textbook law declared invalid was brought by an upstate school board. The school board's attorney contended that the law would pave the way for further aid, and that it was a violation of the requirement of separation of church and state.<sup>466</sup> The trial court struck down the statute as repugnant to the establishment and free exercise clauses of the first amendment to the Constitution.<sup>467</sup> This decision was reversed by the Appellate Division,<sup>468</sup> and the plaintiffs appealed to the Court of Appeals. In upholding the validity of the textbook statute, the court, in *Board of Education v. Allen*,<sup>469</sup> noted that "the Constitution does not demand that every friendly gesture between church and State shall be discountenanced."<sup>470</sup> The court rested the validity of the statute on the child benefit theory:

Since there is no intention to assist parochial schools as such, any benefit accruing to those schools is a collateral effect of the statute, and, therefore, cannot be properly classified as the giving of aid directly or indirectly.<sup>471</sup>

Judge Van Voorhis spoke for the dissenters:

[T]his statute will create and foster a pressure to dominate the choosing of books that shall be used in the public schools (so that they may be used also in parochial schools) which will always be latent, and at certain times and places irresistible, and, as action begets reaction, there will be an opposite tendency, equally dangerous, on the part of the state to dominate the church.<sup>472</sup>

The point of Judge Van Voorhis is valid insofar as it attacks the advisability of state aid, and if such a situation as he envisions occurred the statute would be unconstitutional in its application. However, it appears certain that a well-drafted textbook statute, that retains title and control of the textbooks in a public agency, can be justified under the child benefit theory. Whether the child benefit theory is valid under a state constitution depends on how high the constitution in question builds the wall between church and state. Whether the child benefit theory is sound under the United States Constitution is an unanswered question.

#### b. Transportation

Busing private school children has long been a form of aid to private schools. In *Everson v. Board of Education*<sup>473</sup> the Supreme Court upheld a New Jersey statute that authorizes reimbursement of parents for bus fares paid in transporting their children to private schools. The Court relied on a public welfare theory

466 See Buffalo Evening News, July 9, 1966, § A, at 12, col. 1.

467 Board of Educ. v. Allen, 51 Misc. 2d 297, 273 N.Y.S.2d 239 (1966).

468 Board of Educ. v. Allen, 27 App. Div. 2d 69, 276 N.Y.S.2d 234 (1966).

469 20 N.Y.2d 109, 228 N.E.2d 791, 281 N.Y.S.2d 799 (1967), *prob. juris. noted*, 389 U.S. 1031 (1968).

470 *Id.* at 116, 228 N.E.2d at 794, 281 N.Y.S.2d at 804.

471 *Id.* The court ignored the effect of the aid and focused entirely on its purpose. The *Schempp* test, which would appear to be of universal applicability, requires a consideration of the effect of the aid as well as its purpose. See text accompanying notes 416-17 *supra*.

472 20 N.Y.2d at 123, 228 N.E.2d at 798, 281 N.Y.S.2d at 810 (dissenting opinion).

473 330 U.S. 1 (1947).

to justify the statute: "It is much too late to argue that legislation intended to facilitate the opportunity of [all] children to get [an] . . . education serves no public purpose."<sup>474</sup> Also, the Court pointed out that protection of a child from the hazards of traffic is a state concern irrespective of that child's religion seems to be a relevant factor.<sup>475</sup> However, the *Everson* decision has been criticized to the extent that if a similar case were brought before the Supreme Court today, the *Everson* holding would probably be repudiated.<sup>476</sup> Coupling this with the fact that many states now allow busing of private school students,<sup>477</sup> it appears that a reappraisal of the validity of busing statutes is in order.

Effective July 1, 1965, Pennsylvania amended its school transportation statute to read as follows:

When provision is made by a board of school directors for the transportation of resident pupils to and from the public schools, the board of school directors shall also make provision for the free transportation of pupils who regularly attend nonpublic elementary and high schools not operated for profit.<sup>478</sup>

On September 2, 1965, a group of taxpayers brought suit to test the validity of this statute under the state and federal constitutions. The state attorney general immediately petitioned for and was granted certiorari to the Pennsylvania supreme court. The supreme court, in *Rhoades v. School District*,<sup>479</sup> rendered five separate opinions in deciding 5-2 that the transportation statute was valid. Six of the seven justices refused to consider the applicability of the Federal Constitution, holding *Everson* controlling.<sup>480</sup> As for the state constitution, Justice Roberts, with whom three other members of the court concurred, believed that:

the process of transporting parochial students in a public bus is so devoid of any psychological, let alone religious, significance, that it does not bring the government into an association with the school which implies the approval or sanction proscribed by our [state] Constitution.<sup>481</sup>

Five members of the court agreed that the school bus statute was a safety measure to protect children from road hazards.<sup>482</sup>

*Rhoades*, it appears, illustrates that courts are inclined to uphold public welfare legislation, even if it provides an incidental benefit to religion.<sup>483</sup>

<sup>474</sup> *Id.* at 7.

<sup>475</sup> *Id.*

<sup>476</sup> See pp. 735-36 & notes 406-09 *supra*. Of course, state and lower federal courts are bound by *Everson* until overruled by the Supreme Court.

<sup>477</sup> E.g., ILL. REV. STAT. ch. 122 § 29-4 (1967); MICH. STAT. ANN. § 15.3590(1) (1968); N.J. STAT. ANN. § 18:14-8 (Cum. Supp. 1964, Supp. 1967).

<sup>478</sup> PA. STAT. ANN. tit. 24 § 13-1361 (Supp. 1967).

<sup>479</sup> 424 Pa. 202, 226 A.2d 53, *appeal dismissed*, 389 U.S. 11 (1967).

<sup>480</sup> *Id.* at 217-20, 226 A.2d at 62-63 (opinion of Musmanno, J.); *id.* at 227, 226 A.2d at 67 (opinion of Jones, J.); *id.* at 229, 226 A.2d at 68 (opinion of Roberts, J.); *id.* at 240, 226 A.2d at 74 (dissenting opinion of Bell, C. J.).

<sup>481</sup> *Id.* at 233-34, 226 A.2d at 70 (opinion of Roberts, J.).

<sup>482</sup> *Id.* at 206-07, 226 A.2d at 56-57 (opinion of Musmanno, J.); *id.* at 228, 226 A.2d at 67 (opinion of Jones, J.); *id.* at 232, 226 A.2d at 69 (opinion of Roberts, J.).

<sup>483</sup> Cf., e.g., *Braunfeld v. Brown*, 366 U.S. 599 (1961); *McGowan v. Maryland*, 366 U.S. 420 (1961).



### c. Shared Time

A challenge has been issued by Roman Catholic educators to their public school counterparts to enter into a new partnership. They want them to help provide the very best education opportunities for all children in the community. It appears that public school men are accepting the challenge that is put forth in Shared Time.<sup>484</sup>

Shared time is a comparatively popular form of aid used by the states to assist private schools. The procedure has been described in the following manner:

In a shared time program of education, students enrolled in Catholic and other church-related schools take some courses (e.g., religion, social studies, fine arts) in their own schools and others (e.g., science, mathematics, industrial arts) in public schools; in a similar manner, public school students [may] take some of their courses in Catholic schools.<sup>485</sup>

Shared time, also referred to as "dual enrollment," is not a new concept. The city of Pittsburgh has had such a program since 1913.<sup>486</sup> No court has as yet faced the question of whether shared time, when implemented for the benefit of private school students, constitutes a violation of the establishment clause of the first amendment.<sup>487</sup> However, the increased interest in church-state relations and the widespread and ever increasing use of this type of aid render a court test probable.

Notwithstanding its popularity, shared time has not been unanimously regarded as a solution to aid to education problems. Shared time is viewed as a blessing by some private school educators. Others, believing the purpose of private education to be essentially different from the purpose of public education and fearing that shared time will subject the private school to decisions of state bodies, have taken a contrary view.<sup>488</sup> Public school educators are similarly divided. Some view shared time as potentially capable of destroying the public school system,<sup>489</sup> while others believe it is a viable compromise in the church-state dispute.<sup>490</sup>

Practically speaking, however, the validity of shared time can be sustained on one argument: If children, irrespective of religion, are allowed to comply with compulsory education laws by attendance at either public or private schools,<sup>491</sup> it should not be unconstitutional for them to fulfill this requirement by part-time attendance at both.<sup>492</sup> Shared time could also be sustained on the

484 A. FRIEDLANDER, *THE SHARED TIME STRATEGY* 26 (1966).

485 1964 NATIONAL CATHOLIC ALMANAC 532 (Foy ed. 1964). Most shared time programs, however, provide only for private school children taking courses in the public school.

486 See A. FRIEDLANDER, *supra* note 484, at 11.

487 While the Supreme Court has upheld the constitutionality of voluntary released time programs when the religious instructions are offered on a location other than public school premises, the validity of shared time arrangements has not yet been fully considered by the courts. 1964-66 *Church-State Survey*, *supra* note 224, at 717.

488 See A. FRIEDLANDER, *supra* note 484, at 6-7.

489 Pfeffer, *supra* note 443.

490 Note, *supra* note 444, at 1227-28; see Comment, 57 RELIGIOUS EDUC. 29, 30 (1962).

491 *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

492 "[S]ince it is not unconstitutional for a child to attend a parochial school full time, it should not be unconstitutional for him to attend both a parochial and a public school." Note, *supra* note 444, at 1227-28.

child benefit theory, since it is the child who benefits from the use of the public facilities. On the other hand, shared time could be viewed as unconstitutional, since freeing the parochial schools from the necessity of teaching certain subjects frees funds which can be used for church purposes.<sup>493</sup>

A court test of shared time recently took place in Illinois. The Chicago Board of Education was conducting an experimental shared time program to determine its feasibility. High school students enrolled in the program took all their courses in a public school except English, social studies, music and art, which were taught at nearby Catholic schools. In *Morton v. Board of Education*,<sup>494</sup> the plaintiffs sought to enjoin the program, arguing on a statutory interpretation basis as well as on the program's state and federal constitutionality. After upholding the program on the basis of statutory interpretation, the Illinois Appellate Court appeared to further justify it by combining the child benefit theory with *Schempp's* neutrality theory:

The program applies to all non-public educational institutions and not to any religious group or groups, and offers its benefits to individual students on a purely voluntary basis upon application by the parents or legal guardians of those children.<sup>495</sup>

*Morton* is significant because it at least offers a test by which the constitutionality of a particular shared time program can be gauged. Whether higher courts, or courts of other states,<sup>496</sup> will accept or reject the *Morton* test lies in the realm of conjecture.

#### d. Auxiliary Services

A problem somewhat different from the type previously discussed arises under state auxiliary services acts. Basically, these acts provide services of a special nature that most private school systems are unable to afford. Such services include health and nursing, speech correction, counselling for emotionally disturbed children, and remedial reading.<sup>497</sup> Perhaps the most controversial auxiliary services act is found in Michigan.<sup>498</sup> The Michigan act provides:

Whenever the board of education of a school district provides any of the auxiliary services specified in this section to any of its resident children in attendance in the elementary and high school grades, it shall provide the same auxiliary services on an equal basis to school children in attendance in the elementary and high school grades at non-public schools.<sup>499</sup>

493 See text accompanying notes 423-25 *supra*.

494 69 Ill. App. 2d 38, 216 N.E.2d 305 (1966).

495 *Id.* at 49, 216 N.E.2d at 310.

496 In *Special District v. Wheeler*, 408 S.W.2d 60 (Mo. 1966), an action similar to *Morton*, the Supreme Court of Missouri struck down a shared time program for children with speech defects. However, the court never reached the constitutional issue, since it rested its decision on interpretation of the statute.

497 See, e.g., MICH. STAT. ANN. § 15.3622 (1968).

498 *Id.* *O'Hare v. Detroit Bd. of Educ.*, (E.D. Mich. filed Jan. 17, 1966) challenges the constitutionality of the Michigan Auxiliary Services Act. However, the three-judge federal court abstained pending determination of questions of state law in the Michigan courts. See COMMISSION ON LAW AND SOCIAL ACTION, AMERICAN JEWISH CONGRESS, LITIGATION DOCKET OF PENDING CASES AFFECTING FREEDOM OF RELIGION AND SEPARATION OF CHURCH AND STATE 22 (Dec. 1, 1967); Note, *The Constitutionality of the Michigan Auxiliary Services Act: Two Views*, 44 J. OF URBAN L. 363 (1966).

499 MICH. STAT. ANN. § 15.3622 (1968).

Insofar as auxiliary services are performed on public school premises, the problem is no different from shared time. Although the benefit to the child is more apparent in an auxiliary services program, if shared time is found to be unconstitutional, it would appear that the greater benefit of the auxiliary services program would not serve as a valid basis for distinction. Likewise, if shared time is upheld as constitutional, then there is little doubt that the auxiliary services programs on public school premises would also be held valid.

But the principal dispute over the validity of auxiliary services acts is that the services are often provided in the private school by a public school teacher. Thus, the issue is not whether the rights of the child are being infringed upon, but whether the rights of the public school teacher have been violated. As one commentator has observed:

The Auxiliary Services Act [of Michigan] would require teachers who are public employees to teach in nonpublic schools and to exercise supervisory control over religious school authorities, or in the alternative, accept an assignment that would necessarily force him to express a belief in religion.<sup>500</sup>

It is, therefore, a very plausible argument that the right of a public school teacher to freely exercise his religion would be hindered by requiring him to teach in a private, sectarian school. On the other hand, if he did not accept assignments in private schools, a public school teacher could face discharge and loss of livelihood. An editorial in *America* has attempted to answer this argument with an example:

[T]he situation of . . . a Jewish teacher assigned to give remedial reading in a parochial school is very similar to the position of a Catholic nurse who is asked to assist at a therapeutic abortion in a public hospital. In either case, the individual may ask to be excused on the ground of conscience; but in neither instance may she impose her conscience on the institution. If the free exercise of religion is no barrier to abortion, it is not an obstacle to remedial reading.<sup>501</sup>

This example is logically compelling, but there is validity to the idea that, unlike the private school child who attends the public school, as in shared time, sending a public school teacher to a private school is an inhibition of that teacher's free exercise of religion. Thus, it appears that constitutionality is a closer question as regards auxiliary services than it is for other types of aid, and constitutionality may very well depend upon the place where the auxiliary services are rendered.

#### 4. Federal Aid

Federal aid to private school students has taken many forms, most of which are unobjectionable.<sup>502</sup> But the most recent provision for federal aid, the Ele-

<sup>500</sup> Note, *supra* note 498, at 376.

<sup>501</sup> *Shared Services and Conscience*, 114 *AMERICA* 543 (1966).

<sup>502</sup> *E.g.*, special milk programs, 7 U.S.C. § 1446(c) (1964); National Defense Loan Program, 20 U.S.C. § 421 (1964); loans for scientific and language equipment, 20 U.S.C. § 445 (1964); national school lunch program, 42 U.S.C. § 1751-60 (1964).

mentary and Secondary Education Act<sup>503</sup> [hereinafter ESEA] has unleashed a storm of litigation.<sup>504</sup> Regarded by some as a "settlement" of the church-state dispute in the area of aid to private education,<sup>505</sup> it is more apt to say that it has enlivened the controversy. A settlement may arise, however, if the Supreme Court sheds its traditional reluctance to review cases in this area.<sup>506</sup> The ESEA is the perfect vehicle to utilize in testing the validity of aid to private education since it provides for federal assistance in most forms commonly used in the states,<sup>507</sup> and since it can be justified by the child benefit theory.<sup>508</sup> Of the act's six titles, only the first three are relevant to the purpose of this survey.

a. Title I—Assistance for Educationally Disadvantaged Children

Title I of the ESEA may be likened to the shared time<sup>509</sup> and auxiliary services<sup>510</sup> programs provided by some states. The purpose of Title I is

to provide financial assistance . . . to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means . . . which contribute particularly to meeting the special educational needs of educationally deprived children.<sup>511</sup>

Among the programs eligible for assistance under Title I are guidance services, school bus transportation, and shared time programs.<sup>512</sup> Section 205(a)(2) specifically provides for private school children. It directs state educational agencies applying for aid to determine whether the various local educational agencies have made provision for including the participation of private school children "to the extent consistent with the number of educationally deprived children in the school district . . . who are enrolled in private elementary and secondary schools . . ." <sup>513</sup> To avoid the argument that private schools may secure

503 Codified in scattered sections of 20 U.S.C. Supp. II, 1967.

504 There are presently six cases in the courts which either have contested or are contesting the validity of some aspect of ESEA: *Carpenter v. Gardner* (E.D. Pa., filed May 24, 1967) (Titles I & II); *Elast v. Gardner*, 271 F. Supp. 1 (S.D.N.Y. 1967), *appeal filed*, 36 U.S.L.W. 3061 (U.S. July 25, 1967) (No. 416) (Titles I & II); *Protestants and Other Americans United v. United States*, 266 F. Supp. 473 (S.D. Ohio 1967) (Title II); *Polier v. Board of Educ.* (N.Y. Sup. Ct., filed Dec. 1, 1966) (Title I); *Yurick v. School Dist.* (Com. Pleas Ct. of Phil. County, filed May 26, 1967) (Title I); *Smith v. School Dist.* (Com. Pleas Ct. of Phil. County, filed Nov. 1966) (Title I). A discussion of each of these cases can be found in COMMISSION ON LAW AND SOCIAL ACTION, AMERICAN JEWISH CONGRESS, *supra* note 498, at 4-9.

505 Kelley & LaNoue, *The Church-State Settlement in the Federal Aid to Education Act*, in 1965 RELIGION AND THE PUBLIC ORDER 110 (D. Giannella ed. 1966).

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

507 Though not specifically mentioned in the statute, assistance for shared time, auxiliary service programs, and transportation may be obtained under Title I and assistance for textbooks may be obtained under Title II.

508 Whatever one thinks of the child benefit theory, it was the theoretical framework on which the Elementary and Secondary School Act of 1965 was built, and it does potentially have enormous functional significance for public/private school relations. Kelley & LaNoue, *supra* note 505, at 156.

509 See text accompanying notes 484-96 *supra*.

510 See text accompanying notes 497-501 *supra*.

511 20 U.S.C. § 241a (Supp. II, 1967).

512 The title is not limited to any specific programs, but numerous "suggestions" are found in the legislative history of the bill. See S. REP. No. 146, 89th Cong., 1st Sess. (1965) re-published in 1965 U.S. CODE CONG. & AD. NEWS 1446, 1455-56 (1965) [hereinafter cited as SENATE REPORT].

513 20 U.S.C. 241e(a)(2) (Supp. II, 1967).

a direct benefit through either control of Title I funds or through ownership of property, assurances must be given that title to property and administration of funds will remain in a public agency.<sup>514</sup> The Senate Committee Report sets out further limitations, presumably to preserve the constitutionality of the bill. First, the committee's expectation was that in programs such as shared time, the local educational agency was to "avoid classes which are separated by religious affiliation."<sup>515</sup> Second, the committee emphasized that "[t]he act does not authorize funds for the payment of private school teachers."<sup>516</sup> However, it was noted that public school teachers who provide "specialized services" may teach on private school premises when the services are not normally provided by the private school.<sup>517</sup> This procedure may raise constitutional objections as an infringement on the teacher's right of free exercise of religion.<sup>518</sup>

But the greatest challenge to Title I may arise, not under the Federal Constitution, but because of limitations in the state constitutions. Title I depends on state and local officials for administration and control of programs and funds. A state constitution may operate adversely on Title I in two ways: It may prohibit the distribution of public funds for a private purpose,<sup>519</sup> or it may forbid state officials to administer programs for the benefit of private school children.<sup>520</sup> In reality, these are two sides of the same coin, but different theories have been advanced to answer each objection. The former objection has been countered by arguing that since the funds are given to the states in trust, the state agency, as trustee must distribute the funds according to the terms of the grant, notwithstanding state constitutional restrictions.<sup>521</sup> A little considered question is whether the state official *as a state official* can be allowed to administer Title I programs. When this question has been raised, the state official has been described as a mere conduit or custodian of the trust that arises out of a federal law, which is supreme over the state constitutional provision.<sup>522</sup> This would answer the second objection, but it has been suggested that this is not an entirely satisfactory explanation.<sup>523</sup>

Title I appears to be a fertile ground for litigation.<sup>524</sup> Theories can be advanced to support the title, but it is also prone to attack. Even if found valid under the Federal Constitution, it appears certain that at least some state courts

514 20 U.S.C. 241e(a) (3) (Supp. II, 1967).

515 SENATE REPORT, *supra* note 512, at 1456.

516 *Id.*

517 *Id.* at 1457.

518 For a consideration of this argument, see text accompanying notes 497-501 *supra*.

519 *E.g.*, N.Y. CONST. art. XI, § 3 (formerly § 4) provides:

Neither the state nor any subdivision thereof shall use . . . any public money, or authorize or permit [it] to be used . . . in aid or maintenance . . . of any school or institution of learning wholly or in part under the control or direction of any religious denomination . . . (Emphasis added.)

520 Many state "religion clauses" are stricter than the first amendment and conceivably require strict separation between public officials and private schools.

521 For an analysis of the trust-fund theory in relation to ESEA, see Comment, *The Elementary and Secondary Education Act — The Implications of the Trust-Fund Theory for the Church-State Questions Raised by Title I*, 65 MICH. L. REV. 1184, 1189-94 (1967).

522 *Id.* at 1194-98.

523 "At the very least, the state has an economic interest in the man-hours expended by the Superintendent of Public Instruction and his staff in constructing and implementing the Title I program." *Id.* at 1195.

524 See cases cited in note 504 *supra*.

will limit the effect of Title I by interpretation of their constitutions.

b. Title II—Library Resources and Textbooks

Title II of ESEA authorizes the Commissioner of Education to make grants “for the acquisition of school library resources, textbooks, and other printed and published instructional materials for the use of children and teachers in public and private elementary and secondary schools.”<sup>525</sup> As under Title I, title to materials provided under the federal program is to “vest only in a public agency,”<sup>526</sup> thereby minimizing the direct benefit argument. Further, to prevent the purchasing by state officials of religious texts or textbooks with religious undertones, use of Title II funds is “limited to those [materials] which have been approved by an appropriate State or local educational authority or agency for use . . . in a public elementary or secondary school of that State.”<sup>527</sup> Where state officials are restricted by state constitutional provisions from providing textbooks and other materials to private school children, Title II, in effect, provides for a “by-pass” of state officials.<sup>528</sup> In such a situation, the Commissioner of Education is authorized to make the distribution to the private school and deduct the amount of the distribution from the state’s share of the funds. This procedure is unlike Title I, where participation by local officials is essential.<sup>529</sup> Three cases have considered or are considering the Title II provisions, but none has as yet reached the constitutional issue.<sup>530</sup>

c. Title III—Supplementary Education Centers and Services

Title III of ESEA authorizes the establishment of projects “designed to enrich the programs of local elementary and secondary schools and to offer a diverse range of educational experience to persons of varying talents and needs . . . .”<sup>531</sup> Among the projects suggested are guidance and counseling, remedial instruction, physical education, and specialized instruction and equipment for students interested in studying advanced scientific subjects.<sup>532</sup> Thus, Title III provides federal assistance for programs similar to the auxiliary services provided by the State of Michigan.<sup>533</sup> The Senate Report on ESEA notes:

Nothing in this title is designed to enable local public educational agencies

525 20 U.S.C. § 821(a) (Supp. II, 1967).

526 20 U.S.C. § 825(a) (Supp. II, 1967).

527 20 U.S.C. § 825(b) (Supp. II, 1967).

528 In any State which has a State plan . . . and in which no State agency is authorized by law to provide library resources, textbooks, or other printed and published instructional materials for the use of children and teachers in any one or more elementary or secondary schools in such State, the Commissioner shall arrange for the provision on an equitable basis of such materials . . . and shall pay the cost . . . out of that State’s allotment. 20 U.S.C. § 824(b) (Supp. II, 1967).

529 See text accompanying notes 521-22 *supra*.

530 *Protestants and Other Americans United v. United States*, 266 F. Supp. 473 (S.D. Ohio 1967) (no standing); *Flast v. Gardner*, 271 F. Supp. 1 (S.D.N.Y. 1967) (no standing), *appeal filed*, 36 U.S.L.W. 3061 (U.S. July 25, 1967) (No. 416); *Carpenter v. Gardner* (E.D. Pa., filed May 24, 1967) (continued pending the outcome in *Flast*). See COMMISSION ON LAW AND SOCIAL ACTION, AMERICAN JEWISH CONGRESS, *supra* note 498, at 5, 6, 8.

531 20 U.S.C. § 843(b) (Supp. II, 1967).

532 *Id.*

533 For a consideration of the Michigan Auxiliary Services Act, see text accompanying notes 497-501 *supra*.

to provide services or programs which will inure to the enrichment of any private institution. . . . Facilities are not to be constructed nor equipment procured which will be to the pecuniary advantage of any nonpublic institution.<sup>534</sup>

Despite this strong statement, Title III is not likely to escape the litigation mill, although its provisions are not yet under attack. The attack may come by contesting *who* chooses the programs as well as by contesting the nature of the program. This is due to the fact that Title III provides:

[a] grant . . . for a program of supplementary educational services may be made to a local educational agency . . . but only if there is satisfactory assurance that in the planning of that program there has been . . . participation of persons *broadly representative* of the cultural and educational resources of the area to be served.<sup>535</sup> (Emphasis added.)

This administrative system was proposed by the Office of Education in order to "effectively bypass the entrenched and moribund habits of some local public school establishments."<sup>536</sup> Included in the definition of "cultural and educational resources" are nonprofit private agencies.<sup>537</sup> At first glance this may appear to potentially vest control of public funds in a private agency — the private agency that happens to have the most influence in the community. However, the title itself places ultimate responsibility in the local educational agency, *i.e.*, the local school board.<sup>538</sup> Actually, it appears that the participation of nonprofit private agencies is limited to recommending programs in an advisory capacity.<sup>539</sup>

The ESEA has squarely presented the issue of whether the child benefit and indirect benefit theories are constitutionally valid. Congress has made its policy decision that such aid is advisable. It is now for the courts to determine if it is constitutional.

##### 5. *Frothingham v. Mellon*—A Judicial Roadblock

No other decision has had a greater effect in the area of church-state relations than *Frothingham v. Mellon*.<sup>540</sup> In that case, the Supreme Court denied standing to a citizen who, as a federal taxpayer, wished to contest the validity of a federal grant-in-aid. The Court was of the opinion that the plaintiff lacked standing since her injury, *as a mere taxpayer*, was insubstantial. The very presence of *Frothingham* may discourage potential litigants who feel very strongly that a particular federal program violates the Federal Constitution. It is certainly one of the reasons for the almost total uncertainty as to whether any program that in some way assists a church-related school is constitutional. Although one authority states that "neither before nor after *Frothingham* has the Supreme

534 SENATE REPORTS, *supra* 512, at 1473.

535 20 U.S.C. § 844 (Supp. II, 1967).

536 Kelley & LaNoue, *supra* note 505, at 117.

537 20 U.S.C. § 844 (Supp. II, 1967). See also SENATE REPORT, *supra* note 512, at 1470; Kelley & LaNoue, *supra* note 109, at 136-38.

538 20 U.S.C. § 844(a)(1) (Supp. II, 1967); Kelley & LaNoue, *supra* note 505, at 128.

539 Kelley & LaNoue, *supra* note 505, at 128.

540 262 U.S. 447 (1923).

Court denied standing to a plaintiff-taxpayer who desired to protest governmental assistance to religion,<sup>541</sup> *Frothingham* has been greatly criticized, and there are indications that it may be overturned or limited. At present, *Frothingham* is being attacked by both the judiciary and the legislature.

#### a. Judicial Attack

The basis of the Supreme Court's decision in *Frothingham* was a fear that a contrary result would be catastrophic.<sup>542</sup> Nonetheless, the Court explicitly stated that "resident taxpayers may sue to enjoin an illegal use of the moneys of a municipal corporation."<sup>543</sup> Apparently, the distinction is based upon the number of citizens in a particular political unit. The less citizens in a unit, the less fear there is of a judicial contest over every appropriation. However, this policy judgment appears ill founded on two grounds. In the first place, it is difficult to justify that the United States, with a population of over 200 million and an annual budget of over 180 billion dollars should be exempt from suits challenging its appropriations, while such "municipal corporations" as New York City, Chicago, and Los Angeles, with populations in the millions and budgets of billions, are subject to suit. It is as difficult to find a "direct and immediate"<sup>544</sup> interest in the case of a large city taxpayer as it is in the case of a United States taxpayer.<sup>545</sup> Secondly, and most importantly, while courts have refused to hear suits on federal appropriations, many states have allowed suits to contest their own appropriations.<sup>546</sup> This right to bring suit has not resulted in the disaster for the states that the Supreme Court foresaw for the federal government in 1923.

Perhaps sensitive to these factors, the Supreme Court has agreed to hear argument in *Flast v. Gardner*,<sup>547</sup> a case that questions the holding in *Frothingham*. In *Flast*, seven plaintiffs brought suit to contest the validity of Titles I and II of ESEA under the first amendment. The plaintiffs claimed standing because of their status as taxpayers and asked for the convening of a three-judge court. The defendant, the Secretary of Health, Education and Welfare, moved to dismiss on the basis of *Frothingham*. District Judge Frankel ruled that the

541 Drinan, *Standing to Sue in Establishment Cases*, in 1965 RELIGION AND THE PUBLIC ORDER 161, 176 (D. Giannella ed. 1966). But two federal district courts have recently held that *Frothingham* bars a suit by a taxpayer asserting a first amendment right. See *Flast v. Gardner*, 271 F. Supp. 1 (S.D.N.Y. 1967) *appeal filed*, 36 U.S.L.W. 3061 (U.S. July 25, 1967) (No. 416); *Protestants and Other Americans United v. United States*, 266 F. Supp. 473 (S.D. Ohio 1967).

542 If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned. 262 U.S. at 487.

543 *Id.* at 486.

544 *Id.*

545 Of course, this argument could be used to show that municipal bodies should also be exempt from suit. Hence, it does not completely satisfy the contention that the federal government should not be exempt. It does, however, show that there should be a change in the present rule.

546 *E.g.*, *Gogerty v. Coachella Valley Junior College Dist.*, 57 Cal.2d 727, 371 P.2d 582, 21 Cal. Rptr. 806 (1962); *Iowa Mut. Tornado Ins. Ass'n v. Timmons*, 252 Iowa 163, 105 N.W.2d 209 (1960); *Singleton v. Treasurer*, 340 Mass. 646, 165 N.E.2d 899 (1960); *Hanson v. Mosser*, 427 P.2d 97 (Ore. 1967); *cf. Helela v. State*, 418 P.2d 482 (Hawaii 1966); *Booth v. Metropolitan Sanitary Dist.*, 79 Ill. App. 2d 310, 224 N.E.2d 591 (1967).

547 271 F. Supp. 1 (S.D.N.Y. 1967), *prob. juris. noted*, 389 U.S. 895 (1967).



plaintiffs' claim was not plainly unsubstantial and ordered the convening of a three-judge court to determine the question of standing.<sup>548</sup> The judge noted that "respectable arguments may flow from the difference in subject matter between *Frothingham* and this case, and from related differences in the asserted bases for the claim of standing."<sup>549</sup> However, the majority of the three-judge court disagreed and, with Judge Frankel in dissent, dismissed the action.<sup>550</sup> The majority found that *Frothingham*, though much criticized, is still very much alive.<sup>551</sup> The dissent, however, very convincingly distinguished *Frothingham*. Judge Frankel noted that Mrs. Frothingham had asked for "nothing less than a roving commission based upon her status as taxpayer, to have an adjudication concerning the validity of any appropriation of money by the Congress."<sup>552</sup> In *Flast*, however, the plaintiffs asserted "now familiar 'legal rights' given by the Establishment Clause . . . ."<sup>553</sup> The basis of the distinction, therefore, is that Mrs. Frothingham could show no injury to herself other than the one arising from her status as a federal taxpayer. In *Flast*, the plaintiffs can show an injury to their first amendment rights *in addition to* an injury arising from their status as taxpayers. This is a valid distinction.<sup>554</sup>

The question to be decided by the Supreme Court<sup>555</sup> is: Do federal taxpayers have standing to maintain a suit challenging, on first amendment grounds, the use of federal funds in support of religious schools?<sup>556</sup> The issue is squarely presented. *Flast* presents the Supreme Court with an opportunity to qualify *Frothingham*, or if it chooses, to reinforce it. The time has come for *Frothingham* to be repudiated.

#### b. Legislative Attack

If the Supreme Court chooses not to modify the *Frothingham* decision, the way is still open for a legislative enactment granting taxpayers the right to bring suit to contest the validity of an appropriation under the first amendment. This is not a new idea. A proposed amendment<sup>557</sup> to the Higher Education Facilities Act of 1963<sup>558</sup> would have provided for judicial review of the statute's constitutionality. Although passed by the Senate, the amendment was rejected in the conference committee.<sup>559</sup> A more comprehensive judicial review bill was passed by the Senate in 1966 and again in April, 1967, but both bills died in the House Committee on the Judiciary.<sup>560</sup> A more limited judicial review bill

548 *Flast v. Gardner*, 267 F. Supp. 351. (S.D.N.Y. 1967).

549 *Id.* at 354-55.

550 *Flast v. Gardner*, 271 F. Supp. 1 (S.D.N.Y. 1967), *prob. juris. noted*, 389 U.S. 895 (1967).

551 *Id.* at 4.

552 *Id.* at 15 (dissenting opinion).

553 *Id.* at 16 (dissenting opinion).

554 *Bue see Protestants and Other Americans United v. United States*, 266 F. Supp. 473, 476 (S.D. Ohio 1967), wherein the court rejected such a distinction.

555 28 U.S.C. § 1253 (1964) provides for direct appeal to the Supreme Court from a decision of a three-judge court granting or denying an interlocutory or permanent injunction.

556 *Flast v. Gardner*, 36 U.S.L.W. 3078 (U.S. July 25, 1967) (No. 416).

557 *See Drinan, supra* note 541, at 161; 113 CONG. REC. 18950 (daily ed. Dec. 15, 1967) (remarks of Senator Ervin).

558 Codified in scattered sections of 20 U.S.C.

559 *See* 113 CONG. REC. 18950 (daily ed. Dec. 15, 1967) (remarks of Senator Ervin).

560 *Id.* at 18950-51.

was then introduced as an amendment to the 1967 amendments of ESEA, and it was again adopted by the Senate, this time by a vote of 71 to 0.<sup>561</sup> But it was deleted in the conference committee, largely due to the opposition of the Department of Justice.<sup>562</sup> Nonetheless, due to the strong support for a judicial review bill in the Senate, and a promise by the House to hold hearings on such a bill in the second session of the 90th Congress,<sup>563</sup> it appears likely that, if the Supreme Court does not act favorably in *Flast*, a judicial review bill will become law.

It has been urged, however, that the judicial review bills that have been rejected by Congress would have been "inconsistent with the 'case or controversy' norm of the Constitution."<sup>564</sup> As pointed out by Dean Drinan:

The precise and narrow point on which the Ervin-Cooper [judicial review] proposal seems to exceed the constitutional power of the legislative branch of government is in the exaltation of the right to be free from any violation of the establishment clause to the point where standing to sue is granted to any person even though this same person would concededly not have similar rights with regard to any other of the guarantees of the Bill of Rights.<sup>565</sup>

The Supreme Court has been strict in requiring standing and a justiciable controversy when faced with a constitutional question. This was well illustrated in the landmark decision, *Muskrat v. United States*.<sup>566</sup> It is, therefore, a distinct possibility that the Court, in reviewing a judicial review law, could find that *Frothingham* was constitutionally compelled. If the Court so finds, and if it believes the Constitution was correctly interpreted in *Frothingham*, a judicial review law would be unconstitutional.

### c. Conclusion

It appears likely that the Supreme Court will limit *Frothingham* in *Flast*. Changing times and the importance of the issues left unresolved due to *Frothingham* necessitate such a course of action. This is preferable to legislation by Congress, for the latter alternative contains the seed of a constitutional objection. As it is more likely that *Flast* will be decided before a judicial review bill becomes law, such legislation may become unnecessary.

## VII. AID TO RELIGION THROUGH TAXATION

In a very real sense, religious organizations are the beneficiaries of aid from the state and federal governments in the form of tax privileges. This aid takes the form of tax exemptions granted to religious organizations and tax deductions granted to contributors to such organizations. There is less controversy generated

<sup>561</sup> *Id.* at 18951.

<sup>562</sup> *Id.*

<sup>563</sup> See 113 CONG. REC. 18953 (daily ed. Dec. 15, 1967) (remarks of Senator Morse).

<sup>564</sup> Drinan, *supra* note 541, at 185.

<sup>565</sup> *Id.* at 186.

<sup>566</sup> 219 U.S. 346 (1911).

over this preferential treatment than there is in the unsettled school-aid area.<sup>567</sup> Perhaps this is due to our "instinctive acceptance" of such treatment,<sup>568</sup> or to the religious nature of the American people.<sup>569</sup> Whatever the reason, it is clear that tax preferences for religious organizations are commonplace and approved of by the majority of American people. Nevertheless, there is still a constitutional issue involved as well as the policy question of whether this type of assistance should be continued. The purpose of this section is to examine the types of tax aid available and the constitutional and policy arguments for and against such aid.

### A. Types of Tax Aid

Governmental aid through tax laws can be direct or indirect. Direct aid usually takes the form of exemptions granted on property used for and activities devoted to solely religious purposes.<sup>570</sup> On the federal level, direct aid can take two forms: exemption from the income tax<sup>571</sup> and exemption from the unrelated business income tax.<sup>572</sup> On the state and municipal level, the primary direct tax aid is exemption from the property tax, although other tax aids, such as exemptions and deductions from income and inheritance taxes are not to be ignored.<sup>573</sup>

Indirect aid takes the form of tax deductions given to persons who contribute to religious organizations. Deductions act as an incentive to contribute, particularly among taxpayers in the higher tax brackets. On the federal level such indirect aid can take three forms: deduction from the income tax,<sup>574</sup> deduction from the estate tax,<sup>575</sup> and deduction from the gift tax.<sup>576</sup>

#### I. Direct Tax Aid

##### a. Federal Tax Exemptions

Section 501(c)(3) of the Internal Revenue Code of 1954 provides an exemption from the federal income tax for "corporations, and any community chest, fund, or foundation, organized and operated exclusively for *religious . . . purposes . . .*"<sup>577</sup> (Emphasis added.) Whether an organization is "religious" depends upon the use that it makes of its profits and the purpose of its existence.<sup>578</sup>

<sup>567</sup> See text accompanying notes 400-566 *supra*.

<sup>568</sup> Hurvich, *Religion and the Taxing Power*, 35 U. CINN. L. REV. 531 (1966). Although tax exemption of the clergy can be traced back to Biblical times, the modern tendency is apparently derived from the status enjoyed by colonial and early post-Revolutionary churches. See Van Alstyne, *Tax Exemption of Church Property*, 20 OHIO STATE L.J. 461, 462 & n.6 (1959).

<sup>569</sup> 1964-66 *Church-State Survey*, *supra* note 224, at 695.

<sup>570</sup> See *Symposium—The First Amendment and Financial Aid to Religion: Limits on the Government's Conduct*, 61 NW. U. L. REV. 777, 790 (1966).

<sup>571</sup> INT. REV. CODE OF 1954, § 501(c)(3).

<sup>572</sup> INT. REV. CODE OF 1954, § 511(a)(2)(A).

<sup>573</sup> Rabin, *Charitable Trusts and Charitable Deductions*, 41 N.Y.U.L. REV. 912, 913 (1966).

<sup>574</sup> INT. REV. CODE OF 1954, § 170(a)-(b).

<sup>575</sup> INT. REV. CODE OF 1954, § 2055(a)(2)-(3).

<sup>576</sup> INT. REV. CODE OF 1954, § 2522(a)(2).

<sup>577</sup> INT. REV. CODE OF 1954, § 501(c)(3).

<sup>578</sup> See *St. Germain Foundation*, 26 T.C. 648, 657 (1956); *Unity School of Christianity*, 4 B.T.A. 61, 70 (1926).

Four requirements must exist before this exemption will be recognized.<sup>579</sup> The net earnings of the organization must not inure to the benefit of any private shareholder,<sup>580</sup> a substantial part of the organization's activities must not be the carrying on of propaganda,<sup>581</sup> and the organization must neither attempt to influence legislation,<sup>582</sup> nor participate in political campaigns.<sup>583</sup> The exemption of religious organizations from the income tax is a form of direct benefit. And so far as "church"<sup>584</sup> income is concerned, the exemption cannot be justified by the argument that the "church" is providing a service that the state would otherwise have to provide. Apparently, the only valid justification for the existence of the exemption is historical, *i.e.*, it has always been done. Congress has found this argument sufficient. Whether history is sufficient to breach the wall of separation on this issue is a question to which the Supreme Court has not yet addressed itself.

But this exemption is not the only direct tax benefit to religious organizations under the Code. An exempt organization can form a "title-holding corporation," the sole purpose of which is to hold title to property. Profits from such a corporation are also exempt.<sup>585</sup> The title-holding corporation, however, must not be organized for the purpose of carrying on a trade or business. In such a case it is classed as a "feeder organization," subject to the unrelated business income tax even if all its proceeds go to the exempt organization.<sup>586</sup>

Another form of direct aid, more limited in scope, is exemption from the unrelated business income tax. The Code provides that organizations that are exempt under section 501(c)(3) are nevertheless subject to the unrelated business income tax.<sup>587</sup> Obviously, this "exception to the exemption"<sup>588</sup> was in-

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

580 A private shareholder is defined as an individual who has a "personal and private interest in the activities of the [exempt] organization." Treas. Reg. § 1.501(a)-1(c) (1958).

581 Thus, an "action organization," which attempts to influence legislation by propaganda or otherwise, cannot qualify as an exempt organization. Treas. Reg. § 1.501(c)(3)1(c)(3)-(ii) (1959).

582 But an exempt organization may attempt to influence legislation in areas that generally affect its charitable operations. *See* Davis, 22 T.C. 1091, 1098-99 (1954).

583 This includes publishing and distributing of statements relating to political campaigns. *See* INT. REV. CODE OF 1954, § 501(c)(3).

584 A distinction is drawn in the Code between a "church" and a religious organization, with the former receiving greater tax advantages. The test that is generally used to determine whether a religious organization qualifies as a "church" is

whether or not it conducts religious worship or ministers' sacerdotal functions under the tenets and practices of the particular religious body, as distinguished from merely "engaging in religious, educational, or charitable activities approved by a church." 4 J. RABKIN & M. JOHNSON, FEDERAL INCOME GIFT AND ESTATE TAXATION § 59.02(2), at 5919b (1968).

585 INT. REV. CODE OF 1954, § 501(c)(2) exempts from taxation the income of "corporations organized for the exclusive purpose of holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses, to an organization which itself is exempt under this section." *See also* Wolder, *Income and Real Estate Tax Exemption Problems of Churches and Associations*, 45 TAXES 613, 614 (1967).

586 INT. REV. CODE OF 1954, § 502 provides:

An organization operated for the primary purpose of carrying on a trade or business for profit shall not be exempt under section 501 on the ground that all of its profits are payable to one or more organizations exempt under section 501 from taxation. Generally, feeder corporations are taxable on their entire income. *See* Sico Foundation v. United States, 295 F.2d 924 (Ct. Cl. 1961) (per curiam). *See generally*, Wolder, *supra* note 585, at 614-15.

587 INT. REV. CODE OF 1954, § 511(a).

588 INT. REV. CODE OF 1954, § 511 (a)(2)(A)(1) provides that the unrelated business

serted into the Code to put otherwise exempt organizations that engage incidentally in a profit-making enterprise on an equal competitive basis with non-exempt businesses.<sup>589</sup> If this is a valid reason for taxing an otherwise exempt organization, it should apply with equal vigor to a "church" as well as other religious organizations. However, "churches" are specifically exempted from its operation.<sup>590</sup> Thus, a measure that was enacted into law to take a competitive advantage from a small group — exempt organizations — instead gives a competitive advantage to an even smaller group — "churches."

#### b. State and Municipal Exemptions

In the state and municipal area, by far the most important tax benefit enjoyed by religious organizations is exemption from the real property tax.<sup>591</sup> Indeed, in view of the huge landholdings by religious groups in this country,<sup>592</sup> it is certainly the most important tax exemption of all, state or federal. As the amount of tax exempt property increases, the tax base decreases proportionately, resulting in a greater burden on the remaining taxable property. Despite this direct effect on property owners, there has been comparatively little litigation in this area.<sup>593</sup>

The test that is most generally applied to determine if property is exempt is the "use" test.<sup>594</sup> Whether the use in question is sufficient for an exemption

tax "shall apply in the case of any organization (other than a church, a convention or association of churches . . . .)" Interestingly, this exemption has been rather strictly interpreted. It has been held that "religious organizations," as distinguished from "churches," are taxable on their unrelated business income. In one case, a federal district court refused to allow an exemption for the operation of a commercial winery by the Christian Brothers. *See De LaSalle Institute v. United States*, 195 F. Supp. 891 (N.D. Cal. 1961).

589 This provision was inserted into the 1939 Code in 1950. *See INT. REV. CODE OF 1939*, § 421, ch. 994 § 421, 64 Stat. 948 (1950), *as amended*. It has been stated that the amendment was brought about by the purchase of a noodle factory by alumni and friends of an Eastern law school. The profits from the factory were dedicated to the law school, and they became exempt from taxation. Note, *Tax Code Loopholes: Business Income of Religious Organizations*, 23 N.Y.U. INTRA. L. REV. 70, 74 (1967).

590 The constitutionality of this section was questioned in *Seversmith v. Machiz* (D. Md. filed Aug. 1964), but the action was dismissed without prejudice pending the outcome of *Flast v. Gardner*, 271 F. Supp. 1 (S.D.N.Y.), *prob. juris. noted*, 389 U.S. 895 (1967), on the standing issue. COMMISSION ON LAW AND SOCIAL ACTION, AMERICAN JEWISH CONGRESS, LITIGATION DOCKET OF PENDING CASES AFFECTING FREEDOM OF RELIGION AND SEPARATION OF CHURCH AND STATE 33 (Dec. 1, 1967).

591 Rabin, *supra* note 573, at 913.

592 It is estimated that in New York City alone, the value of tax exempt property has increased by 5 billion dollars between 1954 and 1964. Even excluding such sectarian-owned institutions as hospitals and seminaries, the value of church-owned property is over 89 million dollars in Baltimore, almost 43 million dollars in Buffalo, over 31 million dollars in Denver, and over 131 million dollars in the District of Columbia. *See M. LARSON, TAX-EXEMPT RELIGIOUS PROPERTY IN KEY AMERICAN CITIES* (1965).

593 In *Murray v. Comptroller of the Treasury*, 241 Md. 383, 216 A.2d 897, *cert. denied*, 385 U.S. 816 (1966), the most notable recent case in the area, the Maryland Court of Appeals, searching for Supreme Court precedent, could find only dicta in three Supreme Court cases that were not decided on first amendment grounds. Other recent cases in this area are: *Evangelical Covenant Church of America v. City of Nome*, 394 P.2d 882 (Alaska 1964); *South Iowa Methodist Homes, Inc. v. Board of Review*, 257 Iowa 1302, 136 N.W.2d 488 (1965); *Lincoln Woman's Club v. City of Lincoln*, 178 Neb. 357, 133 N.W.2d 455 (1965); *Board of Publication v. State Tax Comm'n*, 239 Ore. 65, 396 P.2d 212 (1964). These cases have been commented upon in 1964-66 Church-State Survey, *supra* note 224, at 696-700.

594 Wolder, *supra* note 585, at 619.

depends on the state constitution and the state exemption statute.<sup>595</sup> "The wording of the particular statute involved is the primary factor in explaining the diverse results which the opinions in this area traditionally reflect."<sup>596</sup> Exemption of the church building itself is the most universally granted of all religious property exemptions.<sup>597</sup> "In most of the statutes exempting church buildings from taxation, express provision is made for also exempting the adjacent land."<sup>598</sup> Further, living quarters of clergymen are specifically exempted in 29 states.<sup>599</sup>

The potential breadth of the property tax exemption varies from state to state. However, it cannot be doubted that the effect of this exemption on the tax base, and ultimately on every taxpayer, is substantial. Since income of religious organizations is also exempt from taxation,<sup>600</sup> a religious organization has a tremendous ability to multiply its net worth by investing non-taxable income in tax exempt property. Thus, through the use of the property tax exemption, exempt funds continue to be exempt and continue to grow.

## 2. Indirect Tax Aid

In addition to exemption from most taxation, religious organizations falling within the definition of a "charitable organization," also enjoy an indirect tax benefit. Contributions to charitable organizations are deductible for federal income,<sup>601</sup> estate,<sup>602</sup> and gift tax<sup>603</sup> purposes. During 1959 alone, it was estimated that individuals saved over one billion dollars in income taxes by giving 4.5 billion dollars to charitable organizations.<sup>604</sup> Charitable deductions, including deductions for religious organizations, exist "almost solely to encourage charitable giving . . ."<sup>605</sup> And giving is certainly encouraged by the deduction. "There is little doubt that the Federal income-tax deduction is a powerful incentive to charitable giving for taxpayers in upper brackets."<sup>606</sup>

For purposes of federal income tax deductions, "churches" are known as "30 percent organizations" because, along with contributions to schools, hospitals, governments, and publicly or governmentally supported charities, con-

595 For a consideration of the state constitutional provisions and the relevant statutes in this area, see Van Alstyne, *supra* note 568. For a comprehensive study of the state constitutional clauses that provide tax exemptions, see C. ANTEAU, P. CARROLL, & T. BURKE, *RELIGION UNDER THE STATE CONSTITUTIONS* 120-72 (1965).

596 *1964-66 Church-State Survey*, *supra* note 224, at 696.

597 Van Alstyne, *supra* note 568, at 463. Professor Van Alstyne notes that the exemption may take a variety of forms: exemption framed in descriptive terms, such as "houses of public worship," exemption based upon use, exemption based upon ownership by a church or religious society, exemption based upon the dual requirements of ownership and use, and exemption of named institutions. *Id.* at 463-70.

598 Van Alstyne, *supra* note 568, at 470. For a study of the tax exemption of church parking lots, see Annot., 75 A.L.R.2d 1106 (1961); for a study of the various constructions given to tax exemption statutes for religious bodies, see Annot., 168 A.L.R. 1222 (1947); and for the exemptibility of property that will be used for religious purposes, see Annot., 2 A.L.R. 545 (1919). See generally Van Alstyne, *supra* note 568, at 470-73.

599 Van Alstyne, *supra* note 568, at 479-84.

600 INT. REV. CODE OF 1954, § 501(c)(3). See text accompanying notes 578-90 *supra*.

601 INT. REV. CODE OF 1954, § 170(a)-(b).

602 INT. REV. CODE OF 1954, § 2055(a)(2)-(3).

603 INT. REV. CODE OF 1954, § 2522(a)(2).

604 J. HELLERSTEIN, *TAXES, LOOPHOLES, AND MORALS* 199 (1963).

605 Rabin, *supra* note 573, at 915.

606 J. HELLERSTEIN, *supra* note 604, at 199.

tributions to "churches" may be deducted up to 30 percent of adjusted gross income.<sup>607</sup> Contributions to "religious organizations" qualify for deductions of up to 20 percent of adjusted gross income.<sup>608</sup>

"The allowance of a tax deduction for charitable contributions cannot be justified — and has not been justified — by any concept within an income tax system; any justification it has is social . . . ."<sup>609</sup> The apparent reason for allowing deductions to religious organizations can only be the same reason for exempting such organizations from taxation. That is, religious organizations are thought to be so necessary to the public welfare that contributions should be encouraged. One authority, however, has concluded that "the revenue loss attributable to the income tax charitable deduction is substantially greater than the amount of contributions induced by the deduction."<sup>610</sup> If, therefore, the sole justification for the deduction is to encourage giving in order to obtain services for the public without using governmental machinery, it is perhaps time for Congress to consider whether the deduction is as desirable as originally believed.

## B. The Constitutionality of Tax Aid

### 1. Direct Tax Aid

Religious exemptions have been attacked as violative of the first amendment.<sup>611</sup> The direct-indirect aid dichotomy may have the same application in this area as it has in the more controversial area of aid to education.<sup>612</sup> However, those who favor religious exemptions are not supported by the secular purpose theory,<sup>613</sup> at least insofar as church income is concerned. It is perhaps significant that the Supreme Court has refused to review the more recent court decisions on tax exemptions.<sup>614</sup>

Its actions may indicate that with respect to this question it is disposed to accept Holmes's axiom that a page of history is worth a volume of logic,<sup>615</sup> as well as Justice Reed's observation that "devotion to the great principle of religious liberty should not lead [the Court] into a rigid inter-

607 INT. REV. CODE OF 1954, § 170(a)(1), (b)(1).

608 INT. REV. CODE OF 1954, § 170(b)(1)(B).

609 G. MCGREGOR, PERSONAL EXEMPTIONS AND DEDUCTIONS 19 (1962).

610 Rabin, *supra* note 573, at 918. The author points out that the Government lost 2,195 million dollars in revenue due to individual charitable deductions in 1962. *Id.* This compares to an estimate that the deduction attracted only 57 million dollars in contributions. *Id.* at 919. As Professor Rabin points out: "This hardly seems a bargain." *Id.*

611 We are certain that no state or the federal government could directly contribute to the church for its religious function. It is equally clear that in any case where the Constitution prohibits direct aid, it also prohibits the indirect aid of tax exemptions. Hurvich, *supra* note 568, at 553.

612 See text accompanying notes 423-25 *supra*.

613 See text accompanying notes 411-17 *supra*.

614 Murray v. Comptroller of the Treasury, 241 Md. 383, 216 A.2d 897, *cert. denied*, 385 U.S. 816 (1966); Lundberg v. County of Alameda, 46 Cal. 2d 644, 298 P.2d 1, *appeal dismissed sub nom.* Heisey v. County of Alameda, 352 U.S. 921 (1956); General Finance Corp. v. Archetto, 93 R.I.392, 176 A.2d 73 (1961), *appeal dismissed*, 369 U.S. 423 (1962).

615 New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

pretation of the constitutional guarantee that conflicts with accepted habits of our people."<sup>616</sup> <sup>617</sup> (Citations renumbered.)

Due to the Supreme Court's refusal to reconsider the validity of tax exemptions, the present "law" is found in cases decided in the nineteenth century. In *Gibbons v. District of Columbia*,<sup>618</sup> decided in 1886, the Supreme Court held that Congress and the state legislatures can exempt property, and inferentially, church property, from taxation.<sup>619</sup> Thirteen years later, in *Bradfield v. Roberts*,<sup>620</sup> the Court held constitutional the use of government funds to erect buildings for a church-owned hospital. It should be noted, however, that the case is not thought to be applicable where a secular purpose is not involved in the church activity.<sup>621</sup>

When state courts are presented with a tax exemption case, the question is generally not whether exemptions are constitutional, but whether a party should be accorded exempt status under the relevant statutory or constitutional provisions.<sup>622</sup>

Thus, while there are arguments against the constitutionality of tax assistance to religious institutions, the historical acceptance of this type of assistance by the American people has kept the number of cases to a minimum. Further, it is arguable that the great number of suits by organizations seeking exempt status, which in no way draw into question the constitutionality of the exemption itself, actually condition the courts to accept this type of assistance. The 1965-66 Survey reported that recent decisions "reflect no indications of dissatisfaction with the practice of granting tax exemptions to religious institutions, but rather, continue to be in the mainstream of the law."<sup>623</sup> There has been no change. This religious tax benefit appears more firmly rooted than ever.

## 2. Indirect Tax Aid

Only two cases have considered whether the indirect religious preferences in the federal income tax law violate the first amendment. In *Swallow v. United States*<sup>624</sup> the defendant, convicted of tax evasion, attacked the constitutionality of the statute. He alleged, in part, that the allowance of deductions for contri-

616 *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 256 (1948) (dissenting opinion).

617 Kauper, *The Constitutionality of Tax Exemptions for Religious Activities*, in *THE WALL BETWEEN CHURCH AND STATE* 95, 116 (D. Oakes ed. 1963).

618 116 U.S. 404 (1886).

619 "In the exercise of this power [of taxation] Congress, like any State legislature unrestricted by constitutional provisions, may at its discretion wholly exempt certain classes of property from taxation, or may tax them at a lower rate than other property." *Id.* at 408.

620 175 U.S. 291 (1899).

621 See Hurvich, *Religion and the Taxing Power*, 35 U. CINN. L. REV. 531, 551-52 (1966).

622 *E.g.*, *State Bd. of Tax Comm'rs v. Wright*, 215 N.E.2d 57 (Ind. 1966) (cabins used as temporary dwelling places by ministers attending religious conferences exempt); *Ruston Hosp., Inc. v. Riser*, 191 So. 2d 665 (La. App. 1966) (exemption limited to portion of property devoted solely to charitable undertakings) (dictum); *Evangelical Lutheran Good Samaritan Soc'y v. County of Gage*, 181 Neb. 831, 151 N.W.2d 446 (1967) (nursing home exempt); *New Haven Church v. Board of Tax Appeals*, 9 Ohio St. 2d 53, 223 N.E.2d 366 (1967) (area of building used for public worship exempt). But see *Murray v. Comptroller of the Treasury*, 241 Md. 383, 216 A.2d 897, cert. denied, 385 U.S. 816 (1966).

623 1964-66 *Church-State Survey*, *supra* note 224, at 701.

624 325 F.2d 97 (10th Cir. 1963) (per curiam).



butions to religious organizations violated the first amendment. In a rather cursory consideration of this contention, the Tenth Circuit stated:

Nor is there any substance to appellant's contention that exemptions and deductions allowable for charitable and religious purposes contravene the establishment of religion clause of the First Amendment. . . . Constitutional questions will not be decided upon hypothetical sets of facts. . . . Moreover, appellant has not shown how his rights could be affected if these activities were held to be unlawful.<sup>625</sup>

In *United States v. Keig*<sup>626</sup> the Seventh Circuit rejected a similar contention, stating that "no court is a forum for defendant's denunciation of the tax laws. If he seeks such a forum, it must be elsewhere, either in the halls of [C]ongress, on public platforms, or in the general media of communication."<sup>627</sup>

*Swallow* and *Keig* illustrate the two difficulties that beset a potential litigant who wishes to contest the validity of the income tax deduction. As intimated in *Swallow*, the principle of standing enunciated in *Frothingham* appears to have application in this area. The Tenth Circuit was reluctant to delve into the constitutionality of the tax deduction in *Swallow* because the defendant could not show how he was affected by it. If *Swallow* lacked standing, it would appear that no taxpayer would have standing to contest the validity of the deduction. Admittedly, *Frothingham* is not directly in point since it held that a taxpayer, as a taxpayer, does not have an injury sufficiently direct and immediate to give him standing to contest an appropriation. A tax deduction is not an appropriation but *Frothingham's* "central principle of precluding suit by a taxpayer whose interest is so minute and indeterminate that he cannot show direct economic injury is in theory equally applicable as a bar to suits attacking the constitutionality of taxing statutes."<sup>628</sup>

Assuming, arguendo, that *Frothingham* is either judicially<sup>629</sup> or legislatively<sup>630</sup> limited, *Keig* would still bar suit on the ground that the constitutionality of a tax deduction simply does not present a justiciable controversy. Analytically, *Keig* was correctly decided. A determination by Congress that income used in a certain way is deductible for tax purposes is equivalent to a refusal by Congress to declare a tax on that income. Since in our system of government Congress has the discretion to legislate or to refuse to legislate, there appears to be nothing the judiciary can do to require Congress to legislate that income contributed to a religious organization is taxable.

If the standing and justiciability barriers are overcome, a valid argument can be made that tax deductions for contributions to religious organizations

625 *Id.* at 98.

626 334 F.2d 823 (7th Cir. 1964).

627 *Id.* at 826.

628 Korbel, *Do the Federal Income Tax Laws Involve an "Establishment of Religion"?*, 53 A.B.A.J. 1018, 1023 (1967). While *United States v. Butler*, 297 U.S. 1 (1936), held that a taxpayer has standing to contest the validity of a federal "processing and floor-stock tax," the author points out that in *Butler*, "the crucial consideration distinguishing *Frothingham* was that the tax was [an] 'incident of [governmental] regulation'" rather than a general appropriation. Korbel, *supra*, at 1023 n.56 (emphasis added).

629 See text accompanying notes 542-56 *supra*.

630 See text accompanying notes 557-66 *supra*.

constitute an unconstitutional establishment of religion under the rule of *School District of Abington v. Schempp*.<sup>631</sup> *Schempp* requires a "secular legislative purpose and a primary effect that neither advances nor inhibits religion."<sup>632</sup> Applying this test to the tax deduction for religious contributions, it appears that both aspects of it are violated. The only discernible intent of Congress in allowing the deduction is to aid religious organizations. Certainly it is not to aid the taxpayer. In addition, the primary effect of the tax deduction is to advance religion. As stated by one authority,

the economic effect of the allowance of these deductions is to furnish the church with a state subsidy in the amount of the tax which would have been payable with respect to the amount of income contributed, had it not been for such contribution.<sup>633</sup>

Further, any feeling that the primary effect of the deduction is to promote morality, or some equally vague public benefit, is completely eradicated when it is realized that "religious organizations are neither by law nor by their nature bound to render service that is of public benefit . . ."<sup>634</sup>

It appears, therefore, that the tax deduction for religious contributions violates both requirements of *Schempp*'s two-pronged test of constitutionality. But it is also apparent that the jurisdictional obstacles to judicial review are insurmountable.

## VIII. FREE EXERCISE AND THE POLICE POWER — CURRENT DEVELOPMENTS

### A. Introduction

This section of the Survey examines the constitutional limitations that restrict the power of the state to set religious values and behavior patterns for the people. The greatest difficulty in this area arises from the inability of courts, legislators, and administrators to recognize a given practice as "religious," and therefore constitutionally protected. Traditionally, the state has relied upon its power to provide for the health, safety, and welfare of the citizenry in order to interfere with the "free exercise" of such practices by certain religious minority groups. Each of the topics discussed in this section exemplifies a particular facet of this conflict between the state's police power and the individual's right to practice his religion without political suppression.

### B. The Amish — A Case Study in Accommodation and Suppression

#### 1. Folk Culture

The Amish are those "plain people" who follow the teachings of Jakob Ammann,<sup>635</sup> a seventeenth century Swiss Anabaptist who broke with the Mennonite Church over the practice of shunning apostates, or *Meidung*.<sup>636</sup> The

631 374 U.S. 203 (1963).

632 *Id.* at 222.

633 Korbel, *supra* note 628, at 1019.

634 *Id.* at 1022.

635 J. HOSTETLER, *AMISH SOCIETY* 23 (1963).

636 *Id.* at 29-33. Ammann advocated complete exclusion of apostates from the religious

Amish began migrating to the Commonwealth of Pennsylvania about 1727, settling at first in Lancaster County.<sup>637</sup> They now reside principally in the rural areas of southeastern Pennsylvania, northern Ohio and Indiana, and in scattered smaller settlements in Ohio, Indiana, Illinois, Iowa, Arkansas, Missouri, and Kansas.<sup>638</sup> The sect presently numbers some 50,000 souls.<sup>639</sup>

The Amish are a remarkable survival of a folk culture. Their religious, cultural, and social values are so unitary in nature that the commonplace distinctions between socio-economic and religious values cannot be rightly applied to the Amish way of life. All Amish values are religious in nature,<sup>640</sup> and the Amish way of life is a consistent religious pattern directed by central religious values that are approved by the members of the church-district and are embodied in a rule of life called the *Ordnung*.<sup>641</sup> Because of this socio-economic-religious unity, it is difficult to draw out those "economic" and "social" concerns which are not protected by the free exercise clause of the first amendment and which may be regulated by general welfare legislation.

## 2. *Theology and Religious Rubrics*

The Amish, being a sectarian branch of the general Mennonite confession,<sup>642</sup> do not baptize their young, but allow them to choose or reject the Amish way of life when they reach maturity.<sup>643</sup> Unlike the Mennonites, the Amish do not seek converts,<sup>644</sup> nor do they engage in broad social service programs.<sup>645</sup> Amish church polity is strictly congregational; each church-district consists of a self-governing unit of thirty to forty families.<sup>646</sup> Although the Amish do not possess a national church juridical structure, Amish church-districts with common or similar rules of life maintain fellowship with one another.<sup>647</sup> Cooperation among local church-districts is informal and is usually arranged through teachers' conferences and other like bodies.<sup>648</sup> The two

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community. Hostetler has reprinted Jakob Ammann's Warning Message of 1693, which provoked the original division between Swiss Mennonites and the Amish. *Id.* at 32-33.

637 *Id.* at 38, 70-71.

638 *Id.* at 72, 79.

639 Hostetler, Extracts from an Address to the Geauga County Historical Society at Burton, Ohio, August, 1967, at 1.

640 HOSTETLER, *supra* note 635, at 10.

641 *Id.* at 13-14. Hostetler makes the following observations on the Amish *Ordnung*:

The *Regel und Ordnung* (or rules and order), which are formulated by each district, cover the range of individual experience. In this little community, whose aim is survival by keeping the world out, there are many taboos, and material traits of culture which become symbolic. Conformity to styles of dress is important. The district is the unit of personal observation and is full representative of the whole of Amish culture. *Id.*

642 *Id.* at 23, 27.

643 *Id.* at 49.

644 *Id.* at 50, 51.

645 *Id.* at 50.

646 *Id.* at 71, 81.

647 *Id.* at 76-77.

648 *Id.* at 71. Recently, the Amish have instituted a multi-district program of co-operation and exchange of views on parochial school education and teaching techniques. This program is accomplished through the medium of *The Blackboard Bulletin*, a monthly Amish teachers' magazine published by Joseph Stoll, a significant spokesman for Amish educational freedom, who has opened an Amish publishing house in Aylmer, Ontario. Stoll's Pathway Publishing Corporation provides all Amish persons with a vehicle for exchanging views and plans with other church-districts on the school issue.

major divisions among Amish church-districts are Old Order and Beachy.<sup>649</sup> The Old Order church-districts refuse to accept the automobile, the telephone, and electrical power. Old Order districts continue to meet in the members' homes for worship. The Beachy church-districts, on the other hand, have built meeting houses and have adopted the automobile and electrical power.<sup>650</sup>

### 3. *Internal Regulation and Exterior Threats*

The rule of life embodied in the *Ordnung* is not unlike the rules of some Roman Catholic orders of religious, since both generally prescribe a strict avoidance of worldly behavior patterns. Amish *Ordnungs* are usually, but not always, oral.<sup>651</sup> Most contain proscriptions against worldly fashions in dress and against involvement in worldly industry.<sup>652</sup> The Amish, therefore, generally prefer to

Indiana's Amish settlements maintain a multi-district Amish Executive Council, which was organized to provide a collective bargaining unit for negotiating the August, 1967 school plan with the Superintendent of Public Instruction. See text accompanying notes 710-13 *infra*.

649 Address by Dr. J. Landing, Associate Professor of Geography, Indiana University, at Indiana University (South Bend), Dec. 13, 1967. See also HOSTETLER, *supra* note 635, at 250.

650 *Id.* There are only five Beachy Amish church-districts in Indiana.

Interview with Dr. J. Landing, Associate Professor of Geography, Indiana University, in South Bend, Indiana, Dec. 13, 1967. Hostetler lists 31 Beachy Amish church-districts in the United States as of 1961. HOSTETLER, *supra* note 635, at 79.

651 HOSTETLER, *supra* note 635, at 58.

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The following *Ordnung* of a contemporary group, published in English, appears to be representative of the Old Order Amish, except for those portions indicated by brackets. That it appears in print at all is evidence of change from the traditional practice of keeping it oral. This *Ordnung* allows a few practices not typically sanctioned by the Old Order: the giving of tithes, distribution of tracts, belief in assurance of salvation, and limited missionary activity.

#### ORDNUNG OF A CHRISTIAN CHURCH

Since it is the duty of the church, especially in this day and age, to decide what is fitting and proper and also what is not fitting and proper for a Christian to do, (in points that are not clearly stated in the Bible), we have considered it needful to publish this booklet listing some rules and ordinances of a Christian Church.

We hereby confess to be of one faith with the 18 articles of Faith adopted at Dortrecht, 1632, also with nearly all if not all articles in booklet entitled Article und Ordnung der Christlichen Gemeinde."

No ornamental bright, showy form-fitting, immodest or silk-like clothing of any kind. Colors such as bright red, orange, yellow and pink not allowed. Amish form of clothing to be followed as a general rule. Costly Sunday clothing to be discouraged. Dresses not shorter than half-way between knees and floor, nor over eight inches from floor. Longer advisable. Clothing in every way modest, serviceable and as simple as scripturally possible. Only outside pockets allowed are one on work eberhem or vomas and pockets on large overcoats. Dress shoes, if any, to be plain and black only. No high heels and pomp slippers, dress socks, if any, to be black except white for foot hygiene for both sexes. A plain, unshowy suspender without buckles.

Hat to be black with no less than 3-inch rim and not extremely high in crown. No stylish impression in any hat. No pressed trousers. No sweaters.

Prayer covering to be simple, and made to fit head. Should cover all the hair as nearly as possible and is to be worn wherever possible. [Pleating of caps to be discouraged.] No silk ribbons. Young children to dress according to the Word as well as parents. No pink or fancy baby blankets, or caps.

Women to wear shawls, bonnets, and capes in public. Aprons to be worn at all times. No adorning of hair among either sex such as parting of hair among men and curling or waving among women.

A full beard should be worn among men and boys after baptism if possible. No shingled hair. Length at least half-way below tops of ears.

No decorations of any kind in buildings inside or out. No fancy yard fences.

be farmers,<sup>653</sup> and although outside work in factories may be permitted as a matter of necessity, very few Amish become part of the general work force.<sup>654</sup> Their purpose in seeking such employment is merely to build up a nest egg for the purchase of a farm.<sup>655</sup>

The guiding principles of the Amish conflict sharply with the prevailing view of the purpose of human life as purveyed by the public school system. Public schools stress success in this world, whereas religious tradition counsels Amish to abstain from worldly values, since they are but pilgrims in a strange land.<sup>656</sup> Public schools teach a way of life that emphasizes the maximum fulfillment of personal talents. The Amish, however, view individual achievement as subordinate to the values of the community, and say pungently that "self-praise stinks."<sup>657</sup> The Amish believe that exposing their children to the worldly values of the public schools will lead to a movement away from the Amish faith by the young.<sup>658</sup>

Linoleum, oilcloth, shelf and wall paper to be plain and unshowy. Over-stuffed furniture or any luxury items forbidden. No doilies or napkins. No large mirrors, (fancy glassware), statues or wall pictures for decorations.

[No embroidery work of any kind.] Curtains either dark green rollers or black cloth. No boughten dolls.

No bottle gas or high line electrical appliances.

Stoves should be black if bought new.

Weddings should be simple and without decorations. [Names not attached to gifts.]

No ornaments on buggies or harness.

Tractors to be used only for such things that can hardly be done with horses.

Only either stationary engines or tractors with steel tires allowed. No airfilled rubber tires.

Farming and related occupations to be encouraged. Working in cities or factories not permissible. Boys and girls working out away from home for worldly people forbidden except in emergencies.

Worldly amusements as radios, card playing [party games], movies, fairs, etc., forbidden. [Reading, singing, tract distribution, Bible games, relief work, giving of tithes, etc., are encouraged.]

Musical instruments or different voices singing not permissible. No dirty, silly talking or sex teasing of children.

Usury forbidden in most instances. No government benefit payments or partnership in harmful associations. No insurance. No photographs.

No buying or selling of anything on Sunday. It should be kept according to the principles of the Sabbath. [Worship of some kind every Sunday.]

[Women should spend time doing good or reading God's Word instead of taking care of canaries, goldfish or house flowers.]

Church confession is to be made if practical where transgression was made. If not, a written request of forgiveness should be made to said church. All manifest sins to be openly confessed before church before being allowed to commune. I Tim. 5, 20. A period of time required before taking new members into full fellowship.

Because of great falling away from sound doctrine, we do not care to fellowship, that is hold communion, with any churches that allow or uphold any unfruitful work of darkness such as worldliness, fashionable attire, [bed-courtship, habitual smoking or drinking, old wives fables, nonassurance of salvation, anti-missionary zeal] or anything contrary to sound doctrine . . . *Id.* at 59-61 (footnote omitted).

653 *Id.* at 228-29.

654 See *Ordnung*, *supra* note 652.

655 HOSTETLER, *supra* note 635, at 228-29. The same impression was gained by the author in the course of interviewing a real estate salesman in La Grange, Indiana. His familiarity with this situation arises from the number of Amish young men who use the money they make in local trailer factories for a down payment on a small farm plot.

656 *Id.* at 50-51.

657 Hostetler, *supra* note 639, at 3.

658 HOSTETLER, *supra* note 635, at 144. See generally J. STOLL, WHO SHALL EDUCATE OUR CHILDREN? 3-51 (1965).

#### 4. *Compulsory Education's Threat to Amish Culture*

Since 1966, a re-evaluation of public education procedures by state officials has changed the traditional treatment of the Amish by local school officials. Formerly, the Amish communities in Indiana, Iowa, and Kansas had been ignored by public officials. So long as the Amish sent their children to a rural one-room grade school and did not openly flaunt the truant laws, no official sanctions were applied to them. Within the past few years, however, the Amish have become a major object of concern to educational officials, primarily because they have withdrawn from the universal, free, public education system.

It should be noted that public education traditionally has been viewed as the great assimilator and equalizer in the United States.<sup>659</sup> The enormous task of Americanizing millions of Polish, German, Italian, Hungarian and other immigrants in the nineteenth century was accomplished by the free public school system.<sup>660</sup> The traditional conduit for providing moral, political and social values to this nation has been public education.<sup>661</sup> No other force contributes so much to the American consensus of values and traditions as does the public school system.

However, not all Americans have supported universal public education as the sole means for training the young in preparation for a useful life. An equally ancient tradition of private education co-exists with the tradition of free public education. The nineteenth century public schools dispensed a brand of non-sectarian Protestantism as the basis of a moral training.<sup>662</sup> Roman Catholics found this unacceptable and began their own system of parochial schools — a system brought into being only after a prolonged struggle for legal recognition of the right to establish such schools.<sup>663</sup> Likewise, Lutherans chose to establish independent schools to train their children in the Lutheran faith and to teach them German, at a time when teaching German to elementary students was thought to be un-American.<sup>664</sup> The current program of establishing church-district parochial schools undertaken by Amish communities in the United States merely continues this tradition of private education.

The conflict between the Amish and government officials is a result of the primary social purpose of public schools — the development of "American"

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The school reflects the total culture of which it is a part; it transmits the dominant values, mores, attitudes and ideas of society. The emphasis in American schools on learning the ways of democracy is an example of this principle of cultural transmission. Debate as we may about what our schools should be teaching and how they should be teaching it, there is nevertheless a general agreement that the schools should produce a citizen who is capable of living in and sharing the responsibilities of a democratic way of life. F. McDONALD, *EDUCATIONAL PSYCHOLOGY* 16-17 (1959).

See also L. HASKEW & J. McLENDON, *THIS IS TEACHING* 142-52 (1962); H. KLAUSMEIER & K. DRESDEN, *TEACHING IN THE ELEMENTARY SCHOOL 5-8* (2d ed. 1962).

660 W. BRICKMAN, *EDUCATIONAL SYSTEMS IN THE UNITED STATES* 18 (1964); J. WISE, *THE HISTORY OF EDUCATION* 350 (1964).

661 Authorities cited note 659 *supra*.

662 *E.g.*, Donahue v. Richards, 38 Me. 376, 38 Me. 379 (1854). A casual inspection of any of *McGuffey's Readers* shows that Protestant moralizing constituted a major portion of the curriculum of the nineteenth century public school. See S. NOBLE, *A HISTORY OF AMERICAN EDUCATION* 503-05 (1954).

663 See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the turning point for Catholics; it legitimized the Catholic school system as an acceptable alternative to public education.

664 See *Meyer v. Nebraska*, 262 U.S. 390 (1923).

values and traditions. The Amish desire to be a people set apart and do not want to subject their children to the conforming processes of public education. Consequently, they have generally been opposed to the consolidation movement, preferring that the one-room public school program be continued. As a result, consolidation of public school systems in areas of major Amish settlements has been retarded. Since the Amish consider politics worldly, however, consolidation was not fought systematically and eventually came to Amish school districts.

The Amish now face the alternative of sending their children to the consolidated schools or of constructing their own parochial schools. If they choose to build their own schools, these schools must conform to the state requirements for specific academic curricula and minimum educational facilities and equipment. Such schools must be staffed by teachers who meet the qualifications required by statute. Finally, the school plant must meet the state requirements for public health and safety. Since the Amish believe that some of these state-imposed standards may be dangerous to their way of life, a collision between the Amish and the school authorities usually cannot be averted.

The rationale for the state's assertion that it can and must specify mandatory standards for the education of all its citizens lies in the assumption that education is a subject of general public concern. The state derives its definition of a suitable education from the tradition of the whole American community. In effect, education for everyone, whether participating in the free school system or not, is defined in terms of what the community consensus holds to be a good public school education.

The Amish do not accept this standard. Amish values are not those of the community at large. The conflict of values is irreconcilable.<sup>665</sup> With the coming of consolidation to rural school districts, many Amish church-districts have chosen to build and operate their own schools. These schools try to present the Amish understanding of education, which is sufficient to teach the Amish way of life, and to provide instruction in secular subjects that the Amish believe will prepare their children to be good farmers and housewives.<sup>666</sup>

The Amish do not wish to conform their children to an outsider's definition of life, and therefore they do not wish to conform their children to an outsider's definition of education. Thus the legal problem is made evident: Whose definition of a suitable education for Amish children is to prevail — that of the state, or that of the Amish?

##### 5. *Comparative Legal Treatment of Amish — Kansas, Iowa, Indiana*

The past two years have witnessed attempts by three states to settle the Amish school problem in three different ways. This recent surge of Amish confrontations with the school laws has been produced by rural public school con-

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665 See STOLL, *supra* note 658, at 23, 27-29. Stoll summarizes the feelings of most Amish persons on the conflict of secular and sacred values:

How can we parents expect our children to grow up untainted by the world, if we voluntarily send them into a worldly environment, where they associate with worldly companions, and are taught by men and women not of our faith six hours a day, five days a week, for the greater part of the year? *Id.* at 23.

666 HOSTETLER, *supra* note 635, at 143.

solidation across the Midwest. In order to understand the legal dimensions of the problem, the modes of treatment must be reviewed comparatively.

a. Kansas — Suppression

In 1965, the Kansas legislature amended its compulsory education act to require students to attend a state-certified school until age sixteen.<sup>667</sup> Formerly, anyone who had completed the eighth grade in a certified school was not obliged to continue his schooling.<sup>668</sup> This former legal standard accorded with the convictions of the Reno County, Kansas Amish settlement. The Amish simply sent their children to a rural one-room public school until the children finished the eighth grade and then withdrew them. The 1965 amendment to the compulsory education law forced the Amish to send their children to the consolidated high school, or in the alternative, to establish their own state-approved secondary schools.

An Amishman named Garber arranged to send his fifteen-year-old daughter, Sharon, to an Amish secondary school, called the Harmony School, conducted in his church-district.<sup>669</sup> At all times, however, she continued to take certain courses from a correspondence school in Chicago in which she had enrolled in 1964.<sup>670</sup> In the Harmony School an Amish person provided the pupils with formal vocational instruction one day a week generally relating to agriculture and home economics. The students were required to spend one hour every day on their studies at home, as well as five hours a day on a vocational project, upon which a written report was submitted to the instructor.<sup>671</sup> The Harmony School, however, was not approved by the State of Kansas,<sup>672</sup> and Garber was indicted for failing to require his daughter to attend a certified school.<sup>673</sup> Garber grounded his defense on the free exercise clause of the first amendment, contending that the state unlawfully abridged his right to practice his faith by prosecuting him for sending his daughter to the Harmony School.<sup>674</sup> He was subsequently convicted.<sup>675</sup>

The Kansas Supreme Court affirmed Garber's conviction,<sup>676</sup> relying on a rationale derived from *Prince v. Massachusetts*,<sup>677</sup> which held that a Jehovah's Witness could not enlist the help of his child to sell the *Watchtower* magazine in violation of the state child labor statute, and *Commonwealth v. Beiler*,<sup>678</sup> a Pennsylvania case involving an Amish father who refused to send his child to high school. The court found that the state had an overriding interest in insuring that its citizens were adequately educated<sup>679</sup> and that the Harmony School

667 KAN. STAT. ANN. § 72-4801 (Supp. 1967).

668 Law of March 20, 1923, ch. 182, § 1 [1923] Kan. Laws 264 (repealed 1965).

669 *State v. Garber*, 197 Kan. 567, 419 P.2d 896, 898, *cert. denied*, 389 U.S. 51 (1967).

670 *Id.*

671 *Id.*

672 *Id.* at 900.

673 *Id.* at 897.

674 *Id.* at 900.

675 *Id.* at 897.

676 197 Kan. 567, 419 P.2d 896 (1967).

677 321 U.S. 158 (1944).

678 168 Pa. Super. 462, 79 A.2d 134 (1951).

679 419 P.2d at 901.



did not meet that standard.<sup>680</sup> It found that Garber's religious freedom was not abridged by prosecuting him for his daughter's truancy.<sup>681</sup> Since Garber was simply required to compel his daughter to attend an accredited secondary school, the court reasoned, he was not constrained to believe anything against his religious creed, but was merely constrained to perform an act that the state has the power to compel despite one's religious convictions.<sup>682</sup> The Supreme Court refused to entertain Garber's appeal,<sup>683</sup> which was sponsored by the American Civil Liberties Union and the National Committee for Amish Religious Freedom.<sup>684</sup>

*Garber* assumes that only the State of Kansas knows what is best for Amish children<sup>685</sup> and therefore permits the state to define for the Amish a standard of education that is antithetical to their way of life. Moreover, it permits the state to impose its definition by criminal sanction. It is true that the Harmony School did not comply with applicable Kansas statutes and therefore was not acceptable to the state. Garber did violate the Kansas truant laws by sending his daughter to that school. Therefore, if the state's definition of a suitable education can be applied to Amish persons like Garber, irrespective of their religious convictions, the state has a prima facie right to close local Amish schools and to arrest Amish participants for violating the truant laws. However, such application can be made only if the first and fourteenth amendments permit states to extinguish religious minorities by creating a standard of education so defined as to exclude any religious school system established by the minority to protect its own value structure.

The Amish in Kansas are in much the same situation as were the Catholics of Oregon in 1925, when Oregon's now infamous compulsory public school attendance law<sup>686</sup> was in effect. At that time, the Catholic school system of Oregon was threatened with extinction, since the statute required all school-age children to be enrolled in a public school. The fallacy of such a statute, and the fallacy in *Garber*, is the presumption that the state can absolutely prohibit parents belonging to religious minority groups from providing a parochial education for their children if the parents' definition of education does not mesh with the generally accepted definition. Such a position was held untenable in *Pierce v. Society of Sisters*.<sup>687</sup>

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him

680 *Id.* at 900.

681 *Id.* at 902.

682 *Id.* at 901.

683 *Garber v. Kansas*, 389 U.S. 51 (1967).

684 AMERICAN JEWISH CONGRESS COMMISSION ON LAW AND SOCIAL ACTION, LITIGATION DOCKET OF PENDING CASES AFFECTING FREEDOM OF RELIGION AND SEPARATION OF CHURCH AND STATE 39 (1967).

685 *But see Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) wherein the Supreme Court lays the primary responsibility for educating the young on parents rather than on the state.

686 Act of Nov. 7, 1922, ch. 1, [1923] Ore. Laws 9.

687 268 U.S. 510 (1925).

and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.<sup>688</sup>

Direct suppression of Amish schools has been unsuccessfully attempted in Indiana and Iowa.<sup>689</sup> Not only is it impossible for school officials to prosecute all the Amish who refuse to abide by the truant laws, but even successful prosecutions produce no appreciable change in the convictions and conduct of the Amish community as a whole.<sup>690</sup> Moreover, considerable outsider sympathy for the Amish and antipathy for the prosecuting officials, is generated by such suppression.<sup>691</sup>

#### b. Iowa — Suppression Converted to Aid

Prior to 1966, some local officials in Iowa had taken a hard line against one-room Amish elementary schools. The Oelwein School Board's decision to seek an injunction to close the uncertified Amish schools in Buchanan County marked the culmination of local severity in Iowa. Although the injunction was denied, the county officials nonetheless attempted to oust the children from their Amish school.<sup>692</sup> When films of this incident were shown on national television,<sup>693</sup> nationwide sympathy was aroused for Amish resistance.<sup>694</sup> The Iowa Department of Public Instruction offered to mediate the dispute with the Amish. A temporary agreement between the Oelwein School Board and the Amish settlement in Buchanan County was negotiated on February 22, 1966.<sup>695</sup> The agreement permits the Amish to establish independent schools on land leased from them by the school board, provided that the schools are staffed by teachers who are certified to teach in Iowa. The Danforth Foundation of St. Louis, Missouri furnishes the money for teachers' salaries.<sup>696</sup> This temporary agreement was augmented by a 1967 amendment to the Iowa Education Code<sup>697</sup> which exempts Amish children from compliance with "any and all requirements of the compulsory education law . . ."<sup>698</sup> Since the statute is silent as to the hiring of teachers and other matters included in the 1966 working agreement, the agreement seems to be the chief means of accommodating Amish parochial schools in Iowa.

The combination of interim agreement and legislative amendment allows Amish parochial schools to co-exist with the public schools. However, three

688 *Id.* at 535.

689 *See* discussion in note 703 *infra*, and in text accompanying notes 692-94 *infra*; L. Scalise, *The Amish in Iowa and Teacher Certification*, 31 ALBANY L. REV. 1, 2-3 & nn. 8-10 (1967).

690 *See, e.g.*, Note, *The Right not to be Modern Men: The Amish and Compulsory Education*, 53 VA. L. REV. 925, 941-43 (1967).

691 Interview with Mr. Richard Detar, former LaGrange County, Indiana Prosecutor, in LaGrange, Indiana, January 4, 1968. Detar tells of the "Care Packages" sent from the Eastern United States to the Amish parents incarcerated for violating the truant laws of Indiana.

692 Scalise, *supra* note 689, at 2.

693 The National Broadcasting System filmed this episode and televised it on the Huntley-Brinkley news program shortly afterward. *See also* NEWSWEEK, Dec. 6, 1965, at 38.

694 *Cf.* LIFE, Dec. 3, 1965, at 47.

695 Scalise, *supra* note 689, at 3.

696 *Id.*

697 3 *West's Iowa Legislative Service* 476 [S.F. 785] (1967).

698 *Id.*

possible objections can be raised to this arrangement. First, the school board leases the premises from the Amish who conduct a parochial school thereon. Consequently, some funds for operating the parochial school are derived from tax money—a procedure that may arguably be in opposition to the establishment clause of the first amendment.<sup>699</sup> Second, the amendment to the Education Code, although ostensibly general legislation, amounts to special, and therefore unconstitutional, legislation for Amish children. Third, exemption of one religious community from the compulsory attendance law could be construed as an unconstitutional religious preference. These objections may not be substantial and might well be overcome in a judicial test of the Amish school arrangement in Iowa. Nonetheless, any plan that presents such constitutional ambiguities cannot be recommended as an appropriate way of protecting the state's interest or the interest of the Amish community.

Iowa has yet to recognize officially the *right* of its Amish community to establish a separate school system, as has recently been done in Indiana through a carefully prepared school plan. Being a local ad hoc arrangement, the Iowa plan leaves much to be desired from a legal point of view and is not such an adaptation as truly serves the interest of the Amish community.

### c. Indiana—Accommodation

Within the past two years Indiana has also had its share of argument over the legitimacy of Amish parochial schools. Indiana's experience with the Amish carries more national significance than do the experiences in Kansas and Iowa because Indiana's Amish community is the third largest in the United States.<sup>700</sup> Indiana's Amish, for the most part, live in Elkhart and LaGrange Counties,<sup>701</sup> although there are scattered Amish settlements in Noble, Allen and several other counties. The Amish make up at least one-third of the total population of LaGrange County,<sup>702</sup> where the Amish parochial schools have roots which antedate the consolidation of rural one-room public schools by some fifteen years.<sup>703</sup> Prior to consolidation, most of the LaGrange County Amish children attended one-room public schools in their localities, and the schools were usually

699 See text accompanying notes 462-501 *supra*.

700 J. HOSTETLER, *AMISH SOCIETY* 72, 75, 79 (1963). In 1961, 4,277 Old Order Amish are reported to have been living throughout the State of Indiana. *Id.* at 79.

701 Twenty-eight of Indiana's 57 Old Order Amish church-districts are located in this settlement. *Id.* at 76.

702 Interview with Mr. William G. Gohl, Superintendent of Schools, Westview Community School Corporation, in Emma, Indiana, Jan. 4, 1968.

703 Detar, *supra* note 691. The first Amish school in LaGrange County, the Christian Yoder Day School, was the subject of considerable controversy in the late 1940's. Mr. Detar informed the writer that he had inspected the Yoder Day School personally, and that he considered the school inadequate because (1) the school was conducted in a converted corn bin and had no windows, (2) illumination was provided by a single kerosene lantern, (3) the ventilation was inadequate, and (4) the teacher had no more than an eighth grade education. He attempted to take action to rectify what he considered substandard fire, safety, and sanitary conditions at the school, either by assisting the Amish operating the school to comply with safety standards, or by closing the school. However, Detar could find no official concern for the quality of Amish private education in LaGrange County. He felt he could not prosecute the proprietors of the Yoder Day School without support from the state agencies responsible for maintaining school safety, health, and curriculum quality. He found no such support and discontinued his efforts.

homogeneously Amish in enrollment.<sup>704</sup> After a county-wide popular consolidation referendum was voted down in 1960,<sup>705</sup> the trustees of the township schools in the center townships of the county voted to consolidate their schools into the Lakeland Community School Corporation.<sup>706</sup> The Amish live in the western townships of the county, which were consolidated into the Westview Community School Corporation in 1963.<sup>707</sup> As part of the overall plan, the seventh, eighth, and ninth grades in the Westview School Corporation were consolidated into a junior high school, and all grades below grade seven were consolidated into regional grade schools.<sup>708</sup> As a result of this process all the one-room public schools in Westview's jurisdiction were closed by September, 1967. A substantial number of Amish parents chose parochial schools as an alternative to public education, and seventeen one-room Amish parochial schools now provide a curriculum for Amish children in the Westview School Corporation's area.<sup>709</sup>

The new parochial schools were created on the authority of an administrative agreement executed on August 22, 1967 between the Indiana Department of Public Instruction and the Amish Executive Council of Indiana.<sup>710</sup> The agreement allows local Amish school boards to administer the Amish parochial school system under a general scheme of state supervision of school construction and maintenance. In addition, the Amish school boards are permitted to retain teachers of their own faith to serve in Amish schools.<sup>711</sup> The schools provide a basic course of standard studies through grade eight<sup>712</sup> and thereafter a vocational education program that continues until the student reaches sixteen, the minimum age for withdrawing from school in Indiana.<sup>713</sup>

This agreement not only indicates that the State of Indiana acknowledges the Amish parochial school system as a fact of life, but it also affords such schools adequate recognition as permissible educational alternatives to public education for Amish children. Since, unlike under the Iowa plan, the Amish receive no assistance from the state or from any other tax-supported body, the agreement does not even arguably offend the establishment clause of the first amendment. Practically speaking, the agreement protects Indiana's Amish from the legal sanction of the truant laws, while it permits an Amish school system to be operated with some state supervision of curricula.

Two objections to this plan have been raised by those not familiar with its terms.<sup>714</sup> First, since the agreement permits Amish schools to employ Amish teachers who cannot be certified under the normal procedure for teacher certification in Indiana, the instructional program for elementary students is thought to be materially below public school standards. Second, since the vocational

704 Gohl, *supra* note 702.

705 *Id.* In the past, the Amish have opposed school consolidation and have gone so far as to vote against county-wide consolidation. *Id.*

706 *Id.*

707 *Id.*

708 *Id.*

709 *Id.*

710 INDIANA DEPT. OF PUBLIC INSTRUCTION, ARTICLES OF AGREEMENT REGARDING THE INDIANA AMISH PAROCHIAL SCHOOLS AND THE DEPARTMENT OF PUBLIC INSTRUCTION (1967).

711 *Id.* at 3.

712 *Id.* at 3-4; e.g., English, reading, writing, spelling, arithmetic, geography, and history.

713 *Id.* at 4-7.

714 Gohl, *supra* note 702.

education program for children who have completed the eighth grade includes many subjects pertaining to agriculture and domestic chores, some persons believe it is a fraud designed to permit Amish children who have completed the eighth grade to remain at home and work for their parents, in lieu of completing the state's minimum attendance requirements. The first objection is based upon a material misunderstanding of the Amish school plan. Amish schools are essentially self-help schools, not unlike those conducted one hundred years ago by the pioneers. The Amish women who act as instructors generally have completed the eighth grade, and although such women are not trained by professional educators in "normal" schools, they are quite capable of conducting a limited elementary program of studies for children.<sup>715</sup> The second objection goes to the heart of Amish compliance with mandatory school attendance laws. If the Amish are not providing a true educational program for students between completion of eighth grade and age sixteen, then the truant problem persists. However, by the terms of the agreement between the Department of Public Instruction and the Amish Executive Committee, the vocational education program is not to be used as a facade to permit Amish children to avoid school attendance.<sup>716</sup> Once each week students must come to school to receive formal instruction in English, mathematics, and related subjects.<sup>717</sup> In addition, each child must spend four hours a day outside the weekly classroom period working on his vocational project, and at least one hour a day outside the weekly classroom period studying his academic subjects.<sup>718</sup> Each student's project must be reduced to writing, and is then graded by an Amish teacher who has been selected for his experience in agriculture, carpentry, and other like vocational endeavors.<sup>719</sup> Such a program is a true educational program compatible with Amish ways. Although it does not prepare anyone for college, nor lead to a career in business or the learned professions, it does fulfill an educational purpose—the training of Amish children in the life tasks normally expected of them in the Amish community.

A final matter must be considered before any conclusion can be drawn on Indiana's accommodation policy toward Amish schools. Since Amish children do not become members of the Amish church unless and until they so choose at maturity, a substantial<sup>720</sup> number of them, principally boys, do not

715 See *id.* at 3-7, wherein every teacher in an Amish parochial school is required to take a "General Educational Development High School Equivalency Test" in order to establish his teaching qualifications. While it is true that these teachers have no more than an eighth grade education, the type of school plan adopted by the Amish does not require sophisticated educational techniques. The author visited two Amish schools in LaGrange County, Cottonwood Grove and Sunnyside, on January 4, 1968. Although the author is no professional educator, he could see that the discipline of these schools was exceptional, that the work done by the students in reading, mathematics and penmanship equaled the best work seen at comparable levels in public schools, and that the Amish teachers were bright, alert, and well-prepared for their limited educational functions.

716 The carrying out of the project will be supervised by the vocational teacher. Daily chores and other routine household duties will *not* be considered as part of a vocational project, except where they are a necessary part of a project. *Id.* at 6.

717 *Id.* at 5.

718 *Id.*

719 *Id.* at 4-6.

720 Unfortunately, no competent statistics are available to show the ratio of refusal of the Amish way of life by young Amish adults. Letter from Dr. John A. Hostetler to Thomas J. Reed, Nov. 30, 1967, on file with the *Notre Dame Lawyer*.

follow their parents' way of life.<sup>721</sup> These Amish "drop-outs" are a legitimate object of state concern, because most Amish children who do not join the church are not accepted within the Amish community and must make their way in modern competitive society without the security of Amish home life. If the Amish parochial schools are unable to provide some preparation for competition on the outside by Amish drop-outs, then the state may be required to take some positive action to ensure that those leaving that school system for the outside world will not become welfare cases. But it appears that most young people who leave the Amish community either before or after baptism, are capable of making a satisfactory living in American society.<sup>722</sup> If Amish continue to be able to take care of themselves upon leaving their culture for American culture, the state would seem to have no real interest to protect and therefore no reason to interfere with the Amish educational program.

Indiana's accommodation of the Amish parochial school system seems to be a sensible middle ground between active suppression and active aid. It offers a way out of the collision between state-conceived programs of education for all and the Amish community's insistence on shutting out the world. Such an arrangement recognizes the legitimacy of Amish aspirations for survival in the twentieth century, which should be as much a matter of public concern as is the proper education of the young.

If local officials apply criminal sanctions to the Amish because of their educational beliefs, they will interpret this as persecution. If so, they are likely to leave their present settlements.<sup>723</sup> We would be forced to admit that only those citizens who accept our current brand of secularism, which divides life into social, economic, political and religious fragments, are entitled to the blessings of religious liberty. Such an admission would be most unfortunate.

### c. The Practice of Islam in Prisons

Like the Amish, Black Muslims practice a culturally integrated religion — a form of Islam that through strict dietary and fast laws and a general theological position that black men should be set apart from whites, permits no compromise with the world. Unlike the Amish, who wish to convert no one, the followers of Elijah Muhammed are committed to converting every black man to their way of life. Naturally, a radical and evangelical religious sect that tells black men that they should not be ruled by whites is bound to create friction in community relationships.

Black Muslims have encountered the greatest difficulties in attempting to practice their faith while incarcerated. Islamic activists have been put in solitary confinement for preaching religion outside of specified Sunday worship periods.<sup>724</sup> Further difficulties have arisen when members of Islam have petitioned authorities for the right to observe the dawn to dusk fast of Ramadan,

<sup>721</sup> Interview with Mr. Russell Schmidt, County Prosecutor, LaGrange County, Indiana, in LaGrange, Indiana, Jan. 4, 1968.

<sup>722</sup> HOSTETLER, *supra* note 700, at 193-211; Hostetler, Extracts from an Address to the Geauga County Historical Society at Burton, Ohio, August, 1967, at 5.

<sup>723</sup> Hostetler suggests that the Amish will move to the most isolated parts of America. Hostetler, *supra* note 722, at 2-6.

<sup>724</sup> *E.g.*, *Evans v. Ciccone*, 377 F.2d 4 (8th Cir. 1967).

since most prison meals are served after sunup and before sundown.<sup>725</sup> Because Islamic preaching usually leads to what would be a breach of the peace in a non-prison environment, the state's concern for discipline and for the safety of prison inmates conflicts with the rights of Black Muslims to act as directed by Elijah Muhammed.

### 1. *Prison Regulations and Islam*

Prison officials argue that Islam's extreme activism leads to intolerable prison discipline problems. They point to incidents of violence provoked by Black Muslim prayer meetings and preaching held in cell blocks and in wash rooms.<sup>726</sup> Until quite recently, the courts were reluctant to entertain suits brought by imprisoned Black Muslims to enforce their first amendment rights to practice their creed. The traditional view of the courts has been that internal prison management was beyond the scope of judicial review, except in extreme and unusual circumstances.<sup>727</sup> Lately, however, the courts have been more willing to listen to such suits,<sup>728</sup> and in some instances prison officials have been instructed to establish a workable set of rules that permits Black Muslims to practice their faith with less restriction.<sup>729</sup>

### 2. *Legal Means Available to Enforce Islam's Right to be Considered a Religion*

The most difficult legal problem facing imprisoned Black Muslims who contend they are denied their free exercise rights is the receipt of a hearing on the merits. A substantial gauntlet of administrative and judicial obstacles must be traversed by a Muslim litigant trying to enforce his religious rights in court. First, there is the problem of choice of remedy,<sup>730</sup> which many times decides the suit's outcome in advance. Second, the litigant must establish that he has exhausted the appropriate administrative remedies before applying to the courts.<sup>731</sup> This screening process cuts off a great number of potential lawsuits prior to a hearing on the merits.

#### a. Habeas Corpus

Muslims have from time to time applied for writs of habeas corpus under federal law,<sup>732</sup> taking the position that any Muslim detained in prison and

725 See *Childs v. Pegelow*, 321 F.2d 487 (4th Cir. 1963), *cert. denied*, 376 U.S. 932; Note, *Suits by Black Muslim Prisoners to Enforce Religious Rights—Obstacles to a Hearing on the Merits*, 20 *RUTGERS L. REV.* 528, 536-38 & n.63 (1966).

726 *Evans v. Ciccone*, 377 F.2d 4 (8th Cir. 1967).

727 The control of federal penitentiaries is entrusted to the Attorney General of the United States and the Bureau of Prisons, who, no doubt, exercise a wise and humane discretion in safeguarding the rights and privileges of prisoners so far as consistent with effective prison discipline. Unless perhaps in extreme cases, the courts should not interfere with the conduct of a prison or its discipline. *Tabor v. Hardwick*, 224 F.2d 526, 529 (5th Cir. 1955).

728 See Note, *supra* note 725, for a detailed discussion of the developing federal case law permitting courts to inquire into prison discipline in order to protect the religious rights of Black Muslims.

729 *E.g.*, *SanMarion v. McGinnis*, 253 F. Supp. 738 (W.D.N.Y. 1966), *enforcing* *Sostre v. McGinnis*, 334 F.2d 906 (2d Cir.), *cert. denied*, 379 U.S. 892 (1964).

730 Note, *supra* note 725, at 558.

731 *Id.* at 546.

732 28 U.S.C. §§ 2241 to 2255 (1964), *as amended*, (Supp. II 1967).

denied the right to practice Islam is wrongfully detained and therefore should be released from custody.<sup>733</sup> Normally, habeas corpus is not an appropriate remedy, since the writ lies to release someone held wrongfully, and in most cases Muslims are complaining about the application of prison rules to their cult, rather than the nature of the detention itself. Since the litigant cannot show he is wrongfully detained, the writ will not issue to relieve him of the inequalities of prison discipline.<sup>734</sup>

#### b. Civil Rights Suits in Equity

The most successful suits<sup>735</sup> brought by Muslims who claim their faith is not recognized as a religion by state prison authorities are those brought under the Civil Rights Act of 1871.<sup>736</sup> Generally, the Islamic litigant has sought to force prison officials to permit Muslims to hold religious services, to receive mail from Elijah Muhammed, and to otherwise keep the rules of Islam.<sup>737</sup> The courts will usually entertain arguments on the merits if the suit is brought in this fashion.<sup>738</sup>

### 3. *The Merits of Recognizing Islam*

Once the remedy obstacle has been overcome, the legal theory behind these suits is simple. Since Islam has been recognized as a religion for purposes of legal protection,<sup>739</sup> Islamic prisoners are entitled to practice it, provided that such practice is compatible with prison discipline.<sup>740</sup> Of course, the concept of free exercise does not give Muslims the right to conduct proselytizing campaigns in cell-blocks, lavatories, or in prison hospital wards.<sup>741</sup> Likewise, it is difficult to see how aggressive anti-white propaganda dissemination can be condoned by prison officials. It is also doubtful that any rational interpretation of the first amendment can be used to support the contention of Islamic prisoners that they are entitled by right to preach their doctrines to all listeners.

#### D. Psychedelic Religion

*State v. Bullard*<sup>742</sup> and *Leary v. United States*<sup>743</sup> involved criminal prosecutions for the illegal possession of marijuana. In each case, the defendants pleaded the free exercise clause of the first amendment as a defense to the

733 *Evans v. Ciccone*, 377 F.2d 4 (8th Cir. 1967); Note, *supra* note 104, at 560-63.

734 *Roberts v. Pegelow*, 313 F.2d 548 (4th Cir. 1963).

735 The writ of mandamus (or an action in the nature of mandamus), while theoretically useful in this area, has been little used, Note, *supra* note 104 at 558-60, and is probably of little value. Cf. *Tabor v. Hardwick*, 224 F.2d 526, 529 (5th Cir. 1955).

736 42 U.S.C. § 1983 (1964). The provisions of 42 U.S.C. § 1983 do not apply to actions by federal prison officials. *Walker v. Blackwell*, 360 F.2d 66 (5th Cir. 1966) suggests that oppressed Muslims incarcerated in federal penitentiaries may obtain relief through a suit in equity in the nature of mandamus brought under 28 U.S.C. § 1361 (1964).

737 See *Sostre v. McGinnis*, 334 F.2d 906 (2d Cir.), *cert. denied*, 379 U.S. 892 (1964); *Cooper v. Pate*, 324 F.2d 165 (7th Cir. 1963), *rev'd per curiam*, 378 U.S. 546 (1964).

738 *Id.* See also *Walker v. Blackwell*, 360 F.2d 66 (5th Cir. 1966).

739 *E.g.*, *Fulwood v. Clemmer*, 206 F. Supp. 370, 373 (D.D.C. 1962); *State v. Cabbage*, 210 A.2d 555, 564 (Del. Super. 1965).

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

741 *Evans v. Ciccone*, 377 F.2d 4 (8th Cir. 1967).

742 267 N.C. 599, 148 S.E.2d 565 (1966).

743 383 F.2d 851 (5th Cir. 1967).



crime charged.<sup>744</sup> In each case, the court affirmed the conviction on the basis of the landmark case of *Reynolds v. United States*,<sup>745</sup> which sustained the constitutionality of an act of Congress which, as applied to Mormons, rendered their religiously constrained practice of polygamy illegal.

Both *Bullard* and *Leary* show the emergence of a cult of quasi-religious practices associated with the use of hallucinogenic drugs such as peyote, marijuana, and LSD, in the wake of the "hippie" movement. The cult owes its intellectual basis to the teachings of such men as Dr. Timothy Leary. The basis of Dr. Leary's theory is the Indian occult teaching that man can experience the presence of divinity by the use of certain hallucinogenic drugs in conjunction with a program of mystical rituals.<sup>746</sup>

The notion that an experience of the divine presence can be had through the use of drugs is not a new idea. The Native American Church, an ancient religion composed of Navajo Indians, uses peyote as the central liturgical instrument in its sacramental meal.<sup>747</sup> *People v. Woody*<sup>748</sup> established that this use of peyote by the Native American Church is to be accorded recognition as a constitutionally protected religious rite.<sup>749</sup> With this one notable exception, however, the courts have been very skeptical of claims that the consumption of hallucinogenic drugs is an outward manifestation of religious dogma.<sup>750</sup> If the potential religious drug-user is to be protected by the first amendment, he must at least meet the narrow test of *Woody*, *i.e.*, he must establish that his religious convictions are sincere and that the use of drugs in his rites is material to his religious cult.<sup>751</sup> Notwithstanding the foregoing, the free exercise of one's religion does not include the right to use harmful drugs indiscriminately. After a practitioner has established that his use of such drugs is both sincere and material to his religious belief, he must introduce into evidence some showing that his use is controlled.<sup>752</sup>

Both *Bullard* and *Leary* point out that religious practices that contravene the public health, safety, and welfare may be forbidden by the state, although one's creed obliges him to perform such acts.<sup>753</sup> This, of course, is classical nineteenth century American church-state law. In applying such precedent to the drug cult practitioners, however, the courts must realize that the modern day drug practitioner has little in common with Mr. Reynolds. For, unlike the significance of polygamy to the Mormons, the consumption of drugs by the

744 *Leary v. United States*, 383 F.2d 851, 858 (5th Cir. 1967); *State v. Bullard*, 267 N.C. 599, 148 S.E.2d 565, 568 (1966).

745 98 U.S. 145 (1878).

746 *Leary v. United States*, 383 F.2d 851, 857 (5th Cir. 1967).

747 *People v. Woody*, 61 Cal. 2d 716, 394 P.2d 813, 814-18, 40 Cal. Rptr. 69-73 (1964).

748 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

749 394 P.2d at 821, 40 Cal. Rptr. at 77.

750 *E.g.*, *People v. Mitchell*, 244 Cal. App. 2d 176, 52 Cal. Rptr. 884 (1967). *But see In re Grady*, 61 Cal. 2d 887, 394 P.2d 728, 39 Cal. Rptr. 912 (1964) (drug case involving peyote eaters not members of Native American Church remanded for determination of defendant's religious sincerity).

751 *In re Grady*, 61 Cal. 2d 887, 394 P.2d 728, 39 Cal. Rptr. 912 (1964); *People v. Woody*, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

752 *People v. Woody*, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (*semble*).

753 383 F.2d at 860-61; 148 S.E.2d at 568-69.

drug cult practitioners is *central* to their religious dogma.<sup>754</sup> It is *the* method of experiencing the divine presence. Therefore, indiscriminate suppression of the drug is indiscriminate destruction of the drug cult as a religious group. The danger of developing a facile doctrine of general suppression is quite real. Consequently, the courts should be cautious to confine their reasoning to the exact issue in each case, *i.e.*, whether, under the particular circumstances, the consumption of the drug must be prohibited and the user must be punished under the police power.

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*Thomas J. Reed*<sup>758</sup>

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754 See *People v. Woody*, 61 Cal. 2d 716, 394 P.2d 813, 818, 40 Cal. Rptr. 69, 74 (1964); *State v. Bullard*, 267 N.C. 599, 148 S.E.2d 565, 568 (1966).

755 Text accompanying notes 1-229 *supra*.

756 Text accompanying notes 230-399 *supra*.

757 Text accompanying notes 400-634 *supra*.

758 Text accompanying notes 635-754 *supra*.