Notre Dame Law Review

Volume 36 | Issue 4 Article 9

8-1-1961

Book Reviews

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EQUITY AND LAW: A COMPARATIVE STUDY. By Ralph A. Newman. New York: Oceana Publications, Inc., 1961. Pp. 280. $7.50. Sixty-five years ago Mr. Justice Holmes doubted "whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal terms uncolored by anything outside the law" even at the cost of losing "the majesty got from ethical associations."[1] How far we have since traveled from this point of view may be noted in Professor Ralph A. Newman's approach in his most valuable study of the substantive fusion of law and equity. He sees the main body of our law cut off from that "system of elevated moral principles which we call equity,"[2] and which is still regarded as separate from the general law. Unlike all the other great legal systems of the world, in which these principles are applied throughout the law, ours alone applies them in a relatively narrow area. This restriction contributes to the "sharp differentiation between law and morals" found only in the Anglo-American legal system and impeding the "approximate approach by law to ideal justice."[3] Professor Newman proceeds to compare our treatment of equitable principles with that of other legal systems in the light of the varying results achieved.

Since the end of any legal system is "social justice"[4] why limit the application of equity's elevated moral principles to a single portion of the law? Since law now "emanates from popular sovereignty" it is senseless to insist today upon equity as a separate substantive body of principles restricted functionally to the correction of some co-ordinate body of legal rules, or to relief from injustice in special types of cases,[5] for "every case presents a moral problem, and almost all moral problems are unique."[6] To resist the complete fusion of law and equity obscures the identity of equity with justice and prevents the application of equitable solutions of the problem of relief from hardship[7] when the plaintiff's complaint sounds not in "technical equity" for specific relief, but in common law for damages alone. Our separate system of equity is the fruit of an accident of history nearly five centuries ago. The subsequent rationalizations which have perpetuated a double standard of justice in our system are threadbare in a day when, as Dean Pound points out in his introduction to Professor Newman's book, "the need is more and more for general principles" and the "time becomes unsuited for a regime of rules."[8] Professor Newman's thesis is clear. The moral principles created and systematized in Chancery long ago by men who drank deeply at the well-springs of natural law should flow freely through the entire body of our law. Equity is not a special form of justice reserved for Sundays.

Why then the persistence of the sharp distinction between law and morals, the substantive separation of law and equity, in our system? Professor Newman restates the circumstances which led to our separate court of equity, and hence to the development of an isolated body of equitable principles. Comparative legal history shows that other legal systems also felt the early demand for institutional devices to supplement and temper in the name of justice the oft-times harsh incidence of law considered as a set of strictly defined rules. We are reminded of Aristotle's treatment of *epieikeia*, of the labors of the Roman praetors, of St. Louis IX holding his own court of justice under the oak of Vincennes. In our own history, as Pollock and Maitland pointed out,[9] long before the Chancellor began to sit in his independent court of equity with his own procedure and with remedies

1 HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 179 (1921).
2 Text at 5, (author's note).
3 *Id.* at 15.
4 *Id.* at 255.
5 *Id.* at 5, (author's note).
6 *Id.* at 16.
7 *Id.* at 13.
8 *Id.* at 9.
9 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW 595 (2d ed. 1923).

of his own invention by way of specific relief, common law judges did not disdain to administer a species of what we would later call "equity." For better or for worse (and in the long sweep of history it may have been the former) the common law courts relinquished this nascent equitable jurisdiction and for "equity" one went thereafter to the Chancellor alone. Two substantive law systems developed side by side in more or less peaceful co-existence, occasionally disturbed by political pressures and jurisdictional jealousies, which diminished when the length of the Chancellor's foot ceased to be the measure of equity, and Chancery precedents became quite as stable as those of the sister courts of the common law.

Nineteenth-century procedural reforms did not produce the substantive fusion of law and equity, if indeed such fusion was ever the intent of the reformers. Five centuries of separation had established an inveterate tradition. Right measured by writ, though wounded, lived on. Even the Federal Rules of Civil Procedure of 1938 left unchanged the substantive distinction between legal and equitable remedies; equitable defenses did not become legal defenses; the principles guiding the courts in granting or refusing injunctive relief remained the same.[10] In the 20th century courts will still say that in an action for specific performance the "principles of ethics have a more extensive sway than in ordinary cases."[11] For Professor Newman such propositions are anachronisms, their rationalizations devoid of sense.

What then are the effects of the bifurcation of our legal system? How do they compare with the effects of complete fusion of law and equity in the other great world legal systems?

In successive chapters, brilliantly concise, with a wealth of citations to Anglo-American case law and to the codes of other legal systems (French, German, Swiss, Italian, Russian, Scots, Islamic, Austrian, Hungarian, Polish, Scandinavian, Spanish, Greek, Chinese, Japanese, Swedish, Indian) the author compares the effects of our resistance to the complete coalescence of law and equity with the results achieved in systems which do not admit that justice means one thing in "equity" and something else in "law." Selected for this comparative study are areas which we traditionally consider as peculiar to "equitable jurisdiction," *e.g.*, unfairness in the negotiation and formation of contracts, mistake, frustration, hardship, unjust enrichment. From the standpoint of the demands of justice it is our system which appears to come off second-best in the provocative comparison which Professor Newman makes between the results of our system restricting the sweep of moral principles to cases traditionally within equity's exclusive domain, and those systems in which no such hampering limitations obtain.[12] In a fascinating chapter Professor Newman shows how much more completely the doctrine of mistake has been extended and enriched in other systems where anything short of total fusion is simply incomprehensible. In another chapter it is submitted that the development of the doctrine of frustration in contract law lags far behind its progress in other systems. Elsewhere, judges are not constrained by the debris of past history to make the nature of the desired remedy — whether for specific relief or for damages — the sovereign test for invoking the higher ethics known to equity. Professor Newman has made a lasting contribution to comparative law. Students, teachers, lawyers and judges will remain his grateful debtors.

Although this able study advises a complete substantive fusion of law and equity, the question remains whether such fusion can be achieved short of the total codification of Anglo-American law. Lord Evershed thinks not.[13] The same point is implicit in Dean Pound's remark that our nineteenth century procedural

10 Text at 51.
11 *Siess v. Anderson,* 159 Mo. App. 656, 139 S.W. 1178, 1179 (1911).
12 *E.g.,* Text at 188.
13 Evershed, *Equity after Fusion,* 1 JOUR. OF THE SOC. OF PUB. TEACHERS OF LAW 171, 181 (1947), quoted in Text, 52-53.

reforms "came too soon."[14] One may debate whether complete codification is desirable, possible, or practicable. Our system is the child of case-law, owing little of its inner spirit or genius to codification. Indeed the very systems which Professor Newman rates as superior to the Anglo-American system are codified. One may therefore question the validity of conclusions drawn from a comparison of systems so essentially different in their origins, traditions, and techniques.

Professor Newman realizes that through human law only an approximate approach to ideal justice is possible.[15] Like all commodities, codification has its price. Similarly, a price must be paid for our uncodified system of case law. Each system has its peculiar values. Some may think that for us the price of codification may come too high.

Nevertheless, through a tedious but steady process, our courts, still operating under a regime of separation of substantive law and equity, have power to develop common law substantive rules with greater approximation to ideal justice. What sovereign decree prevents them from picking up the threads of equity dropped by the common law judges of five centuries ago? Lord Mansfield may have failed to exorcise the doctrine of consideration in *Pillans v. Van Mierop*[16]; however, he succeeded in creating new frontiers for quasi-contract in *Moses v. Mac Ferlan*[17]. Legislation, slowly supplementing the traditional case-by-case technique, and remedying "what flaws may lurk" therein is still possible and fruitful.[18] The demands of order, of certainty, of predictability — not the least of the *desiderata* of a system of justice according to law — may suggest that for us the complete substantive fusion of law and equity through total codification would not be an unmixed benefit. The Rule of Law cannot become a law without rules.

Nevertheless our history shows that equity and law were not parted by a divorce *a vinculo* and perhaps the old anecdote of Lord Chancellor More has its own deeper symbolism:

> Whensoever he passed through Westminster Hall to his place in the Chancery by the Court of the King's Bench, if his father, one of the judges thereof, had been sat ere he came, he would go into the same Court and there reverently kneeling down in the sight of them all, duly ask his father's blessing.[19]

*Edward F. Barrett**

LIFE, DEATH, AND THE LAW. By Norman St. John-Stevas. Bloomington: Indiana University Press, 1961, $5.95. This book is about law and morality. The precise object of inquiry is whether and to what extent the public law, particularly the criminal law, should uphold and give penal sanction to moral standards of behavior. The law in the book is Anglo-American, with some small reference to continental codes; the morality is Christian, though this must be said rather broadly, because of sharp controversy over the moral issues, principally between Catholics and Protestants and liberal Protestants. The author himself is a Catholic, an English lawyer and legal scholar in his very early thirties. He shows legal prudence and wisdom extraordinary in a man so young. His analysis of the pertinent literature — legal, theological, and sociological — is thorough, unpretentious, and clear. His recommendations are fair-minded, objective, and practical. The book is an all-around excellent one: cogent, clear, and rationally persuasive, in controversial

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14 Text at 53, quoting Pound, *The Etiquette of Justice* 3 (address before the Nebraska State Bar Association, November 24, 1908).

15 Text at 15.

16 3 Burr. 1664, 97 Eng. Rep. 1035 (K.B. 1765).

17 2 Burr. 1006, 97 Eng. Rep. 676 (K.B. 1760).

18 *E.g.*, N.Y. PERS. PROP. LAWS § 33.

19 Roper, *The Lyfe of Sir Thomas More, knighte,* quoted in REYNOLDS, ST. THOMAS MORE, 10 (1958).

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matters in which some other writing, perhaps of partisan religionists, has been fuzzy-minded, strident, and doctrinaire.

Law and morality are different from each other. Law looks to external order and public peace. The sanctions of law are external and public. Intention has no significance in law unless it is carried out in the overt act. Morality, on the other hand, is interior in both aim and sanction; the interior act, in quality and intention, has ruling moral importance even anterior to, or apart from, its external performance. If there is overlap between the two — and it is known that there is — this is because in a given society some "sin" is also seen as a "crime": an offense so harmful to public order and civil peace as to require the external sanctions of law as well as the inner condemnation of conscience. Examples, still operative even in our pluralist society, are murder, rape, theft, etc.

But Mr. St. John-Stevas' book deals with six forms of activity which have a lot of law and morality connected with them, but which do not now receive the same unanimous moral condemnation that we still accord to murder and rape. These are: contraception, artificial insemination, homosexuality, suicide, sterilization, and euthanasia. All of these are covered in Anglo-American law, mostly in the criminal law either by way of prohibition or regulation, but most of them also have consequences in the civil law, in questions of annulment and divorce, inheritance, administrative law, and actions for damages. And clearly these activities are in the law by reason of sin, by reason of a former moral condemnation. Anglo-American law is based on a Christian moral code which not too long ago enjoyed an assumed or real commonness of theoretical assent, but which is now in dispute, not only between Christians and secularists, but also among Christians themselves. The theoretical community is now absent, but the laws remain. At no time did the law attempt to make all sins crimes. But the law has intervened, in one way or another, in the six forms of activity covered in Mr. St. John-Stevas' book; and here controversy lies, on the moral grounds which in the first instance gave rise to the laws.

Controversy lies mainly between the Catholics on one side and all other parties on the other. In an introductory chapter Mr. St. John-Stevas analyzes briefly the basic division, in theory and history, that separates Catholics and Protestants in the question of law and morality. From the beginning of the split, Catholics and Protestants differed on the two questions of the origin of moral duty and on the nature and function of the state. Catholics saw moral duty as contained in and required by nature, particularly the nature of man. Human nature was harmed, but not destroyed, by sin. Human reason is capable of coming to an adequate knowledge of nature's structure and laws; and the law of human nature, or the moral law, consists in man's duty to fulfill nature as rationally known by reason. Along with Catholic optimism over nature and reason went a positive theory of the state. Since man is by nature a social animal, the state is a product of nature, and, since natural, good. The state would have existed apart from sin and regardless of sin. In a sinless society the state would have existed to put organization and structure into virtuous activity. Against this background, it is to be expected that Catholic thought would have assigned a positive function to the state to make and execute laws furthering the ends of nature and promoting the common good of man.

In Protestant thought, nature was corrupted by sin, and human reason therefore corrupted along with the rest of nature. Nature and reason are not only inadequate but completely untrustworthy norms of moral conduct. Good moral conduct consists in getting out of nature, rising above it, not following sinful reason as a norm, but exercising personal liberty with faith in Christ. And the state itself is the product of sin, suffused in sin, utterly incapable of providing moral direction and virtuous leadership for its citizens.

Such is the background of the controversy. The development since has not

been consistent by any means. For example, it was Protestant activity, not Catholic, that originally put into the public law many of these morals-based laws that some Catholics now strive to uphold, while Protestants and others want them out. The emergence of a new Protestant orthodoxy has tended to widen the split in some respects, while opening the way to more understanding discussion in others. The theoretical cleavage on law and morals gives the explanation of much of the irritation and resentment between Catholics and Protestants in these matters. Protestants resent Catholic attempts to lay down the moral law for everybody else. The Catholic claim that the moral law as interpreted by the Catholic Church is universal and not sectarian irritates Protestants endlessly. Catholics, conversely, are bewildered and annoyed by the absence of body and principle, and by the personalist and changeable character, of Protestant moral theology. And Catholics resent the lining-up of Protestants and secularists on the same side of many questions where Catholics think solid human values are endangered.

The chapters of Mr. St. John-Stevas' book attempt to establish and apply principles and guide-lines to aid the law in this touchy matter of legislating morality. The law should bear in mind its outer-directedness towards public order and external peace. Thus prohibition of private homosexual activity between consenting adult males, for instance, should go out of the criminal law. Again, public law in moral matters requires a "moral consensus," in the absence of which groups should refrain from pushing for laws as part of a power struggle in which the moral issue itself tends to get lost. The Catholic side of the contraception issue no longer enjoys a moral consensus, and the Catholic body in, for example, Massachusetts and Connecticut has no right to enforce its view through public law. However, though moral consensus may be lacking in a portion of an issue, it may be present or at least possibly present in another portion. Thus Catholics, abandoning the struggle for legal prohibition of contraception, may still rightly press for legislation against advertising, sale to unmarried minors, sale from slot-machines, and provisions for contraception in foreign-aid programs. Whether a moral consensus exists as to a given issue should be determined by peaceful democratic processes. No group should attempt to use naked power, but rational persuasion only. Mr. St. John-Stevas suggests that the Catholic legislators of Connecticut might, for a change, turn their attention towards the state's compulsory sterilization law, just as much against Catholic morals as contraception, and discover if they might find a moral consensus for the repeal of that.

No side is favored in Mr. St. John-Stevas' book. Catholic intransigence has placed the Catholic Church in the unwelcome, unrewarding, and ultimately impractical role of watchdog of everybody's conscience. But Protestant and liberal Protestant relativism, personalism, opportunism, changing with the times, joining up with anybody, place Protestants under a strong necessity of coming to some decision as to where, morally, they stand. Short of bloody murder, there seems now to be almost no manifestation of human behavior that does not find some ministers and others willing not only to condone and permit, but enthusiastically to support and sign petitions for. Besides the Catholic and Protestant, other positions, secularist-liberal and utilitarian, receive review and criticism in this book.

Life, Death, and the Law is a truly didactic book, in the best sense of that word. It teaches, and the reader learns from it. It is full of good law, good moral theology, and good sociology and criticism. It is clear, cogent, and persuasive throughout its development, arguments, and recommendations.

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THE PLANNING AND ADMINISTRATION OF ESTATES. Edited by René Wormser. New York: Practicing Law Institute, 1961, Pp. 324. $——. In the summer of

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1958, the Practicing Law Institute held a two-day session in New York City during the course of which the affairs of a hypothetical client, Androcles Simpson, were analyzed by two successive panels of outstanding experts in the field of estate planning and administration before a gathering of six hundred practicing lawyers from all parts of the nation. The first panel, consisting of William J. Casey, W. T. Hackett, Robert J. Lawthers, Merle H. Miller, Peter Miller, William E. Murray, Norman A. Sugarman and James F. Thornburg, under its moderator, René A. Wormser, discussed the planning of Mr. Simpson's estate. The second panel, consisting of Kingsbury Browne, Jr., Bernard V. Lentz, Joseph W. Price, 3rd., Martin F. Shea, Jr., Lloyd George Soll, William K. Stevens and Eustace W. Tomlinson, under its moderator, Henry Cassorte Smith, tackled the problems of administrating Mr. Simpson's estate after his convenient but "untimely" death. These panel discussions were recorded and were subsequently edited and supplemented by Mr. Wormser. The result is a publication which is a unique contribution to the materials available to the practicing attorney, which so frequently are unimaginative in their approach to legal problems in the area of estate planning techniques.

In his preface, Mr. Wormser states that "of the various ways of learning more about estate planning and administration, I believe the panel method to be the most rewarding." For those who have never had the good fortune to have attended any of the many panel performances which have been conducted under the direction and moderation of Mr. Wormser in the past, this modus operandi will open new vistas of methods, approach and judgment in handling the tax, property and human problems of estate planning, and they are certain to agree that the panel method is "most rewarding." For those who have been fortunate enough to have been present during such a panel discussion, this book will be extremely welcome since it now affords the reader the opportunity to sit down in leisure and private seclusion to meditate and ponder the many interesting and fascinating aspects of estate planning and administration which are raised by these outstanding panels.

Each panel deals in clinical fashion, on an advanced level, with typical estate planning and administration problems (although the solutions suggested are not always typical), and, therefore, a rudimentary knowledge in this field is presumed. Thus, this book is not designed for the novice except to the extent that it makes him aware of the areas in which his knowledge may be insufficient — and, everything else to the contrary notwithstanding, ignorance is not always bliss.

The discussion of each panel is based on stated facts which were distributed in advance to the audience and which are set forth in detail in the book. Naturally, the affairs of Mr. Simpson, his assets and his personal family problems, are extremely complex in order to present sufficient opportunity for the panel to analyze a wide range of specific problems, make recommendations and indicate how to implement such recommendations. Mr. Simpson's net taxable estate for federal estate tax purposes is approximately $1,500,000.00, with a wide variety of assets including a cabin cruiser, stamp collection, real estate in New York, Florida and Louisiana, listed securities, complete ownership of a closely held corporation, life insurance, a vested remainder interest in a testamentary trust created by his grandfather, and a power of appointment in a testamentary trust created by his father. Mr. Simpson's family problems are equally imposing. He has a second wife who is an ideal companion and mother, but who is completely inadequate in financial matters. He has a son by his first wife, who is in very poor health, five children by his second wife, one of whom is definitely retarded, an orphan grandchild, and an aged mother-in-law in failing health. Here is a client who should be welcomed with open arms by the practicing attorney.

Each member of the first panel is an expert in the field of taxation and much of the discussion necessarily centers around tax considerations since every phase

of Mr. Simpson's estate is affected by this aspect of the law. However, the principal objective of the panel is to provide an estate plan which, in the words of the editor, will open the client's eyes "to exciting and intriguing prospects — not merely for tax savings but, more importantly, for creating an effective and sound plan related to the persons whose welfare should dictate the objectives." This objective permeates the entire discussion and the panelists themselves frequently caution one another that they may be losing sight of primary objectives when, in their eagerness, they may have struck upon a new concept or a new idea which will eliminate cash from the coffers of Uncle Sam. For example, midway through the proceedings of the first panel, Mr. Murray issued such a warning when the panel appeared to have agreed upon a form of buy-sell agreement between Mr. Simpson and Lion Mfg. Corp., of which he was the majority stockholder. In order to make certain that the redemption of the deceased stockholder's interest in the corporation did not constitute a constructive dividend, a suggestion was made that there should be no tie-in between the buy-sell agreement and the obligation of the corporation to carry insurance on the life of Mr. Simpson; to which point Mr. Murray took exception in the following statement:

> That brings up other considerations, as distinguished from the tax factors. If you drop the buy-and-sell agreement, the majority shareholders can have the insurance collected, pay themselves big salaries, use the money to buy a new plant, etc., while the widow screams for action and the estate stock remains unliquidated. It becomes a question whether you wish to take some risk in using a buy-and-sell agreement or lay yourself open to frustration through the other shareholders' recalcitrance.
>
> I have never believed that tax considerations should govern entirely. I think we must consider, carefully whether, in being too anxious to avoid any possible tax risk, we are failing to protect our client.[1]

Thus, this book is much more than just a tax handbook in the field of estate planning. It is a practical treatise which interrelates all phases of estate planning in broad perspective.

Two basic and integrated themes pervade the discussion of the first panel. The first theme is liquidity. Will there be sufficient liquid assets at Mr. Simpson's death to pay all debts, administration expenses and death taxes? If not, what are some of the methods by which additional liquid assets can be made available or, in the alternative, what are some of the methods of reducing the amount of liquid assets necessary at his death?

The first and most obvious solution is the full utilization of the marital deduction which will reduce the federal estate tax at death and thereby reduce the amount of liquid assets required at that time. What is the best method of capturing the maximum marital deduction? Is it wise to give Mrs. Simpson the right to withdraw principal from the so-called marital deduction trust? What about protecting her from the "swami" by giving her, instead, a power of appointment exercisable only at her death? Or should the wife have the right to consume capital from the marital deduction trust, with income from both trusts going to the children (who will be taxed at a lower rate), protecting the widow with a "sprinkling" clause in the non-marital deduction trust which authorizes the trustee to distribute income among a designated group, including the wife. These questions, and many others pertaining to the use of the marital deduction, are considered and discussed in detail by the panel.

Another mechanism for providing liquidity at death is the use of gifts during life. The advantages are considered and discussed by the panel, viz.: the privilege of split-gifts made with the consent of a spouse; the annual exclusion of $3,000.00 per person; the life time exemption of $30,000.00; the fact that the gift tax rates are lower than the estate tax rate and, consequently, in making the comparison, the estate tax rate must be established by superimposing the fund in question

1 Text at 63.

on the rest of the estate, while, in computing the gift tax, the rates which apply are those reached by superimposing the fund only on gifts already made. The danger of a gift in "contemplation of death" is considered and suggestions are made as to how to mitigate this element of risk.

Next, the panel reviews the intriguing possibilities for estate tax diminution through gifts to charitable institutions. The savings in estate tax resulting from a testamentary gift is apparent since the gift is deductible from the gross estate. However, if the gift is made during the lifetime of the donor, there are multiple tax savings since the income taxes are saved during life and the property is not included in the estate of the donor at his death. One particular form of lifetime gift to charity which protects the ultimate beneficiaries of the donor is a charitable term trust by which the donor gives the income rights for a term of years to the charity with the remainder to the members of the family. This increases the current cash position of the donor because the actuarial value of the interest given to charity is currently deductible and a deferred gift is made only on the value of the remainder interest. Depending upon the tax bracket of the donor, it is actually possible to make money on some term trust gifts to charity.

The reverse kind of charitable trust also has terrific potentialities. In this type of trust, the remainder goes to charity and the life interest is reserved to the donor. The donor can use appreciated securities for the trust, and, if there is compliance with Revenue Ruling 60-370[2] they can be converted into tax-exempt bonds by the trustee without paying capital gain on the appreciation of the converted securities, since the capital gain is chargeable to the charitable remainder interest and is tax free. Thus, the donor receives an income tax deduction for the remainder interest, computed at the appreciated value of the securities placed in trust, plus a conversion without capital gain, and he receives tax-exempt income during his life. Since the donor retains a life income in the trust, the value of the trust at his death will be included in the gross estate. However, the then value of the charitable remainder will be deductible from the gross estate and, in addition, the estate will be entitled to the maximum marital deduction. In other words, the marital deduction is determined without reference to the charitable deduction.

In the same manner, the panel considers other methods of solving the liquidity problem, viz.: the obtention of more insurance if the client is still insurable, possible conversion of existing policies, change of beneficiary designations on policies so as to obtain the maximum marital deduction, gifts of insurance policies, either in trust or directly, sale of assets during life or, by a buy-sell agreement, after death (with special regard to Sections 302, 303 and 306 of the Internal Revenue Code of 1954) and the use of United States savings bonds purchased at a discount for estate taxes under Section 632 of the 1954 Code.

The second theme is the general consideration of the client's objectives. The preservation of the family enterprise is high on the list of Mr. Simpson's objectives and, because the problem of management succession is important, there is a detailed consideration of deferred compensation, both qualified and non-qualified plans, including long-term employment contracts, pension and profit-sharing plans, stock options and stock bonus plans. Through the maximum use of the advantages offered by such plans, the client can do much to obtain qualified executives and subsequently retain their loyalty. By tying the executive to the business through one or more of these plans which create self-interest, greater loyalty can be assured after the proprietor's death.

Another objective of the client is the establishment of plans which will pro-

2 Revenue Ruling 60-370, 1960 Int. Rev. Bull. No. ——, at ——, holds that the donor would be taxable with capital gains realized upon the disposition of the appreciated property by the trustee, if the trust instrument required the trustee to make such sale or if such an obligation were implied from all of the surrounding facts, notwithstanding an absence of mandate to sell in the trust instrument itself.

vide for specific beneficiaries. The use of the short term or so-called "Clifford" trust is considered in detail as a mechanism which will accommodate such beneficiaries as the children, grandchildren and aging mother-in-law. This type of trust will protect the client since he will have the reversionary interest, and yet it will provide temporary benefits to specified individuals with a consequent reduction of income taxes since the income will not be taxed to the settlor but will be taxed to the beneficiaries who will be in a lower income tax bracket.

Specific plans are considered for the protection of the incompetent son, the ailing son and the daughter-in-law (the "forgotten woman"). The problem of guardianship of the "person" of the minor children is discussed and specific recommendations are made.

As previously indicated, the second panel assumes the death of Mr. Simpson and then considers the myriad problems created by the administration of his estate. It is impossible to review in detail the specific problems considered by the second panel, but from the size and scope of Mr. Simpson's estate as set forth above, it should be easy for the reader to imagine the complexities facing the persons responsible for administrating the estate. These problems are given the same comprehensive treatment as that which was given to the planning of the estate by the first panel.

Neither panel attempts to provide ready-made solutions for ready-made problems. In fact, the experts frequently do not agree among themselves. However, the book does provide an endless supply of ideas and imaginative techniques from which the practicing attorney can benefit immensely.

We would be remiss if we did not point out the fact that humor and spontaneity are essential ingredients of the panel method. In the midst of a very serious discussion about the Treasury Regulations which provide, that where a grandparent establishes a "support" trust for a grandchild, the income of the trust is taxable to the parent to the extent it is used for reasonable support, Mr. Murray reports the reaction of a very wealthy grandfather whose daughter was divorced by a ne'er-do-well son-in-law:

> "Fine. We will give Fifty Thousand Dollars a year to these children. We will bankrupt my son-in-law."[3]

Perhaps such comments are the real reason why Mr. Wormser considers the panel method to be "most rewarding."

*Edward J. Gray**

THE TAX PRACTICE DESKBOOK. By Harrop A. Freeman and Norman D. Freeman. Boston: Little, Brown and Company, 1960. Pp. xx, 581. $17.50.

> The schoolboy whips his taxed top; the beardless youth manages his taxed horse with a taxed bridle on a taxed road; and the dying Englishman, pouring his medicine, which has paid seven per cent, into a spoon that has paid fifteen per cent, flings himself back upon his chintz bed which has paid twenty-two per cent, and expires in the arms of an apothecary who has paid a license of a hundred pounds for the privilege of putting him to death.[1]

If any area of the law can be said to cut across all other areas, it is tax law. The ability to deal quickly and efficiently with tax matters is no longer important to the tax specialist alone, but to every attorney and businessman. Two members of the New York Bar have made a valuable contribution to the literature of this pervasive subject. Calling upon 25 years of tax practice and 15 years of tax teaching, Harrop A. Freeman and Norman D. Freeman have attempted a comprehensive study of the procedural aspects of tax matters. They have singled out

3 Text at 142.

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1 Text at 4.

the procedural phase of tax law because, in their own words, "Attention can be focused on the real tax questions far better if tax practice is so smoothly and knowingly followed that procedural errors do not divert attention."[2]

In their preface the authors address their book to the general legal practitioner, the accountant, the tax specialist, the student, and the businessman.[3] However, since the authors frequently assume that their readers possess legal training, the book's usefulness to accountants and businessmen might be somewhat limited, although parts are of benefit to non-lawyers.

Much of the material in the book is likely to be second nature to tax specialists; but it will be a helpful tool even to the expert; it could be the starting point for researching every tax case. Needless to say, if the book can be so important to a man who often handles tax matters, it can be doubly important to the general practitioner and the tax student. It provides all the answers for the general practitioner handling routine tax problems and warns him when his case is so involved that a specialist should be consulted. The student will find good use for the book in supplementing the knowledge of substantive tax law that he acquires in his regular taxation courses.

The authors take a dual approach to their subject. Basically they use a "Hornbook" style, interspersed with bits of personal hints and opinions through which the authors share their own tax experience.

This book is a comprehensive legal treatise. The exhaustive treatment of tax procedure law is supplemented by enough substantive tax law to enable the practitioner to get a good start on any tax research from one book. The authors also discuss other areas of the law such as the Federal Rules, estoppel, and res judicata. However, they avoid making their approach too broad; they limit consideration of these matters to their application to tax cases.

The law of tax procedure is treated in a framework which explains the different steps through which a tax problem may proceed — from preparing a return to arguing an appeal. Throughout the book, the authors list the alternatives a taxpayer has at each level of a tax case and present the requirements for an adequate approach to the problem. If there is a minority view on a particular problem the authors are careful to bring it forth. They seldom review the reasoning which supports such a second line of authority, but, by comprehensive footnoting, supply instead a starting point for the researcher interested in complete coverage.

When the authors need to illustrate a point, they need not call upon X or Y or Blackacre, but instead can cite actual cases they have handled. They are able to tell the reader what they have found to be the attitude of the Internal Revenue Service and the Tax Court; they remind practitioners to watch certain cases now pending in courts; they point out what they feel are the current trends in the law. When the law is unsettled on a particular point, they give their opinions on what the law appears to be and advise the reader on what they think should be done if a case involving the point must be handled.

Frequent check lists are another major attraction. These lists resemble those which every careful practitioner draws up from experience to save himself time when handling subsequent cases. Mention has already been made of the lists of alternatives at various stages of the taxation process. There are also check lists designed to prevent any omissions or common errors in handling specific types of problems and proceedings.

Chapter I is entitled "General Tax Practice." The theory of tax practice, procedural choices, and qualifications for admission to practice before the Treasury Department and the Tax Court are discussed. There is also an introduction to the research tools of tax practice and how to use them. It is important for one

2 *Id.* at vi.
3 *Id.* at v.

who has not done much tax work to become acquainted with the last part of this chapter, since the extensive footnoting of specialized tax law sources which marks the rest of the book requires considerable familiarity with these sources.

The second chapter, "Preventive Tax Practice," contains tips on conducting a business in order to avail oneself of tax advantages—a full discussion of preparing returns, ranging from corporate income to estate tax. The authors explain how to get federal and state tax rulings, and the values of such rulings to the preventive tax practitioner. Finally the authors discuss what records a taxpayer should keep. The first of the check lists in this section is a compilation of the advantages and disadvantages of filing a consolidated return;[4] the second is a list of the tax duties of an executor or administrator.[5]

The next chapter is on facts — how to get them, and how to prove them.[6] It begins with a check list[7] of steps and the practitioner should take in discovering and organizing his facts, which is expanded and analyzed later in the chapter.[8] There are copious illustrations.[9]

Chapter IV concerns the organization, policies, attitudes, powers, and procedures of the Internal Revenue Service, including IRS policy on the publicity of tax returns, one of a series of discussions of attitudes and policies of the IRS toward taxpayers.[10] There is also a simplified chart showing the internal procedure of the department in income tax disputes.[11]

The fifth chapter, "Deficiencies and Overassessments," begins by continuing the discussion of the Internal Revenue Service. The pre-decision procedures, the auditing process, the 30-day letter, the Appellate Division, and the 90-day letter are all treated. The authors discuss the alternatives open to the taxpayer and how overassessments should be handled. There are three very useful charts at the beginning of the chapter: on the processing of income tax returns from the taxpayer to the Supreme Court;[12] on the flow of tax cases; and on the taxpayer's alternatives at the various stages.[13] The authors draw upon their experience to provide some hints on how to negotiate and compromise with the Internal Revenue Service,[14] and how to treat a field auditor.[15]

The Tax Court is the subject of the next chapter and the discussion begins with an explanation of its organization and its jurisdiction. Tax Court petitions, answers, and replies are treated, as are pre-hearing, hearing, and post-hearing procedures. Rules of evidence, burden of proof, and brief requirements are among the other subjects discussed. The authors use a Tax Court petition to illustrate its form and content.[16]

The chapter on the Department of Justice explains its organization and its treatment of civil, criminal, and appellate tax cases. Chapter VIII, "Refunds," includes a discussion of pre-court refund procedure, as well as how and by whom suit may be brought. The authors outline the considerations which should be weighed in choosing one's forum and then explain tax practice in the district courts and in the Court of Claims. There is a long check list to help the reader fulfill all the requirements of a refund petition. The discussion of related procedural areas

4 *Id.* at 39.
5 *Id.* at 46.
6 *Id.* at 22.
7 *Id.* at 71.
8 *Id.* at 80.
9 *Id.* at 72-80.
10 *Id.* at 115-119.
11 *Id.* at 114.
12 *Id.* at 144.
13 *Id.* at 145.
14 *Id.* at 160, 161.
15 *Id.* at 147-149.
16 *Id.* at 199.

of the law (*e.g.*, res judicata[17]) is confined to their relation to tax law.[18]

The next chapter discusses appeal of tax cases from the Tax Court, from the district courts, and from the Court of Claims. In the last section the authors comment on the sort of cases the Supreme Court has reviewed in the past and what it is likely to review in the future. A convenient check list is provided for appealing a Tax Court decision.

In Chapter X the procedural problems of limitations, estoppel, and res judicata are fully considered. The problem of collection and enforcement is also discussed. Three charts are used to summarize the statute of limitations provisions as they apply to assessments and collections, refunds, and court proceedings.[19] Each chart lists the limitations and provisions of both the 1954 and the 1939 Codes.[20]

Penalty cases are the subject matter of the next chapter, which discusses fraud, net worth, and criminal cases. The authors also advise as to compromise of penalty cases. This chapter, like the one preceding, begins with charts, which list the civil and criminal penalties provided for in the 1954 and 1939 Codes.[21] There is a final diagram showing the administrative procedure in tax fraud cases.[22] The final chapter is "How to Brief a Tax Case." In it the authors adopt and explain the Department of Justice's outline of a brief.

No book review can really do this work justice — it must be seen to be appreciated. It is the type of book that every man who handles tax matters ought to have. Reference to it might well be the initial step in handling any tax case.

*David T. Link**

INSURANCE AND PUBLIC POLICY: A Study in the Legal Implementation of Social and Economic Public Policy. By Spencer L. Kimball. Madison; The University of Wisconsin Press, 1960. Pp. xii, 387. $7.50 (with full documentation); $6.00 (regular edition). This study of one state's development in the field of insurance law is an ambitious undertaking to relate a "part of the story of American insurance law."[1] In the preface, the author notes the volume of material available to the researcher and concludes that the best course is to deal fully with the development of insurance law in one state, "leaving wider generalizations for the future."[2] The selection of Wisconsin as the state to be studied, instead of a more prominent state such as New York, is defended as a choice of a state more typical of the general American growth. This reviewer remained unconvinced throughout the book that the unique experience of Progressivism did not render the state extraordinary.

> The research for this study was done under a grant from the Rockefeller Foundation, as one of similar inquiries into "legal history" in Wisconsin. As interpreted in the larger program of which this is a part, legal history is not a narrowly conceived study of the antiquities of technical legal doctrine, but is an investigation into the interplay of law and society — into the legal implementation of social and economic public policy.[3]

Within the framework of this purpose, the author's undertaking is twofold, as the title suggests: first, the material object, the history of insurance law in

17 *Id.* at 278.
18 *Id.* at 323.
19 *Id.* at 340-346.
20 *Ibid.*
21 *Id.* at 406-409.
22 *Id.* at 441.

* 1961 graduate, Notre Dame Law School; Teaching Fellow in Accounting, College of Commerce, University of Notre Dame.

1 Text at v.
2 *Ibid.*
3 *Ibid.*

terms of relevant legal materials, is to be recounted; and secondly, the formal object, the development of insurance law as an integral part of the expression of public policy, is advanced as a thesis to be developed and proven.

The author's treatment of the history is admirable, both for its completeness and for its intelligibility. The more complete documentation is contained appendix-fashion as 40 extra pages in the special edition, but the omission of these does not seriously impair the value of the story to be told since the text is partially annotated. The actual arrangement of the subject is dictated by the formal object, but as a proper historian, the author preserves internal objectivity in the narration.

Following a general introductory section, the structure of the book is as follows: "Validation of the Insurance Enterprise"; "Creation of an Adequate Insurance Fund"; "Protecting the Integrity of the Insurance Fund against Dissipation"; "The Administration of Claims"; "The Distribution of the Fund"; "Insurance in the Larger Society"; and "Conclusions." The treatment of the relations between public policy and the insurance business is historical, but the arrangement is logical rather than chronological, "logical as considered from the vantage point of the business rather than from that of the conceptual framework of the law."[4] The writer takes the point of view that the law takes its initial premises from the life of society outside the law and it ultimately justifies legal decisions in terms of social goals and moral standards. As a result insurance is viewed as an aspect of the life of society, and insurance law as an expression of public policy.

This approach enables the author to write much more than a history of insurance, as indeed this work demonstrates, while limiting the documentation to the appropriate insurance data. However, since this work does not purport to present a consistent theory of history, it should not be condemned on that score, but its conclusions could be questioned by one whose particular historical views conflict with the basic assumptions of the author.

In a section discussing insurance law as reflective of public policy, the author correctly states that in the latter part of the nineteenth century, the prevailing legislative and judicial attitudes were sympathetic to the growth of industrial and financial capitalism, although it is doubtful that the growth of capitalism was that uppermost in the mind of the common man.

> In the field of insurance, and of commercial law generally, the most important component of this complex of attitudes was the notion that the free will of contracting parties should be given complete effect — that freedom to make contracts included freedom to make oppressive contracts. This attitude was embodied in articulated legal doctrine, and thus remained effective as a conservative factor in the judge-made law of insurance long after the extreme nineteenth-century forms of the philosophy that produced it had ceased to control community opinion.[5]

Since elsewhere in this book insurance law is interpreted as the conscious expression of public policy, (*e.g.* the anti-charter policy of the early nineteenth century is viewed as an expression of Jacksonian democracy),[6] an interpretation that the conservative judges of the period were merely rationalizing unjust results can be justified. If this be so, the moral worth of much of the common law of insurance is drawn into question. But what is more startling, those judges are being labelled judicial activists in an age where passivism was almost militant.

In the concluding chapter the author interprets the materials so painstakingly accumulated in the earlier pages, to confirm his basic thesis. The reader may take issue with some of the judgement therein, such as "In the field of insurance law, dogma rarely inhibits growth, for in the long run the persistent pressure of

4 Text at 5.
5 *Id.* at 302.
6 *Id.* at 66.

society's needs generally overcame the toughest doctrine,"[7] or with the author's choice of words calling insurance a public utility or viewing it as a means of socializing the risks of enterprise or the ordinary activities of daily life.

This work does not avoid what it stated it was going to avoid: the wider generalizations. In fact there is some conclusion inherent in typifying Wisconsin as an ordinary state in the matter of insurance law. That the state of Wisconsin was chosen by the Rockefeller Foundation for special investigation is some indication that it is not "Middlestate." But the conclusion that this is truly a significant contribution to the field of legal history is equally unavoidable. And its utility will not be limited to the state of Wisconsin.

Gerald M. Gallivan

IT'S THE LAW. By Bernard Tomson. New York: Channel Press, Inc., 1960. Pp. xi, 436. $7.50. Bernard Tomson is an authority and an articulate commentator on architectural law. The present volume was developed from Mr. Tomson's monthly column in the *Progressive Architect,* a noted architectural journal. Mr. Tomson has been a lawyer for 25 years and is at present a judge in the Nassau County District Court of New York.

The author's aim is to compile a reference guide to the basic legal problems facing the architect, engineer, or contractor. Although each area dealt with is treated in a separate chapter, Tomson divides his book into five parts. Part 1 deals with the statutes regulating the practice of architecture, engineering and building construction. In this section, the author recommends uniform licensing requirements in order to create a standard of high level professional competence.[1] In Part 2 Tomson discusses the organization and business problems facing the architectural firm. After a comparison of the advantages and disadvantages of partnerships and corporations, he recommends the partnership as the most flexible, workable form. The remaining chapters in Part 2 are brief essays on fees,[2] ethical restraint on fee-splitting,[3] construction bids,[4] performance bonds,[5] and building codes.[6] Part 3 is entitled *The Employment Relation.* The three chapters comprising this section are the heart of the book. Under this broad heading Mr. Tomson treats areas which are vital to architect, engineer, and contractor — such recurring problems as the content of the construction contract, the role of the architect in controlling the interaction between owner, contractor, and sub-contractor, use of arbitration in contract disputes, and the power of the government "contracting officer" in construing construction contracts are all included in the discussion. The fourth part is entitled *Rights and Liabilities of Architects, Engineers, and Contractors;* contained are capsule summaries of the law in such distinct areas as mechanics' liens,[7] specific performance,[8] negligent performance,[9] liability insurance,[10] and defamation of architects.[11] The fifth and final part concerns restrictions on the use of property. Mr. Tomson devotes a chapter to restrictive covenants, zoning ordinances, and the role of esthetics in zoning regulation. It is not until this final

7 *Id.* at 314.

1 Text at 26. "[I]t is apparent that a 'uniform' statute would be of considerable aid to state groups of architects seeking an effective licensing law."
2 *Id.* at 66.
3 *Id.* at 80.
4 *Id.* at 94.
5 *Id.* at 110.
6 *Id.* at 125.
7 *Id.* at 230.
8 *Id.* at 276.
9 *Id.* at 245.
10 *Id.* at 272.
11 *Id.* at 239.

chapter, dealing with esthetics, that the author deviates from his straight expository approach. Following an extensive discussion of the landmark case of *Berman v. Parker*,[12] Mr. Tomson advocates an increased recognition of esthetics as a legitimate basis of zoning regulation. He reasons that such recognition will raise the status of the architect in his role as a community planner.[13]

Each of the preceding parts is followed by a collection of "miscellaneous decisions" pertaining to topics discussed in the chapters. The final 75 pages are given to an appendix of standard forms used by the American Institute of Architects.

It's the Law is not a legal reference book. The legal problems considered are given a superficial and simplified treatment. The book is sparsely annotated and an overly large share of the cited cases are New York decisions. The reader cannot quarrel with the author's reasoning, nor can he take issue with his conclusions, since Mr. Tomson limits his treatment to existing law; he does not analyze or predict. The suggestions he makes regarding uniform licensing requirements and the increased use of esthetics as a basis of zoning regulation stand out as isolated statements of opinion.[14]

The topics are treated in individual essays and, as a result, the book lacks continuity. The connection between some of the chapters in a given section is often tenuous. This could prove distracting to a person reading the book in its entirety and not using it solely as a reference text. The lack of cohesion is explained to a large extent by the fact that a good many of these chapters were drawn from separate articles in the *Progressive Architect*.

In spite of, (perhaps because of), its legal shortcomings, *It's the Law* may be a valuable asset to an architect. Not only are the topics of interest, but the entire volume is geared to acceptance and understanding by the layman. In his introduction the author states that his aim is to aid the architect in making him able to recognize, not solve, legal problems which arise in his profession.[15] This desire is underscored by constant reminders that when serious legal problems arise, the architect had best contact a lawyer. By abandoning heavy citation and leaving a large share of the case discussion to the "miscellaneous decisions" sections following each part, and by avoiding unnecessary use of unfamiliar legal terms, the author sets out a clear exposition of legal principles. The forms section at the conclusion of the text is another attractive feature, especially if one does not normally have access to these AIA standard forms.

Despite the lack of annotation, *It's the Law* never falls into legal inaccuracy. Because of its simplicity and clarity, the book ought to be a helpful handbook for the architect whose work brings him in contact with legal problems.

James K. Stucko

SPACE-AGE SUNDAY. By HILEY H. Ward. New York: The Macmillan Company, 1960. Pp. 160. $3.95. In December, the United States Supreme Court heard oral argument in two cases, one from a three-judge federal district court in Massachusetts which had struck down a Massachusetts Sunday law as unconstitutional because it required a Jewish market to close on Sunday;[1] and one from a federal

12 348 U.S. 26 (1954).

13 Text at 337.

> The ultimate impact of the *Berman* case cannot yet be measured. Nevertheless, esthetic values in commercial and residential housing can be expected to play a greater role in future legislation.
>
> [T]he architect is the *professional*—the expert best qualified for leadership in this field.

14 *Supra* notes 1 and 13.

15 Text at x.

1 Crown Kosher Super Mkt. v. Gallagher, 176 F. Supp. 466 (D. Mass. 1959).

district court in Pennsylvania, which upheld a Pennsylvania Sunday closing law.[2] In late November, *Space-Age Sunday,* was published. The author, the present Religion Editor of the Detroit Free Press, adeptly describes the stage for this mid-20th century Sunday law conflict, and then he pointedly announces to the reader his timely message:

> And while all appearances would indicate that the causative factors [of this Sunday law conflict] are the new socioeconomic forces, the real main factor is the obstacle of an unadaptable church tradition.[3]

The book can roughly be divided into five subparts. In the first, the author describes the Sunday law conflict and then, in a very scholarly two chapters, he gives the origin and the rationale for Sunday laws. In the third part, he directly attacks the rationale. In the last chapters, Mr. Ward, a Baptist scholar and author, proposes an approach for "the church,"[4] and for the individual, the one harmed by this conflict. His closing discussion, "Sunday and Deeper Levels of Faith," results in an instructive religious philosophy for the space-age Christian.

A traditional day of rest, according to the author, is indispensable for the non-churchgoer,[5] but not for the Christian. The reason is that the Christian is more adaptable to another schedule, and he is adaptable because he makes a distinction between the different kinds of rest. The author then gives an analysis of the trend in secular thought about physical rest. This informative analysis proceeds: bodily rest is relative, since no two people need the same amount; work can be rest; tension, not a tranquilizer, can be restful; vacations can determine the kind of rest; rest should be meaningful; and no absolute principle[6] governs rest. (No matter how correct the preceding observations are, it is submitted that there is a minimum absolute principle concerning physical rest. This principle is that all men need rest, even though each man's needs may vary as to the amount and kind of rest. And the state under its police powers may provide for its citizens' health, which includes their need for physical rest.)

Mr. Ward describes the religious origin of Sunday observance, juxtaposed to the Sabbath observance by the Jews. But despite his rather accurate historical understanding of the Babylonian (pre-Biblical) religious rest days, the Jewish Sabbath, and the Eastern and African periodic religious days, the author posits that state-enacted Sunday laws fail to achieve the goal of Sunday, a family rest day. Is not the primary goal of Sunday observance, and its historic predecessors, more than just a family rest day? Was not the primary goal of these days the common or public observance of respect and adoration of the deity in pre-historic times and of a monotheistic God in Biblical times? Are not all these historical facts a sample of an innate need in man for special times for the public worship of God?[7]

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2 Two Guys from Harrison-Allentown, Inc. v. McGinley, 179 F. Supp. 944 (E.D.Pa. 1959).

3 Text at 14.

4 Throughout *Space-Age Sunday,* when the author speaks of "the church," he seems to use this term in its broadest sense, to include all Christian denominations.

5 Text at 42.

> The nonchurchgoer needs this church day . . . His philosophy dictates it or feeds upon it, his philosophy of noninvolvement, of living a humdrum existence. An advertising man was telling me recently when he flew to New York from Chicago on business, if the business should carry over to Monday the company always flew him home for the weekend and then back on Monday. The day was that important.

6 *Id.* at 108, & n. 4:

> By principle, we mean an absolute, unchanging idea or ideal; an external criterion for evaluating the entire subjective and objective experience of man. If a principle changes, then it is not a principle. Principle in this book means that idea to which is ascribed metahistorical significance and permanence.

7 ALOYSIUS ROCHE, APOLOGETICS FOR THE PULPIT 627-28 (1950).

Is not Sunday the Lord's Day, a day when men gather together to honor God?[8] If the Sunday observance is also to promote a family day of rest, is not the failure of such laws to achieve this result partly due to the legislature's failure to modernize their provisions and its failure to positively permit family activities? The author attacks the Sunday laws,[9] because of their anachronistic, outdated, and unenforced provisions; he also decries their negation of family activities on Sunday, such as sports and movies and food and drink in public places.[10] Do not both of these defects in so many of the state statutes arise from incidental weaknesses of the laws, which can be corrected, rather than from an inherent weakness in the idea of Sunday closing laws?

The two most potent arguments of *Space-Age Sunday* against Sunday closing laws are: that minority religions, such as Judaism, should not be ignored by the state, which enacts religious observance laws; and that such laws are not in keeping with the spirit of the Constitution. The author's latter argument is interesting, but short. He notes three things about Sunday laws: that they confiscatorily deprive people who worship on days other than Sunday of time which could be usefully spent, by forcing on them a holy day which they do not observe; that they are discriminatory against certain products, minority religions, and are susceptible to inequitable enforcement;[11] and that Sunday laws make the innocent criminal. The author is legally mistaken in his understanding of the effect of the 14th amendment on state statutes in the area of first amendment freedoms. He states:

> The First Amendment says that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." But this has been construed to apply to Congress only. The states could conceivably, by the right of state legislatures, make a law in a category that Congress would not. This conflict was partially corrected after the Civil War with the Fourteenth Amendment, which says that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." This corrects the situation to a certain extent, but it does not bring the same limitation of the First Amendment of Congress to apply to the state legislatures.[12]

The privileges and immunities clause of the fourteenth amendment does not have reference to fundamental, natural rights, such as the freedom of speech, but is concerned with rights arising from United States citizenship, such as the right to join or not to join a labor union.[13] But the due process clause of the fourteenth amendment has been held to apply the same guarantee of freedom of religion and separation of church and state to state statutes as is applied to federal legislation.[14]

In Chapter V, the author sets out to tell "the church," what to do in this modern conflict to avoid its static, tradition-riddled approach to Sunday closing laws and Sunday observance. The approach for religious bodies, he says, is to compromise their positions on this Sunday law issue; to encourage novelty; and to not assert principles as the guide to action even if the religious body insists on recognizing principles. His point seems to be that a religious body will have the most beneficial influence if it speaks "with jabs, quips, and not with invariable principles."[15] Undoubtedly, this solution is influenced by the author's theological

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8 A CATHOLIC COMMENTARY ON HOLY SCRIPTURE, (Dom Bernard Orchard and Associates, ed.) 812 (1953).

9 Text at 12:

> Language changes contribute to the Sunday battle. Most Sunday laws are clothed in archaic verbal garb. Yet states are hesitant to revise the language.

10 *Id.* at 93-94.

11 See note, 35 NOTRE DAME LAWYER 405, 429-30 (1960).

12 Text at 94-95.

13 Hague v. C.I.O., 307 U.S. 496, 510-15 (1939); Slaugter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

14 West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943); see Note, 35 NOTRE DAME LAWYER 405, 407, n.5(1960).

15 Text at 114.

orientation, but nonetheless, it is worth consideration by any spiritual adviser. But a religious body, such as the Catholic Church, which feels and believes that its primary duty is not only to advise man but to organize man's spiritual life,[16] cannot avoid proclaiming principles of the following sort to guide and organize man's spiritual life: Sunday is a holy day and a day of rest.

The author suggests, if a single day is to be selected, that Friday, a day of the cross, be selected. His proposal is unique and somewhat extreme, but it undoubtedly merits a reply from the various Christian sects. Sunday is not a worn-out tradition, as the author would lead one to believe. He seems to use the word "tradition" in a theological sense: and article or doctrine of religious practice that has not been committed to writing. If this is his meaning, then it is not a tradition with some religious bodies, such as the Catholic Church, which has codified its observance of Sunday in its Canon Laws.[17] Certainly, if Sunday invites caricature,[18] as the author also would lead one to believe, the answer is not to abrogate Sunday observance, when it has an important function to perform. Sunday is an external, sensible expression of a religious mystery, just as a national holiday is an expression of national pride and feeling and meaning. Although such days sometimes are eroded by commercialism — for example, Christmas — does that require the abolition of the day and what it represents?

Space Age Sunday may be subject to question by theologians of various faiths. Also, since the author devotes little time to the legality or constitutionality of Sunday closing laws, his book may not be of particular interest to the practicing attorney. Nevertheless, the author does have a definite message for theologians, lawyers, and state legislatures:

> To keep today's organized religion, Christianity, close to the personal compassionate Christ, Tillich suggests paying particular attention to the role of the Jew. "One thing for Christians to remember is that the very existence of Judaism is a corrective against pagan danger," . . . . Whenever a church seeks to impose on other members of the society the religious content of its faith, no matter how it may clothe that content

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16 KARL ADAM, THE SPIRIT OF CATHOLICISM 60-61 (1954). Karl Adam calls a spontaneous type of religion one that

> behaves as though Christianity is and must be a mere object of knowledge, a mere subject for scientific investigation, as though the living Christian faith could be resolved into a series of ideas and notions. . . . Christianity then becomes, not unitary, original and abounding life, but a juxtaposition of ideas and conceptions, which . . . have gradually by the power of collective faith gathered round the person of Jesus of Nazareth . . .

He notes that the Catholic Church is an organized body of members in which these members are joined externally and internally; the Church is not just an adviser and guide.

> The more closely the Catholic then gets into touch with his Church, not merely externally, but internally, with her prayer and sacrifice, with her word and sacrament, the more sensitive and attentive will he be to the inspiration of the divine Spirit in the community, the more vitally will he grasp the divine life that flows through the organism of the Church.

17 2 HENRY DAVIS, MORAL AND PASTORAL THEOLOGY, 59 (1938); 2 ABBO AND HANNAN, THE SACRED CANONS 503 (1960). Canon 1248 provides:

> On Sundays . . . Mass must be heard; moreover, there is also an obligation to abstain from servile work, from judicial acts and, unless lawful custom or particular indults justify them, from public marketing, the holding of fairs, and any other kind of public commercial occupation involving buying and selling.

18 Text at 144:

> Sunday invites caricature. There are special Sundays set aside for themes in addition to that of the Lord's Day. Reformation Sunday at the end of October, Universal Bible Sunday and Student Recognition Sunday in December, Holy Family Sunday in January, Brotherhood, Mother's, Father's, Children's Sundays, a "film Sunday" observed by Australian Roman Catholics, a "traffic safety sabbath" observed throughout Illinois churches on the Sunday before Labor Day — to name a few.

> in terms of desirability, the church has resorted to tyranny and become a slave of pagan forces, religious or secular, that are contrary to the spirit of its Savior and Redeemer.[19]

The benefits to the Christian churches resulting from this respect in our country for such a commitment to the rights and views of the minority, are easily demonstrable.[20] On the basis of this commitment to saving the Jews and other believers who do not observe Sunday, any religious body, no matter how much it disagrees with the author's premises and theology, will have to agree that our Sunday closing laws need to be rethought and possibly changed. Perhaps a two or three-day week end could be the answer to the Sunday closing law conflict. The author agrees that such an approach might be the state's "relization of all its worship goals."[21] If not, how about an elective system for the benefit of the Jew and the possible Wednesday worshipper, with a mandatory closing on Sunday otherwise?[22]

For now, *Space-Age Sunday* poses, and provides contemporary thought and historical views on Sunday laws; it presents a unique proposal for reconsideration of the Sunday closing law issues by Protestants and Catholics. We can be sure that if the dominant religious groups in the United States do some rethinking, they will be heard by the state legislatures.[23]

Thomas M. Clusserath

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19 *Id.* at 86.

20 MURRAY, WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 73-74 (1960).

> Religion itself, and not the least the Catholic Church has benefited by our free institutions, by the maintenance, even in exaggerated form, of the distinction between church and state. Within the same span of history the experience of the Church elsewhere, especially in Latin lands, has been alternately an experience of privilege or persecution. . . . It would be difficult to say which experience, privilege or persecution, proved in the end to be more damaging or gainful to the Church.

21 Text at 134.

22 Note, 35 NOTRE DAME LAWYER 405, 432 (1960); Recent Decision, 35 NOTRE DAME LAWYER 569, 572-73 (1960).

23 Text at 124.

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LABOR LAW

CASES AND MATERIALS ON LABOR RELATIONS LAW. (appendix and 1960 supplement) By Smith and Merrifield. Indianapolis: Bobbs-Merril Co., 1960. Pp. xix, 1212. $12.75.

* Reviewed in this issue.