



5-1-1960

Church-State -- Religious Institutions and Values: A Legal Survey 1958-59

William J. Gerardo

William R. Kennedy

Paul J. Schierl

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NOTES

CHURCH-STATE
RELIGIOUS INSTITUTIONS AND VALUES: A LEGAL SURVEY
1958 - 59

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I. INTRODUCTION

If it may be assumed that there has been a religious revitalization in the United States in recent years, then the theory that the common law follows a lethargic course in its conformance to sociological change, gains additional proof. The courts have shown little tendency to accord religious institutions and values any increased recognition in the decisional process.

In continuing the biennial survey of the Church-State relationship, the *Notre Dame Lawyer* has carefully re-examined the primary areas covered in the 1955-57 survey. In addition, contained herein is an analysis of a particular sphere of controversy, that of Church gambling. The section on obscenity will be carried in the forthcoming August issue of Volume 35.

In making a generic separation between religious institutions and values, several observations may be made. The religious institution has been accorded a rather unique place in society in the categories of taxation and zoning. This suggests, in the form of a sort of quid pro quo, a general recognition of the desirability of the church as an institution in a pluralistic society. However, despite general tax exemption and the urban mobility accorded churches under zoning precedent, this quid pro quo does not readily extend itself to the realistic needs of the school as a religious institution. Even though the reported cases are spotted with statements extolling the necessity of such a "supplementary" school system, the slightest hint of positive aid is immediately rejected.

The jurisprudential emphasis is on the Church as an institution, however, and

not upon its intrinsic composition of individuals embracing common values. Thus, tax exemption is granted to religious schools and churches, but there is none given members of a religious society who, in harmony with the group values, choose to send their children to a parochial school rather than a tax supported public school.

Consistently, perhaps, an individual who seeks to carry his religious values into the communicative dealings of everyday living, and who names them as such, will find little advantage thereby to be gained in a court of law.

It is left for the individual conscience to translate religious values into a code of morality and ethical conduct, and, in so doing, to gain ultimate favor in the eyes of the law. It is in this tacit, but nevertheless real, influence that religious values pervade the law.

It is in the marginal area, where morality and theology entwine, and where ethical judgments differ, that religious values most consistently yield. Here, judges are faced with the most perplexing enigmas and the end result must, of necessity, reflect an independent value judgment of the individual jurist. Moved to deny the value by traditional standards of decisional criteria, he can rarely choose the alternative because of the often violent disagreement on the point at issue among diverse religious sects. While "establishment" may be questionable in some cases, "preference" is strictly taboo in all.

The result is one of the most fascinating studies in common law jurisprudence. For each side of the church-state hyphen, it is an area of sporadic misunderstanding and occasional keen insight, evolving about a core of judicial restraint and inarticulated reasoning.

II. RELIGIOUS INSTITUTIONS

A. ZONING — *Toward Increasing Urban Mobility*

With the mushrooming of urban areas in this country, the necessity arises to determine what uses of property will be permitted within these populated areas. To this end zoning regulations and private restrictions have been enacted. The validity, application, and effect of such ordinances has been a continuing source of conflict. It is the purpose of the present survey to treat these questions as they involve religious institutions. The cases analyzed involve zoning ordinances and other forms of restrictions which in one manner or another tend to exclude the building of churches and other religious structures¹ in urban areas. The constitutionality² of those ordinances and restrictions which tend to exclude religious institutions have been the subject of a number of state court decisions but the United States Supreme Court has never explicitly passed on the issue.³

1) *Constitutional Rights*

The first amendment to the Constitution of the United States, insofar as it respects religion, reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercises thereof; . . ." ⁴ This

1 Married students' dormitories have been held to be "religious uses." *Schueller v. Board of Adjustment*, 95 N.W.2d 731 (Iowa 1959); whereas it has been held that use of land for a cemetery, even by a religious society, was not a "religious use," *Appeal of Russian Orthodox Church of the Holy Ghost of Ambridge*, 397 Pa. 126, 152 A.2d 489 (1959).

2 "It should be noted, however, that certainly not all conceivable constitutional problems had been solved." *Savage, Land Planning and Democratic Purposes*, 34 NOTRE DAME LAW. 65, 66 (1958).

3 Although the ordinance involved in *Village of Euclid v. Amber Realty Co.*, 272 U. S. 365 (1926) upholding zoning as a proper exercise of the state police power, contained restrictions relating to churches, the Court found it unnecessary to consider the validity of these provisions since there was no allegation that the plaintiff was damaged by them. *Id.* at 385. The problem was presented again in *Minney v. City of Azusa*, 164 Cal. App.2d 12, 330 P.2d 255 (1958), but the appeal was dismissed for want of a federal question, 359 U. S. 436 (1959).

4 U. S. CONST. amend. I.

amendment is binding on the state courts through the fourteenth amendment⁵ of the Constitution of the United States.

The latest zoning case decided on this issue is *Congregation Temple Israel v. City of Creve Coeur*.⁶ In this decision the Supreme Court of Missouri held that an enabling act, empowering the municipality to regulate the "location and use of buildings, structures and land for trade, industry, residence or other purposes,"⁷ granted no authority to prohibit the building of either churches or parochial schools in residence districts. On motion for rehearing, which was denied, the court said:

we think that such a construction of this language to include the authority to restrict or prohibit the use of land for religious or church purposes would make it possible to interfere with the free exercise of religion protected by the First and Fourteenth Amendments; and that this is a most persuasive reason for holding this clause must not be broadened by implication to include these uses not specifically stated therein.⁸

This appears to be one of the few decisions resting on the first amendment freedom of religion ground.⁹ The most common ground used by the courts in holding that religious institutions may not be excluded from residential areas is that such exclusion is not a valid exercise of the police power, since it has no reasonable relation to public health, safety, morals, or general welfare, and therefore constitutes a deprivation of property without due process of law.¹⁰ The proven weakness of the due process ground rests in its vulnerability should the court feel that the administrative body has not abused its discretion in excluding a particular religious institution.¹¹ It has been intimated that it is merely a question of convenience¹² as to the ground on which this issue should be decided, but it is probably more accurate to say that the due process ground is too vague and that the freedom of religion ground provides a more stable basis for legal argumentation.¹³ In any event, zoning and private restrictions are being used in an attempt to exclude religious institutions, if not directly, then indirectly. To this attempted exclusion, the constitutional guarantee of freedom of religion may well be the answer.

5 U. S. CONST. amend. XIV, § 1, provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The freedoms of the first amendment are incorporated into the due process clause of the fourteenth amendment. See: *Zorach v. Clauson*, 343 U. S. 306 (1952); *Kunz v. New York*, 340 U. S. 290 (1951); *Terminiello v. Chicago*, 337 U. S. 1 (1949); *Illinois ex rel. McCollum v. Board of Education*, 333 U. S. 203 (1948); *Cantwell v. Connecticut*, 310 U. S. 296 (1940); *Gitlow v. New York*, 268 U. S. 652 (1925) (dictum); *Pierce v. Society of Sisters*, 268 U. S. 510 (1925); and *Meyer v. Nebraska*, 262 U. S. 390 (1923).

6 320 S.W.2d 451 (Mo. 1959).

7 Mo. REV. STAT. § 89.020 (1949).

8 320 S.W.2d 451, 457 (Mo. 1959).

9 "Although the central issue in determining the validity of an ordinance excluding churches from a zoned area would seem to be whether the restriction interferes with the first-amendment guarantee of freedom of religion as incorporated in the fourteenth, none of the decisions invalidating these ordinances has explicitly rested on this ground." Note, 70 HARV. L. REV. 1428, 1436 (1957).

10 See, e.g., *Diocese of Rochester v. Planning Bd.*, 1 N.Y.2d 508, 154 N.Y.S.2d 849, 136 N. E.2d 827 (1956); *Brandeis School v. Village of Lawrence*, 18 Misc.2d 550, 184 N.Y.S.2d 687 (1959).

11 *Milwaukee Company of Jehovah's Witnesses v. Mullen*, 330 P.2d 5 (Ore. 1958), United States Supreme Court dismissed appeal and denied certiorari without comment at 359 U.S. 436 (1959); *West Hartford Methodist Church v. Zoning Bd. of Appeals*, 143 Conn. 263, 121 A.2d 640 (1956).

12 See note, 23 BROOKLYN L. REV. 185, 192 (1957).

13 "By making use of the more concrete test provided by the first amendment provisions concerning freedom of religion, rather than the vague criterion of due process, constitutional privileges will be more readily assured and private religious organizations will realize the necessary guaranties for effective activity." Brindel, *Zoning Out Religious Institutions*, 32 NOTRE DAME LAW. 627, 641 (1957).

2) *Uses Permitted*

Classically, a master zoning ordinance establishes the basic uses permitted within the particular zoned area. Usually such permitted uses are not exclusive and the zoning act will also enumerate certain other uses which do not comply with the ordinance but which nevertheless may be permitted. Although various jurisdictions use different terminology when referring to such exceptions, they fall within one of three categories, and the attributes of each type are essentially the same in all jurisdictions.

The first is the nonconforming use. This is a use of property that was in effect prior to the enactment of the zoning ordinance. Although prohibited, it may be permitted if the petitioner can show that it is not a menace to the health, welfare and safety of the public.¹⁴ When a structure of a religious institution comes within this category, even though it may be able to justify its present use on the above ground, any application for permission to expand will be closely scrutinized, and even though the particular board may grant permission, the application may be denied upon judicial review. The New Jersey Court of Appeals did just this in *Ranney v. Istituto Pontificio Delle Maestre Filippini*,¹⁵ even though there was a showing on the part of the religious institution of hardship and also that the proposed building site was unsuitable for construction of residences. It is noteworthy however, that since the *Ranney* decision, the highest court in New Jersey has ruled more favorably toward religious institutions. In *Andrews v. Board of Adjustment*¹⁶ the use of residential premises for a parochial school with living quarters for teachers was permitted, although parochial schools were unauthorized in the residence zone. The statute involved¹⁷ required two critical findings: (1) that the use can be granted without substantial detriment to the public good and if such use would not substantially impair the intent and purpose of the zoning ordinance; and, (2) that special reasons exist for the use. Both of these findings were made by the zoning board. As to the first requirement, the court reasoned that a school involves no inherent detriment to the public good. The ordinance contemplated uses other than one-family homes, *i.e.*, apartment houses, garden apartments, apartment hotels, hotels, boarding houses, churches, public schools and public playgrounds. The court reasoned that the use of premises as a parochial school was not dramatically different from those envisioned in the zoning plan. As to the second requirement, a special reason for the use existed. The education provided by a parochial school is an accepted equivalent to public schooling and the need exists for both types, the court reasoned, because of the swelling population. The New Jersey *Andrews* decision is in line with the growing tendency to equate religious schools with public schools for purposes of zoning.¹⁸

The second type of permission is the conditional use, which is sometimes re-

14 See generally, 2 METZENBAUM, LAW OF ZONING 1210-73 (2d ed. 1955).

15 20 N. J. 189, 119 A.2d 142 (1955).

16 30 N. J. 245, 152 A.2d 580 (1959). New Jersey, however, continues to frown upon expansion of nonconforming uses. See *Mocco v. Job*, 56 N. J. Super. 468, 153 A.2d 723 (1959).

17 N. J. STAT. ANN. § 40:55-39 (Supp. 1958).

18 The Court of Appeals of New Jersey continues to permit the exclusion of churches. *Alendale Congregation of Jehovah's Witnesses v. Grasman*, 30 N. J. 273, 152 A.2d 569 (1959), held that an ordinance requiring that a building intended to be used as a church must provide a usable space for off-street parking, to wit, space for one motor vehicle for every three seats to be installed, did not abridge freedom of worship and was not invalid on its face. It is interesting to note that in this case the municipality's conduct in increasing its general zoning restrictions while the result of the pending application by the religious group for permission to build was being awaited, was presumed to have been in good faith and for the public interest and deemed lawfully controlling the pending application. For similar reasoning but a different result see *Redwood City Company of Jehovah's Witnesses v. City of Menlo Park*, 167 Cal. App.2d 686, 335 P.2d 195 (1959). There the California Appellate Court held that when the religious group complied with the off-street parking requirements, the refusal to grant a permit to build a church was arbitrary and capricious, and a writ of mandate was granted to compel the issuance of the building permit.

ferred to by the general term "exception." A conditional use may be permitted if it is shown that its existence is essential or desirable to the public convenience or welfare, and that it will not impair the integrity and character of the zoned district. It must be shown, therefore, that it is not detrimental to public health, public morals, or public welfare. Since hardship is not a prerequisite to the issuance of a conditional use permit, there is no burden on the applicant to show hardship of any nature.¹⁹

In *Tustin Heights Ass'n v. Board of Supervisors*,²⁰ a Roman Catholic Archbishop petitioned a county planning commission for a conditional use permit for the establishment of a church and an elementary parochial school. After hearings, the planning commission recommended denial of the application on the grounds that (1) the site was not large enough to take care of the students under customary state standards and also provide adequate parking space; and (2) that material detriment or injury to the neighborhood would result from issuance of the permit. In spite of the fact that the applicant proposed to amend the application by changing the location and the number of the access roads, the size, type, number and location of the buildings, parking and playground area; and that the board of supervisors authorized the issuance of the conditional permit on the basis of the proposed amended application, the California Fourth District Court of Appeal held that it was improper to construe the ordinance as permitting the board of supervisors to grant a conditional use permit contrary to the recommendation of the planning commission. In zoning cases in general, procedural defects are fatal, and this no less applies to the applications of religious institutions. Nevertheless, the *Tustin Heights* decision seems inconsistent with a prior decision²¹ of the Supreme Court of California, which declared unconstitutional²² an ordinance that excluded private schools from a district covering 98.7% of a municipality. The court in *Tustin Heights* attempted to distinguish this important precedent by stating:

However, in that case [*Roman Catholic Welfare Corp. v. City of Piedmont*, 45 Cal.2d 325, 289 P.2d 438 (1955)] the ordinance prohibited only private schools and the Supreme Court of California held such a restriction to be discriminatory. The ordinance before us purports to restrict all schools and, on its face, is not subject to the same criticism.²³

The distinction is shallow when one realizes that, as a matter of California law, public schools cannot be excluded from residential districts by zoning ordinances²⁴ because the state of California has occupied the field of public education.²⁵ The court in *Tustin Heights* completely rejected the applicant's arguments of discrimination against religious schools and the denial of their equal protection of the law,²⁶

¹⁹ See generally, YOKLEY, ZONING LAW AND PRACTICE §§ 131-33 (2d ed. 1953, Supp. 1958).

²⁰ 339 P.2d 914 (Cal. Dist. Ct. App. 1959).

²¹ *Roman Catholic Welfare Corp. v. City of Piedmont*, 45 Cal.2d 325, 289 P.2d 438 (1955).

²² *Id.* at 443. The court did not specify in what respect the ordinance was unconstitutional, saying only that it was an arbitrary and unreasonable discrimination against private schools.

²³ *Tustin Heights Ass'n v. Board of Supervisors*, 339 P.2d 914, 922 (Cal. Dist. Ct. App. 1959).

²⁴ *Town of Atherton v. Superior Court*, 159 Cal. App.2d 417, 324 P.2d 328 (1958), commented upon in 47 CALIF. L. REV. 171 (1959).

²⁵ *Hall v. City of Taft*, 47 Cal.2d 177, 302 P.2d 574 (1956).

²⁶ See generally HORACK & NOLAN, LAND USE CONTROLS § 7, at 111 (1955): "Surprising as it seems, some communities attempt to exclude all schools—public, parochial, or private. Equally unexpected is the practice of many communities to exclude schools from single-family residence districts. Still other means have been used to reduce the burden of schools on single-family residence districts. Public schools are permitted but parochial and private schools are prohibited. To date, with few exceptions, the courts have found such ordinances arbitrary and discriminatory." See also Note, 31 NOTRE DAME LAW. 113, 116 (1955):

Conceding that a *per se* difference does exist between public schools and private schools, the writer nevertheless fails to detect in this distinction a reasonable relation to the object sought by zoning ordinances. The effect

notwithstanding the fact that the zoning ordinance enforced against them could not have been enforced against public schools.²⁷

This most recent California view is not followed in New York. In *Brandeis School v. Village of Lawrence*,²⁸ the New York Supreme Court, Special Term, held that an exclusion from a residential district of a private school performing the same educational functions as a public school bears no substantial relation to public health, safety, morals or general welfare, hence was a constitutionally invalid exercise of the police power. The court reasoned that a zoning ordinance which excluded such a school from a residential district violated due process notwithstanding that noise, traffic congestion and attendant hazards to safety may result when such a school is established and put into operation, and despite the fact that such conditions may be expected to have a tendency to disrupt the peace and quiet of a residential neighborhood and to cause a depreciation in property values.²⁹ However, the New York courts have excluded some private schools that were not religious in nature. In *Town of Hempstead v. Merrick Woods School, Inc.*,³⁰ day camps were enjoined from operating in a residential zone in which day camps were prohibited. The court reasoned that neither the equal protection clause nor the due process clause of the state or federal constitutions gives private persons the right to operate a day camp in an area zoned residential.³¹ Thus it appears that the New York courts consistently permit an exception when the applicant is a religious institution, but have ruled otherwise when the institution is privately owned and operated.

The third type of permissive use is known as the variance. When a variance is sought, the constitutionality of the ordinance itself is not usually questioned. The essential requirement for a variance is a showing that strict enforcement of the zoning limitations would cause unnecessary hardship. The burden of showing such hardship is on the applicant. If the variance is denied by the zoning board, upon judicial review the applicant must show that the board acted arbitrarily and capriciously

of discriminating between two groups which are different merely in themselves, but who are similar in their status to given legislation, is to deny them the equal protection of the laws.

27 *Tustin Heights Ass'n v. Board of Supervisors*, 339 P.2d 914, 922-23 (Cal. Dist. Ct. App. 1959).

28 184 N.Y.S.2d 687 (N.Y. Sup. Ct. 1959).

29 The New York court states:

This Court has heretofore expressed the view that in respect to the exercise of the zoning power a distinction can validly be made between public and private schools. . . . Those views were expressed before the Court of Appeals in *Diocese of Rochester v. Planning Bd.* [1 N.Y.2d 508, 154 N.Y.S.2d 849, 136 N.E.2d 827 (1956)], announced its view to the contrary. . . .

While it may be . . . that public and private schools have many characteristics which distinguish them from one another organizationally, these differences are not of sufficient importance . . . to justify different treatment in a zoning ordinance.

The Court finds . . . in addition to providing its students with a secular education which more than meets minimum requirements of the State Educational Department, [the religious institution] is furnishing simultaneously a religious training for Jewish children which is comparable to that given in parochial schools for Catholic children. The same reasons which the Court of Appeals gave for permitting the establishment of a parochial school in *Diocese of Rochester v. Planning Bd.* . . . apply with equal cogency here. *Brandeis School v. Village of Lawrence*, 18 Misc.2d 550, 184 N.Y.S.2d 687, 696, 697-98 (N.Y. Sup. Ct. 1959).

30 177 N.Y.S.2d 81 (N.Y. Sup. Ct. 1958).

31 The New York court stated:

As for the *Diocese of Rochester* and similar cases, the accessory uses mentioned therein are different from the day camp situation in this case. The accessory uses mentioned therein pertain to the year-round accessory use to the primary, religious activities in those edifices and on those lands. 177 N.Y.S.2d 81, 84 (N.Y. Sup. Ct. 1958).

in refusing to permit the variance,³² and the proof of this is difficult, even for religious institutions.

In *City of Miami Beach v. Greater Miami Hebrew Acad.*,³³ the Third District Court of Appeal of Florida, reversing the Circuit Court for Dade County, held that a refusal by the city council to change the zoning of a religious institution's lots so as to permit construction and operation of a religious school thereon was not arbitrary or unreasonable, and that the chancellor of the lower court had no authority to substitute his judgment for that of the city council. The Florida court reasoned that when one purchases land in the face of existing zoning restrictions, there is no hardship, and any claimed hardship would be inactionable because self-imposed.

In *Minney v. City of Azusa*,³⁴ the Second District Court of Appeal of California held that there was no showing of an abuse of discretion in denying a variance to permit the erection of a church in a residential area, even though there was an allegation that the ordinance excluded churches from 90% of the area in a municipality and the remaining locations were undesirable because of obnoxious fumes and noise.³⁵ When the religious institution in *Minney* appealed to the United States Supreme Court, the appeal was dismissed for want of a properly presented federal question.³⁶

Occasionally religious institutions attack a variance that has been issued to build a business nearby over their protest. Then the burden is once again upon the religious institutions, this time to prove that the issuance of the variance was a violation of the zoning ordinance. In *Russo v. Stevens*,³⁷ the New York Supreme Court, Appellate Division, Third Department, held that a variance to build a gas station across the street from a church was properly permitted in a business district by the zoning board over the objection of a member of the Lay Committee of the Catholic Church.

3) *Restrictive Covenants*

Restrictive covenants excluding religious institutions, although rarely litigated, appear to be almost universally enforceable.³⁸ Encumbering land with private restrictions has been characterized by some legal writers as a form of private zoning, and usually may be evidenced in one of three forms: (1) on a plat; (2) in a deed (to the lot to be conveyed or to some other lot in the subdivision); or (3) in a separate document. Probably the chief enforcement difficulties are not the courts,

32 See generally, YOKLEY, *op. cit. supra* note 23, §§ 134-45 (2d ed. 1953, Supp. 1958).

33 108 So.2d 50 (Fla. Dist. Ct. App. 1958).

34 164 Cal. App.2d 12, 330 P.2d 255 (1958).

35 The California court stated:

The pleading presents first the fundamental issue whether a zoning ordinance can lawfully exclude churches from a residential district. This question is settled in the affirmative so far as California law is concerned. 164 Cal. App.2d 12, 330 P.2d 255, 257 (1958).

It being established law that churches can be excluded legally from a residential zone and that they are subject to reasonable zoning regulations, appellant [religious institution] stands, with respect to this claim of unreasonable classification or discrimination on the face of the ordinance, in the same position as any other litigant who raises that issue. In other words, proposed use of property for religious purposes does not give it *per se* a title to any particular zone; a church, like any other property owner, is to be considered on its merits as fitting into the general scheme of a comprehensive zoning, entitled to no preference and subject to no adverse discrimination. 164 Cal. App.2d 12, 330 P.2d 255, 261 (1958).

36 359 U.S. 436 (1959).

37 7 App. Div.2d 575, 184 N.Y.S.2d 989 (1959) *reversing* 173 N.Y.S.2d 344 (Sup. Ct. 1958).

38 See: *Buckleu v. Trustees Bayshore Baptist Church*, 60 So.2d 182 (Fla. 1952); *Housing Authority of Gallatin County v. Church of God*, 401 Ill. 100, 81 N.E.2d 500 (1948); *West Nichols Hills Presbyterian Church v. Folks*, 276 P.2d 255 (Okla. 1954); *Johnson v. Mt. Baker Park Presbyterian Church*, 113 Wash. 458, 194 Pac. 536 (1920); *Hall v. Church of the Open Bible*, 4 Wis.2d 246, 89 N.W.2d 798 (1958).

but the inertia of subdivision residents and a general reluctance of subdividers to go beyond the means of friendly persuasion.³⁹ Where the residents and subdividers have resorted to the courts, they have been successful. In *Hall v. Church of the Open Bible*,⁴⁰ the Supreme Court of Wisconsin held that restrictive covenants providing that lots in a recorded plat could be used only for residential purposes⁴¹ gave no right to purchasers of a lot in that plat to erect a church and that they could be enjoined from doing so. The Wisconsin court decided the question as a matter of public policy and noted that there is a substantial difference between the exclusion of churches by zoning ordinances as juxtaposed to restrictive covenants.⁴² The decline of the power of public zoning to exclude religious institutions from residential districts may force the residents to resort more frequently to private restrictions.⁴³

This survey shows that religious institutions can be and are being effectively excluded from populated areas. The problem is one of balancing the interests between the residence owners asserted under the police power of the states, and the religious institutions' constitutional guarantees of freedom of religion, due process and equal protection. Contrary to the prediction of two years ago,⁴⁴ churches and church-related institutions have not had smooth sailing in this field. Petitions for building permits, exceptions, variances and the like, have not always been greeted favorably. There is considerable conflict among the decisions, but this conflict is in part real and in part apparent because of the different factual situations. One thing is certain, however, and that is that this is an area of Church-State relations in which constitutional issues are no longer latent, but are being drawn out to preserve and promote the conflicting interests.

B. SCHOOLS — *Minimal Retreat from the Extreme of Establishment*

The "free exercise" of religion by individual citizens continues to encounter relatively little difficulty, but the problem of "establishment" is growing apace — especially in the Catholic desire for public subsidy of parochial schools (or the exemption of Catholic parents from public-school taxation) and in the Protestant desire for public-school encouragement (and often more than encouragement) of at least non-sectarian religious morality.⁴⁵

It goes without saying that the most important Supreme Court decisions construing the "establishment" clause of the first amendment have been in the field

39 See Consigny & Zile, *Use of Restrictive Covenants in a Rapidly Urbanizing Area*, 1958 Wis. L. Rev. 612.

40 4 Wis.2d 246, 89 N.W.2d 798 (1958).

41 The following is the restrictive covenant here involved:

No lot shall be used except for residential purposes. No building shall be erected, altered, placed or permitted to remain on any lot other than one detached single-family dwelling not to exceed two and one-half stories in height and a private garage for not more than two cars. 4 Wis.2d 246, 89 N.W.2d 798, 799 (1958).

42 The court stated:

A basic reason for the difference which the law recognizes would seem to be that zoning is a governmental action while restrictive covenants are agreements between private individuals. There is nothing in the record to show that there is any concerted movement in the city for the exclusion of churches. Conceding the social value of churches, it is nevertheless true that churches, like other places of assembly, produce noise, congestion and traffic hazards. The exclusion of uses which create such conditions in an area planned as residential cannot be said to be against public policy. Owners of land in the plat have the right to impose such a restriction and the courts will enforce it. 4 Wis.2d 246, 89 N.W.2d 798, 800 (1958).

43 See 55 MICH. L. REV. 601, 603 (1957): "A municipality will find it exceedingly difficult . . . to exclude a church from a residential area, either by [a] zoning ordinance or [by] decision of the zoning board." For an extended discussion of this aspect of the zoning question, see Note, 70 HARV. L. REV. 1428 (1957).

44 Note, 33 NOTRE DAME LAW. 416, 420 (1957).

45 AMERICAN CIVIL LIBERTIES UNION, 38th ANN. REP. 7 (1958).

of education. A restatement of these cases is provided for a better and more thorough presentation of the problem. In 1947, the Supreme Court, in *Everson v. Board of Education*,⁴⁶ held that a statute authorizing reimbursement of parents for expenditures for bus transportation of their children to school, including Catholic parochial schools, did not constitute an establishment, its purpose being merely to provide safe transportation and thus protect the general welfare. In the course of its opinion however, the Court for the first time spelled out the meaning and the implications of the prohibition against an establishment of religion contained in the first amendment. In a now famous dictum, Justice Black, speaking for the majority,⁴⁷ stated:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."⁴⁸

The following year, in the case of *McCollum v. Board of Education*,⁴⁹ the Court relied on the above dictum to invalidate a released-time system under which pupils, whose parents signed permission cards, were given periods of religious instruction on the public school premises during school hours by teachers employed by religious organizations. Non-participating children attended a regular class or a study hall during this released-time period. The majority⁵⁰ refused to accept the argument that the first amendment forbids only preference of one religion over another and held that since public buildings were being used for religious instruction and the state's compulsory education system was in turn being used to help provide for instruction carried on by the separate religious institutions, the program was unconstitutional.

The most recent Supreme Court decision on this issue was *Zorach v. Clauson*,⁵¹ which upheld the New York released-time system,⁵² holding that the first amendment did not require separation in every respect, the question in each case being one of degree.⁵³ This case emphasized the fact that we are a religious people whose institutions presuppose a Supreme Being.⁵⁴ The Court reasoned that to refuse to accommodate the public service to their spiritual needs would be to prefer non-believers over believers. It was pointed out that, since the children were released for instruction outside the school, religious instruction in public schools was not involved.⁵⁵

The *Zorach* decision constitutes a retreat from both *Everson* and *McCollum*. Where *Everson's* broad dictum, reaffirmed in *McCollum*, outlawed aid to all religious institutions, *Zorach* recognized that the government can, without constitutional violation, accommodate all religious institutions.

46 330 U.S. 1 (1947).

47 Justices Jackson, Frankfurter, Rutledge, and Burton dissenting.

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

49 333 U.S. 203 (1948).

50 Justice Reed dissenting.

51 343 U.S. 306 (1952).

52 N.Y. EDUC. LAWS § 3210 (1953). Other states having similar statutes are: California, CAL. EDUC. CODE 1959 § 8201; Hawaii, HAWAII REV. LAWS § 40-15 (1955); Kentucky, KY. REV. STAT. ANN. § 158.190 (1955); Maine, ME. REV. STAT. ANN. ch. 41, § 146 (1954); Oregon, ORE. REV. STAT. § 336.260 (1957).

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

54 *Id.* at 313.

55 *Id.* at 314, Justices Black, Frankfurter, Jackson dissenting.

The released-time issue is not dead. In *Perry v. School District*,⁵⁶ a taxpayer brought an action against the school district to have the released-time program in public schools declared unconstitutional. The question was one of first impression in Washington and the statutory authority to excuse a child for religious instruction, though not explicitly granted, was construed to be granted.⁵⁷ The Washington Supreme Court affirmed the lower court and upheld the constitutionality of the program. However, the court modified its judgment by holding that the distribution of information cards in public schools, or the making of announcements or explanations for the purpose of obtaining the parents' consent for their children's participation in the released time program, by representatives of religious groups or instructors in the schools, was in contravention of the state constitution.⁵⁸

Recently the members of the 1959 Wisconsin State Assembly requested the opinion of the Wisconsin attorney general as to the constitutionality of a bill relating to released time from public schools for religious instruction. His opinion, forwarded to the State Assembly on June 24, 1959, was that the proposed bill did not violate the United States Constitution (based on *McCullum and Zorach*), but he stated:

It is readily apparent that Wisconsin is in a minority position on the "released time" question. Most of the states approve it, even those that have similar constitutional provisions to ours. The constitution means, for legal purposes, what the Wisconsin Supreme Court says it means. Based on the construction given these provisions by the Supreme Court and my predecessors in office and for the reasons stated herein, I do not see how I could come to any conclusion except that Bill 281, A., violates the Wisconsin Constitution.⁵⁹

The Wisconsin attorney general's rationale even questioned the use of school facilities by religious institutions for any religious purpose whatsoever. As a result, at the time of this writing, there is no released-time statute in the state of Wisconsin.

Some states have not been quite so restrictive. In Florida, a school board of trustees recently permitted several churches to use school buildings during Sunday non-school hours. The authorization was for the temporary use of the buildings pending completion of construction of church buildings. Some taxpayers objected and instituted proceedings by which they sought an injunction against such use. They took the traditional position that, by permitting the religious institutions to use the school buildings, the school board was indirectly taking money from the public treasury in aid of religious institutions, contrary to their constitutional rights. It was their position that regardless of how small the amount of money might be, nevertheless, if anything of value could have been traced from the public institution to the religious institution, their constitutional rights had been thereby violated. The

56 344 P.2d 1036 (Wash. 1959).

57 WASH. REV. CODE § 28.27.010 (1952), states:

The superintendent of the schools of the district in which the child resides, . . . may excuse a child from such attendance if the child is physically or mentally unable to attend school, . . . or for any other sufficient reason. (Emphasis added.)

58 WASH. CONST. art. 1, § 11, art. 9, § 4. The latter section provides that all public supported schools "shall be forever free from sectarian control or influence."

59 Letter from John W. Reynolds to the Honorable Members of the 1959 Wisconsin State Assembly, June 24, 1959. The attorney-general reasoned:

- (a) A plan set forth in Bill 281, A., whereby pupils are released from school for religious instruction outside the school and which utilizes the tax-established and tax-supported public school system to aid religious groups to spread their faith is in violation of sec. 18, Art. I, Wis. Const.
- (b) There is grave doubt as to the validity of any released time plan that makes use of a pupil's school time, whether off or on the school property, and which makes use of school regulations to facilitate attendance for religious instruction.
- (c) There is doubt as to the validity of any released time plan where school authorities cooperate to the extent of releasing the children for religious instruction if the children remain under the technical jurisdiction and discipline of the public school. *Id.* at 19.

Florida Supreme Court held, in *Southside Estates Baptist Church v. Board of Trustees*,⁶⁰ that the action of the Board did not violate either Florida Laws or the first amendment. In rejecting the above contentions, the court properly applied the maxim *De minimis non curat lex*. The court stated that logic, as well as its traditional attitudes toward the importance of religious worship, justified its alignment with other courts which permitted such use of their public schools. The court stated:

We, therefore, hold that a Board of Trustees of a Florida School District has the power to exercise a reasonable discretion to permit the use of school buildings during non-school hours for any legal assembly which includes religious meetings, subject, of course, to judicial review should such discretion be abused to the point that it could be construed as a contribution of public funds in aid of a particular religious group or as the promotion or establishment of a particular religion.⁶¹

The question of state financial support to religious educational institutions has also been the subject of recent litigation in Vermont. A Vermont statute provided in part that each town district shall maintain a high school or furnish secondary instruction for its advanced pupils at a high school or academy to be selected by the parents or guardians of the pupils. This statute also provided for the payment of tuition by the local town district per pupil per school year as billed.⁶² Under the statute, public funds were being used by the South Burlington School Board to pay tuition for pupils attending Catholic schools.⁶³ The court enjoined these payments and stated:

Here we have a direct conflict between sectarian education convenient to the parents and guardians and paid by public tax moneys and the separation of Church and State. The doctrine of separation must prevail. It is indeed difficult to upset such a long standing practice nor is this practice being upset lightly. The First Amendment has erected a wall between Church and State. That wall must be kept high and impregnable. This court could not approve the slightest breach. This practice has breached that wall.⁶⁴

This decision has not been popular⁶⁵ but Vermont's lieutenant governor, who is expected to seek the governorship in the next election, said that he believed the decision was "the only proper ruling,"⁶⁶ and observed, "If the ruling is upheld it will take the most patient and temperate kind of activity on the part of everyone to find the proper solution to the problem."⁶⁷

A new issue is presented in the form of attempts to interject prayers into the public schools and the closely kindred subject of Bible reading. Many states have statutes requiring the Bible to be read in the public schools.⁶⁸ The Supreme Court has not yet ruled on this practice,⁶⁹ but the issue has been spotlighted by a three-

60 115 So.2d 697 (Fla. 1959).

61 *Id.* at 700-01.

62 VT. STAT. ANN. tit. 16, § 793 (1958).

63 The Burlington Free Press, Feb. 20, 1960, p. 1, col. 4.

64 Swart v. South Burlington, Civil No. 1685 (Vt., Chittenden County Ct. Feb. 19, 1960).

65 Burlington Daily News, Feb. 29, 1960, p. 1, col. 1.

66 Vermont Sunday News, Feb. 21, 1960, p. 1, col. 8.

67 *Ibid.*

68 Alabama, ALA. CODE tit. 52, § 542 (1940); Delaware, DEL. CODE ANN. tit. 14, § 4102 (1953); Georgia, GA. CODE § 32-705 (1933); Idaho, IDAHO CODE ANN. § 33-2705-07 (1947); Kentucky, KY. REV. STAT. ANN. § 158.170 (1955); Maine, ME. REV. STAT. ANN. ch. 41, § 145 (1954); New Jersey, N.J. REV. STAT. § 18:14-77 (1937); also provided for is the reading of the Lord's Prayer, N.J. REV. STAT. § 18:14-78 (1937); Pennsylvania, PA. STAT. ANN. tit. 24, § 15-1516 (1950); Tennessee, TENN. CODE ANN. § 49-1307 (1955). Note: in the above statutes, only Georgia and Kentucky provide for students to be excused with parent or guardian permission. Some states merely provide that the Holy Scripture *may* be read in public schools: Kansas, KAN. GEN. STAT. ANN. § 72-1628 (Supp. 1957); North Dakota (at option of teacher, but parent or guardian may excuse child), N.D. REV. CODE § 15-3812 (1943); Oklahoma, OKLA. STAT. ANN. tit. 70, § 11-1 (1941). Two states provide that the Bible shall not be excluded from their public schools: Indiana, IND. ANN. STAT. § 28-5101 (1948); and Iowa, IOWA CODE ANN. § 280.9 (1946).

69 *Doremus v. Board of Education*, 342 U.S. 429 (1952), dismissed for want of standing on appeal from a judgment upholding reading of the Bible in New Jersey schools. See also,

judge federal district court decision holding the Pennsylvania Bible reading statute⁷⁰ unconstitutional in *Schempp v. School District*.⁷¹ In *Schempp*, a Unitarian parent⁷² sought to enjoin enforcement of a state statute providing for the reading of ten verses of the Holy Bible⁷³ in the public school classrooms each day, without comment. The American Civil Liberties Union sponsored the case⁷⁴ and the American Jewish Congress appeared as amicus curiae, filed a brief and participated in the argument.⁷⁵ In an ably written opinion by Judge Biggs, it was held that such a reading constituted a religious ceremony and therefore the statute violated the proscription of the first amendment to the federal constitution as applied to the states by the fourteenth amendment. The court further held that the reading of ten verses of the Bible without comment in conjunction with a mass recitation of the Lord's Prayer also violated the first amendment. However, having passed on the constitutional issues presented by the reading of ten verses of the Bible, and by the reading of the Bible verses followed by the recital of the Lord's Prayer, the opinion specifically noted that it did not reach the issue relating to a ceremony which consists merely of the recital of prayer, such a case not having been before the court.⁷⁶ It is noteworthy that the Pennsylvania statute required attendance at school of every child of school age⁷⁷ and imposed criminal penalties on parents or other persons in loco parentis for the child's non-attendance.⁷⁸ The statute made no provision for excusing the child during the reading of the Bible.⁷⁹ The court undoubtedly felt that this mandatory requirement put the children in the path of "compulsion, [which] . . . , may be subtle and thus particularly effective in respect to children. . . ." ⁸⁰ Six other states have Bible reading statutes, embodying this apparently fatal defect.⁸¹

In New York, the sole issue of prayers in public schools was contested in

Gideons International v. Tudor, 14 N.J. 31, 100 A.2d 857 (1953), cert. denied, 348 U.S. 816 (1954), a New Jersey judgment holding unconstitutional the distribution of Gideon Bibles through the schools. It may well be asked on the authority of *Tudor*, whether all Bible reading is unconstitutional as a preference of one religion since sects in fact embrace diverse "official" versions.

70 PA. STAT. ANN. tit. 24, § 15-1516 (1950).

71 177 F. Supp. 398 (E.D. Pa. 1959).

72 Plaintiffs were Unitarians and one of the children testified that he did not believe in the divinity of Christ, the Immaculate Conception, or the concepts of an anthropomorphic God or the Trinity. All of these doctrines were read to him at one time or another during the course of his instruction at the Abington High School.

73 The legislature of Pennsylvania did not define the term "Holy Bible" as do none of the other state statutes. They do not, for example, make a differentiation between the King James Version, frequently used by the Protestant churches, and the Douay version, which is authorized by the Roman Catholic Church, nor between the Old Testament and New Testament, the latter an arena of doctrinal demarcation.

74 AMERICAN CIVIL LIBERTIES UNION, 38th ANN. REP. 27 (1958).

75 N.Y. Times, Mar. 3, 1959, p. 14, col. 2.

76 177 F. Supp. 398, 404 (E.D. Pa. 1959):

It might also be argued with equal force that the compulsory recital of the Lord's Prayer, solely, standing alone, constitutes an establishment of religion and a prohibiting of the free exercise thereof. But we do not and cannot reach issues relating to a ceremony which consists of the recital of the Lord's Prayer, Bible reading being omitted therefrom. Such a case is not before us.

77 PA. STAT. ANN. tit. 24, § 13-1327 (Supp. 1959).

78 PA. STAT. ANN. tit. 24, § 13-1333 (1950).

79 PA. STAT. ANN. tit. 24, § 15-1516 (1950).

80 *Schempp v. School District*, 177 F. Supp. 398, 406 (E.D. Pa. 1959).

81 Alabama, ALA. CODE tit. 52 § 542 (1940); Delaware, DEL. CODE ANN. tit. 14, § 4102 (1953); Idaho, IDAHO CODE ANN. § 33-2705-07 (1947); Maine, ME. REV. STAT. ANN. ch. 41, § 145 (1954); New Jersey, N.J. REV. STAT. § 18:14-77, 78 (1937); and Tennessee, TENN. CODE ANN. § 49-1307 (1955). Note that the Kansas and Oklahoma statutes merely provide that the Bible may be read in public schools, but there is no provision for the child to be excused with parent or guardian permission, KAN. GEN. STAT. ANN. § 72-1628 (Supp. 1957), and OKLA. STAT. ANN. tit. 70, § 11-1 (1941).

Engel v. Vitale.⁸² In *Engel*, the taxpayers in the school district brought mandamus proceedings to compel the Board of Education to discontinue the use in public schools of the prayer "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our Country." In a lengthy opinion by Justice Meyer, the Special Term held that the "establishment" clause of the first amendment did not prohibit the *noncompulsory* saying of prayer in the public schools, so long as the School Board takes affirmative steps to protect the rights of those who, for whatever reason, choose not to participate in the saying of the prayer.

Much of the furor has been in the area of bus transportation, school lunches, textbooks on secular subjects, and health services.⁸³ While religious institutions generally favor separation of church and state in the educational arena,⁸⁴ it has also been observed that the state may have an obligation to aid these separate educational systems, and the national interest might be adversely affected if aid is not forthcoming.⁸⁵ The religious institutions have not expected or even greatly desired basic institutional support (*i.e.*, salaries and buildings), but incidental expenses such as enumerated above have been another matter.⁸⁶ Rev. John A. O'Brien, recently stated:

Regarding parochial schools, the Senator [John F. Kennedy] said: "as for such fringe benefits as buses, lunches, and other services, the issue is primarily social and economic and not religious. Each case must be judged on its merits within the law as interpreted by the courts." Here many Catholics would point out that the issue is not *merely* social and economic since it involves justice and rights: justice to taxpayers and "equal protection under the law." Catholics have supreme confidence in the fairness of both our courts and the general public in reaching just decisions on these matters, once all the facts are understood.⁸⁷

Many communities have been debating this problem and have simultaneously been subjected to pressures from within⁸⁸ and without.⁸⁹ In *Squires v. City of Augusta*,⁹⁰ the city of Augusta, Maine, passed a municipal ordinance and an order providing for public bus transportation to children attending non-public schools. Thirteen taxable inhabitants of the city sought to enjoin the city officials from carrying into effect the provision of this ordinance. On May 25, 1959, the Supreme Judicial Court, Kennebec County, held that in the absence of express authority from the state legislature in the city charter or in a statute, the Augusta city council had no authority to enact an ordinance of this type. The Maine legislature is now considering public transportation for parochial school children,⁹¹ as some states have already done.⁹²

82 191 N.Y.S.2d 453 (Sup. Ct. 1959).

83 For a general discussion of the problem, pointing out that such support is primarily a service to the children and their parents and not a handout, see Kenealy, *The Private School and Public Law*, 2 INSTITUTE OF CHURCH AND STATE 62, 79 (1959).

84 See HESBURGH, PATTERNS FOR EDUCATIONAL GROWTH 52 (1958), for a discussion of some of the problems of parochial schools; see also RIESMAN, CONSTRAINT AND VARIETY IN AMERICAN EDUCATION 57 (1958).

85 Last year's National Defense Education Act set up sorely needed programs for testing and guidance in the public schools, but parochial schools were eliminated, *Time*, Dec. 7, 1959, p. 62, col. 3; for a more perceptive analysis, see McCLUSKEY, CATHOLIC VIEWPOINT ON EDUCATION (1959).

86 For the European approach, which is a form of reimbursement to parents of children attending private schools of taxes paid by them to support the public schools, see *Commonweal*, Nov. 27, 1959, p. 255; For European Repercussions, see *N.Y. Times*, Dec. 25, 1959, p. 2, col. 2, 3.

87 *Look*, Feb. 16, 1960, p. 20.

88 A citizens group called "Citizens for the Connecticut Constitution, Inc." was organized to protest providing bus transportation to the school conducted by St. Rose's Roman Catholic Church, after the municipality of Newtown, Conn., had approved same in a referendum: *N.Y. Times*, Oct. 31, 1959, p. 25, col. 1.

89 *N.Y. Times*, Feb. 14, 1959, p. 2, col. 1.

90 155 Me. 151, 153 A.2d 80 (1959).

There have been other miscellaneous issues that are difficult to categorize and that possibly reflect a distinctive change in the philosophy of some of the courts. In the Village of Ossining, New York, a committee comprised of Catholics and Protestants has, each year beginning with 1956, erected a Nativity scene on the lawn of the local public high school. This was done with the permission of the Board of Education and the project was financed by private subscription. The Supreme Court, Westchester County, dismissed on the merits an action to enjoin the erection of the Nativity scene.⁹³ In so ruling, Justice Gallagher stated:

Much has been written in recent years concerning Thomas Jefferson's reference in 1802 to "a wall of separation between Church and State." It is upon that "wall" that plaintiffs seek to build their case. Jefferson's figure of speech has received so much attention that one would almost think at times that it is to be found somewhere in our Constitution. Courts and authors have devoted numerous pages to its interpretation. This Court has no intention of engaging in a dispute among historians as to the meaning of a metaphor. The only language which we are called upon to interpret and apply is the plain language quoted above from the Federal and State Constitutions.⁹⁴

Absolute separation is not and has never been required by the Constitution. . . .⁹⁵

By no process of legal reasoning could the permission granted to the Creche Committee be construed as an establishment of religion or a denial of the right to worship freely and without discrimination.⁹⁶

Public school property is not then entirely off limits for religious observance, as long as no public funds are expended thereon and there is no student compulsion involved in the observance.⁹⁷

In another unusual case the Supreme Court of Oklahoma held, in *State v. Williamson*,⁹⁸ that the construction of a memorial chapel to be paid for by private funds and to be used for assembly purposes, including nonsectarian, nondenominational religious worship, did not violate the first amendment to the federal constitution or state constitutional provisions. Although the case dealt with the erection of such a chapel at an orphanage, there is a strong suggestion that a similar plan relating to a state school would be judicially condoned. Of course this case did not require state funds ab initio and courts are usually reluctant to frustrate a private gift to the state, but it does pose a nice problem of what separation of church and state means. In its answer the court analogized to the chapel at West Point, which is supported by government funds and is available for the cadets to attend.⁹⁹

Having analyzed what is happening in the area of religion in the educational field, we have touched the heart of the "establishment" turmoil. Its importance to us as individuals, and as a country, cannot be overestimated. What is to happen can sometimes be foretold by perceiving trends in what is happening. Having examined the cases and the tempo of the times, the writers predict a continued exclusion of religious influences in the public educational institutions, but on the other hand, there appears to be a growing favoritism toward providing the usual governmental services to the schools of the religious institutions. As to this latter

91 Time, Dec. 7, 1959, p. 62, col. 3.

92 State statutes providing for transportation of non-public school pupils: ALASKA COMP. LAWS ANN. § 37-11-4, 5 (Supp. 1958); ILL. ANN. STAT. ch. 122, § 29-7 (Smith-Hurd 1959); LA. REV. STAT. § 17:158 (1951); MICH. COMP. LAWS § 15.3366 (1959); MONT. REV. CODES ANN. § 75-2003 (1947); N.H. REV. STAT. ANN. § 189:9 (1955); and R.I. GEN. LAWS ANN. § 16-21-2 (1956).

93 Baer v. Kolmorgen, 14 Misc.2d 1015, 181 N.Y.S.2d 230 (Sup. Ct. 1959).

94 *Id.* at 237.

95 *Id.* at 239.

96 *Ibid.*

97 See also Southside Estates Baptist Church v. Board of Trustees, 115 So.2d 697 (Fla. 1959).

98 347 P.2d 204 (Okla. 1959).

99 *Id.* at 207.

point, Harrop A. Freeman of the Cornell Law School has aptly drawn the conclusion:

Some believe that they see a pattern in the cases: that the strongly Catholic states and judges uphold aid to parochial education. Although the cases tend in this direction, I do not see therein the *ratio decidendi*. I believe the courts have been trying to apply a difficult but valid test: If the aid is directly to the "church" the use of public funds (property) is uniformly held invalid; whereas, when the aid is a normal governmental service to its citizens regardless of their religious affiliations the grants will be upheld.¹⁰⁰

Perhaps, then the rationale should be a policy of non-discrimination in essential school services rather than thinking of such as positive aid. This positive-negative distinction may well be the key to the true understanding of the "establishment" clause of the first amendment in the field of education. To proscribe establishment is not to order discrimination. Equality of academic standards is generally demanded of all sectarian institutions and rightly so. It seems strangely incongruous, then, to withhold services incidental to the general and equally convenient education of all.

C. TAXATION—*A Cultural Quid Pro Quo*

The Supreme Court has made a major judicial decision¹⁰¹ on the matter of tax exemption for religious institutions and property; and that was controlled by considerations of a loyalty oath as a requirement for obtaining tax exemptions versus freedom of speech. In striking down this portion of the law because it placed the burden of proof on the applicant rather than on the state, the Court held that this was a violation of due process. The Court invoked the rationale of *Speiser v. Randall*,¹⁰² decided the same day in reaching its conclusion. That case held the oath provision as a step in the process of determining eligibility for the exemption unconstitutional in that it casts the burden of proof on the applicant for the exemption.¹⁰³

The allocation of burden of proof was perceptively viewed as possibly outcome determinative in the marginal areas of permissive speech,¹⁰⁴ and "[w]here the transcendent value of speech is involved, due process certainly requires . . . that the State bear the burden of persuasion to show that the appellant engaged in criminal speech."¹⁰⁵

The majority opinion noted the appellant's contentions that the provisions were "abridgments of religious freedom and . . . violations of the principle of separation of church and state" but avoided any conclusion on these as necessary since the *Speiser* rationale was dispositive of the case.¹⁰⁶ Only Justice Douglas expressed the opinion that the case ought to rest on the issue of religious freedom. From the record it appeared that it was a stated principle of the church that the state could not exact an oath of coerced affirmation as to church doctrine, advocacy or beliefs. Justice Douglas summarizes: "There is no power in our government to make one bend his religious scruples to the requirements of this tax law."¹⁰⁷

100 Freeman, *Exemptions From Civil Responsibility*, 20 OHIO ST. L.J. 437, 440-41 (1959).

101 *First Unitarian Church v. County of Los Angeles*, 357 U.S. 545 (1958). Companion case decided the same day, *Valley Unitarian-Universalist Church, Inc. v. County of Los Angeles*. *First Methodist Church v. Horstmann*, 357 U.S. 568 (1958) relies on *First Unitarian* as its basis of decision.

102 357 U.S. 513 (1958). Companion case: *Prime v. City & County of San Francisco*.

103 Not only does the initial burden of bringing forth proof of non-advocacy rest on the taxpayer, but throughout the judicial and administrative proceedings the burden lies on the taxpayer of persuading the assessor, or the court, that he falls outside the claim denied the tax exemption. *Id.* at 522.

104 *Id.* at 525-6.

105 *Id.* at 526.

106 *First Unitarian Church v. County of Los Angeles* 357 U.S. 545, 547 (1958).

107 *Id.* at 547, 548.

After this decision the California legislature repassed the tax exemption bill without the provision requiring the loyalty oath.¹⁰⁸ It seems that this tax exemption, especially for private and parochial schools, has had trouble before in California;¹⁰⁹ but it appears to have weathered the storm, for a while at least, with the defeat of proposition 16.¹¹⁰

A very interesting case was recently decided by the Montana Supreme Court.¹¹¹ A church society organized on a communal living basis claimed exemption from the Montana corporation and association license tax as a religious society. The exemption was denied despite reliance of the society on first amendment freedom of religion guarantees. The agricultural activities of the community, which sustained the socialized living services, were held purely commercial in nature and divorced from any possible religious beliefs of the members. As such, these activities were subject to the corporate privilege tax. The court used a common test in comparing the questioned activities to similar activities of purely commercial groups, discerning thereby similarity and competitive aspects. Another issue in this area is the determination of whether a particular piece of property lies within the definition of the state Constitution¹¹² and/or statute granting the exemption.

In understanding the cases on the matter of tax exemption it is imperative that they be read in the light of the peculiar terms of the statute or Constitutional provision under which they arise. In Nebraska, under a statute¹¹³ which provides that the property must be owned and used exclusively for religious purposes without profit to the owner or user, the court held that property owned by a religious group is exempt from taxation where it, and the income from it, is used exclusively for carrying out its educational work.¹¹⁴ It is the ultimate use of the property and not the status of the owner which was here determinative of the taxability of the property. In Oregon, exclusive use was the statutorily imposed test applied to property owned by the institution (whether religious, charitable, scientific, etc.). In *Multnomah*,¹¹⁵ it was held that a tax exemption was applicable even to the house where a janitor and the superintendent of the dining hall lived.

The phrase "exclusively used" has reference to the primary and incidental use . . . when the primary purpose is an exempt one, any incidental use of the exempt property for another purpose does not negative the exemption when the incidental use is not for profit.¹¹⁶

It is enough if the facility is incidental to the prime purposes of the institution and is reasonably necessary to the accomplishment of that purpose.¹¹⁷ Yet in the same case, the court denied an exemption to a book store owned by the same institution

108 N.Y. Times, Feb. 26, 1959, p. 19, col. 3.

109 N.Y. Times, Feb. 16, 1958, p. 63, col. 3. The voters were asked to adopt a constitutional amendment (proposition 16) which would repeal the tax exemption. This was supported by the Masons and some Protestant leaders and opposed by Catholics, Seventh Day Adventists, Lutherans and Episcopalians. There was added interest in the controversy as when the amendment granting exemption had been adopted in 1952, those favoring the exemption had only a 77,000 vote majority out of 5,000,000 votes cast.

110 N.Y. Times, Nov. 6, 1958, p. 22, col. 3.

111 State v. King Colony Ranch, 28 U.S.L. WEEK 2474, Mont. Sup. Ct., Mar. 17, 1960.

112 Only Kentucky, Louisiana, and New Mexico have constitutional provisions alone without statutes to back them up.

113 NEB. REV. STAT. § 77-202 (1958).

114 Nebraska Conference Ass'n of Seventh Day Adventists v. County of Hall, 166 Neb. 588, 90 N.W.2d 50 (1958).

115 Multnomah School of the Bible v. Multnomah County, —Ore.—, 343 P.2d 893 (1959). Here the exemption was granted under Ore. Rev. Stat. § 307-130 (1957) which provides for exemptions to literary, benevolent, charitable and scientific institutions, rather than under the section granting exemptions to religious institutions (§ 307.140); however the two sections are otherwise comparable. Therefore the same reasoning will probably apply to exemptions for religious institutions. The institution involved was a nondenominational liberal arts school emphasizing the study of the Bible.

116 *Id.* at 898.

117 See also 166 Neb. 588, 90 N.W.2d 50, 57 (1958); (discussion of case where the House of the Good Shepherd operated a laundry for profit).

because it was run for profit, even though all the money was turned over for the use of the school, a formalistic distinction not respected in the *Seventh Day Adventist* case (*supra*). Similarly in *Gull Lake*,¹¹⁸ the court granted a tax exemption to land used by the conference for running its Bible schools, under the charitable rather than religious exemption, even though rent was charged of those who used the facilities of the conference.

The charges made for such services and facilities approximate the cost thereof to plaintiff, and the income derived therefrom should and does not, in the opinion of this Court, detract from the charitable character of the plaintiff organization.¹¹⁹

The pertinent statutes in the latter two states are not significantly different,¹²⁰ yet the *Gull Lake* case seems preferable because the use to which the money is put ought to be determinative; there should be no penalty for attempting to defray the expenses in running the charity or religious institution.

The same reasoning was used in a Pennsylvania case¹²¹ where the lower court said that it is the actual use which is to determine whether a parking lot is tax exempt when the statute says that an exemption is to be given to "all churches, meeting-houses, or other regular places of stated worship, with the ground thereto annexed necessary for the occupancy and enjoyment of the same."¹²² The lower court buttressed its decision by mentioning the distance from the Church which many of the members live, the indispensability of the automobile and the traffic problem created by parking in the street. However, the Pennsylvania Supreme Court reversed¹²³ since the Pennsylvania constitution allowed exemption only for "actual places of religious worship."¹²⁴ Thus, "the exemption of Church property is constitutionally restricted, as educational and charitable property is not, to the actual place of worship."¹²⁵ The decision seems highly unrealistic in view of the fact that those who drafted the constitutional provision could hardly have contemplated parking lots, plus the fact that a subsequent legislative enactment exempted places of worship "with the ground thereto annexed necessary for the occupancy and enjoyment of the same."¹²⁶ The court chose to construe "necessary" very narrowly in light of the constitutional provision.

Courts have generally limited the favorable treatment accorded religious institutions in the tax exemption field to cases where the rationale of quid pro quo with society at large is applicable. Exemption from other general laws seldom clears the hurdle of the ban against discriminatory legislation. Thus, in a Kansas case¹²⁷ the court struck down a municipal ordinance which forbade door to door selling but made an exception as to religious, charitable or community service organizations.

Where an ordinance imposes penalties, it cannot make a particular act penal when done by one person and impose no penalty for the same act done under like circumstances by another.¹²⁸

There is no reasonable ground upon which the classification can be made.

118 *Gull Lake Bible Conference Ass'n v. Township of Ross*, 351 Mich. 269, 88 N.W.2d 264 (1958).

119 *Id.* at 267.

120 MICH. COMP. L. 211.7 (1948) "such real estate as shall be owned and occupied by . . . charitable . . . institutions . . . while occupied by them solely for the purposes for which they were incorporated"; ORE. REV. STAT. § 307.130 (1957) "only such real or personal property, or proportions thereof, as is actually and exclusively occupied or used in . . . charitable . . . work carried on by such institutions."

121 *In re Second Church of Christ Scientist v. City of Philadelphia*, 189 Pa. Super. 579, 151 A.2d 860 (1959). Cases therein cited indicate, however, that the exemptions allowed in *Seventh Day Adventists*, *Multnomah*, and *Gull Lake* would not have been allowed by the Pennsylvania Court.

122 PA. STAT. ANN. tit. 72 § 5020-204(a) (1950).

123 *Second Church of Christ Scientist v. City of Philadelphia*, 157 A.2d 54 (Pa. 1959).

124 PA. CONST., art. IX, § 1.

125 157 A.2d 54, 55 (Pa. 1959).

126 PA. STAT. ANN. tit. 72, § 5020-204(a) (1950).

127 *City of Derby v. Hiegert*, 183 Kan. 68, 325 P.2d 35 (1958).

128 *Id.* at 37, citing 5 McQUILLON, MUNICIPAL CORPORATIONS § 18.11 (3d ed., 1949).

It bears no relation to the object and purposes of the ordinance. Its only effect is to permit one class to violate the provisions of the penal ordinance without penalty and to hold another class strictly responsible thereto.¹²⁹

The field of tax exemption for religious institutions¹³⁰ does not seem to be too controversial of late. The test for determining if property will be exempted seems to be the use to which it is put, but the loss of the exemption for income producing property which is exclusively for the use of the religious institution seems to be a distinction which bears little relation to the purposes of the exemption — to remove the burden of taxes from those institutions which are considered to be performing an actual public service. No great injustice is done by this distinction but likewise no great harm would be done by its abolishment. This area, then, seems to be the one major area in which the state is constitutionally able to give aid to religion (although not solely to a certain denomination or denominations). It is an element of institutional recognition traditional in our society and is latent precedent that such can exist.

D. TORT LIABILITY — *Emerging Realism*

The question of immunity of religious institutions from tort liability is but one facet of the broader problem of immunity of charitable institutions from tort liability. It is beyond the scope of this survey to analyze the entire field of charitable immunity and the legal changes which have taken place within that area since the decision in *President and Directors of Georgetown College v. Hughes*.¹³¹ Although the majority of the courts have made little, if any, distinction between a religious charitable institution and other types of charitable institutions,¹³² some courts have discussed religious factors in cases involving charitable immunity. A few of these cases deserve comment.

In *Casey v. Roman Catholic Archbishop of Baltimore*¹³³ plaintiff slipped and fell on a waxed aisle of a dimly lit church and sustained serious injury. A cross appeal was filed by plaintiff on the ground that the trial judge erred in not allowing certain questions concerning religious prejudice to be asked of the jury during voir dire. The court, in reversing and remanding, stated:

[I]f the religious affiliation of a juror might reasonably prevent him from arriving at a fair and impartial verdict in a particular case because of the nature of the case, the parties are entitled to . . . have the court discover for them, the existence of bias or prejudice resulting from such affiliation. . . . [A] party is entitled to a jury free of all disqualifying bias or prejudice without exception, and not merely a jury free of bias or prejudice of a general or abstract nature.¹³⁴

With the recognition by the court that some jurors might hesitate to render an award against a religious institution, and the granting of the opportunity to disclose such hesitancy during voir dire, religious institutions are properly placed on the same footing as any other litigant.

New Jersey recently discarded the doctrine of immunity in regard to religious institutions.¹³⁵ Having discarded charitable immunity earlier the same day¹³⁶ and

129 *Id.* at 37.

130 See generally, Van Alstyne, *Tax Exemption of Church Property*, 20 OHIO ST. L. J. 461 (1959).

131 130 F.2d 810 (D.C. Cir. 1942). For an excellent discussion of the broad area of charitable immunity, see *Collopy v. Newark Eye and Ear Infirmary*, 27 N.J. 29, 141 A.2d 276 (1958).

132 See, e.g., *Knecht v. Saint Mary's Hospital*, 392 Pa. 75, 140 A.2d 30 (1958) (immunity upheld; no discussion of religious character of institution). Compare *Dalton v. St. Luke's Catholic Church*, 27 N.J. 22, 141 A.2d 273 (1958) (tort immunity discarded; religious affiliation not discussed) with *McDermott v. Saint Mary's Hospital Corp.*, 144 Conn. 417, 133 A.2d 608 (1957) (immunity doctrine upheld; religious character of institution not discussed).

133 217 Md. 595, 143 A.2d 627 (1958).

134 *Id.* at 632.

135 *Dalton v. St. Luke's Catholic Church*, 27 N.J. 22, 141 A.2d 273 (1958).

136 *Collopy v. Newark Eye and Ear Infirmary*, 27 N.J. 29, 141 A.2d 276 (1958).

finding no reasonable grounds on which to distinguish between a religious institution and other types of charitable institutions¹³⁷ the New Jersey court joined the increasing number of states that have discarded the immunity of eleemosynary institutions.¹³⁸

In a recent Minnesota case, *Mulligan v. Saint Louis Church*,¹³⁹ plaintiff, having descended the church steps, was standing on the public sidewalk when she was knocked down by another parishioner who had tripped over a mat lying on the church steps. In sustaining a recovery for plaintiff, the court stated that as the relation between the church and plaintiff had ceased, plaintiff was in the same relationship to the church as any other pedestrian who passes the premises on a public walk.¹⁴⁰ This decision places a church in the same status as any other charitable institution; the relationship of church and church-goer, just as the status of licensee, terminates when the person leaves the premises.¹⁴¹

Where a statutory duty is involved, the courts have not hesitated to impose liability on religious institutions.¹⁴² However, where no statutory duty exists, a few states have persisted in upholding the immunity of religious institutions. This has been done on the grounds that if immunity is to be abrogated, it is a task for the legislature¹⁴³ or that public policy requires that religious institutions be immune from tort liability in order to prevent depletion of their charitable funds.¹⁴⁴

Two states have reached conflicting results in applying the doctrine of respondeat superior to religious institutions. The Washington Supreme Court upheld the immunity of religious organizations where a gratuitous service was rendered¹⁴⁵ while the California Supreme Court saw no reason for distinguishing between re-

137 *Id.* at 274.

138 See, e.g., *Wheat v. Idaho Falls Latter Day Saints Hospital*, 78 Idaho 60, 297 P.2d 1041 (1956); *Haynes v. Presbyterian Hospital Ass'n*, 241 Iowa 1269, 45 N.W.2d 151 (1950); *Roland v. Catholic Archdiocese*, 301 S.W.2d 574 (Ky. 1957) (no immunity where statutory duty exists); *Foster v. Roman Catholic Diocese*, 116 Vt. 124, 70 A.2d 230 (1950). *Contra*, *McDermott v. St. Mary's Hospital Corp.*, 144 Conn. 417, 133 A.2d 608 (1957); *Landgraves v. Emanuel Lutheran Charity Board*, 203 Ore. 489, 280 P.2d 301 (1955); *Penalozza v. Baptist Memorial Hospital*, 304 S.W.2d 203 (Tex. 1957).

139 95 N.W.2d 1 (Minn. 1959).

140 *Cf. Fandel v. Parish of St. John The Evangelist*, 225 Minn. 77, 29 N.W.2d 817 (1947). Some cases have involved the recognition that the injured party was not an invitee on church premises but merely a licensee since a beneficiary of the religious activity involved. *Springer v. Federated Church*, 71 Nev. 177, 283 P.2d 1071 (1955); *Coalbaugh v. St. Peter's Roman Catholic Church*, 142 Conn. 536, 115 A.2d 662 (1955). An interesting case is *Manning v. Noa*, 345 Mich. 130, 76 N.W.2d 75 (1956) where plaintiff, injured on church property while leaving premises after having played bingo, was allowed to recover over the objection that her participation in an unlawful act, *viz*: bingo, barred her from recovery.

141 No immunity for religious institutions exists in Minnesota. *Geiger v. Simpson Methodist Episcopal Church*, 174 Minn. 389, 219 N.W. 463 (1928).

142 *McQueeney v. Catholic Bishop of Chicago*, 21 Ill. App. 2d 553, 159 N.E.2d 43 (1959) (church failed to provide handrails as required by city ordinance; no immunity from liability). According to the Illinois rule, *Moore v. Moyle*, 405 Ill. 555, 92 N.E.2d 81 (1950), immunity for charitable institutions is limited to the trust funds necessary for the charity, but where these funds will not be diverted because of adequate insurance coverage, the normal rules of liability are imposed. In this case there is no discussion of insurance coverage. The case may turn upon either the statutorily imposed liability or the existence of insurance. *Watry v. Carmelite Sisters*, 274 Wis. 415, 80 N.W.2d 397 (1957) (Wis. STAT. § 101.06 (1955) applies to religious organizations in its requirement that public buildings be maintained in a safe condition). *Compare* *Roland v. Catholic Archdiocese*, 301 S.W.2d 574 (Ky. 1957) with *St. Walburg Monastery of Benedictine Sisters v. Feltner's Adm'r*, 275 S.W.2d 784 (Ky., 1955).

143 *Landgraver v. Emmanuel Lutheran Charity Bd.*, 203 Ore. 489, 280 P.2d 301 (1955).

144 *Baptist Memorial Hospital v. McTighe*, 303 S.W.2d 446 (Tex. 1957). *Cf. Steele v. St. Joseph's Hospital*, 60 S.W.2d 1083 (Tex. 1933) (no immunity where there is negligence in hiring or keeping employee whose negligence causes injury).

145 *Lyon v. Tumwater Evangelical Free Church*, 47 Wash. 2d 212, 287 P.2d 128 (1955) criticized in Comment, *Questionable Status of the Charitable Immunity*, 31 WASH. L. REV. 287 (1956).

ligious institutions and charitable institutions and held the religious institution liable.¹⁴⁶

One state has drawn a distinction between a charitable hospital and a religious group. While holding a charitable hospital liable because of increased insurance coverage¹⁴⁷ a religious group was granted immunity from tort liability in *Hunsche v. Alter*.¹⁴⁸ This immunity doctrine was subsequently extended and upheld in *Tomasello v. Hoban*.¹⁴⁹ The rationale behind both decisions is stated in *Hunsche v. Alter*:

This changed situation [increased insurance coverage] has required a change in public policy with respect to charity hospitals and has prompted the courts of a number of states (including Ohio) to reconsider the question of tort immunity for such institutions. No such change has occurred, however, in the operation of nonprofit religious organizations and the reasons which prompted the courts to grant partial immunity to them on the basis of sound public policy in the past still exist.¹⁵⁰

Lack of adequate liability insurance coverage by religious institutions is apparently the sole basis for the two Ohio decisions. In neither case did the Ohio court base its decision on facts and figures concerning insurance coverage of religious institutions. If, in fact, insurance coverage is lacking for some religious institutions, the Ohio court's distinction may be sound. However, there are certain activities of religious institutions which call for the same legal liability as is imposed on non-religious associations.¹⁵¹ Lack of adequate insurance coverage should not be a bar to recovery in those situations. But where the activity of a religious association could be considered primarily of a religious nature, the lack of insurance coverage may be sufficient justification for allowing immunity for religious associations from tort liability.

E. INSTITUTIONAL RESISTANCE TO EXISTING LAW—*Church Gambling*

If the thesis may be established that the law often denies to religious institutions and values the recognition that should be accorded them in our modern pluralistic society, then it must be admitted that at least one area exists where the antithetical situation is apparent. Such is the problem of institutionalized violation of anti-gambling legislation.

While twelve states of this country permit certain specified types of lotteries for the benefit of charitable or religious organizations,¹⁵² the remaining states make no such exceptions to their blanket prohibitions against gambling.¹⁵³ Thus, in thirty-

146 *Malloy v. Fong*, 37 Cal. 2d 356, 232 P.2d 241 (1951). Both *England v. Hospital of the Good Samaritan*, 14 Cal. 2d 791, 97 P.2d 813 (1939), and *Silva v. Providence Hospital*, 14 Cal. 2d 762, 97 P.2d 798 (1939) discarded the doctrine of charitable immunity and this holding was extended to apply to *Malloy v. Fong*, *supra*.

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

148 145 N.E.2d 368 (C.P. Ohio 1957). No such distinction has been drawn by other courts. See, e.g., *Roland v. Holy Angels Church*, 160 Neb. 299, 70 N.W.2d 97 (1955) utilizing *Muller v. Nebraska Methodist Hospital*, 160 Neb. 279, 70 N.W.2d 86 (1955) (immunity upheld).

149 155 N.E.2d 83 (C. P. Ohio 1958).

150 145 N.E.2d 368, 369 (C. P. Ohio 1957). Cf. *Avellone v. St. John's Hospital*, 165 Ohio St. 467, 135 N.E.2d 410 (1956) (immunity of charitable hospitals discarded).

151 See, e.g., *Roland v. Catholic Archdiocese*, 301 S.W.2d 574 (Ky. 1957). (Violation of statute in regard to income-producing rental property resulting in injury to stranger to charity.)

152 CONN. GEN. STAT. REV. §§ 7-169—7-186 (1958) (Bingo, Raffles, and Bazaars); DEL. CODE ANN. tit. 28, §§ 1101-1156 (1957 Supp.) (Bingo); ME. REV. STAT. ANN. Ch. 139, § 21 *et. seq.* (1954) (Beano); MD. ANN. CODE art. 27, §§ 247-64 (1957) (Bazaars permitted in some counties only); MINN. STAT. ANN. § 614.054 (1947) (Bingo); N. H. REV. STAT. ANN. §§ 287.1-287-10 (1955) (Beano); N. J. REV. STAT. 5:8-1—5:8-7 (1959) (Bingo and Raffles); N. M. STAT. ANN. 40-22-18 (1953) (Lotteries) N. Y. MUNIC. §§ 475-99 (Bingo); OHIO REV. CODE ANN. § 295.12 (Page 1954) (Charitable games of chance); R. I. GEN. LAWS ANN. 11-19-30 (1956) (Bingo); WYO. COMP. STAT. ANN. § 6-213 (1945) (Raffles only).

153 ALA. CODE tit. 14, § 275 (1940); ALASKA COMP. LAWS ANN. §§ 65-13-1—65-13-6 (1949); ARIZ. REV. STAT. ANN. §§ 13-435, 13-436 (1956); ARK. STAT. §§ 41-2018—41-2025 (1947); CALIF. PEN. CODE § 319-26; COLO. REV. STAT. ANN. §§ 40-16-1—40-16-17

eight states of the country, the familiar parish bingo games or the church raffles are run in contravention of the law. These games are almost always sponsored by Catholic Church groups¹⁵⁴ and in many cases are major sources of income.¹⁵⁵ To be sure, attempts are seldom made to prosecute these groups for violating the anti-lottery laws,¹⁵⁶ however, prosecutions are brought against non-church and non-charitable lotteries.¹⁵⁷

While there are really no legal problems raised by church gambling — for such lotteries clearly violate the law¹⁵⁸ — this practice on the part of church groups does pose a number of moral problems worthy of consideration in determining whether any possible justification exists for such wholesale violation.

Ecclesiastical law is somewhat unclear on the specific point of gambling,¹⁵⁹ and, since parish bingo games are aimed at lay participation, the canon law directed against clerical gambling would not seem to have any bearing on the problem.¹⁶⁰ However, it is an express tenet of canon law that the church has the right to acquire property by all the just means of the natural law and of the positive law by which others may acquire property.¹⁶¹ It would seem clear, then, that canon

(1953); FLA. STAT. ANN. § 849.09 (1949); GA. CODE ANN. §§ 26-6501—26-6508 (1953); HAWAII REV. LAWS §§ 288-1—288-19 (1955); IDAHO CODE ANN. §§ 18-4901—18-4909 (1947); ILL. ANN. STAT. Ch. 38 §§ 406, 408 (Smith-Hurd 1935); IND. ANN. STAT. §§ 10-2301—10-2303 (1956); IOWA CODE ANN. § 726.8 (1950); KAN. GEN. STAT. ANN. §§ 21-1501—21-1506 (1959); KY. REV. STAT. ANN. §§ 436.360—436.430 (1955); LA. REV. STAT. ANN. § 14.90 (1951); MASS. GEN. LAWS ANN. ch. 271, § 7 (1956); MICH. COMP. LAWS §§ 750.372—750-376 (1948); MISS. CODE ANN. § 2270 (1942); MO. ANN. STAT. § 563.430 (1952); MONT. REV. CODES ANN. §§ 94-3001—94-3011 (1947); NEB. REV. STAT. §§ 28-961—28-963 (1943); NEV. REV. STAT. §§ 462.010—462-080 (1959); N.C. GEN. STAT. §§ 14-289—14-292 (1953); N.D. REV. CODE §§ 12.2401—12-2407 (1943); OKLA. STAT. ANN. tit. 21 §§ 1051—1068 (1958); ORE. REV. STAT. §§ 167.405—167.430 (1954); PA. STAT. ANN. tit. 18 § 4601 (1945); S. C. CODE §§ 39-2017—29-2019 (1956); TEX. PEN. CODE Art. 619-21 (1948); UTAH CODE ANN. 76-27-9—76-27-10 (1953); VT. STAT. ANN. tit. 13, §§ 2101—2103 (1958); VA. CODE ANN. §§ 18-301—18-303 (1950); WASH. REV. CODE §§ 959.010—959.050 (1952); W. VA. CODE ANN. § 6104 (1955); WIS. STAT. ANN. §§ 945.01—945.02 (1958).

154 All major Jewish groups are opposed to gambling as a means of fund raising. N.Y. Times, Nov. 19, 1959, p. 25, col. 3. In addition almost all Protestant denominations are opposed to church gambling. N.Y. Times, Oct. 12, 1954, p. 52, col. 3.

155 A few random articles from the N.Y. Times show the size of the profits realized by some churches. Thus one New Jersey parish and its Holy Name Society grossed over \$200,000 in less than one year from Bingo games. N.Y. Times, Dec. 30, 1955, p. 21, col. 5. One Brooklyn parish was reported to draw 3,000 people to a weekly Bingo game. The participants paid a \$3 admission to this "party." N.Y. Times, Sept. 24, 1955, p. 32, col. 5. The pastor of a church in Rockaway Beach reported that 80% of the Church's revenue was derived from Bingo games. N.Y. Times, Feb. 14, 1955, p. 21, col. 3.

156 In September, 1954, Deputy Inspector Goldberg of the N.Y. Police Department was dismissed for enforcing the New York lottery laws against several church and fraternal organizations in Brooklyn. N.Y. Times, Sept. 10, 1954, p. 1, col. 8. In December, 1954, a national furor in the Catholic Press was raised over the attempted prosecution of two nuns in California for violating the California Gambling laws. 1 CATHOLIC LAW 74 (1955).

157 The Decennial Report for 1959 shows 42 lottery convictions. None of these involved church organizations. This fact is sometimes used by church groups to argue that the laws do not apply to them because of disuse. However, it should be noted that desuetude is not generally a principle of our jurisprudence. See 64 HARV. L. REV. 1181 (1951). Beyond this, affairs like the Goldberg incident (see note 156 supra) have undoubtedly made many public officials fearful of enforcing these laws.

158 When it has suited their purposes, Church lawyers attempted to hide behind the illegality of church gambling. Thus in one case where a woman was suing for personal injuries suffered as she was leaving a parish bingo game, the church defended on the ground that the woman was herself a wrongdoer. *Manning v. Noa*, 345 Mich. 130, 76 N.W.2d 75 (1956). See also *Hardy v. St. Matthew's Community Center*, 240 S.W.2d 95 (Ky. 1951).

159 For a general history of the Canon Law in relation to gambling see 6 CATHOLIC ENCYCLOPEDIA 367 (1909).

160 Clerical gambling is regulated by Canon 138, CODEX JURIS CANONICI. In addition, in this country, the Second Plenary Council of Baltimore forbade illegal clerical gambling. (Acta, no. 154).

161 *Ecclesia acquirere bona temporalis potest omnibus justis modis juris sive naturalis, sive positive, quibus idalis licet.* CODEX JURIS CANONICI, Can. 1499 § 1.

law adopts the positive civil law as a negative norm to govern the acquisition of property.¹⁶² Viewed in this light, it is difficult to imagine any religious justification for the gathering of funds through illegal means.

Even if canon law permits the Church to raise funds through illegal gambling activities there would still seem to be moral objections to this willful disobedience of lawful authority. For the Christian, legitimate civil authority must be respected not only as an attribute of his government, but as being in its ultimate derivation divine: "Let everyone be subject to the higher authorities, for there exists no authority except from God, and those who exist have been appointed by God."¹⁶³

Not only are these laws against gambling to be respected as enactments of legitimate civil authorities, but it seems to be the opinion of moralists that "such laws are just and useful, inasmuch as they serve to keep within the bounds of decency the dangerous habit of gambling and the many evils which are usually associated with it."¹⁶⁴

The difficulty in this area is not with the general principles but rather with deciding to what extent one is morally obliged to obey the laws against gambling. A different conclusion may result depending on whether or not one accepts the "purely penal law" theory. According to this theory there are some laws which are purely penal, that is, they do not oblige the doing or not doing of the act specified. They merely assess a penalty for the violation of the law, which penalty one is morally obliged to accept if one is convicted.¹⁶⁵ A number of moralists have argued that the anti-gambling laws are themselves purely penal and that one is not morally obliged to obey them.¹⁶⁶ The difficulty is that one is morally obliged to accept the penalty which is assessed for the violation of a purely penal law. Yet the loud and angry protests at the attempted enforcement of these laws indicate that many church members are unwilling to even accept the penalty for the breach of these laws.¹⁶⁷

Opposed to the purely penal law school of moralists is arrayed a school of thinkers, beginning with St. Thomas Aquinas,¹⁶⁸ who maintain that there is no such thing as a purely penal law. As one modern writer has argued:

The opinion according to which certain laws do not bind to the accomplishment or omission of the act but only to the penalty prescribed for the certified violation of these laws does not, or so this writer feels, deserve recognition. If a law is just, if it is commanded in virtue of the common good, it requires obedience.¹⁶⁹

Since the laws against gambling are just and enacted in virtue of the common good, under this theory they are morally binding.¹⁷⁰

162 See RAMSTEIN, *MANUAL OF CANON LAW* 561 (1948); BOUSCAREN AND ELLIS, *CANON LAW* 736 (1947). Both of these texts take the position that Canon 1499 by its terms "canonizes" the civil law.

163 Romans 13, 1.

164 2 *CATHOLIC ENCYCLOPEDIA* 539 (1909). To the same effect see DAVIS, *MORAL AND PASTORAL THEOLOGY* 404, 405 (1958).

165 For an exposition of the origin of the purely penal law theory see DAVITT, *THE NATURAL LAW* (1951).

166 *E.g.*, DAVIS, *MORAL AND PASTORAL THEOLOGY* 405 (1958).

167 See note 154, *supra*. In addition, See N.Y. Times, Aug. 24, 1954, p. 15, col. 3. A church in New Jersey was found to have violated the terms of the New Jersey permissive gambling law and was ordered to refund \$3000.00 which it had realized from an illegal 50-50 game. In his Sunday sermon, the pastor called the governor "insincere" and branded the legislature as being "dominated by Protestant ministers." *Ibid.* Another pastor in a public letter called the New Jersey Control agency "Meyner's gestapo" and accused the governor of sanctioning "totalitarian practices." N.Y. Times, Dec. 30, 1955, p. 21, col. 5. A third churchman in his parish bulletin when his bingo game was closed, wrote that "the politicians have closed down our bingo game." N.Y. Times, Feb. 14, 1955, p. 21, col. 3.

168 See Davitt, *op. cit. supra* note 165, at 4, 5.

169 BEGIN, *NATURAL LAW AND POSITIVE LAW*, 137 (1959).

170 It should be noted that there is a school of Catholic thinkers who argue that civil law has no authority over matters such as the acquisition of Church property. Rather the church

In the final analysis, the most serious objection to the prevalence of Church gambling is the image of the Church which springs from such activities. Disrespect for the law and for its officials is taught, and a picture of the Church placing convenience before obedience to the law emerges.

To attempt to justify an illegal activity on the ground that it supplies much needed funds to carry on religious activity is a pragmatic argument which can obviously not be the basis for legal justification.

If the church desires the law to respect its institutions and values, it should reciprocate to the extent of respecting the law as written in the gambling area, for the church is no less bound by the will of the majority in non-religious matters than is any other societal institution.

The proper remedy of religious institutions here lies in urging exception to the law, not in blatant disregard of its existing precepts.

III RELIGIOUS VALUES:

A. SUNDAY CLOSING LEGISLATION — *A Patent Constitutional Conflict*

There has been much activity in the field of Sunday laws within the last two years,¹⁷¹ but the result of this activity has not presented a clear pattern. In fact, the area is more confused since the Massachusetts law has been struck down by a three judge federal district court.¹⁷² The most consistent trends can be seen only by looking at the problem on a state by state basis, but even here there is contradiction.

Those who favor the laws usually belong to trade groups or are members of a Christian religious sect.¹⁷³ Opposition is centered mainly in large discount houses, supermarkets, and members of the Jewish faith who protest on religious grounds.¹⁷⁴ To date those in favor of the laws in states where they exist have had the better of the debate,¹⁷⁵ with the courts upholding the laws by stating that they are a valid exercise of the police power of the state.¹⁷⁶ This is indicated by the Ohio court in *State v. Kidd*:¹⁷⁷

The policy of Sunday laws is based upon the observed fact, derived from long experience and the custom of all nations, that periods of rest from ordinary pursuits are requisite to the well-being, morally and physically, of a people. . . . This is the foundation and policy of all statutes regulating the observance of a day of rest, and whether the day selected is one consonant

tolerates such laws. Cf. CIOGNANI, CANON LAW, 119 (1934). The writers of this note are not in accord with such a view.

171 See generally *Annot.*, 57 A.L.R.2d 975 (1958).

172 *Crown Kasher Super Mkt. v. Gallagher*, 176 F. Supp. 466 (D. Mass. 1959). *Contra*, *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 28 U.S.L. WEEK 2250-51 (E.D. Pa., Dec. 8, 1959).

173 The country's biggest retail trade organization went on record favoring closing all but a few kinds of stores. N.Y. Times, Jan. 9, 1958, p. 49, col. 1. However, it should be noted that there are no supermarkets or discount houses in the organization. Catholics oppose any change in the New York Sunday law, saying: Sunday is a day of prayer, religious worship and rest. With due respect to the religious beliefs and practices of others, we maintain that the present laws concerning the proper observances of Sundays should not be relaxed. N.Y. Times, Mar. 2, 1958, p. 55, col. 1.

174 N.Y. Times, Jan. 23, 1958, p. 29, col. 6. The New York Board of Rabbis deplored the discrimination against those who observe Saturday as the day of rest. N.Y. Times, Jan. 30, 1958, p. 15, col. 2. The Rabbinical Council of America expressed the same views. However, the Jewish ranks are not unanimous in this regard with one Rabbi asserting:

I feel it is no disservice to American freedom of religion to have as a common day of cessation from business that one in the week on which nearly all of the 175,000,000 Americans are generally taught to abstain from work. N.Y. Times, Feb. 9, 1958, p. 59, col. 1.

175 *But see* *Pacesetter Homes, Inc. v. Village of South Holland*, 163 N. E.2d 464 (Ill. 1960). Here, the court held that Sunday laws can be upheld only if they are reasonably connected to the purpose of avoiding interference with the religious worship of others.

176 See 33 NOTRE DAME LAW. 432 et seq. (1958).

177 167 Ohio St. 521, 150 N. E.2d 413 (1958).

to the religious views of a portion of the people or not does not affect the validity of the regulation, where no religious observance is enjoined.¹⁷⁸

Until recently the argument along this line seemed to be dominant. However, the federal court in Massachusetts disregarded it in *Crown Kosher Super Mkt. v. Gallagher*¹⁷⁹ and held the state statute unconstitutional as applied to the owners and customers of a Jewish market and certain rabbis who inspected the market to enforce compliance with Orthodox dietary laws. Such enforcement was held to violate due process of law and also the equal protection clause of the fourteenth amendment to the United States Constitution. The court said that the many amendments to the law had made it a "hodgepodge" and that:

What Massachusetts has done in this statute is to furnish special protection to the dominant Christian sects which celebrate Sunday as the Lord's day, without furnishing such protection, in their religious observances, to those Christian sects and to Orthodox and Conservative Jews who observe Saturday as the Sabbath, and to the prejudice of the latter group. . . . Without doubt, if they remain faithful to their religious convictions, they will be under a very substantial disadvantage as compared with shoppers whose Sabbath is observed on Sunday.¹⁸⁰

It had been previously pointed out that the Massachusetts Sunday law was originally directed "to compel a seemly observance of that day of the week celebrated as the Sabbath (Sunday) by the dominant Christian sect."¹⁸¹ The dissent attacks the motives of the market owner, suggesting that commercial gain, and not religious scruples, was the dominating factor motivating the protest against the law.¹⁸²

In New Jersey, a Sunday law was struck down also,¹⁸³ but apparently not on religious grounds. Here, the act provided that its prohibitions would apply to all counties except three which bordered on the Atlantic Ocean and the court said that since neither the fact of their geographical location, their population, nor their employment opportunities provided a valid basis for classification, the statute was unconstitutional as discriminating against the counties adversely affected.¹⁸⁴ *McGowan v. State*,¹⁸⁵ a Maryland case, upheld the state Sunday law even though one of the counties in the state was exempted from the effect of the law. However, in this case the attack on the statute was not made, as in New Jersey, on the portion exempting certain areas of the state; but, rather the defendant attacked the statute as being enforced discriminatorily in that it permitted sales of specified goods and performance of certain kinds of work. The intent of the legislature seems to have been to permit the county catering to tourists to be open on Sunday, but the court said this applied only to articles sold at amusement places and did not extend to the entire county.

In addition to reasons used by the courts to uphold the laws, there are reasons other than those mentioned by the courts presented for the desirability of these laws, such as the inclination of the state to give an enforced day of rest to employees through state legislation.¹⁸⁶ Another reason behind these laws is the insistence of storeowners, who want the day off, that others also be prohibited from working so that no com-

178 *Id.* at 416.

179 176 F. Supp. 466, 473 (1959):

The characterization of the Sunday law as being merely a civil regulation providing for a "day of rest" seems to have been an *ad hoc* improvisation . . . because of the realization that the Sunday law would be more vulnerable to constitutional attack under the state Constitution if the religious motivation of the statute were more explicitly avowed.

180 *Id.* at 475.

181 *Id.* at 472.

182 *Id.* at 477.

183 N. J. STAT. ANN. §§ 2A:171-5.1 to 171-5.7 (Supp. 1958).

184 *Sarner v. Township of Union*, 55 N. J. Super. 523, 151 A.2d 208 (1959). The statute involved has two contradictory provisions, one providing for severability and the other rejecting it.

185 *McGowan v. State*, 151 A.2d 156 (Md. Ct. App. 1959), *appeal docketed*, 28 U.S.L. WEEK 3092 (U.S. Oct. 6, 1959) (No. 438).

186 See *Tinder v. Clarke Auto Co.*, 238 Ind. 302, 149 N. E.2d 808 (1958).

petitive advantage can be gained by those who would open on Sunday.¹⁸⁷ Yet another reason for Sunday laws, especially municipal ordinances in small towns, is the desire to insure peace and order on Sunday. The Mayor of Saddle River, New Jersey, said, regarding a local Sunday closing ordinance:

We are not trying to bring back blue Sundays out of any religious motive. . . . But business interests began developing the center of town commercially, and now we have two shopping centers along the main street that bring hundreds of out-of-towners here every Sunday to shatter our peace and quiet.¹⁸⁸

The situation in New York is quite confused, with no seeming uniformity in the decisions. In *People v. Gwyer*,¹⁸⁹ a conviction for violating the Sunday law was reversed as to an owner of a laundromat because he was prosecuted under the section of the statute relating to selling rather than that pertaining to the carrying on of a trade. In another case with similar facts, the conviction was affirmed because the prosecution was brought under the trade section of the statute.¹⁹⁰ To add to the confusion created by different results being reached in factually similar situations, simply because the prosecution is brought under different sections of the law, in *People v. Welt*,¹⁹¹ the owner of a laundromat had his conviction for performing a trade reversed because he was not physically present, hence was not performing a trade. In *People v. Rubenstein*¹⁹² the defendant was convicted for laboring on Sunday because he opened the door of the laundromat and turned on the lights. The court distinguished *Gwyer* and *Welt* in that here the defendant was present and he worked; whereas in *Gwyer* there had been no selling and in *Welt* the defendant had not been present. It seems to be generally true, however, that it is legal for a citizen to do his laundry on Sunday at a laundromat. *People v. Ali-prantis*¹⁹³ applied the ideas of custom and usage permitting such work, and said:

Slovenliness is no part of any religion, nor is it conducive to rest. Scripture commends cleanliness. ". . . [A]nd the man shall wash his clothes, and shall be clean . . . and his clothes being washed he shall be clean." (Leviticus, ch. 13, pars. 6, 34).¹⁹⁴

A self service supermarket employee was acquitted of selling under the New York law because she merely did the menial work in the store and, "Thus, this is no proof that the defendant herein intended to sell or offered for sale the prohibited meat, within the meaning of the statute, on a Sunday."¹⁹⁵ A conviction for selling clothes was upheld even where the defendant claimed that he was within the exemption granted to roadside markets.¹⁹⁶ The same was true of convictions obtained under the trade and labor sections of the New York statute, where the defendant kept his showroom open on Sunday for the purpose of making appointments, but his conviction under the selling section of the statute was reversed.¹⁹⁷ In *People v. Kupprat*¹⁹⁸ the Appellate Division of the Supreme Court had reversed the conviction of the defendant for selling tombstones near a cemetery on a Sunday because such actions, according to common understanding, are not serious interruptions of the repose and religious liberty of the community. However, the Court of Appeals reversed the Appellate Division and ordered a new trial, saying that

187 *Ibid.*

188 N.Y. Times, Sept. 1, 1958, p. 15, col. 5.

189 7 App. Div. 2d 711, 179 N.Y.S.2d 987 (1st Dept. 1958).

190 *People v. Kaplan*, 8 App. Div. 2d 163, 188 N.Y.S.2d 673 (1st Dept. 1959).

191 14 Misc. 2d 275, 178 N.Y.S.2d 313 (Nassau County Ct. 1958).

192 17 Misc. 2d 10, 182 N.Y.S.2d 548 (Ct. Spec. Sess., Kings County 1959).

193 8 App. Div. 2d 276, 187 N.Y.S.2d 477 (1st Dept. 1959).

194 *Id.* at 480.

195 *People v. Kless*, 17 Misc. 2d 7, 190 N.Y.S.2d 82, 83 (Buffalo City Ct. 1959).

196 *People v. White of Massapequa, Inc.*, 12 Misc. 2d 254, 171 N.Y.S.2d 452 (Nassau County Ct. 1958).

197 *People v. Polar Vent of America, Inc.*, 10 Misc. 2d 378, 174 N.Y.S.2d 789 (Nassau County Ct. 1957), *aff'd*, 4 N.Y.2d 954, 151 N.E.2d 621, 175 N.Y.S.2d 825 (1958).

198 6 N.Y.2d 88, 160 N.E.2d 38, 188 N.Y.S.2d 483 (1959), *reversing* 7 App. Div. 2d 739, 180 N.Y.S.2d 628 (2d Dept. 1958).

such considerations did not make any difference and that the legislature is the one to make exceptions to the law. Yet, the very same reasoning which was rejected by the court in the *Kupprat* case was used to affirm a reversal of a conviction of the defendant for gratuitously painting his mother-in-law's house on Sunday.¹⁹⁹ Likewise, a defendant was acquitted in a case where a police officer induced him to make a sale on Sunday when the defendant had his store open for his own use and the officer walked in on him.²⁰⁰ From an analysis of these cases it appears that the courts in New York are not overly fond of the Sunday laws and will strictly construe them against enforcement.

The argument based upon sociological and cultural change was urged without avail in Pennsylvania in *Commonwealth v. Taber*,²⁰¹ and the court affirmed the conviction of the defendant for violating the law against unlawful hunting by engaging in a turkey shoot. The law under which this conviction was obtained was also upheld in *Commonwealth v. Bauder*,²⁰² where the argument that the law was being discriminatorily enforced was rejected.²⁰³

The problem in New Jersey became more complicated with the *Sarner* decision²⁰⁴ striking down the new state law on Sunday regulation, but prior to that time, problems had arisen with regard to the validity of municipal ordinances enacted under the authority of the old (pre-1948) law. In *Town of W. Orange v. Carr's Dept. Store*,²⁰⁵ the court upheld a conviction of employees accused of taking inventory on a Sunday, and refuted the contention that the new act had repealed the old law so that the ordinance, which had been passed under the old act, was invalid, by saying:

The purpose of the revision [1958 change] was to leave to municipalities the power to regulate and control Sunday activity. This they do pursuant to the Home Rule Act. The 1958 statute does not in the slightest degree purport to affect this. The ordinance, therefore, is not invalid because it contains a penalty provision lacking in the statute.²⁰⁶

In Indiana, in *Tinder v. Clarke Auto. Co.*,²⁰⁷ the court upheld the imposition of a heavier penalty on car dealers who violated the Sunday law than was imposed

199 *People v. Deen*, 4 N.Y.2d 708, 148 N.E.2d 311, 171 N.Y.S.2d 100 (1958), *affirming* 3 App. Div. 2d 836, 160 N.Y.S.2d 962 (2nd Dept. 1957). A dissent in the Appellate Division characterized the "no serious interruption" theory of the majority as judicial legislation. See also *People v. Binstock*, 7 Misc. 2d 1039, 170 N.Y.S.2d 133 (Ct. Spec. Sess. 1957). The court here used similar reasoning to acquit a Jewish storeowner accused of selling on Sunday since he closed his store on the Sabbath and there were no churches in the town. *But see* N.Y. Times, Mar. 21, 1958, p. 23, col. 1: The New York legislature killed a bill permitting storekeepers in New York City who observe another holy day to open on Sunday.

The principal beneficiaries of the measure would have been Jewish storekeepers, although it was also supported by the Seventh Day Adventists. The Roman Catholic Church had taken a stand in opposition to the measure.

200 *People v. Oser*, 9 Misc. 2d 585, 170 N.Y.S.2d 277 (City of N.Y., Magis. Ct. 1958).

201 188 Pa. Super. 415, 145 A.2d 908 (1958). See also N.Y. Times, Aug. 11, 1959, p. 14, col. 3 reporting the signing by the Governor of a bill increasing the penalties for violation of the state's Sunday laws. This law was subsequently declared constitutional. *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 28 U.S.L. WEEK 2250-51 (E.D. Pa., Dec. 8, 1959).

202 188 Pa. Super. 424, 145 A.2d 915 (1958).

203 However, the Supreme Court of Pennsylvania enjoined a justice of the peace from arresting persons for working on Sunday while it determined the legality of the action. He had arrested 225 people on sight: toll collectors, newsstand operators, an actress, and maintenance employees. He claimed he wanted to demonstrate how ridiculous the Sunday law was. N.Y. Times, July 30, 1959, p. 27, col. 1.

204 See note 183, *supra*, and accompanying text.

205 53 N.J. Super. 237, 147 A.2d 97 (1958). *Accord*, *Town of West Orange v. Jordan Corp.*, 52 N.J. Super. 533, 146 A.2d 124 (1958) which also upheld the Sunday law but reversed the conviction of the defendant for showing a model home on Sunday because the exceptions in the ordinance were not discounted in the complaint. *Contra*, *State v. Ginnis*, 158 N.E.2d 553 (Ohio Ct. App. 1959), in which a conviction for selling on Sunday was affirmed because the defendant did not show that he was within the exemptions.

206 *Id.* at 102-03.

207 238 Ind. 302, 149 N.E.2d 808 (1958).

on others violating the law, making much of the fact that all the dealers would be forced to open on Sunday if some of them did, and playing down the idea that the difference in penalty was in any way discriminatory. A dissent questions whether car dealers are so different as to necessitate a heavier penalty.²⁰⁸

On the whole, then, most of the laws regulating activity on Sunday have been upheld as a valid exercise of the police power of the state. The more recent cases have involved such things as a zoning ordinance being used to forbid operation of a laundromat on Sunday;²⁰⁹ a city ordinance requiring a license to furnish publicly Sunday musical entertainment by mechanical means;²¹⁰ a city ordinance forbidding auctions on Sunday;²¹¹ a statute permitting the sale of antiques on Sunday although forbidding other sales;²¹² and various statutes and ordinances forbidding the sale of goods on Sunday.²¹³

There are usually various types of exceptions made in the Sunday regulatory schemes, the most common exception being that of necessity.²¹⁴ Another common exception is that which permits those people to open their stores who observe Saturday or another day as their day of rest.²¹⁵ In some areas industries which require continuous operations, are excluded.²¹⁶

Many states have Sunday closing laws which pertain to Sunday activities generally,²¹⁷ while others regulate only particular areas, e.g., automobile sales.²¹⁸ The solution to the problem of whether the prohibition of Sunday activity should be directed at the sale of certain goods or the operation of certain businesses is suggested by the Arkansas Supreme Court:

A study of the cases indicates that to test discrimination solely on the basis of the article sold is apt to result in abolishing all exceptions to Sunday laws,

208 *Id.* at 820 (Babbitt, J., dissenting).

209 *State ex rel Superior Corp. v. City of E. Cleveland*, 158 N.E.2d 565 (Ohio Ct. App. 1959).

210 *Mosey Cafe, Inc. v. Mayor of Boston*, 154 N.E.2d 591 (Mass. 1958).

211 *ABC Liquidators, Inc. v. Kansas City*, 322 S.W.2d 876 (Mo. 1959).

212 *State v. Shuster*, 145 Conn. 554, 145 A.2d 196 (1958).

213 *State v. Kidd*, 167 Ohio St. 521, 150 N.E.2d 413 (1958); *Kirk v. Olgiati*, 308 S.W.2d 471 (Tenn. 1957); *Clark v. State*, 319 S.W.2d 726 (Tex. Crim. App. 1959).

214 *E.g.*, N.Y. PEN. LAW § 2143.

215 CONN. GEN. STAT. REV. § 53-303 (1958).

216 *Mullis v. Celanese Corp. of America*, 108 S.E.2d 547 (S.C. 1959); S.C. CODE § 64-6 (1952).

217 CONN. GEN. STAT. REV. §§ 53-300 to 303 (1958) as amended (Supp. 1959); DEL. CODE ANN. tit. 28, § 906 (1953) as amended (Supp. 1958); FLA. STAT. ANN. §§ 855.01 to .07 (Supp. 1958); GA. CODE ANN. §§ 26-6901 to 20 (1935); IDAHO CODE ANN. §§ 18-6202 (1947) and § 18-6203 (Supp. 1959); IND. ANN. STAT. § 10-4301 to 4303 (1956), and § 10-4304 (Supp. 1959); KAN. GEN. STAT. ANN. § 14-417 (1949) and § 21-955-956 (1949); KY. REV. STAT. ANN. § 436-160 (1955); LA. REV. STAT. ANN. §§ 51-191 to 193 (1950); ME. REV. STAT. ANN. ch. 134, §§ 35 to 45 (1954); MD. ANN. CODE art. 27 §§ 492 to 534 (1957) as amended (Supp. 1959); MASS. ANN. LAWS ch. 136 (1957) as amended (Supp. 1959); MICH. COMP. LAWS §§ 435.1 to .8 (1948); MINN. STAT. ANN. §§ 614.28 to .31 (1947); MISS. CODE ANN. §§ 2368 to 71 (1942); MO. ANN. STAT. § 563.690 to .730 (1953); MONT. REV. CODES ANN. § 94-35-216 (1947); NEB. REV. STAT. § 28-940 (1956); NEV. REV. STAT. § 201.260 (Supp. 1955); N.H. REV. STAT. ANN. §§ 578:3 to :5 (1955); N.J. REV. STAT. §§ 2A:171.1 to .11 (1951) as amended (Supp. 1958) and N.J. Sess. L. Ch. 119, p. 213 (No. 5, 1959); N.M. STAT. ANN. §§ 40-44-1 to -5 (1953); N.Y. PEN. LAWS §§ 2140 to 54; N.D. REV. CODE § 40-0503 (1943) and §§ 12-2114 to 2122 (1943) as amended (Supp. 1957); OHIO REV. CODE ANN. §§ 3773.23 to .99 (Page 1953) as amended (Supp. 1959); OKLA. STAT. ANN. tit. 21, §§ 907 to 911 (1958); PA. STAT. ANN. tit. 18, §§ 632, 4699.4 (1945) and PURDON'S PA. LEG. SER., Act. 212, p. 660 (1959); R.I. GEN. LAWS ANN. §§ 11-40-1 to -4 (1956) and §§ 5-23-2 and -3 (1956); S.C. CODE §§ 64-1 to -6 (1952) as amended (Supp. 1959); TENN. CODE ANN. §§ 39-4001 to 4003, 4005 (1955); TEX. PEN. CODE ANN. arts. 283 to 287 (1952); VA. CODE ANN. §§ 76-55-1, 2 (1953); VT. STAT. ANN. tit. 13, §§ 3301 to 3308 (1958); WA. CODE ANN. § 18-329 (Supp. 1958); WASH. REV. CODE §§ 9.76.010 to 9.76.030 (Supp. 1956); W.VA. CODE ANN. § 6072 (1955) and § 6073 (Supp. 1959); WYOM. COMP. STAT. ANN. § 15-160(11) (1957).

218 See, e.g., COLO. REV. STAT. ANN. §§ 13-20-1 to -3 (Supp. 1957); N.J. REV. STAT. § 2A: 171-71. (Supp. 1958). See also, *Annot.*, 57 A.L.R.2d 1290 (1958).

for businesses are tending more and more to overlap one another's activities.²¹⁹

These Sunday laws have been repeatedly upheld as a valid exercise of the police power of the state; yet at the same time the very basis of the laws rests on a religious foundation. Since the element of religion plays such a part in these laws, an exception should be made for those who actually observe another day as a day of rest and religious observance. A possible solution to the problem created by this exception would be to require an election by the owner as to which day he would be closed. However, this would not provide a means of preventing unscrupulous persons from selecting a day in the middle of the week as their day of rest, and thus allowing them to stay open on both Saturday and Sunday, giving them an advantage over those who truly desire the day of rest on religious principles.²²⁰ The exception to the usual observance of the law should exist only when the person can prove that he does use another day as a day of rest and religious observance.

Such an elective system would obviate the constitutional objections of the *Crown Kosher Super Mkt.* case, and, as long as closing on one day or the other was mandatory, it would deter those who seek to violate the Sunday laws for commercial reasons alone.

If the "preference of the dominant sect" objection of *Crown* should evolve into an establishment of religion rationale, the reconciliation of an elective system with objections to "establishment" may well be found in the statement by the spokesman for the New Jersey Catholic Conference in a hearing before the legislature of that state regarding Sunday laws.

Religion has no place in this matter and I urge you to keep religion out of it. Sunday is not the only holy day recognized by religious people. I wish you would consider only public health, safety and welfare in determining any Sunday legislation.²²¹

B. DOMESTIC RELATIONS—*An Interested Third Party: The Family*

The influence of religious values in family law seems indeed minimal. It is apparent to the casual observer, that if courts were to devote as much energy to deciding the religious problems presented as they do in avoiding such issues, the body of Church-State domestic relations law would be truly ponderous. However, in the exercise of the broad discretion of trial courts in family matters, desirable results are obtained in numerous religious controversies, if not based explicitly on the questions presented, then in spite of them. This is the area of implicit recognition of religious values where such are recognized at all. To all organized religion, grounded essentially in the family unit, this is a baffling anomaly.

1) *Annulment, Separation and Divorce — Marginal Acquiescence.*

Many of the reported cases of attempted marriage dissolution involving religious issues arise in New York. In dealing with these cases, it should be remembered that adultery is the sole ground for divorce in New York.²²² As a result, annulment for fraud is the remedy usually sought, with post-marital transgressions often thus translated into breach of contract terminology through the machinations of unhappily wed litigants.

219 *Hickinbotham v. State*, 227 Ark. 1032, 303 S.W.2d 565, 567 (1957). See also *Hickinbotham v. Corder*, 227 Ark. 713, 301 S.W.2d 30 (1957), *cert. denied*, 355 U.S. 841 (1957) in which the court granted an injunction to restrain the defendant from operating his store on Sunday. The court here felt it could enjoin a criminal act because the enforcement of the law was ineffective since the fine was small.

220 It should be borne in mind that this resolution will not be satisfactory to those who favor Sunday laws because they are trying to keep their towns quiet or to those who are trying to restrain competition.

221 *N.Y. Times*, Mar. 14, 1958, p. 51, col. 4.

222 *N.Y. CIV. PRAC. ACT.* § 1147 (1955). Only two states allow divorces for religious reasons: *KY. REV. STAT.* § 403.020(f) (1955), for "Uniting with any religious society whose creed and rules require a renunciation of the marriage covenant, or forbid husband and wife

Thus, the question in New York seems to be "does the claimed ground amount to vital fraud?"²²³ To this query, a religious promise or understanding between the parties usually draws a negative reply.

Religious convictions may be the basis of conflict between spouses as to the begetting of children and the inference is strong that although refusal to have children is not ground for annulment even if religious convictions are involved, a premarital promise to have children may open the door to judicial dissolution.²²⁴

Continuing within the framework of contract theory, the New York courts appear to recognize an implied promise to have "normal" sexual relations in the marriage bond but deny that there is an implied promise to have children, even if religion demands it.²²⁵ A premarital agreement not to have children is of no legal effect, however, unless an "adequate cause" exists.²²⁶ The rationale of this proposition is that to give any effect to such agreement in a court would be to thwart one of the primary purposes of marriage and would hence violate public policy. It is further indicated that a cause of action which may validly subsist on a premarital promise to have children may be waived by the complaining spouses' acquiescence in a contrary course of conduct for some time.²²⁷

A not uncommon situation arose in a recent New York case, involving a civil marriage with a promise by the husband of a subsequent religious ceremony. The court, apparently convinced by the alien husband's obvious desire to enter the country on a non-quota basis, that he never intended to keep the promise, granted an annulment to the wife:

It is settled, and indeed the proposition is not challenged that where one prospective spouse, in order to induce the other to enter a civil marriage, makes a promise of a subsequent religious ceremony, without intending to keep it, an annulment will be granted, at least where, as in the present case, there has been no consummation by cohabitation.²²⁸

from cohabiting," and N.H. REV. STAT. ANN. § 458:7 (VIII) (1955) which is quite similar, although it adds a time requirement.

At least one New York Court has recently abhorred the strict divorce law in a case where it was reluctantly compelled to follow it:

This is the logical though distressing result of our unrealistic and outmoded laws against a merited and socially acceptable severance of the marital bond. Such stringency may be warranted where children are involved or where there is a sudden parting following long years of marital life. But there is no justification whatever for forcibly perpetuating a totally hopeless marriage in the case of a childless couple who have been physically separated for an extended period. Until the legislature liberalizes the divorce law a marriage in name only, such as this, must regrettably be left undisturbed. *La Parle v. LaParle*, 8 Misc.2d 691, 168 N.Y.S.2d 746, 748 (Sup. Ct. 1957).

223 See *Lepides v. Lepides*, 254 N.Y. 73, 171 N.E. 911, 913 (1930):

The fraud which may dissolve the marriage tie must relate to something vital. . . . The law of this state affords no relief to subsequent disappointment.

224 See *Attar v. Attar*, 15 Misc. 2d 792, 181 N.Y.S.2d 265, 267 (Sup. Ct. 1958).

The sworn duty of a judge in such matters is to adhere to the law of the land, to the clear and positive law of this state which does not sanction a dissolution of marriage for refusal to bear children, absent an unredempted promise so to do. Thus no matter how sincere and even understandable is the husband's present purpose, his deep religious feelings cannot alone serve as a basis for the annulment of the marriage.

But cf. *Mirizio v. Mirizio*, 242 N.Y. 74, 85, 150 N.E. 605, 613 (1926) (wife's refusal to cohabit until religious ceremony as per premarital agreement is a defense to her action for abandonment).

225 Compare *Lopez v. Lopez*, 10 Misc. 2d 367, 169 N.Y.S.2d 74 (Sup. Ct. 1957) with *Attar v. Attar*, 15 Misc. 2d 792, 181 N.Y.S.2d 265 (Sup. Ct. 1958).

226 *Height v. Height*, 18 Misc. 2d 1023, 187 N.Y.S.2d 260 (Sup. Ct. 1959); *Frost v. Frost*, 15 Misc. 2d 104, 181 N.Y.S.2d 562 (Sup. Ct. 1958). See also *Sarda v. Sarda*, 153 A.2d 305 (D.C. Mun. Ct. App. 1959).

227 *Riedl v. Riedl*, 153 A.2d 639 (D.C. Mun. Ct. App. 1959); *Dougherty v. Dougherty*, 10 Misc. 2d 429, 169 N.Y.S.2d 242 (Sup. Ct. 1957).

228 *Brillis v. Brillis*, 4 N.Y.2d 125, 149 N.E.2d 510, 173 N.Y.S.2d 3, 5 (1958). *But cf.*

Almost totally denied as a basis for divorce, religious values have found a glimmer of recognition in actions for annulment for fraud, although as a practical matter the burden of convincing a court of an original intent not to keep the religious promise is an onerous one for a complainant to shoulder. Further, this question's resolution presupposes a favorable decision on the issue of whether or not the promise was a material inducement to enter into the contract.

2) *Agreements and Religious Training of the Child—Substitution of Values*

After a divorce, annulment or separation has taken place, the courts are often called upon to give effect to an ante-nuptial agreement concerning the children of the marriage. More often than not, these agreements pertain to the religious upbringing of the child. They are often embodied at least partially in the decree dissolving the marriage, although a careful examination of the cases discloses that there is little practical advantage gained by so doing, at least as far as religious provisions are concerned.

It should be noted at the outset that a court will not, as a general rule, meddle in family affairs when the parents are still living together. Thus, the Alabama Supreme Court reversed a lower court injunction preventing a wife from interfering with the parochial education of the child in violation of an ante-nuptial agreement.²²⁹ The equity court was held to have no jurisdiction in a family disagreement, absent a separation or custody controversy. Counsel had raised the rather novel argument that the court decree below, since it, in effect, ordered attendance at a school where there was mandatory denominational teaching, gave an unconstitutional preference to one sect. The issue was avoided by the denial of jurisdiction.

The Ohio Court of Appeals squarely faced the issue of a pre-nuptial agreement to raise the child in a particular religion in *Hackett v. Hackett*.²³⁰ In holding the agreement unenforceable by judicial decree, the court recognized that the agreement could not have been enforced while the parents were together and extended this doctrine even further:

Certainly if an agreement is unenforceable at the time it is made, it does not gain in stature with respect to its unenforceable provisions because of the subsequent divorce of the parties.²³¹

The right to educate and train children, to this court, followed custody, with absolutely no consideration given to a contrary agreement.²³²

Actually, an award of custody by the court in a valid divorce decree need not give the parent having custody the sole right to choose the child's religion, and week-end "visitation" rights of the non-custodial parent may be used to provide

Mirizio v. Mirizio, 242 N.Y. 74, 150 N.E. 605 (1926), denying a wife claiming abandonment any support because her refusal to cohabit until the performance of a promised religious ceremony was based upon inadequate legal reasons:

. . . her position amounts to legal misconduct, which, under the provisions of section 1163 of the Civil Practice Act, is a defense to her action to enforce such obligations. *Id.* at 608.

There was no cohabitation in either case and, viewed as a precedent, *Brillis* represents a healthy step away from *Mirizio* and the cases following it. See 33 NOTRE DAME LAW. 453 (1958).

229 *Kilgrow v. Kilgrow*, 268 Ala. 475, 107 So.2d 885 (1958).

230 150 N.E.2d 431 (Ohio Ct. App. 1958), appeal dismissed, 168 Ohio St. 373, 154 N.E.2d 820 (1958).

231 *Id.* at 434.

232 The opinion was additionally critical of the agreement because it represented a restriction of the individual's right to choose his own religion: "Nor can the free choice of religious practices be circumscribed or controlled by contract. *Id.* at 433. *But cf.* *Ross v. Ross*, 4 Misc. 2d 399, 149 N.Y.S.2d 585 (Sup. Ct. 1956), *appeal dismissed*, 4 App. Div. 2d 1001, 170 N.Y.S.2d 1006 (1957):

A promise of this kind cannot be treated lightly and although it is but a spiritual right, it is nonetheless as real and as valuable as any property right. (p. 589).

This is a discerning pronouncement in a case whose dictum cannot be ignored by any who would advocate the recognition of religious values in domestic relations courts. See also comment, 33 NOTRE DAME LAW. 455 (1958).

religious training to the child under another recent Ohio ruling.²³³ The court reasoned "as between Christian religions denominational differences are irrelevant and can not be the basis of decision by the court."²³⁴ Recognizing the resulting anomaly, it continued, "whether the form of training is single or dual is not of present, or should it be of, concern."²³⁵ Here again, the religious issue is neatly sidestepped and the decision, by maintaining a painful status quo, has not only disappointed both litigants but also augurs that the parents' religious differences will continue to plague the innocent offspring. It is submitted that this case emphasizes clearly the extent to which a court will go to refuse to decide a religious issue. The best interests of a child dictate that this conflict be minimized and no matter which religion is chosen for the child's upbringing, that one be chosen is imperative.

In *Hehman v. Hehman*,²³⁶ acting Justice Shapiro of the New York Supreme Court offered a penetrating human insight into the problem confronting the court:

No court can fail to be distressed by broken marriages and ruptured homes. These cases of deep unhappiness are rendered all the more tragic when diversity of religion is one of the causes which aids in destroying what should be the most joyous human relationship, and one of the most sacred of human institutions.²³⁷

In this case, a pre-nuptial agreement had provided that alternative children were to be raised in the husband's religion. There were three children at the time of separation, and all three were placed in custody of the mother, with rights in the father to provide for the religious education of the second child. In recognizing the doctrine of *primus inter pares* as to the creeds at issue, Justice Shapiro refused to give effect to the agreement and intimated that the child's best interests would dictate he live in an undivided house and embrace the religion of his maternal custodian, brother and sister. However, since the child was thirteen years old and was presumably familiar with the tenets of both religions, the choice of which he would espouse was left with him. It was, to the court, a choice "that would be his right as an inhabitant of this country, and the day that he, or anyone similarly situated, loses that right will see our country a whitened sepulchre."²³⁸ In so holding, the court felt bound by the decision in *Martin v. Martin*,²³⁹ and almost reluctantly left itself open to the criticisms of the dissent in that case,²⁴⁰ which was acknowledged, in *Hehman*, to contain "much merit and logic."²⁴¹

If anything, the general proposition that a court will not give effect to a freely-entered pre-marital agreement to rear children in a particular religion, when confronted with an action against a recalcitrant party, has become stronger than ever in the past two years. Perhaps, as suggested by Justice Shapiro in *Hehman*, the answer to this grave sociological problem lies not in the courts but with the religious institutions themselves, since they, in effect, have the power to deal with the problem before it arises:

All of the major religions are sensitive to religious intermarriage. Thus, to cite only a few, the "Code of Canon Law" contains several canons forbidding Catholics to marry non-Catholics; the Methodist Church, in May, 1956, adopted a resolution stating in part, ". . . It is therefore strongly urged that each young person consider carefully before becoming engaged to anyone who does not have a similar religious background"; and The United Lutheran Church, in October 1956, adopted a resolution stating in part, ". . . Congregations and youth and student groups of the church should

233 *Angel v. Angel*, 2 Ohio Op. 2d 136, 140 N. E.2d 86 (C. P. 1956).

234 *Id.* at 88.

235 *Ibid.*

236 13 Misc. 2d 318, 178 N.Y.S.2d 328 (Sup. Ct. 1958).

237 *Id.* at 329.

238 *Id.* at 331.

239 283 App. Div. 721, 127 N.Y.S.2d 851 (1954), *aff'd per curiam*, 308 N.Y. 136, 123 N.E.2d 812 (1954).

240 308 N.Y. 136, 123 N.E.2d 812, 812 (1954). For an extensive critical comment, see 33 *NOTRE DAME LAW*. 456-57 (1958).

241 13 Misc. 2d 318, 178 N.Y.S.2d 329, 331 (Sup. Ct. 1958).

continue to carry on educational programs regarding the special problems in mixed marriages. The inevitable compromise on denial of the faith and the social and cultural problems usually accompanying such marriages should be thoroughly explained.²⁴²

3) *Adoption and Custody of Children — Practical Commingling*

In earlier times agency and/or judicial dissatisfaction with an applicant's "religious background" often had to be overlooked if the child was to be placed. Today such dissatisfaction can easily be made decisive; other applicants, equally well qualified in other respects and with the proper religious qualifications, are readily available as substitutes.²⁴³

Even in this seemingly ideal situation, few, if any, phases of the adoptive process have been the subject of more bitterness and controversy than the matter of religion. Illustrative of the point is *Matter of Maxwell*.²⁴⁴ The mother had been separated from her husband since 1950, and had had six children by him while living with him. Of these six, only one was living with her in 1953, as the Canadian authorities had taken the others from her. At this time the mother became pregnant by a paramour and the child involved in this litigation was the product of that illicit relationship. Desiring to conceal the situation, the mother went from Canada to New York, under an assumed name, to give birth to the child. At this time she told her obstetrician that she did not want the baby. Several hours after the baby was born, she signed an affidavit consenting to the adoption, and declared that she did not embrace any religious faith. She then left the hospital and the baby and returned to Canada with her paramour. One year later, in adoption proceedings, she raised the objection that the couple desiring to adopt the child were Protestants, that she wanted the child returned to her, and, in any event, she desired him to be brought up a Roman Catholic. The trial judge granted the order of adoption, giving custody to the Protestant couple, who agreed in turn to have the child baptized in the Catholic faith and educated in a Catholic elementary and high school. This decision was affirmed by the New York Court of Appeals.²⁴⁵ Speaking for the majority, Judge Fuld stated:

It is, of course, the settled policy of this state to insist upon adoption by persons of the same religious faith as that of the child. But this policy does not require a court to deny custody to adoptive parents where a child has been accepted by them following a declaration or representation by the mother, which may or may not be true, that she *does not embrace any religious faith*. If the rule were otherwise, the foster parents would ever run the risk of not being able to adopt the child, and the child ever subjected to the danger of having attachments formed painfully severed, for how may it be known that the natural mother has not lied about her religious affiliation?²⁴⁶

A strong dissent by Judge Desmond criticized the majority on two grounds. He first reasoned that the state constitution²⁴⁷ and four different state statutes²⁴⁸ applicable to varying situations, all state the heretofore policy of New York,²⁴⁹ that "when practicable," adoption must be by persons of the same religious faith as the child. The dissent pointed out that:

In the present case no effort was made to find adoptive parents of the same

²⁴² *Id.* at n. 330.

²⁴³ Broeder and Barrett, *Impact of Religious Factors in Nebraska Adoptions*, 38 NEBR. L. REV. 641, 642 (1959).

²⁴⁴ 4 N.Y.2d 429, 151 N.E.2d 848, 176 N.Y.S.2d 281 (1958). For comments, see 25 BROOKLYN L. REV. 334 (1959); 10 SYRACUSE L. REV. 124 (1958); and 6 U.C.L.A.L. REV. 459 (1958). See also, *In re Stone's Adoption*, 156 A.2d 808 (Pa. 1959).

²⁴⁵ 4 N.Y.2d 429, 151 N.E.2d 848, 176 N.Y.S.2d 281 (1958).

²⁴⁶ *Id.* at 284.

²⁴⁷ N.Y. CONST. art. VI § 18.

²⁴⁸ N.Y. DOM. REL. LAWS § 112; N.Y. SOC. WELFARE LAWS § 373; N.Y.C. CHILDREN'S CT. ACT. § 26; and N.Y.C. DOM. REL. CT. ACT § 88.

²⁴⁹ A number of states besides New York have statutory requirements as to religious considerations in adoptions, and statutes of at least five states contain the identical phrase "when practicable" See: GA. CODE ANN. § 24-2423 (1959); MASS. GEN. LAWS ANN. ch. 210, § 5B

faith as that of the child. . . . As to whether an adoption to Catholic parents was practical, there is no proof . . . but it is inconceivable that in the City of Buffalo such persons could not be found.²⁵⁰

The second reason for the dissent was based on the public policy argument forbidding the giving of finality to a promise taken in the hospital just after birth from a woman who was not adequately advised or informed as to the religion of the proposed adoptive parents.

The status of the natural parents in *Maxwell* gave the majority a peg to hang the decision on. As a result of the decision, there is precedent for a situation where Protestant parents are raising, or have agreed to raise, a Catholic child. Recently, in commenting upon the *Maxwell* and related decisions, in attempting to focus attention on the complex legal-religious problems, professor Paul Ramsey of Princeton poignantly stated:

In a too zealous effort to safeguard religion in adoption proceedings, the state has chosen legal methods of dubious constitutional validity and of questionable effect upon the family unit, based on determinations of religion it is not competent to make. A solution may be found in large part by more adequate judicial consideration of the religion of the child, and by the exercise of discretion by the court in any adoption proceeding where a religious question arises to enable the creation of a new familial relation which will "imitate natural sonship perfectly."²⁵¹

It is evident that such a policy of requiring the adopted child to be reared in some religious faith, preferably that of its natural parents, may prevent many couples from adopting children. For this reason Protestant²⁵² and Jewish²⁵³ groups have opposed such laws, but Catholic officials have been most insistent that the religious requirement in the adoption law be retained, and, if possible, strengthened.²⁵⁴ Officials of non-Catholic agencies have expressed the opinion that the trend in the country is for the adoption laws to become stricter, not weaker. Their opinion was based on the increasing influence of Roman Catholics in matters of legislation.²⁵⁵ In any event, the impact of this religious factor is being recognized by our legal and social institutions today.²⁵⁶

The influence of religious values is more subtle in litigation between separated and divorced parents for the custody of their children. These cases usually turn on issues of parental fitness with the theological aspect only incidental. In a recent New Jersey case, *Sheehan v. Sheehan*,²⁵⁷ the mother had committed adultery and subsequently married her paramour, himself the father of seven children by a prior marriage. The mother brought the action to obtain the custody of her two daughters from the father. The court applied the "best interest" test, the keystone of which is the "welfare" of the children. The court stated that welfare concerns, *inter alia*, the spiritual and social welfare of the child. The court noted that the mother, although professing to supervise the religious education of the children, had been

(1955); MO. ANN. STAT. § 211.221 (Supp. 1959); NEB. REV. STAT. § 43-216 (1952); and R. I. GEN. LAWS ANN. § 15-7-13 (1956). ILL. ANN. STAT. ch. 4 § 9.1-15 (Smith-Hurd Supp. 1959) uses the words "whenever possible."

250 *Matter of Maxwell*, 4 N.Y.2d 429, 151 N.E.2d 848, 176 N.Y.S.2d 281, 289 (1958) (dissent).

251 Ramsey, *The Legal Imputation of Religion to an Infant in Adoption Proceedings*, 34 N.Y.U.L. REV. 649 (1959). Apparently the latter quote is from ST. THOMAS AQUINAS, *SUMMA THEOLOGICAE*, III (Supp.), Q. 57, art. 1.

252 The New York Council of Churches called for a relaxation of religious requirements in state adoption laws. *New York Times*, Dec. 22, 1959, p. 13, col. 7.

253 The Hebrew Congregations Union opposes state legislation requiring religious tests for adoptive parents. *New York Times*, Nov. 19, 1959, p. 82, col. 2.

254 *New York Times*, Oct. 11, 1959, p. 1, col. 2.

255 *Id.* at p. 82, col. 2.

256 AMERICAN LAW INSTITUTE, *FAMILY LAW* 52 (1958), notes this growing importance. For varying views on religion in adoption and custody, see generally, 1 INSTITUTE OF CHURCH AND STATE, *CONFERENCE PROCEEDINGS, RELIGION IN ADOPTION AND CUSTODY CASES* 56-114 (1958).

257 51 N.J. Super. 276, 143 A.2d 874 (1958).

excommunicated from the Roman Catholic Church as a result of her second marriage. In *Sheehan*, even though the mother testified that she attended church regularly²⁵⁸ and the daughters testified that they would rather live with her, the court denied her custody and put the children in a boarding school some distance from home, continuing custody in their father.

In *Hall v. Hall*,²⁵⁹ the theological element was a little more unusual. The father had obtained a modification of the divorce decree, on the mother's nonappearance, awarding him the custody of their children on the ground of neglect arising out of an averred polygamous climate in which the mother was rearing the children. The mother then brought an action to get back the custody of the children. The Utah court ruled in her favor and affirmed the lower court's exclusion of evidence tending to show that she engaged in polygamous practices. In so holding, the court stated:

There was no evidence . . . to the effect that, whether she at one time had embraced polygamy as a religious tenet or not, she either presently or for sometime past espoused or practiced such dogma or attempted the unlikely chore of teaching it to her children, the eldest of which was only seven years old.²⁶⁰

The Utah court appeared to overlook the moral aspects of the mother's past conduct.²⁶¹

There have been other cases where the doctrinal issue has been more pronounced. In *Battaglia v. Battaglia*,²⁶² the parents had been married in the Presbyterian Church, which was also where their child was subsequently baptized. Later the wife became a Jehovah's Witness. As a result of this, a clash developed which led to their separation. The father alleged that as a result of the mother's absorption in the activities of her newly embraced religion she neglected the child and would not permit a necessary blood transfusion, even though the child's life might thereby be saved. The New York Court awarded the custody of the child to the father, and stated:

She has not, however, the right to impose upon an innocent child the hazards to it flowing from her own religious convictions. The welfare of the child is paramount. If medical science requires a blood transfusion to preserve the child's life, the child should not be deprived of life because the mother's religious persuasion opposes such transfusion. It is of no concern to the court what religious preference the parents may elect. The best interests of the child are the primary concern in all custody conflicts and not the desires of either the father or the mother.²⁶³

It should be noted that the court has neatly avoided an express ruling on this controversial religious tenet, while tacitly disapproving of it in accomplishing a just and humane result.

In conclusion it is submitted that religious values may be an element in the award of custody of children, insofar as it remains a secondary factor to be considered along with the practical aspects of past conduct weighted to promote the child's best interest and general welfare.²⁶⁴ Moreover, in none of the cases does

258 Many times both parties seeking custody of their children aver that they attend church regularly. In *Fronk v. State*, 7 Utah 2d 245, 322 P.2d 397 (1958), both parties made averments to that effect, but the court favored the husband, apparently as he had not committed adultery, and granted him custody under Juvenile Court supervision.

259 7 Utah 2d 413, 326 P.2d 707 (1958). Compare *State in Interest of Black*, 3 Utah 2d 315, 283 P.2d 887 (1955), *cert. denied*, 350 U.S. 923 (1955), and for comment, see 5 *UTAH L. REV.* 381 (1957). See also, *Reynolds v. United States*, 98 U.S. 145 (1878).

260 *Id.* at 709.

261 Some courts are more particular about the mother's conduct. See *Salley v. Salley*, 116 So.2d 296 (La. 1959).

262 9 Misc.2d 1067, 172 N.Y.S.2d 361 (1958).

263 *Id.* at 362. But see *Jackson v. Jackson*, 181 Kan. 1, 309 P.2d 705 (1957), dictating a contrary result should the court allow religion to permeate its decision.

264 New York has a policy of consulting the child as to his preference. See *Martin v. Martin*, 308 N.Y. 136, 123 N.E.2d 812 (1954); *Hehman v. Hehman*, 13 Misc.2d 318, 178

religious values appear to be the *sole* basis upon which a parent or other person can be deprived of the custody of children.

William J. Gerardo
William R. Kennedy
Paul J. Schierl

N.Y.S.2d 328 (1958). For comment, see 59 COLUM. L. REV. 680 (1959). See also 33 NOTRE DAME LAW. 416, 456 (1958). New Jersey continues to consult the child as to his wishes but his choice is not conclusive. *Sheehan v. Sheehan*, N.J. Super. 276, 143 A.2d 874 (1958); *Matter of Jacques*, 48 N.J. Super. 523, 138 A.2d 581 (1958).