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THE LEGISLATIVE PROCESS AND THE RULE OF LAW: ATTEMPTS TO LEGISLATE TASTE IN MORAL AND POLITICAL BELIEFS*

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IN a nutshell, the topic of this paper is "Comstockery and the Bowdlerizing of Ideas." The thesis here asserted is that the Rule of Law is violated when legislatures succumb to modern attempts by the often pathologically-motivated zealot *legally* to freeze current tastes in moral and political *beliefs*. The relationship between taste statutes and the seemingly esoteric topic, "The Legislative Process and the Rule of Law," is based on the premise that the maximum possible degree of *intellectual* freedom for each individual is an essential ingredient in the legal system of a civilized society.

Archibald MacLeish, although addressing himself to a somewhat different topic, has beautifully stated this concept of individual intellectual freedom which should be considered a part of the Rule of Law.[1] In speaking of the national purpose which is the basic foundation of the Declaration of Independence and of the United States Constitution, particularly the Bill of Rights, he said that "prior to July 4th, 1776, the national purpose of nations had been to dominate: to dominate at least their neighbors and rivals and, wherever possible, to dominate the world. The American national purpose was the opposite: to liberate from domination; to set men free." He goes on to say that this is what is sometimes referred to as "the American Dream. We were dedicated from our beginnings to the proposition that we existed not merely to exist but also to be free, and the dedication was real in spite of the fact that it took us three generations and a bloody war to practice our preachment within our own frontiers. It was real in spite of the fact that its practice is still a delusion in numerous pockets of hypocrisy across the nation." He continues, "And America did move steadily on before it lost headway in the generation in which we live. The extraordinary feel of liveness that the Americans communicated, whether agreeably or not, to their early European

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1 MacLeish, National Purpose: MacLeish "Dream," N.Y. Times, May 30, 1960, p. 14, col. 1.

visitors came from that sense of national expectation. We were never a very philosophical people politically after Jefferson and his contemporaries left us. We were practical men who took instruction from the things we saw and heard and did. But the purpose defined in our Declaration was a reality to us notwithstanding. It gave us aim as the Continent gave us scope, and the old American character with its almost anarchic passion for idosyncrasy and difference was the child of both." He then makes a statement which is peculiarly appropriate in considering the type of statute here discussed. He says, "The truth is, of course, that freedom is never an accomplished fact. It is always a process. Which is why the drafters of the Declaration spoke of the *pursuit* of happiness: They knew their Thucydides and therefore knew that 'the secret of happiness is freedom and the secret of freedom, courage.' The only way freedom can be defended is not by fencing it in *but by enlarging it, exercising it.*" [Emphasis added.]

Actually matters of taste in moral and political beliefs cannot be handled adequately by legislative action. Statutory enactments not only tend to mislead society into thinking that the problem is solved, but they also indicate that a society has lost faith in itself. They paint, for the world to see, a picture not of intellectual freedom and enthusiasm for the morrow, but of an intellectual decadence which others care not to copy. The value judgments underlying these statutes are open to serious question and we must not let ourselves be stampeded or panicked into thinking we can legislate taste in the expression of beliefs, moral or political. These are taught by example, and history tells us that they change. We must be willing to hear new ideas, and to condone the actions of those we find objectionable only as a matter of taste. The Comstocks of today must not be allowed to emasculate our intellectual vigor merely because thoughts are couched in terms found distasteful to some or even to a temporary majority. A legislative Rule of Law should be that the *mind* (although not necessarily all the *actions)* of man should be free!

When seen in proper historical perspective, the folly or at least futility of enacting such taste statutes becomes obvious. The thesis here propounded, however, is that the kinds of modern statutes criticized in this discussion are not only as futile as some of the humorous historical examples to be described, but, more importantly, also run counter to the concept of individual intellectual freedom, which is—or ought to be—part of our Rule of Law.

Before describing the old, however, and then cataloging the new taste statutes whose enactment the legal profession should oppose, several matters of definition and caution must be mentioned, including a definition of the Rule of Law.

I. DEFINING THE RULE OF LAW

Most of the writing resulting from the recent resurgence of interest in the Rule of Law, to the extent that a definition in general terms is attempted, seems to be rather sterile mental gymnastics. At best, the Mad Hatter's suggestion to Alice is appropriate—the Rule of Law seems to mean what each individual using the term wants it to mean. For present purposes it is defined as follows: A search for the Rule of Law is man's attempt to determine with some degree of rationality the basic value judgments which should determine the actions and attitudes he will *legally* enforce or prohibit, encourage or discourage. Meaningful exploration of the topic for almost all persons starts and ends with attempts to identify the *specific* values which the law should foster. Quixotic tilting at generalities is tempting but almost never rewarding.

Even the source from which these basic values are derived is not our concern. Many, including the writer, think they come from the minds of men, including not only his ability to think but also to feel. Even those who assert that there is a divinely-inspired, or perhaps a divinely-determined set of rules, must admit that these rules are communicated to the rest of us through the tongue and pen of man, and the possibility of error in the transcription is obvious. The search for the immutable, everlasting verities must continue. But the searcher should be most reluctant to assume that he or anyone else at any one time has discovered what such verities are, or at least how they should be applied to individual situations at any specific period in history. Each legislative enactment's desirability should be tested against the best thinking at the time as to what the basic values of our society are. It is here suggested that taste statutes constitute an encroachment upon the basic value of individual intellectual freedom, and that lawyers should therefore try to convince legislators that society loses more than it gains by such enactments. These losses include not only the loss of intellectual freedom, but a potentially greater loss in that the statutes strain the limits of the legal system as an effective

tool of social control and thus tend to weaken the system in the area where it *must* operate to maintain order.

Most of the types of legislation to be discussed have been treated separately in legal periodicals, but typically with emphasis only on constitutional limitations on governmental actions. In many of these cases a constitutional question of some significance is involved, but here our interest is much broader. In considering the Rule of Law and its meaning for our legal system, there should be an affirmative character to such analysis far beyond the negative prohibition found in most of our constitutional concepts limiting the power of the government to control the individual in society. All citizens, and particularly the members of the legal profession, have a responsibility to see that the legislature concerns itself with things *vital* to our society and which can *appropriately* be dealt with by statute. The legislature should not be permitted to become so absorbed in *prohibiting* that its enactments are unimaginative and ineffective in dealing with important problems.

II. THE ROLE OF THE BAR

Lawyers as a group have given too little attention to the legislative process which today is the most vital part of our legal system of social controls.[2] We have concentrated on the legal rules imposed by the courts in the traditional common law areas or in their role as interpreters of statutes, and, in the last two decades or so, on those enforced by the administrative agencies and the executive branch of government. Except as an individual lawyer has a client whose interests are involved in a particular piece of legislation, seldom is the organized bar actively engaged in scrutinizing, and where necessary, criticizing, the statutes which the legislature is adopting at a particular time.

It is true that the Commissioners on Uniform State Laws, the American Law Institute, and various groups in the American Bar Association and state bar organizations work on statutory revision. Most of such efforts, however, are directed to "technical" matters dealing with property law, contracts, and court procedures. These are important areas, of course, and lawyers should give even more attention to them. On the other hand, the bar probably is the only organized group which, over a period of centuries, will see that the value judgments being made by the legislature are consistent with

2 See comments by Frank Newman, *A Legal Look at Congress and the State Legislatures,* COLUMBIA LAW SCHOOL CENTENNIAL CONFERENCE VOLUME, p. 69 (1959).

our fundamental concepts of achieving progress and at the same time protecting individual rights to freedom of beliefs. One individual, no matter how brave, can do little to check the excesses of the legislatures. Only to the extent that we have safety in numbers, and can point to our long history of concern for civil liberties (too often inadequately acted upon it is true), will we be able to preserve the principles upon which our system is built. To find and support these values in essence is a search for a Rule of Law.

The ideas discussed here are not the only important or even the most important aspects of a legislative Rule of Law. Nevertheless, a unifying thread of a social value judgment is involved in all of these apparently unrelated statutes, and lawyers should recognize that the Rule of Law is being abused by such enactments, whether or not constitutional principles are violated. We should diligently oppose legislation dealing with subjects such as are here discussed, although it possibly subjects us to public criticism on the ground we are fostering irreligion, immorality, and subversion.

III. A CAUTION ABOUT EMOTIONS

One caution about emotions is necessary. Probably each person, including the writer, at some point, will feel uncomfortable because these subjects stir one's emotions. In the writer's opinion, however, those things about which we have emotional reactions must be recognized and we must realize that although having the reaction is perfectly normal it is not rational to pass laws as the result solely of these emotional responses. A case can be made that the zealots who push too hard for the type of legislation discussed here are fairly described as sick, at least to the extent of suffering from what psychiatrists term "reaction formation." They probably are trying to fortify their own weak wills. This is not to suggest that all legislators who adopt such statutes, or those lawyers hired to draft such material, are themselves sick. Our society, and particularly the legislature, is misguided and irrational, however, when it gives in to the incantations of such zealots whose overreaction to the evils they see or imagine in society is at least immature. Although often emotionally sympathetic with the motivation of such zealots, lawyers must concern themselves with the question of what types of legislation should be enacted and as members of the bar we ought to protest those which we think are inconsistent with the more basic value judgments we believe to be important in establishing the legal rules by which we live.

IV. SOME HISTORICAL PERSPECTIVE, FREQUENTLY HUMOROUS

A history of legislation dealing with taste in moral and political beliefs could begin at almost any point in recorded history but possibly most significant for Americans is what happened in England. During the reign of Edward III in the 14th century the English Parliament enacted two sumptuary laws directed against sumptuous living. One regulated the number of courses an Englishman could serve for dinner,[3] possibly to create a larger source of funds which the King could tap for his own purposes, including the conduct of wars. The second Edwardian taste statute dealt with apparel.[4] It provided that none but the high (and they were also the mighty) should be so ostentatious and extravagant as to wear fur. A quarter of a century later handball, football, cock fighting and other games were outlawed.[5]

In spite of the efforts of officials of the King and the Church, enforcement of these types of prohibitions was not effective and Parliament repealed all apparel statutes in 1604 and rejected reenactment attempts in 1656, perhaps in part as a result of criticisms such as those expressed by John Milton in *Areopagitica*.[6]

A new type of taste statute prohibiting blasphemy began to appear during the 17th century in England. Directed first at use of blasphemy in plays and shows,[7] the prohibition against "pro-

[3] BALDWIN, SUMPTUARY LEGISLATION AND PERSONAL REGULATION IN ENGLAND 24 (1926).

[4] It provided that no man or woman in England, Ireland, Wales, or Scotland — the King, Queen, and their children and certain nobles and churchmen only excepted, should wear any fur in or on his clothes upon penalty of the forfeiture of the fur, and further to be punished "by the King's will." BALDWIN, *op. cit. supra* note 3, at 30-32. Although such an enactment today would find some sympathy among husbands and animal lovers, in the light of women's suffrage it would surely be politically unfeasible. In any event the feminine glee probably is worth the pain it costs and in case of doubt the presumption should be in favor of freedom.

[5] Edward III forbade "handball, football, handy ball . . . or cockfighting" and encouraged archery (so vital to the defense of England) by requiring regular contests in the use of the bow. BALDWIN, *op. cit. supra* note 3, at 57. Would it not have been much better in the long run to avoid the unenforceable negative and concentrate on the affirmative requirement?

[6] *Id.* at 249 and 264.

[7] The law was directed to "the preventing and avoiding of the great abuse of the holy name of God in stage plays, interludes, May games, shews and such like," so that thereafter anyone acting in a play, pageant, or similar activity must not, "jestingly or profanely speak or use the name of God, Jesus, Christ, the Holy Ghost or the Trinity," and if he should do so he "should forfeit ten pounds for every offense, one-half to go to the king, *the other half to anyone who should sue in any court of record at Westminster.*" *Id.* at 268. (Emphasis added.) As Bristol put it, "how the graceless king . . . could say 'Le Roi le veut' to it whilst he himself was swearing obscenely passes comprehension." *Ibid.*

fane swearing and cursing" was broadened in 1650.[8] These statutes made use of informer's fees and graduated penalty provisions.[9] The prevalence of tippling and drunkenness, even among the clergymen,[10] during this same period brought about a statute which provided that only travelers, and artisans and laborers during their dinner hours only, were permitted to drink in inns and alehouses.

James, like Edward III, also undertook to regulate the playing of games and other amusements, but not without making certain exceptions which were objectionable to the Puritans.[11] The Puritans gained revenge during the Puritan Revolution, however, and the Declaration of Sports of James I was burned and the books were destroyed as well as all copies of the Declaration.[12] Nevertheless, in general, by this time most of the original sumptuary legislation had ceased to have much, if any, effect.

The responsibility for these sumptuary laws can not be placed on the Puritans or even on Christianity generally. Historians have found austerity statutes enjoining the spartan life in early Greek groups, particularly the Dorian races. In Laconia no drinking was allowed at entertainments and no furniture was tolerated which was more elaborate than could be made with axe and saw.[13] The Romans, as early as 215 B.C., prohibited women from possessing more than ½ ounce of gold, or wearing a dress of different colors.[14] Later the Romans went even further. In 187 B.C., laws controlled the number of guests who could be entertained at one time, and in 161 B.C. it became illegal to serve fowl when entertaining, except

[8] *Id.* at 269.

[9] *Ibid.* A duke, marquis, earl, viscount, or baron was fined thirty shillings; a baronet or knight, twenty shillings; an esquire, ten shillings; a gentleman, six shillings, eight penny; and all inferior persons, three shillings, four penny. It was a graduated fine in another sense also, in that the fines were doubled from the second offense to the ninth. The penalty was also imposed on women, if they used oaths. A wife or widow paid according to the rank of her husband, while a single woman paid according to the rank of her father. If the offender were a child under twelve years of age he was put in the stocks or publicly whipped in lieu of the fine. If an anti-swearing law were enforced rigorously today our armed forces would be reduced drastically and food would be taken from the mouths of babes of great groups of our work force who swear frequently and with abandon.

[10] *Id.* at 273.

[11] *Id.* at 272.

[12] *Id.* at 273.

[13] 21 ENCYC. BRIT. 559 (14th ed. 1937). Perhaps encouragement of a spartan existence was essential for survival and justified such enactments but these regulations soon became only taste statutes.

[14] *Ibid.*

one hen, unfattened.[15] Apparently these statutes were not attempts merely to make good soldiers or save food.

The English were not the only people to adopt Greek and Roman taste statutes. Such statutes were very common and extremely extensive in coverage of subjects throughout Europe during the middle ages and later. Nürnberg legally regulated extravagance of dress, particularly of "children during Holy Week,"[16] and prohibited "peaks on the shoes."[17] A maximum of six men and six women guests at weddings was imposed by law,[18] and the giving of wedding gifts was severely limited.[19] Those who informed on violators were protected by law against any opprobrium! Later in Nürnberg ladies were prohibited from serenading on the streets as part of the wedding festivities because such activities did not "become a maiden and matronly modesty."[20] A related regulation might appeal to parents of teenagers today. It prohibited "any but the customary dances which have come down from old," and the dancers even then were legally prohibited from taking "by the neck or embracing one another."[21]

One Nürnberg regulation, of all things, deals with *men's* clothes.[22] The gradual shortening of men's outer garments, which at first had reached the ground, outraged the sense of propriety of those in power. The Council tried to stop the length of these jackets at the point as far down as the arms extended but they were not able to stem the tide of fashion. The one thing insisted on by

15 *Ibid.* Today one might seek to legislate against being overweight which insurance companies say means over 145-160 pounds for a male of average height and frame. N.Y. Times, Feb. 2, 1960, p. 25, col. 4. Surely such legislative interference today would be unacceptable. The Marine Corps, however, is trying to achieve it by fiat. *Id.*, Nov. 14, 1960, p. 1, col. 3.

16 GREENFIED, SUMPTUARY LAW IN NÜRNBERG 30 (1918).

17 *Ibid.*

18 *Id.* at 34. If thirteen or more were present each was liable to a fine of ten pounds haller, and so was the host. *Ibid.* Perhaps the city fathers wanted only to stop week-long celebrations which meant the loss of productive capacity of all participants, but surely a time limitation would have served this purpose better.

19 *Id.* at 41. To help in the enforcement of such provisions, the person who expected to have a wedding in his house was required to go to the rathaus and read the laws as written and then give his word that he and his wife would observe them.

20 *Id.* at 63.

21 *Id.* at 93-94. The 15th-century rule reads as follows: "Since it has definitely come to the knowledge of the honorable council that many unwonted shameful immodest and novel dances are daily encouraged and practiced, which is not only a sin and without doubt displeasing to Almighty God, but also may produce much dishonorable light-mindedness and scandal besides, among men and women, the same to prevent, our lords of the council earnestly and strictly command, that henceforth no player or minstrel shall pipe, play or cause any *but the customary dances which have come down from old*; also no one whoever it be, woman or man, shall dance the same, and in dancing shall not take by the neck or embrace one another. (Emphasis added.)

22 *Id.* at 114-115.

the Council, however, was that the mantle should cover the fly of men's trousers. The reason is found in the then-current fashion to make flies of a conspicuous color contrasting with that of the breeches, and to have the flap "stuffed and artifically enlarged." This reaction to men's shortening jackets sounds very much like the plaints heard today about women's necklines, only in the reverse direction. In considering how nebulous and changing are tastes in clothes, it is worth noting that perhaps women have been unjustly accused by men of originating such anatomical deceptions.

Sumptuary laws were common also in the great cities of Switzerland during the Middle Ages. Invariably profanity was regulated, and in 1520 three men were executed under ordinances enacted during the Protestant Reformation.[23] Equally prevalent were Sunday laws which nevertheless made exceptions for practice by rifleshooters and users of the cross bow.[24] Zurich later prohibited the giving of gloves to women who took part in christening ceremonies[25] and Basel tried to shorten funeral exercises by limiting the number of mourners and enjoining shorter funeral sermons, "especially in time of epidemic."[26]

Many regulations of dress are found throughout Europe during this period. Zurich once decreed that women of a certain class might have silk borders on their bodices but without hooks or buckles.[27] The penalty for breach of this ordinance was confiscation or sale "for the benefit of the husband's business necessities." The incongruities of human taste are demonstrated by the fact that the limitation on belts was not applicable to those who belonged to the "aristocratic gilds" and to "public prostitutes." In France, Philip IV regulated both the table and dress of his people, and Charles V forbade long-pointed shoes.[28]

Historical studies of the medieval period in Europe clearly

23 VINCENT, COSTUME AND CONDUCT 12 (1935).

24 *Id.* at 17. One provided that on Sundays "no one may walk up and down on St. Peter's Platz, go into secret places to play cards, or commit other wanton acts." The exceptions indicate that the city fathers were sensitive to strong enough pressures. The rifleshooters were to practice without noise or confusion and could not admit to their quarters persons who came just for the eating and drinking. It surely is a safe guess that a number of poor shooters joined.

25 *Id.* at 23.

26 *Id.* at 27.

27 *Id.* at 44-45. The provision for sale for the benefit of the husband's creditors is not completely unfamiliar to those familiar with common law doctrines regarding gifts and fraud on creditors.

28 21 ENCYC. BRIT. 559 (14th ed. 1937). Chiropodists assert that such a ban today would do much to lessen the discomfort and improve the disposition of people, but the suffrage guaranteed by the 19th amendment surely precludes such interference with women's sufferance!

show that these "sumptuary laws were not the expression of sectaries or radicals or of men in an eddy, but of representative public minds."[29] These early attempts of society to regulate, usually by means of criminal statutes, what could be termed taste in moral and religious beliefs gives the necessary historical perspective to evaluate the place of taste legislation in modern society. Although the examples given may seem humorous they were chosen to emphasize how obviously inappropriate was the subject matter for legal regulation. And such regulation is not representative of only the dark or Middle Ages. As late as 1959, the Germans completed a revision of some 15,000 laws dating back to 1795, of which only 400 survived the revision.[30] These old laws included fines for smoking, two years imprisonment for encouraging fellow citizens to leave the country, and one, which put a reverse twist on the older sumptuary laws, required the well-to-do, on pain of criminal punishment, to use wool and linen in burying the dead. Of the 400 retained in the modern enactments most regulate matters of property, roads, and water rights.

V. MODERN TASTE STATUTES

Surely history teaches us that the next half millennium will produce the same drastic change in custom and manners so that modern taste statutes, now thought sensible by the temporary majority, will be considered silly 500 years from now. Attempts to freeze such tastes in statutes are not merely silly, however, they are dangerous. Some will feel that at least a few of the laws here discussed are improperly placed in the category of objectionable statutes and a few may even be disturbed by the categorization. Emotional anxiety or anger, however, is a signal to pause and think, not a proper basis for concluding that a first and emotional reaction is a rational basis upon which a legislative judgment should be made as to what values should be legally imposed through the legislative process.

Because this discussion is concerned with the trend of legislative thinking as a product of the times, reference is made not to the statute books as such, or directly to the many cases decided daily by the courts in this country. Rather, two other sources were chosen: The *New York Times* from January to June 1960, and the *Legislative Research Checklists* for 1959 and 60, published by the Council of State Governments. These sources seem more

[29] GREENFIELD, SUMPTUARY LAW IN NÜRNBERG 31 (1918).
[30] N.Y. Times, June 19, 1960, p. 20, col. 1.

likely to reflect a trend of current thinking which finds its way into statutory rules with no or little direct assistance from the bar or the bench, except as members at large of the community. These sources obviously are not slanted to emphasize the startling, the lurid, or the ridiculous. Nevertheless, an interesting and disturbing story can be constructed from their staid contents.

A. *Religious Laws*

One type of statute which is most ill-advised and which the organized bar should oppose, is that dictating that Sunday shall be a *legal* day of rest. For example, in June 1960,[31] the Attorney General of Maryland was asked to give an interpretation of the Maryland statute prohibiting the making of "loud and unseemly noises" and the doing of "bodily labor" on Sunday. His opinion was asked as to the right to use power lawnmowers in Baltimore. His very practical opinion indicated that they could be used on Sunday—if they were quiet and if they did not require too much effort to push. While he concocted a most practical opinion it seems ludicrous that he was put in such a position. Perhaps the moral of his ruling is: keep your machine well oiled.

Nor does one have to look far in the press to find instance after instance of the agitation for the type of law Massachusetts recently adopted banning sales on Sunday,[32] and which the Westchester County (New York) realty board wants to enact[33] to prevent "unfair" competition from salesmen who work on Sundays. These laws sometimes are justified on the grounds that everybody needs a day of rest and it is convenient to pick Sunday because this is the day on which most do take a day off. If this were really carried to its logical extreme, why not legally adopt a five-day working week as New Zealand has done?[34] There the law prevents the opening other than on Monday through Friday, of any kind of establishment with certain very minor exceptions for emergency purposes and one small concession to the gastronomical needs of man allowing small dairies selling milk, ice cream and similar commodities to remain open.

We may be less than honest when we argue that a day of rest is our concern if by that is meant a day of physical rest for purposes of health. Our history makes it clear that these laws are a modern

[31] Ann Arbor News, June 14, 1960, p. 14, col. 1.
[32] N.Y. Times, June 12, 1960, p. 66, col. 5.
[33] *Id.*, April 23, 1960, p. 25, col. 8.
[34] *Id.*, June 24, 1960, p. 30, col. 3.

version of the old laws of the Middle Ages clearly enacted for religious purposes. They found their way into the colonial laws of this country and then into the laws of the states of this nation at the insistence of Christians and their leaders. The Supreme Court of the United States in its 1960 term agreed to hear a case from Massachusetts, one from Pennsylvania, and one from Maryland testing whether or not these so-called Sunday laws are constitutional.[35] Regardless of whether or not they are constitutional (and they are not if the Court is willing to recognize the real motivation for such enactments) they are statutes which, as a matter of legislative policy, should not be enacted. Such statutes discriminate against important minorities within our own society, whether they be of the Jewish religion, believers in the principles of the Seventh-Day Adventist, or followers of the Moslem, the Buddhist, or any other group. The attitude exemplified by this type of statute is typical and is to be expected of many members of the Christian church whether they be Catholic or Protestant. Actually, however, such *legal* discrimination seems inconsistent with true Christian principles, if Christ's peaceful moral persuasion approach is accepted. That such laws create a substantial volume of legal work is illustrated by a recent thirty-page annotation[36] devoted solely to one aspect of the Sunday laws, that of discrimination between types of stores.

Perhaps one's first reaction to such statutes could best be summarized in the question, "How silly can we get?" This is hardly sufficient justification, however, to object to such a law as a violation of the Rule of Law in the legislative process. The reason such laws are passed is significant in arriving at the value judgment. They are passed because the people who believe, in this case in keeping the Sabbath holy, are afraid that their religious ideas will not be or have not been accepted by the community at large. Having failed in moral suasion, they look for legal help from the legislature or the city council. Such laws, therefore, are indications that the hold of the Church on the minds of men has been lost. This type of religious discrimination and legal enforcement of one group's moral precepts leads to the kinds of abuses which have been seen in some countries where the Catholic Church is the only recognized religious institution, or as in Sweden where recently a bishop of the official state church, the Lutheran, was cited for

[35] *Id.*, April 26, 1960, p. 30, col. 4. Maryland also forbids atheists to hold public office, *id.*, July 13, 1960, p. 30, col. 1.

[36] Annot. 57 A.L.R. 2d 975 (1958).

violation of the Swedish law because he attempted to keep the Salvation Army from operating in one of the areas of Sweden.[37] As his is the church officially recognized by the state, his action was official action of the state. Likewise, at the present time in Sweden there is a most serious argument within the Lutheran Church (and therefore the state) as to whether women should be permitted to act as members of the clergy.[38]

A perusal of the newspapers reveals another form of this attempt to dictate moral standards and religious beliefs which should be precluded by the doctrine of the separation of church and state. Jewish rabbis have protested the reading of the Bible, and probably particularly the New Testament, as a part of the formal exercises in public schools.[39] The New York State report to the White House Conference on Youth included a recommendation that religious beliefs be taught in the schools as an essential ingredient of any attempt to teach our children to be good and moral citizens.[40] Again the Jewish rabbis dissented.

A similar instance of this use of the force of the state to further religious beliefs is the concept which Professor Kauper referred to in his discussion and which was approved by the Supreme Court of the United States in the *Zorach* case.[41] Why do the churches want school time or released time rather than dismissed time? They can no longer claim that it is because the public school system takes too much of the time of the child. This argument is met by a dismissed-time program. Instead, they want the state, through a released-time program, to use its hold over the child (unfortunate though it is) which it has by giving him a choice of going to religious instruction or keeping at his school work. This is a use of the legal system which should be protested not just by rabbis but by the legal profession itself. Aside from any question as to whether it is constitutional, our value judgment of freedom of religious belief and pursuit of the teachings of the group of our own choice, necessitates that the imprimatur of the state should not be placed on the activities of *any* religious organization.

These religious groups seek this type of legal support because of an emotional reaction which psychiatrists call "reaction formation." At least subconsciously they realize that their persuasive powers have not been successful in reaching a great many of the

[37] N.Y. Times, Feb. 7, 1960, p. 19, col. 1.
[38] *Ibid.*
[39] *Id.*, June 23, 1960, p. 60, col. 1.
[40] *Id.*, March 24, 1960, p. 29, col. 4.
[41] Zorach v. Clauson, 343 U.S. 306 (1952).

people in this country. Those who argue the most zealously for such enactments by legislative bodies probably include those who need these laws to reinforce their own shaky beliefs in the validity of their concepts. In other words they are seeking to dictate to others, as a crutch for their own beliefs that subconsciously they are beginning to question. By working so hard to bring all types of pressure to bear on the legislative bodies to enact these laws, they convince themselves that they believe most strongly and so repress the beginnings of their subconscious disbelief. To paraphrase what Christ once said, without meaning to be sacrilegious or heretical, one might suggest that he would say something like this, "What Caesar enacted, let Caesar enforce; what God commands, let only God enforce."

The legal system should have no quarrel with any religious person who attempts to persuade others to abide by the rules of the Church and observe the Sabbath. To persuade by legislation, however, is not merely a petty annoyance, although the annoyance is not a particularly great one. To believe that he has a legal right to force other people to *think* as he does is symptomatic of a very dangerous disease. One should have no right to control legally the *thoughts* of others to bolster his own moral or political beliefs because in the light of historical perspective more is lost when new ideas are made dangerous and people are afraid to give society the benefit of their new thoughts. The law should not help reach a result involving moral beliefs which intellectual persuasion, with complete access to the minds of men, has not achieved.

B. *Regulation of Non-political Speech and Ideas*

1. *Obscenity and Sex.* In characterizing the subject of this paper the term "bowdlerize" was used in a considerably broader sense than is ordinarily meant by those who refer to the publication of expurgated editions of books. The term derives from a Dr. Thomas Bowdler who, in 1818, published a "family" edition of Shakespeare from which he had expurgated all "indelicate" passages. The term, therefore, ordinarily is used to denote deletion of all references to sex, or at least too realistic or lusty mentions of it. It was used before, however, to indicate a broad range of efforts to convince ourselves that something does not exist in the mind or feelings of man if we can just omit any reference to it, whether it be sex, or different religious beliefs, political ideologies, or moral standards.

This is not the time to analyze the myriad of statutory provisions attempting to prohibit the use of obscene material.[42] Nor is it the purpose here to discuss the constitutional issue involved, although it is an important one which has not been satisfactorily resolved. Instead, some examples of calls for censorship action as reported in the "good grey Times" will be cited.

The *Times* recently reported the concern of the House of Lords about the state of the British press.[43] In this country, coincident with the abortive Jack Paar walk-out strike, the *Times* carried several news reports of meetings and speeches by members of the television industry and of the press,[44] each accusing the other of calling the kettle black as to the emphasis on sex and violence in the bill of fare each exhibited to its public. TV officials sanctimoniously pointed out that they had censored Paar's British w. c. joke (wayside church or water closet, depending on whether one is in Switzerland or Britain, so the *newspapers* informed us), and newspaper spokesmen replied with that hoary defense that they only print the news, they don't make it. Most interesting of all is the fact that each felt it should defend its honor with regard to this delicate subject, because, for all their brashness in treating sex and violence, they are afraid to admit that they exploit it to line their coffers. They do not want to call a spade a spade; they only want to describe or show it and profit from it.

Much more important for present purposes is the report that a Harvard University psychiatrist was charged with violation of an obscenity statute because he imported some pornographic objects for use in one of his classes for doctors.[45] The president of Harvard felt called on to issue a statement that Harvard stood behind the psychiatrist in this educational use of the material.

At Illinois University, a state school, a professor was dismissed by the president apparently for expressing in a letter to the student newspaper the view that an argument could be made for premarital

42 There is a considerable bibliography in legal periodicals. *E.g.*, 20 LAW & CONTEMP. PROB. 531-688 (Autumn 1955); Paul & Schwartz, *Obscenity in the Mails: A Comment on Some Problems of Federal Censorship*, 106 U. PA. L. REV. 214 (1957); Schmidt, *A Justification of Statutes Barring Pornography From the Mail*, 26 FORDHAM L. REV. 70 (1957); Alpert, *Judicial Censorship of Oscene Literature*, 52 HARV. L. REV. 40 (1938); REPORT, N.Y. STATE JOINT LEGISLATIVE COMMITTEE STUDYING THE PUBLICATION AND DISSEMINATION OF OBJECTIONABLE AND OBSCENE MATERIALS, N.Y. Leg. Doc. No. 32 (1956); 33 N.Y.U.L. REV. 989 (1958).

43 N.Y. Times, June 23, 1960, p. 19, col. 3.

44 *E.g.*, Speech of Dr. Frank Stanton to the American Society of Newspaper Editors, excerpted in the N.Y. Times, April 23, 1960, p. 10, col. 4; Gould, *Tempest in a TV Tube*, N.Y. Times, Feb. 13, 1960, p. 25, col. 5.

45 N.Y. Times, April 6, 1960, p. 41, col. 6; see *id.*, March 28, 1960, p. 46, col. 6.

intercourse under some circumstances.[46] According to the newspaper accounts, nothing of this nature was advocated by the professor in the classroom.

In Louisiana, the legislature considered a new statute dealing with obscenity, and although it had not yet been considered by the Senate (where all such bills have died in recent years), the news report concluded with the statement that "so far, the bills have aroused relatively little opposition."[47] Apparently it was the typical broad type of bill, and yet no bar group took up the cudgel in opposition, if the newspaper report is accurate.

In New York State, the legislature considered a bill authorizing the Motion Picture Division of the Board of Regents to place an official seal of approval upon those motion pictures considered suitable for children.[48] Not to be outdone by state officials, a House subcommittee in the Congress conducted extended hearings on sexy films and advertising.[49] In addition the postal authorities conducted a benighted campaign to warn all parents of the harm possibly lurking in the mails if they did not watch out. A woman staff member travelled throughout the country setting up meetings of school officials and parents and undoubtedly giving them a thrill by describing just how bad the material was. Many non-governmental religious and decency groups also have been organized to combat obscenity, but our concern is with governmental action.

The drive for more rigid governmental prohibition of such obscene material has become intense enough to draw the attention of the American Civil Liberties Union. One of their group has taken the position that the test of obscenity should be that the publication is not censorable if it has "even the slightest redeeming social importance."[50] It is easy to agree with this basic assumption (contrary to the language in Mr. Justice Brennan's majority opinion in the *Roth*[51] case) that speech is speech and that it is all protected within whatever standard is applied under the first or fourteenth amendment. What is obscene, and therefore not protected by freedom of speech and press under Mr. Justice Brennan's definition, cannot be determined until the test of protected speech is applied. In any event, even the ACLU admits too much censorship power.

[46] *Id.*, April 8, 1960, p. 34, col. 4.
[47] *Id.*, June 12, 1960, p. 66, col. 6.
[48] *Id.*, March 24, 1960, p. 31, col. 1.
[49] *Id.*, Feb. 6, 1960, p. 11, col. 2.
[50] *Id.*, April 24, 1960, p. 72, col. 1, quoting from the *Roth* case.
[51] Roth v. United States, 354 U.S. 476 (1957).

Existing scientific investigation of the effect of pornographic literature has uncovered no acceptable evidence of a causal connection between such literature and illegal *action,* on the part even of the youthful.[52] Although not enough evidence exists yet to be *sure* there is no causal connection, all but one or two psychiatrists who have expressed opinions on the matter have indicated they think there is no such relationship. The burden of proof in speech cases should remain on the prosecution to show that there is at least some evidence indicating a danger of *action* resulting from the exposure to the offensive material. No good reason exists justifying abandonment of the clear-and-present danger test, at least as a matter of legislative policy judgment, and preferably as a constitutional test as well. This is not the place to recount the material suggesting the complete lack of connection, but one interesting fact found by some researchers is that juvenile delinquents do not read very much![53] There is much evidence that their troubles, if they be sexual along with others, are much more deep-seated than can be explained by reading violent or dirty comic books. Society should not fool itself into thinking it can in any way help remedy the situation by passing obscenity laws.

Here again our legislatures, for fear of the political repercussions if they are accused of supporting obscenity by not supporting the legislation banning it, have been stampeded into accepting the offerings of the zealots who push so hard for its passage. Those who become so emotionally involved in the suppression of such material are not very mature psychologically or they would not get such reactions. Probably here again is an example of a "reaction formation."

2. *General Customs and Culture.* Space does not permit as full exposition of some of the other types of statutes equally reprehensible when tested against the value judgments which should be used in the legislative process of enacting statutes. It is important, however, to include at least a brief mention of several of these, because they show a pattern which lawyers should come to recognize and oppose.

The complaint of the British Lord about the quality and character of the English press included things other than sex and ob-

52 Lockhart & McClure, *Literature, the Law of Obscenity, and the Constitution,* 38 MINN. L. REV. 295, 385 (1954); A.L.I. MODEL PENAL CODE, Tentative Draft No. 6, at 24 (1957); EBERHARD & KRONHAUSEN, PORNOGRAPHY AND THE LAW (1959).

53 Roman, Margolin, & Harari, *Reading Retardation and Delinquency* 1 J. NAT. PAROLE AND PROBATION ASS'N 1, 1-7 (1955).

scenity. It referred to a general lowering of the cultural level of the country. Reference can be made in our own country to the *New York Times* series of articles or pieces by prominent people concerning "what's wrong" as well as "what's right" with America to find concern for our own moral standards.[54] Public exchange of correspondence between Steinbeck and Stevenson[55] points to the same kind of concern about the loss of moral fiber and national purpose. What can happen if this kind of feeling gets reflected in legislative enactments?

If the propriety of legislating taste is accepted, why not adopt the British approach of placing an arbitrary limit on the showing of United States films on TV (a government operation) to a total of 30% of the available time?[56] The objection they give is that the life depicted in our movies is most deleterious to the British culture. The Premier of Indonesia went even further by legally banning "cha cha" type dancing in his country.[57] In the United States this kind of reaction is manifested by the violent outbursts of parents against TV, and most parents must admit guilt to this occasionally. In a recent conference, the head of a parents organization warned the TV industry that if they did not do something about cleaning up their programs, parents would turn the sets off and leave them off![58]

As a result of these complaints, the Federal Communications Commission considered setting up a twenty-five man board to scrutinize the program offered by TV throughout the country.[59] A simple solution seems not to have occurred to the parents and to others who object not only to TV but to the type of literature found in the book stores and the reading offered in the newspapers. Why not just refuse to buy or look at it or read it? They

54 MacLeish, *supra* note 1, was one of a series of articles.

55 Steinbeck & Stevenson, *Our Rigged Morality*, Coronet, March, 1960, pp. 144-47.

56 N.Y. Times, March 7, 1960, p. 31, col. 4.

57 *Id.*, Feb. 7, 1960, p. 13, col. 1; and see the list of Do's and Don't's published by the Hungarian government, N.Y. Times, July 5, 1960, p. 3, col. 4. The list included advice such as:

— "Never rest your elbow on a person's shoulder or hat."

— "Don't write in an offensive tone to anybody; you can never be sure that the letter will be read only by the addressee."

— "A spoon is to be used for soup and liquids."

— "After having spent an evening with a friend, don't abandon him immediately."

— "Use a napkin to wipe your mouth."

— "When you speak, it is not polite to play with the button on the other fellow's suit."

58 N.Y. Times, March 30, 1960, p. 24, col. 1; *id.*, June 27, 1960, p. 25, col. 4, reporting an attack by religious leaders on TV exploitation of sex.

59 *Id.*, May 21, 1960, p. 1, col. 2.

could turn the set off themselves instead of waiting for "Big Brother" to do it. They also could refuse to patronize those sponsoring such objectionable cultural material.

Imagine the kind of mind possessed by a person who could be hired to sit on a review board looking at television hour after hour, day after day, and week after week! To think of the possibility of this kind of person having the power to determine what type of material one should see, or refuse to see, as the case may be, reminds one of the comment Groucho Marx once made when he was invited to join a very exclusive club. He replied that he refused to join an organization which let a person like himself become a member.

3. *Honesty.* One need only look at the newspapers in this six months to note an apparently entirely different type of moral indignation which may lead to government action. The *New York Times* alone in the past six months has carried at least fifty items dealing with the functions of the Federal Communications Commission and the Federal Trade Commission as they relate to honesty in public programs and advertising. There was a much greater public hue and cry about the rigged quiz shows and similar entertainment contests than about false advertising about cigarette filters, or the advertising of drugs to doctors and the writing of articles which were really paid advertisements. One TV network even issued orders that canned laughter used by TV comedians would have to be announced as such.[60] Congressional committees concerned themselves with payola and plugola, and have started to investigate the validity of the statistical rating services used by the networks to determine the popularity of programs.[61] One report indicated that 18 Senate and 100 House Bills dealing with these problems had been introduced at the 1960 congressional session alone.[62]

To the extent that these matters deal with entertainment and commodities related to entertainment, such as records, such concern at best is "much ado about nothing," and puts the government needlessly in the censorship business. Nevertheless, none other than the drafters of the American Law Institute Model Penal Code have accepted the theory of government intervention in rigged

[60] Gould, *Canned TV Laughter, id.* March 16, 1960, p. 75, col. 1; see also N.Y. Times, March 24, 1960, p. 29, col. 7.
[61] *Id.*, March 30, 1960, p. 43, col. 2.
[62] *Id.*, June 1, 1960, p. 63, col. 3.

entertainment. Section 223.9 of the Mode Penal Code makes it a crime to rig "any publicly exhibited contest."[63]

Here is another example of attempts to get the legislature and the legal system engaged in what one layman described as "nosey-parkerism."[64] Enforcement of such statutes is very expensive and probably not at all effective, no matter how much effort is expended. More important, such statutes foster an unhealthy, uncritical trust that the government will protect us against our gullibility rather than teach us to be independently critical in our judgments. More than likely the demand for such legislation is caused again by a "reaction formation" much like that found in those who promote laws which enforce certain religious and moral beliefs.

4. *Group Defamation and Group Pressure on Government Agencies.* Here again the justifiable concern of a responsible section of the community results in the imposition of artifical if not even dangerous limitations on freedom of speech. Admittedly these persons seek to right what most agree are wrong ideas, but legal pressures of the kind insisted on should not be permitted. In Queen's College in New York City recently, twenty-two faculty members felt obliged to object to the recommendation of the City Commission on Intergroup Relations to the effect that the president of the city colleges take disciplinary action against a student newspaper which the Commission felt published anti-religious statements.[65] The student editors had published an article on non-Catholic views about birth control and were criticized by the City Commission on Intergroup Relations, although the editors sought to run an article on the Catholic view at the same time. The same thing is found in the criticisms by the Jewish people of the failure of the Bavarian government to prevent the singing of Nazi songs by members attending an old SS reunion.[66]

Worst of all is the kind of action taken by the United States Supreme Court in the famous or infamous *Beauharnais* case.[67] Here the Supreme Court upheld an Illinois statute as applied to the White Circle League members who handed out pamphlets asking the electorate to encourage the legislature to pass statutes providing for segregation in housing. The pamphlet described

63 A.L.I. MODEL PENAL CODE, Tentative Draft No. 11, § 223.9 (1960).
64 READ, MACDONALD & FORDHAM, LEGISLATION 761 (1959).
65 N.Y. Times, April 9, 1960, p. 2, col. 4.
66 *Id.*, June 12, 1960, p. 85, col. 4.
67 Beauharnais v. Illinois, 343 U.S. 259 (1952).

the Negro race in terms which, if applied to individuals, clearly would be defamatory.

The assertion here is that all of these attempts are misguided ones, resulting from a legitimate emotional reaction to past wrongs which cannot be corrected by limitations on freedom of speech. The same protection of free speech which allows one to argue for desegregation or to protest against racial or religious bigotry, or for or against birth control, should apply to those who espouse the view with which one disagrees, no matter how abhorrent he finds it, so long as it constitutes no substantial and imminent danger of illegal *action*. The emotional desires of the minority and maligned groups are understandable, but lawyers should not accept the legislative value judgment which permits this infringement of the rights of the people to advocate unpopular views. Members of the bar, here as well as in the cases mentioned before, should actively oppose enactment of any such statutes. This does not mean that the seriousness of the problem of religious bigotry should be dismissed lightly because in Washington, D. C., in one six-weeks period, eighty-two acts of desecration of religious building occurred.[68] Nevertheless, these problems cannot be met by preventing freedom of speech, except when clear and present danger of *action* is found.

C. *Regulation of Political Speech and Ideas*

Another type of statute fits the same basic pattern which violates the legislative rule of law here advocated. Statutes of this type attempt to regulate unpopular political beliefs. Space does not permit development of the details, but a few examples should be given. One is the refusal of Mayor Wagner of New York City to permit the American Nazi party to hold a meeting in Union Square on July 4.[69] The reason he gave was that the views are so unpopular in New York that a riot might ensue, such as that suggested by the 150 people who gathered when the leader came to apply for his license. This is like the government action involved in the *Terminiello*[70] case, and equally wrong from the standpoint of the value judgments we should insist on as part of our legislative rule of law.

The fact that unpopular political views may cause some people to riot is not, without more, a justification for preventing such

[68] N.Y. Times, Feb. 1, 1960, p. 9, col. 4.
[69] *Id.*, June 23, 1960, p. 1, col. 1.
[70] Terminiello v. City of Chicago, 337 U.S. 1 (1949).

speech or for arresting the speaker. Only if responsible government authorities have taken reasonable but unsuccessful precautions to prevent the riot should a person be prevented from expressing views calling for no illegal action. There was no charge in either situation that the speaker was trying to arouse riotous feelings in his audience. The riot was by those who disagreed with the views.

The actions of private groups such as the American Legion who succeed in holding the movie industry and some public school boards in fear[71] do not fall within the scope of the condemnation here asserted. They are unfortunate according to the views of many people, but this involves no legislative rule of law judgment.

One should object strenuously, however, to the modern versions of the old Sedition Acts of 1798. The idea of the Post Office Department censoring mail from the Communist countries by refusing to let Americans receive it is a most pathological reaction.[72] The same pathological reaction is evident in the attempts by our government in the past to control or prevent the visits of Americans, particularly newsmen, to Red China, at least to the extent that such refusals are based on a fear of our people finding out what goes on in Red China.[73] If there ever was an institutional "reaction formation" case, this is a perfect example.

One last example of misguided statutes can be cited: statutes that deal with oaths. Statutory attempts to make those attending schools take oaths that they do not believe in forceful overthrow of the government, or belong to organizations which are known to have advocated such beliefs at some time, are most misguided efforts. In New York even high school students must take such an oath to graduate, although it was recently waived, pending redefinition of the policy.[74] A national law imposes both an oath and an affidavit requirement upon those who receive federal scholarships to attend college. The recent action of the United States Senate to end the student oath moves in the right direction, but not far enough.[75] Psychologically it is wrong to leave in the provision about being a member of the Communist Party. If there is one group whose exposure to the educational process should be continued, it is this very one. What better assurance is there of a

71 N.Y. Times, May 12, 1960, p. 42, col. 6; *id.*, Feb. 15, 1960, p. 21, col. 1; Crowther, *Hitting the Blacklist*, *id.*, Feb. 14, 1960, § 2, Part I, p. IX, col. 7; *id.*, Feb. 9, 1960, p. 28, col. 1; *id.*, Feb. 8, 1960, p. 1, col. 4; *id.*, May 24, 1960, p. 43, col. 3.

72 *Id.*, May 23, 1960, p. 1, col. 2.

73 *Id.*, July 1, 1960, p. 8, col. 2.

74 *Id.*, June 23, 1960, p. 8, col. 3.

75 *Id.*, June 16, 1960, p. 1, col. 2; *id.*, June 6, 1960, p. 22, col. 7.

chance to convince them of the error of the communistic beliefs than to subject them to the kind of intellectual questioning received from their peers and their teachers in a university in this country?

Aside from the possible pathological explanation for much of the support for such government action, it seems to be a most useless form of activity. The proper reaction to such oaths, as legal requirements, is epitomized by a story that appeared in the *New York Times.*[76] An eight-year-old boy was being tried as a delinquent before the magistrate in London. In putting the boy under oath, the magistrate decided he should determine whether or not the eight-year-old understood the significance of this ritual. The reply of the boy is a classic. When asked if he understood what it meant to place his hand on the Bible and swear to tell the truth, he replied: "Yes. That means that when you don't tell the truth, everybody must still believe you." The loyalty oath does nothing but insult and antagonize those who are loyal, because their loyalty is questioned, and means nothing to those the oaths seek to control. Such people have no compunctions about lying. Lawyers are badly misled if they think that taking a formal oath means anything to a person, other than those who, on being seriously enjoined to tell the truth, would tell the truth anyway.

VI. REACTION FORMATION AND THOUGHT CONTROL

The statutes discussed above have one common denominator — basically they are "thought control" measures frequently enacted by the legislature as a result of the pathological reaction formations of zealots. Although the emotional reactions people have to the matters dealt with in such statutes are neither abnormal nor unusual, the legal negative injunctions enacted as a result of such irrational reactions almost never help solve the basic problem. Frequently they intensify it and usually prevent identification of more imaginative and sounder solutions.

Anthony Comstock and his successful campaign to enact the first federal statute regulating the mailing of obscene material is a classic example of reaction formation at work. Apparently he was abnormally interested in women's bosoms and unconsciously sought to repress his fear of this interest by crusading against obscenity.[77] The unsuccessful struggle of many courts with the inter-

[76] *Id.*, March 23, 1960, p. 59, col. 2.

[77] Paul & Schwartz, *Obscenity in the Mails,* 106 U. PA. L. REV. 214, 216 (1957). Comstock's diary is very revealing of the man who caused all this trouble. His reaction to the news that it was so cold at Buchanan's inaugural festivities that the ladies all had to wear shawls or cloaks over their low-cut ball gowns is a violently emotional outburst of righteous

pretation of the statute which Comstock got enacted has consumed considerable valuable time and no proof exists that any immoral thoughts have been prevented or erased by such efforts.

A recent call in England for caning of those who commit violent crimes[78] and most of the resistance in this country to abolishment of capital punishment for certain crimes also are the result of reaction formation. Subconsciously such people fear they might lose control and commit such acts themselves, and fortify their defense against this admission by overreacting against the one who is caught. The same often is true of the crusader against prostitution, of some members of vice squads who seek to arrest homosexuals, and of the person who feels "called" to serve on censorship boards. Psychiatrists in treating patients from these groups frequently find them emotionally immature or neurotically disturbed about these very subject matters. Often they use prostitutes themselves, or are incipient homosexuals who psychologically "entrap" those they arrest, or get a "thrill" from the obscene material they review in the name of protecting the rest of the public; all variations on the old adage, "It takes one to catch one." To take only one example, considering the amount of pornographic or near-pornographic material submitted to censorship boards for perusal, clearly practically all of a member's time, spare and otherwise, is spent reading such material. According to their own assertions, at best they cannot but *become* warped personalities after service on such boards! The interest of people in these subjects cannot be legislated out of existence by a mere negative injunction; the cause must be found and treated, if possible.

The proposals of parent groups and congressional committees to regulate the television industry to assure the exposure of the young and even adults to proper moral values only, and the consideration of enacting legal sanctions against the rigging of contests (athletic or intellectual) and popularity ratings of records and TV programs[79] generally are manifestations of the same irrational reaction formation and equally misguided. Without suggesting approval of the rigging of contests or ratings, the anger or at least indignation with which people react to revelation of these matters

thanksgiving that none could show their practically exposed bosoms. A psychiatrist has little difficulty identifying this as a reaction formation.

[78] N.Y. Times, March 19, 1960, p. 3, col. 1. The Tories in England passed a resolution urging caning against the entreaties of some of their leaders to wait until a study then in progress was completed.

[79] Notes 61-63 *supra*.

suggests that their egos are hurt because they have been betrayed as gullible persons with little independent judgment.

There is some expert opinion to the effect that the basic values of the child are formed before he reaches an age when TV is meaningful to him.[80] Surely there is little to distinguish the deceit practiced in TV wrestling from that involved in giving answers to university professors before they appear on TV quiz shows, except that the academic community is hurt much more by the latter because it harbored the misguided hope that the interest of the public in intellectual achievements on TV meant that the country now thought university professors are people to be respected and admired, to be idolized even. These emotional reactions are not a rational basis for seeking the enactment of a legislative solution with all of the paraphernalia of government, merely to assure honest entertainment and to conceal the fact that Barnum of circus fame was right!

Some may react with nausea or at least disgust to the insertion of sexual overtones into political campaigns,[81] but is not this merely the result of anger aroused because a highly intellectualized version of how a presidential candidate should be appraised is shown to be the unrealistic view of practical politics it is? Candidates *are* voted for by some because of just such unconscious appeal, but such reactions and their influence on elections certainly cannot be prevented by the enactment of a law prohibiting any political advertisements which "appeal to prurient interests," to borrow the test from the *Roth* case majority opinion.[82]

Those who seek to censor political beliefs with modern versions of the Sedition Acts probably are experiencing reaction formation also, and legitimately may be suspected of subconsciously being much less loyal to our ideals than they profess. The pathological gyrations of the McCarthys and the Kaspers gave every indication

[80] N.Y. Times, March 30 1960, p. 24, col. 1.

[81] The writer had just such a reaction to an advertisement with political overtones in the *New York Times*. It was a full-page picture of a closeup of Senator John Kennedy. Very likely it aroused the maternal instincts of a good many adult women in the United States, what with his infectious grin, rumpled hair and glasses pushed up on top of his head. The caption in large, black type was: *"Will Women Love Him or Leave Him?"* In smaller print the advertisement goes on: "One commentator says, 'The effect he has on women is almost naughty.' And in March Ladies' Home Journal, Jack [not John you'll notice] Kennedy himself says, 'I depend on the women in a campaign.'" It turned out to be a magazine's advertisement plugging its March issue, but the writer's first reaction was of nausea. N.Y. Times, Feb. 23, 1960, p. 32, col. 2.

[82] Roth v. United States, 354 U.S. 476, 487 (1957). Instead of legislating away such emotional reactions our society must pin its hopes on signs of self-motivated maturity such as that which perhaps is indicated by the report of the growth of the *New York Times*, both in advertising and in circulation, in New York City at a rate greater than any

to the trained psychiatrist that these super-patriots were fighting some serious emotional problems.[83] Those who decry dictatorship so vigorously remind one of that wonderful cartoon showing Khrushchev with foot on the rail and elbow on the bar declaring, "I can lick anyone in this room who says that I'm not the most peace-loving man here!" Those who have real faith in a free democracy are willing to let others be exposed to opposing thoughts. In any event, Communism and Red China cannot be bowdlerized. Threats do not disappear merely because one refuses to listen or see. Fears are conquered only when faced realistically, so those who know most about human psychology tell us. Probably the very people who want to regulate and suppress these matters which expose our people to the propaganda of the dictator are themselves psychologically dictator personalities.

VII. THE DANGERS OF TASTE STATUTES

Admittedly, society faces some serious problems in some of the areas here discussed. Nevertheless, attempts to solve the problems by statutes of the kind under consideration do little or no good and are harmful for several reasons. They often breed contempt for the law generally, because they impose standards which are known to be substantially unenforceable. Such laws waste the time of enforcement officers and breed dissatisfaction with the law, among both officers and those arrested, because it is known that the number of persons who have done the same thing without detection probably far exceeds the number arrested. Equality in law enforcement, although never capable of full achievement, is by these statutes rendered obviously and ridiculously unattainable.

More importantly, these statutes impinge most seriously on our concept of the maximum freedom of belief and speech for the individual. The ideas being huckstered by the zealot (including the anti-zealot zealot!) always should be viewed with skepticism, particularly when they tend to restrict the political processes by

other daily. N.Y. Times, Feb. 15, 1960, p. 12, col. 6. The public may be less gullible than it used to be and as it becomes more sophisticated perhaps it will seek to be culture vultures instead of materialistic status symbol seekers. In any event laws will not effect a change which will prevent the kind of gullibility indicated by the report that one Washington, D.C., liquor store finally labeled one of its whiskeys "Brand X" to meet the requests of its many customers who said, "I've been hearing a lot about Brand X on TV. I'd like to try some." N.Y. Times, May 3, 1960, p. 66, col. 7.

[83] Marmor, Bernard & Ottenberg, *Psychodynamics of Group Opposition to Health Programs,* 30 AM. J. ORTHOPSYCHIATRY, No. 2, p. 341 (April 1960). They report that John Kasper of Clinton, Tennessee race riot fame has since led campaigns against fluoridation and the Alaska Mental Health bill.

which legislative change is achieved.[84] Taste legislation paints the wrong picture for those nations in Asia and Africa which, we hope, will look to us for guidance in creating a free society dedicated to the dignity of man. The American Dream described by Mr. MacLeish can be realized only by *exercising* and *enlarging* our intellectual freedom. Is it rational to be so concerned and frightened by what another reads or feels or thinks, so long as he takes no action which physically affects the adult members of society without their consent? We must learn to show more faith in our ideals than is exhibited by such laws.

Finally, the time spent by legislatures in pursuing these fruitless tasks serves only to deter them from experimenting with more imaginative and affirmative solutions for our social problems. The twenty-two major bills pending in the 1960 session of Congress[85] deserved the full time of our representatives without dilution by 18 Senate and 100 House bills on advertising and TV alone.[86] Similar examples are found in the various state legislatures.[87] The legislative process must be used imaginatively and with as much realism and rationality as possible, which means the punitive and negative injunctions must be minimized. The youth delinquency problem will not be solved by making more of their actions criminal violations, yet legislative time is spent in this direction. The pioneering approach to the narcotics problem which England has

84 See suggestion in another context by Justice Stone, United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938).

85 N.Y. Times, March 28, 1960, p. 14, col. 3; see also *id.*, June 29, 1960, p. 18, col. 3.

86 Note 62 *supra.*

87 The legislatures of the various states in the 1959 sessions officially ordered that the following studies be made, as reported in the Legislative Research Checklist, published by the Council of State Governments, February and May 1960: confinement of wild animals as tourist attractions (N.C.); use of retired persons to run wild animals in their natural habitat (Wis.); the practice of barbering (Calif., $17,500); the cost of garbage collection, a continuation of a 1958 study (N.J.); opening of liquor establishments for sale of liquor on Sunday (Wash.); the trading stamp industry (Mich., $1500 for House and $500 for Senate study); same subject (Calif., $25,000); continuation of *1949* study of publication and distribution of offensive and obscene material (N.Y., $20,000); pornographic literature (Calif.); feasibility of conducting a space age exposition (Calif., $17,500); bill relating to carnivals and circuses at fairs (Calif., $17,500); bill relative to kosher meats (Calif., $19,000); bills relative to labeling vitamins and to kosher meats (Calif., $20,000); preservation of antiquities (Md.); preservation of historic sites (N.Y., $15,000); automobile license plates (Calif., $40,000); subliminal messages (Calif., $17,500); bills authorizing night harness racing and prohibiting minors at horse races (Calif., $14,500); bills relative to pay television (Calif., $15,000).

A look at a list of reports of studies actually completed does indicate that some of the less important studies do not create waste paper in the form of a report. Many of the studies listed here undoubtedly are worthy causes but are they worthy of serious legislative attention? The relative monetary support given to various subjects of study seems disproportionate at least. More important, most studies by legislative committees make little contribution to the fundamental knowledge which will be required to solve the problems suggested, assuming them worthy of legislative attention.

adopted has not been tried here in spite of the evidence that establishment of official dispensaries where addicts are sustained for pennies a day will remove all profit in illegal traffic. New solutions to gambling must be found if the largest state in the Union finds that this is by far its most pressing law enforcement concern.[88] The problems of the poor, the chronically unemployed, the skid row bums,[89] and the mothers of illegitimate children[90] challenge our best efforts, all of our legislative time, and our most imaginative minds.

Conclusion

I suggest that the Rule of Law, as applied to the legislative process, requires that legislatures confine themselves to controlling human *actions,* and desist from efforts to control taste in moral and political beliefs, or other matters which fall in the realm of intellectual ideas. The attacks on some results of the legislative process and criticism of those legislators who have heeded too willingly or fearfully the incantations of the taste zealots is not predicated upon any lack of respect for the legislative process. Rather, the criticism is offered in the firm belief that the legislature is the ultimate determiner and therefore also the protector of our way of life, and with the hope that its efforts can be directed toward the attainment of the basic values of our society. If the stupid, the humorous, or the ludicrous has sometimes been emphasized, it has been done for a most serious purpose — to help the legal profession recognize its obligation to protect the basic human values we cherish and to recognize the ways in which they may be subtly undermined or attacked. If this discussion does no more than stimulate thought about these matters, it has served a substantial part of its purpose. If it should convert readers to the point of view propounded, so much the better.

88 N.Y. Times, April 1, 1960, p. 27, col. 2.

89 *Id.,* March 14, 1960, p. 1, col. 6.

90 Just one example of misguided legislation in the area of action (basically the subject of another discussion) will demonstrate how ridiculous we become when we emphasize the negative instead of developing new affirmative legislative programs to solve social welfare problems. The problem of the poor taking advantage of the aid to dependent (usually illegitimate) children program by not getting married is a most serious one in both North and South but how can it possibly be solved by the bill reported in the following news item? "Baton Rouge, Louisiana, June 14 (AP). The Louisiana Senate passed a bill today to make it a crime to have more than one illegitimate child." N.Y. Times, June 16, 1960, p. 37, col. 1. Apparently the statutory prohibition applies only to women, but even so one doubts seriously that society intends to solve the problem of support of illegitimate children by jailing all potential mothers until it is biologically safe to return them to society, if they have twice had children out of wedlock. For a follow-up on the repercussions under the federal statutes of the Louisiana legislation, see story in N.Y. Times, Nov. 16, 1960, p. 25, col. 1.