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CONTENTS

law quad notes

1 Schnautz, Keyes Win Campbell Competition

2 Prof. Harris Re-Elected Mayor of Ann Arbor

2 Record Number of Applications Arrive for Law Admissions

2 School Receives $77,000 Grant to Assist in Practical Training

2 Two Law Professors Appear On NBC "Today" Show

2 Law School Seniors Receive Judicial Clerkships

3 Recent Speakers at the Law School

4 On the Crisis of Justice
by Professor Alfred F. Conard

6 Don Quixote, Sancho Panza, and Legal Education
by Dean-Designate Theodore J. St. Antoine

9 Liberalizing Michigan's Corporation Law
by Professor Stanley Siegel

12 Law Students Teaching College Students: a Golden Opportunity
by Charles J. Averbook '72

14 Only One Crime in Eight Results in Conviction
by Professor Yale Kamisar

18 Government and Religion: The Search for Absolutes
by Professor Paul G. Kauper

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On the cover: Graphics Designer Douglas Hesseltine, U-M Publications Office, offers this line rendition of two law deans—Francis A. Allen, who will relinquish the post on June 30, and Theodore J. St. Antoine, who will take the office as Allen leaves it.

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Schnautz, Keyes Win Campbell Competition

Student finalists in the Campbell Moot Court competition, from left, are Joseph D. Lonardo, John A. Van Luvanee, Stephen P. Schnautz, and Jeffrey Keyes. Judges, back to front, Dean Francis A. Allen, Justice G. Mennen Williams, Justice Potter Stewart, Judge Sterry Waterman, and Prof. Terrance Sandelow.

Stephen P. Schnautz of Indianapolis, Ind., and Jeffrey J. Keyes of Ft. Lauderdale, Fla., were declared winners of the University of Michigan Law School's 1971 Henry M. Campbell Moot Court Competition.

The two U-M Law School juniors argued as a team in a hypothetical case before a distinguished bench. Winners were announced at a Case Club banquet March 10 at the Michigan League.

Runnerups in the competition were John A. Van Luvanee of Newtown, Pa., and Joseph D. Lonardo of Cleveland, Ohio, also juniors at the Law School.

Judges for the competition were U.S. Supreme Court Justice Potter Stewart, Judge Sterry R. Waterman of the 2nd U.S. Circuit Court of Appeals, Justice G. Mennen Williams of the Michigan Supreme Court, U-M Law School Dean Francis A. Allen, and Prof. Terrance Sandalow of the Law School.

The two students on the winning team received a cash prize of $150 each, and the runnerups received $100 each. The names of all four finalists will be engraved on a plaque at the Law School.

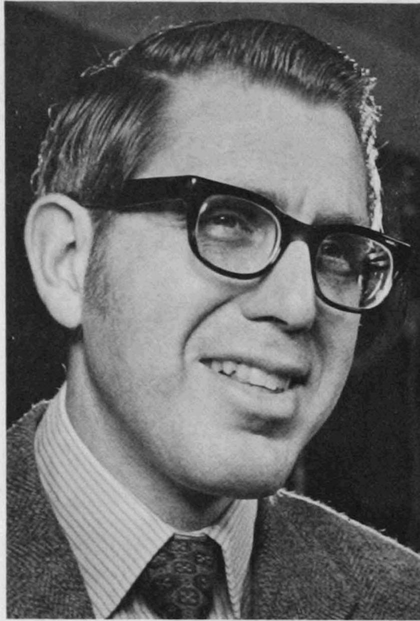
The winning team argued as defendants in a case challenging the constitutionality of the traditional taxation system for public schools.

All U-M Law School freshmen are assigned to case clubs and engage in legal research, analysis, writing and appellate argumentation. While the program is primarily an educational experience, it is also a competition.

The top 32 freshmen are selected to compete in the Campbell competition

during their junior year. Following two elimination rounds, four students are selected for the final debate.

Prof. Harris Re-Elected Mayor of Ann Arbor



Robert J. Harris

After being re-elected mayor of Ann Arbor on April 5, University of Michigan Law Professor Robert J. Harris reported for his 9 a.m. law class the next morning and was greeted with a victory cake from his students.

Harris, a Democrat, began his second term as mayor after scoring an impressive victory over his Republican challenger, Ann Arbor attorney Jack J. Garris. Harris received 15,925 votes to Garris' 11,222.

Norris J. Thomas, Jr.

Also winning in the election was Norris J. Thomas, Jr., a 1970 U-M Law School graduate and one of Harris' former students, who was elected to the Ann Arbor city council from the city's first ward.

Thomas, a staff attorney with the Washtenaw County Legal Aid Society, is also a Democrat.

Record Number of Applications Arrive for Law Admissions

Admissions applications to the University of Michigan Law School have reached a record total, according to Assistant Dean Matthew P. T. McCauley, the school's admissions officer.

By the April 1 deadline, 4,841 applications were received for the 1971-72 academic year. The School will accept only 370 students for its next freshman class.

For 1970-71, the Law School had received 3,989 applications and the previous year's total was 3,056.

Among the factors responsible for the rise in applicants, according to McCauley, are the increasing popularity of public institutions which offer lower tuition costs than private schools, the reputation of the U-M Law School, the increase of prospective students returning from military service, and a rise in the number of black and women applicants.

McCauley also suggests that an oversupply of Ph.D.'s in a number of academic disciplines has prompted many former graduate students to seek the law as a profession.

Many of this year's applicants, he says, are professionals—such as ministers, newspapermen, doctors, and businessmen—who have decided to change careers in order to help solve social problems through the law.

School Receives $77,000 Grant To Assist in Practical Training

The University of Michigan Law School has received a $77,000 grant which will enable law students to provide legal assistance to the poor as part of their academic training.

During the two-year period covered by the grant, some 180 law students will work in legal aid clinics where they will get first-hand experience in such matters as divorce cases, landlord-tenant disputes, and welfare and consumer problems.

The grant is from the Council on Legal Education for Professional Responsibility (CLEPR), a New York-based organization affiliated with the Ford Foundation.

Starting this fall, 30 students per term will begin working at the Washtenaw County Legal Aid Clinic under the supervision of a U-M Law School faculty member. Students will spend about 20 hours a week at the clinic, in addition to attending a seminar related to their work experience. The course carries seven academic credits.

Francis A. Allen, dean of the Law School, said the internship program will be one of the most extensive in the nation in terms of the number of student participants and the intensity of faculty involvement.

The students, Dean Allen said, will gain valuable experience by working directly with clients, learning of social problems, and acquiring the interviewing and negotiating skills required of the practicing lawyer.

The program will be supervised in the fall by Prof. Jerald H. Israel, in the winter by Prof. Whitmore Gray, and in the summer by Prof. James J. White.

Prof. White laid the groundwork for the project three summers ago when he conducted an experimental class in which students also spent part of their time working at the Washtenaw clinic.

Eventually the law faculty hopes to expand the program to include practical work in such areas as labor law, environmental litigation, and some aspects of criminal law.

Two Law Professors Appear On NBC "Today" Show

Profs. Arthur R. Miller and Joseph L. Sax of the Law School appeared recently on NBC's nationally televised "Today" program to discuss their new books.

Sax, author of ***Defending the Environment—A Strategy for Citizen Action,*** was on the show February 8. Sax's book urges more judicial intervention in critical environment disputes.

Miller, who wrote ***The Assault on Privacy—Computers, Data Banks, and Dossiers,*** appeared March 4. His book offers an examination of the threat to personal privacy by uncontrolled use of modern data-gathering systems.

Law School Seniors Receive Judicial Clerkships

Twenty-three members of the Law School Class of 1971 had been appointed to judicial clerkships by the

middle of the term. Thirteen will clerk for federal judges, including three appellate court, two tax court, and eight district court judges. Six will clerk for state supreme court justices and four for state appellate court judges.

The clerks and the judges under whom they will serve are:

Howard L. Boigon
Clerk to The Honorable Wade H. McCree, Jr.
United States Court of Appeals—
Sixth Circuit
Detroit, Michigan

Winston P. Bullard
Clerk to The Honorable Paul L. Adams
Supreme Court of Michigan
Lansing, Michigan

Charles B. Craver
Clerk for The Honorable George MacKinnon
United States Court of Appeals
Washington, D.C.

Donald E. Erickson
Clerk for The Honorable Timothy C. Quinn
Michigan Court of Appeals
Lansing, Michigan

Michael A. Gross
Clerk for The Honorable M. C. Matthes,
Chief Judge
United States Court of Appeals—
Eighth Circuit
St. Louis, Missouri

Joel N. Kreizman
Clerk to The Honorable Clarkson Fischer
United States District Court
Camden, New Jersey

Steven H. Levinson
Clerk for The Honorable Bernard M. Levinson
Supreme Court of Hawaii
Honolulu, Hawaii

Robert E. McFarland
Clerk to The Honorable T. John Lesinski
Michigan Court of Appeals
Detroit, Michigan

Kathleen O'Dea
Clerk for The Honorable John Feikens
United States District Court—
Eastern District
Detroit, Michigan

Dawn L. Phillips
Clerk for The Honorable Ralph M. Freeman,
Chief Judge
United States District Court—
Eastern District
Detroit, Michigan

John J. Rapp
Clerk for The Honorable Kazuhisa Abi
Supreme Court of Hawaii
Honolulu, Hawaii

Robert R. Reinhart, Jr.
Clerk for The Honorable Noel P. Fox
United States District Court—
Western District
Grand Rapids, Michigan

Kirk E. Rider
Clerk to The Honorable James K. Groves
Supreme Court of Colorado
Denver, Colorado

William C. Sage
Clerk for The Honorable Vernon R. Pearson
Court of Appeals—State of Washington
Tacoma, Washington

William H. Scharf
Clerk to The Honorable Norman O. Tietjens
United States Tax Court
Washington, D.C.

Jeffrey L. Schmier
Clerk to The Honorable T. John Lesinski
Michigan Court of Appeals
Detroit, Michigan

J. Douglas Sorensen
Clerk to The Honorable Graydon G. Withey
United States Tax Court
Washington, D.C.

David Spector
Clerk for The Honorable Walter V. Schaefer
Illinois Supreme Court
Chicago, Illinois

Stephen D. Stitt
Clerk for The Honorable William A. McRae
United States District Court—
Middle District
Jacksonville, Florida

Eric J. Thorsen
Clerk for The Honorable Noel P. Fox
United States District Court—
Western District
Grand Rapids, Michigan

Barton D. Whitman
Clerk to The Honorable Phillip Pratt
United States District Court—
Eastern District
Detroit, Michigan

Larry C. Willey
Clerk for The Honorable Martin Pence
United States District Court
Honolulu, Hawaii

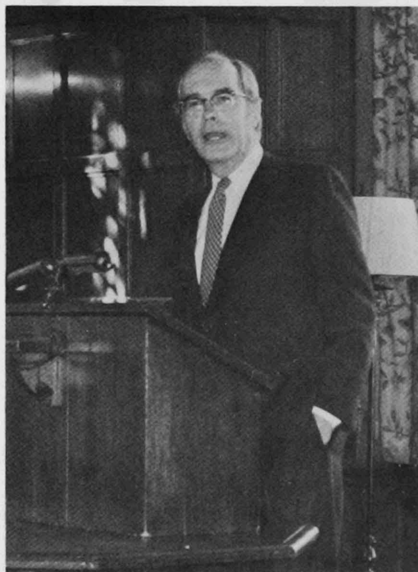
Richard A. Witte
Clerk for The Honorable G. Mennen Williams
Supreme Court of Michigan
Lansing, Michigan

Recent Speakers at the Law School

Retired Justice Bernard Botein,
New York State Supreme Court

Judge Henry Friendly,
U.S. Court of Appeals, 2nd Circuit

Actress Jane Fonda


Gardner Ackley, U-M Economist
and former chairman of
President Johnson's Council
of Economic Advisers

ON THE CRISIS OF JUSTICE

Remarks on Induction to the Presidency of the Association of American Law Schools, Chicago, December 30, 1970.

by Professor Alfred F. Conard

I am deeply sensible of the honor and the responsibility of presiding over the affairs of our association. I don't know how I can be so lucky as to win this prize just in a year when we are running a $40,000 deficit, law schools are up against the wall, the whole of higher education is on the defensive, and government and foundations are cutting back on the support to which we have become accustomed. Probably one of the blessings of our invisible system of nominating officers is that when one of us is approached, he has no idea how many wiser men have turned down the job before it was offered to him.

I have only this slight consolation. Thanks to our imminent incorporation, the debts incurred will not be a personal liability of the new president, as the debts of 1970 are for Jeff Fordham.

However, the financial troubles of the association are not the most serious ones we have to deal with. We have others which are more fundamental, both inside and outside.

Inside, we have a problem of functional democracy. I suspect that our spirited discussion of finances is a symptom of a lack of widespread participation in the activities and decisions of the association. Although channels have been open, they have not been used. We can and we must reorder our relations so that all of us will find it easier to follow what our association is doing, and make our views felt as issues arise. President Fordham and I have created a new committee, headed by (Dean) John Cribbet, to re-examine the association's purposes and its structure. This committee will consider substantial revision of our channels of communication and our decisional processes. In particular it will give consideration to the appointment of a delegate of each member school, charged with a personal responsibility to follow association affairs, and to represent the views of his faculty. I am confident that, when we come here in 1971, all of us will know more than we did in 1970 about the association's affairs, and our diverse opinions will be better known to the association's officers.

On the outside, we have an even graver problem, which I would characterize as the moral responsibility of legal education for the solution of the social crisis which grips the United States of America. This is not a crisis of hunger, or of disease, or of foreign invasion. This crisis which grips America today is a crisis of justice—a crisis in the resolution of the conflicting interests and demands of the diverse ethnic groups, age cohorts, economic levels, and opinion sectors. The crisis can be seen in the repression of crime, in freedom of speech and the press, in the compensation of injury victims, in the determination of wages, and in the control of pollution.

I suppose you may ask how this got to be *our* responsibility. *We* have not been mugging shoppers or bugging telephone lines, shooting drugs, disrupting courtrooms, nor even striking for higher pay. But we have been lagging badly in devising new ways of solving the problems which threaten the dissolution of the social organization in which we now live.

Our colleagues in agronomy, medicine, and engineering have discovered new and vastly more effective ways to produce food, to conquer disease, to repel heat and cold, and to travel in two hours as far as our forefathers traveled in two months. In the law, we are using basically the same approaches to crime and to civil liberties which we used in 1790, and it probably takes longer to get one's day in court now than it did then. Our attachment to ancient rites, celebrated in obsolete terminology, is sometimes reminiscent of the Roman curia's resistance to the ***aggiornamento.***

In the law, we are using basically the same approaches to crime and to civil liberties which we used in 1790, and it probably takes longer to get one's day in court now than it did then.

Fortunately, we stand at the dawn of a new day in our capacity to analyze and understand the workings of justice. Studies of jury deliberations, of pretrial hearings, of court delays, of injury reparation, of release on recognizance, and of police methods show that we can produce a new kind of sociolegal data, leading to a new kind of jural science, and new solutions to the conflicts which are endemic in human society.

In a sense, we are moving from microjustice to macrojustice. For centuries, jurists have focused on the rights of one litigant against another. Microjustice has devised more and more elaborate ways of conducting trials, and excluding evidence, but has failed to notice that the waiting line outside the courtroom has grown to be five years long. Macrojustice focuses on the effects of rules on the total mass of involved humanity, not just on the lucky individual who has found a lawyer and got his day in court. It is concerned with how many people experience justice, and how many just hear about it as something that happens to somebody else—like sweepstakes winnings. It is concerned with how many months or years it takes to get justice. What good is money to pay doctor bills and lost wages if it arrives five years after the doctor, the grocer, and the landlord had to be paid?

There is scarcely any area of law which cannot be illuminated by macrojural analysis. In the embattled area of searches and seizures, where libertarians insist on the absolutism of civil rights, and where police allege that civil rights are destroying public safety, the open-minded observer would be greatly enlightened if he could be told how many more criminals would range at large, or how many more police would be required to catch them, if the strictest rules were followed? How many innocent citizens are detained, and how many innocent homes invaded, under more relaxed rules?

In the settlement of small estates, are more assets gobbled up by formalistic procedures than would be misappropriated under more informal methods?

In the reparation of automobile injuries, how much more would it cost to pay everyone's out-of-pocket costs regardless of fault, than to investigate and litigate the elusive questions of negligence, contributory negligence, and causation in order to compensate only the innocent victims of the guilty?

In the administration of criminal corrections, how many offenders could be as effectively cured by finding them jobs as by incarcerating them?

In the crisis of the polluted hydrosphere, how can we balance the ineluctible necessity of using air and water with the equally imperative need of preserving them?

Many factors have led to our past neglect to explore and to apply macrojustice. There has been in the past an overly reverent fixation on the words of the judges as holy writ; there has been too much abstract conceptualism; until very recently, we were relatively ignorant of scientific methods for observing the habits and attitudes of people. These barriers have now been largely surmounted. The remaining barrier is money. While hundreds of millions of dollars are being spent in each year on research in the physical sciences and in the health sciences, and millions in the social sciences, the expenditure on legal research is too small to be recorded in the United States Statistical Abstract.

If we are serious about our obligation to contribute to the solution of social crises, we must demand support of jural research which will permit justice to keep within hailing distance of the vertiginous evolution in the rest of society. That means that we must devote ourselves to changing the attitudes of senators, congressmen, university administrators, philanthropists, and philanthropoids toward research on justice. We intend to press this concern in public hearings and in private colloquies during the coming year. I would like to ask the help of all of you in this endeavor.

These concerns are more than enough to give us a busy association year in 1971. I hope we may work effectively together in dealing with them.

Don Quixote, Sancho Panza

and legal education

Based on a speech delivered at the Honors Convocation of the University of Michigan Law School, April 3, 1971

by Dean-Designate
Theodore J. St. Antoine

The student generation that is emerging today from our universities has done to its teachers the worst thing any human being can do to another: it has given us our hearts' desire. For decades we in the universities, and especially we in the law schools, have sought to shake students out of their complacency, to force them to think for themselves, to make them challenge the conventional wisdom. Now we have succeeded. And it is not at all as we had dreamed. We wanted challenge within safe limits, marginal challenge, not total challenge. What we have instead is a questioning of the very foundations. Law students, for example, question the legitimacy of the legal system, and they also question, often sharply and scornfully, the traditional aims and methods of legal education.

Law faculties are no longer sure what it is they are supposed to be teaching, and obviously, therefore, they are no longer sure how they are supposed to go about teaching it. Part of the difficulty for the law teacher is inherent in his subject matter. What, after all, is the law? Is it an art or a science? A body of knowledge or a mode of thinking? An instrument of order or the light of justice? In a way, the law is a Rorschach test. We see in it what we bring to it. As W. H. Auden says:

> Law is the wisdom of the old,
> The impotent grandfathers shrilly scold;
> The grandchildren put out a treble tongue,
> Law is the senses of the young.
>
> Law, says the judge as looks down his nose,
> Speaking clearly and most severely . . .
> Law is the Law. . . .
>
> And always the loud angry crowd,
> Very angry and very loud,
> Law is We,
> And always the soft idiot softly Me. . . .

Perhaps I can leave the question of what the law is to the philosophers, and view the function of legal education from a different perspective. The purpose of legal education, at least at a major law school, is to produce great lawyers. And while I may not be sure what the law is, I have known for a few great lawyers, and I think I can tell something about what makes them great.

The great lawyer, in my eyes, is more than a money-making, client-pleasing practitioner, although he is certainly that when he wishes to be. The great lawyer is a person who can find ways to transform the diverse goals of society into tangible achievements with a minimum amount of friction. This means he must often be a man at war with himself. He must be both dreamer and realist, both visionary and practical man. He must, in short, be a unique blend of Don Quixote and Sancho Panza. After the Don had attacked the windmills, mistaking them for evil giants, and had been rudely unhorsed for his pains, he picked himself up out of the dirt, remounted his steed, and, undaunted as ever, announced to Sancho: "I propose to do such exploits that you shall deem yourself fortunate to have been found worthy to come with me and behold marvels that will be almost beyond belief." To which Sancho replies: "I believe everything that your Grace says; but for now tighten up your saddle a little, because you seem to be slipping off your horse!"

The great lawyer must be concerned with means, like Sancho, no less than with ends, like Quixote. If he would rid the environment of pollution, he must know how to draw upon equitable remedies. If he would rid society of racial discrimination, he must know how to get into the

federal courts. If he would rid the community of consumer exploitation, he must know how to move around in the labyrinthine ways of the Uniform Commercial Code. At the same time, in the less glamorous, but frequently no less vital, tasks of the corporate legal department, the prosecutor's office, and the small town general practice, he must know how to advance his clients' interests, day after day after day, in a manner that will be consonant with the best interests of the larger society.

Able, dedicated lawyers need not and should not confine themselves to romantic causes and deeds of derring-do. Not all the good of society is to be found among the dispossessed. Power, too, deserves the ministrations of the best, both for its own sake and because the taming and civilizing of power is a prerequisite for the harmonious community.

What kind of legal education is best suited to fashion great lawyers? When I was in law school, I regarded my association with a group of exceptional fellow students as one of the most valuable aspects of my academic life. My hunch is that most students react similarly today. But I am no longer entitled to speak for students, and so I shall limit myself to the faculty's contribution to the educational experience.

American law faculties these days debate endlessly, and sometimes heatedly, about the length and shape of the curriculum; about the merits of a more academic, interdisciplinary approach to legal studies as opposed to a less academic, clinical approach; and even about such matters as whether we should organize our courses according to the traditional subject-matter breakdown or according to some new type of methodological breakdown. These are all important inquiries. But they should not let us lose sight of what I consider the critical factor. For me, the best legal education is, quite simply, a certain period of association with a great law faculty.

What makes for a great law faculty? There is plainly no single definition, but I should say it consists of persons of superior creative intelligence operating in what I would describe as an atmosphere of suspended belief. Let me deal with those elements separately. By intelligence in this context I mean, and I say this almost apologetically because it sounds a bit inhumane, a kind of raw brainpower, a capacity for rigorous, tough-minded reasoning. The analytic demands of law teaching being what they are, I consider this an indispensable starting point, although it is only a starting point. To intelligence must be added creativity—the ability to impose a meaningful order, an original stamp, on the confusing clutter of legal phenomena. Needless to say, many of us on the podium only approximate this ideal, at best.

In pinpointing creative intelligence as my standard of faculty excellence, I am wholly conscious that the great lawyer (as distinguished from the great teacher) must have an even wider range of qualities, and that brainpower alone may not nurture some of these other qualities. The great lawyer, for example, must be a person of sound, practical judgment, a person who can get along with many types of people. I think it would be a wasteful diffusion of energies, however, for law schools to attempt to provide their students with every tool needed by the successful practitioner. We have our students for only three years. In that limited time, we must concentrate on doing for them what we can do best. And that, I would suggest, is essentially the development of their own capacity to employ creative intelligence in the resolution of legal problems.

The practitioner may have to be a good speaker, a good salesman, a good moralist. But the law schools are not designed to teach elocution, or selling, or the Russian novelists, or the existential philosophers. The law student must understand that he started equipping himself for his profession when he began purveying lemonade along the sidewalk at the age of six. And hopefully he will still be continuing the process when he is old and gray and nodding over his Plato.

Literary critics have said that we must approach imaginative art in a spirit of suspended disbelief. I have used the term "suspended belief" to describe the atmosphere I feel is necessary for the effective functioning of a great law faculty. For I believe that the creative intelligence cannot flourish unless educational institutions, in their corporate capacity, suspend judgment, suspend belief, on the major political issues of the day.

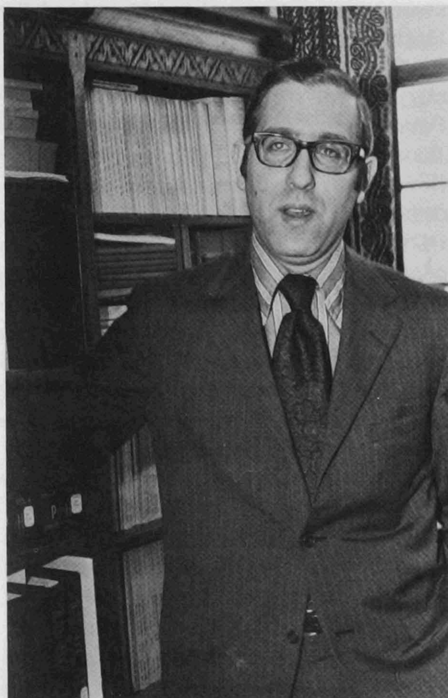
I have two principal reasons for this view. The first is derived from some fairly common notions concerning academic freedom. The university is the principal institution created by society, not for the purpose of taking action, but for the purpose of promoting truth through a fair combat of ideas. Truth, we have learned, is most likely to emerge when all contending factions have equal access to the arena. Allow the institution—the custodian of the arena—to take sides with one group of contestants against another, and thereafter it seems to me impossible to assert that all voices are being given the same opportunity to be heard and to prevail. More concretely: an individual faculty member holding an opinion different from that of a majority of his colleagues undoubtedly regards himself today as being under no significant handicap. He may even glory in his uniqueness, given the academic propensity for contention. But if the faculty as a body should formally oppose or condemn that same person's position, his very status as one entitled to "profess" his ideas on a plane of absolute equality would be subverted. In addition, as Dean Francis Allen has reminded us, once the university intrudes on the political realm, we can be almost certain it will lost its present privileges as an intellectual sanctuary; the political realm will retaliate by intruding on the university.

My second reason for resisting institutional politicalization is perhaps even more pragmatic. The moment the university as an institution begins to make politics its business, political tests will become criteria for membership in the academic community. Faculty members who are concerned—sincerely concerned—about ensuring that the "right" position is maintained on significant political issues will not lightly vote to hire persons of strongly opposing opinions, however well qualified otherwise. Even student selection would be affected, at least by a self-selection process whereby students would seek out schools with political attitudes akin to theirs. The peculiar glory of academic life—its diversity, its independence, its uninhibited intellectual thrust and parry—would begin to dim. And our budding Quixotes and Sanchos would lose the challenge of being confronted with the richest possible variety of potential goals, and the richest possible variety of potential routes by which to reach those goals.

But I trust that this melancholy state will not come to pass, and that the law schools will continue to be tomorrow what they are today: the source of a veritable legion of young Don Quixotes and Sancho Panzas. And so I say to you: "Onward! There are windmills enough for all. But as you go forward, look you to your saddle girths!"

liberalizing MICHIGAN'S CORPORATION LAW

By Professor Stanley Siegel



Professor Stanley Siegel

Prof. Siegel served as Reporter to the Michigan Law Revision Commission to draft the proposed Michigan Business Corporation Law. His remarks reflect his own views, and not necessarily those of the Law Revision Commission.

In the argot of the corporate lawyer, the term "liberal" takes on a special meaning when used to describe a body of laws governing corporations. A "liberal" corporation code contains the minimum number of limitations on corporate activity and has few, if any, sanctions to support its prohibitions. In the early days of this century, New Jersey, and later Delaware, earned the title "Mother of Corporations" by easing the strictures on corporations established under their laws. The fact that corporations even then operated beyond the boundaries of their chartering jurisdictions led to an influx of corporations that leaves its clear mark on American corporation law to this day. Of Fortune's Top 500 Industrial Corporations, more than 200 are incorporated in Delaware, some 60 in New York, and more than 40 in New Jersey.

As the century has progressed, so have the corporation laws. The last two decades have seen "liberalized" revisions of the corporation statutes of nearly every state in the union. The flagship states—New York, New Jersey, and particularly Delaware—have gone far toward eliminating all regulation of corporate activity by state statute. This process of state "liberalization" has not been without its costs. Emerging as the most powerful countervailing force is the Securities Exchange Commission which, through enforcement of the 1933 Securities Act and the 1934 Securities Exchange Act, has expanded significantly the corpus of "federal common law of corporations."

Though it is not perfectly clear that

the liberalization of state corporation law has led to expanded federal limitations on corporations, it has surely contributed to that expansion. Whatever the cause, however, the corporate lawyer today is more likely to be concerned about federal limitations on his client than he is about strictures of the state corporation law—unless his client is a Michigan corporation.

The Michigan General Corporation Act was passed in 1931, and it was a liberal act by the standards of the day. In 1971 it stands as a heavily amended, confusing, and largely archaic statute. An attorney faced with its limitations is well advised to reincorporate his client in Delaware. Indeed, a number of Michigan corporations of long standing have done just that in the last few years.

Early in 1968, the corporation committees of the Michigan senate and house requested that the Michigan Law Revision Commission undertake a revision of the Michigan law of business corporations. The 1970 Annual Report of the Law Revision Commission includes a completely new Michigan Business Corporation Act, which has been introduced into the 1971 legislative session. As proposed, the act would be among the most liberal in the nation; incorporation in Delaware would offer a prospective enterprise little advantage over incorporation in Michigan. The proposal also provides a number of features not now found in the corporation laws of the major states. A summary of the proposed act follows.

For the large corporation with multistate operations, the existence of a sophisticated, current, and liberal corporation statute in any state—Delaware and New Jersey being the current favorites—is sufficient. Such a corporation suffers no disadvantages from simply incorporating in the favored jurisdiction. The small intrastate corporation is a different story; for such an enterprise, incorporation outside of the state of operations entails some costs and complexity. For example, a corporation incorporated outside of the state in which it does business cannot possibly seek the intrastate exemption from the registration requirements of the 1933 Securities Act.

Perhaps the most important changes wrought by the proposed act relate to the closely-held corporation. Throughout the act, provisions are made for solving the unique problems of the "incorporated partnership." In particular, the act validates agreements on voting and control, share transfer restrictions, deadlock-breaking devices, and simplified corporate procedures, all by agreement among the shareholders. In addition, the act provides for the resolution of corporate disputes and deadlocks—which arise particularly in closely-held corporations—in the event the shareholders have established no mechanism of their own for resolution.

Other changes in the act will benefit all corporations. The proposal includes the most streamlined and simplified procedures in the Nation for filing and documentation. All filings are pursuant to a single section, and are made in one copy with one signature. Corporate records may be kept in computer-compatible form, provided arrangements are made for read-outs upon request.

One area of corporate record-keeping and documentation that has emerged as a major problem recently is the universal requirement that shares of stock be evidenced by share certificates. Accounting for, transferring, and safe-keeping of these certificates has become a monumental job as trading volume on and off the exchanges has mushroomed. A number of commentators have suggested that alternatives to share certificates be authorized, but no concrete proposals have yet been approved by the exchanges. The proposed act, noting this development, becomes the first in the nation specifically to authorize elimination of share certificates and establishment of other methods of recording ownership as may be provided by the rules of any national securities exchange.

Many corporation statutes, of which Michigan's existing law is not the most restrictive, exercise their most significant limitations in the area of capital structure and corporate distributions. In most states, par value as a limitation on stock sales price has become less important with the wide use of low-par and no-par stock. Nevertheless, limitations on the use of "stated capital" remain in the form of the requirement that dividends be paid only out of earned surplus. Capital surplus is similarly available for dividends, but usually upon an additional vote of the shareholders. Stated capital—the accumulate par or stated value of outstanding shares—must remain intact. This structure is a legacy from the days when businessmen and scholars alike viewed the paid in capital of a corporation as security for the payment of its creditors. Few serious students of finance would argue today that creditors rely upon the stated capital of a corporation. Their security lies in the corporation's earnings, which provide the corporation with the ability to pay debt service. Statutes that attempt (as many now do) to maintain a core of assets for payment of creditors are mistaken in their fundamental assumptions.

Moreover, statutes that have limited the ability of corporations to pay dividends and make other distributions have gradually been eroded to the point where the well-advised corporation may generally (through a series of steps) declare any dividends up to the point where the distributions threaten corporate insolvency. The proposed Michigan Act recognizes this fact forthrightly: dividends may be paid out of any surplus unless insolvency is threatened. Moreover, increases in the value of the corporation's assets, even if not realized by sale of the assets (so-called "unrealized appreciation") may be utilized in calculating the corporation's dividend-paying ability. Finally, the stated capital of a corporation may be reduced pursuant to greatly simplified procedures. All of these procedures, however, including the sources from which dividends are to be paid, become the subject of complete disclosure to the shareholders. By recognizing the financial facts of life, the proposed act does not in any substantial way water down the protection of creditors. Rather, it destroys the premium on complex and unnecessary legal maneuvering in the capital structure area.

Much interest has recently been focused on problems, both personal and institutional, concerning the board of directors. On the one hand, greater leeway must be provided to allow directors to act other than in the setting of a formal meeting. On the other, directors have (not without cause) become fearful

One of the principal roadblocks to the effectuation of a merger is the appraisal remedy, a formerly universal provision under which dissenters to a major corporate change may demand payment from the corporation equal to the fair value of their shares. . . . Corporations unhappy with traditional appraisal statutes will simply reincorporate in Delaware. The appraisal remedy may simply be one of the inevitable casualties of the federal system.

that however they act they will be subject to potentially crushing personal liability. The proposed act addresses the first of these problems by allowing action of the board without a meeting upon unanimous consent, by broadly allowing delegations of authority by the board of directors, and by permitting attendance at a meeting of the board through conference telephone or similar facilities. In addition, the proposal deals with the problem of transactions by "interested" members of the board of directors (*e.g.*, dealings with other corporations in which they have a managerial or financial interest), allowing their validation through any of several alternative procedures: determination of fairness, disinterested vote of directors, or disinterested vote of shareholders.

The problem of director liability—posed in striking terms in the *Bar Chris* case—had already been the subject of extensive discussion at the time the revision effort was initiated. Delaware and the Model Act, in a joint drafting effort, adopted extensively "liberalized" indemnification procedures. The Michigan proposal advances some of the features of the Delaware-Model Act section. It distinguishes indemnification as to third-party actions (allowing indemnification for judgments as well as expenses) from indemnification as to actions by the shareholders and the corporation itself (allowing indemnification for expenses only). Indemnification is mandatory in either situation where the defendant is successful on the merits or otherwise. Two aspects of the Delaware-Model Act formulation were rejected. Literally read, that language would permit indemnification of a director who made profits on transactions in his company's own shares based on inside information about the company, the *Texas Gulf Sulphur* situation. Moreover, the "nonexclusive clause" of that statutory language would, literally, allow a corporation to indemnify by contract without any limitations, despite the limitations expressed elsewhere in the statutory language. Both the Securities Exchange Commission and the chairman of the House Banking Committee (Rep. Wright Patman) have expressed doubts as to the validity of these aspects of the statute. Indeed, quite apart from questions of legal validity, it seems hardly likely that a corporation could justify indemnifying its directors beyond the limits expressed in the statute or in the *Texas Gulf Sulphur* situation.

The proposed Michigan indemnification section requires as a condition of indemnification that the director or officer indemnified "acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation *or its shareholders. . . .*" The italicized language would preclude indemnification in the *Texas Gulf Sulphur* situation. The Michigan language also limits the "nonexclusive clause" by providing that indemnification outside of the specific statutory terms "shall be invalid only insofar as it is in conflict with this section." Despite this narrowing of the Delaware-Model Act language, Michigan corporations will be capable of indemnifying directors and officers against any legitimate and reasonable risk of office short of intentional violation of the law.

For many years, Delaware has been a favored incorporation jurisdiction of expanding corporations largely because of the ease with which Delaware corporations can effect mergers and other business combinations. Delaware's recent corporation law revision substantially eased the already simple procedures. The proposed Michigan act would make merger in this state in virtually every respect as easy and inexpensive as in Delaware; and, indeed, simpler in at least one respect (appraisal remedy, discussed below).

The corporate lawyer today is more likely to be concerned about federal limitations on his client than he is about strictures of the state corporation law—unless his client is a Michigan corporation.

The proposed statute adopts majority vote throughout for all major corporate actions from merger through amendment of the articles of incorporation. The now common "short merger" section (allowing merger without any vote if one corporation owns 90% of the outstanding shares of each class of another corporation) is included in the revision in its most liberal form. In addition, the revision includes Delaware's provision allowing a merger without a vote of the surviving corporation where common stock issued under the plan does not exceed 20% of the common stock outstanding immediately prior to the merger. The effect of this section is to allow large conglomerate corporations to expand by merger without a vote of their own shareholders in many situations.

Also adopted from the Delaware statute is a section allowing action by the shareholders without a meeting on any question—including a proposed merger—provided sufficient votes in favor of the action are obtained in writing. Therefore, even in the situation where a shareholder vote will be required for a merger, the statute provides a simplified procedure for taking that vote.

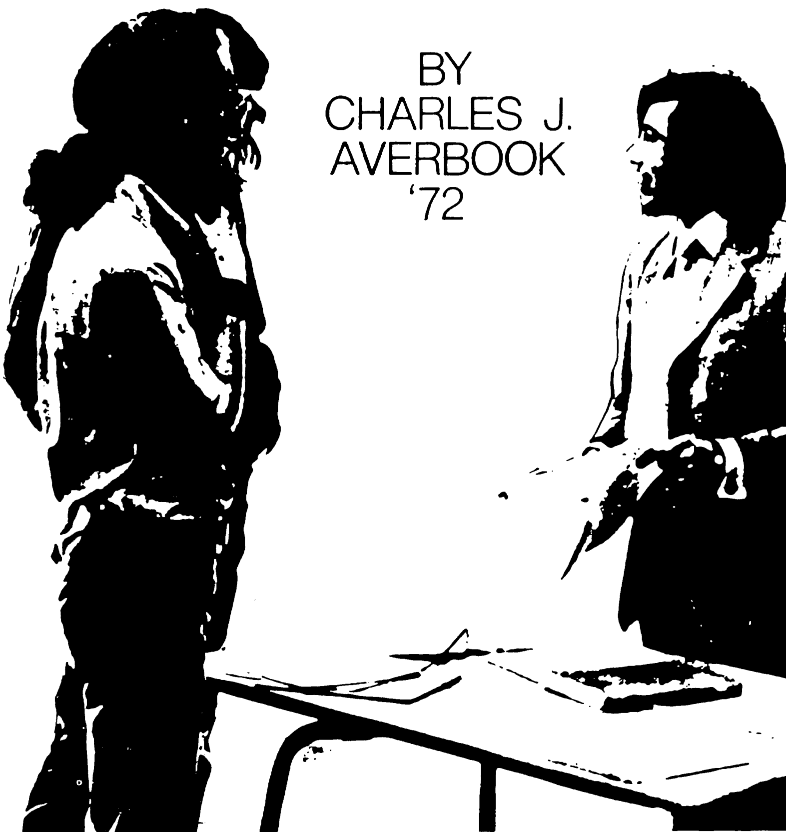
Apart from the cash drain that payment of substantial appraisal demands may occasion, litigation on the question of fair value is frequently extended and costly. Obviously, the appraisal remedy if demanded by any substantial number of shareholders can thwart a merger plan. Equally obviously, at least in the minds of some, if the shares have a ready and fair market, the same protection for the dissenting shareholder can be afforded by his sale of the shares on the market.

Following this reasoning, several states (now followed by the Model Act) have eliminated the appraisal remedy whenever the affected shares have a market. Market is variously defined, but generally involves one or another or both of two criteria: shares held of record by 2,000 or more shareholders, or traded on a national securities exchange. Michigan's proposal goes a step further by eliminating appraisal also whenever the consideration to be given in *exchange* for the affected shares consists of cash or securities with a market. Only in the situation where the shares of the affected corporation have no market *and* the consideration for those shares includes securities with no market will appraisal be preserved.

The reporter dissented to several of these "liberalizing" provisions on the ground that significant protections were lost through their adoption. For example, in the appraised situation, the existence of a market is no guarantee that the market will not decline significantly upon announcement of the merger plan. All appraisal statutes provide for this eventuality by setting fair value independently of the effect of the announcement of the merger. The only remedy to the affected shareholders whose shares decline upon announcement of the merger will now be to seek injunctive relief. These dissents, however, are difficult to maintain in light of the demonstrable fact that if enacted as proposed, the Michigan Business Corporation Act will be among the most liberal in the country. It will eliminate archaic restrictions on corporate activities and will eliminate some valuable shareholder protections as well. On balance, however, it will retain the core of limitations necessary to protect legitimate state interests.

law students teaching college students

a golden opportunity



BY CHARLES J. AVERBOOK '72

Not often in the field of higher education does there exist an opportunity for hundreds of college students to learn relevant and important subjects at no cost to themselves or their institutions. And not often in the field of *legal* education do law students find an exciting means of developing the non-research related skills that every attorney should possess. Even more rare would be a procedure that combines both of these needs into one single program. Sound impossible? Not at all. Simply let law students teach law courses to undergraduates.

Opportunities for Law Students

The benefits of teaching that would accrue to the law student are numerous. Teaching allows practice in the fundamental art of understanding a body of law, then managing, selecting, organizing, and presenting the material in a clear and interesting manner. Furthermore, it promotes the law student's ability to handle questions thrown at him from all directions. Thus, teaching can be an invaluable exercise in acquiring the fingertip control of legal theories that is essential to the success of any advocate.

Teaching also serves other important functions. For the law student who feels he would eventually like to be a professor, the experience can provide a relatively painless opportunity to decide, at an early stage in his legal career, whether or not he will enjoy the teaching profession *and* whether or not his students will enjoy him. Furthermore, for the student who had never considered teaching as a vocation, the enlightening experience may be an impetus for moving into that field. In either case, the law student's edification is immeasurable.

Opportunities for Undergraduates

The undergraduate student body can also be richly rewarded by the implementation of this program. In a time when students everywhere are becoming increasingly aware of the legal system's impact on their lives, there is a clamor for the filling of the lacuna of knowledge which now prevails in many individuals. Undergraduate students are anxious to learn even *general* aspects of landlord-tenant law, basic tort law, and the laws of arrest, search, and seizure, to name but a few topics. They need an opportunity to really understand this judicial system that is so basic to the functioning of our society. Indeed, Harvard Law Professor Harold J. Berman, writing on this subject a decade ago, maintained:

"They [colleges] should be graduating people who are prepared to take responsibility—and I include here responsibility for ideas as well as for action. The study of law provides such a preparation, because it presents to the student a record of responsible decisions—judicial, legislative, and administrative—and it presents this record in a form that challenges him to make up his own mind as to what decision *he* would have made in each case, and *why.*"

In the same vein, and about the same time, William M. Beaney, a Michigan Law School graduate who was then teaching political science at Princeton, noted:

"The present situation is to be deplored. A steady and substantial effort is necessary if there is to be any broadening and deepening of the quality of law teaching in the liberal arts program . . . [T]here can be no true liberal arts program without adequate attention to the vital and enduring role of the law in human affairs."

Moreover, in addition to alleviating a lack of legal knowledge, matriculation in a law course can, for the undergraduate student, function as a vital decision-making tool. For the student who is considering future enrollment in Law School, it can either reinforce his desires or be an *a priori* discovery of his lack of interest in pursuing the rigors of a legal career. On the other hand, for the student who has never considered Law School, it may be the discovery of a heretofore unrecognized road to the fulfillment of either personal or humanitarian ambitions.

Implementation of the Program

The implementation of such a program is not difficult. In fact, at The University of Michigan, the machinery already exists. A department in the School of Literature, Science, and Arts called Course Mart allows a graduate student to initiate his own undergraduate course. The student must first obtain a "sponsor" of professorial status to vouch for his ability. Then he must prepare a course outline describing the subject matter to be covered, the teaching materials to be used, the method of grading, and the number of credits which undergraduates would receive. Finally, the law student must be interviewed by, and submit his proposal to, the LSA Curriculum Committee. If the Committee approves of him and his course, he's ready to go. A salient distinction (and some of us engaged in the program like to think the only real distinction) between a Course Mart teacher and any other University instructor is that the Course Mart teacher does not get paid. This fact, from the University's point of view, is the economic selling point of Course Mart.

A Case Study

If at this point the reader feels that the idea sounds a bit hypothetical, it may be of help to interject my personal experience. In September, 1970, after following all Course Mart procedures and obtaining the sponsorship of Prof. Yale Kamisar of the Law School, my mentor (and tormentor) in the field of Criminal Procedure, I began teaching a course called "Legal Rights and Police Practices."

Despite the fact that there was little time for publicity about the course (it was not listed in the catalog) I ended up with 81 students—about 50 more than I had expected. In order to effectively present the material and to illustrate what the study of law is like, the text I used was ***Basic Criminal Procedure,*** 3rd Ed., by Professors Livingston Hall, Yale Kamisar, Wayne LaFave, and Jerold Israel (a volume based on the same authors' much larger ***Modern Criminal Procedure,*** used in the Law School). The class met twice each week, and when the term ended we had covered due process, arrest, search and seizure, wiretapping and electronic surveillance, entrapment, police interrogations and confessions, and appropriate smatterings of right to counsel, self-incrimination, and habeus corpus. Both the midterm and final examinations were old Kamisar Criminal Procedure exams, and the students performed quite well on both of them.

Personally, I found the teaching experience to be the most valuable endeavor of my admittedly limited Law School career. As for the Course Mart Director and the Curriculum Committee, they, too, were quite pleased. In fact, for this term they approved the teaching of ***two*** sections of "Legal Rights and Police Practices" plus a separate "Independent Legal Study" course which I am teaching to accommodate those students from last term who wished to engage in further study of the law.

I would like to think that the students' reaction to my courses are well illustrated by the enrollment in this term's classes. Through "grapevine" publicity alone, "Legal Rights and Police Practices" now has over 150 students and, though I had intended to limit the enrollment to 15, my "Independent Legal Study" course has 24 students. Further, in tabulating the results of a detailed student questionnaire completed at the end of last term, I found that, ***after*** taking my course, 52 per cent of the class was now considering going to law school, whereas only 27 per cent had been leaning in that direction at the beginning of the year.

This data, I believe, points out the significance of this program from the Law Schools' point of view. The availability of these courses in undergraduate school will mean that many students who are not attracted to graduate schools in the natural sciences, or the arts, or even engineering and medicine, will become exposed to the difficulties and delights of the law, and many of the ablest of them, no doubt, will choose law school for their graduate work.

Alleged Disadvantages

After describing the advantages and popularity of this plan and the effective completion of one example of it, it is necessary to consider the arguments against the idea.

The first contention is that undergraduate students would not respect and possibly not learn enough from a teacher who is a "mere law student" and is only a couple of years older than they. Recent studies of the phenomenon of "peer group teaching," however, indicate just the opposite. Facts indicate that a formal, strict, authority figure as a teacher is often an impediment to learning—that students are often afraid to ask what may turn out to be "dumb" questions. From discussions with my students and from answers to the questionnaire they completed, I found that the desire to learn and to excel is enhanced when a student's can "relate" to his teacher, and the undergraduate student's confidence and comfort with a law student as a teacher is quite apparent.

Another question which might be raised is the possibility of duplication of the subject matter anent those who go on to law school. True, there may be some. But in an undergraduate course taught by a law student, the atmosphere is much less formal, and the emphasis may be more toward *integrating* the theory with very practical applications. As Professor Berman has observed:

> **"Granted that much of what [undergraduate students] had learned may have to be corrected and refined; still, they would have gotten some sense of case analysis, of the balance of rule and discretion and of the interrelationship of private and public laws. . . ."**

In addition, it seems that the need to inform those who will not go on to law school outweighs any claim of duplication.

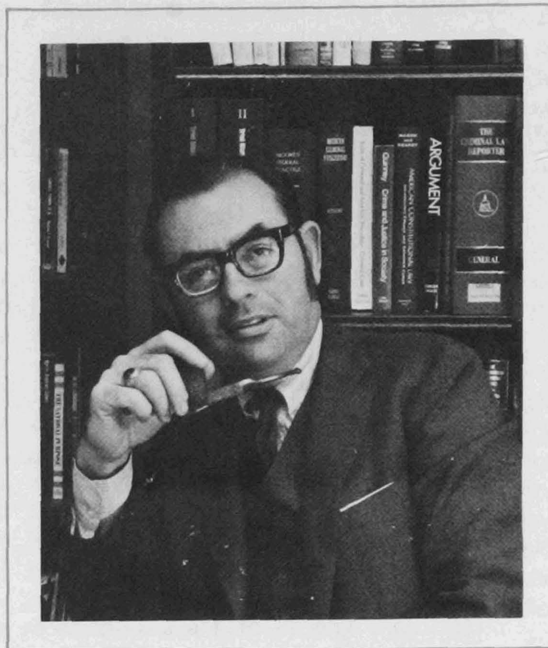
The third concern in questioning the plan is that, because of the rigorous Law School curriculum, the law student will not be able to prepare adequately enough to do a good job in such an extra-curricular exercise. Although the point is certainly valid, the problem is easily remedied. Either the law student can take a light academic load during the term he is teaching or, better yet, the Law School could make the teaching ***curricular,*** not extra-curricular. That is, allow Law School credit for the teaching, maybe as a portion of the credits the Law School now allows for enrollment in graduate level courses in other departments of the University.

Conclusion

The idea of students teaching students is economically, academically, and practically sound. It allows law students to increase their knowledge and improve their skills while providing an essential opportunity for undergraduates to explore the legal system. It has proven itself in actual practice. The idea of students teaching students is, indeed, a golden opportunity.

WHY—AND WHAT IT MEANS TO SAY THAT—

"Only One Crime in Eight Results in Conviction"



Based on a section of a paper on crime statistics delivered at the University of Oklahoma, January 21, 1971

by

Professor Yale Kamisar

"With 87 out of every 100 offenders in our country going free and escaping any punishment," wailed Senator Ernest Hollings during the Congressional debates on the Crime Control Act of 1968, "the criminal knows there is very little bite to the law today. No longer can it be said that crime does not pay when there is now only a 13 per cent chance that an offender will be caught and punished and the criminal knows this. There is no questioning the fact that the recent decisions of the Supreme Court have contributed greatly to this problem." Senator John McClellan similarly lamented the low "conviction rate." After describing "the kind of men" the courts are turning loose, he protested: "No wonder the criminal feels he can go out and violate the law, because he knows that he can get away with it." And in his May 1968 position paper on crime *Toward Freedom from Fear* (using figures which varied from Senator Hollings' by one percentage point), Presidential Candidate Richard Nixon warned: "Only one of eight major crimes committed now results in arrest, prosecution, conviction, and punishment—and a twelve per cent chance of punishment is not adequate to deter a man bent on a career in crime. Among the contributing factors to the small figure are the decisions of a majority of one of the United States Supreme Court."

Such talk, no doubt, manifests the speaker's determination not to "pussyfoot" about the crime issue, but is it "straight talk?"

Suppose you were trying to express in numbers the probability that a baseball player who took the field regularly would strike out *sometime* during the season. To say that he had only a twelve per cent chance of striking out *any one time* he went to the plate would be a rather awkward and obscure way of saying that in the course of the season he would strike out *thirty or forty* times, would it not? Fortunately few burglars or robbers get as many "turns at bat" as baseball players, but (unless they're caught the first time) they do commit many more than *one* burglary or robbery a "season," let alone a career.

If apprehension and conviction were purely a random occurrence (as opposed, in fact, to a product of such non-random factors as the status of the particular victim, the skills of the particular criminal, and the efficiency of the particular police department), and *if* the odds of a crime resulting in conviction were one in eight (as I indicate below, they are probably a good deal lower), then anyone who committed five burglaries or more would stand a better than 50 per cent chance of being punished. Even if the chance of being caught and punished for any one crime were much lower, the run-of-the-mill burglar and robber, because he spends so much time plying his trade, would be bucking very stiff odds over any substantial stretch of time. To say that 87 or 88 reported offenses out of 100 do not result in conviction is ***not to say***, as Senator Hollings did, that 87 or 88 ***offenders*** out of 100 "escape any punishment."

A ***thinking*** would-be-criminal—especially one who is supposed to be shrewd enough to study and to take into account the latest Supreme Court decisions—must consider the ***cumulative*** statistical chance of escaping unscathed when he engages in 20 or 50 or 100 crimes, and as the University of Chicago Law School's Frank Zimring recently put it when I broached the subject, "anybody who figures that at today's odds he can afford to pursue a criminal ***career*** is poorer at arithmetic than the fellow who calculates that he can safely go over Niagara Falls in a barrel."

The "only one-in-eight crimes results in conviction" and "twelve per cent chance of punishment" figures are misleading in another sense, and in a ***different*** direction. Presumably these figures

are based on crimes ***reported*** to the police, but various surveys indicate that there is a "dark figure" of unreported crime ***several times*** greater than the amount which shows up in crime statistics. Why has so much crime gone unreported? According to several studies, among the reasons are embarrassment (in the case of rape and other sex offenses), fear of reprisal, an unwillingness to take the time, lack of knowledge as to how to report, and—the reason most often given for all offenses—a feeling that the police "can't do anything about it anyway," i.e., can't recover the property or identify the offender.

Thus, Messrs. Nixon, McClellan, Hollings, and other politicians could have chosen say, a spectacular "only one burglary in 24 [or 32] results in conviction" statistic rather than the less sensational (but still frightening) "one ***reported*** burglary in eight results in conviction" figure. Why didn't they?

Perhaps because the more spectacular statistic might have necessitated some discussion of the vast reservoir of unreported crime and this in turn might have raised some doubts about the solidity and sanctity of crime statistics. Perhaps because a primary thrust of much "law and order" rhetoric is to place a large part of the blame for the sorry state of crime on the courts and although computations based on reported crime ***understate the crime problem***, they greatly exaggerate the extent to which ***the courts*** may be contributing to the problem. After all, how much blame can be heaped on the courts for the increase in burglaries and for the "fact" that only one in 24 or 32 burglaries results in conviction if 16 of every 24 burglaries—or perhaps as many as 24 of every 32—aren't even reported to the police?

For political purposes the "only one-in-eight crimes results in conviction" statistic has more than adequate gee-whiz! appeal—so long as its arrest, prosecution, and conviction components are not singled out. The lump figure may be misunderstood as meaning that only one out of every eight who are ***caught and prosecuted*** is convicted—when the primary reason for the "one-in-eight" figure is that most reported offenses ***never result in an arrest or prosecution.*** This is precisely the error Senator Russell Long made in the course of the recent crime control debates when he claimed that "seven out of the eight criminals ***we catch*** are turned loose anyway." (Emphasis added.)

Once that "one-in-eight" lump figure is ***broken down,*** however, the limited extent to which the judiciary generally, as contrasted with other agencies and multiple socio-economic factors, can possibly be contributing to the low "conviction rate" is quickly grasped. For example, the ***Uniform Crime Reports*** for 1967 (the basis for the Nixon-McClellan-Long crime statistics) reveal that, for reasons I shall touch upon below, ***less than one reported crime out of four*** was "cleared by arrest." That is to say, only about 22 per cent of the time were the police able to say that their investigation established the identity of the offender and that the crime reported was "cleared" or "solved" by his arrest.

A crime is "cleared," it should be pointed out, ***whether or not*** the arrestee is later convicted—or even indicted. Indeed, as noted in the ***Uniform Crime Reports*** (for such reasons as failure of the victim to cooperate or appear for the prosecution, referral of the arrestee to juvenile authorities, and insufficient evidence to support a formal charge), only 75 per cent of those arrested for crime index offenses were turned over to the courts for prosecution.

In short, even if the conviction rate—as the term is used by the ***Uniform Crime Reports*** and as it is normally understood—the percentage of those held for prosectuion who are found guilty—even if the conviction rate were ***100 per cent***, only one reported crime in six would result in a conviction, because only one reported crime in six ***leads to a criminal prosecution.*** (The "conviction rate," once the cases get to the courts, is in the 80-90 per cent range.)

Although the over-all clearance rate has always been low, and sinking lower (from 26.1 per cent in 1960 to 23 in 1966 to 20.6 in 1969), the rates vary considerably depending upon the crime involved. They have always been highest for murder, where maximum detective-power is allocated, typically the circle of suspects is small, and the offender (as the police well know) often turns out to be the victim's spouse, parent, lover or close friend. They are fairly high for forcible rape and aggravated assault, where more often than not the offender is at least casually acquainted with the victim and leads are provided by personal contact between victim and criminal. They have always been low, and dropping lower, for burglary (from 29.5 per cent in 1960 to 22 in 1966 to 18.9 in 1969) and for crimes against property generally—where the lack of witnesses and the tremendous volume of these offenses work in the criminal's favor.

Although the percentages are slipping, the ***number*** of crimes being cleared is increasing substantially. The trouble is that the number of reported offenses is rising even faster. Why the low, and dropping, clearance rates?

It is important to keep in mind that a single arrest may lead to the "clearance" (on paper, at least) of many crimes. Even when he cannot be connected to other "unsolved" or "uncleared" crimes by solid evidence, a suspect may be willing to confess to these other offenses if he believes he will receive more lenient treatment for his "cooperation" in the "clearing cases." Detectives are rarely displeased at "writing off old cases" and looking better on the FBI books.

A dramatic illustration is furnished by sociologist Jerome Skolnick, who witnessed the incident in the course of his study of a California police department [***Justice Without Trial*** 176-79 (1966)]: A burglar who "confessed" to—and enabled the police to "clear"—some 400 burglaries was ***prosecuted for only one***, and given a mere 30 day sentence at that. On another such occasion a district attorney insisted upon a heavy sentence, despite the fact that a promise of leniency had already been made in return for the defendant's "clearance" of other burglaries than the one for which he had been arrested and prosecuted. However, reports Professor Skolnick, eventually the police view prevailed, on the grounds that unless the police were "backed up" future burglary investigations would be "seriously impaired."

Although ***Escobedo*** and ***Miranda*** have not had the impact their supporters had hoped (and their critics had feared), apparently these cases have had the salutary effect of instilling (or heightening) an awareness among police interrogators that the courts will be "looking over their shoulder." This ***sense of review*** has led to a significant curtailment of the time the suspect used to be held before being taken before a judicial officer—and thus worked a substantial diminution of the "opportunity" the police once enjoyed to get the suspect to "confess to," and to "clear," ***crimes other than*** the one for which he had been arrested and was to be prosecuted. (This change probably began some years before ***Escobedo*** and ***Miranda***, because the last stages of the old "totality of the circumstances"-"voluntariness" test for admitting confessions saw the Supreme Court assigning increasing importance to lengthy police detention as a factor operating against "voluntariness.")

The reliability of clearance rate statistics is further shaken by a recent study of the New York City police, disclosing a ***twenty-fold*** variance in the number of crimes "cleared" per arrest. The most

likely explanation is that different commanders *define* clearances differently. The number of cases "cleared" by an arrest in any unit, points out the study, "is probably influenced by how important the unit commander feels his clearance rate is." Greenwood, *An Analysis of the Apprehension Activities of the New York City Police Department* 16-18 (1970) (New York City Rand Institute).

This is not to deny that there has been a *real* drop in the clearance rates. Professor H. Richard Uviller, for many years an outstanding assistant district attorney until he recently joined the Columbia Law Faculty, suggests some reasons: "What police manpower we do have is being spread thinner and thinner; much is now allocated to street demonstrations, for example; more is being extended to prevention and patrol and less to actually *solving* crimes. Thus, the police are forced to limit their investigative efforts to very serious crimes and, too often, can do little more than simply *record* reported burglaries and other crimes against property." (At this point one begins to wonder why the clearance rate for burglary is so *high*.) Moreover, notes Harvard criminologist Lloyd Ohlin, the number of reported burglaries is rising especially fast in the suburbs—"where police forces are even thinner than their urban counterparts and homeowners, less accustomed than are their city cousins to using locks and taking other security measures, are relatively easy, wide-open targets."

If anything, Professors Ohlin and Uviller may have significantly understated the intractability of the problems posed by crimes against property. The aforementioned New York City Rand Institute reveals that *most* of the arrests for crimes against property are made *at the scene of the crime*; "the probability that any particular case of robbery, burglary, or grand larceny will result in an arrest through a detective investigation is extremely small—six per cent for robbery and about two per cent for burglary and grand larceny"; "detectives are no more successful in solving cases to which they assign high priority than they are for cases of less significance"; and that "the solution of any particular property crime is a chance event, insensitive to the amount of investigation conducted."

The sad, stubborn finding of the Rand Study, as well as earlier studies made for the National Crime Commission, is that absent personal observations of the offense by a police officer or personal identification by a victim or witness, *the great bulk of crimes are not, never have been, and (at least for the foreseeable future) are not going to be* solved—in most of these cases no arrests are ever made.

Politicians are often tempted to fulfill an angry public's demand for simplistic solutions to stubborn, tangled problems. On the domestic front, no less than on foreign policy matters, a "mood of irritated frustration with complexity," as Dean Acheson once called it, finds expression in scapegoating. The double impact of (1) the low percentage of crimes reported and (2) the low arrest-clearance rates for those offenses which are reported, goes a long way toward laying bare the extent to which those politicians who concentrate their fire on the courts for the current "breakdown" in law and order are, in effect, perpetrating a cruel hoax on the public.

This point was dramatically made in recent testimony by the former Executive Director of the President's Commission on Law Enforcement and the Administration of Criminal Justice (Crime Commission), Professor James Vorenberg of the Harvard Law School. A few years ago, it should be pointed out, Professor Vorenberg incurred the wrath of a number of self-styled liberal law professors (including this writer) for his criticism of the *Escobedo* and *Miranda* decisions and their potential for expansion. But in recent testimony, he took members of a Congressional crime committee through the following "arithmetical calculation based on the statistics from the Crime Commission Report":

About three-fourths of the crime committed in this country is not reported to the police and only one-fourth or one-fifth of the crime that is reported leads to an arrest. "Changing the *Miranda* rule is not going to do any good for the other three-fourths [or four-fifths] because we cannot make the arrest anyhow." Then, in more than two-thirds of the arrests that are made, "the police have other information. They do not need a confession. There is a witness. Or the police themselves have seen the offense occur. So now you are down to [1/3 of 1/4 (or 1/5) of 1/4]. Then we know from [various empirical studies] that [even after *Miranda*] they still are confessing. So when you get all through, what you have is maybe a fraction of one percent of all crime that might be affected by a change in the *Miranda* rule. [Compare that figure] with the kinds of increases of crime that are being reported. . . ."

Even if the conviction rate . . . were 100 percent, only one reported crime in six would result in a conviction, because only one reported crime in six leads to a criminal prosecution.

Government and Religion

The Search for Absolutes

Extracts from the Henry Russel Lecture, delivered at The University of Michigan, March 11, 1971

by

Professor Paul G. Kauper

According to some current reports, God is dead, the churches are moribund, and religion is withering on the vine. If these views are correct, then only a dilettante's interest or the academician's fatuous concern with the irrelevant can justify the choice of the subject for this lecture. But a number of contemporary developments suggest, if I may borrow Mark Twain's phrase, that the report of the death of God is exaggerated and that the requiems for the churches and for religion in general are premature. Actually the churches are asserting, perhaps more than ever, the freedom to influence public policy and thereby creating their own perspective in church-state relations. Perhaps some guage of the vitality of the religious factor in American life is found in the volume of cases coming before our courts. Issues of religious liberty and of church-state relations now occupy a more prominent position than at any other stage in our constitutional history. Large and wide claims are made in the name of religious liberty; the freedom to use drugs as part of religious ritual, the right of the Amish to educate their children according to their own educational philosophy founded on religious considerations, the right of parents not to have their children exposed to non-ethical teaching about sex in the public schools, all suggest questions of lively contemporary interest. Indeed, the whole concept of religion is being expanded to include a general freedom of conscience and ethical conviction, as demonstrated by the questions arising under the Selective Service legislation and the lively discussion of the duty to resist unjust laws. Other questions are directed at governmental measures supportive of religion and religious organizations. Last year the United States Supreme Court held that a state could properly exempt church property from taxation [*Walz*]. Recently we have gone through dramatic days in Michigan in voting on a constitutional amendment designed primarily to prohibit use of public funds in aid of students attending parochial schools. Presently the United States Supreme Court is considering the question whether state parochiaid schemes violate the establishment clause.

I propose to deal with these questions in the context of legal ideas, and, more particularly, constitutional ideas developed by the Supreme Court of the United States in the interpretation of the First Amendment to the Constitution of the United States. Admittedly, this is a limited view of the matter. Many aspects of the area under consideration present public policy questions to be resolved by the legislative process. The churches and the theologians have much to contribute to the discourse on the subject. Moreover, even if consideration is limited to the constitutional facets of religious freedom and church-state relations, account should be taken of the long history of state constitutional limitations. This latter point deserves further attention.

An extraordinary development of Federal constitutional limitations began in 1947 when the Supreme Court for the first time stated that the effect of the Fourteenth Amendment was to make the First Amendment's establishment clause applicable to the states [*Everson*]. This decision had momentous consequences since it tended to make a national issue now out of questions which up to this point had been dealt with as problems under local constitutiona and statutes.

A consequence of the emphasis on the First Amendment limitation has been that it has overshadowed the state constitutions and unfortunately so. For years many of our state constitutions have included provisions, dating back to the first half of the last century, expressly prohibiting the use of public funds to aid sectarian schools and sectarian education. A number of state courts have construed these provisions to invalidate the use of state funds to provide free bus transportation and free textbooks to children attending parochial schools. I have no

doubt that 20 or 25 years ago the great majority of state courts would not have hesitated long before finding invalid under these limitations legislative programs authorizing use of public funds to purchase the teaching of secular subjects in parochial schools. But a bizarre development has occurred. The Supreme Court in the interpretation of the First Amendment has said that states may subsidize the secular aspects of parochial school education. Inspired by this, state courts, although not required to do so, have written the secular purpose escape provision into their state constitutions, thereby diluting their significance. This was the holding of the Michigan Supreme Court last October in sustaining the validity of Michigan's parochiaid statute which surely at an earlier time and without the intervening federal interpretation would have been declared unconstitutional. But in the end, the citizens of Michigan resolved the issues by amending the Michigan Constitution to outlaw parochiaid and possibly a good many other programs designed to aid private schools. Even this may not be the end, however. The argument is now made that if parochiaid does not violate the First Amendment, then Michigan's act in outlawing the parochiaid program itself violates religious liberty and the equal protection of the laws, protected by the Federal Constitution. This simply points up how the development of the Federal limitation has resulted in a topsy-turvy situation under the state constitution and perhaps points to the ultimate conclusion that questions like this are basically public policy questions to be resolved, as Michigan has resolved the question, by the vote of its electors. . . .

The First Amendment to the Constitution states that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. It states two distinct ideas, although they are facets of one general area of concern. Put rather neatly and with a certain misleading incisiveness, the First Amendment both protects the free exercise of religion against the government and also assures that the government will not use its powers in order to be supportive of religion. The two ideas, of course, can work together to achieve the same result. Any act of government which requires adherence to a given religious point of view violates the limitation implicit in both parts of this language. This is clear enough. On the other hand, depending on the construction given this language, the two clauses may compete with each other and even run on a collision course. While some separationists urge that the establishment clause by prohibiting legislation supportive of religion stands in the way of public support of parachial schools, others argue that since the operation of parochial schools is part of religious freedom, to deny public assistance to a parent because he has elected to exercise his religious freedom violates the free exercise clause both because it burdens a choice dictated by religious considerations and impermissibly employs the religious factor as a basis for discrimination. What is here one man's meat is another man's poison, and our conclusions depend on where we plant our feet in the first instance. So the question is one not only of the interpretation of the two clauses viewed as independent proscriptives but in their relationship to each other. Professor Philip Kurland several years ago [in his book, ***Religion and the Law***], said that here we have a body of law in search of a theory, and he attempted to supply that theory. It may be questioned whether since Professor Kurland's book the Supreme Court has advanced very far in development of a theory, and indeed one may spell out from the Court's decision different ideas and theories on the interpretation of the religious clauses of the First Amendment language and they are not all mutually compatible. . . .

When churches . . . enjoy corporate status . . . own substantial property . . . and depend . . . on the law of the state . . . the notion of . . . separation is simply an illusion and a myth. . . .

. . . Separation and no-aid as primary principles distilled from the First Amendment have a limited usefulness in dealing with the questions before us. The principle of separation of church and state does not give us either a very viable principle or a workable test for judicial resolution of concrete controversies. As Justice Douglas observed, the Constitution requires separation only to the extent needed to implement its provisions and does not say there shall be a thorough-going separation in all respects [*Zorach*]. Separation is not an ultimate principle but a derivative from the application of constitutional guarantees. Indeed, absolute separation is impossible. It may be attained in a substantial manner with respect to a discrete religious community which finds its life entirely in its spiritual resources and fellowship with no property in its corporate capacity, asserts no corporate status, and withdraws from the mainstream of the social order although, as dramatized by the Amish school problem, complete separation is not possible here either. But government and churches operate within the same social environment, and points of interaction are inevitable. The wall metaphor is peculiarly inept to describe the situations. Indeed, the separate covenant idea is not wholly adequate either, both because the churches are subject to the state in many respects, share some functions with the state and assert the freedom and authority to influence the state's policy and program with ideas and standards which have religious foundations. Perhaps Jefferson and Madison would have been quite happy with a strictly private role for the churches, viewed as local bodies devoted to spiritual purposes and excluding and intrusion on their part into the public order. But no one seriously asserts today that some legal concept of separation requires the churches to mute their voices on issues of social concerns. On the contrary, the liberty of the churches to speak their voice on issues in the public domain is recognized as a facet of their constitutionally protected freedom.

I do not mean that the separation idea is without relavancy to problems in this area. In the interests of the accurate use of language, it should have reference to formal relation between the churches and government. The church is not to be represented in the organs of secular authority, and government is not to be represented in the affairs of the churches. But separation does not provide a complete index to the question on the relationship of law and religion, and its use as some absolute standard is futile and misleading.

Similarly, the no-aid idea can hardly be useful as an effective approach in

dealing with the questions here of the proper relationship of the state to religion and the churches since by hypothesis churches and those engaged in religious activities necessarily profit much from the operation of the secular state. Indeed, the basic protection accorded by the secular state to the church and religious activities itself is perhaps the most significant aid accorded the churches. One would not possibly argue that the churches should be put outside the pale of the legal system in order to avoid a forbidden form of aid which would constitute an establishment. This may seem to be taking vengeance on the obvious, but it does point up the inadequacy of the no-aid idea except as it is construed to mean at most that the government shall not use its resources distinctively in aid of religious objectives or to promote religious objectives. This was early recognized by the Supreme Court and it has continued to be recognized in cases where the Court has held that so-called incidental aid accorded religious groups pursuant to appropriate secular programs of the government is not forbidden by the Constitution. Thus, the state may provide free bussing for children going to parochial schools since this is incident to a program providing bus transportation for children going to all schools that are recognized under the laws of the state. The state may enforce Sunday closing laws because they are directed to proper secular objectives. Any aid to any particular religion is again seen to be an incident rather than the primary object of the law. More recently the Court has sustained legislation providing for free text books for children going to parochial schools. The no-aid limitation was not even cited as a relevant principle in this connection.

Moreover, and here we get to the more critical questions, even programs and laws distinctively aimed in furtherance of religious objectives are not necessarily invalid where they are seen to be a legitimate expression of the state's interest in the religious freedom of the parents and of religious liberty. For the state to put the imprimatur of its authority on a given set of religious beliefs or practices is one thing; for it to preserve private freedom of choice in religious matters is another. In *Zorach* where the Court upheld released time conducted off the school premises, it relied on the theory that the state may accommodate its program to the religious needs of its people. Thus, the religious interests of the people is a sociological datum which the legislature may recognize and it may take appropriate measures to implement the freedom of parents to pursue this interest, even through some aid furnished by the public school system. Even more striking perhaps is the recent decision by the Court upholding tax exemptions for churches on the ground that this, too, is a permissible accommodation by the state to the interests of the churches by freeing them from obligations which would burden them in the discharge of their functions. What is important here is that we recognize that government may grant a preferred position on religious grounds in some situations and that this is not only consistent with the establishment clause but sanctioned and perhaps even required by the free exercise clause.

If substantial . . . energy and services of the church are directed toward social justice and to reform of laws . . . clearly identified as secular, how shall we distinguish between the secular and the sacred?

The separation princple yielded no workable test since its premises as a legal test were faculty. Similarly, the no-aid proscription had to be abandoned. Like any categorical, absolute proposition, it was inadequate to explain American historical development and to gain credibility at all had to be modified and limited so as to make it a meaningless proposition. Perhaps its basic weakness was that in elevating the prohibition of the establishment clause, it failed to take account of the competing demands of the free exercise guarantee.

New approaches were required. It remained for Justice Clark, in his opinion in the school prayer and Bible reading cases, to formulate a new test which was designed to govern these problems. Essentially two basic ideas appeared in his opinion in the *Schempp* case. One was the emphasis on neutrality. Government must be neutral in religious matters. This seemed to be the starting point of his opinion. It was not a new idea. Justice Black had already said in *Everson* that separation did not require the state to be hostile to religion and that if New Jersey preferred not to discriminate against children attending parochial schools and instead elected to be neutral, this did not violate the First Amendment. Later Justice Douglas had said that the state must be neutral between the various religions—a limited notion of neutrality embodying an equal protection guarantee. But Justice Clark appeared to be extending the neutrality idea further to mean that government must be neutral between believers and non-believers and between religion and non-religion. Indeed, it carried him to a corollary proposition which has since been regarded as the key element of the case and has emerged as an authoritative test: Does the governmental program have a secular purpose and a primary effect which neither advances nor inhibits religion? This is the now famous secular purpose and effect test. As used in *Schempp*, this was identified with neutrality, and the conjunction of the two ideas suggested that the Court was now setting up the standard of the secular and religiously neutral state as the central guide to interpretation of the First Amendment. Secular purpose and neutrality, if given strict applications, tended to converge on the same result, since both commanded exclusion of religious considerations in the enactment of law and the determination of government policies. At least, secular purpose and effect was best achieved by governmental acts which ignored religion as a relevant consideration in the shaping of the public order.

As evidenced by the subsequent cases and literature, neutrality and secular purpose have been elevated to high levels as governing tests under the establishment clause and have joined the parade of absolutes led by the wall-of-separation and the no-aid limitations. Like all absolutes and categorical tests, these have proven vulnerable and inadequate, both as tests and as explanations of the American development and experience. . . .

Secular purpose and strict neutrality in classification are not strictly synonymous ideas even though they frequently point to the same conclusion. This is clear in some cases. A law requiring prayer exercises in public schools in order to cultivate a sense of religious devotion and promote a religiously founded morality is not neutral and is not directed toward a

secular end. On the other hand, a law requiring all parents to send their children to a school until age 16, without any exemption based on religious grounds, is clearly directed toward a secular end, and by ignoring the religious factor, is neutral. But the secular purpose concept may, in some instances, be more restrictive than neutrality. A law which appropriates money for or grants a tax exemption to all nonprofit organizations is neutral with respect to religion, since it takes nonprofit element as a standard of classification. It should be held valid if neutrality is the standard. But insofar as funds are granted or tax exemptions allowed for one category of nonprofit organizations, namely, a church, the statute to this extent fails to advance a secular purpose.

The strict secular purpose theory as providing an index to the First Amendment's religious clauses is suspect. In its ultimate analysis, it reflects the Jefferson-Madison hypothesis that the principal objective of the establishment clause is to immunize the public order to any threat of ecclesiastical domination or religious influence. It is a phase, and a vital one, of the wall of separation idea. The state's business is secular and the church's business is religious. But does the Jefferson-Madison interpretation furnish the authoritative and exclusive gloss of the First Amendment? Surely the Roger Williams tradition that the establishment limitation serves the end of religious freedom has its place, too. Construed in this light, the establishment clause yields an entire different perspective and may even support those aspects of the public order which furnish a benign climate for the recognition and promotion of religious interests. Indeed, there is some ground to believe that Roger Williams and the traditions which he founded rested on a theocratic principle in the sense that the state and its policies were to reflect basic religious concerns and morality, and that what we call the unofficial establishment in this country is consistent with the freedom of the churches and of separation as Williams understood it. Sociologists Berger and Bellah have noted the phenomenon of the unofficial establishment as evidencing an American understanding and tradition distinctly at variance with rhetorical utterances about separation.

A second consideration is that the distinction between the secular and the sacred, always a dubious one, is becoming increasingly blurred. Surely, no one can deny that so far as the churches are concerned in this day of turbulent and radical change, the focusing of new attention on the secular as a sphere for the operation of the sacred, has gone far in destroying the historical dichotomy between the sacred and the secular. And one feature of this problem is that the state brands as secular what the religious community labels sacred, and in the end the label fixed by the secular organs of the state is determinative. The Jehovah's Witness views the flag salute as an idolatrous and hence odious religious practice. The state sees it as serving the secular purpose of promoting patriotism. Justice Harlan has suggested that while a program of released time for religious instruction for public school students should be held invalid, a program of released time for ethical instruction would be valid even though the teaching in some of the classes would have a distinctive religious foundation. Religious means may be used to effectuate secular objectives.

While the courts profess incompetence to define and interpret religious ideas and practices, they indirectly do the same by giving definition to what is included in the secular.

But perhaps the most telling criticism of the secular purpose doctrine is that carried to an absolute conclusion and serving as the authoritative standard, it shortcuts and defeats neutrality in its most substantial sense, and, more particularly makes the establishment clause a vehicle for the subordination of religious freedom.

A secular purpose and effect test, strictly construed, can operate to the disadvantage of religion and burden its free exercise. If, for instance, a state grants tax exemptions to all nonprofit organizations serving some intellectual, moral and social purposes but expressly excludes churches from its operation since they do not serve a secular purpose, the constitutional limitation serves as a justification for a classification which discriminates against religious groups. But if secular purpose and effect are a constitutional requirement derived from the establishment clause, then not only is this discrimination permitted. It is required. Similarly, in the parochial school case, even though these schools admittedly serve a secular purpose, if, as some contend, secularity blends with the religious so as to defeat the secular aspect and therefore requires the invalidation of any assistance to these schools, it becomes the vehicle and cover for a mandatory constitutional discrimination. Or take the case of the use of public parks by Jehovah's Witnesses or any other religious groups. These parks are open to meetings by various groups, but if a requirement of secular purpose requires the exclusion of meetings held for religious purposes, the secular purpose doctrine again becomes a sword requiring discriminating on religious grounds and is at odds with the principle of neutrality.

It is unnecessary to give further examples to demonstrate that a secular purpose and effect test pressed to an absolute result is incompatible with even a strict formal neutrality respecting the religious factor. Moreover, what Justice Goldberg [concurring in *Schempp*] describes as a "brooding and pervasive devotion to the secular" by the state, resulting from "untutored devotion to the concept of neutrality," elevates the secular purpose limitation to a point where it becomes a dominant philosophy and in a very substantial sense crowds out religion as a consideration worthy to be taken into account in the public order. Consider, for instance, religion as an academic discipline in the university or even in the public schools. A general and unfounded assumption of the past has been that the attempt to deal with this subject would somehow violate the separation idea. No one seriously adheres to this idea anymore. The study of religion as an academic discipline is now recognized as appropriate to the university and to the public schools. But in order to preserve constitutional amenities, the academic study of religion is labeled secular and hence the problem is solved. I have no doubt that the establishment of a theological division at a state university, as long as not distinctively sectarian and not employed for indoctrination purposes, would likewise be labeled secular in order to assure its validity. Any substantial objection to religious instruction is not one founded

on an abstruse separation principle, but one founded on narrower considerations relating to coercion and forced exposure to sectarian indoctrination. In an interesting recent opinion [*Cavalry Bible Presbyterian Church*], the Washington Supreme Court, justifying a course in Bible as a study of literature at the University of Washington, notwithstanding a restriction of the state constitution on religious instruction at any state-supported institution, concluded that this was a secular study and within the range of the University's discretion, as against the interesting objection by a conservative religious group that any attempt to present the Bible strictly from a secular point of view as literature and history itself did offense to the Bible as a religious document and violated the state's constitutional ban on religious instruction.

This leads to the point that the limitation of the secular purpose standard may be avoided and the whole concept eroded by a stretching of the term. Churches are seen to serve secular as well as sacred purposes, therefore, the government may well include churches among non-profit organizations granted exemptions from property taxes. The protection and promotion of religious freedom may be characterized as a secular objective; therefore, steps deliberately taken by the government to promote and implement religious liberty are constitutional. After all, the First Amendment protects the free exercise of religion, and the Constitution is a secular document, so its concern must be with secular values. Along a different line, Mr. Justice Brennan in his opinion in *Walz* said that the maintenance of a healthy pluralistic structure which includes churches and their own distinctive contribution to American life was an appropriate secular purpose. This idea has enormous implications. If pressed to its logical conclusions, it devitalizes the whole secular-sacred distinction.

I have said enough to indicate that the secular purpose and effect doctrine has its limitations, that its use as an absolute is incompatible with a national tradition which accords a positive place to the religious factor in American life and in the public order, that its literal application requires a discrimination on religious grounds and that its use as a standard may lead to interpretations and rationalizations that empty the term of any central content.

If the secular purpose and effect doctrine has at most a limited usefulness, what about neutrality which has assumed such significance in recent years? Everybody is in favor of neutrality. . . . But any examination of the concept leads to what I would characterize as the neutrality illusion or puzzle. . . . The term is often used in a misleading way. It may, in the minds of some, be equated with the separation principle, which denies all aid to religion, or to a secular purpose principle which may require discrimination on religious grounds. To some, it means that the state cannot favor one religion over another, to others that it may not favor religion over irreligion. Professor Kurland has propounded the theory that the religious factor cannot be used as a basis for classification so as either to favor or hinder religion. This lays the basis of a strict formal neutrality which

The strict neutrality test not only permits governmental support of church-operated schools which satisfy the secular purpose . . . under the compulsory education laws, but even requires it as a constitutional matter.

deserves particular attention. Professor Kurland's theory converts the twin religion clauses of the First Amendment into a special equal protection clause which denies the validity of the religious factor as a basis for classification. To paraphrase the elder Harlan's well known statement in his dissent in ***Plessy v. Ferguson***, Kurland's test means that the Constitution is religion blind. It has the merit of achieving a simple and coherent construction of these clauses. It avoids the separation of state principle and the emphasis on secular purpose as the central criterion.

It should be clear that neutrality cuts both ways. The religiously neutral state, while it cannot on the one hand assume a benevolent aspect toward religion, may not on the other hand discriminate either. A strictly secular neutral state cannot grant an exemption for military service on grounds of religion or grant a property tax exemption for property used as a house of worship. Obviously, it is not neutral in either of these cases by pursuing these policies. But, by the same standard, it cannot deny to schools, simply because they are operated by churches, the benefit of public funds granted to all other schools. This, too, would be a gross breach of neutrality. Indeed, the first to disown it here.

Strict neutrality, as an absolute, does not hold up any more than the no-aid or secular purpose limitations. It does not accord with American history and experience and is not supported by the Supreme Court's decisions.

Strict neutrality respecting religious matters finds no support in American experience. On the one hand, both state and the Federal governments have over the years pursued programs which single out religion and religious organizations for special and preferred treatment. The exemption of churches and believers from various types of obligation have been and are common. The provisions for chaplains in the armed services is a conspicuous example. Released time for religious instruction furnishes another illustration. . . . Conversely, it has been traditional policy in many states to deny the benefit of some laws and programs to religious institutions and thereby use the religious factor as a basis for discrimination. I refer particularly to the constitutional restriction and laws of a number of states which deny the use of public funds to aid parochial schools, even though the schools of necessity perform the functions required of any schools which meet the demands of the compulsory education laws. Kurland's theory requires the invalidation of such discrimination, and, indeed, requires that the state treat all schools evenhandedly as long as they satisfy the requirements of the compulsory education laws.

What is probably the greatest weakness of the kind of strict neutrality resulting from the Kurland classification thesis is that in postulating a formal neutrality, it leads to results which mark a breach of neutrality in the substantive sense. In a number of situations, the state by being strictly neutral is un-neutral, just as we are coming to recognize in the field of race relations, that for a state to be strictly neutral on race matters may really mean that it is tolerating if not sanctioning gross inequalities. A state by insisting that its educational program be confined to secular subjects may appear to be neutral respecting religion, when

actually by ignoring the religious factor it is far from neutral. The intriguing ***Epperson*** case suggests some basic questions on neutrality. The Court said that a state statute prohibiting the teaching of the Darwinian theory of evolution in public schools was unconstitutional, since this was designed to favor and to protect the Biblical theory of creation. Hence, the law was invalid as an establishment of religion even though the law did not mention the Biblical theory and did not require its teaching. Justice Black's separate opinion raises interesting questions. If the purpose of the law was to avoid controversy over a matter of deep religious concern to some people, was it not a proper legislative purpose to prevent its intrusion into the public school curriculum? In terms of neutrality, is the state neutral when it limits the teaching and study in a way that precludes consideration of religious sensibilities, or is it more neutral if it requires competing or contrasting theories to be stated? Or is it even more completely neutral if it requires that the subject be completely deleted? Obviously, neutrality has many different implications in this situation. Is a program of sex education in public schools neutral when it presents sex in an empiric way without regard to moral implications, thereby offending parents who believe that sexual behaviour cannot be studied except in the context of moral restraints? Where does neutrality lie in this case? Or in the case of the Bible course at the University of Washington is the state being neutral when it offers a course in the Bible which views it only as a secular document or which rests on only one school of Biblical interpretation? Again, one may ask, where does neutrality lie in these cases?

Insofar as strict neutrality is premised on Kurland's classification principle, it presents inherent difficulties simply in terms of ordinary constitutional considerations. As Professor Katz has pointed out, it is unrealistic to propose that the legislature, any more than the courts, can be indifferent to the place of religion in American life and to deal with the matter as if it did not exist at all. Furthermore, as Justice White noted in his separate opinion in the conscientious objector case decided last spring [*Welsh* (dissenting opinion)], the Constitution itself in the First Amendment singles out the religious factor for special treatment and establishes religious liberty as a separate category of constitutionally protected freedom.

Kurland's theory deprives the legislature of any discretionary authority to deal with the religious element as a separate factor, whether for the purpose of recognizing the validity of this factor in American life, of implementing and strengthening religious freedom, or of correcting the imbalance resulting from a pervasive and untutored secularism. It places a premium on formal classification and definitional skill. A released time program for ethical instruction is valid, but a program for religious instruction is invalid. A classification of all nonprofit organizations for tax exemption purpose is valid even if it includes churches, but a separate classification for churches is invalid.

Whatever individual justices have said about neutrality, it is clear that the Court as a whole has not accepted this standard. Only Mr. Justice Harlan has committed himself to this view. Far from endorsing a strict neutrality, the Supreme Court's decisions, attaching a paramount position to the free exercise guarantee, have even forced government to depart from neutrality in the interests of religious liberty. A state cannot deny unemployment compensation to a Seventh-Day Adventist who refuses a job requiring Saturday work, since this would place an indirect burden on his free exercise of religion. Religion thus becomes a basis for a preferential classification. The Wisconsin Supreme Court has held that the Amish in the name of religious liberty may claim a constitutional exemption from a state law requiring parents to send their children to a school until they attain their]6th birthday. No neutrality here. The constitution even forbids it.

. . . it connotes a judicial process whereby the Court attempts to strike a balance between the free exercise and establishment limitations, and in doing so, gives a pre-eminent position to the free exercise clause.

Perhaps even more significant is the acknowledged discretionary authority of the legislature to pursue programs designed to recognize legitimate public interest in religious matters, or to promote and protect religious freedom beyond what is constitutionally required, or to achieve a substantial neutrality by what Professor Katz terms "neutralizing aids" which are designed to offset aspects of the public order which limit freedom of religious choice. This is what Chief Justice Burger, in his opinion in the tax exemption case decided last term, called a "benevolent neutrality." Thus the government in order to avoid forcible burdens on the religious functions may exempt churches from property taxes even though this is not constitutionally required. Unlike a strict neutrality, it recognizes that government may grant exemptions and preferred treatment on distinctively religious grounds and that such preferred treatment does not violate the establishment clause, that the government may accommodate its program to religious interests and religious liberty beyond that required by the Constitution, and that in the interest of a genuine neutrality, government may adopt programs supportive of religious interests in order to balance off an official secularism.

The wall of separation, the no-aid limitation, the secular purpose and effect doctrine, the strict neutrality approach all represent efforts to deal with the problem in terms of categorical absolutes, and their weaknesses become apparent. Perhaps the most significant feature of the Court's opinion in the tax exemption case was the recognition that no absolute principles can be stated and that the Court's task is essentially a pragmatic one of looking realistically at the problem before it, to identify the interests at stake, to attempt to determine what constitutional values are involved and to seek a reasonable accommodation between these interests.

We cannot finish a discussion of this subject, however, without consideration of another factor which, for the first time, receives special emphasis in the *Walz* case. The Court put it in terms of entanglements, suggesting that a primary function of the religion clauses is to keep the government from being entangled in the affairs of the churches. Apparently, the Court was speaking of administrative intrusions by civil authorities into the affairs of religious bodies. Using this idea to justify tax exemptions for church property, the Court said that a policy of

exemption enabled the government to avoid placing burdens and making administrative determinations which would embroil the civil authorities in religious matters. The full implications of this idea remain to be seen. . . . Is the "entanglements" limitation now the governing principle, or is it a factor taken into account along with other considerations which the Court has weighed in the balance? Cases now before the Court on the validity of parochiaid may prove to be highly significant on the entanglements question which has assumed paramount importance in the arguments. Parochiaid can be justified under the First Amendment, as a permissible program, whether secular purpose, strict neutrality, or benevolent neutrality is a standard. But entanglements raises a question whether the supervision required of the civil school authorities to administer this program forces them to administer and pass upon distinctively religious matters, or at least upon matters where religious and secular considerations are closely intertwined. This is no insignificant problem. Lurking behind it all, and hopefully the Court's opinions will address themselves meaningfully to the problem, is the question whether and to what extent government and the churches may cooperate in undertaking functions which from the state's point of view are secular and which from the churches' views are appropriately incident to their religious function, without on the one hand risking the hazard that civil authorities will involve themselves in the determination of religious issues, and, on the other hand, that the churches will sacrifice the autonomy which is a distinctive aspect of their constitutionally assured function.

Conclusions

Having undertaken, whether wisely or not, to make the establishment limitation of the First Amendment applicable to the states, the Supreme Court has had to face up to the difficult and unenviable task of giving concrete meaning to this clause in conjunction with the free exercise limitation. It is understandable that the Court has searched for absolutes to lessen its task, but it has become clear that the pursuit of a formula, couched in absolute terms—whether it be wall of separation, no-aid, secular purpose and effect, or strict neutrality—is futile and fruitless. Neither American history nor the course of the Court's decisions support any of these formulations as a single universal standard or test for solving the concrete problems that come before the Court. Nor can it be supposed that the more recently emphasized freedom from entanglements can usefully be pursued to the point where it becomes a controlling test.

I do not mean to suggest that these various formulations are completely devoid of value. . . . The objection is to them as absolutes and the failure to recognize that carried to extremes, they conflict and present hopeless dilemmas.

The basic task faced by the Court is (1) to define the ultimate values secured by the twin religion clauses of the First Amendment, and (2) to formulate the criteria for choice of values when conflicts appear. These values find their significance in the contemporary social scene and must necessarily take account

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both of the multi-faceted enterprises of the churches and of the nature of American religious pluralism. A substantial contribution by *Walz* to understanding of the First Amendment is its recognition that a page of history is worth a volume of logic. A decent regard for history and a pragmatic approach which searches out basic policy considerations appropriate to the conditions of our day are indicated as the most fruitful approaches to these problems. One may suggest that the questions critical to our day cannot be resolved by the fears and even prejudices of the eighteenth and nineteenth centuries. Should fear of Roman Catholic ecclesiastical domination continue to be a primary premise—whether articulate or inarticulate—of our thinking? Should fear of inviting ecclesiastical demands upon the government be a deterring consideration in the day when it is appropriately recognized that churches may in a very aggressive fashion assert a responsibility to help shape public policy? Is it inappropriate to inject issues of religious interest into the sphere of public discussion and debate when these issues are being channeled into the courts in increasing measure? Must constitutional interpretation be based on the assumption, highly congenial to Jefferson and Madison, that religion is irrelevant to public affairs? Or shall we explore the Brennan thesis that churches occupy an important and unique place in the American pluralistic structure?

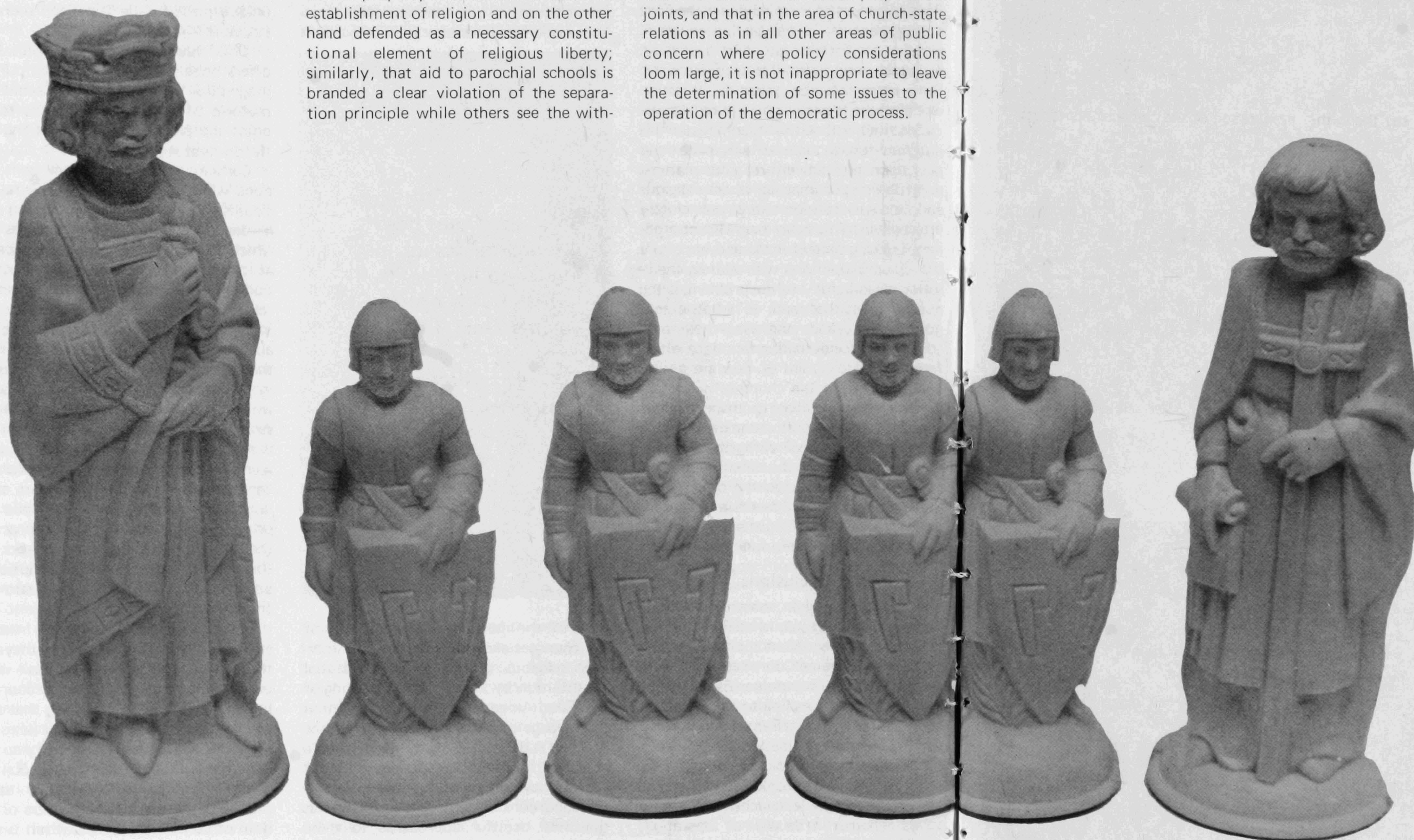
Chief Justice Burger's opinion in *Walz* offers hope that the Court will pursue a pragmatic approach which avoids the rhetoric of absolutes and seeks to pinpoint the problems in terms of the basic freedoms at stake.

Certainly there are bedrock considerations which are implicit in the religion clauses and which are the beginning point in dealing with the basic freedoms with which the Court may well be concerned as its primary objectives in the interpretation of these clauses: A full measure of religious freedom to be asserted by both individuals and corporate bodies; the autonomy of the churches in carrying on their distinctively spiritual functions and in maintaining that voluntaristic posture which has been the source of their strength and freedom in American life; the freedom of all citizens from governmental practices which are coercive of conscience or belief; the freedom of the unbeliever from burdens that lend support to distinctively religious practices; the duty of the government both to abstain from an official prescription of belief and to protect the freedom of choice in religious matters.

By concentrating on these freedoms and making the choices when they conflict, the court can keep its task within manageable limits. Moreover, a court can limit its task also by insisting that those who object to governmental laws and programs show substantial injury to their own freedom or to their pocketbook. The court needs to look critically at the problem whether every assertion of freedom of conscience comes within the free exercise of religion and whether the freedom of the unbelievers is not the kind of freedom protected by the establishment limitation rather than by the guarantee of the free exercise of religion. I say this not to minimize the freedom to be enjoyed by unbelievers, but rather to suggest that perhaps we can better approach our problems under the First

Amendment by a more careful use of terms and by not making the free exercise clause serve a duty for which it was not intended.

The stress here is on manageable criteria and standards designed to keep the traditional problems within workable limits. Many questions fall within the center of a broad spectrum of policy issues and considerations where elementary value conceptions furnish no conclusive answer, and where, it seems to me, that the legislative body should have the ultimate authority in determining the policy issues. Unfortunately, our reliance on the judiciary has helped to aggravate this problem, and every public policy question is put in terms of constitutional imperatives or prohibitions. We thus face the paradox that tax exemption of church property is assailed as a forbidden establishment of religion and on the other hand defended as a necessary constitutional element of religious liberty; similarly, that aid to parochial schools is branded a clear violation of the separation principle while others see the withholding of aid as a gross instance of unconstitutional discrimination. What I am suggesting is that the court may well say that these results are neither forbidden nor required, that the Constitution does not speak categorically to these questions, and that they are essentially legislative policy questions. In short the courts may in an appropriate gesture of modesty recognize that they do not have all the wisdom in these matters, that there is latitude for some play in the joints, and that in the area of church-state relations as in all other areas of public concern where policy considerations loom large, it is not inappropriate to leave the determination of some issues to the operation of the democratic process.

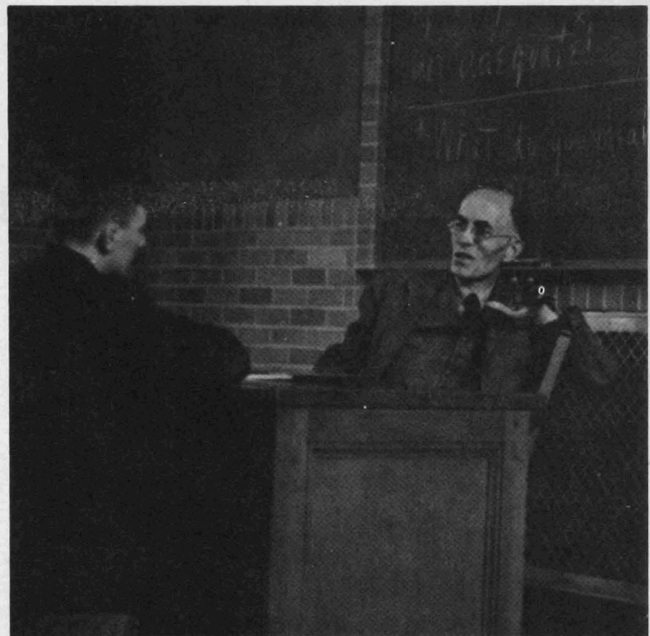


Footprints in the Sands of Time

Law Faculty Circa 1939

"So then the court in the foreign jurisdiction finds itself more or less *hors d' combat*, shall we say?"

—Hessel S. Yntema

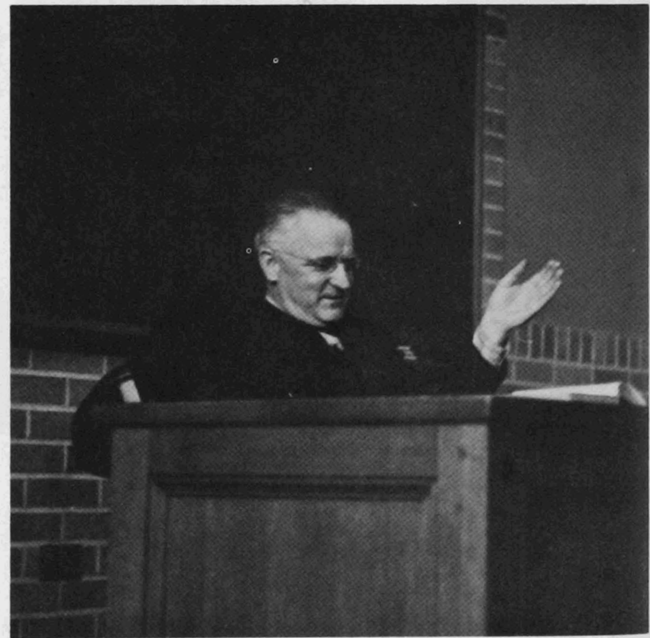


"All of this really goes back to Lord Mansfield, you see."

—Edgar N. Durfee

". . . and *who* said anything about the morals of the procedure?"

—Laylin K. James



"When they had the officer in court, he was muttering some sort of mumbo-jumbo . . ."

—John Barker Waite