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Lex et ius

When President Johnson, Dick Daley, assorted members of the Congress, and our old friend, the Man on the Street, say that we are going to have to restore law and order in our communities our first inclination is to ask them what they mean.

Law and order are not necessarily logically sequential, as are life and death, conception and birth, fire and smoke, beginning and end. That is to say, order need not be the product of law and law does not necessarily produce order.

The trouble is that, in our fuzzy-minded way, we English-speaking people have tried to stuff too much into this word "law." When we talk about law, we are talking about at least two things at the same time, things which in Latin would be distinguished from each other by the two words lex and ius, in German by Gesetz and Recht, in French by loi and droit.

The Nazis were a wonderfully Gesetz-abiding lot and under their regime Germany enjoyed a high degree of order. But those who resisted them during the days of Hitler and those who punished them after the war did so on the grounds that their Gesetz violated Recht — their statutes could not be squared with what was right. Similarly, the Petain regime was the loi-ful government of France during World War II. But General DeGaulle was the droit-ful spokesman for France.

Those who counsel us that we must, above all else, be obedient to the law owe it to us to explain in what sense they are using the word. If they mean that we must obey every statute or ordinance enacted by some authority of government we must answer that we can give government no such blank check. Lex can require the citizen to throw a pinch of incense on the Emperor's statue. Ius forbids it. Gesetze can make it a criminal offense to conceal Jews who a government proposes to send to the gas chambers. Recht requires it.

Within the context in which the appeal for "law and order" is usually issued nowadays the implied demand is that one condone the continuing oppression of the black man and even assent to repressive measures if he resorts to extra-legal means to assert his freedom and manhood. Ius forbids us to condone the oppression of any human being and may even require us to associate ourselves with him in taking such steps as may be necessary to relieve the oppression. Obviously, one does not lightly appeal to violence as a remedy for even the gravest ills. But neither, in an evil world, can one a priori exclude violence as a means of desperation for redressing grievances which are condoned or, in some cases, even sanctified by the law.

Toward the Prussian Way of Life

Some strange and disquieting things seem to be happening to our thinking about the theory and function of the Selective Service System.

In the Civil War, in World War I, and in World War II, the draft was accepted, with considerable reluctance, as something basically foreign to our institutions but necessary to raise large numbers of men as equitably as possible in a short period of time to meet a clear situation of national peril. No one suggested that military service was a positive good to which every young person ought to be subjected for the sake of his own self-realization and self-fulfillment. No one would have dared to suggest that it was a form of degradation to which a young man might be subjected in lieu of confinement in a penal institution.

This attitude toward compulsory military service has, it seems to us, undergone two subtle (or perhaps not so subtle) shifts in recent years.

From many levels of government, including the White House itself, have come repeated suggestions over the past several years that it would be a good thing if every young man and woman were required to put in a year or two either in the armed forces or in some other work useful to the state. Behind the suggestion seems to lie the assumption that the state has some proprietary right
in the life and time of its citizens quite apart from consideration of its security in times of national crisis. This, it seems to us, is a new form of feudalism which should be resisted by the free citizens of a democratic republic.

The second shift has been one toward using the threat of induction into the armed forces as a deterrent to dissent. We have personally little patience with certain forms of strident dissent which have been adopted by some of our young people who are opposed to our involvement in Viet Nam. But the whole purpose of a Bill of Rights is to protect minorities from the tyranny of majorities. It is, we think, bad public policy to allow the director of the Selective Service System to use his wide discretionary powers in such a way as to establish the permissible limits of dissent. The Selective Service Act is a public law which makes adequate provision for the punishment of those who violate it. It is the function of civil authorities to indict, try, and punish those who do violate it. It is not, we would suggest, the function of the director of Selective Service to take upon himself the role of policeman, prosecutor, and judge by ordering certain types of dissenters to be placed at the top of the list of registrants to be called for military service.

Taken together, these two tendencies pose the threat of a growing Prussianization of our country. We would do well to reverse them before they become irreversible.

**Newspaper Across the Muzzle**

We have a rule of thumb, admittedly not foolproof, for determining the moment at which a government proposes to bull its way forward on a course which it finds hard to justify normally. It is the moment when it begins to arrest intellectuals and clergymen for opposing it.

Ordinarily the government — any government — takes the same sort of indulgent attitude towards intellectuals and clergymen that men take toward their dogs: throw them a few scraps, let them run about their mysterious business, give them an occasional pat on the head, but do not solicit their counsel. In return, the dog is expected to reward his master with loyalty, affection, and, if need be, protection.

Trouble arises when the dog shows signs of having a mind or insights of his own — when, for instance, he sniffs some danger to his master of which the master is not himself aware and persists in barking after he has been told to shut up. More than one faithful dog has gotten a newspaper across the muzzle for that kind of breach of discipline and, understandably, some have preferred silence to a second experience of the newspaper.

But the dog who truly loves his master continues to bark. And this, it seems to us, is what a small minority of the American intellectual and religious communities are doing in the case of the war in Viet Nam. It is perfectly possible that they are barking up the wrong tree or smelling burglars when, as a matter of fact, there are no burglars about. But it is equally possible that they sniffed some real danger which the rest of us lack the sensitivity to identify. In any case, we serve them and ourselves ill by giving them the newspaper across the muzzle.

Dr. Benjamin Spock, the Reverend William Sloane Coffin, and their colleagues who have been indicted for counseling young men to avoid the draft may very well be mistaken about the dangers which they have been barking about. They may even have violated some "no barking" rule. (We hope that they will be given a speedy trial to determine whether, as a matter of fact, they have.) But we know them to be responsible men, men of conviction who, at great personal sacrifice, have refused to keep silent about a situation which, in their mature judgment, is both immoral and illegal. The government unquestionably has the power to silence them and, if they are guilty as charged, it can do so quite legally. But doing so will surely cause many of us to be even more uneasy than we are now about our involvement in Viet Nam and our sending young men to fight and possibly die in this war.

**On Forsaking All Others**

From all that we have been able to read and observe, the "new morality," particularly in the area of sexual ethics, has been widely accepted by the present high-school and college generation. Put down in words, it conflicts at many points with the code to which our generation subscribed. In its practical workings, we do not see that it has produced behavior radically different from the behavior of our generation.

This does not mean, of course, that we may not properly fault the proponents of the morality for building their lives and relationships upon a false set of values. But if we are going to do so, we ought to be able to explain why we still subscribe to a code of behavior which our generation honored more in the breach than in the observance.

First of all, perhaps we should say clearly what this code was. In simplest terms, it demanded absolute continence outside marriage and absolute faithfulness within marriage. We do not need to be told by adolescents that these demands run so contrary to human nature that only the rare individual was able to live up to them. We know that, and if it be hypocrisy to profess ideals which one does not live up to, ours is a generation of hypocrites.

The question is not, however, whether we are a generation of hypocrites. The question is whether the code to which we subscribed would, if we had honored it in the observance, have given us a richer, fuller, and happier life than might reasonably be expected from the demands and promises of the new morality. We think it would have. We think that, in the case of those who did live by it, it did.

There comes a time in life when one needs to know that there is one person whose love and understanding
Legalize Pot . . .

For several months we have been reading everything we can lay our hands on about the physiological and psychological consequences of smoking marijuana ("pot"). We started from what appears to be the fairly general assumption that pot falls into the same category with heroin as an addictive drug and LSD as a hallucinogen dangerous to physical health and productive of personality disintegration. It had been our intention to write a reasoned, carefully documented editorial urging stricter enforcement of laws forbidding its manufacture, sale, and use.

We have not been able to find any compelling arguments which would have supported such an editorial. There are, of course, arguments aplenty against taking into one's body any substance which is not positively beneficial to one's health. These arguments could be adduced against smoking, drinking, and any number of other practices which can be injurious to health but which are not prohibited by law. But the specific arguments which are usually advanced for prohibiting the manufacture, sale, and use of marijuana do not seem to stand up under careful investigation. It appears to be addictive only in the sense that tranquilizers, certain sleeping pills, and alcohol are addictive, i.e., it can become a form of escape to which the user is strongly inclined to resort; but it does not create a physiological demand for its continued consumption. Neither does the evidence so far assembled support the argument that it is a kind of half-way house to stronger and more dangerous drugs.

There seems to be some disagreement as to its hallucinogenic properties. We have so far found no responsible opinion that it is hallucinogenic in the same sense that peyote, mescaline and LSD are. Apparently the hallucinations which it is capable of producing are more comparable to those which are produced by alcohol.

Subject to correction, therefore, by anyone who is more knowledgeable in this matter than we are, we are inclined to feel that a good case could be made for repealing those laws which presently forbid the manufacture, sale, and use of pot. Essentially our argument would be this: that the dangers attendant upon its use are more than offset by the evils associated with its procurement through illegal channels. There is, we think, a valid analogy between the present illegal traffic in marijuana and the bootleg traffic in alcohol under Prohibition. Sumptuary laws designed to regulate habits which are not generally accepted as immoral are usually unenforceable and their widespread violation contributes to a general disrespect for law. We already have quite enough of that.

But Discourage Its Use

We hope that those scissors-and-paste sheets which fill their space with (copyrighted) materials from other publications will at least do us the favor of not reprinting the previous editorial without including what we are about to say in this one.

The argument for legalizing "pot" is by no means an argument for encouraging or even approving its use. We would, indeed, do everything within our power to discourage young people from experimenting with any substance which does not clearly contribute to better physical, mental, and emotional health. We accept without reservation the Christian understanding that all of life is stewardship — money, time, health, mental lucidity, the works. The fact that something won't kill you is not sufficient reason for using it; it ought to do something positively good for you.

But public policy must necessarily be a matter of balancing one evil against others. The Christian ethic can not be made normative for that majority of our population which either does not subscribe to that ethic at all or which, by reason of the weakness of the flesh, is not able to live up to it. In the area of public policy, therefore, the rule of reason must be applied. Even if one starts from the assumption that there is a clear word of God on this or that ethical or legal problem, the question still arises whether that word, if rigorously applied, might not violate equally clear words of God which are of more immediate reference to the peaceful ordering of a society.

Prohibition produced the bootlegger and syndicate crime. It is proper to ask whether — whatever one's views about the merits or evils of drinking — it is possible to prevent people from drinking. And it is equally proper to ask whether the attempt to forbid it did not create more evils than drinking itself had ever caused.

The same kinds of question might be asked about the attempt to prevent the manufacture, sale, and use of marijuana. It is a matter of fact that it is being used on a large scale, particularly by young people. It is a matter of fact that they are getting it through illegal channels at exorbitant prices. It is reasonable to assume that their flouting of this law encourages a general attitude of disrespect for the law. It is almost certain that the profits from the marijuana traffic help to support...
other and more socially dangerous enterprises of organized crime. It is within this total context that one must make a reasoned judgment as to the wisest public policy. Meanwhile, of course, we shall continue to urge our children and our students to avoid pot like the plague. And we suspect that they would be more likely to follow our advice if the elements of naughtiness and daring were removed from its use.

The Day Thou Gavest...

It was a sad day for many of us when Roy Jenkins, speaking for Her Majesty’s Government, put into words what has long been an obvious and painful fact, that Britain’s day as a super-power is ended.

Change and decay are, of course, in the order of nature and the death of empires is as inevitable as our individual deaths. But in a world where power and only power is the ultimate arbiter of things one may regret the passing of any individual or institution that has wielded great power with compassion, with restraint, and with some sense of obligation to the weak.

Britain can by no means look back without some sense of shame upon the days of her imperial glory. But as she looks back upon those days, the remarkable thing is how little there is that she need be ashamed of and how much she may rightfully be proud of. There was, for more than a century, a Pax Britannica not only among the peoples of the Empire but within those territories where British law and firmness and decency and fair play allowed millions of people, often for the first time in their histories, to enjoy secure lives in an orderly society.

No doubt the Empire would have run its course even if Britain had not been weakened by its gallant and lonely stand in two world wars. “Our little systems have their day.” But it should be recorded that the nation which envy had once labeled “perfidious Albion” laid its treasure and its very life on the line twice in this century when self-interest might well have dictated breaking her pledged word in apparently hopeless situations. One cannot have traveled through Britain without remembering the crosses set up in every village and town to memorialize the millions of dead who, with their young blood, forever blotted out the calumny of her “perfidy.”

What tomorrow holds for Britain stripped of her empire and reduced to the status of a secondclass power can not yet be predicted with any certainty. It may very well be that Britain will follow the pattern of Sweden which, once it had abandoned its dreams of empire, devoted its energies and resources to creating within its own constricted borders a good life for its own people. That is, as a matter of fact, the course which some of most thoughtful leaders are recommending. But whatever the future may bring, there is that in the British character which will ensure her a respected voice in the councils of the nations — respected all the more, perhaps, simply because it has no force behind it other than the power of reason, humaneness, and the wisdom acquired by long experience in trying to accomplish the best possible in a world where the absolute best is intrinsically impossible.

They That Would be Rich...

We have always felt about money the way Lord Acton felt about power — that it corrupts, and that large amounts of it tend to corrupt absolutely. From this it has followed, in our thinking, that those of us who have chosen the academic life need, for the sake of our own integrity, to know that we would be better off financially in some other line of work. The freedom which we enjoy should cost us something, and the cost of it should be great enough that we are not unduly tempted to make any shabby compromises of integrity for the sake of financial advantage.

No doubt teachers on all levels have been grossly underpaid in the past. Many, particularly in private and denominational schools and colleges, are still so inadequately paid that they must engage in various forms of non-professional moonlighting merely to stay solvent on a modest scale of living. But hardship at one end of the spectrum may, in the long run, pose less of a threat to the integrity of the academic community than does the affluence which, at the other end of the spectrum, tempts the mere time-server or the careerist to stay on in the academic world because he has a good thing going for him financially.

We are not suggesting that we should return to the medieval model of the academic man as a “poor clerke.” Teachers deserve and should receive a living wage. But the profession will lose a great deal — probably far more than it will gain — if the time should ever come when we can not take a certain proper pride in the fact that it is costing us something to teach. Rightly or wrongly, an academic man feels much more immune to certain forms of temptation if he knows that he can pick up his telephone and get himself a job that will pay him considerably more than he is getting as a teacher. But how much is too much? A reasonable question, and an embarrassing one, for we do not claim to have the answer. Perhaps no general answer can be given except that, in any individual case, it should be less than a man knows he can make in some other line of work. No doubt even so vague a suggestion will be read as heresy to those in our profession who see teachers as employees entitled to every penny they can bargain out of their employers. But, of course, we reject the idea that we are employees. We are, or at least have been, professional men and women who are associated together in the enterprise of increasing and diffusing knowledge. It is on that ground that we claim freedoms which no other occupational group in our society enjoys. And if we want to continue enjoying this necessary freedom we had better accept the sacrifices which are the earnest of our responsibility, seriousness, and dedication.
Observing an Amateur

By ALFRED R. LOUMAN

We tend to forget how much we know about something or how much skill we have acquired in a certain operation until we see an amateur bungling a job which to us would seem to be so easy. While observing an amateur we get a strong urge to scream or to take over. forgetting that the knowledge or skill that we have was acquired in the same slow way. I would suppose many grandparents experience this feeling when they watch the manner in which their own children take care of the grandchildren. Surely grandparents get the urge to scream. to take over. or at least they must wonder why the Lord entrusted the raising of children to rank amateurs.

This thought occurred to me recently when I was experiencing frustration from watching one of my teenage sons learn to drive a car. He enrolled in a driver training course at high school and successfully completed it. Either it was because it had been so long since I had watched anyone learn to drive. or else I had exaggerated expectations for the results of a driver training course, but I was amazed when he finished. how much more he had to learn and how little prepared he was for taking a car out alone.

Now that I have given the matter a little more thought I can understand that no course. unless it was prohibitively long. could do more than teach a person the basics of driving a car. The things remaining to be learned can only be learned by driving. because the motor skills involved cannot be taught but must be gained by experience. Further. in differing circumstances driving responses change and an experienced driver makes these adjustments automatically because he has experienced something similar at some previous time.

My son came out of the driver training course with what is called. in this state. a Driver's Permit. which meant he could drive only when accompanied by a licensed adult driver. I was the licensed adult driver who did most of the accompanying during this period.

Our experiences in that first month or two were rather harrowing. The first problem was to get control of myself so that I could easily force down screams and could keep my son from observing that my feet were applying a thousand pounds per square inch pressure on the right floorboards. Eventually I was able to control myself knowing it was a necessity if my son were ever to gain confidence as a driver.

Believe me. this experience has caused me to look back with a great deal of sympathy and gratitude toward the persons who taught me to drive. True. that was in a different era when there were fewer cars. not much traffic in our small town. and plenty of quiet country roads to practice on. But on the other end. there was no such thing as automatic transmission. no turn signals. and no driver training course.

I can faintly remember the difficulties I encountered shifting gears. and it was a month or two before I could get underway without jerking the other occupants of the car out of their seats. I can no longer recall how certain operations were performed. How. for example. at a stop street when we wanted to turn left. did we shift gears. hold the left arm out of the window as a signal. and still turn the steering wheel? But that was time ago and. as an indication of how long. the car I learned to drive was a Willys-Knight.

After several months' driving experience. my son had the skill in driving and the confidence necessary to apply for a driver's license and to take the driving test. I accompanied him to the license bureau for that purpose. While he was filling the necessary forms. I looked around for some man. perhaps a State Trooper. who would be giving the driving test. but there was no such person around.

It turned out the examiner was a woman. And she was a woman with a very flinty look. I thought the situation was hopeless if my son had the feeling this woman examiner would have driving standards similar to his mother's. for while my standards for my son's driving skill were high they were not nearly so high as his mother's. When the driving examiner returned from the test with a stony expression I thought he must have failed. but apparently his driving was satisfactory for he now owns his own license.

The problems are not over. if I understand correctly. From other parents of young drivers. I gather that I must now overcome the tendency to lie wide-eyed in bed until I hear the sound of the garage door closing on the nights he has the car. This may be. I am well aware that I have a more immediate problem and that is how to finance the increased cost of automobile insurance now that we have a teen-age driver.

March 1968
The Elementary and Secondary Education Act of 1965: The Establishment of Religion?

By THEODORE E. MESH
Attorney at Law

Introduction

The Elementary and Secondary Education Act of 1965, Public Law 89-10, 79 Stat. 27 (1965) — the statute is equally vague and confusing under any of its names. This note will attempt to explore the outer reaches of power apparently authorized by the above Act with regard to aid to parochial schools, directly or indirectly, as well as to delve into the problems of practical interpretation and to note points where a liberal interpretation of the Establishment clause of the First Amendment statute is equally confusing.

The declared purpose of the Act is "to provide financial assistance...to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means...which contribute particularly to meeting the special educational needs of educationally deprived children." Title I of the Act provides funds to help local educational agencies to set up or expand programs to meet the needs of educationally deprived children in their districts. Title II provides funds for the acquisition of library resources, textbooks, and other instructional material for the use of children in elementary and secondary schools, both public and private.

Title III provides for direct grants by the Commissioner of Education to local educational agencies to construct and operate supplementary educational centers. Title IV authorizes grants by the Commissioner to colleges and universities to set up regional centers of research in education. Title V provides funds to strengthen State educational departments. The bulk of these funds go to local school districts for use practically at their discretion so long as any proposed projects meet the basic criteria set up by the U.S. Commissioner of Education as applied by State educational agencies in charge of the distribution of these federal funds.

One of the chief controversies of the Act with regards to Church-State separation arises out of Section 205 (a)(2) of Title I. This section requires that a local educational agency, in applying for a grant under this Act, give assurance that it has made provision for special educational services and arrangements for educationally deprived children in the school district who are enrolled in private and parochial schools. The section further suggests programs "such as dual enrollment, educational radio and television, and mobile educational services and equipment." The regulations state that "the local educational agency must make provision for including special educational services and arrangements...in which such [private and parochial] children can participate." (Emphasis added.) Opponents of the Act feel that such provisions amount in effect to subsidizing of parochial schools by relieving the schools of expenses that other...
wise would or should be theirs. The regulations continue to more clearly define the possible services as including therapeutic, remedial, or welfare programs.

Dual enrollment, encouraged by the Act and the regulations, and apparently intended to be carried out solely in public school buildings, would seek to mix the students from the separate schools and to avoid classes separated by school enrollment or religious affiliation.

The issue of state establishment of religion is further raised by the promise of actual government involvement inside of parochial school buildings. Regulation 116.19(d) allows public school personnel to be made available to “other than public school facilities” to provide specialized services “not normally provided by the non-public school.” Portable equipment may be temporarily placed in private schools, title, however, remaining in a public agency. While the regulations specifically forbid that federal funds be used for paying “salaries of teachers or other employees of private schools,” the Act and regulations can and are being interpreted to allow for publicly paid teachers to teach in private schools. These teachers are apparently limited to courses not normally taught in such private schools and to courses of a remedial nature designed to meet the special needs of the educationally deprived children of the school.

Yet such “remedial” teachers could apparently include guidance counselors, school therapists, remedial reading specialists, school social workers, even physical education and music teachers, where none were otherwise available. As a result, publicly paid teachers may be provided in parochial school buildings to teach almost any new subjects not previously available. Thereby the parochial school’s curriculum is increased; its effective, if not actual, faculty is enlarged; and it becomes increasingly able to attract more and better students. Since all its students are, concededly, subject to the all-pervasive religious influence of the parochial school, and since an increased and more intelligent enrollment is to the advantage and in the interest of the indoctrinating and proselytizing purposes of the church to which the parochial school is affiliated, opponents of the Act argue that such placement of publicly paid teachers in parochial schools violates the establishment clause of the First Amendment.

The Bill’s proponents were very willing to let the local school boards decide what were “special” services and which of these special services and courses should be provided. While it is clear that the bill could not provide funds for a public school teacher to supplant a parochial school teacher, and while the list of services suggested by the committee reports is specifically qualified in the House debates as applicable only to public schools, the actual limitations on the use of these funds for parochial schools are at best minimal. With the encouragement from the committee for the local school boards to employ imaginative thinking and to use new approaches in meeting the problems of educationally deprived children and with the clear qualification that the list is not intended as setting the limits of possible programs, it seems fairly clear that Congress intended few restrictions indeed on the use of these funds by parochial schools.

The suggested list of projects in the committee reports is apt to lead local agencies to assume that any of the named projects will have the blessing of the Commissioner, regardless of the scope of application. Unless the local education agency members delve into the House debates, they are unlikely to find that the entire list was not intended to be applicable to programs conducted in non-public schools. Yet even with this limitation in mind, it is difficult to determine which of these suggested programs might be implemented in parochial schools.

No breakdown of the list into projects which are permissible or not permissible in non-public schools can be found. Clearly some of the suggested programs would be permissible. Which, if any, would not permissible is left to the local school board’s judgment. In fact, a re-reading of the House debates leaves the impression that this limitation is more apparent than real, and that the majority really intended no meaningful restriction on the use of the funds in parochial schools by their agreement to this supposed limitation. However, opponents of the Act are especially concerned with such possible programs as the use in parochial schools of publicly paid teaching personnel, with the “loaning” of equipment such as language and science laboratory facilities which test the borderline of what is or isn’t “mobile,” and with the already much litigated areas of bus transportation and textbooks and other library resources.

The use of federal funds for teaching personnel in parochial schools promises to be highly susceptible to unconstitutional application. The “list” of suggested programs includes (1) in-service training of teachers and (2) additional teaching personnel to reduce class size. Nothing in the regulations apparently forbids the former in parochial schools, while the latter could be accomplished in practice by merely supplying public school personnel to teach classes which will be designated as “remedial” and into which the slower segments of the class are placed. Under a broad interpretation of the regulations it is even conceivable that the more advanced students might be segregated for special treatment with the new teachers. Nor is there any indication that this would be contrary to the Congressional intent, for there is every indication that the Legislature wants to provide aid to religious schools, but doesn’t want to be accused of violation of the establishment clause.

A severe strain is placed on the so-called “child benefit” theory when science and language laboratory
equipment, large kitchen appliances, and other "equipment" are placed in parochial schools. While all of these may be within the "portable" or "mobile" definition of the regulations, and while all are only "loaned" to the parochial school, they may in actual practice be left there for the useful life of the equipment, and while undoubtedly such equipment will benefit the pupils in attendance there, so will better facilities, more and better-trained teachers, and a host of other provisions. Yet the question must be answered whether new equipment, more and better-trained teachers, better library facilities benefit only the pupils or also the school.

Obviously all of these above-suggested provisions benefit both the student and the school. It is conceded that a school is benefited by equipment, library resources, and additional teachers at its disposal, though these provisions be technically "loaned" or a "temporary" basis, when in fact it is the intent of the Act to provide continuing benefits of this nature, likely to be withdrawn only in case of abuse.

However, the mere fact that a realistic view of possible interpretation of the Federal Elementary and Secondary Education Act of 1965 shows that both parochial students and parochial schools may benefit from its application to them does not necessitate an immediate conclusion of unconstitutionality. Some benefits, such as police and fire protection, are provided to everyone, and any direct benefit accruing to a religious group is only incidental to the overall purpose of protection for the general public. This, carried a little further, is the whole basis of the child benefit theory. The problem, then, is to determine where to draw the line between general welfare benefits (such as police and fire protection) and direct aid to religion (such as direct subsidy of church worship services). Also the right of freedom of religion must be considered. Somehow boundaries must be drawn for these three interwoven and oft-conflicting rights and purposes.

Thus the next task is to undertake a somewhat speculative interpretation of Supreme Court decisions applicable to this Act in an effort to determine if and where the preceding suggested interpretations of the Act may infringe on First Amendment limitations on aid to religion.

**Supreme Court Guidelines — Are There Any?**

The difficulty of predicting the outcome of future Supreme Court decisions in the area of church and state conflicts can, perhaps, be better understood by attempting to analyze several apparently conflicting sentences from the same paragraph of Mr. Justice Douglas's majority opinion in Zorach v. Clauson.44

"We are a religious people whose institutions presuppose a Supreme Being." "When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions." "Government may not finance religious groups nor undertake religious instruction nor blend secular and religious education nor use secular institutions to force one or some religion on any person." "The government must be neutral when it comes to competition between sects."

The first two sentences imply a principle of accommodation.45 The third sentence espouses one of strict separation,46 whereas the last sentence preaches a concept a neutrality.47 The prohibition on the blending of secular and religious education in Zorach clearly forbids the giving of religious instruction in the regular public school program, but whether aid of a secular nature, if presented by the government in a parochial school, would be a prohibited "blending" is uncertain.

Several cases involving financial assistance of church schools by government and other questions of the establishment clause must be examined to determine the current meaning of Jefferson's "wall of separation" between church and state in the area of financial assistance.

The earliest case in which the question arose was Cochran v. Louisiana State Board of Education.49 There the Court sustained a state statute permitting the use of public funds to purchase textbooks for loan to all students, whether attending public or private schools. The Court held that since the books, which were non-sectarian, were for the use of the children and not for the school, and since the parochial school did not actually receive any funds, the purpose of the statute was public and the legislation was constitutional. This was the first case developing the child-benefit theory.50

More significant about the case, however, is the fact that that attack on the statute was based upon the due process clause of the Fourteenth Amendment, as taxing private property and using the proceeds for a private purpose. The establishment clause was not even considered since it had not yet been held applicable to states through the Fourteenth Amendment.51 Consequently Cochran is distinguishable today where the attack is based on the establishment clause.

The most current case directly in point is Everson v. Board of Education.52 In Everson the majority, at least in the dissent's view, proves in fact the unconstitutionality of the aid granted and then reverses itself and concludes that the aid is constitutional.53 This case, involving reimbursement by the state to parents for money paid for bus transportation of their children to school, public or parochial, is the first case to consider the question of financial establishment of parochial schools where the attack is grounded on the establishment clause. Justice Black, writing for the majority, traces the historical background lead-
ing to the adoption of the First Amendment. He sees the establishment clause as a safeguard of individual integrity against persecution and taxation for another’s cause. He finds the objectives of the establishment clause to be the same as those of the famous “Virginia Bill of Religious Liberty,” which took an extremely strict and absolute view of church and state separation. Justice Black continues with a definition of the establishment clause which is so strict that a casual reader reading it out of context might well conclude that church and state are as opposite as matter and anti-matter, that the very slightest contact between the two, the mere mention of the affairs of the one by the other, would violate the First Amendment.

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

Taken alone at face value, Justice Black’s definition would seem to deny every and any contact between church and state, be it police and fire protection for church property or chaplains in the armed services. However, Justice Black continues by modifying his apparently hopelessly strict stance with an exception which he designates “public welfare legislation.” The establishment clause cannot exclude any individual, because of his particular faith or his lack of any faith, from receiving the benefits of public welfare legislation. This public welfare legislation, which Justice Black in Everson finds to pass the test of constitutionality, is legislation which provides services which are “so separate and so indisputably marked off from the religious function. The Black opinion would seem to allow welfare expenditures which incidentally benefit parochial schools where such payments were directed toward all children regardless of religion or school enrollment.

On the other hand, Justice Jackson in his dissent in Everson seems to hold for a very strict separation principle, finding aid to a church school indistinguishable from aid to the Church itself. Justice Rutledge clearly states what Justice Jackson implies, finding that the establishment clause “forbids state support, financial or other, of religion in any guise, form or degree. It outlaws all use of public funds for religious purposes.” Boiled down, five justices feel that the bus transportation is primarily for a welfare purpose and four feel that it is primarily for a religious purpose.

The case of Illinois ex rel McCollum v. Board of Education gives us the only clear indication of what is beyond the limits of the First Amendment establishment clause. Eight of the nine justices (Reed dissenting) agree for various reasons that public classrooms cannot be turned over to religious groups during school hours for sectarian training with attendance records kept for attendance enforcement. Here, unlike in the Federal Act, the question is one of religion in the public schools, not public aid to parochial schools. The majority of recent cases are of this nature, which, though not directly in point, may shed some tangential light on the Act.

Justice Black, writing for the Court in McCollum, found that the First Amendment prohibits impartial government assistance to all religions. McCollum thus seems to require neutrality as between religion and non-religion. Justice Frankfurter’s concurring opinion, however, places an emphasis upon the pressure imposed upon the non-attending children by the circumstances as tending to coerce attendance. Justice Reed’s dissent, wherein he seeks to find an answer to his question of what portion of the practices were unconstitutional, leaves the reader less than certain as to whether the decision is based upon aid of a financial nature or aid of a coercive nature.

Zorach v. Clauson involves nearly the same fact situation as McCollum. In Zorach, however, the pupils are “released” to attend religious instruction in church facilities, while those not released remain in public classrooms for a minimal amount of instruction. Justice Douglas, writing for the majority, distinguishes Zorach from Mc Collum on the basis of the use of public school classrooms and expenditures of public funds for religious training in the latter case. Justice Douglas then continues to espouse a philosophy of accommodation interspersed with attempts to maintain some sort of separation.

The dissenters in Zorach also show differing opinions as to the meaning of the establishment clause. Justice Black, who wrote the majority opinions in both Everson and McCollum, reaffirms his philosophy
of strict separation, denying that the First Amendment allows even the slightest entrance by the state into the field of religious affairs. He cannot agree that there is a distinguishing difference in Zorach, stating that “the McCollum decision would have been the same if the religion classes had not been held in the school buildings.”67 Justice Black feels that the circumstances of Zorach, like those of McCollum, violate the establishment clause in these particulars: “the school authorities release some of the children on the condition that they attend the religious classes, get reports on whether they attend, and hold the other children in the school building until the religious hour is over.”68 Thus the state “helps provide pupils through the use of the State’s compulsory public school machinery.”69 The channeling of pupils into religious classrooms by use of compulsory school machinery is the damaging factor in McCollum in Justice Black’s viewpoint. The situation in Zorach involves the same process.

Justice Frankfurter, in near agreement with Justice Black, finds the constitutional violation in the failure to release all the pupils, including those not attending religious training. It is this compulsory school attendance for those not released that raises the constitutional issue.70

While the Court in Zorach claims to follow McCollum, both the dissenters and certain authorities see little left to the McCollum decision after Zorach.71

Zorach and McCollum are instructive only insofar as they show the Court’s willingness to allow a government to lend support to religious instruction. Since the government was permitted in Zorach to advance a religious end, perhaps indirect aid to religion to advance a secular end, under the Act, will also be permitted. However, the issue in these two cases involved public school cooperation for religious instruction, whereas the Act involves direct financial aid to pupils in parochial schools. “Cooperation with” is quite different from “financial aid to.”

Several other cases deserve brief comment. Bradfield v. Roberts72 early established that grants are not unconstitutional merely because the management of the grantees is connected with a religious order. In Bradfield, a congressional appropriation to a hospital operated by Roman Catholics was upheld against the challenge of establishment where it was found that the hospital was of a secular nature and where there was no discrimination based on religious beliefs in admitting patients.

In McGowan v. Maryland73 the Court found that the current primary purpose of the Maryland Sunday closing law was to establish a uniform day of rest. The Court determined that although the law was originally enacted to serve a religious purpose, and although religions which consider Sunday to be their day of rest were still being incidentally benefited, the purpose of the law was primarily secular and therefore not invalid under the establishment clause challenge.

In Engle v. Vitale74 the Court found that it was not the business of the New York Board of Regents to compose a compulsory non-denominational prayer for use in the public school system. The Court invalidated the recital of the prayer as an impermissible fusion of government with religion.

These three preceding cases touch on issues similar to, but not the same as, those raised by the Federal Act, and thus are instructive only as shedding a little light on the setting and background of the current controversy.

Abington School District v. Schempp75 is instructive for proposing a new possible test under the establishment clause. Here the Court invalidated a law requiring the reading in the public schools of Bible verses without comment at the start of each school day. Justice Clark, writing for the majority, set out what is sometimes called the “purpose and primary effect” test:

What are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibitions religion.76

However, before wholeheartedly accepting this new test, we should note a serious weakness. Although the Court in Schempp cites Zorach with approval,77 Zorach could not stand up to this new test. Clearly the purpose and primary effect in Zorach was the advancement of religion, nothing more or less.

The most recent Supreme Court action involves a denial of certiorari in a cross appeal from a Maryland Supreme Court decision.79 in Horace Mann League of the United States of America, Inc. v. Board of Public Works,80 the Maryland Court tangled with the problem of state grants to church-related colleges, and, by a 4-3 decision, invalidated three of the four grants. The college receiving the one grant allowed to stand was found not to be sufficiently sectarian to disqualify it.81

In Horace Mann the Maryland Court specifically finds that the grants do not violate the Maryland Declaration of Rights82 and bases the decision squarely on the establishment clause of the First Amendment.

The apparent test used by the court is taken from another recent Maryland case.83 If the primary purpose [as contradistinguished from an incidental one] of the state action is to promote religion, that action is in violation of the Amendment, but if [the operative effect of] a statute furthers both secular and religious ends, an examination of the means used is necessary to determine whether the state could reasonably have attained the
secular end by means which do not further the pro-
motion of religion.

Thus the Maryland Court adopts the “purpose and primary effect” test of Schempp but goes further with it. As that court uses it, neither the purpose nor the primary effect may advance or inhibit religion, and if the purpose and the primary effect qualify, but the statute has an incidental or secondary effect which promotes religion, then the statute will be valid only if the state could not accomplish its secular purposes by some other reasonable means which would not have the incidental beneficial effect on religion.

If this is the test applied by the Supreme Court, much of the Act, or at least many programs set up under it, may fail, since it can be argued that the govern-
ment could accomplish its objects by grants solely to and for public schools and colleges with after-school, Saturday, and summer programs open to non-public school children.

No Establishment of Religion — Three Theories

The “establishment of religion” clause of the First Amendment has been interpreted to support very divergent theories. Three widely considered interpretations of its “true” meaning may be summarized by these three principles — Strict Separation, Neutrality, and Accommodation. In practice each of these three divisions of thought is subject to wide interpretation and consequently a near-complete spectrum of opinion can be found. However, even without trying to set rigid boundaries, an adequate understanding of the problem can be acquired by briefly investigating these three principles to determine their basic tenets.84

The theory espousing strict separation, basing its roots in Jefferson’s so-called “wall of separation” doctrine,85 finds adequate expression in both the majority and the dissenting opinions in Everson. Justice Black’s now famous enunciation of the meaning of the “establishment of religion” clause66 leaves lit-
tle doubt that government can do nothing which would in any way involve governmental support of religion or would be favorable to the propagation of religious interests.

Justice Rutledge, in his dissenting opinion, seems to agree with Black’s exposition if not his conclusion. “The prohibition broadly forbids state support, financial or other, of religion in any guise, form or degree. It outlaws all use of public funds for religious pur-
poses.”87 But Justice Rutledge interprets the bus transpor-
tation there in question as violative of the establish-
ment clause. Whereas Justice Black justifies it as a “general welfare” expenditure, Justice Rutledge believes that the state is not required by the concept of neutrality to provide bus transportation to parochial children even though such is provided to children attending public schools.88 Justice Rutledge sees the parochial child’s right to attend public school as unimpaired, and the conscious choice of the child (or rather his parents) prevents his acceptance of this benefit.89

Professor Kauper feels that the key proposition of the strict separation theory of the establishment clause is that it prohibits aid to all religions.90 Thus not only is the state forbidden to establish one church, or to give preferential treatment to several churches, but the state is prohibited from supporting all churches or from supporting religion or religious activities in general as against non-religion.91

If the Court chooses to adopt this theory in exam-
ining the Act, a good deal of pruning is to be forecast. Title IV,92 for example, allows for direct grants to public and other non-profit universities and colleges for use in research in the field of education. Thus direct financial aid could go to church-affiliated institu-
tions. This could not be permitted under the strict separation theory.93 At least that portion of Title IV would be invalidated. Title I does not enumerate any required programs, so any attack on it will have to be directed at the local application of the title. How-
ever, such suggested projects as dual enrollment, the use of public personnel in parochial schools, and mobile equipment in parochial schools would almost certainly violate the establishment clause as viewed by the strict separation theory. Title II would provide textbooks, teaching materials, and library resources. To justify textbooks, it must be determined that they are a welfare benefit to the child and not an educa-
tional expense of the school. Where the child was pre-
viously providing his own texts, such an argument might succeed in convincing the strict separationists. Teaching materials and library books are a different matter. Clearly the school must provide the teacher with instructional materials; and no child is required to supply his own library. The strict separation theory could never be applied without a finding that instruc-
tional materials were an expense of the school and there-
fore their provision via the Act unconstitutional; nor would that theory believe that the use and availability of library resources and books would not accrue to the benefit of the school. Consequently this too would fail. Section 303 (b)(5) of Title III94 allows funds to be used to make special equipment and personnel available on a temporary basis to public and other non-profit schools. This sounds like direct aid to the school itself and would therefore be invalidated.95 At least these areas will be effected if a strict separa-
tion theory is adopted.

A second theory, encompassing a broad range of actual opinion, may be referred to generally as the neutrality theory. Justice Clark, in writing for the major-
ity in the Schempp case,95 finds that the Consti-
tution requires a "wholesome neutrality." His test, the "purpose and primary effect" test, requires that the main purpose and effect of the statute be religiously neutral. Thus if the purpose is secular and the enactment does not have the "primary effect" of advancing or inhibiting religion, then incidental effect upon religion will not invalidate the legislation. Thus what is forbidden is not the enactment of legislation which may benefit religion in some manner, but rather the use of the religious factor as a basis for classification combined with an actual purpose to or practical effect of either advancing or inhibiting religion. Professor Kurland of the University of Chicago adopts a similar analysis. He, however, finds the establishment clause and the freedom of religion clause to be a single, indivisible precept.

[T]he proper construction of the religion clauses of the first amendment is that the freedom and separation clauses should be read as a single precept that government cannot utilize religion as a standard for action or inaction because these clauses prohibit classification in terms of religion either to confer a benefit or to impose a burden.

Consequently, under Professor Kurland's view, the establishment clause precludes direct aid to organized religion; but aid which is directed toward a legitimate secular purpose and incidentally extends benefits to certain religious activities within the broader secular scope is condoned.

Professor Katz of the University of Wisconsin takes a different view of neutrality, which requires not only neutrality between various sects, but also neutrality between believers and non-believers. However, his view of neutrality may require active support of religion at times in order to avoid putting religion at a disadvantage: such instances would occur where the free exercise clause and the establishment clause are in apparent conflict and where failure to aid religion might prevent its free exercise. Examples of this would include the aid extended to religion by the government by permitting chaplains in prisons and in the armed forces.

Finally the establishment clause has been held in the Zorach case to require a neutrality as between religious groups. Such a so-called neutrality, which would apparently allow for active support of religion as against non-religion, is really a type of accommodation.

If neutrality is the keynote of a Supreme Court decision involving the Act, if neither religion or non-religion can be used as a standard of classification in conferring a benefit, and if neutrality is to be required as between believers and non-believers, what will be the effect on the Act? Clearly the main purpose and effect are secular for the Act as a whole. Under this theory then, the only attacks that can be made will arise where the actual effect of some section of the legislation is to promote religion or if religion is found to be a basis for classification. Title IV must remain suspect even under this theory. It will at least be argued that a research grant to a sectarian college is primarily beneficial to the college, though it also fosters a secular purpose, and that anything directly beneficial to a church college is also beneficial to the church. Dual enrollment and most other programs under Title I would be acceptable. Direct use of publicly-paid teachers in parochial schools would be a borderline question, it being unclear whether this would be exceeding mere neutrality and primarily aiding the parochial schools. Title II would likely pass on the theory that the aid was directed toward the children, and only incidentally toward the school. Title III could still be challenged, at least in part, on the theory that religion was being used as a basis for classification. The logic might run something like this: Title III gives aid only to public and other non-profit schools; the only group of non-public, non-profit schools are parochial schools (as a practical matter); therefore, aid is given to public and parochial schools and denied to all others; thus religious schools are singled out and classified for favored treatment; this violates the prohibition on the use of religion as a basis for classification; therefore, the enactment is invalid.

The third theory of interpretation of the establishment clause, advocated by Professor Kauper of the University of Michigan, is the accommodation theory. This theory is perhaps best exemplified by the Zorach case, Justice Douglas writing for the majority. Whether called accommodation or liberal neutrality, this approach clearly allows much greater interaction between government and religion than do the previous approaches. Justice Douglas in Zorach requires a complete separation of church and state insofar as interference with the actual "free exercise" of religion and the actual "establishment" of religion are concerned. However, such First Amendment coverage is limited to these two nebulous areas, and once outside the scope of its coverage, the First Amendment no longer forbids interaction of church and state.

The problem, of course, is in ascertaining the exact boundaries of coverage. However, clearly outside the scope of coverage are such activities as police and fire protection for religious groups, prayers in legislative halls and in courts, the proclamation of Thanksgiving Day as a holiday, courtroom oaths which include the phrase "So help me God," and the words "In God We Trust" on our money. Further, the First Amendment apparently does not prevent certain other activities involving positive cooperation between church and state, for when the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public services to their spiritual needs. To
hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

Justice Douglas then continues by requiring government neutrality in competition between sects, but allows government to "close its doors or suspend its operations" to accommodate those desiring the opportunity for religious worship or instruction. Professor Kauper finds this accommodation theory to be the pragmatic approach to the issue. Via this route justification can be found for such historical religious practices in public life as military chaplains, tax exemption for religious property, prayers in legislative halls and at public occasions. Also this theory provides a useful means of relating the free exercise clause to the establishment clause. Since each is an independent limitation which may conflict with the other, the no-establishment principle may not be used to jeopardize the free exercise requirement. Consequently, preferred treatment may be a requirement in certain instances. Thus special exemptions on a religious basis from general regulatory and tax laws may be justified. In contrast, the strict separation theory, which forbids any form of aid, and the strict neutrality theory, which precludes classification on the basis of the religious factor, cannot incorporate such privileges and, if they attempt to explain these benefits at all, must dismiss them as unconstitutional.

The accommodation theory, if applied to the Act, would go a long way towards accepting the Act as passed. Titles I and II would probably pass the establishment test as proper and necessary to maintain the balance between public and parochial schools and to avoid placing the parochial schools at a serious disadvantage in the competition for students. Under this theory it might also be argued that to fail to give aid to parochial schools would in effect abridge the free exercise of religion by preventing students from getting both a religious and a good secular education (inasmuch as heavy taxes for public schools would prevent parochial parents from voluntarily providing equally good facilities for the parochial school students). Title III would also pass. Since the accommodation theory would require neutrality between sects, but would not require neutrality between religion and non-religion, it would not be inconsistent with that theory to give slightly favored treatment to religious schools over non-public, non-religious schools. Only Title IV might cause some uncertainty under the accommodation theory, and in the end would probably pass. The only question might arise if in practice sectarian colleges were given preferential treatment in the distribution of grants, even over public colleges. Only this would be interpreted as doing more than merely maintaining the balance between public and church schools, and would therefore get close scrutiny. However, the accommodation theory, if applied by the Supreme Court would, in fact, permit very near total acceptance of the Federal Elementary and Secondary Education Act of 1965 as constitutional.

Under the accommodation theory it might be argued that since children have a constitutionally protected right to attend a school of their choice, and since church schools satisfy the requirements of compulsory education, the giving of aid to public schools while denying it to church schools limits or denies the free exercise of religion, either by requiring parochial parents to choose between sending their children to non-Christian public schools and poorly equipped and staffed parochial schools (since high taxes for public schools prevent them from providing sufficient funds for their parochial schools) or else by requiring the parochial parents to finance, at great hardship, two systems of education, only one of which is benefiting them.

The answer to this argument is that members of religious groups, like all other citizens, are taxed to support only one school system. When they, for religious reasons, elect to support privately administered church schools, they do so voluntarily and without compulsion. The fact that they no longer benefit from the public school system is of their own choosing, for it remains open and available for their use. They can no more complain about financing it than can a bachelor complain about paying for it merely because he has no children to benefit from it. Can a pacifist refuse to pay taxes which support a war, or can a Christian Scientist object to being taxed for the support of public hospitals?

On the other hand, if financial aid were given to parochial schools, then the general public would be taxed to support two systems of schools, one of which they would have no administrative control over and to which their children could be denied admission.

No decision of any court has ever given parents who exercise their right to send their children to parochial schools a claim on public tax funds to subsidize that private right not to use the free public schools. No child is barred from a public school because of his religion. However, parents who decide to send their children to parochial schools do make a discriminating choice on religious grounds as to the type of school which they want their children to attend.

Justice Rutledge clearly states in Everson, Of course discrimination in the legal sense does not exist. The child attending the religious school has the same right as any other attending the public school. But he foregoes exercising it because the same guaranty which assures this freedom forbids the public school or any agency of the state to give or aid him in securing the religious instruction he seeks.

Can the parochial parent justly claim that his school
has a right to public tax funds lest he be denied the free exercise of religion? If this can be done by Catholics and Lutherans, cannot Black Muslims, Buddhists, Jehovah's Witnesses, members of every other religion, and also atheists and agnostics demand subsidy for supporting old or for establishing new schools in which the tenets of each's particular faith or non-faith is given adequate expression?

But the state, in its wisdom, has chosen to establish one free public school system available to all. Any group that chooses to support a separate school system may do so, but in declining to use the public schools, they voluntarily elect to support a separate system. They have no right and no claim to any subsidization from public funds. They cannot force others to support their clause. The free exercise clause allows them to choose a separate system, but it does not give them the right to demand public support for their system. This burden they have freely chosen and they must bear it by themselves.

Conclusion

The three aforementioned theories have been used in various instances by the Court in reaching its desired results. None of the theories have been repudiated by the Court at any time. Further, none of the cited cases have been overruled and all are still valid law, each having been cited in numerous subsequent cases with approval. Also of interest is the fact that in deciding these cases, the justices generally remain in fairly close agreement in a case as to the theory to be used, but differ only as to the meaning and interpretation of the theory in that specific factual context. Consequently, this leaves anything but certainty in predicting the future action of the Court, either as to the theory to be used or as to how the theory will be applied.

If and when the Elementary and Secondary Education Act of 1965 is challenged before the Supreme Court, it seems unlikely that the Court will find the Act itself to be unconstitutional, but rather it will examine the application of the Act in each factual context to determine the narrower issue of constitutional application. This much, however, seems relatively clear; if a strict separationist approach is taken by the Court, at least portions or specific applications of the first four titles of the Act could be declared unconstitutional. If, on the other extreme, the pragmatic accommodation approach is used, nearly all of the Act will pass the judicial scrutiny. However, this writer believes that the wide discretion left to local educational agencies by the Act will give rise to such a wide range of interpretation that, whichever theory the Court applies, there are almost certain to be both constitutional and unconstitutional applications of the Act. Certainly, if litigation reaches the Supreme Court, a new, perhaps totally different, and hopefully more lucid interpretation of the "establishment of religion" clause will be forthcoming.

Footnotes

1. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances. U.S. Const. amend. I.
10. $1.06 billion out of $1.33 billion for the entire Act for fiscal 1966. See also Note 41 Ind. L. J. 302 (1966), for a discussion of individual sections of the Act.
13. 30 Fed. Reg. 11813 Section 116.18(g) (1965). See also Section 116.19(d) forbidding the use of Title I funds for the construction of facilities for private schools.
14. For a suggested, but not exclusive, list of possible programs under Title I, see H.R. Rep. No. 146, 89th Cong., 1st Sess. 5-7 (1965); 1965 U.S. Code, Congressional and Administrative News 443-444.
16. 30 Fed. Reg. 11813 Section 116.19 (1965). The regulations are implicitly authorized by the section, but listed in 30 Fed. Reg. 11813 Section 116.20(a) and 79 Stat. 57, Title VI Section 603(a). See also Title I Section 204(a), Title II Section 204(a), Title III Section 304(a), and Title V Section 502(b)(2). See note 21 infra.
17. See note 15 supra.
19. 111 Cong. Rec. 5744 (1965) (Mr. Perkins' answer to question by Mr. Forbstein).
20. See note 18 supra.
21. 30 Fed. Reg. 11813 Section 116.19(d) (1965). See note 16 supra for the authority of the regulations. The writer does not intend to indicate that the regulations exceed the authority of the Act, for the regulations are taken almost verbatim from the Act, except for the clarification of the meaning of the words "equipment" and "private schools must be portable. Note also that books and periodicals may be provided to parochial schools under this definition of equipment.
23. See notes 21 and 22 supra.
24. See 111 Cong. Rec. 5744-46 (1965) (discussion between Mr. Carey and Mr. Id. at 5979, 6097 (remarks of Mr. Thompson). See Letter From Anthony Thrope to Mike Nadr, Deputy Attorney General of Indiana, to Richard Firestone, Speaker of the House of Representatives of Indiana, May 9, 1966. This letter finds the prime test to be the child benefit theory and foresees no violation of federal or Indiana laws in assigning "special service personnel," paid from public funds to non-public schools, either on a part time or a full time basis so long as the services provided are of a therapeutic, health, remedial or welfare nature and are not normally provided by the school.
26. 111 Cong. Rec. 5755, 5979 (1965) (remarks of Mr. Thompson); 111 Cong. Rec. 5986-87 (1965) (remarks of Mr. Goodsell).
27. 111 Cong. Rec. 5745-46 (1965) (dialog among Mr. Cahill, Mr. Carey, and Mr. Perkins).
28. 111 Cong. Rec. 5746 (1965) (remarks of Mr. Perkins); 111 Cong. Rec. 5747 (1965) (dialog between Mr. Carey and Mr. Goodsell); 111 Cong. Rec. 5749-50 (1965) (remarks of Mr. Brademas).
30. The list of services is a good listing of over forty possible programs for educationally deprived children on which the committee received testo.
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many. No blanket approval of the list is given, but there is a strong implica-
tion that under the proper circumstances each suggested program could
be used. However, the committee report encourages imaginative thinking
on the part of the local school board, and it is clear that the list is intended
as merely suggestive and not as restrictive. The list, however, is at least
authoritative as legislative history, as it is referred to frequently in the de-
bates as a list of apparently approved programs.

32. See note 14 supra and accompanying text.
33. 111 Cong. Rec. 5754-55 (1965) (remarks of Mr. Powell and Mr. Perkins).
34. See note 14 supra and accompanying text.
35. Ibid.
36. Ibid.
37. See note 33 supra and accompanying text.
38. Ibid. But see Taylor, Citizens for Educational Freedom, 32 infra.

47. See note 30 supra and accompanying text.
46. Ibid. But see Taylor, Citizens for Educational Freedom, 32 infra.

58. Ibid.
59. Ibid.
60. Ibid. at 320-23.
cases see Two Guys From Harrison-Allentown v. McGinley, 366 U. S. 582
66. 374 U.S. 203 at 222.
67. Id. at 213.
68. For further discussion and criticism of this text, see Note, 41 Ind.L.J. 302
at 324-26.
70. Ibid.
71. The Maryland decision gives an interesting history of the background of the
establishment clause as well as the Supreme Court cases decided under it.
Some of the "tests" are also reviewed by the majority, and yet still another
test is developed and used. While, of course, the Supreme Court's refusal
to consider the case does not justify a conclusion that the new test will be
adopted, yet the logic and the compromise nature of the test make it worthy
of consideration.
72. 220 A.2d 51 at 73-76.
74. See Kauper, Religion and the Constitution 59-79 (1964) for a more thorough
analysis of these theories.
75. See note 48 supra.
76. See note 55 supra and accompanying text.
77. 330 U.S. 1, Rulledge, J. dissenting at 33.
78. Id. at 56.
79. Id. at 58.
80. Kauper, op. cit. supra note 70 at 61.
81. Id. at 59-64. See generally Katz, Religion and American Constitutions 24-28
(1964). For an active advocacy of strict separation, see various publications
of Protestants and Other Americans United, e.g., 19 Church & State (1966)
and pamphlets "A Trickling Stream," "The Child-Benefit Theory: A Legal
Fiction," "Step by Step Down the Stairs to Subsidy."
92. 61 U.S. 132 (1859).
93. 79 U. S. 79-82 (1877).
94. See note 76 supra and accompanying text.
95. See note 76 and accompanying text.
96. 330 U.S. 1, Jackson, dissenting at 24.
97. See note 76 and accompanying text.
98. 330 U.S. 1, Jackson, dissenting at 24.
99. 330 U.S. 1, Jackson, dissenting at 24.
99. 333 U.S. 203, Frankfurter, J., concurring at 212; 333 U.S. 203, Jackson,
J. concurring at 227.
100. 333 U.S. 203, Frankfurter, J., concurring at 227.
101. 333 U.S. 203, Reed, J. dissenting at 256.
103. See note 44 supra and accompanying text.
104. 343 U.S. at 314.
105. Id. at 312-14.
106. Id. at 312-13.
107. Id. at 313-14.
108. Kauper, op. cit. supra note 84 at 70.
109. See note 102 supra and accompanying text.
110. See generally Kauper, Religion and the Constitution 67-71, 80-119 (1964)
for a more complete analysis of the theory of accommodation and its
application.
111. 330 U.S. 1, Rulledge, J. dissenting at 58.
Repenting and Rejoicing

By ALVIN P. YOUNG
Instructor in Theology
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Have mercy upon me, O God, according to thy steadfast love; according to thy abundant mercy blot out my transgressions.
Wash me thoroughly from my iniquity, and cleanse me from my sin!...
Create in me a clean heart, O God, and put a new and right spirit within me.
Restore to me the joy of thy salvation, and uphold me with a willing spirit. ...
O Lord, open thou my lips, and my mouth shall show forth thy praise.
—Psalm 51: 1, 2; 10-12; 15

“Repent, for the Kingdom of heaven is near.” And the church year begins. This is the call of preparation for the coming of the Lord Jesus in the Advent season. It is also the call of preparation in the Lenten season. Ash Wednesday signalled the start of the Lenten season. Preparation is the keynote of Lent — preparation for the celebration of the Resurrection of our Lord and our own rising with Christ to the new life.

The preparation of Lent is an examination of our lives to discover attitudes, practices, and habits that are incongruous with the new life into which we have been born by Holy Baptism. Lent is a time of penitence, of putting out of our lives all that remains of the old life or has crept in once more. But the preparation of the Lenten season is not focused only on Lent. What is given up in Lent is a preparation for the new life in Christ and is therefore given up permanently. The training, practice, and discipline which we undertake during Lent are to be habitual and permanent in the new life resurrected in us. To think about Lenten preparation in terms of giving up smoking or drinking or in terms of other dietary regulations when a person has no intention of making this discipline a permanent part of his new life is to caricature the real thing. It would be better to indulge oneself completely than to undergo such shallow preparation for the new life in Christ.

Anything that is important is worth preparing for. The resurrection of Christ in us is crucial for life. And our preparation for this celebration ought to reflect the centrality of this event.

But the importance of our preparation does not center only in remembering a past event. Lenten preparation is a matter of making the events of the past alive for us now. We are always preparing ourselves for the new life of Christ in us right now. Our celebration of the life and ministry of Jesus is a matter of making that life a part of our lives.

Our Lenten preparation, therefore, centers in repentance in its fullest meaning. Repentance is not a matter of tabulating transgressions so that no sin is overlooked. It is not working oneself into an emotional state of sorrow and despair. In fact repentance will miss the point if it dwells too long on misdeeds and the sinner. Repentance is designed to pass its attention quickly from the qualities (or lack of them) of the sinner to the mercy of God. Too much emphasis upon our faults may begin to cloud the Father's favor. A constant harping upon our weaknesses may eventually conceal the real strength of the love and grace of God. An overemphasis on our own failings may even force us to overlook the Father's forgiveness.

And so Psalm 51 begins, “Have mercy upon me. O God, according to thy steadfast love.” The man of God comes before the Almighty as a beggar for mercy. He brings nothing, no claim whatsoever. He knows nothing really qualifies him for the mercy of God except that he needs it and seeks it. Repentance finally comes down to a man’s admission of his complete helplessness in creating any new life on his own terms. And every attempt that he might make to establish and secure a new life for himself turns out to be little more than a tidied-up replica of his old life.

But repentance viewed as an admission of helplessness and as total submission to God’s mercy is not really very attractive to us. If it were, we probably would not be human. Man longs to hold out for just a little credit for himself. He wants to offer at least some bit of goodness to God in exchange for his life. But he finds that he has nothing to offer. And unless a man makes the pretense that he does have something to offer, he usually forgets the whole thing.

Repentance is not very attractive because it seems so dehumanizing and depersonalizing. It puts a man out on a limb where he must entrust himself solely to the mercy of God. Therefore man has devised ways of avoiding repentance. He might just blatantly refuse to take part in repentance at all. He might claim it has no value for mature people who know how to stand on their own. Or a man might resist repenting by blithely going through
the motions of repentance because it is that point in the worship service or church year or because it is the expected thing to do.

We resist repentance, furthermore, because it makes us feel isolated and alone. We have lost the meaning of community and the Body of Christ in our lives. Christians have largely neglected to support the sinner who stands helplessly before God. We have tended to leave the sinner alone in his grief. We might even use his grief to bolster our own self-confidence.

But repentance is not meant to isolate a man. He is not in this alone. Not only should the Christian community be involved in supporting one another in repentance: God himself is also deeply involved in this practice of repentance.

Notice the imperatives in Psalm 51. This ancient worshipper is confident that God Himself had a commitment in this matter. And so he calls upon God to “have mercy,” “wash me,” “cleanse me,” “Create in me a clean heart,” “put a new spirit in me,” “restore to me joy,” and “open my lips.”

God himself is the main actor in our repentance. And finally it is His mercy and steadfast love which prompt us to repentance anyway. As St. Paul puts it in Romans 2:4, “Do you not know that God’s kindness is meant to lead you to repentance?” Notice that God’s people are never required to stay in the depths. Our heavenly Father does not take any pleasure in seeing His children squirm under His oppressive judgment. Almighty God has not made the repentant state a permanent abode for His people. Although repentance must be repeated daily, if not hourly, in life, it is still only a temporary situation. Repentance is not an end in itself, but a means to the end of new life.

Therefore in the Scripture the word repentance is usually accompanied by some term or expression emphasizing that according to the will of God repentance always issues in salvation (2 Corinthians 7:10). Repentance and conversion are linked together in Acts 3:19, just as are repentance and forgiveness in St. Luke 14:3, repentance and faith in Acts 20:21, repentance and knowledge of the truth in 2 Timothy 2:25, repentance and healing in St. Mark 6:12,13, repentance and new life in Acts 11:18.

Therefore repentance is not meant to bring with it moods of deep depression. It is not the funeral dirge of piety. But God is with us bringing mercy and new life into repentance. Repentance ought to bring rejoicing over God’s grace rather than depression over our guilt. The Psalmist said it this way: “Restore to me the joy of my salvation.” He continues, “O Lord, open thou my lips, and my mouth shall show forth thy praise.”

On Second Thought

You remember the hymn, “God loves me dearly, planned my salvation.” We used to sing it heartily and sincerely. But the church does learn and change. thank God. We are realizing that the concept of individual salvation for the sake of an individual’s escape from hell to heaven does not fit with the facts of Jesus Christ. We call that “the protestant heresy.” We talk rather of being saved in community, of many being made one in the church, the people of God.

When you put together John 17 and 2 Corinthians 5, another even larger concept of salvation emerges. God has reconciled the world to Himself. All men are redeemed in Jesus Christ. Salvation is accomplished for everyone. God, and not men, will say what heaven and hell mean and who has chosen which. We only know that there is joy in Christ, in being reconciled to God.

The end objective is that all men might be one. To this end the ministry of reconciliation has been given to the church. She is God’s agent to minister the accomplished salvation to all men: to preach the good news “which shall be to all people.” She is there to plead with men, “Be reconciled to God.” Reconciliation is her form of life.

The key word is “know.” For this is life eternal, that men might know God as Father, and Jesus Christ whom He has sent. The church is there as ambassador: that the world might know that it is saved because of what God is: that the world might know what salvation means by what the church is. The church’s being is functional. her marks are means.

It is not being “saved” or “redeemed” or “forgiven” that sets us apart as a church. In those categories all men are alike. But in ministry, in stewardship of the Gospel, as ambassadors of God we are called apart, separated, made holy. In those categories the church is different from the world of men.

Individual discipleship is therefore an individual commitment to the church. God has called the church. We answer the call as individuals because of what God is. We achieve our individual stance by our personal acceptance of covenant, as ministers within the function of the church. That is the only place we stand as individuals, with an individual right. Because we stand there as individuals we answer not only for what the world learns through us, but for what the church becomes in its function of ministry.

We are “workers together,” all of us. We fail in the work when we think that we’ve been saved alone; when we forget the need of the world to know; when we hesitate to make the church what it is called to be.
The Visual Arts

Ambiguous Order

By RICHARD H. W. BRAUER

My earth serves also others
my world is mine alone

To distribute material possessions
is to divide them
to distribute spiritual possessions
is to multiply them

From Poems and Drawings by Josef Albers, Readymade Press

The idea of paradox has been given tangible, sensible expression in the art of Josef Albers (b. 1888). Using clear, simple elements Albers has created seemingly rational images whose inner contradictions, delightfully, never resolve themselves. As the eye shifts across the image (that is, takes different “viewpoints”) local contexts become dominant, reversing or radically shifting the action of individual elements. In Light Passage, for instance, the orange colored center square appears to come forward out of the less brilliant ochre square immediately surrounding it. Yet when pitted against the cooler buff and grey of the two larger enframing squares the orange tentatively recedes as though it were a light at the end of a deep passage. In Structural Constellation parallel and interrupted lines momentarily may seem to diverge with a change of the beholder’s focus. Yet completely unsettling is the futile attempt to pin down the spatial position of the line connecting the two major units. In the center of Prefatio the long diagonal plane made up of vertical straight lines appears alternately to be (1) unbending in its direction, (2) bent in two directions, and (3) bent in three directions. Apparently in these images no one cue gets the upper hand. For instance, without a dominant center, bilateral symmetry, as seen in Ascension, forces the eye from one half to the other equally dominant matching half; back and forth bounces the eye restlessly searching for a resolution.

Josef Albers’ search for strong visual interactions among colors has been handsomely furthered by his painting series begun in 1949 called Homage to the Square. This series has employed a neutral format that paradoxically makes the squares look like vertical rectangles. But the colors provide the real action. For instance, in Yellow Signal, the center square is canary yellow. The surrounding square is a light neutral grey, and the outside square is a slightly greyed chartreuse. The overall effect is that of a gay, controlled brilliance. As one studies it the yellow center seems to grow lighter and the surrounding grey and green becomes somewhat darker. Then the violet after-image for the yellow center starts to dance around giving a blinking quality to the yellow center. The surrounding two squares seem quite stable and keep the dancing center anchored down.
There Are Giantkillers in the Land

By WILLIAM F. EIFRIG, JR.

It is the age of giants. If Jack is to avoid extinction, he's got to be clever. The small nation watches warily the strategy of big nations. The small business looks for markets missed by big businesses. The small school steps lively to maintain some identity in an academic world of masses. The musical arts too play at Jacks and Giants.

There are in this country about four major symphony orchestras. Boston, New York, and Philadelphia, because of their older urbanized state, maintain the three most venerable. To these I would add the Cleveland Orchestra, which has held top-rung status through the musical superiority of its conductor, George Szell. Chicago has been doomed to temporary membership in the giant club since the passing of Thomas and Stock. The stature of the orchestra is dependent upon the fame and energies of the conductor of the moment. The same may be said of Minneapolis and San Francisco and Pittsburgh.

But these names are those of a race of tall people, not of giants. Houston, Atlanta, Dallas, Los Angeles, Indianapolis, Detroit — fine instruments all, plying the musical trade in the long shadows cast by the giants. Zubin Mehta may publicly prefer his Los Angeles Philharmonic to New York, but the musical scene is dominated by the larger figures of the east nonetheless.

Imagine the plight of the young boys of United States orchestras, those whose history is short as well as their payrolls, whose ambitions are matched by grass-roots dedication but not by endowments. How are they to contribute importantly to the culture of American music? How can they side-step the trampling feet of the giants while keeping pace with them?

Two conductors of these Jacks among orchestras have successfully based their strategy on the phonograph record market. The orchestra that sells records has a reputation. The orchestra that sells records can appeal to its patrons for continued support. The critic of recordings wields a transcontinental power; the critic of local concerts has more parochial weapons.

Robert Whitney in 1948 convinced the gentry of Louisville that a market was waiting for records of the latest music and got support in 1953 was the Rockefeller Foundation for his unique program of commissioning and recording works by most current composers. The Louisville Orchestra subscription series of recordings has become a mainstay in libraries of twentieth-century music and has attracted attention to that band of musicians on the Ohio as recordings of Beethoven and Tchaikovsky (who are included in concerts) could have never done. Mr. Whitney's market analysis was correct. A duplication of the standard repertoire recorded by the Big Three or Four results in a trampling by giant feet. The unusual work coupled with the Louisville name stands out on the pages of record catalogues. What better way to guarantee unique titles than to commission the composer and hold first performance rights?

A conductor in the western-ness of Utah has successfully pursued another, though not necessarily a better, course. To those living east of the Mississippi the best known product coming across the Father of Waters is the motion picture. Increasingly, however, a musical public has grown aware of an orchestra based in Salt Lake City. The recorded successes of the Utah Symphony Orchestra bear no resemblance to the crassly commercial union of the Tabernacle Choir and the Philadelphia Orchestra. (How closely the giant's foot falls!) They are evidence of a competent musical organization under expert leadership playing fine literature.

Maurice Abravanel left New York for Utah in 1947. He left behind a secure position as conductor of successful Broadway plays and a post at the Metropolitan Opera. He began as a conductor in Germany of operettas and concerts in smaller theaters. His successes brought him to the Berlin Opera and many major European podiums.

His skill is demonstrated in the sounds of the orchestra he has built in Utah and his sensitivity by the interpretations presented on recording. More important, however, are his capabilities as impresario. With canny sense for the recording market Mr. Abravanel has managed a feat similar to that of Mr. Whitney but even more remarkable, for he chooses to work in the standard repertory and to record the works suited to his temperament. Of about fifty major works recorded by Abravanel and the Utah Symphony almost half are the only available recordings of the work or are one of two in the catalogue. Should one notice the absence of a work like Honnegar's Roi David or Vaughan Williams' Dona Nobis Pacem from the list of recordings in print he may be quite certain that within a few months it will be available in a fine performance by Abravanel and his orchestra.

Of course the methods by which these two Jacks have outwitted the giants do not bear repetition. The conductors of other minor orchestras will have to invent their own stratagems. It is good to know, however, that giants do leave some room for smaller folk to walk about.
The British Invasion of Broadway

By WALTER SORELL

It is inescapable. One cannot help noticing it. The fact is that the British theater is built on an old tradition. (The renaissance of the American theater was paralleled by the rise of the movie industry, and the last three generations are far more inclined to be movie-conscious than theater-conscious.) Also, the theater is better and less expensive in London than on Broadway. But all this does not explain the phenomenon that more than half of the plays produced here have come from England and that those which survive because they are meatier plays are British.

I am not thinking of Shakespeare and Shaw. After World War II and with the gradual disintegration of the British Empire, the new generation has dared to take a good look at itself and the world. Free of a past of possessions and pretences, it is now free to speak of the greater values of life, of the frivolous and frightening or of the ultimate questions. There have been waves of new and fascinating dramatists coming from England, from John Osborne and the other angry young men to the latest newcomers, Tom Stoppard, Charles Dyer, and Peter Nichols. They are not yet tagged, although a strain of dark humor in an un-well-made play is characteristic of their work.

I have no way of knowing whether America has produced any playwrights of significance lately. If so — the producers have kept them from being discovered. Of course, it is financially less risky to import from London pre-tested plays. London’s West End has become Broadway’s most important tryout town.

Our only theater of interest at the moment, provocative and challenging, can be found at the off-off-Broadway stages. But these plays are still limited in their artistry, still groping for a new way of form and expression, while the young British writers have already found the polish of theatrical excitement. (By the way, what has happened to our great hopes of yesterday — to Gelber, Richardson, and Kopit? Their promise has remained totally unfulfilled.)

One of the great successes of the London stage was “The Prime of Miss Jean Brodie,” based on the Muriel Spark novel and dramatized by an American, Jay Allen. Miss Brodie is an unusual school teacher, advanced in years and views, in Edinburgh during the 1930s. She is a woman with overheated but half-baked romantic notions who cannot master her fantasies. Instead of teaching her girls history she tells them about her trip to Italy, about the Giottos she saw there and the men she met; she tells them of her great love who died on the field of Flanders in 1918. “one day before the Armistice”: she impregnates the children with her fanatic ideas, she wants to make them live more consciously. She herself lives on the edge of reality. She sends one girl to Spain to fight for Franco, and the girl is killed by a bomb. Another girl she tries to make the mistress of the philandering art master with whom she is in love. Miss Brodie lives vicariously and fills the imagination of the school girls with strange ideals and vague concepts of life. She is a loner and afraid of being "assassinated" by the dull world that surrounds her. And one of her favorite disciples finally betrays her.

I saw the play in London with Vanessa Redgrave, but Zoe Caldwell, who gives a magnificent performance here, may be even better suited to the part. But why has the play been tampered with at different spots before it came to New York? Why was Miss Brodie’s tragic end, her suicide, omitted? Are the American producers afraid that “death” might have a detrimental influence on the box office? It seems so, even if it is dramaturgically logical.

Peter Nichols, “A Day in the Death of Joe Egg” was shortened to “Joe Egg” by the producers in all their advertisements and on the marquee. The author had to insist on having the full title in The Playbill. Joe Egg is the spastic child of a middle-class couple, “a vegetable,” as the doctor calls her, or a “living parsnip,” as the couple refers to her. Two young people have to live and cope with it. The play is about the incongruity of life. It is a moving and profound play about love and marriage and how both are affected by this accident. It is full of bitter, ironic wit. The couple tries to save itself by laughing at “it,” while we feel how their relationship is gradually wrecked by “it.” The play is also technically fascinating, a skillful mixture of domestic comedy, vaudeville, and revue sketches. Albert Finney plays the husband superbly and Zena Walker does equally well as his wife.

Another provocative play came from England, “Staircase” by Charles Dyer, a two character play. It explores a homosexual relationship in a most exquisite manner. There are two aging barbers in a London suburb and both depend on each other emotionally. The play has to do with the crisis of one of the men who was arrested at a questionable nightclub. But essentially it investigates the needs of human beings, their bickering and loving, their being very much in need of being understood. It is a worthwhile play. The London theater has made this season on Broadway a very lively one so far.
A Study in Contrasts

I have hesitated to write this column since it is our policy to review works which are significant or of special interest to our readers. Possibly John Warwick Montgomery's *Crisis in Lutheran Theology, Vol. 1* (Baker, 1967) qualifies under the latter category since some efforts have been made to promote this book in Lutheran circles as an intelligent conservative Lutheran call to theological renewal. Lutheran readers of conservative temperament will still have to wait. That is unfortunate. A patient, lucid recall of some of trenddom's more erratic speakers is necessary. On a number of issues we are out on a limb, or have gotten trapped into false either-or positions. A good many pastors and laymen are furthermore perplexed by what appear to them to be strange movements and unfamiliar language. Times of swift change are, unfortunately, easily exploited by men who have zeal without knowledge, no matter what their theology and churchmanship. Turbulent periods such as ours give a wide audience and an opportunity to men of conservative bent. We are all aware of the theological Birchites who would profit from this situation. Just as in our political life the liberal elements in our society suffer great loss through the rise of radical, anarchic action, so radicals from the other end of the spectrum will damage valid conservative causes, especially if they are too eagerly and indiscriminately embraced. Confessional Lutherans, who will always find elements of conservative thought congenial to their theology, owe it to their church to present the riches of orthodox faith, grounded in sure scholarship, in ways that will compel the interest of the simple and the learned. Lutherans in America have not yet fully lived up to this responsibility; that is an essential part of their crisis.

Montgomery's book does not measure up to this need. Rhetorically it tends to inflame rather than move the reader to clear and sound reflection. As to substance, the book contains a strange amalgam of rationalistic and religious opinion. All issues are reduced to one issue: that the crisis in Lutheranism is the rise of a "non-inerrant" view of the Bible which leaves one in meaningless subjectivism. This logic in turn rests on a philosophical demonstration in which the author actually affirms Ayer's verifiability principle, asserting that this principle offers the best available guide through the forest of truth claims (p. 27), and that it is the philosophical principle employed by Jesus (p. 39)! This principle is first introduced to demolish claims of religious experience by existentialist thought, held to be at the root of the current crisis. Since Ayer's thought is anti-metaphysical in its very assumptions, such demolition is not arduous. (Existential thought is indeed great game for analytical philosophers.) In its further application, since this principle requires that all claims to truth be validated through testable experience, it follows that Christian subjective truth claims must be verified through objective truth. Thus Christian experience of God can be verified through an objective truth, the inerrant Bible.

The kernel of truth concerning the relationship between religious experience and God's Word is, of course, an anti-Schwaermer commonplace. Such a reminder is pertinent today. Still, the verifiability principle here is being rather loosely handled. Indeed, sometimes it is the Bible itself that must be verified. "It is only a Bible capable of standing the acid test of objective verifiability that will provide the 'map' of God's blue sky of religious truth" (p. 34). Just what this acid test might be is not at all clear. Nor is it clear how you verify the acid test. I think that pursuit of this issue might lead the author to put less confidence in philosophical horses, chariots, and princes. Hopefully, in any case, the acid test is not the author's excursions into exegetical matters toward the end of the book, which are not all wholly persuasive. The author would do well to ponder more carefully how faith is awakened in men, why Jesus could say that they would not believe even though one came to them from the dead, the kinds of "evidence" which confirm faith, and the problems connected with verifying historical truth claims.

In brief, confessional Lutheran theology has, we think, a different agenda of critical questions; it does not first require epistemological certainty. The problem of the Bible is high on that agenda, and there is no doubt that neo-orthodox theology has had a deforming effect on Lutheran theology. From time to time Montgomery lights on that truth. Too many contemporaries have accepted the notion that the more irrational you are, the more purely you live by faith. But this critique has already been made, and with finesse. A very substantial movement exists which seeks to relate faith-assertions to human experience and historical investigation. This is full of promise.

In *Accents in Luther's Theology* (Concordia, 1967) we do have a superior volume of theological essays written mostly by Missouri Synod writers, edited by the able church historian at Springfield Seminary, Heino Kadai. The authors (Tietjen, Sasse, Koenker, Pelikan, Hoyer, Marty, Kadai) leave no doubt about the vitality and promise of the Lutheran tradition for our time; pastors who do not find time for these essays do themselves and their flocks a disservice. We cannot comment on each essay, but the one by Sasse is of interest by virtue of its contrast with Montgomery's book in dealing with the subject of the Word of God. Sasse is notably conservative, but Lutheran first, conservative second. Therefore his thought is theological and not secular. He is above all a mature, temperate writer; disagreement with him leads you to important issues. In dealing with the subject of the Word of God, he is of course distressed with the loss of authority in Protestantism that has accompanied its neglect of the Bible. He does not lash out at the historical critical method, however. He does not indulge in scare tactics. He points out that of course we must deal with the Bible in a new way because of new skills in dealing with historical material. All who have read his fine essays in Kittel's theological dictionary, or his exegetical comments on such controversial passages as Genesis 1-3, know how he skillfully and sanely employs these common tools of theology. As a venerable and established theologian, always an admirer and friend of the Missouri Synod, he has no need for self-advertisement, nor any fear of criticizing his friends. He notes that fundamentalism did in fact influence the thought of the Missouri Synod generation of Pieper and Engelker, as contrasted with the generation of Walther. He observes that the second generation's favorite exegesis of the Johannine passage, "Scripture cannot be broken," was unknown in Walther's time. The main impact of fundamentalism is to orient Christian thought and life to the Bible first, to Christ second. For Lutherans it is the reverse, and this is the great discovery of the Reformation. This is also the meaning of the subtle Lutheran regulative doctrine concerning the distinction between Law and Gospel, a point insufficiently appreciated in Montgomery's critique. The Lutheran treatment of Christ and the Bible is not meant to drive a wedge between Christ and the Bible. Some theologians have done that. Rather it provides the hermeneutical key to the Bible, as distinguished from the fundamentalist concern to attach first importance to an inspired and inerrant Bible as the reliable source of all knowledge about Christ.

Sasse, as all orthodox theologians must be, is concerned with the inspiration, truth, and authority of the Bible. But he goes neither to philosophy, psychology, or the church's traditions in order to reconstruct a valid doctrine for today. He points to John 14:16 as containing the answer, a christocentric doctrine of the Spirit. Hopefully his wise counsel will prevail.

RICHARD BAEPLER
A Handbook of American English

In our age of overwrite and sometimes underthink, we must be reminded that words, whether spoken or written, are meant to communicate—neither merely to take up time as between dream and
time, nor else by manufacturing them homespun. Of our large capacity for taking in new words, phrases, and usages either from outside sources or else by manufacturing them homespun. The essence of any real language, said J. O. H. Jepperson, is activity.

Accordingly, "It is time we had an American book of usage grounded in the philosophy that the best in language—which is often the simplest—is not too good to be aspired to." So wrote Wilson Follett in 1958 when he began to write Modern American Usage: A Guide (New York: Hill & Wang, 1966, 436 pages, $7.50). This book verifies the fact that English as presently used in the United States is not in real danger of being arrested in its growth by the purists and grammarians, nor burdened with irrational affectation by fashionable pretension. Not necessarily, and yet frequently, we linguistically employ superior imaginativeness and resourcefulness over our British cousins, whose current language practices are ably recorded in the 1965 Second Edition of A Dictionary of Modern English Usage by H. W. Fowler as Revised and Edited by Sir Ernest Gowers. Inasmuch as dictionaries and books on grammar normally follow the recorded usages, they do not determine it (though, of course, all these language-tools do a praiseworthy job in assisting the stabilization of our media of communication).

Dr. Follett, frequent essayist contributor to the Atlantic and similar journals, loved clarity plus appropriate orderliness in dictation. He respected the invigorating power of words as the literary symbols of thought. He was among the first to cry out at the linguistic scientists' seeming-victory when the unabridged Webster's Third New International Dictionary appeared in 1961. Having started his Modern American Usage in the summer of 1958 to present the viewpoint of the intelligent layman (as against that of the technical linguist), Follett meant to share the fruits of a lifetime of observing, writing, and editing. The manuscript, unfinished at the time of the author's death in 1963, was completed by Jacques Barzun with the co-operation of the following collaborators: Carlos Baker, Frederick W. Dupee, Dudley Fitts, James D. Hart, Phyllis McGinley, and Lionel Trilling— all of them able critics, who added some 50,000 words of text to the existing 175,000 words previously penned. The scope is indeed comprehensive by both variety and illustration or exemplification, the unity of emphasis as planned by Follett himself is adhered to with surprising reasonableness and good taste. I will not quibble over minor matters.

"The Introductory Chapter attempts to clear up certain current notions about usage and grammar, purism and pedantry." The alphabetized Lexicon presents its comments directly or cross-references "to a more general article, in which several similar locutions are treated together." Precise and persuasive entries are classified under either Diction or Idiom or Syntax or Style. The Appendix discusses the shall/will enigma and principles of punctuation.

My space permits only one generous example, the confrontation of the dilemma over "different than," or "from," or "to," or "different from." Which combination is preferable in order to avoid seeming uneducated while being modern-American? And this, moreover, regardless of region, profession, or economic status? The Modern American Usage two-column entry asserts:

British colloquial usage seems to make one thing different than another different to and different from. In the United States different to is almost nonexistent... In both England and the United States there is an increasing tendency to follow different than because it is sometimes awkward to follow different with the accepted prepositive form. As for differently than, it can often be replaced by otherwise than, which is irreproachable... Herein can be seen the necessary repetitiveness, but I hasten to add that samples are included (though without source identification) where I have resorted to deletion marks. If you care about the impression made by, or if you work with, language, this handbook is useful for reliable information, American-slated, on confusing words with similar meaning (anxious-eager, adhesion-adherence), on distinctions (imply-infer, apparent-evident), or such excellences as that or which as the relative pronoun to use wisely. For me this book's chief value is its ability to remove conventional objections to a number of expressions or constructions which in our country today are commonly found in the idioms of everyday speech or in the informal writing of fairly well-educated people.

HERBERT H. UMBACH

Worth Noting

The title is multidimensional since almost every element of the novel is suspended "in the balance"—between dream and reality, sanity and insanity, past and present, comedy and tragedy, balance and imbalance. But Baylor's flight remains circular and never leads to any real escape of fulfillment. When she kills a man in Mexico on the final leg of her flight, her college dream again enters her mind: "I expected not just an added inch to that horizon which I could see so well from the sand hills, but a sight beyond the horizon to what lay on the other side, so that dreams could be answered, pitted against reality; alternatives realized, choices made, the balance tipped." It is still only a dream.

The central episode in the novel concerns Baylor's tryout for an experimental movie. Like the movie, the novel is both comic and tragic, and the reader can hardly separate the two responses. Jumbo, a colored jazzman who co-stars in the movie, describes it as "one long chase scene. Camera every which way you look—ain't no hope of escaping it. Call that funny?" This is also Baylor's plight, and Miss White does make it funny, but ultimately terribly tragic.

In the Balance is a gripping and disturbing novel. Although numerous events of the past and present are welded together in a successful defiance of time, the reader wonders at the end if the rapid first person point of view has disclosed enough of Baylor's total being. For all the brilliance of the cinematic techniques Miss White employs, the novel seems most successful in the narrative sections where action is managed in a straight chronological order. By totally disrupting the conventional techniques like Dickens and Thackeray, a modern experimental novelist like M. E. White runs the risk of confusion and unnecessary ambiguity.

ARLIN G. MEYER

March 1968
To crawl into the skins and the lives of others, this is the Incarnation that many Christians are talking about. In the Word made flesh (as the New Testament likes to talk about it), many Christians are insisting, God has located people, has identified them, and has called them by name. When the Christian Church, as its adherents claim on many occasions, comes to people, it comes in behalf of this Incarnation. It would seem, then, that the Church is also in a position to locate people, to identify them, to recognize them, and to call them by name.

If this is done seriously, and perhaps with less formality and ritual, the people to whom the Church talks will begin to understand the human predicament and to see themselves as they are. The poor and the disadvantaged certainly recognize their plight without much talk from the power structure of the Church. The Church would do well to talk to its own power structure before it talks to anyone else.

The Church’s interest in the poor could give the poor confidence. It would be heartening to the poor and the disadvantaged if they really knew and understood that the Church cared. People who are recognized as worthy of attention from God and His people will begin to love themselves and thus, I am sure, will feel comfortable with other people and with a world that seems hostile to them. Operations dedicated to the human concern on the part of the church will help to solve the self-identity problems of both the rich and the poor, of both the black and the white.

At any rate, it is a beautiful thought: the Christian Church and Christians telling people that they are worthwhile because God has created them all, that like all humans they are part of one created humanity (black and white, Jew and Gentile, American and North Korean, Greek and barbarian), that God has written them all into the heavenly records.

The sad part is: this kind of talk is a lot of nonsense and many things worse if we really do not put our money where our mouths are. How can we locate and identify the poor if our Christian churches put more into the construction of church buildings than into projects to rehabilitate the poor and programs to re-condition their environments? How can our churches identify with the disadvantaged as long as the disadvantaged feel so strongly that the churches are part of the middle class establishment of affluence — when they see religious people associating so much more comfortably with bankers, mayors, Lions and Kiwanians, with the suburbs, and with intellectuals? The poor and the disadvantaged simply do not think that religious communities are speaking for the poor.

And, for heaven’s sake, how are you going to get to the poor with all this classical and metaphysical talk about God? Now you just listen to some words from the Nicene Creed: “God of God, Light of Light, Very God of Very God, begotten, not made, being of one substance with the Father.” Outside of referring in every vague terms and in ancient language to the mysteries of God and godliness, these words do not tell the poor very much about God. The poor and the disadvantaged in Milwaukee do not understand this kind of theological talk. And, as a matter of fact, neither do I. This kind of talk puts the idea of God and of humanity so far away from man and certainly does not crawl into his style of life.

Well, what is it that the poor want? They want a truth that means something to them and that functions in their lives. So why hand out a Truth couched in the language and culture of two thousand years ago or in the mores and taboos of the Victorian age? The poor and the disadvantaged are also losing interest in the language and images of free enterprise that sneak through so many of the sermons they hear.

The poor also wonder about men and women preaching sacrifice from the pulpits and pews of million dollar churches. The Negro does wonder about a church or a synagogue preaching the cosmopolitan religious message where only Anglo-Saxon worship, where only the Jews sit, where only the Irish or the Polish pray. They do wonder about schools and churches where the constituents are expected to wear white shirts, clean ties, and polished black shoes.

“Man.” I heard a poor Negro say the other day, “how do I get next to that kind of MAN?” Well, how can one practice integration in such a system?
A Cheer for the Death of the Leading Man  

By DON A. AFFELDT

If listing on the New York Stock Exchange is any index to such matters, film-making is business, and big business at that. The entertainment industry may exist to give people kicks, but people involved in the industry whether as owners, managers, or performers are not in the industry for kicks. They want, and are getting, money — lots of it.

The Star-System of the movies has helped to make the money roll in. Beside being a felicitous arrangement for bringing together colossal egos and hoards of nobodies wanting someone to idolize, the Star-System has for decades furnished movie-makers with the kind of assurance which the movie-makers, as money-makers, so dearly prize. One simply does not lose money when he invests in a Cary Grant picture, and when Doris Day and Rock Hudson team up, one can almost hear the sounds of the moguls flit up to financial bliss as admission coins clink in the coffers. So effective and so pervasive is the Star-System that one is hard pressed to name a movie that has not included at least two noted personages at the head of the billing. Yet the Star-System works directly against the entertainment which the industry presumably seeks to provide.

The problem lies in the conflicting criteria of great fame and good films. A Star is (generally) one who is instantly recognizable, regardless of the role he is playing; especially in Hollywood does significance attach to physiognomy rather than dramatic abilities. Yet if one’s thoughts while seeing Richard Burton as Petruchio or as Thy Spy Who Came In From The Cold are about Richard Burton, Petruchio and The Spy Etc. are bound to suffer by comparison. The point of the evening is to see Petruchio come alive, and that end is not well-served by one’s having thoughts of Burton whenever one looks at Petruchio.

Some actors and actresses are obviously more gifted than others, and perhaps skill in acting just is the ability to transfer the audience’s attention from oneself to the character one is playing. One sees both good and bad acting, on this criterion, in the recent In the Heat of the Night. Rod Steiger, who plays the sheriff charged with solving an important homicide case in a small Southern town, does beautifully; his achievement was recently recognized by the New York Film Critics, who selected him as the outstanding actor of the past year. The film, incidentally, was similarly chosen best of the year — and both Steiger and the film are likely to do a repeat performance in the coming Academy Award ceremonies.

But in the same film one also sees an actor who appears unable to escape his own skin: Sidney Poitier. His performance as the Negro criminologist first charged with committing, and then with solving, the homicide is not at all good, in spite of the fact that Poitier is himself an Oscar winner for his work in Lilies of the Field. Poitier fails in Heat just because he is always Sidney Poitier, though the script requires that he be referred to as Virgil Tibbs. No doubt some of Poitier’s difficulties lay in the script; the role delineated in the script is pretty one-dimensional, and few actors, I think, could have made it come alive. Perhaps the script gave Steiger an edge on Poitier, for the sheriff did change as the film progressed, but still the issue of credibility is not decided simply on the basis of character development. Steiger is good in most of the roles he plays; he brings his characters to life, often at the expense of preserving an image of Rod Steiger. With Poitier, it is always Poitier that we see, with the same grimaces, inflections, and gestures, regardless of the film’s title. He is always a Negro who seems to have been raised in an Oxford (England) ghetto.

Not so with Steiger. His other most memorable role in recent years was as the defeated Jew in The Pawnbroker. Two more different roles could hardly be imagined: in Heat, the sheriff is supremely confident (at least at first), distinctly Southern, and throbbing with power and vitality. In Pawnbroker, the Jew is a shell of a man who was emptied by the Nazi horrors, distinctly immigrant-New Yorker, and drained of any capacity for emotion (except at the end). Yet Steiger was consummately good in both roles, even as he excelled as Komarovsky in Dr. Zhivago, and in other of his many roles. He is a character actor in the great tradition of Olivier, Scofield, and Shaw — and what else, finally, can a good actor be but a character actor? The difference between good and bad actors, then, comes to the number and variety of characters that they can play effectively.

As I’ve indicated, the Star-System works directly against this goal of good acting. Once a man is famous in his own right, it becomes more difficult for him to persuade audiences that the character he plays is more real, so to speak, than the actor himself is. Yet the production of such a belief in the viewer is critical to full dramatic success, for without it drama becomes a charade as silly as most TV offerings and Star-System comedies of the Doris Day genre. Filmed drama need not fail in this way, though often it does. It need not fail, if actors like Rod Steiger can erase the leading-man image by continuing to excell in films for which they get top billing. The leading man may not yet be dead, but prospects of his demise rightly cheer lovers of good cinema.

March 1968
Introduction to Lent, 1968

We have come now to the first Lenten season in the final third of the 20th century. . . . From my small ivory tower it looks different from any Lenten season I have known. . . . different in both degree and kind. . . .

Perhaps the most important factor in this Lenten season is the appearance of the post-modern mind. . . . still somewhat formless. . . . Its nature and structure are momentarily unclear. . . . Its basic characteristics, however, are very evident. . . . It seems to be growing also on our American campuses and it manifests itself not only in the humanities and the social sciences. . . .

It is a disillusioned mind. . . . The slogans of the 20th century — freedom, democracy, success, security — all these have been emphasized out of proportion to their real meaning and value. . . .

As a consequence, the post-modern mind believes that the 18th century saw us lose faith in God. . . . In the 19th century we lost our faith in man. . . . In the 20th century we lost our faith in things. . . .

Therefore, the world as it now is. . . . our nihilism. . . . our frantic hedonism. . . . from the Hippies to Playboy. . . . to sensual pleasure seekers. . . . And we end up with our Sartre, our Camus, and our Beckett. . . .

All this, of course, has left indelible marks on the church. . . . Slowly but surely it is moving away from the past. . . . living under the sign of the conflict and bitterness and hate. . . . the sound of its voice lost in the winds of the world’s confusion and pain. . . .

Once more we heard the forgotten watchword of Martin Luther, ecclesia semper reformanda. . . . the sign of repentance and renewal has become a real dynamic. . . . a passionate willingness to march boldly into a new age which seems in the divine pity to be bursting round about us once more. . . .

This means that we move into the age before us with the ultimate theology of humility. . . . the age of space exploration. . . . the explosion of population and knowledge. . . . our monstrous machines. . . . the ambiguities of history. . . . the birthpains of Asia and Africa. . . . all these now come tumbling and stumbling about us upon whom Lent, 1968, has come . . .

Once more this blessed season we can stand erect and unafraid, knowing that at the end of every theological road there stands Jesus Christ in the continuing fullness of His power and the plentitude of His grace . . .

Certainly this should be said by the Church during Lent, 1968, bringing a new awareness of the Christological interpretation of man and history and life. . . .

Certainly it will be more difficult than ever before to see the true meaning of Lent in the last third of the 20th century. . . . This is especially true of our younger generation. Their problem, of course, is indifference. . . . Some of the post-modern world really does not care much one way or the other about the thorn-crowned figure on the Cross. . . . They offer lip service by coming to church more often during Lent. . . . a little haunted by the gallant figure of the lonely sufferer. . . . Now in 1968 there is a vague, uneasy feeling in the post-modern mind that He knew something which life and time have taken away. . . . a relentless strength. . . . a far hope. . . . a continuing dream of righteousness and goodness and love which we have never really known. . . .

And then there is also the post-modern fool. . . . He no longer says: “There is no God.” . . . He now thinks and writes and speaks: “I am against God. I want to take part in His killing just as my friends and contemporaries did 2000 years ago. I must admit that I am a little frightened by our world and by the notion that this whole business about God’s coming into my planet may be true, that this torn and broken figure is really God — and worst of all for me, that by earning the power to save He has also earned the power to judge.”

And so — we must devote a part of this Lenten season in 1968 to saying something about the long, slow, terrible way God has of coming back in history and life to judge what He could not save. . . . This our generation must know if it is to remember now the hour of its visitation. . . . He has a strange way of coming back . . .

Now that He has the H-bomb under His dominion, Lent 1968, in an excellent and ultimate time to listen for the coming of His feet. . . .