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Article 15

Wearing Religious Garb, Fluoridation and Religion, "Charitable Purposes" Defined, Sunday Laws

RECENT DECISIONS

Wearing Religious Garb

On February 2, 1956, the Court of Appeals of the State of Kentucky affirmed in part and reversed in part, the decision of the Circuit Court in *Rawlings* v. *Butler*.[1] However, in so doing, the Court held that Sisters of the Roman Catholic Church may teach in the public schools while wearing their religious garments.

Three problems were presented on appeal:

(1) May the Board of Education expend public tax money in the payment of the salaries of Sisters of the Roman Catholic Church who are teaching in the public schools while dressed in religious garb and wearing symbols of their religion?

(2) May the School Board pay rent to the Catholic Church for buildings in which public school classes are taught?

(3) May the School Board spend public money for transporting Catholic children to public schools?

In answering the first question in the affirmative, the Court commented:

> While the dress and emblems worn by these Sisters proclaim them to be members of certain organizations of the Roman Catholic Church and that they have taken certain religious vows, these facts do not deprive them of their right to teach in public schools, so long as they do not inject religion or the dogma of their church. The garb does not teach. It is the woman within who teaches. The dress of the Sisters denotes modesty, unworldliness and an unselfish life. No mere significance or insignificance of garb could conceal a teacher's character. Her daily life would either exalt or make obnoxious the sectarian belief of a teacher.
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> Our General Assembly has not yet prescribed what dress a woman teaching in the public schools must wear, or whether she may adorn herself with a ring, button, or any other emblem signifying she is a member of a sorority. These Sisters are not teaching religion in the public schools or attempting to force their religious views on the pupils under their charge. The religious views of these Sisters and their mode of dress are entirely personal to them. If they were prevented from teaching in the public schools because of their religious beliefs, then they would be denied equal protection of the law in violation of the Fourteenth Amendment of the Federal Constitution.

Appellant-taxpayer, however, argued that the Sisters' garb itself impresses on the children the religious faith of its wearers. The Court rejected this argument, and referred to the case of *Hysong* v. *School District*, wherein it was said:

> The religious belief of teachers and all others is generally well known to the neighborhood and to pupils, even if not made noticeable in the dress, for that belief is not secret, but is publicly professed. Are the courts to decide that the cut of a man's coat or the color of a woman's gown is sectarian teaching, because they indicate sectarian religious belief? If so, then they can be called upon to go further. The religion of the teacher being known, a pure, unselfish life, exhibiting itself in tenderness to the young, and helpfulness for the suffering, necessarily tends to promote the religion of the man or woman who lives it. Insensibly, in both young and old, there is a disposition to reverence such a one, and at least, to some extent, consider the life as the fruit of the particular religion. Therefore, irre-

[1] 24 U. S. L. WEEK 1126, 2374 (1956). (The references to the opinion of the Court herein refer to an unofficial and as yet unpublished copy of the opinion.) For a discussion of the opinion of the lower court see 1 CATHOLIC LAWYER 62 (Jan. 1955).

proachable conduct, to that degree, is sectarian teaching. But shall the education of the children of the commonwealth be entrusted only to those men and women who are destitute of any religious belief?[2]

A "more difficult question" for the Court was presented by section 189 of the Kentucky Constitution, which prohibits using public funds to aid any church, sectarian or denominational school. Are the salaries paid to these Sisters, who have taken a vow of poverty and thus are obliged to contribute their salaries to their orders, really contributions to the Catholic Church?

The majority replied in the negative. The Sisters are paid in the same manner as other teachers; they endorse their own checks. The salaries paid to these Sisters are their own, and they may dispose of them as they see fit. To prohibit them from contributing their checks to their orders would itself constitute a denial of religious liberty. The Court did indicate, however, that a state constitutional question might arise were the Sisters "but the conduits through which public school funds are channelled into the coffers of the Catholic Church."

The second question presented was answered in the affirmative, *i.e.*, the School Board could pay rent to the Catholic Church for buildings in which public school classes were taught. There was one *caveat*. The Church may not attempt to exercise any dominion or control over the schools or the classes taught therein, and the Board must have complete control of the buildings.[3]

The third problem presented to the Court was answered in the negative. The School Board may not expend school funds for the purpose of transporting children to secular or private schools.[4] However, the Court pointed out that the *fiscal courts* may contribute tax money for the purpose of accommodating *all* primary school children in the state who are not within walking distance of their school.[5]

The instant case raises the question of what the solution would be had the Court decided against the wearing of religious garb as has been done in several other states.[6] The dissenting opinion indicates

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2 164 Pa. St. 629, 30 Atl. 482, 484 (1894).

3 The Court distinguished the facts in the instant case from the case of Berghorn v. Reorganized School District, 364 Mo. 121, 260 S.W. 2d 573 (1953), where the payments were disallowed. In that case the buildings rented to the school boards by the church were under the same roof as the church, or church school, or were immediately adjoining the church or rectory, or Sisters resided in the buildings rented to the school board, or the buildings contained religious symbols. *Accord:* Zellers v. Huff, 55 N.M. 501, 236 P. 2d 949 (1951).

4 In Sherrard v. Jefferson County Board of Education, 294 Ky. 469, 171 S.W. 2d 963 (1942), the Court held as unconstitutional an act of the General Assembly of 1949 (KY. STAT. §4399-20) which had authorized such expenditures.

5 In Nichols v. Henry, 301 Ky. 434, 191 S.W. 2d 930 (1945), the Court held unconstitutional an act of the General Assembly of 1944 (KY. REV. STAT. 158.115) permitting fiscal courts to contribute tax money to supplement bus transportation for all children, on the theory that this was necessary to protect them from highway hazards.

6 Three states, Nebraska, Oregon, and Pennsylvania, have specifically prohibited the wearing of religious garb by any persons teaching in the public schools. See NEB. REV. STAT. §79-1274 (1950 Reissue); ORE. REV. STAT. §342.650 (1953); PA. STAT. ANN. tit. 24, §11-1112 (Purdon 1945) (Supp. 1954). In two other states, New Mexico and New York, the courts have barred the wearing of religious garb by persons teaching in public schools. See Zellers v. Huff, 55 N.M. 501, 236 P. 2d 949 (1951); O'Connor v. Hendrick, 184 N.Y. 421, 77 N.E. 612 (1906) (Superintendent of Public Instruction could prohibit it by departmental regulation).

that there would be no objection to the Sisters' teaching in public schools, if they would "exchange their religious raiment and insignia for a dress or garment that is without distinctive suggestion and which does not itself proclaim sectarianism in action. . . ." But if the orders of Sisters were willing to adopt a modern costume as their habit, would not that, too, soon become "dated"? Would not the very similarity of each Sister's dress soon "proclaim identity and doctrinal religious service"? It seems inescapable that such would eventually fall within the purview of these statutes.

For those orders of Sisters engaged in teaching in public schools, the ultimate solution to the problem may lie in a modeling of their rule on one similar to that used by the Daughters of the Heart of Mary (the Nardins). In that order the Sisters dress in conservatively modern clothes of their own choosing. This avoids the objection that their very garb tends to proselytize, or that the uniformity of their dress proclaims religious service. Moreover, this would be in keeping with the appeal of Pope Pius XII, contained in an address to the Mothers Superior of various women's religious orders, attending an international congress in Rome during September of 1952.[7] His Holiness urged some modifications in the traditional nuns' dress, with a view toward encouraging a greater number of women to enter the religious orders. It would seem that exchanging their religious habits for modern dress in order that they might teach the young would give impetus to compliance with the spirit of the Holy Father's appeal.

[7] N. Y. Times, Sept. 21, 1952, p. 31, col. 2.

Fluoridation and Religion

The city of Bend, Oregon, adopted an ordinance providing for the introduction of fluorine into the public water supply as a palliative measure to prevent dental caries in children. The plaintiff, a resident of the city, commenced litigation to enjoin the proposed action, claiming that the ordinance was unconstitutional on two grounds first, that it would deprive him of his liberty under the due process clause of the 14th Amendment; and more specifically, that since fluoridation amounted to forced medication, it would encroach upon his freedom of religion secured by the 1st and 14th Amendments to the Federal Constitution, and by the Bill of Rights of the Constitution of Oregon. The religion of the plaintiff is nowhere stated in the opinion. Plaintiff appealed from a determination for the defendant city, the Supreme Court of Oregon holding that the fluoridation enactment was a reasonable and valid exercise of the State's police power to provide for the health and general welfare of the city and its inhabitants. The Court in its opinion negated the plaintiff's objection that the ordinance constituted an unreasonable impingement upon his religious freedom. *Baer* v. *City of Bend*, —Ore.—, 292 P. 2d 134 (1956).

The present case, involving the controversial problem of fluoridation of drinking water,[1] is hardly one of first impression. The

[1] For an exhaustive study of the medical and legal aspects of fluoridation see Dietz, *Fluoridation and Domestic Water Supplies in California*, 4 HASTINGS L. J. 1 (1952); Annot., 43 A.L.R. 2d 453 (1955) and SPIRA, THE DRAMA OF FLUORINE, ARCH ENEMY OF MANKIND (1953).

It is interesting to note that the City of New York has not taken a definite stand on the proposed fluoridation of the city's water supply. The heated controversy has led to a dispute between the Commissioner of Health, Dr. Leona Baum-

problem has been considered in seven other jurisdictions.[2]

Fluoridation ordinances and resolutions have withstood an assortment of objections in these jurisdictions. Thus, it has been held that a fluoridation ordinance was not an excessive exercise of police power granted a municipality in its charter.[3] Similar provisions have been sustained over the objection that they infringed upon state statutes applicable to medicine, dentistry and pure food laws.[4] Such enactments have been held not to be an abuse of the state's police power[5]; and neither discriminatory[6] nor unreasonable impingements upon freedom of religion.[7] It is the latter assertion that appears to be the most formidable proposition and certainly the most interesting and significant. In this regard it may be well to observe the judicial treatment of other police power regulations confronted with this same objection.

That freedom of religion is a preferred right[8] is beyond contention. However, it is equally well recognized that it is not an absolute right but a relative one, subject to reasonable regulation.[9] Freedom of religion has a duel aspect: freedom of religious belief which is absolute, and, freedom of religious acts which may be reasonably regulated.[10] Regulation is valid provided it is not a palpable invasion of fundamental rights and it bear a reasonable relationship to a legitimate object.[11] In the *Cantwell* case it was stated that "In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom."[12]

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gartner, an ardent advocate of fluoridation and Arthur C. Ford, Commissioner of Water Supply, Gas and Electric, a vigorous antagonist of the proposal. N.Y. Times, March 28, 1956, p. 63, col. 1.

In Tuckahoe, New York, fluoridation of the town's water supply survived a recent legal challenge. Residents charged that fluoridation was carried on without local knowledge or consent. The court held that since the county Health Department of Westchester absorbed the Health Department of Eastchester and authorized the fluoridation, the activity was perfectly valid. The court said that fluoridation was proven safe. N.Y. Times, March 30, 1956, p. 21, col. 8.

2 De Aryan v. Butler, 119 Cal. App. 2d 674, 260 P. 2d 98 (1953), *cert. denied,* 347 U.S. 1012 (1954); Chapman v. Shreveport, 225 La. 859, 74 S. 2d 142 (1954), *appeal dismissed,* 348 U.S. 892 (1954); Kraus v. Cleveland, 116 N.E. 2d 779 (C.P. 1953), *aff'd,* 121 N.E. 2d 311 (Ct. App. 1954), *aff'd* 127 N.E. 2d 609 (Ohio 1955); Dowell v. Tulsa, 273 P. 2d 859 (Okla. 1954), *cert. denied,* 348 U.S. 912 (1955); Kaul v. Chehalis, 45 Wash. 2d 616, 277 P. 2d 352 (1954); Froncek v. Milwaukee, 269 Wis. 276, 69 N.W. 2d 242 (1955).

3 See note 2 *supra.*

4 Chapman v. Shreveport; Kraus v. Cleveland; Dowell v. Tulsa; Kaul v. Chehalis; Froncek v. Milwaukee; cases cited note 2 *supra.*

5 De Aryan v. Butler; Chapman v. Shreveport; Kraus v. Cleveland; Dowell v. Tulsa; Kaul v. Chehalis; Froncek v. Milwaukee; cases cited note 2 *supra.*

6 Chapman v. Shreveport; Kraus v. Cleveland; Dowell v. Tulsa; Froncek v. Milwaukee; cases cited note 2 *supra.* The cited cases all refute the contention that since only children are immediately benefited by fluoridation such provisions are discriminatory.

7 De Aryan v. Butler, 119 Cal. App. 2d 674, 260 P. 2d 98 (1953), *cert. denied,* 347 U.S. 1012 (1954); Kraus v. Cleveland, 116 N.E. 2d 779 (C.P. 1953), *aff'd,* 121 N.E. 2d 311 (Ct. App. 1954), *aff'd,* 127 N.E. 2d 609 (Ohio 1955); Dowell v. Tulsa, 273 P. 2d 859 (Okla. 1954), *cert. denied,* 348 U.S. 912 (1955); Note, 1 WAYNE L. REV. 141 (1955).

8 See West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

9 Chicago, B. & Q. R.R. v. McGuire, 219 U.S. 549, 567 (1911), wherein the Court stated: "Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations. . . ."

10 Cantwell v. Connecticut, 310 U.S. 296 (1940).

11 Jacobson v. Massachusetts, 197 U.S. 11 (1905)

12 Cantwell v. Connecticut, *supra* note 10 at 304.

The criterion most often applied in determining whether the ordinance has fallen within the aforesaid requirements has been Holmes' conveniently flexible "clear and present danger" test.[13] Thus a threatened epidemic was a sufficiently "clear and present danger" to sustain compulsory vaccination laws,[14] even though the vaccination process was not universally accepted as perfected and safe.[15] That the confidence reposed in the measure may ultimately be proven by science to have been misplaced does not conclusively invalidate such preventative measures.[16] Later, it was held that required vaccination of school children before enrollment in elementary school was perfectly valid even though there existed no threatened epidemic.[17] The practice of religious tenets that contravene public policy may be prohibited.[18] Child labor laws have been sustained as not violative of freedom of religion under the theory that the state stands in a role of "parens patriae,"[19] and the right of a State University to require an x-ray as a condition precedent to registering has been upheld in spite of its conflict with religious convictions.[20] The courts have sustained a state's interference with parental control in order to administer exigent medical care where the parents of a child have refused such care on religious grounds.[21]

The present decision follows the general tendency revealed in these holdings. Indeed, since chlorination has been upheld as a valid exercise of the state's police power,[22] it is argued that there is no reason why fluoridation should not receive similar judicial

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13 See Schenck v. U.S., 249 U.S. 47 (1919).

14 Jacobson v. Massachusetts, *supra* note 11. See also Blue v. Beach, 115 Ind. 121, 56 N.E. 89 (1900). In reference to compulsory vaccinations the court said that the courts will not interfere except where the measures invade fundamental rights or are arbitrary, oppressive and unreasonable.

15 Viemeister v. White, 179 N.Y. 235, 72 N.E. 97 (1904).

16 See note 15 *supra*.

17 Sadlock v. Board of Education, 137 N.J. L. 85, 58 A. 2d 218 (1948); Dunham v. Board of Education of City School District of Cincinnati, 99 N.E. 2d 183 (Ohio, C.P. 1950).

18 Reynolds v. United States, 98 U.S. 145 (1878). Regardless of the religious belief of the Mormon sect the Court upheld Utah legislation making polygamous marriage a crime.

19 Prince v. Massachusetts, 321 U.S. 158 (1944). In this case a guardian was convicted under the provisions of a child labor statute which prohibited the distribution by minors of religious literature on the streets. The guardian had been supplying the minor with this material and permitting the ward to distribute it. The court upheld the conviction and stated that it was not violative of freedom of religion nor was it a denial of equal protection of the laws under the 14th amendment. The court reiterated that freedom of religion was subject to incidental regulation.

20 State v. Armstrong, 39 Wash. 2d 860, 239 P. 2d 545 (1952).

21 Morrison v. State, 252 S.W. 2d 97 (Mo. App. 1952); People v. Labrenz, 411 Ill. 618, 104 N.E. 2d 769 (1952). In both cases Jehovah Witnesses refused to allow their children, suffering from a dangerous blood malady, to undergo blood transfusions to save their lives. The State's interference under the theory of "parens patriae" was upheld regardless of the religious belief of the parents.

Where parents, even because of religious scruples, refuse to provide medical treatment for their seriously ill children, they may be convicted of a misdemeanor in New York. N.Y. PENAL LAW §482 (1).

The constitutionality of this statute was upheld in People v. Pierson, 176 N.Y. 201, 68 N.E. 243 (1903). The statute was declared to be a valid exercise of the state's police power and not an undue deprivation of religious freedom.

22 Commonwealth v. Town of Hudson, 315 Mass. 335, 52 N.E. 2d 566 (1943). A chlorination regulation by the Department of Health was held a proper exercise of the state's validly delegated police power despite the fact that the danger sought to be obviated was merely a potential one. No religious question was raised or mentioned by the court.

approval. Proponents feel there is no real distinction between the two. Whereas one is an additive to the water and destroys germs therein, the other, although in some regions a natural element of the water, is also an additive and builds up a resistance to those germs.[23]

It has been argued that because there is no penal or direct compulsive element to the fluoridation ordinances (since non-fluoridated water for drinking purposes is generally available), there is no substance to the objection such as made by the plaintiff herein, that the ordinance involves a deprivation. Others urge that fluoridation is not medication in the true sense of the word.[24]

The Christian Scientists, who believe that the sick are healed by mental and spiritual practice and not by medicines, are ardent assailants of compulsory fluoridation of public water supplies. They regard fluoridation as compulsory medication and contrary to their religious beliefs. They contend that fluoridation encroaches upon the constitutional right of freedom of religious worship; is an invalid extension of police power and form of benevolent despotism.

Though the Christian Scientists are not opposed to measures of sanitation or to chlorination of water for purification purposes, fluoridation, they feel, is a transgres-

[23] Note, 23 GEO. WASH. L. REV. 343 (1955).

The proponents fail to state that the fluorides found naturally are usually organic calcium fluorides which are found in combination with other natural elements serving to lessen and neutralize the toxic effects of fluorine, and which can be assimilated by the body. The artificially fluoridated water is obtained with sodium fluoride which is an inorganic, cumulative poison eighty-five times more toxic than calcium fluoride, and which cannot be assimilated by the body. When sodium fluoride is added to the water, an acid, hydrofluoric acid, an extremely active and dangerous poison, is the net result. The New York City water supply is "soft water" (almost totally lacking calcium).

The antagonists point to the fact that many people even now are suffering from fluorine poisoning from the presence of fluorine in foods, cooking utensils and innumerable other sources.

Though the proponents vigorously point to the experiments that have been conducted, and call forth a battery of scientists' names and research institutes that support fluoridation, the antagonists with equal vigor assert that the experiments have first been only conducted on *children*. What effect fluorine has on adults and the sick and aged has yet to be fully determined. Secondly, they point to the fact that the experiments have only been conducted for the past ten years. Fluorine is a cumulative poison and since only a small amount is actually used by the teeth and the rest is absorbed by the bones, the antagonists claim that twenty or thirty years should pass before the full effect can be determined. Thus, they liken fluorine to strontium from the H-bomb fall-out, which is gradually absorbed by the body having detrimental results much later. Those arguing against fluoridation advance an impressive battery of scientists and research groups, including the Louis Pasteur Institute of France which is diametrically opposed to fluoridation.

While those in favor of fluoridation believe there are no harmful effects on health, even if taken for a lifetime, the antagonists offer their scientific data which unequivocally asserts that fluorine has a deleterious effect on the kidneys, heart, liver, digestional tract, pancreas, nerve cells and brain tissue. Among the diseases reputedly caused by fluorine poisoning are pyorhhea, gingivitis and various other ectodermal lesions. Sterility and baldness have been attributed to fluorine poisoning. It is argued that the danger of fluorine poisoning is augmented by the fact that there is no known antidote for it. See SPIRA, THE DRAMA OF FLUORINE, ARCH ENEMY OF MANKIND (1953); Spira, *Chronic Poisoning Even Without Water Fluoridation*, 6 PREVENTION 59 (1954); Holmgren, *The Moral Issues in Fluoridation*, 6 PREVENTION 78 (1954); *Can We End Our Toothaches?*, 46 U.S. NEWS AND WORLD REPORT 30 (Dec. 9, 1955); 98 CONG. REC. 2763 (1952); *Better Health for 5 to 14 Cents a Year Through Fluoridated Water*, PUBLIC HEALTH SERVICE PUBLICATION No. 62, Revised April, 1951 (U.S. PUBLIC HEALTH SERVICE).

[24] Note, 23 GEO. WASH. L. REV. 343 (1955); 20 BROOKLYN L. REV. 298 (1954).

sion of their religious beliefs and amounts to arbitary governmental fiat. They are not opposed to any *voluntary* system of medicine. Nor are they opposed to those who wish to treat their own children's teeth according to the latest medical theories. But to pass legislation of this nature, they contend, would destroy any idea of voluntariness and *compel* them to be subject to a system of mass medication. While they do not attempt to impose their beliefs on any other group, they feel that no one should impose medical treatment, contrary to their deepest religious convictions, on them.[25]

The Jehovah Witnesses, frequently foes of therapeutic measures, in a recent article[26] took no positive stand on the question whether fluoridation violated their religious dogma. The article presented both sides of the fluoridation hassle and adopted a cautious attitude, implicitly favoring a "wait and see" outlook.

Many people see fluoridation statutes as another form of "creeping socialism" and view with alarm what they consider the sacrifice of individualism to the elevation of a mass movement. They feel that individual rights and freedom of choice are sacrificed for the tyranny of a majority. Democracy, they believe, should work for all and not merely the greater part.

> . . . [T]he opposers to fluoridation, while not wishing to take fluorides personally, do not seek to deprive their fellowmen of their right to take the chemicals. There are other ways to take this medication. But the proponents of fluoridation not only wish to take fluorides, but wish to force them on their unwilling fellow citizens. There is a big difference in the two groups.[27]

That the state may, in the exercise of its police power interfere with one's practice of religion provided it is reasonably necessary for the general welfare is clear. The courts today have a propensity to sustain such ordinances securing the public health, safety and welfare despite the conceded preferential status of religious liberty. However, to what extent the police power may be exercised without being checked by the judiciary is not clearly defined. Unfortunately, the Supreme Court of the United States has not passed upon the legality of the present problem though one case herein cited has tried unsuccessfully to obtain certiorari.[28] Notwithstanding, fluoridation laws appear not violative of any rights guaranteed to individuals under the Federal and State Constitutions.

Another interesting aspect is the effect fluoridation of drinking water has on the fasting laws in respect to Catholics. The law of the Eucharistic fast, stated tersely, is: "*Natural* water does *not* break the Eucharistic fast."[29] This has been officially inter-

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25 See Statement In Opposition To The Fluoridation of the New York City Public Water Supply made before the New York City Counsel, January 26, 1956, at a public hearing on Resolution 296 by Frank S. Bartlett, Christian Science Committee on Publication for the State of New York, representing the Christian Science denomination and thirty-five Branch Churches of Christ, Scientist, located within the five New York City Boroughs.

26 *The Fluoridation Issue,* AWAKE (March 22, 1956). AWAKE magazine is an official publication of the Jehovah Witnesses.

27 C. W. Holmgren, *The Moral Issues In Fluoridation,* 6 PREVENTION 78, 83-84 (1954).

28 Dowell v. City of Tulsa, 273 P. 2d 59 (Okla. 1954), *cert. denied,* 348 U.S. 912 (1955).

29 Pope Pius XII, *Apostolic Constitution,* CHRISTUS DOMINUS, 6 Jan. 1953, 45 ACTS APOSTOLICAE SEDIS 5, 22 (1953). The eucharistic fast, generally stated, denotes the abstinence from food and drink for a stated period prior to the reception of Holy Communion.

preted[30] to mean: "Natural water (that is, water without any additive) no longer breaks the Eucharistic fast." In a commentary on the subject, Palazzini[31] observes:

> Water purified by a public agency, by means of mixing with it chemical elements, can be said to be natural water. Although there is present in it an added foreign element, nevertheless it is water in common use.[32]

Palazzini states further that:

> All commentators agree in asserting this, though they disagree in the reasons offered. Some appeal to the common estimation of men. Others say that the quantity of added medicinal elements is proportionately minimal, and may be ignored. Others say that unless this view be taken it is practically impossible to take the benefit of the law (Eucharistic law); finally others argue that this is a perfect example of epikeia.[33]

It is true that the commentators refer only to "purification" and not to fluoridation. Nevertheless, all the reasons offered to permit use of "purified water" would seem applicable to fluoridated water: it is water in common use, it is natural water in the common estimation of men, the additive is of minimal proportions, and to exclude the use of such water would make it impossible for whole communities to take advantage of the Eucharistic law. It is respectfully submitted that for the foregoing reasons there is almost as much reason to assert that the law is dispensed by epikeia in so closely analogous a situation.

"Charitable Purposes" Defined

Recently, the California Supreme Court held that Section 214 of the Revenue and Taxation Code which exempts from taxation nonprofit schools of elementary and secondary grade contravenes neither the state nor federal Constitution. *Lundberg* v. *County of Alameda* [—Cal. 2d—(1956)].

In California, all property is taxable unless an exemption is authorized by the state Constitution or granted by the laws of the United States. However, Section 1c of Article XIII of the state Constitution permits ". . . the Legislature [to] exempt from taxation all or any portion of property used exclusively for religious, hospital or charitable purposes. . . ."

The statute in question granted an exemption to property ". . . used exclusively for school purposes of less than collegiate grade and owned and operated by religious, hospital or charitable funds, foundations or corporations." At issue was the interpretation of the term "charitable" as employed in the California Constitution.

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30 Congregation of the Holy Office, 6 Jan. 1953, 45 ACTS APOSTOLICAE SEDIS 47 (1953).

31 Pietro Palazzini, in 1953 was professor of moral theology at the Lateran University, Rome.

32 The author's comments are based on a study of twenty-six articles commenting upon the law and instruction, and published in Italy, France, England, Ireland, Spain, Germany, Belgium, Australia and the United States.

33 Palazzini, *Adnotationes,* 26 APOLLINARIES 81, 87 (Rome 1953). For this view he cites specifically: Connell, *The New Rules for the Eucharistic Fast,* 128 AMERICAN ECCLESIASTICAL REVIEW 241-254, 461-462 (1953); Frazioli, *La Nuova Disciplina del Diguino Eucharistico,* 28 PERFICE MUNUS 382-394 (1953). *"Epikeia* is an interpretation exempting one from the law contrary to the clear words of the law and in accordance with the mind of the legislator. It is evidently a very exceptional thing. It may be used with prudent discretion, and is justified, only in a particular case where: (a) the strict interpretation of the law would work a great hardship; and (b) in view of the usual interpretation it may be prudently conjectured that, in this particular case, the legislator would not wish the law to be strictly applied." BOUSCAREN and ELLIS, CANON LAW 33-34 (2d Rev. ed. 1953).

The Court followed the *Estate of Henderson* case [17 Cal. 2d 853, 112 P. 2d 605 (1941)], which held a charitable institution to be one whose ". . . aims and accomplishments are of religious, *educational* (emphasis supplied), political or general social interest to mankind . . ." (112 P. 2d at 607), thus embracing the educational purpose which was the subject of the disputed statute.

In a strong dissenting opinion concurred in by two of the justices it was argued that the legislative history of Section 1c of the California Constitution clearly evidenced an intent to exclude educational purposes and that accordingly, the statute in question was unconstitutional. The majority felt that the legislative history of the constitutional provision was inconclusive as to intent and that absent a clear showing to the contrary the construction of the term "charitable" as settled by decisional law should prevail.

Although the principal issue, as focused upon by both the majority and dissenting opinions, was the question of construction, a federal question was also raised. Plaintiff, a citizen-taxpayer, contended that Section 214 constitutes a violation of the "establishment clause" of the First Amendment. The majority opinion disposed of that contention on two grounds; first, that the exemption did not directly benefit any religious group but inured to the advantage of the public in general, and second, that even if a direct benefit could be found, tax exemptions for charitable organizations have always been held to be consonant with the First Amendment.

It seems unlikely that the Supreme Court of the United States will review the projected federal question since the petitioner appears to lack the necessary substantial financial interest. [See *Doremus* v. *Board of Education,* 342 U. S. 429 (1952)].

[For a treatment of various interpretations placed upon "charity" and similar terms see 2 CATHOLIC LAWYER 172-76 (April 1956). For another aspect of the problem of public aid to private education see 1 CATHOLIC LAWYER 333-35 (October 1955)].

Sunday Laws

In the case of *Humphrey Chevrolet, Inc.* v. *City of Evanston,*[1] a group of automobile dealers brought an action to enjoin the city from enforcing an ordinance requiring businesses to close on Sunday on the ground that, as against them, its enforcement would be discriminatory. The highest state court of Illinois held that the ordinance was constitutional as a reasonable exercise of the city's police power.

"Sunday laws" are traceable to 321 A.D. when Constantine the Great, then a heathen, passed an edict commanding all inhabitants of cities to rest on that day.[2] Since then various forms of Sunday prohibitory laws have evolved throughout the world and have been enacted in all the states.[3]

Different jurisdictions hold different views on the purpose of such laws[4] but generally speaking there is a twofold objective: first, to protect the right to undisturbed observance of the Sabbath and, secondly to provide a day of rest for the working class.

The power of legislatures to pass "clos-

1 7 Ill. 2d 402, 131 N.E. 2d 70 (1956).

2 21 ENCYCLOPAEDIA BRITANNICA 565 (1951).

3 AMERICAN STATE PAPERS 380-452 (Blakely ed. 1949).

4 See, *e.g.,* People *ex rel.* Moffat v. Zimmerman, 48 Misc. 203, 95 N.Y. Supp. 136 (Sup. Ct. 1904); State *ex rel.* Walker v. Judge, 39 La. Ann. 132, 1 So. 437 (1887); Arrigo v. City of Lincoln, 154 Neb. 537, 48 N.W. 2d 643 (1951).

ing" laws has never been successfully questioned and cannot be disputed.[5] The power is universally held to emanate from the general welfare aspect of police power.[6] However, some courts in particular instances have recognized that similar laws may lose their effectiveness.[7]

While the power to enact "Sunday laws" is beyond doubt, certain purported enactments regulating Sunday conduct have been outlawed by the courts as unreasonable and arbitrary. Thus in *Mt. Vernon* v. *Julian* the court said: "... [A]n act which has no tendency to affect or endanger the public in connection with health, safety, morals, or general welfare and which is entirely innocent in character, is not within the police power."[8] In that case, a grocery store owner was convicted under an ordinance which contained a general closing provision but which exempted such business establishments as eating places, drug stores, tobacco shops, ice dealers, gas stations and telegraph offices. In holding the ordinance unconstitutional the court said:

> We do not see where the public welfare is served by closing the grocery store and allowing a confectionery store to remain open, nor in closing a notions store while a drug store next door which sells notions is permitted to operate ... These distinctions appear to be entirely arbitrary. ...[9]

An objection raised repeatedly by Sabbatarians (those who keep holy the seventh day of the week) is that "Sunday laws" infringe upon the constitutional provisions guaranteeing freedom of religious worship; but that contention has been consistently overruled.[10]

Basically, there are three principal types of Sunday legislation: (a) that which prohibits only particular kinds of business establishments but permits all others to remain open;[11] (b) that which contains a general closing provision but exempts from the operation of the law certain business which may sell the same products as those prohibited to open on Sunday;[12] and (c) the commodity-type which prohibits all business activities but exempts the sale of

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5 People v. Dunford, 207 N.Y. 17, 100 N.E. 433 (1912).

6 Mt. Vernon v. Julian, 369 Ill. 447, 17 N.E. 2d 52 (1938).

7 "No citizen any longer makes a complaint under them, and thus they become dead letter laws. It is not the business of the police to revive them." People *ex rel.* Pool v. Hesterberg, 43 Misc. 510, 513, 89 N.Y. Supp. 498, 500 (Sup. Ct. 1904).

8 369 Ill. 447, 17 N.E. 2d 52, 55 (1938).

9 *Ibid.*

10 See Silverberg Bros. v. Douglass, 62 Misc. 240, 114 N.Y. Supp. 824 (Sup. Ct. 1909) in which the court held that "Sunday laws" do not interfere with the religious liberty of any person but rather are restraints upon civil liberty within the police power. The court in *Ex parte* Newman, 9 Cal. 502 (1858) held that the legislature was powerless to enact Sunday laws on the ground that they would infringe upon freedom of religion. However, that view was subsequently overruled by the same court in *Ex parte* Andrews, 18 Cal. 679 (1861).

11 See, *e.g.*, the statute passed upon in Eden v. People, 161 Ill. 296, 43 N.E. 1108 (1896): "[I]t shall be unlawful for any person or persons to keep open any barber shop or carry on the business of shaving, haircutting, or tonsorial work on Sunday, within this state."

12 A typical example of this type is the ordinance reviewed in Mt. Vernon v. Julian, 369 Ill. 447, 17 N.E. 2d 52 (1938): "It shall be unlawful for any person to keep open or permit to be kept open his place of business on Sunday within this city; provided, that this section shall not be applicable in cases of necessity or charity, nor to hotels, restaurants, eating places, drug stores, tobacco stores, confectionery stores, news dealers, ice dealers, shoe shining parlors, garages, gasoline filling stations, telephone exchanges, telegraph offices and moving picture theatres."

certain commodities from the operation of the law.[13]

In the instant case, the court for the first time passed on the validity of the commodity-type, similar to that of New York State, after having previously declared unconstitutional ordinances of the other two types. Similarly, other jurisdictions including New York have been upholding the commodity-type of "Sunday law"[14] while striking down the other two as discriminatory and unreasonable.[15] It would appear from the cases that the test as to whether a "closing" ordinance is unreasonable or arbitrary is this: Do the exemptions from the provision relate to the health, safety, morals or general welfare of the people? Does the ordinance affect all persons similarly situated or engaged in the same business without discrimination?

From the very nature of the commodity-type of Sunday legislation, since it affords the same opportunities to dealers in the same products, it would therefore appear that this type of provision would be least likely to be declared discriminatory and hence would serve as a sound guide for legislatures desirous of enacting some form of "closing" law.

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[13] Typifying this type of "closing" law is N.Y. PENAL LAW §2147: "All manner of public selling or offering for sale of any property upon Sunday is prohibited, except as follows: 4. Prepared tobacco, bread, milk, eggs, ice, soda-water, fruit, flowers, confectionery, souvenirs, newspapers, gasoline, oil, tires, drugs, medicines and surgical instruments, may be sold in places other than a room where spiritous or malt liquors or wines are kept or offered for sale and may be delivered at any time of the day."

[14] Petit v. Minnesota, 177 U.S. 164, 20 Sup. Ct. 666 (1900), *affirming*, 74 Minn. 376, 77 N.W. 225 (1898); People *ex rel.* Moffatt v. Zimmerman, 48 Misc. 203, 95 N.Y. Supp. 136. (Sup. Ct. 1904); Theisen v. McDavid, 34 Fla. 440, 16 So. 321 (1894); People v. Krotkiewicz, 286 Mich. 644, 282 N.W. 852 (1938); State *ex rel.* Hoffman v. Justus, 91 Minn. 447, 98 N.W. 325 (1904); Komen v. St. Louis, 316 Mo. 9, 289 S.W. 838 (1926); State v. Diamond, 56 N.D. 854, 219 N.W. 831 (1928); Seattle v. Gervasi, 144 Wash. 429, 258 Pac. 328 (1927).

[15] Among the cases in which courts have declared unconstitutional ordinances which contained a general closing provision but which exempted certain businesses which may sell the same products as those prohibited to open are: Gaetano Bocci & Sons Co. v. Town of Lawndale, 208 Cal. 720, 284 Pac. 654 (1930); Allen v. Colorado Springs, 101 Colo. 498, 75 P. 2d 141 (1938); Mt. Vernon v. Julian, 369 Ill. 447, 17 N.E. 2d 52 (1938); *Ex parte* Hodges, 65 Okla. Crim. 69, 83 P. 2d 201 (1938); Broadbent v. Gibson, 105 Utah 53, 140 P. 2d 939 (1943).

Typical of the cases in which courts have outlawed that type of legislation which prohibits only particular kinds of businesses but permits all others to remain open are: *In re* Jacobs, 98 N.Y. 109 (1885); Cowan v. Buffalo, 157 Misc. 71, 282 N.Y. Supp. 880 (Sup. Ct. 1935), *aff'd*, 247 App. Div. 591, 288 N.Y. Supp. 239 (4th Dep't 1936); Elliott v. State, 29 Ariz. 389, 242 Pac. 340 (1926); *In re* Scaranino, 7 Cal. 2d 309, 60 P. 2d 288 (1936); Eden v. People, 161 Ill. 296, 43 N.E. 1108 (1896); *Ex parte* Ferguson, 62 Okla. Crim. 145, 70 P. 2d 1094 (1937); Stewart Motor Co. v. Omaha, 120 Neb. 776, 235 N.W. 332 (1931).