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Right Reverend Monsignor George H. Guilfoyle, LL.M.

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*The following article extends the scope of the Church-State problem beyond the parochial school issue.*

# CHURCH-STATE RELATIONS IN WELFARE\*

RIGHT REVEREND MONSIGNOR GEORGE H. GUILFOYLE, LL.M.†

**A**MID THE VARIED, vibrant aspects of the mission of the Church is Her charitable apostolate. The mission given the Church by Her Divine Founder is to bring God to man and man to God — the total man, composite of body and soul. The works of mercy, established and practiced within the Church throughout the centuries, are not merely worthy humanitarian projects. They are among the credentials of the Church of Christ. In the hierarchy of values the supernatural is greater than the natural, the spiritual greater than the material. But that is by no means to say that the natural and the material in man are not important or that they do not count in God's plan. The total man is soul and body, spiritual and material — it is that total man whose happiness is to be sought, whose salvation is to be won. Obviously in helping man the Christian mission has to take into account the whole man even though the primacy lies with the spiritual aspects of his nature. There *is* a Christian humanism — it is the only true humanism.

And so, necessarily from the nature of things as well as from precept, the Church of Christ must be concerned with the welfare needs of man, and, indeed, not only concerned, but active about them. At the same time, within its charge the State has the duty to provide for the material and temporal welfare of its people through the promotion of the common good and by cooperative activity. Inevitably, then, we face questions of the relationships of Church and State in the field of welfare.

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\* An address delivered at the Catholic University School of Law on February 13, 1957.

† Priest of the Archdiocese of New York; Executive Director of Archdiocesan Catholic Charities.

The Church and State are each concerned with the well-being of the human race. In *Immortale Dei* Pope Leo XIII stated:

God has divided the government of the human race between two powers, the ecclesiastical and the civil; the one being set over the Divine, the other over human beings. Each is supreme in its own sphere; each has fixed limits within which it moves. Each is circumscribed by its own orbit, within which it lives and works in its own natural right.<sup>1</sup>

In Church and State, therefore, we have two perfect societies with their proper spheres. The Church's end is man's spiritual welfare; that of the State, his material well-being. Though distinct and complementary, we find in them an area of overlap. This area of overlap is the thorny one in delimiting the proper spheres of each.

Today much is said and written on the subject of Church-State relations from the civil law point of view. Many, perhaps, do not realize that in addition to the broad, intricate discussion of this subject in the field of legal philosophy and constitutional theory, there is among theologians a parallel discussion of the moral principles applicable to the relationships of these two societies. Lawyers and future lawyers should find particular interest in the theological discussion of Church-State relations and in the fervor and skill with which protagonists of the traditional view, among whom Father Francis J. Connell of the Catholic University of America is a leader, vie with Father John Courtney Murray, S.J., and others defending a modern liberal view.

Suffice it to say here that the theologians have a great deal to offer the lawyers and that lawyers should be interested in and

active in their own communities and areas of influence, and in the development of sound legal principles on this vital question. In an address delivered at Fordham University on October 15, 1955, Father Murray observed:

. . . I do not myself believe that any solid bridge of legal doctrine has yet been built to a right decision — both legislative and judicial — on the vexing problem of reconciling the legal demands of separation of church and state with the rightful social and religious demands of a people that confesses itself to be religious and that also knows its socio-religious structure to be pluralist and tripartite. There is here a task for the legal profession, to be performed not only, or even mainly, in the courtroom, but also, and particularly, in the larger forum of public opinion.<sup>2</sup>

### Background

Our discussion will center, not on the theology of the matter, but rather on the American law and practice involved in the Church-State question in respect to the welfare activities of religious organizations.

The pivotal statement of civil law on the whole Church-State question in the United States is the First Amendment to the Constitution, which reads in part:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

Related is Section 1 of the Fourteenth Amendment which reads:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

<sup>1</sup> Encyclical Letter of Leo XIII, *Immortale Dei* (1885).

<sup>2</sup> Murray, *Freedom, Responsibility, and the Law*, 2 CATHOLIC LAWYER 214, 222 (1956).

A review of the decisions reported indicates that during the last decade there has been more interest in the matter of Church-State relations and more contests under these sections and related state constitutional provisions than during the sum of all the prior years.

We have had no *federal* establishment of religion although history records many evidences in this country not only of religious bigotry but of religious preference. In fact, nine of the original thirteen states had established churches, and some continued them even after the establishment of a federal government. In addition, in several states there were legal discriminations based on religion, *e.g.*, against Catholics for many years (in New Hampshire as late as 1876 despite the passage of the Fourteenth Amendment in 1868).

Nevertheless, since the establishment of the nation we have had for the most part mutually cooperative relations. The tax exemption accorded all charitable organizations, chaplains for various public undertakings, payments of public monies for services rendered by sectarian charitable organizations, have been some of the generally accepted relations between Church and State. It is beyond our scope to review the federal and state cases on these matters, but several recent key cases must be mentioned. These bear on the problem for the future with regard to the Church-State question in welfare. They are the comparatively recent Supreme Court decisions in *Everson v. Board of Education*,<sup>3</sup> *Illinois ex rel. McCollum v. Board of Education*,<sup>4</sup> *Zorach v. Clauson*,<sup>5</sup> and most recently,

*Heisey v. County of Alameda*.<sup>6</sup>

Actually, we find that the term, "Separation of Church and State," has various meanings and has been applied differently in different areas of public policy, education, welfare and the military. The separation is most apparent and far reaching in education. Most state constitutions prohibit not only direct, but indirect aid to sectarian educational institutions. Private religious schools have been, traditionally, fully supported by the personal sacrifice of the members of the religious bodies.

The *Everson* decision sustained the constitutionality of a New Jersey statute which provided for transportation of children to and from parochial schools. The *McCollum* decision struck down as unconstitutional an Illinois program of "released time" from public school for religious instruction within the public school building.

These decisions promulgated an extreme view of this absolute separation in the field of education. Justice Black, speaking for the majority of the Court in the *Everson* case, wrote:

Neither (a State nor the Federal Government) can pass laws which aid one religion, aid all religions, or prefer one religion over another.<sup>7</sup>

and further on

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.<sup>8</sup>

The theory followed in the *McCollum* case, developed in the first instance by Jus-

<sup>3</sup> 330 U. S. 1 (1947).

<sup>4</sup> 333 U. S. 203 (1948).

<sup>5</sup> 343 U. S. 306 (1952).

<sup>6</sup> 352 U. S. 921 (1956).

<sup>7</sup> 330 U.S. at 15.

<sup>8</sup> *Id.* at 16.

tice Black and lengthily supported by Justice Rutledge in his dissenting opinion in the *Everson* case, is that the clause "law respecting an establishment of religion," supplemented by the Fourteenth Amendment, forbids both the national government and the states "to pass laws which aid one religion, aid all religions, or prefer one religion over another."

This represents an extreme and, in my judgment, an unsound view. Some would extend this doctrine to other fields and thereby disrupt historical practices. After all, the bus transportation for school pupils involved and supported in the *Everson* case, while of tremendous importance to the individual citizen, pales in significance in respect to what is involved compared, for instance, with the tax exemption enjoyed by churches and their activities, and the system of purchasing support of dependent children from religiously operated institutions.

In connection with the *Everson* and *McCullum* decisions and this whole Church-State problem, of prime importance is the decision of the United States Supreme Court in *Zorach v. Clauson*. In the *McCullum* case, the Illinois released time program was outlawed. In the *Zorach* case, decided four years later, the New York State released time program was upheld. Speaking for the majority, Justice Douglas had some notable observations. He said, *inter alia*:

The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion

would be aliens to each other — hostile, suspicious, and even unfriendly.<sup>9</sup>

We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. . . . 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. . . . But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.<sup>10</sup>

We cannot read into the Bill of Rights such a philosophy of hostility to religion.<sup>11</sup>

*Heisey v. County of Alameda* presents another reason for encouragement. This case originated in California where it was known as *Lundberg v. County of Alameda*.<sup>12</sup> The Supreme Court of California upheld the right of tax exemption of educational organizations and religious organizations. In this case plaintiff, a citizen and taxpayer of the county, brought suit to challenge the constitutionality of a portion of Section 214 of the California Revenue and Taxation Code which grants tax 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." The exemption was added in 1951 and approved by public referendum. This appeal to the Supreme Court of California was from a judgment declaring it invalid.

<sup>9</sup> 343 U. S. 306, 312.

<sup>10</sup> *Id.* at 313-14.

<sup>11</sup> *Id.* at 315.

<sup>12</sup> 46 Cal. 2d 644, 298 P. 2d 1, *dismissed on appeal sub nom.* Heisey v. County of Alameda, 352 U. S. 921 (1956).

The California Constitution, Article XIII, § 1c, provides that in addition to such exemptions as provided in the constitution, the legislature may exempt from taxation property used exclusively for religious, hospital or charitable purposes and owned by chests, funds, foundations or corporations organized and operated for religious, hospital or charitable purposes and not for profit.

The court said that the validity of the statutory exemption involved in this case depended first on whether an educational purpose may be regarded as a charitable purpose within this article. The court went into this at length and said:

It thus appears that the word charitable has been given a broad construction in tax exemption cases as well as others, and it would seem clear that nonprofit schools owned by nonprofit organizations and operated for the benefit of the public come within the term charitable as defined by our decisions.<sup>13</sup>

The court also discussed the *legislative history* of the section of the Constitution in question with the same result, namely the inclusion of educational purposes within the term charitable.

The court considered the argument that the exemption, as applied to schools owned by religious organizations, violated Article IV, §30, of the state constitution which provides that the legislature shall not grant aid to any religion, sectarian purpose, sectarian school, college, etc. The court said this did not mention tax exemption and, in any case, was superseded by subsequent adoption of Article XIII, §1½ which exempted property used for religious worship and of §1c "which, as we have seen, authorizes exemption of nonprofit schools

<sup>13</sup> *Id.*, 298 P. 2d at 5.

and specifically refers to property owned and operated by religious organizations."<sup>14</sup>

The court *then* took up the argument that the exemption contravenes the First Amendment and dismissed it. It said, "Under the circumstances, any benefit received by religious denominations is merely incidental to the achievement of a public purpose."<sup>15</sup>

The California court also said that even if we regard tax exemption as benefiting religious organizations, it does not follow that it violates the First Amendment.

The principle of separation of church and state is not impaired by granting tax exemptions to religious groups generally, and it seems clear that the First Amendment was not intended to prohibit such exemptions. Accordingly, an exemption of property used for educational purposes may validly be applied to school property owned and operated by religious organizations.<sup>16</sup>

In the United States Supreme Court where the case was known as *Heisey v. County of Alameda*, the appeal was dismissed for want of a substantial federal question. Mr. Justice Black and Mr. Justice Frankfurter dissented, and the Chief Justice did not participate.

It has been succinctly stated that:

. . . [T]he militant secularists have scored three major victories in their campaign to keep religion within the four walls of the church building. Two of these victories were . . . the *Everson* and *McCullum* cases. . . . The third secularist victory is perhaps the greatest. Through clever propaganda secularists have duped many people into thinking these decisions were warranted. They have shelved the actual wording of the First

<sup>14</sup> *Id.*, 298 P. 2d at 7.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Id.*, 298 P. 2d at 8.

Amendment, ignored its history, and substituted their favorite metaphor, "the wall of separation between Church and State."<sup>17</sup>

Certainly the perversion of Jefferson's "wall of separation" was so effectively done that for many it has become, in its distorted meaning, a by-word. For that reason the decision and observations of the majority in the *Zorach* case and the result in the *Heisey* case must have been a breath of fresh air to all those who believe that neither principle nor the Constitution require government and religion to be hostile and uncooperative.<sup>18</sup>

Some have expressed the view that the Church-State problem is being overplayed in this country at the present time. If this be so, why is it so? That question invites some interesting theories. It is factually evident, however, that certain organized groups view with horror not only the provision by government of even welfare services to a child in a parochial school but any practical recognition by government of religion in any welfare services to young or old.

In my judgment, the *Everson* decision was right in conclusion but wrong in much of its reasoning. Neither constitutional history nor legal theory justify the wall of absolute separation. Moreover, I think that the Supreme Court today, presented with the same facts as in the *Everson* and *McCullum* cases, might be expected to reach the same conclusions but not with the same argumentation. A lot has happened in the courts and outside in the ten years since the *Everson* decision. And yet, we can not

be certain what the future has in store. Hopefully, the attitude of Church and State in the areas of overlap will be one of mutual friendliness and cooperation.

### New Philosophies in Welfare

"Separation of Church and State" has had a different *application* in welfare than in education. Many complex factors, largely related to history, necessarily enter any analysis of the causes of this difference as it has developed in the thinking of the public, legislators and judges. One fundamental difference between education and welfare in this country is the fact that we have built a large and powerful system of schools, at all levels of education, under the control of government. In welfare we do not have any comparable network of direct public services although we do have tremendous programs of public assistance.

By and large, throughout the country it is the voluntary agency, the voluntary hospital, the voluntary child care institution to which the public has looked in the past and still looks for most direct charitable services. These strong voluntary agencies represent the traditionally accepted way of providing such needed services. They are respected, they have status in the community.

Discernible in the last decade, however, is a growing opposition, small, perhaps, but vociferous, to this traditional role and to the acceptance which voluntary welfare agencies have enjoyed under our way of life. The reasons for this trend may be divided, for purposes of discussion, into three. They are: (1) the assumption of an increasing and often necessary role by the State in the area of social welfare; (2) an unreasoned fear in some quarters of any aid by government to religion, even when

<sup>17</sup> KEEFE, AMERICAN SEPARATION OF CHURCH AND STATE 9-11 (1951).

<sup>18</sup> For a discussion of this subject by an advocate of this point of view, see O'NEILL, RELIGION AND EDUCATION UNDER THE CONSTITUTION (1949).

the aid is basically to individual citizens and the religious agency through which it is channeled is performing a common good; (3) the development of secularism.

### Expanding Welfare Role of Government

The development of public welfare services has received its greatest impetus since the end of World War II. With a prolonged period of economic prosperity and huge tax funds at its command, the State has been able to initiate and further on a large scale welfare programs which voluntary agencies could never hope to undertake. The development of Social Security and public assistance, for instance, could not have reached present levels if public monies had not been plentiful. Public monies for combating juvenile delinquency and for various types of rehabilitation are other examples of heretofore unheard of activity by government. Certainly this increasing acceptance by government of responsibility for social welfare has been necessary and to its credit.

We find, however, that the architects of these vast programs of social legislation, dedicated as they may be, are often officials who have not been closely allied, nor even in some cases familiar, with the role and values of voluntary welfare agencies. Many either are not acquainted with, or do not recognize, the soundness of what is termed the "*principle of subsidiarity*," and which has been so forcefully outlined on occasion by Pope Pius XII. The principle of subsidiarity should be fundamental in welfare as elsewhere. It is a norm for regulating and gauging the proper order of responsibility and the discharge of the obligations of justice and charity — both personal and governmental, local, state and federal — in

relation to human needs and their alleviation. In accord with this principle a sound community welfare program would utilize first voluntary effort, and should that be insufficient, then governmental effort, local, state and federal, in that order. For the closer the relationship, the greater the responsibility.

Parallel with the principle of subsidiarity, a second criterion for the evaluation of new public welfare programs is that of *partnership*. The joinder of forces between voluntary and public agencies, each independent but contributing within its competence and supplying what the other lacks, provides the ideal democratic program of welfare. Such a partnership exists, for instance, where government does not duplicate what voluntary agencies provide, but rather purchases the services of voluntary agencies, if persons who are government charges are involved. Principal among such services are the care of the sick and the care of homeless children in institutions or boarding homes.

The changes in our population and economy often require large scale programs with huge operating expenditures which can only be met by public funds. But, the service itself, the immediate care of the child, the individual counseling, the vocational guidance, the nursing care, can be rendered more humanely and with greater deference to the individuality and dignity of the human being by the voluntary charitable agency. Moreover, it can usually be rendered more economically and efficiently by the voluntary agency and this is especially true where the voluntary institution has the benefit of the donated services of religious.

The Secretary of Health, Education and Welfare, Marion B. Folsom, on December



6, 1956, in an address before the National Press Club expressed with force and clarity the ideal division of function between government and voluntary agencies, a division which aptly applied the concepts of both subsidiarity and partnership. He said in part:

... [W]e say the Federal Government would fail to serve the people's interest if it stood idly by, indifferent to broad deficiencies in health, education or economic security — deficiencies which might undermine our national progress and well-being. We believe that when the welfare of the whole people is involved in certain problems which are nationwide in scope — problems which cannot be solved, or solved quickly enough, by private efforts or local and State governments — then there is a deep Federal responsibility to help. We believe the Federal Government, no less than local or State governments, is an instrument of the people. It can and should act in these fields for the benefit of all the people.

When Federal concern leads to Federal action, however, we believe the most helpful often is *not* to take over the whole show. Instead, Federal activities often should be designed to encourage greater initiative and enterprise by individuals, private agencies, and local and State governments. This method has two great advantages. First, it combines a wider range of resources against a problem — human resources of experience and ingenuity, as well as financial resources. And, second, it frequently has the advantage of applying these resources through the people and channels closest to the problem, where knowledge and judgment of local conditions can be invaluable.

Thus, we seek a pattern of cooperative action by private enterprise and by local, State, and Federal governments — a sharing and division of responsibility designed to foster the best combination of services for all the people. The Federal role is one of leadership and assistance, but not domination. The Federal government supports local and private effort, but does not supplant it. . . .

The fact remains, however, that increasing costs combined with the increase of available public monies, the development of greater social welfare consciousness combined with a public welfare philosophy among certain community leaders and professional personnel in public agencies, make one wonder whether voluntary and especially religious welfare activities can continue to live and to grow. If not, certainly something of great moment would be lost. Surely it is important to be clear in our own minds and also articulate with regard to the fundamentals of good welfare.

### Fear of Encroachment

The *second* element is the fear of the encroachment of religion in government. The statements and actions of the organization known as "Protestants and Others United for the Separation of Church and State" indicate this fear. The political philosophy of this organization, and persons of similar persuasion, has been, of course, most apparent in the area of Church-State relations in education. But, it has distinct overtones in welfare.<sup>10</sup>

### Secularism

The *third* element, secularism, is not necessarily related in causation and motive to the second, mentioned above, but its ob-

<sup>10</sup> For instance, in October 1951, the Senate was called upon to clear appropriations under the Hill-Burton Act to two voluntary hospitals, one Methodist and the other Catholic, in the District of Columbia. "Protestants and Others United" registered sharp disapproval of the grants before the Senate District of Columbia Committee. Their disapproval was based on the Church-State issue and the First Amendment to the Constitution. The Committee and the Senate rejected this argument but the significance is that arguments of this nature, comparatively new in the welfare field, are now being made.

jectives are essentially the same — the complete separation of government and religion, including church welfare activities. The secularist may be driven by conviction rather than fear. Indeed, he is often noted for the intensity of his convictions. Secularists vigorously deplore any form of contract between government and religious agencies, even governmental purchase of services for value received. Many carry their activities to such lengths that they can justly be considered hostile to religion even if their formal opposition is limited in words to opposition to anything hinting of religion in public life. Of course, secularism is a form of the materialism which is perhaps the greatest plague of our day.

In 1952, in a statement of the Catholic Bishops of the United States which spoke of the threat of secularism, it was said:

These words of Lincoln not only recall to us our national traditions relative to the importance of religion; they also remind us of the constant temptation for this Country to turn away from God and to become immersed in material pursuits.

In our own day wide spread yielding to this temptation has given rise to an even greater danger — the way of life we call Secularism.

Those who follow this way of life distort and blot out our religious traditions, and seek to remove all influence of religion from public life. Their main efforts are centered on the divorce of religion from education. Their strategy seems to be: first to secularize completely the public school and then to claim for it a total monopoly of education.<sup>20</sup>

The views of the secularist are greatly different from those of the Church. From the beginning the Church has recognized

that her duty to the needy involves practical service. Very early, charity in practice became to a degree organized and systematized. The few were delegated to serve the needy in the name of the many.

The objective then was the same as now — the alleviation of human misery in order to help the total man work out his eternal salvation. If sectarian welfare organizations are to fulfill this praiseworthy objective, they must be recognized and respected by government as well as the community. If they perform a welfare service for the community, for the public good, it is hardly conceivable that they would not be in some kind of partnership with governmental agencies. Yet, the secularist would take man apart if not completely strip him of his spiritual dignity, and he would insist that what deals with man's spiritual concerns must be isolated from his "non-spiritual" concerns.

In His Christmas Message of 1952, Pope Pius XII beautifully expressed the concepts basic to this question when he said:

It is superstition to expect salvation from rigid formulas mathematically applied to the social order, for this way of thinking attributes to them an almost prodigious power which they cannot have. . . .<sup>21</sup>

Elsewhere in the same Message, the Holy Father wrote:

Whoever, therefore, would furnish assistance to the needs of individuals and peoples cannot rely upon security as an impersonal system of men and matter, no matter how vigorously developed in its technical aspects.

Every plan or program must be inspired by the principle that man as subject, guardian and promoter of human values, is

<sup>20</sup> The Tablet, Nov. 22, 1952, p. 8, col. 2.

<sup>21</sup> The Tablet, Jan. 3, 1953, p. 8, col. 6.

more important than mere things, is more important than practical applications of scientific progress, and that above all it is imperative to preserve from an unwholesome "depersonalization" the essential forms of the social order which We have just mentioned, and to use them to create and develop human relationships.<sup>22</sup>

### Criteria

Attorneys interested in preserving intact the tradition of personal, meaningful service to the needy as discharged by religious and other voluntary agencies, and legislators and judges with the same conviction may find the following questions useful in the evaluation of legislation and the assessment of court constructions:

(1) Is it predicated on the principle of subsidiarity?

(2) If public monies for services are involved, does it reflect the principle of partnership?

(3) Does it promote the notions of human dignity and personal service?

(4) If it relates to children and minors, does it preserve the fundamental rights and duties of parents and the rights of the child?

These questions are pertinent in the evaluation of all programs touching Church-State relations in welfare. If the program is traditional, the answers likely will be in the affirmative. If the program is a new one, the answers may or may not be in the affirmative, at least in the beginning stages of legislation. It is interesting to note, that many new welfare programs when first suggested contain highly controversial features, but somehow or other before enactment the democratic process usually asserts itself and right principles prevail. Whether or not this will continue depends in no small measure on the lawyers of the future.

<sup>22</sup> *Ibid.*

### Specific Problems

Until recent years welfare concerns have been primarily state matters rather than federal. It may be interesting now to turn to some specific examples under the laws of New York. It is necessary here to select some areas and to omit others. One of those omitted, the increasing problems accompanying zoning laws, could alone be the subject of important study. Another important topic omitted is that of taxation. True enough there is generally exemption from taxes for religious as for all charitable agencies but there are notable exceptions, *e.g.* certain excise taxes, some special district assessments, etc.

### Public Monies

In the State of New York we have one of the finest patterns of welfare legislation in the country, a pattern in which religion and religious agencies receive a respect and recognition unknown in some parts of the country. We have, moreover, a large pattern of services under religious auspices. These programs are protected by constitutional and statutory provisions. And yet, at the same time it is also interesting to note that in New York we have a concentration of much of the efforts directed against governmental relations of any kind with religious groups and religious welfare programs.

Article XI, §4, of the New York State Constitution provides:

Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doc-

trine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning.

Under this section, its history and interpretation, there can be no question regarding the policy of the State toward State supported schools. Such education must be non-partisan and non-sectarian.<sup>23</sup> Public monies may not be used, directly or indirectly, to aid any school in which a denominational tenet is taught. But, what has been the effect on welfare institutions that provide care and maintenance, including education of the dependent child?

Article VII, §8, and Article VIII, §1, of the New York Constitution control the use of State and local monies respectively for private purposes. Both prohibit the gift or loan of public monies to private undertakings. But, both sections contain an exception of vital significance to welfare agencies.

The exception language of Article VIII, §1, regarding local monies, is set forth below. This provision is similar though not identical to Article VII, §8. The same reasoning applies though the problem more frequently arises in connection with local monies.

Subject to the limitations on indebtedness and taxation applying to any county, city or town, nothing in this constitution contained shall prevent a county, city or town from making such provision for the aid, care and support of the needy as may be authorized by law, nor prevent any such county, city or town from providing for the care, support, maintenance and secular education of inmates of orphan asylums, homes for dependent children or correctional institutions and of children placed in family homes by

authorized agencies, whether under public or private control, or from providing health and welfare services for all children. Payments by counties, cities or towns to charitable, eleemosynary, correctional and reformatory institutions and agencies, wholly or partly under private control, for care, support and maintenance, may be authorized, but shall not be required, by the legislature.

These exceptions provide the constitutional authority for the excellent partnership of public and private agencies existing in New York State. Under their sanction it is permissible, for instance, for the state and local government to contribute financially to the support of children needing institutional or foster home care by purchase of service, while at the same time the warm personal service and individual care and training are provided by voluntary groups including religious agencies. Indeed the language would seem sufficiently broad and inclusive to extend similar partnerships as circumstances may require to a variety of social services such as family counseling to needy persons, day care centers for the aging, and the like.<sup>24</sup>

One interesting and key aspect of the program was settled in *Sargent v. Board of Education*.<sup>25</sup> The court held that though St. Mary's Boys' Orphan Asylum of Rochester provided for its children secular education in addition to ordinary care, the Home should not be barred from public funds under former Article IX, §4, which prohibited the payment of monies to denominational schools. The court recognized that the instruction of the Asylum's population was neither practicable nor possible

<sup>23</sup> *Judd v. Board of Education*, 278 N.Y. 200, 15 N.E. 2d 576 (1938).

<sup>24</sup> See *People ex rel. N.Y. Inst. for Blind v. Fitch*, 154 N.Y. 14, 47 N.E. 983 (1897); *Shepherd's Fold v. City of New York*, 96 N.Y. 137 (1884).

<sup>25</sup> 177 N.Y. 317, 69 N.E. 722 (1904).

elsewhere than in the institution and held that St. Mary's Orphanage was neither a school nor an institution of learning within the meaning of the Constitution, but on the contrary was an orphan asylum within §14 of former Article VIII permitting payment of public monies.

This is a far cry from the wall of absolute separation that some would erect despite the traditions and practices to the contrary throughout the country.

A recent important opinion in another jurisdiction is that of the Supreme Court of Pennsylvania in *Schade v. Allegheny County Institution District*.<sup>28</sup> An unfavorable decision in this case could have been a damaging blow to the cause of religious welfare organizations. The issue was basically a Church-State issue involving the role and function of religious welfare agencies in the community. The court decided unanimously in favor of the defendant.

The section of the Pennsylvania Constitution under review, Article III, §18, reads:

No appropriations, except for pensions or gratuities for military services, shall be made for charitable, educational or benevolent purposes, to any person or community, nor to any denominational or sectarian institution, corporation or association.

The court said that payments to sectarian institutions for the care of children were not appropriations within the meaning of that term as employed in Article III, §18. In the court's quotation from the concurring opinion below, we find this significant distinction which may check the trend that separationists and secularists have been encouraging:

The cost of the maintenance of neglected children either by the State or the County is

<sup>28</sup> 386 Pa. 507, 126 A.2d 911 (1956).

neither a charity nor a benevolence, but a governmental duty. All the plaintiffs proved was that the monies received by the defendant institutions were in partial reimbursement for the cost of room and board of such minors. . . .

The Constitution does not prohibit the State or any of its agencies from doing business with denominational or sectarian institutions, nor from paying just debts to them when incurred at its direction or with its approval.<sup>27</sup>

The court also averted briefly to appellant's argument that the payments violated the Fourteenth Amendment by tending toward the "establishment of religion." It rejected this contention summarily, noting that it was settled in *Everson v. Board of Education* where it was held that the states' use of public funds for transportation of pupils did not promote the establishment of religion.

Somewhat allied questions have been involved in the various state tests of the Hill-Burton grants to voluntary hospitals, including hospitals under religious auspices. The Hill-Burton Act recognizes the fact that most American hospitals, though privately controlled, are semi-public charitable institutions contributing to the common good.<sup>28</sup> While there have been no federal decisions, there have been a few significant state challenges.

An early leading case on this general subject is *Bradfield v. Roberts*.<sup>29</sup> This involved a suit brought by a taxpayer to enjoin the Commissioners of the District

<sup>27</sup> *Id.* 126 A.2d at 914.

<sup>28</sup> 68 Stat. 461 (1954), 42 U.S.C. §291 (v) (Supp. III, 1956), amending Hospital Survey and Construction Act of 1946, 60 Stat. 1040, 42 U.S.C. §291 (1952).

<sup>29</sup> 175 U.S. 291 (1899).

of Columbia from making a contract with Providence Hospital under which they would use funds appropriated by Congress to erect a building on the hospital grounds. Upon completion of the building it would be turned over to the hospital, which agreed that two-thirds of its capacity would be reserved for poor patients assigned by the Commissioners. The Providence Hospital was incorporated by an Act of Congress. The plaintiff maintained that the hospital corporation was composed of religious of the Roman Catholic Church and conducted under the auspices of the Roman Catholic Church. He argued that the corporation was a religious or sectarian body and that the proposed step violated the Constitution.

In rejecting the plaintiff's contentions, the Supreme Court said:

The facts above stated do not in the least change the legal character of the hospital, or make a religious corporation out of a purely secular one as constituted by the law of its being. Whether the individuals who compose the corporation under its charter happen to be all Roman Catholics, or all Methodists, or Presbyterians, or Unitarians, or members of any other religious organizations, or of no organization at all, is of not the slightest consequence with reference to the law of its incorporation, nor can the individual beliefs upon religious matters of the various incorporators be inquired into. Nor is it material that the hospital may be conducted under the auspices of the Roman Catholic Church. To be conducted under the auspices is to be conducted under the influence or patronage of that Church. The meaning of the allegation is that the church exercises great and perhaps controlling influence over the management of the hospital. It must, however, be managed pursuant to the law of its being. That the influence of any particular church may be powerful over the members of a non-sectarian and secular corporation, incorporated for a certain de-

finer purpose and with clearly stated powers, is surely not sufficient to convert such a corporation into a religious or sectarian body. That fact does not alter the legal character of the corporation, which is incorporated under an act of Congress, and its powers, duties and character are to be solely measured by the charter under which it alone has any legal existence. There is no allegation that its hospital work is confined to members of that church or that in its management the hospital has been conducted so as to violate its charter in the smallest degree. It is simply the case of a secular corporation being managed by people who hold to the doctrines of the Roman Catholic Church, but who nevertheless are managing the corporation according to the law under which it exists. The charter itself does not limit the exercise of its corporate powers to the members of any particular religious denomination, but on the contrary those powers are to be exercised in favor of any one seeking the ministrations of that kind of an institution.<sup>30</sup>

In conclusion, the Supreme Court stated:

The act of Congress, however, shows there is nothing sectarian in the corporation, and "the specific and limited object of its creation" is the opening and keeping a hospital in the city of Washington for the care of such sick and invalid persons as may place themselves under the treatment and care of the corporation. To make the agreement was within the discretion of the Commissioners, and was a fair exercise thereof.<sup>31</sup>

In 1949 the Kentucky Court of Appeals in *Kentucky Bldg. Comm'n v. Efron* held that grants to Episcopalian and Catholic hospitals did not violate the Federal or State Constitution. The court said:

[A] private agency may be utilized as the pipeline through which a public expenditure is made, the test being not who receives the

<sup>30</sup> *Id.* at 298-99.

<sup>31</sup> *Id.* at 299-300.

money but the character of the use for which it is expended.

The fact that members of the governing boards of these hospitals, which perform a recognized public service to all people regardless of faith or creed, are all of one religious faith does not signify that the money allotted the hospitals is to aid their particular denomination.<sup>32</sup>

Another welfare situation, arising under the New York constitutional provisions, concerns the payment of public monies to day care centers serving the children of working mothers. Under New York law, there has been no formal implication that payment of such public monies to voluntary agencies was other than a needed and proper governmental expenditure; nor has there been serious question of the propriety of such monies going to day care centers conducted under religious auspices.

But in New York the payment of monies to day care centers conducted by religious agencies on parochial school premises has been seriously challenged. Since day care centers must be accessible to the community, the use of parochial school facilities is often a vital necessity for these programs. However, on May 12, 1943 the Attorney General of New York held that the maintenance of a child care project in a religious school building, even though outside school hours, would be a direct violation of Article XI, §4 of the State Constitution.<sup>33</sup> This, he held, was true whether the programs were conducted by religious authorities, private social agencies or public authorities.

The defect was judged to be not that the program was conducted by a religious agency, nor that it was conducted on prop-

erty owned by a religious corporation. The defect was that the program was conducted in a school building in which a denominational tenet was taught. The day care center was held to be an indirect aid to the parochial school.

Multiple problems might have followed such reasoning, if the opinion had not been distinguished and revised. After extended study and conference the situation was materially improved by a further opinion of the Attorney General which held that the use of the non-instructional facilities of denominational schools by publicly supported youth projects could not be held, as a matter of law, to foster and encourage the educational functions of such schools.<sup>34</sup> Under this revised opinion the State Youth Commission and the New York City Youth Board have been able to help set up many worthwhile projects utilizing the services of voluntary agencies. Many of these projects are of a recreational nature and are conducted in the gymnasium or recreation rooms of parochial schools.

### Religious Protection Clauses

Still another and more important phase of Church-State relations in welfare is that of the religious protection of minors. Customarily the term "religious protection clauses" is used to embrace those constitutional and statutory provisions which require generally that when a minor is placed for adoption or committed for foster care to an institution or private home, such minor, whenever practicable, must be placed in an institution or home under the control of persons of the same religious faith. In New York State this welfare practice has constitutional sanction.

<sup>32</sup> 310 Ky. 355, 220 S.W. 2d 836, 837-38 (1949).

<sup>33</sup> N.Y. ATT'Y GEN. REP. FOR 1943 at 118-19.

<sup>34</sup> N.Y. ATT'Y GEN. REP. FOR 1950 at 210-12.

Article VI, §18, of the New York Constitution authorizes the legislature to establish Children's Courts. It provides further:

In conferring such jurisdiction the legislature shall provide that whenever a child is committed to an institution or is placed in the custody of any person by parole, placing out, adoption, or guardianship, it shall be so committed or placed, when practicable, to an institution governed by persons, or in the custody of a person, of the same religious persuasion as the child.

Conforming New York statutory requirements are found in the Social Welfare Law,<sup>35</sup> the Domestic Relations Court Act,<sup>36</sup> the Children's Court Act,<sup>37</sup> and other statutes.

These are realistic and practical clauses. Certainly they testify by implication to religious differences among citizens in our pluralistic society and to the existence of institutions and homes of different faiths. They reflect, moreover, the considered judgment of the community as expressed by its legislators. They are tangible evidence of the importance and esteem accorded the place of religion in the lives of all. Further, these clauses are intended as an expression and application, appropriate to the circumstances, of the parent's natural and legal right to determine the religious training of the child.

In instances where a court or public welfare department is required to commit or make other disposition of a child away from his parents, the state — that is such court or public welfare department — stands in loco parentis, with all that such relationship implies. In matters of this nature, affecting the lives of minors, the state exercises much

more than a purely ministerial function. It necessarily takes to itself, for the good of the individual and society, the discharge of a supremely delicate and personal function. In the discharge of that function the "best welfare" of the child takes precedence. This has clearly been held by the courts in a variety of fact situations bearing on the custody of children. What is less clear, however, are the factors that comprise "best welfare" and who shall be the ultimate arbiter of this.

Speaking for the citizens of their respective states, the New York Legislature and 42 other State Legislatures as well, have by statute answered these questions in part. One state, New York, has a constitutional provision requiring consideration to be given to the religious affiliation of the persons involved. Twenty-one states have statutes requiring some consideration of religious faith in *adoption* proceedings. Thirty-three states have statutes with religious provisions relating to commitment or placement of *dependent* children in private institutions or foster homes. Thirty-six states have provisions relating to commitment or placement of *neglected* children in private institutions or foster homes. Thirty-six states have statutory religious provisions relating to commitment or placement of *delinquent* children in private institutions or foster homes.<sup>38</sup> Through these clauses they have indicated that they judge religious considerations to be a component of "best welfare." They also have considered it not sufficient to provide only for formal religious training. But recognizing that the for-

<sup>35</sup> N.Y. SOC. WELFARE LAW §373.

<sup>36</sup> N.Y.C. DOM. REL. CT. ACT §88.

<sup>37</sup> N.Y. CHILDREN'S CT. ACT §26.

<sup>38</sup> See ST. THOMAS MORE INSTITUTE FOR LEGAL RESEARCH, SURVEY OF LAWS RELATING TO RELIGIOUS CONSIDERATIONS IN THE ADOPTION AND PLACEMENT OF CHILDREN I-II (St. John's Univ. School of Law, 1956) (unpublished mimeograph report).



mation of a child along religious lines is a continuous overall process that must permeate the entire way of life, they have thought it wise to require that, whenever practicable, the child should be cared for in the home of persons of the same religious faith. It is to be noted that this is not an arbitrary or capricious requirement. It is to be applied only "when practicable" thus leaving a reasonable and proper area for the discretion of the court.

It is difficult to recognize how in good faith there can be disagreement with the philosophy, aspiration and law of this procedure. There is patently no establishment of religion, nor aid to religion. There is fidelity to a trust established in line with the convictions of the majority. Nevertheless, some secularistic minded persons and groups have embarked on a campaign in derogation of these principles. A multiplicity of reasons have been advanced depending on which phase of the clause is being attacked and the forum that is utilized.

Usually, however, the arguments of opponents of the religious protection clauses take the following general lines:

1) The religious protection clauses emphasize religion to the detriment of welfare in the care of children. This argument overlooks the traditionally accepted concept that religion is a basic component of "best welfare," and is not to be regarded merely as an additional consideration. If the situation were as opponents of these clauses prefer, the approval of religion as an element of welfare would be largely governed by the predilections of the particular justice or public welfare official.

2) The religious protection clauses make the State an instrumentality of the Church.

The characterization is entirely unwarranted. The court or public welfare agency does no more than protect the religious faith of a child deprived of parental care. Actually, although the State has an ample area of discretion through the use of the phrase "when practicable," the mandatory aspect of the language of the clause actually serves as a guide to the court or welfare department in assessing the relative importance of religion in welfare. The Supreme Judicial Court of Massachusetts in construing the words "when practicable" in a Massachusetts statute said:

The difference is that, whereas before the new statute there was no definite rule binding upon the judge in any set of circumstances as to how much weight was to be given to anyone of the several elements as against the others, he is now bound to give controlling effect to identity of religious faith "when practicable," but not otherwise.<sup>80</sup>

3) They reflect a proprietary interest on the part of the Church in children who are wards of the State. Actually, they reflect the rights of parents and the duty of the State to bring about conditions that will promote the temporal well-being and happiness of man.

4) The clauses disregard the wishes of parents and thus violate the Federal and State constitutional guarantees of religious freedom. So far as I am aware, from the point of view of civil law, there is complete recognition of the rights of parents to determine the religion of a child. I doubt very much whether any court or official would feel it incumbent to commit a child to a particular home against the expressed wish of the parents. Of course, special questions

<sup>80</sup> Petition of Gally, 329 Mass. 143, 107 N.E. 2d 21, 25 (1952).

are presented when parents are in conflict with one another.

There have been few cases reported construing these statutes in New York and then only particular phases rather than the basic issue raised by the secularists and others. But in one case considered by the Appellate Division of the New York Supreme Court, the court in reversing the decision below said:

On the facts presented herein, the legislative mandate leaves no area for judicial discretion. It was and still is practicable to give these infants to an institution under the control of persons of their religious faith in fulfillment of the statute that their "religious faith shall be preserved and protected by the Court" (N.Y.C. DOM. REL. CT. ACT, §88, subd. 4). To this the children have a natural and legal right of which they cannot be deprived by their temporary exposure to the culture of another religion prior to the age of reason.<sup>40</sup>

### Conclusion

The object of this paper has been to present some considerations of importance

<sup>40</sup> Matter of Santos, 278 App. Div. 373, 375, 105 N.Y.S. 2d 716, 718, *reargument and appeal denied*, 279 App. Div. 578, 107 N.Y.S. 2d 543 (1st Dep't 1951), *appeal dismissed*, 304 N.Y. 483, 109 N.E. 2d 71 (1952).

to the community, of particular importance to religious welfare organizations, and, I think, of special interest to lawyers and future lawyers. One of the great problems of the day is the balancing of freedom and authority. Related is this question of the relationships of the compulsory processes of government with the many social and religious organizations of a pluralist society. My conviction is that neither the history nor the theory of our laws justifies the hostility to religion predicated by those supporting absolute separation. With Justice Douglas in the *Zorach* case, I can

find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.<sup>41</sup>

Certainly I am not urging any union of Church and State in America; but I do believe and urge that the relations of Church and State should be friendly, sympathetic and cooperative in those matters of mutual concern to both societies.

Study and discussion, in and out of legal circles, can make for a notable contribution to the development of sound legal doctrine in this matter of such current importance.

<sup>41</sup> *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

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[The statistics employed in the above article, based upon a survey of the laws of forty-seven states, contain no reference to the Nevada Revised Statutes which became available while this issue was being printed. The Nevada statutes contain no religious provisions relating to adoption, but do require that consideration be given to the religious factor whenever practicable in the placement of children in family homes and private institutions. *Ed.*]

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