

Discrimination in Restaurants; Antenuptial Agreements; The Law against Contraception; Developments Since "The School Bus Challenge";

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RECENT DECISIONS AND DEVELOPMENTS

Discrimination in Restaurants

The right to service in a public roadside restaurant without regard to color might seem fundamental. Yet, because no state or federal action is involved—only personal discrimination—food to a traveler may be refused. So long as such refusal is a result of business choice by individual proprietors catering to the desires or prejudices of their customers, no constitutional right has been impinged and no recourse may be had to the courts. In *Slack v. Atlantic White Tower System, Inc.*¹ local practice allowed restaurant service to Negroes on a take-out basis but did not allow them to eat inside the restaurant. The continued operation of such a restaurant by virtue of a state license was held not to be state action within the prohibition of the Fourteenth Amendment.

In 1883, the Supreme Court, in holding unconstitutional the Federal Civil Rights Act² with its provisions against discrimination in such public places as restaurants, analyzed the position of the Freedman. He was no longer a “mere child” who “needed the protection which a wise government extends to those who are unable to protect themselves,”³ but a legally accepted citizen. The majority in the *Civil Rights Cases*,⁴ while holding that private discrim-

ination could not be prevented by federal legislation, recognized that:

Innkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them.⁵

This simply restated the common-law tradition of right to service without discrimination at an inn bottomed on the quasi-public nature of the business and the practical necessity of lodging and meals for a traveler.⁶ The Court did not decide whether service was an essential civil right. However, it would seem that the same reasoning should apply to a roadside restaurant. By literally interpreting and applying the rule to inns and hotels only, the courts have allowed a restaurateur to discriminatorily select his clientele on the basis of color without fear of legal sanction.⁷ He is not an innkeeper charged with a duty to serve everyone who applies,⁸

⁵ *Id.* at 25.

⁶ *DeWolf v. Ford*, 193 N.Y. 397, 401, 86 N.E. 527, 529 (1908). The English common law required an innkeeper to receive all travelers at reasonable prices. 21 HALSBURY'S LAWS OF ENGLAND 445, 446 (3d ed. 1957); Hartman, *Racial and Religious Discrimination by Innkeepers in U.S.A.*, 12 MODERN L. REV. 449 (1949).

⁷ *Nance v. Mayflower Tavern, Inc.*, 106 Utah 517, 150 P.2d 773 (1944). See also *Noble v. Higgins*, 95 Misc. 328, 329, 158 N.Y. Supp. 867, 868 (Sup. Ct. 1916).

⁸ *Alpaugh v. Wolverton*, 184 Va. 943, 948, 36 S.E. 2d 906, 908 (1946), cited in *Williams v. Howard Johnson's Restaurant*, 268 F.2d 845, 847 n. 1 (3d Cir. 1959).

¹ 181 F. Supp. 124 (D. Md. 1960).

² Civil Rights Act of 1875, ch. 114, § 1, 18 Stat. 336.

³ *Strauder v. West Virginia*, 100 U.S. 303, 306 (1879).

⁴ 109 U.S. 3 (1883).

and, absent statutes, such a practice cannot be eliminated. Until the patron shows he is an overnight guest, and not one merely entering for a meal, dining service may be withheld.⁹

The failure to bring restaurant service within the ambit of civil rights protected by the privileges and immunities clause¹⁰ highlights the inherent conflict between the minority's right not to be discriminated against as a group and the individual's right to choose freely his associates. The Supreme Court struck down federal legislation which would have brought class discrimination by quasi-public facilities within the prohibition of the Fourteenth Amendment.¹¹ Since that time it has been fundamental that only state action is proscribed by the Fourteenth Amendment.¹²

What constitutes state action is a sensitive and constantly litigated problem facing the courts today. The legislative,¹³ executive¹⁴ and judicial,¹⁵ as well as political subdivisions¹⁶ of the state are all included within this prohibition. As *Shelley v. Kraemer* made clear, racially restrictive covenants cannot be specifically enforced because judicial determination is state action.¹⁷ Similarly, police ejection of a Negro from a private amusement park, although he had purchased a ticket to the pool facilities, was unconstitutional state action.¹⁸

Further, where public property was leased to private interests any discrimination on the part of the lessee was held to be state action¹⁹ and violative of the Fourteenth Amendment.²⁰

The standard set in *Ex parte Virginia*²¹ forms the basis for what today distinguishes state action from mere private wrong:

Whoever, by virtue of public position under a state government, . . . denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the states, and is clothed with the State's power, his act is that of the State.²²

This standard has, by virtue of gradual judicial expansion, been held to apply to areas which in a period less sensitive to civil rights might well have been considered private domain. It encompasses private agreements "in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms. . . ."²³ It even includes the operation of a company-owned town exercising many administrative functions normally performed by the state.²⁴

But, as held in the *Civil Rights Cases*, "the wrongful act of an individual, unsupported by any . . . authority, is simply a private wrong. . . ."²⁵ Thus, where a court

⁹Alpaugh v. Wolverton, *supra* note 8.

¹⁰U.S. CONST. amend. XIV.

¹¹Civil Rights Cases, 109 U.S. 3 (1883). For a discussion of this case, see Peters, *Civil Rights and State Non-Action*, 34 NOTRE DAME LAW. 303, 314 (1959).

¹²Shelley v. Kraemer, 334 U.S. 1 (1948).

¹³Strauder v. West Virginia, 100 U.S. 303 (1879).

¹⁴Board of Educ. v. Barnette, 319 U.S. 624 (1943).

¹⁵Shelley v. Kraemer, *supra* note 12.

¹⁶Yick Wo v. Hopkins, 118 U.S. 356 (1886).

¹⁷Shelley v. Kraemer, 334 U.S. 1 (1948).

¹⁸Valle v. Stengel, 176 F.2d 697 (3d Cir. 1949).

¹⁹City of Greensboro v. Simkins, 246 F.2d 425 (4th Cir. 1957); Department of Conservation & Development v. Tate, 231 F.2d 615 (4th Cir. 1956) (per curiam); Jones v. Marva Theatres, Inc., 180 F. Supp. 49 (D. Md. 1960).

²⁰Culver v. City of Warren, 84 Ohio App. 373, 83 N.E.2d 82 (1948). See also Lawrence v. Hancock, 76 F. Supp. 1004 (S.D. W.Va. 1948).

²¹*Ex parte Virginia*, 100 U.S. 339 (1879).

²²*Id.* at 347.

²³Shelley v. Kraemer, 334 U.S. 1, 13-14 (1948).

²⁴Marsh v. Alabama, 326 U.S. 501 (1946).

²⁵109 U.S. 3, 17 (1883).

is not required to take "affirmative action" and maintains "neutrality" — where the discriminatory action is not sought to be enforced but merely not prevented — no breach of the Fourteenth Amendment has occurred.²⁶ When the Supreme Court ruled that the state-appointed trustees of Girard College, a school established by will for "poor male white orphans," could not refuse admission to Negroes,²⁷ private trustees were appointed. This substitution of trustees who were not officers of the state and so were capable of administering the estate according to the directions of the testator did not impinge on any civil rights of Negro children.²⁸ Apparently, the approach is negative: courts cannot participate in discrimination but they are not bound to prevent it.

The decision in *Slack v. Atlantic White Tower System, Inc.*,²⁹ far from being either regressive or startlingly fresh, correctly interprets the law today for those states lacking anti-discrimination and anti-bias laws.³⁰ So long as no state interferes with the privileges or immunities of United States citizens no federal remedy is available. The Supreme Court in *Shelley v. Kraemer* re-

established the standard that:

The action inhibited by the . . . Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.³¹

To avoid this limitation, petitioner Slack contended that the issuance of a license to an out-of-state corporation to do business within the state "invested the corporation with a public interest" and its action in excluding him on a racial basis was equivalent to state action.

This argument was rejected in *Williams v. Howard Johnson's Restaurant*³² because there was no specific state statute dealing with discriminatory practices in restaurants.³³ The licensing of restaurants to serve the public does not burden the state with the positive duty of prohibiting unjust discrimination in the use and enjoyment of those facilities. A license is only a permission to exercise a pre-existent right or privilege which has been subjected to regulation for the public welfare. Licensing of a privately owned enterprise by the state does not establish a relationship making discrimination by the licensee forbidden state action.³⁴ To argue otherwise would make "every licensee . . . 'an administrative agency of the state' in the conduct of his everyday business simply because he pays a tax or fee for his license."³⁵

The petitioner introduced the additional

²⁶ See *Rice v. Sioux City Memorial Park Cemetery*, 245 Iowa 147, 60 N.W.2d 110 (1953), *aff'd by an equally divided Court*, 348 U.S. 880 (1954) (per curiam), in which the defendant successfully defended an action for damages arising out of a refusal to bury the plaintiff's husband because of a restrictive covenant.

²⁷ *Pennsylvania v. Board of Trustees*, 353 U.S. 230 (1957).

²⁸ *In re Girard College Trusteeship*, 391 Pa. 434, 138 A.2d 844, *cert. denied*, 357 U.S. 570 (1958).

²⁹ 181 F. Supp. 124 (D. Md. 1960).

³⁰ For a comparison of the various anti-discrimination measures and their enforcement, see AMERICAN JEWISH CONGRESS, CHECK LIST OF STATE ANTI-DISCRIMINATION & ANTI-BIAS LAWS (rev. ed. 1953).

³¹ 334 U.S. 1, 13 (1948).

³² 268 F.2d 845 (3d Cir. 1959).

³³ *Id.* at 847.

³⁴ *Madden v. Queens County Jockey Club*, 296 N.Y. 249, 255, 72 N.E.2d 697, 699 (1947); *State v. Clyburn*, 247 N.C. 455, 101 S.E.2d 295 (1958).

³⁵ *Madden v. Queens County Jockey Club*, *supra* note 34, at 254, 72 N.E.2d at 698-99.

element of a possible burden on interstate commerce since she was traveling interstate. Substantial economic effects were alleged in so far as the roadside restaurant was a facility of interstate commerce. In support of this contention the petitioner pointed to cases involving interstate carriers as analogous. *Williams v. Howard Johnson's Restaurant*³⁶ distinguished this very point by pointing out the distinction between directly engaging in interstate commerce and accommodating it:

[W]e do not find that a restaurant is engaged in interstate commerce merely because in the course of its business of furnishing accommodations to the general public it serves persons who are travelling from state to state.³⁷

It also indicated that a restaurant is only an instrument of local commerce.³⁸

Yet, the particular restaurant here involved is specifically designed to cater to transients and is located on a U.S. highway.³⁹ Far less has been required to successfully invoke the commerce clause.⁴⁰ Furthermore, interstate travel has been held to be interstate commerce within the meaning of the clause.⁴¹

The right of freedom of association is presented whenever talk of anti-discrimination measures arises as "a law compelling people to integrate who do not desire

to do so."⁴² The grim picture is presented of pervasive legislation by which the state would regulate even purely social areas including private clubs.⁴³ That which is legislated to protect and enhance the status of the minority succeeds in destroying the majority's right of voluntary association. Plainly put, the position is that:

... compulsory integration is a program by which some people presume to dictate to others in which type of environment they shall live. In so doing, they arrogate to themselves the right of choice of others which constitutes a fundamental human right inseparable from the dignity of each person as an individual.⁴⁴

This insistence on the right of persons to be selective acts as a brake against a headlong rush into remedial legislation. The argument has merit when applied to a person as an individual; it has considerably less validity when applied to a person as a member of a class. Certainly, the right of free and voluntary association ought to include the right of the minority to associate with the majority; it must include the right to free access to and use of public and quasi-public facilities.

Antenuptial Agreements

In order for a Catholic to obtain a dispensation to marry a non-Catholic, an antenuptial agreement must be entered into by both parties. This agreement contains, among other things, a proviso that any children of the marriage will be brought up

³⁶ 268 F. 2d 845 (3d Cir. 1959).

³⁷ *Id.* at 848.

³⁸ *Ibid.*

³⁹ *Slack v. Atlantic White Tower System, Inc.*, 181 F. Supp. 124, 126 n. 1 (D. Md. 1960).

⁴⁰ See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942), where a farmer's consumption of his own wheat was held to affect interstate commerce.

⁴¹ *Gibbons v. Ogden*, 9 Wheat. (22 U.S.) 1, 189 (1824).

⁴² Avins, *Anti-Discrimination Legislation as an Infringement on Freedom of Choice*, 6 N.Y.L.F. 13, 36 (1960).

⁴³ *Legislation, Recent New York City Ordinance Bans Discrimination in Certain Private Housing Facilities*, 56 MICH. L. REV. 1223, 1225 (1958).

⁴⁴ Avins, *supra* note 42, at 37.

as Catholics.¹

In *Doe v. Roe*,² a separation action in which the plaintiff husband succeeded on grounds of cruel and inhuman treatment, the New York Supreme Court stated that, when a non-Catholic wife enters into an antenuptial agreement³ with her Catholic husband, such an agreement is both valid and enforceable. The Court awarded custody of the children to the father, despite their young ages, thus permitting their continued upbringing in the Catholic faith. In so holding, the Court noted that the mother's position in refusing to bring up the children as Catholics was uncompromising.

In nineteenth century England, the courts refused to consider antenuptial agreements in awarding custody of children, and applied the principle that the father's word determined the children's religion.⁴

¹ See BOUSCAREN & ELLIS, CANON LAW, TEXT & COMMENTARY, c. 1061 (1957).

"§1 The Church does not dispense from the impediment of mixed religion unless: (1) There are just and grave reasons therefore; (2) The non-Catholic party shall have given a guarantee to remove all danger of perversion from the Catholic party, and both parties shall have given guarantees to baptize and educate all the children in the Catholic faith alone; (3) There exists moral certainty that the guarantees will be fulfilled.

"§2 The guarantees are as a rule to be required in writing." *Ibid.*

² 143 N.Y.L.J. 14, col. 4 (Sup. Ct. June 14, 1960).

³ Unless otherwise specified, whenever the term *antenuptial agreement* is used in this text, it will refer to the promises between husband and wife concerning the religious upbringing of the children.

⁴ *In re Agar-Ellis*, 24 Ch. D. 317 (1883). "But this Court holds this principle — that when, by birth, a child is subject to a father, it is for the general interest of . . . children, and really for the interest of the particular infant, that the Court should not, except in very extreme cases, interfere with the discretion of the father, but leave to him

In the United States, the rule became established that the most important element to be considered in awarding custody of the children is the welfare of each child.⁵ However, at an early date, some controversy arose among authorities in this country concerning the enforceability and weight to be given the antenuptial agreement in determining what is best for the child's welfare.⁶ Some courts avoided the question by adhering to the English rule that the father, as the head of household, should be preferred over the mother in awarding custody.⁷ Other courts have indicated that the wishes of both parents as to religious education would be given some weight,⁸ while still others have stated that a court is prohibited from making any religious preferences.⁹

Today, generally, the mother has been

the . . . power which nature has given him by the birth of the child." *Id.* at 334. See *In re Flynn*, 87 N.J. Eq. 413, —, 100 Atl. 861, 863-64 (1917). See also Friedman, *The Parental Right to Control the Religious Education of a Child*, 29 HARV. L. REV. 485, 488-91 (1916).

⁵ See, e.g., *Hernandez v. Thomas*, 50 Fla. 522, —, 39 So. 641, 645 (1905); *Purinton v. Jamrock*, 195 Mass. 187, 80 N.E. 802 (1907); *Jones v. Bowman*, 13 Wyo. 79, 77 Pac. 439 (1904).

⁶ See generally, Friedman, *supra* note 4, at 498.

⁷ *Hernandez v. Thomas*, *supra* note 5, at —, 39 So. at 645.

⁸ See *Purinton v. Jamrock*, *supra* note 5, at —, 80 N. E. at 805. "The wishes of the parent as to the religious education and surroundings of the child are entitled to weight; if there is nothing to put in the balance, against them, ordinarily they will be decisive." *Ibid.* See also *In re Butcher's Estate*, 206 Pa. 479, 109 Atl. 683 (1920).

⁹ *Jones v. Bowman*, *supra* note 5, at —, 77 Pac. at 440. "[A]s the statutes of this state not only fail to make any distinction as to religious belief, but absolutely prohibit any distinction being made on . . . account thereof, we cannot and will not give such evidence the slightest weight in our decision. . . ." *Ibid.* See *Brewer v. Cary*, 148 Mo. App. 193, —, 127 S.W. 685, 691-92 (1910).

given equal rights by statute regarding custody and upbringing of the children.¹⁰ Many courts, therefore, including those of New York, can no longer refuse to enforce antenuptial agreements on the grounds that the father determines the child's religion.

Some courts have adopted the position that antenuptial agreements are unenforceable because they violate the non-Catholic party's constitutional rights.¹¹ One court reasoned that the upholding of these agreements would constitute a judicial determination that one religion is better than another, and, in addition, would force a non-Catholic to support a religion against his will.¹²

A majority of courts have taken the stand that under no circumstances should the importance of these agreements supersede the consideration of what is best for the child's welfare.¹³ In *Stanton v. Stan-*

ton,¹⁴ where a Catholic party sought to gain custody of the children or, in the alternative, an order directing the non-Catholic party to adhere to the terms of the agreement, the court said:

[I]n awarding custody of minor children, the primary and controlling question is their welfare. . . . Parents cannot by contract control the discretion and duty of the court in determining the question of custody, and the court may disregard the contract and award the children to either parent or to a third party if the best interest of the children requires it.¹⁵

Thus far, New York has taken the view that antenuptial agreements are valid and enforceable. *Weinberger v. Van Hessen*¹⁶ was an action brought by a mother for specific performance of a contract, in which the mother granted custody of her child to a third party in return for the third party's promise to support the child and direct his moral and religious education. The Court of Appeals, specifically directing its remarks to the religious phase of the contract, stated: "No question of public policy arises out of this phase of the contract. Agreements between parents for a particular sort of religious upbringing have in general been held valid in this country."¹⁷

In two New York lower court cases enforcing antenuptial agreements between

¹⁰ Pfeffer, *Religion in the Upbringing of Children*, 35 B.U.L. REV. 333, 356 (1955). See, e.g., N.Y. DOM. REL. LAW §81, which provides: "A married woman is a joint guardian of her children with her husband, with equal powers, rights and duties in regard to them." See also N. J. STAT. ANN. §9-2-4 (1960).

¹¹ See OHIO CONST. art. 1, §7: "No person shall be compelled to attend, erect, or support any place of worship against his consent. . . ." In *Hackett v. Hackett*, 146 N.E.2d 477 (Ohio C.P. 1957), *aff'd* 150 N.E.2d 477 (Ohio Ct. App.), *appeal dismissed*, 168 Ohio St. 373, 154 N.E.2d 820 (1958), the court held that by sending a child to a Catholic school the non-Catholic mother was supporting and maintaining the Catholic faith, and added: "to compel her now . . . to keep her promise . . . would appear to be compelling her to support and maintain a certain 'form of worship against her consent.'" *Id.* at 479. See *McLaughlin v. McLaughlin*, 20 Conn. Supp. 274, 132 A.2d 420 (1957).

¹² *Hackett v. Hackett*, *supra* note 11, at 479.

¹³ See, e.g., *Dumais v. Dumais*, 152 Me. 24, 122 A.2d 322 (1956); *In re Butcher's Estate*, 266 Pa. 479, 109 Atl. 683 (1920); Pfeffer, *supra* note 10, at 360-62.

¹⁴ 213 Ga. 545, 100 S.E.2d 289 (1957).

¹⁵ *Id.* at ___, 100 S.E.2d at 293.

¹⁶ 260 N.Y. 294, 183 N.E. 420 (1932).

¹⁷ *Id.* at 298, 183 N.E. at 431. *Contra*, *Hackett v. Hackett*, 146 N.E.2d 477 (Ohio C.P. 1957), *aff'd*, 150 N.E.2d 431 (Ohio Ct. App.), *appeal dismissed*, 168 Ohio St. 373, 154 N.E.2d 820 (1958). Compare *Martin v. Martin*, 283 App. Div. 721, 127 N.Y.S.2d 851 (2d Dep't), *aff'd*, 308 N.Y. 136, 123 N.E.2d 913 (1954) (court refused enforcement of antenuptial agreement, holding that a child of twelve may decide on a religion himself).

husband and wife, it was said that since the Catholic party had irrevocably changed his position in reliance upon such an agreement, the consideration was sufficient to make the agreement valid and enforceable.¹⁸ The courts also relied on the great value Catholics place on the religious training and education of their children, as well as the fact that the children had already been baptized as Catholics.¹⁹

In the present decision, the Court followed the precedents of the lower New York courts by reiterating the doctrine that antenuptial contracts are enforceable. Ordinarily, because of the youth of the children, the mother is given custody, and in order to enforce the contract, she is also instructed to raise the children as Catholics.²⁰ In the present case, however, in view of the mother's unqualified refusal to raise the children as Catholics, the Court, in giving the agreement effect, awarded custody to the father.

This decision, therefore, reaffirms the New York minority position²¹ that this type of antenuptial agreement is valid and enforceable. It seems unlikely, however, that a New York court will ever award custody of a child to an unworthy Catholic parent solely on the basis of such an agreement.²²

¹⁸ *Shearer v. Shearer*, 73 N.Y.S.2d 337 (Sup. Ct. 1947); *Ramon v. Ramon*, 34 N.Y.S.2d 100 (Dom. Rel. Ct. 1942).

¹⁹ *Shearer v. Shearer*, *supra* note 18, at 358; *Ramon v. Ramon*, *supra* note 18, at 112.

²⁰ *Ramon v. Ramon*, 34 N.Y.S.2d 100 (Dom. Rel. Ct. 1942). See also *Shearer v. Shearer*, 73 N.Y.S.2d 337 (Sup. Ct. 1947).

²¹ *McLaughlin v. McLaughlin*, 20 Conn. Supp. 274, 132 A.2d 420 (1957); *Brewer v. Cary*, 148 Mo. App. 193, 127 S.W. 685 (1910); *Boerger v. Boerger*, 26 N.J. Super. 90, 97 A.2d 419 (1953).

²² "[The religious] prenuptial agreement is en-

It is submitted that the present decision is sound in giving legal recognition to arrangements so beneficial to the deepest welfare of children, the violation of which would be morally indefensible.

The Law Against Contraception

The concomitant occurrence of the widely heralded "population explosion"¹ and a decision of Connecticut's Supreme Court of Errors² upholding that state's rigid birth control statute³ has again highlighted the ever present conflict between advocates and opponents of contraception.⁴ The highest court of Connecticut has recently held that the prohibition against contraceptives may not be interpreted as an interference with a doctor's right to "practice his profession free from unreasonable restraint."⁵ The same Court had previously denied the right of a doctor to challenge the

forceable like any other, unless and until its enforcement is shown harmful to the child." *Martin v. Martin*, 308 N.Y. 136, 140, 123 N.E.2d 812, 813 (1954) (dissenting opinion).

¹ Christopher, *Population Explosion*, Time, Jan. 11, 1960, p. 19; *Standing Room Only in the World?*, U. S. News & World Report, Nov. 23, 1959, p. 80.

² *Buxton v. Ullman*, 147 Conn. 48, 156 A.2d 508 (1959).

³ CONN. GEN. STAT. §53-32 (1958). Unlike other birth control statutes, the Connecticut law attempts a complete suppression of contraceptive articles and prohibits the use thereof. "Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned." *Ibid*.

⁴ See Gibbons, *The Birth Control Issue - What Both Sides Say*, U. S. News & World Report, Dec. 21, 1959, p. 58.

⁵ *Buxton v. Ullman*, *supra* note 2.

statute on behalf of his patients;⁶ but, in the instant case, the physician brought the action not for his patients, but for himself.⁷ The Court stated that as it is not unconstitutional to deprive a patient of the use of contraceptives, neither is it unconstitutional to prohibit the prescription of these devices by a doctor.⁸ Thus the Connecticut statute

⁶ *Tileston v. Ullman*, 129 Conn. 84, 26 A.2d 582 (1942), *appeal dismissed*, 318 U.S. 44 (1943); *State v. Nelson*, 126 Conn. 412, 11 A.2d 856 (1940). In the *Nelson* case, two physicians were convicted of counseling married women to use a spermocidal drug and contraceptive device to preserve their "general health." The Court refused to construe the statute as allowing a doctor's exception, and cited as a basis for that refusal numerous unsuccessful legislative attempts to change the statute. In the *Tileston* case, a licensed physician sought a declaratory judgment as to whether the statute made it unlawful for him to prescribe the use of contraceptive devices for married women in cases where pregnancy would endanger life, and if so, whether the statute was unconstitutional. The court, pointing out that since the *Nelson* decision a medical birth control bill had failed of enactment in the 1941 General Assembly, said, "The manifest intention of the legislature of this state, to date, for all out prohibition cannot very well be denied." *Tileston v. Ullman*, *supra* at —, 26 A.2d at 585. The Supreme Court dismissed the appeal on the grounds that the appellant had no standing to litigate the constitutional question, that his life was not endangered, and that he was not empowered to bring the action for his patients by claiming their deprivation of life.

⁷ Under CONN. GEN. STAT. §54-196 (1949), "Any person who assists, abets, counsels, causes, hires or commands another to commit any offence may be prosecuted and punished as if he were the principal offender," the physician would be guilty as an accessory to the offense prohibited by §53-32.

⁸ Although the doctor challenged the law as affecting himself, the Court pointed out that "essentially, there is no real difference in the nature of the right. The effect of a regulation of a business or profession is to curtail the activities of both the dispenser and the user of goods or services." *Buxton v. Ullman*, *supra* note 2, at —, 156 A.2d at 512.

remains a complete restriction on the use of contraceptive articles.

Since the passage of the federal Comstock Act in 1873,⁹ thirty-four states have passed laws restricting the sale or advertisement of contraceptives,¹⁰ with an additional four states and the District of Columbia having statutes restricting articles of "indecent or immoral use."¹¹ While the constitutionality of these statutes has been

⁹ 17 Stat. 598 (1873), 18 U.S.C. §§1461-62 (1958). This statute makes it unlawful for anyone to deposit in the mails any information concerning birth control or to put into carriage in interstate commerce any article or thing designed, adapted or intended to prevent conception. See also 17 Stat. 598 (1873), 19 U.S.C. §1305 (1958). This statute prohibits the importation of any article for the prevention of conception.

¹⁰ ARIZ. REV. STAT. ANN. §13-213 (1956); ARK. STAT. §§82-944-50 (1947); CAL. BUS. & PROF. CODE ANN. §601 (Deering 1960); COLO. REV. STAT. ANN. §40-9-17 (1953); CONN. GEN. STAT. §53-32 (1958); DEL. CODE ANN. tit. 16, §§2501-02 (1953); HAWAII REV. CODE LAWS §§302A-1-3 (1955); IDAHO CODE ANN. §18-603, §§39-801-10 (1947); IND. ANN. STAT. §§10-2803, 2806 (1956); IOWA CODE ANN. §725.5 (1949); KAN. GEN. STAT. ANN. §21-1101 (1949); KY. REV. STAT. ANN. §214.190-240 (1955); LA. REV. STAT. §14.88 (1950); ME. REV. STAT. ANN. ch. 134, §11 (1954); MD. ANN. CODE art. 27, §41 (1957); MASS. GEN. LAWS ANN. ch. 272, §§20-21 (1956); MICH. COMP. LAWS §750.40 (1948); MINN. STAT. ANN. §617.25 (1945); MISS. CODE ANN. §2289 (1942); MO. ANN. STAT. §563.300 (1949); MONT. REV. CODES ANN. §94-3616 (1947); NEB. REV. STAT. §28-423 (1943); NEV. REV. STAT. §202.190 (1955); N. J. REV. STAT. §2A:170-76 (1951); N. Y. PEN. LAW §1142; OHIO REV. CODE ANN. §§2905.32-34 (1960); ORE. REV. STAT. §435.010 (1959); PA. STAT. ANN. tit. 18, §4525 (1945); S. D. CODE §13.1726 (Supp. 1952); TEX. PEN. CODE ANN. art. 740 (Supp. 1960); UTAH CODE ANN. §58-19-2 (1953); WASH. REV. CODE §9.68-030 (1951); WIS. STAT. ANN. §151.15 (1957); WYO. COMP. STAT. ANN. §§6-103, 105 (1957).

¹¹ ILL. ANN. STAT. ch. 38, §468 (Smith-Hurd 1935); N. H. REV. STAT. ANN. §§571:14-15 (1955); N.D. REV. CODE §12-2109 (1943); OKLA. STAT. ANN. tit. 21, §1032 (1951). See D.C. CODE

repeatedly upheld under the general police power,¹² their value and status have been weakened by judicial decision and lack of enforcement.

This diminishing rigidity of the statutes is apparent from an examination of judicial interpretation. In the federal courts a physician's exception has been injected into the statutes,¹³ and concurrently, the law has been read as requiring proof of an unlawful

intent.¹⁴ In New York the statutory physician's exception¹⁵ has been extended to druggists and vendors acting upon the physician's prescription,¹⁶ even though contraceptives remain contrary to the public policy of the state.¹⁷ New Jersey, in the case of *State v. Tracy*, denied the necessity of a *mens rea* for a conviction under the birth control statute,¹⁸ but later distinguished that case and allowed proof of a lawful intent, *i.e.*, the use of prophylactics to prevent disease, as a sufficient defense.¹⁹ Recently, a lower court of New Jersey held that the statute's "without just cause" phrase rendered the law "vague, indefinite and incapable of construction," and, therefore, unconstitutional.²⁰ Even the Massa-

ANN. §22-2001 (1951). For an indication that articles of indecent and immoral use include contraceptives, see *Lanteen Labs., Inc. v. Clark*, 294 Ill. App. 81, 13 N.E.2d 678 (1938).

¹² *State v. Nelson*, 126 Conn. 412, 11 A.2d 856 (1940); *Commonwealth v. Gardner*, 300 Mass. 372, 15 N.E.2d 222 (1938); *Commonwealth v. Allison*, 227 Mass. 57, 116 N.E. 265 (1917); *People v. Sanger*, 222 N.Y. 192, 118 N.E. 637 (1918); *People v. Byrne*, 99 Misc. 1, 163 N.Y. Supp. 682 (Sup. Ct. 1917). *But see Note, The Constitutionality of Anti-Birth Control Legislation*, 7 Wyo. L.J. 138 (1953), which implies that only the statutes allowing physician's exceptions are valid and questions the constitutionality of the Massachusetts and Connecticut laws, which do not permit such an exception. See also *State v. Kinney Bldg. Drug Stores, Inc.*, 56 N.J. Super. 37, 151 A.2d 430 (Essex County Ct. 1959).

¹³ In *United States v. One Package*, 86 F.2d 737 (2d Cir. 1936), the defendant, a physician, had received in the mails a package of vaginal pessaries from Japan. The majority of the court held that physicians who use such articles for the health of their patients are excepted by implication from the literal terms of the statute. "It seems unreasonable to suppose that the national scheme of legislation involves such inconsistencies and requires the complete suppression of articles, the use of which in many cases is advocated by such a weight of authority in the medical world." *Id.* at 740. See also *Consumers Union of United States v. Walker*, 145 F.2d 33 (D.C. Cir. 1944). *But see United States v. One Package*, *supra* at 740, where Justice Learned Hand, although concurring in the majority opinion, made the following observation: "There seems . . . substantial reason for saying that contraceptives were meant to be forbidden, whether or not prescribed by physicians, and that no lawful use of them was contemplated."

¹⁴ *Davis v. United States*, 62 F.2d 473 (6th Cir. 1933). The defendant, engaged in the business of handling druggists' rubber sundries, was charged with the violation of 18 U.S.C. §§334, 396 (1958) (predecessors of 18 U.S.C. §§1461-62). The trial court had refused to admit into evidence testimony that the articles had a legitimate and surgical use in the treatment and prevention of disease, and that they were to be used for other than the contraceptive purposes condemned by the sections involved. The Circuit court, accepting the broad dictum of *Youngs Rubber Corp. v. C. I. Lee & Co.*, 45 F.2d 103, 108 (2d Cir. 1930), admitted the evidence and held that the intent to use for condemned purposes the articles described in the circular or shipped in interstate commerce, was a prerequisite to conviction. If the possibility of a lawful intent were not recognized, the physician's exception would be impossible. See note 13 *supra*.

¹⁵ N.Y. PEN. LAW §1145.

¹⁶ *People v. Sanger*, 222 N.Y. 192, 118 N.E. 637 (1918).

¹⁷ See *Barretta v. Barretta*, 182 Misc. 852, 46 N.Y.S.2d 261 (Sup. Ct. 1944).

¹⁸ 29 N.J. Super. 145, 102 A.2d 52 (App. Div. 1953).

¹⁹ *State v. Kohn*, 42 N.J. Super. 578, 127 A.2d 451 (Essex County Ct. 1956).

²⁰ *State v. Kinney Bldg. Drug Stores, Inc.*, 56 N.J. Super. 37, 151 A.2d 430 (Essex County Ct. 1959). The reasoning of the court was that a

chusetts law, which, like Connecticut, has no physician's exception, now requires proof that an unlawful purpose was intended as a prerequisite to conviction.²¹ Similarly, Wisconsin has injected the requirement of an illegal intent,²² as has Ohio.²³ It is readily discernible that this requirement of proof makes the possibility of a conviction under the birth control laws more difficult. The prophylactics involved generally have dual functions, *viz.*, the prevention of disease and the prevention of conception. Since the former purpose is usually legal,²⁴ it becomes doubly difficult to prove that an illegal intent was present. Consequently, the chance of conviction is greatly lessened.²⁵ Furthermore, the large number of states having physician's exceptions which extend to pharmacists²⁶ indicates a greater leniency in the prohibition against birth control.

These factors are a strong indication of

the ever-increasing acceptance of contraception, not only when it is medically desirable to prevent conception, but as a general practice. Throughout the world contraception is receiving increased social sanction, notably in England, Sweden and India.²⁷

In spite of the apparent acceptance of these contraceptive practices and the criticisms levied at the laws restricting them, the statutes remain. The purpose behind the attempt to restrict birth control is accordingly rather vague. In this country protection of public morals is usually the basis for the passage of the law.²⁸ Indeed, many statutes are within the obscenity sections of the codes,²⁹ and others refer simply to indecent and immoral articles.³⁰ There are, nonetheless, specific instances where the courts have expressed themselves less generally, *e.g.*, "to remove the fear of preg-

"just cause" may mean different things to different persons. Any married couple might consider it just to space children, to prevent conception because of the wife's health, family economic situation, etc.

²¹ *Commonwealth v. Goldberg*, 316 Mass. 563, 55 N.E.2d 951 (1944); *Commonwealth v. Corbett*, 307 Mass. 7, 29 N.E.2d 151 (1940).

²² See *State v. Arnold*, 217 Wis. 340, 258 N.W. 843 (1935).

²³ See *City of Toledo v. Kohlhofer*, 96 Ohio App. 355, 122 N.E.2d 20 (1954) (interpreting a municipal ordinance in accordance with state policy).

²⁴ *But see* KY. REV. STAT. ANN. §§214.190-240 (1955); ME. REV. STAT. ANN. ch. 25, §114 (1954).

²⁵ Notwithstanding this difficulty, convictions have been obtained. See *Commonwealth v. Goldberg*, *supra* note 21; *State v. Arnold*, *supra* note 22.

²⁶ *E.g.*, ARK. STAT. §82-944 (1947); COLO. REV. STAT. ANN. §40-9-17 (1953); DEL. CODE ANN. tit. 16, §2503 (1953); IDAHO CODE ANN. §39-801 (1947); IOWA CODE ANN. §725.10 (1949); N.Y. PEN. LAW §1145; TEX. PEN. CODE ANN. art. 740 (Supp. 1960).

²⁷ *What Other Countries Do About Birth Control*, U.S. News & World Report, Dec. 14, 1959, p. 67. On the continent, however, a concern over the decrease in the number of births has led to an effort to lessen contraceptive practices, as evidenced by laws in France and Italy. *Id.* at 68.

²⁸ See *Tileston v. Ullman*, 129 Conn. 84, —, 26 A.2d 582, 587 (1942), *appeal dismissed*, 318 U.S. 44 (1943); *Commonwealth v. Gardner*, 300 Mass. 372, —, 15 N.E.2d 222, 224 (1938); *People v. Byrne*, 99 Misc. 1, 4, 163 N.Y. Supp. 682, 685 (Sup. Ct. 1917).

²⁹ *E.g.*, IND. ANN. STAT. §§10-2803-2806 (1956); IOWA CODE ANN. §725.5 (1949); MINN. STAT. ANN. §617.25 (1945); MISS. CODE ANN. §2289 (1942). That birth control statutes were intended to be only a part of a movement to stop obscenity and have remained opposed to contraception only because of a minority bloc, see Note, *Judicial Regulation of Birth Control Under Obscenity Laws*, 50 YALE L.J. 682 (1941).

³⁰ D.C. CODE ANN. §22-2001 (1951); ILL. ANN. STAT. ch. 38, §468 (Smith-Hurd 1935); N.H. REV. STAT. ANN. §§571:14-15 (1955); N.D. REV. CODE §12-2109 (1943); OKLA. STAT. ANN. tit. 21, §1032 (1958).

nancy would unquestionably result in an increase of immorality."³¹ Noble as this may appear, it is not the natural law objection to birth control. Massachusetts, however, came very close to the natural law viewpoint with this statement:

Their plain purpose is to protect purity, to preserve chastity, to encourage continence and self restraint, to defend the sanctity of the home, and thus to engender in the state and nation a virile and virtuous race of men and women.³²

This appears to reflect, at least generally, a recognition of the inherent evil of contraception, but it fails to express the evil itself, *i.e.*, the frustration of the primary end of the marital act.

If the purpose of the contraception laws is the preservation of the general morality, and not the prevention of the inherent evil of birth control, allowing a single exception (the physician's exception) would not seem to lead to a decline in morality. From the fact that Connecticut does not allow such a physician's exception it might be inferred that the state recognizes the natural law theory that any interference with the primary end of the sexual act is wrong. The aim of the Connecticut law is not easily ascertained.

Connecticut allows an exception in its abortion statute when necessary to save human life.³³ The dissent in *Tileston v. Ullman*,³⁴ pointing out that the abortion laws do allow such exceptions,³⁵ said:

³¹ *People v. Byrne*, 99 Misc. 1, 6, 163 N.Y. Supp. 682, 686 (Sup. Ct. 1917).

³² *Commonwealth v. Allison*, 227 Mass 57, —, 116 N.E. 265, 266 (1917).

³³ CONN. GEN. STAT. §53-30 (1958).

³⁴ 129 Conn. 84, 26 A.2d 582 (1942), *appeal dismissed*, 318 U.S. 44 (1943).

³⁵ See, *e.g.*, ARIZ. REV. STAT. ANN. §13-212 (1956);

According to the theory of the state, it is not lawful for a physician to prescribe articles so as to prevent conception, in the case of married women whose health will not permit them to bear children; but it is lawful in case such women do become pregnant to perform abortions upon them when necessary to preserve their lives.³⁶

Such an apparent inconsistency may in reality be reconcilable with the natural law. According to Aquinas, reason recognizes the direct frustration of the marital act as intrinsically evil,³⁷ but may allow so-called "abortions" in ectopic operations in extra-uterine pregnancies,³⁸ under the principle of the double effect.³⁹ While not attributing this intent to the Connecticut law, which permits a broader exception,⁴⁰ its reasoning remains at least generally consistent with the natural law. The Court itself, however, attributes its refusal to allow a doctor's exception to the birth control section to repeated unsuccessful attempts in the legis-

IDAHO CODE ANN. §18-601 (1947); MASS. GEN. LAWS ANN. ch. 272, §19 (1956); MINN. STAT. ANN. §617.18 (1945); TENN. CODE ANN. §39-301 (1955).

³⁶ *Tileston v. Ullman*, *supra* note 34, at —, 26 A.2d at 590-91 (dissenting opinion).

³⁷ See AQUINAS, *SUMMA THEOLOGICA*, II-II, q. 154, art. 1.

³⁸ KELLY, *MEDICO-MORAL PROBLEMS* 105-14 (1958).

³⁹ See FAGOTHEY, *RIGHT & REASON* 85-87 (1952). The so-called "double effect" refers to the morality of acts having two effects, one good, one evil. The controlling principles, under which such an act may be performed are: 1) The act must be morally good or at least morally indifferent; 2) The good effect must not be obtained by means of the evil effect; 3) The evil effect must not be intended for itself, only permitted; 4) There must be a proportionately grave reason for permitting the evil effect.

⁴⁰ The statutory exception extends to all cases where the mother's life is threatened. The abortion performed legally need not conform to the double effect principles.

lature to change the statute.⁴¹ And a statement in *State v. Nelson* that the law prevents illegitimate pregnancies⁴² evidences at least one of the given aims of the statute.

Above and beyond the criticism leveled at the absence of a physician's exception is the criticism of the birth control statutes in general. One objection that is often urged as a reason for repeal is the ineffectiveness of the laws to prevent contraception.⁴³ It is said that apart from the availability of legal methods of birth control,⁴⁴ "there is little benefit and perhaps some harm in keeping a statute on the books that is no longer being obeyed."⁴⁵ Nonetheless, the fact that these laws may be dead letter statutes is no reason to abolish them. It is well settled that mere non-use will not serve to repeal a statute or to render it unenforceable.⁴⁶ The laws, as they remain, reflect the state's

concern with morality and evidence at least a public policy objection to contraception.

Another objection arises when the increased acceptance of contraception is noted as being in conflict with the statutory prohibition.⁴⁷ While factually there may be truth to this objection, the duty of the state to legislate is bound not only by the mores, but by the morality involved. The first requirement of a just law is that it not be in conflict with a higher law.⁴⁸ The natural law prescribes a divine prohibition against contraception, and obviously a statute commanding birth control practices would be without moral force.

Closely allied to the foregoing objection is the thought that the Church as a "minority bloc" is responsible for the failure of the legislature to repeal these laws.⁴⁹ That Catholics have played a role in retaining these laws may well be true, but:

every person has . . . the civic right to advance his own cause, to advocate and attempt to persuade others to his point of view. One may advocate pacifism, prohibition, polygamy or planned parenthood. If one is successful, if there is a reasonable consensus, the laws and even the conven-

⁴¹ *Buxton v. Ullman*, 147 Conn. 48, —, 156 A.2d 508, 513 (1959); *Tileston v. Ullman*, *supra* note 34, at —, 26 A.2d at 565.

⁴² 126 Conn. 451, —, 11 A.2d 856, 861 (1940).

⁴³ "[A]ny antiseptic is capable of use as a contraceptive, including vinegar, sour milk, bichloride of mercury, as well as such proprietary antiseptics as Lysol, Listerine and Pepsodent." *State v. Arnold*, 217 Wis. 340, —, 258 N.W. 843, 844 (1938). A Fortune magazine survey estimated that approximately \$200,000,000 is spent annually by American women on contraceptives, many of them sold under the disguise of "feminine hygiene." See *Birth Control*, 3 ENCYCLOPEDIA BRITANNICA 647, 650 (1951). But see IDAHO CODE ANN. §39-809 (Supp. 1959): "Suppositories, cones, tablets and simple cleansing powders not classified as contraceptives or prophylactics by the Idaho department of public health or state board of pharmacy . . . may . . . be advertised but insinuation in copy . . . must not convey impression that such [products have] contraceptive virtue."

⁴⁴ The legality of prophylactics which prevent disease has already been noted.

⁴⁵ See 23 B.U.L. REV. 115 (1943), where the *Tileston* case is criticized.

⁴⁶ See *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 117 (1953).

⁴⁷ See Note, 50 YALE L.J. 682 (1941). The anomaly is further evidenced by the fact that one of the seven states disseminating birth control information in its public health programs, Mississippi, has statutory prohibition restricting the sale or advertisement of contraceptives. MISS. CODE ANN. §2289 (1942). See *Birth Control*, BRITANNICA BOOK OF THE YEAR 165, 166 (1955).

⁴⁸ See AQUINAS, SUMMA THEOLOGICA, I-II, q. 90, art. 4; Cahill, *Natural Law Jurisprudence in Legal Practice*, 4 CATHOLIC LAWYER 23, 30-34 (Winter 1958).

⁴⁹ A commentary on the *Buxton* decision attributed the birth control ban in Connecticut to the stout support of the state's Catholic clergy. It pointed out that the Catholic vote, 47%, is a powerful voting bloc. *Unreasonable Restraint*, Time, Jan. 4, 1960, p. 18.

tions of the country will reflect this.⁵⁰

If the Church is the sole restraining hand on the legislative bodies, it is up to the "majority" to exert its force and repeal the laws, if it wishes to do so. As it stands, the criticism against the Church is not only unfair, but illogical.

The position of the Church on birth control is clear. "[I]t is *absolutely* and *always* wrong. There can be no question of a justifying reason, nor of a 'permission' for even one act of contraception."⁵¹ Pope Pius XI in the encyclical *Casti Connubii* stated that "no reason, however grave, may be put forward by which anything intrinsically against nature may become conformable to nature and morally good."⁵² Accordingly, only those laws such as Connecticut's, which admit of no exceptions, are in strict conformity with the natural law.⁵³

The prohibition is absolute; it is binding on all men. That there are those who do not recognize it as such is undeniable.⁵⁴ The

⁵⁰ *Birth Control in Politics*, 71 COMMONWEAL 335, 336 (1959).

⁵¹ KELLY, MEDICO-MORAL PROBLEMS 154 (1958). "The only possible excuse is a subjective one, such as, for example, ignorance of this divine prohibition." *Ibid.*

⁵² Pius XI, *Christian Marriage* para. 54 (1930), FIVE GREAT ENCYCLICALS 95 (1939).

⁵³ The absence of a physician's exception is the *sine qua non* of the conformity of the Connecticut law. "A doctor may under no circumstances recommend artificial birth control nor even hint at its necessity or advisability. To do so would be to encourage others to perform an intrinsically evil act. Moreover, he is not allowed to give patients information as to the best methods of artificial birth prevention, nor to purchase for them nor to insert such contraceptive devices." HEALY, MORAL GUIDANCE 306 (1952).

⁵⁴ The possibility of varying degrees of knowledge of the natural law is recognized by St. Thomas. AQUINAS, SUMMA THEOLOGICA, I-II, q. 94, art. 4.

moral status of a civil law that conforms to the natural law is clear.⁵⁵ The legal status of such a law, although equally established, may not be as clear. Certainly, the right of the state to legislate gives rise to the duty of citizens to obey its mandates.

The appeal of *Buxton v. Ullman* is now pending before the Supreme Court⁵⁶ on the question of the constitutionality of the Connecticut statute. The law is indeed in conformity with the natural law,⁵⁷ yet we must await the Court's determination as to its constitutionality. If it is upheld, the citizens have the legal power to change the law if their dissatisfaction is great. But as it stands, the statute mirrors the divine prohibition against contraception.

Developments Since "The School Bus Challenge"

A recent issue of *The Catholic Lawyer* presented a discussion of the problems associated with expending public funds to transport school children to private or sectarian schools.¹ The article discussed the history of this issue, the federal and state problems involved, and suggested courses of action to be followed where such pupil

⁵⁵ The requirements of a just law, according to Aquinas, are that it be (1) not in conflict with a higher law, (2) an enactment for the common good, (3) made by a competent authority, (4) promulgated. *Id.* at q. 90, art. 4.

⁵⁶ 362 U.S. 987 (1960).

⁵⁷ Even the solution suggested by the Court in the *Buxton* case for those who find it necessary to prevent pregnancy is in line with the reasoning of the natural law, *i.e.*, total abstinence from sexual intercourse. See *Buxton v. Ullman*, 147 Conn. 48, —, 156 A.2d 508, 514 (1959).

¹ Reed, *The School Bus Challenge*, 5 CATHOLIC LAWYER 99 (Spring 1959).

transportation is desired. The author, Mr. George E. Reed, commented on litigation then in progress in three states which he felt significant in this area. These cases have now been decided.

In Connecticut, the Supreme Court of Errors ruled that a statute enabling communities to provide public transportation of pupils to parochial schools was not violative of the state constitutional provisions prohibiting compulsory support of a church and guaranteeing religious freedom. However, the statute was ruled to be unconstitutional in that public funds, appropriated solely for public school use, were expended for transportation to private schools.² In a second case, the New York Supreme Court ruled that the expenditure of public funds for transportation of nonpublic school children was not violative of either the Federal Constitution or, by reason of a 1938 amendment, the state constitution.³ Finally, the Supreme Judicial Court of Maine held that the city council of Augusta had no authority under its police power to enact an ordinance providing transportation for pupils attending private schools.⁴

The United States Supreme Court upheld the first⁵ school bus case to reach it.⁶ The Court held that a New Jersey statute providing transportation for children attending nonprofit private schools did not violate either the First or the Fourteenth Amendments of the Federal Constitution.

² Snyder v. Town of Newton, ___ Conn. ___, 161 A.2d 770 (1960).

³ Board of Educ. v. Allen, 17 Misc. 2d 1080, 192 N.Y.S.2d 186 (Sup. Ct. 1959).

⁴ Squires v. City of Augusta, 155 Me. 151, 153 A.2d 80 (1959).

⁵ Bolmeier, *Legal Issues in Pupil Transportation*, 20 LAW & CONTEMP. PROB. 45, 52 (1955).

⁶ Everson v. Board of Educ., 330 U.S. 1 (1947).

In his article Mr. Reed observed: "It [the decision] squarely holds that legislation designed to transport children to and from parochial schools does not involve a violation of the policy of separation of Church and State."⁷ The Court maintained that since a state cannot exclude citizens from receiving the benefits of public welfare legislation because of their religion, a state has the right, but not the duty, to provide transportation for nonpublic school children.⁸ In supporting the New Jersey statute, the Court reaffirmed the child benefit theory so often advanced by the proponents of transportation of pupils to nonpublic schools.⁹

Mr. Reed states that although the separation of church and state argument cannot be successfully raised in a *federal* test of public transportation to parochial schools, proponents of such plans must still satisfy *state* statutory and constitutional requirements. Normally, enabling legislation must be enacted to empower local school boards to provide transportation to private schools. Furthermore, since many states limit the expenditure of school funds to public schools, special appropriations may have to be made to avoid unauthorized use of the public school funds.¹⁰

In relating the history of bus transportation to private schools, Mr. Reed contrasts the situations as they developed in Missouri and Kentucky.¹¹ Both states enacted legislation empowering school districts to provide transportation to non-

⁷ Reed, *supra* note 1, at 101.

⁸ Everson v. Board of Educ., *supra* note 6, at 16.

⁹ Everson v. Board of Educ., *supra* note 6, at 18.

¹⁰ Reed, *The School Bus Challenge*, 5 CATHOLIC LAWYER 99, 102 (Spring 1959).

¹¹ *Ibid.*

public schools. Both states had school funds which were constitutionally restricted to *public* school use. The Missouri enabling act was declared unconstitutional since the necessary moneys were appropriated from the school fund. The Kentucky statute, on the other hand, was upheld since the necessary appropriation was derived from general funds rather than the restricted school fund. Mr. Reed concludes: "In summary, . . . legislation must be sought. It must be framed with the state constitution in mind and with full knowledge that it will be subjected ultimately to a judicial test."¹²

A Connecticut enabling act¹³ was recently tested in *Snyder v. Town of Newtown*.¹⁴ In that case, plaintiffs challenged the state and federal constitutionality of a statute empowering a municipality, with elector approval, to provide transportation for pupils attending a nonprofit private school. The Town of Newtown, after approval by the electorate, furnished transportation for pupils attending a Roman Catholic elementary school. The Court, citing *Everson v. Board of Educ.*,¹⁵ disposed of all of plaintiffs' claims under the Federal Constitution except for a claim of equal protection of the laws. The Court refused to consider this claim since the

plaintiffs were not members of a class which was allegedly denied such protection. The next contention advanced was that the statute violated the state constitution in that it authorized the expenditure of public funds for a private purpose. The Court rejected this claim.¹⁶ Plaintiffs' main argument centered around a state constitutional article which states in part: "[N]o person shall by law be compelled to join or support . . . any congregation, church or religious association."¹⁷ Plaintiffs contended that the use of tax-derived public funds to provide transportation to a school maintained by a church constituted public support of that church. The Court held that the statute aided the parents and the children, preserved the public health, safety and welfare and fostered education. The statute came up to, but did not breach, the wall of separation between church and state.¹⁸ Plaintiffs' final argument was that the funds used to implement the statute were restricted by the state constitution to public school use.¹⁹ On this point, the

¹² *Id.* at 105.

¹³ CONN. GEN. STAT. REV. § 10-281 (1958). The provision reads in part, "Any town . . . may provide, for its children attending private schools therein, not conducted for profit, . . . any transportation services provided for its children attending public schools. . . . The chief executive authority of any such municipality shall, upon petition, . . . submit the question . . . to a vote of the electors. . . ."

¹⁴ ___ Conn. ___, 161 A.2d 770 (1960).

¹⁵ 330 U.S. 1 (1947).

¹⁶ *Snyder v. Town of Newtown*, *supra* note 14, at ___, 161 A.2d at 774. The Court found that since the equal protection and due process clauses of the Federal Constitution and the Connecticut constitution had substantially the same meaning, the words of the United States Supreme Court were appropriate on this matter. "It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose." *Ibid.* See *Everson v. Board of Educ.*, 330 U.S. 1, 7 (1947).

¹⁷ CONN. CONST. art. VII, § 1.

¹⁸ *Snyder v. Town of Newton*, *supra* note 14, at ___, 161 A.2d at 775-79. The Court reviewed the history of the church-state relationship in Connecticut and reached its conclusion while relying heavily on the reasoning in the *Everson* decision.

¹⁹ CONN. CONST. art. VIII, § 2. This section of the constitution established a school fund, ". . . the interest of which shall be inviolably appropriated

Court agreed and ruled that the statute in question, in so far as it purported to make available moneys from this school fund, was unconstitutional.

It is no doubt significant that the Connecticut Court discussed the federal issues, the "private purpose" issue and the "support of religion" issue and found that the statute was not objectionable on these grounds before it ruled the statute unconstitutional on the ground of the improper use of public school funds. The Court could have declared the statute unconstitutional without discussing these other factors. It would appear, therefore, that if legislation were enacted specifically appropriating funds from sources not limited to public school use, the Connecticut Court would find the statute constitutional.²⁰

In *Board of Educ. v. Allen*,²¹ the Commissioner of Education of the State of New York ordered a school district, as provided by statute, to expend public funds to provide transportation of pupils to parochial schools.²² The Board of Education,

to the support and encouragement of the public, or common schools. . . ."

²⁰ *Cf. Squires v. City of Augusta*, 155 Me. 151, —, 153 A.2d 80, 87 (1959). The Maine Court, while declaring certain practices involving transportation to private schools unlawful in the absence of statutory provisions, observed that a properly worded statute could meet both state and federal constitutional standards.

²¹ 17 Misc.2d 1080, 192 N.Y.S.2d 186 (Sup. Ct. 1959).

²² N.Y. EDUC. LAW §§ 3635, 1807. Section 3635 establishes the criteria of the remoteness of the child's home from the school or the welfare of the child as the standard for determining when transportation should be provided. This section also permits a parent to appeal an adverse vote by a school district on such matters to the Commissioner of Education. Section 1807 empowers the Commissioner to order the local district to provide moneys for transportation if in his judgment the criteria established in § 3635 so require.

in contesting the order, maintained that the Federal Constitution as well as the state constitution had been violated.²³ The Court ruled that on the strength of the *Everson* decision, there was no violation of the First and Fourteenth Amendments of the Federal Constitution. The Court's handling of the petitioner's claims under the state constitution requires some historical background. In 1938, the New York Court of Appeals, in *Judd v. Board of Educ.*,²⁴ ruled that the expenditure of public funds to provide bus transportation to a parochial school, pursuant to a state statute, constituted support of a school wholly or partially under religious control and was, therefore, unconstitutional. In the election of that year the voters of the state approved an amendment to the constitution which read in part, "[T]he legislature may provide for the transportation of children to and from *any* school or institution of learning."²⁵ Despite this amendment, the Board of Education, in the *Allen* case,²⁶ attacked the orders of the Commissioner of Education as being violative of the state constitution. In dismissing the petition, the Court stated that the Board was placing undue emphasis on the *Judd* case²⁷ in view of the subsequent constitutional amendment. The Court observed, "[T]he People of the State of New York have determined that the use of public funds for transportation to non-public schools is a constitutional expendi-

²³ Since the Court's opinion is rather brief, the precise state and federal constitutional questions are not clearly defined.

²⁴ 278 N.Y. 200, 15 N.E.2d 576 (1938).

²⁵ N.Y. CONST. art. XI, § 4. (Emphasis added.)

²⁶ *Board of Educ. v. Allen*, 17 Misc.2d 1080, 192 N.Y.S.2d 186 (Sup. Ct. 1959).

²⁷ *Judd v. Board of Educ.*, 278 N.Y. 200, 15 N.E.2d 576 (1938).

ture."²⁸

In the third case mentioned in Mr. Reed's article, the City of Augusta, Maine, enacted an ordinance to provide transportation for pupils attending nonpublic schools.²⁹ Taxpayers brought suit against the city contending that neither the Maine statutes nor the Augusta city charter conferred this power on the city.³⁰ Plaintiffs further contended that the ordinance violated the state and federal constitutions. All parties agreed that no express terms in the statutes or the city charter granted the city the power to adopt such an ordinance. The city maintained that the enactment of such an ordinance was an exercise of its police power. The Court agreed that the city had the authority to exercise the police power but that the use of this police power must be consistent with the public policy of the state.³¹ A review of the state education laws led the Court to the conclusion that since the expenditure by municipalities of public funds for education, in all its phases, had for over one hundred years

been authorized by the legislature in specific and definite terms, it was the public policy of the state that a city ordinance such as the one under consideration could be enacted only after clear and unmistakable authorization by the legislature. Since the city's exercise of the police power was inconsistent with the general education policy of the state, the Court ruled that the city's expenditure of public funds for the transportation of children to nonpublic schools was unlawful.

Although a decision was reached in this case before considering any of the constitutional questions, the Court specifically stated that a properly worded enabling act authorizing communities to spend funds to transport children to private schools would meet both federal and state constitutional requirements.³²

In addition to these three cases referred to by Mr. Reed, there have been other developments of interest. Kentucky was cited by Mr. Reed as being an example of a state whose courts had upheld the constitutionality of public transportation to nonpublic schools because the legislature had enacted a proper enabling act and had utilized only a *general* fund to pay for the transportation.³³ Despite what would appear to be now simply a routine matter for school boards, the Kentucky courts are still required to formulate rules in the bus transportation area. In 1956 the Court of Appeals of Kentucky had to decide how to apportion the bus transportation expenses between the public school fund and

²⁸ Board of Educ. v. Allen, *supra* note 26, at 1082, 192 N.Y.S.2d at 188.

²⁹ An ordinance of the city of Augusta authorized the mayor to make a one year contract to provide transportation for Augusta children attending nonpublic schools. The purpose of the ordinance was stated to be to conserve the health, safety and welfare of the children. Money was appropriated for this project from the city's contingent fund. See Squires v. City of Augusta, 155 Me. 151, —, 153 A.2d 80, 81-82 (1959).

³⁰ Squires v. City of Augusta, 155 Me. 151, 153 A.2d 80 (1959).

³¹ *Id.* at —, 153 A.2d at 88-89. A municipality cannot under its general grant of power from the state enact ordinances which are repugnant to the policy of the state. Where the state has clearly determined the public policy on a subject through legislation, a municipality cannot act contrary to or in qualification of that policy. 5 McQUILLIN, MUNICIPAL CORPORATIONS § 15.21 (3d ed. 1949).

³² See Squires v. City of Augusta, *supra* note 30, at —, 153 A.2d at 87 (dictum).

³³ Reed, *The School Bus Challenge*, 5 CATHOLIC LAWYER 99, 102-03 (Spring 1959).

the general fund.³⁴ The court ruled that a simple per capita basis should be used unless peculiar or unusual circumstances existed. The same court was asked, in 1960, to define "peculiar or unusual circumstances."³⁵ The court, although not answering the request, stated that since its only concern was to make certain that no public school money was expended for the nonpublic buses and that a straight per capita method came closest to assuring this goal, it would again direct that the per capita basis be used.

The New York State Legislature has amended, effective September 1, 1961, a section of the Education Law dealing with bus transportation.³⁶ The effect of this amendment is to make it mandatory for school districts to provide bus transportation to both public and private schools for grade school students who reside at distances of from two to ten miles from school and for high school students who reside at distances of from three to ten miles from school.³⁷ Under the existing law, if the local school district does not provide transportation for school children, an appeal can be taken to the Commissioner of Education. The Commissioner

will order the school district to provide transportation for the children to the schools they legally attend if such transportation is being provided for some of the children in the district or if the school district's refusal to provide the transportation is unreasonable considering either the remoteness of the pupil's home or the best interests of the child.³⁸ In practice the Commissioner generally ordered transportation to both public and private schools to a maximum distance of eight miles.³⁹ The amendment will not only codify what had become the general policy of the Commissioner of Education, but also, will simplify the appeal procedure and extend the maximum limit of coverage from the previously established eight miles, to ten miles.⁴⁰

From the above discussion, it is clear that since the *Everson* decision,⁴¹ a state

³⁴ *Rawlings v. Butler*, 290 S.W.2d 801 (Ky. 1956). In addition to the bus issue, the constitutionality of using public funds to pay the salaries of Roman Catholic nuns teaching in the public schools and to lease buildings owned by the Roman Catholic Church for public school use was questioned. The court found no violation in these practices.

³⁵ See *Board of Educ. v. Jefferson County*, 333 S.W.2d 746 (Ky. 1960).

³⁶ N.Y. EDUC. LAW § 3635 (Supp. 1960).

³⁷ The operation of the existing bus transportation law and the probable effects of the amendment are discussed in a memorandum by the State Education Department and a message from the governor upon the signing of the amendment. McKinney's N.Y. Sess. Laws 1925, 2067 (1960).

³⁸ *Ibid.* N.Y. EDUC. LAW § 3635.

³⁹ See, e.g., *Matter of Patnaude*, 74 State Dep't (N.Y. Educ.) 46 (1953). A school district was providing transportation for the public school pupils. The Commissioner ruled that "in accordance with the established precedent, the pupils attending parochial schools are entitled to transportation provided they are attending the nearest available school of their denomination and such school is more than two miles from their homes in the case of elementary pupils or more than three miles distant in the case of secondary pupils, except that school districts are not required to provide transportation where the school is eight miles or more." (Emphasis added.) The standards of distance were established by the Commissioner's rulings not by statute.

Matter of the Towns of Hempstead and North Hempstead, 73 State Dep't (N.Y. Educ.) 25 (1952). The Commissioner ruled that "where the distance involved exceeds three miles but is less than eight, it becomes the duty of the school meeting to authorize transportation for children who attend non-public schools."

⁴⁰ See note 39 *supra*.

⁴¹ *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

court cannot declare a statute providing for the transportation of pupils to sectarian schools violative of the Federal Constitution on the ground that expenditure of public funds for such a purpose would constitute the support of a religion. However, since state courts of last resort are the final judges of the effect of *state* constitutional provisions, an invalidation could arise on that basis. The Supreme Court of Washington made such a decision only two years after the *Everson* case.⁴² Parents sought a writ of mandamus from the Washington Court ordering a school district to provide transportation for their children to a sectarian school. The parents contended that under a state statute *all* children, attending school in accordance with the state's compulsory attendance laws, were entitled to use the transportation facilities currently being provided by the school district.⁴³ They alleged that since their school district provided transportation for the public school children, the statute required that the district extend the service to the parochial school students. To answer the objection that public school funds could be expended only for public school expenses, the plaintiffs alleged that funds other than the public school funds were available. The plaintiffs also alleged that if transportation were denied them, their rights under the First Amendment would be abridged.

The Court disposed of the Federal Constitutional question on the strength of the

⁴² *Visser v. Nooksack Valley School Dist.*, 33 Wash.2d 699, 207 P.2d 198 (1949).

⁴³ WASH. REV. CODE § 28.24.060 (1956). "All children attending school in accordance with the laws relating to compulsory attendance shall be entitled to use the transportation facilities provided by the school district in which they reside." *Ibid.*

majority opinion in the *Everson* case in which Justice Black stated that a state could, if it wished, provide transportation only to public school children.⁴⁴ The Court agreed that the language of the statute did apply to children attending parochial school but that the main issue was whether public funds could be constitutionally expended for such a purpose. The state constitution provided that no public funds could be appropriated for the support of a religious establishment and that schools maintained in whole or in part by public funds must be free from sectarian control.⁴⁵

The Court, in discussing whether such expenditure as was requested would constitute support of a religion, stated: "[W]e must . . . respectfully disagree with those portions of the *Everson* majority opinion which might be construed, in the abstract, as stating that transportation, furnished at public expense, to children attending religious schools, is not *in support* of such school. . . . [W]e are constrained to hold that the Washington constitution although based upon the same precepts [as the First Amendment], is a clear denial of the rights herein asserted by appellants."⁴⁶ The Court, contrary to the conclusion reached in the

⁴⁴ *Everson v. Board of Educ.*, *supra* note 41, at 16.

⁴⁵ WASH. CONST. art. I, § 11. This section reads, in part, "Absolute freedom of conscience in all matters of religious sentiment, belief, and worship, shall be guaranteed to every individual. . . . No public money or property shall be appropriated for, or applied to any religious worship, exercise or instruction, or the support of any religious establishment. . . ." *Ibid.*

WASH. CONST. art. IX, § 4. "All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence." *Ibid.*

⁴⁶ *Visser v. Nooksack Valley School Dist.*, *supra* note 42, at ___, 207 P.2d at 205.

Everson case, ruled that providing transportation of pupils to parochial schools constituted support of that religion and denied the writ.⁴⁷

Although the courts of several states have declared certain practices involved in nonpublic school bus transportation unconstitutional, they have stated in several instances that the operation itself is funda-

mentally constitutional and can be operated in a lawful manner. On the other hand, some courts have been unable to sustain such practices in light of their constitutions. In the latter instances, a constitutional amendment may be the only answer for those desiring publicly financed transportation for nonpublic school children.

⁴⁷ See *Perry v. School Dist.*, ___ Wash.2d ___, 344 P.2d 1036 (1959). The Washington court again was called upon to interpret articles I and IX of the state constitution. The release-time program for religious education off the school grounds was ruled unconstitutional. Teachers and representatives of religious groups distributed cards and made explanatory announcements for the purpose of obtaining parental consent prior to a child's participation in the program. The court found the

practice was a "use of school facilities supported by public funds for the promotion of a religious program, which contravenes Art. I, § 11. . . . This practice has the further effect of influencing the pupils, while assembled in the classrooms, as a 'captive audience' to participate in a religious program, contrary to the express provisions of Art. IX, § 4. . . ." *Id.* at ___, 344 P.2d at 1043. Although this program had been in operation since 1938, the Washington court had not previously passed on it.