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IN OTHER PUBLICATIONS

Aid to Education

The long awaited study by the legal department of the National Catholic Welfare Conference on the topic, "The Constitutionality of the Inclusion of Church-Related Schools in Federal Aid to Education," has finally appeared in print in the current issue of the *Georgetown Law Journal*. The precise question to which the study is addressed is: May the federal government, as part of a comprehensive program to promote educational excellence in the nation, provide secular educational benefits to the public in private nonprofit schools, church-related as well as nondenominational? Three related questions are not treated: the basic constitutionality of federal aid to education; the constitutionality of federal aid to education exclusively in public schools; and the constitutionality of federal aid to religious instruction.

While no conclusion is expressed respecting the desirability, in principle, of large-scale federal aid to education, it is clear that it would be both needful from the viewpoint of national policy and lawful from the viewpoint of constitutionality to assist the secular aspects of education in church-related schools if such large-scale federal aid should be undertaken.

The specific conclusions to which the study comes are as follows:

(1) Education in church-related schools is a public function which, by its nature, is deserving of governmental support.

(2) There exists no constitutional bar to aid to education in church-related schools in a degree proportionate to the value of the public function it performs. Such aid to the secular function may take the form of matching grants or long-term loans to institutions, or of scholarships, tuition payments, or tax benefits.

(3) The parent and child have a constitutional right to choose a church-related educational institution meeting reasonable state requirements as the institution in which the child's education shall be acquired.

(4) Government in the United States is without power to impose upon the people a single educational system in which all must participate.

With respect to policy considerations, the study establishes that it is in the national interest that every American child have the opportunity for an education of excellence. But it is also in the national interest that our Judaeo-Christian moral heritage be preserved, along with the freedom to acquire education in diverse, non-state institutions. Herein lies the unique public value of our church-related schools. While our great public school system — built by men of all faiths — should receive the particular interest (as it does the financial support) of those who are dedicated to church-related schools, it is also true that the immense public contribution of the latter schools should be better known.

These schools were the original source of American popular education. Far from deviating from the American educational tradition (which was one of hospitality to religious values) they stand at the very core of that tradition. Today, Catholic schools (the largest of the groups of our church-related schools) are providing education (recognized by the states as meeting essential citizens' needs) to four and a half million elementary school children and one million high school children — or about 13% of the total school population of the nation. In nineteen states whose school population represents half that of the nation, Catholic schools are providing education to 18.6% of all children in elementary and secondary schools. For the year 1960 alone, the Catholic educational system saved American taxpayers \$1.8 billion.

However, one of the principal public benefits attributable to the Catholic schools is not economic but social. Typically, the Catholic schools are a meeting place for children of different economic and ethnic backgrounds and have usually not been located according to *de facto* zoning which divides neighborhoods racially. They have historically proved an invaluable training ground in the preparation of citizens for full participation in a pluralist society. Their graduates are found everywhere in American life, contributing commonly with all other citizens, to the welfare of the American society.

If, as seems true in the current educational crisis, *all* of the country's means of education should be utilized to their fullest extent, then (unless constitutional considerations dictate to the contrary) sound policy requires that if the federal government offers large-scale aid to education, this

should include education in private, non-profit schools, church-related as well as nondenominational.

With respect to constitutional considerations, the study establishes that they fully support these policy requirements. The provisions of the federal constitution chiefly involved in discussions of federal aid to education in church-related schools are the "religion" clauses of the first amendment and the "due process" clause of the fifth amendment. Historically, it is clear that the Founding Fathers did not and would never have written into their Constitution any clauses which would be aimed at sterilizing all public life and institutions of religious content. Opponents of aid to church-related education, however, rely principally on the language of the first amendment that "Congress shall make no law respecting an establishment of religion." When this clause was drafted it was understood to mean that Congress could not create a national church or give any religion a preferred status. This "no establishment" clause was aimed at preventing governmental transgressions upon religious liberty and not at preventing all relationships — *even certain cooperative relationships* — between church and state. Certainly it was never understood to mean that religious institutions which perform public services are disqualified to receive compensation for them through the governmental organs of the society which has benefited by the services. Neither was it understood to mean that government may proffer its assistance to the health and education of our citizens only through secularized governmental institutions. No decisions of the United States Supreme Court contradict these last-stated points; in fact, the Supreme Court deci-

sions which are closely relevant support them.

There are three decisions of the Supreme Court which relate to the constitutionality of aid-providing by government for the accomplishment of public welfare objects through church-related institutions. Not only do none of these decisions hold such aid-providing unconstitutional, they all flatly affirm its constitutionality. These decisions are *Bradfield v. Roberts*,¹ *Cochran v. Board of Educ.*,² and *Everson v. Board of Educ.*³

Two further Supreme Court decisions, widely cited in the controversy over federal aid to education in church-related schools, are *McCullum v. Board of Educ.*⁴ and *Zorach v. Clauson*.⁵ Each dealt with the constitutionality of "released time" programs in the public schools and so is not in point with respect to the present discussion of aid-providing by government, save insofar as each contains comment upon the general meaning of the "religion" clauses of the first amendment. The *McCullum* case involved a released time program conducted on the public school premises and carefully integrated into the public school program; this was held unconstitutional. The *Zorach* case involved an unintegrated program conducted off the public school premises, and this was held to be constitutional. Since the majority opinion in the *McCullum* case spoke three times of the first amendment's creating a "wall of separation between church and state," some commentators believed that the Supreme Court had stated a doctrine of *absolute*

separation of church and state and that the way had now been prepared for the liquidation of fruitful relationships between government and religion which had been the American experience of one hundred and sixty years. The decision of the Court four years later in *Zorach* proved these commentators wrong.

In *Zorach* the Supreme Court made it clear that the concept, derived from the first amendment, of separation of church and state was not to be taken in any absolute sense. The Court stated that "we are a religious people," and that religion and government may in various ways cooperate. Neither the *McCullum* nor the *Zorach* case constitutes in any sense precedent against the kinds of possible aid to education in church-related schools under discussion in the study.

A third group of Supreme Court decisions relevant to the discussion is *Meyer v. Nebraska*⁶ and *Pierce v. Society of Sisters*.⁷ These involved the all important rights of free choice in selecting educational institutions. The *Meyer* case involved the violation, by a teacher in a Lutheran parochial school, of a state statute making it a crime to teach in any elementary school any language other than English. The United States Supreme Court reversed the conviction, stressing that there are three groups of rights which the Constitution protects against unreasonable intrusion by the state: those of the child, of the parent and of the teacher. The Court struck forcefully at the view that all educational rights belong to the state, and it said that the desire of the legislature to "foster a homogeneous people" could not be fulfilled at the expense of liberties guaranteed by the Constitution.

¹ 175 U.S. 291 (1899).

² 281 U.S. 370 (1930).

³ 330 U.S. 1 (1947).

⁴ 330 U.S. 203 (1948).

⁵ 343 U.S. 306 (1952).

⁶ 262 U.S. 390 (1923).

⁷ 268 U.S. 510 (1925).

The landmark case of *Pierce v. Society of Sisters* involved an expanded recognition of parental and child rights in education. Here an Oregon statute (which had been promoted by the Ku Klux Klan and some allied groups) required that parents send their children only to public schools. The plan of the statute was to "Americanize" all children in what was described as the "public school melting pot." Protestants, Jews and Catholics rose in opposition to the scheme. The Supreme Court of the United States ruled the statute unconstitutional as denying the rights of parent and child freely to choose education in non-public (including church-related) schools. The Court said that the legislature could not give the state a monopoly over education. Most significantly it said:

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State. . . .⁸

The *Meyer* and *Pierce* cases thus strongly underscore the protection with which the American Constitution jealously surrounds individual rights in education. Each stresses child-parental rights and by clear implication attacks the concept of the statist culture which would result from the permitting of government monopoly of education. Having thus considered present questions of policy and, in addition, the governing constitutional law, the study gives some consideration to probable future consequences of programs of massive federal aid to public education which would exclude church-related education. The predictable result would be a critical weaken-

⁸ *Id.* at 535.

ing of the latter, presaging the ultimate closing of many church-related schools. Since, *de facto*, most parents would no longer enjoy the freedom to send their children to church-related schools, the freedom of parent and child protected by the *Pierce* decision would, practically speaking, have been rendered meaningless.

Moreover, a practical governmental monopoly of education would result. This would not only dangerously transform our free, pluralistic society but would also pose the most serious problems respecting freedom of belief. Freedom of belief would be endangered by the fact that virtually all children would be compelled to attend state-run schools. Values are inculcated in all schools, not only in those in whose curricula specific ethical or social concepts are advocated, but also in schools whose curricula distinctly omit such concepts. For the person whose conscience dictated the choice of a church-related school, here as a matter of practicality would be the result discountenanced in *McColum*: coercion to participate in schooling, the orientation of which is counter to belief.

The study concludes by observing that the present argument over aid to education has unhappily become overclouded by opinions which have tended to engender the belief that the problems here involved are to be solved by simple, absolutist interpretations of the Constitution and by generalizations based thereupon. Ours, however, is a Constitution of rationality, not one of absolutes which paralyze social action. The problems here involved are predominantly practical; no constitutional bar exists to the aid herein described to education in church-related schools. Constitutionally proper forms may be found in which such aid may be given. Practicalities,

not slogans, should govern the determinations to be made — determinations which give clear recognition to the rights of parents, the rights of children, the enlargement of freedom, and the preservation of the nation.

The Ribicoff Memorandum

Another excellent presentation on the subject of aid to education is an article in the Winter edition of *Thought* magazine (published at Fordham University) by an outstanding scholar, Rev. Joseph F. Costanzo, S.J., assistant professor of political philosophy at Fordham. Entitled "Ribicoff on Federal Aid to Education," this treatise is an exhaustive and analytical presentation. Father Costanzo's thesis is that a law-supported program that extends federal aid to all schools, except parochial ones, precisely because of their religious affiliation, is unjust, unreasonable and unsound. The treatise gives excellent material on the *Everson*, *McCullum* and *Zorach* cases.

In his introduction, Father Costanzo quotes as follows from the text of President Kennedy's special message sent to Congress on Feb. 20, 1961:

Our progress as a Nation . . . will require the maximum development of every young American's capacity. The human mind is our fundamental resource. A balanced federal program . . . must include equally determined measure to invest in human beings. . . . Our twin goals must be: a new standard of excellence in education — and the availability of such excellence to all who are willing and able to pursue it.

The author then remarks:

It was indeed regrettable to many loyal Americans that such universal affirmations of educational needs in the case of students,

teachers and facilities, all "unequivocally" related to our Nation's progress should have been so quickly contradicted by the President himself in outlining discriminatory norms for the disbursement of federal funds. . . .

(The same discrimination was repeated by the President in his State of the Union address.)

Father Costanzo continues:

On March 28, 1961, Mr. Ribicoff, Secretary of Health, Education and Welfare, in response to a request made by Senator Morse, chairman of the Senate Subcommittee on Education, sent the latter a memorandum discussing the constitutionality of loans to private schools, including sectarian institutions, and a summary of existing federal legislation which benefits sectarian institutions. Because the memorandum is, in its own way, an official document of opinion, it could be easily misconstrued as an authoritative interpretation of the historical practices of governmental aid to education. Actually it is no more than a cabinet officer's report committed a priori and ex officio to the support of his Chief Executive. To acknowledge frankly the restricted purpose and loyal service of the memorandum is not to deride it.

There are many excellent passages in Father Costanzo's article, which covers 51 pages in *Thought*. We append some of them:

There is no basis in constitutional law, in the history of higher and lower education, or in sound reason to warrant the distinction whereby the Federal government may favor with financial assistance in any form church-related colleges and universities and on the other hand be required to deny it in all forms to their subsidiaries in the pre-collegiate grades.

The constitutional principles on which federal subsidies to the church colleges and universities are based also justify the extension of government assistance to their gram-

mar and secondary schools. A Constitutional principle which defends support of sectarian schools on the one level and denies it on another level — both of which in the minds of the churchmen themselves cohere as a continuous educational process — cannot be established validly.

Father Costanzo concludes:

Unfortunately, the discussion has been partly obfuscated in the popular mind by uncritical and specious associations. A religious establishment is not an establishment of religion. The Constitution forbids a state religion; it does not proscribe a religious state. There is nothing in the Constitution that requires tax-supported education to be wholly secular and divorced from religious influence and orientation nor any requirement that public education and general welfare be identified with state schools exclusively.

Separation of Church and State is not and cannot ever be separation of religion and education. Church schools are not religious schools as are seminaries, ministry and rabbinical schools. They are truly educational facilities that comply with state educational standards and requirements of teaching and curriculum — even when considered within their own religious orientation, environment and influence. Religious instruction in accredited private schools needs no apologia within the context of America's religious heritage. The national interest depends as much upon their vigorous survival as it does upon state schools.

A religious and moral imperative is at the heart of American culture. Successive generations of Americans have prided themselves on the spiritual and religious well-springs of our democratic way of life. It is not without profound significance that the most revered and time-honored document in our national history is the Declaration of Independence, which protests to the whole world the birth of a new nation in terms of self-evident truths.

In the international struggle to contain Communist totalitarianism and dehumani-

zation Americans look to religion as a principal ally and major defense for the preservation of the free way of life. At home there is a general consensus among the people and government officials that our democracy rests more firmly upon religious foundations and that our civil liberties are ultimately justified by the spiritual concept of the dignity of man, the validity of which is beyond any social mores to arrest or majoritarian determination to defeat. The unique American experience has been to hold fast to these religious presuppositions of our institutions, on the one hand by exercising no legal constraint over the consciences of its citizens and on the other by providing equal protection of laws and legal immunity for the free exercise of religious liberty. It is in the national interest for all schools to retain this relevance of religious life and the spiritual values implied in our democratic institutions. No legal prejudice or disability should be visited upon those who do.

Church and State

The latest and best articles dealing with the relationship between church and state appear in the November *Michigan Law Review* and the Autumn issue of the *Chicago Law Review*. Professor Kauper's paper entitled "Church and State: Cooperative Separatism" is featured in the Michigan journal, while Professor Kurland's survey, "Of Church and State and the Supreme Court," occupies a similar position in the Chicago periodical.

According to Professor Kauper, a number of groups and organizations are devoting new study to questions of church-state relations in order to clarify their position. While to some it may seem that the term "separation of church and state" solves such questions, it has become clear to the more thoughtful observer that the relationship between the political and the religious

forces of the community, all operating within the same social structure, and often serving concurrent or overlapping purposes, and drawing upon the same basic human resources and personnel, is a matter too complex to be described by use of slogans or symbols. Indeed, the problems attending this relationship are too difficult to be solved by doctrinaire propositions or absolutes.

"Separation of church and state" is the symbolic language so often used as a beginning point of discussion. Actually this precise language does not have much relevancy to the American scene. It is borrowed from European history and tradition where the problem could be identified in terms of a single church and of a single state, or in later years of a single state and two churches, namely, Catholic and Protestant. To speak of separation of church and state in the United States invites some difficulty in the use of terms, first, because we have a plurality of states including the federal government and the individual states and, second, because we have a plurality of church bodies. Perhaps it would be more illuminating to identify the subject in terms of the problems arising out of the interrelationship of religious and political forces in the community. This interrelationship creates the problem in which we are interested. Use of the term "state" denotes the politically organized community with its monopoly of coercive power. The church on the other hand, is a voluntary association which must depend on noncoercive religious motivation and persuasion in making its impact upon the individual and the community. In any critical examination of this general problem of church-state relation and more particularly of the nonestablishment limitation, it is

useful to start with the elementary idea that the state and the church serve basically different functions and objectives. It is the state's business to operate the politically organized society and serve the community's civil needs. The business of the church is to minister to man's spiritual needs and to carry on activities appropriate to a sense of religious concern. Some may prefer not to put it in this way, but rather to say that the state is concerned with the secular functions of our society and the churches with its spiritual functions. This, too, may be a gross oversimplification, but it does, at least, point up a central consideration, namely, that church and state serve different primary functions. It is not the business of the state to operate a church or to engage in the propagation of religious ideas. On the other hand, it is not the function of the churches to exercise the coercive authority of the politically organized community. This separation of function has its roots not simply in some theoretical conception of a convenient division of labor but is grounded more profoundly on the theory that the cause of human freedom is best served when religion and its institutions are grounded in voluntarism and not dependent upon political force. The really important questions we face today, however, do not arise from any threat of formal confusion of functions or any attempt at formal institutional blending of the separate functions of the church and state. Rather they have to do with the practical problems of the recognition of each other's function and of the contribution that each makes to the total scheme of things. As the church is dependent on the state and depends for its effective functioning and even survival on valuable services furnished by the state, so, in turn, the politi-

cally organized community expects to be served by the religious community. The tradition developed in English legal history that the Chancellor was the keeper of the King's conscience. This term epitomized the idea that the King counted upon conceptions of equity developed by the Chancellor who was an ecclesiastical officer to liberalize the common law and to infuse it with moral conceptions that had a basic religious orientation. This, in turn, is simply another manifestation of the idea that the churches, in the discharge of their separate functions in cultivating the spiritual lives of their parishioners and in developing moral and ethical ideas founded on religious insight and motivation, make an important contribution to the politically-organized community. The state in formulating policy and in fashioning the law must depend upon the moral sense and values of the community. It makes little difference whether we recognize the church's contribution to the legal order and to the conception of public policy in terms of a body of moral or natural law which serves as a guide or norm for the framing of positive law or, whether apart from any conception of natural law, we identify this contribution to the civic order both through the impact of religiously motivated citizens and public officers and the discharge by the church of a prophetic function in speaking to matters of public concern. In regard to such matters as disarmament, the use of nuclear weapons as war weapons, birth control, distribution of surplus food to needy peoples, immigration policy, aid to education, aid for the aged, the churches do have a real, vital interest. These are matters of both religious and civic concern.

Professor Kauper concludes by stating:

This writer is not advocating federal aid for parochial schools. But it is his opinion that consistent with the non-establishment principle of the first amendment and the separation limitation derived from it, and in view of the interpretations given to this language and the practices that have been sanctioned, Congress may grant some assistance to these schools as part of a program of spending for the general welfare, so long as the funds are so limited and their expenditure so directed as not to be a direct subsidy for religious teaching.

It is clear that we cannot find answers to any of the questions in the field of church-state relations by employing broad and sweeping postulates based on a theory of complete separation or on a theory that the state can do nothing which in fact aids religion. These problems will have to be answered on a pragmatic basis that takes account of competing and conflicting interests and of the underlying purposes served by the separation principle. But it should also be stressed that the issue of constitutional power should not be confused with the question whether it is desirable or wise as a matter of policy for the government to give support to parochial schools. Certainly any proposal for such support does invoke very important policy considerations. On the one hand, the effect of such assistance in promoting parochial schools and the resulting impact and effect on the public school system must be considered and weighed. And, in turn, those interested in the parochial schools must seriously and carefully weigh the question whether and to what extent they should receive and accept assistance from the government at the expense of submission to controls that properly accompany grants of public funds. But these are questions of policy to be debated and argued in the public forum and in the legislative halls. Debate on these issues should not be foreclosed or obscured by indiscriminate invocation of the separation principle derived from the first amendment.

Professor Kurland's review of the church-state issue also supports the view

of those who believe, as Professor Kauper, that aid to church-related schools poses an issue of public policy rather than law. Professor Kurland concludes his article with the following paragraph:

This paper has stated and examined, in the context of the Court's opinions, a principle believed to be appropriate to the first amendment objectives. The principle tendered is a simple one. The freedom and separation clauses should be read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden. This test is meant to provide a starting point for the solution to problems brought before the Court, not a mechanical answer to them. Perhaps such a search for rules of decision is futile or undesirable. Certainly the recent plea for "neutral principles" of constitutional adjudication has not met with uniform acclaim. Only if equality and certainty are still fundamental objectives of our legal structure do such principles have a function to serve. And perhaps this notion of law is outdated in the society in which we live. But no apologies are offered for the belief that democratic society cannot survive if these elements of the rule of law are rejected.

Law and Morals

Another excellent article from the pen of Professor MacGuigan appears in the latest issue of *Current Law and Social Problems*. Entitled "Positive Law and the Moral Law," it outlines St. Thomas Aquinas' conception of the relationship of law and morals and develops some of the conclusions which seem to be implicit in his doctrine.

According to Professor MacGuigan there is for St. Thomas a mutual interpenetration of law and morals. Some moral obligations

are also legal obligations (static norms), and all legal obligations are moral obligations, either primarily and necessarily (static norms) or secondarily and prudentially (dynamic norms). In fact, St. Thomas even goes so far as to say that legislative determinations which are unjust (and therefore, by his own definition, not law at all) may sometimes be binding in conscience for prudential reasons, that is, in order to avoid the greater evils of scandal and disturbance. St. Thomas does not confuse the moral and legal orders. He clearly sees the essential features of each and distinguishes them effectively. But for him distinction is not separation, and so far is he from adopting a theory of the separation of law and morals that he posits a massive penetration of each into the realm of the other.

As a result of this interpenetration of law and morals two advantages accrue as deduced by Professor MacGuigan. First, the guidance given to law by the natural law and its derivative, natural morality, though not descending to the purely practical level of prudence, is considerable. Secondly, by making all legal rules moral precepts, either primarily or secondarily, this theory makes possible a moral and rational explanation of all law; legal obligation becomes explicable in rational terms and law thus gains the support of reason as well as the adherence of will. The Thomistic theory of the interpenetration of law and morals thus gives both speculative satisfaction and practical assistance to man as political animal.

Fair Housing Laws

Nine states — Colorado, Connecticut, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Oregon and

Pennsylvania — now forbid discrimination in the sale or rental of housing on the basis of race, color, religion, national origin or ancestry; moreover, these laws cover not only public housing, publicly assisted housing (urban renewal) and publicly insured private housing (FHA- or VA-insured) but apply as well to extensive portions of private housing that is not governmentally aided, not even by government insurance on mortgages. This coverage of entirely private housing is the really distinctive feature of these laws. From this fact they are called "fair housing laws in private housing," although their broad provisions also include public, publicly assisted and publicly insured housing.

The January 1962 issue of *Social Order* contains an excellent discussion of these laws in an article by Richard Roberts, S.J. entitled "Fair Housing Laws: A Tool for Racial Equality."

Father Roberts surveys the major provisions of anti-discrimination laws in private housing in the aforementioned states and then discusses the arguments pro and con with respect to such legislation. A leading claim against the passage of these laws is that fair housing laws in private housing violate the right to control of one's own property. Freely to select one's buyers or tenants is among the important benefits of private property ownership. To curtail the landlord's freedom of selection is to deprive him of a right essential to his freedom, a right forming an important part of the American tradition. Although zoning laws and similar state regulation of private property in the interest of the general welfare are admittedly proper, fair housing laws, it is asserted, are not of this nature but instead constitute an unreasonable and arbitrary deprivation of rights. Moreover, thus

to abridge the property owner's freedom is to convert private housing into a public utility, for the mark of a public utility is that the public has a right to demand its services without discrimination.

Opponents also argue that not only do fair housing laws impair the right of private property ownership but they also infringe on the right of freedom of association of the owner who chooses to live in his property. No longer is he free to select the persons with whom he associates in connection with his own property, neither is he free to enjoy the correlative of the right of "freedom of association" which is the "freedom to non-associate." Thus, under a fair housing statute, a landlord is not free to rent other apartments in his building to members of his own religion only, rejecting all others.

It may be remarked that this argument from the right of "freedom of association," while primarily applying to the owner-occupier, is capable of wider applications. Tenants in a building also have a right, it is claimed, to freedom of association and may legitimately protest the entrance of a tenant with whom they do not choose to associate.

Opponents also argue that the true purpose of those advocating fair housing legislation in private housing is not the provision of better housing for minorities but the compulsory integration of the races. These opponents stress they do not oppose voluntary integration; they insist, however, that integration should be a matter of free choice. And the choice should work both ways: those who wish to live in a racially or nationally homogeneous apartment building or neighborhood are entitled to this liberty, as much as those preferring a mixed residential pattern.

A leading argument in behalf of fair housing statutes is based on the natural and inherent right of every individual and family to bargain for shelter and to move freely into any neighborhood, without exclusion or penalty because of race, color, religion or national origin.

A second argument employed by fair housing law proponents stresses that the practical effect of this ghetto-containment is to confine the Negro and other minorities to slum areas. Denied access to the new housing market or other desirable sections, in city after city Negro families are largely restricted to the oldest and most overcrowded districts. An unfavorable image of the minorities is unfairly created and reinforced by this compelled association with slum residents.

Contested also, is an opposition argument that is couched in the familiar phrase "you can't legislate morality." Fair housing advocates deny the parallel that foes would draw between these laws and the Prohibition Amendment and Volstead Act of unhappy memory. Rather, they counter, anti-discrimination laws in housing give formal expression to the moral, democratic conviction of the community that housing discrimination is wrong. This in itself is healthful. In addition, proponents point to the successful operation of existing anti-discrimination legislation in housing and other fields.

Father Roberts expresses his own opinion on fair housing legislation in the following concluding paragraph:

Whatever answers history may write to these questions, in the current social context fair housing laws in private housing are, in the present writer's view, both just and necessary. The status of a free man is simply not consonant with his deprivation of an equal place in the housing market, by

the virtually concerted forces of the housing industry and the community hostility, solely because of race, color, religion or national origin. This deprivation is a current fact, demanding the remedy of legislative power. Also meritorious is a second argument that state action is imperative, since housing discrimination is one of the causes of a major social evil, the urban slum. Fair housing laws in private housing, then, bear the hallmark of legislation that is practical, just and wise. And this they do, even though the citizen may still be surprised at his government's entry into areas of conduct long considered beyond its scope.

Labor Law

The concern currently expressed by several large and powerful national organizations about racial and religious discrimination in employment, and the attention given to the problem by both major political parties at their 1960 conventions, portend renewed efforts to enact federal legislation providing legal remedies to persons suffering such job discrimination.

In an article by Walter Maloney, Jr. entitled "Racial and Religious Discrimination In Employment and the Role of the NLRB" featured in the current *Maryland Law Review*, certain definite observations are made concerning such legislation. According to Mr. Maloney, the NLRB has realized the inherent limitations of the National Labor Relations Act in affording an effective remedy for racial and religious discrimination in employment. Congress clearly did not have this problem in mind when it brought the Board and its act into existence, nor when it expanded the powers of the Board in 1947. Whenever racial and religious problems have arisen in the course of Board litigation, they have come up incidentally in some peripheral context of the administration of the act.

It has been ably argued that the Board could, in filling up the broad interstices of the act, assume a more vigorous and comprehensive role in eliminating racial job bias. It has been suggested that the duty of a union to bargain under section 8(b)(3) of the act encompasses a duty owed to its constituents as well as to its economic protagonist. Accordingly, racial discrimination in employment, or at least in collective bargaining, would be deemed as an unfair labor practice. Mr. Maloney argues that such an argument does not accord due deference to Congress. However compelling the reasons may seem to be for federal action in the area of racial and religious job bias, Mr. Maloney feels that it is of paramount importance to accede to the expressed wishes of the body which the Constitution has designated for the creation of new law and new policy. When Congress has failed to set such a policy, an administrative body would be ill-advised to attempt, by a flanking action, what elected representatives have declined to accomplish by frontal assaults.

Hostility to federal job bias legislation cannot reasonably be expected to subside, even in the face of the most modest proposal. However, the degree and intensity of such opposition may become modified if the proposal advanced is clearly remedial in character and does not contain express criminal sanctions. This practical end may be accomplished by a proposal making racial and religious discrimination a new and distinct unfair labor practice on the part of either labor organizations or employers to be remedied under the established procedures of the NLRB.

Contingent Fees

Fortune magazine has an article entitled, "The Crisis in the Courts," in its December 1961 issue. According to the article, most plaintiffs' lawyers work on contingent fees, picking up from 25% to 50% of their clients' awards or settlements. This system is defended on the ground that it provides counsel for the most impoverished accident victims. Its vices are more glaring: the contingent-fee system clogs the calendars with thousands of small, weak suits that should never have been brought; juries, knowing that the plaintiff's lawyer will get a third or more of the award, inflate their verdicts far beyond actual damages and, naturally, this tendency has the effect of increasing premiums for liability insurance. A few plaintiff lawyers in nearly every big city solicit likely cases against "target defendants" (rich ones) and, in flat violation of professional ethics, advance funds to support clients until trial time. In California a special bar commission reported some contingent fees "unreasonable and unconscionable," but the state bar membership refused to set maximum limits of 33⅓% of the first \$20,000 and 20% above that. The New York Supreme Court's Appellate Division in Manhattan and the Bronx limits fees to 33⅓% with exceptions for special cases. In New York City alone, according to the article, accident awards run \$220 million a year to 160,000 people; no less than \$75 million of that amount goes to lawyers. The American Judicature Society, hard core of the court-reform movement, estimates that contingent fees in the United States may run as high as \$700 million annually.