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For Immediate Release

AJCONGRESS SAYS RELIGIOUS SCHOOLS MAY

SELECT TEACHERS ON BASIS OF BELIEFS

A religious school has the right to insist that its teachers subscribe to its particular religious beliefs, says the American Jewish Congress.

The organization adds that in cases where anti-discrimination laws appear to conflict with such religious criteria, priority must be given to Constitutional protection of the school's religious rights.

An amicus, or friend-of-the-court, brief filed by AJCongress with the United States Supreme Court, declared that Dayton Christian Schools, Inc. (DCS) a consortium of evangelical schools in Ohio, was well within its rights in refusing to rehire a teacher, Linda Hoskinson, who was about to give birth, on the grounds that the school's religious beliefs held that mothers should remain at home with young children.

Announcement of the filing of the brief was made by Norman Redlich, chairman of AJCongress' Commission on Law and Social Action and dean of the New York University School of Law.

The amicus brief maintained that the Ohio Civil Rights Commission had erred in charging that in refusing to rehire the teacher, Dayton Christian Schools had violated the state's anti-discrimination law which upholds women's rights.

The case grew out of a 1979 complaint by Linda Hoskinson, a teacher at Dayton Christian Schools, who, upon learning she was pregnant, spoke to her principal about being rehired the following year. She was informed that she would not be rehired because the school's religious tenets included the belief that mothers should stay home and take care of their young children.

Mrs. Hoskinson sought the advice of an attorney, who wrote the school a letter threatening a lawsuit over the refusal to renew the contract. The school then fired her for violating the Biblical chain-of-command by seeking the advice of a secular authority.

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Mrs. Hoskinson subsequently filed an administrative complaint alleging sex discrimination and illegal retaliation under Ohio's anti-discrimination law.

The Ohio Civil Rights Commission attempted voluntary conciliation but failed. After a preliminary investigation, it concluded there was probable cause to believe that Dayton Christian Schools had violated the anti-discrimination law.

DCS refused to sign a "proferred conciliation agreement" but submitted a formal answer to the complaint and then filed an action in Federal Court to protect its Constitutional religious rights.

The district court upheld the Civil Rights Commission. The court found that Dayton Christian Schools was "pervasively religious" and that teachers were "selected because of their ability to blend their avowed religious beliefs into every lesson and school activity...." It said, "The school demands that teachers conform both in thought and conduct to the tenets and principles felt essential to leading a Christian life."

The district court also noted that the Ohio anti-discrimination statute contains no exemptions for religious-based employment discrimination.

Dayton Christian Schools appealed to the Sixth Circuit Court of Appeals. The appellate tribunal reversed the district court's ruling, declaring that State interference with Dayton Christian Schools' selection of religion role models constituted "a substantial burden on religious freedom." While it said that the state had a "compelling interest" in eliminating sex discrimination, it maintained that the state had alternative ways of furthering this goal, including conditioning of tax exemption on non-discriminatory policies. The Court also upheld Dayton Christian Schools' claims of excessive entanglement by the Ohio Civil Rights Commission.

AJCongress attorneys, in filing the brief before the United States Supreme Court, noted that "what Dayton Christian Schools would be required to do by Ohio law is to hire a teacher and, since it holds its teachers up as models of Christian living, hold her up as a model of a proper example of Christian living when she is openly violating the school's

While the state has a compelling interest in eliminating sex discrimination, that goal is not seriously impeded by carving out an exemption for religious schools, AJCongress attorneys argued. They added that the Ohio Civil Rights Commission erred when it suggested that the school would not be coerced by the Ohio code to abandon its religious beliefs. A state may not compel a church school to hold up as a role model a person who, in the school's view, is unworthy of that office, the AJCongress brief contended.

The right of a church school to select teachers is equivalent to the right of a church to select a minister. Dayton School teachers function like ministers, the brief went on.

But while upholding the schools' right to insist on a religion test for its teachers, the AJCongress brief held, nevertheless, that school officials were in the wrong for retaliating against Mrs. Hoskinson for seeking the advice of a secular authority. Although the filing of the complaint violated the school's religious beliefs, the Constitution should not be construed to protect this belief.

Anti-retaliation statutes protect those who believe that they have been the victims of discrimination, and who file good faith complaints with the appropriate authorities. These statutes allow government to determine whether it may adjudicate a particular case. Without such statutes, religious institutions would be sole judges of their own cases, the brief declared.

By insisting that their religious belief in a "Biblical chain of command" forbids Christians to file complaints about church activity with secular authorities, Dayton Christian Schools attempted to avoid this analysis, the brief argued. The state's interest in preventing retaliation against those who file complaints is sufficiently compelling to outweigh the school's religious concerns, it added.

The AJCongress brief was signed by attorneys Marc D. Stern, Lois C. Waldman, and Ronald A. Krauss.

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Christmas - Chanukah
in the
Community and Schools:
A Jewish Communal Guide

Commission on Law and Social Action

AMERICAN JEWISH CONGRESS
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CHRISTMAS - CHANUKAH

in the

COMMUNITY AND SCHOOLS:

A JEWISH COMMUNAL GUIDE

Prepared by
Commission on Law and
Social Action
of the
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INTRODUCTION

Two recent cases work a major change in the law governing the power of government -- federal, state and local -- to display religious symbols of various kinds. In Lynch v. Donnelly, 52 U.S.L.W. 4317 (1984), a 5-4 majority of the United States Supreme Court held that the City of Pawtucket could fund and erect a creche on private land as part of the city's annual Christmas display without violating the Establishment Clause. In McCreary v. Stone, (1984) the United States Court of Appeals for the Second Circuit ruled that the Village of Scarsdale was required to permit a private group to erect a nativity scene, standing alone, on public property. The McCreary decision is authoritative only in the states of New York, Vermont and Connecticut, and is currently being appealed to the Supreme Court. The Lynch decision, however, is now the law of the land.

The Lynch and McCreary decisions leave open a number of questions, both as to their application in specific circumstances and what they augur for church-state law generally; this memorandum will make no attempt to answer all of them. It will, however, attempt to sketch in broad outline what those seeking to oppose creches and other religious symbols need to know about the changes made in the law. We will point out both those factors peculiar to the Pawtucket case, whose absence in other situations might change the result, as well as those legal issues or distinctive factual situations still left open by the cases, which might provide the basis for legal attacks. It will also briefly enumerate some of the policy arguments against the display of religious symbols that might be advanced in meetings with municipal authorities and might be used to convince other community groups to join in such opposition. Although these cases deal with displays on public property, they also raise some questions concerning Christmas observances in the schools, which we also will discuss.

We do not believe Lynch and McCreary wholly foreclose legal challenges to government sponsored creches or other religious symbols. Nevertheless, they certainly require that legal challenges be selected with unusual care, launched only after careful consultation with, and the assistance of, attorneys with broad experience and particular expertise in this field. The legal staff of the American Jewish Congress will be available for such consultations and to participate in such legal challenges if found appropriate.

I. THE LYNCH DECISION

The Lynch decision involved four significant facts: 1) the creche was publicly sponsored and funded; 2) the creche was placed on private land; 3) the creche was part of a larger Christmas display, including a sleigh with reindeer, a Santa Claus house, a Christmas tree, carolers, etc., most of which was "secular" in nature; and 4) the creche was displayed only during the Christmas season, and was not permanent.

The Court's legal analysis was based on a three part test that the Court has with rare exceptions employed in detecting violations of the Establishment Clause. This test, first enunciated some fifteen years ago in Lemon v. Kurtzman, 403 U.S. 602 (1971), requires that, in order to pass constitutional muster under the Establishment Clause, a governmental practice must have: 1) a secular purpose; 2) a primary effect which is secular; and 3) must not unduly entangle government and religion. This last branch of the tripartite test in turn has two parts: first, that government not be required to police religious activities and second, that the practice not create (or, possibly, have the potential for creating) political divisions along religious lines.

Before applying that test to the Pawtucket municipal creche, the majority made an assumption that was critical to its decision -- that the focus of the Court's inquiry "must be on the creche in the context of the Christmas season," 52 U.S.L.W. at 4320. The emphasis on context appears throughout the opinion, although the Court had difficulty making up its mind whether the context was the Christmas season as celebrated in 20th century America, or, more narrowly, the larger Pawtucket Christmas display with its predominantly secular aspects. The emphasis on context is significant because the Court acknowledged that a "focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause."

A. Secular Purpose

Despite the contrary findings of the lower federal courts, the Supreme Court found that, when viewed "in the proper context of the Christmas Holiday season," 52 U.S.L.W. at 4320, the creche was displayed to "celebrate the Holiday" and to depict "the historical origins of this traditional event long recognized as a National Holiday." Id. As such, the display as a whole had a secular purpose.

The Creche as a Religious Symbol

While the Court accepted the display as secular in its total context, it firmly held that the creche itself was religious. The majority opinion went so far as to practically rebuke Pawtucket for arguing otherwise. The holding in Lynch, therefore, must be understood as upholding the use of a religious symbol in connection with a religious celebration.

B. Effect

The majority of the Court acknowledged that the creche had a religious message, but found that the impact of that message on society was too insignificant to merit constitutional condemnation. The Court found that the benefit to religion was less than that conferred by other practices held constitutional -- such as textbook loan laws, released time, or legislative prayers. The Court offered little guidance to the lower courts for calculating how to weigh effect in other cases* and determining how much is too much. It did suggest that whatever effect the creche had, it was "no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origin of the Holiday itself as "Christ's Mass," or the exhibition of literally hundreds of religious paintings in governmentally supported museums." 52 U.S.L.W. at 4321.

C. Entanglement

The Supreme Court found no entanglement, agreeing with the district court that the creche did not require the government to police a religious observance. In addition, the Court found no political divisiveness.

The Court noted that Mueller v. Allen, 103 S.Ct. 3062, n.11 (1983), limited the political divisiveness argument to those cases in which there was a direct financial subsidy to religious institutions. Chief Justice Burger went on to note that, in any event, there was no record evidence of any controversy about the creche (other than the lawsuit)

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* Justice O'Connor, in her concurring opinion, took a different approach to the effect test. In her view, the question under this branch of the tripartite test was whether a practice, without regard to the purposes of the government in engaging in that practice, could "fairly be understood [by a reasonable person] to convey a message of government endorsement of religion." 52 U.S.L.W. at 4324

This interpretation of the tripartite test is consistent with Justice O'Connor's view that one of the chief purposes of the Establishment Clause is to prevent government from sending "a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message." 52 U.S.L.W. at 4322. Inexplicably, however, O'Connor found that the Pawtucket creche sent no such message. The dissenters, however, found that it did.

in the forty years it existed.*

Justice O'Connor, commenting on the "potential for religious divisiveness" approach, wrote that it was "too speculative an enterprise" for the courts to guess whether a practice has the potential to create religious controversy. However, she wrote, proof of actual controversy would be evidence either that government has drawn too close to religion, or that the practice is perceived as an endorsement of religion. 52 U.S.L.W. at 4323. She agreed with the Chief Justice, however, that allowing the lawsuit itself to serve as evidence of divisiveness would allow for a bootstrapping of one person's objection into a veto over governmental action.**

D. Christmas as a National Holiday

Much of Chief Justice Burger's opinion seems to deal with an issue not in the case -- whether Christmas may constitutionally be observed as a national holiday (52 U.S.L.W. at 4322):

> To forbid the use of this one passive symbol -- the creche -- at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while the Congress and Legislatures open sessions with prayer by paid chaplains would be a stilted over-reaction contrary to our history and to our holdings. If the presence of the creche in this display violates the Establishment Clause, a host of other forms of taking official note of Christmas, and of our religious heritage, are equally offensive to the Constitution. (emphasis added)

II. McCREARY v. STONE: THE SCARSDALE CRECHE CASE

Lynch dealt only with the question of whether a municipality may itself erect a creche. McCreary v. Stone presented the question whether the

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* Whether if there had been divisiveness a different result would have obtained may become clearer if the Court grants certiorari in McCreary v. Stone, the Scarsdale creche case, in which there is a detailed quarter century history of religious divisiveness.

** Neither the Chief Justice nor Justice O'Connor made any effort to answer the dissent's suggestion that the absence of actual divisiveness might have been due to a "sense of futility in opposing the majority." 52 U.S.L.W. at 4326. Nor is there any hint in their opinions how they would react to proof that the absence of divisiveness was attributable to a fear of challenging the majority -- a very likely possibility in smaller communities, in which the overwhelming majority of citizens are of one faith.

guarantee of free speech required a village to allow private parties to erect a creche in a public park.

The park in question was sometimes used for religious services, and secular groups on occasion had been permitted to erect displays there. The case therefore involved a conflict between the constitutional right to use public property to exercise freedom of speech,* here religious speech, and the obligations of the Village to keep church and state separate under the Establishment Clause. The Village Board of Scarsdale, after years of controversy over allowing the creche to stand in the park during the Christmas season, reversed direction and refused private groups permission to erect the creche and the groups sued.

In an opinion delivered before the Supreme Court decided Lynch v. Donnelly, the district court upheld the Village's decision to bar the creche, based on the Supreme Court's decision in Widmar v. Vincent, 454 U.S. 236 (1981). In Widmar, the Court held that a university making space available to all student groups and thus establishing a public forum could not make content-based** distinctions in determining who who could use a public forum, such as excluding religious clubs, unless such distinctions were justified by a compelling state interest. The Widmar Court had stated that distinctions based on efforts to avoid Establishment Clause problems might be such an interest, but found that allowing religious clubs on a college campus would not be perceived as indicating state sponsorship of religion and therefore would not violate the Clause.

In McCreary, the Village asserted that permitting the creche to stand in the park would violate the Establishment Clause and that, as the Court had suggested in Widmar, avoiding that violation was a sufficiently compelling interest to permit a content-based distinction. The district court agreed with their assertion, because display of the creche in the park suggested governmental approval of Christianity to the viewer. It rejected as inadequate to cure the constitutional defect small signs posted near the creche disclaiming municipal support or approval.

While the appeal was pending in the United States Court of Appeals for the Second Circuit, the Supreme Court decided Lynch v. Donnelly. In late June, the Second Circuit reversed the decision of the district court. The appellate court, like the district court, approached the

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* This is the constitutional concept of equal access to a limited public forum which is the same concept the United States Congress claimed to be implementing in passing the religious clubs equal access bill.

** Restrictions of expression may be divided into two types -- content-neutral and content-based. The latter restrict communication because of the nature of the message conveyed.

case as a variation on Widmar. What had changed in the interim was the Supreme Court's interpretation of the requirements of the Establishment Clause.

The Second Circuit read Lynch as affecting most strongly the law of non-establishment under the effect test, and ruled that the result in this case followed a fortiori from Lynch:

> If the Lynch creche was not construed as a primary advancement of religion, a fortiori, the Village's neutral accommodation herein to permit the display of a creche in a traditional public forum at virtually no expense to it cannot be viewed as a violation of the primary-effect prong of the Lemon test, and therefore, violative of the establishment clause. As the Court noted in Widmar, religious benefits derived from the use of an open-access forum are incidental, 454 U.S. at 274, and the availability of benefits to a broad spectrum of groups is an important index of secular effect, Id.; Mueller, 103 S. Ct. at 3068. Here, there is no doubt that Boniface Circle is available to a broad range of Scarsdale's nonreligious and religious organizations, groups and persons. The district court stated that it did not believe that a broad class of nonreligious and religious symbols will abound in Scarsdale's parks. McCreary, 575 F. Supp. at 1132. However, this belief does not lessen the opportunities for free-speech usage of Scarsdale's public forums, including Boniface Circle. Further, we reject as sheer conjecture any implication that the Village will be overrun with applications for use of the limited space in its public forums. (emphasis in original)

Paradoxically, however, the Second Circuit found that the signs erected by the group which had put up the creche, while helpful in dispelling any lingering impression of governmental support, were in fact too small to serve that function. It ordered that the district court enter an order requiring the posting of a sign sufficiently large to be

viewed by passersby.*

A petition for certoriari is pending in McCreary.

III. THE CURRENT STATE OF THE LAW

Lynch and McCreary, like many court decisions, leave open as many questions as they decided, and because they are so recent, we have little guidance from other courts to give us answers to these questions. Accordingly, it is difficult to predict precisely how Lynch and McCreary will affect the result of any particular case. The most we can do now is to point out where the open questions are, and to suggest ways to elicit favorable answers.

In the section that follows, we utilize a question and answer format to point out the problem areas in a way that we hope will prove useful.

A. The Scope of Government Discretion

1) Q. Are governments required on their own to erect creches?

A. No. Lynch did not mandate that cities or other organs of government erect creches at Christmas time. It simply held that the city of Pawtucket could not be enjoined from doing so on the facts before it. The Supreme Court's decision concerning the creche must be distinguished from decisions in which the Supreme Court finds affirmative rights, such as a right to attend integrated schools or sit at integrated lunch counters.

2) Q. If a group of citizens requests permission from a local government to erect a creche in a public forum (e.g., a public park), must permission be granted?

A. In the Second Circuit (that is, New York, Connecticut or Vermont) the answer is yes. Elsewhere it is open to argument that McCreary is bad law, that the Free Speech Clause of the Constitution should not be read so broadly as to deprive public officials of the right to exclude all religious symbols from being placed for substantial periods of time in public parks. However, it must be realized that urging this view on city officials even in these other jurisdictions is asking them to run some risk of personal liability for nominal damages as well as a substantial risk of

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* As a practical matter, this part of the opinion will prove troublesome to the Jewish community. Those seeking to place creches on public land will, either voluntarily or at the request of municipalities, erect signs disclaiming governmental support for religion. The presence of such a sign will undoubtedly make more difficult constitutional attacks on creches accompanied by such signs. Moreover, efforts at persuading government not to erect an official creche may be met with the suggestion that a sign be placed to accompany the creche denying any intent to send a religious message.

governmental liability for attorney's fees if their decision is challenged in court by the group whose offer to put up the creche has been rejected and the municipality loses the challenge.*

However, it can be argued that where fact sensitive matters of arguable constitutional law and where conflicting constitutional claims are possible, municipal officials should not be deflected from using their judgment as to what course of action is best for the community by the prospect that the municipality may incur some attorneys' fees if eventually the position the officials take is not sustained in court.

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* Under current law, voting by members of a governmental body, such as a city council or village board, for the purpose of carrying out an official task is a discretionary activity. In the exercise of such discretionary tasks these officials have "qualified" or "good faith" immunity that permits the defeat of insubstantial claims against them without resort to trial. Applying this standard, municipal officials will not be subject to damages for refusing permission for groups to display a creche on public property if it can be shown that at the time the decision was made that the right of free speech they denied was not clearly established by law so that the official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified.

Because variations of fact patterns may dictate different results and other circuits may not be willing to follow McCreary, it is not at all certain that a court in another jurisdiction would now find after McCreary that the plaintiffs' rights are so "clearly established" that municipal officials would lose their qualified immunity and be subject to damages by denying the right to display a creche. The cases do not indicate just how many circuits must decide a case in a particular way before the law is said to be "clearly established," although it is established that that question is a matter of law for a judge, not a jury, to decide. Clearly, if certiorari in McCreary is granted by the Supreme Court -- or if there is even a slight variation from the Scarsdale fact pattern -- the law could not be said to be "clearly established." In any event the exposure, if any, would be limited, since the damages proved would at most be nominal.

The same cannot be said about the municipality's liability for attorneys' fees in the event a McCreary type case is lost in the same or even another jurisdiction. The Civil Rights Attorneys' Fees Award Act of 1976, 42 U.S.C. § 1988, gives the trial judge broad discretion with respect to the award of fees. However, such discretion is governed by a rule that a successful plaintiff is to be awarded fees in all cases unless special circumstances would render such an award unjust. "Good faith" in the sense that it is used in determining officials' personal immunity from suit, i.e., that the law is not wholly clear, is generally not a special circumstance justifying denial of attorneys' fees.

Within the Second Circuit, however, municipalities are required to allow private parties permission to erect a creche in a public forum.

3) Q. Can a private group demand that a municipality erect a creche in any location the group chooses?

A. No. In considering whether McCreary applies to a private group's demand to erect a creche in particular municipal locations, it is important in the first instance to consider whether the location involved is, in fact, public property as to which a free speech right exists -- that is, whether it is a public forum. Under the First Amendment, streets and parks have traditionally been used for assembly, including religious meetings, and for communicating thoughts between citizens and discussing public questions. As to these "quintessential" public forums, the state must justify any content-based exclusions as narrowly drawn and serving a compelling state interest, although it may impose reasonable content-neutral time, place and manner limitations.

A second category of "forums" consists of public property which has been opened for use by the public as a place for expressive activity. The Constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place. As to these "limited" public forums, although a state is not required to retain the open character indefinitely, so long as it does so it is governed in these designated public forums by the same strict standards that govern the more traditional public forums.

Finally, there is a third type of public property which a state may reserve for its intended governmental (e.g., a jail or a military base) purposes. A state may restrict speech on such property so long as the restrictions are not an effort to suppress expression merely because the public officals oppose the speaker's point of view.

The existence of the right to put up a creche depends in the first instance on the character of the property at issue. If it is a park, which has traditionally been the site of expressive activities as well as other community activities and on which other structures have been permitted, as was the case in McCreary, there is little doubt that a public forum would be found. On the other hand, the lawn area in front of the municipal building or a parking lot may not be a public forum if it has not traditionally played host to such activities.

4) Q. Is a Christmas display less constitutionally offensive if it includes a number of secular elements (such as Santa Clauses, reindeer, etc.), as opposed to a creche standing alone?

A. Apparently, yes. The opinion in Lynch constantly emphasizes the importance of the context of the creche, although it vacillated between identifying the context as the Christmas season and the larger Pawtucket Christmas display. This latter view of context suggests, as one district court in Michigan has now held, Levin v. City of

Birmingham, _____ F.Supp. _____ (E.D. Mich. 1984), that a creche standing alone, without any other secular symbols, would be unconstitutional. McCreary, however, interpreted context as discussed in Lynch to be the Christmas season and held a creche standing alone not to constitute a violation of the Establishment Clause.

The emphasis on "context" could create bizarre results. If it is correct that there is no secular context to Chanukah, which is not a national holiday or widely celebrated as a secular holiday, would a municipal menorah erected at Chanukah therefore be impermissible? And would it be impermissible to erect a menorah even if it were erected to counterbalance the sectarian impact of a creche? Would a creche and a menorah together be treated differently (because they tend to neutralize each other) than either standing alone? Is a cross displayed on Good Friday impermissible, but one displayed on Easter, together with a few Easter bunnies, permissible? Litigating issues like this should help expose the essential weakness of the Lynch decision, perhaps to the point that the Court is ultimately forced to reconsider it.

Finally, the Supreme Court emphasis on context suggests that a clearly religious context can result in invalidation of a display which standing alone might be permissible.

5) Q. Is a government-sponsored Christmas display less constitutionally offensive if it stands on private, rather than public, land?

A. It should to make no difference. It was not considered dispositive that the creche in Lynch stood on private land, while the creche in McCreary stood on public land. The Second Circuit -- not entirely unreasonably -- concluded that if a municipality could pay for, erect, and display its own creche without violating the Establishment Clause, it could surely allow private parties to erect a creche on public land. On the other hand, the petition for certiorari in McCreary argues that it was the "aura" of the public site which the plaintiffs sought specifically, since there were many creches on non-public land in Scarsdale during the Christmas season, and that, therefore, the use of public land in that case did convey a message of government endorsement of religion.

6) Q. Must a town permit non-recurring, but clearly religious, observances on public land.

A. Yes. Even before Lynch, use of public facilities were permitted for occasional, non-recurring religious events and displays of religious symbols. The rationale for the constitutional permissibility of such transient religious use is that when the state creates a public forum the state cannot discriminate among the groups on the basis of the context of the speech or expression, even if religious, Widmar v. Vincent. And when such use is temporary and non-recurring, there is no danger of a perception of government sanction for religion, O'Hair v.

Andrus, 613 F.2d 931 (D.C. Cir. 1979) (Papal Mass on National Mall); Gilfillian v. Philadelphia, 637 F.2d 924 (3rd Cir. 1980) (similar).

7) Q. Can a town sponsor a permanent, purely religious display?

A. Almost certainly not. Lynch and McCreary notwithstanding, the overwhelming weight of legal authority suggests that government involvement in unquestionably religious displays or observances would not be constitutionally permissible. For example, permanent placement of a large, illuminated cross on public park land, ruled unconstitutional in ACLU v. Rabun County 698 F.2d 21 (1983) would almost certainly still be ruled unconstitutional. At least one court, ruling after Lynch, has so held, Greater Houston Chapter of the ACLU v. Eckels, ____ F. Supp. ____ (S.D. Tex. 1984) (erection of war memorial in public park consisting of 3 Latin crosses and a Star of David held unconstitutional).

B. Other Religious Holiday Symbols and Observances

8). Q. Do Lynch and McCreary create a precedent for finding a secular context for other religious holidays, symbols and observances, which would lead to permissible government sponsorship of them as well?

A. Even if one accepts McCreary's conclusion that the context in Lynch which makes the creche acceptable is the Christmas season, the status of other holiday symbols is left unresolved. Christmas is, unlike all other religious holidays, a national holiday, and one which, perhaps in large measure as a result of this status, has achieved a degree of secularity not held by, for example, Chanukah or Good Friday.*

Easter, too, would appear to be closer to Good Friday than to Christmas, so that any municipal symbols erected to mark it, such as a cross, might be unconstitutional. Unlike Good Friday, however, there are secular symbols associated with Easter (eggs, rabbits), which if scattered about a display of the cross, might duplicate the Santa Claus and the like in the creche content.

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* Griswold Inn v. Connecticut, ____ Conn. ___, ___ A.2d ___ (1981) (statute banning sale of liquor on Good Friday unconstitutional) ("Good Friday lacks widespread public popularity or acceptance as a secular holiday"); Mandel v. Hodges, 54 Cal. App. 3d 596, 612; 127 Cal. Rptr. 244 (1976) (impermissible to close state offices on Good Friday). Cf. Brown v. Thompson, 435 U.S. 938 (1978) (staying order allowing governor to fly the flag at half mast Good Friday afternoon).

C. Litigation Strategy

9. Q. Are there any facts, not present in Lynch or McCreary, which would make a particuar Christmas observance case ripe for litigation?

A. Most likely yes, although we urge utmost caution before recommending litigation. A number of factors need to be taken into consideration before launching into litigation. With that caveat, we suggest that communities take note of the following.

a) Availability of proof that a creche does, in fact, send a message to non-Christians that Christianity is favored, would be very useful. Certain factual circumstances lend themselves to such proof -- a small Jewish community or statements by city officials favoring Christianity. Expert testimony by child psychologists, Rabbis and others that the presence of a creche sends a message that some people are less equal than others in the community and results in psychological problems for minority religion children may be particularly valuable. If presented persuasively, this may prove as decisive in the executive and legislative branches of government as well as in the judiciary.

b) Proof of a long history of community conflict over the erection of a creche is significant. While the Supreme Court seems badly divided over the relevance of evidence of divisiveness, and the court in McCreary neglected it entirely, it is certainly open to argue to the city council that it ought not to embark down a path which is certain to be divisive in the community. A history of conflict may permit a challenge to creches where, along with other distinguishing factors, there is strong evidence of such community divisiveness on the issue. Evidence that no challenge was considered out of fear of the consequences of objecting would probably also be probative.

c) Evidence that the city erects only a creche and is unwilling or has in the past been unwilling to erect symbols of other faiths suggests the sort of intentional discrimination which the Court conceded in Lynch would constitute evidence of unconstitutional favoritism for one religion over another.

10) Q. Is there any method by which a community can avoid a McCreary request?

A. Possibly, but only as to some public forums. If the town has reasonable regulations which ban all structures from a particular site, particularly one set aside for contemplation or meditation, a free speech right may not be present.

As a preventive measure, communities seeking to avoid having their parks dotted with various temporary structures may want to develop reasonable neutral time, place or manner restrictions concerning the erection of all symbols. These restrictions should be legal as long as they are neutral as to content, and not tailored to bar the erection of

only religious symbols. But a municipality might be able to ban all displays left overnight, in at least some public forums, particularly if there were other ways of communicating the same message.*

11) Q. Are the state courts now more hospitable to Establishment Clause cases than the federal courts?

A. Possibly -- it depends to a significant degree on just how the particular state constitution analogue to the Establishment Clause reads. However, if McCreary is correct, state constitutional provisions may not be invoked to deny access by private groups to public forums, because such access would be guaranteed by the First Amendment. They may be used to prohibit government from erecting creches. Some states (e.g., California, Massachusetts, Tennessee) have state constitutional provisions which are either textually more restrictive than the First Amendment's Establishment Clause, or which have been so construed by State courts. But even in those states whose anti-establishment clauses have been construed as being no more stringent than the First Amendment, it does not follow that state courts would agree, for example, with the Supreme Court's evaluation of the impact of a creche on members of minority religions.

At least one such challenge is now before the Colorado Supreme Court for the second time, Conrad v. City and County of Denver, 656 P.2d 662 (Col. 1982). In that case, the Colorado Supreme Court held that plaintiffs could also challenge under the state constitution a municipal creche whose constitutionality under the federal Constitution had previously been upheld by a federal district court, Citizens Concerned v. Denver, 526 F. Supp. 1310 (D. Colo. 1981). The Colorado Supreme Court held that plaintiffs had made out a sufficient case, under a provision of the state's constitution prohibiting preferences for any religion, to require a full trial. The trial court subsequently found that the creche was not erected in violation of the state constitution. An additional appeal to the Colorado Supreme Court has been noted.

D. The Future State of the Law

12. Q. What is the probable result if the Supreme Court decides to hear the McCreary appeal?

A. It is not certain that the Supreme Court will, when and if it

* Cf. Clark v. Creative Community for Non-Violence, 52 U.S.L.W. 4986 (1984) (upholding ban on sleeping on National Mall, even as part of political demonstration, and suggesting that, despite lower court rulings to the contrary, even a ban on erecting tents would pass constitutional muster). Id. at 4988.

decides to grant certiorari, uphold the McCreary decision. Widmar v. Vincent, it is true, does seem to suggest that religious speech may not be excluded from a public forum unless its presence in that forum suggests governmental endorsement of religion. That case, if applied broadly, does put public officials between the rock of the Free Speech Clause and the hard place of the Establishment Clause, because whichever way they turn, they run the risk of violating someone's constitutional rights.

A long line of cases, however, suggests that the Court is eager to avoid stepping into that either/or box. It has, for instance, held that states may provide bus transportation for children attending parochial schools without offending the Establishment Clause. It has just as steadfastly rejected arguments that to deny that assistance to these students constitutes a denial of Free Exercise or Equal Protection. In sum, the Court has been careful to see to it that there is room for "play in the joints," allowing state and local officials to pay greater attention to Establishment Clause values than the Constitution demands.

Applied to this case "play in the joints" may mean that public officials could ban all religious symbols from a public forum if they had reasonable grounds to believe that their display would trench upon the values protected by the Establishment Clause, as where government would be perceived as endorsing religion or the presence of religious symbols would be divisive. Presumably, local officials could consider the length of time the symbol would be displayed, its prominence, the nature of the public forum (a sidewalk, a park, a courthouse lawn) and similar factors. Local officials could not, however, exercise discretion with regard to the particular point of view expressed. In other words, discretion could not be exercised so as to permit menorahs and exclude creches.

Short of an abrupt about-face by the Court and a reversal of Lynch, a decision in McCreary granting officials discretion to exclude all religious symbols from public forums may be the best that can be expected. Even such a grant of discretion poses substantial risks for the Jewish community. While it seems clear that whatever discretion would exist could not be used to discriminate against a particular religion, it is easier to state the principle than to apply it. How could a court police a decision that a creche did not carry with it a message of government sponsorship because its message was lost in the larger Christmas context, but that a menorah did, because of the absence of a larger secular context?

Even more troublesome is the fact that discretionary decisions about whether to permit religious symbols, or even particular symbols, will necessarily be a hotly contested issue, particularly in smaller cities and towns. Acceptance of the "play in the joints" argument would require the Jewish community to create some political controversy over religion in order to avoid placing of private creches in public places. On the other hand, that may be preferable to a blanket decision

requiring municipalities to permit private groups to erect creches on public property or to be in violation of the Constitution.

IV. CHRISTMAS IN THE SCHOOLS

13) Do Lynch or McCreary make opposition to Christmas observance in the schools more difficult?

A. As a legal matter, probably not, although both cases seem to be creating a climate which is more amenable to Christmas observances in the schools.

Lynch v. Donnelly presented no question concerning creches or other Christmas observances in the schools, although, of course, its emphasis on the broad secular context of Christmas celebrations will make it harder to challenge such practices.* There was, however, one sentence in the Court's opinion which will prove particularly troublesome (52 U.S.L.W. at 4322).

> To forbid ... one passive symbol ... at the very time people are taking note of the season with Christmas hymns and carols in public schools ... would be a stilted over-reaction....

* The leading case is Florey v. Sioux Falls Independent School District, 619 F.2d 1311 (8th Cir.), cert. denied, 449 U.S. 987 (1980) upholding the right of school boards to "observe" Christmas in a secular fashion. At issue in Florey were three school board rules. The first of the challenged rules provided that those holidays which have both a religious and secular (but not those with a wholly religious) basis may be observed in the public schools. The second provided that the public shools could permit as part of the observance of the above holidays the performance of "music, art, literature and drama having a religious theme or basis" so long as presented in a "prudent and objective manner." Under the last of the challenged rules, religious symbols connected with the holidays could be displayed as examples of the traditional observance of the holiday in the classrooms on a temporary basis as teaching aids. Other provisions of the rules provided that students not wishing to participate in these exerises were to be excused.

The Court of Appeals emphasized that neither the Establishment nor Free Exercise Clause required schools to purge the curriculum of religion, and found that the practices in question were sufficiently part of the culture to be legitimately included in the public school curriculum. Although the Court did not go into detail about what the rules would actually permit, it did specifically approve the singing of Christmas carols. However, it also noted that neither the rules nor the First Amendment would permit "predominately religious activities" in the public schools.

Chief Justice Burger's statement was dicta bcause no question concerning carols in the schools was before the Court, and is, therefore, not dispositive. It certainly does not affect the free exercise right of a student to be excused from such exercises, and it should not be understood as denying to school officials the right to exclude Christmas carols, assemblies and other observances, if they so desire.

V. COMMUNITY ACTION QUESTIONS

The law is an important instrument for social change. However, good community relations assumes a variety of techniques to be selected according to circumstances. Therefore, in addition to legal remedies, the following should be considered in determining how to deal with these church-state problems.

14. Q. How do we best protest against a government-sponsored Christmas observance if we want to avoid a lawsuit?

A. Probably the most effective way is to let your local government officials know, as early as possible, and without publicity, that you feel government-sponsored Christmas observances are unwise as a matter of policy. It would be most effective if you could do so in coalition with other religious groups, both Protestant and Catholic. Of course, any action should have effective support within the Jewish community, and that community must understand the principles and considerations involved.

It would be particularly helpful for Protestant or Catholic members of any ecumenical group meeting with municipal authorities to offer to display religious symbols on the grounds of church facilities which are located in well traveled or central locations, instead of on public land. Protestant and Catholic clergymen are also in a position to make the argument that display of religious symbols to lure shoppers, and for similar secular purposes, results in the trivialization and secularization of such symbols, denuding them of their spiritual content.

Some of the arguments that might be helpful in a presentation to city officials might be as follows:

- We certainly do not oppose the celebration of Christmas by people in their homes or their churches.

- We enjoy the festive decorations of our neighbors and local churches, as well as the music of carolers.

- We regard celebration of Christmas as a solemn religious responsibility for Christians, and as a reminder of the religious diversity and freedom that we all enjoy.

- But public parks, and government office buildings are purchased and maintained out of taxes imposed on everyone, irrespective of religious beliefs. Such areas are, in effect, owned by all of us. The presence of religious symbols in such areas is an implied endorsement by government of the religious doctrine which the symbols represent. In effect, the government is telling me I must put Christmas decorations on my land.

- We do not ask that our religious symbols -- menorahs or Stars of David -- be placed on city land, because we feel that to do so would be an unfair intrusion on your beliefs. We ask that you respect our feelings of intrusion as well.

- We recognize that we are a minority religion, and that even some of our Jewish neighbors disagree. But we do not feel that this is a matter for majority vote. One of this country's founding principles is that some matters are too important for majority vote -- we feel this is one.

- You should know that if you insist on erecting this religious symbol, you are telling us, despite whatever good intentions you have, that this is a Christian community, and Jews and members of other faiths are merely second-class citizens, whose feelings the City can disregard.

- Lynch does not require a municipality to put up a creche.

We have available a statement agreed to by a joint Jewish-Catholic group in Boston which could serve as a model for ecumenical action in this area.

In this connection see also the Op-Ed New York Times piece by Dean Norman Redlich of New York University School of Law, Chairman of the Commission on Law and Social Action of the AJCongress.

15. Q. If our municipality is intent on a Christmas display, should we request a Chanukah display on public property as well?

A. Our position has always been that the constitutional separation of church and state requires that government is prohibited from sponsoring religious observances -- even Jewish ones. To abandon that principle now would be to turn our backs, not only on what we believe is a correct constitutional principle, but also on decades of fighting for church-state separation.

The American Jewish Congress remains convinced that the Jewish community should oppose publicly funded displays of Jewish religious symbols in every instance and should confine the displays of menorahs and other symbols to private property. The political considerations for each community may be different, however, and each community must consider carefully what is in its best interests, for both the short and long term.

16. Q. How do we best protest against school sponsored Christmas observances without resorting to a lawsuit?

A. It is particularly important that any action taken by the Jewish community in this area also have effective support within the Jewish community. The strength of that support is a factor to be considered carefully in deciding what action should be taken in any particular situation. Hence, the first responsibility for Jewish organizations is again to make sure that their own constituency understands the principles and considerations involved.

Beyond, that, any program to bring about changes in sectarian school practices may draw on the full range of procedures by which Americans seek to win acceptance of their point of view. It may include efforts to educate school and other public officials, religious leaders and the public at large. It may include arrangements for joint action by similarly minded groups. It must include, finally, representations to public officials urging corrective steps.

Experience indicates that formal representations to public school authorities should be made by the broadest possible grouping of elements in the community. This means that efforts should be made to obtain widespread support and cooperation, particularly by religious leaders, Christian and Jewish. Representations made by individual parents rarely carry as much weight as those made by recognized community spokesmen. Finally, it is imperative to meet with school authorities as early in the year as possible before school Christmas observances are planned or rehearsals begin.

In addition to using some of the arguments set forth above under question 14, you can add the following:

Our efforts to halt religious practices in the public schools are prompted in no small part by the hard fact that any such celebration places Jewish children in a most unhappy position. They must either violate their conscience by participating in ceremonies that conflict with their religious teachings or they must place themselves in apparent opposition and hostility to their teachers and fellow pupils. At the same time, any Jewish parent who attempts to give his child perspective on these practices is placed in the position of undermining the authority of the schools. The principle of separation of church and state was designed in part to insure that the powers of government would not be used to create such conflicts.

When this point is raised with public school officials, they sometimes respond by adding a Chanukah celebration (in the mistaken belief that two wrongs make a right) or by reducing the religious content of the Christmas celebrations. It is at this point that the cry is heard: "Keep Christ in Christmas." We say, "By all means -- but not in the public schools." There the celebration of Christmas can never be satisfactory because it must either be religious, and consequently

sectarian, or nonreligious, and consequently trivial and even offensive to believing Christians.

We have available for your information some suggested guidelines for public schools that have been adopted by Jewish groups, and one that was adopted by an interfaith council.

17. Is there any way to avoid an anti-Semitic backlash to our objection to Christmas observance?

A. Probably not, although the approaches suggested should minimize the likelihood of one. We consider the chances of a serious anti-Semitic backlash in most communities to be slight. We have available, however, for your information an article on the experience of the Indianapolis Jewish community in 1976, which discusses in detail the problems they faced. The article is outdated in the sense that Lynch v. Donnelly and McCreary have changed the law and substantially undercut the constitutional arguments against erection of municipal creches. Nevertheless, its description of the Indianapolis response to Jewish complaints about the creche, of the inflammatory role played by the press and some local politicians, as well as the variety of responses and attitudes in the Indianapolis Jewish community itself dramatically illuminates some of the problems which may be faced.

If, in fact, your community does experience difficulties of this nature, the resources and staff of the American Jewish Congress and other Jewish communal agencies with many years of experience in this field are available to assist you. Please call on us.

NEWS FROM THE COMMITTEE

ajc THE AMERICAN JEWISH COMMITTEE Institute of Human Relations, 165 E. 56 St., New York, N.Y. 10022, (212) 751-4000

The American Jewish Committee, founded in 1906, is the pioneer human-relations agency in the United States. It protects the civil and religious rights of Jews here and abroad, and advances the cause of improved human relations for all people.

MORTON YARMON, Director of Public Relations

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FOR IMMEDIATE RELEASE

NEW YORK, July 30...The American Jewish Committee has joined the Baptist Joint Committee on Public Affairs and the National Council of the Churches of Christ in a brief amicus to the U.S. Supreme Court protesting a Grand Rapids, Michigan, program under which public school teachers teach secular subjects in non-public schools. The chief attorney for the amici is John W. Baker, general counsel of the Baptist Joint Committee.

These schools, participating in the so-called "shared time" and "community education" programs, the brief points out, are operated and controlled by religious organizations, and, in Michigan, ignore "safeguards" requiring that such instruction be provided only on public school premises and that all students in the program be under the exclusive jurisdiction of public school authorities.

In the absence of such regulations, the three organizations maintain, the Grand Rapids procedures are in violation of the Establishment Clause of the First Amendment to the Constitution.

Lower courts have upheld this view, and the School District of the City of Grand Rapids has appealed. In its argument, the organizations "cling to their traditional firm support of the constitutional requirement of the separation of church and state."

"We believe," they state, "that both church and state flourish best when the two are separated. The financial support, promotion, and preferment, of religion, which are forbidden by the Constitution, are clearly at issue here."

In its explanation of its involvement in the case, the American Jewish Committee stated:

....more

"It is the conviction of this organization that the civil and religious rights of Jews will be secure when the civil and religious rights of all Americans are equally secure. To fulfill this aspiration, we strongly support the constitutional principle of separation of religion and government.

"This principle has been the cornerstone of religious liberty in America and, historically, has proven to be of inestimable value to citizens of all faiths and of none."

Samuel Rabinove, Director of the Legal Division of the American Jewish Committee, observed:

"It is not a proper function of government to subsidize, whether directly or indirectly, any schools whose chief reason for being is to propagate a religious faith."

The American Jewish Committee is this country's pioneer human relations organization. Founded in 1906, it combats bigotry, protects the civil and religious rights of people here and abroad, and advances the cause of improved human relations for all people everywhere.

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Church - State

RELIGION AND THE PUBLIC SCHOOLS

by
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RELIGION AND THE PUBLIC SCHOOLS
A SUMMARY OF THE LAW

What follows is a summary of the major church-state issues touching on the public schools. It does not attempt a history of these issues. For that, those interested are referred to Leo Pfeffer's *Church, State & Freedom* (1967).

Perhaps none of the legal constraints applicable to the public schools are as controversial as those touching upon religion. Despite almost forty years of litigation, not all the problems which arise have definitive answers. Nevertheless, many problems faced by school officials have been resolved by the courts. This memorandum attempts to summarize objectively the current state of the law. No attempt has been made, however, to catalog all of the judicial decisions, state statutes, or state attorney general opinions dealing with religion in the public schools.

I. Prayer In The Schools

A) Vocal Prayer

The leading case on school prayer, *Engel v. Vitale*, 370 U.S. 421 (1962), struck down as unconstitutional the practice of having a state-composed prayer read daily in the public schools. More recently, the Alabama legislature enacted a prayer for recitation in the public schools. A federal court initially enjoined enforcement of this statute, *Jaffree v. James*, 544 F. Supp. 727 (S.D. Ala. 1982), but it subsequently held that the Supreme Court's decision in *Engel* was based on a misreading of history, and should therefore not be followed, 554 F. Supp. 1104 (S.D. Ala. 1983). It therefore declined to follow *Engel*. The United States Court of Appeals reversed that judgment, 705 F.2d 1526 (11th Cir. 1983), and was in turn summarily affirmed on this point by the United States Supreme Court, 104 S.Ct. 1704 (1984).

1. Prohibition Not Limited to State-Composed or Voluntary Group Prayer

Reading *Engel* as prohibiting only religious exercises composed by the state is not plausible in view of the Bible reading case, *School Dist. of Abington Twnshp. v. Schempp*, 374 U.S. 203 (1963), in which the recitation of the Lord's Prayer as part of an opening exercise was held to be unconstitutional.

Moreover, in both the *Engel* and *Schempp* cases, participation in the religious exercise was voluntary, and students could seek to excuse themselves. Neither factor is constitutionally significant.

Efforts have been made to permit student volunteers to select prayers

for public recitation, either in the classroom or at school assemblies. Under some of the schemes, not only were prayers student selected, but students could choose between attending the prayer session held in a central location or going to another room. Nevertheless, the courts have been unanimous in striking down even these statutes as unconstitutional. *Karen B. v. Treen*, 653 F.2d 897 (5th Cir.), *aff'd*, 455 U.S. 913 (1981); *Collins v. Chandler Unified School District*, 644 F.2d 759 (9th Cir. 1981), *cert. denied*, 454 U.S. 863 (1981) (school assemblies); *Opinions of the Justices*, 387 Mass. 1201, 440 N.E.2d 1159 (1982) (volunteer to lead prayer or meditation); *Kent v. Commissioner of Educ.*, 380 Mass. 235, 402 N.E.2d 1340 (1980) (volunteer to lead prayer).

None of the above decisions stand for the proposition that students may not pray quietly in school, so long as they do not interfere with school discipline or the rights of others. Such activity, free of school sponsorship, is constitutionally protected. There is thus no basis for school officials to prohibit students from reading the Bible on the school bus, reciting the rosary, or discussing religious subjects with their classmates over lunch, so long as school officials do not encourage or facilitate these practices. *See e.g.*, Md. Atty Gen. Opinion No. 84-031, 69 OAG Md. (1984).

Teachers who refuse to comply with the constitutional prohibition on religious exercises in the public schools, and pray with their students, may be terminated notwithstanding claims that such terminations violate the right of a teacher to freely exercise his or her religion. *See, e.g., Fink v. Bd. of Educ.*, 65 Pa. Cmwlth. 320, 442 A.2d 837 (1982) *app. dismissed for want of a substantial federal question*, 103 S.Ct. 1493 (1983); *La Rocca v. Bd. of Educ.*, 63 A.D. 2d 1019, 406 N.Y.S.2d 348 (2d Dept.), *app. dismissed*, 46 N.Y. 770 (1978); *cf. Lynch v. Ind. State Univ.*, 177 Ind. App. 176, 378 N.E.2d 900 (1978), *cert. denied*, 441 U.S. 946 (1979).

B) Silent Prayer/Silent Meditation

A related issue is that of providing a moment of silent meditation at the beginning of the school day. There is no constitutional objection to this practice. *School Dist. of Abington Twshp v. Schempp, supra*, 374 U.S. at 281 (Brennan, J., concurring). *Opinions of the Justices*, 113 N.H. 297, 307 A.2d 558 (1973); *Opinions of the Justices*, 108 N.H. 97, 228 A.2d 161 (1967). As a matter of sound educational policy, however, AJCongress opposes such practices.

A closer question is presented when a statute or school board rule calls for "silent prayer or meditation." One court has upheld such a statute. *Gaines v. Anderson*, 421 F. Supp. 337 (D. Mass. 1976) (three judge court).

On the other hand, *May v. Cooperman*, 572 F. Supp. 1561 (D. N.J. 1983), *app. pending*, (3d Cir. 1985); *Beck v. McElrath*, 548 F. Supp. 1161 (M.D. Tenn. 1982); *Duffy v. Las Cruces Public Schools*, 557 F. Supp. 1013 (D. N.M. 1983), all found such statutes unconstitutional. The United States Court of Appeals for the Eleventh Circuit also held a "silent prayer or meditation" statute unconstitutional, *Wallace v. Jaffree*, 705 F.2d 1526, *reh. denied*, 713 F.2d 614 (11th Cir. 1983). The Supreme Court agreed to review this latter decision, 104 S.Ct. 1704 (1984). Oral argument was held in December, 1984. A decision is pending.

II. Bible Reading

The Supreme Court has ruled as well on the constitutionality of Bible reading in the public schools, *School Dist. of Abington Twshp. v. Schempp*, 374 U.S. 203 (1963). The Court held that schools could not require (or permit) students to read aloud a passage from the Bible at the beginning of the school day. In *Schempp*, students selected the passage to be read, and the edition of the Bible to be used. Attendance was voluntary. Here, too, neither fact was considered constitutionally significant.

A) Teaching About Religion

In both *Engel* and *Schempp*, the Supreme Court emphasized that the Constitution did not forbid teaching *about* religion in an objective manner. One cannot teach the history of Western (or Eastern) civilization without teaching about religion. Neither could one teach art or music without teaching about religious art and music. If handled with sensitivity, none of this should present a constitutional problem. For this reason, one court held that schools could use *Slaughterhouse-Five* in a high school literature course despite its religious references. *Todd v. Rochester Community Schools*, 41 Mich. App. 320, 200 N.W.2d 90 (1972); Accord, *Grove v. Mead School Dist.*, __ F.2d ___ (9th Cir. 1985).

Nevertheless, while the Supreme Court's approval of the objective teaching of religion is often overlooked by critics, it is true that objective teaching about religion has given rise to several problems. One of the most common involves the teaching of "Bible as Literature" classes. One such course, which was offered as an elective, was in litigation for several years in Chattanooga, Tennessee, on the ground that it was a subterfuge for teaching religion, *see Wiley v. Franklin*, 468 F. Supp. 133, *on further consideration*, 474 F. Supp. 525 (E.D. Tenn. 1979), *on further consideration*, 497 F. Supp. 390 (E.D. Tenn. 1980).

As one can tell from the various opinions rendered in the *Wiley* case, several difficult problems arise from efforts to conduct such classes, including the selection of subjects and teachers (can ministers teach such courses?). The *Wiley* court held that certain sections of the Bible could not be taught, because they were wholly sectarian in content

While as a matter of law, one can teach *about* any part of the Bible, and, to this extent, *Wiley* is certainly incorrect, it is certainly difficult to see how one can objectively teach the Bible to elementary and secondary school students without avoiding certain passages.

Moreover, it is probably almost impossible to deal with subjects such as Biblical criticism in an objective manner without creating religious conflict in the public schools. Moreover, some religious groups object to neutral, literary treatment of the Bible. Others object to any other treatment. To pass constitutional muster any course on the Bible must be devoid of any particular denominational bias, *Hall v. Board of School Comm'rs*, 656 F.2d 999 (5th Cir. 1981) ("Bible as Literature" course taught with sectarian text unconstitutional).

In *Crockett v. Sorenson*, 568 F. Supp. 1422 (W.D. Va. 1983), a District Court noted that, while a "Bible as Literature" course was sufficiently secular so that it could be taught in the public schools, it was at the same time sufficiently religious to require excusal of any student who did not wish to participate. Students who did not wish to participate had to be offered an alternative course. The Court thus disagreed with a contrary decision on this point in *Vaughn v. Reed*, 313 F. Supp. 431 (W.D. Va. 1970).

Although we know of no cases which so hold, we believe that public school libraries may include religious literature, provided that no one sect is favored, and the library as a whole does not show any preference for religious works in general, or of a specific faith in particular.

It is also settled that posting the Ten Commandments on a classroom wall cannot be justified as teaching about the Judeo-Christian tradition, *Stone v. Graham*, 449 U.S. 39 (1980). However, a plaque bearing the motto "In God We Trust" was held, prior to *Stone v. Graham*, *supra*, to be permissible, *Opinion of the Justices*, 108 N.H. 97, 228 A.2d 161 (1967).

III. Use of Classroom Space for Student Initiated Religious Activities

A) Equal Access for Student Clubs

Student groups have sought to evade the Supreme Court's school prayer rulings by requesting permission to conduct religious activities in public school classrooms either before or after school or during free periods. These efforts have taken two forms — a constitutional claim and a statutory enactment, the Equal Access Act, P.L. 98-377, 20 U.S.C. 4071, *et seq.*

The constitutional claims are bottomed on the argument that denying such use to religious groups, while permitting secular ones (chess, Demo-

cratic or Marxist clubs, 4-H, and the like) to meet, impermissibly discriminates against speech solely on the basis of content. Advocates of this viewpoint to the decision in *Widmar v. Vincent*, 454 U.S. 263 (1981) in which the Supreme Court held that colleges which allowed secular student groups to use empty classrooms for extracurricular activities could not exclude religious groups from such uses. Such an exclusion, the Court held, would impermissibly discriminate against speech on the basis of content.

All but one of the lower federal courts, both before and after the decision in *Widmar v. Vincent, supra*, have rejected attempts to extend *Widmar* to elementary and secondary schools, *Bender v. Williamsport Area School District*, 741 F.2d 538 (3d Cir.), *petition for certiorari granted*, 53 U.S.L.W. ___ (1985); (club hour during home room); *Nartowicz v. Clayton County School Dist.*, 736 F.2d 646 (11th Cir. 1984) (after school); *Lubbock C.L.U. v. Lubbock Ind. School Dist.*, 669 F.2d 1038 (5th Cir. 1982), *reh. denied*, 680 F.2d 424, *cert. denied*, 459 U.S. 1159 (1983) (before school); *Brandon v. Bd. of Educ.*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981) (before school). *Contra, Clergy and Laity Concerned v. Chicago Bd. of Educ.*, 586 F. Supp. 1408 (N.D. Ill. 1984). One other case raising the issue is pending on appeal, *Bell v. Little Axe School District*, (10th Cir. 1985).

The two state courts that have considered the issue have also concluded that school officials may not permit religious clubs to meet in the public schools, *Trietly v. Bd. of Educ.*, 65 A.D.2d 1, 409 N.Y.S.2d 912 (4th Dept. 1978); *Johnson v. Huntington Beach Union H.S. Dist.*, 68 Cal. App. 3d 1, 137 Cal. Rptr. 43, *cert. denied*, 434 U.S. 877 (1977).

Those courts not allowing "equal access" have emphasized that, unlike the college setting, activities on the elementary or high school level require official supervision and approval. Relying on a suggestion in *Widmar*, these courts reason that this approval and control is likely to be perceived by high school and elementary students as indicating government support for, or approval of, these activities. However, until the Supreme Court rules on this issue, in the *Bender* case, it must be regarded as open. The Supreme Court has announced that it will hear argument in that case. A decision cannot be expected until spring, 1986.

The Equal Access Act is a complex piece of legislation, not easily summarized. In brief, it provides that a secondary school which allows student initiated groups not directly related to the curriculum to meet before or after the school day, may not discriminate against any such club based on its philosophical, religious, or political content. Schools may not (and perhaps must not) sponsor these groups, or allow teachers to participate in their activities (particularly in regard to religious clubs). They may (and perhaps must) prevent non-school personnel from lead-

ing, controlling or regularly attending such meetings. The Act explicitly preserves the right of school officials to regulate the activity of student clubs in order to preserve discipline or to protect the well-being of students and teachers. They need not countenance illegal conduct.

The Attorney General of Maryland has opined that the Act is unconstitutional. However, the Act's constitutionality will likely remain in question until the Supreme Court rules on it.

For further details, see AJCongress' publication, *Equal Access: A Practical Guide*.

B) Rental of School Facililties for After Hours Use

The question of equal access to or for student religious clubs for periods directly before or after the school day, during lunch time, or as part of an activities period is different from the question of whether school officials may make school facilities available for use by religious groups at times when school is not in session. If state law allows the rental of school buildings to community groups, school facilities may be made available — at least on a less-than-permanent basis — upon payment of a fee approximating the cost of the facilities (heat, light, maintenance) (or, perhaps, the fair rental value) to religious groups as well, without establishing religion, *Resnick v. Bd. of Educ.*, 77 N.J. 88, 389 A.2d 944 (1978); *Southside Estates Baptist Church v. Bd. of Trustees*, 115 So.2d 697 (Fla. 1959). Indeed, it seems almost certain, as one court recently held, *Country Hills Christian Church v. Unified School Dist. #512*, 560 F. Supp. 1207 (D. Kan. 1983), that schools may not refuse to rent to religious groups if they rent to others, even if that state law does not explicitly authorize rentals to religious groups, *cf. Widmar v. Vincent*, 454 U.S. 263 (1981). *But see*, 60 Ops. Cal. Atty. Gen 269 (1977) (interpreting state constitution); *see generally, Annotation, Schools — Use for Religious Purposes*, 79 A.L.R. 2d 1148 (1961).

School officials may insist that requests for rentals of public school buildings by religious groups — but not others — be considered by the Board of Education itself, and not, as with other applications, by administrative officials "in order to ensure the proper handling of Establishment Clause issues," *Salinas v. School District*, 751 F.2d 288 (8th Cir. 1984).

IV. Holiday Observances

The leading (and only reported) federal case on the question of whether schools can celebrate holidays with religious overtones such as Christmas and Easter is *Florey v. Sioux Falls School Dist.*, 619 F.2d 1311 (8th Cir.), *cert. denied*, 449 U.S. 987 (1980). *See also, Johnson v. Shiverman*, 658 S.W.2d 910

(Mo. Ct. of App. 1983). The *Florey* court upheld, by a divided court, a set of school board rules which permitted the *observance* of holidays with both a secular and religious basis, provided that the observances are conducted in a "prudent and objective manner." The rules permitted the use of religious symbols as teaching aids, and provided that religious works of art and music could be performed as well as studied. Students who objected to participation could be excused.

The Eighth Circuit noted that its decision meant only that the rules adopted by the Sioux Falls School District were not inevitably unconstitutional. It was careful to note that particular observances might well be unconstitutional in practice.

Since the decision in *Florey*, many school districts have adopted rules on the subject of religious holiday observances in the schools. Many have simply adopted the rules upheld in *Florey*. Some districts have adopted more restrictive rules, on the ground that the *Florey* rules were insensitive to the rights of schoolchildren, particularly those of minority faiths. Copies of sample rules are available from AJCongress.

The Eighth Circuit's ruling may not be the last word on the subject, although in a passing remark the Supreme Court recently indicated that public schools could permit the singing of carols at Christmas time, *Lynch v. Donnelly*, 104 S.Ct. 1355, 1365 (1984). The American Jewish Congress (and others) believe that *Florey* was wrongly decided. The objection, of course, is not to teaching *about* religious holidays, for as already noted, such teaching is permissible. Rather the objection is to celebrating these holidays in the public school at the time when, and in the same manner as, these holidays are being observed in the churches and synagogues. The result is the appearance that the public schools are religious institutions, engaged in religious education. Moreover, such practices place children from other religious groups in a very awkward position.

The constitutional and educational objections to holiday observances are not cured by observing the holidays of all faiths, although they are exascerbated when the schools observe only the holidays of one faith.

V. Compulsory Attendance and Religious Holidays

Two types of problems arise from schedule conflicts between the school calendar and religious observances. The first of these is excusal from compliance with compulsory attendance laws, and is usually covered by an exemption contained in the relevant statute. The Constitution's Free Exercise Clause has been held to require such exemption even if the statute does not. *Church of God v. Amarillo Ind. School Dist.*, 511 F. Supp. 613 (N.D. Tex. 1981), *aff'd*, 670 F.2d 46 (5th Cir. 1982).

The second set of problems is whether schools may or must close on religious holidays so as to avoid a conflict with students' religious practices. The AJCongress takes the position that, while the schools cannot be compelled to close on religious holidays, they may, as a matter of administrative convenience, do so without thereby establishing religion, *Zorach v. Clauson*, 343 U.S. 306 (1952). When they choose not to close, conflicts between scheduled events (exams, field trips, graduation and extracurricular activities) and religious holidays must be resolved.

The *Church of God v. Amarillo Independent School District* case establishes that penalties (such as the refusal to provide a make-up examination, for example) cannot be imposed on a student who is absent for a religious holiday. Many districts provide by rule that class trips, graduation and other school events will not be scheduled on religious holidays. It is, however, unlikely that a court would enjoin a class trip scheduled for a religious holiday in order that an observant student not miss the trip.

Finally, one state has held that school officials may prohibit the scheduling of extracurricular activities on Friday nights, Saturday, and Sunday morning to avoid conflicts with student religious beliefs without thereby establishing religion, *Student Playcrafters v. Bd. of Educ.*, 177 N.J. Super. 66, 424 A.2d 1192 (1981), *aff'd*, 88 N.J. 74, 438 A.2d 543 (1982).

VI. Released Time Programs

The use of released time programs seems to have declined in recent years. Under such a program, students are released from the public school to attend religious classes. Released time programs are constitutional only if school officials do nothing to promote attendance at religious schools, solicitation of students to attend is not done with the assistance of public school officials, and if the programs are held off public school premises. The leading cases are *Zorach v. Clauson*, 343 U.S. 306 (1952) and *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948).

One related question is whether the public schools may give credit for courses taken in released time classes. The answer so far seems to be (a highly tentative) no, at least if credits are not given for other outside courses, *Lanner v. Wimmer*, 463 F. Supp. 867 (D. Utah 1978), *aff'd in relevant part*, 662 F.2d 1349 (10th Cir. 1981); *State ex rel Dearle v. Frazier*, 102 Wash. 369 (1918) (state constitution).

Lower courts have held that public schools may not enter into certain forms of shared facilities arrangements whereby students at parochial schools take their secular training at the parochial schools, in classes taught by public school teacehrs, *see, e.g., Americans United v. School District of the City of Grand Rapids*, 546 F. Supp. 1071 (W.D. Mich. 1982), *aff'd*, 718 F.2d 1389 (6th Cir. 1983), *cert. granted*, 52 U.S.L.W. 3631; *Bell v. Felton*, 739 F.2d 48 (2d Cir.) *probable jurisdiction noted*, 53 U.S.L.W. 3269 (1984); *Americans United v. Porter*, 485 F. Supp. 432 (W.D. Mich. 1980). *But see PEARL v. Harris*, 489 F. Supp. 1428 (S.D. N.Y. 1980), *app. dismissed on procedural grounds*, 101 S.Ct. 55 (1980). The Supreme Court will rule on this subject before the end of its current term in the *Grand Rapids* and *Felton* cases.

Where an increase in enrollment leaves public schools temporarily short of space, they may rent facilities from churches, if there are no religious symbols in the rented space, and the rented facilities are wholly distinct from space used for religious purposes, *see, e.g., Americans United v. Oakey*, 339 F. Supp. 545 (D. Vt. 1972); *School Dist. v. Neb. State Bd. of Educ.*, 88 Neb. 1, 195 N.W.2d 161, *cert. denied*, 409 U.S. 921 (1972) (Marshall, J., *dissenting from*, and Brennan, J., *concurring in, denial of certiorari).*

The state courts are divided over whether school may (or must) allow non-public school students, including those who attend parochial schools, to attend public school classes. The Michigan Supreme Court held that, under Michigan statutes, such students *must* be allowed to attend "non-core" curricular classes, and that such attendence does not violate the Federal constitution's Establishment Clause, *Snyder v. Charlotte Public School Dist.*, ___ Mich. ___ N.W. 2d ___ (1984). A Maryland court concluded that school officials are not compelled by the Constitution or the Maryland statutes to permit such attendence, *Thomas v. Allegany Bd. of Educ.*, 51 Md. App. 312, 443 A.2d 622 (1982).

Finally, the courts have held that parochial schools may be excluded from school sports leagues if there are sufficient secular reasons for doing so, such as the impossibility of policing parochial school recruiting practices. They may not be excluded, however, because school officials dislike parochial schools or wish to make them unattractive to students, *see, e.g., Valencia v. Blue Hen Conference*, 476 F. Supp. 809 (D. Del. 1979) *aff'd without opinion* 615 F.2d 1355 (3d Cir. 1980); *Christian Brothers Institute v. No. N.J. Interscholastic League*, 86 N.J. 409, 432 A.2d 26 (1981).

VII. Distribution of Gideon Bibles

The courts and state attorneys general have unanimously held that school officials may not permit outsiders to distribute Gideon Bibles on school premises. The leading case is *Gideons International v. Tudor*, 14 N.J. 31, 100 A.2d 857 (1953), *cert. denied*, 348 U.S. 816 (1954). *Accord,*

Goodwin v. Cress County School Dist., 394 F. Supp. 417 (E.D. Ark. 1973). For a comprehensive and more recent discussion, see the 1980 opinion of a Maryland Attorney General on this subject, 65 Md. O.A.G. 186 (1980), as well as *Lubbock C.L.U. v. Lubbock Ind. School Dist.*, 669 F.2d 1038, 1040, n.38, *rehearing denied*, 680 F.2d 424 (5th Cir. 1982).

An interesting variant of this problem is whether students may, on their own, distribute religious literature on school property to other students. The only two decisions, however, reach opposite results. *Hernandez v. Hanson*, 430 F. Supp. 1154 (D. Neb. 1977) (such activity protected); *Cintren v. Bd. of Educ.*, 384 F. Supp. 674 (D. P.R. 1974) (such activity forbidden). In principle there is no objection to such distribution if it is not sponsored or facilitated by school officials.

A preliminary injunction barring school officials from making announcements of club-sponsored (secular) activities has been upheld, *Nartowicz v. Clayton County Bd. of Educ.*, 736 F. 21 646 (11th cir. 1984). The parties in that case agreed that announcements of religious activities were constitutionally impermissible.

VIII. Baccalaureate Services

Baccalaureate services typically have a minister in attendance to deliver an address on a relevant religious theme to a graduating class and to offer a prayer. Because attendance is not compulsory, and frequently takes place away from the school, the few recorded decisions have generally refused to interfere with the practice, at least absent clear proof of their religious nature. *See, e.g. Goodwin v. Cross County School*, 394 F. Supp. 417 (E.D. Ark. 1973).

Official sponsorship of baccalaureate services is difficult to reconcile with the school prayer decisions described in Point I, A. For this reason, AJCongress believes that it is unconstitutional for the public schools to lend their support to baccalaureate observances which have a religious theme. Certainly, no student may be compelled to attend such a service, or be penalized for a failure to do so.

At least one court held that graduation could not be held in the chapel of a church, although the appellate court vacated that decision as moot, and thus drained it of precedential value, *Lemke v. Black*, 376 F. Supp. 87 (E.D. Wisc. 1974), *vacated and remanded*, 525 F.2d 694 (7th Cir. 1975). Nevertheless, the District Court's decision appears to be correct. Some courts have refused to prohibit the recitation of prayers at a graduation, *see, e.g., Grossberg v. Deusebio*, 380 F. Supp. 285 (E.D. Va. 1974), but another court held that such prayers were unconstitutional, *Doe v. Aldine Ind. School Dist.*, 563 F. Supp. 883 (S.D. Tex. 1982).

IX. Scientific Creationism

Recently, there have been calls to "balance" the teaching of Darwinian evolutionary theory with "scientific creationism." It is clear that school officials may not prohibit the teaching of evolutionary theory. *Epperson v. Arkansas*, 390 U.S. 941 (1967). Those who, for religious reasons, object to Darwin's theory of evolution have responded with calls for equal treatment of "scientific creationism" and evolutionary theory in science classes.

The courts have so far been unanimous in rejecting such claims, including most recently an Louisiana "equal time" statute. They have done so after determining that the doctrine of creationism is a religious doctrine without scientific basis. *Aguilar v. Treen*, ____ F. Supp. ____ (E.D. La. 1984), *app. pending* (5th Cir. 1985); *McLean v. Arkansas Bd. of Educ.*, 529 F. Supp. 1255 (E.D. Ark. 1982); *Daniel v. Waters*, 515 F.2d 485 (6th Cir. 1975); *Steele V. Waters*, 527 S.W. 2d 72 (Tenn. 1975); *Wright v. Houston Independent School District*, 366 F. Supp. 1208 (S.D. Tex. 1972), *aff'd per curiam*, 486 F.2d 137 (5th Cir. 1973), *cert. denied*, 417 U.S. 969 (1974). *See also Crowley v. Smithsonian Institution*, 636 F. 2d 738 (D.C. Cir. 1980) (denying injunction seeking to enjoin museum display illustrating the theory of origins); Opinion of the Oregon Attorney General #79-82 (1980).

As already noted, the Constitution does not forbid teaching about religion. Therefore, there would be no constitutional objection to teaching a philosophy course on the origins of either the solar system or man, or both, provided that the religious theories of origin are identified as such, not passed off as science, and not endorsed by the school. Finally, the Constitution stands as no bar to the simple statement by teachers (including science teachers) that there are religious groups which disagree with the theory of evolution. Such statements might do much to defuse the controversy over the teaching of evolution in the schools.

X. Curriculum Content

Another divisive area, related to the dispute over scientific creationism, is the question of teaching subjects or ideas which conflict with religious beliefs. *Epperson v. Arkansas, supra*, which held that a state prohibition on teaching evolution was unconstitutional, would, by extension, stand for the proposition that a refusal to teach a subject may not be based on religious objections to the subject matter, *Grove v. Mead School*

Dist., ___ F. 2d ___ (9th Cir. 1985);*Williams v. Bd. of Educ., Cty of Kanawha*, 388 F. Supp. 93 (S.D. W.Va. 1975), *aff'd*, 530 F.2d 972 (4th Cir. 1975). *See generally, Roman v. Appleby*, 558 F. Supp. 449 (E.D. Pa. 1983) (suit against guidance counselor for discussing religious issues with child; court found that counselor violated no clearly established constitutional right of parents). See also the discussion of Secular Humanism, which appears below at XI.

The lower courts have so held in turning back such challenges to the teaching of sex education classes, *Smith v. Ricci*, 89 N.J. 514, 446 A.2d 501 (1982) *appeal dismissed for want of a substantial federal question*, 459 U.S. 962 (1982); *Medeiros v. Kiyosaki*, 52 Haw. 436, 478 P.2d 314 (1970); *Citizens for Parental Rights v. San Mateo County Bd. of Educ.*, 51 Cal. App. 3d 1, 124 Cal. Rptr. 68 (1975), *appeal dismissed*, 425 U.S. 908 (1976); *Hopkins v. Hamden Bd. of Educ.*, 29 Conn. Supp. 397, 289 A.2d 914 (Ct. Com. Pleas 1970), *app. dismissed*, 305 A.2d 1973 (1970); *Cornwell v. State Bd. of Educ.*, 314 F. Supp. 340 (D. Md. 1969), *aff'd*, 428 F.2d 471 (4th Cir. 1969), *cert. denied*, 400 U.S. 942 (1970).

None of this means, however, that school must offer sex education courses, *Mercer v. Michigan State Bd. of Educ.*, 379 F. Supp. 580 (E.D. Mich. 1974), *aff'd*, 419 U.S. 1081 (1974) (local option on sex education courses constitutional).

On the other hand, either by statute (as in New Jersey as to sex education) or by virtue of the Constitution, students may have a right to be excused from those portions of classes to which they object on religious grounds, unless school officials can show a compelling interest in having the student attend, or if excusal would disrupt the child's entire education. Thus, where parents objected to their children's participation in music classes, and classes in which audio-visual materials were used, a court held that the state had no compelling interest in having students attend the former, but did have an interest in having students participate in the latter, given the pervasiveness of such materials throughout the entire curriculum, *Davis v. Page*, 385 F. Supp. 395 (D. N.H. 1975); *Hardwick v. Bd. of School Trustees*, 54 Cal. App. 696, 205 P.49 (1921) (excusal from required course in social dancing). For an argument to the contrary as to sex education see *Note, Sex Education: The Constitutional Limits of State Compulsion*, 43 So. Cal. L. Rev. 548 (1970).

The arguments for and against granting exemption are both weighty. The issue of whether such exemptions are constitutionally compelled, and how to resolve a conflict between the wishes of parents and children, must be regarded as open, *see, Sheck v. Baileyville Ind. School Committee*, 530 F. Supp. 679 (D. Maine 1982). However, it does seem clear that no federal constitutional prohibition forbids the granting of an excusal.

XI. Secular Humanism

A) General

Accusations that the public schools are teaching secular humanism are quite common. In *Torcaso v. Watkins*, 367 U.S. 488 (1961), the Supreme Court noted that secular humanism was a religion for constitutional purposes. That observation has been the source of much unfortunate misunderstanding.

It is undoubtedly correct that secular humanism is a religion in the constitutional sense, if it is defined as the belief that religion has no role to play in resolving human problems. The public schools may no more preach that doctrine than they may propagate the view that only through belief in God can man attain salvation.

It does not follow, however, that teaching a particular subject without reference to religious views amounts to secular humanism. It is in this latter sense that many persons seem to define secular humanism. This use of the phrase, however, is quite different from that of the Supreme Court, for this popular definition of secular humanism would simply make the constitutional prohibition on religious instruction in the public schools meaningless. *Grove v. Mead School Dist.*, ___ F.2d ___ (9th Cir. 1985).

A recently enacted federal statute, 20 U.S.C. §1301, *et seq.*, providing financial aid to "magnet schools" stipulates that federal funds may not be used to teach secular humanism, a term not defined in the statute or the legislative history. Indeed, the legislative history establishes that recipients are to determine whether a course of instruction is tainted with "secular humanism." The principles discussed above must guide any such determination.

B) Values Education

More so than perhaps any other course, values education is likely to raise charges of "secular humanism." It is not impossible that, in a particular circumstance, the charge will be true. It is at least as likely, of course, that values courses will be charged — again, sometimes accurately — with promoting religious values. While these charges will be difficult to avoid, the Constitution requires only that the state be neutral in matters of religion, neither favoring nor disfavoring religious values. For good general discussions of the problems in this area and how to avoid the pitfalls, *see* 64 Md. O.A.G. 134 (1979).

Transcendental Meditation has been held to be a religious doctrine

and therefore may not be taught by the public schools. *Malnak v. Yogi*, 592 F.2d 197 (3rd Cir. 1979).

XII. Dress Codes

Under the Free Exercise Clause of the First Amendment there has been a good deal of litigation by parents who object to their daughters' being required to wear what they consider to be, for religious reasons, immodest clothes during gym classes. All the cases have resulted in victories for the parents, whether by judicial decision or settlement, *see e.g. Moody v. Cronin*, 484 F. Supp. 270 (C.D. Ill. 1979).

XIII. Teachers' Rights and Responsibilities

A) Religious Garb

There are some states which forbid public school teachers to wear religious garb while teaching. These provisions have, in general, been upheld against challenges that they interfered with a teacher's right to practice his or her religion, *e.g., Zellers v. Huff*, 55 N.M. 501, 236 P.2d 949 (1951). The courts have reasoned that such prohibitions help to maintain the state's neutrality vis-a-vis religion. Other courts, however, disagree about the necessity of such restriction for this purpose, *see, e.g., Gerhardt v. Heid*, 66 N.D. 444, 266 N.W.2d 718 (1936). While AJCongress believes that *Zellers* states the better rule, it must be noted that such bans may be illegal under Title VII of the 1964 Civil Rights Act which prohibits religious discrimination in employment. The legality of such rules may today be regarded as open.

B) Religious Holidays

The problem of teacher excusal for religious holidays is somewhat more complicated. Title VII of the 1964 (federal) Civil Rights Act (prohibiting, *inter alia*, religious discrimination in employment) provides that employers (a term which includes school boards) must make reasonable accommodation of the religious observances of employees, such as Sabbath observance. In practice, this means that teachers must be allowed to have holidays off, since substitute teachers are available to teach their classes, *see, e.g., Wangsness v. Watertown School Dist. No. 14-4*, 541 F. Supp. 332 (D. S.D. 1982); *Niederhuber v. Camden County Vocational & Technical School Dist.*, 495 F. Supp. 273 (D. N.J. 1980).

However, it is generally the position of the courts that one need not be paid for time not worked. In other words, teachers have no claim to be paid for days not worked due to religious observance. *See T.W.A. v. Hardison*, 432 U.S. 63 (1977) (Title VII of the 1964 Civil Rights Act does not require employers to make more than a minimal expenditure to accommodate employees.) In some school districts this problem is ameliorated by the availability of "personal days" which teachers may use for any reason, including religious observance. Even where personal days are not available by terms of the relevant contract or regulation, for religious holidays, Title VII may require that the teachers be allowed to use them, *Philbrook v. Ansonia Bd. of Educ.*, ___ F.2d ___ (2d Cir. 1985).

It may also be possible to allow the teacher to make up time lost by assigning other duties to that teacher. Where this is possible, a school board may be under an obligation to allow teachers this option, *Philbrook v. Ansonia Bd. of Educ., supra, McCormick v. Bd. of Education*, 32 F.E.P. 504 (N.D. Ill. 1983). However, in at least one state it has been held that it would unconstitutionally establish religion to allow teachers extra days off with pay in order to enable them to observe religious holidays without having to lose a day's pay, *Hunterdon Cent. H.S. Dist. v. Hunterdon Cent. High School Teachers Ass'n*, 174 N.J. Super. 468, 416 A.2d 980 (App. Div. 1980), *aff'd*, 86 N.J. 43, 429 A.2d 354 (1981). *See generally*, Sharp, *Accommodating School Employees Religious Practices and Observances Under Title VII*, 21 Ed. L. Rep. 1 (1985).

Some efforts have been made by Jewish teachers to secure time off with pay for Rosh Hashana or Yom Kippur on the theory that the Christian teachers do not have to take time off without pay to observe Christmas, Easter or Good Friday since these are usually included within the traditional spring or winter recesses. Such an effort was rebuffed in *Pinsker v. Joint District 28J*, 554 F. Supp. 1049 (D. Col. 1983), *aff'd*, 735 F.2d 388 (10th Cir. 1984). Absent proof of a deliberate intent to discriminate in favor of Christians (or against Jews) this result seems correct.

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ZIONIST FEDERATION OF AUSTRALIA

INFORMATION SERVICE

5 March 1986

Church - Jnl

Mr. Max Green
Associate Director
Office of Public Liaison
Old Executive Building
Washingont D.C. 20001
U.S.A.

Dear Max,

It was a pleasure meeting you in Washington, and most interesting to compare America and Australia. As you know, we do not have an Office of Public Liaison, or any government appointee performing a similar role to yours.

This does not mean the public has no access to government here, but that our system is different.

The Jewish education scene is also very different, and I have enclosed for your interest some material on the Schools Commission review of funding. The clippings were kindly provided by Dr. Colin Rubenstein, an advisor to the Victorian Co-ordinating Committee of Jewish Day Schools.

If there are any other areas of Jewish life in Australia which interest you, I would be happy to send on information. I have placed you on our mailing list for briefings and news releases, which give a good picture of our major areas of work and concern.

Warm regards,

Leeora Black

Leeora Black
DIRECTOR OF PUBLIC AFFAIRS.

☐ VICTORIA: 584 ST. KILDA ROAD, MELBOURNE. 3004.
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Linda,
Hope you find this informative. We the writers and many others in this country have had time understanding the continued funding of the opposition to freedom forces in countries such as Angola & Mozambique.
Frank Ernst Jr.

ADDRESSO'SET
707/643-5100 BOX 3009
VALLEJO, CALIF. 94590

Our Letter

Musha
Somewhere in Afghanistan
c/o Mary Spencer & Karen McKay
Committee for a Free Afghanistan
Washington, D.C. 20013

February 22, 1986
OUR LETTER No. 11

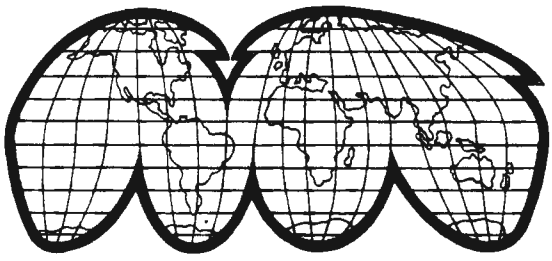
Open Letter

Dear Musha,

When last we wrote you we let you know what we are doing to help you. We hope you got the food sent after our letter a few months ago. We told you then about the **Invisible Bureaucracy influencing the outcome of events in your country of Afghanistan, in Africa, in the United States and all over the world.** We were horrified to read how 1985 was the "Year of the Atrocity" in Afghanistan. We told you how our County Supervisors were being persuaded to punish South Africa for apartheid and ignore how the Killer Empire is killing hundreds of thousands of people all over the world. This Board chose instead an action that throws 200,000 South African black citizens out of work and lets 6 to 10 million more to go hungry if not starve (told by Don McAlvany). South Africa though, believes in saving lives. Our County Board naively (?) voted to punish a country that is more democratic and responsive to its people than most all other countries of Africa. South Africa is a country that believes in freedom and believes in not enslaving its people.

In South Africa both sides really do want to settle their differences without a war, but there are lots of people in this country (even in my own family I am ashamed to say) who are doing things to make it more dangerous for the people who live there. **It's as if an Invisible Bureaucracy is protecting the Killer Empire from public (media & political) attention.**

Many of us here in this country know that the Killer Empire of the north has done many mean and terrible "things" to many, many people all over the world. We are saddened to hear that the maiming, killing, and suffering of children like your brother and sister continues to go unchecked. Rob Schultheis wrote in the San Francisco Examiner how totally cruel and sadistic the Russians are in your country. It is their official policy there. A few here have said your country is a hopeless case. They do not sing songs for the children of Afghanistan. The T.V. actors do not plead for help for the children of Afghanistan. But we believe in you and your freedom AND freedom in the heart is never hopeless.



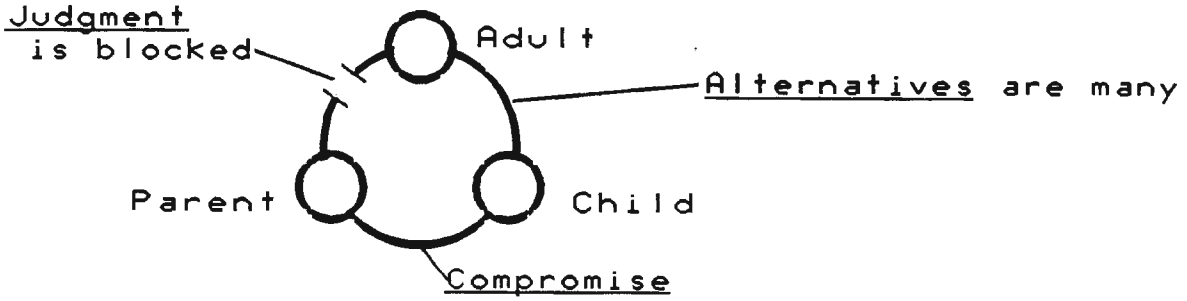
THE PLANET EARTH

We know, just like your family tells you, there is something like a secret society that spreads out beyond the borders of the Killer Empire all over the world. People the world over are now being led like sheep to ignore the present day mass cruelty of the Invisible Bureaucracy and instead be entertained by stories of Hitler's atrocities of 50 years ago.

A MOST NEGATIVE VIEW

Many of us in this country have heard how the head of the Killer Empire, Gorbachev, told the leader of Pakistan that he takes a **"most negative"** view of Mr. Zia giving any more help to Afghanistan. He objects to people helping the maimed children, disfigured by the booby trapped toys dropped from his deadly helicopters. We and your family do agree that **the Killer Empire is the "most negative thing"** ever to happen to the world, is the worst scourge to ever visit our planet. **This Killer Empire has killed more people in the last 70 years than all other empires of the past put together in the history of mankind. The scourage of their killings and starvations will soon pass all the number of people who died from smallpox, bubonic plague, cholera, and tuberculosis combined.** 120 million in the Soviet Union, 70 million in China, 4 million in Cambodia, 3 million in Vietnam, 2 million in Afghanistan, 10 million in Africa, and the list of millions goes on. **PEOPLE - PEOPLE - PEOPLE.** A free mankind is an endangered species at the hands of the Killer Empire.

The bureaucrats of this Killer Empire don't have and cannot even conceive of the idea of using **judgment** (the ability to combine good Adult information processing with Parental teachings). They have very few **alternatives** because they think like one body, they think differently than you and I, Musha. They can **compromise**, but only after a great deal of pushing and shoving among themselves and after eliminating most reasonable alternatives.



Those groupy people with a **"most negative view"** can only decide "things" (people events) in their groupies and then only after the more powerful of their kind have shown the others "some good reasons why", have out talked, brow beaten the others of their group into accepting "the consensus plan." After "consensus" (that means after everyone else has been forced to agree with the leader) they then rehearse their tasks to be implemented later. They gather up their resources and then wait to pounce upon their prey. After they have softened up their victim over a period of time, by conditioning him, by feeding his appetites, by beating him down psychologically and if possible by getting him to do something bad that he gets "caught" at, betrayed on, and made him too weak to resist, then the final touches are added. They spring a trap.

Because of this thinking/psychological groupy, absolute limiting requirement to go over their adventures in groups as they unfold, the group members project a lot of their ineptness onto others and therefore are compelled to get rid of some of "them." They attempt to substitute "group brainstorming" and group discussion for judgment. The result is not bad judgment, this is the total absence of judgment, compassion, loyalty, and pride.

These MOST NEGATIVES, *these NEGITES are like the sadistic homosexual Mr. Ennat as written by Eric Berne. They are lacking a true Parent in their individual heads. At best they use a childhood imitation of a Parent,* an *artificial Parent, a "droid" Parent, a "toy" Parent. The negites are led to believe that continuous reviewing of alternatives will serve as a substitute for judgment. They are paralyzed* when it comes to individual action or expression of independent thought *because* they *fear* what their fellow groupies will say or do to them. They are fearful of making a *mistake,* and they do make mistakes. *Their groups make mistakes, too.*

When they do make mistakes *their fellow groupies tell them how stupid they are. They have no inner, self-sustaining true Parent, no firmly fixed set of ideals, no set of personal values of what is right and wrong. They only know what their fellow groupies tell them. That is why they call their own substitute for an inside guiding set of standards "the critical Parent." The only corrective guiding they get is in the demeaning, harshly critical tones and words of their fellow groupies in sessions. Part of becoming a negite and member of the Invisible Bureaucracy is to have one's own personal sense of values that come from Mom and Dad gradually erased, chipped away piece by piece while getting better and better at pretending.*

(P) --- The Parent tells you what is right and wrong, how to feed and how to care for the sick

(A) --- The Adult thinks clearly

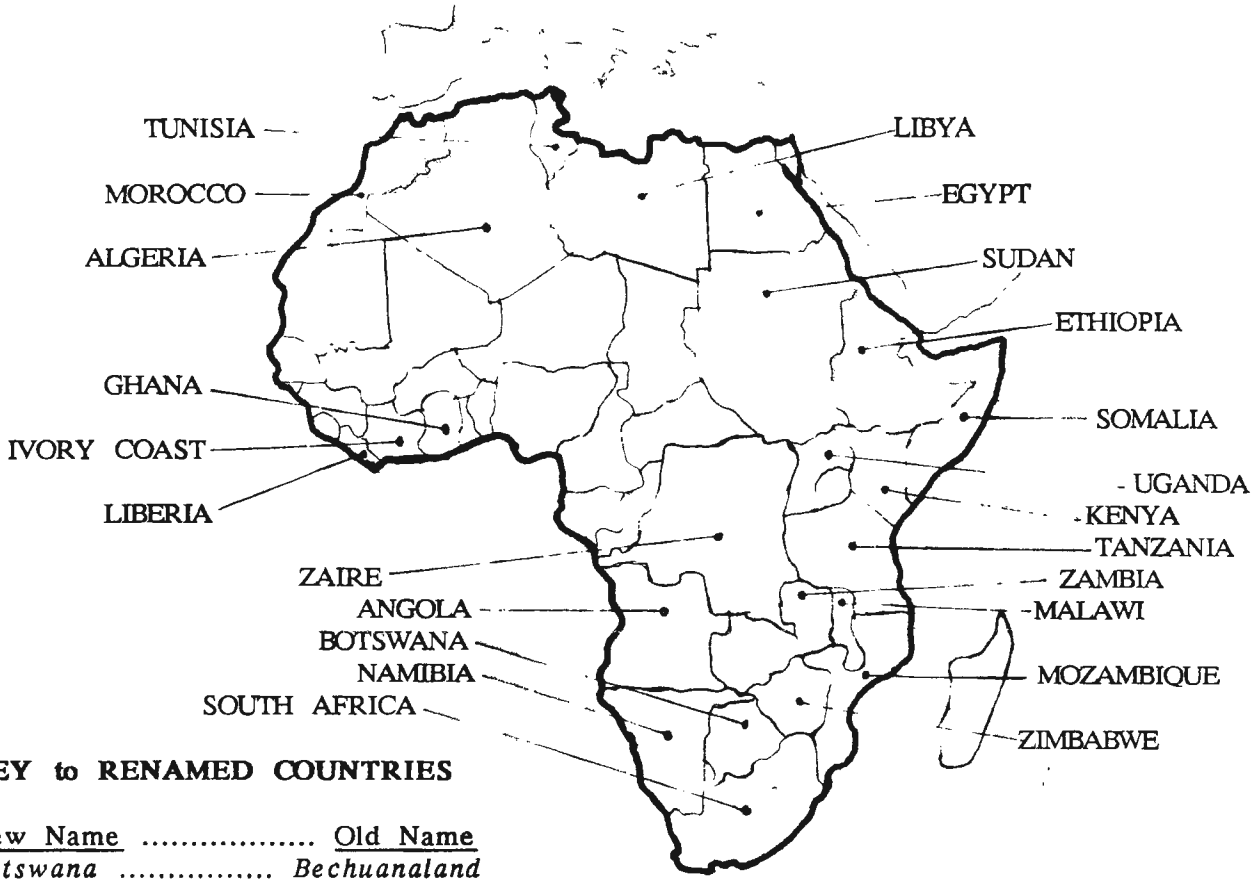
(C) --- The Child plays, has feelings, makes believe, pretends.

FREEDOM vs US STATE DEPARTMENT

On August 3, 1972 the United States Senate made a deal that compromised the Constitution of the United States of America and threatens freedom. The Senate voted 88 to 2 to ratify the Strategic Arms Limitation Treaty (SALT) between the United States and Russia, which limited antiballistic defensive missile systems. The Constitution of the United States of America says we must defend ourselves against all enemies foreign and domestic. Yet in the past few years **the US State Department with the assistance of the US Senate and US Congress has selectively been inattentive and has even shut off the ability of free people to learn about the Killer Empire and the big need here to defend ourselves against their bombs, missiles and sabotage.**

South Africa used to keep track of the Empire's submarines spying on the shipping tankers going around the southern end of Africa. Free trade and access to energy reserves in the Persian Gulf depends on the use of that highway in the sea. However, the US State Department will not allow South Africa to purchase replacement airplanes in order to keep on patrolling the ocean waters off the Cape of Good Hope. The State Department says we made a deal with this Empire not to defend ourselves against its aggressions; therefore this applies to us helping other countries defend freedom.

Today it appears that Mozambique's efforts in regaining freedom are being hindered by the US State Department. These facts have been: (1)well censored, (2) confused; (3) the people obstructing the facts are generally unknown, (4) the known obstructionists are well protected, too, and (5) the fact that most people don't realize that $375 million US dollars have been sent to the Communist government of Mozambique and Samora Machel to crush Renamo and freedom there. Freedom loving South Africa is being browbeaten and abused by this country's TV and papers whenever it helps the people in Angola and Mozambique regain their liberty.



KEY to RENAMED COUNTRIES

New Name	Old Name
Botswana	*Bechuanaland*
Malawi	*Nyasuland*
Namibia	*South West Africa*
Tanzania	*Tanganyika*
Zaire	*Belgian Congo*
Zambia	*Northern Rhodesia*
Zimbabwe	*Southern Rhodesia*

The US State Department encourages the US media to harass South Africans and to turn off the American people about South Africa. In the meantime, it sends $400 million from U.S. banks to Communist Angola, enough to pay for all the Cuban, Russian, North Korean, and European soldiers and some of the Russian tanks and helicopter gunships in Angola. Is the US State Department hindering the efforts of freedom loving people in Central America, too? Read what Joel Skousen has to say about this.

South Africa has also helped the people in Namibia. We do not hear about this, either. Turner Broadcasting Company's CNN had a few stories about this the day before the Space Shuttle Challenger was blown out of the sky. We were reminded here how U.S. space program has been stained and tainted before so many times. As one example, it was only hours before Neil Armstrong was due to step onto the moon July 19, 1969 that the Chappaquiddick Kid had his day; Mary Jo Kopechne died. We only hear how apartheid is bad; nothing about their successes at correcting it and far more rapidly than in this country.

The facts are clear and they point to the forked tongue hypocrisy of some of career members of the US State Department. Now we hear all around us about the effects of the Invisible Bureaucracy and its branches intervening in the elections of the Philippine Islands. This Bureaucracy is quite intent on getting our country to betray the Philippines just like they got us to betray the people of Iran about 8 years ago, and your country for 7 years now.The evidence says The Killer Empire thru the Invisible Bureaucracy is using the US State Department to fight against freedom in Angola, Mozambique and South Africa (Frank Wizner, Chester Crocker). Is this is what is hapenning in Afghanistan, too? We hear that our CIA's John McMahon, using bureaucratic chokepoint theory, has been blocking help to Afghanistan.

The people of Mozambique, northeast of South Africa are struggling to regain their freedom from the tyrants of the Killer Empire. Their freedom movement, called Renamo, has been succeeding to a limited degree. But over 20,000 babies, boys, girls, and people of all ages have been killed in the last three years by the indiscriminate acts of the **Most Negative Empire.** These are killings under Samora Machel of his own countrymen. **Genocide?** They are racial, tribal killings out of prejudice and spiteful cruelty. This does not happen in free countries.

Like the freedom organizers in Savimbi's Angola, RENAMO only asks that the US stop sending hundreds of millions of dollars of US Taxpayer's dollars to anti-freedom, oppressive governments. What would the outcome have been if the present day U.S. State Department had been running things during the American Revolution of 1776 ?

United States Senator Jake Garn, angry about new U.S. bank loans to the Soviet Union, is pushing legislation that would give the President the power to ban such credits.

The Utah Republican, who is the chairman of the Senate Banking Committee, announced committee hearings and action in September in the wake of a new $600 million loan to the U.S.S.R. organized by First Chicago Bank.

"I want to know how the American bankers are going to explain to U.S citizens - who can't get mortgages or are facing farm foreclosures - why their banks are organizing half-billion-dollar loans to our adversaries," Garn said.

Yeah, And why is our Congress trying to destroy one of our few friends, South Africa, and to deliver it to our Soviet enemy? Millions of blacks want into South Africa; none wants out. Hundreds of millions of people want out of the Communist slave states; none wants in.

-- American Way Features

In more recent months members of the Invisible Bureaucracy in our nation's Democratic Party and in our Congress have been advocating "punishing" free South Africa. What is this Invisible Bureaucracy that is pushing so hard for the abolition of freedom? People are so used to calling Invisible Bureaucrats "Communist", "liberals", "radicals", etc. they forget they don't even know what a Communist is, let alone what prompts and controls them, how their personalities work, and how so very different their personalities are from the uncontaminated personalities of free people. We will do better when we quit calling them communists and instead, refer to them by a better, more appropriate, objective term. We propose the term "NEGITE." The Invisible Bureaucracy is composed of an army of "negites."

ACCURACY IN MEDIA

Most of our newspapers are pretty much under the control of this Invisible Bureaucracy. Many, maybe most reporters working for newspapers are good people, though. All of them, however, are subject to the same pressures as you and I. What I mean is that reporters may want to write all the news, the whole story, be as honest and accurate as they can. But when they write about somebody doing a good job for freedom the story usually does not get printed. If the reporter is still a cub and still believes he could get a straight answer from his boss or the editor, then

he might ask why our home-grown, at-home freedom fighter is never mentioned in our newspaper. The reporter begins to get the message after several trys. The individual who believes in freedom for the citizens often gets quoted when he says something that could get him in trouble, be misconstrued, misinterpretted or make him look foolish. **More than likely, if the newspaper boss is a member of the Invisible Bureaucracy our new reporter will be told one of these standard put down phrases:**

"Oh that's not really news."
"We can't just be writing about the characters in town."
"Oh not that stuff again. We don't want too much of the same thing."
"He is in the minority. Don't pay any attention to him."
"He's just a crack pot."
"He's just trying to get his name in print."
"People don't care about what he's saying. It's beyond most people.
"It's too complicated."
"His answers are too simplistic."
"We don't want just anybody for the story."
"We have to write for readers who are not very smart."
"Oh he wants on the bandwagon, too,"

and so forth to discourage the reporter. The reporter's freedom stories are "put on the spike." Pretty soon he gets the message. This is technically called operant conditioning.

Old-time reporters who know what the score is will just indulgently smile the idealist on who protests about censorship. **He may on the other hand caution our freedom "zealot" about not banging around too hard if he wants to keep his job,** that there are a lot of other reporters who could be hired if the editor gets annoyed with the cub's persistence. **The oldtimers in the trade admit privately that what is printed isn't necessarily the news, and certainly is lopsided. Many openly admit that much of the news is aimed more at influencing individuals away from the advantages of being free than in writing clean news.**

To write about a person who thinks for himself is discouraged. Instead, the glorious benefits of grouping are written. Writers are told to write about groups arriving at a consensus. In our Universities and Colleges they are taught the pleasures and gains of submerging differences. Some of them have brought their liberal views with them from behind the Iron Curtain. Some are taught and told to look for specific prearranged group actions where any disagreement or personal view at variance with the "majority" can be claimed to be eccentric, out of step with "the people", "society."

Unwittingly or not, newspaper reporters today are encouraged to ostracize or cause a person to be subjected to peer pressure because of his views. We have watched and listened to how people are negatively influenced, argued into giving up their thinking, or suggested out of their own thinking, by innuendo, tone of voice, jeering remarks, leering smile, defamatory stories, cruel gossip, and then cheered on for doing stupid things as a result of a slanted or bogus news story. The media and the network of Invisible Bureaucrats surround, blanket, ridicule and discourage most of the clear thinking people into shutting up. Negative thinking Invisible Bureaucrats will hammer away at an individual's thinking process when someone elses original anti-oppression idea make sense. Negites do their best to suppress, belittle new ideas until they can control and pervert the ideas to their own use. They obscure fresh ideas, ignore them, they funnel the alternatives of ideas into narrow channels to control the direction of public opinion.

The groups in positions of negative influence of the unofficial coalition of the national newspaper editors *"decide" (are ordered) to print (or not print) certain stories,* decide "what is newsworthy." "The National Coalition of Editorial Policy", as a branch of the Invisible Bureaucracy, has influenced many parts of our land, our

government's official actions. As you can see Musha, most of what is called our "free press" is really under the negative influence if not direct control of the unofficial **"coalition of national editorial policy", the "news" branch of the Invisible Bureaucracy**. (See Reed Irvine's periodical "Accuracy in Media.") We now see it and its disinformation service going into action in the Philippine Islands.

PEER PRESSURE and OPERANT CONDITIONING

We were so glad to hear one of your father's cousins conscripted by the Russians was able to warn your village about the coming Russian raid on New Year's Day in time for you to get away before it happened.

We both know a lot about "unofficial" pressure. When our friends are talking about not liking their mommy or daddy, then if we want to keep them as friends it doesn't make very good sense to talk about how we like our own parents. In grown-up language this is called **"peer pressure."** If your friends talk about their parents in a jeering manner they are giving up good judgment, but you are keeping yours by not talking about yours. We are glad you know you can find other, better friends if that happens to you. I (H.) once knew a priest who encouraged me to talk bad things about my parents. I gave up my priest friend. You might ask why didn't he trust the priest. Well, I wanted to, but this one was a fake, hiding behind a cross. He tried to cross me up with my parents. He was urging me to break the Fifth Commandment "Honor thy Father and thy Mother."

Peer pressure is a form of operant conditioning. More sophisticated manipulators of peer pressure use OPERANT CONDITIONING as a way to more easily control and influence free thinking and speaking people. We become conditioned by processes, practices, standards, events, incidents, management decisions, other people and what happens to them. Negites use OPERANT CONDITIONING for the benefit of the Invisible Bureaucracy by exerting harmful demoralizing indirect influences on our lives, i.e our families, friends, businesses, governments, and other aspects of our free society. The Invisible Bureaucracy is very, very skillful at the techniques of this kind of divisive influencing and controlling.

The Invisible Bureaucracy is dedicated to just such a goal: Control of all mankind, their minds and bodies; to make the rest of the human race become the servants and slaves of the central corps of its controllers. Its goal is to control what the "slaves" see, read, hear and even think. **The Invisible Bureaucracy has this goal because it fears the individual.** An individual who has a gift for and ideas about freedom can show how the entire Invisible Bureaucracy will tear itself apart. Listen to what Dr. Jack Wheeler has to say about this.

NEGITES COME FROM FAMILIES

Operant conditioning is not bad in and of itself though. Our families, the core of free people are held together by how fellow family members influence us. From our families we learn to live with other people. We learn to respect their ways. Each member of the Invisible Bureaucracy has come from a family. In our hearts each one of us knows which one is the family negite, which ones are betraying our family trust. In our minds we may not want to believe he would do such a thing, but in our hearts we know. We know inside ourselves who they are. The betrayer's loyalty is no longer given to the family from which he came. He has another overriding program and lust, and only pretends to his children, sisters, brothers, wife or husband and parents.

For the negite members of the Invisible Bureaucracy, ideas like compassion, liberty, mercy, sympathy, and feeling for the individual and his dreams and ambitions are only roles to learn to pretend and play in order to blind real people. The ideas

which are at the center of the free man's character and personality are only words to be played with and used by the negite in order to sound more convincing to the unsuspecting and suggestible; just words used to keep fooling good people of the world. Many a prominent negite is skillful at showing different colors at different timesfor different people. His (her) tones, words and the "values" he talks about merely reflect the current group programming he is getting as this is ordered by those higher in his own power pyramid.

Negites do have a personality disorder. As individuals they lack a personal conscience. They are true psychopaths held in line (like the obedient soldiers they are) by blackmail, bullying, bribery, by reminding each other "Well you know you asked to be in it" to any who would object to an assignment or an order. Not one of them has a personal set of standards.

THEY ARE THE SOLUTION

Why do people join and continue to staff the Invisible Bureaucracy? Why do they protect the Killer Empire? How do young people in their early teens get persuaded, tempted, seduced, frightened into taking those first few fateful steps that ultimately lead them to **alienating and invalidating** themselves? How is this "invisible" form of child abuse allowed to continue? How do we as fellow family members get lulled and/or sidetracked into not noticing what is happening right within our own families? One child from my own family, one from my neighbor's, one from my doctor's. one from my councilman's, one from my professor's family, my Congressman's family. One by one these children are successfully recruited away from us by these child molesters. How is it that so many intelligent people become vassals, obedient soldiers, servants of this Invisible Bureaucracy that so totally wipes out any independent dreams and goals of earlier life?

Part of the answer and part of the weakness of the Invisible Bureaucracy lies in its unremitting, unrelenting hold over its troops. Its members are systematically crippled into total dependency on each others strokes. Like termites, negites build tunnels into and feed on the strengths of uncontaminated people. They also depend on the strokes of good people. And they trick good people into fronting for their goals. They cannot survive as individuals because they have been drained of individual self respect, self esteem, and pride. They are shells with no personal sense of direction. Not one of them owns any personal set of standards for his own behavior.

As we study their negative societal influence we see that they respond by trashing, stinking up, maiming, stealing, terrorizing. They want to disrupt the thoughtfulness of the free, fill our time with their words and feelings. But they are the solution. Learn from them and they will tell us how to undo them. Be patient. In time they will show us how to dismantle this Bureaucracy that helps the Killer Empire spread its cancerous stranglehold on ever more of Allah's Holy children. **Once the bureaucracy is dismantled, then this Killer Empire can no longer exist, will cease to be.**

Musha, let us hear from you again. We pray for your safety. Listen to your mother and pray for your brothers and father.

Love, Harry Frank

Franklin "Harry" Ernst III Franklin H. Ernst Jr.

ADDRESSO'SET PUBLICATIONS

VICTORIAN CO-ORDINATING COMMITTEE OF JEWISH DAY SCHOOLS

BACKGROUND

Co-ordinating Committee represents all seven Jewish Day Schools in Victoria.

Five thousand pupils.

Seventy percent of all Jewish children attend day schools.

CHARACTERISTICS OF JEWISH DAY SCHOOLS

(a) All Schools have open enrolment policy with unrestricted entry.
At least 25% and up to 53% of children in Jewish Day Schools receive remissions on fees. In effect the better off parents support those on lesser incomes.
All schools operate with considerable deficits.

(b) Socio-economic profile - all Jewish day schools contain a significant proportion of students from low-income families. Schools are not elitest. Each school will have children of the unemployed the sick and the separated.

(c) Recent origin and capital indebtedness - the recent origin and continued expansion of our schools has resulted in substantial capital outlays and other commitments.

(d) Jewish Studies - our Schools aim to imbue :-

(i) a strong Sense of Australian identity.
(ii) a strong sense of Jewish self-awareness and group identity.

This requires education in a variety of historical, cultural, linguistic and religious traditions.
Jewish studies takes up at least 25% of a lengthened school day.
In essence Jewish Schools conduct two schools on the same premises.
Our schools maintain two syllabi, two staffs and two sets of expenditure.
Jewish Schools have been taken as a model for multi-cultural education.
The Schools Commission, following an inspection last September by a Senior Officer, reaffirmed that there are no other schools which have similar characteristics to Jewish Schools.

FUNDING

(a) The Karmel principal of funding is that the more you spend on education the richer you are by definition and the less support you require from the Government.

(b) At the inception of the Schools Commission back in 1973, (under the Whitlam Labour Government), it was recognized that a fair application of any system of measuring expenditure involved a parity of comparison and that in applying any formula based on expenditure or resources the additional costs of Jewish studies should be excluded. In other words that part of the curriculum which had no equivalent in other schools should not be included.
This principle has continued from the Whitlam era up until the present time.

(c) Review of funding - over the past twelve months there has been a review of funding by the Schools Commission. Jewish Schools have participated in that review and have made a number of major submissions.

In addition there have been a number of meetings throughout 1984 with the Chairman of the Schools Commission, a number of Schools Commissioners as well as Senior Officers of the Schools Commission. In a letter dated the 18th July 1984, Dr. Tannock confirmed his undertaking that "existing policies for assessing Jewish Schools would be maintained in respect of the approach taken for Jewish studies". At a meeting with Dr. Tannock in August 1984 he reaffirmed his assurances. Following a Schools Commission inspection of our schools, a Senior Officer of the Schools Commission finalised the principles applicable to the exclusion of Jewish studies under the new criteria established by the Governmnt. The matter was finalised. We were to receive in December 1984 our funding catagories for 1985. Out of the blue and without any consultation or discussion and without reasons, we were informed in a letter from Dr. Tannock dated the 8th January 1985 that "the Minister has decided that no adjustments should be made for the Jewish studies component".

IMPLICATIONS OF CHANGE OF POLICY

Implications for the Jewish Community in Victoria are simply enormous. It is not possible to provide precise figures but the following are estimated losses for one school with a population of approximately 800 pupils.

Chron-Pat

May 29, 1986

Hatch Amendment (SJR 3)

"The right to abortion is not secured by this Constitution."

Lud Gr.
German

With the compliments

of the Embassy of the Federal Republic of Germany

Best regards
Gebhardt v. Moltke

4645 Reservoir Road, N. W.
Washington, D. C. 20 007-1998
Tel.: (202) 298-4000

Mit den besten Empfehlungen

der Botschaft der Bundesrepublik Deutschland

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CHAI/IMPACT
A Service of the Commission on Social Action of Reform Judaism

2027 Massachusetts Ave. NW Washington DC 20036 (202) 387-2800

Chuck Hall

ACTION NEEDED ON S.J. RES. 2

February 28, 1986

BACKGROUND:

Today we are facing a serious assault on the wall of separation between Church and State -- a Constitutional Amendment allowing Silent Prayer. Senators Orrin Hatch (R-UT) and Dennis DeConcini (R-AZ) have proposed Senate Joint Resolution 2 (S.J. Res 2), a Constitutional Amendment which would permit voluntary "individual or group silent prayer or reflection in public schools." Although this Resolution may appear to be less offensive than amendments allowing vocal prayer, it poses a grave danger to our traditions of freedom through the acceptance of organized prayer in the public schools. The Amendment's deceptively innocuous nature is its proponents' greatest asset.

Some argue that this Resolution is "religion neutral" -- it does not promote one religion over another, or religion in general -- and thus is in keeping with our nation's principles of justice. The Supreme Court, however, in its 1985 *Wallace v. Jaffree* decision, ruled that an organized moment for silent prayer or meditation is neither "religion neutral" nor constitutional. By amending the Constitution to permit organized prayer or meditation in public schools, this nation will, in effect, be helping to tear down the wall of separation which protects the right of all peoples to worship and practice their religions in the manner which they see fit -- without fear of government intervention.

Proponents of S.J. Res. 2 contend that this Constitutional Amendment will permit our children to pray. As the *Wallace* case reaffirmed, however, our children already have the absolute right to pray in public school -- when, where, and how they wish, as long as they do not interrupt class or disrupt school. Senate Joint Resolution 2 will give state employees (teachers) the right to organize this religious activity and to coerce students to pray silently or meditate at the time that the school decides it is appropriate -- not when the students are moved to do so. This Constitutional Amendment would undermine the freedoms and protections secured by our First Amendment. It would set a precedent of Congressional erosion of our Constitutional liberties which could radically alter the future of this nation.

In addition to raising serious Constitutional problems, this amendment is bad religious and public policy. America's problems will not be mysteriously solved by putting organized silent prayer in our classrooms. Distracting public attention from our pressing issues ill-serves America's needs. The lack of religious identity and values cannot be solved in a moment of silent prayers. Distracting attention from the task of strengthening our synagogues and churches is detrimental to the needs of religion today.

LEGISLATIVE STATUS:

S.J. Res. 2 has already been passed in the Senate Judiciary Committee by a vote of 12-6. The bill is expected to come to the Senate floor for a vote any time between early next week and mid-March. The pro-prayer forces are well organized and are flooding Senate offices with letters and phone calls. We encourage you to pick up your phone and call your Senators today to express to them your opposition to this Resolution. Most importantly, try to have Christian clergy in your community contact their Senators. Wavering Senators need to be able to say there are Christian as well as Jewish clergy who object to Silent Prayer in public schools.

RECOMMENDED ACTION:

1. Call or write your Senators immediately. All Senators may be contacted through the Congressional switchboard at 202-224-3121 or by addressing a letter to them at: The United States Senate, Washington, D.C., 20510. They are keeping a careful count of the phone calls and letters they are receiving on this issue.

2. Organize letter/telegram or phone call campaigns in your congregations.

3. If you have contacts among Christian clergy who might be sympathetic, urge them also to call or write their Senators. It is crucial that Senators do not perceive this as only a "Jewish" issue.

4. Prepare articles or letters for your local newspapers explaining our concerns on this issue. Whenever possible see if you can have it signed by Christians and Jews. Ask for a meeting of a cross-section of leaders to meet with the editor to see if you can secure an editorial against the amendment.

March 3, 1986

ALERT: JUST TODAY, WE WERE ABLE TO EFFECT A DELAY ON THE VOTE ON S.J. RES 2. IT IS LIKELY TO COME UP FOR A VOTE IMMEDAITELY AFTER THE EASTER RECESS. THIS WILL GIVE YOU THE TIME TO ORGANIZE MORE CALLS AND MAIL TO THE SENATORS ON THIS ISSUE.

The situation of Jews in the Soviet Union

Statement in the German Bundestag (Parliament) by
State Minister Lutz Stavenhagen, Foreign Office
of the Federal Republic of Germany (30 January 1986)

The situation of Jews in the Soviet Union is of concern to all of us. At stake here are human rights which have an important role in contemporary international relations.

The fate of Soviet Jews is of special meaning to us, because it is so similar to the fate of ethnic Germans in the Soviet Union to whom we direct special efforts. What I have in mind here are families divided, in some cases for decades now. What I have in mind here is the agonizing of many Jews over being discriminated against in terms of maintaining linguistic and cultural roots, and over increased pressure for assimilation.

It is against this background, and out of solidarity with the Jewish people, that the Federal Government has repeatedly intervened on behalf of Soviet Jews in its dealings with the Soviet leaders. I am referring, for instance, to the talks between Foreign Ministers Genscher and Shevardnadze during the foreign ministers' meeting in Helsinki for the 10th anniversary of the CSCE Final Act; I am also referring here to interventions of the delegation of the Federal Republic of Germany during the recent CSCE experts' meeting on human rights in Ottawa.

The Soviet Union likes to point out how much has been done for Soviet Jews: that they have an autonomous Jewish region of their own around Birobidzhan (East Siberia) which is a true homeland for Soviet Jewry with Yiddish publications

...

and a Yiddish theater. Soviet officials will also remind us that Yiddish is a recognized national language.

However, the facts are that during the latest census a mere 14 percent of Jews gave Yiddish as their native language, and that less than 1 percent of the approximately 1,8 million Soviet Jews live in Birobidzhan, but 98 percent of them in the European part of the Soviet Union. Which underscores the vast gap between reality and official claims: language and culture are being officially promoted above all in a region that has almost no Jewish population.

The Soviet Union boasts an excellent level of research in Hebraistics, and righteously so. However, it is also a fact that teaching modern Hebrew is prohibited and that Jews engaging in this are subject to prosecution. It is in this context that Soviets frequently refer to "zionist elements". But the fact of the matter is that a new self-perception, especially among Jews of the younger generation, is developing here which represents a countermove to the strong pressure of assimilation. And let us not forget that anti-zionist campaigns are paving the way for anti-semitism.

General Secretary Gorbachev, in a televised interview on the eve of his Paris visit in October 1985, stated that Soviet Jews are overrepresented in arts and scientific research, given their 16th place among the Soviet nationalities. Yet many Jews don't see a future for their professional and artistic development and cannot cope with the problems arising from their nationality in the Soviet Union. This is the reason for the massive desire of Soviet Jews to emigrate. Figures speak out loud and clear. And this, too, is very similar to the problems of Germans in the USSR. It is no

mere chance that emigration of both Germans and Jews under the family reunification scheme is threatened by a complete standstill. The Soviet explanation of natural causes for decreasing figures can claim little credibility in view of the great number of applications for emigration on record.

It is rather the political factor that plays a decisive role. The Soviets are wrong in maintaining that discussion of these issues is tantamount to interference in Soviet domestic matters. A reference to provisions of the CSCE Final Act, which also bears a Soviet signature, cannot be dismissed as interference in internal matters.

The Soviet Union, in outlining its foreign policy, places peace above everything else. It should be aware that peace is more than just the prevention of war and that respect for human rights is a significant contribution towards peace.

The Soviet leadership should also be aware that their credibility is being put to the test, that open-mindedness and generosity vis-à-vis minorities such as the Jews and Germans are part of the commitment that arises from the Soviet signature under the CSCE Final Act.

I therefore appeal to General Secretary Gorbachev to make sure that his words about the fundamental significance of guaranteeing human rights are matched by deeds.

Statements & Speeches

Federal Republic of Germany

Vol. IX No. 1, January 30, 1986

WELCOME TO ISRAELI PRIME MINISTER SHIMON PERES

Address By Federal Chancellor Helmut Kohl,
Bonn, January 28, 1986

In his address, Chancellor Kohl stressed the following points:

- *Since 1960 (Adenauer and Ben Gurion in New York) meetings of leaders of the two countries have marked the development of relations between the Federal Republic of Germany and Israel.*

- *The moral standards applying to relations between the German and the Jewish people also determine German-Israeli government relations.*

- *Germans must live with the terrible truth of their history and learn from it.*

- *Both countries are committed to the same Western values; both countries need allies and friends.*

- *An important German political aim is to help safeguard Israel's future and maintain its viability.*

GERMAN INFORMATION CENTER, 950 THIRD AVENUE, NEW YORK, N.Y. 10022 (212) 888-9840

Mr. Prime Minister:

I am especially pleased that you are visiting the Federal Republic of Germany and extend a warm welcome to you and your delegation.

We last met in October, in the Waldorf Astoria Hotel in New York. That is a place of historical significance for German-Israeli relations. Konrad Adenauer and David Ben Gurion met there in 1960 to lay the foundations for a new beginning between Germans and Jews, between the Federal Republic of Germany and the State of Israel.

Today it is our joint duty to preserve the legacy of those great statesmen. Our task is to continue and intensify cooperation between our peoples and countries, in the direction they had in mind but in different circumstances.

At our meeting in New York you accepted my invitation to visit Bonn and I am glad you have been able to come so soon. The various high-level political contacts between our two countries are a barometer for the state of our relations. One of my first journeys abroad as federal chancellor took me to your country two years ago. Our discussions then were already marked by friendship and mutual trust. In the meantime we have been able to deepen our relationship further, as was borne out by our very constructive discussions today.

Last October a German head of state visited your country for the first time. That visit, and your president's acceptance of an invitation to visit the Federal Republic, show how well and promisingly relations between our two countries have developed.

We see your visit here today, Mr. Prime Minister, as a sign of your readiness to continue with us along the path of reconciliation and cooperation.

While in Israel last year, the federal president expressed our country's and our people's sentiments toward Israel. We have no doubt that the moral standards applying to relations between the German and the Jewish people also determine our intergovernmental relations.

We Germans know that we must also keep in mind and acknowledge the darkest chapter in our history. We cannot and do not wish to dismiss from our thoughts the horrible deeds of the past - out of consideration for the victims and their children, and out of consideration for ourselves and our descendants. We must live with this terrible truth of our own history and learn from it.

In a commemorative ceremony at Bergen-Belsen last April, I confirmed as federal chancellor the responsibility of our people, but also of every individual German, in the light of history. Yesterday, at that same place, you paid homage to the millions of Jewish victims of National Socialism.

Not always in the course of history have our paths been overshadowed by such tragic events. Long stretches of our common history were happy and mutually beneficial. Over the centuries our Jewish fellow-citizens have greatly inspired the spiritual and cultural life of Germany. The names of many of them are associated with brilliant achievements which have received international recognition as part of Germany's cultural assets. It would be very fortunate if we could continue to build on those foundations.

The things we have in common have helped to narrow the gap between our two nations:

- We are committed to the same Western values based on democracy and law and are judged by those values.

- The preservation of our national security calls for great efforts. Both countries need allies and friends in the world.

The foremost objective of my Government's policy as prescribed by the constitution is to safeguard the dignity of man in peace and freedom, both through our own efforts and in cooperation with our partners. In our relationship with Israel the federal governments have sought to translate the pursuit of this goal into practical policies.

An important political aim is for us to help safeguard Israel's future and maintain its viability. We want to expand and deepen our relationship with Israel. We feel closely linked with Israel and therefore see it as our practical duty to assist in Israel's development and to stand by her side. We do this in our bilateral relationship, within the European framework, and within the United Nations. You know that we have also made ourselves the advocate of legitimate Israeli interests that have resulted from the southern expansion of the European Community.

Official relations alone would not have made the German-Israeli relationship what it is today. Dismay and reflection about what has happened, but also admiration for the young state, have aroused a deep sympathy for Israel's fate in many Germans. Thousands of German pilgrims, holidaymakers, participants in study trips, voluntary workers and youths visit Israel annually in search of contact with a nation whose human warmth and cultural vitality attracts them.

Every German who goes to Israel finds political ideals, social concepts and intellectual impulses which have been developed by Jews, mostly through their contact with the West - and incorporated in a new, independent culture. That is what makes your country fascinating to us as well as our spiritual and emotional ties and the reverence in which we hold a country that is holy to three great religions.

Sympathy for Israel also means showing concern for the fate of the State of Israel. In the light of our own experience we Germans deeply appreciate Israel's security needs.

The Middle East conflict is one of the most dangerous sources of crisis in the world. It is a threat to the existence of the nations of that region and could - unless active steps are taken to contain it - spark another world conflagration. This conflict cannot be resolved by military means. There is no reasonable alternative to negotiations.

We have been hopefully following the attempts initiated at the beginning of last year to restart the negotiating process. Although the positions are still far apart there appear to be encouraging signs.

All concerned are beginning to get used to the idea of an international negotiating framework. It is essential that such a framework should receive the widest possible support within the community of nations. In your speech before the United Nations on October 21, Mr. Prime Minister, you indicated that Israel, too, is considering new approaches that my lead to the conference table.

This road will be long and difficult. And it will require concessions to be made on all sides. We want to help make it easier for those concerned to move towards one another.

We cannot resolve the Middle East conflict but we can tell our friends what we consider to be achievable. We speak with one tongue to all our partners.

You in Israel do not always share our opinion. Nor, in many respects, do the Arab countries agree with us. All the same, we believe we have to point to the existing possibilities of moving a step closer to peace.

We do not overestimate our influence, but in the world of today no country can pursue a completely independent policy. We are all living in the same house and all have an interest in ensuring that it remains habitable.

The difficulty of resolving the Middle East conflict lies in reconciling the right of Israel and of all nations in the region to live within recognized and secure borders with the right of self-determination of the Palestinian people. The reference to the right of self-determination, which we, too, claim for our nation and therefore cannot deny to others, meets with criticism in your country.

But I believe that this is due to a misunderstanding. We Europeans have always seen the exercise of that right to self-determination in relation to the rights of the nations of the region. The realization of the right of self-determination of the Palestinian people is limited by Israel's right to exist.

Only a compromise borne by all countries and all those concerned in the region, including the Palestinians, will produce a lasting, comprehensive and just solution - provided that all concerned renounce the use of force once and for all.

In recent months we have witnessed a resurgence of terrorism, especially in Europe. We have roundly condemned those vicious attacks. Such terrorist activities, far from serving the interest of the Palestinian people, are more likely to impede a just solution to the Middle East conflict.

Together with our European partners we have called upon all governments, and I repeat all governments, to play an active part in finding, arresting and sentencing those responsible for such heinous attacks. Nowhere should the perpetrators be able to count on support.

We have not abandoned the hope of your region being able to achieve through patience what Europe has achieved - though only after centuries of hostilities: a settlement of all conflicts in the realization that the nations of a region can only master the problems of the modern age through their joint efforts.

The European Community is still far from its ideal state; nonetheless all of its members are benefiting from the pooling of their resources and markets.

Mr. Prime Minister, it is our sincere hope that Israel and her neighbors will be blessed with a future in peace based on free self-determination.

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TOWARDS A PEACEFUL COMMUNITY OF EQUALS

Speech by Hans-Dietrich Genscher,
Minister of Foreign Affairs of the Federal Republic of Germany,
at the Inaugural Meeting of the Ninth Round of the Conference on
Confidence- and Security-Building Measures and Disarmament in Europe
Stockholm, January 28, 1986

Exactly two years ago the foreign ministers of Europe, the United States and Canada inaugurated the Conference on Confidence- and Security-Building Measures and Disarmament in Europe. The common goal is to achieve more confidence and more security in Europe. More confidence and more security - that is the great hope of our nations. It imposes on us a historical responsibility that we must live up to.

I am pleased to have this opportunity today to present together with my friend and colleague, Monsieur Roland Dumas, foreign minister of France, our joint ideas on the CDE. We seek a substantive outcome to this conference yet this year, before the start of the CSCE follow-up meeting in Vienna.

Our joint appearance at the conference reflects the close friendship and cooperation linking our two peoples and states. It also reflects our full agreement on the goals of the CSCE process, of which the CDE is an integral part. We regard the relationship between our countries as an example for the whole of Europe: The Germans and the French have shown that it is possible to replace animosity and rivalry with lasting friendship and cooperation. The same holds true of the European Community, which - newly strengthened by the democracies of Spain and Portugal - has become a force for stability, reconciliation and peace in Europe. The community, which is increasingly formulating and pursuing its interests, not least in the field of security, is to a growing extent able and willing to assume responsibility for shaping Europe's destiny. It is a model of successful cooperation among equal and independent states. It is and remains a motor in the CSCE process.

European integration and incorporation into the North Atlantic alliance are cornerstones of our policy. We realize that Europe does not end at the River Elbe. Perhaps even more than to others, this applies to the Federal Republic of Germany, which is conscious of its historical responsibility as a country in the heart of Europe and whose citizens will never forget that Germans also live on the other side of the dividing line.

With the CSCE, Europe has returned to the international arena. The CSCE is the instrument that Europe has given itself to lay the foundations for the establishment of lasting peace on our continent. The participating states are under obligation to make full use of this instrument. The CSCE follow-up meeting in vienna at the end of this year will provide an opportunity to assess the progress made in the CSCE process. This assessment must include the work of the numerous conferences and meetings of experts that were agreed upon in Madrid and have subsequently taken place.

All participating countries must strive to give effect to all parts of the Final Act in a balanced fashion in the awareness of their inner coherence. Everyone will then benefit from the fruits of the Final Act. It must not be torn apart in disputes over promotion of certain elements and abandonment of others. This would deprive it of its effect as a Magna Carta of cooperation, thereby causing everyone to lose out.

In taking stock in Vienna and preparing further programs, we shall have to take human rights just as seriously as security, political cooperation just as seriously as economic cooperation. We seek cooperation and exchanges in all spheres - in the spheres of humanitarian improvements, technology, science and environmental protection, information and culture.

We welcome the fact that the Soviet leadership also acknowledges the political dimension of the European Community. Regarding the European democracies as a factor in their own right with an equal claim to security is just as important as recognizing the essential role played by the United States and Canada as CSCE participants in the security framework afforded by the CSCE. In the CSCE process, the responsibility of the superpowers for improving the overall security conditions must interact with the contribution made by small and medium-sized European countries, a contribution which fills out the framework through diverse forms of cooperation and the development of close relations.

Nobody may rule himself out or be excluded here. The CDE is proof that security and disarmament are not bilateral matters, but are the responsibility of all participants. The CDE must demonstrate that all negotiations that deal with European security are of equal importance and equal urgency.

Ladies and gentlemen, in January 1984 I remarked in this forum that the international situation gave reason for concern. Today we can state quite clearly that the apprehensions have not materialized. The CSCE net has stood the strain. The situation has changed for the better. East and West have embarked on an attempt to make genuine progress in the sphere of disarmament and arms control which is so vital to the future of mankind. In Geneva and in the multilateral fora, far-reaching Western proposals have been submitted. They represent a solid basis for the achievement of substantial results.

My Government subscribes to an active policy of safeguarding peace. Our goal is a state of lasting stability which will reliably exclude any kind of war.

The the Final Declaration issued after the Geneva summit, all parts of which meet with our approval, it says: "Recognizing that any conflict between the USSR and the U.S. could have catastrophic consequences, they emphasized the importance of preventing any war between them, whether nuclear or conventional. They will not seek to achieve military superiority."

This important statement applies not only to the relationship between the superpowers. It must apply to all countries. Individual defensive efforts alone will not ensure the achievement of this objective. Thus all efforts must be directed to cooperative solutions leading to lasting stability at the lowest possible level of arms and forces.

Every attempt to reverse the spiraling arms build-up must prove its worth here in Europe. The problem of security in Europe cannot be seen merely in its separate elements. Its roots and its interrelationships have to be identified: The political causes of tension, the conventional superiority of the continental superpower, the response of nuclear deterrence.

We live in a complex system of security in which the destructive power of nuclear arms rules out the possibility of using war as a means of gaining political power. The role of nuclear weapons of mass destruction in the military equation is a high price for the banning of war. In the competition to constantly increase and perfect such systems that price reaches senseless proportions. Consequently, the efforts to stop and reverse this process have the support of all nations.

These efforts must lead to an increase in stability. They must not serve to heighten the risks of dangers from other sources that have been offset by nuclear deterrence. We must not reach a situation where it appears a war in Europe can again be won.

If we in Europe want to bring about a radical change for the better, then we shall have to devote as much attention to conventional stability as to the nuclear balance of power.

Here there exists an inner relationship among all the elements of the military balance of power. Our aim must be to prevent any war in Europe, even a conventional one, which, given modern weapons systems, would exceed the horrors of the Second World War to an unimaginable degree. The creation of lasting peace in Europe demands more than the removal of military imbalances.

We do not want to revert to the times when military alliances with heavily armed conventional forces confronted one another, ever ready for combat. Thus in the long term we must discuss not only numbers but also armaments, military doctrines, enemy images. The confidence- and security-building measures which are the subject of our negotiations here in Stockholm should not merely be the preliminary stage of disarmament measures in the conventional sphere. They should also lay the foundations for cooperative security arrangements which remove the incentive for the use of force as well as the fear of such force. That is why our readiness to carry out such measures is a test of our will to ban war from Europe forever as a means of achieving political aims.

The new proposals put forward by General Secretary Gorbachov on January 15, 1986, can give the negotiations major impulses and open up possibilities for movement.

For this it is necessary that the new elements of these proposals prove useful in both the bilateral and the multilateral negotiations. We are studying these proposals with our allies and constructive new elements will be met with constructive responses.

The proposals for the reduction of nuclear potentials again show how important it is to seek also conventional stability in Europe. This is where Europe's fundamental security interests become apparent, which have to take into account the nuclear, chemical and conventional threats. Each of these areas has its importance for overall stability.

Of course the Soviet ideas on intermediate-range missiles are of special interest to us because here, too, we are directly affected. We attach great importance to the opinions of our French and British friends on these matters.

Mr. Gorbatchov's statement with regard to verification deserves special attention. The fact that the Soviet Union is now prepared to accept strict controls including international on-site inspections within the framework of a universal convention banning the use of chemical weapons is also of fundamental importance for the multilateral arms control negotiations, where a breakthrough can be achieved if effective verification arrangements now prove possible.

As regards chemical weapons, it will be crucial to agree on effective verification which will make it possible to clarify cases of suspicion as well and to ensure that no products intended for civilian purposes can be diverted to the manufacture of chemical weapons.

In the case of MBFR it is a question of agreeing on a system of verification and inspection measures to provide the data base for the obligation of both sides not to increase their force levels, and for subsequent reductions.

Substantive results at the CDE also assume greater importance because the area of MBFR reductions comprises only central Europe.

Mr. Chairman, the ninth round of the CDE marks the beginning today of the decisive third year of negotiations. The aim is to strengthen confidence and security by means of a set of politically binding, militarily significant and verifiable measures which will have to be applied throughout Europe. All involved have become increasingly aware that confidence-building is an indispensable element of a policy aimed at detente and cooperation. Only on the basis of growing confidence founded on concrete measures will it be possible to make progress in mutual cooperation and towards an accommodation in the field of security among the participating states.

Our aim is to effectively and visibly reduce the danger of the use of military power by means of cooperative confidence-building measures. We share Mr. Gorbachov's view that the road leading to the use of force and to covert preparations for war must be blocked. Actual or supposed threats can be reduced by measures which subject the military conduct of participating states to specific rules, thus making it calculable. Reliable verification is a crucial element of such measures.

Confidence should not be "blind." The one showing confidence must himself be able to see that the military efforts of the other side exclusively serve to maintain its own defensive capability. Affording proof of one's good intentions in a militarily relevant manner means convincing others of one's own peaceful aims.

The detailed proposals submitted by the West correspond with this concept of confidence-building. The proposals put forward by other delegations concur with that concept in many respects. We need concrete arrangements which will prove capable of dispelling mistrust in their area of application in the whole of Europe - from the Atlantic to the Urals - and of enhancing military stability. This aim is of considerable

military significance today. That significance will increase further still if it proves possible both to reduce nuclear weapons drastically and where possible eliminate them altogether, and to establish a balanced relationship of power in the conventional sphere and do away with chemical weapons completely.

As you all know, the U.S.-Soviet declaration of January 8, 1986, meets with our full approval, also where it calls for the prevention of an arms race in space and its termination on earth.

The mandate of this conference established a relationship between specific measures and the principle of the non-use of force. Its task is to lend impact and expression to the existing prohibition of force by means of effective measures to reduce the danger of military confrontation.

The states participating in this conference committed themselves in the Helsinki Final Act to the non-use of force, one of ten principles of fundamental importance.

To renounce force does not mean renouncing convictions, values and positions on controversial issues. Rather, it limits the means by which states may resolve their differing and often opposing interests. The non-use of force is indivisible. It must apply worldwide and between any states. That also means that a stop must be put to force wherever it is being applied.

By reaffirming their renunciation of force in connection with agreement on new confidence- and security-building measures in Stockholm, the participating states would translate the principle of the non-use of force embodied in the UN charter into reality. They would thereby lend convincing expression and impact to their determination to observe strictly the prohibition of force in their international relations. In this way, a substantial contribution could be made to preventing war.

Time is now short, and the negotiating agenda is extensive and difficult. It can be mastered only if all sides demonstrate good faith and willingness to compromise. This implies that the Madrid mandate must not be put into question.

We must make use of the available time to reach a result that constitutes a "leap forward" from the confidence-building measures of the Helsinki Final Act. An agreement must have taken clear shape by this summer. A substantive agreement in Stockholm would be an important step in the CSCE process and a good basis for progress in other spheres of CSCE at the follow-up meeting in Vienna.

1986 will be a year of decision as far as long-term developments are concerned. It is important that the options for these developments are seen clearly and that the intentions of the affected parties are known. Bold new plans still arouse great skepticism. However, the nations seek firmer foundations on which to build lasting peace. Efforts to achieve that goal must take account of every factor that goes to make up stability. The measures aimed at confidence-building that we are able to agree on here will also serve as a test when it comes to evaluating the chances of more extensive progress in the arms control efforts. Progress in implementing the Helsinki Final Act, whose realization or prospects we shall review in Berne and Vienna, will be an important yardstick of this confidence building.

What is necessary is that confidence be created among states and people in the serious commitment of all CSCE participating states to the aim of creating a lasting peace in Europe in which the provisions of the Final Act and of the other documents of the Helsinki process have become reality. This reality means a peaceful community of equals whose larger members enjoy no greater degree of security than their smaller partners.

It must be a community of states within which the right of self-determination has become reality, where nations develop their cultural identity and individuals enjoy their rights and engage in international exchange. The Federal Republic of Germany, which in the past has contributed to reducing tension in Europe, will do its best to help ensure that use is made of today's opportunities to bring about a far-reaching transformation of the relationship between West and East.

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list of recipients of the Francis Boyer Award, which includes former President Gerald R. Ford, Ambassador Arthur F. Burns, British historian Paul Johnson, the late William J. Baroody, Sr., former Secretary of State Henry Kissinger, University of Chicago President Hanna Holborn Gray, and British economist Sir Alan Arthur Walters.

AEI is pleased to be able to present Judge Bork with the Francis Boyer Award, and we are grateful to the Smith-Kline Beckman Corporation for making possible the award and lecture. Judge Bork describes in this Boyer lecture the "sharply divergent ideas that are struggling for dominance within the legal culture," and thereby reminds us of the importance of the belief that is at the core of AEI's public policy research—the belief that the competition of ideas is fundamental to a free society.

Bill Baroody Jr.

WILLIAM J. BAROODY, JR.
President
American Enterprise Institute

TRADITION AND MORALITY IN CONSTITUTIONAL LAW

When a judge undertakes to speak in public about any subject that might be of more interest than the law of incorporeal hereditaments he embarks upon a perilous enterprise. There is always, as I have learned with some pain, someone who will write a story finding it sensational that a judge should say anything. There is some sort of notion that judges have no general ideas about law or, if they do, that, like pornography, ideas are shameful and ought not to be displayed in public to shock the squeamish. For that reason, I come before you, metaphorically at least, clad in a plain brown wrapper.

One common style of speech on occasions such as this is that which paints a bleak picture, identifies even bleaker trends, and then ends on a note of strong and, from the evidence presented, wholly unwarranted optimism. I hope to avoid both extremes while talking about sharply divergent ideas that are struggling for dominance within the legal culture. While I think it serious and potentially of crisis proportions, I speak less to thrill you with the prospect of doom—which is always good fun—than to suggest to you that law is an arena of ideas that is too often ignored by

intellectuals interested in public policy. Though it was not always so, legal thought has become something of an intellectual enclave. Too few people are aware of the trends there and the importance of those trends for public policy.

It is said that, at a dinner given in his honor, the English jurist Baron Parke was asked what gave him the greatest pleasure in the law. He answered that his greatest joy was to write a "strong opinion." Asked what that might be, the baron said, "It is an opinion in which, by reasoning with strictly legal concepts, I arrive at a result no layman could conceivably have anticipated."

That was an age of formalism in the law. We have come a long way since then. The law and its acolytes have since become steadily more ideological and more explicit about that fact. That is not necessarily a bad thing: there are ideologies suitable, indeed indispensable, for judges, just as there are ideologies that are subversive of the very idea of the rule of law. It is the sharp recent growth in the latter that is worrisome for the future.

We are entering, I believe, a period in which our legal culture and constitutional law may be transformed, with even more power accruing to judges than is presently the case. There are two reasons for that. One is that constitutional law has very little theory of its own and hence is almost pathologically lacking in immune defenses against the intellectual fevers of the larger society as well as against the disorders generated by its own internal organs.

The second is that the institutions of the law, in particular the schools, are becoming increasingly converted to an ideology of the Constitution that demands just such an

infusion of extraconstitutional moral and political notions. A not untypical example of the first is the entry into the law of the first amendment of the old, and incorrect, view that the only kinds of harm that a community is entitled to suppress are physical and economic injuries. Moral harms are not to be counted because to do so would interfere with the autonomy of the individual. That is an indefensible definition of what people are entitled to regard as harms.

The result of discounting moral harm is the privatization of morality, which requires the law of the community to practice moral relativism. It is thought that individuals are entitled to their moral beliefs but may not gather as a community to express those moral beliefs in law. Once an idea of that sort takes hold in the intellectual world, it is very likely to find lodgment in constitutional theory and then in constitutional law. The walls of the law have proved excessively permeable to intellectual osmosis. Out of prudence, I will give but one example of the many that might be cited.

A state attempted to apply its obscenity statute to a public display of an obscene word. The Supreme Court majority struck down the conviction on the grounds that regulation is a slippery slope and that moral relativism is a constitutional command. The opinion said, "The principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word?" One might as well say that the negligence standard of tort law is inherently boundless, for how is one to distinguish the reckless driver from the safe one. The answer in both cases is, by the common sense of the community. Almost all judgments in the law are ones of degree, and the law does not flinch from such judgments except when, as in the case of morals, it seriously doubts the community's right to define harms. Moral relativism was even more explicit in the major-

ity opinion, however, for the Court observed, apparently thinking the observation decisive: "One man's vulgarity is another's lyric." On that ground, it is difficult to see how law on any subject can be permitted to exist.

But the Court immediately went further, reducing the whole question to one of private preference, saying: "We think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." Thus, the community's moral and aesthetic judgments are reduced to questions of style and those are then said to be privatized by the Constitution. It testifies all the more clearly to the power of ideas floating in the general culture to alter the Constitution that this opinion was written by a justice generally regarded as moderate to conservative in his constitutional views.

George Orwell reminded us long ago about the power of language to corrupt thought and the consequent baleful effects upon politics. The same deterioration is certainly possible in morality. But I am not concerned about the constitutional protection cast about an obscene word. Of more concern is the constitutionalizing of the notion that moral harm is not harm legislators are entitled to consider. As Lord Devlin said, "What makes a society is a community of ideas, not political ideas alone but also ideas about the way its members should behave and govern their lives." A society that ceases to be a community increases the danger that weariness with turmoil and relativism may bring about an order in which many more, and more valuable, freedoms

are lost than those we thought we were protecting.

I do not know the origin of the notion that moral harms are not properly legally cognizable harms, but it has certainly been given powerful impetus in our culture by John Stuart Mill's book *On Liberty.* Mill, however, was a man of two minds and, as Gertrude Himmelfarb has demonstrated, Mill himself usually knew better than this. Miss Himmelfarb traces the intellectual themes of *On Liberty* to Mill's wife. It would be ironic, to put it no higher, if we owed major features of modern American constitutional doctrine to Harriet Taylor Mill, who was not, as best I can remember, one of the framers at Philadelphia.

It is unlikely, of course, that a general constitutional doctrine of the impermissibility of legislating moral standards will ever be framed. So the development I have cited, though troubling, is really only an instance of a yet more worrisome phenomenon, and that is the capacity of ideas that originate outside the Constitution to influence judges, usually without their being aware of it, so that those ideas are elevated to constitutional doctrine. We have seen that repeatedly in our history. If one may complain today that the Constitution did not adopt John Stuart Mill's *On Liberty,* it was only a few judicial generations ago, when economic laissez faire somehow got into the Constitution, that Justice Holmes wrote in dissent that the Constitution "does not enact Mr. Herbert Spencer's Social Statics."

Why should this be so? Why should constitutional law constantly be catching colds from the intellectual fevers of the general society?

The fact is that the law has little intellectual or structural resistance to outside influences, influences that should properly remain outside. The striking, and peculiar, fact about a field of study so old and so intensively cultivated by

men and women of first-rate intelligence is that the law possesses very little theory about itself. I once heard George Stigler remark with some astonishment: "You lawyers have nothing of your own. You borrow from the social sciences, but you have no discipline, no core, of your own." And, a few scattered insights here and there aside, he was right. This theoretical emptiness at its center makes law, particularly constitutional law, unstable, a ship with a great deal of sail but a very shallow keel, vulnerable to the winds of intellectual or moral fashion, which it then validates as the commands of our most basic compact.

This weakness in the law's intellectual structure may be exploited by new theories of moral relativism and egalitarianism now the dominant mode of constitutional thinking in a number of leading law schools. The attack of these theories upon older assumptions has been described by one Harvard law professor as a "battle of cultures," and so it is. It is fair to think, then, that the outcome of this confused battle may strongly affect the constitutional law of the future and hence the way in which we are governed.

The constitutional ideologies growing in the law schools display three worrisome characteristics. They are increasingly abstract and philosophical; they are sometimes nihilistic; they always lack what law requires, democratic legitimacy. These tendencies are new, much stronger now than they were even ten years ago, and certainly nothing like them appeared in our past.

Up to a few years ago most professors of constitutional law would probably have agreed with Joseph Story's dictum in 1833: "Upon subjects of government, it has always appeared to me, that metaphysical refinements are out of place. A constitution of government is addressed to the common-sense of the people, and never was designed for trials of logical skill or visionary speculation." But listen to how Nathan Glazer today perceives the lawyer's task, no doubt because of the professors he knows: "As a political philosopher or a lawyer, I would try to find basic principles of justice that can be defended and argued against all other principles. As a sociologist, I look at the concrete consequences, for concrete societies."

Glazer's perception of what more and more lawyers are doing is entirely accurate. That reality is disturbing. Academic lawyers are not going to solve the age-old problems of political and moral philosophy any time soon, but the articulated premise of their abstract enterprise is that judges may properly reason to constitutional decisions in that way. But judges have no mandate to govern in the name of contractarian or utilitarian or what-have-you philosophy rather than according to the historical Constitution. Judges of this generation, and much more, of the next generation, are being educated to engage in really heroic adventures in policy making.

This abstract, universalistic style of legal thought has a number of dangers. For one thing, it teaches disrespect for the actual institutions of the American polity. These institutions are designed to achieve compromise, to slow change, to dilute absolutisms. They embody wholesome inconsistencies. They are designed, in short, to do things that abstract generalizations about the just society tend to bring into contempt.

More than this, the attempt to define individual liberties by abstract reasoning, though intended to broaden liberties, is actually likely to make them more vulnerable.

Our constitutional liberties arose out of historical experience and out of political, moral, and religious sentiment. They do not rest upon any general theory. Attempts to frame a theory that removes from democratic control areas of life the framers intended to leave there can only succeed if abstractions are regarded as overriding the constitutional text and structure, judicial precedent, and the history that gives our rights life, rootedness, and meaning. It is no small matter to discredit the foundations upon which our constitutional freedoms have always been sustained and substitute as a bulwark only abstractions of moral philosophy. The difference in approach parallels the difference between the American and the French revolutions, and the outcome for liberty was much less happy under the regime of "the rights of man."

It is perhaps not surprising that abstract, philosophical approaches to law often produce constitutional nihilism. Some of the legal philosophers have begun to see that there is no overarching theory that can satisfy the criteria that are required. It may be, as Hayek suggested, that nihilism naturally results from sudden disillusion when high expectations about the powers of abstract reasoning collapse. The theorists, unable to settle for practical wisdom, must have a single theoretical construct or nothing. In any event, one of the leading scholars has announced, in a widely admired article, that all normative constitutional theories, including the theory that judges must only interpret the law, are necessarily incoherent. The apparently necessary conclusion—that judicial review is, in that case, illegitimate—is never drawn. Instead, it is proposed that judges simply enforce

good values, or rather the values that seem to the professor good. The desire for results appears to be stronger than the respect for legitimacy, and, when theory fails, the desire to use judicial power remains.

This brings into the open the fundamental antipathy to democracy to be seen in much of the new legal scholarship. The original Constitution was devoted primarily to the mechanisms of democratic choice. Constitutional scholarship today is dominated by the creation of arguments that will encourage judges to thwart democratic choice. Though the arguments are, as you might suspect, cast in terms of expanding individual freedom, that is not their result. One of the freedoms, the major freedom, of our kind of society is the freedom to choose to have a public morality. As Chesterton put it, "What is the good of telling a community that it has every liberty except the liberty to make laws? The liberty to make laws is what constitutes a free people." The makers of our Constitution thought so too, for they provided wide powers to representative assemblies and ruled only a few subjects off limits by the Constitution.

The new legal view disagrees both with the historical Constitution and with the majority of living Americans about where the balance between individual freedom and social order lies.

Leading legal academics are increasingly absorbed with what they call "legal theory." That would be welcome, if it were real, but what is generally meant is not theory about the sources of law, or its capacities and limits, or the prerequisites for its vitality, but rather the endless exploration of abstract philosophical principles. One would suppose that we can decide nothing unless we first settle the ultimate questions of the basis of political obligation, the merits of contractarianism, rule or act utilitarianism, the nature of the

just society, and the like. Not surprisingly, the politics of the professors becomes the command of the Constitution. As Richard John Neuhaus puts it, "the theorists' quest for universality becomes simply the parochialism of a few intellectuals," and he notes "the limitations of theories of justice that cannot sustain a democratic consensus regarding the legitimacy of law."

Sometimes I am reminded of developments in another, perhaps parallel, field. I recall one evening listening to a rather traditional theologian bemoan the intellectual fads that were sweeping his field. Since I had a very unsophisticated view of theology, I remarked with some surprise that his church seemed to have remarkably little doctrine capable of resisting these trends. He was offended and said there had always been tradition. Both of our fields purport to rest upon sacred texts, and it seemed odd that in both the main bulwark against heresy should be only tradition. Law is certainly like that. We never elaborated much of a theory—as distinguished from mere attitudes—about the behavior proper to constitutional judges. As Alexander Bickel observed, all we ever had was a tradition, and in the last thirty years that has been shattered.

Now we need theory, theory that relates the framers' values to today's world. That is not an impossible task by any means, but it is a good deal more complex than slogans such as "strict construction" or "judicial restraint" might lead you to think. It is necessary to establish the proposition that the framers' intentions with respect to freedoms are the sole legitimate premise from which constitutional analysis may proceed. It is true that a willful judge can often clothe his legislation in sophistical argument and the misuse of history. But hypocrisy has its value. General acceptance of correct theory can force the judge to hypocrisy and, to that

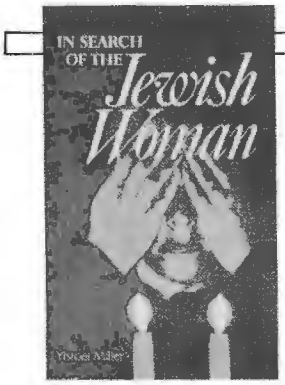
extent, curb his freedom. The theorists of moral abstraction are devoted precisely to removing the judge's guilt at legislating and so removing the necessity for hypocrisy. Worse still, they would free the intellectually honest judge from constraints he would otherwise recognize and honor.

It is well to be clear about the role moral discourse should play in law. Neuhaus is entirely correct in saying

> whatever else law may be, it is a human enterprise in response to human behavior, and human behavior is stubbornly entangled with beliefs about right and wrong. Law that is recognized as legitimate is therefore related to—even organically related to, if you will—the larger universe of moral discourse that helps shape human behavior. In short, if law is not also a moral enterprise, it is without legitimacy or binding force.

To that excellent statement I would add only that it is crucial to bear in mind what kind of law, and which legal institutions, we are talking about. In a constitutional democracy the moral content of law must be given by the morality of the framer or the legislator, never by the morality of the judge. The sole task of the latter—and it is a task quite large enough for anyone's wisdom, skill, and virtue—is to translate the framer's or the legislator's morality into a rule to govern unforeseen circumstances. That abstinence from giving his own desires free play, that continuing and self-conscious renunciation of power, that is the morality of the jurist.

BOOKS



IN SEARCH OF THE JEWISH WOMAN, *by Yisroel Miller (New York, 1984, Feldheim Publ., $8.85 hardcover, $6.95 softcover)*

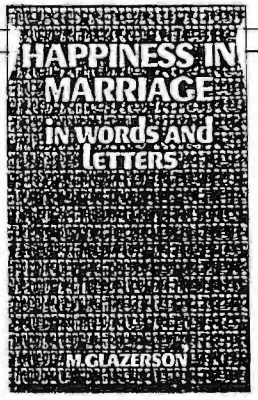
This eminently readable and enjoyable volume belongs to what may be called the "second generation" of books on the Jewish woman. The first generation works were essentially defensive in character; in a society where the equality of the sexes was considered a sine qua non and Judaism was conceived as denying this fundamental principle, it was necessary to show that the Jewish woman might have a role differing from that of man but that her role was, in its way, as important, valued and, yes, satisfying as that of man. Times have changed somewhat. A number of writers have eloquently presented the Torah view of the respective tasks of men and women — and, on the other hand, there appears to exist a new awareness in the wider world that equality does not mean identity, and that the interests of women are not served by denying them their distinctive nature and function, and casting them as imitation men. Rabbi Miller is not concerned with defending the Torah view of a woman's role — he seeks to show how it can be lived more fully and satisfyingly. His book deals with the key elements of a woman's life — marriage and childrearing, housekeeping, career and community obligations. The author is concerned with the perspectives and attitudes that are needed to make a woman's life meaningful, and the ways in which she can develop and grow in the discharge of her mission as guardian of the family's equilibrium and well-being. But he does not preach — he writes lucidly, practically, and with a fine sense of humor. Indeed, a must volume for the Jewish woman!

THE MODERN JEWISH WOMAN, *A Unique Perspective (A Lubavitch Women's Publication, Brooklyn, 1981, $10.95 hardcover, $7.95 softcover*

Even a cursory glance at this volume will impress the reader on three counts — the quality of the photographs which (even without the accompanying text) speak volumes about the beauty and splendor of Jewish living; the wide-ranging scope of the 30 essays which make up the content of this book; and the fact that they are almost all written by women. The writers do not shirk any of the issues that could be of concern to the reader — our approach to love, romance and dating, to marriage and singleness, to family planning and large families, careers and fulfillment in the house, *taharas hamishpocha* and the meaning of *tuma*, the historic role of Jewish women and their special function in preserving the spiritual essence of our people. Many of the essays are particularly poignant because they beautifully reflect the feelings and experiences of these authors — no dry and labored expositions here, but words that flow from the heart. It is only natural that several passages in the book reflect the authors' perception of Chabad Chassidism as *the* expression of Jewish perfection, and adherence to it as *the* necessary key to our redemption; they do not take away from the value of this volume for those who do not share this conviction.

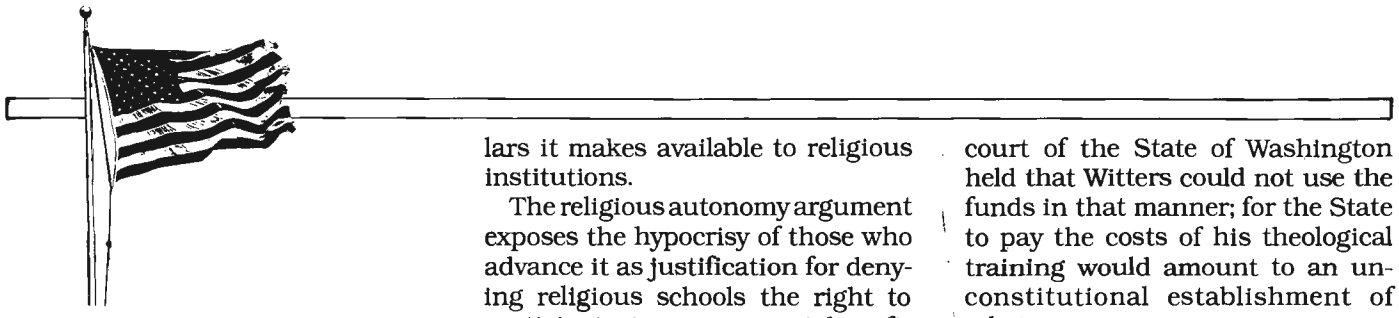
MAN AND WOMAN, The Torah Perspective, *by Leo Levi (Jerusalem, 1979, distributed by Feldheim, $2.95)*

This pamphlet, written in the author's customary clear style and systematic manner, is a brief presentation of the roles of man and woman in Judaism, their relationship to each other, their respective places in the family, the initiation and dissolution of marriage, and the halachic status of women in such areas as property laws, public functions, and *mitzva* observance. While the treatment is summary, and one could have wished for more elaboration on many of the topics, the author provides throughout references to the sources, as well as a coherent interpretation of the significance of the halachic provisions in the different areas, as reflecting the Torah's teachings on the nature of women and their distinctive role in the world.



HAPPINESS IN MARRIAGE, in Words and Letters, *by Mattityahu Glazerman (Jerusalem, 1983, Feldheim, $4.95 paperback)*

This pamphlet is devoted to Torah insights into the different facets of marriage. Its unique character derives from the fact that the author grounds these insights in the letters and words of the Hebrew language, in the manner of his earlier writings, notably 'Sparks of the Holy



autonomy claim to do so not because they hate such schools but because they love them. "This may hurt but it's for your own good," say the secularists, "and in the long run you'll thank us for it."

WHOSE INTERESTS DO THE SECULARISTS REALLY HAVE AT HEART?

It might be easier to accept the secularists' assertion that their attack against governmental support of religious schools is benevolently motivated if they would couple that attack with a massive program of private support for Jewish education. But Leo Pfeffer and those who espouse his "separationist" views have hardly been in the vanguard of philanthropic efforts to support Torah education through private donations. The pathetic record of secular support for Jewish education speaks volumes louder than all of the noble sounding rhetoric about religious autonomy.

The rhetoric is shot through with logical holes as well. Governmental aid need not come with the type of unacceptable strings attached to it that would require a religious school to compromise its principles in order to receive the aid. Returning to the question of gender discrimination, for example, Congress has specifically exempted religious schools from the requirement that they mix the sexes in order to receive federal support. The Executive Order 50 case, for another example, established that Agudath Israel's receipt of New York City dollars does not automatically require Agudath Israel to adopt the same set of anti-discrimination laws that govern the City itself. The solution to the threat of governmental incursion upon religious autonomy, thus, is not to insist that government withhold support from religious institutions, as the secularists would have it, but to insist that government detach the religiously objectionable strings from the dollars it makes available to religious institutions.

The religious autonomy argument exposes the hypocrisy of those who advance it as justification for denying religious schools the right to participate in government benefit programs. Whether or not the strings attached to any particular form of governmental assistance would require a religious entity to compromise its religion is a decision the entity itself should make—not government, and certainly not the secularists. Yet the secularists purport to be so concerned that religious entities will trade in their religion for a pot of government lentils that the secularists insist on deciding the issue on their own. It is blatant paternalism at best, and outrageous cynicism at worst, for the Leo Pfeffers of society to assert that only they know how to advance the cause of religion in this country and that religious schools cannot be trusted to make the right decisions themselves.

A CHANGE IN THE WIND AT AJCONGRESS?

Given the views of Professor Pfeffer, it is hardly surprising that the organization for which he has served as principal legal spokesman has targeted government aid to religious schools as an area to be addressed by the "Fund for Religious Liberty." But let us not be so swift to pass judgment on the American Jewish Congress. Recent developments suggest a possible shift in the wind.

The strongest evidence that AJCongress may be retreating from the absolutist positions of Pfeffer and his followers is an *amicus curiae* (friend of the court) brief submitted by the organization to the United States Supreme Court in June of this year. The case before the Supreme Court involves a Washington State statute providing government funds to blind people "so that they can be trained to engage in gainful employment and become self-supporting." Larry Witters, a blind man, applied for funds under this statute to pay for ministerial training at a seminary of theology. The highest court of the State of Washington held that Witters could not use the funds in that manner; for the State to pay the costs of his theological training would amount to an unconstitutional establishment of religion.

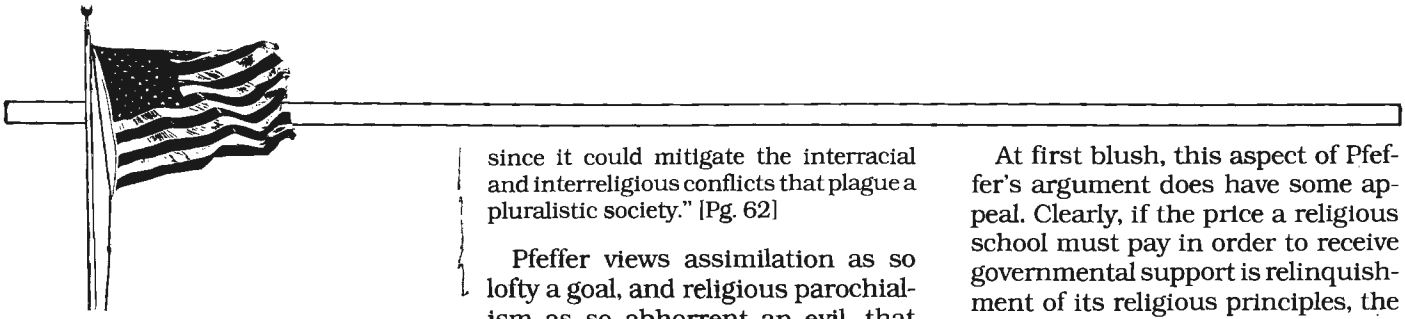
In what can only be described as a stunning—and most encouraging—development, the American Jewish Congress has asked the Supreme Court to reverse the Washington court's decision and permit Witters to use the State dollars for ministerial training. In its brief, AJCongress acknowledged its own historical role as a staunch opponent of aid to religious schools, but expressly disavowed the type of absolutist approach advocated by Leo Pfeffer:

> "The principle of non-establishment, enshrined in the First Amendment, is an indispensable element of religious liberty. Hence, AJCongress has repeatedly urged that the Establishment Clause be given a generous construction. It has appeared repeatedlfy before this Court urging the invalidation of statutes intended to provide subsidies for religious education. *But the Establishment Clause, more so perhaps than other constitutional principles, must not be expanded indefinitely, for to do so inevitably leads to clashes with that other guarantee of religious liberty, the Free Exercise clause.*" [Emphasis added]

Needless to say, Professor Pfeffer's name appears nowhere on the brief.

Is its legal brief in the *Witters* case merely a temporary "aberration" or a harbinger of new attitudes at the American Jewish Congress? Will AJCongress reconsider its opposition to such innovative measures as education vouchers to be used by parents at any school of their choosing, including religious schools? Has a new young generation, less committed to the assimilationist battles waged by AJCongress in the past, and whose ideas of "heaven" and "perfection" are closer to ours than to Leo Pfeffer's, assumed ascendancy in the organization? Or will the new lawyers hired out of AJCongress' "Fund for Religious Liberty" urge support for government programs that benefit blind ministerial students but not for those that benefit seeing Yeshiva students?

Only time will tell.■



no students attend religious schools for religious education! Is Pfeffer suggesting that Reb Shraga Faivel Mendlowitz זצ"ל and the other Torah pioneers in this country set up an elaborate Yeshiva system to avoid mingling with blacks? Or that Torah education in the United States owes its continued existence and consistent expansion to racial prejudice rather than religious commitment?

GLORIFYING THE PUBLIC SCHOOLS

If parents who choose religious education for their children are not racists, Pfeffer intimates, they are at least fools, and cruel ones at that:

"One of the great benefits of public education lies in the fact that it brings together pupils of all faiths, races, and economic status. ... *Pierce* v. *Society of Sisters* [a 1925 Supreme Court decision upholding a parent's right to choose religious schooling for his child] guarantees the right of parents to withhold this benefit from their children but it does not require that the state subsidize the exercise of that right." [Pg. 37]

Indeed, Pfeffer advances the argument that, in order to protect children from parents who are so foolish and cruel as to withhold from them the benefits of an assimilationist educational melting pot, government should *compel* public school attendance:

"A reasonable argument can be made that the ... concept of public policy, and a recognition of the government's power to exercise a parental duty when—even for religious reasons—the natural parents refuse to do so, can justify laws compelling not merely school but public school attendance. Only in a public school can a child be assured of an opportunity to learn to live some part of the day with persons of all religions, races, and social and econo nic classes, as he will have to do throughout his adult life. The state (that is, the community at large) also benefits from this compulsory mixing, since it could mitigate the interracial and interreligious conflicts that plague a pluralistic society." [Pg. 62]

Pfeffer views assimilation as so lofty a goal, and religious parochialism as so abhorrent an evil, that government should adopt policies that strengthen the former at the expense of the latter. Children ought not be permitted to suffer on account of their parents' misguided religious convictions, Pfeffer urges. Religious schools, by their very nature, foster cultural exclusivity. If one regards such exclusivity as inherently evil, as Pfeffer apparently does, it is in government's interest to undermine religious schools, not support them.

One can only wonder how Pfeffer would react to the resolution recently adopted by the Union of American Hebrew Congregation (the central Reform Jewish body in the United States) supporting "the concept of autonomous, self-supporting Reform Jewish day schools as a valid educational option." At its biennial convention in early November 1985, the Reform Union decided that autonomous Reform day schools were necessary for children who otherwise might be placed (Heaven forfend!) in Orthodox or Conservative day schools. Perhaps even Pfeffer would endorse the concept of Reform day schools; such schools no doubt will work to instill in students an appreciation of diverse races and cultures—so long as it's not authentic Judaism, thank you—and therefore provide students with the same assimilationist benefits Pfeffer finds in the public schools.

SAVING RELIGIOUS SCHOOLS FROM SECULAR TEMPTATIONS

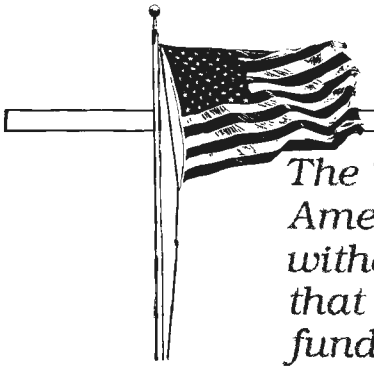
Professor Pfeffer hints at yet another reason for disqualifying religious schools from any form of governmental subsidization: religious autonomy. The draftsmen of the First Amendment, Pfeffer asserts, "did not want tax-raised funds to be used for religious instruction, nor did they want the government to intrude into the religious domain and pass judgment on how churches spend their own money." [Pg. 29]

At first blush, this aspect of Pfeffer's argument does have some appeal. Clearly, if the price a religious school must pay in order to receive governmental support is relinquishment of its religious principles, the price is too steep. If, for example, receipt of governmental funds would require a yeshiva to refrain from "discriminating" on the basis of gender—*i.e.*, to have mixed classes of boys and girls—the yeshiva's acceptance of governmental dollars would compromise its very *raison d'etre*. To spare the yeshiva from the temptation of entering into such compromises, Pfeffer would preclude government from offering any assistance to religious institutions.

A most recent instance where the religious autonomy argument was forcefully advanced by those opposing government aid to religious schools was the litigation that culminated earlier this year in a ruling by the United States Supreme Court striking down a New York City program of sending public school teachers onto religious school premises to provide secular remedial education for disadvantaged students. In an *amicus curiae* (friend of the court) brief submitted to the Supreme Court by four secular groups (including the American Jewish Congress) opposing this "Title I" program, which brought some $4 million of remedial education services into New York City Yeshivos annually, the secular groups had this to say:

"Even if the substitution of public school teachers for parochial school teachers mitigates the danger of religious influence on the secular program, the cure is far worse than the disease, because, by stationing public school teachers in a religious school, New York City's program threatens the autonomy of the religious institutions themselves. ... The fact that some religious institutions are, apparently, prepared to risk their autonomy in order to receive a financial benefit does not mitigate the danger. History teaches that religious autonomy is at least as vulnerable to the financial carrot as it is to the stick."

In essence, those who attack public funding of religious schools on grounds of protecting religious



The "Free Exercise Clause" guarantees that Americans of all creeds can practice their religion without governmental interference. Where does that leave yeshivos in the scheme of governmental funding of education?

discrimination provision upon City contractors. What the Court's ruling means, of course, is that if gay rights legislation does get enacted (a real possibility as of the date of this writing), and if the City at that time still deems fit to insist that religious organizations like Agudath Israel leave their religious principles at the door when they come to do business with the City, the parties may well be back in court debating the First Amendment. Stated otherwise, the right of religious entities to operate government financed programs in a manner that conforms with their religious principles may yet ultimately hinge on the balance struck between the Establishment and Free Exercise Clauses.

After one of its executive boards invited representatives of Agudath Israel and New York City to present their respective positions on the controversy, the American Jewish Congress decided to take no formal position in the Executive Order 50 case. In the context of governmental aid to nonpublic schools, however, AJCongress traditionally has raised its voice in loud opposition. Indeed, if there is any one person in the United States who has stood out as the most articulate and forceful opponent of aid to nonpublic schools, it has been Leo Pfeffer, Special Counsel to the American Jewish Congress and professor of political science at Long Island University.

PFEFFER'S ASSAULT

Professor Pfeffer's most recent book, *Religion, State and the Burger Court* (Prometheus Books 1984), sheds some revealing insight on the philosophy of this "strict separationist." In Pfeffer's view, absolute separation between government and religion—*i.e.*, no financial assistance in any form, direct or indirect, to religious institutions—would be "heaven," "perfection":

> "Those defending the strict separationist interpretation of the First Amendment's Establishment Clause recognize that the absolute separation of church and state is not possible, but what does that prove? Does the reality that no person is immortal mean that the medical and pharmaceutical profession should be abolished? Realistic separationists recognize that the absolute separation of church and state cannot be achieved, else what's a secularist heaven for? Nevertheless, that is the direction they would have constitutional law relating to the Religion Clause take, fully aware that perfection will never be reached." [Introduction, pg. xi]

The inevitable corollary of Pfeffer's absolutist vision is that conflicts between the constitutional principles of non-establishment and free exercise must always be resolved adversely to the claim of free exercise. Pfeffer would automatically penalize a parent for choosing religious schooling for his child—a choice that clearly embodies free exercise of religion—by rendering the parent and child ineligible for the same secular benefits made available by government to those who choose non-religious schooling. In Pfeffer's "secularist heaven," therefore, there is a clear hierarchy among the First Amendment's two religion clauses: the Establishment Clause on top, surrounded by the Angels of Atheism; the Free Exercise Clause on bottom, in the company of the Downtrodden Devoted.

NOT EVERYTHING IS BLACK AND WHITE

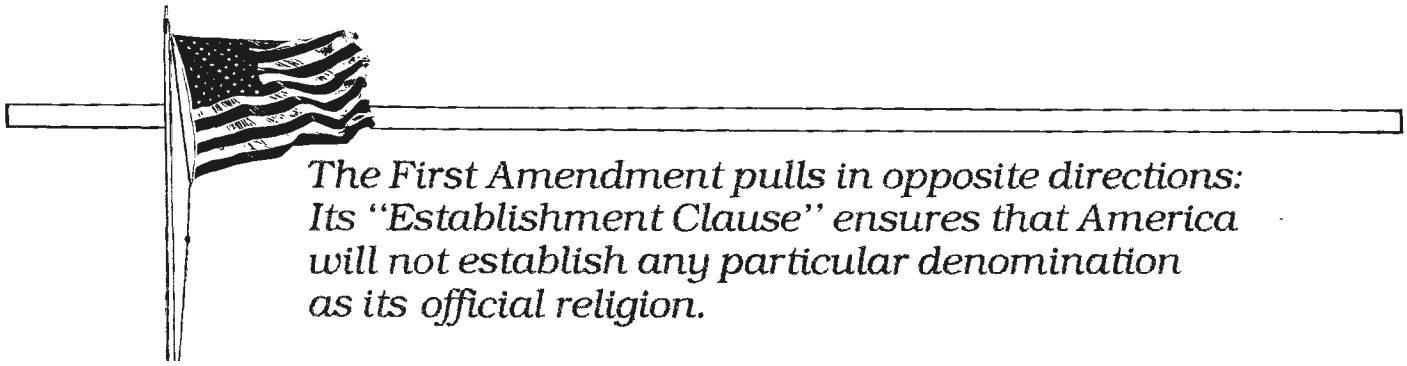
Why is Professor Pfeffer so adamantly opposed to governmental aid to religious schools? One theme that emerges from his book is that many parents who choose religious education for their children are racists, and that government ought not subsidize racism:

> "Too often parents are taking their children out of public schools or initially sending them to religious schools not so much that they fear G-d but that they fear blacks even more. ... Resorting to religion as a means of maintaining racial segregation is hardly new. ... Of all ethnic groups, blacks suffer most from government funding of parochial schools." [Pgs. 16, 17, 43]

Even taken at face value, Pfeffer's argument suffers from a host of serious flaws. One could make a strong case for the proposition that of all ethnic groups, blacks and other "minorities" suffer the most from Pfeffer's strict separationist stand. For one thing, it is hardly the case that parochial schools in the United States are lily-white; nearly 20% of all students enrolled in Catholic schools, which comprise the large bulk of religious schools in this country, are "minorities."

Moreover, when government aid is reserved exclusively for public education, those at the bottom rung of the economic ladder—often minorities—are denied any real choice in the matter of where to educate their children. It is only by increasing aid to nonpublic schools, and thereby making those schools more accessible to society's less fortunate, that government can begin to address the "white flight" problem with which Pfeffer is concerned.

Even more fundamental than the logical holes in Pfeffer's analysis are the faulty, and highly offensive, premises under which he operates. "The scope of this book," says Pfeffer, "extends only to the constitutionality and public policy of utilizing tax-raised funds to support the exodus of white pupils in search of a haven in religious schools" [pg. 17]—as if



The First Amendment pulls in opposite directions: Its "Establishment Clause" ensures that America will not establish any particular denomination as its official religion.

Amendment's ban against governmental establishment of religion and its concomitant guarantee of free exercise of religion is essential to an understanding of the legal battles that continue to rage over "religious freedom" and that have such a profound impact upon the Torah community in the United States. Let us consider the case of *Everson* v. *Board of Education* (1947), perhaps the first major U.S. Supreme Court decision squarely to face the conflicting strains within the First Amendment itself.

A CONSTITUTIONAL GAP —BIG ENOUGH FOR THE BUS?

At issue in *Everson* was the constitutionality of a New Jersey law providing free bus transportation for all schoolchildren, including those who attended parochial schools. Those challenging the transportation statute argued that by diverting public funds for the benefit of children at religious schools, New Jersey was "establishing religion," in violation of the First Amendment.

The Supreme Court agreed that the Establishment Clause prohibited not only the designation of Christianity or any other faith as an official state religion; but also "laws which aid one religion, aid all religions, or prefer one religion over another ... No tax in any amount, large or small, can be levied to support any religious activities or institutions." Accordingly, reasoned the Court, "New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church."

That being the case, the conclusion would seem inescapable that the New Jersey transportation law was unconstitutional. But the Court, invoking the Free Exercise Clause, did escape that conclusion:

> "On the other hand, other language of the [First] Amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith or lack of it, from receiving the benefits of public welfare legislation.... Measured by these standards, we cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools."

As a result of the precarious balance struck by the Supreme Court in the *Everson* case, government does not run afoul of the Constitution if it allocates tax dollars to transport little Shloimie and Shaindy to and from Yeshiva and Bais Yaakov. Employing similar analysis, the Court has also upheld laws granting parochial school students or their parents the right to benefit from government-loaned textbooks, government-sponsored mandated services, tuition tax relief, and several other forms of governmental assistance. Yet other decisions of the Supreme Court, however, have come down on the other side of the balance, prohibiting religious schools from participating in such government aid programs as teacher salary supplements, publicly financed on-premises remedial education, and reimbursement for costs of teacher-prepared examinations.

If the reader has difficulty understanding why certain forms of aid fall on the prohibited side of the constitutional line while others do not, the reader is in good company. In a moment of unusual candor, the Supreme Court itself confessed that it "can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law," *Lemon* v. *Kurtzman* (1971); and that its decisions have been marked by "considerable internal inconsistency" as it has "struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." *Walz* v. *Tax Commission* (1970).

EXECUTIVE ORDER 50 AND THE FIRST AMENDMENT

Agudath Israel's successful legal challenge against Executive Order 50 is a more recent illustration of the tension inherent within the First Amendment. New York City's executive branch sought to condition its award of social service contracts to Agudath Israel upon a pledge of nondiscrimination in employment against homosexuals. Among its other contentions, Agudath Israel argued in court that the First Amendment's Free Exercise Clause protected its right to enter into government contracts without having to abandon its religious principles. The City responded that if Agudath Israel insisted upon remaining loyal to its religion in performing the social service contracts, then the First Amendment's Establishment Clause prohibited government from financing those contracts.

In its decision striking down the Executive Order, the New York Court of Appeals found it unnecessary to reach the First Amendment issue, ruling instead that the repeated refusal of the Federal, State and City legislatures to enact "gay rights" bills precluded the executive branch from imposing the disputed anti-

Chaim Dovid Zwiebel

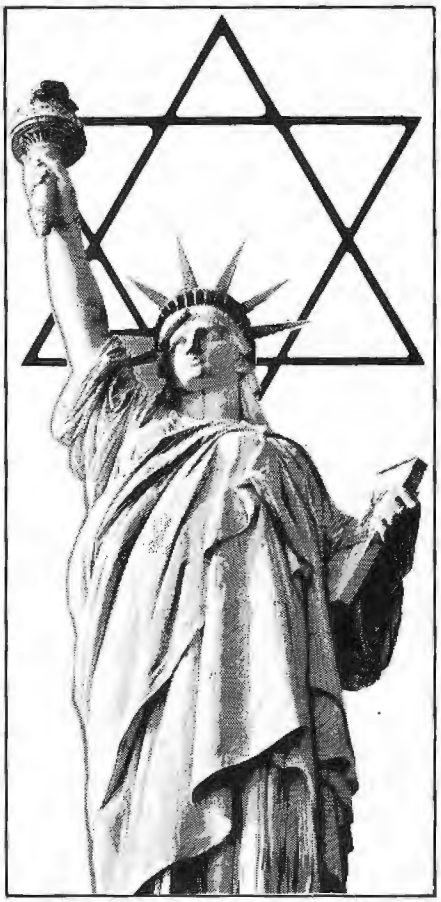
Of "Religious Liberty" and Government Aid to Sectarian Schools: Where Do Our Secular Jewish Brethren Stand?

Earlier this year, at a $500-a-plate dinner at the Park Avenue Synagogue on New York's Upper East Side, the American Jewish Congress launched a major new initiative to raise $1 million over three years to expand its existing legal staff from three attorneys to five. According to a report in *The New York Times*, AJ Congress' newly created "Fund for Religious Liberty" is designed to counter "the rise of the religious right." One of the targets specifically singled out for vigorous challenge is "public financing of parochial education."

But "religious liberty," like beauty, is in the eyes of the beholder. To the American Jewish Congress and those that share its predominantly secular perspective, religious liberty is enhanced when those who choose religious schooling are by virtue of that choice disqualified from receiving the benefits of governmental aid to education. To Agudath Israel of America and other groups on the "religious right," however, such disqualification has long been regarded as the very antithesis of religious liberty.

The legal battleground on which this fundamental clash is being waged is the First Amendment to the United States Constitution.

Mr. Zwiebel, an attorney, is Director of Agudath Israel of America's Office of Government Affairs. His "Fighting City Hall" was featured in JO of March, '85.



THE FIRST AMENDMENT VS. THE FIRST AMENDMENT

Under the First Amendment, government may neither "establish" a religion nor prohibit the "free exercise" of religion. Until the middle of this century, there was little conflict as to the meaning of, or between the provisions of, the First Amendment's two proscriptions regarding governmental involvement in religion: the "Establishment Clause" was designed to ensure that America would not establish Christianity or any other denomination as its official religion; the "Free Exercise Clause" to ensure that Americans of all creeds could practice their religious faith without governmental interference. The Establishment and Free Exercise Clauses thus complemented one another and together formed a unified guarantor of religious freedom.

In recent years, however, tension has replaced tranquility, as both proponents and opponents of governmental aid to religious institutions have pointed to the First Amendment in support of their respective legal positions. As government's role in collecting public monies through the tax system and redistributing them through aid programs has grown exponentially, and as the American judiciary has assumed an increasingly activist role in "interpreting" the Constitution to conform with the judges' own views of proper public policy, the First Amendment's two religion clauses have been pitted against one another with increasing frequency—and with varying results.

Understanding the nature of the inherent conflict between the First

II

98TH CONGRESS
1ST SESSION

S. J. RES. 73

Proposing an amendment to the Constitution of the United States relating to voluntary school prayer.

IN THE SENATE OF THE UNITED STATES

MARCH 24 (legislative day, MARCH 21), 1983

Mr. THURMOND (for himself, Mr. HATCH, Mr. CHILES, Mr. ABDNOR, Mr. NICKLES, and Mr. HELMS) (by request) introduced the following joint resolution; which was read twice and referred to the Committee on the Judiciary

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JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States relating to voluntary school prayer.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the following article is hereby proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution if ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress:

"ARTICLE —

"Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer.".

○

SCHOOL FUNDING IS RESOLVED

The Federal and State Governments have recognised the separate and extensive nature of Jewish studies offered in Jewish day schools.

They accepted continuation of the principle that these schools would not be financially disadvantaged for the extensive Jewish studies programmes they provide.

Separate meetings with Senator Susan Ryan (Federal Education Minister), and Mr Robert Fordham (State Education Minister) formalised acceptance of this principle.

The meeting with Senator Ryan in Canberra last Thursday, was arranged by Mr Ian Rockman acting chairman of the Victorian Co-ordinating Committee and acting co-chairman of the Australian Co-ordinating Committee of Jewish Day schools.

MINISTER

He was accompanied by Mr Phil Symons (ECAJ representative), Rabbi Y. D. Groner, Mr Hersh Cooper, Dr Colin Rubenstein, Mr Phillip Simonds and Mr Ivan Port (from Sydney), as well as Mr Clyde Holding MHR (Melbourne Ports).

Senator Ryan made available time to consider the issue and stressed she was determined to find a just and equitable solution to the problem.

Before going to Canberra, a delegation from the Victorian Co-ordinating Committee and the Victorian Jewish Board of Deputies met with Victorian Premier, Mr John Cain and Mr Fordham.

The Premier and Education Minister assured members of the delegation that serious financial consequences which could have resulted from an earlier decision by Senator Ryan would not have been allowed to eventuate.

In both meetings, the political leaders were advised that Jewish schools were not seeking nor had ever received financial support for their Jewish studies programmes.

They said they did not want to be penalised for the very significant self-help they had exercised in developing Jewish studies in the day schools themselves.

Following the Canberra meeting, Senator Ryan issued a special ministerial statement which said the Government "accepts in principle, that where a Jewish studies school is operating separately alongside a regular school, the regular school should be categorised on the basis of total income available from private sources for its separate operation.

"Private income available for the recurrent operation of the separate Jewish Studies school will not affect the categorisation of the regular school," she said.

Senator Ryan agreed the principle will apply from the 1985 school year.

On Monday, State Education Minister Fordham, meeting a delegation from the Victorian Co-ordinating Committee, endorsed the same principle and agreed to mutually satisfactory interim funding arrangements for the Jewish day schools.

The co-ordinating committee said it was indebted to Mr Saul Same for his support over the last two years.

At the same time was expressed appreciation to local Federal parliamentarians Mr Clyde Holding and Mrs Joan Child as well as Mr Andrew McCutcheon MLA (St Kilda).

Mr Rockman said that much of the inspiration for the committee's work had come from the late Arnold Bloch, who had been founding chairman of the committee.

Mr Isi Leibler (president, Executive Council of Australian Jewry) welcomed the decision described as a critical turning point for the Jewish day school movement, and the Jewish community.

Mr Haddon Storey (State Education spokesman) would ensure non-government schools received adequate funding.

"A Kennett Liberal government will provide a basic per capita grant, payable through each non-government school, of an amount equivalent to 20 percent of the cost of educating a student at a government school," he said.

CHAI/IMPACT
A Service of the Commission on Social Action of Reform Judaism

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July 29, 1986

Action Alert

(Church-State)

YARMULKE RIGHTS BEFORE CONGRESS

Legislation is presently pending in Congress which would restore freedom of religious expression to Jewish-Americans serving in the armed forces.

BACKGROUND:

Last March in Goldman v. Weinberger, the Supreme Court supported the Air Force in denying S. Simcha Goldman, an Orthodox Jew serving as an Air Force clinical psychologist, the right to wear his yarmulke indoors. The Court decision supported Air Force Regulation 35.10, which provides in part that "head gear will not be worn...while indoors *except* by armed security personnel in the performance of their duties." Goldman had been ordered to remove his yarmulke under the authority of Regulation 35.10.

In this clash between the authority of the Air Force to impose uniformity of dress on its officers and the Constitutional right to free exercise of religion, the Court found that the First Amendment does not provide the same measure of protection in the armed forces that it does in civilian life. It, therefore, did not guarantee the right of Dr. Goldman to wear a yarmulke. As a result of this decision, as Justice Brennan's dissenting opinion pointed out, Jewish Air Force servicemen who wish to wear a yarmulke are required to violate the tenets of their faith "virtually every minute of every work day."

In American law, rights can be derived from two sources: the Constitution and legislation. Thus, even though the Court did not guarantee the right of armed service personnel to wear yarmulkes, Congress can secure such a right statutorily, hence protecting the right to wear religious apparel even in the absence of a Constitutional guarantee. The proposed legislation described below would serve this purpose.

LEGISLATIVE UPDATE:

Senators D'Amato (R-NY) and Lautenberg (D-NJ) have offered a bill (S.2269) which would guarantee service personnel the right to wear "neat and conservative" religious apparel which is not normally a part of their regulation uniform providing it would not interfere with the performance of military duties. Representative Sisisky (D-VA) has introduced similiar

language as an Amendment to the House version of the 1987 Department of Defense Authorization Act.

Opponents of the proposed legislation point to the military's interest in maintaining uniformity of dress, and the injustice of permitting the wearing of yarmulkes, while excluding more "obtrusive" religious apparel. Neither argument should prevail. The first one renders inconsistent present policy in the armed forces. As Justice Brennan noted in his dissenting opinion, Air Force regulations already permit reasonable and unobtrusive departures from uniformity of dress, including the wearing of jewelry with religious significance. Furthermore, there is no evidence that the wearing of a neat and unobtrusive yarmulke in the military would undermine the discipline which uniformity of dress is thought to promote.

The second argument, that permitting the wearing of yarmulkes is unfair if other more obtrusive religious apparel remains prohibited, sets up an unreasonable burden of proof for anyone seeking government accommodation for religious expression. For this argument assumes that an advocate of the yarmulke-rights legislation should demonstrate that the armed forces would *never* have a legitimate interest in ~~prohibiting~~ any religious apparel, *regardless of how obtrusive*. But an advocate of yarmulke rights should have ~~no such burden.~~ It should be a sufficient argument in favor of the legislation to show only that the armed forces ought to allow *neat and unobtrusive* religious apparel. The second argument, then, is also unpersuasive.

how about Crew pornography - + fit in ?

While it is possible that the legislation will move through the Senate as a separate bill, it is more likely that it will be offered as an amendment to the Defense Authorization Act. Passage of this legislation would effectively resolve the dilemma which the Goldman decision created for Jews who wish to both follow the dictates of their faith and serve their country.

ACTION SUGGESTION:

1. Write or call your Senators and Representative expressing the seriousness of your concern, and urging them to support this legislation, whether in the form of a separate bill or as an amendment to the DOD Authorization Act.

WRITE: The Honorable _____
U.S. Senate
Washington, DC 20510

The Honorable _____
U.S. House of Representatives
Washington, DC 20515

PHONE: the Capitol switchboard at (202) 224-2131 and ask for your Senator's or Representative's office.

2. This is an issue on which the entire Jewish Community can work together. In doing so, coalitional understanding between the different branches of Judaism is strengthened. Contact the Conservative and Orthodox Congregations in your community and urge them to join you in contacting their elected officials as soon as possible.