LIBERTY

PCP IN OUR SCHOOLS!

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"Deuteronomy Versus the Bankruptcy Code"

I am a bankruptcy lawyer. Kermit Netteburg's article (January-February) on the bankruptcy court's decision to take tithe money is not surprising to bankruptcy lawyers and clearly states the law. Churches have no superiority over creditors when it comes to receiving money from bankrupts.

In my opinion, a bankrupt can deduct tithe by carefully documenting the services the bankrupt and his family receives from the church. Financial problems are frequently associated with family strife and the bankrupt receives the benefit of family counseling, as well as financial counseling. When a bankrupt is forced to admit personal failure before his financial associates and the members of his church, pastoral counseling is invaluable in assisting the bankrupt and his family in making the right choices when liquidating their business.

Our critics frequently point to tithing as an indication of the hypocrisy and meaninglessness of biblical scripture. Christian ministers support liberal interpretations, modern interpretations, or do their own interpretations, but then quickly point to "the Word of God" when it comes to tithing. Nonbelievers view Christians as using the cross to shield their wallets. My examination of this case indicates there was no attempt by church to demonstrate humility, or seek reconciliation with any alleged creditors or the trustee. Nor was there any attempt to demonstrate a truer humility or willingness to sacrifice by offering to return the money rather than having their church or the name of Christ held up to public ridicule by aggrieved creditors who were told to lose their money, because the church somehow acquired a superior right in Christ's name over the debtor's money. Do you think Christ or the apostles would take money from a family who did not pay their debts and allowed the creditors to suffer, so they could proclaim good works in the name of the Christian church?

SCOTT L. MITZNER
Attorney
Westmont, Illinois

While I applaud the commitment of the Youngs to their church I believe that they and the Seventh-day Adventist Church (among others), were in error on two counts when they participated in filing a friend-of-the-court brief.

First, Deuteronomy 14:22 states that tithe is on the *increase.* When someone is in bankruptcy there clearly is no increase. These tithes should more properly be labeled offerings.

Second, I believe it is tantamount to robbery when tithe is paid and creditors are ignored. Bankruptcy implies that commitments were made that the Youngs were not able to fulfill. Making offerings to the church does not forgive or lessen a previously made obligation.

Bankruptcy is a painful experience for anyone who has to go through it. I am pleased that the Youngs have a strong spiritual foundation to enable them to survive this ordeal. Considering creditors as people who also have families and bills to pay is no less a Christian virtue than paying tithe.

DAVID G. SMALL, Jr.
Sparks, Nevada

"Endangered Freedoms"

As a Hungarian immigrant who has resided in the U.S. since 1956, I find this article by former *Liberty* editor Roland R. Hegstad (January-February) inappropriate and misleading.

Mr. Szilvasi, a Seventh-day Adventist, represents an extremely tiny minority in Hungary where there are approximately 50 religious denominations. That fact in itself negates the charge of a "threat to free churches."

As for Mr. Hegstad's reference to international covenants, the principle of sovereignty overrides those

COVER ILLUSTRATION BY TED RAMSEY

whenever national interests are concerned. In that respect the United States has broken numerous international covenants, in manipulating policies and politics in Central America and the Middle East.

And, you should be advised that Cardinal Mindszenty did not escape to take part in the revolution of 1956; he was liberated by the people. He may be considered by some as a libertarian, but he was most certainly a coward, abandoning his office and the believers at the time of greatest need. A unique accomplishment never encountered before in the 1,000-year-old history of the Catholic Church in Hungary.

Considering the sad state of morality, ethics, and social conditions in America, you should concentrate first on putting your own house in order before pointing fingers at other nations. No Hungarian organization meddles with the affairs of the United States in any way; minding our own business should be a primary consideration.
LOUIS J. MIHALYI, Ph.D.
Professor Emeritus
California University System
Newland, North Carolina

Liberty Prevails

Truth is amazing! It warms and enlightens some, while others find it repugnant and revolting. It frees some from very hazardous results and brings joy, while only frustrating and angering those with another agenda. Keep chipping away at truth. For some, when they face absolute truth before God, *Liberty* will not give them the opportunity to say, "I was not aware of this point of view."

Liberty confronts political agendas in religious disguise. It meets the hard right with its own medicine, adverse confrontation mixed with cynicism, which leaves a lot of room for improvement on both sides. May God bless you. Truth is never easy.
ALAN WILLIAMS
Lake Charles, Louisiana

[Amen. Say it again, Alan!—Ed.]

"Prejudice in the Press"

Roland Hegstad's third of a century as editor of *Liberty* has meant many important contributions to the cause of religious freedom. He will be missed, and he leaves a large pair of shoes for his successor to fill.

I must take issue, however, with Marvin Olasky's thesis (January-February) that the media have an anti-Christian bias. It is true that journalists are sometimes insensitive and/or inadequately informed, but on balance they are not hostile to religion. My own observation, after many years as a religious journalist, is that conservative Christian viewpoints are more common than any others in syndicated columns and almost totally dominate the religious electronic media.

When Pat Robertson or Jerry Falwell is criticized, it is generally not for their religious views but for their political agenda.

What I sense as somewhat lacking in the media is a degree of support for religious freedom and church-state separation equal to their support for press freedom.
EDD DOERR, Executive Director
Americans for Religious Liberty
Silver Spring, Maryland

"Media and Religion"

Don Clark's article (January-February) gives us an important inside look at the extent of anti-Judeo-Christian bias among those who control the news media. These leaders applauded Ted Turner's call in a Kansas City speech to repudiate the Ten Commandments as a moral code and to substitute Turner's own personal guidelines. CNN may be depended on to insidiously attack or belittle Judeo-Christian beliefs.

Good journalists like Don Clark may well revive ethical treatment of and respect for religious beliefs.
LARRY W. WOLF, Attorney
Hanover, Pennsylvania

DECLARATION OF PRINCIPLES

The God-given right of religious liberty is best exercised when church and state are separate.

Government is God's agency to protect individual rights and to conduct civil affairs; in exercising these responsibilities, officials are entitled to respect and cooperation.

Religious liberty entails freedom of conscience: to worship or not to worship; to profess, practice and promulgate religious beliefs or to change them. In exercising these rights, however, one must respect the equivalent rights of all others.

Attempts to unite church and state are opposed to the interests of each, subversive of human rights and potentially persecuting in character; to oppose union, lawfully and honorably, is not only the citizen's duty but the essence of the Golden Rule–to treat others as one wishes to be treated.

POP PORN: Could anything good come out of the Los Angeles earthquake? Yes. It pummelled the hub of America's $3 billion X-rated video industry. The three communities of Chatsworth, Northridge, and Canoga Park—which surrounded the quake's epicenter—contained nearly 70 companies that churned out more than 95 percent of the roughly 1,400 sexually explicit videos made every year in the United States. Every one of the slut makers—without exception—suffered major damage. What's the matter? Doesn't God believe in "free speech"?

WHEN ALL ELSE FAILS, LEGISLATE PRAYER: With violence in the District of Columbia schools worsening, Councilman Marion Barry introduced a bill that would allow "non-sectarian" prayers to be said over the intercom, at assemblies, and at graduation ceremonies. "With all this violence," the former mayor said, "we need to allow those who want to pray to do it." He never mentioned, of course, that nothing stops students from praying now. Also, no evidence exists that legislated prayer in school will decrease violence, except perhaps heads bowed in prayer might avoid a few bullets.

MOONDAY, MOONDAY, CAN'T TRUST THAT DAY: *Religious News Service* reports that an attempt in the House of Representatives to make each July 28 Parents Day came from the influence of the Unification Church, whose adherents believe that Reverent Sun Myung Moon and his wife Hak Ja Han are the divine parents of mankind. "This is not about honoring my mother or your parents in general," warned sociology professor Anson Shupe and Moonie-watcher. "It's about honoring Mr. and Mrs. Moon as the true parents of mankind." Though the Unification Church hasn't openly tied itself to the resolution, the Washington *Times* (which Moon owns) reported that Representative Dan Burton (R-Ind.) introduced the idea of Parents Day to mark the occasion of a Capitol Hill reception given in honor of Hak Ja Han Moon. Gary Jarmin of Christian Voice, a right-wing lobby with ties to the Unification Church, claims that his organization thought of the concept, but he acknowledges a "semantic overlap" between Parents Day and belief in the divine parenthood of the Moons.

ABRAHAM'S "ALL FAITH WELCOME WITHOUT PREFERENCE" DELI: In an attempt to have a yellow pages that "in no way, shape, or form could be conceived as discriminatory" or which conflicts with federal guidelines—US West Direct has decided to cleanse religious symbols from its yellow pages ads. As a result, St. Benedict's Center, a Catholic nursing home, had to remove a logo that contained a cross. The nursing home was told too that it could use the name "Benedict" only once. The Good Shepherd Lutheran Home also had to remove its cross logo. We recommend that US West Direct executives "let their fingers do the walking across the yellow pages" of another document. It's called the U.S. Constitution! (After a barrage of protests, US West Direct backed down.)

GOD'S OWN PARTY: In an age of "stealth candidates"—conservatives who run for local offices without revealing their true position until elected—at least the Riverside, California, Republican Party office isn't hiding its views. The preface to the Party's recently passed resolution quotes the Founding Fathers on the importance of religion for good government, and it states the Party's commitment to "Traditional Family Values and High Moral Standards." Fine. But then the resolution itself reads that "we will be committed and dedicated to the ethical teaching of Jesus Christ, the Master of all teachers." Committee chairwoman Kathy Walker said she hopes non-Christian Republicans won't be "alienated by the resolution." Whatever could have given her that idea?

ILLUSTRATION BY RAY DRIVER

LET DONNA SHALALA GO FIRST: In a massive publicity campaign against AIDS, the administration is producing various "safe-sex" advertisements for radio and television. Rock stars and other role models such as Anthony Kiedis of Red Hot Chili Peppers (convicted of sexual assault and indecent exposure) espouse the wonders of the condom to protect copulaters from HIV and other sexually transmitted diseases. One animated ad has a packaged condom jump out of a dresser drawer and into bed with a couple, saving them from sexual suicide. Though sex with condoms is safer than sex without them, probably not one of those pushing "safe sex" would be willing to engage in it with an HIV-positive partner. Why not? You have, after all, a thin rubber sheath between you and HIV. What possibly could be safer than that?

CONCORDAT: During the long, dark days of Communist rule in Poland, the Catholic Church remained a powerful force for religious values. Now, however, with the Communists out of power and the church firmly entrenched in this overwhelmingly Catholic land, many fear the Vatican's rising influence. *News Network International* reports that a proposed agreement, called the Concordat, between the Vatican and Poland will give the church even more political power, particularly in public education, where it already exerts considerable control. Protestants, only 3 percent of the population, are concerned that among other things, decisions about textbooks, curriculum, and faculty will all be left to the church. According to church-state expert Jerzy Wislocki, the Concordat would "eliminate the idea of the division of church and state." Cardinal Jozef Glemp, primate of Poland, has said that those opposed to the agreement are guided solely by their own interests, and that the church has a duty to speak out on political matters of morality, justice, and truth.

TV BLACK AND BLUES: With kids being saturated by a violent act every 47 seconds during Saturday morning cartoons, and with prime-time network and cable viewers seeing 10 violent acts per hour, we're a long way from the days of *Ozzie and Harriet, Father Knows Best,* and *Leave It to Beaver.* With no good results, either. One hundred and eighty-eight studies, involving 244,000 participants, reveal that a substantial number of viewers will become more aggressive, even violent, after watching violence on the tube. Children are affected more than adults, and boys more than girls. Nevertheless, the networks are still fighting any attempts at "censorship." It was only after 10 bills in Congress threatened restrictions that the networks finally agreed to some type of monitoring, though most networks still continue to question whether TV violence begets real-world violence. Sort of like Joe Camel questioning whether smoking cigarettes causes lung cancer.

DUPED BY THE LIGHT: In one of the most popular near-death-experience books in years, Betty J. Eadie's *Embraced by the Light* has spent five weeks in the top slot on the *New York Times* best-seller list. In her book, Eadie describes what happened when she "died" during a hysterectomy almost 20 years ago. Though she professes faith in Jesus as "the Creator and Savior of the world" and says that "of all knowledge, however, there is none more essential than knowing Jesus Christ," *Embraced by the Light* overflows with unChristian thought. First, Jesus taught that death was a "sleep" (Matthew 9:24; John 11:11, 13; Luke 8:52; Mark 5:39), not an immediate departure into another existence. Eadie claims that "all people as spirits in the pre-mortal world took part in the creation of the earth," and that "we assisted God in the development of plants and animal life that would be here." Also, when she writes about a "pre-earth life" and spiritual entities that have "been with me for eternities," whatever Eadie is espousing, it's not biblical teaching. Actually, according to *Christianity Today*, it's "mainline Mormon doctrine" and Mrs. Eadie is a Latter-Day Saint, something that *Embraced by the Light* fails to mention.

THE EDUCATION OF

Senior Patrick J. Mooney was fired as a resident assistant (RA) at Carnegie Mellon University in Pittsburgh after he refused to wear a button signifying solidarity with gay rights.

The university asserts that Mooney's lack of sensitivity rendered him inappropriate for the job. Mooney claims the university fired him because of his religious beliefs and is suing in federal court.

Who's right?

Ultimately, the courts will decide. But whatever the outcome, Patrick Mooney's firing exemplifies the conflict between those with traditional religious and moral values and an establishment determined to gain acceptance for homosexuality

Joseph E. Broadus is a constitutional law professor at George Mason University in Arlington, Virginia.

PATRICK J. MOONEY

BY JOSEPH E. BROADUS

Patrick Mooney, 22, came from Frederick, Maryland, where he attended Catholic and public schools. With a brother at Stanford and a sister at Dartmouth, Mooney's family valued achievement and excellence. Mooney selected Carnegie Mellon University (CMU) in Pittsburgh for his undergraduate study with the mixture of enthusiasm and coolness that's typical of bright graduating high school seniors. Mooney, however, wished that a college guide could have prepped him for what was coming.

"On the first day," he said, "they gave me a condom. A little while later the campus paper ran a picture declaring the pope was pro-choice."

Mooney began working as a resident assistant, an undergraduate dorm resident paid by the university to counsel other students on academic and personal matters. In McGill Hall he advised 45 students during the spring term of 1991 and was scheduled for summer training in preparation for a transfer to Carol Hall, where he would advise upperclassmen. At six feet and 205 pounds, the half-Irish, half-Cuban former football player was rarely mistaken for a freshman.

In August he reported for a training session entitled "Gay and Lesbian Issues" and was ordered to wear a button with either a pink or black triangle signifying support for homosexuals and lesbians. Roslyn Hall, a session leader passing out the buttons, told the RAs, "You have no choice. You have to do this." When Mooney refused, claiming the button's expressions were counter to his faith, he was fired three days later.

Besides the conventional Joe College good looks, Mooney had the determination and character of a lineman. "I'm morally and ethically opposed to such things as the legalization of sodomy, the changing of the age of consent so that young boys can have sex with adults, and a host of other items on the homosexual rights agenda."

CMU dean of students Michael C. Murphy denied that the university would ever force anyone to "wear any declaration" that they did not want. In a letter to Mooney, Murphy said that he had surveyed other student and professional employees of the housing office and none felt discrimination was involved.

Exactly how other undergraduate students could be expected to resolve a technical legal issue—such as whether the demand to wear the button was discrimination—Murphy did not explain. Nor did he explain how much candor could be expected from kids who had seen their coworker summarily dismissed for raising questions on this point.

Murphy said that the students were assured confidentiality, but these students may have remembered that Mooney was also told in the training session that he could decline any activity that made him uncomfortable.

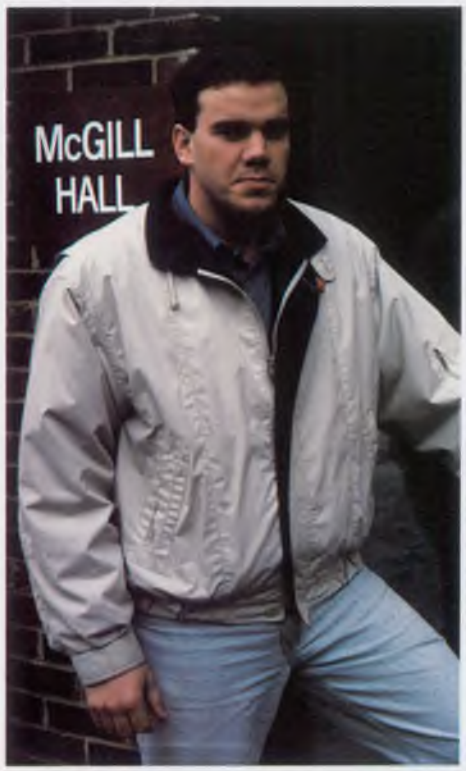
As for the assurance of the professional employees, were they not the very people who had drafted and enforced the policy in the first place? How likely were the policy's architects to denounce it as bigoted?

CMU admits that Mooney's firing grew out of his refusal to wear the button, but the university denies the intent was religious discrimination. Instead, university officials claim that Mooney's response to the "request" to wear the button was an overemotional outburst that included "cursing" and showed an intolerance inappropriate for a dorm adviser.

In public, however, Murphy downplayed the vulgarity claim, stressing instead that Mooney's attitude lacked a respect for diversity. Murphy questioned whether Mooney could appropriately provide counseling for homosexual dorm residents. In a letter dismissing Mooney, Amy

M. Ginter, the assistant director of housing for residence life, described Mooney's behavior as both "adamant and inappropriate." She said that he gave an expression of intolerance incompatible with the job.

Later Ginter offered Mooney employment as a desk assistant in the housing office, an act probably precipitated by the expectation of a lawsuit. The university fired Mooney so hastily that it had ignored the federal employment law provision requiring the employer investigate and offer reasonable accommodation before an employee can be dismissed for refusing to perform acts incompatible with his or her faith.



Patrick J. Mooney: "I should have gone to Notre Dame."

The job offer was an attempt to prove that Mooney had quit and was not fired. This came as a surprise to Mooney, who remembers picking up a letter in the housing office that stated he was fired because he refused to wear a button "decorated by triangles designating different groups which were oppressed in concentration camps." Prior to the letter there had been no attempt to accommodate.

The university conceded that Mooney's on-the-job performance was "satisfactory." Oddly, in Ginter's letter firing Mooney, she cited one student's negative comment about Mooney's political and social conservatism: "He thinks nothing is serious, except he feels his ultra-conservative views are extremely important to the rest of us. He's quite obnoxious."

For Mooney, that statement is significant. He sees himself as a victim of politically correct McCarthyism, for which he provides an easy target. He is a founder of *The Phoenix*, the conservative paper on campus, and has been active on campus in pro-life activity. He is also a graduate of Martin Blackwell's Leadership Institute, which attempts to prepare young conservatives for careers in journalism and politics. Mooney has both interned and campaigned for Republicans.

As an example of McCarthyism, Mooney cites an incident in which his computer files were invaded and a letter published without his permission. He claims that the university ignored the mini-Watergate, despite the illegality of invading his computer files, because officials were happy to see a conservative embarrassed.

"One example," Mooney says, "exemplifies the school's attitude. The gays and lesbians put up a poster attacking the Catholic Church and Cardinal O'Connor. They were never made to take it down. If the poster attacked a black, Jewish, or female leader, the organization would be put on probation and their student funding would be out."

Mooney's case presents a host of factual, legal, and policy issues. Did university officials demand that Mooney wear the button? If so, did he use vulgarity in refusing? Was he fired for not wearing the button? Was his firing for refusal to wear the button based on religious discrimination? Was the offer of a desk job an appropriate accommodation?

These are small questions dwarfed by a larger one: Why would a society committed both to freedom of religion and freedom of speech exclude Pat Mooney's view of the world?

Professor Richard Duncan, a University of Nebraska law professor, warns that the culture war is most intense when advocates of sexual revolution lock horns with adherents of traditional religions. He says "religious freedom is endangered when civil rights laws or policies are converted to advance the sexual revolutionist cause against the religious."

Duncan asserts that the goal of these policies, unlike other civil rights laws, is not to remove economic or social disadvantage from homosexuals, but to "legitimize their lifestyle and practices, and to brand and stigmatize those who disagree." That's why Mooney was so quickly shot down.

This issue is particularly hot on college campuses. Homosexual rights' protesters have carried signs suggesting that Christians be fed to the lions; what's really happening, however, is that a growing number of college campuses are being fed to the politically correct bureaucrats instead. Mooney is just another victim.

In retrospect, Patrick Mooney sees the choice of CMU as a mistake.

"CMU is not safe for people of faith," he lamented. "It's politically correct to the max. I wish I had gone to Notre Dame instead."

And no doubt, facing a potentially expensive and embarrassing religious discrimination lawsuit, CMU wishes he had as well.

ARE GLASS, WOOD, AND STONE COVERED UNDER THE FIRST AMENDMENT?

ARCHITECTURE AS WORSHIP

BY NORMAN WENDTH

Worship and religious speech are protected by the Free Exercise Clause. But what about architecture? Is shape and structure religious expression? And if so, do they merit constitutional protection?

The Community of Jesus in Orleans, Massachusetts, found the answer, but only after more than two years of litigation, an attempted boycott, and instances of religious bigotry.

"We're fighting a battle," said Community of Jesus board chairman William Kanaga, "not just for ourselves, but as a matter of principle for all Americans. We're fighting for the preservation of our First Amendment rights."

In 1991 the 325-member congregation outgrew Chapel of the Holy Paraclete and decided to build a new church that would not only accommodate all its members, but would become part of their wor-

(Above) The architect's drawing of Community of Jesus' New England Gothic edifice.

Norman Wendth, Ph.D., teaches English at Atlantic Union College in Lancaster, Massachusetts.

ship. "The current building," the Community says, "neither accommodates nor expresses the church's current liturgy, worship, or identity."

When Architectural Design Incorporated designed a large building in New England Gothic, including a 65-foot ridge and a 100-foot tower, the Community of Jesus was thrilled, but the community of Orleans was appalled.

"What we've got here is a quaint seaside community," argued resident Chris Minor, "and this church would be at least 30 or 40 feet taller than anything else in town. It would overpower everything around it."

"The people of the Community of Jesus should ask themselves which proclaims the glory of God," said another critic, "an ostentatious edifice, or His own simple earth and water?"

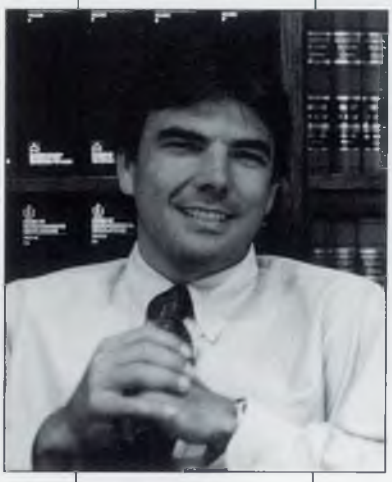
Orleans is a resort justly proud of its traditional New England character, its beautiful but fragile wetlands, quaint fishing villages, and white clapboard churches. That character includes luxurious inns and shops, because Cape Cod relies heavily on tourism. Like many other communities, therefore, Cape Cod protects the area's income, its ecosystems, and its traditional architectural flavor.

Thus, the Orleans Conservation Commission, the Old King's Highway Regional Historic District Committee, and other local groups rejected the proposed Gothic chapel. One opponent called it "visual pollution."

The commission said that it was not opposed to a new chapel that was "compatible" with "traditional Cape Cod" architecture and suggested a smaller white Colonial clapboard structure like the "meetinghouse" churches of the Quakers or the Congregationalists.

But that wasn't what the Community of Jesus envisioned. An ecumenical body (16 clergy from five mainline churches lead the worship), it wanted a church reminiscent of the time before Western Christendom broke up into squabbling denominations. Also, as followers of Benedictine tradition who keep the traditional divine offices, they also want a chapel that will support their liturgical forms, especially one with acoustics to enhance the services in Gregorian chant that they perform every three hours day and night.

According to the Community of Jesus, white clapboard churches witness to Protestant/Reformist religious values rather than the "higher"—and older—liturgical symbolism valued by the Community.



Christopher Kanaga: "Undue restrictions on the size and aesthetics of the sanctuary would violate free exercise."

The city argued it had the right to protect the environment, both ecological and aesthetic, which makes the community a desirable place to live.

Unfortunately, the debate in Orleans did not always remain civil. Schoolchildren taunted their classmates whose parents were Community members. Whispered tales of child abuse and cultic practices circulated. Letters to the editor of local papers took extreme positions, some seeming to have arisen more from suspicion of the Community of Jesus than from concern about the environment or architecture.

"It's very flattering that you folks would want to build this handsome chapel in my name," said one voice speaking for God. "I do think, however, that it is a bit too grand for little old Rock Harbor. If you really need more space for worship, why not consider a structure modeled on the elegantly simple white churches that abound in small New England towns?" The conclusion, however, is in the letter writer's own voice: "I think He would be too polite to say the proposed structure is appalling. We think it is, and urge the town to reject it."

Another wrote that "the very limited purpose of this letter is to lay bare the applicant's principal and covert motive, now camouflaged as a heroic struggle against religious bigotry. What actually underlies this application is perhaps the prettiest piece of fast buck spirituality since the Bakkers, Jim and Tammy Faye, were peddling salvation."

Some even attempted a boycott. Citizens Against Rock Harbor Environmental Destruction, C.A.R.E.D., asked everyone to "send a message to the Community of Jesus by boycotting all businesses owned and supported by the Community and all functions held by the Community to which the public is charged admission."

Most Cape Codders, fortunately, shared the opinion of The Cape Cod *Times* editorial: "The conflict is not, and should not be allowed to become, one group of private citizens against another. Any attempt to punish members of the Community for a decision the organization's directors may have made is nothing short of reprehensible. . . . More than that, such an action smacks of bigotry."

To help quell the furor, the Community of Jesus offered a compromise, with a ridge that extends only 55 feet (instead of 65) and a tower

only 75 (instead of 100). The commission refused, and the battle went to court.

Richard Laraja and Christopher Kanaga, two of the lawyers representing the Community of Jesus, cited two important earlier court decisions involving the aesthetic regulation of church architecture. A Massachusetts court had decided in *The Society of Jesus v. Boston Landmarks Commission*[1] that it was unconstitutional for a regulatory body to prevent a church from making interior renovations, in this case to a sanctuary that had been considered a historical landmark. In *First Covenant Church of Seattle v. City of Seattle*,[2] a Washington court ruled that it is unconstitutional for a landmark preservation body to subject the exterior of a house of worship to regulation.

The crucial point was that "the exterior and the interior of the structure are inextricably related." A significant emphasis in both decisions was the power of architecture to affect the performance of worship within the religious structure.

Laraja and Kanaga went even further, arguing before the Barnstable Superior Court that church architecture constitutes an expression of faith and thus is protected under the Constitution. "The building itself is an icon of the church," said Kanaga, "just as are the cross and the paintings and mosaics of Jesus on the interior walls." Kanaga wrote that "undue restrictions on the sanctuary based on size and aesthetic considerations would still run afoul of the Free Exercise Clause of the United States Constitution. Obviously, worship is intimately intertwined with the space in which it is conducted. This symbiotic relationship between theology and architecture exists not only to ensure that worship is accommodated; it also enables the religious community to assert a statement of its identity and purpose."

Andrew Miao, one of the principals in Architectural Design Incorporated, said: "The most important element in our design was to find a way to express the worship of the Community." Symbolizing the unity of the body of Christ means, for Architectural Design, using pre-Reformation elements such as a floor plan in the shape of a cross and pointed windows.

"The space should be uplifting," he explains, with a feeling of "soaring high places flooded with light."

That means a form with high windows, a tower, and most of all, volume. Volume is also important for the acoustical space needed for the chanting of the offices and for the recording of sacred choral music by Gloriae Dei Cantores, the choir that is part of the Community's fund-raising and witnessing program. Even the building materials have been part of the controversy, and Miao defended the architect's choice of stone as more than just the traditional building material for cathedrals.

Richard Laraja argued that architecture is worship. The judge disagreed.

"Stone embodies the expression of eternity," he says, "and we chose local granite from the Cape both for its weathering characteristics and to show how the eternal can be part of the local."

In superior court, however, Judge Gerald O'Neill was not convinced. In February 1993 he said that because the members were already worshiping in their old building, the new building could have no religious significance, and thus ruled against the Community. Because members already worship in the old chapel, the new proposed one isn't "mandated" by the religion, and therefore the Community suffers no religious burden by denial of the building permit. He said too that because they had considered other designs, their final choice couldn't have had religious significance.

"If you're building a house," said attorney Kanaga, "are the only plans that have significance the first ones you look at? It boggles the mind."

"We see this decision," said a Community spokesperson, "as a serious limitation to our religious freedom and freedom of expression as laid down in the First Amendment, and we plan to appeal to a higher court."

The Community did appeal—and after a year of more litigation and hundreds of thousands of dollars on both sides, the commission finally agreed to the compromise structure that the Community had originally offered more than a year earlier!

Of course, the superior court's ruling is binding only in this case. It's not the law of the land. Yet it could still exert an influence if and when the issue of architecture as free exercise ever makes it back to the courts.

Meanwhile, the Community of Jesus is still working through the regulatory process as it prepares to erect its New England Gothic edifice (compromise version), and the question of whether wood, glass, and stone are protected under the Free Exercise Clause remains unresolved.

FOOTNOTES
[1] 409 Mass. 38, 564 N.E. 2d 571 (1990).
[2] 1992 W. L. 337026 (Wash).

THE CASE OF THE SUSPECT SCHOOL DISTRICT

Is a whole school district unconstitutional?

BY MITCHELL A. TYNER

In the only case involving religion that it has agreed to hear this term, the United States Supreme Court has been asked to rule on the propriety of a school district whose very existence is alleged to be unconstitutional.

The village of Kiryas Joel, an incorporated town about 40 miles north of New York City, is inhabited almost entirely by Hasidic Jews of the Satmar sect, committed to an all-encompassing religious culture and lifestyle and generally avoiding contact with outsiders.

As with any town, the residents of Kiryas Joel include children with mental retardation, deafness, speech and learning impairments, etc.[1] The village cannot afford to meet these needs in the parent-financed religious schools, which most students attend. And every public school district is required to meet such needs by both federal and state laws requiring them to provide "free appropriate public education" to all children within its jurisdiction needing special education services.[2]

Before 1985 these needs were handled in the religious schools of Kiryas Joel by teachers from the Monroe-Woodbury school district, of which the village was a part. But that year the Supreme Court ruled that such a plan violated the antiestablishment clause of the U.S. Constitution.[3] Some village children then went to the regular public schools to receive special education, violating the group's belief in avoiding the outside world, but the children were ostracized because of their different dress and language. When village leaders then asked the school district to provide special education at a religiously neutral site within the village, the district refused.

In 1989 the New York legislature responded by establishing a new school district with boundaries the same as those of Kiryas Joel, enabling the village to use its tax base to fund a public school to offer the needed special education classes. When two state officials, acting as private citizens, filed suit against the New York Department of Education, arguing the plan violated the constitutional prohibition against establishment of religion, the state's highest court ruled the establishment of the new school district created "a symbolic union of church and state" that had the principal effect of advancing religion.[4] The United States Supreme Court heard the case on March 30.[5]

Historically, cases involving religion and public schools have always involved either the proper limit on official actions giving preference to religion (e.g., classroom prayer) or limits on religious activities of students (e.g., student-initiated religious groups). In this case no allegations of either type appear. The new school district has apparently operated as would any other public school, with no religious content to its curriculum. The non-Hasidic superintendent and most of the teachers live outside the village. Thus, it is not the school district *program* that is at issue, but the district's very *existence.*

Opponents argue that the whole plan is an effort to give special benefits to a religious group *because* of their religion. The establishment of the district, they allege, has the primary effect of advancing religion. They rely, as did the lower courts, on a three-part test of establishment clause questions used by the High Court since 1971: a challenged action must be shown to have (1) a secular purpose and (2) a primary effect that neither advances nor inhibits religion, and (3) must not lead to excessive entanglement between church and state.[6]

Several members of the Court, Justice Antonin Scalia the most vocal among them, have expressed dissatisfaction with the tripartite *Lemon* test, but have not yet been able to gain the support of a majority for another test. Many observers believe the Court accepted review of this case in order to either replace or clarify *Lemon.*

Opponents of the lower court decision argue that the establishment of the new district is not an effort to establish religion, but only to provide special education—a generally available government benefit to which the students are otherwise entitled—in a non-traumatic atmosphere. They argue that the Kiryas Joel plan is a proper governmental *accommodation* of religion: an action taking religion into account, not to promote it, but to enable its adherents to exercise their religious beliefs without hindrance.

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May government properly "take religion in account" in the making and applying of laws? If not, how can government require (as it does) that a private employer "take into account" the religious practices of its employees and to accommodate those practices, short of undue hardship?[7] If singling out religion for protection not given other activities violates the establishment clause, then is the free exercise clause itself unconstitutional?

The New York Court of Appeals rejected the establishment of the Kiryas Joel school district "because special services are already available" to those students. But to avail themselves of those services, the students would be forced to compromise religious belief and suffer ostracism and psychic trauma.

Can receipt of a generally available governmental benefit be thus conditioned on conduct that compromises religious belief? No, the Supreme Court said in 1963, when it held that Adele Sherbert could not be denied unemployment benefits even though she refused to accept a job requiring her to work on her Sabbath.[8] The state of South Carolina argued, as do the plaintiffs in *Kiryas Joel*, that the desired benefits were already available on the same basis they were available to all other citizens. Yet the court ruled that requiring Sherbert to violate her conscience in order to receive a government benefit was the equivalent of a tax on her religion. South Carolina was required to "take Sherbert's religion into account," not to promote it, but to enable her to exercise her belief without hindrance.

The New York court's decision holds that the primary effect of the establishment of the Kiryas Joel school district "is not to provide those [special education] services, but to yield to the demands of a religious community whose separatist tenets create a tension between the needs of its handicapped children and the need to adhere to certain religious practices." Was South Carolina not forced to "yield to the demands" of Adele Sherbert, whose religious conviction—Sabbathkeeping—created a tension between her need for unemployment compensation and her need to adhere to her religious practices?

Is separatism inherently suspect? Must members of a religious group give up its unique practices and at least partially conform to the dominant majority culture in order to receive generally available government benefits? A positive answer flies in the face of *Sherbert*, whose rationale was recently reestablished by passage of the Religious Freedom Restoration Act.[9]

What about the propriety of school districts in those numerous small towns across America where the vast majority of the population—and the students and teachers in the public schools—belong to one faith?

I remember one such town. It too lies about 40 miles from a major metropolitan area and is populated almost entirely by members of a single denomination, whose practices might be called separatist. The town was established by members of that group who also founded religious schools—elementary through college, which most students attend. This village also has a public elementary school, supported by a school district with boundaries basically the same as those of the town. Most students and staff are members of the same religious group that dominate the town, although, as in Kiryas Joel, no religion is taught in the public school.

The town is Keene, Texas, where I spent my first two college years. And I wonder, do some people consider that small public school in Keene an affront to the Constitution, a threat to religious freedom?

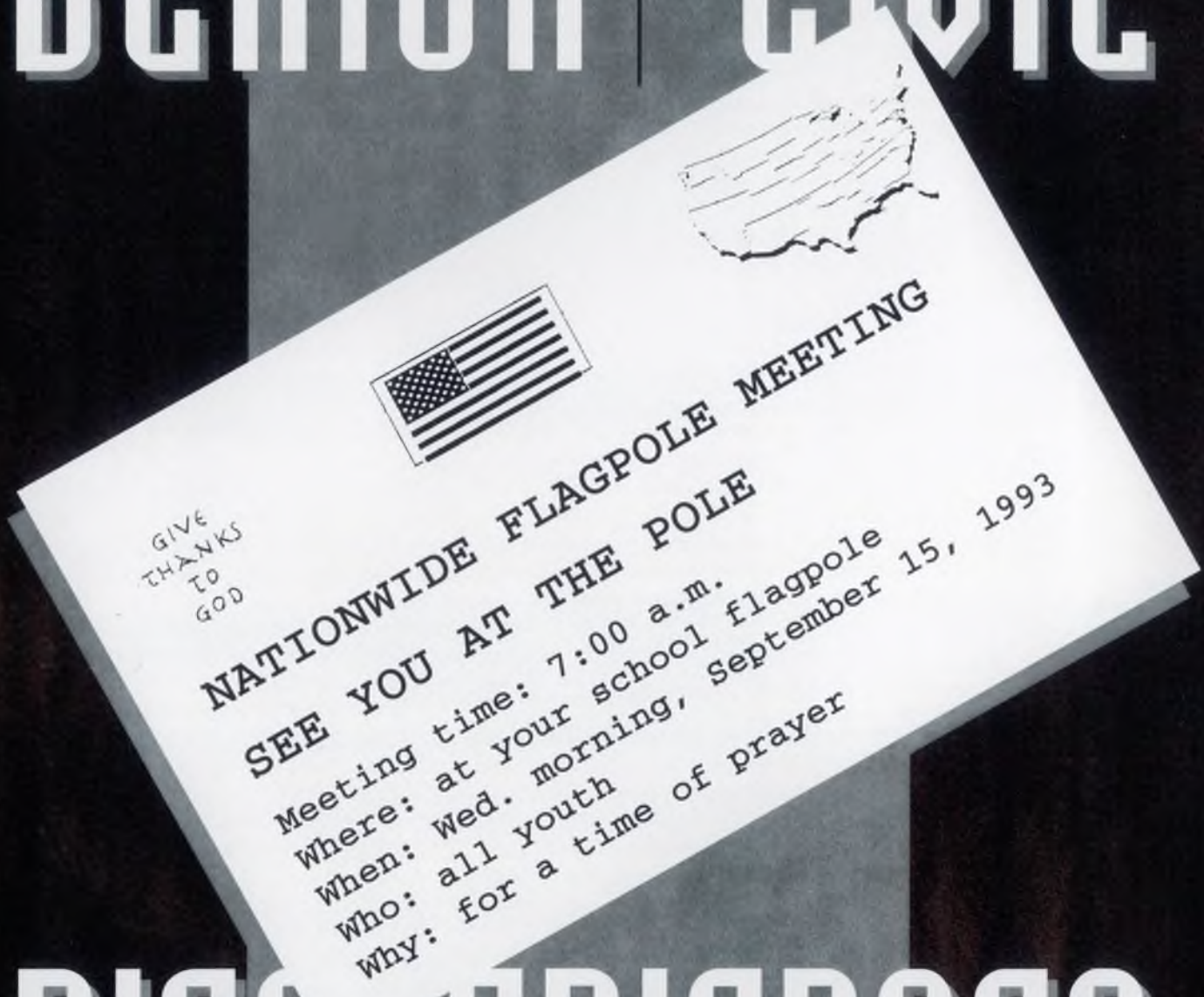
To be sure, arguments in favor of accommodating religion can be taken too far. A state might decide that the best way to deliver a tax-funded education, deemed to be the right of every student, while accommodating the parents' genuine religious belief that they must educate their children in harmony with their religious belief, is to provide tax-based funding for all religious schools. But that is not the case presented by *Kiryas Joel*.

The line between impermissible governmental establishment of religion on the one hand and permissible—and desirable—governmental accommodation of religion on the other is a fine one. It is just such a line that the Supreme Court should draw in a decision expected in July 1994.

FOOTNOTES

[1] *Board of Education v. Wieder*, 72 N.Y.2d 174, 179 (1988).
[2] 20 U.S.C. § 1400(c), § 1401(a)(18), § 1412; New York Education Law § 4401 et seq.
[3] *Aguilar v. Felton*, 473 U.S. 402 (1985). *Grand Rapids v. Ball*, 473 U.S. 373 (1985).
[4] *Grumet v. Board of Education*, 618 N.E. 2d 94 (N.Y. Ct. App. 1993); *cert. granted*, 62 U.S.L.W. 3368, 3375 (11/29/93).
[5] *Ibid.*
[6] *Lemon v. Kurtzman*, 403 U.S. 602 (1971).
[7] Title VII, Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e, et. seq.
[8] *Sherbert v. Verner*, 374 U.S. 398 (1963). *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136 (1987). *Thomas v. Review Board of the Indiana Employment Security Division, et. al.*, 450 U.S. 707 (1981). *Frazee v. Illinois Department of Employment Security, et. al.*, 489 U.S. 829 (1989).
[9] 42 U.S.C. 2000 bb.

BENIGN CIVIL DISOBEDIENCE?



BY PAMELA MAIZE HARRIS

The Silliness of the See You at the Pole Rallies

Michelle, Matthew, and Mary McCune at South Pittsburgh High School in Tennessee have declared war on the U.S. Supreme Court's "ban" on prayer in school.

These three students, along with about a million others, pick a day each September to defy openly the United States Supreme Court's ruling on school prayer.

In this act of benign civil disobedience, high school students across America have gathered for the past three years around campus flagpoles to pray for the right to pray in school.

In reality the whole thing is a farce.

First, though promoted as student-initiated, student-organized, See You at the Pole (SYATP) is an adult-organized event involving such groups as the Southern Baptist Convention, the Rutherford Institute, the American Center for Law and Justice, and the National Network of Youth Ministries.

For example, Pat Robertson's American Center for Law and Justice (ACLJ) issued a special "See You at the Pole" edition of their *Law & Justice* journal in August 1993 with an article titled "A Little Child Shall Lead Them" and a full-page advertisement urging adults to "organize students to take leadership."

The See You at the Pole in South Pittsburgh, Tennessee, was a family affair: Mrs. McCune, Matthew, and Michelle.

In April ACLJ's chief counsel Jay Alan Sekulow wrote, "Youth leaders, lawyers, and television production experts met to pray for guidance on building on the previous success of See You at the Pole. We came out of the meeting with incredible sense of unity. The Lord moved on all of us to put an action plan together to increase the impact of See You at the Pole."

A 12-page "Mobilizing Your Community for See You at the Pole" promotional booklet from the National Network of Youth Ministries provides preprinted flyers for church bulletins, a student leaders' guide, and a section entitled Helping Students Lead—Ideas to Consider.

"Despite all the rhetoric," says Joe Conn, editor of *Church and State* magazine, "it really isn't student-initiated. It is organized by outside religious groups that want to evangelize on public school campuses."

Conn's concern brings up the second concern about the rallies: that they are manipulated by adults to proselytize on school property. If so, the intent may have gone beyond student free speech—supposedly the heart of the matter of SYATP.

"This whole thing began," says Conn, "as an evangelism attempt by the youth department of the Texas Baptist convention. It shows a great deal of insensitivity, too. How would many of these evangelical parents feel if Moonies, Mormons, or Jehovah's Witnesses were proselytizing their children? I don't think they would like it."

Finally, if SYATP is supposed to be an act of benign civil disobedience, it's so benign and civil that it's hardly disobedient. Despite all the rhetoric, the Supreme Court has never banned personal prayer in public school. What the various cases have asserted is that any type of *official* prayer that involves coercion, no matter how subtle, is unconstitutional.

As Justice Kennedy wrote for the majority in *Weisman*, which dealt with school-sponsored prayer at graduation ceremonies: "The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion. . . . The state may not, consistent with the Establishment Clause, place primary and secondary students in this position."

Thus, SYATP hardly defies the Supreme Court. A group of students standing around a flagpole praying has never been ruled unconstitutional, though in a few instances school officials might have thought it so.

Actually, when Matthew, Michelle, and Mary gathered to pray for prayer in public schools, they should have remembered the Lord's promise: "Before you speak, I will hear." He must have heard their petitions before they spoke them, because their praying on school grounds proves what church-state separationists have been saying all along: that prayer has never been banned from public schools to begin with!

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PCP

What Politically Correct Prayers Really Mean

IN OUR SCHOOLS!

BY RONALD B. FLOWERS

The church-state controversy *du jour* is prayers at public school commencement ceremonies. Separatist organizations, such as the American Civil Liberties Union (ACLU), and accommodationist ones, such as Pat Robertson's American Center for Law and Justice (ACLJ), are using the issue to argue against the other side and to raise funds.

What seems to be the future of the controversy, and what could it mean for religion in America?

The centerpiece of the controversy is the Supreme Court's opinion in *Lee v. Weisman.*[1] The question of the constitutionality of prayers at commencement exercises had been raised in courts as early as 1972,[2] but *Weisman* was the Supreme Court's first opinion on the matter. *Weisman* found that commencement invocations and benedictions violated the Establishment Clause.

School officials had selected a clergyman to say the invocation and benediction and provided him with guidelines on how to make the prayers inclusive and nonoffensive, i.e., politically correct. The Court held this action to be equivalent to state-composed prayer, long ago held unconstitutional.[3] The Court ruled too that commencement prayers exerted psychological coercion on those who objected to participate or even to give symbolic assent to the prayers. State-sponsored coercion to participate in a religious exercise violates the Establishment Clause as well.

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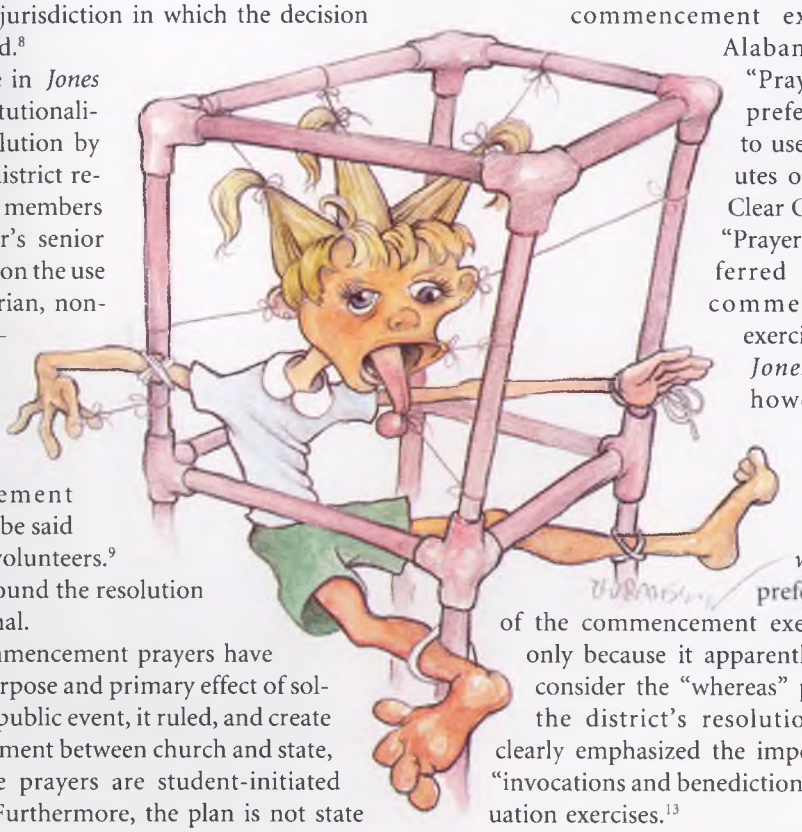
This decision did not settle the issue, but inflamed it. Some scholars found its Establishment Clause analysis wanting.[4] Conservative advocates promoted *Weisman* as an opportunity for the inclusion of a different kind of prayer in commencement exercises. The ACLJ sent a "Special Bulletin . . . Concerning Graduation Prayer at Public Schools" to all 14,658 public school superintendents in the country, noting that *Weisman* had forbidden prayers in which school officials had invited clergy and given suggestions about the content of prayers. Other ways of getting prayers into commencements would be permissible, it said. In fact, a model was available.

The Fifth Circuit Court of Appeals had decided *Jones v. Clear Creek Independent School District.*[5] That court had answered all the objections raised in *Weisman* and approved student-initiated and student-led prayers. The *Jones* court had reached this decision in part by relying on a phrase

from an earlier Supreme Court case: "There is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[6]

In a later news release the ACLJ exulted that the Supreme Court refused to hear *Jones v. Clear Creek*,[7] giving the impression that this action cleared the way for schools to allow students to vote on whether they shall have prayer at commencement. Of course, when the Supreme Court refuses to hear a case, that action is *not* an approval or endorsement of the decision of the lower court. It also means that the case is law only in the jurisdiction in which the decision was rendered.[8]

The issue in *Jones* is the constitutionality of a resolution by the school district requiring the members of each year's senior class to vote on the use of nonsectarian, nonproselytizing invocations and benedictions at commencement exercises to be said by student volunteers.[9] The court found the resolution constitutional.



The commencement prayers have a secular purpose and primary effect of solemnizing a public event, it ruled, and create no entanglement between church and state, because the prayers are student-initiated and -led. Furthermore, the plan is not state endorsement of religion, because the resolution permits invocations "free of all religious content."[10] If the prayer does have religious content, graduating students will know it is because of the vote of classmates and the choice of the student giving the prayer, rather than school officials. Finally, the plan is not coercive, because it does not direct the nature of the commencement, does not necessarily result in religious observances, and requires that the invocations and benedictions be led by students, rather than school or clergy authority figures. Also, high school seniors "are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis."[11]

The court, however, did not examine Clear Creek's resolution in the light of *Wallace v. Jaffree*.[12] In that case, a law mandated a minute of silence in all public schools in Alabama "for meditation." Later, the legislature modified the purpose of the minute of silence to be "for meditation or voluntary prayer." The Supreme Court held the modified version of the law to be unconstitutional because it conveyed the message that prayer was the preferred way to use the moment of silence.

The Clear Creek resolution is similar. Alabama said: "You *will* have a moment of silence." Clear Creek said: "You *will* vote on the nature of commencement exercises." Alabama said: "Prayer is the preferred way to use the minutes of silence." Clear Creek said: "Prayer is a preferred part of commencement exercises." The *Jones* court, however, explicitly held that prayer *was not* a preferred part of the commencement exercise, but only because it apparently did not consider the "whereas" portion of the district's resolution, which clearly emphasized the importance of "invocations and benedictions" at graduation exercises.[13]

The resolution, in fact, does not address any other facet of commencement exercises. The total effect of the resolution of raising up invocations and benedictions for student vote is much greater than Alabama's inclusion of the words "or voluntary prayer," which the *Jaffree* court found as an unconstitutional state endorsement of religion. The "power of suggestion" is a larger part of the Clear Creek School District's resolution than it was in Alabama's law.

The *Jones* court says too that the invocations and benedictions may be free of religious content. That may be true in the broadest interpretation of those words. But the common sense

ILLUSTRATION BY TED RAMSEY

and dictionary definitions of "invocation" and "benediction" imply religious content, i.e. prayer, and that would be the understanding of a reasonable person.[14] It is arguable that the Clear Creek resolution is unconstitutional under the rationale of *Jaffree.*

The resolution also mandates that invocations and benedictions shall be "nonsectarian and nonproselytizing."[15] Who decides if the invocations meet that standard? The student volunteer who has a place on the program? A formal student committee planning the exercises? A bunch of guys at the malt shop?

No, because in each case the students might not be able to determine if they have conformed to the school board's requirement. Finally, a school official has to decide. The resolution itself says that "the use of an invocation and/or benediction" shall be "with the advice and counsel of the senior class principal." A school principal becomes an arbiter of theology—an excessive entanglement between government and religion.

On the entanglement question, the *Jones* court said: "We know of no authority that holds yearly review of unsolicited material for sectarianism and proselytization to constitute excessive entanglement."[16] The court here is wrong on three points. First, that the material is "unsolicited" is questionable, given the existence of the resolution and the rationale of *Jaffree.* Second, that the principal's determination of sectarian theology or potential for proselytization is only "yearly" is irrelevant to a constitutional question. Third, the *Jones* court said that it knew of no authority that would prohibit a school official from checking on the sectarian nature of invocations and benedictions. The court needed to have gone no further than *Weisman* to see that this authority existed. "Principal Lee provided Rabbi Gutterman with a copy of 'Guidelines for Civic Occasions,'" the Supreme Court wrote in *Weisman,* "and advised him that his prayers should be nonsectarian. Through these means the principal controlled and directed the content of the prayer."[17] *Weisman* did not use entanglement analysis to arrive at its decision, but it could have.

Consequently, *Jones v. Clear Creek School District,* although passed over for review by the Supreme Court and currently the darling of the Religious Right, is arguably unconstitutional.

A similar case was recently decided by the U.S. district court in Idaho, *Harris v. Joint School District No. 241.*[18] It took *Weisman* into account, but also found in favor of commencement prayers. *Harris v. Joint School District No. 241* is different from *Jones* in that no school board resolution existed. In this school district there was a longstanding policy of allowing students to plan their commencement exercises. For many years students had elected to include prayers. The federal district court in Idaho found that practice constitutional. The lack of school supervision over the formulation of the ceremonies distinguished the case from *Weisman.*[19] It would not be possible to attack this school district's practice on the basis of *Jaffree*'s reasoning, because there was no official endorsement, yet the case does leave some questions unanswered. Here, as in *Jones,* school officials have some supervisory authority over

FOOTNOTES

[1] 112 S. Ct. 2649 (1992).

[2] Thomas A. Schweitzer, "*Lee v. Weisman* and the Establishment Clause: Are Invocations and Benedictions at Public School Graduations Constitutionally Unspeakable?" *University of Detroit Mercy Law Review* 69, No. 113 (Winter 1992): 123, 124.

[3] *Engel v. Vitale,* 370 U.S. 421 (1962).

[4] For example, Schweitzer; Christian M. Keiner, "A Critical Analysis of Continuing Establishment Clause Flux as Illustrated by *Lee v. Weisman,*" 112 S. Ct. 2649 (1992) and "Graduation Prayer Case Law: Can Mutual Tolerance Reconcile Dynamic Principles of Religious Diversity and Human Commonality?" *Pacific Law Journal* 24 (1993): 401-460.

[5] 977 F.2d 963 (1992).

[6] *Jones v. Clear Creek School District,* 977 F.2d 963 at 969, quoting *Board of Education v. Mergens,* 496 U.S. 226 at 250 (1990) (emphasis in original). The ACLJ quoted this sentence in its "Special Bulletin" to school superintendents.

[7] *Jones v. Clear Creek School District,* 977 F.2d 963, certiorari denied 113 S. Ct. 2950 (1993).

[8] In the case of *Jones,* the fifth circuit, Texas, Louisiana, Mississippi, and the Canal Zone.

[9] The specific wording of the resolution is:

"Whereas, invocations and benedictions have been a ceremonial tradition at graduation exercises in the district since its inception, and at public school commencements, generally, since the beginning of public schools in this country; and

"Whereas, invocations and benedictions at graduation exercises serve to solemnize the occasion, expressing confidence in the future, and encouraging recognition of what is worthy in our society; and

"Whereas, a controversy now exists regarding the use of invocations and benedictions at high school graduation ceremonies and the practice of this district in connection therewith; and

"Whereas, to the extent there may be any misunderstanding, it is in the best interest of the students, their parents, and the district for this board to make the practice of the district clearly and expressly known;

"Now, therefore, be it resolved by the board of trustees of Clear Creek Independent School District that:

"(1) the use of an invocation and/or benediction at high school graduation exercises shall rest within the discretion of the graduating senior class, with the advice and counsel of the senior class principal;

"(2) the invocation and benediction, if used, shall be given by a student volunteer; and,

"(3) consistent with the principle of equal liberty of conscience, the invocation and benediction shall be nonsectarian and nonproselytizing in nature," (Myra C. Schexnayder, "Religion in the Schools: A Survey of Recent Decisions and Cases Pending Before the Supreme Court During the 1992-93 Term," Eighth Annual School Law Conference, University of Texas School of Law, Mar. 4, 5, 1993), pp. 19, 20.

[10] *Jones v. Clear Creek School District,* 977 F.2d 963 at 969.

[11] *Board of Education v. Mergens,* 496 U.S. 226 at 250.

the conduct of the commencement, as they must. What role those school officials play is not discussed, nor is the question of the sectarian or nonsectarian nature of the prayers. These questions are important in a religiously pluralistic society and in deciding on the constitutionality of the practice involved. Furthermore, a commencement is still a public school event, even if the decision to have prayer is the result of a student vote, and poses the same "psychological coercion" to objecting students mentioned in *Weisman.* But this case ignores the problem and argues that *truly* student-initiated and student-led prayers[20] may well carry the day.

What is the future of this controversy? In the short term, more litigation will arise. Strict separationists will continue to try to remove what they see as state promotion of religion in commencement exercises; accommodationists will continue to try to put as much religion as possible in the public schools. The Supreme Court will probably revisit this issue, particularly because of the contrary opinions in lower courts on the topic.[21]

Two principles must be remembered in this controversy. One, it is not permissible for people to utilize the state to promote their free exercise of religion.[22] Second, as indispensable as majority rule is to our democratic system, constitutionally guaranteed freedoms—such as freedom from an establishment of religion—are fundamental and not subject to majority vote.[23]

Finally, these cases have troubling theological dimensions far beyond their legal ramifications. In the cases that have found commencement prayers constitutional, what is left? Nonsectarian, nonproselytizing prayers, invocations and benedictions without religious content, utterances in which the name of God or any deity may not be mentioned. In short, politically correct prayers.

The cases posit invocations that only solemnize the event. If these practices are constitutional, what price will have been paid? The attempt to get religion into state-run or state-sponsored arenas is a threat to religion. The more the state does the work of the church, the more irrelevant the church will seem to its members and to society. Religious leaders do no service to the church when they try to get the state to promote religion. The church will increasingly lose its importance as an institution for the instruction and uplifting of Americans.

Another dimension of the price paid is the evisceration of religion, the trivialization of theology—from the perspective of any theological tradition. Religion reduced to the point that it is acceptable to the Establishment Clause is essentially watered-down, contentless pabulum. It lacks the majesty, dignity, profundity, and importance of a vital religious tradition. As one judge said of commencement prayers that were to "solemnize" the occasion: "To many, this relegation of prayer to a meaningless ritual will seem a shabby purpose indeed, quite incompatible with communion with a Supreme Being."[24] Exactly. This damage to vital religion will be a result of this ongoing controversy.

But no matter, separationist and accommodationist advocacy groups will continue to battle it out.

Nothing raises money like an enemy.

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[12] 472 U.S. 38 (1985).

[13] See footnote 9. The "whereas" portion of the resolution is not quoted in either the text or the footnotes of *Jones.*

[14] A standard that *Jones* itself applies at 977 F.2d 963 at 968.

[15] Does not the inclusion of this clause in the resolution presuppose the assumption that invocations and benedictions are essentially religious?

[16] 977 F.2d 963 at 967.

[17] 112 S. Ct. 2649 at 2656.

[18] 821 F. Supp. 638 (1993).

[19] Does this mean that a school that has been allowing students to vote on prayers at commencement for a long time can continue, but a school that does not have such a tradition can never begin? Not necessarily. Under the *Harris* reasoning, if students come to school administrators on their own, without any prompting (such as school board resolutions), it seems that would be sufficient.

[20] Although the *Harris* school district allowed the students to invite clergy to deliver the invocations.

[21] Commencement prayers have been found unconstitutional in seven cases and constitutional in nine cases. Cf. Keiner, pp. 423, 424. I have added *Harris* to the statistics Keiner provides.

[22] "While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to *anyone,* it has never meant that a majority could use the machinery of the State to practice its beliefs" (*Abington Township School District v. Schempp,* 374 U.S. 203 at 226 [1963]).

[23] The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections (*West Virginia Board of Education v. Barnette,* 319 U.S. 624 at 638 [1943]).

Apropos to commencement prayers: It may well be that the majority of graduating seniors and the majority of the population in the defendant school district would like to have an invocation and benediction as part of the commencement exercises. However, the enforcement of constitutional rights is not subject to the pleasure of the majority. It would be the antithesis of the concept of constitutional law to apply the protection of the Constitution, which is the fundamental law of our land, in any given situation only if the majority at the relevant time and place approved. The Constitution protects all of us, including those who are in the minority. Indeed, First Amendment rights . . . would be meaningless if they were not available to minorities, the unpopular, and those courageous enough to speak out against the prevailing views of the majority and those entrusted with governmental power (*Graham v. Central Community School District,* 608 F. Supp. 531 at 537 [1985]).

[24] *Wiest v. Mount Lebanon School District,* 320 A.2d 362 at 369 (1974).

The School Wars Continue

During the initial weeks of this academic year, parents condemned "Impressions" readers for promoting satanism, Outcomes Based Education for invading family privacy, and the "Pumsy" self-esteem curriculum for injecting Eastern religion into the classroom.

GOOFINESS OR GODLINESS?

The protesters are commonly fundamentalist Christians whose objections to aspects of public school curricula often strike outsiders as ludicrous, hyperbolic, or paranoid. Yet whether one views these parents as godly or goofy, their protests deal with complex and vital issues about public education and the rights of parents to raise their children according to the dictates of their conscience.

BY STEPHEN BATES

GODLINESS

Mozert v. Hawkins County Public Schools, known as Scopes II, exemplified the continuing struggle between some conservative Christians and the public school system. In 1983 fundamentalist parents in Hawkins County, Tennessee, detected sacrilege in the county's new reading textbooks. After first trying to ban the books, they filed suit, claiming that the First Amendment's Free Exercise Clause entitled them to alternative textbooks.

At trial in 1986 the plaintiffs elaborated their objections to the readers. They opposed, along with other material, a story adapted from *The Wizard of Oz,* because it portrays good witches, and an excerpt of a play based on *The Diary of Anne Frank,* because it asserts that all faiths are equally valid. From those objections, most people concluded that the plaintiffs were balmy. The *Oz* point seemed preposterous; the Anne Frank one, anti-Semitic.

Judge Thomas G. Hull gave the plaintiffs a partial victory: they couldn't have alternative books, but they could remove their children from class and teach them reading at home. Since the First Amendment protects the freedom to hold even outlandish religious beliefs, Judge Hull tried to set aside his personal assessment of the plaintiffs' objections. Privately, Hull's clerk remembers, "We thought they were just as goofy as everybody else did."

The press, fixating on this goofiness, depicted the judge's ruling as lunacy. The Atlanta *Constitution* said that Hull's reliance on the sincerity of the plaintiffs was "peculiar"; instead, he should have considered whether their beliefs were "reasonable." The Memphis *Commercial Appeal* termed the judge's analysis "strained, even weird." "The worst judicial decision in a very long time in a country rich in lousy judicial decisions," declared George F. Will. *Washington Post* columnist Richard Cohen accused Judge Hull of sanctioning "child abuse."

In 1987 the Sixth Circuit Court of Appeals reversed the Hull ruling, on the ground that "mere exposure" to offensive ideas cannot violate the First Amendment—and the press breathed a sigh of relief. "No other ruling makes sense in a pluralistic society," pronounced the *New York Times.* The Philadelphia *Inquirer* termed it "good news for the republic."

But was it? The plaintiffs' extremism—especially the *Oz* and Anne Frank complaints—smothered everything else in the case. Despite their apparent goofiness, though, the plaintiffs held comprehensive and in some cases valid concerns. The Tennessee protesters contended that the Holt readers were not merely augmenting the child's knowledge, but were also mucking about with values and attitudes. Conservative Christians have frequently voiced similar complaints. "It's unfortunate that a second-grade book would teach children that their mommas would lie to them," protester Jennie Wilson said of one story. Moral Majority cofounder Greg Dixon has accused the schools of undertaking "subtle yet intense brainwashing." Tim LaHaye, a prolific Religious Right author, has called public education "the most dangerous single force in a child's life."

School officials often disclaim any interest in children's values. "We teach reading for reading's sake," said Hawkins County school board member Larry Elkins. "The actual material that you're reading is not supposed to form your opinion of life." Yet public schools have *always* tried to shape character. Horace Mann considered moral education "the highest and noblest office of education." Efforts to teach morality intensified early in the twentieth century, spurred by fears of new immigrants. By midcentury virtually every public school in the country was teaching moral values, prompting Jacques Barzun to remark that educators seemed to assume that each pupil possessed "the supremely gifted mind, which must not be tam-

Stephen Bates, a senior fellow at the Annenberg Washington Program, is the author of a book about the Tennessee textbook case, *Battleground: One Mother's Crusade, the Religious Right, and the Struggle for Control of Our Classrooms.*

pered with, and the defective personality, which the school must remodel."

Today, tolerance is the value that most keenly concerns educators. Schoolbooks prominently feature minorities, women, the aged, the handicapped, single-parent families, and other formerly excluded groups. As documents subpoenaed in *Mozert* demonstrate, the diversity didn't arise spontaneously. One Holt editor observed in a memo that a particular story was "not great literature" but "we gain two points—a female leading character and characters with Spanish-American names." "We simply could not find a good story with an Asian-American female lead," another editor lamented.

Efforts to promote tolerance go beyond textbook diversity. In a widely used classroom exercise, the teacher declares that blue-eyed students are superior to brown-eyed ones for the day; the next day, brown eyes will be superior. The experience unsettles some participants, but, educators Deborah A. Byrnes and Gary Kiger have written that, "the possible long-range benefit" justifies students' "short-term emotional discomfort."

So the fundamentalists are partly right. It's hardly brainwashing, but the schools are trying, as they always have tried, to modify students' values.

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A fundamentalist might argue, though, that the morality promoted in the classroom isn't what it used to be. "I trusted our educational system that I had been brought up in," Tennessee plaintiff Bob Mozert recalled. "But I have since found out that the purpose of education has changed." Tim LaHaye writes that American schools were once "based solidly on biblical principles," in contrast to the "atheistic amorality" of today.

Schooling has indeed changed. The American colonists viewed education as a religious undertaking; they valued literacy as a means for understanding Scripture. As late as the 1950s, textbooks commonly spoke of the afterlife, the efficacy of prayer, and other religious concepts. Today the Christian framework has all but disappeared. Modernity, religious diversity, and the Supreme Court have essentially, and properly, secularized the schools. To the extent that fundamentalists are trying to restore religious dogma in the classroom, they are out of sync and out of line with the times.

But protesters aren't always seeking to inject religion into the classroom. "We were not trying to have anyone teach Christianity in the schools," Mozert insisted. "All we wanted is the right to preserve our Christian heritage, and not have it taught against by these texts."

As part of this argument, the Tennesseans contended that the Holt books, for all their strenuously achieved diversity, excluded conservative Christians. New York University professor Paul Vitz examined the books and found that, of approximately 600 stories and poems, not one depicted biblical Protestantism. "There are no stories about life in the Bible Belt," Vitz testified at trial, "no stories about churchgoers, families, or individuals who pray to God." In contrast, the books gave respectful attention to Buddhism, American Indian faiths, and the occult. The Holt books weren't unique in this regard. Several studies in the 1980s found that schoolbooks woefully underrepresented the role of religion. "To leave out one's heritage and history is to make one feel somewhat embarrassed or ashamed of it," Vitz said. When they raise this argument, fundamentalists are simply seeking their share of the multicultural pie.

Another form of silence about religion also troubles fundamentalist protesters. Because legislators and educators tend to view "any and all social problems as educational problems," as education historian Henry J. Perkinson has written, the curriculum has expanded into realms that, until recently, were vouchsafed to family and church: AIDS education, death education, peace education, values education. To many conservative Christians, these topics are inescapably religious. As lawyer William Bentley Ball once said: "*If* . . . public education conceives that it is charged with providing a child with a working philosophy of life, if it feels that it must address itself to those ultimate questions of the child which were always deemed religious, I do not think that the answer it gives can constitutionally be one which is agreeable to me as a Christian."

Along with addressing new topics, the schools have ushered new literature into the classroom. First came contemporary fiction, such as *Catcher in the Rye*, then young adult novels, such as Judy Blume's works, and most recently, tales of the supernatural. According to teachers, these materials motivate students to read. But fundamentalists object to the depictions of profanity, premarital sex, alienation, disobedience, and the occult.

Here as elsewhere, protesters often go too far, as in LaHaye's charge of "atheistic amorality." But they are right to say that public education has changed in ways that tend to collide

Short of physical abuse and other equally egregious misdeeds, our system leaves child-raising to the parents—who are free to disbelieve the experts, even to regard them as treasonous, and to raise children in a religious tradition that other people consider anachronistic and wrongheaded.

with their faith.

Educators often respond that these new programs were developed by experts who know far more about child development and pedagogy than fundamentalist parents do. Protesters are generally unimpressed by this defense. In fact, they sometimes perceive experts as malevolent conspirators. In Hawkins County, Jennie Wilson announced that the Holt Publishing Company was allied with the New Age movement, which, she contended, was paving the way for the antichrist. Tim LaHaye has written that the whole-world method of teaching children to read is part of a plot to "lower the literacy level in the Western countries, particularly America, and raise it in the Soviet Union," with the ultimate goal of merging the two nations into "a one-world socialist state."

Despite their ludicrousness, the conspiracy theories make some pertinent points. First, American culture is less hospitable toward religion than it once was. In *The Culture of Disbelief,* Yale law professor Stephen L. Carter writes of the culturally prevalent view that "religion is like building model airplanes, just another hobby." Reflecting the cultural shift—and sometimes hastening it—educators have denuded the classroom of a great deal of Christian influences, in ways that are constitutionally required (the elimination of legislated school prayer) and in ways that are not (the religion blindness of schoolbooks). To a degree, fundamentalists' distrust is understandable.

In addition, public schools are governed by communities, not by experts. What if voters don't want *Catcher in the Rye* in the schools? "That's a community decision," Barbara Parker, of People for the American Way, once told *Time.* "My disagreement is that in education today things are being run by vocal control, not local control." To be sure, local control has its limits. A school can't teach religious dogma, even if everyone in the community favors it. And teachers can uphold the values of their profession, perhaps by saying (as historian Arthur Bestor urged in 1958): "What you propose will not produce an educated man or woman. I will have no part in misleading and miseducating you." Within constitutional limits, though, ultimate authority resides in the electorate.

Similarly, as the Supreme Court said in *Pierce v. Society of Sisters* (1925), "the child is not the mere creature of the state." Short of physical abuse and other equally egregious misdeeds, our system leaves child-raising to the parents—who are free to disbelieve the experts, even to regard them as treasonous, and to raise children in a religious tradition that other people consider anachronistic and wrongheaded.

In their exercise of parental rights the Tennessee plaintiffs wanted public education minus the Holt readers. The parents stressed that they could handle everything else in the county curriculum; only the Holt books offended them.

Now, however, some of the Hawkins County plaintiffs, and many Christian activists elsewhere in the country, are advancing a different argument. The dissonance between their worldview and the curriculum is simply too great to bridge, they say; and anyway, the schools have proved resoundingly unwilling to build bridges. The only solution is school vouchers.

Though voucher initiatives in Colorado and California failed, the school choice movement is far from dead—and public school educators may unwittingly fuel it through their handling of schoolbook protests. Aggrieved protesters, like those in Tennessee, may switch their allegiance to private education and seek tax funding. And voters, fed up with the ceaseless battles over the curriculum, may see vouchers as a path to civic peace.

Yet, a better solution exists: Judge Hull's much-maligned approach in the Tennessee

"The interesting thing I find," Haynes added, "is that the resistance to accommodation almost always comes at the point when the request is from a Christian religious group. That is when heels dig in."

case. The schools shouldn't teach religious dogma, but, within broad limits, they should excuse dissenters from offensive assignments. Offering alternative assignments would enhance religious diversity in the classroom. Religious dissenters would remain in the public school, instead of (as in Hawkins County) transferring to private school or home schooling. Alternatives would also mollify many grassroots activists. Pat Robertson might continue supporting vouchers, school board takeovers, and school prayer, but many of the movement's ground troops would lay down their arms.

In addition, an opt-out approach would preempt many schoolbook protests. As in Tennessee, many protesters who set out to ban a book would be satisfied with an alternative assignment. Finally, religious excusals would avoid the fruitless, enervating disputes about the meaning and impact of an assignment. Parents and teachers could agree to disagree about whether a ghost story promotes satanism or stimulates imagination, and focus on the mechanics of accommodation. Instead of discussing whose interpretation is right, they could concentrate on whose interpretation should govern the education of this particular child.

Schools already tailor the curriculum in a variety of ways: special education for the handicapped; bilingual education for students not yet fluent in English; and special programs, even special schools, for gays, gang members, drug abusers, and pregnant students.

Religious accommodations also exist. Schools routinely excuse students' absences on religious holidays, and some schools prohibit school-related events on Jewish and Christian Sabbaths. Many states exempt students with religious objections from required vaccinations. As a result of court rulings, religious objectors can refuse to recite the Pledge of Allegiance, refuse to enroll in otherwise-mandatory ROTC and physical education, and leave the room during noneducational use of audiovisual equipment.

Accommodations exist in the academic curriculum, too. Kansas, as a matter of state law, allows excusal from "any activity which is contrary to the religious teachings" of the family, upon a written request signed by a parent or guardian. Various districts, as a matter of law or policy, excuse objectors from dissecting frogs, as well as from classroom assignments dealing with sex, world religions, hygiene, physical disease, and drugs. The Supreme Court has ruled that Amish students can opt out of public education entirely at age 14, even if state law requires attendance to age 16.

Informal ad hoc accommodations are even more common. According to Charles Haynes, executive director of the First Liberty Institute, teachers frequently excuse Orthodox Jews, Amish, Muslims, Buddhists, and other religious minorities from offensive assignments.

"The interesting thing I find," Haynes added, "is that the resistance to accommodation almost always comes at the point when the request is from a Christian religious group. That is when heels dig in."

There are reasons for the double standard. Teachers are often Christian, and they may consult their own beliefs in judging the validity of another Christian's objection. In addition, teachers bitterly remember the Religious Right's record of hostility toward public education. Yesterday's censorship attempts taint today's requests for alternatives.

Slowly, however, a more evenhanded attitude may be taking hold. People for the American Way vehemently opposed Judge Hull's approach in 1986. "Rather than teaching students to understand and tolerate different points of view," PAW asserted in *Attacks on the Freedom to Learn 1986-1987,* "this opt-out arrangement divides students along religious lines. The net effect is divisiveness among the various groups that make up the classroom and the community." *Attacks on the Freedom to Learn 1992-1993* sounds a different note: "Removing one's *own* child from a particular assignment or program is regarded as legitimate parental involvement, and as such not included" in the report's list of censorship attempts.

The legal backdrop has also changed. The Religious Freedom Restoration Act, which President Clinton signed into law in November, makes it easier for religious people to win exemptions and accommodations from government. Fearing the law's impact on the curriculum, the National School Boards Association tried but failed to get public education exempted. Nobody knows how the courts will construe RFRA, and public schools aren't eager to find out. To avoid costly litigation, "the schools will let anybody and everybody opt out of curricular materials," predicted August Steinhilber, general counsel of the school boards' group.

As Steinhilber added, these accommodations will increase the teacher's workload. But a bit of extra paperwork may be a small price to pay for diminishing the acrimony and anguish of schoolbook protests.

HOG FEEDER

How an Argument Over a Device to Feed Pigs Went to the Canadian Supreme Court and What the Ruling Could Mean for Canadian Churches

BY MARTIN ZEILIG

With his black clothes, black hat, and black beard, 57-year-old Hutterite Daniel Hofer, Sr., stands in the snow on the 3,000-acre hog- and grain-producing colony in Winnipeg, Manitoba, where he has lived most of his life. At his feet is a silver 24-inch-high, double-sink hog feeder—an innocuous-looking contraption that automatically delivers wet or dry food to hogs.

"This is where it all broke out," says Hofer, pointing to the box. "With this feeder here."

It all "broke out" for Hofer in 1986, when he claimed to have built a special mechanism for the feeder that allowed the hogs to choose wet or dry food. Another Hutterite colony, Crystal Springs, made a similar feeder and moved to enforce patent rights against Hofer, who refused to stop manufacturing his feeder, even when requested by the elders of the Lakeside Colony of the Hutterian Brethren, a 104-member commune 20 miles west of Winnipeg.

Martin Zeilig is a freelance writer living in Canada.

A disagreement over a hog feeder among a few of the less than 10,000 Canadian Hutterites probably shouldn't cause much stir out-

side the pacifist, somewhat isolated Hutterite community itself. Nevertheless, because it involved such fundamental issues as natural justice and property rights, Hofer's squabble over the hog feeder worked its way through the judicial system to the Canadian Supreme Court, whose decision can have serious implications for every church body in Canada.

"Those who took us to court said that I was expelled from the colony," said Hofer with obvious satisfaction as he put the hog feeder back into a steel shed, "but the Supreme Court decided differently."

When controversy over the patent surfaced, Hofer appeared at the general meeting of Lakeside's voting members and angrily insisted no one could stop him from making the feeders. He invented them, he said, and it was his right to continue producing them. In response, Hofer was told that he was "expelling himself" from Lakeside and that he was no longer a member of the church or community. No formal vote was held; it was the consensus of those present: Hofer and his family were to be expelled.

When Hofer refused to "vacate the colony lands," the elders went to court to obtain an order forcing Daniel Hofer and his family to leave Lakeside permanently and return all colony property. The elders also asked the court to declare that Daniel Hofer and his sons were no longer Lakeside members.

"He is a pig, the poor man," said Joshua Hofer, an elder and cousin of Daniel. "He is a renegade in our society. He is stealing our property and eating our food. We want him to go."

The colony was successful at the lower courts, but Daniel Hofer appealed to the Canadian Supreme Court. In a 6-1 decision, the high court ruled in *Lakeside Colony v. Hofer* that the process by which the colony attempted to expel Daniel Hofer, Sr., breached the rules of natural justice, making the expulsion invalid. Hofer, Sr., the court ruled, remains a member of Lakeside Hutterite Colony.

Though the court said it was "reluctant to exercise jurisdiction over the question of membership in voluntary associations, especially religious ones," jurisdiction was proper in cases in which a property or civil rights issue turns on the question of membership. Were the issue merely doctrine, faith, or a person's status within a religious community, the courts generally would not get involved, even if the procedure denied the plaintiff natural justice. When property or civil rights are involved, however, as with Hofer and Lakeside, the courts will often accept jurisdiction.

Dan, Sarah, and Larry Hofer in their living room: The whole family faces *absonderung*.

Corrugated shed where Hofer once made hog feeders: the patent went to Crystal Springs.

Hutterite colonies operate under the principle that a member may be expelled or dismissed from the colony or congregation by a majority vote of all the adult male members at any annual or general meeting. Any individual who ceases to be a member of the colony gives up claims to colony property. Because all the property is communally owned in the Lakeside Colony, and because members devote their time, labor, and possession to the community, the court viewed property ownership as an issue.

"There is, however, a property right at stake in this case," the court said, "especially from the point of view of the colony. If the defendants were strangers to the colony, then the colony would surely be entitled to an order barring them from the property, since that would be part of the colony's right of ownership."

In dealing with membership in a voluntary organization, the court said that it would look at

three issues only: (1) whether the rules of any voluntary association have been observed; (2) whether anything was done contrary to natural justice, which includes the notice of a complaint against a person, the opportunity to make a representation, or an unbiased tribunal; (3) whether the decision is *bona fide.* In this case, the court found a problem with natural justice.

"The supreme court," wrote law professor M. H. Ogilvie (*Canadian Bar Review*, vol. 72, p. 243), "focused on one element of natural justice, sufficient notice, and declined to consider the requirements of an unbiased tribunal and an opportunity to make representations."

Though the court noted that principles of natural justice are flexible and depend on individual circumstances, it ruled that natural justice had been violated by the colony in Hofer's case. The justices said that he had not been given adequate notice that expulsion would be discussed at the meeting. The court said that notice must be specific regarding any possible expulsion, so a person could consider and prepare a position.

"A member must be given notice," the court said, "of the cause for which he is to be expelled. It is insufficient merely to give notice that the conduct of a member is to be considered at a meeting. The member who is to be expelled must also be given opportunity to respond to the allegations made against him. . . . Natural justice requires procedural fairness no matter how obvious the decision to be made may be." The court ruled that even if prior notice of a possible expulsion and an opportunity to respond wouldn't "change anything" in regard to the outcome, prior notice and an opportunity to respond are still required by law.

"The supreme court said that it was satisfied that there wasn't adequate notice given," said Donald Douglas, Hofer's lawyer, "and therefore everything that followed was of no effect. If you don't give someone adequate notice, the whole process is flawed. The supreme court set a very high standard on the issue of notice to Mr. Hofer. What the court established was a charter of rights for Hutterites. Before this case, the will of the majority was absolute. But the court said that the procedures surrounding the making of those decisions must be in compliance with natural justice."

Though beginning over just a hog feeder, *Lakeside Colony of Hutterite Brethren v. Hofer* received a fair amount of publicity in Canada. Churches and other voluntary organizations had a special interest in the outcome, because it involved the thorny question of judicial intervention in internal church affairs.

"Judicial intervention is necessarily intrusive," wrote Ogilvie (p. 249). "Therefore the courts are faced with the stark choice either of becoming involved or of completely refraining from involvement. The latter choice condones the injustices which often characterize church tribunal, while the former attempts to alleviate them."

In this case the court chose to alleviate an injustice. Yet the interference dealt only with procedure, not with outcome. The court wanted fairness in the decision-making process, that's all. It didn't deal with the heart of the matter, Hofer's claim to the patent, or any substantive theological questions that might have been raised. Nevertheless, *Lakeside v. Hofer* should send clear signals to all voluntary organizations in Canada, churches included, that in dealing with internal disputes, if property or civil rights are involved, the courts will demand that certain procedures of natural justice be followed. If not, then these organizations could find the judicial system making decisions that should have been left up to them. As in the case of Hofer, though the governing body of the community wanted him expelled, the court said that he stays.

"The supreme court said that Danny is still a member of the community by law," admitted Michael Radcliff, the lawyer for the Lakeside Colony. "But theologically he is persona non grata."

Indeed, Hofer and his family face *absonderung,* or shunning. Most other members of the colony won't eat in the communal dining hall with Hofer or his family (six sons, four daughters, 11 grandchildren, and the three other members who supported him). They won't worship in the Lakeside church with the Hofers, nor talk to them.

Hofer, his wife, Sarah, and the rest of his family seem unconcerned about their status as they go about their daily business. In attempting to drive Hofer and his followers out, the elders don't allow them to work on the colony. Hofer works elsewhere. He's determined not to give up.

"I'm not starving," he says.

And neither are the pigs, which can now choose wet or dry feed. However, they won't be getting their meals from any feeders that Hofer claims he invented. Though Daniel might have won in the supreme court, the patent went to Crystal Springs.

NATURAL

BY M. H. OGILVIE

What is "natural justice"? Why has the Supreme Court of Canada required all church tribunals to comply with it?

American law speaks of due process, while Anglo-Canadian common law speaks of the rules of natural justice, that is, procedural rules for the hearing of a dispute, which in themselves contain substantive principles of fairness and justice.

Natural justice evolved in the medieval English common law courts, when both judges and barristers were still clerics, and connotes much the same meaning as the older understanding of natural law: the law of God, whose unalterable and fundamental moral principles are discernible by the exercise of right reason. In other words, procedural fairness is a divine mandate with which all earthly courts must comply.

In this sense, natural justice, per se, lingered into the late seventeenth century but retreated with the rise of the modern theory of parliamentary sovereignty. After several false starts at the end of the nineteenth century, it has enjoyed a revival—first in England and subsequently in Canada—as courts increasingly resorted to procedural fairness to protect individuals against the high-handed and arrogant conduct characteristic of the agencies and administrative boards of the socialist state. In recent years its application has been extended to a wide variety of other civil tribunals, with religious institutions one of the last organizations to be subjected to the rules.

In *Lakeside Colony*, the supreme court stated that natural justice was composed of three aspects: (1) the right to an unbiased tribunal; (2) the right to know the case against one; and (3) the right to be heard in reply on one's own behalf. While the precise content of each rule may vary with circumstances, the courts require more stringent compliance when the consequences of a decision are serious. Thus, more exacting compliance is required when questions of employment or reputation are at stake, because economic self-sufficiency and a good reputation are highly valued. Both are especially important in ecclesiastical disputes because a minister wrongfully removed from one congregation may never get another, thereby losing profession and livelihood, while reputation is regarded as a reflection of Christian commitment and faith and ought not to be wrongfully called into question.

The rights to know the allegations and to present a defense involve a number of corollary rights: the right to adequate and full prior notice of the allegations, preferably in writing, and in sufficient time to prepare a defense prior to the hearing; the right to a full hearing, exploring all aspects of the case, including all relevant evidence the parties wish to submit, usually by a hearing in person with the right to hear, call, examine, and cross-examine all witnesses in most cases; the right to adjournments of the hearing so as to provide an opportunity to prepare responses to arguments made; and the right to a decision made by the members of the tribunal and based substantially on the evidence submitted at the hearing. The right to legal representation is also sometimes mandated by the requirements of natural justice, in particular, when the allegations are very serious and the consequences of a decision grave. Legal representation may be insisted upon even where the procedural rules governing a tribunal purport to ex-

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clude legal counsel. Issues of livelihood and reputation are sufficiently serious for this purpose.

The right to an unbiased tribunal is sometimes the most difficult rule of which to prove breach. The test for bias is whether or not there is a "reasonable apprehension of bias." This standard may be satisfied where a tribunal member shows "attitudinal bias" by conduct toward a party before or during a hearing, for example, by expressing opinions about a party either during the hearing or outside it. Bias may be present by reason of pecuniary interest or family, personal, or professional relationship. Bias may take the form of "institutional bias," that is, a desire to reach a decision to protect the institution, rather than to do justice between the parties. Bias is also present when the same person plays the roles of complainant, prosecutor, and judge, or some combination of these concurrently, and where the actual procedural rules are so designed as to favor one party or the institution itself. Bias is particularly difficult to counter in a small church in which many members think they are familiar with, and certainly gossip about, one another.

Several recent reported cases against the United Church of Canada demonstrate how frequently and how blatantly the rules of natural justice are breached by church tribunals. In *McCaw* a minister whose style of ministry caused concern was dismissed by the presbytery without being told the nature of the complaints, without notice of the hearing, and without being present at the hearing. The court reinstated him and awarded substantial damages. In *Davis* a minister charged with sexual harassment was again removed by the presbytery. Although the original complainant did not even lay a formal charge, the minister was not informed of the allegations made against him, and a hearing was held in his absence. The court reinstated him, with a formal hearing to follow. In *Hobbs* another minister was charged with sexual harassment and removed. He did not receive written charges until two and a half months later and was given no opportunity to reply, although the complainant was not a member of the church and therefore without standing before the church courts. The court reinstated him, with a formal hearing to follow. At the subsequent formal hearings for Davis and Hobbs, decisions were made to remove them again, but in accordance with sexual harassment guidelines that had not been approved by the church's general council. This is also a breach of natural justice, and civil actions have been filed against the United Church for almost Cdn$3 million damages.

In all these cases not only did the church courts fail to follow the rules of natural justice, but they did not even comply with the procedures set out in the church's own manual. Whatever the substantive merits of the allegations made against the ministers, procedural unfairness and procedural errors precluded their full and proper resolution.

The more interventionist position taken by civil courts in Canada has caused considerable discomfort to many religious organizations. Church insiders have long been aware of the blatant procedural injustices perpetuated against ministers and dismissed employees, and many agree that needed adjustments are now being forced upon them. The irony that "natural justice" should be dictated by the secular state should not distract churches, however, from the dangers to religious freedom in Canada theoretically posed by increased judicial intervention.

Socrates Meets Snoop Doggy Dog

"It is not only to the poets therefore that we must issue orders requiring them to portray good character in their poems or not to write at all; we must issue similar orders to all artists and craftsmen, and prevent them portraying bad character, ill-discipline, meanness, or ugliness in . . . any work of art, and if they are unable to comply they must be forbidden to practice their art among us."—Socrates

"Yo [expletive deleted], ho, ho. He [expletive deleted] the fleas off the [expletive deleted] he shaked the ticks off [expletive deleted] [expletive deleted] [expletive deleted]."—Snoop Doggy Dog.

Voltaire once complained that he had been sent to the Bastille for a poem he didn't write, written by someone he didn't know, expressing views with which he didn't even agree.

In fifteenth-century England, one could face death for calling the king a fool, publishing anything that ridiculed him, or even imagining his death.

"Must I shoot a simple-minded soldier boy who deserts," a frustrated Abraham Lincoln once asked, "while I must not touch the hair of a wily agitator who induces him to desert?"

"We have freedom to speak in the Soviet Union," an émigré from the former U.S.S.R. joked in the 1970s. "The only difference is that in America, you have freedom *after* you speak!"

From Socrates, who urged strict censorship in order to protect the morals of the youth—to Jesse Helms, who would censor almost everything except tobacco advertisements, freedom of expression has always had enemies.

Nevertheless, some cries about free speech infringements prove that the clause stills protects jurisprudential nonsense. For example, Pat Robertson's American Center for Law and Justice (ACLJ) has argued that the Supreme Court ban on legislated prayers at graduation ceremonies (*Weisman*) infringes upon the free speech rights of those who want officially sanctioned prayer.

The ACLJ is correct. The ban on graduation prayers *does* infringe upon the right of free speech, but only in the same way that federal laws against bank robbery infringed upon John Dillinger's right to earn a living.

Freedom of expression has never been, and should never be, absolute. "The most stringent protection of free speech," wrote Oliver Wendell Holmes, "would not protect a man in falsely shouting fire in a theater and causing a panic." Just the *talk* (nothing else) about killing the president will bring the Secret Service to your door. The free speech clause doesn't (and shouldn't) allow you to intrude into a stranger's home and croon Snoop Doggy Dog lyrics or quote Socrates, any more than it allows a religious official to give a government-sponsored prayer at a graduation ceremony.

Why? Because the free speech provision must be balanced with other constitutional provisions as well, such as the Establishment Clause, which protects people from religious coercion, even as subtle as one might find at a high school graduation. At minimum the Establishment Clause should not allow the government to set up a religious norm that drives students away from anything, much less their own graduation, just as years ago in *Engel v. Vitale* the High Court didn't allow the government to set up a religious norm from which students had to be excused from their own classroom.

The free speech clause no more mandates state-sponsored prayer in public school than freedom of the

JACQUES LOUIS DAVID *THE DEATH OF SOCRATES* THE METROPOLITAN MUSEUM OF ART, WOLFE FUND, 1931. CATHARINE LORILLARD WOLFE COLLECTION.

press mandates that Jimmy Breslin be allowed to write his next column in green spray paint across the face of the Vietnam War Memorial, or that the National Organization of Women allow Rush Limbaugh to address its annual convention.

If the free speech clause gives a clergyperson the right to deliver a nondenominational prayer at a high school graduation (even if voted by a majority of students), then does it give the local chapter of Queer Nation the right to address the graduating class on the joys of sodomy (even if voted by a majority of students)? Would forbidding the local satanist club from invoking Lucifer be a restriction of free speech? According to the ACLJ argument, it would.

If the free speech clause was violated anywhere in *Weisman,* it was by the school district, which "advised" the clergyperson on how to pray. When school officials start telling rabbis and ministers how to invoke Deity, more than free speech has been breached.

What we say has been given greater constitutional protection than where, how, and when we say it. That's the issue. The problem isn't the gutless and spiritless incantations so typical of state-sponsored prayer (see page 16). The problem is coercing people to hear them. Free speech might give you the right to speak, but it doesn't mean that others must be forced to listen.

Of course, we shouldn't take lightly any *real* threat to freedom of expression. The ayatollahs of political correctness, for example, are doing to free speech on college campuses what Roosevelt did to procedural due process when he interned Japanese-Americans during World War II. And take-no-prisoners feminist Catherine MacKinnon, who sees pornography as the root of all evil, calls for sweeping governmental suppression of all expression that exacerbates any "historically oppressed" group's subordinate status. The lines regarding free speech should be drawn as far away from any restrictions as possible, because those lines could one day wrap around the throats of those who once drew them.

Indeed, Socrates himself—not exactly I. F. Stone when it came to freedom of expression—was sentenced to death in Athens. The charge: his teaching corrupted the youth.

Clifford R Goldstein

O,

let my land be a land where Liberty
Is crowned with no false patriotic wreath,
But opportunity is real, and life is free,
Equality is in the air we breathe.

There's never been equality for me,
Nor freedom in this "homeland of the free."

I am the poor white, fooled and pushed apart,
I am the Negro bearing slavery's scars,
I am the Red man driven from the land,
I am the immigrant clutching the hope I seek—
And finding only the same old stupid plan
Of dog eat dog, of mighty crush the weak.

O, yes,
I say it plain,
America never was America to me.
And yet I swear this oath—
America will be!

I swear to the Lord
I still can't see
Why Democracy means
Everybody but me.

—Langston Hughes
African-American poet,
writer (1902-1967)