



Harvard Law Record

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'You Are the Sole Judges of the Facts...'

Blue Law Cases Examined

Harvard Law Record

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CALENDAR

Thursday, November 26

Classes are recessed for the
THANKSGIVING HOLIDAY.

Friday, November 27

THE INTERNATIONAL LAW CLUB will present Sir Gerald Fitzmaurice, K.C.M.G., Q.C., President of the International Law Commission, who will speak on "The Development of International Law by International Courts" at 8 p.m. in the Pound Room.

Saturday, November 29

Dr. Henry A. Kissinger will speak at the **FORD HALL FORUM** on the "United States' Position as a World Power — An Assessment."

Wednesday, December 2

Mr. James D. St. Clair, of the Boston firm of Hale and Dorr, will speak to the **LAW WIVES** on trial practice. Mr. St. Clair assisted Mr. Joseph Welch at the Army-McCarthy hearings.

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Byse Speaks Up About the Oath

Clark Byse, Professor of Law, urged that Harvard University refrain from the administration of the loyalty oath and "affidavit of disbelief" required of all students who receive loans under the National Defense Education Act of 1958. In an address before the members of the Graduate School of Design, he asserted last week:

In a very real sense, university administration and financial support of such an affidavit of disbelief requirement is a perversion of the function of a university in a free society.

President Nathan M. Pusey had already "suspended use of the [loan] funds until the entire policy is reviewed." The day after Mr. Byse's address, it was announced that the Harvard Corporation had decided to reject the \$357,873 assigned to Harvard under the Act. A parallel action was announced by A. Whitney Griswold, President of Yale.

The Act authorizes both graduate fellowships and loans to needy students. The fellowships are administered by the Commissioner of Education, but the loans are administered by the educational institutions and are financed 90 percent by the government and 10 percent by the schools.

Section 1001 (F)

The part of the Act that has produced clamor among educators is Section 1001 (f) which states:

No part of any funds appropriated by or otherwise made available for expenditure under authority of this Act shall be used to make payments or loans to any individual unless such individual (1) has executed and filed with the Commissioner an affidavit that he does not believe in, and is not a member of and does not support any organization that believes in or teaches, the overthrow of the United States Government by force or violence or by any illegal or unconstitutional methods, and (2) has taken and subscribed to an oath or affirmation in the following form: "I do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America and will support and defend the Constitu-

tion and laws of the United States against all its enemies, foreign and domestic." The provisions of Section 1001 of Title 18, United States Code [providing criminal penalties for false statements], shall be applicable with respect to such affidavits.

Last year Harvard protested this section, but accepted \$26,807 with the pledge to provide other money for any students who chose not to take the oath.

Professor Byse described the efforts to repeal this section of the Act last summer when the Kennedy-Clark Bill was introduced. It was reported favorably out of committee, with a minority report filed by Senators Gold-



Professor Byse

water, Dirksen, and Prouty. Professor Byse related that this minority view agreed that the affidavit should be eliminated "because they are 'ineffectual to accomplish the purpose for which they are intended, and may create an erroneous public impression that those who are required to execute them are members of a class or category of persons

peculiarly guilty or susceptible to subversion.'” After quoting the minority report’s rejection of the affidavit, Mr. Byse said that it proposed to provide criminal sanctions for any individual “who accepts such benefits while advocating the overthrow of our constitutional form of government by illegal means.”

The Senate voted 46 to 45 to retain the oath to support the Constitution, but to remove the “affidavit of disbelief.” After this, however, the Senate passed a motion to recommit the Bill to committee by a vote of 49 to 42.

Faculties Vote

This fall the faculties of Arts and Sciences, the Graduate School of Education, and the Divinity School voted to urge the Corporation “not to use loan funds under Title II of the National Defense Education Act of 1958 until the Affidavit of Disbelief in Section 1001 (f) is removed, and not to participate in any other federal program in which Harvard must take administrative responsibility for similar affidavits.” Student groups in the College have also urged this position; however, the Harvard-Radcliffe Graduate Student Council took the position that the University’s policy should be one which “disrupts no educational careers while seeking needed reforms.” This resolution was apparently motivated by a desire to protect the 150 graduate students on National Science Foundation fellowships which require similar affidavits.

After relating the story of the “peculiar process through which a Harvard consensus is reached,” Mr. Byse addressed his remarks to the question “What should be done?” He reiterated his opposition to the affidavit requirement for students and said it “invidiously singles out students from nearly all other beneficiaries of Federal funds.” He noted that no similar requirement is made of farmers, social security widows, banks, builders and home owners under F.H.A. loans, operators of airplanes and ships “who are subsidized directly,” and the publishers of newspapers and magazines “who are subsidized indirectly.” He then quoted Mr. Justice Frankfurter:

The cardinal article of faith of our civilization is the inviolate character of the individual. A man can be regarded as an

individual and not a function of the state only if he is protected to the largest possible extent in his thoughts and in his beliefs as the citadel of his person. Entry into the citadel can be justified, if at all, only if strictly confined so that the belief that a man is asked to reveal is so defined as to leave no fair room for doubt that he is not asked to disclose what he has a right to withhold.

Chief Vice

Professor Byse continued, “But, I believe equally or more important, than this affirmation by Mr. Justice Frankfurter, is the fact that the N.D.E.A. oath and affidavit are administered by educational institutions to students.” He reiterated his opposition to coercive tactics to induce any group to “execute affidavits of disbelief or to take futile oaths,” but asserted that the chief vice in the present controversy is that colleges and universities are required under the Act to participate in the coercion of students to take this oath. He then reminded his listeners:

We are talking about an affidavit of disbelief requirement which is made a condition of a loan by a student and which is administered by and a portion of the funds supplied by the institution in society which, above all others, is or should be dedicated to searching for truth, by the very social institution whose primary function is to free the mind from constraints of the orthodox and the accepted, and this affidavit is to be executed by students, the very persons whose minds and spirits should be directed toward free, not inhibited, inquiry.

He said that it would be impractical to seek a judicial remedy, although he believes that the affidavit is too vague to be constitutional.

The decision as to whether or not a school should refuse the funds because of the affidavit and oath is based on a balance of the student’s freedom to choose to take the oath and the interest of an educational institution in protecting its integrity as a free institution, according to Mr. Byse. He said the strongest argument against the University’s refusal of the funds is that “by so doing Harvard will deprive students who may wish to do so of the opportunity to borrow under such a loan program.” But, he added, the student’s freedom is not absolute in this

matter, because of the University's responsibility to society. He suggested that Harvard would have to refuse a grant of a million dollars with which to make loans, if the terms of the loans required that "recipients will swear not to teach in integrated schools."

He then expressed his confidence that Harvard would refuse to administer the affidavits, a decision that was announced the next morning. "Other questions remain," he added. "Perhaps the most important is the National Science Foundation fellowship." He distinguished this problem from the N.D.E.A. loans, on the grounds that the oaths and affidavits required for these fellowships are not administered by Harvard, but are administered through the mail by the Washington, D.C. office of the National Science Foundation. The same is true with regard to some of the graduate fellowships offered by the Department of Health, Education, and Welfare under the N.D.E.A. With regard to graduate fellows who have taken oaths administered not by Harvard, but by the N.S.F. or by the Commissioner of Education, Professor Byse would have Harvard do nothing, except urge that the oaths and affidavits are unnecessary, ineffectual, and insulting. He recommended that it would be unwise for the University to refuse these students. He found that the chief vice, that of Harvard

administration of oaths and affidavits, is avoided in these instances.

However, there are N.S.F. Cooperative Fellowships and N.D.E.A. foreign language fellowships which do require the University to administer oaths and affidavits. Professor Byse said that Mr. Pusey has expressed his intention to continue Harvard's administration of these programs. However, Mr. Byse argues for Harvard's refusal to continue to administer oaths in regard to the cooperative fellowships and to the foreign language fellowships, because they involve the chief vice of this controversy, Harvard's administration of oaths and affidavits. He asserted that Harvard should urge the National Science Foundation and the Department of Health, Education, and Welfare to administer their oaths and affidavits in the same manner as they do with regard to the regular N.S.F. and N.D.E.A. fellowships. "In other words, it is my position that the University should refuse to administer such a requirement, but that it should not refuse to permit students who have received such fellowships to attend the University," Professor Byse stated.

He concluded, "But in balancing the student's freedom and the University's responsibilities, I think it is proper to draw the line where I have."

— Manley

Meyner Blasts Agency Foul-ups

Vividly paraphrasing John Randolph of Roanoke, Virginia; Governor Robert B. Meyner of New Jersey told a Harvard Democratic Leadership Forum Wednesday: "TV shines and stinks like a rotten mackerel by moonlight!" Reading further from a prepared address liberally salted with quotes from such disparate characters as Woodrow Wilson, Gilbert & Sullivan, and Goethe, Governor Meyner lashed out against varied ills of the current American scene before a small but appreciative audience (of about 175) sparsely sprinkled throughout Lowell Lecture Hall.

Introduced by Dr. Martin Lichterman who represented Governor Furcolo, Governor Meyner was flanked by his attractive wife, Helen Stevenson Meyner, daughter of a

former Oberlin College president and herself a (somewhat removed) cousin of Adlai Stevenson.

Despite a certain woodenness in reading his prepared address, the Governor brightened perceptibly when answering questions at Lowell Lecture Hall and at the subsequent Phillips Brooks House reception.

Non-Parkinsonian

Developing what he termed a "Non-Parkinsonian Law," the Governor delivered a reasoned attack on the "progressive ossification" of the great regulatory agencies — FAA, FCC, FPC, SEC, and ICC. "Under the Republicans these agencies reached maturity and impotence at the same time," the Governor charged.

As illustrations of his contention that "Those who should be safeguarding the public interest have too often been the servants of the very industries they are supposed to regulate," the Governor cited the Dixon-Yates, Hell's Canyon, Richard Mack, and Van Doren cases. He also referred to the "strangulation by regulation" of the non-scheduled airlines set up by returning veterans.

Commenting on the current sound and fury over TV, Governor Meyner opposed the



Governor Meyner

tendency "just to pass another law." What is really needed, the Governor insisted, is simply that the agencies do their job. "What we need is not new law, but the application of the law we have." By "payola" quiz shows, canned applause, and technical tear-jerking, "The nation's airwaves — a great national resource — have been used to perpetrate a monstrous hoax," the Governor charged.

Passing to an examination of TV programming, the Governor termed it "shoddy and unimaginative" and demanded that the Communications Act of 1934 be enforced. This Act requires TV and radio stations to show that programming is in the public interest in order to obtain or renew the three-year FCC licenses to operate.

The Governor urged a post-program monitoring audit by the FCC to ensure that claims used by stations to obtain licenses are lived up to. "A Commission doing its job would have nipped this whole (TV quiz) scandal in the bud," the Governor asserted. "I just can't imagine where FCC investigators and monitors have been all this time while TV programming has been going lower and lower," the Governor lashed out.

Bugaboo

Castigating the present FCC Chairman who has objected that any Federal regulation of TV quiz shows would be censorship, Meyner commented acidly: "The claim of censorship here is a bugaboo to excuse the inexcusable. Now that the horse has been stolen, the Administration is rushing in to close the door."

Governor Meyner clearly held President Eisenhower largely responsible for ineffective Federal regulation in all areas: "What's needed is dynamic leadership in the White House — a program that will give life and vitality to the laws," Meyner asserted. "Dixon-Yates, Hell's Canyon, Richard Mack, the TV scandals mean the Federal regulatory agencies have failed to do their job. Their failure means the Republican Administration has failed the American people," Meyner contended.

In a clearly partisan electoral appeal, the Governor stated: "What is needed is the return of these regulatory agencies to those who created and nourished them against bitter Republican opposition." — **Camp**

Ames Trial Results

The case of *Sally Moore v. Lucius T. Willard, individually and as executor of the estate of Grace Willard, and Ann Willard* went before the jury last Thursday night. The "twelve good men and true" decided in favor of the defendant. The oriental pearl necklace that plaintiff insisted was the subject of a gift to her, will be turned back to Lucius Willard and his wife.

Professor Arthur E. Sutherland was the counsel for the winning defendant. Professor Robert E. Keeton represented the plaintiff. The verdict will be appealed.

For a fuller account of the trial see Features Section of this newspaper, page nine.

Student Bar:

Atom Roams the Seven Seas

The Student Bar Association heard Jerome S. Rubin of the New York Bar discuss the problems of "Admiralty Law in the Atomic Age." Mr. Rubin, who graduated from the Law School in 1949, addressed the group last Friday, November 20.

He began his speech by telling his audience what he would have talked about if he were giving an address on the general practice of law. He would have said that there is very little "law" involved in practice — that attorneys deal mostly with facts and not very often with legal reasoning. He would have pointed out that a law suit is a "terrible sporting contest" which encourages minor deceptions and superficial arguments. "For many people," Mr. Rubin would have asserted, "a law practice is merely a way to make a living. The fine distinctions in an argument are not always understood by judges who sometimes are not as intelligent as your law school professors," he would have told his audience.

Getting down to the subject of his address, Mr. Rubin revealed that there are still opportunities for the lawyer to engage in creative thinking and to use the constructive approach to problems. "Ships propelled by nuclear means present a challenge to lawyers," he continued. "The use of nuclear merchant ships in international commerce will present many legal problems," he predicted. The most striking of these problems are 1) Health and Safety Controls, and 2) Rules governing legal liability.

Health & Safety

Mr. Rubin pointed out some of the issues with regard to the former: "Who would establish the regulations? Who should be able to inspect the ships? Should it be the country where the ship was built, where the reactor was built, whose flag it flies, or of each port?" "What," he asked, "would be done in the case of a Japanese tanker with a British reactor running on atomic fuel obtained from Canada, flying a Liberian flag, domiciled in France, operated by a Panamanian subsidiary of a Dutch company, entering the port of New York?"

The possibilities, the audience was told, consist of either a criss-cross of bilateral and multilateral international agreements or control by an international body. The speaker predicted the adoption of the second possibility to deal with these problems.

Legal Liability

Concerning legal liability for nuclear incidents, Mr. Rubin pointed out that the likelihood of such incidents is extremely remote, but the possible liability is tremendously large.

The following problems regarding liability were suggested by the speaker:

(1) Jurisdiction, venue, and procedure to be used. Should the plaintiff choose the forum? Upon whom should the burden of proof fall?

(2) Would the creation of one International Tribunal be too great an abdication of national sovereignty for the nations of the world to bear?

(3) Which country's law should control? Should it be common law or civil law, admiralty law or domestic tort law, or the result of treaties and conventions?

(4) The difficulty of collecting foreign judgments.

(5) What kind of statute of limitations could there be? An injury resulting from radiation might not manifest itself until years after the incident that caused it.

Through these examples, Mr. Rubin pointed out the opportunity for creative lawyers to aid in the growth of an infant industry — commerce via nuclear-powered ships.

— Traum

Christmas Formal Announced

The Dormitory Council Christmas Formal will be held in Harkness Commons on Saturday, December 12, from 8 p.m. to 12 midnight. Music will be supplied by George Graham's Orchestra and set-ups will be provided for a nominal charge. Admission is by Social Activities Card. The cards are obtainable from Dorm Council Reps or at the door.

This will be the sixth in the series of dances sponsored by the Dormitory council. The fifth in the series was an informal dance at Harkness last Saturday, November 21.

Dorm Council Social Chairman Sydney S. Traum, 2L of Belle Harbor, N.Y., has announced that there will probably be four more informal dances in addition to a February mixer and a Spring Formal.

Civil Liberties Man Speaks

Lloyd K. Garrison, '19, LL.B. '22, will be presented at a meeting under the joint sponsorship of the Law and Graduate Democratic and Republican Clubs on Tuesday, December 1, at 8 p.m. Mr. Garrison has been Vice-Chairman of the National Committee of the American Civil Liberties Union since 1937, and he will speak from his vast experience in many areas of public life.

He was engaged in private practice from 1922 to 1932 and has been practicing again since 1946, but he has found time to devote much effort to labor relations — including service on the National Labor Relations Board — to education, and to bar association problems.

Mr. Garrison was dean of the University of Wisconsin Law School from 1932 until 1945 and has continued his interest in education through teaching at New York University Law School, serving on the board of overseers of Harvard University, and as a trustee of Sarah Lawrence College. Fond of teaching as he certainly is, yet he is remembered well by Professor Clark Byse of the Law School, who knew Dean Garrison at the Wisconsin Law School, for the pleasure he expressed at being able to resume his active practice of law in New York City in 1946. "I find great enjoyment," he told Professor Byse, "in practicing the profession which it has been my opportunity to teach to others."

Mr. Garrison is perhaps best remembered by the public for his defense of J. Robert Oppenheimer. At other times he has been counsel to the Association of the Bar of the City of New York in ambulance chasing investigations and bankruptcy investigations. Dean Erwin N. Griswold will introduce him.

Dark Horse to Forum

California Governor Edmund "Pat" Brown, dark horse contestant for the Democratic Presidential nomination, will speak before the Law School Forum on Friday, December 4. Billed as a "return visit" of Senator John Kennedy's recent nonpolitical tour of California, the Forum speech will be Governor Brown's first out-of-state appearance since other unannounced candidates began extensive traveling.

Mr. Brown came into national prominence and Presidential speculation by his decisive victory over William Knowland, former Senate Republican leader, in the 1958 gubernatorial election. Governor Brown has declined to say whether he will launch a concerted drive to win the nomination. His trip to Massachusetts, where he plans to confer with Governor Foster Furcolo and other leading Democrats, is apparently aimed at determining potential support.

Students Hit the Ice

A Law School hockey team has been a challenger on the ice for the past three years. Games are played about once each week, generally on Friday evenings at 9 p.m. when the Harvard Athletic Association gives the Law School the use of the ice.

All skating is conducted at Watson Rink which is located next to the Harvard Stadium on Soldiers Field. A charge of fifty cents is extracted from each person using the rink unless the individual is the proud possessor of an athletic participation card, in which case no charge is made.

Games for this year have already been scheduled with the Business School and with the Harvard Junior Varsity Hockey Team. Other games with various undergraduate teams are in the process of being scheduled.

All those associated with the Law School, students, active professors, et al., are invited to participate in these Friday evening enterprises. (Miss Fairbanks, take note.)

LL.B. '55 — Herbert Wasserman, former RECORD President, has been appointed Assistant to the Chairman of the Board of Schine Enterprises, Inc., of New York.

FEATURES SECTION

'You Are the Sole Judges of the Facts...'

After two hours and thirty-four minutes of deliberation, the jury returned a verdict for the defendants in the case of *Sally Moore v. Lucius T. Willard, et al.* It was the lengthiest jury deliberation in the recent history of the Ames model trials.

Judge Bailey Aldrich of the First Circuit Court of Appeals commenced the litigation early Thursday evening shortly after a standing-room-only crowd of first-year students had packed the James Barr Ames Courtroom. The ensuing trial, framed in first-year property terms, was notable for the litigants' agreement on the facts. The crucial disagreements concerned the inferences that the jury should draw from them. Both litigants agreed that the two issues were whether the decedent, an elderly widow who had taken a maternal interest in the plaintiff, had "intended" to make a gift of a necklace to the plaintiff and whether the decedent's acts amounted to a "delivery." The particular words and acts involved were for the most part undisputed. Professor Keeton argued for the plaintiff, an aspiring musician in her twenties; Professor Sutherland defended the sole legatee of the decedent's estate, the decedent's son.

Proceedings Below

After Judge Aldrich briefly outlined the facts for the jury, Professor Keeton called Sally Moore, the plaintiff. He first attempted to prove the intent of the decedent to make a gift. Sally thus testified that the decedent, "Aunt Grace," had invited her to live in the decedent's home, that "we grew terribly fond of each other," that Aunt Grace's son, Lucius, lived elsewhere and was seldom in contact with his mother, and that Sally and Aunt Grace travelled abroad together. Moreover, on the evening of the "Ames Charity Ball" Aunt Grace produced the disputed necklace and said to Sally: "I want you to wear it tonight. In fact I want to give it to you so you can wear it whenever you want to." To prove delivery, Sally then claimed that Aunt Grace had put the necklace on the table before Sally, saying: "Here

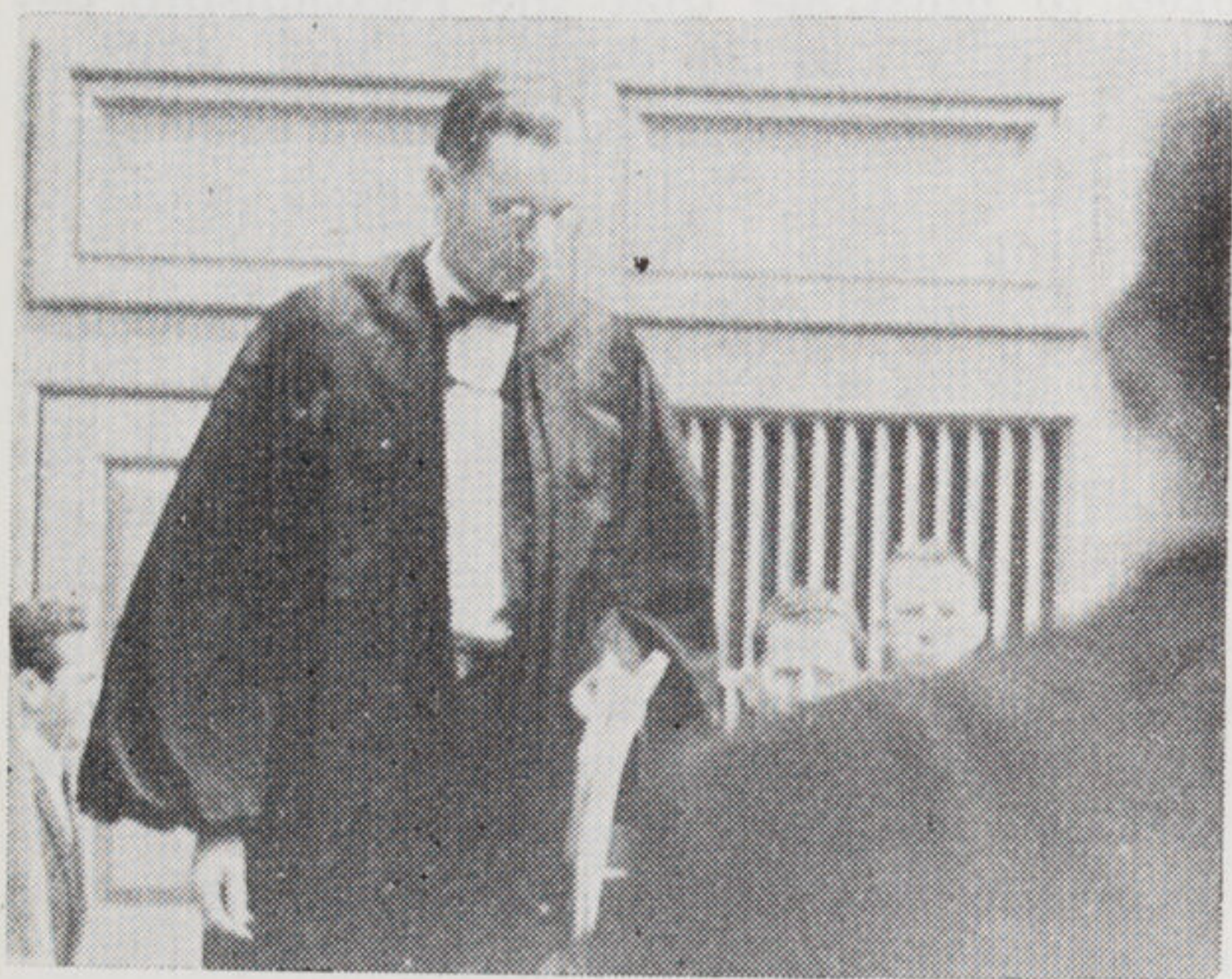
are the pearls, Sally, put them on." The string, however, broke before the plaintiff could obey. Aunt Grace thereupon put the valuables in a safe and entrusted Sally with the combination. She later gave Sally the claim check to the jewelry store at which the necklace was being repaired. On cross-examination, Professor Sutherland endeavored to illustrate that the relationship between Sally and the decedent, Mrs. Willard, was not as amicable as Sally had previously indicated. For Sally had sent a tape-recording of her singing to several out-of-town potential employers soon after she had begun living at the Willard residence. Sally also admitted that on the evening of the Charity Ball, "I remember what my understanding was better than the specific words."

Professor Keeton then produced both an eye-witness to the pre-Charity Ball episode and the owner of the jewelry store to corroborate Sally's testimony and bolster the plaintiff's contention that Sally was "a daughter" to Mrs. Willard.

At the close of the plaintiff's case, Professor Sutherland moved for a directed verdict which Judge Aldrich denied. The defendant then proceeded to construct his own case. First witness was Lucius. He claimed that the necklace was "an old family heirloom." Lucius also attempted to refute Sally's contention that he was on poor terms with his mother. On cross-examination, however, Professor Keeton fired several salvos at Lucius. He reluctantly admitted that his mother had disapproved of his marriage. Once he had telephoned home shortly before Christmas to inform his mother that he could not return home that holiday. Professor Keeton evoked laughter from both audience and jury by inquiring: "And the subject of the call was 'Merry Christmas, Mother, I'm not coming?'"

The remaining witness for the defendant was elderly Godfried Todd, brother of the decedent. He testified that his sister "suggested that Miss Moore should wear the necklace *that evening*." Once again the pro-

ceedings were interrupted by laughter and applause when Judge Aldrich peered down from his bench and asked the grey-haired witness, "Were you going to the ball, too?" Godfried's testimony had another humorous twist. For the role was ably played by Professor McGuire, who forgot himself, however, on one occasion. In response to the question on cross-examination: "Had you not interfered, the necklace would have been on Sally?" Professor McGuire looked quizzically at Professor Keeton and, not able to suppress his pedagogical instinct, retorted, "That is for the jury to decide."



Judge Aldrich

After his motion for a directed verdict was denied for the second time, the defendant made his argument to the jury. He emphasized that Sally never acted as though she were the owner of the pearls. She neither discussed the subject with anyone nor did she thank her supposed benefactor. Mr. Keeton, in his argument, drew attention to the fact that if Sally didn't get the necklace then, Lucius would have it for his wife, whom the decedent plainly disliked. Thus Mrs. Willard must have intended that Sally have the oriental pearl necklace.

Judge Aldrich divided his instructions into two parts: intent and delivery. As to intent, he said, "You must be satisfied to a *high*

degree of probability (emphasis added)... if you are not satisfied at least to that extent that Mrs. Willard intended to make a gift, your verdict must be for the defendant." As to delivery, he instructed, "There must be an act which, under all the circumstances of the case, transfers to you at least momentarily the ability to control the object to the extent that you would be expected to control it if you were the true owner." The plaintiff must prove delivery by "*a preponderance of the evidence*" (emphasis added) to prevail. He added that it is not necessary that Sally take control in a "tangible, physical sense." There may be constructive control. For example, if someone desired to make a gift of a book on the living room table and the recipient were close enough to pick it up, reasonable men might conclude that there was constructive delivery.

The jury, equally composed of men and women, then retired until 1:30 a.m.

Jury Deliberates

Lawyers must often wonder what occurs in the minds of the jury as the facts are unraveled before them. There has been much speculation. But the model trial presented a rare opportunity to interview the jury and thus scrutinize their reactions to the trial and understanding of the facts and law involved.

Of seven jurors (four men, three women) interviewed, all agreed that the facts and issues were brought out clearly during the course of the trial. In the words of one, "The lawyers made it easy to understand the facts."

Surprisingly, most of the jurors preferred the plaintiff's character to the defendant's and also thought her more convincing as a witness. "She was telling the truth," commented one woman. A male juror added that "she seemed sincere" and was "a very genuine sort of a person." Only one woman eyed Sally somewhat skeptically. She claimed that the plaintiff "was just too demure at the trial." The defendant, on the

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other hand, was almost universally disliked, though he won the verdict. The jurors described him variously as "mean," "embarrassed by cross-examination," "rich and snobbish," "a spoiled son." Other unflattering comments were: "didn't strike me as very deep," "he had neglected his mother." Indeed, Professor Braucher, cast as the defendant, played his role with Lon Chaney-like skill. Yet the jury conscientiously ignored its distaste for the defendant's personality. Most jurymen and women claimed that, in their opinion, Mrs. Willard would have preferred that Sally, rather than her estranged son, have the necklace, "but Mrs. Willard just didn't do everything that was necessary to make a legal gift."

Everyone interviewed thought that there was no dramatic turning point in the trial, yet the closing arguments apparently had a

a reasonable doubt that Mrs. Willard had given her that necklace because a man is innocent until proven guilty." He continued, "In order to establish a high degree of probability that Mrs. Willard intended to make a gift there had to be a preponderance of the evidence" in favor of the plaintiff. Several jurors claimed that the words "high degree of probability" and "preponderance of the



Defendant with both counselors



It was up to the jurors

substantial influence. Several jurors showed displeasure with the plaintiff's contention that a verdict for the defendant would conclusively prove that Sally "is dishonest." They felt that Sally was honest but wrong. On the other hand, several others agreed with the defendant that a girl in her twenties "wouldn't keep it a secret," as one woman juror stated, if she received an expensive necklace as a gift. These same jurors, however, were unwilling to conclude that Sally was lying when she testified that she believed she had received a gift.

The jury all thought that the judge's instructions were clear and concise, though most admitted that they would have preferred to have the instructions in writing. When asked to repeat the charge, however, there was some variation of opinion. One man reconstructed the charge in his own words: "Sally Moore had to prove beyond

evidence" were unfamiliar, though the former was mentioned periodically in the juryroom. Another jurymen felt that the sum and substance of the instructions were that, "The plaintiff had to have a reasonably strong case" to prevail. A woman stated that the plaintiff must prove "to the highest probability whether there was a delivery made." Finally, a jurywoman admitted that she had forgotten the phraseology of the instructions when in the juryroom, though others appeared to remember it in discussion. She also detected that "the judge appeared to favor the defendants" when charging the jury. This helped persuade her.

The juryroom discussion centered around the intent issue inasmuch as the plaintiff had clearly upheld his burden on the delivery issue, the jury felt.

Written ballots, taken periodically, indicated the demise of the plaintiff's forces, until the final capitulation of the last plaintiff's man at 1:32 a.m. Then twelve bleary-eyed good citizens went home.

— Terry

Book Review

POWER UNLIMITED — THE CORRUPTION OF UNION LEADERSHIP by Sylvester Petro, New York: Ronald Press Co. (1959), \$5.00, 323 pp.

This is a book of violence. The first part, which covers about two-thirds of the pages, reads like a script from "Gangbusters," except the gangs are in control, the cops are cowards, the mayor is the political puppet of evildoers, and, in the end, America is going to dissolve into a jungle.

Professor Sylvester Petro of New York University Law School does not like unions and he sets out to arouse fear and hatred in his readers in order to spark them to act to halt the menace of union gangsterism.

The narrative is largely a digest of the 15,000 pages in the 39-volume report of the Senate's Select Committee on Improper Activities in the Labor or Management Field (popularly known as the McClellan Committee). It is replete with case histories, testimony, and opinion about assaults on persons and property, extortion, graft, embezzlement, payoffs, and every manner of skulduggery within the capacity of unvirtuous union heads.

Teamsters

The Teamsters Union has colorful characters, who, according to the McClellan report perform colorful deeds:

A racketeer would go to a contractor and say in substance: Well, if you give me \$20,000 or \$30,000 or \$50,000 we won't strike; and if you don't give me the \$50,000 we will call a strike. (32)

According to the testimony before this committee their deeds are not always directed towards labor relations, but sometimes concern private businesses run on the side, as in the case of the Portland tavern keeper who was picketed because he purchased his own coin-operated shuffleboard machine, instead of renting it from a union-approved association of pinball dealers.

The U.A.W. also fits into the narrative as the haven of arch evildoers in the Kohler strike. The details of mass picketing, bombings, beatings, and pay-offs to local politicians are spilled on the pages of this book as though its author were cleaning a slaughtered chicken.

His position is that all this evil comes from the fact that unions are controlled by gangsters who use their privileged position in society to acquire personal power and wealth at the expense of workers, management, and the public.

'I make mayors . . .'

As evidence of the privilege, he quotes one union official:

I make mayors and I break mayors, and I make chiefs-of-police and I break chiefs-of-police. I have been in jail and I have been out of jail. There is nothing scares me. (175)

In order to demonstrate his concept of the union leader's antisocial motivation, he quotes another unionist:

Well, it was a combination of both, sir. I didn't kid myself. Whoever had the 30,000 members would make a nice living and would have a powerful organization and would be secure. Basically, when we started, it was primarily for some security. (112)

Quotes and anecdotes of union violence are laid out in the first part to form what the author calls a "panorama of power and corruption." Each of the first seven chapters tells more details of corruption, violence, and power, under captions such as "Violence in Organizing," "Violence in Collective Bargaining," "Every Nonunion Man an Outlaw," "Every Union Man a Serf," and so forth.

Part II, "The Anatomy of Power," repeats some of the exposition of Part I, but adds a greater amount of argument and points to some of the more subtle aspects of Professor Petro's analysis, in a very unsubtle manner.

The Key

The "key" to the labor problem is stated in this part with the force and vigor one expects from a man angered by what he has reported in the first part of his book:

The disclosures of the McClellan Record — "the rascality, the thievery, the very scum of union behaviour," the violence, the monopolistic coercion, and all the rest — are the surface expression of a deep lust on the part of men who have achieved position in trade unions for more power, money, or both than their positions as union officials can legitimately bring. They seek, and some have

already attained, economic power greater than that of any businessman. They seek also, and this many union officials have attained, a power over men of a kind and to a degree not available to any politician in a free representative government. While seeking such power, however, the union leaders are not willing to operate within the framework of peaceable and voluntary action which controls in the case of businessmen and politicians. (187)

For the great privileges which he finds have been gained by these power seekers, he places the blame on everyone, except businessmen, but principally upon the "unwise laws," which "have been made worse by the administration and interpretation they have had." (230)

After his detailed descriptions of the evils of union corruption and his generalization that the labor movement as a whole is rotten, in Part III he calls for drastic action. He has great confidence in the ability of the United States to resist Soviet aggressions, because it is free, *ergo* strong. But this freedom and this ability to be strong in the face of Soviet aggression is soon to be removed from the American scene because, "intent upon securing a position in the world which simple representation of employee grievances cannot afford, union leaders seem bent upon destroying the free society which will not voluntarily yield to them." (253)

Save Society

In his search for methods to save our society, he rejects detailed financial reporting and restrictions of union political contributions as measures that demand an impossible amount of detail in enforcement. Instead, he wants stricter control on unions through the restoration of the injunction as a means of granting immediate relief and the abolition of the N.L.R.B. A return to the courts and a rejection of the administrative agency as a means of fighting labor battles is Mr. Petro's proposal.

His two reasons for the abolition of the N.L.R.B. are that (1) "it and all other quasi-

judicial agencies are unconstitutional," and (2) "the political influences upon the Board . . . render it unfit for reliable judicial interpretation."

He wants to repeal the Norris-LaGuardia Act because he sees injunctive relief to be the only effective protection against union abuses, because it is fast. In a labor dispute, he maintains, speed is just as important as whether or not the decision is right. To support this he repeatedly refers to the case of Tom Coffey who never lost a case before the N.L.R.B., but who lost his business, because "the Teamsters' vicious boycott was privileged to continue throughout the tortuous, long-drawn-out election procedures of the N.L.R.B." (300)

Evaluation

Enough of an outline is set forth to show that this is an exceedingly hard book to evaluate, simply because it is a book of violence. It describes violent actions of violent men in order to rouse violent passions which the author hopes will produce support for his legislative program. Many readers will be captured by the power of the book and praise Professor Petro for his masterful exposition of what must be presumed to be some of the worst McClellan discoveries. Others will react with a bitter attack on Professor Petro's "anti-Labor" outlook.

If there were a man from Mars free from strong sentiments in favor of or against unions, and free from the Law School distaste for "emotional" attempts at persuasion, he would see this book as the work of a man captured by great forces of personal conviction. He would thank the author for digesting 15,000 pages of the McClellan Committee Report, but he would also want to check a few quotes to see what they look like in context. And ignorant of other facts in the American labor-management scene, he might be persuaded, but for the fact that the problem is developed in such complex detail, that the suggested solutions appear impossibly simple.

— Manley

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Blue Law Cases Examined

by
Ralph Nader

In the context of the nationwide increase in litigation and lobbying over Sunday blue laws, the recent decision in *Crown Kosher Super Market of Mass. Inc. v. Raymond Gallagher, Chief of Police of Springfield*, (U.S. District Court, Mass., May 1959), takes on added significance.

Crown Kosher closed on the Jewish Sabbath from sundown Friday to sundown Saturday but opened on Sunday, which day accounted for about one-third of weekly gross sales. The corporation president was convicted in a Massachusetts court of violating the state's Lord's Day law. He appealed and the Supreme Judicial Court overruled his exceptions relating to the law's unconstitutionality under the state constitution, 336 Mass. 384 (1957). In the past the high court has upheld on several occasions the statute against similar attacks but has never passed on its validity under the Federal constitution.

The case brought before the Federal district court involved plaintiffs who were all of the orthodox Jewish faith. They included the corporate president, customers, and rabbis. The Sunday law was challenged on three grounds, all founded on the fourteenth amendment: (1) that the Lord's Day law is a law respecting the establishment of a religion and denying the free exercise of religion and hence a violation of the due process clause of the fourteenth amendment; (2) the statute deprives the corporate plaintiff of its property and other plaintiffs of their liberty arbitrarily; (3) the statute denies the corporate plaintiff the equal protection of the laws.

In a broad, sweeping opinion Judge Magruder, with Judge Wood-

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bury concurring, condemned the law and accepted all three arguments offered by the plaintiffs. He wrote:

Dominant Christian Sects

"What Massachusetts has done in this statute is to furnish special protection to dominant Christian sects which celebrate Sunday as the Lord's day, without furnishing such protection in their religious observances, to those Christian sects and to Orthodox and Conservative Jews who observe Saturday as the Sabbath. . . . It is clear that by denying to plaintiff the liberty to work, shop or pursue other 'secular' conduct on Sunday, the law puts an economic penalty upon a person observing as his Sabbath some other day than Sunday by depriving him of productive use of one further day of the week."

He continued by declaring that Massachusetts furthered no legitimate interest by a statute requiring Crown Kosher to close on Sunday causing the store to lose potential sales and denying the right to use its property on that day. The result, he said, would be to deprive the corporate plaintiff of liberty and property and other plaintiffs of liberty without due process of law.

Denial of equal protection of the laws was found in the statute's discriminatory classification which abounded with "prolix and irrational exceptions to its prohibitions,"

that did not conform to the purported reason for the law — providing a day of rest and relaxation. The opinion pointed out that the statute doesn't generally forbid the keeping open of a store on Sunday to sell food, but just limits this liberty to selected types of stores such as drugstores, bakeries, and farmers' fruit and vegetable stands. "Employees of the favored stores are not less in need of rest than those of Crown Kosher nor does any reason show that the operating of these stores is less calculated to distract the rest of the citizens than does the opening of Crown Kosher."

Furthermore, the court noted that many classes of work excepted are no less destructive of public rest and relaxation than the kosher market's operation. All professional sports are permitted. One may dig for clams on Sunday but not dredge for oysters. Persons operating Crown Kosher or its customers "could dig ditches or do any other type of labor, if that were their ordinary calling and apparently

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could even vend food outside the store building."

Valid Police Power?

Earlier in the opinion, Judge Magruder disputed the prevailing judicial interpretation of the statute as being merely a "day of rest" statute enacted pursuant to the police power, particularly in view of "those numerous provisions which permit various activities on Sunday, which certainly are not 'works of necessity or charity' at specific hours and places designed not to affront godly persons worshipping in their churches during the usual morning hours." He referred to the first Sunday law enacted in 1653, and with additional modifications in the colonial period, as having "had the religious purpose to compel a seemly observance of that day of the week celebrated as the Sabbath (Sunday) by the dominant Christian sect." In 1858 the legislature began to amend for exceptions which now total 70 odd different amendments. "The result is that the Sunday law, as it now exists on the books, is an almost unbelievable hodgepodge."

"The characterization of the Sunday law as being merely a civil regulation," he wrote, "providing for a 'day of rest' seems to have been an *ad hoc* improvisation because of the realization that Sunday laws would be more vulnerable to constitutional attack under the state constitution if the religious motives of the statute were more explicitly avowed."

In a sharp dissent, Judge McCarthy offered procedural, factual and "on the merits" objections to the majority opinion. Regarding

the latter, he believed the statute to be clearly within the police power of the state giving it authority to protect all persons from physical and moral debasement and, second, that the legislature's classifications were reasonable. He accused the corporate plaintiff of trying to destroy a traditional way of life expressed in the spirit of rest, comfort and quietness of Sunday in the lives of the people of Massachusetts and, also, under an allegedly religious motive, of trying to sell non-kosher food.

Supreme Court Appeal

The case is being appealed to the Supreme Court which has never considered the equal protection and religious challenges to such a Sunday closing statute. Meanwhile a proposal is being readied for the coming legislative session which would follow Connecticut and several other jurisdictions in excepting from the operation of the statute persons who observe another day as their Sabbath and do not trade or labor on that day.

The decision by Judge Magruder represents the most complete Sunday law invalidation in recent decades and generally runs against most state judicial opinion especially with regard to accepting the first amendment challenges. If this line of reasoning finds acceptance in other jurisdictions, many of the 36

state statutes (plus several other states delegating their authority to municipalities) now prohibiting, with exceptions, Sunday trade, labor, production and recreation could be invalidated.

A Federal district court in Pennsylvania will soon hand down its decision concerning a Pennsylvania Sunday law that is substantially similar to that of Massachusetts. Many state statutes contain no exception for persons observing another Sabbath while a number of those states that do except, have seen their provision vitiated by judicial interpretation limiting the exception to laboring and not selling. New York is an example of this latter group.

In order not to exact an economic penalty amounting to a substantial prohibition of the free exercise of religion, it seems necessary for Sunday laws to except Jews, Seventh Day Adventists and other sects not observing a Sunday Sabbath. Connecticut has this "certificate type statute" which provides that no person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath and actually refrains from secular business and labor on that day and who has filed written notice of such belief with the prosecuting attorney of the court having jurisdiction, shall be liable to prosecution provided he does not

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Difficulties

But there are substantial difficulties in this certificate-type statute. First, as a practical matter, the state cannot take the applicant's word as conclusive; it may have to inquire into the veracity of his religious professions which course of action may be unconstitutional on grounds similar to those in *Cantwell v. Connecticut*, 310 U.S. 296 (1940). Perhaps mere observation of conduct to see whether the individual closes on Saturday may be permissible if the exception clause relates to conduct rather than religious belief.

Second, the exception clause would give to Jews and Seventh Day Adventists the option to close either Saturday or Sunday while Sunday observing Christians would be restricted to closing on Sunday. This might raise a question of equal protection and in some market areas may impose a substantial economic burden on Sunday Christians.

Third, what about corporations and partnerships? How can the "conscientious belief in another Sabbath" be validly determined when these business units are involved in the filing of written notice?

Assuming a valid legislative authority to enact Sunday statutes, the problem of discriminatory classification persists and is largely one of competent drafting and resistance to special interest groups when their desires do not conform to the purpose of the law. All

courts now record the actual effect of the law (health and welfare) as the "purpose" even if the legislative purpose was originally religious. By a continuous process of amendments, most Sabbatarian legislation is replete with garbled, obfuscated, irrational and discriminatory provisions.

Competition

There are many thorny legal, political and administrative problems which must go untreated here. Suffice it to be said that the contemporary blue law controversy raging in many states, but especially in New Jersey and Pennsylvania, is far more than a dispute between religious contestants. It is very much of an economic struggle such as the one between retail giants — the downtown department stores for Sunday closing and the large highway and suburban discount stores, supermarkets, and furniture stores in many areas against such restriction. The downtown retailers who have traditionally closed Sunday have been adversely affected by the seven-day, high-volume, low-price

competition of highway stores. Whereas in the past, sporadic discriminatory blue law enforcement was used principally as an instrument of religious persecution and personal vindictiveness, now booming Sabbath business, especially in the west, has become a national phenomenon and a serious issue in the retail trade.

The contemporary impact of Sunday statutes is a far cry from the year 1649 when Mr. Birdseye of Milford, Conn. was sentenced to the whipping post for kissing his wife on the Sabbath or the year 1789 when the local tithingman commanded George Washington (then touring through Connecticut) to explain the occasion of his riding on Sunday morning before permitting him to proceed on his journey. The radical changes in community living from colonial days together with existing labor legislation might well give state legislatures good cause to commence an independent revaluation of the function and actual consequences of ye olden blue laws.

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