Personal and Institutional Rights in Community*

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This article is primarily concerned with the concept of justice in the relationship between the individual and his church and between the individual and private educational institutions, particularly church affiliated educational institutions. There are obviously many other types of private social institutions to which an individual may belong and it will, of course, sometimes be necessary to consider the implications of justice in the individual's relations with these other institutions as well. Nevertheless, a consideration of these other areas of possible conflict between the interests of the individual and those of the community will only be peripheral to my central purpose. Moreover, even within the areas of my primary concern, it must be recognized that the importance and vast dimensions of the subject would defy any attempt to discuss adequately all the myriad issues involved. Accordingly, having renounced all pretensions to encyclopedic coverage of my subject, I will focus instead on several highlights that seem of particular interest and importance at the present time.

"Justice" is a term of many meanings and uses. One important use of the word is to refer to the law of the State which the moral philosophers tell us is an ordinance of reason directed to the common good. Thus, one who violates the law of the State acts unjustly, for the law has specified what is just or unjust in various particular situations. Another use of the term "justice" is to refer to the moral relationships between men which are anterior to, and sometimes independent of, the civil law. I shall in the course of my article refer to both of these notions, since any discussion of the relationship between the individual and his church or between the individual and his school or university involves both aspects of justice.

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I. The State’s Justice

A. Justice and the Church

Legal philosophers writing in the natural law tradition have had difficulty in either reconciling or rejecting the impact of positive law on the relationship between the individual and his church. It is well enough to say “Render unto Caesar what is Caesar’s and to God what is God’s,” but what, in actual practice, does this mean? Jean Dabin, a great modern natural lawyer, who taught at the University at Louvain, has said:

The relations of man with God, his Creator and supreme Good, are governed, as to outward as well as inner acts, by morals, especially under the heading of the virtue of religion. They do not as such belong to law, at least not the law of the civil society. Indeed, when religion itself has been established in society by the ecclesiastical institution (which must give rise to a specifically ecclesiastical law: *Ubi societas ibi jus*), the civil society as such has no competence in religious matters. This follows from the distinction between the spiritual and temporal powers: It does not belong unto Caesar to define the rights of God or to make them his concern. That task belongs strictly to the church and, for those who reject any church, to the individual conscience.1

Yet previously Dabin has recognized that all human relations of a temporal order fall, to at least some degree, within the competence of the civil law. Insofar, therefore, as religion involves outward acts, which are by definition acts which operate in the temporal order, how can it be immune from State regulation? The problem is made more difficult in a religiously tolerant society such as ours, where the principles of religious freedom and separation of church and State are constitutionally enshrined, because it is very often not the State which wants to intervene in religious matters but religious bodies which actively seek the intervention of the State in matters that seem very much, under Dabin’s view, not to belong within the competence of positive law. Dabin himself shows some inconsistency on this score. He states first of all that civil society is under a duty “to proclaim the rule of freedom of worship and to safeguard it against any attack from whatever quarter, on the part of private individuals or public officials.”2 He then goes further and states:

The safeguard of the law may indeed extend beyond this indispensable minimum. If the state deems it opportune it will lay down

2. *Id.* ¶ 71, at 294-95.
rules to prohibit certain acts or attitudes showing ostentatious contempt with regard to religion, e.g., blasphemy, sacrilege, parody of worship. Indeed, acts of that kind have nothing in common with the freedom, guaranteed as such, of sincere antireligious propaganda: Their sole aim is to shock the feelings of the religious part of the population. The injury done to worship recoils to hit the worshipers: The act contrary to religion becomes a blameworthy violation of respect for persons and often an attack upon national unity.3

Finally, Dabin also recognizes that the church might request financial assistance from the State and also seek to provide religious instruction in the public schools.4

In searching for instances of what Dabin would call justifiable State intervention in the spiritual sphere, one might note that it was not the crowning point of the late Cardinal Spellman's career that he managed to generate enough pressure on the New York Board of Regents to induce them to revoke the license for the exhibition of the motion picture "The Miracle."5 The Board of Regents acted in reliance upon a statute prohibiting the exhibition of "sacrilegious" films in New York. Fortunately, the Supreme Court of the United States unanimously reversed the judgment of a New York court upholding the banning of "The Miracle" and it is extremely doubtful whether statutes covering blasphemy and sacrilege have any further validity in this country.6 Turning to a field in which the Catholic Church has not been as active as several Protestant sects, as recently as this year two states prohibited the teaching of the theory of evolution in public schools. I understand that

3. Ibid.
4. Ibid.
5. The case which eventually reached the Supreme Court of the United States was Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952). Cardinal Spellman's role in the controversy and other surrounding circumstances are related in Mr. Justice Frankfurter's concurring opinion. Id. at 507-16.
6. See Joseph Burstyn, Inc. v. Wilson, supra note 5. The Burstyn case was the first in this country to consider the concept of "sacrilege." Blasphemy, on the other hand, was an offense known to the common law. Prosecution for blasphemy was, in the early 19th century, sometimes justified as preventing "annoyance . . . of the public." See Vidal v. Girard, 43 U.S. (2 How.) 61, 84 (1844) (opinion of Mr. Justice Story). Later cases limited prosecution only to those instances where the blasphemy tended to disturb the peace. See, e.g., Neola v. Reichart, 131 Iowa 492, 109 N.W. 5 (1906); Town of Torrington v. Taylor, 59 Wyo. 109, 137 P.2d 621 (1943). However, a breach of the peace was found in one case where a man said "damm" while standing in a church door. Orf v. State, 147 Miss. 160, 115 So. 202 (1927).

Perhaps where immediate public violence is threatened, a blasphemy prosecution would still lie. See Beauchamais v. Illinois, 343 U.S. 250 (1952). The recent trend of decisions makes even this proposition an uncertain one. See also Garrison v. Louisiana, 379 U.S. 64, 69-70 (1964). Nevertheless, a man was recently sentenced to thirty days in jail by a Westminster, Maryland magistrate for taking the Lord's name in vain. Newsweek, July 29, 1968, at 31.
an attempt is now being made to repeal this prohibition in one state and in the other it is being challenged in the courts as an abridgement of the constitutional right of freedom of speech.

I do not want to get into the question of the use of public funds in religious schools or of tax exemption for certain types of church property. I only cite these problems, as I do the sacrilege and evolution cases, because they are all instances where it is the churches themselves that are seeking State intervention in spiritual matters, despite the fact that most churches maintain that religious matters are beyond the competence of the State, are beyond the realm of that notion of "justice" which is embodied in the positive law. But Dabin, who believes that this type of State intervention on behalf of religion is sometimes justified, has not even scratched the surface of the areas where an unwilling State has been forced by the churches themselves to become involved not only in furthering the interests of religious bodies but actually to become involved in the internal affairs of churches. It is to these cases I shall now turn.

Churches, like any other bodies that attempt to perpetuate themselves and to organize men for a common purpose, must mobilize material resources. But control of property has never been without its problems, even for churches. Although American courts, and English secular courts at least since the 19th century, have been extremely reluctant to interfere in the affairs of private, non-commercial associations, such as churches and clubs, disputes among church members over control of church property have led to repeated requests for judicial assistance by the losers in the religious forum. Despite the gravest misgivings, the courts have been unable blankly to refuse to entertain such requests, because disputes over control of property cannot be left for settlement by self-help measures, and the State cannot rationally adopt a policy of deciding all disputes over church property in favor of whoever happens to be in possession of the property. The types of disputes that have overflowed religious forums are almost infinitely varied. I shall for the present restrict my consideration to those cases which are most instructive for our present purpose, namely those disputes over church property which are rooted in disputes over church doctrine or organization. We may distinguish between two types of churches for purposes of this discussion. First, there are hierarchical

9. The taxation of church property will be touched on in connection with the state's power to define what is a religion and what is a church for civil law purposes. See text accompanying note 34 infra.
churches of which the Roman Catholic Church is an example, but by no means the only example in American life. Churches governed by general assemblies, such as the Presbyterian Church, are also classified as hierarchical churches for these purposes, although they do not have bishops, or what some might call an ecclesiastical hierarchy. The second type of church relevant for the present discussion is the congregational type, in which the local congregation is a completely autonomous body. Obviously there are examples of churches neither clearly hierarchical nor clearly congregational.

Where property is given unconditionally for use as a religious body may see fit, the majority of the congregation, if it is a congregational church, or the governing authority in the church, if it is a hierarchical church, has for all practical purposes complete control over the use and disposition of the property. The cases which have required the State's intervention have involved property which was given to a religious group either expressly or by clear implication either to support particular religious beliefs or upon the condition that the group continue to maintain a particular body of religious beliefs.


The Church of God case is of particular interest because it raises the question of the constitutionality of Maryland statutes which seemingly require control of church property to be in the hands of the local congregation. The Roman Catholic and other specifically mentioned hierarchical churches are governed by separate statutory provisions. In another recent case, the federal courts held unconstitutional an Alabama statute permitting a 65% majority of a local congregation to sever its connection with the parent church and to take with it control of the local church property. Northside Bible Church v. Goodson, 387 F.2d 554 (5th Cir. 1967). (Apparently most of the congregation thought that the social positions of the Methodist Church were too radical.)

11. The Church of God case, supra note 10, is also interesting because it refers to the discussion in Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871), that declares that, unlike American law, the English law of its day would, in all cases of disputes about church property, inquire into the nature of the beliefs of the contending parties. Id. at 727-28. The Maryland court in the Church of God case expressed this supposed difference of approach more guardedly in terms of a willingness to find "an implied trust on the part of those who gave the property to the local church that the trust res would be used for the promulgation of the faith and doctrines in effect when the property was given, even though there was no express provision to that effect in making the gift." 249 Md. at 660, 241 A.2d at 697. The English case cited for this proposition, Attorney General ex rel. Mander v. Pearson, 3 Mer. 353, 36 Eng. Rep. 135 (1817), supports no such broad conclusion, however. In that case, Lord Eldon entered into doctrinal questions only because he expressly held that a detailed examination of the terms of the trust in the light of the surrounding circumstances showed that "they did not mean to invest in the Trustees, or the major part of them, any right to vary the system or plan of doctrinal teaching . . . according to their own discre-
In these cases the dispute over the control of property is just a part, albeit a very important part, of the overall doctrinal disagreement. In the case of congregational churches it has been held by the courts that where any such restriction on the use of property can be made out, control over the property will be given to the orthodox minority and not to the majority which has voted to change the religious beliefs or practices of the congregation. When the use of property is held to be so restricted it obviously limits the ability of the local congregation either to merge with other congregations having different basic beliefs or to join even a moderately hierarchical type of church. Normally, these disputes concern the use of the church building and church endowments, but they have even involved the use of communion plates and baptismal basins.

An interesting recent case involved the Second Church of Boston. It had received a silver basin for “the purpose of most holy baptism” in 1706. In 1711 it received a silver dish “for the use of the Communion table.” At the time these gifts were made the church was a Trinitarian Congregational Church in which the sacraments of baptism and holy communion were of great importance. In the early part of the nineteenth century the Second Church adopted Unitarianism, and it gradually abandoned the celebration of the sacraments. Considering that the two silver pieces had not been used for sacramental purposes for some time, and considering that the two pieces

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12. A fairly recent case in point is Berkaw v. Mayflower Congregational Church, 378 Mich. 239, 144 N.W.2d 444 (1966); cf. Newhall v. Second Church & Soc’y of Boston, 349 Mass. 495, 209 N.E.2d 296 (1965). It would be possible, of course, for the courts to rule that regardless of the intention of the grantor, and however he may express that intention, all gifts to religious institutions shall be treated as unconditional gifts which the ruling bodies of those institutions can dispose of as they wish. The courts have not taken this position, however, and I see no reason why the normal doctrines of law relative to gifts of property should be held to have no application in the religious sphere. The separation of church and state does not seem to me to require such an extreme result, a result which would sacrifice the freedom of the individual in the name of religious autonomy.

were the work of Edward Winslow, a renowned early American silversmith, the Second Church wished to sell the pieces to a member of the duPont family for presentation to a museum in Wilmington, Delaware. The Supreme Judicial Court of Massachusetts held that the Second Church did not have the unlimited power to dispose of these items and it issued an injunction restraining the church from selling these pieces.

Hierarchical churches have not been immune from these kinds of disputes. A most interesting case was one heard in the House of Lords in 1904. While there are countless differences in church-state relationships between Great Britain and the United States, I believe an examination of this case will be useful because of the importance of the issue involved.

In the 1840's the Church of Scotland underwent a schism. A group with a majority of the lay members of the church separated from the established church and formed a new body called the Free Church of Scotland which claimed to be the Church of Scotland. The reason for the schism was that the members of what became the Free Church objected to State interference in the appointment of clergy in the Church of Scotland. The Free Church was not against the establishment principle as such, however, because it firmly believed that the State should support the church. It merely rejected all State control over the church and was willing to forgo State financial assistance if State control was the quid pro quo. Divorced from the public purse, the Free Church embarked on an urgent campaign to secure independent financial support. In this campaign it was singularly successful and large amounts of money and real property were given to the Free Church for its support. The ultimate legislative authority of the Free Church, as in the Church of Scotland from which it had separated, was in a General Assembly. In 1900 the General Assembly of the Free Church voted to merge the Free Church with the United Presbyterian Church, which was also a nineteenth century schismatic offshoot of the Church of Scotland. The United Church differed in some important doctrinal respects from the Free Church. In the first place it not only rejected State control over the church; it also rejected State support

14. General Assembly of Free Church of Scotland v. Lord Overtoun, [1904] A.C. 515 (Scot.). For a somewhat related American case involving a similar hierarchical church see Presbyterian Church in the United States v. Eastern Heights Presbyterian Church, 224 Ga. 61, 159 S.E.2d 690, cert. granted sub. nom. Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 88 S. Ct. 2060 (1968) (No. 1380, 1967 Term; renumbered No. 71, 1968 Term), a case discussed, infra, at note 17. See also Lutheran Free Church v. Lutheran Free Church (Not Merged), 273 Minn. 332, 141 N.W.2d 827 (1966) where the majority faction of the Lutheran Free Church that had voted to merge with other Lutheran churches in the American Lutheran Church successfully enjoined the minority from using the name "Lutheran Free Church," but not before the court assured itself that the majority had acted canonically and that, in entering into the merger, the majority had not deviated from any fundamental doctrines of the church.
for the church. It was, in short, against the establishment principle. In the second place, the United Church did not subscribe to the strict doctrine of predestination which had been a part of the Confession of Faith of the Church of Scotland from its inception. To get around these differences, the terms of the merger of the United and the Free Churches left each member of the merged church free to maintain his traditional beliefs on these matters.\textsuperscript{15} The dissenting minority in the Free Church who were opposed to the merger—mainly members of poor highland parishes—brought suit to get control of the property of the former Free Church and to prevent it from being transferred to the merged church which was called the United Free Church of Scotland. When the case reached the House of Lords in 1904, a majority of their Lordships sustained this claim, although, the following year, their decision was superseded by an Act of Parliament.\textsuperscript{16} According to the majority of the law lords the establishment principle and the doctrine of predestination were key beliefs of the Church of Scotland and of the Free Church of Scotland. Those who responded to the appeals of the Free Church for financial assistance in the mid-nineteenth century did so in order to support a church maintaining these beliefs. While the General Assembly of the Free Church had the power to revise the doctrines of the Free Church, it did not follow that property given to support one body of beliefs would be available to support another.\textsuperscript{17} On the other hand, of course, where a substantial direct connection between the receipt of certain property and the maintenance of certain beliefs cannot be made out, the property will follow the reformers who control the church government.

\textsuperscript{15} General Assembly of Free Church of Scotland v. Lord Overtoun, \textit{supra} note 14, at 629. The Free Church had tried to abandon the doctrine of predestination in 1892. \textit{Id.} at 625.

\textsuperscript{16} Act, 5 Edw. 7, c. 12 (1905). This statute provided, roughly, for pro-rating of the property of the old Free Church between the United Free Church and the adherents of the old church based on the allegiance of the individual congregations.

\textsuperscript{17} The \textit{Free Church of Scotland} case is therefore distinguishable from an analogous recent American case, Presbyterian Church in the United States v. Eastern Heights Presbyterian Church, \textit{supra} note 14, where several local churches sought to withdraw from the Presbyterian Church and to take with them property whose legal title was in the local churches, because of alleged doctrinal changes by the Presbyterian Church. One of the alleged changes related to the doctrine of "foreordination" but the others related to pronouncements by the Presbyterian Church on Vietnam, civil rights, civil disobedience, and bible reading in schools, all allegedly contrary to the Church's principle of non-intervention in civil matters. A jury decided that these pronouncements amounted to substantial abandonments of the original tenets of the Presbyterian Church of the United States. This is, therefore, a more radical case than the \textit{Free Church of Scotland} case. The only question the House of Lords examined was whether certain property could be said to have been given for the support of certain doctrines. Given the dramatic context out of which the Free Church was formed, the House of Lords' decision was a supportable one. There was, on the other hand, very little evidence in the Georgia case as to how much the acquisition of certain property by the local churches was conditioned on the maintenance of certain beliefs by the local congregation and by the Presbyterian Church in the United States.
The Free Church of Scotland case has important implications. In the 1950's the Russian Orthodox Church in America, which had renounced the administrative control of the Patriarch in Moscow, sued to gain possession of St. Nicholas Cathedral in New York which was in the possession of an archbishop appointed by Moscow. Title to the cathedral was held by a corporation organized for the purpose of acquiring a cathedral for the Russian Orthodox Church in America as a central place of worship and as a residence of the ruling archbishop "in accordance with the doctrine, discipline and worship of the Holy Apostolic Catholic Church of Eastern Confession as taught by the holy scriptures, holy tradition, seven oecumenical councils and holy fathers of that church." The record in the case showed that before the Russian Revolution the Russian Orthodox Church in America was controlled from Russia and that the Patriarch of Moscow had never renounced his authority over the Russian Orthodox churches in America. Accordingly, the Supreme Court of the United States held that neither the legislature nor the courts of New York State could deprive the archbishop appointed by Moscow of possession of the Cathedral. One might speculate, half humorously, that, if the English courts in the time of Henry VIII were willing to take the same view of the law, there would perhaps never have been a split with Rome.

The moral to be learned from these cases is that perhaps the individual members of churches have a right founded in justice or what have you—a right that courts of law will sometimes protect—in the maintenance of the orthodoxy of their church. People presumably join churches because they share and are willing to subscribe to the declared beliefs of the church. It perhaps is not unreasonable on the part of such people to expect the church which they have joined to continue to subscribe, at least, to the most important of those beliefs. After all, a religious organization is not formed primarily to permit people who individually possess little power to secure, by union, political, economic or social power but rather to pursue spiritual goals. When these people's expectations are disappointed, that is, when the church has changed its beliefs or its organization despite these people's objections, for want of any other source to turn to they will turn to the State and attempt to wage guerrilla warfare against the reformers by striking at the economic base of the reformed church. In religion, then, justice, at least as conceived of


by the State, may not require that the majority should rule, but rather that orthodoxy should prevail. The justification of such a policy may lie in the fact that in a free society no one is compelled by the civil law to remain in a church; in this respect the church is unlike the State itself which may, and often does, prohibit its citizens from renouncing their allegiance to it.

Church members have sought justice in the law courts of the State not only when they have had doctrinal or organizational disputes with their church. As a body dealing in the world of men, churches engage in commercial relationships, and no one has seriously suggested that church members who engage in commercial relations with their church should be without the right to seek the help of the State's courts to resolve disputes which have arisen out of such relationships. But an individual's relations with his church are not limited to the contractual and property relations with which the civil law is familiar. Most religious bodies have procedures, often very elaborate procedures, for maintaining church discipline. Elemental notions of fairness would require that, when a church has established certain procedures for resolving internal disputes, i.e., disputes as to whether a priest has the right to preach, a member is entitled to receive the sacraments, etc., the church should in good faith follow these procedures when they are by their terms applicable. Unfortunately, whatever the notions of fairness might require, the State has fairly successfully been able to resist the cries for intervention to set things right by those who claim that they have been unfairly treated by their church. Only when property or contract interests are involved, which is not often the case, will a reluctant State intervene. Thus, if the rules of a church provide that a pastor cannot be removed except upon thirty days' notice, the State will enforce the right of the pastor to exercise the economic functions of his office until the thirty days' notice has been properly given.20

I have thus far been discussing the cases, and most of the cases have been of this nature, where a very reluctant State has been dragged into essentially religious matters because of irreconcilable disputes among the members of a church. There are, nevertheless, some areas even in America where the State has sought to intervene in what many would claim are essentially religious matters, despite the fact that neither the church nor any of its members have asked for this intervention. A very familiar instance is the forcing of the Mormon Church to renounce the practice, although not the doctrine, of polygamy when the state of Utah was admitted into the Union.21 The case

20. St. John's Greek Catholic Hungarian Russian Orthodox Church of Rahway v. Fedak, 96 N.J. Super. 556, 233 A.2d 663 (1967). Some other church cases are cited in notes 37 and 40 infra. In a church in which membership carries a pro-rata ownership of church property, membership itself is partially an economic interest which will receive some protection from action not in accordance with church rules.

21. Cf. Reynolds v. United States, 98 U.S. 145 (1878) where a prosecution for big-
which interests me more because it is more relevant to contemporary problems is the serious problem which was avoided when the eighteenth amendment to the Constitution of the United States went into effect. The wording of the eighteenth amendment seems absolute. The purchase, sale, transportation, manufacture, and importation of intoxicating liquors for beverage purposes was prohibited. Although to some it might seem a strained reading of the amendment, the use of wine in the sacrament of holy communion was not considered to be "for beverage purposes." The Volstead Act which implemented the eighteenth amendment made this clear.22

The problems, however, have not faded away with the fortunate repeal of prohibition. The State has felt free to prohibit the use of rattlesnakes in religious ceremonies, however essential their use might be under the doctrines of any church.23 The State as parens patriae reserves to itself the right to have the last word as to what is in the interest of the health and safety of its citizens, and it will not surrender this right to the churches. The case for State supremacy seems clearer when, as in the case of the use of rattlesnakes in religious ceremonies, the practice is patently dangerous to life. State intervention can perhaps also be justified when the beliefs of a church—such as the belief that no Christian should seek medical attention, or certain kinds of medical attention such as transfusions and injections—are applied by the adult members of the church so as to jeopardize the lives of their children. At any rate, the State has not been unwilling to interfere in this area as well.24 There was, of course, the outrageous case in the District of Columbia where doctors at Georgetown Hospital secured a court order authorizing them to give a transfusion to an otherwise sane and rational adult, who, as a

23. Statutes making it a crime to handle poisonous snakes so as to endanger life or health have been upheld, e.g., in Hill v. State, 38 Ala. App. 404, 88 So. 2d 800 (1956); State v. Massey, 229 N.C. 734, 51 S.E.2d 179, appeal dismissed sub nom. Bunn v. North Carolina, 336 U.S. 942 (1949) (Durham city ordinance); Harden v. State, 188 Tenn. 17, 216 S.W.2d 708 (1948).
24. In Jehovah’s Witnesses v. King Cty. Hosp. Unit No. 1, 278 F. Supp. 488 (W.D. Wash., 1967), a statute authorizing the courts of Washington State to issue orders for the welfare of minors "grossly and wilfully neglected as to medical care" was upheld as against the claim that the Washington courts were applying the statute to order transfusions for minors over the objections of their parents and sometimes of the minors themselves. Even without such a statute courts have issued such orders in these circumstances. See People ex rel. Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769, cert. denied, 344 U.S. 824 (1952).
Jehovah’s Witness, refused to permit the transfusion, despite the fact that the doctors asserted she would die without it.\textsuperscript{25} What makes this case outrageous, and it has been justly condemned,\textsuperscript{26} is not the fact that the State invaded the religious sphere. The principle is exactly the same even if the woman’s refusal were not based upon any religious belief. In our society it is part of an adult’s constitutionally protected freedom, so long as he is otherwise in full control of his faculties, to resist any and all tampering with his body so long as it does not affect the safety of others. He can be vaccinated against his will to prevent the contagion of others\textsuperscript{27} but if he wishes to die rather than permit his leg to be amputated or rather than permit a transfusion he must be permitted to die, however much it may grieve his doctor.\textsuperscript{28}

The tough case would be one where the State absolutely prohibited the use of alcoholic beverages so that the use of wine in the sacrament of holy communion were prohibited.\textsuperscript{29} Alcoholic beverages might in some manner of speaking, even when taken in moderation, pose some slight danger to health, but they are not dangerous in the sense that rattlesnakes or LSD are danger-

\textsuperscript{25} Application of the President & Directors of Georgetown College Inc., 331 F.2d 1000, \textit{rehearing en banc denied}, 331 F.2d 1010 (D.C. Cir.), \textit{cert. denied}, 377 U.S. 978 (1964). The rehearing en banc was denied on the ground that since the transfusion had been given and the order expired, the case was moot. Judge Miller filed a particularly bitter dissent, in which he was joined by Judges Burger and Bastian, 331 F.2d at 1011.

\textsuperscript{26} In addition to Judge Miller’s remarks, cited \textit{supra} note 25, see also the strong unanimous opinion of the Supreme Court of Illinois in \textit{In re Estate of Brooks}, 32 Ill. 2d 361, 205 N.E.2d 435 (1965). \textit{But cf.} United States v. George, 239 F. Supp. 752 (D. Conn. 1965). In the \textit{Brooks} case the Illinois court chose to decide the case although the treatment had been given and the original order had expired. This was in order to give instruction to lower courts that might otherwise be tempted to issue similar orders. I do not believe that the subsequent vacating of a court order would expose a doctor who executed the order to liability under state law. Conceivably, a doctor acting under a state court order against the wishes of an adult patient could be sued under an old federal statute (42 U.S.C. \textsection{} 1983 (1964)) that has received increased attention in recent years and that permits a civil action against anyone who, under “color of state law,” deprives a person of rights secured under the constitution and laws of the United States. This argument was made in the Jehovah’s Witnesses case, \textit{supra} note 24, but the court refused on procedural grounds to consider the issue. A doctor in the District of Columbia could not be reached under this statute, since the statute only applies to state action.

\textsuperscript{27} Jacobson v. Massachusetts, 197 U.S. 11 (1905).


\textsuperscript{29} In 1967 the Arkansas legislature passed an act (Act No. 120), which became law without the Governor’s signature, that made it a crime, and in the case of multiple violations a felony punishable by a jail term of up to fifty years, to serve wine to persons under 21. An attempt expressly to exempt the serving of communion wine was defeated. The Episcopal Bishop of Little Rock announced his intentions to defy the law and to instruct his clergy likewise. \textit{See} Slavin, \textit{A Primer for Spartans}, 11 St. Louis U. L.J. 570 (1967). Fortunately this act was superseded by Act No. 277, which expressly allowed the serving of wine in religious ceremonies. \textit{Ark. Stats. Ann.} \textsection{} 48-903 (Supp. 1967).
ous. What about the use of peyote or marijuana in religious ceremonies? The scientific evidence thus far available indicates that these substances are even less harmful than alcoholic beverages. When taken to excess, alcoholic beverages are universally recognized as very dangerous. Excessive use of peyote and marijuana is not considered by many people to be as dangerous, at least insofar as lasting physical effects are concerned. There is, nevertheless, no question that the majority of persons in this country, and that includes the vast majority of religious persons, feel that the use of peyote and marijuana in religious ceremonies should not be permitted.

In two recent cases the issue was squarely presented whether statutes making it a crime to possess or use peyote or marijuana could constitutionally be applied against a person who claimed that he used them in connection with religious ceremonies which incorporated the use of these drugs as part of the ritual. In the first case, People v. Woody, decided in 1964, the Supreme Court of California held that a statute making possession of peyote a crime could not be applied to an American Indian who was a member of the “Native American Church” and who had used peyote in a religious ceremony. The use of peyote is an essential part of the Native American Church, which, although a somewhat informally organized church, has a substantial following among American Indians. Peyote is believed to embody the Holy Spirit, and the use of peyote in religious ceremonies is believed to bring the user into direct contact with God. The California court pointed out that peyote had been used by the Indians in religious ceremonies since at least the mid-sixteenth century, although Peyotism has never been adopted as an official belief by any American Indian tribe, and some tribes even forbid its use. The court relied on the fact that the use of peyote has no lasting effect on humans and that the State had not produced any evidence to support the State’s claim that the use of peyote would or even could lead to the use of dangerous narcotics. Noting that the defendant’s sincere belief in Peyotism was unquestioned, the Supreme Court of California held that the United States Constitution’s guarantee of religious freedom precluded the defendant’s conviction. The court was assisted in reaching this decision by the fact that the use of


31. People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964). Cf. In re Grady, 61 Cal. 2d 887, 394 P.2d 728, 39 Cal. Rptr. 912 (1964), where a writ of habeas corpus was granted and petitioner, previously convicted of possessing peyote, was remanded to the custody of a trial court for the determination of whether his belief in Peyotism was genuine.
peyote in religious ceremonies was permitted by statute in New Mexico and
Montana and by judicial decision in Arizona.32

The second and more recent of the two cases I wish to discuss is State v.
Bullard,33 decided in 1966 by the Supreme Court of North Carolina. Mari-
jjuana and peyote had been found in Bullard's apartment in Chapel Hill.
Among Bullard's defenses was the claim that he was a Peyotist with Buddhist
leanings and that he had recently joined the Neo-American Church. The
beliefs and rituals of the Neo-American Church were apparently almost
identical with those of the Native American Church discussed in the Woody
case in California. While the Supreme Court of North Carolina declared
that there was evidence which would justify a jury in doubting the bona
fides of Bullard's belief in Peyotism, it went on to hold that, in its view, the
Constitution of the United States did not prevent a State from absolutely
prohibiting the use of hallucinatory drugs such as peyote. Even if it is correct
in the result reached in the particular case before it where defendant's good
faith could legitimately be questioned, the approach of the North Carolina
court seems wrong. Where a religious practice offends the moral standards
of the majority but is neither harmful to its practitioners nor to the community
at large (other than by shocking its moral sense), justice would require that
in a country devoted to religious freedom, the sincere believer be permitted to
engage in the practice. As a corollary to this principle, when the State grants
tax exemptions to religious institutions, so long as a purported religious in-
stitution's beliefs are not directed primarily to economic or political action
and are not otherwise illegal, the State should not deny the exemption to a
body whose beliefs are unorthodox, e.g., the rejection of the Judaeo-Christian
concept of God.34

B. Justice and Private Educational Institutions

I should now like to move the focus of our attention to private institutions,

32. People v. Woody, supra note 31, at 723-24, 394 P.2d at 819, 40 Cal. Rptr. at 75.
34. See the discussion and the cases cited in Boyan, Defining Religion in Opera-
tional and Institutional Terms, 116 U. Pa. L. Rev. 479 (1968). For an illustration
of the sorts of issues that can arise where the State grants tax exemptions only to some
types of church property, cf. Church of Jesus Christ of Latter-Day Saints v. Henning,
[1964] A.C. 420 (1963), where a Mormon temple in Godstone, England was denied an
exemption from local property taxes on the ground that it was not a "place of public
religious worship" owing to the fact that a Mormon Temple, unlike a Mormon Chapel,
was not open to the general public but only to Mormons in good standing. Lord Ever-
shed, who reluctantly concurred in this interpretation of the statutory language because
he did not wish to register a lone dissent, pointed out that a place of "public religious
worship" could be a place where a number of people worshipped together in public, as
opposed to a place of individual or family worship. Id. at 430, 434. A respectable argu-
ment drawn from legal authority could be marshalled for this view, which seems to me
to be more sensible besides being more imaginative.
particularly to private religiously affiliated universities. Universities are part of a wide spectrum of private associations. Insofar as such associations concern themselves solely with social or religious matters, it is only with extreme reluctance that the law courts of the State will intervene. This principle of non-interference by the State, which is premised upon a preference for freedom of association, is reinforced by the unsuitability of legal remedies for dealing with intra-group disagreements. It is possible, however, for private associations to perform functions which are not in popular parlance strictly social or religious.

The range of functions a private association can perform is practically limitless, but at one end of this range are functions often performed by the State itself. A clear example is a county medical association, membership in which is necessary if a physician is to be able to use the facilities of the local hospitals. Since in controlling effective entry into the practice of medicine in that particular locality the county medical society is performing a function often, and perhaps normally or more properly, performed by the State itself, the county medical society, in return for the power which it exercises, will be subjected to some of the limitations which the law imposes upon official conduct.35 Again, and in an analogous vein, if the State grants certain privileges and powers to trade unions, including the right to compel workers to join them, the unions cannot complain when the State imposes certain standards of responsibility upon them.36

Even with regard to private associations which do not exercise quasi-public functions or which have not been granted the legal power to compel membership in them, the State quite properly exercises some control over their relations with their members. As with churches, where economic interests are involved a private association such as a club will be compelled to comply with its own regulations for resolving disputes.37 Even more important for our pur-


In the club situation, payment of dues can give the member a contractual right in the maintenance of the club's rules even in the absence of other economic injury, although in most clubs members in good standing, as owners of club property, would
poses, there will be limits to what private associations can do vis-à-vis their members even in complete compliance with their internal rules. The modern cases indicate that a social club cannot deny a member the right to use club facilities because he votes for a Democratic candidate or because he favors Medicare. While a club might use these criteria to refuse to admit a person to membership it would be too great an inhibition to public discussion and political freedom to permit a man to be denied the right to play golf at his club because he took part in the public debate of the issues of the day. The social purposes of the club may not be held to permit suppression of this kind of dissent. The difficult cases arise where it might be said that the purpose of the association legitimately carries with it the right to suppress some dissent. A political party might be able to expel a member who refuses to support its candidates and policies. Likewise, a religious body can expel members who refuse to accept its beliefs. Of course, in many of these cases the absence of economic injury to the person expelled would preclude judicial intervention in any event, but the principle seems the same regardless of the presence or absence of an economic interest, although the presence of an economic interest would probably induce a court to examine at least whether the church has followed its own procedures. How much dissent an organization founded for a specific purpose should permit with regard to its central purpose seems to a large extent to be for the association itself to decide. We are assuming, of course, that the association's purpose is a lawful one in the first place.

With this background in mind, let us turn to the private universities, particularly private religious universities. What are their purposes? What are the interests that the State will protect? More particularly what, if any, are the economic interests involved? The rights of faculty can be fit more or


40. Randolph v. First Baptist Church, supra note 37, is a typical case. For other church cases see Judicial Control of Actions of Private Associations, supra note 35, at 1021-23, and Note, supra note 10, at 509-11.

41. For a comprehensive review of the law on this aspect of this article, see Academic Freedom, 81 Harv. L. Rev. 1045 (1968).
less into the employer-employee pattern of relationships. As for students, their relationship to an educational institution is often compared to that of a child to his parents, but it is an odd kind of family relationship because the university family claims the right to expel him, something that is difficult for the natural family to do, and because the child in the university family has traditionally had very few rights against his alma mater, fewer than against his natural mother. When a student pays his tuition, what is he buying or paying for? If he is expelled from the university or school, what relief would he want to seek? I presume that his primary interest is not whether he can sue for a refund of his tuition, although that is his clearest and most immediate economic loss.

In 1962 two Roman Catholic students at St. John’s University in Brooklyn were married in a civil ceremony and two other Roman Catholic students at St. John’s served as witnesses at the ceremony. One of the witnesses subsequently publicly disclosed this fact. Thereupon, after a hearing, all four students were expelled from the university. The university supported its action as follows: The regulations of the university, the pertinent portions of which were printed in the university’s bulletins, stated:

“In conformity with the ideals of Christian education and conduct, the University reserves the right to dismiss a student at any time on whatever grounds the University judges advisable. Each student by his admission to the University recognizes this right. The continuance of any student on the roster of the University, the receipt of academic credit, graduation, the granting of a degree or a certificate, rest solely within the powers of the University.”

By participating in a civil marriage, the students violated their religious duty as Catholics and gave public scandal to the student body of the university. Since the university was founded inter alia to “enable men and women to develop in learning and culture according to the philosophical and theological principles and traditions of the Roman Catholic Church,” and since the university had reserved to itself the right of dismissal for any cause, the university contended that expulsion was totally proper.

There is no question, of course, that the students were aware of the university regulations just quoted. Presumably, therefore, the regulations were “part” of their contract with St. John’s University. The case was nevertheless

42. Carr v. St. John’s Univ., 34 Misc. 2d 319, 231 N.Y.S.2d 403 (Sup. Ct. Kings Cty.), rev’d, 17 App. Div. 2d 632, 231 N.Y.S.2d 410, aff’d, 12 N.Y.2d 802, 187 N.E.2d 18, 235 N.Y.S.2d 834 (1962). The facts are most completely presented in the opinion of the trial court (Supreme Court, Kings County). I shall, however, sometimes, for the sake of conciseness of reference, use the opinions of the other courts that heard the case to support of my statement of the facts of the case.
43. Supra note 42, 17 App. Div. 2d at 633, 231 N.Y.S.2d at 412.
44. Supra note 42, 34 Misc. 2d at 320, 231 N.Y.S.2d at 406.
a very difficult one. One of the students, the husband in the civil marriage, had completed all the requirements for the bachelor of science degree and was waiting for the university's next commencement to receive his degree. His wife and one of the witnesses were seniors. Upon being informed of the university's decision to expel them, the students were remarried with the same witnesses before a priest.\footnote{45} Shortly thereafter the university formally confirmed its action and the students went to court to obtain relief. The trial court granted that relief on the grounds that the university's regulations under which the students were expelled were so vague as to afford no basis for proceeding against the students.\footnote{46} The court started from the premise that a university cannot take a student's fees and then deny him a degree for no reason at all.\footnote{47} By paying his tuition the student secured a contractual right to receive a degree if he fulfilled the university's academic requirements. It was, of course, to get around this principle of contract law that St. John's University adopted the regulations just quoted so as to possess by contract the right to deny degrees and to expel for any reason the university thought fit. On appeal this decision was reversed, the reason given being that universities possess the right to expel for misconduct, and the misconduct in the instant case was at least arguably within the scope of the legitimate concern of the university, given its goals and purposes. There was, however, a dissent based on the premise that under the facts of the case there was no basis for the university's action. The dissenters declared that

The University is a public institution, chartered by the State, open to persons of all religious faiths, and engaged in providing secular learning leading to a general academic degree. Such a University may not enforce against a student an ecclesiastical law, the breach of which is not immoral according to the standards of society in general, or which it does not enforce equally against all students at the University, whether Catholic or non-Catholic.\footnote{48}

In my view the argument of the dissenters is unanswerable, particularly where, as was actually the case here, it was not necessary to be a Roman Catholic to become a member of the university community. The university’s action was based upon premises which amount to nothing less than an assertion of the right to visit civil consequences upon a Catholic's constitutional right to renounce his faith. In a free society no man by contract or otherwise can give

\footnote{45} Supra note 42, 34 Misc. 2d at 321, 231 N.Y.S.2d at 407.
\footnote{46} Supra note 42, 34 Misc. 2d at 324, 231 N.Y.S.2d at 409-10.
\footnote{47} This was the holding of an old New York case that a university could not arbitrarily refuse to permit a medical student to take his final examinations. People ex rel. Cecil v. Bellevue Medical College, 60 Hun. 107, 14 N.Y.S. 490 (Sup. Ct.), aff'd mem., 128 N.Y. 621, 28 N.E. 233, 14 N.Y.S. 462 (1891).
\footnote{48} Supra note 42, 17 App. Div. 2d at 634, 231 N.Y.S.2d at 414.
up that right. Of course, a church may expel from the church itself members who violate its rules and, even in a secular society, religious grounds should be sufficient to justify expulsion of a student from a seminary. But to use religious grounds to justify a refusal to award a general academic degree, a degree whose value depends upon the State authorizing the university to award the degree, is another matter. Times have changed, however, even since 1962. The changes in St. John's since the faculty strike of 1966 make it unlikely that students would be expelled today for participating in a civil marriage. For example, a Protestant has now been appointed to be academic vice president and provost of St. John's University. Nevertheless, should a case like the one just described arise again I believe the position of the dissenters would prevail.

The most important change in this area, however, is not the internal changes which religious institutions are now undergoing, however important and beneficial those changes may be. Rather, the most important change is that the public purse is being tapped to support private educational institutions, including religious colleges and universities. The availability of public funds puts pressure on these institutions to secularize themselves in order to secure easier and greater access to the available funds. More importantly for present purposes, the acceptance of public funds by a religiously affiliated university opens it to the public function argument explored earlier in this article. Insofar as a religious educational institution spends public funds, the public becomes a partner, and not necessarily a silent partner in its undertakings. Even when the support is given without strings, the courts have shown a tendency to treat some of the actions of private educational institutions as "state action" within the meaning of the fourteenth amendment or as United States Government action for purposes of the fifth amendment. In such cases

50. Tulane University, which was partially founded with State funds, receives a special tax exemption for the income of its commercially leased real estate, and has among its 17 trustees three public officials who held their position as trustees ex officio, was held to be engaged in "state action" in refusing to admit Negroes, Guillery v. Administrators of Tulane University, 203 F. Supp. 855 (E.D. La. 1962), but this finding was vacated on rehearing, 212 F. Supp. 674 (E.D. La. 1962). Tulane has, however, now desegregated. State action was found more recently in Commonwealth of Pennsylvania v. Brown, 270 F. Supp. 782 (E.D. Pa. 1967), aff'd, 392 F.2d 120 (3d Cir. 1968), cert. denied, 88 Sup. Ct. 1811 (1968) where an orphans' school refused to admit Negroes based on these major findings: (1) the school's trustees at one time (and for over 125 years) were public officials who served ex officio; (2) the trustees were appointed by the Orphans Court of Philadelphia; and (3) with the assistance of Philadelphia public school officials, the orphans' school actively solicited applicants from the poor white male students of the Philadelphia public school system. Cf. Eaton v. Grubb, 329 F.2d 710 (4th Cir. 1964) where a private hospital receiving federal funds was ordered to desegregate. For the practical implications of a finding of "state action" see Van Alstyne, The Judicial Trend Toward Student Academic Freedom, 20 U. Fla. L. Rev. 290 (1968).
the courts will impose the same restrictions that are applicable against official action to the actions of the religious institution. No organ of government, for example, could punish a student for participating in a civil as opposed to a religious marriage ceremony.

To sum up then, a private educational institution, whether religiously affiliated or not, will be restrained by the requirements of the justice administered in the State's courts of law from exercising over students power which is not justified by the educational institution's purpose. I believe the modern tendency will be to read the institution's purposes quite narrowly and to deny the institution the power of moral censor, particularly at the college and university level. The extent of this restraint will be limited by the requirement that, for courts to intervene in the affairs of private institutions, some economic interest must be at stake. Thus until a private university, religious or secular, accepts the student's tuition or makes him legally liable for the payment of his tuition, it has a much greater freedom of action with respect to him. Moreover, although it may be restricted in its ability to expel a student for no cause at all, the same restrictions may very well not apply to the cancelling of a scholarship or, at least, to the failure to renew a scholarship. Scholarships from private institutions are considered more or less as gifts and, by and large, no one has the right to a gift. As the private educational institution comes to receive and to rely on support from public funds, however, this same justice will impose upon it more and more of the limitations applicable to government action, although without at the same time granting it the privileges possessed by the government. When government action is involved, the economic nexus which is so important when private parties are involved is not so crucial. Civil rights can be protected despite the fact that they may not, even by stretching the point, have a cash value.\footnote{See Evans v. Newton, 382 U.S. 296 (1966) (right to use quasi-public park); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (right prior to Civil Rights Act of 1964 to eat in privately run lunch counters on publicly-owned property).}

\textit{II. The Demands of Justice in Its Broader Sense}

The time has now come to attempt some general remarks on justice and the relations between individual men and the groups to which they belong. "Justice" shall now be used, not as a synonym for the law of the civil State, but rather in its wider or moral sense. We may state, first of all, with a considerable degree of confidence, that at the very least justice requires that in dealing with its members a group must follow its own established procedures and it must be bound by its own regulations. Fairness, after all, is one of the components of the concept of justice. But does the individual have any other
claims against his group besides the claim that he must be treated fairly? When a church or other private association decides to change its beliefs or policies, should the majority rule?

We normally think of majority rule as one of the essential components of justice. I think we do this because majority rule is one means of implementing what I would call a more basic requirement of justice, namely, that those bound by a rule must have had some participation in the formulation and establishment of that rule, or have some means of seeking a change in an existing rule. I believe this is why, for example, the laws of the civil society are binding in conscience, why in short the State is not the gunman situation writ large. Majority rule is one means of assuring the necessary participation of the individual in the formulation of the rules that bind him, but it is not the only means. The chance to present our views to our rulers with the knowledge that they will carefully consider our views before coming to a conclusion may in some circumstances be enough of a participation in rule-making to make obedience to group rules binding in conscience. I think the Catholic Church is moving towards insuring this type of participation by its members in its legislative deliberations and I believe it is a good thing. Certainly enlightened private educational institutions are also moving in this direction.

Is there also, however, a component of the notion of justice similar to what I have called in the first part of my article “The demands of orthodoxy”? Groups are often founded not only as a means for effective social action but in order to protect certain agreed-upon values and ideals. In this case, the notion of majority rule seems to be capable of abuse if a majority can bind the minority to a change of values and ideals. I take it that the Constitution of the United States embodies some such values and ideals. That is one of the purposes of a written constitution. But society changes, the natural environment changes, and man's view of life might have to change accordingly. The Constitution of the United States recognizes this possibility by permitting amendments, but the amending process is made so complicated and difficult that a mere majority is prevented from forcing its desire for a change in basic values upon the rest of the citizens. The most usual manner of amending the Constitution of the United States requires passage by two-thirds of both houses of the Congress and ratification by three-fourths of the States, expressed either through state legislatures or special conventions called solely for this purpose.\(^5\) For most groupings of human beings this seems an acceptable compromise. The need for effective group action, the requirement that the individual be permitted to participate in the formulation of the rules that bind him, and the requirements of orthodoxy in the sense of adherence

\(^5\) U.S. Const. art. V.
to strongly held beliefs, are thus all reconciled. But what about religious
groups premised upon the absolute adherence of the group to certain beliefs
and values, such as the virgin birth of Christ, the resurrection of Christ, or
the redemption of sinners? Can justice, as expressed in the expectations of
the members of the church, demand the supremacy of the principle of ortho-
doxy so that no majority, however large, can change these beliefs so as to bind
even a minority of only one?

My own view is, "it depends." As long as the majority are free in conscience
to leave the group and this freedom is protected by the law of civil society,
then the absolute supremacy of orthodoxy in some circumstances is not per se
objectionable. People who have freely joined the group or who, having been
born into it, have elected to remain in the group can be said to have volun-
tarily accepted the burdens of orthodoxy. But if there is no such freedom, then
there must be some procedure for overcoming the strangle-hold of orthodoxy.
Otherwise men would be in bondage to values and ideals in which they no
longer believed, and group life which is normally a blessing would become a
curse.