

The recent ruling of the Supreme Court upholding the Blue Laws has perplexed the American Jewish community. Most strongly affected are Orthodox Jews, for whom the Sabbath is the cornerstone of Judaism. A reaction to this decision which takes exception to the general conclusions of American Jewry, but which takes into consideration certain realities of Jewish belief and practice usually overlooked, is here presented by Rabbi Meyer Kramer, rabbi of Adath Zion Congregation in Philadelphia, Pa. Rabbi Kramer, who was ordained by Yeshiva University, received his legal training in the law school of the University of Pennsylvania.

IS AMERICA A CHRISTIAN COUNTRY?

Sunday Closing Laws vs. Sabbath Observing Jews

The examination of the meaning of the First and Fourteenth¹ Amendments to the Constitution of the United States of America, which provide that no law shall be made by the Federal government or the states "respecting an establishment of religion or prohibiting the free exercise thereof" is proceeding on many fronts.² At the moment, debate is centered upon the propriety of state aid to private schools operated by religious bodies. Simultaneously, however, other aspects of the question, such as Bible reading or religious observances in the public schools, are being litigated in the courts. To the Orthodox Jew, one of the more important of these problems was decided by the Supreme Court of the United States on May 29, 1961.

Involved was the constitutionality of the so called "Blue Laws," state statutes which prohibit, under penalty of fine or imprisonment, certain acts on Sunday which, if done on any other day of the week, would be lawful. Since in the value range of the *mitzvot*, the *Shabbat*, or Sabbath, ranks so high that it is impossible to be a truly Orthodox Jew without being a strict

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observer, these Sunday closing statutes have weighed heavily upon the Orthodox businessman. Forced by the Torah to stay closed on Saturday and by the State on Sunday, he stands to lose a full weekend of trade, a severe handicap for a small entrepreneur seeking to compete with the large enterprise. Yet to be written is a history of the struggle of American Orthodoxy to ease this legal burden of the Sabbath observer.

BACKGROUND

State courts have invariably upheld the constitutionality of Sunday closing laws and their applicability to Sabbatarians.³ Some measure of relief was obtained through exemptions in the Blue Laws excepting the Sabbatarian from their provisions, and in twenty-one out of the thirty four states which have general prohibitions against labor on Sunday, some exceptions are made for the *Shomer Shabbat* (Sabbath observer).⁴ However, in only eight of these states may a Sabbath observer *sell* goods on Sunday,⁵ and many states provide no exemptions whatsoever. Hence, in order to stay in business by remaining open on Sunday, the *Shomer Shabbat* storekeeper has depended, by and large, upon the general non-enforcement of the Blue Laws, understanding mercy on the part of the judiciary, and the comparatively light fines contained in most Sunday closing statutes. Though his situation has been neither comfortable nor legally correct, it was bearable so long as he remained a small tradesman serving a Jewish clientele or the only shopkeeper open on Sunday within a limited radius in a non-Jewish neighborhood. Recent years, however, have witnessed the rise and proliferation of the chain discount store and the merchandise mart, attracting customers from a large area, whose widespread success has been based not only on low prices made possible by huge volume, but also upon doing business for the full seven days of the week. In self protection, the center city stores and the small merchants have been pressuring police officials and district attorneys to enforce Sunday closing laws strictly and they have joined Protestant and Catholic religious groups in urging legislatures to pass stricter Sunday laws carrying heavier fines.⁶ In this war between

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competing commercial institutions, the Sabbath-observing small shopkeeper has found himself in an especially vulnerable position. His hope lay in challenging before the Supreme Court of the United States the entire concept of the Blue Law, as being an unconstitutional establishment of religion tending to prohibit the free exercise of Judaism. In *Braunfeld et al vs. Gibbons*⁷, the Supreme Court squashed that possibility.

THE CASE

The Braunfeld case was instituted by five Orthodox clothing and furniture merchants in Philadelphia to enjoin the enforcement of a 1959 law raising the fine for selling clothing and home furnishings on Sunday from \$4.00 to \$100.00 for every offense.⁸ Alleging that each of them “does a substantial amount of business on Sundays,” and that Braunfeld especially “will be unable to continue in his business if he may not stay open on Sunday and he will thereby lose his capital investment,” they argued, first, that the economic consequences of staying closed on Sunday in addition to Saturday tends to compel them to abandon observance of the Sabbath and thus the State interferes with the free exercise of Orthodox Judaism. Secondly, the Sunday closing laws of Pennsylvania establish a Christian religious doctrine as the law of the State and prefer Christian sects to other denominations. The first point was economically obvious. The second argument was substantiated through the language of the original Blue Law of Pennsylvania “that, according to the example of the primitive Christians, and for the ease of the creation, every first day of the week, called the Lord’s day, people shall abstain from their usual and common toil and labour. That, whether masters, parents, children, or servants, they may the better dispose themselves to read the Scriptures of truth at home, or to frequent such meetings of religious worship abroad . . .”;⁹ the wording of the existing basic Sunday closing law, prohibiting the performance of any worldly employment or labor whatsoever “on the Lord’s Day, commonly called Sunday”;¹⁰ and the justification given by the judiciary for enforcing Sunday closings because “Christianity is part of the common

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law of Pennsylvania and its people are Christian people. Sunday is the holy day among Christians.”¹¹ “The Christian religion, and the sanctity of Sunday as a holy day, is an inseparable part of our fundamental law . . . With our understanding, that our people profess Christianity, we cannot assume that there is any change in our fundamental law that would convert Sunday into a worldly day.”¹²

A Supreme Court divided 6 to 3 upheld Pennsylvania’s 1959 Sunday closing act.¹³ Blue Laws, said the majority of the Court, do not prevent an Orthodox Jew from fully exercising his religion. “Fully recognizing that the alternative open to appellants [Sabbath observers] and others similarly situated — retaining their present occupation and incurring economic disadvantage or engaging in some other commercial activity which does not call for either Saturday or Sunday labor — may well result in some financial sacrifice in order to observe their religious beliefs, still the option is wholly different than when the legislation attempts to make a religious practice itself unlawful.”¹⁴

Nor do Blue Laws constitute an “establishment” of Christianity by the state. Although their origin was indubitably religious, “In light of the evolution of our Sunday closing laws through the centuries, of their more or less recent emphasis upon secular considerations, it is not difficult to discern that as presently written and administered, most of them, at least, are of a secular rather than of a religious character, and that presently they bear no relationship to establishment of religion as those words are used in the Constitution of the United States . . . The ‘Establishment’ Clause does not ban federal or state regulation of conduct where reason or effect merely happens to coincide or harmonize with the tenents of some or all religions.”¹⁵ “. . . The State’s purpose is not merely to provide a one-day-in-seven work stoppage. In addition to this, the State seeks to set one day apart from all others as a day of rest, repose, recreation and tranquility — a day which all members of the family and community have the opportunity to spend and enjoy together, a day in which there exists relative quiet and disassociation from the everyday intensity of commercial activities, a day in which people may visit friends and relatives who are not

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available during working days.”¹⁶

Even among the three dissenting judges, only one, Justice Douglas, saw in the Blue Laws an “establishment” of religion. The other two Justices, Brennan and Stewart, emphasize the restriction on the free exercise of religion. “Pennsylvania has passed a law which compels an Orthodox Jew to choose between his religious faith and his economic survival. That is a cruel choice. It is a choice which I think no State can constitutionally demand.”¹⁷ “This clog upon the exercise of religion, this state imposed burden on Orthodox Judaism, has exactly the same economic effect as a tax levied on the sale of religious literature.”¹⁸ “The special protection which Sunday laws give the dominant religious groups and the penalty they place on minorities whose holy day is Saturday constitutes in my view state interference with the ‘free exercise’ of religion.”¹⁹

DISCUSSION

However large an economic strain the Supreme Court’s decision seems to place on the *Shomer Shabbat*, this writer, as an Orthodox Jew, cannot help but concur with its basic thesis. In challenging the validity of the Blue Laws, traditional Jewry is in an anomalous position. In Israel, Orthodoxy demands that all Jewish establishments must be closed on *Shabbat* regardless of the convictions of individual Jews, on the theory that the *Shabbat* requires a general atmosphere of quiet and peace, as well as on the ground that each Jew bears responsibility for the sins of his fellow Jews. In America, on the other hand, Blue Laws are opposed on the principle that “religious liberty is impaired if any person is penalized for adhering to his religious beliefs, or for not adhering to any religious belief, so long as he neither interferes with the rights of others nor endangers the public peace or security.”²⁰ Surely, what is right for Israel cannot be wrong for America.²¹

Nor is the Sabbath observer necessarily interested in the total invalidation of Sunday closing laws. Economically, he stands to gain very little thereby. As Justice Frankfurter pointed out, were there no Blue Laws and businesses generally were

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open seven days a week, the Sabbath observer would be no better off financially than he is at present.²² What the Sabbatarian really wants is the right to be open on Sunday, which can be made available through specific exemptions, without the need of declaring all Sunday closing legislation unconstitutional. Yet such is the nature of the American governmental process, that, where statutory exception is unavailable by legislative mandate and relief has to come through the judiciary, the Constitutional argument has to be phrased in a manner that would make Sunday closing laws inapplicable even to the Christian. As a result, the *Shomer Shabbat* finds himself in the same corner with the discount house whose management is using the identical reasoning to stay open seven days a week, thus making difficult the observance of *Shabbat* for the Jewish storekeeper and of Sunday for the Christian one. This apparent partnership with the big merchandisers is, at best, an unnatural one for the Orthodox Jew and it is well that it will no longer exist.

One must remember that the separation of religion and state written into the First Amendment bespeaks theological assumptions as well as practical considerations. The multiplicity of sects, the large number of unchurched, the need to win the support of religious minorities for a republic newly created — these made any attempt at establishment politically dangerous. But there were ideological influences which were equally important in leading to separation.²³ The basic one was the assumption that religion was a private matter of conscience outside the scope of all civil authority. Roger Williams had developed the doctrine of the two tables, i.e. "that it was the business of the civil magistrate to enforce the injunctions of the second table of the Decalogue which concerned man's dealings with his fellow men, but that the punishment of offenses against the first table, governing one's relations with God, was not within the proper sphere of the state."²⁴ Thus the Baptist followers of Roger Williams argued that "religion is a concern between God and the soul with which no human authority can intermeddle."²⁵ "The care of souls cannot belong to the civil magistrate, because his power consists only in out-

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ward force; but pure and saving religion consists in the inward persuasion of the mind, without which nothing can be acceptable to God."²⁶

Implicit in this approach is the distinction between "faith" and "works" which was strengthened by the "Great Awakening" in the middle of the eighteenth century,²⁷ the evangelical religious revival which made the experience of conversion important to salvation. If faith by the sinner in divine grace is the essential religious act, the state, of course, could not possibly interfere. A curtain was drawn between what was supposed to pertain to Caesar and what belonged to God. This theology, stressing the individual affirmation, fitted in with the concept that every man should read and interpret the Bible for himself and that the relationship between God and man is not only direct but complete. Where each man could place his own gloss on the scriptures, and where his religion was solely an I — Thou relationship, outsiders, represented by the state, could not step in. The ultimate result is not only a separation between church and state, but also between religion and politics.²⁸

Any knowledgeable traditional Jew can appreciate the gulf between the outlook of the Torah and this faith-centered individualistic Protestantism. Without embarking on a prolonged exposition of Judaism, it contains far more than the subjective element of belief. The drama of Judaism is played out in the arena of Torah *and* Mitzvot. Objective deeds are the links between God and man. "Jewish law is in a sense, *a science of deeds*."²⁹ Judaism can also be defined as a science of life. Whatever man does, even in his capacity as a citizen, possesses religious significance. The collectivity, too, is permeated with sanctity. "Community is not something external to man and alien to his essential nature. On the contrary, it is that through which man realizes his personality and in which he actualizes his being."³⁰ The unity between God, society, and man is organic. Hence Judaism does not distinguish between civil and ecclesiastical law, between the law of sacrifices, the law of marriage, and the law of damages. *Be'khol derakhekha da'ehu*, God must be, as He can be, affirmed in every act of life. The Torah cannot be left outside when the representatives of the

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people make the decisions needed for running a state or when they pass the laws which govern citizen and body politic. Political life is but one aspect of the religious.

The Jewish theology of politics unfortunately leaves American Orthodoxy impaled on the horns of a dilemma whenever it must deal with a governmental manifestation of Christian practice or value. To assert that the influence of Christianity should stop at the chambers of the legislature is to deny to the Christian faith what we claim for our own. And yet practical exigency has forced traditional Judaism time after time to argue for a theory of separation between religion and government which contradicts its own basic attitudes. This schizophrenia has left our Christian neighbors wondering whether the religious Jew really is what he claims to be.

The fact is that even such a statement as "Christianity is part of the common law of Pennsylvania,"³¹ used to uphold that state's Blue Laws, contains a large element of truth. Obviously, a nation which in its Federal and most state constitutions bars government from establishing a religion, and numbers among its citizens Catholics as well as Protestants of many opinions, is not going to give special status to any brand of Christianity without running into difficulty. Therefore, "Although it has been broadly said that Christianity is part and parcel of the common law, and that the Bible is the foundation of the common law, this statement has been held to have application only in a qualified sense, in that, as it appears in the title Blasphemy, the law will not permit Christianity to be reviled and ridiculed openly, and will punish such acts as tending to a breach of the peace and jeopardy of the public welfare. Other authority in fact holds that in America there has never been any union of the church and the state, that the legislative control lies exclusively over things temporal, and that neither Christianity nor any other system of religion constitutes a part of our common law."³² Nonetheless, however far Christianity must be removed legally from official government action, sociologically speaking, America is a Christian country. The overwhelming majority of Americans consider themselves Christians. Over half are formally affiliated with a Christian Church.³³ Almost all Americans

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celebrate Christmas and most also observe Easter. Weddings and funerals are commonly conducted by clergymen. The public schools are permeated with the Protestant spirit. Culturally, the thread of Christian practice and thought runs through the entire fabric of American life, its depth having been evidenced in the last Presidential election. In some sense, at least, Americans are a Christian people.

Therefore, whatever the constitutional barriers, it was inevitable that Christianity should find its way into the law. Without entering into any jurisprudential discussion concerning the nature of law, few will protest Jerome Hall's felicitous description of "law as cultural fact."³⁴ The interpenetration of law by the ethical and religious norms of society is undeniable. American Christianity is expressed not only in carols and Easter pageants in the public schools, crèches on public property, official Good Friday observance, or Sunday closing statutes. Its views and concepts have shaped the laws of marriage and divorce, custody and adoption arrangements, censorship and obscenity statutes, and even the prescription of contraceptive advice. These manifestations of Christian values may affect more people more deeply than outright aid or hinderance to religion. A childless Jewish husband in New York who, according to Jewish law, cannot continue to live with his spouse because of her immodest behavior, and yet who is unable to obtain a civil divorce for lack of proof of adultery, may find himself unable to fulfill the *mitzvah* of procreation because of the Christian dogma against divorces. Yet it is generally accepted that, whatever the religious motivations, these statutes are legitimate formulations of the state's interest in preserving the health, safety, and morals of its inhabitants.

It is against such a background that one must read the judicial opinions which have consistently upheld the Blue Laws. It is true that Blue Laws originated as religious measures to insure proper religious observance of Sunday, but divorce laws, too, sprang from ecclesiastic courts.³⁵ It is also a fact that Blue Laws help the religious Christian observe Sunday properly; but so do divorce statutes keep the Catholic in line. Hence the observation made by Justice Frankfurter cannot be gainsaid:

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It cannot be fairly denied that the institution of Sunday as a time whose occupations and atmosphere differ from those of other days of the week has now been a portion of the American cultural scene since well before the Constitution; that for many millions of people life has a hebdomadal rhythm in which this day, with all its particular associations, is the recurrent note of repose.³⁶

STRATEGY

Having said all this in favor of the constitutionality of Blue Laws, the question still remains: What about the Sabbath observer? Can the law offer him any help to offset his economic handicap?

As indicated earlier, the Sabbath observer is interested primarily in a broad exemption permitting him to do on Sunday whatever non-Jews may do on Saturday. In a few states, such an exception exists and there the *Shomer Shabbat* has received equal treatment at the hands of the law. In most states, though, exceptions are either inadequate or non-existent. In these jurisdictions, Orthodox Jewry must make a concentrated effort to have comprehensive exemptions enacted.

Shamefacedly, it must be admitted that if today the law inadequately protects the Sabbatarian, the blame rests not upon Christian groups hostile to genuine Sabbath observers as much as upon a Jewish community that has given up Sabbath observance as a fact, and, in many cases, even as an ideal. When Jews throughout America have been ready to accept Sunday as the time for rest and recreation, when the Sabbath has become to them the chief business day of the week, and when the non-Orthodox Jew who does not accept full observance of the Sabbath as a contemporarily valid principle of the Torah has been permitted to draw the image of what Judaism is and how it is practiced before the eyes of Christian America — how should Christians know that there are Jews making substantial economic sacrifices to observe Saturday as a true *Shabbat*? Here, as elsewhere, the way of the Orthodox is difficult not because he differs from the Christian, but because he differs from the majority of his fellow Jews. Hence the first step that needs to be taken in order to obtain for the Sabbatarian legislative ex-

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emption from Sunday closing laws is an educational effort to inform opinion-making Christians of the existence of a substantial number of Jews who are *Shomrei Shabbat*. At the same time, the Jewish community must be taught that whatever individual standards of practice may be, every Jew has a moral responsibility to ease the path of full Sabbath observance. Thirdly, the point must be made clearly and strongly that Jews are not advocating the abolition of Sunday closing laws; that their sole interest is in an exemption for Sabbath observers. Things being what they are today, these tasks will not be easy.³⁷

The spread of discount and chain stores which are open on Sunday has turned the question of Sunday closings into an economic battlefield between competing business interests,³⁸ obscuring completely the rights of a Sabbatarian to practice his religion without suffering undue economic penalties. To ask to stay open on Sunday has become tantamount to seeking improper competitive advantages. Even the Supreme Court was concerned with the financial benefits that a Sabbath observer might derive on Sunday. "To allow only people who rest on a day other than Sunday to keep their businesses open on that day might well provide these people with an economic advantage over their competitors who must remain closed on that day; this might cause the Sunday-observers to complain that their religions are being discriminated against. With this competitive advantage existing, there could well be the temptation for some, in order to keep their businesses open on Sunday, to assert that they have religious convictions which compel them to close their businesses on what had formerly been their least profitable day. This might make necessary a state conducted inquiry into the sincerity of the individual's religious beliefs, a practice which a state might believe would itself run afoul of the spirit of constitutionally protected religious guarantees . . ." ³⁹ The initial reaction of a Christian to talk about an exemption is that someone is trying to find a way of *evading* the Blue Laws. Therefore, there must be persistent emphasis that traditional Jewry is not challenging the concept of the Blue Laws as they apply to Christians. The goal is freedom of worship, not disestablishment. Whether the Jewish agencies in the Civil Right field will be

willing to accept the constitutionality of Blue Laws remains to be seen. The Orthodox Jew cannot do otherwise.

Nor can traditional Jewry long evade some dialogue with the Roman Catholic Church concerning each other's aspirations and needs. Sunday closing laws originated with Protestant Christianity, Catholic dogma permitting business on Sunday after attendance at mass.⁴⁰ Today, it is the Protestant who has a flexible attitude toward the Blue Laws, while the Catholic has become their strongest defender.⁴¹ The change in Catholic attitude probably flows from the belief that Blue Laws slow secularization, encourage Church attendance, and help preserve the family. Despite the Catholic's present intrasigent opposition to any modification, it is this writer's opinion that the Church would be quite sympathetic to the Sabbatarian once it has learned to distinguish him from the non-observant Blue Law violator, and would agree to broad exemptions in his favor. Unfortunately, Orthodoxy has permitted non-traditional forces in Jewish life to shape its outlook toward Catholicism, and this essentially negative bias, based in considerable measure upon the historic tensions of the past, has made conversation between the two groups difficult. Yet there are significant areas of religious outlook where Catholicism and Orthodoxy share agreement, so that mutual understanding could rebound to their common benefit. Certainly a sympathetic attitude by the Church towards the Sabbath observer would be quite helpful in securing the enactment of exemptive legislation.

In sum, the constitutional validation of the Blue Laws is perhaps God's challenge to American Jewry to make some serious efforts on behalf of those "who keep the Sabbath from profaning it."

NOTES

1. "Nor shall any state deprive any person of life, liberty, or property, without due process of law." *Cantwell v. Connecticut*, 310 U.S. 296 (1940), held that the Fourteenth Amendment made the legislatures of the states as incompetent as Congress to enact laws establishing a religion or prohibiting its free exercise.

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2. See "The Supreme Court And The Establishment and Free Exercise of Religion," by Maximilian W. Kempner, in *Religion and The Free Society* (The Fund for the Republic: 1958), pp. 65 ff.

3. See Justice Frankfurter's opinion in *Braunfeld et al. v. Gibbons*, 29 U.S. Law Week 4512, 4534.

4. *Ibid.*, Footnote 103, p. 4535. These include Indiana, Kansas, Kentucky, Massachusetts, Michigan, Missouri, Nebraska, New Jersey, New York, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Texas, Virginia, Washington, West Virginia, and probably Connecticut and Maine.

5. *Ibid.*, Footnote 104, p. 4536. The states are Indiana, Kentucky, Michigan, Nebraska, Ohio, Oklahoma, Virginia, and West Virginia.

6. See *Summary of Proceedings*, Conference on Developments in Pennsylvania regarding Sunday closings, convened by the Joint Advisory Committee of the Synagogue Council of America and the National Community Relations Advisory Council, Harrisburg, Pennsylvania, September 11, 1958.

7. 29 U.S. Law Week 4512, May 29, 1961. Three other cases challenging Blue Laws were decided at the same time: *McGowan v. State*, 29 L.W.4488 (a general store open seven days a week); *Two Guys From Harrison-Allentown, Inc., v. McGinley*, 29 L.W.4500 (a discount house open seven days a week); and *Crown Kosher Market v. Gallagher*, companion case to *Braunfeld v. Gibbons* (closed on Saturdays).

8. The Act of August 10, 1959, P.L.660, 18 Purd. Stat. 4699.10. Compare with the basic Sunday closing law of April 22, 1794, 3SM. L.177.

9. From the Great Law of December 7, 1682. A fuller quotation might be helpful as well as interesting:

"Whereas, ye glory of Almighty God and ye good of Mankind, is ye reason and end of government, and therefore, government in itself is a venerable ordinance of God; And — forasmuch as it is principally desired and intended by ye proprietary and governor, and ye freemen of ye province of *Pennsylvania*, and territory thereunto belonging, to make and establish such laws as shall best preserve true Christians, and civil liberty, in opposition to all unchristian, licentious and unjust practices, whereby God may have his due, *Caesar* his due, and ye people their due, from tyranny and oppression on ye one side, and insolvency and licentiousness on ye other, so that ye best and firmest foundation may be laid for ye present and future happiness both of ye governor and people of this province and territorys aforesaid, and their posterity.

"Be it therefore enacted by *William Penn*, Proprietary and Governor, by, and with ye advice and consent of the deputys of ye freemen of this province and counties aforesaid in assembly mett, and by ye authority of ye same, that these following chapters and paragraphs shall be the laws of *Pennsylvania* and the territorys thereof. Chap. 1. Almighty God, being only Lord of conscience, father of lyghts and spirits, and ye author as well as object of all Divine knowledge, faith, and Worship, who only can enlighten ye minds, and persuade and convince ye understandings of people in due reverence to his sov-

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ereinty over the souls of mankind . . . Be it enacted by the authority aforesaid, that . . . to the end that looseness, irreligion, and atheism may not creep in under pretense of conscience in this Providence, Be it further enacted by the authority aforesaid, that, according to the example of the primitive Christians, and for the ease of the creation, every first day of the week, called the Lord's day, people shall abstain from their usual and common toil and labour, that, whether masters, parents, children, or servants, they may the better dispose themselves to read the Scriptures of truth at home, or to frequent such meetings of religious worship abroad as may suit their respective persuasions."

10. See note 8, *supra*.

11. *Commonwealth ex. rel. v. American Baseball Club of Phila.*, 290 Pa.136, 143, 138 A. 497 (1927).

12. *Commonwealth v. Coleman*, 60 Pa. Superior Ct. 380, 385 (1915).

13. Chief Justice Warren wrote the Majority Opinion; Justice Frankfurter authored a lengthy Concurring Opinion with Justice Harlan; Justices Brennan, Douglas, and Stewart dissented.

14. 29 Law Week at p. 4514.

15. *McGowan v. State*, 29 Law Week 4488, 4495.

16. *Ibid.*, p. 4497.

17. Justice Stewart, Law Week, p. 4517.

18. Justice Brennan, with Justice Stewart concurring, Law Week, p. 4517.

19. Justice Douglas, Law Week, p. 4576.

20. Brief of the Synagogue Council of America and National Community Relations Advisory Council filed with the Supreme Court of the United States in the cases of *Gallagher v. Crown Kosher Super Market* and *Braunfeld et al. v. Gibbons*, p. 4.

21. Of course, unlike America, Israel has no written constitution serving to restrict the powers of the Knesset. Nonetheless, questions of religious freedom and religious establishment agitate Israelis. See *Israel's Emerging Constitution*, by Rabbi Emanuel Rackman (New York: Columbia University Press, 1955), Chapter IX.

22. Law Week, p. 4537.

23. See *Church, State and Freedom*, by Leo Pfeffer (1953), Chapter IV.

24. *Ibid.*, 75.

25. Quoted from a memorial by Isaac Backus in *ibid.*, p. 89.

26. Quoted in *ibid.*, p. 91.

27. See *A History of Christianity*, by Kenneth Scott Latourette (1953), pp. 957 ff.

28. See *Mixing Religion and Politics* by William Muehl (1958), an acute criticism of individualism in politics.

29. *God In Search of Man*, by Abraham J. Heschel (Philadelphia: Jewish Publication Society, 1956), p. 292 and Chapters 28 and 29. See *In His Image*, by Dr. Samuel Belkin (New York: Abelard-Schuman, 1960), Introduction.

30. *Judaism and Modern Man*, by Will Herberg (New York: Meridian — J.P.S., 1959), p. 135.

31. See notes 15 and 16, *supra*.

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32. 15 C.J.S. 615, "Common Law," see 6. Compare with *Vidal v. Girard's Executors*, 43 U.S. (2 How.) 127, 198, 11 L. Ed. 205, 234 (1844).

"It is also said, and truly, that the Christian religion is a part of the common law of Pennsylvania. But this proposition is to be received with its appropriate qualifications, and in connection with the bill of rights of that State, as found in its constitution of government. The constitution of 1790 expressly declares, 'that all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience; and no preference shall ever be given by law to any religious establishments or modes of worship.' Language more comprehensive for the complete protection of every variety of religious opinion could scarcely be used; and it must have been intended to extend equally to all sects, whether they believed in Christianity or not, and whether they were Jews or infidels. So that we are compelled to admit that although Christianity be a part of common law of the State, yet it is so in this qualified sense, that its divine origin and truth are admitted and therefore it is not maliciously and openly reviled and blasphemed against, to the annoyance of believers or the injury of the public."

33. Almost 110 million Americans, 63% of the total, were church members in 1958, according to the *Yearbook of American Churches*, published by the National Council of Churches. See "Religion As a Source of Tension," by William Clancy, in *Religion and the Free Society*, published by The Fund for the Republic (1958).

34. Chapter heading in *Living Law of Democratic Society*, by Jerome Hall (1949). See in his *Readings in Jurisprudence* (1938) the chapters on "Social Functionalism" and "Law and Custom."

35. 27A. C.J.S., Divorce 83, p. 17. See Justice Frankfurter's remark in *Braunfeld v. Gibbons*, note 5, *supra*, p. 4519. "Innumerable civil regulations enforce conduct which harmonizes with religious canons. State prohibitions of murder, theft, and adultery reinforce commands of the decalogue. Nor do such regulations, in their coincidence with tenets of faith, always support equally the beliefs of all religious sects; witness the civil laws forbidding usury and enforcing monogamy."

36. *Braunfeld v. Gibbons*, note 5 *supra*, p. 4532.

37. The difficulties in getting an exemption from the Blue Laws for Sabbath observing *businessmen* approved by a legislature are revealed by the defeat in the New York State Assembly of a Bill which would have authorized New York City to except Sabbatarian businessmen from the Sunday closing laws (*New York Times*, March 21, 1958, p. 23). Since this writer followed the effort only through the pages of the Yiddish press and the *New York Times* and is unfamiliar with the inside details and the varied pressures, he has no real right to suggest an analysis. Still, ignorance has a way of generating a power all its own, and he ventures to remark that failure can be attributed to in-

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adequate support from the Jewish community, wrong emphasis in justifying the Bill, and the lack of an understanding with the Catholic Church. The Catholic Church opposed the Bill, (See *New York Times*, March 19, 1958, p. 11). Though Orthodox Rabbis and laymen pushed strongly for the Law and picketed for it, the number of people involved was small and the general Jewish community seemed to remain apathetic. Even the Kosher butchers did not support it. And finally, in agreeing to a "local option" form of exemption, there was an implicit waiver of the moral imperative of the principle of religious freedom, which would be applicable on a state wide basis, in favor of the practical exigency of getting a Bill which, by virtue of its geographical limitation, became stamped as a Jewish law. As a matter of fact, New York has a exemption for "work or labor on the first day of the week" by a man who "uniformly keeps another day of the week as holy time, and does not labor on that day," when "done in such manner as not to interrupt or disturb other persons in observing the first day of the week as holy time" (New York Penal Law, section 2144). While the exception "excludes selling" (*People v. Friedman*, 302 N. Y. [1950]), the Jewish community should have pressed for an expansion of this exemption on a state wide basis to include selling. The argument could have been cogently made that since express language protects Christians observing Sunday from disturbance, fairness would dictate that Jewish businessman and artisan be treated alike.

38. Cf. *Newsweek*, April 21, 1958, p. 472.

39. 42 L.W. p. 4515.

40. Leo Pfeffer, in *Summary of Proceedings*, note 8 *supra*, p. 2.

41. *Ibid.*