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# Case Notes

# CASE NOTES

**Conflict of Laws—Refusal To Apply Statutory Limitation on Damages in Action Brought Under Foreign Law Held Violation of Full Faith and Credit.**—Plaintiff's husband was killed when defendant's airplane, on which he was a passenger, crashed in Massachusetts while en route to that state from New York. An action was brought in the United States District Court for the Southern District of New York[1] in which plaintiff sought $160,000 damages under the Massachusetts wrongful death statute.[2] At the time of the crash, plaintiff and decedent were citizens and domiciliaries of New York, and defendant was a citizen of Massachusetts.[3] The jury awarded $134,943.77 damages, and the court added interest from the date of death to the date of judgment in the amount of $26,106.88.[4] The United States Court of Appeals, reversing the district court, held: (1) that the trial court's application of New York law[5] and refusal to apply the Massachusetts limitation on recovery, *in this action based on the Massachusetts statute*, was a violation of the full faith and credit clause of the United States Constitution;[6] and (2) that the trial court erred in awarding interest from the date of death, rather than from

1. Federal jurisdiction rested on diversity of citizenship. 28 U.S.C. § 1332(a)(1) (1958). See note 3 infra and accompanying text.

2. Mass. Ann. Laws ch. 229, § 2 (1955). "If the proprietor of a common carrier of passengers . . . by reason of . . . its negligence . . . causes the death of a passenger . . . it shall be liable in damages in the sum of not less than two thousand nor more than fifteen thousand dollars, to be assessed with reference to the degree of culpability of the defendant. . . ." This section has been amended, effective January 1, 1959, to raise the maximum recovery to twenty thousand dollars. See Mass. Ann. Laws ch. 229, § 2 (Supp. 1961).

3. 28 U.S.C. § 1332(c) (1958). "For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." Northeast Airlines was incorporated in and has its principal place of business in Massachusetts.

4. Pearson v. Northeast Airlines, Inc., 201 F. Supp. 45 (S.D.N.Y. 1961).

5. "Since federal jurisdiction rests on diversity, it is clear that Judge McGohey was obliged to apply the law of the State of New York, Erie R. Co. v. Tompkins, 304 U.S. 64, including its conflict of laws doctrine, Klaxon v. Stentor Electric Mfg. Co., 313 U.S. 487, unless some provision of the Constitution of the United States precludes its application." Pearson v. Northeast Airlines, Inc., — F.2d —, — (2d Cir. 1962). (Italics omitted.) N.Y. Const. art. I, § 16, provides: "The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation." In Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961), which was a wrongful death action arising from the same accident as the instant case, the court, in a strong dictum, said that New York would apply this policy to actions brought in New York against a New York domiciliary under a foreign statute.

6. U.S. Const. art. IV, § 1. "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." See also the implementing statute, 28 U.S.C. § 1738 (1958).

the date of the writ. *Pearson v. Northeast Airlines, Inc.*, — F.2d — (2d Cir. 1962).

On the issue of limitation on recovery, the reasoning which led to the majority's decision may be stated as follows: A dependent of the decedent has the right to sue in New York under the New York wrongful death statute[7] for death occurring in New York; therefore, under the full faith and credit clause,[8] plaintiff had the right to sue in New York under the Massachusetts wrongful death statute for death occurring in Massachusetts.[9] Regardless of the public policy of New York (the state of the forum), the court applying the Massachusetts statute must, by full faith and credit, give to the *entire substance* of the Massachusetts statute, the same force and effect that it has within that state.

The basis of the decision in the case at bar was the implicit holding of the court that the limitation on damages is a substantive part of the Massachusetts wrongful death statute.[10] This is precisely the point on which the instant case departed from the dictum in *Kilberg v. Northeast Airlines, Inc.*,[11] which stated explicitly that the limitation is a procedural matter.[12]

The instant decision undoubtedly resulted from the court's idea that a limitation on recovery is essentially a part of the measure of damages. Even the New York Court of Appeals, subsequent to *Kilberg*, stated recently in *Davenport v. Webb*:[13]

> The overwhelming weight of authority, recognizing that "the question of the proper measure of damages is inseparably connected with the right of action" (*Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U.S. 485, 491), has long held that the measure of damages for a tort is to be treated as a matter of substance . . . . This has been particularly true in the area of wrongful death actions.[14]

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7. N.Y. Deced. Est. Law § 130.

8. See note 6 supra.

9. First Nat'l Bank v. United Airlines, Inc., 342 U.S. 396 (1952); Hughes v. Fetter, 341 U.S. 609 (1951). See also for the discussion of these cases in the instant opinion, — F.2d at —. While these cases were purportedly decided on the basis of full faith and credit, due process was also involved. In such instances, full faith and credit and due process probably overlap to some extent.

10. This holding is noteworthy since the law of the forum state is usually the final authority in determining what is procedural. See Murray v. New York, Ont. & W.R.R., 242 App. Div. 374, 376, 275 N.Y. Supp. 10, 12 (1st Dep't 1934). See also 3 Beale, Conflict of Laws §§ 584.1-4.2 (1935); Goodrich, Conflict of Laws §§ 80-81 (3d ed. 1949).

11. 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

12. "It is open to us, therefore, particularly in view of our own strong public policy as to death action damages, to treat the measure [in context this means "limitation"] of damages in this case as being a procedural or remedial question controlled by our own State policies." Id. at 41-42, 172 N.E.2d at 529, 211 N.Y.S.2d at 137. It was chiefly public policy considerations which led the court in Kilberg to its position on limitation of damages; and, in fact, public policy was the only reason stated by the court for its conclusion that the limitation was a matter of procedure.

13. 11 N.Y.2d 392, 183 N.E.2d 902, 230 N.Y.S.2d 17 (1962).

14. Id. at 393, 183 N.E.2d at 903, 230 N.Y.S.2d at 18.

It is difficult to perceive any essential difference between the limitation of damages by a statutory ceiling, and the measuring of damages by a rule (such as culpability, or pecuniary loss). The latter seems, at first, to affect the plaintiff's rights more directly because, while the limitation merely sets bounds, the measure goes further and determines the exact damages, within the bounds (if any). More important, however, is the fact that in most cases the application of a limitation has a more drastic effect on the amount of damages than does the choice of one measure over another.[15]

The theory of the instant decision is further supported by the statement of the New York Court of Appeals, in *Davenport* concerning wrongful death actions:

> Such actions did not exist at common law; they are creatures of statute . . . . Therefore, as we have said on another occasion, "Right and remedy coalesced" and are "united" (*Matter of Berkowitz v. Arbib & Houlberg*, 230 N.Y. 261, 272).[16]

Actually, this statement destroys the "substantive-procedural" distinction which the *Kilberg* dictum introduced to justify its rejection of the limitation imposed by the death statute of the *locus delicti*. *Davenport* says, in effect, that a limitation on damages in a wrongful death action, even if it is considered in the first instance to be procedural or remedial, is also essentially a part of the *substantive* right. This makes it apparent that the *Kilberg* dictum "must be held merely to express this State's strong policy with respect to *limitations* in wrongful death actions,"[17] and that the statement in *Kilberg*, that the limitation is procedural,[18] was merely a convenient justification for upholding New York's public policy in the face of the conflicting Massachusetts statute.

An excellent statement of the bare logic of the question was made by Mr. Justice Holmes in *Slater v. Mexican Nat'l R.R.*,[19] wherein he stated:

> It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose.[20]

Judge Kaufman, who dissented in the instant case, found the *Kilberg* rejection of the Massachusetts limitation a public policy determination. He stated:

> The [*Kilberg*] case involved nothing more than a particular application of a doctrine well established in New York and elsewhere that a state may refuse to apply principles of substantive law "borrowed" from other states in accordance with standard choice of law rules, when the foreign principles conflict with some fundamental public policy of the forum.[21]

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15. It is important to distinguish between the limitation, which merely sets a maximum allowable recovery, and the measure of damages, which determines the exact damages within the limits set (if any).

16. 11 N.Y.2d at 393-94, 183 N.E.2d at 903, 230 N.Y.S.2d at 18.

17. Id. at 395, 183 N.E.2d at 904, 230 N.Y.S.2d at 20.

18. See note 12 supra.

19. 194 U.S. 120 (1904).

20. Id. at 126.

21. — F.2d at — (dissenting opinion).

As noted above, however, the *Kilberg* dictum expressly characterized the limitation as a procedural matter.[22] It is submitted that by admitting that the limitation was substantive, Judge Kaufman must ultimately destroy the only valid basis there might be for upholding the *Kilberg* dictum.

Judge Kaufman further stated:

> The reference to *First National Bank of Chicago v. United Air Lines, Inc.*, 342 U.S. 396, 400 (1952) . . . reinforces my belief that the majority has decided that the law of *lex locus delicti* must under all circumstances be applied to define liability.[23]

This, however, is a questionable conclusion. The holding of the case at bar is limited to the proposition that, as opposed to the law of the forum, the substantive law of the *locus delicti* must be applied *if the plaintiff sues under that law;* that is, the forum has no choice of substantive law in this situation.

Although traditional conflict of laws rules, including those of New York,[24] require that the *lex loci delicti* be applied in wrongful death actions, it is an interesting question whether the plaintiff could *constitutionally* choose to sue and recover under the New York wrongful death statute in this case, were New York to allow it.[25] Apparently, the point has not been directly passed upon, for the states generally do not claim extra-territorial effect[26] for their wrongful death statutes.

It is submitted that the United States Constitution does not preclude the plaintiff from choosing to sue under either *lex loci delicti* or *lex fori* (assuming the state of the forum allows it), as long as due process[27] is not violated by virtue of insufficient contacts between the state of the forum and the circumstances surrounding the accident. Such suit under *lex fori* would not, it seems, violate full faith and credit. By allowing a plaintiff to sue under *lex fori,* a state would not be denying effect to a foreign statute, but would be giving wider effect to its own statute—by giving the plaintiff a cause of action in addition to those he otherwise has. A defendant's rights are preserved by the application of full faith and credit to prevent the former, and in the latter instance by demanding compliance with the rules of due process—specifically, the "sufficient contacts" rule. It would not be prejudicial to the defendant to allow the plaintiff to choose which statute to sue under—that of the forum or that of the *locus delicti*—for the same reasons that the plaintiff is traditionally allowed a choice of theories of recovery. And if the plaintiff were allowed to sue under the law of the forum, then, by the converse of *Hughes v. Fetter*[28] and

22. See note 12 supra.

23. — F.2d at — (dissenting opinion).

24. See Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 40, 172 N.E.2d 526, 528, 211 N.Y.S.2d 133, 136 (1961) (dictum).

25. The point was not at issue in First Nat'l Bank v. United Airlines, Inc., 342 U.S. 396 (1952), and Hughes v. Fetter, 341 U.S. 609 (1951), for in neither of those cases did the state involved claim extra-territorial effect for its wrongful death statute.

26. States generally refuse to entertain a suit under the lex fori where the negligence and death occurred in a foreign state, but rather require suit to be brought under the statute of that foreign state.

27. U.S. Const. amend. XIV, § 1.

28. 341 U.S. 609 (1951).

*First Nat'l Bank v. United Airlines, Inc.*,[29] the defendant would not be entitled to the limitations in the *lex loci delicti*.

The tendency of the Supreme Court is indicated in *Richards v. United States*,[30] a recent wrongful death action under the Federal Tort Claims Act,[31] in which the Court stated, in a unanimous opinion:

> Where more than one state has sufficiently substantial contact with the activity in question, the forum state, by analysis of the interests possessed by the states involved, *could constitutionally apply to the decision of the case the law of one or another state having such an interest in the multistate activity.* Thus, an Oklahoma state court would be free to apply either its own law, the place where the negligence occurred, or the law of Missouri, the law where the injury occurred, to an action brought in its courts and involving this factual situation.[32]

Thus the critical point is what constitutes "sufficiently substantial contacts." *Richards* approves of applying the law of the state where the negligence occurred.[33] A further extension is proposed here.

In the instant case, the plaintiff and the decedent were New York domiciliaries at the time of death, and there were other contacts, ably set forth by Judge Kaufman,[34] between New York and the circumstances surrounding the crash. These contacts seem amply sufficient under due process to allow the plaintiff to sue under New York law, even though the negligence, injury and death all occurred outside of New York. Of course, at present, New York claims no extra-territorial effect for its wrongful death statute—*Kilberg* made that clear.[35] However, such extension of the effect of the New York statute may be the only alternative left to New York in order to preserve its public policy against limitations on damages, and even then it could be done only where there were "sufficient contacts." If on review the instant case is affirmed by the Supreme Court, New York will be forced to make the choice between enduring a situation repugnant to its public policy against limitations on recovery and changing its conflict of laws rule which limits the effect of its statute to deaths within New York.

With regard to the issue of prejudgment interest, the court unanimously held, and properly so, that the trial court erred in awarding interest from the date of death.[36] Apparently, Judge McGohey in the district court ruled as he did from a feeling that the New York law on the point is expressed in Section 132

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29. 342 U.S. 396 (1952).

30. 369 U.S. 1 (1962). The Court held that under the Federal Tort Claims Act (see note 31 infra) the law of the place of the negligence was controlling.

31. 60 Stat. 842, as amended, 28 U.S.C. §§ 1291, 1346(b)(c), 1402(b), 1504, 2110, 2401(b), 2402, 2411(b), 2412(c), 2671-80 (1958).

32. 369 U.S. at 15. (Emphasis added.)

33. Id. at 15-16. See also Schmidt v. Driscoll Hotel, Inc., 249 Minn. 376, 82 N.W.2d 365 (1957); Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953).

34. — F.2d at — (dissenting opinion).

35. 9 N.Y.2d 34, 40, 172 N.E.2d 526, 528, 211 N.Y.S.2d 133, 136 (1961).

36. — F.2d at — (majority opinion), — (dissenting opinion).

of the Decedent Estate Law.[37] However, in *Davenport v. Webb*,[38] the New York Court of Appeals resolved this issue by refusing to extend the New York statute to a suit under a foreign wrongful death statute, and by determining that Section 132 of the Decedent Estate Law cannot be severed from sections 130-31. The court said in *Davenport*:

> In New York, the prejudgment interest in a wrongful death action is "part of the damages" (*Cleghorn v. Ocean Acc. & Guar. Corp.*, 244 N.Y. 166, 167), the addition of which is governed by recourse to the usual conflicts of law rules, which we have consistently applied by not adding interest to the judgment unless *lex loci delictus* authorizes such an addition [citations omitted].[39]

That court distinguished the *Kilberg* case as having expressed New York's "strong policy with respect to *limitations* in wrongful death actions"—not with respect to interest.[40]

Although the New York Court of Appeals stated that the interest is part of its substantive law,[41] it is interesting to note that in this case it is really immaterial whether the Massachusetts interest rule is classified as substantive or procedural. If substantive, then Massachusetts law controls directly by full faith and credit, as it did with respect to the limitation on damages; if procedural, the result is the same, because New York now clearly precludes interest from the date of death unless the *lex loci delicti* authorizes it.[42] Thus, by either approach, the controlling law is, in effect, that of Massachusetts, which provides for interest from the date of the writ.[43]

**Constitutional Law—Establishment of Religion—State Sanction of Prayer Violates Constitution.**—The New York Board of Regents recommended the recitation of a twenty-two word nondenominational prayer[1] as part of a program of "Moral and Spiritual Training in the Schools."[2] Respondents, board members of the Union Free School District, directed that the prayer be said aloud daily at the district's public schools by each class, on a voluntary participation basis. Petitioners, parents of children at one of the district's schools, contended that the state law authorizing the use of the prayer, and the school district's directive

37. "Amount of Recovery—The damages awarded to the plaintiff may be such a sum as the jury . . . deems to be a fair and just compensation for the pecuniary injuries. . . ."

38. 11 N.Y.2d 392, 183 N.E.2d 902, 230 N.Y.S.2d 17 (1962).

39. Id. at 394, 183 N.E.2d at 903, 230 N.Y.S.2d at 18-19.

40. Id. at 395, 183 N.E.2d at 904, 230 N.Y.S.2d at 20.

41. Kiefer v. Grand Trunk Ry., 12 App. Div. 28, 32, 42 N.Y. Supp. 171, 173 (4th Dep't 1896), aff'd, 153 N.Y. 688, 48 N.E. 1105 (1897), cited in Davenport v. Webb, 11 N.Y.2d 392, 394, 183 N.E.2d 902, 904, 230 N.Y.S.2d 17, 19 (1962).

42. 9 N.Y.2d 34, 40, 172 N.E.2d 526, 528, 211 N.Y.S.2d 133, 136 (1961).

43. Mass. Ann. Laws ch. 229, § 11 (1955).

1. "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." Engel v. Vitale, 370 U.S. 421, 422 (1962).

2. Id. at 423.

implementing it, violated the "establishment of religion" clause of the first amendment. The New York Supreme Court denied petitioners' contention and held the law constitutional,[3] which finding was affirmed by the appellate division.[4] The court of appeals also affirmed, holding that the act in issue was an acknowledgment of God which, in itself, was removed from questions of constitutionality.[5] On certiorari, the Supreme Court reversed, holding that the state law authorizing the recitation of the prayer violated the establishment clause insofar as "it is no part of the business of government to compose official prayers. . . ." *Engel v. Vitale*, 370 U.S. 421, 425 (1962).

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press. . . .[6]

In fashioning the freedoms of the first amendment, the framers of the Constitution, because of the tenor of the times, deemed it necessary to complement the guarantee of religious liberty with an additional safeguard, the "establishment" prohibition.[7] The establishment clause was clearly designed to insure free exercise,[8] but the juxtaposition of the two phrases has given rise to the absolutist concept that there should exist a wall of separation between church and state.[9]

Those who adhere to this position consider "aid to religion" synonymous with the prohibited establishment of religion.[10] What effect this "aid to religion" might have on the free exercise of religion is generally undetermined however. It is submitted that the effect is nil; free exercise is unimpeded.[11] Only *compulsion* destroys freedom.[12]

Under the absolutist view, carried to its logical conclusion, any given law promulgated for the public good, can be subjected to a constitutional prohibition if it can also be shown to render "aid to religion."[13] Hence we reach an area in

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3. 18 Misc. 2d 659, 191 N.Y.S.2d 453 (Sup. Ct. 1959).

4. 11 App. Div. 2d 340, 206 N.Y.S.2d 183 (2d Dep't 1960).

5. 10 N.Y.2d 174, 180, 176 N.E.2d 579, 581, 218 N.Y.S.2d 659, 661 (1961).

6. U.S. Const. amend. I.

7. O'Neill, Nonpreferential Aid to Religion Is Not an Establishment of Religion, 2 Buffalo L. Rev. 242 (1953); Pfeffer, No Law Respecting an Establishment of Religion, 2 Buffalo L. Rev. 225 (1953).

8. Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).

9. Manning, Aid to Education—Federal Fashion, 29 Fordham L. Rev. 495, 499 (1961).

10. Everson v. Board of Educ., 330 U.S. 1, 28 (1947) (Rutledge J., dissenting).

11. It would be difficult, for instance, to conceive, in Everson v. Board of Educ., how school bus transportation made available to parochial school children interfered with the exercise of religion of other school children (or their parents) likewise receiving free transportation to school. See O'Neill, supra note 7, at 244. "Aid to religion" is essentially a misnomer, for in virtually every case the "aid" is the distribution of a public good to a tax-paying citizen. If the citizen uses the "aid" in such a way so as also to benefit a religious organization, then the question of constitutionality sometimes has been raised.

12. Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203 (1948).

13. Judd v. Board of Educ., 278 N.Y. 200, 15 N.E.2d 576 (1938). Contra, McGowan v. Maryland, 366 U.S. 420 (1961).

which neutrality to religion is professed, but where the inevitable result is hostility.

Recognizing the illogic of this interpretation—that legislation is invalid if it aids religion in general—the Supreme Court, in *McGowan v. Maryland*,[14] found that Sunday Closing Laws constituted neither an establishment of religion nor a threat to free exercise. There the Court held that to forsake the public benefits derived from the Sunday Closing Laws simply because they also aided religion, would defeat the "obviously secular purpose of the law," and thus reach a result clearly not intended by the Constitution.[15]

The act of reciting a twenty-two word prayer apparently was too intangible to be considered in terms of the public good. The majority of the instant Court did not view the act as a beneficial statement of an American tradition, nor did its purpose—a moral good derived from the acknowledgment of God—have any secular benefit such as was found in the day of rest and recreation in *McGowan*, the bus rides in *Everson v. Board of Educ.*,[16] or the text books in *Cochran v. Louisiana State Bd. of Educ.*[17] On the contrary, Mr. Justice Black chose not to rely on any previous decision, treating the question almost as though there were no relevant precedents. The issue which was posed was a very narrow one: Does a state sanction of this act establish religion in violation of the first amendment?[18]

The Court defined the act as a prayer enacted by law. In viewing the prayer as an enactment, the twenty-two word nondenominational acknowledgment of God was treated as an official *specific* religion despite its obvious character as an acknowledgment of religion in general.[19] With respect to the *nature* of the act as being relevant to the issue, the Court's assumption is quite questionable.

Mr. Justice Black reasoned that *sanctioning*, per se, establishes religion,[20]

14. 366 U.S. 420 (1961).

15. Id. at 444-45.

16. 330 U.S. 1 (1947).

17. 281 U.S. 370 (1930).

18. 370 U.S. at 437 (Douglas, J., concurring).

19. All recognized religions are also an identifiable group of people. These people practice their religion by means of particular exercises. Generally speaking, a religious exercise is dependent for form and content on the religious group responsible for its composition. However, we reach a semantic difficulty in this case because the twenty-two word prayer is a religious activity, but it is not subject to the domination of any religious group. New York State, unlike England, is not aligned with a state religion. The prayer is a religious activity, an acknowledgment of God, addressed to God, not to a teacher. The Court has cloaked the prayer with the prohibited accouterments of a recognized religion. It considered it as a doctrine, an official religion, a particular belief, a religious service. In short, the Court said if it is nondenominational, dependent on no religious group, then it is a religion by itself and the State of New York is its controlling group. Hence, the Court forced the prayer into the mold of a specific religion before subjecting it to the establishment test.

20. In using the word, "sanction," the Court employed a broad and logical term. The Regents' prayer could have been composed by a board member or a nonmember and adopted by this process of "sanctioning." Francis Scott Key would fall into the category of a nonmember whose composition would be sanctioned by the board if the fourth stanza of the National Anthem were recommended by it. 370 U.S. at 449 (Stewart, J., dissenting).

that the mere writing or the sanctioning of a writing by the state, through its laws, is an elevation of that twenty-two word "doctrine" above all nonwritten belief.[21] The Court equated *sanction* with *establishment*,[22] the underlying reasoning being based on the question: Is a state sanction an *imposition*?[23] If it is, it would, in the Court's view, be inconsistent with the establishment clause. The Court found, in effect, that a state enactment is official, and any official act is an imposition.[24] However, the determination falters when tested under the free exercise clause, because all responsible parents could have easily rejected the twenty-two word prayer.[25] The only actual imposition was of a psychological nature.[26]

It is submitted that the connotation more consistent with sanction, is *to present* for acceptance or rejection. At this point, the nature of the act is especially meaningful, for the presentation of an *official* religion might very well violate the establishment clause. On the other hand, the presentation of an act of religion *in general* could hardly hold the same threat.[27] In ruling that the act is a violation of petitioners' rights, the Court completely denied a majority of children an opportunity to accept or reject. The dangers found to result from a psychological imposition seem to be greatly outweighed by the denial of freedom of choice.

While the state presented religion with approval, the ultimate question was whether this slight and limited approval is proscribed by the establishment clause? The establishment clause was intended originally, to prohibit the preferential treatment of one religion over another.[28] Justice Black noted that

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21. "It is no part of the business of government to compose official prayers. . . ." 370 U.S. at 425.

22. Ibid. New York merely sanctioned a prayer, and the issue to be determined was to what extent that act caused an establishment.

23. Justice Black said, "that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer American people can say. . . ." Id. at 429. This statement strains to close the gap between "sanction" and "establish." The bridging concept is imposition.

24. Id. at 430-31.

25. Id. at 423.

26. "[T]he indirect coercive pressure. . . ." 370 U.S. at 431. Justice Black maintained consistency in his reasoning. He set forth essentially the same argument in Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203 (1948). See Manning, Aid to Education—Federal Fashion, 29 Fordham L. Rev. 495, 520-21. See also note 26 infra.

27. The state does place what it considers a religious act, in general, in a position above irreligion simply by virtue of publicly presenting the prayer. The motive for this act is found in the basic incentive for the exercise of all police power, the public good.

28. Mr. Justice Black pointed out that the " 'Virginia Bill of Religious Liberty' [was one] by which all religious groups were placed on equal footing . . . [previously] religious groups struggled with one another to obtain the government's stamp of approval . . . the history of governmentally established religion . . . showed that whenever government had allied itself with one particular form of religion . . . it had incurred . . . hatred. . . ." 370 U.S. at 428-31. See O'Neill, Nonpreferential Aid to Religion Is Not an Establishment of Religion, 2 Buffalo L. Rev. 242 (1953).

at the time the first amendment was proposed "powerful groups representing some of the varying religious views of the people struggled among themselves to impress their particular views upon the Government. . . ."[29] His opinion came close to the recognition of the preferential meaning of establishment, when he concluded:

> It is true New York's establishment of its Regents' prayer . . . does not amount to a total establishment of one particular religious sect to the exclusion of all others . . . [but the prayer is dangerous because, as Madison cautioned], "[I]t is proper to take alarm at the first experiment on our liberties. . . . Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?"[30]

Nevertheless, preferential treatment is precisely the element the Court chose to ignore.[31] In doing so, it never accepted the fact that the twenty-two word nondenominational prayer was in fact, two centuries removed in meaning and threat from the entrenchment of the Anglican religion in England. It is submitted that the Court dismissed with undue haste respondents' contention that the Board of Regents consciously sought to avoid the establishment of any particular religious group's views in preference to another's. The Court stated that the fact that the prayer may be denominationally neutral was not operative in freeing it from its unconstitutionality. However, it offered no reason to support that position other than the begged question that the "establishment clause . . . is violated by the enactment of laws which establish an official religion. . . ."[32] The New York Court of Appeals had taken a different view:

> [The prayer] is not "religious education" nor is it the practice of or establishment of religion in any reasonable meaning of those phrases. Saying this simple prayer may be, according to the broadest possible dictionary definition, an act of "religion," but when the Founding Fathers prohibited an "establishment of religion" they were referring to official adoption of, or favor to, one or more sects. They could not have meant to prohibit mere professions of belief in God for, if that were so, they themselves in many ways were violating their rule when and after they adopted it.[33]

From the Supreme Court's opinion one fact emerged clearly: the Court read the establishment clause as—*Congress shall make no laws respecting religion.* It actually deleted the concept of "establishment" from its reasoning. In a strong statement of its holding, the Court said: "It is no part of the business of government to compose official prayers . . ."[34]—which has a construed similarity to—it is no part of the business of government to establish religion. Thus it seems the Court has constructed a set of relationships which best come together only in a faulty analogy.[35]

29. 370 U.S. at 426.
30. Id. at 436.
31. Id. at 430.
32. Ibid.
33. 10 N.Y.2d at 180, 176 N.E.2d at 581, 218 N.Y.S.2d at 660-61.
34. 370 U.S. at 425.
35. See note 22 supra and accompanying text.

Mr. Justice Stewart, dissenting, examined the possibility of the act interfering with the free exercise of religion and, on finding no compulsion, analyzed it in terms of the establishment clause.[36] He reasoned that the denial of an opportunity to pray would be an active wrong to petitioners outweighing any evidence that the prayer is an official religion.[37] He viewed the Regents' prayer as part of "the spiritual heritage of our Nation,"[38] in the company of the presidential oaths, congressional invocations, and our National Anthem and motto. The majority found the composition or wording of the latter to be the critical factor,[39] the implication being, that preference is inherent in any attempt "to prescribe any particular form of words to be recited by any group of the American people on any subject touching religion."[40] Justice Stewart did no more than demonstrate that this difficulty has been surmounted in a gradually acquired and generally accepted religious tradition.

In a footnote, the majority distinguished the traditional prayers of America on the ground that they are patriotic or ceremonious acts.[41] It would appear that this characterization would apply to the Regents' prayer as well. The timing, at the start of the school day, and the patriotic nature of the prayer would seem to give it the same ceremonious standing as the Pledge of Allegiance, immediately after which it was recited. Presumably, these ceremonial acknowledgments of God are no less meaningful in religious content than the Regents' prayer. Unfortunately, therefore, the reasoning of the Court which renders these ceremonies permissible, leads to the conclusion that in order to consider them as being void of any prohibited religious content, public officials must actually avoid the meaning of what they are saying. Mr. Justice Stewart contended that Americans do pray, and that laws about religion are constitutionally enacted. However, such laws must not prefer or establish one religion over any other. In holding that Congress shall make no laws respecting religion, the result is not mere neutrality but suppression of the public exercise of religion.

**Criminal Law—Mistake of Fact Is No Defense to Misdemeanor Assault.** —Defendant forcibly interfered with two strangers whom he honestly, but erroneously, believed were attacking a young man. At the time of his intervention he was unaware that the two men were plainclothes detectives making a valid arrest. For his part in the altercation, the defendant was convicted of third degree assault. The appellate division set aside the conviction and allowed

36. 370 U.S. at 444.

37. Mr. Justice Stewart said, "I cannot see how an 'official religion' is established by letting those who want to say a prayer say it. On the contrary, I think that to deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation." Id. at 445.

38. Ibid.

39. See note 20 supra and accompanying text.

40. 370 U.S. at 449.

41. Id. at 435 n.21.

the defense of mistake of fact.[1] The court of appeals reversed, holding that "one who goes to the aid of a third person does so at his own peril."[2] *People v. Young*, 11 N.Y.2d 274, 183 N.E.2d 319, 229 N.Y.S.2d 1 (1962) (per curiam).

Although the origin of the mistake of fact doctrine is obscure, its existence has long been recognized,[3] and its growth coextensive with that of its companion doctrine, *mens rea*.[4] A product of ecclesiastical influence,[5] *mens rea* introduced into criminal jurisprudence the canonical standard of sin, which emphasized the wrongdoer's morally reprehensible intent, *i.e.*, his guilty mind.[6] Since the basis of the concept was that no wrong could be committed without a wrongful intent,[7] it followed that an accused acting under a mistaken idea that his conduct was morally justified, could not be adjudged guilty of a crime.

The modern approach to *mens rea* is far less dogmatic. It rejects the notion that a single definition can be found which is applicable to all crimes, and considers it merely as the mental intent required to convict a person for any crime.[8] This somewhat cyclic pronouncement is no doubt due to the judicial abhorrence of the confusion between motive and intent created by the old view.[9] It has been both the cause and the effect of the narrow specificity of intent which is necessary to constitute a crime under our modern penal codes. As a result, *mens rea* has practically lost its independent identity.[10]

The problem presented by the instant case is admittedly one of first impres-

1. People v. Young, 12 App. Div. 2d 262, 210 N.Y.S.2d 358 (1st Dep't 1961).

2. People v. Young, 11 N.Y.2d 274, 275, 183 N.E.2d 319, 229 N.Y.S.2d 1, 2 (1962) (per curiam).

3. Levett's Case, Cro. Car. 538, 79 Eng. Rep. 1064 (K.B. 1638). The case is recited by Jones, J., rendering the opinion in Cook's Case, Cro. Car. 537, 79 Eng. Rep. 1063 (K.B. 1638). There the defendant, reasonably but erroneously, supposing that Frances Freeman, an invited guest of defendant's servant, was a burglar, killed her with a thrust of his rapier. The court resolved it was not manslaughter, for the defendant "did it ignorantly without intention of hurt to said Frances." Ibid.

4. For a good historical sketch of the concept of mens rea see Morissette v. United States, 342 U.S. 246 (1952); see also Mueller, On Common Law Mens Rea, 42 Minn. L. Rev. 1043, 1059 (1958); Sayre, Mens Rea, 45 Harv. L. Rev. 974 (1932); Smith, The Guilty Mind in Criminal Law, 76 Law Q. Rev. 78 (1960). Other specific defenses have also been developed which vitiate mens rea, e.g., insanity, infancy and compulsion.

5. Sayre, supra note 4, at 975. But see Mueller, Mens Rea and the Law Without It, 58 W. Va. L. Rev. 34, 35 (1955); Mueller, supra note 4, at 1059.

6. "There can be no crime, large or small, without an evil mind. In other words, punishment is the sequence of wickedness. Neither in philosophical speculation, nor in religious or moral sentiment, would any people in any age allow that a man should be deemed guilty unless his mind was so. It is therefore a principle of our legal system, as probably it is of every other, that the essence of an offence is the wrongful intent, without which it cannot exist." 1 Bishop, Criminal Law § 292 (9th ed. 1923).

7. Lee v. Dangar, [1892] 2 Q.B. 337, 347-49.

8. See generally 1 Bishop, Criminal Law §§ 285-416 (9th ed. 1923); Perkins, Ignorance and Mistake in Criminal Law, 88 U. Pa. L. Rev. 35 (1939); Sayre, Mens Rea, 45 Harv. L. Rev. 974 (1932).

9. 1 Bishop, Criminal Law § 287 (9th ed. 1923).

10. Mueller, Mens Rea and the Law Without It, 58 W. Va. L. Rev. 34, 45 (1958).

sion in New York.[11] Elsewhere there is a substantial split of authority as to its solution. The majority of jurisdictions hold that the right of a person to defend another, ordinarily, should not be greater than that person's right to defend himself.[12] Thus, in effect, the accused becomes the *alter ego* of the party he defends. Under this view it is the objective fact, extrinsic to the intervenor, which determines his guilt or innocence. In *State v. Chiarello*,[13] this rule was severely criticized, the court expressing doubt that it even represented the majority view. The court partially based this assertion on Section 3.05(1) of the Model Penal Code[14] which provides that an actor would be justified in the use of force if under the circumstances, as they appear to him, the person whom he seeks to protect would be justified. The court concluded that this provision indicates "the American Law Institute rejects the [majority's] 'alter ego' rule as repugnant to the fundamental principle of Anglo-American criminal jurisprudence that the defendant must be shown to have a *mens rea*, or guilty intent."[15] In *Moore v. State*[16] an attempt was made to rationalize the majority stand on the ground that "the opposite rule would allow an innocent man who had been forced to strike in self-defense to be killed with impunity merely because appearances happened to be against him at the moment a relative of his antagonist reached the scene of conflict."[17] Appealing as this argument might be, in New York it lacks vigor since Section 1055 of the Penal Law, which contains the requisite conditions for justifiable homicide, expressly allows an intervenor who slays an alleged assailant to act on his reasonable belief.[18] The minority view,[19] which the court in *Chiarello* deemed preferable,

11. 11 N.Y.2d 274, 183 N.E.2d 319, 229 N.Y.S.2d 1 (1962).

12. Griffin v. State, 229 Ala. 482, 158 So. 316 (1934); Thompson v. State, 37 Ala. App. 446, 70 So. 2d 282 (1954); Commonwealth v. Hounchell, 280 Ky. 217, 132 S.W.2d 921 (1939), McHargue v. Commonwealth, 231 Ky. 82, 21 S.W.2d 115 (1929); State v. Best, 91 W. Va. 559, 113 S.E. 919 (1922).

13. 69 N.J. Super. 479, 174 A.2d 506 (Super. Ct. 1961).

14. Model Penal Code, § 3.05 (Tent. Draft No. 8, 1958). Use of Force for the Protection of Other Persons "(1) The use of force upon or toward the person of another is justifiable to protect a third person when: (a) the actor would be justified under Section 3.04 in using such force to protect himself against the injury he believes to be threatened to the person whom he seeks to protect; and (b) under the circumstances as the actor believes them to be, the person whom he seeks to protect would be justified in using such protective force; and (c) the actor believes that his intervention is necessary for the protection of such other person." Ibid.

15. 69 N.J. Super. at 487, 174 A. 2d at 510.

16. 25 Okla. Crim. 151, 219 Pac. 175 (Crim. App. 1923).

17. Id. at 162, 219 Pac. at 178.

18. Section 1055 (1) reads in part: "Homicide is also justifiable when committed: (1) In the lawful defense of the slayer . . . or of any other person in his presence or company, when there is reasonable ground to apprehend a design on the part of the person slain . . . to do some great personal injury to the slayer, or to any such person . . . ."

19. Brannin v. State, 221 Ind. 123, 46 N.E.2d 599 (1943); State v. Mounkes, 88 Kan. 193, 127 Pac. 637 (1912); State v. Chiarello, 69 N.J. Super. 479, 174 A.2d 506 (Super. Ct. 1961); Little v. State, 61 Tex. Crim. 197, 135 S.W. 119 (1911); Kees v. State, 44 Tex. Crim. 543, 72 S.W. 855 (1903).

would hold that one acting under a reasonable mistake of fact is not criminally responsible if, had his erroneous supposition been true, he would not have been guilty of a crime.[20] This subjective test is the one approved by the text writers who have urged the deprecation of "the imputation of criminal liability in the range of serious common-law offenses, including aggravated assault, where there is neither guilty intent nor criminal negligence."[21]

Mental intent is the distinguishing feature among the degrees of assault under the New York Penal Law.[22] A person must not only have committed an assualt, but he must also have entertained an additional intent, *e.g.*, the specific intent to kill, in order to be adjudged guilty of assault in the first degree.[23] On the other hand, a misdemeanor assault is simply defined as one not amounting to a felony.[24] Nowhere in the statute can a general intent requisite to the commission of an assault, per se, be found. In this omission lies the crux of the problem that was before the court in the instant case.

The majority held that the only intent necessary to convict for third degree assault is the intent to strike a blow.[25] The court, therefore, denied the notion that any vestige of the concept of *mens rea* is implicit in the general intent essential to an assault. Consequently, any mistaken belief as to the circumstances into which the defendant intervened is irrelevant.[26] It is irrelevant because defendant's allegation could operate only to negate the inference that he intended to do wrong, since he unquestionably intended to strike the officers. The court further asserted that the defendant did not fall within the purview of Section 246(3) of the Penal Law which provides that the use of force is not unlawful "when committed either by the party about to be injured or by another person in his aid or defense, in preventing or attempting to prevent an offense against his person. . . ." The court's conclusion is justified since the police officers in the instant case were rightfully using force in making a lawful arrest,[27] and, therefore, no offense was being committed against the young man.

In *People v. Cherry*[28] it was recognized that it is the "right to resist" which governs the resister's bar to conviction under section 246(3) with respect to a defendant who is himself the subject of an illegal arrest. In *People v.*

20. People v. Young, 11 N.Y.2d 274, 276, 183 N.E.2d 319, 320, 229 N.Y.S.2d 1, 3 (1962) (dissenting opinion).

21. State v. Chiarello, 69 N.J. Super. at 488, 174 A.2d at 511. Although the quotation refers specifically to aggravated assault, the court in this same opinion refused to follow an early New Jersey case, State v. Ronnie, 41 N.J. Super. 339, 125 A.2d 163 (Essex County Ct. 1956), which had applied the so-called majority rule to a conviction for disorderly conduct.

22. N.Y. Penal Law §§ 240, 242, 244.

23. N.Y. Penal Law § 240.

24. N.Y. Penal Law § 244.

25. 11 N.Y.2d at 275, 183 N.E.2d at 320, 229 N.Y.S.2d at 2.

26. Ibid.

27. N.Y. Penal Law § 246(1) reads in part: "To use . . . force . . . upon or towards the person of another is not unlawful . . . (1) When necessarily committed by a public officer in the performance of a legal duty . . . ."

28. 307 N.Y. 308, 121 N.E.2d 238 (1954).

*Gallo*[29] this rule was expanded to include a situation where a defendant, without knowledge of the circumstances, went to the aid of his brother who was being held without just cause by four police officers. In dismissing the prosecution's contention that the *Cherry* case was not applicable since there was a possibility in *Gallo* that the defendant was aware of the identity of the officers, the court intimated that the accused's knowledge is of no consequence in a third degree assault.[30] If this be true, it would be interesting to speculate what the court's decision would be if the party unlawfully arrested offered no resistance, but another person in his defense did.[31] Logically, the court in its strict application of section 246(3) should acquit this defendant also, since he, whether cognizant of it or not, was preventing an offense against another's person (illegal arrest). Undoubtedly, if the prosecution's contention be correct, the defendants in *Gallo* and in the hypothetical case are far more blameworthy than is the defendant in the instant case. Nevertheless, the first two defendants are excused from responsibility solely because of the fortuitous circumstance of illegal detention.

Judge Froessel, in a vigorous dissent, condemned the conclusion of the majority.[32] His entire argument, however, was predicated upon an acceptance of wrongful intent as a necessary element to a conviction for third degree assault. He urged[33] that the court adopt the rule enunciated in *People v. Maine*[34] which completely exonerates an intervenor who slays a supposed attacker if he is proceeding under a reasonable mistake of fact. *Maine* and Section 1055 of the Penal Law, the dissent continued, contain a true appraisal of the public policy of the State of New York regarding the defense of mistake of fact and, hence, ought to be read into section 246(3) despite the lack of express inclusion by the legislature. Reasonableness rather than chance should be the standard of criminality. However, New York, on the basis of the present decision, Judge Froessel noted, is now in the unenviable position of condoning an intervenor's misguided conduct where it results in death, but condemning it where it is anything less than fatal.

The majority of the court in the instant case justified its position by stating that to have reached any other decision would not be conducive to an orderly society. The validity of this proposition is questionable since any effect this case may have will operate in favor of the precipitator of an unwarranted attack. He is now free to pursue his adventure secure in his mind that honest individuals will be reluctant to intervene for fear of incurring penal liability. The wrong-minded intervenor, on the other hand, will no more be deterred than the aggressor, since neither proceeds in contemplation of subsequent punishment.

29. 206 Misc. 935, 135 N.Y.S.2d 845 (Magis. Ct. 1954).

30. Id. at 938, 135 N.Y.S.2d at 848.

31. Cf. People v. Young, 12 App. Div. 2d at 268, 210 N.Y.S.2d at 364-65.

32. 11 N.Y.2d at 276, 183 N.E.2d at 320, 229 N.Y.S.2d at 3(1962) (dissenting opinion).

33. Id. at 278, 183 N.E.2d at 321-22, 219 N.Y.S.2d at 5 (dissenting opinion).

34. 166 N.Y. 50, 59 N.E. 696 (1901).

**Interstate Commerce—Right of Domiciliary State To Tax Railroad Cars of a Corporation on an Unapportioned Basis Unaffected by Permanent Absence From the State of an Ascertained Average of Cars.** —Petitioner, a Pennsylvania corporation, is licensed to operate a railroad solely within the borders of that state. Its right of way extends from the anthracite coal region in Pennsylvania to the New Jersey border. In 1951, the company owned 3,074 freight cars which were used, on its own lines, by the Central Railroad Company of New Jersey on its lines, and by other railroads throughout the country. A daily average of more than 1,659 of the petitioner's cars was used on lines owning track wholly outside of Pennsylvania, while an average of 1,056 cars was used on lines owning track both within and outside of the state. Although "regularly, habitually and/or continuously employed," these cars did not run on fixed routes or regular schedules. In fact, only a daily average of 158 cars used on the lines of the Central Railroad Company in New Jersey operated in such manner.

In imposing its annual Capital Stock Tax,[1] Pennsylvania assessed the petitioner at the full value of all of its freight cars and engines located both within and outside of the state. The company petitioned to have its rolling stock assessed on an apportioned basis.[2] The denial of its petition by the Pennsylvania Board of Finance and Review was sustained by the Pennsylvania Court of Common Pleas.[3] The Supreme Court of Pennsylvania held the tax applicable to all of petitioner's freight cars, but inapplicable to the engines used on fixed routes and schedules over the lines of the Central Railroad Company of New Jersey.[4] On appeal, the Supreme Court of the United States modified the judgment of the Supreme Court of Pennsylvania, holding that petitioner's freight cars which ran on fixed routes and schedules on the lines of the Central Railroad Company of New Jersey had acquired a tax situs in that state, and, therefore, were exempt from its unapportioned tax. The Court upheld, however, Pennsylvania's right, as the domiciliary state, to assess the remainder of petitioner's freight cars at their full value, absent a showing that a portion of the cars had established a tax situs in another state. *Central R.R. v. Pennsylvania*, 370 U.S. 607 (1962).

The question whether the state of a railroad's domicile may tax all of the railroad's rolling stock at full value, even though a large portion of the cars spend the entire tax year outside that state, was first answered in *People ex rel. New York Central & H.R.R. v. Miller*.[5] That case held that a mere showing of the continual absence of a determined number of cars from the domicile would not preclude the domiciliary state from taxing all of a railroad's cars on an unapportioned basis. If a portion of the cars had established a tax situs in a foreign state, then the state of domicile would be precluded from taxing all

1. Pa. Stat. Ann. tit. 72, § 1871 (Supp. 1961).
2. An apportioned tax would have reflected only the time spent by petitioner's cars within Pennsylvania.
3. Central R.R. v. Pennsylvania, 370 U.S. 607, 611 (1962).
4. Commonwealth v. Central R.R., 403 Pa. 419, 169 A.2d 878 (1961).
5. 202 U.S. 584 (1906).

the cars at full value.[6] Such multiple taxation of interstate commerce on an unapportioned basis would offend the commerce clause of the United States Constitution.[7] Whether a mere showing, however, that a substantial average of cars was continually outside the state would be enough to establish a tax situs has never been specifically decided.

Under the due process clause, a tax on any property must "in practical operation [have] . . . relation to opportunities, benefits, or protection conferred or afforded by the taxing State."[8] It has consistently been held that the "benefit" requirement is satisfied upon a showing of the existence of a tax situs in a foreign state.[9]

The principles underlying the existence of a situs necessary for the taxation of the moveable property of a foreign corporation have undergone an extensive evolution. In the early law governing vessels, ships were taxable only at their "home port,"[10] unless, "though engaged in interstate commerce, [they] are employed in such commerce wholly within the limits of [another] . . . State . . . ."[11] The "home port" rule required evidence of exclusive use of specific property in a nondomiciliary state before a situs might be established. A vessel's stop in a foreign port was "a mere incident of its voyage, and to determine that it has acquired an actual situs in one port rather than another would involve such grave uncertainty as to result often in an entire escape from taxation."[12]

This rule was subsequently changed by the introduction of the concept of apportioned taxation based upon the "unit rule." The introduction of this standard of taxation to property in transit through foreign states gave rise to new tests for the establishment of a foreign situs. The "unit rule" allowed each state traversed[13] to assess the value of the property of the corporation engaged in interstate transportation, based upon the " 'organic relation of the property in the State to the whole system.' "[14] Such assessment based upon the "unit

6. Standard Oil Co. v. Peck, 342 U.S. 382 (1952).

7. Id. at 385. See also Johnson Oil Ref. Co. v. Oklahoma, 290 U.S. 158 (1933); Union Tank Line Co. v. Wright, 249 U.S. 275 (1919); Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194 (1905).

8. Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169, 174 (1949); see also Union Refrigerator Transit Co. v. Kentucky, supra note 7.

9. See cases cited in note 8 supra.

10. Hays v. Pacific Mail S.S. Co., 58 U.S. (17 How.) 596 (1854); St. Louis v. Ferry Co., 78 U.S. (11 Wall.) 423 (1870).

11. Old Dominion S.S. Co. v. Virginia, 198 U.S. 299, 309 (1905).

12. Southern Pac. Co. v. Kentucky, 222 U.S. 63, 75 (1911).

13. The unit rule has been applied to vessels, rolling stock and airplanes.

14. Union Tank Line Co. v. Wright, 249 U.S. 275, 282. The application of this apportionment rule would depend upon the nature of the carrier. Rolling stock might be taxed on the average number of "car days" spent in each state. The number of car days spent in each state can be found by multiplying the average number of cars found therein by 365. Thus, each state's taxation could be assessed on a percentage basis according to the number of car days on the entire line. A similar assessment could be made in the case of airplanes on the basis of the number of stops made in each state. In the case of inland vessels, such an apportionment could be made on the basis of the mileage within each state.

rule" was first applied to vessels operating in inland waters in *Ott v. Mississippi Valley Barge Line Co.*[15] There the court allowed a nondomiciliary state to tax " 'an average portion of property permanently within the State. . . .' "[16] In *Standard Oil Co. v. Peck*,[17] it was held that a state was precluded from taxing the property of a domestic corporation on other than an apportioned basis where such property was subject to apportioned taxation in foreign states. In *Peck*, the Court noted that *Ott* had placed inland water transportation "on the same constitutional footing as other interstate enterprises."[18] The "unit" method of assessment was first applied to railroad cases in *Pullman's Palace Car Co. v. Pennsylvania*[19] which held that the "unit rule" of taxation was consistent with the commerce clause of the Constitution. In *American Refrigerator Transit Co. v. Hall*,[20] evidence of an average of forty cars present within the nondomiciliary state during the tax year was sufficient to establish a foreign situs for the purpose of apportioned taxation even though they were not always the same cars and did not run on regular schedules. Similarly, in *Union Refrigerator Transit Co. v. Lynch*,[21] the Court sustained a tax upon an average of cars, without knowing the *exact* number within the state during the year.[22] Proof of an average of cars constantly present throughout the year in the nondomiciliary state, although not always the same cars, and not run on regular routes and schedules, was held sufficient to establish a situs for apportioned taxation by a foreign state.[23] In *Braniff Airways, Inc. v. Nebraska*,[24] the Court allowed a nondomiciliary state to tax apportionately, based not upon an average of planes present within the state, but upon the fact that the planes made eighteen stops per day there. The mere entering of the property into the nondomiciliary state upon fixed routes and schedules was held sufficient to establish a foreign situs for the purpose of an apportioned tax. Consequently, the constitutional basis for apportioned taxation by a nondomiciliary state was established either by evidence of an average of cars *constantly* present or of an undetermined number of cars *continually* running on fixed routes and schedules in a foreign state.

15. 336 U.S. 169 (1949).
16. Id. at 175.
17. 342 U.S. 382 (1952).
18. Id. at 384.
19. 141 U.S. 18 (1891).
20. 174 U.S. 70 (1899).
21. 177 U.S. 149 (1900).
22. Id. at 154.
23. See also Johnson Oil Ref. Co. v. Oklahoma, 290 U.S. 158 (1933); Germania Ref. Co. v. Fuller, 184 Mich. 618, 151 N.W. 605 (1915), aff'd, 245 U.S. 632 (1917) (per curiam).
24. 347 U.S. 590 (1954). Although Braniff, dealing with airplanes, is the only case which directly held that continual use in the nondomiciliary state is enough for a foreign situs, the Peck case implies that it would be sufficient for other means of interstate transportation as well. The record in Peck shows that the barges traveled on fixed routes and schedules in other states. The fact that the Court allowed the domiciliary state to tax only on an apportioned basis shows that it felt the barges had acquired a tax situs in these other states. In other cases in which fixed routes and schedules have been shown, the decision of the Court was also based on the fact that there were an average number of cars presently in the state.

The basis for the jurisdiction of a domiciliary state to tax property outside the state derives from the "legal relation of creator and creature" existing between a corporation and the state to which it owes its existence.[25] Under the "home port" rule, the only limitation upon the domicile's right to tax on an unapportioned basis had been the showing that *specific ascertained* property was located permanently in a foreign state.[26] This rule was applied to airplanes in *Northwest Airlines, Inc. v. Minnesota*[27] to allow the domicile to tax unapportionately despite the fact that a foreign tax situs was shown by regular routes and schedules. In *Union Refrigerator Transit Co. v. Kentucky*,[28] however, the Court limited this doctrine, holding that taxation by the domicile violated due process when the property is permanently located in other states.[29] The "home port" rule was applied to railroad cars in *People ex rel. New York Central & H.R.R. v. Miller*[30] to allow a domiciliary state to tax all of the plaintiff's rolling stock. There, the Court noted that "no inference whatever could be drawn that the same cars were absent from the State all the time."[31] The question, "whether there is any necessary parallelism between liability elsewhere and immunity at home," was not answered because "it [did] . . . not appear that any specific cars or any average of cars was so continuously in any other State as to be taxable there."[32] This issue was decided in *Standard Oil Co. v. Peck*,[33] which held that "the rule which permits taxation by two or more states on an apportionment basis precludes taxation of all the property by the state of the domicile."[34] In *Peck*, however, a domiciliary state was required to tax apportionately because there existed a foreign tax situs which was established by a *continual* use in other states by barges operating on fixed routes and schedules. Consequently, a showing that the property moved on *fixed* routes and schedules in *other states* would preclude unapportioned taxation by the domicile. It seems evident that the *Peck* case did not change the rule in *Miller*, where the use in *other states* was "constant," but where there was no showing of a *continuous* use in any *particular* foreign state by an average of the cars. Fixed routes and schedules necessarily show at least *continual* use in the states touched along the routes. Merely a "constant" use in other states, however, shows no *continuous* use in any particular one.

Thus, the majority in the instant case, correctly found that no decision "has weakened the pivotal holding in *Miller*—that a railroad . . . cannot avoid the imposition of its domicile's property tax on the full value of its assets merely

25. Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 294 (1944).
26. See cases cited in notes 10 & 11 supra.
27. 322 U.S. 292 (1944).
28. 199 U.S. 194 (1905).
29. Id. at 204.
30. 202 U.S. 584 (1906).
31. Id. at 595.
32. Id. at 597-98.
33. 342 U.S. 382 (1952).
34. Id. at 384.

by proving that some determinable fraction of its property was absent from the State for part of the tax year."[35]

The argument of the dissenting opinion that "as a result of the *Ott*, *Peck*, and *Braniff* cases the average of . . . cars that run regularly, habitually, and continuously on lines . . . outside of Pennsylvania could be taxed by other States . . ."[36] clearly finds no support in those cases. In *Ott*, taxation was based on a *continuous* presence of an average of cars in a particular nondomiciliary state. In *Peck* and *Braniff*, nondomiciliary taxation was based upon a *continual* presence in *other states*, as determined by the *fixed* routes and schedules utilized.

In allowing Pennsylvania to assess those cars for which no foreign situs was shown, and disallowing the taxation of petitioner's cars which ran on fixed routes and schedules in New Jersey, the instant decision has crystallized the relationship between the principles set out in *Miller* and *Peck* concerning the right of the domiciliary to tax. The *Miller* rule, that mere absence from the domiciliary does not preclude the domiciliary from taxing, and the *Peck* rule, that the existence of foreign tax situs does preclude unapportioned taxation by the domiciliary state, were each applied consistently. The logical synthesis of these principles dictated the result that permanent absence from the domiciliary state does not of itself establish the existence of a foreign situs in a particular state and that the burden of proving a foreign situs, either from regular routes and schedules or from an average number of cars present in a foreign state, rests upon the party seeking to avoid the tax.

**Mandamus—Courts Will Not Interfere With Discretion Exercised in Expelling Student on Ecclesiastical Grounds.**—Two of the petitioners, while enrolled as students at a Catholic university,[1] were married before a city clerk in a civil ceremony. The circumstances of the marriage became common knowledge at the university through the third petitioner, also a student, who had acted as witness.[2] As Catholics, these students are considered by the Roman Catholic Church to be guilty of a serious sin and a breach of canon law.[3] Having

35. 370 U.S. at 611.

36. Id. at 624.

1. St. John's University is an educational corporation chartered by the Board of Regents of the University of the State of New York and is operated by the Order of the Congregation of the Mission, a Roman Catholic order of priests. As stated in its general bulletin, the university "has the general objective of offering such opportunities to achieve traditionally classical and professional education as will enable men and women to develop in learning and culture according to the philosophical and theological principles and traditions of the Roman Catholic Church." Although enrollment is open to members of all religions, ninety-four per cent of the university's students are Roman Catholics.

2. Jean Catto, one of the witnesses, joined in the petition, but the other witness did not.

3. Canon 1094 states: "Only those marriages are valid which are contracted before the pastor or the Ordinary of the place, or a priest delegated by either of these, and at least two witnesses, but in accordance with the rules laid down in the canons that follow. . . ." Bouscaren & Ellis, Canon Law a Text and Commentary 562 (3d rev. ed. 1957).

failed to give a satisfactory explanation of their conduct to school authorities,[4] they were subsequently expelled from the defendant university.[5] They then sought to set aside their dismissal pursuant to Article 78 of the New York Civil Practice Act.[6] The New York Supreme Court granted the application, annulled the university's determination and ordered reinstatement.[7] The appellate division, in a three-to-two decision, reversed and held that a private university's honest exercise of discretion in expelling a student for a breach of ecclesiastical law is not subject to court review. *Carr v. St. John's Univ.*, 17 App. Div. 2d 632, 231 N.Y.S.2d 410 (2d Dep't 1962) (memorandum decision).

The use of mandamus as a means to compel reinstatement of a student expelled from an educational institution is a relatively modern innovation.[8] The propriety of its availability in a particular instance, however, is dependent upon the school's status as either private or public.[9] Unlike the situation in a public institution,[10] the relationship between student and governing bodies in a private institution is generally considered to be contractual.[11] Implicit in such a relationship is the university's duty to allow a student upon admission, to work towards and receive his degree[12] with the condition, however, that "the student will not be guilty of such misconduct as would be subversive of the discipline of the college or school, or as would show him to be morally unfit. . . ."[13]

With respect to the mechanics of a dismissal, New York and the majority of

4. The students were notified to appear and explain their conduct before the "Committee on Student Integrity" which is composed of faculty members including the dean of men and the dean of women. This committee recommended dismissal.

5. The students were notified orally of their dismissal immediately after that decision was reached on the morning of April 12, 1962. In the evening of that same day, petitioners, Howard Carr and Greta Carr, were remarried before a Catholic priest with the same persons acting as witnesses. On April 18, 1962 the four students received formal notice of their dismissal by letter.

6. N.Y. Civ. Prac. Act § 1283-306.

7. 34 Misc. 2d 319, 231 N.Y.S.2d 403 (Sup. Ct. 1962). Judge Eilperin ordered the university to place petitioner Howard Carr, who had completed all course requirements, on the January 1962 graduation list and to confer a degree on him in June 1962 and to reinstate the other petitioners as of April 18, 1962.

8. Harker, The Use of Mandamus To Compel Education Institutions To Confer Degrees, 20 Yale L.J. 341 (1911).

9. See 12 B.U.L. Rev. 670 (1932).

10. The right of admission to a public university "is a right which the trustees are not authorized to materially abridge, and which they can not, as an abstract proposition, rightfully deny." State ex rel. Stallard v. White, 82 Ind. 278, 285 (1882). This decision recognizes the distinction between the right of admission to a public university and the control of such person's conduct by the university after admission. See People ex rel. Tinkoff v. Northwestern Univ., 333 Ill. App. 224, 77 N.E.2d 345 (1947), cert. denied, 335 U.S. 829 (1948).

11. 1 Williston, Contracts § 90D, at 317 (3d ed. 1957). See, e.g., Anthony v. Syracuse Univ., 224 App. Div. 487, 231 N.Y. Supp. 435 (4th Dep't 1928).

12. People ex rel. Cecil v. Bellevue Hosp. Medical College, 60 Hun 107, 14 N.Y. Supp. 490 (1st Dep't), aff'd mem., 128 N.Y. 621, 28 N.E. 253 (1891).

13. Goldstein v. New York Univ., 76 App. Div. 80, 83, 78 N.Y. Supp. 739, 740 (1st Dep't 1902).

other jurisdictions have long recognized the right of a private university to deprive a student of the guarantee of procedural due process.[14] In *Anthony v. Syracuse Univ.*[15] a regulation of a private university reserving the power to summarily dismiss a student for any reason without disclosing the same was upheld. The court stressed the contractual freedom of both parties, and the student's consent to such a regulation by registration.[16] Although the question has never been settled in this state as to a public university's right of summary dismissal, there is no indication that the courts would not adopt the majority view as exemplified by the case of *Dixon v. Alabama State Bd. of Educ.*[17] There, regulations of a public institution which denied a student a right of notice, hearing or opportunity for defense regarding his dismissal were held to violate the constitutional mandate of due process contained in the fourteenth amendment.

In no case, however, whether an institution be private or public, can the action of school officials be arbitrary or capricious.[18] The general rule in New York, as stated in *People ex rel. Cecil v. Bellevue Hosp. Medical College*,[19] is that the court "will not review the discretion of the corporation in the refusal for any reason or cause, to permit a student to be examined and receive a degree; but where there is an absolute and arbitrary refusal, there is no exercise of discretion."[20] The general policy behind such a rule is judicial awareness of the fact that educational authorities are best qualified to judge a student's fitness[21] and, that these officials stand in loco parentis to their charges.[22] Thus,

14. See John B. Stetson Univ. v. Hunt, 88 Fla. 510, 519, 102 So. 637, 641 (1924) where the court stated: "Where the rules and regulations of a private institution of learning receiving no aid from the public treasury in effect provide that a student may forfeit his connection with the institution without any overt act if he is not in accord with its standards it is not incumbent on the institution to prefer charges and prove them at trial before dismissing permanently or temporarily a student regarded by it as undesirable." Accord, Dehaan v. Brandeis Univ., 150 F. Supp. 626 (D. Mass. 1957); Barker v. Trustees of Bryn Mawr College, 278 Pa. 121, 122 Atl. 220 (1923) (per curiam).

15. 224 App. Div. 487, 231 N.Y. Supp. 435 (4th Dep't 1928).

16. Id. at 490-91, 231 N.Y. Supp. at 439.

17. 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961). See also Gleason v. University of Minnesota, 104 Minn. 359, 116 N.W. 650 (1908); Commonwealth ex rel. Hill v. McCauley, 3 Pa. County Ct. 77 (1886).

18. Anthony v. Syracuse Univ., 224 App. Div. 487, 231 N.Y. Supp. 435 (4th Dep't 1928); People ex rel. Cecil v. Bellevue Hosp. Medical College, 60 Hun 107, 14 N.Y. Supp. 490 (1st Dep't), aff'd mem., 128 N.Y. 621, 28 N.E. 253 (1891).

19. 60 Hun 107, 14 N.Y. Supp. 490.

20. Id. at 108-09, 14 N.Y. Supp. at 490.

21. Woods v. Simpson, 146 Md. 547, 126 Atl. 882 (1924); Edde v. Columbia Univ., 8 Misc. 2d 795, 168 N.Y.S.2d 643 (Sup. Ct. 1957), aff'd mem., 6 App. Div. 2d 780, 175 N.Y.S.2d 556 (1st Dep't 1958).

22. "College authorities stand in loco parentis concerning the physical and moral welfare, and mental training of the pupils, and we are unable to see why to that end they may not make any rule or regulation for the government, or betterment of their pupils that a parent could for the same purpose." Gott v. Berea College, 156 Ky. 376, 379, 161 S.W. 204, 205 (1913); see also People ex rel. Pratt v. Wheaton College, 40 Ill. 186 (1886); Tanton v. McKenney, 226 Mich. 245, 197 N.W. 510 (1924).

courts uniformly refrain from reviewing the substantive ground for expulsion unless in the exercise of its right, the university has clearly abused its discretion.[23]

Furthermore, it is insufficient to establish an abuse of discretion on the part of a university merely to prove that it has expelled a student for the breach of a regulation which denies him the exercise of those freedoms which are incident to personal liberty.[24] In *People ex rel. Pratt v. Wheaton College*,[25] where petitioner's son was expelled for joining a benevolent secret society, the court, in advancing this principle, stated:

A discretionary power has been given them [school authorities] to regulate the discipline of their college in such manner as they deem proper, and so long as their rules violate neither divine nor human law, we have no more authority to interfere than we have to control the domestic discipline of a father in his family. . . . When it is said that a person has a legal *right* to do certain things, all that the phrase means is, that the law does not forbid these things to be done. It does not mean that the law guarantees the right to do them at all possible times and under all possible circumstances. A person in his capacity as a citizen may have the right to do many things which a student of Wheaton college cannot do without incurring the penalty of college laws. A person as a citizen has a legal right to marry, or to walk the streets at midnight, or to board at a public hotel, and yet it would be absurd to say that a college cannot forbid its students to do any of these things. So a citizen, as such, can attend church on Sunday or not, as he may think proper, but it could hardly be contended that a college would not have the right to make attendance upon religious services a condition of remaining within its walls.[26]

Accordingly, courts have universally upheld expulsions of students who lived[27] or ate[28] in forbidden places, joined prohibited organizations,[29] married[30] or refused on religious grounds to participate in compulsory military training.[31] Nor is the university's jurisdiction, as was held in *Samson v. Trustees of Columbia Univ.*,[32] confined to any exact boundaries. There the court said,

the implied stipulation of good conduct, variable in its meaning and incapable of precise definition as that term must always be, is not . . . to receive the restricted construction that the student's conduct may be the subject of control only in so far as it relates to his actions in his capacity and status of student.[33]

The term "morally unfit" was viewed in a broad sense and defined as com-

23. People ex rel. Goldenkoff v. Albany Law School, 198 App. Div. 460, 191 N.Y. Supp. 349 (3d Dep't 1921); People ex rel. O'Sullivan v. New York Law School, 68 Hun 118, 22 N.Y. Supp. 663 (1st Dep't 1893).

24. See note 10 supra.

25. 40 Ill. 186 (1866).

26. Id. at 187-88.

27. State v. Regents, 179 Ga. 210, 175 S.E. 567 (1934).

28. Gott v. Berea College, 156 Ky. 376, 161 S.W. 204 (1913).

29. State ex rel. Stallard v. White, 82 Ind. 278 (1882).

30. Hall v. Mount Ida School for Girls, Inc., 258 Mass. 464, 155 N.E. 418 (1927).

31. Hamilton v. Regents, 219 Cal. 663, 28 P.2d 355, aff'd, 293 U.S. 245 (1934).

32. 101 Misc. 146, 167 N.Y. Supp. 202 (Sup. Ct. 1917).

33. Id. at 150, 167 N.Y. Supp. at 204.

prising any conduct that may interfere with or injure the university, or lessen its proper control over its student body, or impair its influence for good upon its students and the community.[34] Thus the court upheld the university's dismissal of a student for his vehement advocation, both on and off the campus, of radically socialistic doctrines.[35] The recent Florida case of *Robinson v. University of Miami*[36] also illustrates the wide latitude educational institutions have in determining moral fitness. There the student was precluded from continuing his studies towards a teaching career because of the undesirable effect his fanatical atheist ideas *might* have on his future pupils.

In addition, courts have recognized that when a student is expelled for misconduct, the school's action need not be based on an infraction of a specific rule, but may be under a general all encompassing reservation[37] such as for an "appropriate reason"[38] or "any reason deemed sufficient."[39] The action of the university in the instant case was predicated on just such a regulation. It stated that "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."[40] The majority of the court pointed out that the import of this rule, both to the petitioners and defendant, was that a student must conduct himself as a Catholic student.[41] The knowledge of the regulation could not be denied since the petitioners after their years of attendance at the university must certainly have been cognizant of its stated objective, namely, to educate men and women "according to the philosophical and theological principles and traditions of the Roman Catholic Church."[42] It was as obvious to these petitioners as it was to the court that participating in a civil marriage did not meet the standard of conduct demanded of Catholic students.[43]

The conduct of petitioners in wilfully disregarding a fundamental tenet of their religion and then publicizing that disregard, logically fits within the scope

34. Ibid.

35. Again in People ex rel. Goldenkoff v. Albany Law School, 198 App. Div. 460, 191 N.Y. Supp. 349 (3d Dep't 1921) a university was upheld for expelling a student on similar grounds.

36. 100 So. 2d 442 (Fla. 1958).

37. The New York Supreme Court found the regulation involved in the instant case to be too vague, indefinite and "not sufficiently clear to mandate a course of conduct standard in application." 34 Misc. 2d 319, 231 N.Y.S.2d 410. It is submitted that such statements of university policy must of necessity be of a general and all encompassing scope. The sheer physical impracticability of listing every breach of academic and disciplinary regulations demands in its place broad language.

38. Dehaan v. Brandeis Univ., 150 F. Supp. 626 (D. Mass. 1957).

39. Anthony v. Syracuse Univ., 224 App. Div. 487, 231 N.Y. Supp. 435 (4th Dep't 1928).

40. This statement was published in the university's bulletins before and during the entire period of petitioners' enrollments.

41. 17 App. Div. 2d at 634, 231 N.Y.S.2d at 414.

42. Id. at 633, 231 N.Y.S.2d at 412.

43. Id. at 634, 231 N.Y.S.2d at 414.

of moral unfitness as promulgated in *Samson*.[44] If even a nonchurch member in a religiously oriented university who by his words showed a patent antagonism towards its pedagogy would be a proper subject of dismissal, how much more is it merited by members who by their actions display this same antagonism. The power of an educational institution to so handle its affairs is founded, as this court and the State of New York concede, on "a fundamental American right for members of various religious faiths to establish and maintain educational institutions exclusively or primarily for students of their own religious faith or to effectuate the religious principles in furtherance of which they are maintained."[45] In effect, the instant court in deciding that expulsion for violation of ecclesiastical law is a proper matter for discretion, is confessing its own inability and lack of authority to determine in the place of the university how best to effectuate the religious principles in furtherance of which the school is maintained.

The underlying reason for the dissent is a basic misconception as to St. John's institutional status. The minority stated categorically that St. John's is a public institution.[46] It gave as reasons the fact that St. John's was chartered by the state, that it is in the public business of education and that it opens its doors to all, regardless of religion.[47] Taken either individually or collectively, none of these factors can operate, in the light of *Dartmouth College v. Woodward*,[48] to make the defendant a public institution. There the Supreme Court stated quite distinctly that although education is an "object of national concern," those who engage therein do not necessarily become public officers.[49] In this same case it was held that "from the fact . . . that a charter of incorporation has been granted, nothing can be inferred which changes the character of the institution, or transfers to the government any new power over it. The character of civil institutions," the Court continued, "does not grow out of their incorporation, but out of the manner in which they are formed, and the objects for which they are created."[50] Indeed, St. John's in its objectives and purposes[51] remains a private institution. The fact that it admits non-Catholics is of no consequence since New York expressly allows the maintenance of religiously oriented schools either "*exclusively or primarily* for students of their own religious faith."[52]

The dissent proffered two other grounds for disagreement, the first being that a student cannot be expelled for conduct which is not considered to be immoral by the general public. If this standard were adopted, scholastic dis-

44. Samson v. Trustees of Columbia Univ., 101 Misc. 146, 167 N.Y. Supp. 202 (Sup. Ct. 1917).

45. N.Y. Educ. Law § 313(1).

46. 17 App. Div. 2d at 634, 231 N.Y.S.2d at 414.

47. Ibid.

48. 17 U.S. (4 Wheat.) 335 (1819).

49. Id. at 408.

50. Id. at 410.

51. See note 1 supra; cf. Carr v. St. John's Univ., 34 Misc. 2d 319, 231 N.Y.S.2d 406 (Sup. Ct. 1962).

52. N.Y. Educ. Law § 313(1). (Emphasis added.)

cipline would be in a state of utter chaos.[53] Secondly, the minority contended that since ecclesiastical law is not enforced equally against all students whether Catholic or non-Catholic,[54] it can not be applied to any as a measure of behavior. The Supreme Court of Wisconsin was faced with analogous reasoning in *Frank v. Marquette Univ.*[55] where a dismissed student sought to inspect the records of the school concerning other students whom he believed were guilty of infractions similar to his own but who were not expelled. In refusing to attach any relevance to such records, the court stated that "disciplinary actions taken by the faculty in other cases are wholly immaterial to the merits of this controversy. . . ."[56] The court in *Frank*, therefore, propounded the notion which appeared obvious to it, that the leniency or complete lack of action taken against one party does not create a right in another to demand identical treatment.

Thus, considering all the circumstances of the instant case, the majority of the court came to the only proper conclusion. To have decided against the university would have seriously impinged upon a religious organization's right, implicit in the "free exercise clause"[57] of the Constitution and explicit under the law of New York,[58] to effectuate and perpetuate itself through the instrumentality of educational institutions. If a student is adverse to ecclesiastical authority, his remedy lies in withdrawal or transfer, not in mandamus.

53. See notes 28-30 supra.

54. A lower New York court has indicated that if school authorities did enforce such regulations equally it might amount to a violation of the student's constitutional rights. Miami Military Institute v. Leff, 220 N.Y. Supp. 799 (Buffalo City Ct. 1926).

55. 209 Wis. 372, 245 N.W. 125 (1932).

56. Id. at 375, 245 N.W. at 127.

57. U.S. Const. amend. I.

58. N.Y. Educ. Law § 313(1).