

# Wall of Separation

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DATELINE SUNDAY, U. S. A.

By Warren L. Johns

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Sunday laws have always been under attack by both the religious and the unreligious. Complaints have been generated by everything from feelings of religious persecution to annoyance at being unable to buy a Sunday afternoon ice-cream cone. In *Dateline Sunday, U.S.A.*, Warren L. Johns tells (the cover announces) "the story of three and a half centuries of Sunday-law battles in America."

As many readers will know, Johns, a lawyer, is the religious liberty secretary for the Pacific Union Conference of Seventh-day Adventists. His familiarity with problems of Sunday laws and his ability to write lucid English are marks of his professional skill. He has given the general reader a refreshing and entertaining book. It is refreshing because it exceeds the norm of much that is written and spoken about religious liberty. It is entertaining because it traces in sparkling detail the absurdities and incongruities of America's Sunday laws. *Dateline Sunday* is happily devoid of the cumbersome prose that too often characterizes lawyers' literary attempts. But the popular style of the book has not been achieved at the expense of serious scholarship.

No special alertness is necessary to recognize that Sunday laws have not kept pace with America's social structure. Some states still prohibit such activities as "bearbaiting" or "rope dancing" and make exceptions for "ferrymen" and "stages." Johns has compiled an impressive array of state statutes that are patently absurd. He is at his best as he chides lawmakers for the foolish distinctions made by Sunday laws and points up the enforcement problems facing the police.

Sunday "crimes" are by their nature limited to a twenty-four hour period. In some cases arbitrary time slots within that period, such as after 2 p.m. and before 6 p.m., compound the confusion. The harrassed enforcer had better be armed with a stopwatch. Next he has to check the geographical boundary. Is this a county which exercised its local option to operate outside some portion of the Sunday-law scheme? Or is this a city with a population level exempted by the legislature from the operation of the law? The police officer had better have his map, his compass, and a recent census report.

But before he makes an arrest, he also should check through the forbidden list and cull out the "essential" from the "nonessential." Selling a car might be forbidden, but selling an auto accessory could be all right. A pair of tennis shoes would be a valid purchase as "sporting equipment" but might be banned if classed as "wearing apparel."<sup>1</sup>

Since it is hard to find a period in our history without a Sunday controversy in one state or another, Johns finds no shortage of subject matter.

One is impressed throughout the book by the ready, often eloquent, voice of Seventh-day Adventists, raised in protest against Sunday laws throughout the last hundred years of American history. In the legal tangles arising from Sunday problems, Seventh-day Adventists have frequently been progressive agents of law reform and have even had the distinction of making some important constitutional law.

We Adventists see ourselves as perhaps more knowledgeable about matters of religious liberty than the general public is. Our pride may be justifiable. We publish a magazine devoted to religious freedom. We contribute to an annual offering to promote this program. No small number of ministers serve as watchdogs over legislatures constantly being tempted to enact or strengthen Sunday laws.

Our general interest and concern for religious liberty, however, is not always matched by a profound understanding of the specific issues. Too often our religious liberty literature creates the impression, undoubtedly unintentionally, that freedom of religion is a simple idea. Public officials are pictured as being either for religious liberty or against it. We see the issues in black and white terms. Such an oversimplified perspective often belies our actual ignorance of the complexity of church-state problems.

A case in point is Johns' concluding statement that until blue laws are "erased from state statute books . . . something less than absolute religious freedom will remain."<sup>2</sup> As reasonable as that sounds, does Johns really mean "absolute religious freedom"? Surely there are some activities that should not be allowed even if they are done in the name of religion. The distinctions of some religious groups are perhaps more eccentric than worshiping on a "different" day. Should freedom of religion allow citizens to take narcotics if this is part of their religious ritual?<sup>3</sup> Should freedom of religion have permitted Mormons to continue plural marriages because their religion encouraged this practice?<sup>4</sup> Even infanticide has been practiced by some small Eastern religions; probably all would agree that freedom of religion should not extend this far. But the question remains, how far *should* it extend? The answer is presumably somewhere short of absolute religious freedom.

All have heard of the "wall of separation" between church and state. When a question arises about the propriety of a proposed government policy that in some way affects religion, many immediately ask if the "wall" would not be "breached" by this action. (Johns states, "Blue laws have pierced the wall of separation."<sup>5</sup>) This widely espoused church-state philosophy could perhaps be referred to as the "antiseptic theory of church and state." Church and state must never "touch" each other, or debilitating contamination will inevitably result. Each must be kept in its own compartment, antiseptically separated by "an impenetrable wall." The notion is that any policy "piercing" or "breaching" the wall must be unconstitutional. The analysis sounds very simple.

Though the antiseptic theory admittedly simplifies the analysis of church-state problems, unfortunately it is complete nonsense. Mr. Justice Reed of the United States Supreme Court once warned against deciding church-state dilemmas by simple reference to a wall of separation, saying that "a rule of law should not be drawn from a figure of speech."<sup>6</sup> Some have argued that tax exemptions for religious institutions, tax deductions for charitable contributions, exemptions from military service

for seminarians and for chaplains in prisons and military installations, all breach the wall of separation, since all constitute direct or indirect aid to religion. Presumably most Adventists would agree it is fortunate that those who have so argued have not persuaded the Supreme Court. These proponents have made the distinct contribution, however, of showing us how the phrase "wall of separation" is amenable to differing interpretations. The wall of separation is not a kind of judicial litmus paper that automatically indicates the solution to church-state constitutional dilemmas.

In point of fact, this phrase was not set out in the Constitution or the Bill of Rights, but taken from a letter written in 1802 by Thomas Jefferson and later read into the Constitution by the Supreme Court. Competent historians differ as to the intentions of the founding fathers in writing the First Amendment and choosing its specific words.<sup>7</sup> Since evidence as to their intent is open to dispute, we can only look for the law to later interpretations by the Court itself. When we do, we find that the Court has given to the no-establishment clause of the First Amendment a rather broad and inclusive meaning, embracing church-state separation in a fairly strict sense. This is still the predominant view on the Court today. There are, nevertheless, many (myself included) who feel that the Court should liberalize its interpretation and that additional kinds of financial aid could properly go from government to church schools without impairing the religious teachings and practices of the church.

One disappointment in *Dateline Sunday* is the author's failure to spell out in any detail his overall church-state philosophy. One cannot intelligently assess the wisdom and constitutionality of Sunday laws apart from the whole galaxy of church-state relationships that make up the great continuing church-state controversy in America today. Sunday laws constitute but one challenge to religious freedom. Warren Johns is clearly capable of telling us more about the broad aspects of religious liberty. One hopes that he will write a book on these larger issues at some later time.

#### REFERENCES AND NOTES

- 1 WARREN L. JOHNS, *Dateline Sunday, U. S. A.: The Story of Three and a Half Centuries of Sunday-Law Battles in America* (Mountain View, California: Pacific Press Publishing Association, 1967), p. 227.
- 2 *Ibid.*
- 3 *People versus Woody, California Reports, Second Series* 61, 716 (1964); *Pacific Reporter, Second Series* 394, 813 (1964).
- 4 *Reynolds versus United States, United States Supreme Court Report* 98, 145 (1878).
- 5 JOHNS, *op. cit.*, p. 232.
- 6 *McCollum versus Board of Education, United States Supreme Court Report* 333, 203, 247 (1948).
- 7 See, for example, MARK DE WOLFE HOWE, *The Garden and the Wilderness: Religion and Government in American Constitutional History* (Chicago: University of Chicago Press, 1965).