Photo: Courtesy Columbia Union College

Columbia Union College campus.

Debating the CUC Case

A Question of Credibility: Columbia Union College and the Pursuit of State Funding

By Nicholas P. Miller

It's any college's public relations nightmare: being accused by state officials before a federal judge of playing fast and loose with the truth. After all, colleges are meant to be bastions of truth seeking. Secular universities pay honor to ideals of academic integrity—witness the motto of what many see as America's premier university, Harvard, which is "veritas," Latin for "truth."

How much more should a religious college, with its commitment to divine ideals of honesty and integrity, be concerned if its credibility were to be publicly questioned? Yet the issue of credibility was precisely the focus of attorneys for the state of Maryland in connection with Columbia Union College's lawsuit to force the state to provide the college with funding.

In a brief submitted in federal court, lawyers for the state of Maryland called into question the basic truthfulness of CUC's leadership. Under a heading entitled "CUC's Credibility Is at Issue in This Litigation," the state lawyers detailed the apparently conflicting accounts that CUC leadership had given about the religious nature of the college to church officials versus accounts given to state officials.[1]

The brief quoted from an August 1998 Institutional Self-Study prepared by CUC officials for review by the Adventist Accrediting Association. In that report, CUC officials had asserted that "faculty at CUC recognize that a vital part of their task is integrating Adventist values and beliefs into all that is taught."[2]

The brief also quoted from a deposition given by Lyn Bartlett, academic dean of CUC for more than four years prior to May 1998, in which Bartlett testified that in the Self-Study, CUC had set out "to influence and convince the church fathers that in actual fact we are more religious than you think we are. . . . CUC was desperate . . . to convince church members . . . [that] it was still within the fold."[3]

The brief then quoted statements made or written to state officials that appeared to be in conflict with the position taken in the Self-Study. According to the state lawyers, Charles Scriven, then president of CUC, had consistently downplayed CUC's religious character in deposition testimony before state officials. In his deposition, President Scriven asserted that nonreligious courses at CUC were basically no different from those that handled the same subjects at secular colleges, testifying at one point that "calculus is calculus, physics is physics, nursing courses are nursing courses."[4]

At his deposition, President Scriven was presented with a letter written by CUC's attorney at a time when CUC had been seeking a religious institution exemption from a

federal statute. In that letter, the attorney for CUC had told state officials that "non-religious courses [at CUC] are taught so as to reflect the beliefs of the Seventh-day Adventist denomination."[5] Upon reviewing the letter, President Scriven pronounced it "misleading." He testified that the letter "was written by an attorney who is not a member of the church and a thoughtful reflection . . . would have required revision."[6]

What course of events led CUC to undertake to navigate the tenuous and thin line between church expectations and state funding requirements? Did the legal arguments CUC pursued cause it to downplay its religious atmosphere and commitments to the state? What implications does the legal decision in the case have for CUC's ability to operate as an Adventist college? Might the decision have ramifications for Adventist education generally?

In exploring these questions, three areas must be examined: first, the legal context within which CUC has pursued state funding; next, the legal arguments that CUC made in pressing its case; and finally, the educational and legal implications of the court's decision for CUC and Adventist education generally.

The Legal Background

The requirement against state funds being used to advance sectarian—or religious—purposes is not a unique or arbitrary requirement created by the state of Maryland. Rather, it is the application of a principle historically found in the U.S. Constitution, but older than it by many years. It is the principle that no person should be compelled to fund or support religion.

The ban against state funding of religious activities has a lineage that stretches back to the colonial struggles over state support for religion that pre-existed America's constitutional founding. Thomas Jefferson, in his 1786 Virginia Act for Establishing Religious Freedom, decreed that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."[7]

Some may quibble with the designation of coerced support of religion as "sinful," but other founders recognized that the practice was fundamentally unfair. James Madison made a similar objection, writing that it was unfair to force those "whose minds have not yet yielded to the evidence which has convinced us" to support our religion.[8]

But the rule against state aid to religion was based on more than a concern for nonbelieving taxpayers. Rather, the funding prohibition was viewed as protecting religion itself. Madison wrote about the corrupting and enervating effect that state aid has on religion, producing "superstition, bigotry and persecution."[9]

This concern was heightened by the political "golden-rule"—he who supplies the gold, makes the rules. Government support and funding of religion would inevitably, it was believed, lead to state regulation of religion because the state must monitor activities that it funds to ensure that those funds are spent properly.

For religious institutions, the positive side of the prohibition against state funds was a corresponding insularity against state oversight and intrusion to which secular groups are subject. Under the U.S. Constitution, truly religious institutions have the right to "decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[10]

Religious entities have the right to hire and fire their employees, from presidents to teachers to janitors, on the basis of religious beliefs or criteria.[11] Religious colleges can set student admissions and lifestyle standards that accord with the religious beliefs of the sponsoring church. Religious schools are exempted from the jurisdiction of federal labor statutes and can prevent their staff from unionizing.[12]

All these actions are basic to maintaining the religious mission of a school or college, and are rights that secular, or even religiously affiliated, colleges lack. Religiously affiliated colleges can use religious criteria in the hiring of chaplains and religion teachers, for which they bear the burden to prove that the positions are related to a truly religious function.[13] However, the colleges cannot regulate student admissions and student behavior based on religious moral standards.[14] Neither are they exempt from the activities of labor unions.

Stating the rules regarding wholly religious colleges is easier than applying them, however. One fundamental is the definition of religion. Are all colleges founded for a religious purpose—or by a church or religious denomination—religious? Anyone familiar with the overbearing secularity of the Ivy League schools—all founded by churches for religious purposes—knows the answer to that question is a resounding "no." Is having a chaplain on campus or weekly worship services in a campus chapel enough to create a "religious college?" Once again, the answer must be "no," for if this were the standard the U.S.

Army would qualify as a religious organization.

Under the law, a school must possess a variety of religious factors and influences if it is to benefit from the protections accorded truly religious schools. Otherwise, secular schools would masquerade as religious schools by merely changing their names or inserting a religious paragraph in the college prospectus.

Over the years, the U.S. Supreme Court developed guidelines for deciding if a college were truly religious in its mission, or merely had a few religious trappings.[15] Wholly religious colleges were called "pervasively sectarian," meaning that religious views pervaded all classes and activities.[16] Colleges with some religious associations, but concerned primarily with secular education, were called "religiously affiliated." These were not eligible for the protections and privileges accorded to pervasively sectarian schools, although they could receive state funding.

For truly religious schools, however, the Supreme Court excluded not only the state hand that provided public funding, but also the one that burdened it with intrusive regulation. Was this really the internal logic of the U.S. Constitution? Couldn't an institution accept the benefit of funding without agreeing to the burden of regulation? In June 1996, CUC with the assistance of lawyers provided by the Center for Individual Rights decided to find out.

CUC's Legal Challenge

Columbia Union College's partnership with the Center for Individual Rights was an uneasy alliance of interests. The center, a Washington, D.C.-based, right-wing legal advocacy group, is best known for its lawsuits challenging civil rights laws that protect and assist racial minorities. The center hardly seemed a natural partner for CUC, with its largely minority enrollment. But the center's right-wing politics also meant that it viewed favorably the support of religion by government, and on that issue the center's view coincided with CUC's agenda.

The center filed suit on the college's behalf, arguing that CUC's exclusion from the Sellinger Program, a program in Maryland to provide state funding for private colleges and universities, violated constitutional rights of freedom of speech, association, and religious exercise. The college compared itself to religiously affiliated colleges that did receive Sellinger funds and argued that CUC was really like the other colleges.

The court, based on agreed facts and the parties' legal arguments, ruled that CUC was a pervasively sectarian institution.[17] It held that CUC was unlike the merely religiously affiliated colleges that received the Sellinger funds. The other colleges had a high level of institutional autonomy from their affiliated denominations, did not require student attendance at worship services, did not prefer church members in admissions or hiring, and limited religious instruction to religion class.

The court noted that CUC was closely tied to the Seventh-day Adventist Church, with more than 20 percent of its revenues coming directly from the Church and with the college's bylaws requiring at least 34 of the 38 board members to be Adventists. Columbia Union College required its traditional students to attend weekly chapel services and dorm worships. The college required students to take a certain number of religion classes, the goal of which was more than academic, and aimed at "deepening student's religious experiences." Furthermore, courses on secular topics were advertised as being taught from a Christian viewpoint. Finally, the college exercised religious preferences in hiring and admissions, with 90 percent of the full-time faculty and 80 percent of the student body being Adventist.

Because of these findings, the court ruled that CUC was a religious entity, and that insofar as its freedom of speech, association, and equality were infringed by the denial of state funding, this was justified by the compelling interest the state had in maintaining separation of church and state.

The college appealed this ruling, and the center's lawyers made two arguments. First, they said that the college should get the money even if it was pervasively religious. To rule otherwise, they insisted, was to penalize CUC for being a religious college. Second, they argued that CUC was not really as religious as the lower court had found. They again compared CUC to a number of other colleges primarily affiliated with the Roman Catholic Church that received Sellinger funding. Columbia Union College was not meaningfully different in terms of religiosity from those colleges, the lawyers argued, which had been found not to be pervasively sectarian.

Some have argued that the only difference between the religious colleges that did receive Sellinger funds and those that did not was the political strength of their respective denominations—Catholics, strong; Adventists, weak. However, this argument ignores what actually happened on the college campuses that received Sellinger funds. One prominent Catholic scholar, commenting on the Sellinger Program and its effect on Catholic colleges, has written:

Catholic higher education institutions have so watered down the transmission of Catholic doctrine and practice that the distinction between their mission and that of secularly oriented colleges has become blurred enough to permit state aid to the former without violating the First Amendment. [This] should hearten those who have hitherto opposed state aid to religious schools, since it indicates that these institutions are losing their proper religious stamp. . . . *On the other hand, the Court's evaluation of Catholic college education should give pause to Catholic educators and challenge them to examine whether they have sold their birthright for a mess of pottage.*[18]

Some people at that time thought that if CUC pursued the case it should not group itself with the now largely secular Catholic colleges. Rather, it should pursue only the first argument, proclaiming its pervasive religiosity but arguing that it was religious discrimination to deny it the funds. The second argument essentially denied that CUC was a wholly religious institution. If accepted by the court, the argument could turn out to be a two-edged sword, because a finding that CUC was only religiously affiliated could undermine many of its legal protections in hiring, firing, and admissions.

Certainly this argument would not be popular with the church leadership and laity. Indeed, church leaders, lawyers, and the laity at large were assured that CUC was not making arguments denying or minimizing its religiosity. However, this claim seemed to be contradicted in the briefs filed by CUC's lawyers.[19]

The decision by the court of appeals removed any confusion about the arguments that CUC approved. The appeals court upheld the legal ruling of the trial court that pervasively sectarian colleges could not receive direct government support. However, the higher court overturned the lower court's factual finding that CUC was pervasively sectarian. The higher court said there was insufficient evidence to show this was so, and it sent the case back to the lower court for further findings of fact on this question.

The decision by the court of appeals narrowed the case to a single question: was CUC a pervasively sectarian college? The case had become the inverse of the old saw "if you were put on trial for being a Christian, would there be enough evidence to convict you?" The court of appeals had decided that there was not enough evidence to convict CUC of being a wholly Christian college—and CUC agreed.

At that point, there was no muddling the issue of whether CUC was trying to minimize its religiosity. The only question before the lower court then was precisely the question of the nature and extent of CUC's religious atmosphere. The state of Maryland argued that CUC was a place where religious themes and beliefs pervaded the course work and programs. If the case were to continue, CUC would have to argue the opposite: that it indeed was not a wholly religious institution and that its primary mission was secular education.

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This time, the arguments of CUC's lawyers succeeded. Based on further factual findings, the lower court decided that the college met only two of the four criteria by which to decide whether a college was pervasively sectarian. The court agreed that the college exercised a preference for Adventists in hiring and admissions and that the Adventist Church exerted a strong influence on the college through finances and board membership. However, these two points were insufficient to make up for the facts that only a minority of CUC students were subject to the mandatory worship policy,[20] and that there was insufficient evidence to show that "advancing the SDA Church's mission is a primary objective of CUC."[21]

This final point seemed to be most crucial to the court's decision. The court spent some time reviewing CUC policy statements, department bulletins, and

course syllabi, and concluded that there was evidence that "secular education is the primary goal of CUC."[22] It rejected the state's contention that the "courses at CUC predominately focus on 'deepening students' religious experiences.'"[23] Put positively, the court said that it could not conclude that CUC's "attempts at religious indoctrination compromise its academic freedom."[24]

This time the state appealed the decision. As to the ruling below that CUC was not pervasively sectarian, CUC lawyer's told the appeals court that "the district court's careful opinion on this point is worthy of affirmance under any standard of review."[25]

The appeals court agreed. It noted that the lower court had determined that "religious references" in the "college's syllabi" were "too isolated and scattered to justify a finding that religion permeates the secular courses." The appeals court agreed that "religion certainly plays a prominent role at Columbia Union, but no more so than" the other colleges receiving state funding. Like these colleges, the court said, "secular education is the primary goal of Columbia Union."[26]

But in a twist based on a recent U.S. Supreme Court decision,[27] the appeals court ruled that it may no longer be relevant whether CUC was pervasively sectarian or not. Rather, the Supreme Court's new standard appeared to allow for the Sellinger funds to go to CUC, regardless of its pervasively sectarian status. The court found this as an alternate basis to support its decision that CUC should receive Sellinger funds.

The state of Maryland declined to seek review, and thus the court of appeals decision became final. The Maryland state attorney's office currently accepts that CUC is not a pervasively sectarian school. Indeed, at least one Maryland state attorney has expressed the view that CUC is no longer eligible for the state and federal exemptions extended to pervasively religious schools.[28]

The Aftermath

If state officials act on the belief that CUC is no longer eligible for the state and federal statutory exemptions due to religiously operated colleges, CUC's ability to prefer Adventists in hiring and admissions will be limited to pastoral positions. The college can expect to face legal challenges if it attempts to enforce Adventist lifestyle standards on students or faculty. It will face difficulty in preventing unions from organizing among the faculty or staff. It may well lose its exemption under the Americans with Disabilities Act, and this alone could more than offset all funds received from the Sellinger Program. It may well find its ability to bring overseas employees on religious worker visas hampered.

Although these limits are not explicit "strings" found in the language of the Sellinger Program, the legal logic behind them is inexorable. Other colleges have already experienced these limits. Once a college segregates its religious activity to a limited, defined portion of its programs and receives state funds for its secular programs, it opens itself up to state regulation that a fully religious college avoids.

To claim otherwise is to ignore well-known, widely cited cases of other schools that have been found to be religiously affiliated but not pervasively religious.[29] These cases demonstrate that opponents of the CUC lawsuit are not driven exclusively or even primarily by "absolutist" theology or eschatology, but rather by practical legal and educational concerns for Adventist colleges. The irony is that had CUC unabashedly argued it was a wholly religious school with a primary purpose to communicate religious ideals it still may have won its case, but would have done so without casting any doubt on the college's religious identity and mission.

But now, having downplayed its religiosity to Maryland state officials and federal courts for the last four years, CUC is hardly in a position to reverse itself and claim that, "sorry folks for the confusion, but really we are a wholly religious institution, with all the rights and privileges thereto obtaining." Such a claim would only serve to underscore the question of CUC's credibility that state lawyers raised in their brief to the federal court.

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grants, such as the land grant from the government of Rhodesia in the late 1800s. The "Solousi land grant" was a single grant with no ongoing entanglement with government. The Solousi grant contrasts sharply with the ongoing state review involved with Sellinger funding.

Unlike the CUC case, in Rhodesia the Adventist Church did not need to establish the secularity of its educational programs to receive the Solousi grant. Furthermore, in order to receive the Solousi grant, the Church did not have to challenge a body of law separating church and state that has proven extremely beneficial to religious minorities. Finally, unlike the CUC case, the Church did not put in jeopardy its ability to hire faculty and admit students according to its religious principles in order to obtain the Solousi grant.

In short, the Solousi grant was a "strings free" grant of land. In contrast, the CUC case involves compromise of religious identity, questions of ongoing state entanglement, a serious blow to constitutional protections that have served the Adventist Church extremely well, and exposure of a church college to serious legal liabilities from which it was previously protected. In quoting Ellen White in relation to the CUC lawsuit, one should not look to her comments regarding the Solousi grant. Rather, far more apt is her comment on the Puritans' cozy church/state relationship in colonial America:

> Thus again was demonstrated the evil results, so often witnessed in the history of the church from the days of Constantine to the present, of attempting to build up the church by the aid of the state, of appealing to the secular power in support of the gospel of Him who declared: "My kingdom is not of this world." John 18:36. *The union of the church with the state, be the degree ever so slight, while it may appear to bring the world nearer to the church, does in reality but bring the church nearer to the world.*[30]

Columbia Union College's destructive tinkering with this principle may well have effects far beyond Takoma Park. It is reasonably possible—even likely—that the CUC decision will be cited as influential precedent in cases involving other Seventh-day Adventist colleges and universities. Whether it be a student or staff member suspended or disciplined for moral failings, the argument will be that because the college is no different from CUC—is thus not pervasively sectarian—it has no right to enforce religiously based moral standards.

Presently, no church body with jurisdiction over CUC has made a formal statement to suggest that CUC has inappropriately rejected the pervasively sectarian label or is any different from other Adventist colleges. Early in the lawsuit, the North American Division asked CUC not to pursue the lawsuit.[31] Certain church religious liberty leaders have also expressed strong concerns over the lawsuit.[32] However, public silence on the results of the case from church leadership responsible for oversight of Adventist education may be construed by state officials and judges to mean that CUC's nonsectarian status is an accepted norm for Adventist colleges.

If CUC's position on its religious identity is to become the new norm—and this is not certain even at CUC, which is under new leadership—the decision should not happen by default. It should be the topic of active discussion among church leaders and laity. It is unfair to college leaders to place the burden solely on them to make such fundamental decisions regarding the direction of Adventist education. All levels of church leadership—lay and otherwise—should be involved. Adventist colleges other than CUC face the same squeeze between church loyalty and state support,[33] and with President George W. Bush's focus on "faith-based initiatives" the tensions will only increase.

The question of credibility raised by the state of Maryland involves church laity as well as Adventist college leadership. The financial pressures that cause leaders of our colleges to seek funds from state programs represent, at least in part, a failure of church laity to support those colleges adequately. Adventist college constituencies everywhere need to give thoughtful, prayerful consideration regarding the Lord's plans for the Church's educational program. It is unfair for us, by our inaction and inattention, to place our college leaders in places where extreme tension exists between fiscal and spiritual values. If this happens, their temptations becomes ours, and we, too, will face a crisis of credibility in the eyes of an onlooking world.

Notes and References

1. "Defendants' Proposed Findings of Fact and Memorandum In Support," 8, filed Feb. 17, 1999, in C.A. 96-1831, at the U.S. District Court for the District of Maryland.
2. Ibid.
3. Ibid., 9.
4. Ibid.
5. Ibid., 11.
6. Ibid.

7. Julian Boyd et al., eds., *The Papers of Thomas Jefferson* (Princeton: Princeton University Press, 1950), 2:546.

8. Madison, *Memorial and Remonstrance*, 4, 330 U.S. at 66.

9. Ibid., 7, at 67.

10. *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 116 (1952).

11. *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987).

12. *NLRB v. Cath. Bishop of Chicago*, 440 U.S. 490, 502 (1979).

13. *Welter v. Seton Hall Univ.*, 608 A.2d 206 (N.J. 1992) (Ministerial status of nun employees did not allow university exemption from employment regulations where job positions were purely secular.).

14. *Gay Rights Coalition of Georgetown Univ. Law Center v. Georgetown Univ.*, 536 A.2d 1, 117 (D.C. Cir. 1987) (University must provide benefits to student gay club, even if club ideals are contrary to religious goals of school.).

15. *Hunt v. McNair*, 413 U.S. 734, 743 (1973); *Tilton v. Richardson*, 403 U.S. 672, 685, 686 (1971).

16. *Lemon v. Kurtzman*, 403 U.S. 602, 657 (1971).

17. All major court opinions and many of the briefs filed in the CUC case can be found on the Web site of the Center for Individual Rights at <www.cir-usa.org/recent_cases columbia_v_clarke.html>.

18. Vincent R. Vasey, "*Roemer v. Board of Public Works, Maryland*: The Supreme Court's Evaluation of the Religious Mission of Catholic Colleges and Church Expectations," *Cath. Law.* 23 (spring 1978): 108.

19. Compare "Fighting for Liberty and Justice: A Statement From Columbia Union College," *Adventist Today* (Sept.-Oct 1999): 1, at <www.atoday.com/magazine/archive/1999/sepoct1999/news/CUC.shtml>. There it was claimed that "The college, then, is certifiably, as well as unapologetically, Adventist. No dark hints of institutional compromise, and no careless rhetoric involving the obscure and legally dubious phrase 'pervasively sectarian,' can negate this fact." In contrast, see the arguments in CUC's Fourth Circuit brief, which for many pages minimizes its religious atmosphere and likens itself to the non-pervasively sectarian colleges in the Sellinger program. See CIR's brief before the Fourth Circuit (Feb. 12, 1998), at <www.cir-usa.org/recent_cases/columbia_v_clarke.html>.

20. Closer factual inquiry revealed that the "mandatory worship policy" on which the court relied in its first opinion applied only to students under the age of 23 who lived in resident halls. Thus, only about 350 to 400 of CUC's 1,172 students were subject to the policy.

21. *Columbia Union College v. Oliver*, 2000 U.S. Dist. LEXIS 13644 *31.

22. Ibid., *35.

23. Ibid., *37.

24. Ibid.

25. Brief of Appellee to the Federal Circuit Court of Appeals in the matter of *Columbia Union College v. Clarke*, 14 (2001).

26. *Columbia Union College v. Clarke*, 254 F.3d 496 (U.S.C.A. 4th Cir.).

27. The case, *Mitchell v. Helms*, 530 U.S. 793 (2001), involved the gift of state-purchased educational materials, such as computer materials and classroom supplies to pervasively sectarian elementary and high schools.

28. Maryland State Assistant Attorney General Pace McConkie expressed this personal opinion to the author shortly after the court of appeals' final decision.

29. *EEOC v. Kamehameha*, 990 F.2d 458 (9th Cir. 1993) (a religiously affiliated school cannot discriminate in hiring on the basis of religion or religious identity); *Welter v. Seton Hall Univ.*, 608 A.2d 206 (N.J. 1992) (a religiously affiliated university cannot use religious criteria in treatment or employmet decisions regarding faculty or staff); *Gay Rights Coalition of Georgetown Univ. Law Center v. Georgetown University*, 536 A2d 117 (D.C. Cir. 1987) (a religiously-affiliated university must provide benefits to a student gay club even if club ideals are contrary to religious goals of school).

30. Ellen G. White, *The Great Controversy Between Christ and Satan* (Mountain View, Calif.: Pacific Press, 1950), 297 (emphasis added).

31. "While we recognize that the matter has already been initiated in the courts, it is to be clear that we do not support the action and are requesting that it be withdrawn." Letter dated Aug. 22, 1996, from A. C. McClure, president of the NAD of General Conference, quoted in "Defendants' Proposed Findings."

32. See an article by Alan Reinach, director of Public Affairs and Religious Liberty for the Pacific Union Conference, in the Nov. 15, 2000, *Church State Newsflash*, at <www.freedomsring.com/news001115.html>.

33. In a statement sent out November 15, 2001, regarding a case involving state funding, the Walla Walla College board said "After further exploring the *Gallwey v. Grimm* case, which had been discussed at the September 10 board meeting, the board acknowledged that further explanations given by college administration clarified some of the misunderstandings which had arisen over statements representing the college in legal documents and court findings. . . . . 'Mistakes have been made, but we are working hard to restore communication and trust,' said Jere Patzer, board chairman. 'We want our administration and faculty to know without a doubt that they are valued and are indispensable to the mission of our college and our Church.'"

Nicholas P. Miller is an attorney with the law firm of Sidley, Austin, Brown and Wood in Washington D.C. He practices with the firm's Religious Institutions Practice group. Miller authored a brief on behalf of the Council on Religious Freedom that opposed Columbia Union College's request for certiorari to the U.S. Supreme Court in the case discussed in this article. He also is an adjunct professor at Columbia Union College's Center for Law and Public Policy.