

# The Catholic Lawyer

---

Volume 2  
Number 4 *Volume 2, October 1956, Number 4*

Article 11

---

## Parents and Education

R.A.G. O'Brien

Follow this and additional works at: <https://scholarship.law.stjohns.edu/tcl>



Part of the [Catholic Studies Commons](#)

---

This Reprint is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in The Catholic Lawyer by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact [selbyc@stjohns.edu](mailto:selbyc@stjohns.edu).

# PARENTS AND EDUCATION\*

R. A. G. O'BRIEN†

I HOPE I SHALL NOT BE ACCUSED of undue nationalism if I speak at some length of the English Common Law and consider the developments and changes occasioned by the comparatively recent establishment of a compulsory and free system of education. Nor will it be thought, I trust, that I wish to suggest that the laws of all other countries ignore or suppress natural rights. Indeed the recent revival of natural law theories began, I know full well, outside England, and the very fact that certain duties and rights are recognised in all civilised countries is, to my mind, strong corroborative evidence that those duties and rights are part of the natural law. The *ius gentium* has always tended to follow the *ius naturale*.<sup>1</sup>

I thought it, however, particularly appropriate to speak of the English Common Law in this town, which knew its chief ornament and the origin of his best-known work—I mean the Utopia of St. Thomas More, Saint and Martyr, the first lay, and perhaps the greatest and best-loved, Lord Chancellor of England. Moreover, it appeared to me of advantage to show how a system of traditional and, notwithstanding the modest protests of the judges themselves, judge-made law, essentially Christian<sup>2</sup> in its origins and conceptions, and pervading its influence throughout

---

\*Condensed and reprinted, with permission, from Parents and Education, 1 CATHOLIC EDUCATION 8 (London, 1956).

†Secretary and Solicitor to the Catholic Education Council of London, England.

<sup>1</sup> Cf. Cicero's "omni autem in re consensus omnium gentium lex naturae putanda est." Tusc. i. xiii, 30.

<sup>2</sup> If in the case of *Bowman v. Secular Society Ltd.*, [1917] A.C. 406, which dealt with Charitable Trusts, and the scope of which can be exaggerated, it was held that Christianity is no longer part of the law of England, it is clear from the judgments there given that originally it was otherwise. And the Christian influence still inevitably continues. Indeed, Lord Sumner himself said in that case: "Ours is and always has been a Christian State. The English family is built on Christian ideals, and if the national religion is not Christian there is none. English Law may well be called a Christian Law, but," he added, "we apply many of its rules and most of its principles, with equal justice and equally good government in heathen Communities, and its sanctions, even in the Courts of conscience, are material not spiritual." *Id.* at 464-65.

English life, has consistently acknowledged and supported in this vital matter those parental rights which are the foundation of voluntary education. This is a point of some importance, as the Common Law principles obtain throughout the British Isles, with the exception of Scotland and the Channel Islands, and have spread to the Commonwealth of Nations and to the Colonies, with exceptions such as in South Africa and Quebec, and to the United States of America, with the exception of the State of Louisiana.<sup>3</sup> Even if pecuniary parity of position is rarely conceded, in none of these countries is there (so far as I am aware) a state monopoly of education.

The Common Law of England is rooted and founded in the natural law. It would indeed be surprising if it were otherwise, for the Common Law, alone, I think, of all the great systems of law was cradled in Christianity. If Christianity takes nothing away from nature, but rather pre-supposes and perfects it, it might be supposed that a law fashioned by judges who were priests or prelates, usually learned in the Roman and Canon Law and therefore attaching much importance to these systems and "perhaps even greater weight to 'natural justice' as it was understood in their day,"<sup>4</sup> would have the natural law as its founda-

<sup>3</sup> "The law of the age that lies between 1154 and 1272 deserves patient study. These few men who were gathered at Westminster round Patishull and Raleigh and Bracton were penning writs that would run (in the King's name everywhere and) in the name of Kingless Commonwealths on the other shore of the Atlantic Ocean. They were making right and wrong for us and for our children." Maitland, Pollock and Maitland's *History of the English Law*, *ad finem*.

<sup>4</sup> Potter, *Historical Introduction to English Law* (London, 1932), p. 17; *Constitutional History of*

tion and guiding principle. And so indeed it has happened.<sup>5</sup>

All the traditions of the formative years in the Middle Ages were resumed by Sir William Blackstone, a judge of the Court of Common Pleas, when, in his well known *Commentaries on the Laws of England*, he declared:

This law of nature, being coeval with mankind, and dictated by God Himself, is, of course, superior in obligation to any other. It is binding all over the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force and all their authority, mediately or immediately, from this original.<sup>6</sup>

It is not necessary to agree entirely with Blackstone and his predecessors in describing the Common Law as the perfection of reason, to prefer their view to those of Bentham and his utilitarian followers, who were legal positivists. It is, I think, significant that Bentham attacked Blackstone,

England (Cambridge, 1909), p. 17, and *Equity* (Cambridge, 1929), p. 9, both by Professor F. W. Maitland, by common consent the greatest and most brilliant of English legal historians. In referring to the Common Law in this paper, I shall speak of that law, as distinct from Statutes, which has been formulated through the centuries by the judges both of the Common Law (properly so called) and Chancery Courts, since cases concerning the guardianship and wardship of infants are the proper province of the latter. Lovers of the operas of Gilbert and Sullivan will remember the reference by the Lord Chancellor in *Iolanthe* to the "pretty young wards of Chancery." Gilbert, the librettist, was a sound lawyer.

<sup>5</sup> See especially the publications of Richard O'Sullivan, Q.C., e.g., in Vol. 1 of the *Modern Law Review*, "Natural Law and the Common Law," published by the Grotius Society, London, 1945; "The Inheritance of the Common Law," by Stevens, London (1950); and numerous articles in *The London Tablet* from 1940 onwards.

<sup>6</sup> *Commentaries*, Introduction, s. 2.

rejected the conception of natural law<sup>7</sup> and advocated a system of universal secular state education.<sup>8</sup> Whatever influence the

<sup>7</sup> Cf. "The foolish criticism of Jeremy Bentham . . . merely showed a contempt for a great conception (i.e., the law of nature) which Bentham had not taken the trouble to understand." The late Professor J. L. Brierly in "The Law of Nations" (Oxford, 4th ed., 1949), p. 21. I am aware that after the attacks of the legal positivists, the Natural Law has by no means been completely rehabilitated and accepted. But I find it difficult to conceive that an ideal that has endured since classical times and the era of Confucius throughout the Christian centuries to the present day is entirely lacking in validity. And the widespread and instinctive condemnation of the inhumanities and injustices of Nazis and Communists alike postulates a superior and more fundamental norm by which State laws are to be judged, for on positive grounds alone all these acts of barbarism were legally sanctioned and therefore justified. (See, for example, "The Theology of Law," a remarkable sermon preached at St. Dunstan's Church, Fleet Street, London, to members of the Bar in 1943, by Dr. Nathaniel Micklem, Principal of Mansfield College, Oxford, and published by Oxford University Press.) Moreover, the Universal Declaration itself presupposes an acceptance of some doctrine of natural law, which underlies State law and to which the latter should tender as to an ideal. Cf. M. Jacques Maritain in "Autour de la Nouvelle Declaration Universelle des Droits de l'Homme," quoted above, p. 65: "Ils doivent cependant reconnaître que depuis Hippias et Alcidas, l'histoire des droits de l'Homme se confond avec l'histoire de la loi naturelle, et que le discredit dans lequel le positivisme a fait tomber pour un temps l'idée de la loi naturelle a entraîné inévitablement un pareil discredit pour l'idée des droits de l'homme." See also "Natural Law," by Professor A. P. d'Entreves (London, 1951), especially the last chapter on "The Ideal Law."

<sup>8</sup> On Blackstone and the attacks made on his commentaries see, for example, two articles in Vol. IV of the Cambridge Law Journal (1932), by Professor Holdsworth and Professor A. V. Dicey, pp. 261 and 286 respectively. For Bentham's educational theories, see the chapter by Dr. N. Hans in "Pioneers of English Education," edited by Professor A. V. Judges (Faber and Faber, London, 1952).

Benthamites have had on legislation (some of it undoubtedly beneficial) and on theories of sovereignty, they did not, as I hope to show, succeed in removing the memory of the law of nature from the Common Law or in preventing the Common Law from continuing to have a proper regard for parental rights.

At University College, Oxford, there are three statues of which I wish to speak. Two are in the library. They are massive, larger than life-size and portray two brothers, William and John Scott, though it is not certain which statue is of which brother. Both brothers made their name in the law. The elder became Lord Stowell and a judge of the Consistory and Admiralty Courts; the other, who first went to University College some thirteen years after Blackstone began those lectures at Oxford which formed the basis of his Commentaries, was, as Lord Eldon, eventually made Lord Chancellor. Near the main entrance of the College there is the third statue, life-size, delicate, beautiful, even effeminate, an appropriate contrast to the other two. It is of the poet Shelley as he was found after his death by drowning. John Scott had a respectable, if not too distinguished a career as an undergraduate at the College. Shelley, some forty years his junior, was sent down from the same College because of his atheistic views. But these two were destined to meet at what was to prove a legal Philippi for Shelley. After the suicide of his wife, Harriet, in 1816, he claimed custody of their children, who were then in the care of her father, and the case came for trial before Lord Eldon. Having reviewed Shelley's past conduct and firm convictions, Eldon declared:

I consider this as a case in which the

father has demonstrated that he must, and does, deem it to be a matter of duty . . . to recommend to those whose opinions and habits he may take upon himself to form that conduct in some of the most important relations of life as moral and virtuous, which the law calls upon me to consider as immoral and vicious — conduct which the law animadverts upon as inconsistent with the duties of persons in such relations of life and which it considers as injuriously affecting both the interests of such persons and those of the Community. I cannot therefore think that I should be justified in delivering over these children for their education exclusively to what is called the care to which Mr. Shelley wishes it to be entrusted.<sup>9</sup>

The language may be laborious, but the judgment is sound and is quoted as a precedent to this day.<sup>10</sup>

This case is, however, the exception which proves the rule: for in general the English Courts show the utmost reluctance to interfere in the affairs of family life. In a judgment delivered in noble prose just over a hundred years later, Lord Justice (as he then was) Atkin said:

The Common Law does not regulate the form of agreement between spouses. Their promises are not sealed with seals of sealing wax. The consideration that really obtains for them is that natural love and affection which counts for so little in these cold courts. . . . In respect of their promises each house is a domain into which the King's Writ does not seek to run and to which his officers do not seek to be admitted.<sup>11</sup>

The saying that an Englishman's home is his castle is not mere rhetoric: it has its justification in the Common Law.

The earliest cases in which the relations between parents and their children were

considered seem, so far as I have been able to discover, those concerned with guardianship. There was guardianship by nature, which, of course, was held to belong to the parents exclusively, and guardianship—in the Norman French of the medieval law—*per cause de norture*, or guardianship for the purpose of maintenance, which, it was decided by Mr. Justice Danby in the reign of Edward IV, could not be claimed by a stranger.<sup>12</sup> In addition there were various guardianships depending on feudal tenures of land, but these do not concern us here.<sup>13</sup> The words by nature and nurture, however, will be met with again, and it was in accordance with the principles established by the Common Law that a statute passed in the reign of Queen Mary proscribed the taking away or marrying of maidens under

<sup>12</sup> 8 Edw. IV, p. 7, Mich., p. 2 (1468)—a note by Danby, J., and others—"mes un estrange ne poit justifier le pris d'un enfant per reason de norture. Mes gardeine per reason de norture poit bail l'enfant a un nome pur enforme et erudire car il n'est forsque come son depretie de garder l'enfant et il poit reprend luy quant il voit." Even a contrary opinion on the particular point at issue conceded: "Si jeo ay forsque un charge per le gard, cestassavoir ad informandum et erudiendum, etc., la poet reprendre." Cf. also 33 Henry VI, Mich. pl. 49 (1454): where it is noted by Littleton, J., that the parental right can be maintained even where the King is the feudal superior: "le pere aura le gard et mariage de son filz et file et heir en chelcun cas nonobstant qe la tere soit tend del Roy ou de quicunque autre." In referring to this case Viner's Abridgment (1754) notes: "the father has the wardship of his son, jure naturae." 14 Viner, p. 162. In Christopher St. German's "Doctor and Student" (1523/28) it is stated: "Within the homestead, the father will undertake the rule of the family and the education of the children."

<sup>13</sup> See Sir Edward Coke's (early seventeenth-century) commentary on Littleton's Tenures (Co. Litt. 88b), and also Notes 12 and 13 by Hargreaves (c. 1745), and 14 Viner, p. 171, and Blackstone's Commentaries, Vol. 1, Chap. XVII.

<sup>9</sup> Shelley v. Westbrooke (1817), Jac. 266.

<sup>10</sup> Cf. for example Halsbury's Laws of England (2d ed.), Vol. XVII, pp. 661, 669.

<sup>11</sup> Balfour v. Balfour, [1919] 2 K.B. 571.

sixteen against the consent of their parents. This statutory prohibition was "in terms which implied that the custody and education of such females should belong to the father and the mother, or the person appointed by the former."<sup>14</sup>

Blackstone classified the duties of parents under the trinity of maintenance, protection and education. Of the first two of these duties, he wrote:

The duty of parents to provide for the maintenance of their children is a principle of natural law; an obligation laid on them not only by nature herself, but by their own proper act in bringing them into the world; for they would be in the highest manner injurious to their issue, if they only gave their children life, that they might afterwards see them perish. . . . And thus the children will have a perfect right of receiving maintenance from their parents. . . . From the duty of maintenance we may easily pass to that of protection, which is also a natural duty, but, rather permitted than enjoined by any municipal laws; nature, in this respect, working so strongly as to need rather a check than a spur.

"The last duty of parents," Blackstone wrote, "is that of giving [their children] education suitable to their station in life; a duty pointed out by reason, and of far the greatest importance of any."<sup>15</sup>

The Common Law, in recognising these parental duties, has also acknowledged the rights which are their consequence, and has therefore always been most reluctant to interfere with the acts of a father as the natural guardian of his children, and especially with his decision on their education and more particularly their religious education. Vice-

<sup>14</sup> Statute 4 and 5 Ph. and M., and see Co. Litt. 88*b*, Note 14 by Hargreaves.

<sup>15</sup> Commentaries, Vol. 1, Chap. XVI.

Chancellor Bacon in 1882 did not hesitate to describe as sacred these paternal rights and to say that the principle of non-interference was one of those principles of law "which have been settled for centuries."<sup>16</sup> A year later, Lord Justice Bowen gave the reason for this well established principle:

The court must not be tempted to interfere with the natural order and course of family life, the very basis of which is the authority of the father, except it be in those very special cases in which the State is called upon, for reasons of urgency, to set aside the parental authority and to intervene for itself. . . . To neglect the natural jurisdiction of the father over the child until the age of twenty-one would be to set aside the whole course and order of nature . . . and would disturb the very foundation of family life.<sup>17</sup>

In conceding this plenitude of power to a father, however, these very Victorian judges by no means expected him to play the role of a Mr. Barrett of Wimpole Street, for in the same case the Master of the Rolls, Sir William Brett, declared that:

[t]he natural duties of a father are to treat his child with the utmost affection and with infinite tenderness, to forgive his child without stint and under all circumstances. . . . They are the natural duties of a father, which, if he breaks, he breaks from all that nature calls upon him to do. . . . The law

<sup>16</sup> Re Plomley, 47 L. T. (N.S.) 284.

<sup>17</sup> Re Agar Ellis (1883), 24 Ch. D. 317, pp. 335, 336. When this case first came before the Courts a few years previously it was decided that the ante-nuptial promise required by Canon 1061 of the Canon Law for a "*coniunx acatholicus*" was not legally binding on a father so far as the education of his children was concerned: see (1878), 10 Ch. D. 49. In re Clarke (1882), 21 Ch. D. 317, it was held that such an ante-nuptial promise could be considered a rebuttable evidence of a father's wishes in this matter.

does not interfere because of the great trust and faith it has in the natural affection of the father to perform his duties and therefore gives him corresponding rights.<sup>18</sup>

It has been decided that a father cannot renounce his right to determine how his child should be educated, because of the duty he owes to consider the child's true benefit. "It is not," Lord Justice Bowen again said, with a humility which it would be hard to parallel among politicians and administrators, "the benefit of the infant as conceived by the Court, but it must be the benefit of the infant having regard to the natural law, which points out that the father knows far better as a rule what is good for his children than a Court of Justice can."<sup>19</sup>

A father can, of course, lose his rights by abandonment<sup>20</sup> or, as has been seen in *Shelley's Case*, by abuse. If he is incapable or unwilling to perform his duties or declines to fulfill them properly, he cannot claim his rights. The Courts will then—though with considerable hesitation—decide what they think best in the interests of the children. But they will certainly not permit strangers to do what they themselves have abstained from doing; they will not sanction either the enticement of immature children, under religious or other strong influence, from their homes,<sup>21</sup> or any provision in a will or settlement of property whereby a parent might be seduced by financial or other worldly temptations from doing what he honestly thought to be the best for his children; for, as was said by a judge some twenty years ago:

<sup>18</sup> *Re Agar Ellis* (1883), 24 Ch. D. 327.

<sup>19</sup> *Id.* at 337.

<sup>20</sup> *Re Newton (Infants)* [1896] 1 Ch. 740; *Ward v. Laverty* [1925] A.C. (Ir.) 101.

<sup>21</sup> *Lough v. Ward* (1945), 1 All E.R. 338.

Infants are, or ought to be, instructed in religious matters by their parents. The parents' duty is to be discharged solely with a view to the moral and spiritual welfare of their children, and ought not to be influenced by mercenary considerations affecting the infants' worldly welfare. . . . In my judgment, this condition is void because it operates to restrain a man from doing his duty.<sup>22</sup>

So far I have spoken only of the rights of a father. In less sophisticated days husband and wife were regarded as one in law, and the husband as that one. In more recent times the emphasis has been changed. By the Guardianship of Infants Act, 1925, the Courts are bidden, in deciding any question on the custody or upbringing of an infant, to regard the welfare of the infant as the first and paramount consideration and the claim of neither parent is to be considered as superior to that of the other. But it has recently been stated by the Privy Council that this Act "merely enacted the rule which has long been acted on in the Chancery Division of the High Court of Justice,"<sup>23</sup> for, as was said in an Irish case: "when a parent is of blameless life and is able and willing to provide for the child's material and moral necessities the Court is, in my opinion, judicially bound to act on what is equally the law of nature and of society and to hold . . . that the 'best place for a child

<sup>22</sup> *Bennett, J., in Re Borwick* [1933] 1 Ch. 657. The condition was so drafted as partially to defeat the interest of a grandchild if he should "at any time before attaining a vested interest . . . be or become a Roman Catholic or not be openly or avowedly a Protestant."

<sup>23</sup> *McKee v. McKee*, an appeal from the Supreme Court of Canada, [1951] 1 All E.R., p. 949. In this case it was also said: "It is the law of Ontario (as it is the law of England) that the welfare and happiness of the infant is the paramount consideration in questions of custody . . . so also it is the law of Scotland and of most, if not all, of the States of the United States of America."

is with its parent'.<sup>24</sup> Parents still have their "immemorial rights by nature and nurture," and it is only when they disagree that the Courts consider in the first place the true welfare of the child. And since the Act, it has been decided in a case where for the first time, at least since the Reformation, St. Thomas Aquinas has been quoted by a Judge as persuasive authority, that it is the mother of an illegitimate child who has the right to determine its education, even against those who may have actual custody of it.<sup>25</sup>

It may also be mentioned that a teacher has always been considered by the Common Law as standing *in loco parentis* and therefore as being, in a real sense, the

<sup>24</sup> Re O'Hara [1900] 2 I.R. 232, p. 240, and see Re Thain [1926] Ch. 676. A father is still the natural guardian of his children. "Subject to the first and paramount consideration of the infant's welfare, a father has a natural jurisdiction over, and a right to the custody of, his child during infancy, except that in the case of a daughter the right determines on her marriage under age." Halsbury's Laws of England (2d ed.), Vol. XVII, para. 1378.

<sup>25</sup> Re Carrol [1931] 1 K.B. 317 (C.A.), and especially the judgment of Slessor, L.J. See also Re K. [1952] 2 All E.R. 377—a case when it was held not unreasonable for a mother, whose life was not quite of the highest degree of sanctity, to refuse her consent to the adoption of the child by foster parents to whom she had committed it. But cf. Re Collins [1950] 1 All E.R. 1057, where the effect of the Guardianship of Children Act, 1925, in the case of an orphan was considered and Re A. [1955] 2 All E.R. 202, where it was held by the Court of Appeal that as between the mother of an illegitimate child and the natural father, the paramount (but not exclusive) consideration was the welfare of the child. It was too wide to submit that "the natural mother... has the right to choose who will bring (the child) up, unless... there emerged prevailing considerations of essential importance to the child" or "unless the mother was shown to be in some way irresponsible or wicked."

parents' agent—certainly so far as the administration of punishment and the care to be taken of children are concerned. In every such case the standard by which the conduct of the teacher is judged is that of a reasonable, prudent parent.<sup>26</sup>

The cases that have been considered have dealt with questions of guardianship and custody and by whom and how the duty to educate should be exercised. The Common Law made no attempt to enforce that duty. But statutes have abundantly supplied the omission of which Blackstone complained in his day, saying "the municipal laws of most countries seem to be defective in this point, by not constraining the parent to bestow a proper education upon his children."<sup>27</sup> Before attention is devoted to the English Education Acts of modern times, it is worthwhile noticing that as early as 1406 a statute provided, in conformity with the principles of the Common Law, that every man or woman, regardless of situation in life, was free to send his or her son or daughter to any school in the realm he or she pleased. This declaration of parents' freedom of choice is remarkable in an era when compulsory education had not yet come to make necessary the development of a precise theory of parental rights, but when in any event education depended so much on parental initiative and personal talent, whether in the case of a Nicholas Breakspear or an Erasmus.

<sup>26</sup> See, for example, Williams v. Eady (1893), 10 T.L.R. 41; Shepherd v. Essex County Council (1913), 29 T.L.R. 303, and Ryan v. Fildes [1938] 3 All E.R. 517; Ralph v. London County Council (1947), 63 T.L.R. 546, and Rich v. London County Council [1953] 2 All E.R. 376, and paras. 1241, 1242 in Vol. 13 of Halsbury's Laws of England (3d ed.).

<sup>27</sup> *Op. cit.* Vol. 1, Chap. XVI.



The Nonconformist Members of Parliament, who forced Gladstone in the course of a week to change the Education Bill of 1870 to the form it eventually took when it became law, were, I believe, properly fighting for the natural rights of parents since they feared that the original proposals would force Nonconformist children to be sent to Church of England Schools.<sup>28</sup> But the solution reached was unfortunate, as the Act provided for the establishment of State elementary schools in which "no catechism or religious formulary which is distinctive of any particular denomination" might be given.<sup>29</sup> Undenominational schools were previously a rare species in the educational system of the British Isles; as will have been noticed, undenominational instruction was foreign to the notions of the Common Law; but by a cruel irony the successful Parliamentary struggle based on parental rights had the practical result of denying similar rights to parents who conscientiously desired a denominational education for their children, more especially after 1880 when education was made compulsory. The injustice was recognized implicitly but clearly by Gladstone himself<sup>30</sup>

<sup>28</sup> See "The Cowper-Temple Clause" reprinted from the *Catholic Times* and appearing in "The Case for Catholic Schools," published by the Catholic Education Council for England and Wales (London, 1955, 2d ed.).

<sup>29</sup> Section 14 of the Education Act, 1870.

<sup>30</sup> In the Committee Stage of the 1870 Bill he stated: "We may either forbid or compel a Local Board to aid voluntary schools; but if we forbid them, and make them leave voluntary schools (as they are) dependent upon the modicum of aid which they now obtain from the Privy Council, that would not be consistent with the view with which this Bill was brought forward, and it would not fulfill the engagement under which, all along, we have admitted ourselves to lie—namely, that of giving fair terms to voluntary schools." A recent

and quite explicitly by W. E. Forster, the father of the 1870 Act. "There are important minorities who very much prefer catechism and formularies," the latter admitted, "... when we take their money to support schools they do not approve of, we should give them some equivalent... we are bound to give them back that education for which we made them pay."<sup>31</sup> But the immense premium put on the State undenominational schools has been retained until the present day. In counting our blessings we can be grateful that voluntary schools have, in spite of many administrative inconveniences, been incorporated in, and indeed form an essential part of, the present State system of Education and that successive breaches have been made in the principles underlying the Act of 1870, from 1902, when Local Education Authorities were first made responsible for the running costs of voluntary schools, to the present time when the scope of such maintenance has been enlarged and new voluntary schools may in certain circumstances qualify for building grants from the State.<sup>32</sup> On the other hand, the sums which have to be

biographer of Disraeli, the leader of the Tory opposition at the time, has written: "Apart from this Irish legislation, Gladstone's main achievement during the 1869-70 sessions was the Education Act... Disraeli's Government had also done something along these lines, and he did not oppose Gladstone's Bill except to criticise the undenominational nature of religious teaching in the schools, the dogmas of the schoolmaster being substituted for those of the priest." Hesketh Pearson's "Dizzy," p. 184.

<sup>31</sup> Hansard CCII, 592.

<sup>32</sup> On maintenance, see the Education Act, 1944, s. 114 (2) and s. 15 (3) as amended by the Education (Miscellaneous Provisions) Act, 1946. On capital grants, see the Education Act, 1944, ss. 102 (as amended by the 1946 Act), 103 and 104, and Sched. III; the Act of 1946, s. 3, and Sched. I; and the Act of 1953, ss. 1 and 8.

paid by those who support such schools for conscience' sake have also increased beyond all expectation.<sup>33</sup> The soundness of the plea that there should be pecuniary parity of position between State and voluntary schools has been acknowledged in many and often unexpected quarters from the late George Bernard Shaw in 1902,<sup>34</sup> to an impressive statement issued in 1943 by a number of distinguished educationists,<sup>35</sup> set up as an Education Committee by the Nuffield College Social Reconstruction Survey; and Mr. R. A. Butler admitted in a frank and revealing sentence that, to avoid alienating the Local Education Authorities, the Free Churches and the Teachers, he had not been able "to concede the full demands of those who desire complete liberty of conscience."<sup>36</sup>

It is at least something that the Butler Act made it obligatory in all schools main-

<sup>33</sup> See generally "The Case for Catholic Schools," mentioned above.

<sup>34</sup> "... Mr. Bernard Shaw put the matter with characteristic incisiveness when he broke a lance with Dr. Clifford in the columns of the *Daily News*: 'For my part I say that as long as there is a school in England to which children practically must go, either because their parents choose to send them there or for want of a better one in the neighbourhood, that school should be placed under the Education Department and fully financed by the State, whether it be Established Church, Nonconformist, Roman Catholic, Positivist or Parsee.'" From "Sir Robert Morant, a Great Public Servant," by Bernard M. Allen, M.A., LL.D. (London, 1934), p. 199.

<sup>35</sup> "Religious Education," a statement published by Nuffield College (Oxford University Press, 1943). See also the quotations given by A. C. F. Beales in his chapter on "The Future of Voluntary Schools" in "Looking Forward in Education," edited by Professor A. V. Judges (Faber and Faber, 1955). p. 104.

<sup>36</sup> During the debate on 30th July, 1943, in the House of Commons on the White Paper entitled "Educational Reconstruction."

tained by Local Education Authorities for each school day to start with a corporate act of worship and for religious instruction to be given,<sup>37</sup> because, in the words of the Board of Education's introductory Memorandum:

[T]here has been a very general wish, not confined to representatives of the Churches, that religious education should be given a more defined place in the life and work of the schools. . . . The Church, the family, the local community and the teacher—all have their part to play in imparting religious instruction to the young.<sup>38</sup>

But for the most part this instruction must be in accordance with the "religion" of the Agreed Syllabus.<sup>39</sup> Since these syllabi must be strictly undenominational,<sup>40</sup> and are drawn up by agreement between parties with very different views, they will represent a minimum and not a maximum of belief. While it is not, I think, necessary to agree that "watered down Christianity is almost worse than no Christianity at all,"<sup>41</sup> it is just to hold that the Agreed Syllabus is not adequate for the crisis of this age. In a remarkable passage the Ministry of Education has diagnosed our malaise:

The many people—indeed some who call themselves Christians—behave as though truth and falsehood were one, and as though gain and pleasure were the real and legitimate springs of action. In modern jargon, this is our moral Fifth Column. At the same time, the citadel is threatened by

<sup>37</sup> Education Act, 1944, s. 25. It is also pertinent to note the scope of the duty put upon Local Education Authorities by s. 7.

<sup>38</sup> "Educational Reconstruction" (Cmd. 6458), para. 36. Cf. also "Religious Education in England, Past, Present and Future," by A. C. F. Beales, published by the Sword of the Spirit (London, 1943).

<sup>39</sup> Education Act, ss. 26 and 27, and cf. s. 28.

<sup>40</sup> *Ibid.* s. 26.

<sup>41</sup> R. A. L. Smith, *op. cit.*, p. 81.

frontal assault. Over large areas of the world the gospel of force is now preached, as it was in Germany before and during the war, with all the weapons of science and propaganda, all the panoply of a Crusade. These evil gospels . . . can only be met by faith as positive and confident as their own. A social conscience, unsupported by religious conviction, has not always the strength to defend itself against organised evil. If homes and schools and society at large are without spiritual ideals, they are houses built on the sand and cannot be relied on to stand against the rising storm.<sup>42</sup>

Professor M. C. V. Jeffreys has expressively diagnosed the malady which is sapping our educational system and indeed undermining our civilisation, in saying, "What we have done is to shift the principle of *laissez-faire* from the economic sphere to the moral sphere. But it is hard to see on what ground we can expect it to work better in the one sphere than in the other."<sup>43</sup> In this matter the Communists are wiser in their generation than so many of the heirs to Western civilisation. What is really needed is teaching, strong, positive and doctrinal, leading to a life grounded in faith, hope and charity.<sup>44</sup> The basis can best be laid in the home,<sup>45</sup> but much can be done in school to foster or mar what good the parents have achieved, precisely

<sup>42</sup> "Citizens Growing Up," Part 1, s. 4. See also "Religious Education in Schools" (S.P.C.K., 1955), and A. C. F. Beales, in "Looking Forward in Education," pp. 99 *et seq.*

<sup>43</sup> *Op. cit.* p. 8.

<sup>44</sup> Cf. the statement of the Right Reverend Dr. Walter Carey, formerly Anglican Bishop of Bloemfontein, in *Lumen Vitae*, Vol. V, 1950, No. 1, pp. 141 and 142, and "Citizens of Tomorrow," a report published by the King George Jubilee Trust (London, 1955), pp. 27-29, 41-46, 99, 124, 125, 129 and 130, and Chap. 11 of Professor M. V. C. Jeffreys, *op. cit.*

<sup>45</sup> Cf. "Citizens Growing Up," Pt. 1, s. 3.

in the measure that the school is regarded as an 'extension or instrument of parental duties and rights. If, as has been candidly said by the Deputy-Principal of Didsbury Training College, Manchester, Miss Phyllis Doyle: "The roots of the moral life of a community are buried in the home; and the homes of today in England are well on the way to disintegration. . . . The Englishman . . . is in a 'far country,' where 'no man giveth him to eat' for there is little or no systematic moral training for the mass of the population,"<sup>46</sup> the converse is also true. In so far as homes are religious, in the best sense of that often-misused word, they are more likely to give a sound moral training, and in so far as the schools continue that training on the same religious foundation the children that come out of them will feel less morally homeless and hungry. The *infelix culpa*, however, is that when parents care about these problems, take the trouble to choose a school where the instruction, the outlook of the teachers and the whole atmosphere shall be in harmony with the education, the outlook and the atmosphere of the home,<sup>47</sup> and hence choose voluntary schools for their children, those schools, instead of being put on a par with the State schools, are usually treated, in the words of one of our great educationists, the late Sir Michael Sadler, as "something unhealthy which merits a fine."

The Act of 1944 certainly provides

<sup>46</sup> Article on Religion and Morals in England in the Year Book of Education, 1951, p. 311.

<sup>47</sup> In para. 47 of a pamphlet issued by the Ministry of Education in 1946 and entitled "Special Educational Treatment," disharmony between school and home is listed as one of the more common causes of what is termed, in modern jargon, "educational retardation." Cf. Dr. W. D. Wall's "Education and Mental Health," quoted above.

statutory sanction for parental duties. By Section 36, in words which it would be difficult to draft better, the duty is imposed on "the parent of every child of compulsory school age to cause him to receive efficient full-time education suitable to his age, ability and aptitude, either by regular attendance at school or otherwise."<sup>48</sup> Section 39 makes it a criminal offence on the part of the parent if a child of compulsory school age fails, subject to certain exceptions, to attend regularly at the school at which he or she is registered. Provisions for the enforcement of these sections are contained in Section 37 (as amended by the Education Act of 1953), Section 39 and Section 40, and the Courts have shown themselves strict in their interpretation of these provisions.<sup>49</sup> As a necessary corollary, education is free in all schools, whether State or voluntary, maintained by the Local Education Authorities.<sup>50</sup>

<sup>48</sup> To fulfil this legal obligation it is not obligatory to pass children through the State system of education or even to send them to school at all, if the parents can teach them efficiently themselves, as many do, or by means of tutors.

<sup>49</sup> See, e.g., *Jenkins v. Howells* [1949] 1 All E.R. 942 and *Spiers v. Warrington Corporation*—the "slacks" case—[1953] 2 All E.R. 1052.

<sup>50</sup> Section 61. On the right to free education being a corollary of compulsory education, see Lord Justice Swinfen-Eady in *Gateshead Union v. Durham County Council* [1918] 1 Ch. 146: "I am of opinion that the Acts which require a parent to cause his children to attend school give him the right to comply with their provisions and enable him to insist that the child which he tenders shall be permitted to 'attend' school . . . He is entitled to free education for his child—that is education without making any payment whatever . . . If a parent has a legal right to free education for his child at a public elementary school, the Board of Education cannot, nor can the Local Education Authority, take it away." There seems, however, to be a serious lacuna in the Education Act, 1944. Section 8. deals with the provision by a Local

The statutory support for parental rights, on which the whole case for voluntary schools is ultimately founded, is, however, much less satisfactory. In response to pressing requests, Mr. R. A. Butler inserted into the Education Bill of 1943 a general declaration of parental rights. This declaration was originally part of what is now Section 8 of the 1944 Act dealing with the provision of schools by Local Education Authorities, and its wording was adapted from that of Section 19 of the Education Act, 1921.<sup>51</sup> When the Bill came to the House of Lords, the declaration was moved to Part IV of the Act and eventually became Section 76, to make it clear that it should have a general application and should not merely be confined to issues about the provision of schools. This Section reads as follows:

In the exercise and performance of all powers and duties conferred and imposed on them by this Act, the Minister and Local Education Authorities shall have regard to the general principles that, so far as is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure, pupils are to be educated in accordance with the wishes of their parents.

All those who supported the cause of voluntary and independent schools welcomed and relied on Section 76, not only

Education Authority of sufficient schools for the children of their area, but there is no mention specifically of maintained schools; and it is only in maintained schools that by s. 61 no fees may be charged.

<sup>51</sup> For the parliamentary history of the clause, see Hansard for the House of Commons for 19th and 20th January, 1944 (and especially cols. 427-429 of the latter issue), 15th February, 1944 (cols. 138 *et seq.*), the House of Lords Official Report for 11th July, 1944 (col. 774), and 12th July, 1944 (col. 864), and Hansard for the House of Commons for 27th July, 1944 (col. 968).

as being in effect a statutory summary of the doctrine of the Common Law on parental rights, but also as a safeguard against the possibility of the voluntary and independent schools being administered out of existence through parents' wishes being ignored. It will not, I think, be denied that it was the genuine intention of the Legislature to afford a reasonable and legally effective guarantee to parents. Difficulties, however, soon arose in the application of Section 76 to specific cases, and the Minister of Education therefore issued memoranda of advice which culminated in the Manual of Guidance on the choice of schools, of 1950. This Manual, with its carefully balanced recommendations on how the Minister thought that the Section ought to be administered, satisfied neither the Local Education Authorities nor the parents who preferred claims against them. The case of *Watt v. Kesteven County Council*<sup>52</sup> has at least provided a judicial interpretation of Section 76, even if that interpretation has to all intents and purposes knocked away the prop on which parents and their champions expected they could rely.

In that case, which was the strongest that could be found in favour of parents, it was argued that since the conditions about the provision of efficient instruction and the avoidance of unreasonable public expenditure were admittedly fulfilled—the schools chosen by Mr. Watt were recognised by the Ministry of Education as efficient and the payments of school fees which he claimed were less than those which the County Council were prepared to pay at the school of their choice—the Council, as Local Edu-

cation Authority, were bound by the terms of the section to comply with Mr. Watt's parental wishes. Mr. Justice Ormerod and the Court of Appeal, however, held that the section did not impose so stringent a duty on the authorities, for in the words of Lord Justice Denning:

It was said that, when there was no maintained or grant-aided school, the County Council had a duty under Section 8 to make available an independent school and to pay the fees in full: and that, in exercising that duty, they were bound under Section 76 to have regard to the general principle that pupils were to be educated in accordance with the wishes of their parents. Hence, if there are two independent schools, one in Stamford and the other far away, both of which are efficient and charge the same tuition fees, the pupils should be educated at the one chosen by the parents. . . . I think that argument is mistaken. . . . Section 76 does not say that pupils must in all cases be educated in accordance with the wishes of their parents. It lays down a general principle to which the County Council must have regard. This leaves it open to the County Council to have regard to other things as well, and also to make exceptions to the general principle if it thinks fit to do so. It cannot, therefore, be said that a County Council is at fault simply because it does not see fit to comply with the parents' wishes.

The only statutory right which parents possess, therefore, is to have their wishes noticed, however cursorily or fleetingly, by the Minister or Local Education Authority, and they cannot be heard to complain in the Courts if those wishes are subsequently ignored. As *The Times Educational Supplement* said of the effect of this case, in the issue of 11th February, 1955:

Administrators must be rubbing their hands with satisfaction. How much easier to arrange for the children's education if

<sup>52</sup> [1955] 1 Q.B. 408, 416; [1954] 3 All E.R. 441; [1955] 1 All E.R. 473: For a detailed account of this case, see *Catholic Times*, 7th April, 1955.

their parents' tiresome prejudices can be safely discounted. Yet is it a vain hope that there are enough authorities with sufficient understanding of the nature of their work and of the spirit of the Act to ensure by their administrative decisions that Section 76 does not become a mere embellishment of the Act, looking nice and signifying nothing?

The previous Common Law decisions on the parents' rights to control the upbringing and education of their children, of course, remain unaffected. As against the interference or enticements of third parties, the Courts will continue to support the parents. The latter will have no problem if they can afford to educate their children as they think best; but, where any issue arises under the Education Acts, a parent is entirely subject to the discretion of the Minister and the Local Education Authority, even when his wishes cannot be said to involve any inefficiency of instruction or unreasonableness in public expenditure. If a settlor wants to give money to someone else's children on condition that these children are brought up in a certain manner, the Courts will hold that condition void as being an unwarranted interference with the parents' duties and rights; but if a Local Education Authority will only dispense the benefits of the Education Acts on condition that the children to be benefited are educated in the way the Authority deems most suitable, the Courts have decided that the parent has no legal ground for complaint. Indeed, teachers have more precise and effective safeguards under the Acts for their rights of conscience than have parents.<sup>53</sup>

In order to provide a secure juridical basis for the natural rights of parents and

<sup>53</sup> See s. 30 of the Education Act, 1944.

for the continued existence and development of the voluntary schools in this county, Section 76 ought to be amended to impose an indisputable obligation on the Minister and the Local Education Authorities to comply with the wishes of parents in regard to the education of their children, so long as those wishes are compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure. It is only then that parents will be enabled to go up higher and occupy their rightful place in the educational hierarchy. . . .

I have mentioned the spread of the English Common Law to the United States. The American Declaration of Independence justified the revolt from the English Crown by an appeal to "the Laws of Nature and of Nature's God." And it was in faithful pursuance of the Common Law that in 1925 the Supreme Court of the United States, in a judgment which was subsequently, as it were, canonized, by being quoted with approval by Pope Pius XI in his Encyclical *Divini Illius Magistri*,<sup>54</sup> declared compulsory public (State) school machinery unconstitutional for the reason that "the child is not the mere creature of the State: those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional duties."<sup>55</sup> This decision remains, I believe, valid, notwithstanding the recent much disputed judgments given by the same Court and based on the interpretation of the First and Fourteenth Amendments to the American Constitution.<sup>56</sup> As in this country, a

<sup>54</sup> Paragraph 42.

<sup>55</sup> The Oregon School Case: *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

<sup>56</sup> See, for example, *Everson v. Board of Education*, 330 U.S. 1 (1947); *McCullum v. Board of*

distinction seems to be drawn between direct compulsion to have a child educated contrary to his parents' wishes and the right of parents, even once compulsory education has been imposed, to claim assistance from public funds when they want for their children an education other than that given in the State schools.

It has, however, been left, I think, to Eire, to exhibit the most felicitous issue of a happy and harmonious union between the Natural and Common Laws. I venture to quote in full Article 42 of the present Irish Constitution as it resumes so admirably all that I have attempted to say:

The State acknowledges that the primary and natural educator of the child is the Family, and guarantees to respect the inviolable right and duty of parents to provide, according to their means, for the religious and moral, intellectual and physical and social education of their children.

Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State.

The State shall not oblige parents in violation of their conscience and lawful pref-

---

Education, 333 U.S. 203 (1948); *Zorach v. Clauson*, 343 U.S. 305 (1952); and James M. O'Neill, *Religion and Education Under the Constitution* (New York, Harper Bros., 1949); the Reverend B. B. Rooney, S.J., "The Relation of Religion to Public Education in the United States," in *Lumen Vitae*, Vol. V, 1950, No. 1, p. 80 *et seq.*; Thomas H. Mahony, LL.B., "The State and Religion for the Past Fifty Years," in the *Catholic School Journal* (published by the Bruce Publishing Co., Milwaukee, Wisconsin), for April, 1951 (Vol. 51, No. 4, pp. 134-137); George E. Reid, LL.M., "Church—State and the *Zorach Case*," in *Notre Dame Lawyer*, Vol. 72, p. 529 *et seq.*, and "Liberty, the State and the School" and "Religious Disestablishment and the Fourteenth Amendment," in *The Catholic Lawyer*, Vol. 1, No. 4 (October, 1955), published by the St. Thomas More Institute for Legal Research of St. John's University School of Law, New York.

erence to send their children to schools established by the State, or to any particular type of schools designated by the State.

The State shall, however, as guardian of the common good, require in view of actual conditions that the children shall receive a certain minimum education, moral, intellectual and social.

The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions, with due regard, however, for the rights of parents, especially in the matter of religious and moral formation.

In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State, as guardian of the common good, by appropriate means shall endeavor to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.<sup>57</sup>

The cause of voluntary education has often been represented as obscurantist, retrograde and unpatriotic. But it is not a sign of progress nor in the best interests of a free community or of sound education to suppress what is natural. Happily this is coming more and more to be realized. What is now necessary is that international and national guarantees of parental rights should not remain in the realm of pious ejaculations.<sup>58</sup> They must not be allowed to be-

---

<sup>57</sup> Cf. also Art. 44: "Legislation providing State aid for schools shall not discriminate between schools under the management of different religious denominations, nor be such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school. . . ."

<sup>58</sup> For an article on the subject of the Universal Declaration having no legal binding force, see Professor H. Lauterpacht in the *British Year Book of International Law* (1948), Vol. XXV, p. 354 *et seq.*

come declarations which are rendered hollow and hypocritical because of economic or administrative pressure on the part of the State and its organs. In the effort to make parental rights actual it can be shown that voluntary education is no mere unpractical ideal, but has everything to recommend it, whether the stand be taken on grounds of religion or natural law, on educational theory or child psychology, on the professional integrity of teachers, or where it is most often and most heavily attacked, on politics. For, as a distinguished historian has warned, "in proportion as education becomes controlled by the State, it will become nationalised or, in extreme cases, the servant of a political party. The last alternative still strikes us here in England as outrageous; but it is not only essential to the totalitarian State, it existed before the rise of totalitarianism and to a great extent created it, and it is present as a tendency in all modern societies, however opposed they are to totalitarianism in its overt form."<sup>59</sup> The struggle for voluntary

<sup>59</sup> Christopher Dawson, Fellow of the British Academy, in "The Study of Christian Culture as

education, which is still to be won in so many countries, is a struggle for freedom.<sup>60</sup> It is even more a sacred struggle because it is fundamentally a fight for the minds and souls of children and for the salvation, temporal and eternal, of families and of future generations. It is a struggle which can already claim its modern martyrs beyond the Iron Curtain; and their sufferings shall not be in vain.

---

a Means of Education," in *Lumen Vitae*, Vol. V, 1950, No. 1, p. 72. Cf. Lecky, quoted by Christopher Hollis in *The London Tablet* for 22nd August, 1953: "The more dangerous forms of animosity and dissension are usually undiminished, and are often stimulated, by its (education's) influence. An immense proportion of those who have learnt to read, never read anything but a party newspaper — very probably a newspaper specially intended to influence or mislead them — and the half-educated mind is peculiarly open to political Utopias and fanaticism," and the speech by Professor Guido Gonella on *La Libertà della scuola e le Libertà Democratiche*, reported in *Scuola Libera*, Anno IX, No. 3-4 (July-December, 1955).

<sup>60</sup> For a statement of the issues in England and Wales, see A. C. F. Beales in "Looking Forward in Education," quoted above.