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SHOULD THE STATE AID PRIVATE SCHOOLS?†

ROBERT F. DRINAN, S.J.*

IN EARLY APRIL 1961, the United States Supreme Court will be asked to review a decision of Vermont's highest court which on January 3, 1961 denied aid to private schools.¹ In this decision the Vermont Supreme Court declared unconstitutional a plan by which students could receive tuition from the town of South Burlington to attend Catholic high schools in Burlington. The opinion of the Vermont court constitutes not merely a topical but a rather significant point of departure in the discussion of a subject where the arguments and the emotions on both sides have in the past few weeks rivalled Castro, the Congo and unemployment as front-page news.

Catholics in America have expressed deep disappointment at the Vermont decision.² Some Catholics have welcomed the fact that the case as of this time is to be appealed to the United States Supreme Court. In the view of these indignant parents, the nation's highest tribunal could not condone this denial of the rights of religious parents to have an education for their children consistent with their consciences.³ More reflective Catholics and many others, however, consider that the Vermont decision, since it seems to rest on both the Vermont and federal constitutions, will be denied review by the United States Supreme Court.

†An address delivered at the Regional Convention of the American Association of School Administrators, March 28, 1961, Philadelphia, Pennsylvania.

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¹ *Swart v. Town School Dist.*, — Vt. —, 167 A.2d 514 (1961).

² See *AMERICA*, Jan. 28, 1961, p. 552.

³ See generally the newsletter "Fair Share News" of the organization, Citizens for Educational Freedom, 3109 So. Grand Blvd., St. Louis 18, Missouri. This is a voluntary group dedicated to "A Fair Share for Every Child."

The Vermont Plan

Under a statute which in its original plan goes back to the year 1869, Vermont law recognizes the right of parents to participate in the selection of a school for their children. In a law which could not possibly be enacted in today's educational climate the legislature of Vermont provided that:

Each town district shall maintain a high school or furnish secondary instruction, as hereinafter provided, for its advanced pupils at a high school or academy, *to be selected by the parents or guardian of the pupil*, within or without the state. The board of school directors may both maintain a high school and furnish secondary instruction elsewhere as herein provided as in the judgment of the board may best serve the interest of the pupils.⁴

A clearer recognition of parents' rights in education could hardly be desired. Not merely may the parents select the school in the absence of a public high school but may even sometimes be able to exercise this right when the town does furnish a public high school.

Tuition is regulated as follows: "Each town school district shall pay tuition per pupil per school year as billed, but not in excess of \$325.00 unless authorized by a vote of the town school district. . . ."⁵ Under this arrangement in 1958-1959 the sum of \$19,687.50 was paid directly to the Rice Memorial High School in Burlington for the education of many South Burlington students at this Catholic school. The sum of \$2,025 was paid in the same year to Mount St. Mary's Academy in Burling-

ton, a school also owned by the Diocese of Burlington.

The Supreme Court of Vermont, having been asked to rule on the permissibility of this arrangement, referred to the case as presenting "sensitive and solemn issues." The court spoke with understanding of the parent who "shares the expense of maintaining the public school system yet in loyalty to his child and his belief seeks religious training for the child elsewhere." The court spoke of "considerations of equity and fairness" which "exerted a strong appeal," but found that the school board of South Burlington, "while acting within the literal provisions of the statute, [has] . . . exceeded the limits of the United States Constitution." The opinion is not entirely clear as to whether the parental right statute also violates the Vermont constitution. The court seems to rely principally for its opinion on the following dicta taken from the *Zorach v. Clauson*⁶ decision: "Government may not finance religious groups nor undertake religious instruction *nor blend secular and sectarian education* nor use secular institutions to force one or some religion on any person."⁷

Assuming that this statement represents the controlling law, the Vermont court found that the "fusion of secular and sectarian education . . . undertaken in religious denominational high schools that are an integral part of the Roman Catholic Church" was something in which, by command of the first amendment, "the state shall not participate."

The court added that the government may not pay tuition to high schools when "the Church is the source of their control

⁴ VT. STAT. ANN. tit. 16, §793(a) (1958). (Emphasis added.)

⁵ VT. STAT. ANN. tit. 16, §793(b) (1958).

⁶ 343 U.S. 306 (1952).

⁷ *Id.* at 314. (Emphasis added.)

and the principal source of their support." The court continues that "this combination of factors renders the service of the Church and its ministry inseparable from its educational function." The court recognized that a Catholic school "is a high and dedicated undertaking . . . and deserves the respect of all creeds" but ruled that "however worthy the object" and "however compelling" the "equitable considerations" the arrangement violates "constitutional barriers."

The Vermont decision, while paying lip service to the "faithful parent" and acknowledging the "severity of this mandate" (its decision) and the "heavy burdens" it will impose, is nonetheless an opinion that is unsatisfactory because it does not really analyze the problem before it, nor seek any way in which to reconcile the desires of religious parents with the first amendment.

The decision, furthermore, is not clear as to the manner in which Catholic or other parents might be able to exercise the option granted to them by the lawmakers of Vermont who have never subscribed to the philosophy of a public school monopoly. What if Catholics or others established schools that were *not* "an integral part" of a church and did not have a church as "the source of their control and the principal source of their support"? Does the court mean that "the service of the Church and its ministry" are "inseparable" or "inseparable" from its educational function? At what point does the "fusion of secular and sectarian instruction" in a school cause the school to turn into a virtual seminary where the pupils are only working "in the pursuit of their religious beliefs"?

Many of the arguments presented by the parents in the Vermont case were not taken up in the court's opinion although

Justice Holden in his opening paragraph stated that the "cause has been well argued and thoughtfully presented." Perhaps it would have made no difference if the court had tried to discuss some of the more fundamental issues. The result would probably be the same. The court would have replied with the same answers as the National Education Association, the American Civil Liberties Union, the American Jewish Congress and the National Council of Churches. Every educator has heard these replies or rather the outright rejection of the religious parent's familiar arguments revolving around double taxation, distributive justice and the rights of parents in a pluralistic society.

The Vermont decision has been presented at some length because it is a recent restatement of the position of most educational associations, and of virtually all Protestant and Jewish bodies.

Can any new argument be made for the parent who insists that he is required in conscience to have a school where the teachers do "blend secular and sectarian education"? This observer feels that most educators, viewing the dilemma of the religious parent as the Vermont Supreme Court did, have profound misgivings about the way in which the problem of the religious parent is being solved. The ever growing and often bitter resentment which Catholic and other parents have over "double taxation" cannot fail to impress and worry the fair-minded observer who sees 5,088,000 children — or almost every eighth American child — enrolled in Catholic primary and secondary schools.

Before an attempt can be made to probe into this question more deeply than the Vermont court was able to do, it is first necessary to analyze in some detail the im-

portant question of what name we should give to the nonpublic school.

What Shall We Call Our "Nonpublic" Schools?

The term "public school" is a prestige-laden title which, in Madison Avenue parlance, has a built-in appeal to the mind and heart of every American. Americans have for so long been conditioned to hearing of the glories of the public school that the nonpublic school has by its very name a negative connotation. The term "nonpublic" assumes or implies that such a school does not fulfill a public function, is not blessed by public authorities and is not responsible or accountable to the public.

The term "private" school contains perhaps even more negative implications. A "private" school suggests an exclusiveness, based perhaps on snobbery or wealth. The "private school" designation, when applied to Catholic primary and secondary schools, is particularly inappropriate because these schools are not "private" in any of the senses which that term implies in the popular mind.

Even more unfortunate is the title "parochial" school. The term is more and more factually erroneous since so many Catholic schools are no longer "parish" schools. More importantly, the school termed "parochial" is by implication a mere extension of the religious mission of the parish.

The terms "Catholic school" or "Church-related school" or "sectarian school" not only share in the negative connotations of every "nonpublic" school but furthermore imply that their principal function is to serve as an extension of Sunday school.

It has been the experience of this writer that no intelligent dialogue about nonpublic schools is possible until we set aside the

tyranny of labels. Let us employ the language of the *Zorach* opinion and call public schools "secular" and Church-related schools "sectarian." Should the state finance only "secular" schools — those schools in which it is forbidden by the nation's highest tribunal to "blend" the secular with the sectarian?

Using this terminology let us propose three arguments which show that it is unfair for a democratic state to aid only the "secular" school and to penalize the "secular-sectarian" school.

(1) It is unfair to coerce students to attend a "secular" school by placing an economic boycott on the "secular-sectarian" school.

(2) Parents and children have a constitutional right not to be coerced into attending a "secular" school or to be penalized for attending a "sectarian" school since such attendance is an integral part of the "free exercise" of their religion which Congress and the states by the first amendment may not prohibit or restrict.

(3) A truly democratic pluralistic society would, without fear of national disunity, allow parents and all responsible groups to operate tax-supported schools where the "secular" would be fused with the "sectarian" or where militant agnosticism would be taught.

Parents or children should not be coerced into "secular" schools by a state economic boycott on all other schools. A "secular" school cannot strictly speaking teach even the existence of God since to many Protestants no knowledge of God can be obtained except by an act of faith. Even the existence of God therefore is "sectarian." Are there some "sacred" but not "sectarian" truths which the "secular" school may communicate? To Catholics and those who be-

lieve in the natural law certain "sacred" truths concerning the existence and nature of God are knowable by reason independently of revelation. But these truths would be "sectarian" to all others.

One sees, therefore, that the "secular" school is by law under a severe limitation on its academic freedom. It may presumably discuss the "sectarian" but can never teach any truth concerning it since this would "blend" the "sectarian" with the "secular." A more formidable intellectual strait jacket could hardly be devised.

The "secular" school has clearly been given a philosophy of education by the United States Supreme Court — a philosophy which assumes that a good education can be given divorced from the realities of the faith or lack of faith of the recipients of the education. How pupils involved in such an educational process can be taught about the great issues of life, history and human destiny remains a mystery. Such a school may be more mythical than real since, as Mr. Justice Jackson pointed out in *McCullum v. Board of Educ.*,⁸ mathematics, physics or chemistry are, or can be, completely secularized but music, architecture, painting, biology and English literature can hardly be taught without at least inferentially blending something "sectarian" into the presentation.⁹

It cannot realistically be maintained that the "secular" school is truly a "neutral" school concerning religion. The impact of the "secular" school on students for thirty hours a week over a period of twelve years is enormous. And that impact is inevitably one which minimizes the importance and even the relevance of the "sectarian." As Sir Walter Moberly puts it:

On the fundamental religious issue the modern [school] intends to be and supposes it is neutral, but it is not . . . it does what is far more deadly than open rejection; it ignores Him [God]. . . . It is a fallacy to suppose that by omitting a subject you teach nothing about it. On the contrary — you teach that it is to be omitted, and that therefore it is a matter of secondary importance. And you teach this not openly and explicitly . . . you simply take it for granted and thereby insinuate it silently, insidiously and all but irresistibly.¹⁰

If we honestly face the fact, therefore, that the "secular" school must by law discriminate (the word is not too strong) against all "sectarian" considerations then does it not follow that nonbelievers receive in a "secular" school an education which confirms their beliefs, whereas believers are subjected to an atmosphere which challenges if not contradicts their basic convictions. It is not really true that the "secular" school is "omnisectarian," as some have claimed. It cannot be such and still comply with the "no-blending" doctrine which is at the moment the highest law of the land. If one follows the literal logic of the "no-blending" doctrine the "secular" school must divorce faith from reason, law from morals and religion from life.

There are movements active today to make the public school even more secular than it is. In Miami, for example, the American Jewish Congress is the prime mover in a suit to force the discontinuance of a large number of practices such as Bible-reading, religious assemblies, psalm singing and other customs of a school system which, until recently, by reason of its faculty, students and tradition, commingled a certain Protestant piety with its otherwise secular education.

⁸ 333 U. S. 203 (1948).

⁹ *Id.* at 235-36.

¹⁰ MOBERLY, *CRISIS IN THE UNIVERSITY* (1949).

It is difficult to be enthusiastic about the plaintiff's allegations in this case since the daily or weekly presence or absence of a few moments of collective piety hardly makes any difference in the over-all impact on a student of thirty hours a week of "secular" education from which all "sectarian" values have been carefully omitted.

Is it then a denial of religious liberty to coerce a child who is deeply committed to "sectarian" truths into an atmosphere where it will be assumed that this commitment is irrelevant to the child's education? Not all public school educators will, of course, accept the full consequences of the "no-blending" doctrine. In fact some have tried to minimize the rigor of the doctrine in order to save the public school from the accusation of being called "secularistic." In New York, for example, the Board of Education some time ago adopted unanimously a statement providing for the teaching of spiritual ideals in New York City public schools. This statement authorizes teachers to advance "the training in the home, ever intensifying in the child that love for God, for parents and for home which is the mark of true character." It is hard to see how "intensifying" in a child its "love for God" can be reconciled with the prohibition on "blending" the "secular" with the "sectarian."

Religious Freedom And Tax-Supported Education

The central issue then — our second "undeveloped" argument — is the question of whether believers have, by reason of the first amendment's protection of the "free exercise" of religion, a right not to be pressured by economic penalties into a school system where "sectarian" values — deemed paramount to life and education

by the believers — are treated as irrelevant in education?

American courts are not too familiar with the arguments surrounding the "central issue." The case of the Catholic parent involved in the Vermont tuition suit has never in our history been presented to the United States Supreme Court. It is interesting to speculate what the nation's highest tribunal would have done if the Vermont courts had agreed with the arguments of the Catholic parents and allowed the parental right statute to stand. Would the United States Supreme Court reach out into Vermont and dictate to its school boards that only "secular" schools may receive the tax money of the citizens of Vermont?

American law has been quite sympathetic to "educational conscientious objectors." Recently in Pennsylvania everyone sought a compromise solution for Amish parents who refused to send their children to a new public high school because it was "too worldly." Christian Scientists have had their children excused from health instruction classes and Jehovah Witnesses need not salute the flag.

Do any of these precedents contain principles by which the religious parent can justify his claim that a "sectarian" school should be financed for him since this is a part of the "free exercise" of religion constitutionally guaranteed to him despite the "no-establishment" clause in the same first amendment?

Is the "no-establishment" doctrine an absolute to such an extent that the "free exercise" of religion must be carried out in a way that requires no state funds? Clearly this is so and *should* be so where the "free exercise" is carried on in voluntary services of worship which the state

does not in any way require. But when the state legally compels individuals to perform certain tasks, may the state require them to perform these duties in a situation into which the "sectarian" elements of life may not be blended?

If citizens are involuntarily detained in mental hospitals, prisons or military units, both the law and public opinion feel generally that the state should provide those "sectarian" aids to which the detained have been accustomed. Is there some analogy to students "detained" by law for thirty hours a week for twelve years?

Is the "right" of parents and children to an education not separated from all "sectarian" considerations a sheer immunity or a full-bodied right assured of implementation?

Catholics have tended to underemphasize that aspect of Catholic schools which would make of them a vehicle by which Catholics practice the "free exercise" of religion. Such an image of Catholic schools tends to imply that they provide only extended catechism classes rather than a fully developed system of secular education. Catholics have quite understandably stressed the great service to the community and nation provided by the rapidly expanding system of Catholic schools. The accent has been on the idea that the state should assist Catholic schools which "save" the state millions of dollars annually.

This argument, however persuasive to Catholics and some others, seems to assume or possibly must assume that Catholic parents and children are constitutionally empowered under the "free exercise" clause to conduct nonpublic "sectarian" schools and consequently should not be economically penalized for asserting a right guaranteed by the Bill of Rights.

If this assumption is required then what is needed is a declaration by the United States Supreme Court that the full thrust of the "free exercise" of religion includes the operation of "secular-sectarian" schools which can receive tax support.

How far will the Supreme Court say the "free exercise" of religion may be extended? Does the "free exercise" clause contain implicitly the right to have one's children in a state-financed "secular-sectarian" school?

Will the Supreme Court ever come to the conviction that the "free exercise" of religion should logically mean the adoption of Article 2 of the Council of Europe's Convention on Human Rights subscribed to by fifteen nations of Europe? That article, intended as an implementation to Article 26 of the Universal Declaration of Human Rights adopted by the United Nations and the United States in 1948, reads as follows:

[I]n the exercise of any functions which it assumes in relation to education and to teaching, the state shall respect the right of parents to ensure such education and teaching as is conformable to their religious and philosophical convictions.

In the whole history of Supreme Court decisions on the "free exercise" clause only one substantial claim has been rejected — the request of the Mormons to practice bigamy as a part of their "free exercise" of religion. The Supreme Court has sought to allow all other requests for an extension of the "free exercise" privilege indicating that only a "clear and present danger" would justify a restriction on religious freedom. It should be noted that the *Everson v. Board of Educ.*¹¹ and the *Zorach v. Clauson*¹² decisions, despite what they said

¹¹ 330 U.S. 1 (1947).

¹² 343 U.S. 306 (1952).

about the "no-establishment" clause, in effect broadened religious liberty. A good deal of thinking and probably more than one solidly researched "Brandeis brief" will be required before the Supreme Court will rule that the "free exercise" of religion includes the constitutional right to have one's children educated in a state-financed "secular-sectarian" school.

One of the most formidable, though formless, difficulties will be the universally expressed fear that aid to the nonpublic school will undermine the public school and weaken national unity. This difficulty brings us to our third point: does a truly democratic society need to depend for its unity on its public schools?

Pluralism in Education

Although we have been told by the Supreme Court and all constitutional experts that the Constitution was designed for people of "fundamentally different faiths" it appears that America is afraid to allow the "fundamentally different faiths" of its people to be operative in its public schools. No less a person than Mr. Justice Frankfurter urged "thought-control" in our schools in these startling words in the *McCullum* decision: "in no other activity of the state is it more vital to keep out divisive forces than in its schools."

Many other jurists and educators have expressed the conviction and hope that our public schools will promote national unity. Although these distinguished critics of American life would deny that they want public schools to promote "togetherness" or to "homogenize" children, the whole coloration of the seemingly widely accepted concept that public schools should promote national unity is — to be very candid — distressing.

It is never clear in discussions on the supposed unifying effect on children of the public school whether the students become unified by merely mingling together or whether the mystique or the instruction of the public school produces a unifying effect — an effect which somehow is thought to be highly desirable.

How much unity and how much pluralism do we want in our schools? It seems fair to say that some — perhaps most — writers on the public schools are afraid of pluralism in education. The growth of nonpublic schools and, much more so, any possible state aid to such schools, is looked upon as a threat to the public school and, as the argument inevitably becomes more emotional, to the "future of American democracy"!

What anxiety — even neurosis — afflicts so many Americans that they are persuaded that our national unity is so brittle that it would be threatened if the "secular" schools had a system of companion "secular-sectarian" schools? Can the communication of sectarian values blended into secular subjects be such a threat to a nation established by profoundly religious citizens? Or is it the mere separation of pupils into "secular" schools and "secular-sectarian" schools that causes the friends of the former to take upon themselves the completely noneducational function of promoting national unity?

The argument that nonpublic schools are less desirable because they do less for national unity than public schools is formidable because it is formless. It assumes a dozen major premises, is based ultimately on emotion and yet, it seems to this writer, represents the most frequently advanced nonlegal argument against the proposal

that the "secular-sectarian" school be publicly financed.

John C. Bennett has a good point in this connection. If, Dr. Bennett writes, the advocates of no aid to private schools desired to do something about the allegedly less democratic outlook imparted in the non-public school, they could arrange that these schools be supplied with and required to use the same secular textbooks as are used by the students in the public school. The use of these books in both systems of school would be "in the interest of the unity of the community."¹³

In the ultimate analysis the real opposition to aid to the "secular-sectarian" schools derives from the failure to comprehend the true nature of our pluralistic society or a fear to face its consequences. The "secular" school was the creation of a new and growing nation in the last century. America's religious sociology has changed radically since that time so that the "secular" school is no longer consistent with the conscience of a significant portion of the nation's citizens.

¹³ BENNETT, CHRISTIANS AND THE STATE 236-51 (1958).

Unfortunately the United States Supreme Court has "frozen" the solution of the last century into a "dogma" of constitutional law. The "dogma" has reached its long arm into Vermont and has told Catholic parents that the state has a monopoly on education and that the "secular" school is the *only* school which merits tax support.

Most of the Catholic parents of America think that this is an unjust decision. They express their sense of injustice with varying degrees of emotion. It would seem fair to say that this sense of injustice is deepening and widening and that the emotions deriving from it are causing an ever more bitter sense of resentment toward the American legal system which has canonized the "secular" and penalized the "secular-sectarian" school.

What will America and its courts decide about this resentment in the generation to come? Will America follow the example of Holland, England, Belgium and France and allow believing parents to have their faith blended into the education of their children? Or will America stiffen its legal attitude on private schools and extend its monopoly to all educational institutions?

That is the central question confronting American education today.