The Catholic Lawyer

Volume 4
Number 3 *Volume 4, Summer 1958, Number 3*

Article 3

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THE RIGHT TO EDUCATE – THE ROLE OF THE PARENT, THE CHURCH AND THE STATE

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SINCE THE END OF WORLD WAR II the attention of the nation has been focused, as never before, upon the education of our children. In books, periodicals, newspapers and public addresses, responsible critics have deplored the poor quality of many of our educational products and have challenged the soundness of many current philosophies of education.

The next few years will witness a profound re-examination of our entire educational system. Objectives must be reconsidered, methods evaluated, materials scrutinized, standards weighed, curricula reorganized, faculty salary scales adjusted, recruitment of teachers intensified, teacher training improved. The task is staggering and the cooperation of all concerned will be needed: parents, teachers, administrators, school boards, departments of education, state legislatures, the federal government, churches, civic groups, educational foundations, everyone having an interest in education and an ability to contribute toward its improvement.

Inevitably there will be conflicts of interest. Inevitably there will be disagreements as to goals and methods. Therefore it is essential that the principles and policies upon which America must rebuild its educational structure be clearly delineated.

Presuming, of course, that all are concerned with the welfare of the child, the three principal parties in interest in any educational plan are the parents, the Church, and the State. All of them have rights but in no case are these rights absolute. And so the first task is to determine what are the respective rights of the parents, the Church and the State.

Right of Parents to Educate

The right of parents to educate stems from their duty to the child. In the words of Pope Pius XI,

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> . . . no one can fail to see that children are incapable of providing wholly for themselves, even in matters pertaining to their natural life, and much less in those pertaining to the supernatural, but require for many years to be helped, instructed, and educated by others. Now it is certain that both by the law of nature and of God this right and duty of educating their offspring belongs in the first place to those who began the work of nature by giving them birth, and they are indeed forbidden to leave unfinished this work and so expose it to certain ruin.[1]

Natural and divine love make easy and even attractive for the normal mother and father this duty to educate their children. Nevertheless the Church spells out this duty in its canon law which in this respect is merely a partial codification of natural and divine law; "The primary end of marriage," says Section 7 of Canon 1013, "is the procreation and education of children."

More specifically, Canon 1113 warns that "Parents are bound by the gravest of obligations to secure by all means in their power the religious, moral, physical, and civil education of their children, as well as to provide for their temporal welfare."

The duty of parents to educate their children is recognized and enforced by the civil law as well. The education law of the Commonwealth of Pennsylvania, for instance, provides that:

> Every parent, guardian, or other person having control or charge of any child or children of compulsory school age is required to send such child or children to a day school in which the subjects and activities prescribed by the State Council of Education are taught. . . .[2]

Duties, indeed, do parents owe to the state to educate their children for civic responsibilities. The extent of these duties we shall examine presently. But parents have rights as well as duties and these rights have been assured them by the Supreme Court of the United States.

Shortly after World War I the State of Nebraska convicted a teacher in a Lutheran parochial school of the crime of teaching German to a ten-year-old boy. The avowed purposes of the statute were to make English the mother tongue of all children reared in the State of Nebraska and to teach them to think in English so that they would not imbibe the foreign ideas and sentiments of their parents.

Mr. Justice Holmes indicated a belief that such legislation was a reasonable experiment in education and hence within the police power of the state. But the majority of the Court disagreed vehemently and held the legislation unconstitutional.

Mr. Justice McReynolds delivered the opinion of the Court, which read in part as follows:

> That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution – a desirable end cannot be promoted by prohibited means.
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> For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide: "That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent. . . . The proper officers will take the offspring of

[1] *On Christian Marriage,* para. 16 (1930), FIVE GREAT ENCYCLICALS 82 (1939).

[2] PA. STAT. ANN. tit. 24, §13-1327 (1950).

> the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better, when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be." In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.[3]

Two years after the Nebraska case the Supreme Court in a unanimous opinion by Mr. Justice McReynolds, Mr. Justice Holmes this time concurring, struck down a statute of the State of Oregon which required parents to send their children to public schools.[4] From a technical point of view the case actually held that two educational corporations, the Society of Sisters, and Hill Military Academy, were deprived of the lawful use of their property by reason of an improper and unconstitutional compulsion exercised by the statute upon parents and guardians. But the Court said specifically that the action of the state against the parents of children who would have attended the two schools was "arbitrary, unreasonable and unlawful."

In the words of the Court:

> As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. 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 obligations.[5]

Right of the Church to Educate

On the parents, then, have God, the Church, and civil society placed the primary duty and hence the primary right to educate the child. Nevertheless the family is an imperfect society and cannot provide by itself all the means for its complete development. However, the child, who through the sacrament of Baptism receives the divine life of grace, is born into a second society, the Church, and to the Church must parents turn for assistance in those phases of education which pertain to the child's eternal salvation, which provide him with a knowledge and a consequent love of and desire to serve God, his final and ultimate End.

In the Catholic theology of education, therefore, the Church plays an important and essential role in the education of the child but it is a supplementary role to the extent that it assists or supplies the deficiencies of parents. In fact so jealous is the Church

> of the family's inviolable natural right to educate the children, that she never consents, save under peculiar circumstances and with special cautions, to baptize the children of infidels or to provide for their education against the will of parents, till such time as

[3] Meyer v. Nebraska, 262 U.S. 390, 401-02 (1923).

[4] Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[5] *Id.* at 535.

> the children can choose for themselves and freely embrace the Faith.[6]

True to her mandate to teach all nations the Church places at the disposal of families, her office and facilities for education, and, conversely, Catholic families eager to profit by this offer entrust their children to the Church in hundreds and thousands.

> These two facts recall and proclaim a striking truth of the greatest significance in the moral and social order. They declare that the mission of education regards before all, above all, primarily the Church and the family, and this by natural and divine law, and that therefore it cannot be slighted, cannot be evaded, cannot be supplanted.[7]

Right of the State to Educate

This mission of education extends to every branch of learning and every regulation insofar as religion and morality are concerned. Nevertheless, the Church recognizes and upholds the right of the State to supervise and promote the physical, civic, and otherwise secular education of its citizens.

It is the duty of the State to protect the rights of the child to education whenever its parents are found wanting either physically or morally in this respect, whether by default, incapacity, or misconduct. In such cases the State does not displace the family but merely supplies deficiencies and provides suitable means in conformity with the rights of the child. In addition, a concern for the common welfare demands that the State require in its citizens a certain degree of education without which the proper operation of government is impossible. In some stages of civilization bare literacy is a goal which can be achieved only with difficulty. In more advanced stages of industrial civilization such as our own, much higher standards are necessary.

A democratic government must have citizens with sufficient education to fulfill their civic duties as voters, jurymen, officeholders; teachers, lawyers, doctors, judges, legislators, administrators, ministers of religion are needed; commerce and industry require engineers, architects, builders, barbers, clerks, stenographers, grocers and manufacturers, plumbers and druggists, bus drivers, sanitation experts, waiters, letter carriers and mechanics – all are needed and all must be educated.

But education for the professions, trades, or other occupations, is not sufficient. In addition to helping young persons to fulfill the unique, particular functions in life which it is in them to fulfill, the welfare of the State demands that education fit these youths for those common spheres which, as citizens and heirs of a joint culture, they will share with others.

The famous report of the Harvard Committee on General Education in a Free Society distinguished these separate goals and designated the first *specialism* and the second *general* education. The goal of general education, in the language of the Committee, is to provide ". . . the broad critical sense by which to recognize competence in any field."[8] Knowledge must be imparted but more important is the cultivation of certain aptitudes in the minds of the young, namely: *to think effectively,* to communicate *thought,* to make relevant judgments, to discriminate among values.[9]

Thus far the educational philosophy with which we have dealt is Catholic. Much of

[6] *The Christian Education of Youth* (1929), FIVE GREAT ENCYCLICALS 47-48 (1939).

[7] *Id.* at 48.

[8] REPORT OF THE HARVARD COMMITTEE, GENERAL EDUCATION IN A FREE SOCIETY 54 (1945).

[9] *Id.* at 64-65.

it adopts the language of canon law and of the Papal encyclicals, and the rest is compatible with Catholic ideals. In many nations, of course, ideas and ideals of this kind are anathema to the State and ruthlessly suppressed. In some countries education is a state monopoly and the Church is completely excluded from the schools. Other nations go a step farther and deny even to parents the right to a voice in their children's education.

In a few countries the right of parents to select the education for their children is given effect by governmental aid. In still other countries the State maintains and supports a system of public education but permits, though it does not support, schools maintained by religious or private organizations.

Philosophy in Education

In each case, however, the educational program adopted by a government is based upon a philosophy. Make no mistake about it. Philosophy cannot be separated from education. The content, the materials, the methods of a system of education will inevitably reflect the beliefs, conceptions, principles, experience, attitudes, values — in a word, broadly speaking, the philosophy of the educator. Just as governments are founded upon the philosophies of Hegel, or Marx and Engels, or John Locke, or Jefferson and Madison, so are systems of education based upon the philosophies of Aristotle, Plato, Socrates, Augustine, Thomas Aquinas, Horace Mann, John Dewey, William C. Bagley, or Herman H. Horne.[10]

At times a particular philosophy is elevated to the rank of official state philosophy and occasionally resembles a most dogmatic theology. Thus the philosophy of Hegel begot Nazism and an extreme form of Marxism has become the official philosophy of education as well as government in Soviet Russia.

When the Founding Fathers of our own beloved country met to draft the first ten articles of the Bill of Rights, they were faced with a very practical problem. Theirs was the task to supplement the Constitution and to complete the foundation of a sound system of government.

Their decisions were not based upon a doctrinaire philosophy which sought to transform radical theories into a plan of government. For the most part, the artisans of the Constitution and the Bill of Rights were lawyers seeking the common good and anxious to assure public peace through equal justice for conflicting groups.

No one can read the history of those great debates without recognizing that compromise was necessary at almost every point. Not the compromise which sacrifices principles to expediency, not the compromise which treads upon inalienable rights, but the compromise which recognizes that certain conflicting interests must be subordinated to the common welfare and which recognizes, moreover, that there are certain areas in which government need not and should not interfere.

Mindful of the sorrow and blood that had engulfed England when Elizabeth and Mary and Charles I and Oliver Cromwell had successively attempted to dictate the religion of the nation, the draftsmen of the First Amendment provided that "congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

[10] BROWN, EDUCATIONAL IMPLICATIONS OF FOUR CONCEPTIONS OF HUMAN NATURE (1940); GALLAGHER, SOME PHILOSOPHERS ON EDUCATION (1956).

Religion was still established in four of the states but the very multiplicity of denominations throughout the colonies made impractical an establishment of religion by the federal government even if there had been no fear such as Madison's that ". . . the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever. . . ."[11]

Development of Education in America

Neither the Constitution nor the Bill of Rights even mentioned the word "education." Under the Articles of Confederation, Congress had evidenced its belief in the need of a republic for popular education by dedicating to public education great blocks of land in the Northwest Territory. Both George Washington and Thomas Jefferson recommended the establishment of a national university but formal schooling at the end of the eighteenth century was chiefly in the hands of religious bodies. As early as 1642 Massachusetts had required its towns to give elementary education to children who were not taught at home. Private schools were fairly common in thickly populated districts and itinerant teachers journeyed about whenever pupils and fees were available. But religious motives chiefly prompted the encouragement of education and religious sects sponsored and, to a great extent, controlled the education of Americans from elementary school through college.

[11] Madison, *Memorial and Remonstrance Against Religions Assessments,* as quoted by Mr. Justice Rutledge, Everson v. Board of Educ., 330 U.S. 1, 65-66 (1947) (dissenting opinion).

At first the growth of parochial schools was fostered by many Protestant denominations as well as by Catholics. With a few exceptions, notably the Missouri Synod of the Lutheran Church, however, the Protestant parochial school system failed. The failure has been variously attributed to a shortage of trained teachers, shortage of money, lack of pupils, and a faltering leadership in the face of liberalizing movements which drew adherents away from the old orthodoxies. Moreover, the denominational publications began to take the position that the state school was not "godless" but Protestant and, above all, American. Protestant Americans were urged to see to it that the common school remained Protestant by retaining the Protestant Bible. The primary education controlled by the State was Protestant. Why should they expend labor and money to create other Protestant schools under the control of the Church?[12]

"Consequently," says Father Francis X. Curran, S.J., "American Protestantism surrendered the traditional claim of the Christian Church to control popular elemental education into the hands of the only other claimant, the state."[13]

Catholic Parochial Schools

Meanwhile Catholic parochial schools were multiplying. At first Bishop Carroll entertained the hope that Catholics might unite with the non-Catholic fellow citizens in building up a system of education that would be mutually satisfactory from the religious point of view. He soon realized the futility of such a hope and in 1792, soon after the First Catholic Synod, he

[12] CURRAN, THE CHURCHES AND THE SCHOOLS 118-30 (1954).

[13] *Id.* at 130.

addressed a pastoral letter to the Catholics of the country in which he emphasized the necessity of a pious and Catholic education of the young to insure their growing up in the Faith.[14]

This admonition was repeated by the First Council of Baltimore (1829) which judged it absolutely necessary that schools should be established, in which the young may be taught the principles of faith and morality, while being instructed in letters.

The Catholic parochial school system prospered, though at the cost of unbelievable sacrifices. Thousands of men and women dedicated their lives to Catholic education in the religious orders and congregations; devoted laymen in lesser numbers, but frequently with comparable sacrifices, joined the ranks of the teachers; families with marginal incomes built schools and met the inadequate but still burdensome salary bills; colleges and universities established courses of teacher training; the bishops and diocesan school officials organized and supervised the educational system and elevated standards to meet the accreditation demands of state departments of education.

By 1900 over five per cent of the primary and secondary school children were enrolled in parochial schools. Fifty-seven years later the percentage had increased to twelve per cent and the percentage of elementary school children in parochial schools had risen to almost thirteen per cent. Thus it seems that today almost sixty per cent of the Catholic children of elementary school age in America are in Catholic schools.[15]

[14] THE NATIONAL PASTORALS OF THE AMERICAN HIERARCHY 2-15 (Guilday ed. 1954).

[15] Sullivan, *The Growth of Catholic Schools,* 98 AMERICA 201-05 (1957).

The contribution which Catholic schools have made to the educational progress of America is incalculable. The expenditure in dollars is only a small portion of the total cost since it does not include the services donated in whole or in part by over 100,000 religious and more than 20,000 lay teachers. And who can evaluate the contribution which has been made by the graduates of parochial schools in the ranks of the professions, commerce, trade, industry, government, education, religion! Who can measure the effect upon our civic and public life of the millions of God-fearing men and women whom parochial schools have educated in morality and good citizenship based upon sound, forceful religious convictions!

Difficulties of Parochial Schools

One might expect America to welcome such assistance; to remove obstacles from its path; to offer financial as well as moral support. Indeed, in the early part of the nineteenth century some Catholic schools did receive public aid. In 1830, Lowell, Massachusetts appropriated fifty dollars toward the establishment of a parochial school. In New York City one Catholic school received state aid for a time, but New York soon withdrew its aid in 1825 because of the activity of the Public School Society.

Despite its name, the Public (originally the Free) School Society was a private organization incorporated for the purpose of establishing free non-denominational religious schools. Under the Laws of New York, 1813, chap. 52, the State legislature appropriated exclusively for teachers' salaries $50,000 to be distributed to the "Free School Society . . . and such incorporated religious societies as now support or here-

after shall establish charity schools within the city. . . ."

Restriction of State Aid to Religious Schools in New York

In 1817 the Free School Society obtained an extension of the purposes for which the public funds might be used and in 1822 the Bethel Baptist Church sought and received a similar privilege. Fearful that denominational schools might draw away pupils from its schools, the Free School Society then sought and obtained legislation depriving all religious schools of a share in the school fund.[16]

For all intents and purposes public education was now in the hands of a private religious, though professedly non-sectarian, organization. The Catholics continued to protest against the use in the free schools of a Protestant version of the Bible and even greater outcries were raised, though in vain, against anti-Catholic passages in the assigned textbooks.

Seeing the futility of attempts to influence the policies of the so-called Public School Society, and equally mindful of the dangers to faith and morals of a school entirely devoid of religion, Catholics set to work to build up a parochial school system entirely independent of the State.

From time to time an abortive effort was made to obtain public assistance, but the Catholic claims received little support from non-Catholics and, by the middle of the century, as we have seen, non-Catholic religious groups had all but abandoned their efforts to organize a parochial school system.

Finally, in 1894, New York State adopted an amendment to its constitution by adding a new section 4 to article IX:

> Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught. . . .[17]

In other places, specifically Florissant, Missouri, and Conewago, Pennsylvania, parochial schools limited their instruction during official school hours to secular subjects and taught religion at other times. In return they received public funds for the secular instruction imparted. As late as 1889 there were similar instances in Connecticut, Georgia and New Jersey.[18]

The most famous compromise, however, was the Poughkeepsie (New York) Plan. For nearly twenty years the City Board of Education, composed entirely of Protestants, leased St. Peter's School building at an annual rent of one dollar. The school was open to all denominations and no religious exercises were held during official school hours. Teachers were selected, employed, paid and subject to dismissal by the board, and both teachers and pupils were subject during school hours to the control and authority of the board.

In practice the board accepted the pastor's nomination of Sisters of Charity and other Catholics as teachers and permitted him to reject schoolbooks which he might consider harmful to the faith or morals of the children.

[16] CONNORS, CHURCH-STATE RELATIONSHIPS IN EDUCATION IN THE STATE OF NEW YORK xv-xviii (1951).

[17] N. Y. CONST. art. IX, §4 (1894). This provision has been renumbered and may be found in the current New York constitution, N. Y. CONST. art. 11, §4.

[18] CONNORS, *op. cit. supra* note 16, at 109-10.

Many Protestants and Jews enthusiastically supported the plan and some of them sent their own children to the school without ever finding reason to complain of unfair treatment. Nevertheless, by 1898, the Poughkeepsie Plan had been declared illegal by decisions of school superintendents on the ground that the wearing of religious garb by the Sisters contributed a sectarian influence and that the Sisters' withdrawal from the world at large made them completely unfit to be public school teachers.[19]

In any event, these decisions were ultimately affirmed by the court under the amendment to the New York State constitution of which we have already spoken.[20] This amendment was explicit in its prohibition of the use of property, credit, or public money of the State, directly or indirectly, in and of any school under the direction of any religious denomination.

Restriction on State Aid to Children in New York

Accordingly, in 1922, New York held that the free distribution, by the City of Ogdensburg, of text books for the use of children attending parochial schools of the Roman Catholic Church was an indirect aid to the schools and hence violative of the State constitution.[21]

Similarly in 1925 New York held a released time program to be unconstitutional since the cards used to check the attendance of the children were printed on public school presses during school hours.[22]

Finally in 1938 New York restrained the Board of Education of the Town of Hempstead from using public funds to furnish transportation for pupils to and from any parochial school pursuant to Section 206 (18) of the New York Education Law.[23] But this time the court was divided four to three. The majority held that *aid furnished indirectly*

> . . . clearly embraces any contribution, to whomsoever made, circuitously, collaterally, disguised, or otherwise not in a straight, open and direct course for the open and avowed aid of the school, that may be to the benefit of the institution or promotional of its interests and purposes. . . . Free transportation of pupils induces attendance at school. . . . Without pupils there could be no school.[24]

On the other hand the minority opinion maintained that having made attendance at school compulsory and having approved attendance at parochial schools, the action of the legislature in providing transportation to insure attendance and to safeguard the health of the children was in aid of the children and not in aid of the school.

Public opinion supported the minority opinion and in due course the Constitution was amended so as to permit the use of public funds to transport children to and from denominational schools.[25]

New Jersey School Bus Case

But soon a new threat to incidental state aid for Catholic children developed in

[19] See decisions No. 4516, 1896, Durant v. West Troy Dist., No. 4546, 1897, Kennedy v. Watervliet Dist., No. 4642, 1898, Lockwood v. Corning Dist., No. 4722, 1898, Keyser v. Poughkeepsie Dist.

[20] See O'Connor v. Hendrick, 109 App. Div. 361, 96 N. Y. Supp. 161 (1905), *aff'd* 184 N. Y. 421, 77 N.E. 612 (1906).

[21] Smith v. Donahue, 202 App. Div. 656, 195 N. Y. Supp. 715 (3d Dep't 1922).

[22] Stein v. Brown, 125 Misc. 692, 211 N. Y. Supp. 822 (Sup. Ct. 1925).

[23] Judd v. Board of Educ., 278 N. Y. 200, 15 N.E.2d 576 (1938).

[24] *Id.* at 212, 15 N.E.2d at 582.

[25] N. Y. CONST. art. 11, §4.

Ewing, New Jersey. In order to understand the *Everson* case,[26] or the New Jersey School Bus Case as it is sometimes called, a bit of constitutional history is necessary.

We have already seen that the First Amendment provided that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. In 1866 the Federal Constitution was again altered by the Fourteenth Amendment which reads in part as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .[27]

But it was not until 1925, in the case of *Gitlow v. New York*,[28] that the Supreme Court held that the First Amendment was now applicable to the states.

The principle of law enunciated in this decision was startling. If appealed to in 1894 it might have invalidated the Poughkeepsie Plan even before the New York State constitution was amended. But the principle was now the basis of an attack on a statute already upheld by the New Jersey courts which had permitted the Board of Education of the Township of Ewing to recompense parents for bus fare expended by their children in traveling to and from a religious school.

The Supreme Court upheld the legislation in spite of attacks based on the due process clause and the establishment of a religion. But the decision was not a victory for religious education. The Court had divided five to four and the minority had written two vigorous dissents. But even the majority opinion of Mr. Justice Black contained language which foreshadowed difficulties to come.

"Neither a state nor the Federal government can set up a church,"[29] said Mr. Justice Black. "Neither can pass laws which aid one religion, aid all religions or prefer one religion over another. . . ."[30] "The First Amendment has erected a wall between church and state."[31]

Although the Court had declined to base its decision in the Oregon School Case on a metaphor which called the public school "a melting pot," the language of the School Bus Case thus appeared to establish, as a principle of constitutional law, an equally rhetorical and inaccurate metaphor.[32]

The McCollum Case

The dangers inherent in the Court's reliance upon a metaphor in the School Bus Case were soon realized.

The Champaign, Illinois, Board of Education had established a program of religious instruction in public schools for children whose parents had given written consent. Classes for separate religious groups were taught once a week for less than an hour in the public school classroom by Protestant teachers, Catholic priests and a Jewish rabbi. Attendance reports of children participating in the program of religious instruction were prepared by the public school teachers while children not so participating were sent elsewhere in the building to pursue their secular studies.

But a Mrs. Vashti McCollum, whose

[26] Everson v. Board of Educ., 330 U. S. 1 (1947).

[27] U. S. CONST. amend. XIV, §1.

[28] Gitlow v. New York, 268 U. S. 652 (1925).

[29] Everson v. Board of Educ., 330 U. S. 1, 15 (1947).

[30] *Ibid.*

[31] *Id.* at 18.

[32] Pierce v. Society of Sisters, 268 U. S. 510 (1925).

child was enrolled in the Champaign public school, attacked the plan in the courts of Illinois. Failing to convince the state courts, she appealed to the Supreme Court of the United States. This time she succeeded and the Court held, in an opinion by Mr. Justice Black, that the Champaign arrangement was in violation of the constitutional principle of separation of Church and State, as expressed in the First Amendment and made applicable to the States by the Fourteenth Amendment, and accordingly that the state courts below had acted erroneously in refusing relief to the complainant, parent and taxpayer, against the continued use of school buildings for such religious instruction.[33]

This conclusion was supported further in a separate concurring opinion by Mr. Justice Frankfurter,[34] in which the historical backgrounds of the principle of separation of Church and State, and of "released time" arrangements, are considered at length.

Mr. Justice Jackson, in an additional opinion,[35] although concurring in the result, expressed doubt as to the standing of the complainant to raise the question at issue and also felt that the relief granted, prohibiting all religious instruction in the schools, was too broad and indefinite.

Mr. Justice Reed dissented[36] on the ground that the cooperative "released time" arrangement did not involve either an "establishment of religion" or "aid" to religion by the State sufficient to justify the Supreme Court in interfering with local legislation and customs.

[33] McCollum v. Board of Educ., 333 U. S. 203, 210 (1948).

[34] *Id.* at 212 (concurring opinion).

[35] *Id.* at 232 (concurring opinion).

[36] *Id.* at 238 (dissenting opinion).

Rarely in the history of the Supreme Court has an opinion been subjected to such severe scrutiny, such lavish praise, such unmitigated condemnation. Enemies of religion, educationists who sought to widen their grasp and influence on American education welcomed the decision in extravagant terms. Proponents of "released time" programs expressed disagreement and disappointment. But the most devastating attack came from one of the country's most respected scholars in the field of constitutional law, Professor Edward S. Corwin, a non-Catholic, interested in the constitutional questions involved rather than the religious and educational overtones.

Professor Corwin cited six senior arguments against the decision in the *McCollum* case. Most forceful, however, were these:

> . . . [T]he decision is seen to stem from an unhistorical conception of what is meant by "an establishment of religion" in the First Amendment. The historical record shows beyond peradventure that the core idea of "an establishment of religion" comprises the idea of *preference*; and that any act of public authority favorable to religion in general cannot, without manifest falsification of history, be brought under the ban of that phrase. Undoubtedly the Court has the right to make history, as it has often done in the past; but it has no right to *remake* it.
>
> Finally, this question may be asked: Is the decision favorable to democracy? Primarily democracy is a system of ethical values, and that this system of values so far as the American people are concerned is grounded in religion will not be denied by anybody who knows the historical record. And that the agencies by which this system of values has been transmitted in the past from generation to generation – the family, the neighborhood, the church – have today become much impaired will not be seriously questioned by anybody who knows anything about contemporary conditions. But what

this all adds up to is that *the work of transmission has been put more and more upon the shoulders of the public schools.* Can they, then, do the job without the assistance of religious instruction? At least, there seems to be a widely held opinion to the contrary.[37]

The Zorach Case

Once before, the Supreme Court, in the case of *Minersville School District v. Gobitis,*[38] had restricted religious liberty in a case involving the public schools by upholding the suspension of a child, a member of the Jehovah's Witnesses, who had refused to salute the flag of the United States on the ground that such a salute is forbidden by a command of Scripture. Upon sober second thought the Court overruled itself in a similar case, *Board of Education v. Barnette,*[39] only Mr. Justice Frankfurter, who had written the *Gobitis* opinion, dissenting.

Consequently, when the New York "released time" program came before the United States Supreme Court, in the case of *Zorach v. Clauson,*[40] its sponsors hoped for a more sympathetic reception than had been tendered the Illinois plan. Justices Black, Frankfurter and Jackson could see no significant difference between the systems and said so in vigorous dissents. The majority of the Court, however, speaking through Mr. Justice Douglas, distinguished the cases on the ground that the New York system did not involve religious instruction in public schools or the expenditure of public funds.

Evidently referring to the "wall of separation between church and state" which figured so strongly in the School Bus Case,[41] the opinion said in part:

> The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other – hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; "so help me God" in our courtroom oaths – these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court."
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> . . . We are a religious people whose institutions presuppose a Supreme Being . . . When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.[42]

And so we begin to discover a hopeful, optimistic note. Under God this nation has gone far towards establishing a modus vivendi among the divergent groups of our pluralist society.

Parents are free to supervise the edu-

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[37] Corwin, *The Supreme Court as a National School Board,* 14 LAW & CONTEMP. PROB. 3, 20-21 (1949).

[38] 310 U. S. 586 (1940).

[39] 319 U. S. 624 (1943).

[40] 343 U. S. 306 (1952).

[41] Everson v. Board of Educ., 330 U. S. 1 (1947).

[42] Zorach v. Clauson, 343 U. S. 306, 312-14 (1952).