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IN OTHER PUBLICATIONS

Religion and Minors

The courts of England have more than once disclaimed any ability or inclination to decide between the respective merits of one religion and another—which affords the greater benefit or the more profound spiritual guidance to its adherents. The question however has arisen in several cases of the particular religious faith in which a young child, the subject of proceedings before the court, ought to be nurtured. It is a question on which the law in England as well as in this country may be said to have grown less definite over the years.

The October 15, 1962 issue of *The Solicitors' Journal* examines into the English law on this perplexing subject and offers an interesting analysis of the pertinent cases. According to the note, at common law the father had very strong rights in the matter, as is affirmed in *Andrews v. Salt* (1873), 8 Ch. App. 622. That case also shows that the father's rights could be abandoned by him. But on the common law has been grafted, as is well known, the two-fold principle now embodied in s.1 of the Guardianship of Infants Act, 1925, namely, (1) that, in any proceeding before any court concerning the custody or upbringing of an infant, the welfare of the child shall be the first and paramount consideration, and (2) that the court shall

not take into consideration whether from any other point of view the claim of the father is superior to that of the mother, or vice versa.

This principle gives only the most general kind of guidance to the court, as is entirely consistent with modern thinking on such family questions. The emphasis has happily moved away from parental "rights," which tended to deny the child dignity and a status of his own. Nevertheless, the 1925 section is not without its limitations. It was pointed out by Eve, J., in *Re Thain* (1926), Ch. 676, at p. 684, that Parliament has not said that the welfare of the child is to be the only consideration; in fact, the word "paramount" suggests that there are others which have to be taken into account, and among these "the wishes of an unimpeachable parent undoubtedly stand first." This dictum has recently been endorsed by Lord Evershed, M.R., in *Re O (Infants)* (1962) 1 W.L.R. 724.

Further, the second part of the statutory principle is directed only to the regulation *inter se* of the rights of parents, and the Court of Appeal in *Re Carroll* (1931) 1 K.B. 317, held that it could therefore have no application to the case of an illegitimate child. The somewhat remarkable *Carroll* litigation resulted, because of this finding, in a decision that the mother of an

illegitimate child had a legal right to require that it should be educated in the religion of her choice, and that despite the fact that over a year before the ultimate decision, she had consented to the child's adoption by Protestant adopters in whose custody it had ever since been.

In the case of a legitimate child, however, the 1925 Act does not cease to apply merely because of the death of one or both of the parents. This was held in *Re Collins (an Infant)* (1950) Ch. 498, where both parents were dead, and the rival creeds were advocated respectively by the infant's paternal and maternal grandparents. The rejection of the argument that in these circumstances the father's wishes again became paramount, as at common law, left the Court of Appeal free to approve the decision of the learned judge not to disturb the child by removing it from the Congregationalist family where it had been for two and a half years. The father had been a member of the Roman Catholic church.

Moreover, the boy whose future was in issue in the *Collins* case had been baptised into the Roman Catholic church. No doubt baptism is one of the factors which have to be taken into account, but *Re Collins* is not the only case in which, as regards a young child, it has not been sufficient to outweigh other considerations. That was the situation, too, in *Re Violet Nevin (an Infant)* (1891) 2 Ch. 299, in which the judgments of Chitty, J., and the Court of Appeal display an enlightenment on the whole subject of infant welfare more akin, if we may say so, to the thought of this century than the last. They were concerned with an orphan infant with no legal guardian but with a kindly relative who had looked after the child, at the father's

dying wish, for several years. The father had been a Protestant but, before marrying his wife (a Roman Catholic), had signed a document undertaking to have any children of the marriage brought up in the Roman Catholic faith. This undertaking had been implemented to the extent that the child had been baptised accordingly, but it was not legally binding on the father, and the court declined to infer that in the events that had happened he would have wished his young daughter to be taken away from her relative on religious grounds—for the relative was a sincere Protestant, not willing to undertake the legal guardianship if it were subject to a direction to bring up the child in the Roman faith. The court gave no such direction, holding that in the circumstances the only question before it was the child's welfare, having due regard to the wishes of the father. Possibly the only modification which a present-day court would import into this criterion would be the taking into account of the mother's wishes as well as the father's; and since 1925 the paramount consideration of the child's well-being obtains whether or not the infant is an orphan.

Re G (an Infant) (1962) 2 W.L.R. 1010; p. 282, *ante*, related to an illegitimate child under the age of one year, and there was no evidence that it had been baptised at all. Nor was there any positive evidence of the religious faith of the mother, or any mention in the report that she had expressed any views on the matter. The problem of religion arose because the applicants for a provisional adoption order in respect of the child were of the Jewish faith.

A provisional adoption order is one newly authorised by the Adoption Act, 1958, whereby the High Court or a county

court may authorize the custody of an infant to be given to prospective adopters who are domiciled outside Great Britain and who would not therefore qualify as applicants for a full adoption order. It is contemplated that the applicants, if successful, will take the child to the country of their domicile and there seek to complete the adoption. The ordinary conditions precedent to the making of an adoption order have to be satisfied in such a case in addition to some others, *e.g.*, there must be expert proof of the law of the country in which the adoption proper is to take place.

All was in order with the application, and the county court judge therefore had a discretion to make or to refuse the provisional order. He refused it, giving as his only ground for so doing the fact that England was a Protestant Christian country and that he did not feel it right, nor did he propose, to grant an application for a Protestant child to be adopted by parents of the Jewish faith.

The English Court of Appeal was satisfied that this was not a proper exercise of the judge's discretion. To take into account only this one matter was to give it an exaggerated importance. Willmer, L.J., did point out, it must be added, that in a great many cases the matter of religious faith may be a most important consideration, and can be vital where the infant is sufficiently old to appreciate and have some understanding of any change that would be involved.

The Thalidomide Case

The recent disquieting verdict at Liege, Belgium in the thalidomide case has prompted an interesting comment in the November 17, 1962 issue of *The London Tablet*.

According to the *Tablet*, Belgium has a very large Catholic population, but also a very large Liberal and Socialist one, with the Catholic strength among the Flemish, and the Liberal and Socialist strength among the French-speaking Walloons. The law has to be a law for both, and does not profess to be the projection of Catholic moral theology, or to impose on non-Catholics a Catholic teaching which sees earthly life essentially in terms of preparation for a real life that is only to begin when this brief, crucial period of moral formation ends. On non-Christian grounds, the Christian legal tradition remains much the best.

A certain number of babies are born blind, and it could well be argued that so terrible an affliction makes them fit subjects for mercy-killing. In fact, they are not killed, but surrounded with special care and grow up with a vivid sense of all the other possibilities of life that remain open to them; and it would deeply shock the moral conscience of the nation if it was suggested that in view of the great handicap with which they come into the world, they should be put painlessly out of it. This general sentiment is particularly strong among those most concerned, to whom the idea of destroying their own offspring is particularly abhorrent.

Neither parents nor doctors are really in a position to act as judges of life and death. It is a very serious precedent if a doctor may prescribe poison at the request of a third party. It was stated in the Liege trial that of seven to eight thousand thalidomide babies, nearly half have already died. Very often the expectation of life is very small for the visible defects are matched by internal malformations. But it will never be known how far another cause has been at

work, the deliberate termination of life, even though the doctors have known that what they were doing could be adjudged murder by the law, and be condemned by their colleagues.

So the question prompts itself whether if the Liege acquittal comes to be taken as an "all-clear" signal, where the line will be drawn. Both in antiquity and in Asia today unwanted children have been and are exposed. But for the immense strength of the Christian moral tradition, the lives of many babies would have been ended in the last century, on the ground that they had been brought into the world so near the starvation line as to have little or no chance of well-being. Many nineteenth-century economists took a callous and fatalistic line about the inevitability of starvation for large numbers, but they did not advocate that the babies so badly placed at birth should therefore be killed.

The comment concludes with the observation that now that the evils of thalidomide have been discovered, it is hoped that this particular tragedy will not recur, and it is very much more with the aged than with the newly born that the controversy will be concerned. The decisive argument against euthanasia being legally approved is that it would poison the atmosphere in the closing months or years of life, suggesting the perhaps unspoken thought, whenever an old and sick person complained that the remedy was in their hands, and they had only to send for the doctor. Perhaps there would be in the air the suggestion that they were being selfish in not doing so, and that their sufferings instead of being accepted with resignation, or seen as in the Christian tradition as opportunity, should be thought to point naturally to the final solution. Just as there have been

peoples which have killed their female children, or of either sex if deformed, so there have been peoples which have killed off the old and infirm, as being no good to themselves or anyone else. People who believe themselves to be more humane and progressive than others in advocating mercy-killing do not know what they are doing, or where what they have started can very well end, and both the law of the land and the code of the medical profession must be adamant in maintaining as their basic principle, the sanctity of human life.

Desegregation

William Kenealy, S.J., has contributed another significant article on the racial issue in the January 1963 *Catholic Mind*. In view of the patent inadequacy of private effort and persuasion, the author justifies federal intervention to prohibit segregation.

Father Kenealy proposes that in view of the persistence of some states in positively imposing segregation by law, the federal government should make vigorous use of its legislative, executive and judicial powers, under the Civil War Amendments, to combat the gross immorality of racial segregation throughout the United States.

His proposition is not based upon the naive thesis that government, state or federal, should attempt to enforce all morality. He essays no lyric leap from morality to legality. Morals and law are related and interdependent. But they are not identical. Their respective fields are not coterminous. The field of law is not private morality but public morality only: that is, justice and liberty as they affect the common good and public welfare of society. But equal liberty under law, equal protection of law, and equal voting rights by law, regardless of race or color, are obviously matters of so-

cial justice and, therefore, of public morality. Moreover, and of critical importance to his argument, they are social rights which have been expressly incorporated into our federal constitution and thereby solemnly guaranteed to all Americans as fundamental federal rights.

The thirteenth amendment abolished slavery. The fourteenth and the fifteenth established federal constitutional guarantees against any state law or state action violating equal liberty under law, equal protection of law or equal voting rights according to law. These fundamental moral rights are now fundamental federal rights.

According to Father Kenealy, in our constitutional system, the States have their own responsibilities, of course, to obey federal law and to respect federal rights. Nevertheless, the superior, the paramount and the ultimate responsibility for the enforcement of federal law and federal rights has been entrusted by the nation, for the benefit of every American, to the federal government. Therefore, when states openly defy the federal constitution, notoriously repudiate their responsibilities to federal law and persistently violate the federal rights of millions of Americans, it seems to him that the federal government has a clear constitutional obligation to respect its own superior responsibility, to use its paramount authority and to honor its ultimate national trust. He proposes that it should do this by alert and vigorous exercise of its legislative, executive and judicial powers under the Civil War Amendments. It is a matter of social justice.

The Prayer Case

The latest on the *Engel v. Vitale* decision comes from the *American Bar Association Journal* of September 1962 in an

article by Gerald Kirven entitled "Freedom of Religion or Freedom from Religion?"

The controversial decision of the Supreme Court in banning the New York "Regents' Prayer" has led Mr. Kirven to ask whether an overzealous regard for the rights of a minority may have resulted in a distortion of the first amendment. He reasons that the price of nonconformity in a religious society, if the United States indeed be a religious society, may be to endure in schools and in society at least identification as nonconformist. The alternative could be minority imposition of abolition of religious influence in schools and perhaps ultimately in society at large.

In conclusion, he argues that while our courts must always intercede to prevent infringements upon freedom of religion, the courts should guard against decisions which will identify the power of government with anti-religion. Freedom of religion does not compel the entire denial to public school children of the influence of religion in their schools. The government is not neutral in the matter of religion when, at the instance of one already adequately protected from compulsion, it lends its power to the suppression of religion and thereby champions the cause of freedom from religion.

Censorship and Prior Restraint

Patrick D. McAnany, S.J., writing in the current issue of the *Kentucky Law Journal*, presents a series of scholarly and logical arguments for the constitutionality of prior restraint in the area of movie censorship in an article entitled, "Motion Picture Censorship and Constitutional Freedom."

According to Father McAnany, the states and communities which have adopted

film licensing techniques have pleaded necessity as a justification for departure from the traditional use of subsequent punishment as a means of control. The argument is that films present a unique problem in matters of obscenity. If they are not reviewed before showing, the remedy of prosecution under criminal statutes comes too late to avert the evil. With the modern theatres holding mass audiences and the program of multiple distribution within the state, piecemeal prosecution is simply impractical. Furthermore, the punishment falls upon the wrong person. The exhibitor is not always able to choose the type of films he shows. Thus the real culprits, the producers and distributors, lose only a certain box-office "take" and nothing more. The solution lies, then, in a system of prior review and licensing of films which protects the community and exhibitors at the same time.

Prominent among other reasons for justifying prior control of films ranks the fact that movies are considered an entertainment medium. Since the theory of constitutional liberty had been traditionally associated with the political process, for a long time entertainment was regarded as unprotected. But by 1942 protection began to be extended. Even here it was not clear whether the protection was given on the basis of the Constitution or from an inability to distinguish entertainment from the expression of ideas. But it was clear from what happened in the area of motion pictures that the protection was not of the same quality as that afforded other media or the press. Hence the proposition about freedom of entertainment could be put thus: entertainment was equally protected with other speech, but that protection would be unequally withdrawn since its

social value was not of the same weight as that belonging to other areas of expression. Whatever one may think of a theory of social utility in the matter of speech, the facts in the film cases seem to point up its current adoption by the majority of the Court.

Other differentiating elements are less theoretical. The fact that obscenity has become almost the only standard proper for film censorship indicates the narrow scope which the licensing power of the censor now has. This was not always the case. There was a time when the censor was given a mandate to rove at large behind such indefinite standards as "the best interests of the people." Then, too, a distinctive feature of film control is the fact that the speech in question is before the licensing official so that judgment on it is not of a conjectural nature. Where an official issues a license to speak based on evidence entirely extrinsic to the speech itself, there is grave danger that his judgment will prevent a legitimate communication of ideas. But where, as in film licensing, the speech itself is before the official as it will be presented to the public, at least the denial of license can be compared to the speech questioned. Further, the distinction between restraint falling on communication before publication and after might be behind the Court's sustaining motion picture licensing, especially where it is done on a community, and not a state, basis. The film is already published and may have been shown elsewhere in the state before it is reviewed by the local board of censors. It would seem captious to demand that each film should have one free showing and then allow the state to step in with the censor. This would hardly be a constitutional distinction on which protection could be

based.

The author concludes, in part, that the use of prior licensing of motion pictures is a unique experiment in peace-time censorship which has against it traditional distrust and Supreme Court dicta, not to say a bad personal record. Still the Court has refused to strike it down as a system of control. The answer to the conundrum of why the Court has continued to endorse the use of prior restraint in an area of free expression lies in the unique features of the movies as a medium and the subsidiary problem of obscenity. Further, the invalidation of a whole system of control seems to go beyond the purposes of the Court and encroach upon the policy choices of the state. Mr. Justice Black has complained that the Court should not place itself in the midst of such policy questions as obscenity and motion pictures, but by invalidating an entire method of control in the abstract the Court would have effectively set policy for the state. It is from a respect for the federal system and the separation of powers that the Court has continued to pursue a method of balancing which answers to the demands of each case, without at the same time refusing to give certain general principles as a guide to the future.

Aid to Education

Patrick D. McAnany, S.J. whose scholarly dissertation in the *Kentucky Law Journal* on prior restraint has already been discussed above, has an equally challenging paper in the October 1962 issue of the *University of Kansas Law Review*. Writing on the constitutionality of government aid to church-related schools, Father McAnany argues that in an orderly society, it is inevitable that a benevolent state and moral-

centered religion will have concurrent interests. Tax exemption of religious institutions is an undeniable recognition of the fact that these institutions do serve a public purpose sufficient to warrant assistance. If tax exemptions were granted to all non-profit institutions except those of stated religious preference, the state would without doubt be discriminating against religion. In the Sunday closing law cases, the Court has effectively resolved concurrent state-church interests in recognizing that the Christian church has a special interest in the observance of Sunday while noting that the state has a valid interest in having all citizens observe one day of rest. If justified only by religious considerations, the Sunday closing laws would automatically be targets for condemnation; however, governmental action serving a valid public purpose escapes the bar of invalidity even though it operates simultaneously to promote religious interests. Similarly, under the Federal Hill-Burton Act, government funds are employed to assist in the construction of new and additional hospital facilities despite the fact that hospitals benefiting within the program are owned and maintained by religious groups or associations.

There are few who would contest the right of the federal government to finance the construction and maintenance of chapels on military reservations, or as a necessary incidence of this activity, to pay the salaries of military chaplains who perform a religious ministry to personnel in the armed forces. Supplying a chaplain's service is an integral part of the government function of maintaining morale and preserving a respectable moral order within the service family. The atheist, the agnostic, the ethical culturalist may wince at the

thought of having to contribute to a practice which so openly supports adherence to a formal creed. Nevertheless, persons of this genre must realize that their expressed intentions to be different should not detract from the right of many others to worship as they see fit. Far from outlawing the use of public funds for any religious purpose, the first amendment in fact dictates that such funds, in certain defined cases, must be expended to guarantee the right to practice the religion of one's choice.

In conclusion he submits that parent and child have a constitutional right to choose a church-related institution so long as that institution meets reasonable educational standards prescribed by the state. To insure enjoyment of this right, the federal

government must never be granted the power to impose a single educational system upon the people, either directly or indirectly by exerting formidable economic pressure. Inasmuch as education in church-related schools can and does perform a public service, some degree of governmental support is recommended. No reasonable constitutional bar exists so long as government aid to church-related schools is relegated to the performance of a secular or public function. In the summing up, these are inherently practical problems which are not solved or bettered by monotonous reference to timeworn maxims, shibboleths and slogans. Far from remaining static, the Constitution must forever be reinterpreted in light of living events.

SEPARATION

(continued)

of federal funds to support at least limited assistance for parochial schools as part of a larger program in aid of both public and private schools. Or, if the Court, supported by some of its past decisions, moves explicitly toward a general principle that the Constitution prohibits only the giving of aid to religion and does not require the exclusion of religious bodies in the nondiscriminatory disbursement of funds for social welfare purposes, there will be no difficulty in sustaining federal grants to parochial schools determined on the same basis as grants to public and other private schools. But if the Court in the future repudiates the result in the *Everson* case and elevates the "no aid" idea to the point that no public funds can be used, directly

or indirectly, whatever form the assistance takes, to support any part of an educational program that includes religious instruction, this will spell the answer to the question of using federal funds to aid parochial schools.

One thing is clear, however, and this is that on the basis of what has been done and said in the past, there is no basis for a categorical opinion that federal assistance for parochial schools would be unconstitutional. And until the Supreme Court has an opportunity to pass on the question, Congress, in dealing with the problem, will have to be guided by its own interpretation of what the separation principle, as it has evolved in our history, tradition and constitutional interpretation, should mean in the context of today's problems and with due regard for all the competing considerations that are at stake.