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Religion, Education and the Law

James E. Harpster

RELIGION, EDUCATION AND THE LAW

JAMES E. HARPSTER*

In times past men have argued religious doctrine and religious dogma with great heat, and occasionally with great light. The history of the world is replete with debates on theological themes. Some of them have been momentous, many of them have been merely trite. In pagan days the subject matter concerned the existence or the non-existence of the gods. Shortly after the beginning of the Christian era the debates no longer concerned themselves with the question of whether God exists—that was taken for granted—but with questions of His essence, His Commandments, and the like. Today religion is still an extremely controversial subject. But we seem no longer to be interested in doctrinal accuracy. Our society is more interested in the externals of religious practice.

On one side of the present conflict are those who still believe that the worship of God constitutes the most important single element in man's existence. They therefore hold for the religious education of the nation's youth so that they may grow with a knowledge of God and their duty to Him. On the other side stand two groups. First are the atheists and the freethinkers who would banish God completely from our midst. The other group is made up of those persons who fear that religious education will weaken constitutional guarantees of liberty. Today God's side is losing.

A most powerful weapon is being leveled at religious education. It is the rather nebulous concept of separation of Church and State. By virtue of the interpretation placed on the first Amendment to the Constitution of the United States, by the proponents of atheism, indifferentism, and secularism, the State is absolutely forbidden to assist in any manner in the religious education of America's children. This of course makes such education difficult, and at times impossible. The arguments advanced and the interpretations put forward have often been extreme to the point of absurdity. Yet the courts of the nation, including the Supreme Court of the United States, have accepted, at least in part, much of what has been presented to them. Religious education has received many severe set-backs by reason of judicial decision, all based on the principle of the separation of Church and State. It is the opinion of this writer that certain of the opinions handed down by the courts will result, not in the separation of Church and State, but in the disintegration of both.

* LL.B., Marquette University; Member of the Wisconsin Bar; Board Member, MARQUETTE LAW REVIEW, 1951-52.

Now there can be no doubt that, properly understood, the First Amendment does provide for the separation of the Church from the State and the State from the Church. Nor can there be any doubt of the wisdom of the provision when properly applied. It is the misapplication of the principle which is mischievous, which is so deleterious to the health of both societies. In this article we will attempt four things: first, to briefly review the law applied by the courts to the various phases of the field of religious education; second, to restate the moral responsibility of the State to safeguard the religious welfare of the nation from harmful influences; third, to interpret the First Amendment as it applies to religion in education; and last, to point out the harm which has and must ensue from stretching the meaning of the First Amendment beyond its manifest intent.

THE LAW

Any decision of the courts on the question of what the federal or state governments may do where religious interests conflict in the field of education depends upon an interpretation of the First Amendment to the Constitution of the United States and the several state constitutions. In its applicable portion the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." In recent years this prohibition on Congress has been extended to state action by judicial interpretation of the Fourteenth Amendment.[1] This latter Amendment provides that,

> "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; nor deny to any person within its jurisdiction the equal protection of the laws."[2]

In addition to these Amendments to the Federal Constitution, the constitutions of all of the forty-eight states have provisions relating to the Church-State relationship.[3] While these provisions are variously phrased, and while slight differences in their application to specified sets of facts do appear, yet they are for the most part of an even tenor and equal intent. The Wisconsin Constitution may be taken as fairly representative of the group, although, as we shall later see, it is interpreted more strictly than most. The three pertinent sections of this Constitution are as follows:

"The right of every man to worship Almighty God according

[1] Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042, 29 A.L.R. 1446 (1923); Hamilton v. Regents of the University of California, 293 U.S. 245, 55 S.Ct. 197, 79 L.Ed. 343 (1934); Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).

[2] U.S. CONST. AMEND. XIV, § 1.

[3] 11 AM. JUR. 1101, CONSTITUTIONAL LAW § 312.

to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any ministry, against his consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries."[4]

"The legislature shall provide by law for the establishment of district schools, . . . and no sectarian instruction shall be allowed therein."[5]

"Provision shall be made by law for the establishment of a state university at or near the seat of state government, . . . and no sectarian instruction shall be allowed in such university."[6]

From time to time various customs, practices, regulations, ordinances, and statutes have been called into question in the state and federal courts involving questions of whether the education of children has been so handled as to violate the religious principles enunciated in the respective constitutions. The issues thus presented have been various, as have the decisions handed down on any particular issue. Although there is some uniformity in the decisions along certain lines, yet it is not incorrect to say that the law has no settled pattern. What was permissible yesterday is not necessarily so today. And what is permissible in one state is not necessarily so in another. As we shall point out later, there is a secularistic influence creeping into the law which is extending the interpretation of constitutional provisions far beyond their stated intent. On the other hand, the law of physics which states that to every action there is an opposite and equal reaction, has manifested itself in the courts. The extremely unpopular decision in the *McCollum* case[7] has initiated a careful investigation of the law by the legal profession in order to prevent the total exclusion of God from our society. For disappear He will if the education of the nation's children is forever barren of Him.

We have in this article selected ten topics on which we wish to restate the law. These topics are not exhaustive of the subject matter, but they are at least fairly representative. They range from the right of parents to direct the education of their children to released time programs, from the use of public property by religious societies to the wearing of religious garb in public schools. Our plan of attack shall be to present the issue, to summarize a few of the arguments for and

[4] WIS. CONST. ART. I, § 18.
[5] WIS. CONST. ART. X, § 3.
[6] WIS. CONST. ART. X, § 6.
[7] People of the State of Illinois ex rel. McCollum v. Board of Education of School District No. 71, Champaign County, Illinois, 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 649, 2 A.L.R. 2d 1338 (1948); noted 32 MARQ. L. REV. 138 (1948).

against the proposition, to briefly review the law today, and to present our criticism, if any, on legal and moral grounds.

I

THE ISSUE:

Does the State have the sole right to control the education of children?

FOR THE AFFIRMATIVE:

It is the duty of the State to protect the welfare of its citizens. In order to afford such protection the State must control whatever pertains to the common good. The education of children most particularly pertains to the common good, since teachings which are inimical to the public welfare subject the community to dangers of upheaval. To be effective this state control must be exclusive. Therefore, the State alone has the right to control the education of children.

FOR THE NEGATIVE:

The child is not a mere creature of the State. The fundamental theory of democratic government is that the State exists for the benefit of the people, and not that the people exist for the benefit of the State. Admittedly the State has the right to prevent teachings which are inimical to the public welfare, but this is a different thing from saying that the State has the sole right to educate. The education of children is intimately connected with the well-being of the State, and, therefore, the State may require, and indeed has the duty to require, the education of all minors, but this is a different thing from saying that the State has the sole right to educate. Since consideration for the good of the community demands that certain subjects be taught to children for the advancement of good moral and patriotic character, the State may prescribe that these subjects be taught, but, again, this is a different thing from saying that the State has the sole right to educate.

The right of education lies, rather, with the parents of the child. They are responsible for his existence, and they are therefore likewise responsible for his care. They must feed him, they must clothe him, and they must educate him. Having brought the child, helpless, into the world, the parents must relieve this state of helplessness. Since they have the duty, they have the right. Further, they alone have the degree of love and understanding of their particular child to direct his education. Therefore, the right to educate resides in the parents alone.

Since the parent has the right to educate, he has the concomitant right to entrust the child's education into the hands of others whom he designates. He may entrust his child to a public or state school, or he may entrust him to a private school, either religious or secular. In order that the parent may exercise this latter right, there must exist such private schools. Private schools, then, have a right of existence for the

purpose of educating the children entrusted to them. And since private schools have a right to educate, this right necessarily does not belong exclusively to the State.

THE LAW:

In 1922, the people of Oregon, by referendum, adopted the Oregon Compulsory Education Act.[8] This law, which was to become effective on September 1, 1926, provided that every person in the state having charge of a child between the ages of eight and sixteen years was obliged to send that child to a public school, or be guilty of a misdemeanor, exceptions being made for children who were subnormal, who had passed the eighth grade, or who lived too far distant from a public school to attend. Two private schools, one conducted by the Society of Sisters of the Holy Names of Jesus and Mary, a Roman Catholic religious community, and one being the Hill Military Academy, both Oregon corporations, sought and obtained injunctions in the United States District Court for Oregon against the Governor of Oregon and other Oregon officials who were threatening to enforce this law.[9] The defendants appealed to the Supreme Court of the United States. In an opinion by Mr. Justice McReynolds the Court affirmed the decree granting the injunctions.[10] After remarking that the private schools were engaged in an undertaking that was useful and meritorious, rather than harmful, and that there was nothing to indicate that the schools had failed to discharge their obligations to the State, their patrons, or their students, and that there was no indication of a present emergency relative to education which would justify the use of extraordinary measures, the opinion went on to say:

> "Under the doctrine of Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042, 29 A.L.R. 1446, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. 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."[11]

[8] ORE. LAWS (1923) § 5259.

[9] Society of the Sisters of the Holy Names of Jesus and Mary v. Pierce, 296 Fed. 928 (D.C.Ore. 1924).

[10] Pierce et al. v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070, 39 A.L.R. 468 (1925).

[11] *Ibid.*, at p. 534. The same doctrine was stated by the Colorado court in People ex rel. Vollmar v. Stanley et al., 81 Colo. 276, 255 Pac. 610 (1927).

The Court recognized, however, the right of the State to reasonably regulate all schools, private as well as public; to inspect, supervise, and examine them, their teachers, and their students; to require attendance at some school for all children; to require that teachers have the proper moral and patriotic qualifications;[12] to compel the teaching of certain subjects which are plainly essential to good citizenship; and, finally, to prohibit the teaching of anything which is adverse to the public welfare.[13]

By this decision the Supreme Court gave positive law confirmation of a natural law right, viz., the right of parents to direct the education of their children. The private and parochial school derives its right from this inherent right of the parent. The correctness of the Oregon case is not open to dispute.

II

THE ISSUE:

Are antenuptial agreements relating to the religious education of probable children of the union capable of enforcement in the courts of the State?

FOR THE AFFIRMATIVE:

Since a parent has a right to direct the education of his children, he may make a contract relating to this education. And since this right of education resides in both parents equally, and since they may have divergent views, they may contract with each other to let the educational policies of one determine the child's future. If the parents are thus capable of contracting concerning the subject matter, the agreement into which they enter is a valid contract. As a valid contract, it is capable of specific enforcement under the same rules governing the issuance of a decree ordering specific performance for other contracts. The antenuptial agreement fulfills the conditions laid down for other contracts.

FOR THE NEGATIVE:

A court of equity does not have the power to decree the specific performance of a moral duty. Because the State cannot prefer one religion over another, it cannot compel a parent to educate a child in a

[12] This right has just recently been reiterated in Adler et al. v. Board of Education of City of New York, 72 S.Ct. Rep. 380 (1952), in which the Supreme Court upheld the validity of § 12-a of the New York Civil Service Law (N.Y. Laws 1939, c. 547, as amended N.Y. Laws 1940, c. 564) as implemented by the so-called Feinberg Law (N.Y. Laws 1949, c. 360). This statute provided that any member of an organization listed by the Board of Regents as subversive would be ineligible for employment as a teacher in the public schools.

[13] However, in Meyer v. Nebraska, *supra,* note 1, referred to by Mr. Justice McReynolds, the Court held that the State may not forbid the teaching of foreign languages in private schools, such a requirement exceeding the bounds of reasonable regulation, and encroaching on the parental right to direct the education of the child.

specific religion. The right of the parent to educate devolves on him for the benefit of the child, not for his own benefit, and, hence, he can neither irretrievably waive the right nor irrevocably contract it away. Finally, such a decree is extremely difficult to enforce, making its issuance a nullity in many cases, a situation into which courts of equity take care not to fall.

THE LAW:

The cases concerning the religious education of children as defined in antenuptial agreements generally do not arise between the original parties. Rather the controversies generally arise between one parent and the parent of his deceased spouse, or between maternal and paternal relatives of deceased parents who enjoy divergent religious views. For the most part the courts will refuse to grant a decree enforcing such antenuptial agreements, on one or more of the grounds stated in the arguments for the negative given above. At least one court has stated that, where the controversy is between the original parent-parties to the contract, the agreement will estop the challenging parent from exercising his prerogative to educate.[14] This assertion of the court was mere *dicta,* however, inasmuch as the case before the court was between the respective relatives of both deceased parents. A Pennsylvania case[15] found that the material welfare of the child was its primary concern, and was able to pass over the question of the validity of the antenuptial agreement when the children's paternal grandfather (opposed in the custody suit by their maternal grand-aunt), who was not of the religious preference designated in the agreement, agreed to raise the children in their mother's faith until they were old enough to choose for themselves. The grandfather was made the children's guardian. Pennsylvania had a statute which provided that in the appointment of guardians, persons of the same religion as the parents of the child were preferable. The court apparently felt that the grandfather's promise was equivalent to this preference. This seems doubtful, however, since the grandfather probably had little sympathy for such education, and was certainly incompetent to impart it himself. The influence of the household will most often outweigh formal instruction given in parochial or Sunday schools.

There are many persuasive arguments on each side of this issue. On the whole the American courts have decided against the enforcement of contracts which determine the religious education of children. The wisdom of such decisions is questionable, however, in view of the fact that the parties themselves consider the contract so important that in

[14] In re Luck, 10 Ohio Sup. & C.P. Dec. 1 (1899).
[15] In re Butcher's Estate, 266 Pa. 479, 109 Atl. 683 (1920).

many cases, notably those in which one of the parties is Catholic, the marriage would never have been celebrated without it.

III

THE ISSUE:

May students of private sectarian educational institutions be compelled by the regulations of such institutions to take part in religious and other exercises when such exercises are in opposition to their own particular faith?

FOR THE AFFIRMATIVE:

Private sectarian schools and colleges are set up and supported by members of religious congregations for the purpose of inculcating in their children the religious doctrines and principles in which they believe. Such schools and colleges, being private, are under no obligation to take in students belonging to some faith other than their own. Since they need not take in such students, any admission of them is an act of hospitality. The schools may condition the extension of their hospitality on an acceptance of their rules and regulations by the student. The student's only alternative to a compliance with these rules is withdrawal from the school. Should the student accept neither alternative the school may withdraw its hospitality and drop him from its roster.

FOR THE NEGATIVE:

Students must often attend a sectarian school in order to receive an education. By threatening to withdraw this education from the student, the school is applying economic or other sanctions to compel him to attend a religious exercise against the dictates of his own conscience. Compulsory attendance at a religious worship is a violation of the student's constitutional rights. It is immaterial whether the coercion is applied by the State or by an individual, it constitutes a denial of religious freedom under either circumstance.

THE LAW:

The cases on this particular issue are not numerous. The question can only arise where a student seeks to take advantage of certain opportunities which are open to him only at a sectarian school, either because of the availability of certain courses or instructors, or because of his individual economic circumstances, and yet at the same time wishes to avoid those obligations which the school imposes on all of its students. The average student accepts the, to him, disagreeable features of the school in order to obtain those benefits that he most particularly wants from it. He does not usually jeopardize these benefits by a court action. This accounts for the scarcity of cases on the question.

When a student matriculates in a private school it is commonly understood that he, or his parent, is entering into a contract with that

school. Implicit in that contract is the student's stipulation that he will abide by the regulations of the school.[16] Dismissal will result from a breach of this stipulation.[17] The City Court of Buffalo, New York, found against the school, however, when this issue was presented. The school, a military academy, had a regulation which required Sunday attendance at various Christian churches in a local village. A Jewish student refused to attend a Presbyterian church because its teachings were in opposition to his own religious convictions. There was no church of this student's faith in the village. The academy offered to let him attend his own church some fourteen miles away at his own expense. This offer was declined, and the student was consequently expelled. The school then brought an action to recover the full amount of the tuition for the school term during which the expulsion took place. The contract between the school and the parents provided for such payment. The court denied recovery, holding that compulsory church attendance was not part of the school's curriculum as provided by the contract. The court found that the statement in the catalogue referring to church attendance was inconspicuous, and the regulation was not contained in a list of regulations contained elsewhere in the catalogue. The court went on to say that even if this requirement were considered a part of the contract, it would be invalid as applied to a non-Christian student.[18] It is significant that this decision was reached in a case where the student was no longer in attendance at the school. There is nothing in the case to suggest that a school must keep on its roster a student who will not abide by its regulations.

Although the decisions on private school regulations involving the practice of religion are rare, there are several cases in which the prescriptions of public institutions of higher learning have, or were alleged to have, violated religious convictions. At least two cases have upheld the right of state universities to prescribe courses in military training for all students, notwithstanding that such training might be in violation of the religious beliefs of some of the students.[19] In *Hamilton v. Regents* the parents of two students brought into question the validity of an order of the Regents of the University of California requiring every able-bodied male student to take a course in military science. The petitioners contended that the order was a deprivation of liberty without due process of law in violation of the guarantee of the Fourteenth

[16] Teeter v. Horner Military School, 165 N.C. 564, 81 S.E. 767, 51 L.R.A. (N.S.) 975, Ann. Cas. 1915D, 309 (1914).

[17] "It is well established by a long line of decisions in practically all of the states in the Union that a private school has power to adopt rules for the regulation of its pupils, and to dismiss pupils who violate them." Hoadley v. Allen, 108 Cal. App. 468, 291 Pac. 601, 602 (1930).

[18] Miami Military Institute v. Leff, 129 Misc. 481, 220 N.Y.S. 799 (1926).

[19] Hamilton v. Regents, *supra,* note 1; Pearson et al. v. Coale et al., 165 Md. 224, 167 Atl. 54 (1933).

Amendment of the Federal Constitution. The Supreme Court of the United States upheld the order of the Regents. The Court said:

> "There need be no attempt to enumerate or comprehensively to define what is included in the 'liberty' protected by the due process clause. Undoubtedly it does include the right to entertain the beliefs, to adhere to the principles and to teach the doctrines on which these students base their objections to the order prescribing military training. (Cases cited.) The fact that they are able to pay their way in this university but not in any other institution in California is without significance upon any constitutional or other question here involved. California has not drafted or called them to attend the university. They are seeking education offered by the State and at the same time insisting that they be excluded from the prescribed course solely upon grounds of their religious beliefs and conscientious objections to war, preparation for war and military education. Taken on the basis of the facts alleged in the petition, appellants' contentions amount to no more than as assertion that the due process clause of the Fourteenth Amendment as a safeguard of 'liberty' confers the right to be students in the state university free from obligation to take military training as one of the conditions of attendance.
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> "Viewed in the light of our decisions that proposition must at once be put aside as untenable."[20]

An even more decided case involved a regulation passed by the Trustees of the University of Illinois which required all students to attend non-sectarian religious services in the university chapel.[21] This provision was attacked as being violative of the Constitution of Illinois which prohibited compulsory attendance at a place of worship. The Illinois court held that compulsory attendance at chapel was not compulsory attendance at a place of worship, and the regulation was upheld.[22]

IV

THE ISSUE:

Is the exemption of sectarian school property from taxation an unlawful state aid to religion?

FOR THE AFFIRMATIVE:

The constitutions of all states provide in some manner that no person shall be compelled to support any church. The guarantee of the First and Fourteenth Amendments re-enforce these state constitutional provisions. If the State exempts church or sectarian school property from

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[20] Hamilton v. Regents, *supra,* note 1, at p. 262.

[21] North v. Board of Trustees of University of Illinois, 137 Ill. 296, 27 N.E. 54 (1891).

[22] The decision in these cases would probably have been different had attendance at the universities been compulsory under state compulsory education laws. However, see Topic VII, p. 42, *infra,* for a discussion of those considerations which might permit the same result even if attendance at the universities were compulsory.

taxation, it is helping to further the beliefs of those particular sects. Further, such exemptions proportionately increase the taxes which the remaining property holders must pay. This has the effect of compelling every taxpayer to support any religion so favored and to help propagate its tenets. Such compulsion is a violation of his constitutional rights.

FOR THE NEGATIVE:

While undoubtedly the exemption of sectarian school property from taxation constitutes an aid to religion, such aid is not unlawful. Thirty-two state constitutions specifically allow such exemptions, fifteen of them making it mandatory. In the remaining sixteen constitutions there is an implied power vested in the legislature to exempt property from taxation. The right to tax carries with it the concomitant right not to tax. Further, one provision of a constitution (that prohibiting involuntary support of religious societies) cannot be interpreted in such a way that a more express provision (that exempting or allowing an exemption of property devoted to religious uses) will be nullified.

Nor can it be argued that the tax exemption of religious property results in an involuntary contribution to the religious societies holding such property. Nothing is given to these groups; it is just that nothing is taken from them. That the tax rate of other taxpayers is thereby increased does not seem to be material, since their money goes, not to religion, but to those public uses which the State maintains through the use of public moneys.

Nor is it unlawful for the State to discriminate in its taxation of property, providing there is a reasonable basis for the State's classification into taxable and non-taxable property.[23] The classification which exempts school property, even though sectarian, is reasonable, since such schools are dedicated to the public use.

THE LAW:

Church and school property have been held tax exempt since early in our history. Such exemptions were in effect long before they were codified into constitutional or statutory provisions. At one time the Church was considered an agency of the State, and necessarily tax exempt since the State would not tax itself. As this idea disappeared, the exemption was based on the benefit which the public received from religious worship and education. The notion soon gained ground in the courts, however, that only such property was tax exempt that was specifically exempted by provision of law. As a consequence of this doctrine, all states have provided for such exemption either in their constitution or by statute. The exemption extends to all sects and

[23] "There is nothing in the Fourteenth Amendment that requires land and stock to be taxed at the same rate or by the same tests. . . ." Klein v. Board of Tax Supervisors of Jefferson County, Kentucky, 282 U.S. 19, 24, 51 S.Ct. 15, 16, 75 L.Ed. 140, 143, 73 A.L.R. 679, 682 (1930).

religious groups, and there is, therefore, no question of state preference of one religion over another.[24]

In Iowa, as in Wisconsin, there is no constitutional provision either demanding or allowing tax exemptions for churches or religious schools. Iowa passed an exemption statute, and, in 1877, an action was brought to have the statute declared unconstitutional as violative of the provision forbidding the compelling of any person to pay taxes for the construction or maintenance of any church or other place of worship. The court upheld the statute, however, on the ground that the prohibition in the Iowa Constitution referred only to the levying of taxes for Church purposes, and not to an exemption of property taxes for churches.[25]

Most courts require that a sectarian school be devoted to the public in order for it to come within the exemption.[26] Thus, a religious academy for girls was held not exempt where the school charged $1,000 a year in tuition, since only a limited number of people could attend under these conditions. It was not an institution "sequestered from private use and dedicated to public use."[27] Any institution which has for its purpose the making of a profit does not come within the exemption, whether or not such profit is ever made.[28] However, the mere fact that a school charges tuition and makes a profit thereby will not prevent its property from being tax exempt if the profit is again turned back into the school.[29]

The exemption of religious property has long enjoyed widespread public support, and rightly so, for, whether it is held that the State may aid religion or not, it is clearly immoral for the State to impose burdens upon it."[30]

V

THE ISSUE:

Is the use of religious property as a public school a violation of the Federal or state constitutions?

FOR THE AFFIRMATIVE:

By using religious property for public school purposes, the State is aiding a particular religious organization in two ways, both unconstitu-

[24] "The circumstances that Bible teaching and religious instruction are made a prominent feature in the course of study does not make the academy any less an educational institution; nor does the fact that it is a denominational school prevent a finding that it is exempt from taxation under the statute." South Lancaster Academy v. Inhabitants of Town of Lancaster, 242 Mass. 553, 558, 136 N.E. 626, 629 (1922).

[25] Trustees of Griswold College v. State, 46 Iowa 275 (1877).

[26] 61 C.J., TAXATION §§ 527, 530.

[27] Female Academy of the Sacred Heart of Albany v. Town of Darien, 108 Conn. 136, 142 Atl. 678 (1928).

[28] Mayor and Council of Wilmington v. Wilmington Monthly Meeting of Friends, West Street, 3 Harr. (33 Del.) 180, 133 Atl. 88 (1926).

[29] Congregational Sunday School and Publishing Society v. Board of Review, 290 Ill. 108, 125 N.E. 7 (1919).

[30] Pope Leo XIII, Encyclical, *Immortale Dei,* 1885.

tional: by paying state money as rental to a religious society, the State is aiding this society with public moneys, and this is equivalent to an involuntary contribution by the taxpayer to a church group; and by compelling minors under the state compulsory education laws to attend school in a church-owned school building, the State is exposing the children to religious doctrines and influences opposed to their own faith.

FOR THE NEGATIVE:

The State is not obliged to buy and own land and buildings in order to maintain its offices or its schools. There is no constitutional or statutory prohibition on the State preventing it from renting the buildings it needs to carry out its functions. In some instances this is the more prudent method for the State to conduct its schools, since it often results in substantial savings to the taxpayer. If the State may rent buildings, then it may rent them from any individual, group, or association that has such buildings available. It may therefore rent school buildings from religious societies as legally as it may rent them from an agency that is in the rental business for profit. The purpose of the constitutional provision is not to exclude religious organizations from legitimate business dealings with the State, but, rather, only to prevent the State from giving a financial or other preference to one religion over another, and to prevent the compulsory attendance of a person at religious exercises or religious instruction which offend his own beliefs.

THE LAW:

In general the law is that church-owned property may be used as a public school, just so long as there is in such arrangement no support of sectarian education by state funds.[31] The primary consideration of the courts in cases where the issue arises is to determine if the tenets of a particular religion are being taught in a public school. Apparently it has been too long settled that the name of the landlord is immaterial for the courts any longer to concern themselves with the issue.

Within the framework of such a rental transaction between a Church and the State are often other factors which might or might not tend to make the transaction illegal. Where the board of education or the school district simply turns over the education of the district to the hands of a religious school, the arrangement is, *inter alia,* an unconstitutional surrender of authority. If the school is to be a public school, as it purports to be, the management of it must remain in the hands of the school board. State moneys will be withheld from a school where this situation arises.[32]

Often also the sectarian teachers who formerly operated the school

[31] Dorner et al. v. School District No. 5 in the Town of Luxemburg, 137 Wis. 147, 118 N.W. 353, 19 L.R.A. (N.S.) 171 (1908); Crain et al. v. Walker et al., 222 Ky. 828, 2 S.W. 2d 654 (1928).

[32] Williams et al. v. Board of Trustees of Stanton Common School District, 173 Ky. 708, 191 S.W. 507 (1917).

as a religious school are retained as teachers of the public school. In some instances, as where the school was formerly conducted by a religious order of the Catholic Church, the teachers wear a distinctive garb. The charge has been made that this subjects children of other faiths to subtle influences contrary to their own faith. We will deal with this particular issue separately in Topic IX, *infra*, page 54.

Where sectarian instruction is given as part of the school curriculum, the arrangement is patently unconstitutional. Inasmuch as the laws of all of the states require school attendance, if a child is compelled to attend a public school where the tenets of a particular faith are promulgated, he is plainly deprived of his constitutional rights.[33] However, the prohibition against sectarian instruction cannot be extended to cover teachings which are merely expositions or explanations of general principles of morality.

The use of church property for public school purposes has recently been brought into question in Wisconsin. The Protestant Bill of Rights Committee, an organization formed by and composed of the members of the Lutheran Men in America of Wisconsin, asked Wisconsin officials in the latter part of February of this year to cut off all tax support to fourteen Wisconsin public schools, on the ground that these schools are "under the domination of the Roman Catholic Church." On March 14th the State Superintendent of Public Instruction, Mr. George E. Watson, granted the demand on the grounds that the schools selected teachers on the basis of a religious test, that they included sectarian instruction in their curriculum, and that they failed to operate a complete school of eight grades.

Most of the schools concerned in the controversy are located in rural areas where the population is almost entirely Catholic. According to Mr. Watson, these fourteen schools were scheduled to receive a total of $25,000 in tax money out of a total budget for public education of $17,000,000. If the schools are infringing on the religious liberty of any person, or if public aid is going to the support of the Catholic Church in preference to other groups, the Lutheran Committee is right in demanding that tax money be withheld from these schools. If, however, the schools are operated simply as public schools, the Committee is wrong in its demand and the State Superintendent is wrong in acceding to it. A statement of the facts in one such case is enlightening.

According to Mr. William R. Bechtel in an article appearing in *The Milwaukee Journal* on February 19, 1952, the Lima school, Pepin County, leases the first floor of a school building belonging to the Church of the Holy Rosary. This circumstance standing alone, as we

[33] State ex rel. Weiss et al. v. District Board of School District No. 8 of the City of Edgerton, 76 Wis. 177, 44 N.W. 967 (1890).

have seen, violates no constitutional provision. On the contrary, it is specifically provided for by statute in Wisconsin.[34] The second floor of the building is occupied by a Catholic high school, conducted as a private sectarian school. Church auhtorities maintain that no religious instruction is given in the Lima school. Mr. Watson ruled that such instruction has been given. There is, therefore, a direct conflict on this issue. We do not have the evidence before us, and we are consequently unable to ascertain the truth of the matter. It would be our opinion that the State Superintendent was mistaken in his assertions. We find it difficult not to accept the word of men dedicated to the doctrine that there is a moral law established by Almighty God, and that, under this law, a falsehood to one who has a right to know the truth is intrinsically sinful. Nor can we assume that these men are mistaken in their statements, since they are on the spot to observe and to know the facts. Further, to our certain knowledge, Catholics never attempt to subject others to their doctrines when these others do not want to hear them. This policy is followed consistently in Catholic schools throughout the country. The non-Catholic enrollment in Catholic schools and colleges varies from one or two per cent to as much as thirty-five per cent or more. Even though it is the privilege of these schools to require attendance at classes of Catholic doctrine or at Catholic religious exercises, this is never done. Protestant schools can boast of no such scupulous regard for constitutional rights. On these grounds, even though they do not have the dignity of evidence, we are inclined to doubt the correctness of Mr. Watson's ruling.

It is a further fact in the Lima school situation that the principal and most of the teachers are nuns. All of them have been properly trained and legally hired. In a later section[35] we shall discuss the wearing of religious garb by teachers in public schools. Suffice it to say here that, although there have been adverse decisions in other jurisdictions, we do not believe the wearing of a particular style of dress is unconstitutional. The Wisconsin Statutes specifically prohibit discrimination on the basis of religious affiliation in the hiring of teachers.[36] This would seem to have some bearing on the right of teachers to exercise their constitutional freedom to follow the disciplinary rules of their

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[34] "The annual common school district meeting shall have power: * * * (5) To vote a tax to purchase or *lease* suitable sites for school buildings * * *." WIS. STAT. (1949), § 40.04 (Italics added). The annual high school district meeting has the same power in relation to high schools under WIS. STAT. (1949), § 40.41(2).

[35] Cf. Topic IX, *infra*, p. 54.

[36] "No discrimination shall be practiced in the employment of teachers in public schools because of their race, nationality or political or religious affiliations, and no questions of any nature or form shall be asked applicants for teaching positions in the public schools relative to their race, nationality or political or religious affiliations, either by public school officials or employees or by teachers' agencies and placement bureaus." WIS. STAT. (1949), § 40.775.

faith, which rules require the wearing of distinctive apparel. The Lutheran Committee also charged that the display of statuary and pictures indicated an adherence to the Catholic Faith. That this should make any difference seems ridiculous—a grasping for any excuse, no matter how feeble, to accomplish an end—but it is of little moment, the offending pictures may easily be removed. The discouraging part of this whole charge is that representations of God and those who devoted their lives to Him could be offensive to persons who profess a belief in that same God.

The group, however, made a far more serious charge. It alleged that in some of the fourteen school districts, the school board has relinquished its duties and placed them in the hands of Church officials. This is clearly an unconstitutional delegation of power if the allegation be true. It would afford a basis of a mandamus action to compel the board to perform its duties. The *Williams* case[37] is authority for the proposition that public funds should be withheld from such schools as are operating under this arrangement. But if the allegation be untrue, there is no issue. It is significant that Mr. Watson made no such finding when he announced his reasons for discontinuing state aid to these public schools.

There is at present a case on the Lima school situation pending in the Eau Claire county circuit court. A Protestant parent refused to send his children to the Lima school, and he has been charged with causing truancy. As a result of this case the Wisconsin Supreme Court may be called upon in the future to rule specifically on the issues herein presented. Also, the schools involved may seek to mandamus Mr. Watson to get the aid which he has summarily cut off.[38]

VI

THE ISSUE:

Is the use of public school property for religious purposes a violation of the Federal or state constitutions?

FOR THE AFFIRMATIVE:

Public schools are erected by tax moneys for the purpose of giving non-sectarian education to the children of the state. In allowing the use of these schools by religious groups, it is within the realm of possibility

[37] Williams v. Board of Trustees, *supra*, note 32.

[38] Mr. Watson's ruling also raises this interesting legal question: In view of his determination that these schools are not public institutions, can the local school boards continue to levy taxes to support them? Presumably an action to enjoin this taxation would have to come from a local taxpayer. But most of these areas are nearly 100% Catholic, and the Catholics will hardly be interested in bringing such an action. Nor can it be assumed that the few non-Catholics in these areas will want to seek such an injunction. Undoubtedly the Milwaukee Lutheran Committee will invade these school districts in search of someone who is willing to sue. It has already pledged its financial support to the Lima farmer of whom we have spoken.

that the state educational program might in some degree be prejudiced. The State has the duty to protect its plan of education from even the merest chance of jeopardy. Therefore, the State must prohibit the use of school property for religious purposes.

The maintenance of the school is a public charge. In using the school property religious groups contribute to the wear of the building, burn electric lights, and require additional heat. In this way such groups are receiving the benefit of tax moneys, and this is no more than a compulsory contribution to that religion by every taxpayer not a member of the Church so benefited. This is expressly prohibited by the Federal and state constitutions.

> "The argument is a short one. Taxation is invoked to raise funds to erect the building; but taxation is illegitimate to provide for any private purpose. Taxation will not lie to raise funds to build a place for a religious society, a political society, or a social club. What cannot be done directly cannot be done indirectly. As you may not levy taxes to build a church, no more may you levy taxes to build a school-house and then lease it for a church. Nor is it an answer to say that its use for school purposes is not interfered with, and that the use for other purposes works little, perhaps no immediately perceptible, injury to the building, and results in the receipt of immediate pecuniary benefit."[39]

FOR THE NEGATIVE:

While it is true that the State must protect the education of its minor citizens from interference, the State is not obliged to reduce its protection to an absurdity by prohibiting that which can in no way affect education. To seek to deprive citizens of the right to use the school-house for religious purposes, during periods when it is not being used for school purposes, on the ground that this might in some unseen way interfere with the educational process, is as senseless as depriving citizens of the right to walk across the school yard, when not being used by the school, on the ground that this interferes with the education of children. *Reductio ad absurdum!* Further, the cost to the taxpayer in such use is so negligible as to come within the rule of *de minimis.*

Affirmatively it may be argued that the State, within proper and reasonable bounds, should allow the use of its schools for religious meetings, since it thereby aids and encourages a better moral spirit in the community. Such a spirit is the core of the common welfare, and, admittedly, the common welfare is the primary concern of the State. There is no question of the preferential treatment that is prohibited by constitutional provisions where the use of the schools is available to all sects indiscriminately.

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[39] Spencer v. Joint School-District No. 6, 15 Kan. 202 (*259), 204 (*262), 22 Am. Rep. 268 (1875).

THE LAW:

Presumably there is no state that recognizes a *right* of citizens to use publicly owned schoolhouses for any purpose other than education. Therefore, when such use is permitted, it is a privilege granted by statute. Some states[40] have never granted the privilege. In *Spencer v. Joint School District*[41] the Kansas court said that no right exists unless granted by the legislature. Where the legislature has failed to act, outside use is prohibited.

Other states have statutes which permit denominational groups to use public schools outside of school hours. A leading case upholding the constitutionality of these statutes is *Nichols v. School Directors.*[42] The Illinois court, speaking through Mr. Justice Sheldon, said:

> "In what manner, from the holding of religious meetings in the school house, complainant is going to be compelled to aid in furnishing a house of worship and for holding religious meetings, as he complains in his bill, he does not show. We can only imagine that possibly, at some future time, he might as a tax-payer be made to contribute to the expense of repairs rendered necessary from wear and use of the building in the holding of religious meetings. A single holding of a religious meeting in the school house might, in that way, cause damage in some degree to the building, upon the idea that continual dropping wears away stone, but the injury would be inappreciable. As respects any individual pecuniary expense which might in this way be involved, we think that consideration may be properly disposed of under the maxim *de minimis,* etc.
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> "Religion and religious worship are not so placed under the ban of the constitution that they may not be allowed to become the recipient of any incidental benefit whatsoever from the public bodies or authorities of the State."[43]

It is well recognized, however, that, under these statutes, those authorities who have the power to permit sectarian religious services in the school building also have the converse right to deny such use.[44] The question as to how far such permission, when granted, may extend has been the subject of litigation in the courts. The general rule would seem to be that the proper authorities may permit the use of the schools for religious purposes as long as such use is reasonable and proper. If the use is so frequent as to turn the school into a place of worship, the

[40] For example, Missouri, Pennsylvania, and Kansas. WIS. STAT. (1949), § 40.16 (5)-(9) allows the use of school buildings only for nonsectarian civic purposes.

[41] *Supra,* note 39.

[42] 93 Ill. 61, 34 Am. Rep. 160 (1879).

[43] *Ibid.,* at pp. 63-64. In Townsend v. Hagan et. al., 35 Iowa 194 (1872), the court said: "That it [the use of a public school building for religious meetings] is proper, ought not to be questioned in a christian State [*sic.*]."

[44] Eckhardt et al. v. Darby et al., 118 Mich. 199, 76 N.W. 761 (1898); 47 AM. JUR. SCHOOLS § 213.

use will be prohibited.[45] If the use in any way interferes with the use of the building as a school, it will be prohibited. Some courts, in order to protect the proper functioning of the school, have interpreted their statutes to mean that religious groups could use the school only during the summer vacation period. Indiana so interpreted the phrase in its statute,[46] "unoccupied for common school purposes."[47] Where the use is restricted to the summer, no heat and very little electricity is used by the church groups.

The Supreme Court for New York County held that the use of public schools by sectarian groups was advantageous rather than harmful where the gatherings were not religious in nature, but, rather, were for the purpose of giving and receiving instruction in education, learning, and the arts. The court held that an inquiry into a group's religious affiliation would violate the group's right to the free exercise of its faith. The groups involved were the Newman Club (Catholic), the Young Men's Christian Association, and other organizations, whose primary purpose in the particular meetings was not worship. The court did not say that worship would be permissible, but then it was not called upon to pass on this question.[48]

VII

THE ISSUE:

Is the reading of the Bible, the saying of prayers, or the singing of hymns in the public schools violative of the Federal or state constitutions?

FOR THE AFFIRMATIVE:

The reading of the Bible, the saying of prayers, and the singing of hymns, taken together or individually, constitutes sectarian instruction and transforms public property into a place of worship contrary to constitutional provisions. Moreover, it compels the taxpayer to support such a place of worship. Where the attendance is compulsory at such exercises, it results in state promotion of sectarian principles contrary to the faith of some of its hearers, and where it is not compulsory, the practice marks off those who choose not to attend in such a way as to result in mental coercion.

FOR THE NEGATIVE:

The Bible is not a sectarian book, nor are prayers or hymns necessarily sectarian. Therefore, neither the reading of the Bible, the saying

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[45] State ex rel. Gilbert et al. v. Dilley et al., 95 Neb. 527, 145 N.W. 999, 50 L.R.A. (N.S.) 1182 (1914).
[46] BURNS ANN. STAT. (1901), § 5999.
[47] Baggerly et al. v. Lee, 35 Ind. App. 177, 73 N.E. 921 (1905).
[48] Lewis v. Board of Education of City of New York, 157 Misc. 520, 285 N.Y.S. 164 (1935) [modified in other respects in 247 App. Div. 106, 286 N.Y.S. 174 (1936); rehearing denied 247 App. Div. 873, 288 N.Y.S. 751 (1936); appeal dismissed 276 N.Y. 490, 12 N.E. 2d 172 (1937).

of prayers, nor the singing of hymns in the public school classrooms constitutes sectarian instruction. Since they are not sectarian, it is immaterial whether attendance at these exercises is optional or compulsory. Nor can these practices standing alone turn the school building into a place of worship.

It must be conceded that it is the duty of the State to promote and protect the moral welfare of the citizenry. This being so, there can be no more appropriate way of fulfilling this obligation as regards children than to read to them books which are promotive of moral principles. The Bible is pre-eminently fitted for this office.

THE LAW:

At the present time the Bible is read in the schools of thirty-five states, either by option or by requirement. In discussing this issue the courts have had to determine two questions: first, is the Bible a sectarian book? and, second, is compulsory attendance at the reading of the Bible a violation of the right to freedom of conscience? We shall for the most part confine this discussion to Bible reading in state conducted schools, since the rules applicable to this are equally applicable to prayers and hymns, and since Bible reading has been the paramount question before the courts.

A majority of the courts hold that the Bible is not a sectarian book. A much quoted case in support of this view is *Hackett v. Brooksville Graded School District.*[49] The Kentucky court was of the opinion that the reading of the Bible, without note or comment, is not sectarian instruction. In order to be sectarian a book must teach the peculiar dogmas of a sect, as such, and not merely be so comprehensive as to include them by the partial interpretation of its adherents. A book not otherwise sectarian does not become sectarian merely because it is edited or compiled by persons committed to any particular religious belief. Arguing from this premise the court reasoned that the reading of the Bible could in no way render the school a place of worship. This being true, no person could have any cause for complaint because of the instruction in the Bible, any more than there could be cause for complaint because geography was being taught in the school system. It must be remembered that the State is free to prescribe any course of study for the children within its jurisdiction that it deems necessary to good citizenship, safeguarding, however, constitutional guarantees of freedom of conscience.[50]

Wisconsin, on the other hand, has taken judicial notice of the fact

[49] 120 Ky. 608, 87 S.W. 792, 69 L.R.A. 592, 117 Am. St. Rep. 599, 9 Ann. Cas. 36 (1905).

[50] Meyer v. Nebraska, *supra,* note 1.

that the Bible is a sectarian book.[51] In line with the Wisconsin view are the courts of Illinois,[52] Nebraska,[53] Washington,[54] and Louisiana.[55] Ohio has upheld a school board directive which prohibited the hitherto followed practice of reading the Bible in the public schools of that state.[56] The decision in the Ohio case, however, was placed upon the grounds that, since the Constitution of Ohio did not *require* religious instruction, the court had no authority to decide for a board of education what the law gave to the board to decide, viz., what instruction should be given in the schools.

On the basis of its decision that the Bible is a sectarian book, the Wisconsin Supreme Court in *Weiss v. Board of Education*[57] held that the reading of the Bible violated two sections of the State Constitution—that prohibiting the giving of sectarian instruction in district schools,[58] and that prohibiting the payment of treasury money to religious seminaries.[59] However, the court conceded that there was much in the Bible that could not be characterized as sectarian, and admitted that such portions could be read to public school pupils without complaint. Further, the prohibition did not include textbooks founded upon the fundamental teachings of the Bible, even though they might contain extracts from it.

Although there is a conflict in the courts as to whether the Bible is or is not sectarian, there is no such conflict among the theologians and exegetes, no matter what their faith may be. The King James version of the Bible differs radically from the Douay (Catholic) version in certain portions. The Jewish Scriptures differ in one glaring particular from both the Catholic and Protestant versions—in the total absence of the entire New Testament. Nor are all Protestant versions in complete harmony. A Protestant translation of a few years back, for example, brought into question the validity of the ending to the Lord's Prayer which has always formed a part of the King James version. Recently the Jehovah Witnesses completed their own edition of the Bible. The differences in the Bible are not, therefore, only differences in interpretation, as was suggested in the *Hackett* case.[60] We are constrained to agree with the experts in their field, with the theologians,

[51] Weiss et al. v. District Board, *supra,* note 33. The doctrine enunciated in this case has most recently been approved in Milwaukee County v. Carter, 258 Wis. 139, 45 N.W. 2d 90 (1950).
[52] People ex rel. Ring et al. v. Board of Education of District 24, 245 Ill. 334, 92 N.E. 251 (1910).
[53] State ex rel. Freeman v. Scheve et al., 65 Neb. 853, 91 N.W. 846 (1902).
[54] State ex rel. Dearle et al. v. Frazier et al., 102 Wash. 369, 173 Pac. 35 (1918).
[55] Herold et al. v. Parish Board of School Directors et al., 136 La. 1034, 68 So. 116 (1915).
[56] Board of Education v. Minor, 23 Ohio St. 211 (1872).
[57] Weiss v. District Board, *supra,* note 33.
[58] *Supra,* note 5.
[59] *Supra,* note 4.
[60] Hackett v. Brooksville Graded School District, *supra,* note 49.

rather than with the view of the majority of our state courts. Wisconsin and its followers are undoubtedly correct in holding the Bible to be a sectarian book. And while we can agree with Wisconsin that there are some portions of the Bible which are not sectarian, because they are but moral principles common to all men, yet we cannot agree that, on this basis alone, such portions may be read in the public school system. Our disagreement stems from the fact that neither the teachers, the school board, nor the courts, are competent to pick out these portions. Despite all of this, however, we feel that Wisconsin is wrong in absolutely prohibiting the reading of the Scriptures in public schools. This brings us to the second point.

In those states in which the Bible is or may be read in the public schools there is generally the provision that compulsory attendance may not be required. In a leading case on the subject the Constitution of Georgia provided:

> "All men have the natural and inalienable right to worship God each according to the dictates of his own conscience, and no human authority should in any case control or interfere with such right of conscience."[61]

The City Commissioners of Rome, Georgia, passed an ordinance which required the daily reading of the King James version of the Bible during the regular sessions of the school, permission for withdrawal being granted at the written request of a child's parents. The Supreme Court of Georgia held that this ordinance did not offend the constitutional provision above quoted.[62] And in Michigan it was held that compulsory attendance at a public school did not constitute compulsory attendance at a place of worship merely because the Ten Commandments were taught therein.[63]

A more recent case on this same subject was decided in New Jersey in 1950. A statute in that state required the reading of five verses of the Bible each school day. In *Doremus v. Board of Education of Borough of Hawthorne*[64] this statute was challenged as violative of the First and Fourteenth Amendments to the Federal Constitution. The New Jersey Superior Court and the Court of Errors and Appeals upheld the constitutionality of the statute. Since attendance was not compulsory, the court could see no compulsory sectarian education, and since the Bible was not regarded by the court as sectarian, the court could see no sectarian education at all. On March 3rd of this year, the Supreme Court of the United States dismissed an appeal of the case on

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[61] GA. CONST. ART. I, § 1, ¶ 12, Civil Code (1910),§ 6368.
[62] Wilkerson et al. v. City of Rome et al., 152 Ga. 762, 110 S.E. 895 (1922).
[63] Pfeiffer v. Board of Education of City of Detroit, 118 Mich. 560, 77 N.W. (1898).
[64] 7 N.J. Super. 442, 71 A.2d 732 (1950), aff'd 5 N.J. 435, 75 A. 2d 880 (1950), noted 34 MARQ L. REV. 297 (1951).

the ground that there was no justiciable controversy. It seems that one of the petitioners had failed to exercise his privilege to have his child excused from the Bible classes and the statute no longer affected another of the petitioners because his child had passed from those grades to which the statute applied. The Court therefore refused to consider the merits of the case.[65]

Colorado,[66] Minnesota,[67] and Iowa[68] have also held with the New Jersey view. In the Colorado case the court stated that if the State compels students to attend the reading of the King James version of the Bible, against the will of the parents, it is thereby usurping the constitutional right of the parents to direct the education of their children. The Colorado view seems to be the correct one. For if the Bible is sectarian, as we maintain, then compulsory attendance at its reading is compulsory sectarian education, and this is plainly unconstitutional under both Federal and state constitutions. But this problem is not met with if attendance is at the will and option of the parents. No student's religious rights are being violated, and no doctrine not approved by his parents is being taught to him. But this raises another problem.

The proponents of Bible instruction are torn upon the horns of a dilemma. If they wish their children to receive Biblical instruction, they must hold the Bible to be non-sectarian, for, if it is sectarian, the instruction violates constitutional provisions (as worded in some states) that no such instruction shall ever be given. These constitutional prohibitions are absolute, and make no exception for those instances where the instruction is optional. But, if they hold the Bible to be non-sectarian, which exegesis, theology, and reason plainly show it is not, then logically they must uphold the right of a school board to prescribe the reading of the King James version of the Bible to Catholics and Jews. This is manifestly a violation of freedom of conscience. The proper solution to the problem seems to be that, for the good of the community in order that the Bible may be read, the Bible should be held non-sectarian. Such a holding, even though contrary to reason, permits the reading of the Bible in the school system without a violation of that section of the constitution which prohibits sectarian instruction. With that obstacle hurdled, there remains only the problem of preventing compulsory attendance. This may be done by a holding that compulsory attendance is barred, not by the fact that the Bible is sectarian, but by the fact that parents have the constitutional right to direct the education of their children. It seems important to us that Bible reading be con-

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[65] Doremus et al. v. Board of Education of Borough of Hawthorne et al., 72 Sup. Ct. Rep. 394 (1952).
[66] People ex rel. Vollmar v. Stanley, *supra*, note 11.
[67] Kaplan v. Independent School District of Virginia et al., 171 Minn. 142, 214 N.W. 18 (1927).
[68] Moore v. Monroe, 64 Iowa 367, 20 N.W. 475 (1884).

tinued in the schools, so long as pupils are not forced to listen to translations which offend their own religious beliefs. One look at the ethical disintegration of our government and the crumbling moral structure of the country as a whole should be sufficient to make even the most militant atheist come screaming in defense of such a program.

There remains but one objection to the optional Bible reading program—the "embarrassment" of children not attending the classes. The Wisconsin Supreme Court put it this way:

> "When, as in this case, a small minority of the pupils in the public school is excluded, for any cause, from a stated school exercise, particularly when such cause is apparent hostility to the Bible, which a majority of the pupils have been taught to revere, from that moment the excluded pupil loses caste with his fellows, and is liable to be regarded with aversion, and subjected to reproach and insult."[69]

This argument was also presented in the *McCollum* case,[70] the petitioner invoking a statement in the *Ring* case,[71] decided in the same jurisdiction, in support of her contention. The state court[72] dismissed the argument on the ground that that statement had been made in a case concerning Bible reading, which was not in controversy in the case before it. The Supreme Court of the United States held that it was not necessary to consider the effect of the released time program on the child in view of its decision on other points.[73] We mention this case here only because we feel that the answer of the school board is at least a partial answer to the objection. The attorneys for the Board of Education argued that, if the child suffered any embarrassment, it resulted from his anti-religious attitude, not from any deficiency in the plan. That is to say, the fault for the embarrassment lay wholly with the child (or, more accurately, with his parents), and not from the practice itself. In effect what these attorneys were arguing was that a whole checkerboard should not be destroyed merely because one checker is blue instead of red or black. If it were the board that were ill-made there would be an argument for its destruction, but not otherwise. This argument was presented in a controversy over released time, but it is equally as valid when applied to Bible reading classes. But it is only a partial answer.

It seems to us that a more complete reply to the charge is that the

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[69] Weiss v. Board of Education, *supra*, note 33.
[70] McCollum v. Board of Education, *supra*, note 7.
[71] *Supra*, note 52. The court said in that case, at p. 351, that, "The exclusion of a pupil from this part of the school exercises in which the rest of the school joins, separates him from his fellows, puts him in a class by himself, deprives him of his equality with the other pupils, subjects him to a religious stigma and places him at a disadvantage in the school, which the law never contemplated."
[72] People ex rel. McCollum v. Board of Education of School District No. 71, 396 Ill. 14, 71 N.E. 2d 161 (1947).
[73] McCollum v. Board of Education, *supra*, note 7.

State has no duty to protect a child from embarrassment, reproach, or insult. Children are by nature brutally frank, even cruel. They tease each other mercilessly, they form aversions, they fight. If the State is going to undertake to protect the child at one point, there seems to be no logical reason for its stopping there—it should protect the child from such mental and emotional abuse in all circumstances. But this is totally impossible. Neither an army of officials nor the entire state treasury can accomplish this. Children must grow solving the problem of their relationships one with the other as best they can. They seem for the most part to be able to do this quite well. There is no occasion for state interference.

The foregoing arguments assume the truth of the contention that children not participating in the program are subjected to embarrassment, reproach, or other abuse. However, basing its observation on human experience, the court in the *Stanley* case[74] dismissed the objection by remarking:

> "It is urged that to absent themselves for a religious reason 'subjects the pupils to a religious stigma and places them at a disadvantage.' We cannot agree to that. The shoe is on the other foot. We have known many boys to be ridiculed for complying with religious regulations but never one for neglecting them or absenting himself from them."

Anyone who knows kids will agree that this is the perfect answer to the objection.

VIII

THE ISSUE:

Is it a violation of state constitutions or statutes or of the First and Fourteenth Amendments to the Constitution of the United States for public schools to release students from school to attend religious classes of their own denomination and choosing?

FOR THE AFFIRMATIVE:

All states have compulsory education laws. If students are released by their teachers, their principals, or by the school board from classes during times ordinarily set aside for school work, the compulsory education statutes are being violated. Admittedly, if a state has a statute which permits released time, the compulsory education laws are not violated, but in these states the compulsory education laws are helping to provide pupils for religious classes. This amounts to a state aid to religion and this is unconstitutional.

The use of school facilities, such as school rooms, telephones, office space, stenographic services, and the like, constitutes an unlawful expenditure of state funds to aid religion. The printing of report cards and attendance cards, as well as the payment of teachers' salaries for

[74] Vollmar v. Stanley, *supra*, note 11, at p. 617.

the time which they use in entering data on these cards, is likewise an unlawful expenditure of state funds. It is not necessary to the validity of this argument that all or even some of these expenditures be made, it is sufficient if there is only one such expenditure.

Released time is an unconstitutional union of Church and State. In order that it function properly certain services must be rendered to the religion classes by the school board, the principal, or the teachers. Since they act as public officials, their services constitute state aid to religion. This aid may easily be construed as amounting to the establishment of religion. Where school premises are used, the union of Church and State is even more obvious.

Released time constitutes an infringement of the constitutional rights of those students not participating in the program, in that, by their failure to attend religion classes, they incur the scorn, reproach, and insults of their fellow students, and are unnecessarily embarrassed thereby. The right of freedom of conscience dictates that non-participating pupils be free of such embarrassment.

FOR THE NEGATIVE:

The power of school authorities to release students from classes for various reasons has never been questioned in the United States. It lies within the discretion of these authorities to determine what constitutes a valid excuse for such absences. The compulsory education laws comprehend this power, at least by implication, and, therefore, released time for religion classes is not a violation of these laws.

It is a *non sequitur* to assert that, because the education laws compel attendance at school, they are thus providing pupils for classes which are entirely voluntary. Classes which are optional do not become obligatory merely because attendance at them follows compulsory attendance at other classes. Nor can it be said that the school is recruiting for various sects, since, under released time plans, the program is only announced to parents who must themselves take positive action by requesting (usually by written note) that their child be released to attend a designated religious class.

There can be no argument with the assertion that the use of public school classrooms, the printing of attendance and report cards, the use of teachers' time, and the rest, all constitute a disbursal of state funds, nor can it be argued that such disbursal does not aid religion. But this goes upon the premise that state aid to religion, per se, is wrong. Under the wording of the Federal Constitution and the several state constitutions this premise is highly questionable. But even if it were wrongful, the amount involved is so infinitesimal as to come within the maxim that "the law does not take notice of trifles." And even if the sums so expended should be considered appreciable, still it constitutes no

obstacle to released time since these services are not essential to the plan. For the same reason it is no valid argument to claim that the rendition of these services or the granting of academic credit for the religion classes is an unlawful union of Church and State. The plan doesn't need them.

However, where such services (or at least some of them) are not granted, the plan is no longer termed released time, but, rather, dismissed time. There is much authority for the proposition that dismissed time is constitutional since it results only in shortening one school day to allow the pupils to go wherever they please. School authorities have always had this power. But under this plan teachers may give their time to check attendance or to perform other services without complaint. For, in such case, they are acting as private individuals and not as state officials. Teachers, as well as anybody else, may donate their time after working hours to whatever project they choose. To deny them this is to deny them due process. Therefore, the use of teachers' time does not constitute an expenditure of public funds on religion.

The various answers to the argument that Bible reading in the school results in embarrassment to the child who does not attend the exercise is equally applicable to the same argument when used with reference to released time or dismissed time programs.[75] There is also in this situation an additional factor mitigating the argument of embarrassment to the child. Whereas in the Bible reading situation the pupils not participating are set apart from the majority who stay together, in released time classes the students are divided into three or four groups. This eliminates the possibility of any conspicuous segregation.

Moreover, every person of religious belief or moral intentions must agree with the statement of Mr. Justice Sheldon:

> "Religion or religious worship are not so placed under the ban of the constitution that they may not be allowed to become the recipient of any incidental benefit whatsoever from the public bodies or authorities of the State;"[76]

or with the statement of Mr. Justice Cardozo, equally applicable to released time, in his concurring opinion in the *Hamilton* case:

> "I cannot find in the respondents' ordinance an obstruction by the state to 'the free exercise' of religion as the phrase was understood by the founders of the nation, and by the generations that have followed."[77]

THE LAW:

The cases on released time are few.. An early case was decided in

[75] *Infra,* p. .
[76] Nichols v. School Directors, *supra,* note 42, at p. 64.
[77] Hamilton v. Regents, *supra,* note 1, at p. 265.

New York in 1925.[78] The Supreme Court held the plan to be illegal on two grounds: first, because public funds were illegally spent in having record cards for the classes in religion printed; and second, because the release of forty-five minutes of school time was a violation of the compulsory education laws. No appeal was taken from this decision. However, two years later a similar case was brought to the New York courts. A different division of the Supreme Court tried this case, and its decision favored the released time program.[79] The court pointed out that in this case there was no question of tax money being illegally spent, since all cards used were printed at private expense. The court did not feel called upon either to approve or disapprove the *Stein* case[80] since that case was not up before it for review. This case was appealed to the New York Court of Appeals, and the judgment of the Appellate Division, affirming the judgment of the Supreme Court, was affirmed.[81] In his opinion Judge Pound said:

> "A child otherwise regular in attendance may be excused for a portion of the entire time during which the schools are in session, to the extent at least of half an hour in each week, to take outside instruction in music or dancing without violating the provisions of the Compulsory Education Law, either in letter or spirit. . . . Practical administration of the public schools calls for some elasticity in this regard and vests some discretion in the school authorities. Neither the Constitution nor the law discriminates against religion. Denominational religion is merely put in its proper place outside of public aid or support."[82]

New York has again been called upon to adjudicate the question of released time. The program was held to be constitutional in view of the fact that no public funds are spent in support of it.[83] As this article goes to press the Supreme Court of the United States has handed down its decision affirming, six-to-three, the New York decision.

Within the past six years the Supreme Court of Illinois has twice had occasion to pass on the question of released time.[84] In neither case could the court find a violation of constitutional guarantees. In *Latimer v. Board of Education*[85] the issuance of a writ of mandamus was asked to compel the Board of Education of Chicago to revoke a regulation of

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[78] Stein v. Brown et al., 125 Misc. 692, 211 N.Y.S. 822 (1925).
[79] People ex rel. Lewis v. Graves, 127 Misc. 135, 215 N.Y.S. 632 (1926), aff'd. 219 App. Div. 233, 219 N.Y.S. 189 (1927).
[80] Stein v. Brown, *supra,* note 78.
[81] People ex rel. Lewis v. Graves, 245 N.Y. 195, 156 N.E. 663 (1927).
[82] *Ibid.,* at p. 664.
[83] Zorach v. Clauson, 198 Misc. 631, 99 N.Y.S. 2d 339 (1950), aff'd 278 App. Div. 573, 102 N.Y.S. 2d 27 (1951), aff'd 303 N.Y. 616, 100 N.E. 2d 463 (1951), noted 35 MARQ. L. REV. 385 (1952).
[84] People ex rel. Latimer et al. v. Board of Education of the City of Chicago, 394 Ill. 228, 68 N.E. 2d 305, 167 A.L.R. 1467 (1946); McCollum v. Board of Education, *supra,* note 72.
[85] Latimer v. Board of Education, *supra,* note 84.

sixteen years' standing permitting released time. The petitioner alleged this regulation constituted an establishment of religion and the diversion of public funds to a sectarian purpose. Mr. Justice Fulton, in delivering the opinion of the court, said:

> "We concede that the board of education should not help sustain or support any school controlled by a church or sectarian denomination or aid any church or sectarian purpose. On the other hand, we do not deem it the duty of a school board to be hostile or antagonistic to religion or churches, nor should it interfere with the free exercise and enjoyment of religious freedom.
>
> "The preamble to the constitution, adopted in Illinois in 1870, recognizes the reliance of the people upon a deity, and while the decisions of the Federal and State courts approve the doctrine of the separation of church and state, it is nowhere stated that there is any conflict between religion and the State, nor any disfavor of any kind upon religion as such. . . . In [*Reichwald v. Catholic Bishop of Chicago,* 258 Ill. 44, 101 N.E. 266, Ann. Cas. 1914B, 301 (1913)], it was held, 'The Constitution does not absolutely prohibit the exercise of religion, but, on the contrary, provides that the free exercise and enjoyment of religious profession and worship, without discrimination, shall be forever guaranteed. . . . The man of no religion has a right to act in accordance with his lack of religion, but no right to insist that others shall have no religion.' "[86]

The court could find no merit in the petitioner's arguments.

Similar disposition was made of the *McCollum* case,[87] the court finding no unlawful expenditure of tax funds. The fact that public school classrooms were used was deemed immaterial, since they would have been used during the period anyway if there had been no released time. The court followed its earlier decisions and the decisions in New York that religion is not completely barred from even incidental aid. This case was destined to have a more famous, or infamous, end than previous cases on the subject. After the Illinois Supreme Court had handed down its decision, the Supreme Court of the United States decided the historic *Everson* case.[88] The four dissenting Justices in that case held that the First Amendment forbade *any* aid by the State to religious exercises, *including released time.* The statement was entirely gratuitous, since only the transportation of parochial school children on state-owned buses was before the Court. This decision determined Mrs. Vashti McCollum to appeal her case. The Supreme Court of the United States reversed the Supreme Court of Illinois,[89] and held the released

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[86] *Ibid.,* at p. 308.
[87] McCollum v. Board of Education, *supra,* note 72.
[88] Everson v. Board of Education of the Township of Ewing et al., 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711, 168 A.L.R. 1392 (1947).
[89] McCollum v. Board of Education, *supra,* note 7.

time program unconstitutional on two counts: tax supported property was used for religion classes; and the compulsory education laws of the state helped to provide pupils for these classes. The Court ignored the constitutional right of other parents to direct the character of their children's education and to be free from state interference with the free exercise of religion, even though certain Protestant parents intervened in the action to assert those rights. Counsel for the Board of Education unearthed previously unpublished documents to show the legislative intent of the Congress upon the passage of the First Amendment. The Court, however, arbitrarily brushed aside the Congressional intent with no more than an observation that it was unable to accept the appellee's contentions in this regard. Mrs. Vashti McCollum was so elated by her victory that she moved to write a book concerning it. From the statements in this book it is obvious that she had no interest in protecting the constitutional guarantee of freedom of religion in bringing her suit. Mrs. McCollum is the daughter of one of the leaders of that chronic disease, the Freethinkers Society. It is clear from her book that she was interested only in the advancement of atheism, and to this end she sought and found a legal weapon to club religion. Happily for Mrs. McCollum she found a court, the Supreme Court of the United States, that was willing to overlook the rights of all those who didn't agree with her.

The *McCollum* decision brought the nation's highest court into disrepute. The legal profession as a whole indicated its disapproval of the case. No one wishes to deny to Mrs. McCollum her right to practice atheism. No one is advocating the abrogation of the freedoms protected by the First Amendment. But we do not believe that anyone should be allowed to accomplish this very same result with respect to the adherents of religion under the guise of being the protector of the First Amendment. In effect the *McCollum* decision denied the free exercise of religion to the vast majority of Americans. We expect our courts to see through such attempts as these. It should be pointed out that, despite its broad language, the *McCollum* case did not outlaw released time programs per se. It was restricted to its own fact situation. The *Zorach* case,[90] just decided by the Supreme Court, contains none of the so-called objectionable features of the *McCollum* case. This decision has done much to clarify the question of just how far the Supreme Court is prepared to go in hindering the advancement of religion. There is a point, Justices Black, Frankfurter, and Jackson dissenting, beyond which even it is not prepared to step.

In the 1948 statement of the Catholic Bishops of the United States it was said concerning the *McCollum* decision:

[90] Zorach v. Clauson, U.S. Sup. Ct., April 28, 1952.

> "The opinion of the court advances no reason for disregarding the mind of the legislature. But that reason is discernible in a concurring opinion adhered to by four of the nine judges. There we see clearly the determining influence of secularist theories of public education—and possibly of law. One cannot help remarking that, if this secularist influence is to prevail in our government and its institutions, such a result should in candor and logic and law be achieved by legislation adopted after full popular discussion, and not by the judicial procedure of an ideological interpretation of our Constitution."

It seems like a reasonable request!

IX

THE ISSUE:

Does the wearing of religious garb by teachers in public schools offend against the constitutional provisions prohibiting sectarian instruction or the control of the schools by any sectarian group?

FOR THE AFFIRMATIVE:

There can be little doubt but that effect of a religious costume, when worn at all times by teachers in the school in the presence of their pupils, is to inspire respect, if not sympathy, for the religious denomination to which these teachers so manifestly belong. To this extent the influence is sectarian, even if it does not amount to the teaching of denominational doctrine.

Over and above this, the hiring of such teachers places the control of public education into the hands of those who are committed to one religious doctrine. In addition, the payment of salaries to these teachers violates constitutional provisions prohibiting the payment of public money to support religious groups or sectarian schools.

FOR THE NEGATIVE:

The effect of a religious garment is merely to direct attention to a person's religious beliefs. Sectarian adherence is not a secret matter. Even if no distinctive garb is worn, a teacher's religious affiliation is generally known, both to the community and to her pupils. The respect inspired by every teacher is respect for the teacher herself, and only incidentally for that teacher's religion. Whatever respect might be shown for the teacher's religion will arise whether religious dress is worn or not.

Inasmuch as every person must have some religious belief, whether it be Catholicism, Protestantism, Judaism, agnosticism, or out and out atheism, the employment of any person as a teacher must necessarily throw the control of public education into the hands of teachers professing adherence to one or another religious belief. The fact that some teachers wear mufti and others do not is of no consequence. To control means to dominate or direct; it does not mean mere employment, or even

numerical superiority. For if it did no school could constitutionally operate unless every sect were represented by the same number of teachers in each school as every other sect. This is manifestly ridiculous. There are in this country 264 sects plus varying degrees of agnosticism and atheism.

Discrimination in the hiring of teachers is prohibited at least implicitly by most state constitutions. These prohibitions are usually buttressed by more specific provisions in the statutes of each state. Furthermore, such discrimination amounts to state interference with the free exercise of religion in violation of the First and Fourteenth Amendments to the Federal Constitution, since it penalizes adherence to any sect so discriminated against. In refusing to hire or in prohibiting the hiring of teachers, otherwise qualified, because their dress reflects their doctrinal persuasion, the State is unconstitutionally discriminating against a person because of his religious affiliation.

THE LAW:

The decisions on this particular issue are in conflict. Some of the decisions hold that the wearing of religious garb is unconstitutional. New York early held this way on the ground that the respect and sympathy engendered for the teacher's religion by reason of the distinctive dress was sectarian teaching.[91] The fact that this was not in any respect doctrinal instruction was considered immaterial. Within the last few months the Supreme Court of New Mexico has also banned the wearing of religious garb.[92] Although the only question which the New Mexican court had to decide was the validity of a resolution of the State Board of Education prohibiting such garb, the court went on to say that the wearing of a religious habit in the public schools would be unconstitutional whether the State Board resolution existed or not.

Other states uphold the constitutionality of hiring teachers who wear a religious dress, but also uphold the validity of a statute or regulation by the school authorities prohibiting their employment. In 1894, the Pennsylvania Supreme Court reiterated the right of nuns to be employed in the public schools of that state. The court said:

> "But it is further argued that, if the appointment of these Catholic teachers was lawful, they ought to be enjoined from appearing in the school room in the habit of their order. It may be conceded that the dress and crucifix impart at once knowledge to the pupils of the religious belief and society membership of the wearer. But is this, in any reasonable sense of the word, 'sectarian' teaching, which the law prohibits? The religious belief of many teachers, all over the commonwealth, is indicated by their apparel. Quakers or Friends, Omnish, Dunkards, and

[91] O'Connor v. Hendrick et al., 184 N.Y. 421, 77 N.E. 612, 7 L.R.A. (N.S.) 402, 6 Ann. Cas. 432 (1906).

[92] Zellers et al. v. Huff et al., 55 N.M. 501, 236 P.2d 949 (1951).

other sects, wear garments which at once disclose their membership in a religious sect. Ministers or preachers of many Protestant denominations wear a distinctively clerical garb. No one has yet thought of excluding them as teachers from the school room on the ground that the peculiarity of their dress would teach to pupils the distinctive doctrines of the sect to which they belonged. The dress is but the announcement of a fact,—that the wearer holds a particular religious belief. The religious belief of teachers and all others is generally well known to the neighborhood and to pupils, even if not made noticeable in the dress, for that belief is not secret, but is publicly professed. Are the courts to decide that the cut of a man's coat or the color of a woman's gown is sectarian teaching, because they indicate sectarian religious belief?"[93]

In the following year, however, the Pennsylvania legislature passed an act which prohibited teachers from wearing any apparel which indicated religious affiliation. This act was adjudged valid, since it was not directed at the beliefs of the teachers, but only at their actions.[94] As recently as 1936 North Dakota held that the employment of nuns, members of a religious order of the Roman Catholic Church, who were otherwise duly qualified as teachers under the state law, was not unconstitutional as contributing tax money to support a sectarian school or as placing the public schools under sectarian control.[95] As in Pennsylvania, however, North Dakota has passed a statute forbidding religious dress in the public schools. New York upheld a prohibitory regulation issued by the State Superintendent of Public Instruction.[96] At the present time there are ten states, including Wisconsin, which permit religious dress in their public school systems.

Both the *Hysong*[97] and the *Gerhardt*[98] cases came to the conclusion that it is not a proper subject for the courts to inquire what disposition teachers make of their salaries. The fact that nuns contribute a portion, or even all, of their wages to the order to which they belong does not constitute state aid to religion, since secular teachers could do the same with their salaries if they so wished. The State has no further interest in the money after it has been paid out in wages.

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[93] Hysong et al. v. Gallitzin School District et al., 164 Pa. 692, 30 Atl. 482, 484, 26 L.R.A. 203, 211, 44 Am. St. Rep. 632, 635 (1894).

[94] Commonwealth v. Herr et al., 229 Pa. 132, 78 Atl. 68, Ann. Cas. 1912A, 422 (1910).

[95] Gerhardt et al. v. Heid et al., 66 N.D. 444, 267 N.W. 127 (1936).

[96] O'Connor v. Hendrick, *supra*, note 91.

[97] Hysong v. Gallitzin School District, *supra*, note 93. The court said, at p. 484 (of 30 Atl.), that, "It is none of our business, nor that of these appellants, to inquire into this matter. American men and women, of sound mind and twenty-one years of age, can make such disposition of their surplus earnings as suits their own notions."

[98] Gerhardt v. Heid, *supra*, note 95.

X

THE ISSUE:

Does the granting by the State of free transportation and free textbooks to children attending parochial schools come within constitutional prohibitions against state aid to sectarian education?

FOR THE AFFIRMATIVE:

The State constitutional provisions prohibit the disbursal of public funds to sectarian groups. This means that any tax money which is authorized for educational purposes must be distributed only to public schools. If the State authorizes either free school bus transportation or free textbooks for pupils in sectarian schools, it is distributing state money, at least indirectly, to these schools. What may not be done directly may not be done indirectly.

FOR THE NEGATIVE:

In making education compulsory, the State has declared its public policy to be the promotion of education. But the education to which the State has thus committed itself is not restricted to public education, since the First and Fourteenth Amendments protect the inherent right of parents to choose their children's school. The State is, therefore, interested in the promotion of any education not dangerous to itself or to the child. While constitutional provisions prohibit the expenditure of State funds on secrtarian groups, they do not prohibit the expenditure of such funds on individual children merely because they receive their education from a denominational school. To the contrary, this would amount to an unconstitutional discrimination in the apportionment of public money because of religious belief.

In giving free transportation and free textbooks to parochial school children, the State is aiding the child to acquire an education. The child, and not the school, is the recipient of this aid. If there is any accidental or incidental benefit to the parochial school, this is of no consequence to the State. It is not the purpose of the Constitution to force such schools out of business.

THE LAW:

There seems to be agreement on the proposition that a state constitutional provision permitting state aid to parochial school children does not offend the Federal Constitution. But where the state constitution makes no stipulation for this, the decisions are in conflict as to whether statutes offend the state constitution. In 1938 the New York Court of Appeals nullified by a four-to-three decision a statute permitting a school board to furnish public transportation to pupils attending religious schools.[99] A vigorous dissent by Chief Judge Crane argued that the statute was designed to assist children and not schools, and that this was

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

no more unconstitutional than approving attendance at these schools. After this case was decided New York amended its constitution to permit such transportation.[100] Wisconsin is in line with the New York case. In *State ex rel. Van Straten v. Milquet*[101] the court refused to accept the argument that such aid was extended only to pupils and not to schools. The question was again presented to the Wisconsin Supreme Court a few years ago in *Costigan v. Hall.*[102] The court, however, avoided the question of whether a district school board could lawfully expend money for the transportation of children to a parochial school. The court held that since, in the case before it, the children were not attending the nearest district school, as provided by statute,[103] they were not entitled, therefore, to public transportation. It was the opinion of the Attorney General that this decision meant that, regardless of any constitutional question, transportation to parochial schools is illegal in Wisconsin in the absence of statutes expressly permitting it.[104]

Maryland, on the other hand, approved a statute similar to that of New York in the same year that New York knocked its statute out.[105] The Maryland court felt that there was nothing unconstitutional in the State acting to help pupils comply with its compulsory education law. To the same effect was the decision of the New Jersey Court of Errors and Appeals in *Everson v. Board of Education of Township of Ewing.*[106] The New Jersey statute allowed reinmbursement to parents of bus fares paid by children attending non-profit private schools. The complainant, one Arch Everson, was a taxpayer and a resident of Ewing Township, New Jersey. He contended that the statute aided the Catholic Church, and was, therefore, a law respecting the "establishment of religion," prohibited by the First and Fourteenth Amendments. Upon receiving an adverse decision in New Jersey, complainant appealed to the Supreme Court of the United States.[107] The judgment was affirmed in a five-to-four decision, Mr. Justice Black correctly reasoning that the First Amendment does not cut members of religious bodies from services that are indisputably separate from the religious function. The State was deemed to be extending a legitimate health and welfare service. The opinion added,

"That [the First] Amendment requires the state to be a neu-

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[100] N.Y. CONST. ART. XI, § 4.
[101] 180 Wis. 109, 192 N.W. 392 (1923).
[102] 249 Wis. 94, 23 N.W. 2d 495 (1946).
[103] "The school boards of all school districts operating public elementary schools or public high schools of any type shall provide transportation to and from school, for all pupils residing in the district and over two miles from the nearest public school they may attend." WIS. STAT. (1949), § 40.34(1).
[104] 38 O.A.G. 582 (1949).
[105] Board of Education of Baltimore County v. Wheat, 174 Md. 314, 199 Atl. 628 (1938).
[106] 133 N.J.L. 350, 44 A.2d 333 (1945).
[107] Everson v. Board of Education, *supra,* note 88.

tral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them."[108]

Despite this favorable decision on the question of free transportation, the decision dealt Church-State relations a severe set-back. Mr. Justice Black held that government cannot, under the Constitution, aid religion in any manner, whether discrimination be present or not. His now famous statement was that,

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."[109]

This was a novel interpretation of the First Amendment, and it provided the basis for the *McCollum* decision previously discussed. It remains to be seen how the *Zorach* decision of April 28th, in which Justice Black dissented, will ameliorate the harm done to religion by the *Everson* case.

On the question of free textbooks, the decisions follow those on free transportation very closely. The Appellate Division of the New York Supreme Court refused to countenance the use of public funds to provide books to children not attending public schools. It held that since the children did not use these books for any purpose distinct from the school purpose, the books were to the benefit of the school.[110] Louisiana reached a diametrically opposite conclusion a few years later in two different cases, on the ground that only the children and the State were benefitted.[111] The case of *Cochran v. State Board of Education* was appealed to the Supreme Court of the United States where it was affirmed, the Court proceding on the ground that, since the state court had concluded that the aid was to the children alone, it could not be said that the taxing power of the state was not being used for a public purpose.[112]

LEGAL AND MORAL CONSIDERATIONS

Since the most serious blows to religious education in recent years have come, not from interpretations of state constitutions, but from the interpretation placed on the First Amendment to the Constitution of the United States in recent years, an examination of that Amendment would not be amiss. It provides that,

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[108] *Ibid.*, at p. 18.
[109] *Ibid.*, at p .15.
[110] Smith v. Donahue et al., 202 App. Div. 656, 195 N.Y.S. 715 (1922).
[111] Borden et al. v. Louisiana State Board of Education et al., 168 La. 1005, 123 So. 655 (1929); Cochran et al. v. Louisiana State Board of Education et al., 168 La. 1030, 123 So. 664 (1929).
[112] Cochran et al. v. Louisiana State Board of Education et al., 281 U.S. 370, 50 S.Ct. 335, 74 L.Ed. 913 (1930).

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . ."

What precisely does this mean? Religion is nothing more nor less than that virtue by which men exhibit due worship and reverence to God.[113] Externally the term denotes a system of beliefs or practices in the worship of God which is common to a particular group of men. Thus, when we speak of a "religion," we most commonly speak of an organized or semi-organized society, formed for the worship of God, professing similar doctrines, and going under a distinctive name, e.g., the Roman Catholic Church. There is no reason for suspecting that Congress referred to anything more in its use of the term than this. The history of the world prior to the enactment of the Constitution, the background of its framers, the legislative annals, and contemporary collateral material all point to such an intent. Congress, then, did not want the establishment of a religious society, an organized group professing one belief, to the exclusion of all others. But what is meant by the term "establishment"? Webster's Collegiate Dictionary defines the infinitive "to establish" as to make a national or state institution of a church, that is, to set up a certain church group which is supported by the civil authority. Practically all of the colonists had come in contact with state-supported churches, either in Europe or in the American colonies, where taxes were levied for the established church. It was the determination of the authors of the Constitution that this situation should not arise in the new nation. They did not, however, feel obliged to prohibit the individual states from erecting state churches. As a matter of fact, the last established church was not abolished until 1833 when Massachusetts disestablished the Congregational Church. We say, then, that the First Amendment merely prohibits Congress from setting up a religion which it can compel men to practice or to support against their consciences.[114]

The Supreme Court has interpreted this in the past to mean that Congress should make no law to aid religion. But this hardly seems justified, as the majority opinion in the recent *Zorach* case seems to realize.[115] The words do not say it, the framers of the Amendment did

[113] ST. THOMAS AQUINAS SUMMA THEOLOGICA, II-II, lxxxi, I.

[114] "Without assuming to express an opinion of the real scope of the prohibitory words, we suggest that it seems to be the opinion of learned commentators of very high authority, that the declaration was intended to secure nothing more than complete religious liberty to all persons, and the absolute separation of the church from the state, *by the prohibition of any preference by law, in favor of any one religious persuasion or mode of worship.*" Roberts v. Bradfield, 12 D.C. App. 453 (1898), aff'd Bradfield v. Roberts, 175 U.S. 291, 20 S.Ct. 121, 44 L.Ed. 168 (1898). (Italics added).

[115] Neither official nor unofficial reports of the Supreme Court decision are as yet available as this article goes to press. However, Justice Douglas, writing the majority opinion, was quoted in the Chicago Tribune, April 29, 1952, as follows: "We are a religious people whose institutions presuppose a supreme being. When the state encourages religious instruction or cooperates with

not mean it,[116] and the conditions of the times certainly do not require it. On the contrary, the poor moral showing of our civilization seems to require just the opposite. In the matter of education, as in every other facet of life in which the State has an interest, the primary concern of the State is good citizenship and the peace and welfare of the community. This concern is most eminently aided by the moral teachings of religion. This was most learnedly said during the Renaissance period by His Eminence, Silvio Cardinal Antoniano.

> "The more closely the temporal power of a nation aligns itself with the spiritual, and the more it fosters and promotes the latter, by so much the more it contributes to the conservation of the commonwealth. For it is the aim of the ecclesiastical authority by the use of spiritual means, to form good Christians in accordance with its own particular end and object; and in doing this it helps at the same time to form good citizens, and prepares them to meet their obligations as members of a civil society. * * * How grave therefore is the error of those who separate things so closely united, and who think that they can produce good citizens by ways and methods other than those which make for the formation of good Christians. For, let human prudence say what it likes and reason as it pleases, it is impossible to produce true temporal peace and tranquility by things repugnant or opposed to the peace and happiness of eternity."[117]

How, then, do the opponents of government aid to religion justify their position? They do it by taking as their guide Jefferson's famous statement that the First Amendment erected a "wall of separation between curch and state." In view of his *Bill for Amending the Constitution of the College of William and Mary* and his many other declaration, there is much doubt whether Jefferson meant by his statement such an extreme separation as that consistently being urged on the American people by Justices Black, Frankfurter, and Jackson. But let us concede that he did. Let us concede that Jefferson meant that the State was to be so separated from the Church that it must harm the Church, if that is necessary, in order to avoid aiding it. Even if Jefferson did mean all of this, that still does not make his statement a rule of law. The First Amendment does not contain the phrase. It is a mere figure of speech. It does not seem necessary to point out that figures of speech do not constitute law. If they did, we would be in a sorry con-

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religious authorities by adjusting the schedule of public events to sectarian need, it follows the best of our traditions.

"To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. * * * We find no constitutional requirement which makes it necessary for government to be hostile to religion."

[116] For example, see Madison's views in the ANNALS OF CONGRESS, I, cc. 758-759 (Washington, Gales and Seaton, 1834).

[117] Silvio Antoniano, *Dell'educaz, crist.*, lib. I, c. 43, as quoted by Pope Pius XI, Encyclical, *Christian Education of Youth*, 1929.

dition indeed. The interpretation of the law is at best a subjective thing anyway. But if we allow loose phrases not contained in the law to color our legal thinking, we are subjecting the body politic to the caprices, whims, and fancies of the judiciary. This is not healthful, and has never been so considered by the legal profession. To the contrary, the courts have endeavored to make as exact a science as possible of the interpretation and application of the law. Why, then, have we made so many exceptions in the case of the First Amendment? Simply because of the ascendancy of secularism in our society. The proponents of the secularist concept want the State without the Church, man without God. They cannot have this if the First Amendment is to be interpreted in the traditional manner. But they have discovered that by supplanting this Amendment with an isolated phrase uttered by one of the Republic's most revered leaders they can reduce religion to an inferior position in the country. This is their aim, and, until the *Zorach* case was decided on April 28th of this year, they had been succeeding admirably. Unfortunately there is no cause as yet to suspect that their success is at at end. One case neither makes nor ends a trend.

By the phrase "separation of Church and State" we may mean any one of four things. We may mean that the Church and its priests, ministers, and rabbis must never express an opinion on any political or ethical question which has become the subject of political controversy. This position has never been accepted in the United States, as witness the passage of the Eighteenth Amendment, the Protestant political partisanship in the Smith-Hoover presidential campaign of 1928, or the exhortations of the Catholic clergy to the faithful to vote against a proposed law to permit euthanasia. Or we may mean by this phrase that the Church has no rights except those given to it by the State. This of course is subjugation, not separation, and is not held at all in this country. The more prevalent interpretation is, as we have seen, that expressed by Mr. Justice Black in the *Everson* case[118] when he said that a governor cannot "aid one religion, aid all religions, or prefer one religion over another." A more rational but less fashionable meaning of the phrase is to the effect that the State may not establish any particular Church or sect as a state church, nor may it give preferential treatment to one Church or a few Churches to the exclusion of all others. We submit herein that this latter interpretation is the correct one, and we reject on three grounds the previous holdings of the Supreme Court: on the clear wording of the First Amendment, on the intent of the Congress when the First Amendment was proposed to it for passage, and on an ethical consideration of the province and duty of the State.

We believe that the wording of the Amendment is clear—it needs

[118] Everson v. Board of Education, *supra,* note 88.

only to be read. The many learned works on the legislative history of the First Amendment makes any reiteration here totally superfluous.[119] The appellate brief of the Board of Education in the *McCollum* case[120] presented a very able presentation of the historical argument. The Supreme Court in that case dismissed these arguments, but in our opinion this does not destroy their validity.

Apart from the First Amendment, does the State have any duty in reference to religion? We believe that it does. We have presented the argument several times throughout this paper, but we will detail it more completely here.

Man is by nature a social creature. Being a social creature he is moved to live in the society of his fellow man. But nature and experience show us that society is impossible without authority. Anarchism will not work, simply because man is often moved by avariciousness and desire to take his neighbor's possessions, sometimes his life, if not restrained. Such restraint must of necessity come from society itself, acting for its own protection and the common welfare. In order to accomplish this effectively, the authority of each member of society to govern himself must be given up into the hands of a single person (e.g., a king) or a group of persons representing specified individuals (as in a republic). This person or group of persons thereafter has the power to enact laws and to enforce them by the application of penal and other sanctions. This is the State.

The State, therefore, has the power of the government of men. But it has this power only for the protection of the individuals who comprise it and for the promotion of the common good. Hence any "law" which does not operate to one of these ends is no law at all, since it is excess of the authority of the State. Therefore, the primary concern of the State is the welfare of the community.

We can say, then, that the State is concerned with all things which advance the common good. Taking as our major premise, which we assume without further proof, the existence of God, we must necessarily acknowledge man's duty to pay reverence to Him. Because of the nature and perfection of God and the nature and dependence of man, the worship of God must constitute man's primary duty. This duty is common to all men. Therefore, whatever facilitates the worship of God promotes the common duty. But what is the common duty but the common good? It seems to us that the inescapable conclusion from this chain of argument is that the State must promote the worship of God as the su-

[119] Two recent works by Professor James M. O'Neill, *Religion and Education under the Constitution* (1949) and *Catholicism and American Freedom* (1952), are recommended to those interested in pursuing this subject. See, also, Edward J. Corwin, *A Constitution of Powers in a Secular State* (1951).

[120] McCollum v. Board of Education, *supra,* note 7.

preme expression of the common welfare. As we have said elsewhere, the worship of God is what we call religion. *Ergo,* it is not only the right of the State, but its positive duty, to aid religion.

If the State fails in this duty, not only is it committing the grievous sin of failing to render unto God the things that are God's but it is also harming itself in a material sense. Where religious ideals are missing the community loses in many ways. Take for example the losses to the armed forces occasioned by promiscuous sexual relations with diseased women. Consider the vast expenditure of tax money on prisons, salaries of law enforcement officials, and criminal and juvenile courts. And above all reflect on all of the money which annually disappears into the coffers of corrupt public officers. These are not scare thoughts, they are actualities attested to by every edition of the nation's daily newspapers. Immorality costs the government money. And immorality is the direct result of the failure of society to place the proper emphasis on religious teachings. The good pagan is a total failure. If there is no God a man is a fool not to take by force and stealth all that he can. What else can society expect as a consequence of failing to inculcate religious teachings in its youth. And what else is society but the State?

In no sense does state aid to religion offend the provisions of the First Amendment. Rather we can say that a denial of such aid is the only unconstitutional action. The second phrase in the First Amendment's provision relating to religion states that Congress shall make no law "prohibiting the free exercise thereof." This can mean no more nor less than that every person shall be free to exercise his religious convictions, except, of course, that any beliefs which are inimical to the welfare of the State may not be practiced. If the State forbids any parent from imparting religious education to his children, it is obviously acting unconstitutionally. It is also acting unconstitutionally if it makes religious instruction more difficult for the parent. Now such things as released time, Bible reading in public schools, tax exempt sectarian schools, and the like, manifestly render the task of giving religious instruction less difficult. If the members of a political subdivision wish to allow these things, and do allow them through legal process, the State is interfering with constitutional rights if it enjoins such acts. The State is no more than the people who comprise it. Thus, the people may, within the legal bounds of the Constitution which they have enacted for their own protection and government, authorize those things which they deem most beneficial to them. The teaching of religion to the nation's young is beneficial. Many groups have recognized this, and have, through various means, sought to encourage this instruction. Of course, in allowing, prescribing, or encouraging religious education, a majority of the people may not deny to a minority the same constitutional rights under which the majority is acting. But where the religious liberty of

the minority is safeguarded, the First Amendment guarantees the rights of the people to practice their religion freely. Now the mere fact that they do this through the use of the public school system makes no difference, as long as the schools are not converted into places of worship, and as long as children are not taught a creed contrary to that professed by their parents. The public schools are, after all, erected for the benefit of the public. They are built primarily for education, but, if this is not interfered with, there is no reasonable objection for using them for other purposes as well. But whether uses other than education are or are not objectionable is of little consequence here, since religious instruction is not only itself education, but is education of the very highest type.

Our conclusion from the foregoing arguments is that the State is bidden on moral grounds to aid the religious education of children, and is forbidden on constitutional grounds from interfering with it.

CONCLUSION

The law is not something to twist and turn and stretch, to distort and dismember and distrust. The law is a reasonable thing, that is, something to which the reason can assent. We therefore hold that, on the basis of reason and the law, every person has a right to practice his religion freely, so long as it is not dangerous to the State, and, even if it is dangerous, he has at least the right to privately believe in his religion. We hold that the First and Fourteenth Amendments to the Constitution of the United States prohibit either the state or federal governments from setting up a state-supported Church or from levying taxes for the support of any particular Church. We hold further that the State may not give any preference to any one Church or group of Churches to the exclusion of others. We hold that the enforced indoctrination of children with a creed not authorized by their parents is unlawful, and that neither the State nor any of its political subdivisions may convert a public school into a place of worship.

But this we do maintain, on both moral and legal grounds: that the State has not only the right, but the affirmative obligation, to aid religion; that it is incumbent on the State to impart moral instruction to children, or, at the very least, to permit others to do so through the public school system. Our position is based on the proposition that the State must do all that advances the common good, and that the workshop of God is the highest expression of the common good. On the same reasoning we maintain that the State has the duty to permit and to encourage the erection of parochial schools. We maintain further that the parents, or those whom they have designatetd, have the sole right to direct the education of their children. The right of the State in this regard stops with the imposition on the parents of the obligation to educate, the pre-

scription of certain courses conducive to good citizenship, and the prohibition of the teaching of those things inimical to the public welfare.

We posit that a denial of religious education does irreparable harm to the State and to the Church which the State has the duty to protect. If the prevailing trend continues, if the *Zorach* case is but an exception to the general rule, if the Constitution continue to be interpreted in the light of the unwritten secularist amendments, the inevitable result will be the loss of the Judeo-Christian concept of morality. The country can no more stand such a loss than it can stand the loss of its armed forces. Many citizens are trying to prevent such a loss. It behooves us all, in and out of government, to aid them.