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INTELLECTUAL LIBERTY AND THE SCHOOLS

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The American constitutional order has sheltered a wide range of conflicting policy. Its primary symbols are spacious and accommodate a variety of interpretations. Still the temptation persists to probe for a central animating theme. A case sometimes is made for equality as the core[1] and another for individual liberty.[2] There are also religious constructions; the Pilgrims saw America as the hope for a new Jerusalem, and eschatology remains a national addiction, even when it assumes the form of a civil religion that no pilgrim would recognize.[3] By contrast, skeptics can plausibly hold that any ap-

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1. A serious effort in this direction is J. R. POLE, THE PURSUIT OF EQUALITY IN AMERICAN HISTORY (1978). Pole's aspiration is, however, frustrated by the problem of giving equality a meaningful definition. J. RAWLS', A THEORY OF JUSTICE (1971), may be seen as broadly egalitarian (But see *infra*, at p. 500). M. WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983) is another prodigious effort to make sense of equality as explanatory. *See also* Dworkin, *What is Equality*, 10 PHIL. & PUB. AFF., (1981); A. Karst, *Why Equality Matters*, 17 GA. L. REV. 245 (1983). For the view that equality is a mere truism see Westen, *To Lure the Tarantula From Its Hole: A Response*, 83 COLUM. L. REV. 1186 (1983) and the series of related articles by Westen and his critics cited therein.

2. M. NOVAK, THE SPIRIT OF DEMOCRATIC CAPITALISM (1982); S. ARONS, COMPELLING BELIEF: THE CULTURE OF AMERICAN SCHOOLING (1983); Smith, *The Constitution and Autonomy*, 60 TEX. L. REV. 175 (1982); Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?* 48 NOTRE DAME L. REV. 445 (1983). There is, of course, an ocean of cognate literature. Indeed, as I suggest below, even much of the "egalitarian" scholarship can be read as a type of argument for a form of individualism. This includes JOHN RAWLS, A THEORY OF JUSTICE, *supra* note 1, and, explicitly, DAVID A. J. RICHARDS, SEX, DRUGS, DEATH AND THE LAW (1982). Obviously any historical focus on liberty must come to terms with slavery; but the civil war amendments can be read as essentially libertarian. It remains unclear that the equal protection guarantee has anything to do with substantive equality.

3. R. BELLAH, BEYOND BELIEF (1970), especially ch. 9, "Civil Religion in America;" J. C. MURRAY, WE HOLD THESE TRUTHS (1960). The 1984 presidential campaign included sprightly exchanges on the meaning and proximity of Armageddon. In some quarters the president was suspected of an inappropriately scriptural attitude to the matter. This complaint was taken seriously enough to rate a denial.

parent drift is merely a vector of interest group purposes — that there is neither soul nor center but only conflicting parts; a version of this thesis would interpret our organic law as a medium for the quick, the clever, and the rich.[4] And those who think in terms of class view the whole structure as a club to beat the workers.[5]

It would be naive to suppose that any of our major institutions could be adequately explained by a single popular value. Nevertheless, it might be an instructive exercise to pretend so, and this is not beyond the imaginative capacity. Without absurdity one could suppose the existence of an implicit American consensus that has crystallized around some particular ideal such as equality or material progress which is conceived to explain our major institutions. To be sure the number of values available for such an exercise is severely limited, for to be instructive they must be empirically plausible; theocracy and pacifism might not qualify. But, with that qualification, the comparison of a particular focussed ideal with bureaucratic structures and social practice may teach us something about the ideal, the institutions, and even ourselves. To measure the church, work, childhood, business, or the army against a single explanatory value is to parallel, at least weakly, the scientific method. One observes the data to see whether the particular hypothesis "saves the appearances." For example, an economist tries to squeeze what is known about the family into a paradigm of economic rationality; eventually he may come to modify either the model or the data, but so much the better for his understanding and ours.[6]

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4. The range of interest group analysts is described and criticized in T. LOWI, THE END OF LIBERALISM (1969).

5. W. N. GRUBB AND M. LAZERSON, BROKEN PROMISES: HOW AMERICANS FAIL THEIR CHILDREN (1982); S. BOWLES AND H. GINTIS, SCHOOLING IN CAPITALIST AMERICA (1976); THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (D. Kairys ed. 1982); Unger, *The Critical Legal Studies Movement* 96 HARV. L. REV. 563 (1983); Przeworski and Wallerstein, *The Structure of Class Conflict in Democratic Capitalist Societies*, 76 AM. POL. SCI. REV. 215 (1982). An argument could be made in Marxist terms that the right and capacity of the rich to choose, when coupled with residential segregation, produces precisely what one should expect — segregation by class.

6. The Friedmans are a prominent example of the effort to use the welfare of the family unit as proxy for the welfare of individual children. M. AND R. FRIEDMAN, FREE TO CHOOSE (1980), especially ch. 6, "What's Wrong with Our Schools?" involves a non-sequitur, but perhaps that can come clear only after the attempt has been made. It seems to me that Marxism makes a similar mistake in seeing the family as an epiphenomenon

This brief essay applies that familiar tactic of analysis to the schools. In an informal and selective manner it looks at the American system of education in the light of one assumed version of the national purpose, asking to what extent that purpose and this institution could be reconciled. A more ambitious and systematic evaluation of education would replicate the process, setting the schools successively against competing teleologies; it would describe a plausible working model of American schools and then ask in order: Could such an institution be sensibly viewed as a conspiracy of the bourgeoisie; as a transmitter of WASP culture and religion; as the wedge for a national dream of equality; as the incubator of a rationalistic, scientific utopia? And so forth.

The device is limited in its uses. By its nature it cannot demonstrate that an institution is in every respect in harmony with some ideal; since the data can never be exhausted, the positive hypothesis is beyond proof. It is not, however, beyond disproof. Sometimes it can be shown that an institution is in some major respect incompatible with a particular value. And the more instances of disharmony — and the greater their individual moment — the more difficult will it be to maintain an interpretation of that institution as salvific, egalitarian, progressive, hedonistic or what have you. Depending upon one's own values and purposes that negative insight may be advantageous,[7] and, in any case, it is clarifying.

I. AUTONOMY AS THE CORE

Here the school system will be set against an assumed civic commitment to individual liberty. The justification for this focus is the plausible priority of liberty in the American polity and the settled habit of educational spokesmen and the Supreme Court to associate the public school with that value.

In this society liberty has competition as an explanatory value; nevertheless, it enjoys at least the degree of priority required for the exercise here projected. It is "constitutional" in the broad English sense of fundamental institutions and understandings as well as in the narrower included domain of judicial review under the specific guarantees of our

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of production. On this point see B. BERGER AND P. BERGER, THE WAR OVER THE FAMILY (1983).

7. The effort to test the system against an idea of liberty is important to one, like myself, committed to a high degree of family autonomy and empowerment. My particular perspective of the present dispensation of authority in education will be registered below.

written constitution. In both senses the American idea embodies a more or less coherent conception of the central place of individual rights. An argument for a single dominating value — liberty or any other — could begin with the observation that, for a system so complex, dynamic and political, it has maintained a remarkable consistency. The relevant opinions of the Supreme Court seldom surprise;[8] and the normative symbols they invoke are generally common to majority and dissent. Indeed, whether in Court or legislature, and amidst the sharpest conflict, most argument seems cut from the same basic cloth.

Broadly speaking that cloth is the ideal of personal autonomy. The centerpiece of domestic human rights is the presumption, often explicit, that each of us can choose for himself. Individual freedom to forge an identity is one main theme of our common purpose whether it be expressed in terms of speech, privacy, association, mobility or (even) property. Under protection of organic law men and women may travel at will and choose their religion and associations; they may read, see or say basically what they choose for themselves. This commitment suffuses the full range of our governmental structures and informs the content of law far beyond the perimeter of the relatively few court-declared rights. This was so from the beginning. The major institutions of American political life were fashioned as insurance for dissenters. What Madison preached concerning the self-canceling effect of private faction was embedded in the foundation.[9] The mutual balancing of the powers of the national government as well as the structure of federalism were instruments to protect the individual will, and they continue to serve that end, if imperfectly.

True, the autonomy theme has never been accepted in the libertarian sense that less government always is better government; as the history of economic and social regulation attests, at no point has the Watchman State approached constitutional status or consensus. Nonetheless, even the vexing legal constraints of modern life can be interpreted less as a limit upon autonomy than as its intended instrument. Every reformer hopes to "liberate" the individual whether in the role of consumer, voter, worker, woman, minority or student. From the FCC to OSHA to affirmative action there continu-

8. I will concede that the abortion decisions, beginning with Roe v. Wade, 410 U.S. 113 (1973), have been exceptions.

9. THE FEDERALIST No. 51, at 339 (J. Madison) (ed. 1937).

ally reemerges the theme that the maximizing of liberty entails not the elimination but the artful tailoring of constraints. However one may assess the actual impact of all this law, the promotion of autonomy has been regulation's most prominent rationale. Such efforts to legislate liberty may in many cases be self-defeating, but this does not necessarily alter the centrality or sincerity of the objective.

This has been true even of the Supreme Court in its occasional interventions on behalf of oppressed groups. When it patches a rent in the social safety net, as in *Plyler v. Doe*,[10] the court no doubt is moved by many concerns, not least of which is the simple samaritan impulse to help the underdog. And, of course, the Court may represent a multitude of other values more or less distinct from liberty including federalism, efficiency, liberal guilt and judicial restraint. But, at a deeper level, it seeks the larger end of a "free society." Each of the other aims, though explicitly normative, is in its relation to liberty, instrumental. The teleology of judicial review remains the preservation and extension of a system of individual autonomy. When the Court opens the schoolhouse door to the children of illegal aliens, it expresses a conviction that, for some, the safety net in its various forms is necessary to the practical exercise of individual choice. Even the health, education and welfare structure, including its constitutional aspects, can be pictured as an instrument of liberty.[11]

It is their sharing in this ideology that makes John Rawls, Milton Friedman, Ronald Dworkin and Ronald Reagan intellectual cousins. Their mutual wars are intense, as befits relatives, but it really is all in the family. For their difference is only about the proper means to deliver liberty and responsibility to the individual. They can all claim to represent the genus liberal. Even Dworkin's most energetic invocations of equality often reduce to instrumental judgments about the

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10. Plyler v. Doe, 457 U.S. 202 (1982). The decision held that children of illegally resident aliens were entitled to educational benefits on the same terms as other children. The majority opinion is cast within a tradition now established for education cases. *See* Brown v. Board of Educ. 347 U.S. 483 (1954). The Court repeats an encomium to the public school in terms of freedom and independence, advancement on the basis of individual merit and other aspects of self-determination.

11. The best exegesis of the theme that welfare rights may best be understood as protected instruments of individual political rights is Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L. Q. 659 (1979) and Michelman, *On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

minimum conditions of autonomy.[12] And while most comment on Rawls concerns itself with the "difference principle," the primary maxim in his lexical scheme is grounded in liberty.[13] It is not clear how much credit should go to these eighteenth and nineteenth century ideologies for the present content of the ideal. The moral premise which most nearly unites and typifies them is J. S. Mills' imperative that no description of the good may claim priority — that value must remain in a matter of personal preference.[14] For contemporaries like Dworkin this continues to be expressed as an absolute.[15] There is, to be sure, a problem here. Driven to its logical boundaries dogmatic relativism may conflict with its own common ideal of tolerance. A radical equality of values cannot without contradiction give special place to anything — including liberty.[16]

Thus, it can be argued that our substantial liberty and its supporting welfare structures persist not so much because of, but in spite of, an allegiance to moral neutrality. The primacy of the individual will could rather be an inheritance from competing creeds holding that some choices are better than others. Some have always supposed on religious or philosophical grounds that the fully human life consists in the free exercise of a capacity to choose or refuse some identifiable good; and it is on this premise that they would support the liberal state.[17] Such an ethic demands opportunities suited to

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12. E.g. "[E]conomic equality and the familiar individual rights stem from the same fundamental conception of equality as independence." Magee, interview with Dworkin, *Three Concepts of Liberalism*, 180 THE NEW REPUBLIC (No. 15) April 14, 1979 41, 47. *See generally* Dworkin, *What is Equality*, 10 PHIL. & PUB. AFF., Nos. 3 & 4 (1981).

13. See Rawls, *supra* note 1, at 60.

14. J. S. MILL, ON LIBERTY (McCallum ed. 1946).

15. For Dworkin it is "the basic liberal idea that justice must be independent of any idea of human excellence or of the good life." Dworkin, *Three Concepts of Liberalism, supra* note 12, at 48. John Wilson, in his *Equality* describes as a "liberal notion the idea that "[W]e are not entitled to weigh the wills of other men by our own criteria at all." JOHN WILSON, EQUALITY 129 (1966) and Bruce Ackerman adds that "No reason is a good reason if it requires the power holder to assert . . . that his conception of the good is better than that asserted by any of his fellow citizens" B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 11 (1980).

16. See Johnson, *Do You Sincerely Want to be Radical?*, 36 STAN. L. REV. 247 (1983); Leff, *Unspeakable Ethics, Unnatural Law*, DUKE L. J. 1229 (1979).

17. W. LIPPMANN, THE PUBLIC PHILOSOPHY (1955); J. C. MURRAY, WE HOLD THESE TRUTHS (1960); *Declaration on Religious Freedom* (December 7, 1965) and *On the Development of Peoples* (March 26, 1967) [both the latter

that capacity; the conditions of moral choice become the foundation for tolerance. If virtue by its nature requires the discretion to sin, a substantial liberty is its indispensable instrument.

In any event, such contests over the intellectual pedigree of liberty really only confirm a curiously stable agreement among very diverse minds that — whatever in the end life may be about — American government and society are about the provision of the structural and material support for autonomy. Or — for the last time — so it may plausibly be argued. Liberty, then, is worth testing as the explanatory value of our institutions, including the schools.

A. *The Special Problem of Children's Liberty*

A major difficulty in this enterprise is the meaning of liberty in the context of childhood. In school, as in virtually all aspects of life, children remain subject to adult rule to a fairly advanced age, generally eighteen. This does not deny that the child at an early age has a will — and often a reason — as distinct and effective as that of an adult. Most adults agree that children lead a moral life which is significant even if relatively narrow in scope.[18] And, as the child advances in competence an understanding, the justification for limiting his choices becomes progressively problematic. Nevertheless, a general subordination to parents and/or bureaucrats endures. What is its rationale? Confusion and ambivalence on this issue are evident both in the social literature of childhood[19] and in court opinions deciding whether to support the

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are encyclicals of Vatican II signed by Paul VI].

18. The popular thesis of a "staged" morality hypothesized by Lawrence Kohlberg (based on Piagetian psychology) may to a degree conflict with this proposition; Kohlberg has committed himself to the gnostic position that " . . . Virtue is knowledge of the good," and that "the . . . ethically higher must come later." L. KOHLBERG, THE PHILOSOPHY OF MORAL DEVELOPMENT: MORAL STAGES AND THE IDEA OF JUSTICE vol. 1 (1981) at 189 and 131 respectively. See also *ibid*, pp. xxix, 30, 128, 134 184-7. I cannot accept the view that unlettered and intuitive moral choices count less than those of the moral savant; for me the "ethically higher" is a possibility for all (including children of modest age and sophistication). Hence, while Kohlberg's data are interesting for some purposes, I reject his thesis as I interpret it.

19. The chaos in the rationalization of a liberty special to children began at least as early as Herbert Spencer's chapter on *The Rights of Children* in SOCIAL STATICS (1851). I recommend it as a hilarious example of 19th Century optimism. For cognate modern works of a more sober sort see L. HOULGATE, THE CHILD AND THE STATE: A NORMATIVE THEORY OF JU-

will of the child, the state or the parent[20] regarding such matters as obscenity,[21] curfews,[22] arm bands in the classroom,[23] cosmetic surgery,[24] abortion[25] and the selection of school library books.[26] Why is the autonomy principle so murky in its application even to relatively mature children?

One possible answer is that self-determination for children is necessarily in conflict with the autonomy of supervising adults. It is unlikely that father and junior can both know best; but it is certain that they cannot both rule. Yet, though this is technically correct, it could mislead. In spite of formal subordination, it may be that the child's autonomy can in practice be consistent with the rule of adults; indeed, extending the point, it will be argued here that without an adult regime the younger child's liberty can scarcely be imagined.[27] If the experience of autonomy is to be available to a child, adult authority must be its instrument, for a child's freedom to choose at all depends upon protections and limits.[28]

Analysis here can start with the political reality that children will be formally subject to the discretion of some particular adult or set of adults. This adult regime will be arranged in the name of child protection, children's liberty, parental liberty, or the interests of third persons — or all four. A parent or a public bureaucracy, or some combination of both, will hold the legal authority to direct his comings and goings

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VENILE RIGHTS (1980); C. LASCH, HAVEN IN A HEARTLESS WORLD: THE FAMILY BESIEGED (1977); F. ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENCE (1982). In my judgment none of these effectively analyzes the complex interrelation of the respective liberty interests of parent and child.

20. The most comprehensive collection of the cases is R. MNOOKIN, CHILD, FAMILY AND STATE, (1978).

21. Ginsberg v. New York, 390 U.S. 629 (1968). See also New York v. Ferber, 458 U.S. 747 (1982).

22. People v. Chambers, 66 Ill. 2d 36, 360 N.E. 2d 55 (1976).

23. Tinker v. Des Moines, 393 U.S. 503 (1969).

24. Lacey v. Laird, 166 Ohio St. 12, 139 N.E. 2d 25 (1956).

25. Bellotti v. Baird, 443 U.S. 622 (1979); H.L. v. Matheson, 450 U.S. 398 (1981).

26. Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853 (1982).

27. For a romantic example of the problem see W. GOLDING, LORD OF THE FLIES (1964); for a possible counter-example see RICHARD HUGHES, A HIGH WIND IN JAMAICA (1929).

28. The argument that follows here is presented in a different form and at length in J. COONS AND S. SUGARMAN, EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL (1978). *See also*, Coons, *Law and the Sovereigns of Childhood*, 58 PHI DELTA KAPPAN 19 (1976).

until some age. If eighteen is the wrong age, make it fifteen — or twenty-one. The principle remains the same. Universal liberation for children in the sense of formal legal autonomy is a non-idea. The only real question here is by what rationale and under what structures should legal authority over the child be parceled out between parent, state, and the child himself if liberty — as opposed to other possible values — is to remain primary?

This inescapable limit on children's freedom is not merely an artifact of politics. It is a fact of nature. Even if one held liberty to be the sole concern, there would remain a practical, insuperable and permanent obstacle to liberation. Children are small, weak, and inexperienced; adults are big, strong and initiated. One may liberate children from the law of man, but the law of nature is beyond repeal. There is no way to send an eight-year-old out of the sovereignty of the family and into a world of liberty. For he will there be introduced to a new sovereignty of one kind or another. It may be a regime of want, ignorance, and general oppression; it may be one of delightful gratification. The ringmaster could be Fagin or Mary Poppins. Whatever the reality, it will be created by people with more power and by the elements. Children — at lest small children — will not be liberated; they will be dominated. And none of this can be altered by providing "open schools" an permissive child rearing. These are merely indulgences granted by and within the dominion of adults who meanwhile stand ready forcibly to rescue the child, even against his will, from nature, hostile adults, and the child's own mistakes.

This is true even of mature teenagers who might have a ripened capacity for autonomy or at least for autonomy in regard to specific activities such as driving. Until formal emancipation these persons will be subject to general-purpose adult regimes either of the state, the family or both. And while particular rights of a child to drive, travel or choose a religion could theoretically be recognized by law, the overall adult regime will retain very significant reins through its control of the purse and its other general powers. The state might decide to allow every child of fifteen to choose his school; nevertheless, so long as parents can retaliate by withholding the car, the allowance, new clothes and other privileges, the child's so-called right loses much of its substance.

But consider the other side: Despite this inevitability of adult dominion, a de facto liberty for children is not a self contradiction. The child's strong and important interest in

liberty can indeed be a favored object of policy. It can be pursued precisely by securing his legal subordination to the particular adult regime that most respects that interest. A child subject to adult authority will in practice be allowed his own choice in varying doses; these will depend upon what the particular authority thinks appropriate. The relevant question then becomes, which regime is the likelier source of such practical autonomy? There are two candidates: On the one hand stands the parent or parent substitute; on the other, some agency of the state. And, of course, authority may be parcelled between them in countless ways. This is an oversimplification, but it is a place to start.

Now let us raise slightly the level of complexity. Obviously the child has not merely a liberty interest but what can fairly be labeled a "welfare" interest; this is composed of physical safety, normal growth, affection, education and the like. His liberty interest — our special focus here — is related to but quite different from the welfare interest. Its core is the religious-philosophic premise that children, like adults, have wills and make choices. In this capacity for choice lies the child's claim to be part of the moral community. Ideally the choices of a child display an advancing rationality and virtue; but, in any case, choice has an absolute value for him just as it has for adults. However, unlike adults, in the case of children the liberty interest often must be subordinated to the welfare interest; otherwise little Lucy will not survive — or at least not develop — so as to exercise her full potential for autonomy. Children can make choices that society deems too costly both to the child's welfare interest and to his expanding capacity for choice. We want the adult free to decide whether to stay up late; hence we curfew the child.

Insofar as one wished to maximize children's liberty, the trick would be to find that special adult regime which would make the daily selections between yea and nay with sensitivity to the child's interest in choice here and now but with equal concern for his growing capacity for self-determination. Employing these criteria an ideal regime would decide when self-direction by the child is desirable and when it is not. It may be beneficial or baneful today for Lucy to be allowed to choose for herself whether to read or go to the movies; it may be wise or foolish to give her the choice to attend either school A or School B. In which adult shall we lodge the authority to decide whether Lucy may decide for herself? And in those cases where choice is to be denied her, who shall then decide the substantive issue?

This last question is not exclusively about liberty; for it does not arise until it has already been determined that the child shall not make the decision. It could be decided, for example, that ten-year-olds shall not be free to consent to surgery; which adult shall then consent or refuse — the state or the parent or both in some combination? The focus here seems to be welfare. Nevertheless, the question remains at least partly about the child's liberty. For, though the child's own preference in the matter cannot be decisive, it may be relevant to the correctness of the decision judged in terms either of liberty or welfare. Thus which regime has the most effective access to his views and can give them proper weight is often an important liberty issue. In truth, decisions about a child's welfare so implicate the child's interest in autonomy that there would be something eccentric about any theory that simply divorced the two. Nevertheless, the primary concern in this essay justifies a somewhat lopsided emphasis upon liberty.

It is now necessary to consider some criteria by which to evaluate the two adult regimes that compete for authority. The questions are who shall determine whether the child is to choose or be chosen for, and, if the latter, who shall decide? On the one hand stands the state operating through its professionalized agencies; on the other stands the family composed ambiguously of at least two, and usually more, human wills. Would there be a preferred way to approach the allocation of authority over these issues, if the object were to enhance liberty?

B. *Parental Representation of the Child's Liberty Interest*

Let us begin with a reservation. Since the child's welfare interest must be respected (even in the name of liberty), it is silly to suppose that the state should simply remain inert in the face of grave risk to the child. When the chips are down, few would abandon the child to a sadistic or wholly neglectful parent. The state may not be much good at setting minimum standards of protection, but it is all we have, unless we are to invite vigilante enforcement of child protection. Throughout I shall assume that such a need for minimum protection would apply to formal education. One can respect those who oppose compulsory education, but it is not clear that liberty is advanced by allowing families to leave their offspring in ignorance. In any case, to concede the necessity for some minimum standard of educational protection would settle nothing

about the allocation of authority over the form that education should take. It would only bring us to the question of who best should decide how the minimum in education (as in anything else) is to be satisfied and what should happen beyond the minimum.

Intuitively one may be inclined to assume that in education or any other matter an adult who knows the individual child will be the best judge both of the child's readiness for autonomy in any particular matter, and — where rejecting autonomy — of the "correct" answer to be imposed. If this intuition is sound, it is a reason to lodge primary control in the parents through legal presumptions in their favor. But it could be wrong and surely would be wrong in individual instances. At best it wants justification as a general proposition.

There are at least four reasons to expect parental primacy to be in general the most effective agent of liberty. Three concern promotion of the child's own liberty and will be described briefly in this section. The fourth is grounded in the liberty of the parent and is considered thereafter. At the risk of being tiresome I shall state now and repeat that these speculations and assertions are based principally upon personal observation through twenty-five years of watching schools and families and raising more than my quota of the world's progeny. There is no social science bearing directly on this issue.[29]

Regarding the liberty of the child it should be observed *first*, that the normal parent has a selfish interest in the child's becoming independent. Few adults want their children to be permanent moral and economic burdens. Parents suffer when the child's autonomy suffers; what is good for the child's liberty tends to be good for parents and vice versa. This conclusion, of course, is not a logical necessity, nor could it be proved by experiment; without self-contradiction one could imagine that most parents prefer that their offspring remain moral puppets and economic parasites. Doubtless some do want just that for reasons that, long before

29. There is, of course, an ocean of literature on the family and bureaucracy but there seems to be none that directly responds empirically or even with serious analysis to the peculiar question of proxy liberty for the child. Part of the problem is the absence of common definitions for basic terms such as autonomy. See, *infra*, pp. 521-522. Two very thoughtful philosophical and relevant analyses of parental rights and duties are Bridges, *Non-paternalistic Arguments in Support of Parents' Rights*, 18 J. OF PHIL. OF EDUC. 55 (1984); and Gutmann, *Children, Paternalism, and Education*, 9 PHIL. AND PUB. AFF. 338 (1980). See also the works cited in note 19.

Freud, the mass of mankind recognized as pathetic and pathological. It is the stuff of sad novels about the high bourgeoisie.

But that is the point; such motivation is not a normality. Emphatically it is not the stuff of ordinary families where adults work for a living and expect their children to do likewise. For them such an attitude constitutes moral and economic insanity. Quite evidently most parents feel that they prosper by making decisions that enhance their child's autonomy, and they suffer from those that create dependency.

Professionally bureaucrats may also in most instances work for the child's autonomy. If so, this is to their credit, for often they have a strong objective interest in maintaining dominance over the child and family; the less the child advances, the more the professional is needed. While one can admire professional restraint where it occurs, the question nonetheless would remain whether the best strategy is to entrust the fostering of the child's liberty to the altruism of experts. Of course, the danger to liberty from professional domination arises chiefly in situations where the client is captive; when, by contrast, the family is free to "exit,"[80] economic incentives can help to unite the self-interest of the professional to that of the child. Later we shall have to assess the degree of liberty typical of the relation between professional and client in the schools.

Accountability for decisions may increase the adult decider's interest in the child's advancement to autonomy; but it does not follow necessarily that the accountable adult is the decider. Conceivably he could be accountable but ineffective. On that issue one has nothing, again, but experience and sense as a guide. Mine suggest that having a stake in the outcome provides a healthy discipline for the decider. Furthermore, if I am deceived — if the best decider is disinterested — we will have introduced a grave difficulty. Applied to adults the same conclusion would disable anyone from deciding for himself; for, in the adult the two roles of subject and decision maker merge producing the ultimate in accountability for mistakes. A preference for the disinterested decider would become a premise for universal dependency.

The second argument for parental choice is that parents care most about the child and that caring promotes decisions

30. The quotation marks signal the familiar and well-regarded work of ALBERT HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

that advance his autonomy. Caring is cousin to accountability but there is a real difference. The distinction is one of altruism — or, more properly — love. Caring denotes not self-interest but disinterest coupled with an affection focussed upon a particular child. Such a focus is normal to the family and uncharacteristic, or even improper, to the professions.

There will no doubt be instances in which accountability and caring will conflict. The support of and special care for a retarded or mentally ill child, for example, is seldom in an adult's self-interest; this is especially true when the harassed parent is offered the opportunity to pack the child away in a state institution.[31] Love, of course, may persist where interest fails, and heroism is common in the parental role. But whether or not love prevails over interest, it must in every case be accounted a benefit to the child in the decision process. And the normal case in which both love and self-interest are allied in the deciding parent must be accounted the ideal.

Still there remains the question whether parental love seeks autonomy as a specific good. To the extent that parental love is conceived as a kind of narcissism, one could be led to expect conflict and ambivalence regarding the child's autonomy. On this issue one consults his encounters with people who are parents and with the central traditions of our culture. At least the latter — and for me the former as well — hold that generally the relation is not only profoundly unselfish but provides the principal, if imperfect, model of selflessness;[32] that we are our own children's keeper is acknowledged even by egotists who regard brotherhood as a canard.

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31. The problem is dramatically represented by Parham v. J. R., 422 U.S. 584 (1979). And see *In re* Roger S., 19 Cal. 3d 921, 569 P.2d 1286, 141 Cal. Rptr. 298 (1977). The saddest example I know is recounted in Phillip B., 139 Cal. App. 3d 188, Cal. Rptr. 781 (App. 1983). A retarded fourteen-year-old boy placed in a state institution by his parents needed heart surgery. The parents resisted, apparently on the paradoxical ground that they feared for the child's welfare if he outlived them. The court approved a guardianship petition and ordered the operation.

32. David Bridges strikes about the right note:

> . . . human love or altruism is rarely perfect and rarely untinged by self-interest or by that complexity of motives which arises when one finds pleasure or joy in giving to others. An account of familial relationships which is devoid of reference to love seems to me to be an impoverished one; but an account which fails to recognize that they also involve a distribution of power is unrealistic. The relationship between love and power in the family is perhaps better the subject of the literary than the philosophical imagination. D. Bridges, *supra*, note 29, at 60.

And, if one accepts this picture as reality, it is also easy to believe that the autonomy of the child is a primary parental object. For to love selflessly is by definition to love one who is distinctly other; perhaps, indeed, the more distinct the other becomes, the richer the possibility for loving him. It may take Albert Schweizer to love Mankind, but a mere mother could love Lucy. And the more the child becomes Lucy, the more her mother loves her.

But let us lean over backwards: The very intensity of the relation could be thought problematic. Parental fervor could get in the way of good judgment about the proper means to secure autonomy. This too seems plausible and is confirmed intermittently, especially in medical decision making. On rare occasions parents seem misled by their very concern into neurotic and bizarre decisions. Surely, however, these are the exceptions proving the rule that parental caring, on the whole, supports autonomy. Equally important, these aberrations are precisely the kind of behavior which minimum standards of protection are designed to prevent.

The third premise is simply that the parent's knowledge of what will nourish autonomy will in general be superior to that of the bureaucratic decision maker, at least for purposes of reaching decision in difficult cases. This is probable for two reasons. The first is that the parent has special access to the child's own view of things. For obvious reasons the child's voice is difficult to hear in large institutions; indeed, outside the home many youngsters respond to crises in their school or day care experience with a silent passivity that masks the problem and discourages adult inquiry. By contrast the intimacy of the family maximizes the child's own power to move adults to do his will. In the normal family even the silence of a child is a strong form of communication. Whatever the family is, it is a debating society, and the child's voice is difficult to exclude.

The parents' knowledge is thereby enhanced in ways closed to an alien professional. Doubtless the professionals' own knowledge is in certain dimensions wholly superior. He "knows" about children in general — the pathologies that sometimes bind them and the therapies that can loose them. There are unfortunately narrow limits to this kind of science and striking dissensus among the professionals. Still no one doubts its potential importance. Insofar as this kind of knowledge is reliable, however, its conclusion can usually be shared effectively with parents in various ways during the decision making process whether the subject be medicine, discipline

or education. The parents knowledge, by contrast, is less subject to communication; it is too immediate, too immanent. It is often literally unspeakable. It follows, curiously, that in an important sense parents can be the more knowledgeable deciders, for they can combine the conclusions of the professional with their own incommunicable insights. This, of course, assumes a relation in which parents not only control the final decision but have access to professionals (of varying opinions).

The import of these first three considerations — self-interest, caring and knowledge — is that the family (almost without regard to its lifestyle) tends to be the right environment for the child's gradual transition from a dependent and dominated infancy to an adolescence marked by an ever increasing practical liberty bestowed by parents. In the run of families the child achieves formal autonomy at eighteen almost without a ripple. Granted, the pilgrimage through adolescence is seldom negotiated without pain; the family, nevertheless, represents the best odds for "breaking away" with one's soul intact. Were it a most miserable institution, the family might in relative terms represent the efficient medium of liberty.[33]

Again, the parental primacy is limited. It can not preempt the duty of the state, where necessary, to intervene to protect the child's health and safety and, thereby, indirectly, to support his liberty. To that end the state imposes its minimum standards; but their application is triggered only by demonstrated and basic family failure. To justify intervention government historically has been required to overcome a strong presumption favoring parental authority. Quite plausibly this policy may rest on the conviction that constant or unpredictable intrusion into the family would poison the source of the very liberty of the child that the state is trying to protect.

C. *Parental Liberty*

The *fourth* justification for familial authority is the parent's own liberty interest. Presumably it is equal in political dignity to that of the child. In terms of autonomy there is a

33. The contrary position is asserted in B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 139-167 (1980). The parental role is viewed as frequently hostile to autonomy, at least by comparison to the role of the liberal state as Ackerman would define it. See discussion, *infra*, pp. 518-521.

great deal at stake here for the parent.[34] The right to form families and to determine the scope of their children's practical liberty is for most men and women the primary occasion for choice and responsibility. One does not have to be rich or well placed to experience the family. The opportunity over a span of fifteen or twenty years to attempt the transmission of one's own deepest values to a beloved child provides a unique arena for the creative impulse. Here is the communication of ideas in its most elemental mode. Parental expression, for all its invisibility to the media, is an activity with profound First Amendment implications. Nor, of course, is parental expression lacking in legal protection; indeed, fathers and mothers may be the only speakers with an enforceable claim to an audience. At the same time the intimacy of the family ensures that the child enjoys a reciprocal advantage in the practical if not in the legal order; in matters that concern him, he can expect a hearing for his own view.

The implications of all this remain to be captured in First Amendment doctrine. For understandable reasons political and legal theories of free expression have been preoccupied with public expression. But it is no exaggeration to say that intellectual liberty has a primary locus in the family and that the heart of the forum is the home.

Indeed, even as we view the parental primacy in its traditional forms, it emerges as a source of intellectual, social and political liberty both for child and parent. It is in the name of liberty that the legal system blesses child rearing practices that range far from the norm. Parents can allow children to make dangerous air trips, stay up late, drink wine, work at various employments otherwise forbidden and pursue exotic religious and political beliefs.[35] So long as they feed and clothe them and keep them in school and out of the hospital, the constitution generally protects the parental judgment even where it is manifested in a broad permissiveness.

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34. Though his own concern is broader, David Bridges' view of the parental interest is certainly relevant to the liberty element:

> . . . though this sort of parental authority is commonly justified in terms of what is in children's interest (i.e. paternalistically) it is quite reasonably and more convincingly justified in terms of mature judgement as to what is a fair balance of the interests of adults and children (i.e. to some extent non-paternalistically). In short, parents have the right to protect themselves from what could be the overwhelming egocentrism of children. D. Bridges, *supra*, note 29, at 58.

35. See cases collected in Mnookin, *supra* note 20, at 277-341.

There are exceptions. *Prince v. Massachusetts*[36] allowed the state to limit the dispensing authority of parents whose children wished to join them in selling religious tracts on the street. But, *Prince* is aging and lonesome. The authority of its 5-4 majority is enfeebled by the variety of recent opinions legitimating very marginal parenting practices and also by a general reform of custody law that has narrowed the state's capacity to interfere with the family. Of course the picture is complicated by counter currents such as separate age-based standards for purchase of sexually explicit materials and by statutes directed at the "kiddie-porn" industry. The latter statutes upheld in *New York v. Ferber*[37] are clearly a (sensible) restraint upon the liberty of both parent and child. The state's purpose was wholly to eliminate practices which it deemed to constitute child abuse. They were below the "minimum;" even parents cannot allow them.

On the other hand superficially similar laws regulating purchase by children of certain reading material suggest a rather different kind of legislative purpose, one consistent with one version of parental liberty. Statutes barring the sale of sexually explicit materials to younger children are a good example; in *Ginsberg v. New York*[38] these were upheld against First Amendment attack. But while *Ginsberg* does limit the child's right to secure these materials on his own, it suggests no limit upon the parental liberty to decide whether they shall nonetheless be made available to the child. Indeed, *Ginsberg* can be interpreted as a legislative effort to support parental discretion against the invasion of external forces of the media that would frustrate the parents' will in the practical order. Given a parental authority to license the child's reading of particular books — or to bestow upon him full discretion — it is hard to paint cases like *Ginsberg* simply as a restraint. In any case the central point remains: The parental liberty weighs in the accounting.

It would be fair to observe that, in declaring parental authority over children to be a form of liberty, I have defined every legal constraint upon parents (including compulsory education) as a liberty lost; the same is true for every legal autonomy bestowed upon children, such as a right to contraceptives.[39] In a polity devoted exclusively to parental liberty this

36. 321 U.S. 158 (1944).
37. 458 U.S. 747 (1982).
38. 390 U.S. 629 (1968).
39. Carey v. Population Services International, 431 U.S. 678 (1977).

line of thought would lead inexorably to the paterfamilias. Had that been my intention, I should not have emphasized the contribution of parental primacy to children's liberty. Still the many conflicts between the liberty of parent and child are inevitable and obvious, and there is no reason that all of them be resolved in favor of the adults. More to the point, they are not to be resolved at all in the sense that there is some decisive calculus of net liberty. No division of power will ever be authoritative. For sanity in policy making it is enough that society appreciate both the ordinary harmony as well as the respective importance of the distinctive liberty interests of parent and child. This harmony is quite sufficient to explain most of the traditional law of childhood in terms that are consistent with liberty. However — and we come at last to the point — it is no assistance in explaining the American system of education.

II. The Educational Exception to Parental Liberty

Since *Meyer v. Nebraska*[40] and *Pierce v. Society of Sisters*,[41] it has commonly been supposed that, above some reasonable minimum set by the state, the liberty interest in education is secure. The reality is more complex and constraining. The congeries of structures legislated to deliver education forces most children into state schools whatever their wishes or their parents. To put it briefly: schooling is compulsory; a state-operated school is available at no tuition; content and method in such schools are settled by majoritarian politics; and assignments are made on impersonal grounds by agents of the state. In such a regime, those with means buy their liberty by residing in their preferred attendance zone or by paying tuition to attend a private school. For the rest the school is selected by compulsion.[42]

This embarrassment to liberty in the "public"schools can be accounted for in historical and even pseudo-libertarian terms. It derives from basic attitudes of the patrician founders of the system. Even today their outlook appears essentially benign. Granted, they paternalized the ordinary family

40. 262 U.S. 390 (1923).

41. 268 U.S. 510 (1925).

42. That the ordinary family experiences the public school assignment as coercive is plain from its expressed desire to exist. See Gallup Poll figures cited in note 87 *infra*. *See generally* Coons, *Making Schools Public*, in E. Gaffney (ed.), Private Schools and the Public Good: Policy Alternative for the Eighties (1981).

in ways that now would seem offensive. They nevertheless viewed themselves as pursuing liberty in ways that may have seemed plausible to the nineteenth century. They imagined that education would in due course become a science; that there was "one best way;" that it would be found; and that any rational person would freely choose it.[43] Compulsion was necessary pro tem only for the barbarian fringe of society. Further, they felt honestly — if paradoxically — that imposition of mainline Yankee culture was the best assurance of a free society. In applying these assumptions the schools were often abetted by their wards. Many immigrants were content to be paternalized in the sense of being assimilated to the mainstream culture. Having their children forced to learn English was seldom perceived as oppression. No doubt the teaching of majoritarian religion in the public schools was another mater, being in many cases odious to dissenters; but various compromises on this issue kept the bondage tolerable.

Both justifications have long since evaporated. Only computer salesmen can still believe that education will become a science like physics or even like economics. The competing medicines for the learning disease are too many to sustain the view that professionals can tell which style and which school is best for the individual child — except in very unusual cases. And as for cultural unity, Americans have long since concluded that there are many models of the good life. David Bridges puts puts it well:

> It is precisely because individuals and factions in society differ in their views about what is in the interests of children individually and collectively that the question of political rights of determination becomes significant. Nor is the 'liberal' or 'neutral' alternative, of presenting the alternative conceptions of the good life to children so that they can choose, an entirely satisfactory answer to the problem. For this is precisely one of the versions of what is good for children which may be and indeed is in practice fiercely challenged . . . In short, the division of opinion among the adult community as to what is in fact good for children undermines their claims to paternalistic intervention in children's liberty in the name of such good.[44]

The short of it is that the original justifications for a mo-

43. See generally, D. TYACK, THE ONE BEST SYSTEM, A HISTORY OF AMERICAN URBAN EDUCATION (1974).

44. D. Bridges, *supra* note 29, at 56.

nopoly school system in a free society have become wholly discredited.

This leaves the system standing as a great puzzle — at best an anachronism — in a constitutional order that values liberty. From top to bottom its structure effectively frustrates the choices of parent and child which the law protects in every other realm of life. Parents choose shoes, food, games, hours and every other important feature of a child's life. In education this liberty is not only opposed but squelched. Ordinary families with all their rich variety in culture and values are forced to accept the form, content and ideology of a politically dictated education.[45] Public schools, as presently organized, chill the traffic in ideas that is generated by free family choices in every other area of life. Though they vest in the mantle of freedom and diversity, in fact they flout this deepest purpose of the First Amendment.

The process of ideological inculcation for the non-rich begins at the textbook publisher's house. Large school systems can and do compel millions of children to come and to read what has been chosen for them by strangers. It is the understandable desire of publishers to please such decision makers. Upon close examination, these turn out to be not only elective and appointed boards at various levels but a whirling circle of intellectual lobbyists. As Mike Bowler reports:

> The publishers cannot survive if their books are not chosen . . . . The pressures appear to be more intense than they ever were, and they come from any number of sources on both the "left" and the "right." There are NOW and the Creationists, whose interests are 180 degrees in opposition. . . .There are the unions and the right-to-work people, those who would rid the books of racial stereotypes, those who would give Indians, Chicanos and Arabs. . . . their rightful place. There are the farmers and the meatpackers. There are the urbanists and the ruralists, both opposed to the white picket fences of Dick and Jane. There are the overlapping "back-to-basics" folks promoting pure phonics and the old math, and there are those who see the federal government as the only hope for bringing imagina-

45. Respecting the intellectual quality of the coming generation of teachers see Weaver, *In Search of Quality: The Need for Talent in Teaching*, 61 PHI DELTA KAPPAN 29. See generally E. FEISTREITZER, THE CONDITION OF TEACHING (Report to the Carnegie Foundation for the Advancement of Teaching) (1983).

> tive and effective curriculum to American children. . . . [T]he industry, already a conservative one, is becoming even more conservative.[46]

The pressures are not exclusively of this informal sort. Many state codes mandate that the curriculum emphasize the contributions of various interest groups—minority and otherwise.[47] Some states have distributed to all teachers prescriptive statements of the content and method for teaching morals.[48] The impact of such official grunts in the classroom may be problematic; but majority sentiment expressed in school board elections and in organized or disorganized protest often do have consequence. Likewise, teacher unions strongly influence the character of the institutions. Much can still depend upon the private preferences and behavior of the assigned teacher,[49] but tenure and credentialing systems tend even further to homogenize the teaching corps. The drift overall is unmistakable; the system is tuned to keep the message mellow. The vectored pressures of interest politics crush the sharp edges of ideas and work to make school the instrument of a smoothly textured ideology. There are exceptions. One occurs where like-minded ideologues capture a school board and dictate the school's mission. Another arises where the school board and administration are indifferent; for in that event the individual teacher can effectively become the master of the students in his hands. But these would hardly be exceptions which would enhance the liberty of parents

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46. M. Bowler, quoted in *Monthly Memo of the Institute for Educational Leadership*, (No. 25), October 1976, p. 7. The most comprehensive and scholarly treatment of the current upset over book selection for schools and libraries is R. O'NEIL, CLASSROOMS IN THE CROSSFIRE (1981). *See also* J. BRYSON AND E. DETTY, THE LEGAL ASPECT OF CENSORSHIP OF PUBLIC SCHOOL LIBRARY AND INSTRUCTIONAL MATERIALS (1982); Nocera, *The Big Book-Banning Brawl*, THE NEW REPUBLIC (September 13, 1982), p. 20. Perhaps the most poignant tale of conflict involves traditional families of West Virginia arrayed against school professionals and their literary preferences. *Inquiry Report: Kanawah County, West Virginia: A Textbook Study in Cultural Conflict*, (Washington, D.C., National Education Association, 1975). Though the study is partisan, it well portrays the inevitability of value coercion in the present school system. For an insightful "inside" view of the pressures constricting teachers in American high schools see T. SIZER, HORACE'S COMPROMISE, THE DILEMMA OF THE AMERICAN HIGH SCHOOL, (1984).

47. See Shelton, *Legislative Control Over Public School Curriculum*, 15 WILLIAMETTE L. REV 473 (1979).

48. *Id.* at 486-88.

49. See Sizer, *supra* note 46, at 210.

and children[50] — certainly not of those who cannot afford to move or pay tuition.

The decisions about style and content thus are made by strangers and imposed. Any hope for redress at the school board elections is reserved for those enjoying leisure time; in larger cities like New York or Los Angeles that hope is fatuous. In any event, if you wind up in the minority, you lose. Of course, no one can specify the precise effects of monopoly. Maybe some children learn better under a fully coercive regime. And, no doubt, some ill-considered decisions by parents are avoided. In this respect the system — despite its anomic pattern — has some of the advantages of any intellectual paternalism. It is, however, hard to defend as a contribution to liberty.

A. *The Deliverance Defense*

That defense nevertheless is sometimes attempted in terms that have yet to be considered in this essay. The argument I have in mind must be treated with respect, for it is made with sincerity by intelligent persons. It commences with faith in the possibility of a "neutral" education that would help to produce adults of a sturdy independence of mind and spirit. This education is thought to represent the child's best chance for deliverance from the prejudice of family and for an introduction to the sunlight of an adult autonomy. There are many variations of this professional vision. Among schoolmen it has the properties almost of a folk legend that is passed across generations. In his criticism of the opinion in the 1968 armband case Professor Robert Burt expresses the core of the tradition:

> The *Tinker* Court erred not in its result, but in its failure to acknowledge the potential educational and constitu-

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50. See generally O'NEIL, CLASSROOMS IN THE CROSSFIRE, *supra*, note 46. If each public schoolroom could in practice represent a true marketplace of ideas, the First Amendment criticism of the system might be blunted. The contribution of family-chosen expression would in that case remain frustrated by coercive assignment but, if each child experienced the marketplace in his own education, arguably this could match in its benign effects the different kind of marketplace that would emerge in a system of family-chosen schools each with its specific style and message. Realistically, however, only under special conditions can public schools become anything approaching a neutral broker of ideas. Further, at least in an era of mass media, it is the ideologically distinctive school that is most likely to contribute to the system of liberty. Of course, this holds only if it is freely chosen. See discussion, *infra*, pp. 519-521.

> tional relevance of the facts in the case suggesting that the children's armbands reflected more their parents' convictions than theirs. The Court ignored the possibility that school officials might exclude parental political views from school in order to free children to think through these questions themselves. As noted, that motivation was implausible on the face of the *Tinker* record, but it is not an implausible educational goal, nor should that goal be prohibited by the Constitution. The *Tinker* Court should have acknowledged that the constitutional question would have changed complexion if the school officials had convincingly argued that they were acting not to impose their political views on students, but rather on behalf of the root values of the first amendment — tolerance, diversity of thought, individual autonomy — against parental impositions on children.[51]

Here are the public schools in the role of liberator, a role fully alternative and candidly competitive to the claims I have made for parents. In the deliverance legend the public system becomes the quintessential hope for a place where "parental impositions" are excluded and children "think for themselves," developing thereby a commitment to first amendment ideals.

The theme is developed at greater length in the dialogues of Bruce Ackerman in his *Social Justice in the Liberal State*.[52] chapter on "Liberal Education" explains his view that, in the name of the liberal vision, parents should be estopped from taking unfair advantage of teenage minds. It may be necessary to allow parents to push their eccentricities on young children, but high school is the place where the liberal state must compel (as it were) a free dialogue. The correct curriculum will be one that is neutral in the sense that all possible views will be represented fairly. Students will decide for themselves what they believe, and they will become truly effective in the arts of self-determination by living through the experience of the "neutral dialogue." Ackerman's mythic liberal educator puts it this way:

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51. Burt, *Developing Constitutional Rights of, in, and for Children*, 39 L. & CONTEMPORARY PROBLEMS. No. 3 118 (1975) at p. 124. And *see generally* Gutmann, *Children, Paternalism and Education*, 9 PHIL. & PUB. AFF. (1980); Bridges, *Non-paternalistic Arguments in Support of Parents' Rights*, 18 J. OF PHIL. OF EDUC. 55 (1984).

52. B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980).

> In exercising my power over the young, I have not used it to indoctrinate them into one or another of the competing ideals affirmed by members of our political community. In my capacity as liberal educator, I do not say that any of these ideals is worthy of greater respect than any other. Instead, my aim has been to provide each child with those cultural materials that—given his imperfect self-control and inexperience— he would find most useful in his efforts at self-definition. After all, these children are citizens of our liberal state. Although they may be subjected to special limitations when necessary to assure their future standing as citizens, they may not otherwise be denied their right to pursue their good in the way they think best.[53]

Later in the book Ackerman's deference to the child's own will becomes more attenuated. He acknowledges that "The task is not to undertake a vain search for the coercion-free educational system, but to consider ways in which the inevitably coercive aspects of socialization can be justified."[54] He concedes that what liberals are searching for is ". . . a theory that will enable decision makers to legitimize their uses of power without claiming the right to declare that one conception of the good is better than another."[55]

In these passages and elsewhere Burt and Ackerman faithfully reproduce the ambivalence of the "neutral" educator who is so opposed to forcing students' minds that he compels them to hear what he thinks will free them. Too liberal to impose on anyone, he imposes on everyone. This paradoxical outlook allows its spokesmen to remain ambiguous as to who is really in charge. On the one hand students "learn to think for themselves." On the other hand there is some unidentified adult hanging around culling the necessarily finite number of ideas that will be thought about. Though his full commission is never made clear, this adult stranger at least is expected to "exclude parental political views from school."[56] We may not know who is running the place, but we know who is not.

To put it delicately, these are questions here about the commitment to an ideal of liberty. Quite apart from the obvious paradox of compelling autonomy, there is an initial question of politics. A strategy of delivering even secondary education into the hands of a "liberal" elite strikes me as simply

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53. *Id.* at 159.
54. *Id.* at 163.
55. *Id.* at 166 n. 10.
56. Burt, *supra* note 51, at 124.

beyond the practical reach of democratic society — at least this one. It is worth remembering, as a starter, that no such educational regime presently operates in public education, nor has it. The notion that the public school is value neutral is illusion, as has been observed by everyone from John Dewey to the present Supreme Court.[57] Nor do I take protagonists such as Burt and Ackerman to assert the contrary; what they are expressing is a longing for an ideal yet untried.

By what stages could such an ideal become a general policy? It would first require frustration of the curriculum preferences of thousands of local majorities. A heroic legislature must begin by declaring the state's general commitment to a principle of value neutrality. This alone would require a political miracle. A second and greater one would be necessary to make this broad policy operational by enacting detailed legislation regulating instruction throughout the entire system. Even though there is no agreement among educators on proper content or method, very particular rules would have to be specified for both. Given the risk that some non-neutral teacher down the line would empathize with the poor or condemn the secret sins of George Washington, little could be left to chance. Such a reform seems unlikely in a majoritarian polity. Indeed, its nearest — if remote — approximation is a creature not of politics but of privatism. It is, curiously, the "independent" academy of the wealthy that is freest to aspire to a neutral curriculum. The last place that will ban Kurt Vonnegut or revive McGuffey is Phillips Andover.

This is not a suggestion that private academies produce autonomous adults — or that they don't. Indeed, whether teaching of a "neutral" sort is effective to that end might be our next question. It may be that a fully socratic secondary education is ideal, but there is little beyond intuition and reputation to suggest it. Plausibly the opposite could be the case. The most promising education for autonomy may be a "nar-

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57. *See e.g.* J. DEWEY, DEMOCRACY AND EDUCATION 26 (1916); N. EDWARDS AND H. RICHEY, THE SCHOOL IN THE AMERICAN SOCIAL ORDER 524-575 (2d ed. 1963), J. TUSSMAN, GOVERNMENT AND THE MIND (1977). And see M. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment* 57 TEXAS L. R. 863 (1979) at 878 where the author argues, in what seems a *non sequitur*, that "It is precisely because public school teachers are charged with instilling values to a captive audience that the protections of academic freedom should be extended to them . . ." For a good insight into the attitude of the current Supreme Court see any of the seven opinions in Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853 (1982).

row" one driven by some distinctive ideology. The most liberated adult could turn out to be one who, throughout his school life, has experienced the steady and uncompromising faith of his fathers — religious or secular. If, as many educators contend, the media — especially television — impose upon children a shallow and marasmic ethic, a case is thereby suggested for a rather more pointed counter-education in school as a source of moral liberty. A strong value position defended by intelligent and committed adults could prove an exhilarating and toughening experience for a young person weaned on Fred Flintstone; it might do more for the possibility and practice of liberty than even a prolonged immersion in socratic dialogue.

Neutral education is, therefore, both unlikely politically and problematic as an efficient instrument for producing autonomous adults. But we must add a third concern, one with which we might well have begun: There is no consensus concerning even the model for autonomy. Who is it that is supposed to represent this peculiar quality? If it is an adult with a penchant for seeing all sides of an issue, autonomy is essentially some attitude of mind — a virtuous intellectual habit. But autonomy may instead be seen as a matter of will and character — specifically the ability to stand against a majority. If so, we may be describing rather different people. My experience tells me that law professors are a fair example of people who can perceive and enjoy diversity of thought and may even "think for themselves." If this be autonomy, they generally have it. But I know of nothing suggesting that law professors are especially good (or bad) at standing tall in a moral crisis. It could be one thing to think for yourself and another to act upon that knowledge with independence. Does the ivory tower intellectual qualify while Good Soldier Schweik fails the test?

No doubt this particular distinction oversimplifies, but it suggests how unhelpful it can be to see the "root values of the first amendment" as consisting of something called tolerance and diversity of thought and then to imply their close association with a model of character called individual autonomy. In fact the relation of autonomy to tolerance is murky partly because the meaning of tolerance is also opaque. Sometimes tolerance suggests a practical disengagement from moral issues in civic life; once we decide with Dworkin or Ackerman that no one has "the right to declare that one conception of the good is better than another," it is a little hard to justify enthusiasm about reforming anything or even to

imagine what reform might mean. Of course in practice not all who espouse tolerance lack moral fervor; at least they are able to summon and express indignation against the intolerant, as by suggesting a lock-out of parental ideas.

In the end the ambiguity about who is intolerant — the parents or the professors — seems unfathomable. And this is but one example of the perplexity concerning tolerance and autonomy that is so richly displayed in the recent political debates over church and state, abortion, gay liberation, school integration and so forth. But all this ambiguity leaves us wondering: In a state of ideological warfare, who is entitled to the prize for autonomy? If there is a scale for being liberated, how do we rate Phyllis Schlafly, Mario Cuomo, the Yoders, James Watt, and Linda Lovelace? Where on the scale should we put the eccentric who physically attacks abortion clinics? What about the Rajneesh, The Happy Hooker or The Moral Majority? Who is liberated?

As I have offered no crisp definition, neither shall I throw the first stone. I am content that the examples of parental and child liberty used in this essay are relationships defined by law — rights, duties and powers of children, parents and the state. It is possible to speak clearly of liberty in juridical terms. Once we move beyond this to the protean moral models of autonomy, anything goes — hence it goes badly. Liberty, self-determination and autonomy continue to emote long after they have ceased to denote.

My sense is that the legend of the neutral school is really in the last analysis not about liberty at all. It borrows heavily from the idiom of liberty for the sound political reason that in this culture liberty is a rich source of value energy. But the legend is really an ark of the nineteenth century covenant concerning schools. Earlier in this essay with some strain I was able to give liberty a temporary and uneasy place within that covenant. But at heart this historic compact concerned the rather different enterprise of capturing from the family whatever was necessary to insure that its barbarisms would become tempered by Yankee and professional virtue. The neutrality legend is best understood as a part of the nativist folklore that saw hope for American in the deliverance of immigrant children from certain ideological and religious baggage. This has never been said more plainly than by those who promoted the Oregon initiative that went down in *Pierce v. Society of Sisters*:

> We must now halt those coming to our country from

> forming groups, establishing schools, and thereby bringing up their children in an environment often antagonistic to the principles of our government.
>
> Mix the children of the foreign born with the native born, and the rich with the poor. Mix those with prejudices in the public school melting pot for a few years while their minds are plastic, and finally bring out the finished product — a true American.
>
> The permanency of this nation rests in the education of its youth in our public schools, where they will be correctly instructed in the history of our country an the aims of our government, and in those fundamental principles of freedom and democracy, upon one common level.[58]

The deliverance of the child from the family that was intended by Oregon would have spared us the discrimination between rich and poor by delivering all children without distinction to the state. This idea remains as plausible today as it was in 1920—or for that matter in fifth century Athens.[59] But it is not an idea that should detain us here, for its connection to liberty is at best remote and problematic. Its real object is the building of culture and community by a particular coercive social instrument. I think its claim for that instrument is profoundly important as well as profoundly wrong;[60] but, much more important, it is irrelevant.

B. *Enter the Justices*

In modern times the United States Supreme Court has had occasional encounters with the question of intellectual liberty in the schools. Since 1923 the justices have produced a sprinkling of endorsements for the limited autonomy of parents and their school children, some of which are relevant here. For all but the most recent of these decisions,[61] it will serve to note the holding and pass on. These cases are familiar even to laymen, and my sole object is to suggest their limited scope:

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58. Argument (Affirmative) on Official Ballot for Initiative to Amend Section 5259 Oregon Laws, reprinted in OREGON SCHOOL CASES: COMPLETE RECORD (Belvedere Press, 1925) pp. 732-4. THE OREGON SCHOOL FIGHT 7 (1925).

59. See PLATO, THE REPUBLIC (trans. B. Jowett 1946).

60. As argued at length in J. COONS AND S. SUGARMAN, EDUCATION BY CHOICE (1978).

61. Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853 (1982).

1. *Meyer v. Nebraska* (1923):[62] A private school teacher may not be forbidden to teach foreign language.
2. *Pierce v. Society of Sisters* (1925):[63] The state may not forbid satisfaction of the duty of compulsory education in private schools; these schools may be regulated to a degree uncertain.
3. *West Virginia State Board of Education v. Barnette* (1943):[64] Public school students with ideological objections cannot be forced to violate their consciences by reciting the Pledge.
4. *Wisconsin v. Yoder* (1972):[65] Students with specific religious qualifications (namely Amish) may be excused from a small part of the compulsory education laws where suitable alternatives are arranged.
5. *Tinker v. Des Moines Independent School District (1969)*:[66] Students in high school may not be disciplined for wearing controversial political symbols so long as they are not the occasion of serious disruption.

There are other decisions that plausibly deal with intellectual liberty and might pretend to a place here. The issue of the rights of public school teachers to introduce or to exclude specific ideas provides an example. In *Epperson v. Arkansas*[67] the Supreme Court was presented with a replay of the classic "Monkey Trial." Even in the 1960's Arkansas still forbade teachers to present the theory of scientific evolution. The Court rescued the teacher. But teacher liberty is neither logically nor even practically connected with student liberty in any system in which the students are not free to seek another teacher. "Academic freedom" is irrelevant to the autonomy of those for whom the system presumably exists. It is at least as vexing to be tyrannized by an individual as by a school board. Racial segregation and discrimination cases are irrelevant for the same reason; the right vindicated has had nothing to do with student or parental choice. Indeed, the locus of liberty in the race cases is, if anywhere, in the federal court.

There is not a great deal that can be said about the con-

62. 262 U.S. 390 (1923).
63. 268 U.S. 510 (1925).
64. 319 U.S. 624 (1943).
65. 406 U.S. 205 (1972).
66. 393 U.S. 503 (1969).
67. 393 U.S. 97 (1968).

tribution to liberty even of the few cases noted. Plausibly *Meyer* and *Pierce* should not be considered with the rest. They are confined to private education. To the degree that they escape "reasonable regulation" private schools may be a source of liberty for those whose preferences they happen to represent and who can afford their tuition. But the "*Pierce* Compromise" does nothing at all for the bulk of families who perforce use public schools, and they are the concern and justification for this essay.

Barnette and *Tinker*, of course, are wholly relevant. Each represents a pure species of intellectual liberty — the former the right to forgo expression demanded by the school; the latter the right to engage in a certain kind of expression forbidden by the school. *Yoder* too represents a limited escape for particular nonconformists; and I should also concede that the exclusion of compulsory prayer from public schools is yet another example of liberty for at least some.[68] Aside from the effect of *Pierce*, however, the strongest single impression from these cases is that of triviality. There is much less here than meets the eye, and the confirmation of this is the Court's 1981 decision in *Board of Education, Island Trees Union Free School District No. 26 v. Pico*.[69] It is to date the most florid example of devotion to the symbols of intellectual liberty and, simultaneously, to the servile reality of school. The Court pledges its allegiance to student liberty while endorsing crude intellectual coercion. The decision deserves special attention.

Pico involved a school board that had brusquely and awkwardly interfered with the administration of its high school library to remove a few volumes which (for reasons that were in dispute) fell out of favor with a board majority. Certain students sought an injunction. The Supreme Court produced seven opinions, the only result being that the case was sent back for trial (and ultimately settled). It may be inferred from all the opinions that a school board's power to remove books is not unbounded, but the substantive and procedural limits of its authority over the whole of the education process remain few and obscure. In the opinion announcing the Court's judgment, Justice Brennan, speaking for only three members of the Court, asserted a new student liberty right to receive

68. See Engel v. Vitale, 370 U.S. 421 (1962); School Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963).

69. 457 U.S. 853 (1982).

information;[70] this sounds important, but his opinion, to be fair, is not only cryptic but inconsequential. The case has been ably analyzed elsewhere,[71] and my interest is limited to the curious light it shed on the liberty thesis.

I said that *Pico* endorses crude intellectual coercion. By this I mean that, even the justices who voted to send the case back for trial, went out of their way to emphasize that school boards have wide authority to impose their preferred forms of intellectual experience upon students. This is said of the library selection process, but more importantly it is said of the curriculum. Indeed, here the board is acknowledged to have a very broad discretion. Given this concession of essential school supremacy, there appears to be something paradoxical in the Brennan encomium to student liberty. In truth, however, this incongruity is required by the Court simultaneous commitment to the existing structure and to the argot of liberty. It cannot bear to surrender its claims as the champion of speech, but it is unshakeably loyal to the coercive system. The Court cannot afford to utter an intelligible rationale based in liberty, for it would be reduced to speaking in contradictions. Who cannot be sympathetic to its plight?

Facing this dilemma, the justices wisely chose to obfuscate the problem. Happily the case came up focussed upon the voluntary use of the library collection; this made the Court's escape from the basic issue relatively easy. The justices could distinguish and isolate the embarrassing implications of a compulsory curriculum. That they did so is understandable. Unlike the library, the curriculum is in every dimension a form of intellectual constraint; it is the full measure of the "inculcative" system operating in its most typical mode.[72] It is what children actually experience on a daily basis.

This is not a suggestion that compulsory education or

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70. *Id.* at 866-67.

71. For detailed analysis see, *Note*, "The Supreme Court, 1981 Term," 96 HARV. L. REV. 62, 151-160 (1982).

72. In a narrower context Professor Tribe has described such intellectual regimen as "[T]he special place of public schools in American life. Nothing could be more expressive of our society's commitment to a particular . . . practice than our willingness to use, as a forum for that [practice], the facilities through which basic norms are transmitted to our young." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 825 (1978). Before I inserted the dots and the bracket in this quotation it included the words "religious" and "religion". On reflection these words only emphasize the parallel between teaching sectarian dogma and whatever it is the public schools now do.

minimum standards violate liberty. These devices need be no more authoritarian in effect than rules against child abuse; they can protect the child by assuring an intellectual safety net. They could be viewed as a part of the very structure of liberty. What could not be justified as liberty is the conscription of a child to attend a particular public school, when the child and/or his parents would prefer another school — public or private — which would satisfy the state-determined minimum standard.

Suppose the next plaintiffs object straightforwardly to ideas odious to them that they are forced to study in class or complain about the exclusion from their classes of ideas that they wish to study. Justice Brennan has assured them that, in the library they have a "right to receive information." Regarding curriculum, however, he is prepared to frustrate this same right in order to protect professional control. Obviously there is a liberty interest in the child's having access in class to the ideas he and/or his parents want learned. How can Brennan's distinction be defended on liberty grounds?

The reality is that once the existing framework of coercion is accepted as legitimate, no judicial remedy can satisfy the liberty interest. This would remain so even if (or especially if) the judges themselves decided what should be studied.[73] No judicial order could promote liberty of the child, unless it secured to the representative of that liberty the capacity to secure the education of his choice. The autonomy principle cannot by its nature be honored under the present regime of compulsory attendance at a school chosen and run by strangers.

Even in the limited library setting of *Pico* the inevitability of intellectual conscription forced the justices into grotesque positions. Brennan, for example, would authorize judicial intervention only within the zone of "voluntary" student inquiry which he asserted is typical of a library and untypical of the classroom. There is, to be sure a distinction here, though the pervasive fact of compulsory attendance saps much of its force. But, even accepting Brennan's point, the overall effect is peculiar, and the protective force of the new right is inconspicuous. For the constitutional guarantee then becomes effective only when it is least needed; indeed, the particular li-

73. Professor Van Geel would apparently approve such a solution. See T. Van Geel, *The Search for Constitutional Limits on Governmental Authority to Inculcate Youth*, 62 TEX. L. R. 197 (1983).

brary books could have been procured elsewhere, while liberty in the classroom — for most families — could not. Brennan declines to rescue student choice exactly where it is most beset. When a curriculum case eventually arises, will the court relent, go further and recognize a student right to receive (or avoid) particular communications in class? I think certainly not, for such a protection would cripple the very system of intellectual constraint which the Court accepts as a given.

There are other peculiarities about the Brennan opinion that betray an acceptance of systematic coercion. It specifically recognizes that, in spite of the liberty interest, government may require student attention to very particular ideas (presumably excluding others) because of the school board's "duty to inculcate community values."[74] Now that duty in most states is only statutory. How it could outweigh the student's First Amendment liberty right is puzzling. Is the statute conceived to justify itself? In other First Amendment settings the government has been required to demonstrate both a compelling interest of its own and the absence of any alternative solution less onerous to the enjoyment of the protected interest.[75] Why not here? It could scarcely be a compelling interest of the state that families not exercise their First Amendment rights.

The Brennan opinion would test the board's power to remove books by examining its motivation. The rights of the students turn on whether the board had its hearts in the right places. How is this to be determined? On the one hand, say the justices, a board can properly wish to inculcate fundamental values and community aspirations, and it may promote " 'respect for authority and traditional values be they social moral or political' ".[76] On the one hand it cannot aim to suppress ideas or to prescribe the " 'orthodox in politics, nationalism. . . or other matters of opinion.' "[77] Much has been said about what this collection of phrases might mean. I will say nothing, for I do not understand it. It seems a wholly elastic notion by which any result will be possible in almost any case. Nor do I grasp still another distinction proposed between censorship in ordering books and censorship in their

74. 457 U.S. at 869.

75. See e.g. United States v. Robel, 389 U.S. 258 (1967).

76. 457 U.S. at 864, *quoting* Brief for Petitioners 10.

77. *Id.* at 872, *quoting* West Virginia Board of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

removal,[78] except perhaps as a pragmatic perception that motivation may be easier to prove in the latter case, thereby easing the Court's task. What can be said with conviction, is that all such niggling and marginal distinctions are precisely what could be expected in an arena where candor would be a hero's (or a fool's) calling and in which the Court cannot afford to get serious about the very liberty interest it proclaims. The plurality opinion in *Pico* is a distracting liberal gesture; nothing more.

I should not leave the impression that the Brennan opinion is the only puzzle in the case. The concurring opinions and dissents seem equally bewildered by the effort to square the First Amendment with the structure of the school system. Justice Rehnquist, in dissent, for example, thinks it useful to distinguish government acting as sovereign from government acting as educator.[79] The implication may be (it is impossible to tell) that government's role as educator is less a threat to First Amendment values. School is a consistently benign institution; it is not the military draft or a code of television censorship. Rehnquist would have it that government acting as schoolmaster is much like government acting as a private property owner; it is free on its own property to do what it could not do elsewhere. He views the system as if the pupils come by choice as willing customers. There is here no perception that the process require the incarceration of persons without consent in order to carry out the "inculcation" that is given judicial blessing."[80] To Justice Rehnquist public school is a tame and virtually private concern of the owner of some buildings that he happens to use as schools.

What is it to act as "sovereign?" Public school is the primary social instrument for the most comprehensive nonpenal system of compulsion known to our society, not excluding the military. School is the lever of intellectual control, the tool of a conscious collective effort to induce citizens to think correct thoughts. This may be good, bad or indifferent; but this is sovereign, or nothing is sovereign. If, the school board, nevertheless, enjoys a special exemption from the First Amendment, this can be only because the interests of such a system precede in constitutional dignity the liberty right of parent and child.

The school system and the declared student right cannot

78. *Id.* at 862.
79. *Id.* at 920.
80. *Id.* at 914.

peacefully coexist; the government's "special role as educator" in its present structure requires that it act as selector, inculcator, and indoctrinator — in short as a restrainer of intellectual liberty. Nor can euphemisms about neutrality alter the reality that teaching involves the transmission of specific values. The only question is who shall get to choose and impose them. Still, I concede that all this may be virtually invisible to persons of the age and peculiar experience of the justices. Perhaps their own families have for the most part been able to choose where to live and where to send the children. They could be forgiven for imagining that the public schools are part of a system of liberty enjoyed even by the nonrich, because they have never been challenged to consider any other possibility. And they have missed the reality.

But in any case little can be expected of the Court. The justices cannot protect the liberty interest of child and parent unless they have the temerity to condemn the system itself. Short of that they are reduced to the role of occasional sniper. The Court can gesture at the margin rescuing a few books for the library; it can provide some procedural harassment on behalf of students in trouble;[81] it can approve their nondisruptive badges and pins.[82] Meanwhile, however, it will reassure the system by authorizing batteries by teachers upon their pupils — batteries that might violate the rights of a convicted rapist.[83] (Are even prisons more libertarian?) Indeed, under the Constitution the school may and does beat children even in the face of parental objection to corporal punishment.[84] And what it may visit upon the body as an exceptional matter it may visit upon the mind in the regular course of school business.

Even if the Court were inclined to heroics, there is little it could do to insinuate fundamental First Amendment values

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81. Goss v. Lopez, 419 U.S. 565 (1975); Wood v. Strickland, 420 U.S. 308 (1975).

82. 78 Tinker v. Des Moines Indep. School Dist., 393 U.S. 503 (1969).

83. Ingraham v. Wright, 430 U.S. 651 (1977).

84. *Id.* And *see* New Jersey v. T.L.O., ___ U.S. ___, 105 S.Ct. 733 (1985). Note should also be taken of the rash of cases that reached the federal Courts of Appeal involving such relevant matters as hair length and student newspapers. These are collected in D. KIRP AND M. YUDOF, EDUCATIONAL POLICY AND THE LAW, (2d ed 1982), at 168-172, 187-193, 201-206, 21-218. The excitement over these issues appears to be spent, the old practices are unabated, and " . . . remarkably little judicial intervention has actually occurred." Kirp, *Pupil Control: How Innocents Get Caught in the Classroom Dragnet*, TIMES EDUCATIONAL SUPP., August 10, 1984.

into public education. So long as the system retains the capacity to force the average family into state institutions, the court is basically helpless. Theory may suggest that, in some activist season, the justices could embark upon a course of institutional restructuring. Arguments are sometimes made that the First Amendment excuses all dissenters from the public school regime. Fair enough; perhaps there are adumbrations of such a liberty in *Barnette*.[85] But how then does the child get educated, if the family cannot afford tuition? Is the Court prepared to find a complementary 14th Amendment right to a subsidy the parents can spend in a school of their choice?[86] It may move that way. But not much and not soon.

CONCLUSION

Will the education of children remain inevitably an exception to a general commitment to individual autonomy? Perhaps not. The present reality may be politically contingent. For only a few generations has the system served the set of interlocking political and economic interests that so conflict with the liberty of parents and children. If these interests are beyond the court's reach, they are not necessarily beyond that of politics. It now is plausible that half the population would desert public schools (as presently operated) were it not for economic compulsion.[87] And it is by no means certain that public school teachers are satisfied with their own or the

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85. West Virginia State Board of Educ. v. Barnette, 319 U.S. 624 (1943).

86. See S. ARONS, COMPELLING BELIEF, *supra* note 2; See also Arons, *The Separation of School and State: Pierce Reconsidered*, 46 HARV. E. R. (1976); Arons and Lawrence, *The Manipulation of Consciousness: A First Amendment Critique of Schooling*, 15 HARV. CIVIL RIGHTS CIVIL LIBERTIES L. REV. 309 (1980). And *see generally* B.M. YUDOF, WHEN GOVERNMENT SPEAKS (1983). The appearance of Arons' sustained argument and Yudof's balanced and objective treatise is earnest of an academic interest in the problem that cannot fail to alter the perception of the next generation.

87. A 1982 survey suggests that forty-five percent of public school families would leave if it were not for economic compulsion, *Gallup Poll of the Public Attitude toward the Public Schools* PHI DELTA KAPPAN (September 1982), p. 37, 47. Here are the precise question and responses:

> Suppose you could send your eldest child to a private school, tuition free. Which would you prefer—to send him or her to a private school or to a public school?

	Public School Parents %
Private school	45
Public school	47
Don't know	8

Why do you say that?

Reasons for preferring private school	Public School Parents %
Higher standard of education	28
Better discipline	27
More individual attention	21
Smaller class size	17
Better curriculum	12
Quality of teachers	11
Religious/moral reasons	5
Parents have more input	3
Miscellaneous	10
Don't know	1

(Figures add to more than 100% because of multiple answers.)

If the 45% who would leave public schools were added to the 10% of the total population already in private schools, it seems plausible that half or more of the electorate might support a system of family choice. This likelihood would increase if the proposal included the opportunity for the public sector itself to adopt the flexibility and choice characteristic of private schools. On the other hand political predictions from such polls are notoriously unreliable.

The 1983 edition of the same poll asked the "voucher" question in a much more direct form. That form and the results are reported in PHI DELTA KAPPAN, September, 1983, p. 38; as follows:

> In some nations, the government allots a certain amount of money for each child for his or her education. The parents can then send the child to any public, parochial, or private school they choose. This is called the "voucher system." Would you like to see such an idea adopted in this country?

public's perception of their place in our culture.[88] The role of monopolist is a source of regret to many in the profession and not merely for the limits it places on economic reward. If the mythology of intellectual liberty begins to erode, reconciliation of schooling with a constitutional ideal of autonomy could be politically imaginable.

	National Totals %	Number Children in School %	Public School Parents %	Nonpublic School Parents %
Favor voucher system	51	51	48	64
Oppose voucher system	38	37	41	30
No opinion	11	12	11	6

NATIONAL TOTALS	Favor %	Oppose %	No Opinion %
1970 survey	43	46	11
1971 survey	38	44	18
1981 survey	43	41	16
1983 survey	51	38	11

88. Fewer than 25 percent of teachers now feel they made the right professional choice. J. NATHAN, FREE TO TEACH 59 (1983). The recent Carnegie Report suggests that teacher salaries represent 37.6 percent of the cost of K-12 public education. E. FEISTRITZER, THE CONDITION OF TEACHING 55 *supra* note 45. If the conventional wisdom (and my own experience) is correct, this is scarcely more than half the percentage consumed by salaries in private schools. The private experience suggests strong customer preference for investment in teachers over alternative services. Assuming that alternative costs (administration, special services, etc.) are necessarily higher in the public sector as now organized, it would seem in the self-interest of teachers to begin to move public schools as far as possible toward the more modestly regulated private model. But see J. Chambers, *Patterns of Compensation of Public and Private School Teachers*, Project Report No. 84-A18, Institute for Research on Educational Finance and Government (Stanford, 1984).