LEGAL ASPECTS OF COMPULSORY SCHOOLING

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Gerrit H. Wormhoudt

I intend to explore the limits, under the United States Constitution, upon the modes of governmental force that may be brought to bear against the rights of people to choose for themselves the manner and content of the education their children will receive.

In legal parlance, compulsory schooling is usually equated with state truancy laws. Truancy statutes typically impose criminal penalties upon parents who do not cause their children to receive, during specified ages, the kind and quantity of education required by state laws. These statutes employ the direct, mailed-fist approach to accomplishing minimum governmental schooling objectives. Parents are given no choice, short of fine or imprisonment, in satisfying the seemingly limited standards set forth in the truancy statutes of the state where they and their children may reside, unless refusal to comply can be constitutionally justified.

It is best to say at the outset, however, that the actual reach of government-compelled schooling obviously far exceeds the domain strictly encompassed by state truancy laws. Those laws cannot be fully appreciated if they are viewed in isolation from the other coercive powers of government that impinge upon freedom of education.

Suppose some state, say New York, should establish its own publishing enterprise administered by its State Department of Public Information, so that all citizens could have without cost, except, of course, for taxes paid, government-published counterparts of the *New York Times, Saturday Review, Fortune* Magazine, and, even-

tually, the intended equivalents of all periodicals, books, and other literature now privately published, other than sectarian works. There would be no direct tax upon private publishers, but they would have to be self-supporting while their government competition would be sustained by some general tax assessment constituting an indistinguishable but ever-increasing portion of the state budget. Next, the state offers to subsidize struggling private publishers who agree, in exchange for the receipt of public funds, to conform to New York's minimum standards of objective, truthful, and desirable publishing. Further, suppose that New York eventually requires every citizen, under penalty of fine or imprisonment, to devote so much time each week, regardless of his reading speed, to the study of prescribed information published by accredited publishing houses employing only certified writers, all in accordance with the accreditation and certification standards established and administered by the New York State Department of Public Information. All of this would rest on New York's legitimate interest in a well informed and self-sustaining electorate, and on every citizen's right to equality of information.

With these rights fully secured, another set of rights becomes increasingly important. As New York's publishing business has expanded at a geometrical rate, and the tax levies necessary for its sustenance have grown apace and have become second only to those required for public school support, the tens of thousands of certified employees of the Department of Public Information have become increasingly restless. They have not only obtained their constitutional right to organize and engage in professional negotiations concerning wages, hours, and other terms and conditions of employment, but they are threatening to strike unless their demands for permanent tenure and for full control of accreditation and certification standards are met. Since their union has affiliated with the NEA and AFT to form the Professional Mind Workers of America, there is the chance that all

sources of information in New York may at least temporarily shut down. The overwhelming majority of the employees of public schools, of government-supported private schools, and of government-supported private publishers, have been certified and organized, and they are honor-bound to strike in sympathy with the demands of their certified brethren employed by the Department of Public Information. If the strike does come to pass, it is predicted that the administration of criminal justice in New York may be pushed to the point of collapse as it attempts to prosecute all those parents who will be in violation of the school truancy act and all of its residents who fail to fulfil their minimum obligations under the compulsory reading act.

If this hypothetical exercise seems either frightening or specious, how does it differ from the real, live American school scene at this moment, except as to the merger of the hypothetical with presently existing professional associations? Are not the actual effects of government's present role as schoolmaster accurately suggested by this imaginary portrayal of government as publisher?

Legal compulsion in schooling occurs whenever government coerces, directly or indirectly, individual choice as to who must go to school, what must be taught, who will be permitted to teach, and which school gets how much money. Truancy statutes are the direct and overt means employed by government to control these choices, but they are by no means the most effective weapon in the government arsenal. The use of tax powers to absorb privately generated funds for the primary use of government schools, the granting of public subsidies to non-governmental schools, conditioned upon their meeting government standards; the threat of denial of tax exemptions to schools that do not conform to government standards—these are all established methods of government coercion in schooling that both complement compulsory attendance statutes and would probably lead to the same near-monopoly of schooling by government

existing today, even if there were no truancy statutes.

The Supreme Court, in *Pierce v. Society of Sisters*,[1] held that no truancy law could constitutionally compel parents to send their children to public schools for the satisfaction of a state's minimum schooling requirements. But the *Pierce* decision was handed down nearly fifty years ago, at a time when a great many Americans could afford to pay the price of both a public and private education for their children, if they did not choose to send their children to government schools. With the notable but diminishing exception of our Roman Catholics, today relatively few parents can afford to shoulder the costs of private tuition after they have been compelled to pay through taxation the costs of maintaining government schools. The constitutionally-guaranteed alternative of non-governmental schooling, set forth in the *Pierce* case, has been foreclosed to most parents by another form of government compulsion which has indirectly, but very effectively, vitiated this right by making its exercise a practical impossibility.

As independent schools struggle to retain a clientele who are required to pay a double price if they send their children to non-governmental schools, these schools become increasingly vulnerable to the lure of government aid. Drowning men and independent schools are free to reject any offers of rescue, but the will to survive usually prevails. The price of survival invariably amounts to government control of the recipient school's activities. In his opinion for the court invalidating on First Amendment grounds the efforts of Rhode Island and Pennsylvania to use tax funds to foot some of the costs of secular education in parochial schools, Chief Justice Burger wrote the message plainly:

> The history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance.[2]

Although we supposedly enjoy the blessings attendant upon an age of legal realism, whatever restraints there are today upon the power of taxation are largely matters of form and not of practical consequence. If a state were foolish enough to impose a tax upon the right of a parent to send his child to a non-governmental school, the tax would doubtless be unlawful, since, in the words of Justice Douglas:

> A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution.[3]

However, in the same opinion, the author distinguished the tax in question, a license tax imposed upon door-to-door solicitors, applied to Jehovah's Witnesses, from a uniform tax on property or income not specifically aimed at the exercise of a constitutional right:

> It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon.[4]

Hence, a uniform tax levied for support of public schools displays on its surface no constitutional infirmity, even though the consequence of such a tax may be the confiscation of the financial ability (of all persons who do not command above-average resources) to exercise the constitutional right to patronize private schools.

Before concluding, however, that the Constitution provides no protection whatsoever against confiscatory, but non-discriminatory, taxation of the economic resources necessary to provide any substance to the constitutional right to choose non-governmental schooling, I should mention that there is at least some basis for hoping to the contrary. While it is ever risky to separate what any court has said from the context of the facts that occasioned the remarks, attempts to do just this are irresistible, especially when the words are what one wants to hear. What has been said before by a court, regardless of context, at least tends to require serious thought, if it is to be explained away on subsequent oc-

casions when it is invoked as applicable. Writing for the court in a case decided in 1972, holding that under the original Civil Rights Act personal rights to liberty are inseparable from personal rights in property, Mr. Justice Stewart said:

> In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.[5]

Now, compare Justice Stewart's statement with the language used by Justice Brennan in his concurring opinion in a First Amendment case that held unconstitutional a Pennsylvania statute requiring Bible reading in public schools:

> Attendance at the public schools has never been compulsory; parents remain morally and constitutionally free to choose the academic environment in which they wish their children to be educated. The relationship of the Establishment Clause of the First Amendment to the public school system is preeminently that of reserving such a choice to the individual parent, rather than vesting it in the majority of voters of each state or school district. The choice which is thus preserved is between a public secular education with its uniquely democratic values, and some form of private or sectarian education, which offers values of its own. In my judgment the First Amendment forbids the state to inhibit that freedom of choice by diminishing the attractiveness of either alternative—either by restricting the liberty of the private schools to inculcate whatever values they wish, or by jeopardizing the freedom of the public schools from private or sectarian pressures. The choice between these very different forms of education is one—very much like the choice of whether or not to worship—which our Constitution leaves to the individual parent. It is no proper function of the state or local government to influence or restrict that election. The lesson of history—drawn more from the experiences of other countries than from our own—is that a system of free public education forfeits its unique contribution to the growth of democratic citizenship when that choice ceases to be freely available to each parent.[6]

Faced with the above language, would not Justices Stewart and Brennan, at least, be required to give serious consideration to the plight of a parent whose limited income prevents him from electing to send his child to a parochial school after he has paid through taxes all or part of the cost of sending his child to a public school? Has not the government in such circumstances inhibited, and in fact eliminated, the exercise of a choice the Constitution supposedly guarantees?

And how would Justice Douglas, confronted with such a case, explain away his position set forth as follows in *Murdock v. Pennsylvania:*

> This tax is not a charge for the enjoyment of a privilege or benefit bestowed by the state. The privilege in question exists apart from state authority. It is guaranteed the people by the Federal Constitution.[7]

Perhaps the justice might answer by saying that a general tax to support the public schools is a charge for a privilege bestowed by the government. But such an answer invites this obvious question in rejoinder: "Why should the state be empowered to destroy the constitutionally guaranteed right to choose parochial schooling under the guise of conferring a privilege or benefit upon anyone or everyone?" Justice Douglas joined in Justice Black's concurring opinion in *Lemon v. Kurtzman* (Note 2), which emphasized that the financing of secular activities in a parochial school amounts to a subsidy of its sectarian programs by releasing additional funds for them, and that to ignore these consequences "...makes a grave constitutional decision turn merely on cost accounting and bookkeeping entries."[8] This logic is surely sound, and it serves to eliminate any realistic distinction between a direct tax upon the right to pursue non-governmental schooling and a tax uniformly levied for support of government schools. It is all the same to the individual taxpayer's pocketbook whether the amount he must pay for public school support is denominated a charge for a government-bestowed benefit, or

a tax upon his right to send his children to schools operating independently of government. In either case, he has no choice as to how his resources available for education will be spent, notwithstanding his supposed constitutional right to choose private schools.

In his *Murdock* opinion Justice Douglas also said:

> Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way."[9]

If this is true, then it must be a further truth, and surely a more profound truth, that those who might afford to pay their own way in exercising a constitutional right may not be deprived by the state of their financial ability to do so, without a compelling reason to the contrary. No contrary reason can possibly be supported. Authorizing a parent who opts for private schooling to retain that part of his school tax bill, only to the extent that it would cost the public schools to educate his children, would not deprive the public treasury of any funds, since the money retained by the taxpayer would merely equal the savings to the public. Nor could such retention of funds by a taxpayer properly be called a tax exemption, to be granted or withheld as a matter of grace. It would simply amount to the unfettering of a constitutionally-guaranteed choice, permitting a taxpayer to spend his resources at a public or private school, as he sees fit, but only so long as he has children of school age. If this reasoning has ever been urged upon the court, its opinions do not so reflect.

During 1973, the Supreme Court in *Sloan v. Lemon,*[10] *Levitt v. Committee for Public Education,*[11] and *Nyquist v. Committee for Public Education,*[12] considered a series of state enactments from New York and from Pennsylvania which were designed to alleviate in part the dollar pressures imposed by government upon parents to for-

reimbursement by a state to private schools for the cost of testing and record keeping requirements mandated by the state. For the same reason, in the *Sloan* and *Nyquist* cases, the court invalidated partial private school tuition reimbursements to parents, limited state tax relief to taxpaying parents whose children attend private school, and fractional state payments to private schools for their costs of maintenance and repair of facilities. All of these enactments were viewed as violations of the First Amendment proscription against an establishment of religion. Not a single justice, including the three dissenters, Burger, White and Rehnquist, discussed the relation between this legislation and the constitutionally protected right of parents to select nongovernmental schools for their children. The justices only disagreed as to whether aid to parents amounted to prohibited religion subsidies and as to whether the New York tax relief program amounted to tax credits, deductions, or exemptions, and if exemptions, whether the court's holding was consistent with its previous approval in *Walz v. Tax Commission*[13] of exemption from state real estate taxes for church property. Nor was mention made of the court's earlier 1973 decision in *San Antonio School District v. Rodriguez,*[14] which held that government provision of education is consistent with, but is not required by, the federal constitution. Seemingly, the court has implicitly said that, while government has no constitutional duty to educate, it has unlimited power to do so, and if such power is used to appropriate the dollars available for effective exercise of the fundamental right of parents to avoid governmentally dispensed education for their children, the First Amendment precludes any disgorgement of those funds. While the court has never said this explicitly, it must be admitted that its recent decisions provide slim hope that the court will soon, if ever,

right meaningful, are mutually interdependent.

The devices available to government for enforcing school attendance are easily laid bare, but intelligibly defining the content of what may be compelled by government in the name of "education" is altogether another matter. The First Amendment school cases decided by the Supreme Court suggest that the problem may be insoluble. Because the First Amendment to the Constitution applies to all levels of government, neither federal, state, nor local officials may establish religion or prohibit the free exercise thereof; and, neither may they abridge freedom of speech or of the press. In a continuing stream of decisions, the Supreme Court is being called upon to decide whether some particular practice or prohibition enforced in the public schools, or some attempt to give public funds to parochial schools, runs contrary to First Amendment mandates. In so doing, the court has made basic assumptions as to "educational" processes which are, to put it mildly, open to question. Those assumptions are also inconsistent with what the court has held on other occasions.

Whenever the Supreme Court has been faced with a claim that some practice in the public schools violates either the establishment clause or the free exercise clause of the First Amendment, or that public funding of parochial schools does so, it has premised its decision on the explicit ground that there is a knowable line of demarcation between secular education and sectarian education, however difficult it may be to locate the boundary. The First Amendment is said to confine government-supported schools to the teaching of secular subjects, and as a corollary, it is construed to sanction government funding of sectarian-controlled schools to the extent of their dispensation of secular education, provided that, in any given case of public aid, government can avoid excessive entanglement with the religious activities of sectarian

cial examination of the problems that have been presented to the court for solution.

In *Board of Education v. Allen*, the court applied the secular-sectarian test in determining the validity of a New York statute which entailed the loan of publicly-purchased textbooks to all school children in grades 7 through 12, including those in attendance at parochial schools. In practice, all such books were approved by public school authorities, and supposedly only secular texts were approved, although parochial school officials suggested texts for approval. None of the texts in issue was reviewed in the majority opinion. Accordingly, the court avoided passing judgment upon the actual contents of any text, and so it was able to conclude, as an abstract proposition, that public funding of texts for parochial schools does not violate the First Amendment:

> However, the language of § 701 does not authorize the loan of religious books, and the state claims no right to distribute religious literature. Although the books loaned are those required by the parochial school for use in specific courses, each book loaned must be approved by the public school authorities; only secular books may receive approval. The law was construed by the Court of Appeals of New York as "merely making available secular textbooks at the request of the individual student," supra, and the record contains no suggestion that religious books have been loaned. Absent evidence, we cannot assume that school authorities, who constantly face the same problem in selecting textbooks for use in the public schools, are unable to distinguish between secular and religious books or that they will not honestly discharge their duties under the law. In judging the validity of the statute on this record we must proceed on the assumption that books loaned to students are books that are not unsuitable for use in the public schools because of religious content.[15]

Justice Douglas and Justice Black dissented. Justice Douglas refused to wear the blinders provided by abstract conceptions of the secular and the sectarian. He

economics, government, and history. Justice Douglas said out loud what other members of the court also surely know to be true. Every textbook on almost any subject will tend to reflect value judgments on the part of the writer and the teacher or other authority who selects it for use:

> Even where the treatment given to a particular topic in a school textbook is not blatantly sectarian, it will necessarily have certain shadings that will lead a parochial school to prefer one text over another.[16]

But Justice Douglas' argument proves too much. If sectarian school officials tend to let their dogmas influence the selection of texts, what may be said of public school officials? Some of the standards set by New York for guiding the judgment of public officials in the selection of suitable texts are mentioned in Justice Douglas' dissent. They deserve full quotation:

> The material is to "promote the objectives of the educational program," "treat the subject competently and accurately," "be in good taste," "have a wholesome tone that is consonant with right conduct and civic values," "be in harmony with American democratic ideals and moral values," "be free of any reflection on the dignity and status of any group, race, or religion, whether expressed or implied, by statement or omission," and "be free of objectionable features of over-dramatization, violence, or crime." *Guiding Principles for Schools in the Selection and Use of "Non-Listed" Instructional Materials* (1952).[17]

The challenged New York law leaves to the Board of Regents, local boards of education, trustees, and other school authorities the supervision of the textbook program. The Board of Regents (together with the commissioner of education) has powers of censorship over all textbooks that contain statements seditious in character, or evince disloyalty to the United States or are favorable to any nation with which we are at war. (New York Education Law § 704.) Those powers can cut a wide swath in

When the court has been faced with questions as to the constitutionality of specific state action dealing with curriculum content, its burden of judgment is painfully clear. Even an Arkansas statute prohibiting the teaching of evolution presented obvious difficulties for a court that does not wish to find itself sitting as a board of review for all public school materials. In *Epperson v. Arkansas,* the majority of the court struck down the law as offensive to the First Amendment, but Justice Black, while concurring, expressed his doubts as to the position the court was assuming:

> However wise this court may be or may become hereafter, it is doubtful that, sitting in Washington, it can successfully supervise and censor the curriculum of every public school in every hamlet and city in the United States. I doubt that our wisdom is so nearly infallible.[19]

The secular-sectarian dichotomy used by the court has also been applied to teacher qualifications. In *Lemon v. Kurtzman*, the chief justice attempted to distinguish the constitutionally permissible funding of textbooks for parochial schools from impermissible public support of sectarian teachers:

> In *Allen* the court refused to make assumptions, on a meager record, about the religious content of the textbooks that the state would be asked to provide. We cannot, however, refuse here to recognize that teachers have a substantially different ideological character from books. In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not. We cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of precollege education. The conflict of functions inheres in the situation.[20]

Again the question comes up: if sectarian teachers may pose a threat to constitutional freedoms, what of their public school counterparts? The court has said that

subjects in a manner that does not make secularism a religion be determined by judges or any other public official?

The decisions of the court mentioned heretofore may be viewed as an attempt to define the secular education that is constitutionally permissible in public schools, by eliminating from it any sectarian influences on a case-by-case basis. In this fashion, the court may indefinitely evade examination of the positive issues inherent in the very nature of schooling.

Dispassionate teachers and dispassionate text writers are as rare as dispassionate judges. In everything that passes for schooling, the views of some particular sect will hold sway, whether that sect be characterized as religious, secular, political, philosophical, or whatever. The range of possibilities is as unlimited as the scope of knowledge, belief, emotion and individual preferences and prejudices. Is it anything other than simple honesty to admit that this is so? The changing character of the public schools provides incontestable proof. The rural and urban neighborhood public schools of not long ago were descendants of denominational schools, most often Protestant in origin. As such, they long continued to ignore any distinction between the secular and the sectarian, until occasionally forced to do otherwise. Those earlier schools also reflected in large measure the values of relatively close-knit communities which also fully sustained them financially. Those who funded the localized schools of yesterday, rightly or wrongly, controlled the content of curriculum, the selection of faculty, and the values that were disseminated.

Both state and federal officials these days assume an ever-growing role in shaping the character of today's schools. Uniform standards of curriculum and faculty are promulgated from ever higher levels in ever increasing detail. School expenditures represent the single largest resources devoted to education are not dispensed in a vacuum. Hundreds of thousands of educationists are dependent upon public finance for their income. Whoever controls the public school structure is in a position to manage the shaping of the minds of all but a handful of our children. These controllers and their interests and values need to be identified if there is to be any realistic assessment of the constitutional dimensions of freedom of choice in American schools.

The fact is that members of the teaching profession are the only certain beneficiaries of public expenditures for schooling. The power of government can be used to create and perpetuate an educationist establishment with monopolistic privileges, just as it can be used to favor business by protective tariffs and subsidies. Likewise, government-imposed standards for accreditation of schools and certification of teachers can be promulgated in the name of the public interest in better schools and teachers, as tariffs are often said to be imposed in order to make the nation safe from its enemies. But in each such case, we do well to seek the identity of those who will measurably benefit from the governmental undertaking in question.

Massive teachers' unions are no different from other groups bonded by a common economic interest. However, they do enjoy prerogatives of a special nature which stem from the paramount interest of all in matters affecting children. Because of common concern that some parents might fail to provide their children with what everyone supposedly knows and recognizes as at least a minimum education, public schools were initiated for the benefit of the children of such neglectful parents. Later, this sentiment gave rise to truancy statutes. These early, limited ventures by government into schooling were usually consistent with the common-law role of the state as parens patriae. Under this doctrine, parents

right had been forfeited in a specific instance of neglect, could government intervene in the parent-child relationship.

> Every statute which is designed to give protection, care, and training to children, as a needed substitute for parental authority and performance of parental duty, is but a recognition of the duty of the state, as the legitimate guardian and protector of children where other guardianship fails.[22]

Building upon such seemingly innocuous premises to justify limited government compulsion of minimum schooling requirements for those children whose parents either could not or would not privately assume them, the proponents of public education have used governmental powers to create an educationist establishment that is approaching monopoly proportions. Chief Justice Burger's aside in *Lemon v. Kurtzman* is appropriate here, and it demonstrates a remarkable ability for understatement:

> We have already noted that modern governmental programs have self-perpetuating and self-expanding propensities.[23]

Schooling today has almost wholly ceased to be a matter of parental control; instead, it is developing into an exclusive domain for professionals who claim for themselves alone the necessary expertise for formulating standards for teachers and schools, and who are sufficient in number and in political influence to see that government enforces the standards they develop. If political action fails, they can assert their coming right to strike against parents and children, who are compelled by truancy laws and taxation to patronize the very schools that teachers, it is claimed, must have the right to boycott if their demands are not met. Ironically, it is still open to question whether the neglected child receives any more or better schooling today than he did

The point to this seeming digression from the Supreme Court's attempt to define secular and sectarian education is simply this: formal schooling of children today is almost entirely a product fashioned by an elite group that has a tremendous stake in ever larger public school budgets, but very little accountability to anyone for what happens in the name of public schooling. Their views of history, economics, government, and the nature of man and society dominate the curriculum and the manner of its dispensation, both in public schools and in those private schools that comply with government standards in order to receive public aid. Generalizations as to the common values of any group are suspect, but at least certain obvious questions are in order as to teachers who depend upon government compulsion for their livelihood. Will they not by virtue of their own commissions be partial to versions of history that favor governmental intervention as the necessary and proper solution to man's recurring problems? Will the nineteenth century be portrayed as a period when purported excesses of economic freedom led to clearly undesirable social conditions, or will those results be attributed to the already growing tendency of government to interfere with the free market by using its powers to favor first one special interest and then another? Will the early twentieth century be seen as an age of reform when government tamed economic monopolies, or as a period when wavering economic concentrations obtained governmental suppression of competition under the guise of industry regulations needed for businesses affected with a public interest? Will the crash of 1929 be told as a story of private greed and irresponsible speculation without mention of the use of governmental monetary policy to encourage those very propensities? Will the ensuing depression years be recounted as the longest period of economic suffering in American history,

American economy?

Even more important questions need to be asked about these beneficiaries of government compulsion. How will they tend to depict the nature of those beings who are subject to their teaching? Will they be seen as responsible, moral agents, endowed with that capacity for conscious choice that gives rise to a system of individually oriented ethical and legal rights and obligations, or will man be viewed as a mobile intersection of biological and environmental happenings, a mere plastic object to be shaped and directed as is any other segment of a material universe? Are the "education" courses and the teaching methods posited by legally established teacher certification requirements based upon the view that men are endowed with neither dignity nor freedom, unless, perchance, they are members of the educationist establishment? Professional educationists as distant in time as Plato and his present heirs, Galbraith and Skinner, have fashioned utopias in which philosopher kings wisely and infallibly use the powers of government to provide happiness and virtue for the lesser creatures who inhabit their realms. The works of John Dewey, the father of modern education, are consistently directed to the displacement of supernatural agencies in the affairs of man in favor of Dewey's own *summum bonum*, scientific methodology, or the method of intelligence, to use his terminology:

> But generalized agnosticism is only a half-way elimination of the supernatural. Its meaning departs when the intellectual outlook is directed wholly to the natural world. When it is so directed, there are plenty of particular matters regarding which we must say we do not know; we only inquire and form hypotheses which future inquiry will confirm or reject. But such doubts are an incident of faith in the method of intelligence. They are signs of faith, not of a pale and impotent skepticism. We doubt in order that we may find out, not because some inaccessible not be confined to sect, class, or race. Such a faith has always been implicitly the common faith of mankind. It remains to make it explicit and militant.[25]

Whether the views of Galbraith, Skinner, Dewey, or anyone else have become an unofficial dogma for modern educationists, a dogma that is uniformly dispensed by them through institutions that are governmentally supported, is not the critical point to be made here. Nor do I suggest that the courts or any other body should attempt to investigate this hypothesis. The important thing is to recognize that all teaching and all teachers are laden with values and beliefs that touch upon every aspect of human destiny:

> We should not let ourselves be deceived by the belief that public schools are neutral about religion. Neutral they are not. By the necessity of the nature which pulsates and breathes in pupils, teachers, and parents as human beings, every school fosters some form of devotion. The religion that inspires a public school, despite the pose of neutrality, will be one of the traditional faiths, or a crusading zeal for social reform, or some other holy cause.[26]

This so obvious fact cannot be indefinitely ignored by resort to legal classifications such as the secular and the sectarian to obscure what actually takes place in any schooling institution.

In another series of cases, which deal with exemptions from military service based upon religious beliefs, the Supreme Court has officially recognized that matters of faith cannot be classified in terms of sectarian or secular labels. Notwithstanding the explicit congressional denial of exemption from military conscription to conscientious objectors whose views are based only upon secular beliefs, the court has construed the exemption provision to include those whose beliefs are deeply and profoundly held, regardless of their secular origin:

> In applying § 6(j)'s exclusion of those whose views are

be remembered that these exclusions are definitional and do not therefore restrict the category of persons who are conscientious objectors by "religious training and belief." Once the Selective Service System has taken the first step and determined under the standards set out here and in Seeger that the registrant is a "religious" conscientious objector, it follows that his views cannot be "essentially political, sociological, or philosophical."[27]

If the Supreme Court's school decisions are tested by results, rather than by reasons given, it is arguable that the court itself has not been bound by the labels it has purported to apply. The *Pierce* decision involved more than the right of parents to choose religious schools for their children. Both a Catholic school and a non-denominational military school were parties to the case, and the court's classic statements therein must be read as a guarantee of the right to non-governmental schooling, whether or not it is sponsored by a church. The stated premise of the court speaks to the liberty of individuals and of rights independent of religious affiliation:

> Under the doctrine of *Meyer v. Nebraska*, 262 U.S. 390, 67 L.Ed. 1042, 29 A.L.R. 1446, 43 Sup. Ct. Rep. 625, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[28]

Earlier, in *Meyer v. Nebraska*, the court had invalidated a state statute that prohibited the teaching of iment following World War I. The court was not concerned with any problems of religious freedom. Its holding was based upon the ground that the individual has the fundamental right under the Constitution to direct the education of his children:

> That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally, and morally, is clear; but the individual has certain fundamental rights which must be respected. . . . For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide: "That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child nor any child his parent. . . . The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be." In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution.[29]

In keeping with the *Meyer* and *Pierce* cases is the decision of the court in *Farrington v. Tokushige*. There the territorial legislature of Hawaii had acted to dominate private schools being conducted by orientals in their own tongues. In addition to requiring such schools to obtain licenses from the public school department, the enactment made teaching in such schools conditional upon a pledge to abide by all of the terms of the act and

The public school officials were also required to select suitable textbooks for such schools. The Supreme Court said:

> The foregoing statement is enough to show that the School Act and the measures adopted thereunder go far beyond mere regulation of privately supported schools where children obtain instruction deemed valuable by their parents and which is not obviously in conflict with any public interest. They give affirmative direction concerning the intimate and essential details of such schools, intrust their control to public officers, and deny both owners and patrons reasonable choice and discretion in respect of teachers, curriculum and textbooks. Enforcement of the act probably would destroy most, if not all, of them; and, certainly, it would deprive parents of fair opportunity to procure for their children instruction which they think important and we cannot say is harmful. The Japanese parent has the right to direct the education of his own child without unreasonable restrictions; the Constitution protects him as well as those who speak another tongue.[31]

The latest Supreme Court decision dealing with compulsory education is *Wisconsin v. Yoder*. Quite consciously striving to rest its decision on the narrowest possible grounds, the court affirmed the holding of the Supreme Court of Wisconsin that Amish parents would be exempted from the literal terms of Wisconsin's compulsory attendance laws after their children had passed the eighth grade. Because the court placed considerable emphasis upon the peculiarities of Amish doctrine, basing its decision solely upon the free exercise clause of the First Amendment, the *Yoder* case may well be, in the words of Judge Learned Hand, one of those "cases where the occasion is at once the justification for, and the limit of, what is decided."[32] While Chief Justice Burger concluded that Wisconsin's interest in compulsory education was not sufficient to override the religious

> be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is a "religious" belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claim would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clause.[33]

The use here by the chief justice of such analytical shibboleths as secular and religious, and his apparent submergence of individual choice in schooling under the weight of the government's interest in compulsory schooling, are in keeping with the sentiments expressed by Justice White in a concurring opinion, in which he was joined by Justices Stewart and Brennan:

> As recently as last term, the court re-emphasized the legitimacy of the state's concern for enforcing minimum educational standards, *Lemon v. Kurtzman,* 403 U.S. 602, 613 (1971). *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), lends no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society; in *Pierce,* both the parochial and military schools were in compliance with all the educational standards which the state had set, and the court held simply that while a state may posit such standards, it may not pre-empt the educational process by requiring children to attend public schools.[34]

With deep deference to Justice White, the *Pierce* decision

McReynolds plainly stated in *Pierce* that those requirements were not an issue in the case, while his subsequent opinion in the *Farrington* case plainly holds that fundamental parental rights may not be overridden by governmental standards. Furthermore, there was no evidence before the court in the *Yoder* case, or in any other case of record, which could support the inference of Justice White that state standards may establish "the knowledge a child needs to be a productive and happy member of society."

Justice Douglas, in partial dissent, evidenced his paramount concern for the student's choice rather than that of the parents. However, he was quick to point out that the majority justification of its holding on the basis of traditional Amish religious belief was squarely inconsistent with the decisions of the court in the draft exemption cases.

The *Yoder* case can be read as a forecast of doom for those who believe that the combination of compulsion and schooling are the grave-markers of freedom in any society, even though, thereafter, its members may be taught that they are free by those who forcibly control the development of their beliefs. And yet the basic tenet expressed in the *Pierce* decision was explicitly approved by the court. The Chief Justice also said:

> The history and culture of western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition. . . . However read, the court's holding in *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children. And, when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a "reasonable relation to some purpose within the competency of the state" is required to sustain the validity *Pierce* if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.[35]

Earlier in his opinion, the chief justice noted that although Jefferson emphasized the need for *education* as a bulwark of a free people against tyranny, there is nothing to indicate he had in mind compulsory *schooling* through any fixed age beyond a basic grade. Even more encouraging are his words last quoted, which suggest that parental decisions must prevail unless the government can show that the parents have jeopardized the health and safety of the child or have created a potential for significant social burdens. Perhaps most significant of all of the chief justice's comments concerning the Amish is his remark, "Even their idiosyncratic separateness exemplifies the diversity we profess to admire and encourage."[36] Hence, it is not merely wishful thinking to conclude that the present Supreme Court has not committed itself to governmental domination in the schools. The actual result of the *Yoder* case speaks plainer than the opinion.

So long as the court maintains that parents are constitutionally assured the primary role in the upbringing of their children, any attempt by a government-created educationist establishment to diminish that role remains subject to challenge before our highest court. In nearly every instance, when the court has been confronted with governmental trespasses against that role, individual liberty has been vindicated. But the court has never candidly considered in its entirety the impact upon individual liberty of an educationist establishment that enlists the aid of government to force ever increasing tax loads for its support, that attempts to use the power of government to standardize schooling for the primary benefit of government-employed educationists, or other special interests, and that, in combination therewith, in

In an opinion that many regard as the finest expression in this century of our abiding concern for individual freedom, Justice Jackson stated principles that may well point to eventual freedom of choice for all Americans whose funds before school taxes would be sufficient to pay for non-governmental schooling:

> Without promise of a limiting Bill of Rights it is doubtful if our Constitution could have mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.[37]

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[38]

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[39]

Justice Jackson was fully aware of the problems inherent in the court's attempt to pigeonhole schooling as either secular or sectarian, and his forecast of impending difficulties has proved accurate:

> Our public school, if not a product of Protestantism, at least is more consistent with it than with the Catholic culture and scheme of values. It is a relatively recent development dating from about 1840. It is organized on the premises that secular education can be isolated from all and lofty neutrality as to religion. The assumption is that after the individual has been instructed in worldly wisdom he will be better fitted to choose his religion. Whether such a disjunction is possible, and if possible whether it is wise, are questions I need not try to answer.[40]

> It seems to me that to do so is to allow zeal for our own ideas of what is good in public instruction to induce us to accept the role of a super board of education for every school district in the nation.... It is idle to pretend that this task is one for which we can find in the Constitution one word to help us as judges to decide where the secular ends and the sectarian begins in education. Nor can we find guidance in any other legal source. It is a matter on which we can find no law but our own prepossessions.[41]

Relying first on the guarantee of liberty in the Fourteenth Amendment, and later on the religion and speech clauses of the First Amendment, the Supreme Court has, without significant exception, ruled against regimentation of the content of schooling by state and local officials by invalidating all such efforts, including the prohibition of foreign language instruction (*Meyer v. Nebraska*), compulsory attendance at public schools only (*Pierce v. Society of Sisters*), detailed public approval of private school curriculum and teachers (*Farrington v. Tokushige*), the use of public school property for the conduct of religious services during school hours (*McCollum v. Board of Education*, 333 U.S. 203), proscriptions against the teaching of evolution (*Epperson v. Arkansas*), official prayers for public schools (*Engel v. Vitale*)[42], and prohibitions against the wearing of black arm bands by students protesting the Vietnam War (*Tinker v. Des Moines*, 393 U.S. 503).[43] Finally, in the *Yoder* case, the court held that Wisconsin's interest in compulsory schooling was outweighed by the right of Amish parents to conduct their children's education in accordance with their religious traditions, after the chil-

concluded that compulsory schooling has not enjoyed a friendly reception from the Supreme Court thus far.

Misgivings do arise when attention is paid to some of the language in the court's opinions, such as its repeated references to the legitimate, but never defined, interest of government in an "educated" citizenry, or its unsupportable categorization of all schooling as either secular or religious. If the Supreme Court should ever attempt to specify the minimum content of that "education" that would satisfy the legitimate interests of government, it will have assumed prerogatives that no court, or any other agency of government, should possess in a free society. In that event the court's distinction between the secular and the sectarian would prove of no real value, for the problems presented in dealing with the appropriate content of schooling are as complex, as profound, and as unlimited as the meaning of life itself. Any attempt to establish by law uniformity in curriculum for minors or in their teachers' qualifications, necessarily rests on the proposition that the child is the creature of the state. Traditionally, government has intervened in the parent-child relationship only when the welfare of the child has been jeopardized in some particular instance by demonstrable parental neglect. In keeping with this tradition, it is suggested here that the government may constitutionally interfere with parental control of education only when, in a specific case, the government is prepared to prove that the parents' responsibility for the education of their children has either been abandoned or is being exercised so as to damage the wellbeing of the child. Courts *are* equipped to deal with such problems on a case-by-case basis, and they have no pecuniary interest in attempting to ignore individual differences by formulating uniform requirements as to curriculum content or teaching qualifications. Much of what the Supreme Court has said is consistent with this suggested approach that minimizes the inherent contradictions between government compulsion in schooling and the individual parent's primary right and duty to shape the destiny of his children while they are immature.

For the great majority of Americans, however, both the right to choose a nongovernmental school for their children and the correlative right to pursue that course free from official disciplined uniformity, have become meaningless, notwithstanding that the Supreme Court has said that these rights are fundamental under the Constitution. This will continue to be true as long as government is not required to account to the taxpaying parent for that portion of his school tax bill that is attributable to the cost of schooling his children, so that he may decide whether that part of his resources available for educational purposes will be used for governmental or for independent schooling. Until that issue is resolved in favor of freedom of educational choice, most parents will have to continue to submit the minds of their children to the government-standardized courses provided by public schools. The present state of the law makes it impossible for them to do otherwise.

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Statute Law and Judicial Interpretations

Robert P. Baker

The subject of schooling is not mentioned in the United States Constitution and there is no right to be educated recognized therein. Under the Ninth and Tenth Amendments, schooling is a matter left to the people and to the several states. As the Supreme Court of the United States put it in a case decided seventy-three years ago:

> The education of the people in schools maintained by state taxation is a matter belonging to the respective states, and any interference on the part of federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land.[1]

The nexus of federal and state law regarding schooling does not emerge unless and until two circumstances exist concurrently: one, the individual state does in fact maintain a tax-supported school system, and, two, the laws governing that system infringe upon some right guaranteed by the United States Constitution. When James Meredith entered the University of Mississippi accompanied by federal marshals, the right being enforced was not Mr. Meredith's right to schooling; neither he nor anyone else has any right to be schooled at the expense of the Mississippi taxpayers. What Mr. Meredith did have a right to, as a citizen of the United States, was equality of treatment under the laws of Mississippi, regardless of the subject of those laws. If, in order to

have had no remedy in the federal courts.

The question often arises in popular discussion whether a state may, consonant with the Constitution, compel parents to educate their children. Despite a widespread belief to the contrary, the Supreme Court of the United States has never directly answered this question. Unfortunately, however, any productive discussion of the merits has been foreclosed by the court's intimating what it would have decided, had it been presented with the question. The popular belief arose out of the famous 1925 case concerning an Oregon school law that required all children to be given instruction solely in public schools. The United States Supreme Court struck down this law, pointing out that

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only.[2]

Thus far and no further, fine. But on the preceding page of the court's opinion, in a mere dictum, a judicial aside, Mr. Justice McReynolds also mentioned the fact that the case presented no question

> concerning the power of the state reasonably to regulate all schools, to inspect, supervise, and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.[3]

Mr. Justice McReynolds was absolutely right. The case presented no such questions. It is a mystery to me why he found it necessary to unburden himself of these legally irrelevant observations. In the years since this case, *Pierce v. Society of Sisters*, was decided, many state courts

most outrageous infringements upon the rights of children and their parents. It has been employed to support the proposition that parents may be compelled to educate their children, and moreover, may be compelled to educate them in accordance with state-prescribed curricula taught by state-approved teachers. The *Pierce* case, so widely regarded as a victory for civil liberties, in fact did enormous damage. Properly construed, it established only one point: that private schools have a constitutional right to exist.

I will return to the constitutional implications of compulsory schooling laws when I discuss how they tend to function in practice, but at this point I want to go into the content of the laws and classify them. Two preliminaries: First, it should be remembered that, under the common law emerging case by case over the last nine centuries, the courts uniformly held that no offense was committed by a parent who failed to provide for his children's education. Our jurisprudence has always held that a father has a moral duty to educate, but not a legal one, and a neglected child's prayer for remedy must be directed to God rather than to the king. Consequently, every compulsory schooling law derives from statute, from specific legislative enactment. This is one of the areas in which there does not exist any law until a statute has been passed. Moreover, every compulsory schooling statute is penal in nature: it forbids certain acts and omissions, providing for criminal penalties in the event of disobedience. Secondly, it must be remembered that when the word "law" is used in this context, it signifies not only the bare words of the legislation as found in the statute books, but in addition the holdings of the courts as they have construed the legislation in cases arising under it. The words of the statute are but half the law; what the courts say those words mean in

manageable multitude of dozens of different laws. In broad outline, however, the laws bear certain similarities, and I have found it useful in my studies to classify compulsory schooling laws under two headings deriving from the social attitudes behind them. I have labeled these classifications, perhaps whimsically but I think accurately, the "other guy" type of compulsory schooling law and the "cookie-cutter" type.

The argument underlying the first type of statute runs as follows: "My colleague who favors the compulsory schooling law stoutly maintains that he would of course educate his children even in the absence of the law, and he admits that I share his sense of moral obligation and would also provide for my children's education without a gun being held to my head. But don't you see—there is that fellow across the street, or if it turns out that the fellow across the street is in fact educating his children, then there is that fellow down the block or in the next county or *somewhere* there is *somebody* who, if there were no compulsory schooling law, would not educate his kids. And thus it follows with impeccable logic that laws prescribing the schooling of millions of youngsters are essential if an entire generation of illiterates is to be avoided." I have yet to meet the man who will admit to me that if it were not for the law, he would leave his children in ignorance; it is for that "other guy" who is so derelict in his parental duties, and whom I have never encountered, that we need the law.

Despite the manifest absurdity of the "other guy" argument, it has important practical consequences for the law. Where adopted, it results in laws that require, on their face at least, no more than what most parents would do anyway. In its naked and minimal form, the statute underlying such a law might read thus:

> Every person having custody of a minor child between [illegible] equivalently instructed.

The significant aspect of such a statute, which of course, is always amplified by sections detailing qualifications of students, curriculum content, periods of attendance, and similar minutiae, is this phrase "otherwise equivalently instructed." So the statutes read in New York, New Jersey and Ohio. These legislatures have done no more than to enjoin all those other guys to afford their children an education substantially as good as that given in the public schools. How they do so is, on the face of the statute, no concern of the legislature.

It can be reasonably argued, I think, that the "other guy" type of compulsory schooling law, while objectionable in terms of liberty, is at least tolerable under any practical circumstances that are likely to arise in a free society. It may overlap laws regarding child abuse; it may indeed be superfluous in a community where the value of education is universally recognized; it is certain to be unavailing against that one parent in a million to whom it might be applied in practice. But it can be lived with.

I now turn to the second class of compulsory schooling law, engendered by a conceptually distinct social attitude, and certainly more conducive to oppressive law. It was advanced openly during the later nineteenth and early twentieth centuries, and while much muted today nevertheless lies behind the compulsory schooling laws of many American jurisdictions. We are all familiar with the myth of the melting pot, which, in its educational manifestation, extolled the virtue of taking the children of the newly arrived immigrants, this wretched refuse of some teeming shore, and processing them through the public school cookie-cutter, turning out millions of standardized Americans. If the immigrant youngsters happened to acquire some intellectual attainments along

Now what kind of law would we expect to evolve from the cookie-cutter theory? Obviously, a law intolerant of any deviation from the norm, requiring strict supervision of the entire educational process, culturally stultifying, and only grudgingly permitting private schooling to exist. *Pierce v. Society of Sisters*, for example, arose out of the determination of the Oregon legislature to assimilate the children of the foreign-born, particularly those treacherous Germans. In order to accomplish this, it was clear that the Catholic and Lutheran parochial schools had to be destroyed, and it was the purpose of the law to do just that. The "cookie-cutter" approach was also responsible for those laws passed in Iowa, Kansas, and Nebraska in the early 1920s requiring that all instruction in any school be conducted solely in the English language and moreover forbidding the teaching of any foreign language in the elementary grades.

Now having made clear, I hope, the conceptual distinctions between the two major classes of compulsory schooling law, we can sharpen our language somewhat. The concept of "compulsory" education (as distinct from schooling) is absurd. In reality, the laws can do no more than compel the custodian of a child to expose him to a reasonable amount and kind of instruction, in the case of an "other guy" type law, or, in the case of a "cookie-cutter" law, to enroll him in and ensure his attendance at an approved institution.

Let us now examine the functioning of particular laws in each of these two major classes as exemplified in a number of contrasting cases. For more than twenty-five years, the New Jersey compulsory schooling statute has contained wording identical to that I gave you earlier, that is, a clause permitting "equivalent instruction elsewhere than at school." When Mr. and Mrs. Bongart were accused of being disorderly persons in 1937 because they themselves were educating their children in

equivalence of instruction. In convicting them, however, the trial judge said,

> I cannot conceive how a child can receive in the home instruction and experiences in group activity and in social outlook in any manner or form comparable to that provided in the public school.[4]

When the defendant father protested that "I am not interested in method, but in results," the judged replied,

> ...that theory is archaic, mechanical, and destructive of the finer instincts of the child. It does seem to me, too, quite unlikely that this type of instruction could produce a child with all the attributes that a person of education, refinement, and character should possess.[5]

We see in this case an obvious example of the "cookie-cutter" theory in practice, superimposed by judicial fiat, and an illustration of my earlier comment that the statute is but half the law.

An even more outrageous case, *Knox v. O'Brien*, arose under the same New Jersey statute in 1950. Therein it was proved at the trial that the mother, who was instructing her children at home, held a state teacher's certificate, and that the children were taught state-prescribed subjects, from state-approved textbooks, during the usual public school hours. Nevertheless, the court clung to the "cookie-cutter" approach, asserting that

> Free association with other children being denied to Mark and Eileen, by design or otherwise, which is afforded them at public school, leads...to the conclusion that they are not receiving education equivalent to that provided in the public schools.[6]

The court's use of the phrase "by design or otherwise" reveals the irony of the case, since it was precisely in order to avoid forced association with other children, children whom the O'Briens considered an immoral

years New Jersey in fact had a compulsory school attendance law. At last, in 1967, a case involving home instruction came before a judge who had the insight to ask what is in retrospect a rather obvious question: If the legislature had indeed intended that education be imparted only in a group, that is, in a "school," then why did it frame a statute providing for an alternative to school? The court then ruled that New Jersey law requires nothing more than a showing of academic equivalence and acquitted the parents who were educating their child at home. In the seven years since this case, *State v. Massa*,[7] New Jersey has had a pure "other guy" type of compulsory education law.

It is not always the judges, of course, who try to ram their "cookie-cutter" philosophy down their neighbors' throats. In Kansas, for example, in 1965, one legislator secured the passage of a bill repealing the exemption from the compulsory education law which had been granted to children who, regardless of age, had completed the eighth grade. The bill was intended, in the legislator's own words, "to force the Amish into the mainstream of American life," and provided that all children below the age of sixteen were required to attend an approved school, regardless of previous educational attainment. I will explore the peculiar difficulties that the laws have visited upon the Amish in more depth when we analyze constitutional problems in greater detail; for now, let me merely assure you that before attempting to force an Amishman to do anything, I would sooner chew on rocks. The Amish community did attempt to comply with the new law to the greatest extent possible, consonant with their religious convictions proscribing worldly learning beyond that normally acquired in elementary school. They established their own school, taught by an Amishman, wherein courses in agronomy, animal husbandry, domestic arts, and similar

prosecuted under the new law and convicted. This conviction was sustained by the Kansas Supreme Court, which held that the Amish school, since it was not conducted by a state-certified teacher and did not follow the same curriculum as that presented in the public high schools, was merely "programmed home instruction," and consequently not permissible, even if demonstrably equivalent education was imparted, because the Kansas compulsory schooling statute made no provision for instruction outside an approved school.[8] Kansas, it can be seen, has a compulsory school attendance law. In the face of continued resistance by the Amish, the "mainstream" amendment was at last repealed and the previous exemption restored to the law. But this came too late for Leroy Garber. By the time the United States Supreme Court denied his final appeal, he had another child approaching completion of elementary school, and could not face a repetition of his ordeal. Garber sold his farm and moved from Kansas, hoping to find that religious liberty in search of which his ancestors had emigrated to America more than two hundred years before.

States other than Kansas have statutes which do not specifically permit compliance by education outside a conventional school. But where the courts are genuinely concerned with education and reject the "cookie-cutter" approach, results apparently contrary to the strict wording of such statutes have been encountered. In the Illinois case of *People v. Levisen*, for example, in 1950, a young girl was being educated at home by her parents, devout Seventh-day Adventists, who believed that educating her in a conventional school in competition with other children would instill an un-Christian pugnacity of character. They decried the fact that faith in the Bible could not be taught in a conventional school, and contended, in their words, that

There was no question that the intellectual atmosphere of the Levisen home was quite good; the father was a college graduate, and the mother had two years of college training, including work in pedagogy and educational psychology. The child's educational program was guided by a church correspondence course, with regular daily hours for instruction, recitation and study. Whatever the abstract merits of the parents' educational philosophy, their practice was apparently beneficial to their child, since upon examination using standard tests she showed a proficiency comparable to the average third grade student, although she was only seven years old. All of this notwithstanding, the parents were convicted in the trial court for violating what was, on its face, a compulsory school attendance statute. The conviction was appealed, both the prosecution and the defendants agreeing in their belief that the Levisen child was not attending a private school, which, under the wording of the statute, was the only permissible alternative to public school. But judicial interpretation, of which we have already mentioned several examples, is a sword that cuts more than one way, and the Illinois Supreme Court, in reversing the conviction of the Levisens, held that the alleged fact agreed upon by the parties was actually a conclusion of law, to be decided upon by the court, and that the Levisens, contrary to their concession to the prosecutor, were operating a "private school" within the intention of the legislature. The Illinois courts have been unusually wise and perceptive in regard to compulsory schooling, and their attitude is well exemplified in a 1966 decision upholding Chicago's experimental dual-enrollment plan, under which parents may comply with the law by having their children attend public school for part of the day and another educational institution of the parent's choice for the remainder. The *Levisen* court formulated the "other guy" philosophy in its least objec-

> children with instruction equal or superior to that obtainable in the public schools. It is made for the parent who fails or refuses to properly educate his child.[10]

The most tragic case I have encountered in my studies illustrates the "cookie-cutter" theory at its most virulent and oppressive. Following the conviction of her parents for violating the compulsory school attendance law of the State of Washington in 1959, a young girl was adjudged delinquent and dependent, and an order was entered making her a ward of the court. It is not clear what the judge's actual motive may have been for taking such drastic action, but the practical effect of the order was to make her removal from the state unlawful without the court's consent. Her parents' religious convictions forbade attendance at a conventional school, and they had been educating her at home. The trial court found as a fact that the parents' religious liberty was indeed infringed by the requirement of school attendance and further found as a fact that the instruction being imparted to the girl in her home was at least the academic equivalent of that available in the public schools. The Washington statute contains no provision permitting instruction elsewhere than in a public or private school. Although the trial court, as later events showed, was sympathetic, it did not, at the time of trial, indulge in the fiction employed by the Illinois Supreme Court in the *Levisen* case five years earlier. Physical custody of the child was left in the parents, conditioned upon their providing for her education in conformity with state law.

Subsequent to the entry of his order of wardship, however, the trial judge researched the matter more deeply and discovered that the Washington legislature had never promulgated any standards governing private schools. Having found this happy means of squaring the law with the justice of the case, the trial judge promptly

The state's attorney appealed, and in an incredible decision, by a five to four vote, the Washington Supreme Court held that, in spite of the absence of any legislative standards for private schools and in spite of the indisputably proper education being afforded the child, no school could be deemed to exist unless instruction were being given by a teacher certified by the state of Washington. The lower court's original order was reinstated. To their credit, the four dissenters wrote a blistering minority opinion, pointing out that it was the function of the lower court to determine what was in the best interests of the child and that it had done so. I submit to you that this case, *Shoreline v. Superior Court,* is a disgrace to American jurisprudence.[11]

Having shown the functioning of the compulsory schooling laws in these relatively simple cases, I want now to consider some of the subtler details of these laws that give rise to greater complexity, in particular the constitutional implications of the regulations embodied in most compulsory schooling laws regarding religion, health, race, and curriculum. In the typical compulsory schooling dispute, a parent fails or refuses to send his child to school, or, in those jurisdictions permitting it, to provide equivalent instruction. Very often such failure is based upon the religious-moral or educational-social convictions of the parent, and when prosecuted, the defendant relies upon an alleged violation of his constitutional rights.

Consider the famous case of *West Virginia State Board of Education v. Barnette,*[12] wherein the constitutionality of a mandatory flag salute was considered. Barnette was a Jehovah's Witness, and for reasons deemed sufficient and compelling by them, Jehovah's Witnesses will not render any form of obeisance whatsoever to any tangible object, including a flag. Embodied in the West Virginia school law was a commandment that every child attending the public schools should salute the flag of the United States each morning. Refusal was considered in-

subordination. Couple these considerations with a compulsory school attendance law and it is obvious that strife is inevitable. Either their parents removed them from the schools, or, in many instances, the children of the Jehovah's Witnesses were expelled and threatened with terms in a reformatory for criminally inclined juveniles. Their parents were prosecuted, both for violation of the compulsory schooling law and for causing delinquency of minors. Their defense, of course, was that the flag salute law violated their religious liberty, guaranteed by the First Amendment to the United States Constitution.

The Supreme Court of the United States did strike down the West Virginia law, but it is interesting to note that its reasoning was not grounded primarily upon the infringement of religious liberty that the law entailed. Rather, the court made it clear that the First Amendment's guarantee of free speech was sufficient to decide the matter:

> It is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind . . . . To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.[13]

That might seem to have settled the matter conclusively, but as recently as 1966 members of another minority sect—in this case, Black Muslims—had to struggle up to the New Jersey Supreme Court before their right not to salute the flag was reaffirmed. This despite the fact that the New Jersey school regulations regarding flag saluting specifically exempt from its provisions those having conscientious scruples which would thereby be offended! The significance of the United States Supreme Court's opinion in *Barnette,* emphasizing the free speech aspects of the right not to salute, can be seen in the fact that the local school board that had expelled the recalcitrants de-

fended its action on the specious grounds that the Black Muslims' objections to saluting were based as much upon their political beliefs as upon their religious beliefs. Of course, it makes no difference.

More strictly pertinent to the First Amendment's protection of religious liberty are those cases involving the conflict between compulsory schooling laws and Bible-reading or prayer in the schools. Until very recently, such conflicts were frequently the objects of litigation in our courts. The earliest so-called public schools were in fact Protestant schools supported by taxation, and part of their efforts to inculcate true Christianity in the young consisted of the reading of the King James Bible and the recitation of Protestant-oriented prayers. This practice continues even today, in defiance of the rulings of the United States Supreme Court. While children are no longer being expelled for their refusal to participate in exercises repugnant to their religious beliefs, or if they are, the cases have not reached the courts, this was once a common occurrence, and—at the risk of some degree of digression—I think that it would be good to examine this matter not only because of its peripheral relationship to compulsory schooling problems, but in order to clarify some of the legal issues surrounding prayer in the schools. The now famous case of *Engel v. Vitale*[14] arose in New York. The regents of that state, who are invested with broad and general supervisory powers over the operation of the public schools, published, in the early 1960s, a *Statement on Moral and Spiritual Training in the Schools*, saying that

> We believe that this statement will be subscribed to by all men and women of good will, and we call upon all of them to aid in giving life to our program.[15]

Embodied in the *Statement* was a short prayer, composed by the regents themselves, to be recited at the beginning of each school day. This order was issued by

local school boards and did contain a provision permitting any child who so desired to absent himself during the recitation. The prayer itself went as follows:

> Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our teachers, and our country.

A substantial number of New York parents objected to this practice, and ten of them brought suit in the state courts to have it enjoined as a violation of the First Amendment. The New York Court of Appeals, while acknowledging that the prayer was offensive to Unitarians, Jews and Ethical Culturists, nevertheless denied the parents their requested injunction. Since a federal question was involved, the United States Supreme Court accepted their appeal, and in a 6-1 decision unleashed a continuing controversy by holding that the required prayer recitation is indeed violative of the Constitution.

It is important here to appreciate precisely what the Supreme Court said—and perhaps even more important to appreciate what it did not say. There is no legal ban upon children praying in school or anywhere else. There are no U.S. marshals stationed in classrooms waiting to swoop down on any youngsters caught looking heavenward and moving their lips. The recent proposed amendment to the Constitution, allegedly designed to guarantee children the right to pray, was not only a political smokescreen but redundant: my child's right to pray, in or out of school, is already protected by that same First Amendment that protects him from having prayers thrust upon him by public officials. What the Supreme Court did say and, when we get to the heart of the matter, all that it said, is that it is no business of the government to be composing or prescribing any prayers for anybody, directly or indirectly. Honest confusion on this issue—not the confusion which has been deliberately fomented by some congressmen—is perhaps understandable, since even Mr. Justice Stewart, the lone dis-

senter and a jurist for whom I have a great deal of respect, failed to grasp the essential point of the court's opinion. He said, in part:

> I think that to deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our nation.[16]

Everyone should agree that if any child were denied his right to pray it would indeed be a monstrous injustice and contrary to our constitutional principles. No such denial is remotely implied in the decision on the New York Regents' case.

This short excursion into the school prayer controversy is not wholly unrelated to compulsory schooling questions. Not only do we see an attempt to use the schools for unrelated social objectives, but there have been direct conflicts involving compulsory education and religious exercises. Since these exercises are considered part of the curriculum, the courts have generally dealt with them in terms of the parents' right to reject certain courses of study for their child. Parents have voiced the most unusual objections. I have found parents rejecting such apparently innocuous things as grammar, algebra, and domestic science. One fellow fought all the way to the Supreme Court of Indiana in order to avoid submitting his daughter to the study of singing. Almost without exception, the courts in this country have been sympathetic in regard to parental objections. As the Supreme Court of Oklahoma put it in 1957, reaffirming a well established legal doctrine in that state:

> The parent...has a right to make a reasonable selection from the prescribed course of study for his child to pursue, and this selection must be respected by the school authorities, as the right of the parent in that regard is superior to that of the school officers and the teachers.[17]

The school law of New York specifically exempts the children of Christian Scientists, who reject the received

wisdom in regard to health and disease, from the study of hygiene. In signing the bill granting the exemption, the governor of New York stated:

> I believe it to be a simple fundamental of freedom of religion that the state shall compel no child to learn principles clearly contrary to the basic tenets of his religious faith.[18]

There may well be a fallacy involved here, since there are very few young children who can be said to have a religious faith in the usual sense of that concept, and in fact it is their parents' religious sensibilities that the law is solicitous of. But this statement exemplifies the current attitude. The sole exception to the courts' libertarian approach to curriculum choice, as suggested earlier, concerns, or until the recent prayer and Bible-reading decisions muted the conflicts, did concern religious exercises. As late as 1955, the Massachusetts Supreme Court, in affirming the conviction of Buddhist parents who were offended when their child was required to participate in Bible-reading, held that this was no defense to a charge of violating the compulsory education law by keeping the child at home. But even in this area, a minority of courts have defended parental curriculum choice. In a case arising out of a parental request to have a child exempted from religious exercises, the Supreme Court of Colorado wrote a ringing defense of individual rights, saying that

> the right of parents to have their children taught where, when, how, what and by whom they may judge best, are [sic] among the liberties guaranteed by section 1 of the Fourteenth Amendment of the United States Constitution....The parent has a constitutional right to have his children educated in the public schools of the state...and to direct, within limits, his children's studies. The school board, though with full power to prescribe the studies, cannot make the surrender of the second a condition...of the first. They cannot say to him, "you have a constitutional right to deny your child the study of biolo-

> gy, and you have a constitutional right to have him taught in the public schools, but, if you are admitted to the latter, we shall deny you the former."[19]

In sharp contrast to the manner in which the compulsory schooling laws have been applied in regard to curricular choice is their application when parents have sought regular absences, for entire days. In Pennsylvania, Muslim parents kept their child from school every Friday, a day revered by Islam and analogous to the Judeo-Christian sabbath. In affirming their conviction, the court held that, while the parents might send their child to a school that recognized their holy day, so long as the child was enrolled in a public school he would have to adhere to its schedule, and there was no right to conform to the compulsory schooling statute only part of the time.[20] So too in a case in 1954 that had no religious implications. Therein a young girl, whose exceptional talent was freely acknowledged, left school every Wednesday afternoon for ballet lessons. The court held that it was not permissible to interrupt the regular course of study, and her father was convicted of violating the compulsory schooling law.[21]

The general rule then, throughout the country, at least in those states having the relatively mild "other guy" type of law, is that you can get your child exempted from specific courses of study, but you may not take regular chunks of time out of the public school schedule.

There are many citizens who, usually on religious grounds, differ from the overwhelming majority in regard to matters of health and disease. In particular, their religious beliefs forbid inoculations. Perhaps they know something, since I recently read a news item stating that the Public Health Service has reversed its previous stance and will now advise against routine smallpox vaccination. Be that as it may, you can easily see that coupling compulsory attendance laws with regulations making vaccination a precondition for school enrollment is going to make lawyers rich, even if it accomplishes no

good for anyone else. The uniform rule of law today, in every jurisdiction that has passed upon the question, is, that where inoculation is a precondition to school attendance, refusal to have your child inoculated is the legal equivalent of refusal to cause him to attend school, and exposes you to prosecution under the compulsory schooling law. Many states have grafted exemptions onto their school laws, providing for children of persons whose religious tenets would be violated by vaccination. Such is the case in New Jersey and North Carolina, for example. With the almost total eradication of smallpox and diphtheria in the United States, public health and school officials may well be abandoning their previous fanaticism in regard to inoculation of children, and disputes are, I presume, being adjusted on the local level. No such cases have reached the appellate courts in the last few years.

We could hardly quit the area wherein religious beliefs come into conflict with the compulsory schooling laws without mentioning, however superficially, the tribulations of the Amish people. The Amish, frequently called "the Plain People," are a sect deeply committed to their views of the Christian life. Their doctrines, and to a large extent their practices, have through choice been frozen as they were at the dawn of the seventeenth century. Over the centuries, the aloofness from the larger society around them that is the Amish practice has had a reciprocal effect of both preserving and of reinforcing their cultural distinctness. The Amish accept in theory and practice an injunction found in the twelfth chapter of *Romans*:

> Be not conformed to this world: but be ye transformed by the renewing of your mind, that ye may prove what *is* that good, and acceptable, and perfect will of God.

There are many Amish beliefs that have brought them into conflict with the larger society around them and its laws. They will not, for example, pay Social Security tax-

es, for does not St. Matthew tell us of Jesus' admonition in the Sermon on the Mount?

> Lay not up for yourselves treasures upon earth, where moth and rust doth corrupt, and where thieves break through and steal: But lay up for yourselves treasures in heaven....

Not long ago the Amish were exempted from the payment of Social Security taxes, but previously, the agents of the I.R.S., undeterred by the scriptural allusions to thieves breaking through and stealing, have seized the property of Amishmen, selling it for pittances at public auction to satisfy assessments. As you might expect, the Amish are also thoroughgoing pacifists, and pushing them around demands just about as much courage as the average tax-collector possesses.

The doctrine that has brought the Amish into collision with compulsory schooling laws stems from the Dortricht Confession of 1632, which warned them against those who attend universities and, apparently in consequence, pervert the word of God. In practice, this doctrine has led the Amish to reject all "worldly" learning beyond that normally attained in the typical elementary school. It should be understood that the Amish are not opposed to learning *per se*. On the contrary, they stress literacy, so that their children may read the Bible, and they desire their children to be able to keep their accounts and to be fluent in liturgical German. Amish expertise in agronomy and animal husbandry is without equal. Since the Amish are predominantly farmers, the education they provide for their children when left in peace is quite adequate for the overwhelming majority who follow their forefathers' agrarian way of life. But it is often not sufficient to satisfy the requirements of compulsory schooling laws. This lack has nothing to do with the quality of education given Amish children. Compulsory schooling laws are not framed to take into account the qualitative—or for that matter even the quantitative—aspects of children's education. Rather, they all specify, without exception, that a child shall be exposed to instruction until he attains a certain age. This is administratively expedient, it is simple to the point of being simplistic, and it obviates any need to treat individuals individually. For most of us it makes no difference; for the Amish it does. What the Amish fear most is that their children, particularly teenagers, will be lured away from their culture by the temptations abounding in the modern consolidated school. It is a danger that the Amish will not tolerate, regardless of the penal sanctions involved, and short of capturing the Amish children physically—which has been done—there is little that governmental agencies have been able to do to force them into the public schools.

How then have the compulsory schooling laws functioned in this setting? Well, some states, trying to reach accommodation, have provided for exemptions. Pennsylvania, for example, once provided for permits to be issued to youngsters over the age of fifteen who were engaged in agricultural or domestic employment. The superintendent of public instruction, however, despite the fact that he was granted no discretion on the face of the pertinent statute, forbade the issuance of such permits without a showing of "dire need" on the part of the child's family. In practice, of course, this would result in an absolute denial of such permits to Amish youngsters, since no Amish family in "dire need" has ever been observed. The first test of the superintendent's usurpation came in a prosecution of an Amishman, whose permit application was denied, under the compulsory schooling law. His son had left school to help on the family farm. The court acquitted the defendant and held that the school regulations, as applied to the Amish, were unconstitutional. The prosecution's appeal was denied. Despite this setback, the school authorities continued to deny the permits that the Amish were entitled to under the law, and, six years later, were able to convince the court that

it was a proper exercise of the superintendent's powers to place such conditions upon the issuance of them—no matter what the statute said.[22]

I think that one of the important points illustrated by this Pennsylvania experience is that it is dangerous, and often futile, for the legislature to enact a "tough" compulsory schooling law and then to graft exceptions onto it, relying upon public officials to carry out the purposes of the law in good faith. Where the persons who are to be benefited by the exception are politically weak, geographically concentrated, and easily identifiable, we may rely upon some officials to find ways of catering to local prejudices. Nor is it always mere prejudice that motivates local officials toward stringency in enforcing compulsory attendance laws against the Amish. Sometimes it is a matter of money. Most schools are supported by local property taxes, and the funds thus derived are supplemented, often in very large amounts relative to the amount raised locally, through additional monies voted out of the state treasury. The degree of this state aid, of course, is related directly to the average attendance in the schools seeking it.

The Wisconsin compulsory attendance statute reads, in part, as follows:

> § 118.15 *Compulsory school attendance* (1) (a) Unless the child has a legal excuse or has graduated from high school, any person having under his control a child who is between the ages of 7 and 16 years shall cause such child to attend school regularly during the full period and hours...that the public or private school in which such child should be enrolled is in session until the end of the school term...of the school year in which he becomes 16 years of age.

That sounds, so far, rather strict, a typical "cookie-cutter" statute, but skipping down to paragraph number four we find a provision that makes clear the reference to the child's possible legal excuse:

> Instruction during the required period elsewhere than at school may be substituted for school attendance. Such instruction must be approved by the department as substantially equivalent to instruction given to children of like ages in the public or private schools where such children reside.

So we can see that the legislature, by grafting an exemption clause onto an otherwise tough statute, has apparently converted it into an "other guy" statute concerned only with seeing that children are in fact educated reasonably. We certainly would not expect conflict under it to arise in regard to the Amish, who maintain their own elementary schools.

The town of New Glarus, located in Green County, about 75 miles west of Milwaukee, has a fine, modern consolidated high school. The consolidated high school, drawing its pupils from a much wider geographical area and having a much larger physical plant than that characterizing high schools of an earlier generation, is a continuing trend in American secondary education, representing an attempt by school administrators to cope with ever more pressing financial problems. New Glarus is no exception, and—trying to look at the matter from the viewpoint of local officials in good faith—we can see that they must have been quite upset. Here were these Amish families in Green County having youngsters who, although they had completed their elementary education, were still below the age of sixteen and yet were not attending the high school, thus in effect "depriving" that school, and its pupils, of the increased state aid to which it would otherwise have been entitled. The obvious solution? Enforce the law to its letter and compel the Amish children to attend. I have alluded earlier to the absurdity of trying to compel the Amish to do anything against their religious convictions. You have never seen passive resistance until you have seen an Amishman with his back up, and thus the stage was set in Wisconsin for a repetition of those repressive acts, including what one

high court judge has described as gestapo tactics, that have so outraged many of us in the past. But this time, in large part because of some brilliant legal talent enlisted in their behalf, the Amish were ultimately vindicated.

The lower court, which convicted three Amishmen whose children, though graduates of elementary school, were still under age 16, accepted as true the contention of the defense that enforcement of Wisconsin's compulsory attendance statute against the Amish violated their religious liberty under the First Amendment to the United States Constitution. But it went on to hold that such infringement was the necessary and justifiable consequence of a legitimate governmental policy, apparently relying in part upon a judicial distinction between religious beliefs absolutely guaranteed, and acts, which even if religiously motivated, are in all cases subject to regulation in the "public interest"—a distinction that originated almost a hundred years ago and has been undergoing judicial erosion ever since. The Supreme Court of Wisconsin, by a six to one decision, reversed these convictions, holding in accordance with a previous decision of the United States Supreme Court that, in order to justify an indirect infringement of a constitutional right, the state must show more than the fact that the offensive law furthers a legitimate governmental concern. As the chief justice of Wisconsin put it,

> A compelling interest is not just a general interest in the subject matter but the need to apply the regulation without exception to attain the purposes and objectives of the legislation. . . . To force a worldly education on all Amish children, the majority of whom do not want or need it, in order to confer a dubious benefit on the few who might later reject their religion is not a compelling interest.

Since there was a question under the Constitution, the state of Wisconsin prosecuted a writ to the United States Supreme Court, which again held for the Amish. The majority opinion, by Chief Justice Burger, is not, in my

judgment, an unmixed blessing; it contains a number of propositions that I believe are simply bad law and that open the door to invidious discrimination against nonreligious dissenters or against those whose religious objections are not of long standing. A discussion of my misgivings, however, is beyond the scope of this presentation. Suffice it to say that, insofar as a Supreme Court decision can make them so, the Amish are safe.[23]

It is worth noting that the Wisconsin battle was needless. Today many states have managed to reach accommodations with the Amish. Pennsylvania, Indiana, Ohio, Iowa, and Maryland, for example, have provided in various ways for the Amish to satisfy the law by establishing vocational training plans for their under-sixteen children. Just such an accommodation was suggested to Wisconsin officials quite early in the course of this recent litigation, but was rejected by them on the grounds that the Amish children would not and could not thereby be afforded substantially equivalent "education."

The last aspect of the functioning of the compulsory schooling laws that must be covered relates to the consequences of violating them. You will have noticed, of course, such words as "prosecution" and "conviction," implying that violation of the compulsory schooling laws constitutes a criminal act. This is indeed true in every state of the Union. The precise nature of the crime consists of a failure or refusal to act. It is the recalcitrance of the child's custodian that is the essence of the offense. Nevertheless, it is possible to violate the law through a positive act in some states. Convictions have been sustained against those who, in the course of strikes or school boycotts, have urged parents to keep their children away from school or who have encouraged truancy in the pupils.

The courts have generally distinguished between the acts of the child and the omissions of the parents. For example, this distinction has been employed by sympathetic courts to resolve the flag-salute controversies men-

tioned earlier. If the *child* refuses to salute the flag, these courts have said, the criminal law may not as a matter of course impute this insubordination to the parents.

Several jurisdictions have held that the omission constituting the offense under the compulsory schooling laws must be accompanied by an intent to do wrong, a *mens rea* as the lawyers call it, amounting to wilfulness and defiance in order to sustain a conviction; but this is definitely a minority rule. In most states, violating the compulsory education law is on an evidentiary par with violating pure food laws. All the prosecution has to show is the statutory elements of the offense. Neither motive nor malice nor any other mental state matters.

Because compulsory schooling prosecutions so often arise out of circumstances peculiarly local, it is important to determine precisely where the crime occurs, and consequently where the accused is to be tried. The general rule is that the offense is committed where the child involved resides, not where he should have attended. Thus, if your child should have gone to a consolidated school thirty miles away, the jury that tries your case will nevertheless be composed of your neighbors.

Suppose you are educating your own child in some unconventional manner in a state having an "other guy" statute. Who has to prove what? It can make an enormous difference whether you have to prove that you come under some exception to the general rules, or the prosecutor has to prove that you don't. The general rule is that, where the compulsory schooling statute, in defining the offense against it, specifies several alternative modes of compliance, it is up to the prosecution to allege and prove non-compliance with each and every one of them. If, on the other hand, the statute prescribes a general rule, such as the very common provision "shall attend a public or private school," and then, separately, lists certain exceptions, all the prosecutor must do is allege your non-compliance with the general rule, while

you must bring forth evidence in your defense that you come under one of the exceptions. Having produced some degree of evidence from which reasonable men could conclude that you do indeed come under some exception, you shift the burden back to the prosecution to prove that you don't, and, these being criminal charges, such proof must be beyond a reasonable doubt. You can see arising from these technical rules the reason for my earlier strictures against legislatures enacting tough "cookie-cutter" statutes, then tacking on exception clauses. The New York statute, for example, reads in part,

> Every person in parental relation to a minor...Shall furnish proof that a minor who is not attending upon instruction at a public or parochial school...is attending upon required instruction elsewhere. Failure to furnish such proof shall be presumptive evidence that the minor is not attending.

I admit that this rule is not a very onerous one, and it should be a simple matter for a conscientious parent to bring forth evidence that he is in fact providing his child with a reasonable education. Indeed, from the standpoint of judicial convenience it can be argued that a contrary evidentiary rule puts too great a burden on the prosecutor; well, under our system of criminal justice the prosecutor is supposed to be burdened. A more searching objection to such presumptions built into statutes, however, is that they tend very easily to rigidify. In Massachusetts, for example, any persons operating a private school must obtain prior approval from public authorities before it will be assumed that the school provides equivalent education, within the contemplation of an exception clause of the law. If a parent whose child is attending such an unapproved school is charged with violating the compulsory attendance law, he may not, at trial, prove the equivalence of the education imparted by that school. The court won't listen to him. The lack of prior official approval is an irrebuttable presumption, that is, a rule of law, that the education is not

equivalent. I submit that such evidentiary rules are ridiculous and a mask for repression.

We have now concluded our survey of the nature, content, and functioning of the compulsory schooling laws. There remains nothing further but to evaluate their efficacy and their future.

Of all the judgments that can be pronounced upon any theory, the most damning is, "it doesn't work." Now it has been contended that parents do have an obligation to educate their children, to prepare them to make their own way in that culture they must someday fully enter. The contrary has been ably argued by scholars I respect. I have not finally concluded in my own mind which side has the better of this debate and, speaking as a lawyer, I really don't care. I don't care because, even when judged within the context of the parental obligation theory that our jurisprudence does in fact assume, on their own terms, the compulsory schooling laws manifestly do not work. They are demonstrably either useless or pernicious, engendering far more compulsion than education.

Some years ago there was a Pennsylvanian named Marsh, who, at the time he makes his first appearance in the law books, had a son, about eight years old. Marsh had some nonconformist ideas concerning health, and refused to have his son vaccinated. He was threatened with criminal prosecution and arrested, not once, but several times since his boy had come of school age, but to no avail. I don't know the outcome of these initial prosecutions, which occurred before Marsh, deciding to counterattack, sued the governor of Pennsylvania in federal court, asking to have him enjoined from enforcing the state's compulsory schooling act, which made vaccination a precondition of school attendance. The court ruled against him, holding that it had no power under the circumstances to restrain any state official, and that Marsh should have exhausted his state remedies, appealing if necessary at last to the United States Supreme Court. While the federal suit was pending, Marsh was convicted again and incarcerated. This time he sued out a writ of habeas corpus against the jail warden and fought it up through the Pennsylvania courts. He lost. At last, several years after Marsh's battles with the compulsory schooling law began, an action was brought *against his son*, seeking to have him declared delinquent and neglected, with a view toward having him removed, if only temporarily, from his father's custody. Even then, the issue was clouded by the delinquency charge, implying some moral fault on the part of the boy. The court, observing that young Marsh had repeatedly presented himself at the school, only to be denied admission, naturally dismissed the delinquency count. But it did hold that the boy was neglected, whereupon he was remanded to the custody of the Pennsylvania Welfare Service, where we may presume he was promptly vaccinated and sent off to school.[24]

Now what is the point of recounting to you this dreary farce bordering on tragedy? Simply this: I defy anyone to tell me how Pennsylvania's compulsory schooling law protected young Marsh's alleged right to an education. During all the years that his father commuted between the courthouse and the jail, what was the law doing to protect the boy? The answer, of course, is absolutely nothing. The law was worse than useless, in that if it had left his father alone at least the son might have gained some degree of education through observation in the home. If the objective of the compulsory schooling laws is to guarantee that children are in fact educated, I fail to see how this goal is furthered by jailing recalcitrant parents. One need not be an expert in the psychopathology of religious fanaticism to understand that penal sanctions, regardless of severity, are ineffective; they beget martyrs, not compliance. Thus, one of the major defects in the compulsory schooling laws is that they are criminal laws.

Both Justice Heffernan of the Wisconsin Supreme Court and Mr. Justice Douglas of the United States Supreme Court wrote dissenting opinions when their respective tribunals passed upon the recent Amish case I mentioned earlier. These dissents were extremely perceptive, and each asked a rather obvious question: What about the rights of the children involved in compulsory schooling disputes? Our American system of law is, for good or ill, an adversary system, and I think it's asking too much of it to expect that antagonists, in the heat of battle, will be scrupulous in their regard for those who, in effect, are third parties under the present law. I have not mentioned the rights of children previously, because the compulsory schooling laws take no account of those rights whatsoever. Setting aside the alleged right to an education, what of the right to due process? During the Wisconsin Amish controversy, the state had the temerity to argue that, even if the law did infringe upon the religious liberty of the Amish parents, the law was in effect directed towards the children, and towards them the state had the right to act in a manner that would be unconstitutional if applied to adults. Such a contention has been rejected by the Supreme Court, which has reaffirmed the principle that children are "persons" to whom the Bill of Rights applies. But mere case-by-case appellate review is not enough. It seems to me that it is incumbent upon the judges of our trial courts, the judges who give to most litigants what is their only day in court, to appoint guardians routinely to protect the rights of children involved in compulsory schooling cases. And just once in a while, it might be a good idea to ask the kids what they think.

Much litigation has arisen out of the question of what constitutes education that is equivalent to that provided in the public schools. In the first place, I submit that this is not a very high standard against which to weigh unconventional modes of teaching youngsters; but in addition, it misses the point. If our theory is that children

are entitled to be educated, the test is not to be applied to the means of instruction, but to the child in question. It should be, and in a very few states it is, the uniform rule that, if standardized tests demonstrate that the child is in fact being educated reasonably, then that is the end of the matter, and it is no concern of the law if he's being taught by a guru on a mountain top.

With regard to the health regulations so often tied to compulsory schooling statutes: in the first place, it is absurd and unjust to penalize the child twice—first he is denied a reasonable standard of health care and then as a result he is denied an education as well. If it is granted that parents have an obligation to provide their children with preventive medical treatments, what sense is there in having the penalty for failing in that obligation fall upon the victim? Today, with the almost total eradication of smallpox and diphtheria, I think that the inoculation laws should be abolished. In any event, they should be severed from the education laws.

It is customary today, when discussing education in the United States, to speak in terms of crisis and conflict. We are all aware of the public uproar over busing and other attempts to use the schools for sociological purposes. What is not often noticed is the contribution of compulsory schooling laws to keeping the pot boiling. Busing is not new, of course, but the social goals being promoted today are different from those that were promoted in the past. For example: in 1957, in Virginia, Mr. Dobbins brought his child to school, but the administrators refused to enroll her. She was of the wrong race. Bus transportation was offered to another school, but declined. The impasse was broken when Mr. Dobbins was prosecuted and convicted for violating the compulsory schooling law. In reversing this conviction, the Virginia Supreme Court of Appeals held that Mr. Dobbins had been denied equal protection of the laws, as mandated by the Fourteenth Amendment to the United States Constitution. Moreover, the court observed, the

compulsory education statute may not be applied as a coercive means to require that a citizen give up his constitutional rights.[25] This attitude, it seems to me, marks the direction in which the law is going. In fact, in some places, the courts have gone overboard, to the point of dismissing the rights of children. When some parents removed their children from a New York school that was demonstrably inferior and were charged with child neglect, the court held that

> These parents have the constitutionally guaranteed right to elect no education for their children rather than to subject them to discriminatorily inferior education.[26]

This seems to be going a bit far, since it implies the rejection of the parental obligation theory, but extreme or not, it seems to me to be the judicial trend. This trend is being reinforced by extra-legal social factors tending to expand freedom of choice. While the growth of the so-called counterculture is not yet significant, certainly not numerically, the relatively increased tolerance for varying life styles induced by it in the general population is slowly turning public opinion towards a greater receptivity for innovation in the specific area of education.

Having concluded, rightly or wrongly, that public education is not only failing, but probably beyond redemption, many people, including of course the judges of our courts, are willing to try anything that offers a chance to escape from the present mess; and if this attitude happens to conflict with the compulsory schooling law, well then, so much the worse for the law.

Lest I paint too rosy a picture of the future, let me hasten to assure you that the compulsory schooling laws are *not* going to be abolished. It will take more far-reaching changes than those I have mentioned to bring about a time when the unarticulated political philosophy of the American people will make that possible. Nevertheless, laws can become irrelevant without being repealed. I think that this will happen to the compulsory schooling laws.

REFERENCES

1. *Cumming v. Richmond County Board of Education,* 175 U.S. 528 (1899), p. 545.
2. *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), pp. 534-35.
3. *Ibid.,* p. 533.
4. *Stephens v. Bongart,* 15 N.J. Misc. 80 at 92, 189 A. 131 at 137 (Juv. & Dom. Rel. Ct. 1937).
5. *Ibid.,* at 92, 189 A. at 137.
6. 7 N.J. Super. 608, 72 A. 2d 389 (Cape May County Ct., L. Div. 1950), at 614, 72 A. 2d at 392.
7. 95 N.J. Super. 382, 231 A. 2d 252 (Morris County Ct., L. Div. 1967).
8. *State v. Garber,* 16 Kan. L. Rev. n. 5 (1968).
9. 404 Ill. 574, 90 N.E. 2d 213 (1950).
10. *Ibid.,* 215.
11. 55 Wash. 2d 177, 346 P. 2d 999 (1959), cert. denied. 363 U.S. 814(1960).
12. 319 U.S. 624(1943).
13. *Ibid.,* at 633-34.
14. 370 U.S. 421 (1962). Related case (Bible-reading) is *School Dist. Abington Twp. v. Schempp,* 374 U.S. 203 (1963). Extensive discussion in Leo Pfeffer, *Church, State, and Freedom,* rev. ed. (Beacon Press, Boston: undated), pp. 460-78.
15. Quoted by Black, J., in *Engel v. Vitale,* 370 U.S. 421 (1962).
16. *Idem.*
17. *School Bd. v. Thompson,* 24 Okla. 1, 11, 103 P. 578, 582 (1909).
18. Cited in N.Y. Educ. Law para. 3204 (Historical Note) (McKinney 1970).
19. *People ex. rel. Vollmar v. Stanley,* 81 Colo. 276, 255 P. 610 (1927), 613, 614.
20. *Commonwealth v. Bey,* 166 Pa. Super. 136, 70 A. 2d 693 (1950).
21. *Commonwealth v. Rapine,* 88 Pa. D. & C. 453 (Montgomery County Ct. 1954).
22. *Commonwealth v. Smoker,* 177 Pa. Super. 435, 110 A. 2d 740 (1955).
23. 49 Wis. 2d 430, 182 N.W.2d 539 (1971), *aff'd,* 40 U.S.L.W. 4476 (May 15, 1972). The *Yoder* decision is founded, at least in part, upon the Wisconsin Supreme Court's interpretation of the First Amendment to the United States Constitution. Thus a federal question is presented. It may well be that the United States Supreme Court wishes to clarify the application of the *Sherbert* rule, particularly in light of the changed membership of the court since *State v. Garber,* 197 Kan. 567, 419 P.2d 896 (1966), *cert. denied,* 389 U.S. 51 (1967). Casad, *supra* note 72, argues cogently that, had the *Garber* court employed the *Sherbert* test, the outcome in that case might have been different. Whatever considerations may underlie the court's decision to review *Yoder,* it is pertinent to note that, had the claim of unconstitutionality advanced in the Wisconsin courts been directed toward the religious liberty provision of the *state* constitution and an analogous ruling obtained, the Amish victory would not have been exposed to jeopardy, since the Supreme Court will not review an interpretation of any state's own constitution made by that state's highest court. *Spector Motor Serv. Inc. v. McLaughlin,* 323 U.S. 101 (1944); *Ashwander v. TVA,* 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring).
24. *Marsh v. Earle,* 24 F. Supp. 385 (M.D. Pa. 1938)
25. *Dobbins v. Commonwealth,* 198 Va. 697, 96 S.E. 2d 154 (1957).
26. *In re Skipwith,* 14 Misc. 2d 325, 180 N.Y.S. 2d 852 (Dom. Rel. Ct. 1958).

Legal Bibliography

(The Law as It Relates to Compulsory Education and Schooling)

I—Legal Cases

II—Books

III—Articles

Annotated and Compiled by

Robert P. Baker (I) and H. George Resch (II and III)

I—Legal Cases

The following listing is intended to be selective rather than exhaustive. It is a compilation of judicial opinions only, from which the legal scholar can enter the field of contemporary compulsory education law. The annotations represent the opinions of the compiler.

1 Abington School District v. Schempp, 374 U.S. 203 (1963).
The famous case in which the United States Supreme Court held that compulsory Bible-reading in public schools violates the First Amendment.

2 Alford v. Board of Education, 298 Ky. 803, 184 S.W.2d 207 (1944).
Holding that failure of a school board to provide safe transportation for pupils in accordance with statute exempts parents from compliance with compulsory education law.

3 Anderson v. State, 84 Ga. App. 259, 65 S.E.2d 848 (1951).

A vaccination controversy, supporting the proposition that a parent must not only send a child to school, but must also prepare the child in such a manner as to assure his admittance.

4 Beiler, Commonwealth v., 168 Pa. Super. 462, 79 A.2d 134 (1951).

One of a series (see Nos. 28 and 33) illustrating the problems of the Amish when public officials are antagonistic.

5 Bey, Commonwealth v., 166 Pa. Super. 136, 70 A.2d 693 (1950).

Holding that religious convictions, requiring regular and repeated absences from public school, cannot justify parents in violating compulsory education statute's demand for attendance every school day.

6 Chalfin, State *ex rel.*, v. Glick, 113 Ohio App. 23, 177 N.E.2d 293 (1960), *aff'd*, 172 Ohio St. 249, 175 N.E.2d 68 (1961).

Illustrating extra-legal attempts by public officials to persecute Amish operating their own schools.

7 Crouse, *ex parte*, 54 Pa. (4 Whart.) 9, 11 (1839).

The earliest judicial expression of the collectivist precept that education is a societal rather than a parental function. Widely cited and concurred in later.

8 Cumming v. Richmond County Board of Education, 175 U.S. 528 (1899).

Holding that public education is solely a matter of state law, in which federal interference can be justified only if a right established under the Constitution is imperilled.

9 Dobbins v. Commonwealth, 198 Va. 697, 96 S.E.2d 154 (1957).

Compulsory education law may not be employed as a threat to induce a citizen to forgo the exercise of his Constitutional rights. Refusal to submit to segregated schooling is justifiable. See also no. 32.

10 Donahoe v. Richards, 38 Me. 376 (1854).

Earliest judicial justification of forcing Protestant Bible upon Catholic children in the public schools. See also nos. 38 and 1, in that order, for erosion of this attitude over the years.

11 Engel v. Vitale, 370 U.S. 421 (1962).

Holding that it is no part of the function of any government agency or official to prescribe prayers for anyone, and that such prayers in the classroom, having the authority of government behind them, violate the First Amendment.

12 Fish, People *ex rel.*, v. Sandstrom, 167 Misc. 436, 3 N.Y.S.2d 1006 (Suffolk County Ct. 1938), *rev'd*, 279 N.Y. 523, 18 N.E.2d 840, 7 N.Y.S.2d 523 (1939).

Flag-salute case, illustrating principle that parents are not to be held responsible for refusal of child to comply with school regulations, and that violation of compulsory education statute cannot be sustained in the absence of proof of wrongful intent (minority rule).

13 Garber, State v., 197 Kan. 567, 419 P.2d 896 (1966), *cert. denied*, 389 U.S. 51 (1967).

Arising out of legislative attempt to force Amish "into mainstream of American life." Tragic case of religious persecution and judicial disregard of settled law. See also nos. 30 and 41.

14 Gault, *In re*, 387 U.S. 1 (1967).

Holding that Fourteenth Amendment guarantees of due process apply to children as well as to adults. Clearest and most authoritative judicial recognition of children's Constitutional rights.

15 Hershberger, *In re*, no. 2835 (Wayne County Juv. Ct. 1958), *aff'd*, *sub nom.* State v. Hershberger, 77 Ohio L. Abs. 487, 150 N.E.2d 671 (Wayne County Juv. Ct. 1958), *rev'd*, *per curium*, 83 Ohio L. Abs. 62, 168 N.E.2d 13 (App. Ct. Wayne County 1959).

Almost incredible official and judicial persecution of an Amishman, who was ultimately vindicated.

16 King, People *ex rel.*, v. Gallagher, 93 N.Y. 438 (1833).

Early case of statist attitude toward education, justifying racial discrimination on the ground that the state may order "its" school system in any manner it may please. Profitably read in conjunction with no. 35.

17 Knox v. O'Brien, 7 N.J. Super. 608, 72 A.2d 389 (Cape

May County Ct., L. Div. 1950).

Second in a trio of cases showing the imposition by judicial fiat, in disregard of statute, of a "cookie-cutter" philosophy of education. Foreshadowed in no. 34 and ultimately rejected in no. 21.

18 Levisen, People v., 404 Ill. 574, 90 N.E.2d 213 (1950).

Penetrating, enlightened opinion, typical of recent judicial attitude toward compulsory education in Illinois, upholding right of parent to educate child personally at home, despite absence of specific statutory provision. Profitably compared to no. 31.

19 Lewis, People *ex rel.*, v. Graves, 127 Misc. 135, 215 N.Y.S. 632 (Sup. Ct. 1926), *aff'd*, 245 N.Y. 195, 156 N.E. 663 (1927).

One of many actions instituted by the late militant atheist, Joseph Lewis, drawing a distinction between irregular attendance, constituting grounds for disciplinary action, and mere occasional absence, requiring only a reasonable excuse. The power to distinguish between the two is vested in local school boards. Compare with no. 5.

20 Marsh's Case, 140 Pa. Super. 472, 14 A.2d 368 (1940).

The last in a series of cases (the others are cited in this report) illustrating the futility of criminal sanctions for violation of compulsory education laws, particularly when recalcitrance is founded upon religious convictions.

21 Massa, State v., 95 N.J. Super. 382, 231 A.2d 252 (Morris County Ct., L. Div. 1950).

Last of a trio of cases (see also nos. 34 and 17) illustrating the imposition and, in this case, the ultimate overthrow of the "cookie-cutter" theory of compulsory education.

22 Miday, State v., 263 N.C. 747, 140 S.E.2d 325 (1965).

Illustrating the minority, more liberal, rules in dealing with religious objections to innoculation as a prerequisite to admission to public school. Also illustrative of procedural niceties involved in criminal prosecutions for compulsory education violations. Compare to no. 3.

23 Minor, Board of Education v., 23 Ohio St. 211 (1872).

A ringing defense of individual rights in one of the earliest Bible-reading cases. "Government is an organization for particular purposes. It is not almighty, and we are not to look to it for everything." Compare to attitude of dissenters in no. 38.

24 Morton v. Board of Education, 69 Ill. App. 2d 38, 216 N.E.2d 305 (1966).

Upholding "dual enrolment" plan, whereby compulsory education law is satisfied through part-time public school attendance, plus additional attendance at educational institution of parents' choice. See also, no. 18.

25 Mountain Lakes Board of Education v. Maas, 56 N.J. Super. 245, 152 A.2d 394 (App. Div. 1959), *aff'd*, 31 N.J. 537, 158 A.2d 330, *cert. denied*, 363 U.S. 843 (1960).

Protracted and complex struggle over inoculation as prerequisite to public school admittance. Extensive discussion by courts of the history and present state of the law in this regard. A leading case. See also and compare nos. 20 and 22.

26 Nebel v. Nebel, 99 N.J. Super. 256, 239 A.2d 266 (Ch. Div. 1968), *aff'd*, 103 N.J. Super. 216, 247 A.2d 27 (App. Div. 1968).

Divorce case involving education expenses of child. Reviews, reaffirms, and for the first time implements by force of law the proposition underlying the present American compulsory education laws—that a parent is obligated to educate a child. Compare this case to older no. 29, demonstrating development of this theory.

27 Pierce v. Society of Sisters, 268 U.S. 510 (1925).

Without doubt the most famous case dealing with schools in the history of American jurisprudence, this case established the right of private schools to exist and of parents to discharge their obligations under the compulsory education laws through such schools. It has been almost universally and by now irretrievably misunderstood as holding that compulsory education laws are unassailable under the federal constitution, a question not involved in the case. Compare nos. 28 and 40.

28 Petersheim, Commonwealth v., 70 Pa. D. & C. 432 (Somerset County Ct. 1949), *aff'd*. 166 Pa. Super. 90, 70 A.2d 395 (1950).

Unusual case, lower court relying upon *Pierce* (no. 27) to hold compulsory education statute unconstitutional as applied to Amish. Appellate court affirmed acquittal of particular de-

fendant, avoiding double jeopardy possibility, but indicated—also relying upon *Pierce*!—that there was no constitutional bar, thus paving the way for further persecution of Amish illustrated in nos. 4 and 33. See ultimate vindication of Amish in no. 41.

29 Purse, Board of Education v., 101 Ga. 422, 28 S.E. 896 (1897).

Early authority supporting parent-benefit theory of public education. Public schools exist to permit discharge of parental obligation, not to benefit children directly. Arguably, the case yet stands for good law in some jurisdictions. Compare judicial attitude in no. 7.

30 Sherbert v. Verner, 374 U.S. 398 (1963).

The principle established in this somewhat neglected case was employed by the Wisconsin Supreme Court to rule compulsory education unconstitutional as applied to the Amish (see no. 41): State action indirectly infringing upon religious liberty cannot be justified by mere power of the state to regulate generally the activities in question, but only by the necessity of regulating without exception.

31 Shoreline, State *ex rel.*, v. Superior Court, 55 Wash 2d 177, 346 P.2d 999 (1959), *cert. denied*, 363 U.S. 814 (1960).

Probably the most striking example in American jurisprudence of statism running rampant over individual rights regarding education of children. A 5-4 decision, with a blistering dissent, holding that Washington parents may not personally educate their children at home if they do not hold state teacher's certificate, despite the absence of any such requirement in the pertinent statute and despite a judicial finding that the education provided is at least equivalent to that provided by the public schools. Profitably read in conjunction with no. 18, illustrating a more reasonable attitude.

32 Skipwith, *In re*, 14 Misc.2d 325, 180 N.Y.S.2d 852 (N.Y. City Dom. Rel. Ct., Child. Ct. Div. 1958).

Illustrating extreme limits of judicial thought in regard to discrimination and compulsory education: "These parents have the constitutionally guaranteed right to elect no education for their children rather than to subject them to discriminatorily inferior education." Compare this attitude with that prevailing earlier in the same jurisdiction, no. 16.

33 Smoker, Commonwealth v., 177 Pa. Super. 435, 110 A.2d 740 (1955).

Last in a trio of cases (see nos. 28 and 4) demonstrating the erosion of statutory guarantees to Amish through judicial encroachment.

34 Stephens v. Bongart, 15 N.J. Misc. 80, 189 A. 131 (Juv. & Dom. Rel. Ct. 1937).

First in a series of cases showing the imposition of the "cookie-cutter" theory of public education through judicial fiat in defiance of statute. See also nos. 17 and 21.

35 Stoutmeyer, State *ex rel.*, v. Duffy, 7 Nev. 342 (1872).

A case, almost a century before the famous Brown v. Board of Education, holding that racially segregated public school system was repugnant to the Nevada Constitution. Contrast judicial attitude in no. 16.

36 Troyer v. State, 29 Ohio Dec. 168, 21 Ohio N.P. 121 (Logan C.P. 1918).

The earliest reported flag-salute case, holding that refusal to salute justifies expulsion. Opinion is notable for vituperation and jingoism. Contrast with no. 39.

37 Turner, People v., 121 Cal. App. 2d 861, 263 P.2d 685 (App. Dep't, Super. Ct. 1953).

Case establishing discrimination against parents teaching their own children at home in favor of teachers in private schools. The former are required to be state-certified, while the latter are not. Example of justifying violation of rights on the basis of administrative expediency.

38 Vollmar, People *ex rel.*, v. Stanley, 81 Colo. 276, 255 P. 610 (1927).

Bible-reading case, treated as dispute over curriculum. Established principle in Colorado that parent may make a reasonable choice for his child among courses offered by public school. Profitably read in conjunction with nos. 10 and 23.

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

Established rule that school officials may not coerce students to salute flag or recite any pledge. One of the most famous Jehovah's Witnesses constitutional cases.

40 Williams, State v., 56 S.D. 370, 228 N.W. 470 (1929).

Only case in which the highest court of any American jurisdiction was squarely faced with the necessity of deciding upon the constitutionality of compulsory education. Relying upon the *Pierce* dictum (no. 27), the South Dakota court held that compulsory education is constitutional.

41 Yoder, State v., 49 Wis. 2d 430, 182 N.W.2d 539 (1971), *aff'd*, 32 L. Ed.2d 15 (1972).

Vindication of Amish contention that compulsory education laws, as applied to them, unconstitutionally infringe upon religious liberty, where law would require schooling in non-Amish milieu above the elementary level. U.S. Supreme Court affirmation appears unduly restrictive and rule of this case is likely to be extended. Profitably read in conjunction with no. 13.

42 Gonyaw v. Gray, 361 F. Supp. 366 (D. Vt. 1967).

In Vermont, *any* degree of corporal punishment inflicted upon a pupil by a teacher is constitutionally permissible, if the punishment is "reasonable."

43 Holmes v. Nestor, 81 Ariz 372, 306 P.2d 290 (S. Ct. Ariz. 1968).

Attendance officer may, without warrant, take into custody any child subject to compulsory attendance law.

44 Meinhold v. Taylor, cert. den., mem., 38 L. Ed.2d 167 (S. Ct. U. S. 1973).

United States Supreme Court declines to review holding of Nevada Supreme Court that a teacher may be discharged for being in disagreement with compulsory education law and expressing such opinions, although no pupil was advised to break law; blistering dissent by Justice Douglas.

45 Peacock v. Riggsbee, 309 F. Supp. 542 (D. Ga. 1970).

Reaffirming principle that there is no federal constitutional right to a public education.

46 Valent v. New Jersey State Board of Education, 118 N.J. Supper 416, 288 A.2d 52 (App. Div. 1970).

On parent's right to reject part of curriculum for child—sex education courses.

47 Woods v. Wright, 334 F.2d 369 (5th Cir. Ala. 1962).

State may not employ truancy laws as a means of racial discrimination.

II—Books

Bender, John Frederick. *The Functions of Courts in Enforcing School Attendance Laws*, New York: Teacher's College, Columbia University Press, 1927.

Drury, Robert L. and Ray, Kenneth C. "Compulsory Attendance," in *Essentials of School Law*, New York: Appleton-Century-Crofts, 1967.

Edwards, Newton. *The Courts and the Public Schools: The Legal Basis of School Organization and Administration*. Chicago: University of Chicago Press, 1955.

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Rogers, Harrell R. *Community Conflict, Public Opinion, and the Law: The Amish Dispute in Iowa*. Columbus, Ohio: Merrill Publishing Co., 1969.

Spurlock, Clark. *Education and the Supreme Court*. Urbana, Ill.: University of Illinois Press, 1955.

III—Articles

Arons, Stephen. "Compulsory Education—The Plain People Resist." *The Saturday Review*, January 1972, pp. 52-57.

Stephen Arons considers the Supreme Court case of Wisconsin v. Yoder. Admittedly the legal question is the quite narrow one of religious freedom. Mr. Arons claims that the case, despite the narrowness of the legal decision, does call into question the entire rationale for compulsory schooling.

Baker, Helen. "Crack in Liberty Bell: Compulsory Education," *Civil Liberties*, April 1972, p. 1.

In this eloquent plea for educational freedom, the author contends that "the school systems of America are the sin- largest state agency for the deprivation of rights, start- it an early age and on a captive audience." Among se deprivations are "denial of free speech, free press, and free association; denial of religious freedom; denial of due process, including punishment without a hearing and denial of the right to remain silent; cruel and unusual punishment; suspension and expulsion used as harassment; selective punishment; invasion of privacy and so on." The most fundamental deprivation, however, is the denial of a right to an education.

The author urges the ACLU to challenge the compulsory attendance laws on the grounds that "we believe the right to an education is so basic that unless there is some way to challenge the monolithic structure of compulsory institutionalization, all liberty will be lost. Let us say that the indictment shows that most schools do not educate...and that the compulsory school community is essentially not a learning environment."

Baker, Robert P. "Compulsory Education in the United States: Big Brother Goes to School. *"Seton Hall Law Review* 3 (1972): 349-385.

Have compulsory education laws tended to undermine the corresponding parental right to education of the child? What conflicts exist between individual rights and laws in the field of education? What has been the goal of compulsory education legislation? Are we closer to or farther from that goal? Do compulsory education laws, as they now exist and are applied, complement the rights of children and their parents?

These are the fundamental questions that Mr. Baker asks to begin his analysis. He attempts a comprehensive survey of all legislation related to the issue of where rights reside and have resided when it comes to educating the child.

Mr. Baker criticizes compulsory education laws for being penal in nature, restrictive as to the manner in which parents discharge their obligation, and often detrimental to the rights of the child.

Caston, Frances. "Is There a Right Not to Go to School?" *Scholastic Teacher* (October, 1972): 20-24.

The author presents a view of the operation of the compulsory education laws as seen by the truant officers charged with their enforcement.

While he is basically sympathetic to such legislation, he feels that such laws could profitably be modified to allow for greater flexibility. He points out that a recent NEA Task Force on compulsory education said that "all Americans require an education, but not necessarily 6 hours a day, 30 hours a week, 36 weeks a year in a building called 'school.' The Task Force recommended a flexible school timetable and urged the adoption of amendments to compulsory attendance laws which would give individual schools and school systems the option to develop alternative programs to the present ones requiring specific periods of time in school buildings."

Gardner, G. K. "Liberty, The State, and the School," *Catholic Law* 1 (1955): 285 ff.

Haight, J. T. "The Amish School Controversy," *Ohio Bar* 31 (1958): 846 ff.

Hiser, P. N. "Compulsory Education in Relation to the Charity Problem," In *Conference of Charities and Corrections,* N.Y., 1900.

Written at a time when compulsory attendance laws were just beginning to be enforced in earnest. The author, who was head truant officer for the City of Indianapolis, points out a number of practical difficulties in their enforcement. The difficulties he enumerates remain today, and continue to make effective enforcement of such laws all but impossible.

Johnson, A. C., Jr. "Our Schools Make Criminals," *Journal of Criminal Law* 33 (1942): 310-315.

"The Right Not to be Modern Men: The Amish and Compulsory Education," *Virginia Law Review* 53 (1967): 925 ff.

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