## RELIGION AND THE SCHOOLS

*Chamberlin* v. D*ade County Board of Public Instruction, Hume, et al.*
*Resnick* v. *The Same*

In September 1961 the Rev. Leslie Weatherhead initiated a correspondence in *The Times* entitled 'Nation in Danger'. The burden of this related to what has been described as the threat to the moral fibre of the United Kingdom, and much of the emphasis was laid on the alleged spiritual and ethical weakness of modern youth. Many of the correspondents emphasised the significance of religion and deplored the fact that not enough weight was given to it in ordinary life. In so far as schools are concerned, it may be questioned whether a united daily assembly is adequate.

The problem for the schools, however, is to draw the line between the role of the church and that of the educator, bearing in mind the need to avoid denominational commitment and to recognise family prejudices. It is as well to point out that Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms affirms that "everyone has the right to freedom of thought, conscience and religion"; while Article 2 of the Protocol to the Convention, which relates to the fundamental right to education, postulates that, "in the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophic convictions". This latter provision is, in the case of the United Kingdom, subject to the reservation that it is accepted "only so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure". The significance of this reservation, which is in accord with section 76 of the Education Act, 1944[1] is illustrated by the decision of the Court of Appeal, affirming that of Ormerod J., in *Watt* v. *Kesteven County Council.* [2]

It must not be thought that the moral dilemma posed by modern youth is confined to the United Kingdom. Statistics are constantly being produced with regard to the increasing juvenile crime rate throughout the world, but it depends on the political and ethical outlook of the critic whether blame is placed on the breakdown of discipline in the home or the rejection of religious influences by parent, teacher and child alike. There are some countries where it is not possible to blame the churches for failing to do their task adequately, due to State restrictions on their activities. This is, for example, the position in Poland. By the Church-State agreement of 1956 religious teaching was allowed in the Polish schools, but, alleging that religious instruction in schools constitutes a basis "for fanaticism and intolerance", legislation was enacted in 1961 ensuring that religion would in future be taught outside the schools, for "the business of schools is education, not religion".[3] This attitude should be contrasted with that of the Ontario Urban and Rural School Trustee Associations which, in July, 1961, adopted a resolution favouring religious education in the public schools. [4] The intention was that the "schools teach all religions, not just Christianity", and this was interpreted by the *Toronto Star* as meaning that the "major world religions" be taught "as history, not creed".

If such a resolution were adopted by, for example, Unesco, it would raise difficulties for, in particular, the United States. In accordance with the First Amendment to the Constitution of the United States, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof". In form, this is an injunction directed to Congress, but in *Gitlow* v. *New York*[5] the Supreme Court expressly declared that "freedom of speech and of the press — which are protected by the First Amendment from abridgment by Congress — are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States". In their practice, the courts of the United States have clearly demonstrated that what is true of some of the 'freedoms' of the First Amendment is equally true of the others. Nevertheless, it should not be thought that these freedoms are so 'fundamental' as to be completely beyond restraint. Laws prohibiting polygamy have been upheld against the objection that they interfered with the religious beliefs of the Mormons, whose faith

1. 7 & 8 Geo. 6, c. 31.

2. [1955] 1 Q.B. 408; see also Green, 'The Right to Learn', 3 *Indian Year Book of International Affairs*. 1954, p. 268, at p. 287.

3. *The Times* (London), January 21. July 15, August 28, 1961.

4. *Jewish Post* (Winnipeg), July 20, 1961.

5. (1925) 268 U.S. 652, 666; see also *Murdock* v. *Pennsylvania* (1942) 319 U.S. 105. 108.

required such a practice,[6] and in *In re State in interest of Black*[7] it was held that parents who insist on teaching their children that polygamy is proper may be deprived of their custody, for "a restriction of religious liberty, like other liberties guaranteed by the Constitution, . . . [is] justified if it is clearly and immediately necessary to protect our total society against the unrestricted exercise of a religious conviction of a particular sect of a religion".[8]

While it has been held that it would be contrary to the Fourteenth Amendment to require that children attend public schools exclusively,[9] it has likewise been held not to be an infringement of that Amendment to prosecute, on the basis of the compulsory education laws, parents who refuse to send children to public schools when the sectarian schools chosen do not provide an education satisfying the minimum standards compatible with life as a citizen in the United States. As it was expressed in *Shapiro* v. *Dorin:* [10] "The issue is whether it is more important to our total society, that all children within the realm of our democratic society shall receive a basic secular education in the English language as prescribed in section 3208 of the [New York] Education Law, than that parents whose religious convictions preclude compliance with our secular education laws, shall be permitted to rear their children exclusively in conformance with their religious conviction. If the answer were in the negative, it might leave the door open to all sorts of abuses against society in the name of religion. . . . The religious convictions of respondents herein must yield to the total public interest. Compulsory education laws constitute but one of many statutes of a government, dedicated to the democratic ideal, which are universally enacted for the benefit of all the children within the realm of the government. . . . Religious convictions of parents cannot interfere with the responsibility of the State to protect the welfare of children".

Despite the efforts of the Supreme Court to give effect to Jefferson's view that there be "a wall of separation between Church and State", which "wall must be kept high and impregnable",[11] the Supreme Court has recognised that parents may want their children educated in accordance with religious beliefs, a realisation that gave birth to the 'released time' controversy.[12] This stemmed from the contention of Dr. George U. Wenner, made at the Interfaith Conference on Federation, New York, 1905, that the public school system unduly monopolized the child's time, to part of which the Church was entitled. The Federation's proposal was that such children should be 'released' from school on Wednesday afternoons so that the Church could provide, in its own premises, "Sunday school on Wednesday". The other children should remain at school, but so that the 'released' children should not be prejudiced, school authorities were requested not to organise courses of compelling interest or importance on Wednesday afternoons. In Illinois a variation of the scheme was introduced, whereby sectarian instruction was given to those requesting it on the school premises, while the other children continued their studies in different classrooms. In *MoCollum* v. *Board of Education*[13] the Supreme Court held that this meant using a tax-established and tax-supported system to assist religious groups in spreading their faith. As such, it was in violation of the First Amendment. On the other hand, in *Zorach* v. *Clauson,*[14] the Court upheld the constitutionality of the

6. *Reynolds* v. *U.S.* (1878) 98 U.S. 146.
7. (1955) 283 Pac. 2d 887, 350 U.S. 928.
8. *Shapiro v. Dorin* (1950) 99 N.Y. Supp. 2d 830.
9. *Pierce* v. *Society of the Sisters of the Holy Names of Jesus and Mary* (1926) 268 U.S. 610.
10. See n. 8 above (this case is discussed in Green, *lac. cit.,* n. 2 above, p. 286).
11. *Everson* v. *Board of Education* (1947) 330 U.S. 1, 16, 18.
12. Edwards, *The Courts and the* Public *Schools,* 1956, p. 49. For an historical account of the 'released time' proposals, see concurring opinion of Justice Frankfurter in *Illinois ex rel. McCollum* v. Board *of Education* (1948) 333 U.S. 203, 213.
13. 333 U.S. 203.
14. (1952) 343 U.S. 306, 315.

New York 'released time' system, whereby students were released to attend religious classes in religious centres, while the remainder stayed at school. Justice Douglas pointed out: "In the *McCollum* case the classrooms were used for religious instruction and the force of the public school was used to promote that instruction. Here, . . . the public schools do no more than accommodate their schedules to a program of outside religious instruction."

Although there is a 'high wall of separation' between Church and State in the field of education, it should not be thought, despite the controversy concerning President Kennedy's School Assistance Bill and the exclusion of Catholic schools from its scope,[15] that all aid to Church schools is unconstitutional. Thus, in *Cochraan* v. *Louisiana State Board of Education*[16] the Supreme Court upheld a statute providing for the issue of free text-books to all children regardless of the school they attended. The Court was of opinion that the statute served a public purpose in that it conferred benefits upon the pupils and not upon the schools they attended. Nevertheless, in 1961 the District Court of Appeals in Orlando, Florida, barred the distribution of the 'Gideon Bible' to children in the local public schools. The Orlando School Board, however, has given notice of appeal to the Florida Supreme Court.[17]

Two recent Florida decisions raise the whole problem of the interplay between Church and State in the realm of education in a marked form. In 1961, Circuit Court Judge J. Fritz Gordon was called upon to decide the cases of *Chamberlin* v. *Dade County Board of Public Instruction and Hume et al.* and *Resnick* v. *The Same.* [18]

Compulsory education exists in Florida and it was alleged that while they were attending the public schools in Dade County, the children of the complainants were subjected to "religious and sectarian practices and instruction". It was contended that there was regular Bible reading with comments by the teachers, and that copies of the Bible and other sectarian literature were distributed to the children. Further, there was regular recitation of the Lord's Prayer, other prayers and grace, together with the singing of hymns and of Christmas carols. In addition, Nativity plays were performed at Christmas and Resurrection plays at Easter. Not only Christian practices that were objected to. The observance of Passover and of Hanukkah, including the lighting of ceremonial candles, also constituted a ground of complaint. The complainants objected that religious symbols, such as the Cross, the rib, the Star of David, and a picture of Christ, were displayed in the school, while children were asked their religious denomination, and teachers whether they believed in God. The contention was that all such practices amounted to violations of the First and Fourteenth Amendments, as well as of the Florida Constitution. [19]

The Board of Public Instruction admitted some of the practices complained of, but denied that they were violative of any constitutional rights of the plaintiffs. The Board pointed out, however, that after operating for a number of years under an unwritten rule, an Instruction regarding Bible Reading was adopted in June 1960. Purporting to be based on a Florida statute which required teachers to read extracts from the Bible daily "without sectarian comment", this Instruction made provision for the children of objectors to be released from this daily Bible reading

15. *The Times,* June 19, 1961.

16. (1930) 281 U.S. 370.

17. *World Jewish Affairs Bulletin,* No. 826, August 17, 1961.

18. 59 C 4928 and 59 C 8873 (I am indebted to Judge Gordon for having arranged for me to he supplied with a copy of his judgment).

19. Amdt. 6, s.6: "No preference shall be given by law to any church, sect or mode of worship and no money shall ever be taken from the public treasury directly or indirectly in aid of any church, sect or religious denomination or in aid of any sectarian institution".

as well as from any non-academic activity which any parent regarded as "violative of [his] religious conscience".

The evidence showed that extracts were read from the Old or New Testament and the Lord's Prayer recited daily. Further, on one occasion, comment was made — not by a teacher — upon the reading, and this the Court held to be unlawful. It was also shown that Bibles and other Holy Books had formerly been distributed on a voluntary basis, but that this had not taken place for some five years. Religious programmes were undoubtedly held at Christmas, Easter and Hanukkah, when the relevant religious symbols were exhibited. In all cases, however, participation in these programmes was voluntary, in the sense that a child was excused from attending provided the request for release came from the parent. The Lord's Prayer was that usually recited, although others had been used. As regards religious tests, it was found that students had occasionally been asked their denomination, but that this was not required by the Board. Similarly, the Court did not consider it a religious test to ask a teacher if he believed in God, especially as there was no evidence of any religious criteria or evaluation of school employees.

An attempt was made to say that to permit Bible reading in the schools ran counter to the decision in *McCollum's* case.[20] That case, however, related to "the use of tax supported property for religious instruction". In the instant cases, on the other hand, "we do not have the problem of 'religious instruction', but rather the reading of a verse from the Holy Bible that has in it expressions or wording that we all use every day, such as 'Thou shalt not kill', even though it might be used in a different form. In almost every creed, religion or belief, the words of the Golden Rule are a way of life by which we should live if we are to exist peaceably. This is not a Godless nation of people. ... In 1948, Justice Jackson wrote: 'One can hardly respect a system of education which should leave the student wholly ignorant of the currents of religious thought that move the world society . . . for a part in which he is being prepared'." The learned judge quoted the comment of the Supreme Court in the *Zorach* case: [21] "When the state encourages religious instruction or co-operates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government shows a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence."

In the light of this reasoning, one can only sympathise with Judge Gordon when he asked: "Can it be said that the use of a school room for the reading of a verse from the Bible [and] the saying of the Lord's Prayer . . ., from which program a student may be excused by request, is violative of the constitutional rights of the plaintiffs here?" So far, there has been no decision of the Supreme Court on this point. These practices have, however, been held not unconstitutional by courts in Colorado, Georgia, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, New Jersey, New York, Ohio, Tennessee and Texas.[22] Decisions

20. 333 U.S. 203.

21. 343 U.S. 306. 314 (the citation in the transcript is given as 343 U.S. 679. this refers to the page reference in 72 S. Ct.).

22. *People, ex rel. Vollmar* v. *Stanley* (1927) 255 Pac. 610; *Wilkerson* v. *City of Rome* (1922) 110 S.E. 896: Moore v. Monroe (1884) 20 N.W. 475 (the transcript refers to this as Moore v. Moore): *Billard* v. *Board of Education of Topeka* (1904) 76 Pac. 422 (the transcript gives the plaintiff's name as Billiard); *Hackett* v. *Brooksville Graded School District* (1905) 87 S.W. 792; *Donahoe* v. *Richards* (1854) 38 Me. 376; *Spiller* v. *Woburn* (1866) 94 Mass. 127; *Pfeiffer* v. *Board of*

the other way have been rendered in Illinois, Louisiana, South Dakota, Washington,[23] and Pennsylvania.[24] In Nebraska it has been held that while Bible reading itself might not be unconstitutional, it becomes so when accompanied by hymn singing or the saying of sectarian prayers.[25] The courts in Wisconsin seem to be unable to make up their minds. In *State, ex rel. Weiss* v. *District Board,*[26] it was held that an uncommentated reading of the King James Bible interfered with freedom of worship — although those who did not wish to participate were excused — and infringed constitutional prohibitions against 'sectarian instruction' and expenditure of public funds for religious purposes. Nevertheless, in *State, ex rel. Conway* v. *District Board*[27] the recital of a non-sectarian prayer by a minister of religion at a graduation ceremony was held not to amount to sectarian instruction.

Judge Gordon mentioned some of the decisions which held that Bible reading was not unconstitutional, but made no direct reference to any going the other way. The nearest he came to the latter was the statement that "a careful reading of these cases and the cases in those states that ruled otherwise and the United States Supreme Court opinions" led him to the conclusion that Bible reading without sectarian comment and on a voluntary basis was not unconstitutional. He expressed the view, however, that "the Golden Rule should be observed by those selecting verses from the Bible to read so that the Old Testament when agreeable would be used and only verses not highly controversial would be read, in order not to offend any student or his parent." As regards the Lord's Prayer, this too the judge considered to be non-sectarian and constitutional, so long as objectors were released.

In so far as hymn singing was concerned, "there is evidence that some songs are sung which could be termed religious in nature around the Christmas and Easter holidays. The songs that were sung, such as 'White Christmas', 'Jingle Bells', 'Silent Night', 'O, Come all ye Faithful', and others, are so closely interwoven with the thoughts of the Christmas and Hanukkah season, that it would be impossible for this court to rule on songs that might be considered by some to be sectarian", especially as attendance at the singing sessions was voluntary. It would be interesting to learn of the rabbinical authority who advised Judge Gordon that the named pieces "are closely interwoven with the thoughts of the Hanukkah season", which is the Festival of Lights connected with the exploits of the Maccabees.

While hymn and carol singing was regarded as constitutional, Judge Gordon did not take a similarly kindly view of school plays connected with Christmas and Easter depicting the Nativity or the Crucifixion. They, with cinematographic films depicting religious happenings, were regarded as being religious teachings and enjoined. One tends to feel sorry for children who are thus prevented from seeing at school parties such 'epic masterpieces' as "The Ten Commandments" or "Ruth" or "David and Goliath", although they perhaps miss nothing by being compelled to attend a normal cinema for payment if they wish to see "Solomon and Sheba". The

*Education of Detroit* (1898) 77 N.W. 250; *Kaplan v. Independent School District of Washington* (1927) 214 N.W. 18; *Doremus* v. *Board of Education* (1960) 76 Atl. 2d 880 — this decision went on appeal to the Supreme Court which held itself to lack jurisdiction (1952) 342 U.S. 429; *Lewie* v. *Board of Education* (1935) 286 N.Y. Supp. 164; *Board of Education of Cincinnati* v. *Minor* (1872) 23 Oh. St. 211: *Carden* v. *Bland* (1966) 288 S.W. 2d. 718; *Church* v. *Bullock* (1908) 109 S.W. 115, respectively.

23. *People, ex rel. Ring v. Board of Education* (1910) 92 N.E. 251; *Herold* v. *Parish Board of School Directors* (1916) 68 So. 116; *State, ex rel. Finger v. Weedman* (1929) 226 N.W. 348; *State, ex rel. Clithero* v. *Showalter* (1980) 293 Pac. 1000. respectively.

24. *The Times,* Sept. 18, 1959.

26. *State, ex rel. Freeman* v. *Scheve* (1902) 91 N.W. 846.

28. (1890) 44 N.W. 967.

27. (1916) 156 N.W. 477.

learned judge refused to enjoin the display of religious symbols like the Cross or Star of David, as to do so "would be to hold that the children could not wear and display such symbols in school".

Among the matters which annoyed the complainants was the use of school buildings after school hours for Bible instruction on a voluntary basis. They also objected to the schools being made available free of charge to churches of varying denominations. In so far as authorization was merely for the temporary use of the buildings, then, on the basis of *Southside Estate Baptist Church v. Board of Trustees,*[28] there was nothing objectionable in the practice. Judge Gordon held, however, that the Child Evangelism Fellowship had been using school buildings over a long period of time, and since this constituted "a continuing and permanent arrangement" it was enjoined.

At one point in the proceedings, the learned judge asked counsel in what form an injunction with regard to Bible reading should be framed. The reply was: "Thou shalt not read the Bible in school." Presumably this would mean that teachers could not read the text of the Ten Commandments. Presumably, however, there would have been nothing wrong in reciting these, especially if they had been learnt from one of the modern English versions of the Bible. On the other hand, there is little doubt that some parent or organisation would contend that the Commandments are sectarian and, therefore, to repeat them is unconstitutional.

Cases like those discussed here lead one to feel that in the United States the desire to keep Church and State separate has resulted in contentions and decisions that verge on the farcical. Further, there appear to be too many organisations which, so fearful of the word 'discrimination', see the threat of a State religion and the suppression of minority faiths in every Christmas tree.

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28. 115 So. 2d 697 (Supreme Court of Florida).