COMMENTS

COMPULSORY EDUCATION IN THE UNITED STATES: *BIG BROTHER GOES TO SCHOOL*

That parents are under an obligation to educate their children, just as they are obliged to feed and clothe them, is a principle deeply rooted in our law.[1] Over the years, every American jurisdiction has enacted statutes specifying, with varying degrees of exactness, that quantity and quality of education which in the opinion of the state constitutes a minimal fulfillment of that obligation.[2] In practice, however, compulsory education laws have generally been either pernicious or useless, engendering more compulsion than education. They have tended to undermine the corresponding parental right to educate the child in a manner consonant with the parents' social, religious, moral and educational convictions.[3] It is the purpose of this comment to illustrate and analyze the conflicts between individual rights and laws in the field of education, and to suggest modifications of compulsory education laws so as to harmonize state supervision of education with individual rights and to promote the underlying objective of those laws.

As early as 1642, the Massachusetts theocracy enacted a law requiring that all children be taught reading, a trade, the capital laws,

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1 W. BLACKSTONE, COMMENTARIES*450-52. However, in the United States, in earlier times, courts consistently held the parent's duty to educate to be one of imperfect obligation. Board of Educ. v. Purse, 101 Ga. 422, 28 S.E. 896 (1897); *cf.* Rawlings v. Rawlings, 121 Miss. 140, 83 So. 146 (1919); Freeman v. Robinson, 38 N.J.L. 383 (Sup. Ct. 1876).

2 Five states provide generally for compulsory education in their constitutions. COLO. CONST. art. 9, § 11; IDAHO CONST. art. 9, § 9; N.C. CONST. art. IX, § 11; OKLA. CONST. art. 13, § 4; VA. CONST. art. IV, § 138. Mississippi, South Carolina and Virginia, in the wake of integration controversies, abolished their compulsory education laws. MISS. CODE ANN. §§ 6509-10 (1952) (repealed 1956); S.C. CODE ANN. §§ 21-761 *et seq.* (1952) (repealed 1955); VA. CODE ANN. §§ 22-251 *et seq.* (1950) (repealed 1959).

3 An illustrative series of cases is Commonwealth v. Smoker, 177 Pa. Super. 435, 110 A.2d 740 (1955); Commonwealth v. Beiler, 168 Pa. Super. 462, 79 A.2d 134 (1951); Commonwealth v. Petersheim, 70 Pa. D. & C. 432 (Somerset County Ct. 1949), *aff'd*, 166 Pa. Super. 90, 70 A.2d 395 (1950). PA. STAT. ANN. tit. 24 §§ 13-1327 to -1343 (1962), provided for compulsory education from the ages of eight to sixteen, but permitted exemptions for those fifteen years or older who were engaged in domestic or agricultural employment. Although no discretion was granted on the face of the statute, the courts, in this series of cases, upheld the action of the Pennsylvania Superintendent of Public Instruction, who forbade the issuance of exemptions absent a showing that the child's family was in "dire need." In practice, this amounted to a total denial of exemptions to Amish children, since, insofar as Amish culture has been observed by sociologists, no instance of an Amish family in dire need has ever been observed. *See, e.g.*, State v. Yoder, 49 Wis. 2d 430, 439-40, 182 N.W.2d 539, 543 n.7 (1971), *aff'd*, 40 U.S.L.W. 4476 (May 15, 1972). A short discussion of the Supreme Court case appears in the Editorial Note at p. 385 *infra*.

and, most important, religious catechism.[4] Shortly thereafter, the other New England colonies adopted similar legislation,[5] but in the remaining parts of settled America, even after independence, education was left in the hands of parents and the non-established churches.[6] Insofar as legislation concerning education existed at all, it was primarily permissive in nature, in that "free" schools were generally established for the benefit of those parents[7] who chose to make use of them, and it was not until the middle of the nineteenth century that the power of government was employed to compel them to do so.[8]

In the first half of the nineteenth century, then, the issue was whether parents had the right to have their children educated at public expense, not whether the state could compel them to be educated. With the eventual rise of large tax-supported systems of elementary schools, however, it became advantageous for sectarians to attempt to gain control over these systems in order to propagandize their creeds among the young.[9] For parents of modest means, there were no practical alternatives to the "public" schools, which in actuality were Protestant schools supported by taxes.[10] The religious domination of the public schools, however, gave rise to very little controversy in the relatively homogeneous climate of theological opinion prevailing in the United States prior to the Civil War. Subsequently, though, waves of immigrants from the Latin and Slavic countries arrived, as did a great many Irish. A large proportion of these immigrants were Catholics. The compulsory education laws were being initially introduced at the time of their arrival, and under such laws, their children were being taught abhor-

4 E. KNIGHT, EDUCATION IN THE UNITED STATES 100 (3d rev. ed. 1951).

5 M. ROTHBARD, EDUCATION, FREE AND COMPULSORY 41 (Center for Independent Education 1971).

6 F. EBY & C. ARROWOOD, DEVELOPMENT OF MODERN EDUCATION 542 (1945).

7 The common law rule was that the public school existed for the benefit of the parent, not the child. Board of Educ. v. Purse, 101 Ga. 422, 28 S.E. 896 (1897). Under many early school laws, it was necessary for the parent to declare pauperism before he could avail himself of the public school facilities. E. CUBBERLY, PUBLIC EDUCATION IN THE UNITED STATES 131-41 (1919).

8 2 ENCYCLOPEDIA OF EDUCATION 376 (1971). The prohibitions against child labor, supported by the growing industrial working class, reinforced the demand and the necessity for elementary schooling of children whose parents were least able to afford it. P. CUROE, EDUCATIONAL ATTITUDES AND POLICIES OF ORGANIZED LABOR IN THE UNITED STATES 12-28 (1926).

9 C. FISH, *Rise of the Common Man*, in VI HISTORY OF AMERICAN LIFE 219 (1937); E. CONNORS, CHURCH-STATE RELATIONSHIPS IN EDUCATION IN THE STATE OF NEW YORK xv-xviii (1951).

10 T. FINEGAN, FREE SCHOOLS, A DOCUMENTARY HISTORY OF THE FREE SCHOOL MOVEMENT IN NEW YORK STATE 53 (1921).

rent theological doctrines in supposedly public institutions.[11] Operating concurrently, immigration and coercive schooling spurred the growth of parallel private (usually religious) schools and provoked the earliest controversies over parental rights.[12]

CONSTITUTIONAL CONSIDERATIONS

There is no right to education recognized in the Federal Constitution.[13] Under the tenth amendment, therefore, the power of public education is left in the states.[14] The general rule was pronounced in *Cumming v. Richmond County Board of Education*:[15]

> [T]he 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.[16]

The "rights secured by the supreme law of the land" which have major relevance for school law are those of free speech and of religion, recognized in the first amendment and made applicable to the states through the fourteenth amendment.[17] Consequently, states are forbidden to

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11 Donahoe v. Richards, 38 Me. 376 (1854) (Catholic child forced to read from King James Bible). As late as 1927, two Justices of the Colorado Supreme Court, dissenting, urged that all children in public school be compelled to take part in reading from the King James Bible, regardless of religious objections. People *ex rel.* Vollmar v. Stanley, 81 Colo. 276, 281-82, 255 P. 610, 618-22 (1927).

12 The controversy raged with particular ferocity in New York. *See generally,* E. CONNORS, *supra* note 9.

13 However, of the original states, Georgia, Massachusetts, North Carolina and Pennsylvania provided for public educational systems in their constitutions. GA. CONST. art. LIV; MASS. CONST. ch. V, § 2; N.C. CONST. art. XLI. Typical is the provision of the Pennsylvania Constitution:

> A school or schools shall be established in each county by the legislature, for the convenient instruction of youth, with such salaries to the masters paid by the public, as may enable them to instruct youth at low prices . . . .

PA. CONST. § 44.

14 U.S. CONST. amend. X states:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

15 175 U.S. 528 (1899).

16 *Id.* at 545.

17 The rights secured under the first amendment are protected against state infringement. Cantwell v. Connecticut, 310 U.S. 296 (1940); Near v. Minnesota, 283 U.S. 697 (1931). In theory, not all of the rights protected against federal invasion are similarly protected against state invasion, but it has been suggested that, in practice, the distinctions have

> make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . [or] deny to any person within its jurisdiction the equal protection of the laws.[18]

Thus, if a state does in fact maintain a system of tax-supported schools, the laws and regulations governing those schools must neither infringe the rights of any person secured to him by those portions of the Bill of Rights made applicable to the states through the fourteenth amendment,[19] nor deny to any person equality under those regulations.

Formerly, perhaps influenced by a stricter regard for the states' rights philosophy than prevails today, the courts tended to stress the lack of any federal privileges or immunities in regard to school law, to the point of ignoring the equal protection aspects. An example of such judicial reasoning, which today would be considered bizarre, is found in the early New York case of *People ex rel. King v. Gallagher*:[20]

> [T]he privilege of receiving an education at the expense of the State, being created and conferred solely by the laws of the State, and always subject to its discretionary regulation might be granted or refused to any individual or class at the pleasure of the State.[21]

This doctrine, however, was later repudiated in the jurisdiction where it originated,[22] and was not the view of a majority of jurisdictions at the time of its pronouncement. As early as 1872, for example, in *State ex rel. Stoutmeyer v. Duffy*,[23] the Nevada Supreme Court had recognized the twofold character of the constitutional question and declared that state's segregation law void as repugnant to the equal protection clause of the Nevada Constitution.[24]

Today, the constitutional right of equal access to educational facilities maintained by the state is well settled.[25] The converse question

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been blurred almost to the point of invisibility. *See* Malloy v. Hogan, 378 U.S. 1, 15-17 (1964) (Harlan & Clark, JJ., dissenting); Brennan, *The Bill of Rights and the States*, 36 N.Y.U.L. REV. 761 (1961); Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746 (1965).

18 U.S. CONST. amend. XIV, § 1.

19 The equal protection of the laws mandated by the fourteenth amendment is not satisfied by segregated schools, even if such schools are demonstrably equal in educational quality. Brown v. Board of Educ., 347 U.S. 483 (1954).

20 93 N.Y. 438 (1883).

21 *Id.* at 447.

22 *In re* Skipwith, 14 Misc. 2d 325, 180 N.Y.S.2d 852 (Dom. Rel. Ct., Child. Ct. Div. 1958); N.Y. EDUC. LAW § 3201 (McKinney 1970).

23 7 Nev. 342 (1872).

24 NEV. CONST. art. 11, §§ 2,3.

25 Brown v. Board of Educ., 347 U.S. 483 (1954); Sweatt v. Painter, 339 U.S. 629 (1950); Sipuel v. Board of Regents, 332 U.S. 631 (1948).

of whether the state may constitutionally require parents to discharge their duty to educate through state educational facilities exclusively has also arisen. In *Pierce v. Society of Sisters*,[26] that question was definitively answered in the negative by the United States Supreme Court:

> [W]e think it entirely plain that the [Oregon Compulsory Education] Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . 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.[27]

Despite innumerable dicta to the contrary,[28] the question of whether or not a state may, consonant with the Federal Constitution, compel parents to educate their children has only once been squarely presented to the highest court of any jurisdiction.[29] In today's society, the issue is not a live one, and it would seem settled by implicit acquiescence.

ORIGINS OF PARENT-STATE CONFLICTS

> 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 . . . .[30]

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26 268 U.S. 510 (1925).

27 *Id.* at 534-35.

28 *See, e.g.*, Everson v. Board of Educ., 330 U.S. 1 (1947); People v. Levisen, 404 Ill. 574, 90 N.E.2d 213 (1950); Knox v. O'Brien, 7 N.J. Super. 608, 72 A.2d 389 (Cape May County Ct., L. Div. 1950). The *Pierce* dictum has been employed to justify compelling parents not only to educate their children, but to educate them in a formal school. People v. Turner, 121 Cal. App. 2d 861, 263 P.2d 685 (1953), *appeal dismissed*, 347 U.S. 972 (1954).

29 State v. Williams, 56 S.D. 370, 228 N.W. 470 (1929) (lower court, misinterpreting *Pierce v. Society of Sisters*, had held the state's compulsory education law repugnant to the first amendment). *See also*, Shapiro v. Dorin, 199 Misc. 643, 99 N.Y.S.2d 830 (N.Y. City Dom. Rel. Ct. 1950), *aff'd sub nom.* People v. Donner, 278 App. Div. 705, 103 N.Y.S.2d 757 (1951), *aff'd mem.*, 302 N.Y. 857, 100 N.E.2d 48 (1951), *appeal dismissed*, 342 U.S. 884 (1952) (Orthodox Jewish parents refused to provide any secular education whatsoever). For dicta stating that compulsory education is constitutional, *see* State v. Hoyt, 84 N.H. 38, 146 A. 170 (1929); Quigley v. State, 5 Ohio C.C.R. 638, 3 Ohio C. Dec. 310 (Cir. Ct. 1891).

30 Meyer v. Nebraska, 262 U.S. 390, 402 (1923).

In thus replying to those who champion the aggrandizement of the state's power in education over the rights of individuals, Mr. Justice McReynolds presaged the *United Nations Universal Declaration of Human Rights*, which stated that "[p]arents have a prior right to choose the kind of education that shall be given to their children."[31] The concern which prompted the inclusion of this principle in the Declaration was highlighted in a report to the United Nations Economic and Social Council (UNESCO) in 1951:

> The prior right of parents to choose the kind of education that shall be given to their children comes up against the monopolistic educational system adopted in various countries.
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> . . . .
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> Even in countries with the greatest respect for independence in educational matters, so-called free or private education is passing through a crisis, and restrictive measures are being applied on a larger scale . . . .[32]

Yet, there are those who contend that "[t]he rights of the parent in his child are just such rights as the law gives him; no more, no less,"[33] and who take a strictly collectivist view of the matter:

> It is to be remembered that the public has a paramount interest in the virtue and knowledge of its members, and that, of strict right, the business of education belongs to it.[34]

Thus viewed, the conflict between compulsory education laws and individual rights is essentially a conflict between the rights of the parent and the "rights of the public."[35] It is submitted, however, that

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31 THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, art. 26, par. 3 (1948) reprinted in UNITED NATIONS, THESE RIGHTS AND FREEDOMS 170, 175 (1950).

32 M. LOUGHERY, PARENTAL RIGHTS IN AMERICAN EDUCATIONAL LAW: THEIR BASES AND IMPLEMENTATION ix, n.1 (1952) (quoting from REPORT TO UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL (April, 1951)).

33 Allison v. Bryan, 21 Okla. 557, 569, 97 P. 282, 286 (1908).

34 *Ex parte* Crouse, 54 Pa. (4 Whart.) 9, 11 (1839).

35 A. RAND, *Collectivized Rights*, in THE VIRTUE OF SELFISHNESS 101-03 (1964):

> Since only an individual man can possess rights, the expression "individual rights" is a redundancy . . . .
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> . . . .
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> A group, as such, has no rights. A man can neither acquire new rights by joining a group nor lose the rights which he does possess.
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> . . . .
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> A nation, like any other group, is only a number of individuals and can have no rights other than the rights of its individual citizens.

A. HACKER, POLITICAL THEORY 266 (1961):

> If confusion is to be avoided, rights must be ascribed only to individuals. To say that governments or states or societies have "rights" will raise more analytical problems than it can ever hope to solve.

the public is not an entity of which rights may be predicated. Yet, as the courts of the several states have aligned themselves on one side or the other of this jurisprudential issue, so have they tended to be either protective or heedless of individual rights in the area of compulsory education law. It is in defense of these rights, as they view them, that parents have most frequently found themselves in conflict with the government.

In the typical compulsory education dispute, the parent fails or refuses to send his child to school, or, in those jurisdictions permitting it,[36] to provide equivalent education as interpreted by public authorities. In general, such failure is grounded upon the religious-moral or educational-social[37] convictions of the parent, and it is usually followed by prosecution where the defense relies upon an alleged violation of a constitutional right. An instructive example can be found in the Virginia case of *Dobbins* v. *Commonwealth*,[38] wherein a Negro father presented his child for admission to the local "white" school and was refused. Transportation was offered to the distant "Negro" school, but declined, and an impasse was reached. Thereupon, the father was prosecuted for, and subsequently convicted of, violating the compulsory education law.[39] In reversing, the Supreme Court of Appeals held that the defendant had been denied equal protection of the laws, contrary

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36 Several jurisdictions have held that education outside of a conventional school, even if demonstrated beyond doubt to be equivalent in quality to that which could be obtained in a school, will not comply with the law. In effect, these jurisdictions have compulsory *attendance* rather than compulsory education laws. State v. Garber, 197 Kan. 567, 419 P.2d 896 (1966). For an informative discussion of *State v. Garber*, *see* Casad, *Compulsory High School Attendance and the Old Order Amish: A Commentary on State v. Garber*, 16 KAN. L. REV. 423 (1968). *See also In re* Shinn, 195 Cal. App. 2d 683, 16 Cal. Rptr. 165 (Dist. Ct. App. 1961); People v. Turner, 121 Cal. App. 2d 861, 263 P.2d 685 (App. Dep't, Super. Ct. 1953), *appeal dismissed*, 347 U.S. 972 (1954); State *ex rel.* Shoreline School Dist. v. Superior Court, 55 Wash. 2d 177, 346 P.2d 999 (1959), *cert. denied*, 363 U.S. 814 (1960); State v. Counort, 69 Wash. 361, 124 P. 910 (1912).

37 Such a classification necessarily excludes certain cases, particularly those wherein compulsory education disputes evolve from a failure or refusal by school authorities to provide transportation for pupils. Alford v. Board of Educ., 298 Ky. 803, 184 S.W.2d 207 (1944) (until provision for transporting children safely was made, no prosecution permitted of parents who kept child at home); *accord, In re* Richards, 166 Misc. 359, 2 N.Y.S.2d 608 (Child. Ct. 1938), *aff'd*, 255 App. Div. 922, 7 N.Y.S.2d 722 (1938); Commonwealth v. Bingaman, 14 Pa. D. & C. 385 (1930); Fogg v. Board of Educ., 76 N.H. 296, 82 A. 173 (1912). Cases relating emancipation to school admittance are collected in Annot., 11 A.L.R.3d 996 (1967). *See* State v. Gans, 168 Ohio St. 174, 151 N.E.2d 709 (1958), *cert. denied*, 359 U.S. 945 (1959) (parents who permitted eleven year-old-girl to marry were convicted of violating compulsory education law after child was excluded from school). *See also* Bolmeier, *Board of Education's Right to Regulate Married Students*, 1 J. FAM. L. 172 (1961).

38 198 Va. 697, 96 S.E.2d 154 (1957).

39 VA. CODE ANN. §§ 22-251 *et seq.* (Repl. 1969) (repealed 1959).

to the fourteenth amendment, and pointed out that the compulsory education statute "cannot be applied as a coercive means to require a citizen to forego or relinquish his constitutional rights."[40]

A considerable body of decisions today establishes the general principle given particular application in *Dobbins*: no regulation or condition governing the education of a child may lawfully deny to him or to his parents the equal protection of the laws. Consequently, denial of such equal protection is a valid defense in compulsory education prosecutions.[41]

Similarly, denial of first amendment rights provides a valid defense. Illustrative is *West Virginia State Board of Education* v. *Barnette*,[42] wherein the constitutionality of a required flag salute statute[43] was considered. Under a regulation of the State Board of Education,[44] refusal to salute the United States Flag was considered insubordination, and as a result children of Jehovah's Witnesses[45] were regularly expelled from school. Their parents were prosecuted for causing delinquency and the children were threatened with terms in reformatories for criminally inclined juveniles. In striking down the regulation as repugnant to the Constitution, the Supreme Court observed that

> [i]t is not necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty.
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> . . . The question which underlies the flag salute con-

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40 198 Va. at 699, 96 S.E.2d at 157.

41 *In re* Skipwith, 14 Misc. 2d 325, 180 N.Y.S.2d 852 (N.Y. City Dom. Rel. Ct., Child. Ct. Div. 1958), wherein parents refused to send children to school which was de facto segregated and had poor instructional staff:

> Until then, [removal of segregated patterns] the Board of Education has no moral or legal right to ask that this Court shall punish parents, or deprive them of custody of their children, for refusal to accept an unconstitutional condition . . . .
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> . . . .
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> These parents have the constitutionally guaranteed right to elect no education for their children rather than to subject them to discriminatorily inferior education.

Id. at 345, 180 N.Y.S.2d at 872-73.

42 319 U.S. 624 (1943).

43 *See id.* at 626 n.1.

44 Set forth in the *Barnette* opinion, *id.* at 626 n.2.

45 The Witnesses based their refusal to render any form of obeisance whatsoever upon the scriptural injunction,

> Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, nor that is in the water under the earth: thou shalt not bow down thyself to them, nor serve them . . . .

Exodus 20:4. *See generally* Mulder & Comisky, *Jehovah's Witnesses Mold Constitutional Law*, 2 BILL OF RIGHTS REV. 262 (1941).

> troversy is whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority . . . .[46]

Although the refusal to comply with the flag salute regulation was motivated by religious belief on the part of the defendant, the Court made it clear that the first amendment concepts of free speech were sufficient to decide the issue without reliance upon any religious considerations:

> 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.[47]
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> . . . .
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> 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.[48]

The rule of *Barnette* continues in force today, and offers protection to those who will not stand during patriotic exercises,[49] and to those whose refusal to participate in patriotic exercises is based as much upon political as upon religious motives.[50] Beyond the primary fact that it safeguards first amendments rights, the *Barnette* rule is sensible on two further grounds. Compulsory participation in patriotic exercises is first of all counter-productive, engendering not patriotism but resentment. Secondly, it protects against the coupling of education regulations which compel acts repugnant to individual conscience with compulsory education laws to oppress dissenters.[51]

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46 319 U.S. at 635-36.

47 *Id.* at 633-34.

48 *Id.* at 642.

49 Sheldon v. Fannin, 221 F. Supp. 766 (D. Ariz. 1963).

50 Holden v. Board of Educ., 46 N.J. 281, 216 A.2d 387 (1966).

51 People v. Chiafreddo, 381 Ill. 214, 44 N.E.2d 888 (1942) (reversing lower court's sentence of one year imprisonment imposed upon parents of child who would not salute); Hering v. State Bd. of Educ., 117 N.J.L. 455, 189 A. 629, *aff'd*, 118 N.J.L. 566, 194 A. 177 (Ct. Err. & App.), *appeal dismissed*, 303 U.S. 624 (1937); Troyer v. State, 29 Ohio Dec. 168, 21 Ohio N.P. 121 (Logan C.P. 1918). For a revealing discussion of a series of cases in which a parent was fined, held in contempt of court, required to post bond and his children removed to the custody of a county welfare board, *see* Haight, *The Amish School Controversy*, 31 OHIO B.J. 846 (1958). For descriptions and photographs of sheriff's deputies physically capturing Amish children and forcing them aboard busses

THE SECULAR REGULATION RULE

Because so many controversies involving compulsory education and individual rights have their origin in religious beliefs, it is profitable to consider briefly the attitudes that the courts have held in regard to the exercise of religious beliefs.

In theory, at least, courts are loath to decide theological questions. A hundred years ago, the United States Supreme Court laid down the rule that, in questions of discipline or faith, wherein the highest church judicatories have rendered a decision, it does not lie within the power of any civil tribunal to review that decision.[52] Moreover, it has been established that religious opinion is an individual, not necessarily an ecclesiastical, view.[53] Nevertheless, the question has frequently arisen in connection with compulsory education cases, what is a religious belief? It might be supposed that there were some objective test whereby a particular belief might be classified as secular or religious, but this simplistic supposition is false, and its adoption has only served to ensnare some courts in the brambles of theological controversy.[54]

In the seminal case of *Reynolds v. United States*,[55] the Supreme Court affirmed the polygamy conviction of a member of the Church of Jesus Christ of Latter-day Saints ("Mormons"). At the time (1879),

for transport to public schools during Iowa dispute, *see* COMMENTARY, Jan. 1968, at 35; NEWSWEEK, Dec. 6, 1965, at 38; U.S. NEWS & WORLD REPORT, Dec. 6, 1965, at 15; Littel, *The State of Iowa v. The Amish*, 83 CHRISTIAN CENTURY 234 (1966).

52 Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952); Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871).

53 *See, e.g.*, State v. Yoder, 49 Wis. 2d 430, 182 N.W.2d 539 (1971), *aff'd*, 40 U.S.L.W. 4476 (May 15, 1972):

> The free exercise clause does not require the codification of religious tenets nor does this clause define the scope of religion. For its purpose, religion defines itself and binds the individual conscience.

Id. at 435, 182 N.W.2d at 541.

54 This is well illustrated by the continuing furor over religious exercises in the public schools, particularly Scripture readings. The history of the futile efforts of dozens of eminent jurists to determine whether or not the *King James Bible* or wall plaques bearing a homogenized version of the Ten Commandments are "sectarian" in nature reflects the impossibility of devising objective standards in this area. Abington School Dist. v. Schempp, 374 U.S. 203 (1963) (reading from *King James Bible* held to be a sectarian activity); Engel v. Vitale, 370 U.S. 421 (1962) (official prayer held to violate first amendment rights, but a vigorous dissent by Justice Stewart); People *ex rel.* Vollmar v. Stanley, 81 Colo. 276, 255 P. 610 (1927) (*King James Bible* held not sectarian); Tudor v. Board of Educ., 14 N.J. 31, 100 A.2d 857 (1953) (distribution of the *King James Bible* in public schools held violative of the first amendment); *In re* Belman, 78 N.Y. St. Dep't Educ., File No. 6310 (1957) (plaque bearing composite Jewish, Protestant and Catholic version of Ten Commandments withdrawn from classrooms). *See generally*, Cushman, *The Holy Bible and the Public Schools*, 40 CORNELL L.Q. 475 (1955).

55 98 U.S. 145 (1879).

that Church taught that multiple marriages were religiously desirable, and there is no question that Reynolds had acted from a sense of religious duty in violating the anti-polygamy statute.[56] In affirming the conviction, however, the Court drew a distinction between religious beliefs, which enjoy an absolute Constitutional protection, and acts, which even if engaged in pursuant to religious conviction, are subjected to governmental regulation in the public interest.[57] *Reynolds* embalmed the "secular regulation" rule, under which it was assumed that governmental action could be characterized as secular or religious according to some objective criterion determinable by a court, without regard to the theological opinions of the persons being regulated. Thus, if a regulation had as its object an activity within the province of governmental control, it was valid despite the fact that it might infringe upon the religious liberty of an individual as he conceived it.[58]

The application of the secular regulation rule to parent-state conflicts over compulsory education is exemplified by *Hering* v. *State Board of Education*,[59] an action to review the expulsion of Hering's children from the public school following their refusal to salute the flag. In upholding the expulsion despite Hering's contention that the flag salute violated his religious convictions, the Supreme Court of New Jersey demonstrated the superiority of its theological imagination over that of the petitioner by claiming that "the pledge of allegiance is, by no stretch of the imagination, a religious rite."[60] So, too, in the more

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56 Utah did not enter the Union until 1896. Five attempts were made to gain statehood after 1849, but failed because of opposition to polygamy. 22 *Encyclopedia Brittanica* 816 (1970).

57 In another polygamy dispute, Davis v. Beason, 133 U.S. 333 (1890), *Reynolds* was followed, the Court observing that:

> It was never intended or supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society.

Id. at 342. If, however, rights may not be predicated of a group, note 35, *supra*, one may ask how morals can be.

58 *Accord*, Braunfeld v. Brown, 366 U.S. 599 (1961); McGowan v. Maryland, 366 U.S. 420 (1961). *See* Comment, *A Braunfeld v. Brown Test for Indirect Burdens on the Free Exercise of Religion*, 48 MINN. L. REV. 1165 (1964).

59 117 N.J.L. 455, 189 A. 629 (Sup. Ct.), *aff'd*, 118 N.J.L. 566, 194 A. 177 (Ct. Err. & App. 1937), *appeal dismissed*, 303 U.S. 624 (1938).

60 117 N.J.L. at 456, 189 A. at 629. The court also asserted that "those who resort to educational institutions maintained with the state's money are subject to the commands of the state." *Id.* It made no mention of the fact, however, that the "state's money" is extracted from the same individuals who resort to its educational institutions.

The New Jersey Legislature enacted *Hering* into positive law:

> Any person . . . who . . . shall influence or attempt to influence any school pupil in this State against the salute to the flag of the United States of America by instruction printed or otherwise shall be guilty of a misdemeanor.

recent case of *Sheldon v. Fannin*,[61] wherein a federal court enjoined, as a violation of first amendment rights, an Arizona school regulation requiring all students to sing the National Anthem,[62] but nevertheless observed that "[t]he singing of the National Anthem is not a religious but a patriotic ceremony, intended to inspire devotion to and love of country."[63] The misconception here, as in all other cases where courts try to determine what is or is not "religious," lies in the assumption that there is some objective standard whereby any alleged religious concept may be categorized. There is no standard save the individual's conscience, and that is purely subjective. If a man claims in a court of law that God tells him that eating pork is an abomination, then, for that man, the eating of pork is a religious matter, and it lies outside the competence of any court to tell him differently. Whether the law will permit him to burn down his neighbor's pigsty is an utterly different question. By implication, at least, the court in *Sheldon* recognized this distinction:

> While implicitly demanding that all freedom of expression be exercised reasonably under the circumstances, the Constitution fortunately does not require that the beliefs or thoughts expressed be reasonable, or wise, or even sensible.[64]

Thus, under the more recent and better reasoned decisions, the issue in compulsory education conflicts is not whether the regulation to which objection is made bears upon a matter of religion. If the individual says it does, it does. Rather, the issue is whether the regulation places a restriction upon the individual's religious practice from which the law will protect him.

The latter question is answered by the United States Supreme Court in *Sherbert v. Verner*,[65] and the answer applied in practice to a compulsory education conflict by the Wisconsin Supreme Court in *State v. Yoder*.[66] *Sherbert* involved a Seventh-day Adventist, who by the tenets of that Church held Saturday as the Sabbath, upon which no worldly work was permitted. She became unemployed, but was denied

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Law of May 24, 1939, ch. 65, [1939] N.J. Laws 108. The statute was not retained in the general revision of the New Jersey school laws in 1968. *Hering* was disregarded in *In re* Lattrechia, 128 N.J.L. 472, 26 A.2d 881 (Sup. Ct. 1942).

61 221 F. Supp. 766 (D. Ariz. 1963).

62 ARIZ. REV. STAT. ANN. § 15-1031(B) (1956). The refusal was based upon petitioner's interpretation of *Daniel* 3:13-28. 221 F. Supp. at 768.

63 221 F. Supp. at 774.

64 *Id.* at 775.

65 374 U.S. 398 (1963).

66 49 Wis. 2d 430, 182 N.W.2d 539 (1971), *aff'd*, 40 U.S.L.W. 4476 (May 15, 1972).

unemployment insurance compensation on the grounds that she was not available for work requiring her presence on Saturdays.[67] In reversing, the Supreme Court held that the reasonableness of a state regulation as applied to others—even all others—does not imply its constitutionality as applied to a particular person. Rather, if the regulation substantially infringes the religious liberty of a single individual, it may not constitutionally be enforced against him unless there is a showing of the traditional "compelling state interest,"[68] not only in the general area regulated, but in regulating that area without any exceptions.[69]

The *Sherbert* rule was recently invoked to give Amish parents relief from a compulsory education statute violating their religious convictions. The Amish, frequently called "The Plain People," are a sect deeply committed to their view of the Christian life.[70] While they strongly advocate a certain degree of education, in that they wish their children to be able to read the Bible, to keep their commercial accounts, and to be fluent in liturgical German, they are opposed on religious grounds to worldly learning beyond that normally attained in the familiar eight-year grammar school. Since the Amish are predominately farmers, the education which they provide for their children when left in peace is quite adequate for those Amish children who follow in their forefathers' agricultural way of life. This degree of education, however, is frequently insufficient to comply with the demands of compulsory education statutes specifying that children undergo formal instruction up to a determined age.[71] What the Amish fear most is

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67 374 U.S. at 399-401.

68 NAACP v. Button, 371 U.S. 415, 438 (1963).

69 374 U.S. at 406.

70 "Be ye not unequally yoked together with unbelievers: for what fellowship hath righteousness with unrighteousness? and what communion hath light with darkness?" 2 *Corinthians* 6:14.

> [B]e 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.

Romans 12:2. The Amish take this scripture with absolute literalness, eschewing all "worldliness." J. HOSTETLER, AMISH SOCIETY (rev. ed. 1968); Gehman, *Amish Society*, 128 NATIONAL GEOGRAPHIC 227 (1965). The opposition to learning beyond that required for their simple ways stems from a warning against those who attend universities and pervert the Word of God, found in the Dortricht confession of 1632. Commonwealth v. Beiler, 168 Pa. Super. 462, 465-67, 79 A.2d 134, 135-36 (1951).

71 The shortest age requirement, 8 to 16, is that of Arizona. ARIZ. REV. STAT. ANN. § 15-321 (1956). The longest is that of Ohio, which has a large Amish population, requiring schooling from 6 to 18. OHIO REV. CODE ANN. § 3321.04 (Baldwin 1970). A statute subjecting all persons to compulsory education between the ages of 7 and 15 inclusive was held not to apply to those who had attained their fifteenth year. Gingerich v. State, 228 Ind. 440, 93 N.E.2d 180 (1950).

that their children, particularly those of high school age, will be lured away from their cultural heritage by the temptations abounding in the modern consolidated school. It is a danger which the Amish simply will not tolerate, regardless of the penal sanctions which may be imposed,[72] and short of capturing the Amish children physically,[73] there has been very little that governmental agencies have been able to do to force them into the public schools.[74]

In *State v. Yoder*,[75] several Amishmen were convicted of violating the Wisconsin compulsory education law[76] in that their children, who had completed the eighth grade, were within the statutory age range but not in school. Had the law been complied with, the Amish youngsters would have attended a consolidated high school.[77] The lower court found that the application of the statute to the Amish did indeed infringe upon their rights to free exercise of their religion, but held

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72 Note, *The Right Not to be Modern Men: The Amish and Compulsory Education*, 53 VA. L. REV. 925 (1967). The Amish have been known to sell their farms and move out of state to escape what they consider religious persecution. Being opposed to litigation, sanctions against them are frequently quite easy to invoke. They are also thoroughgoing pacifists. Casad, *Compulsory High School Attendance and the Old Order Amish: A Commentary on State v. Garber*, 16 KAN. L. REV. 423 n.5 (1968).

73 Authorities cited note 51 *supra*.

74 The Amish are willing to adapt to the commands of state law by operating their own schools; in Pennsylvania and Maryland they do so with cooperation of state education authorities. J. HOSTETLER, AMISH LIFE 32 (1970). The Amish fears of cultural genocide where the state is more hostile are not wholly unfounded. As an Iowa official said, "We are going to assimilate these people whether they want to be assimilated or not!" SATURDAY REVIEW, Nov. 19, 1966, at 86.

75 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).

76 WIS. STAT. ANN. § 118.15 (Spec. Educ. Pamphlet 1968).

77 There was some evidence in the case that the school authorities were less interested in the education of the Amish children than they were in the greater state financial aid the school would receive with increased enrollment. Heffernan, J., in a dissenting opinion, alluded to "gestapo tactics by school authorities" that figured in similar controversies over the Amish in other states. 49 Wis. 2d at 453-54, 182 N.W.2d at 550.

that such infringement was justified as the necessary consequence of a legitimate governmental function. In overturning this conviction, the Wisconsin Supreme Court explicitly applied the analytical technique derived from *Sherbert*. It agreed with the lower court that the defendants' right to free exercise of their religion was infringed.[78] However, it then went further to determine and weigh the degree of the burden upon those rights as against the alleged compelling interest of the state. It held that while the burden upon first amendment rights was quite heavy and direct, there was no compelling interest on the part of the state in enforcing the statute without exception.[79] The court also considered and rejected the state's contentions that, acting in *parens patriae*, it might restrain children in a manner which would be unreasonable if applied to adults,[80] or that granting an exemption to the Amish would involve an unreasonable administrative complication.[81]

The *Sherbert* rule is an eminently sensible one, in that once an encroachment upon the individual's constitutionally protected liberty is shown, the obligation is then upon the state to demonstrate that the encroachment is justified, not merely in general, but in the case of that particular individual. Thus the parent who, because of his religious convictions, does not comply with the letter of the compulsory education law, but nevertheless in good faith provides his children with a reasonable education,[82] need not, under the *Sherbert* rule, show justification.

> The law is not made to punish those who provide their 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.[83]

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78 "We view this case as involving solely a parent's right of religious freedom to bring up his children as he believes God dictates." *Id.* at 438, 182 N.W.2d at 542.

79 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.

Id. at 438, 440, 182 N.W.2d at 542-44.

80 *Id.* at 440, 182 N.W.2d at 543. *See In re* Winship, 397 U.S. 358 (1970); *In re* Gault, 387 U.S. 1 (1967).

81 *Id.* at 443, 182 N.W.2d at 545. *Contra*, People v. Turner, 121 Cal. App. 2d 861, 263 P.2d 685 (App. Dep't, Super. Ct. 1953), *appeal dismissed*, 347 U.S. 972 (1954).

82 For a consideration of what is reasonable, *see* text *infra* at 364-70, and accompanying notes.

83 People v. Levisen, 404 Ill. 574, 577, 90 N.E.2d 213, 215 (1950).

THE EQUIVALENCY RULE IN COMPULSORY EDUCATION CONFLICTS

Many compulsory education statutes provide that a child shall be instructed in the public school, unless he receives an equivalent education otherwise.[84] What is meant by "equivalent" has seldom been elucidated by the courts. If interpreted to require mathematical identity of courses and time spent in their study, equivalency becomes impossible of attainment, and the state itself violates any hypothetical requirement of equivalence by providing for distinct academic, commercial and vocational curricula in the public high schools and by employing the "track" system[85] in elementary schools. Similarly, parochial schools incorporating courses in their respective religious doctrines necessarily give nonequivalent education in this strict sense. Obviously, if the requirement of equivalence is not to result in an absurdity in practice, courts must determine what degree of similarity between the education a child would receive in the public school and that which he receives in the manner his parent directs is sufficient to comply with the law.

The courts have split quite sharply on the issue of what constitutes substantial compliance, not only among the various jurisdictions, but within single jurisdictions at different times. This is well illustrated by a series of New Jersey cases. In *Stephens v. Bongart*,[86] parents were held to be disorderly persons in that they educated their children at home in alleged contravention of law.[87] The court stated:

> 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.[88]

This may conveniently be referred to as the "socialization theory" of education, the theory that the function of education is to adjust the

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84 *See, e.g.*, N.J. STAT. ANN. § 18A:38-25 (1968) (equivalent instruction elsewhere than at school); N.Y. EDUC. LAW § 3204(2) (McKinney 1970) ("Instruction given to a minor elsewhere than at a public school shall be at least substantially equivalent" to that in a public school); OHIO REV. CODE ANN. § 3321.04(A) (1), (2) (Baldwin 1964) (requires "proper" home instruction).

85 The track system attempts to take into account individual differences in children by grouping them according to the teacher's estimate of their ability. Thus one finds in the same school grade, and often in the same classroom, three "tracks": slow, normal and advanced, with different teaching techniques, and often different materials, for each. *See* Hobson v. Hansen, 269 F. Supp. 401, 442-46 (D.D.C. 1967).

86 15 N.J. Misc. 80, 189 A. 131 (Juv. & Dom. Rel. Ct. 1937).

87 Law of April 14, 1914, ch. 223, § 2, [1914] N.J. Laws 457 (repealed 1968).

88 15 N.J. Misc. at 92, 189 A. at 137.

child to society in addition to preparing him intellectually. To the defendants' assertion that "I am not interested in method, but in results,"[89] the court replied that

> [t]hat 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.[90]

In *Knox v. O'Brien*,[91] children were instructed at home by their mother, who held a state teacher's certificate. They were taught prescribed subjects, from approved texts during the usual school hours. Nevertheless, the court clung to the socialization theory:

> [F]ree 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 . . . .[92]

The court's allusion to "by design or otherwise" reveals the irony of the case, since it was precisely in order to avoid forced association with other children whose immoral influences were deemed undesirable by the O'Briens that they withdrew their children from the public school in the first place.

The law under which the *Bongart* and *O'Brien* cases were decided specifically provided for alternatives to public school in terms of "equivalent" education,[93] and the superimposition of the socialization theory by judicial fiat was at last rejected in *State v. Massa*,[94] a 1967 trial de novo on appeal from a municipal court conviction of violating the compulsory education law.[95] The prosecution stipulated that under the statute a child might lawfully be taught at home and that no teacher's certificate need be held by the instructor. The sole issue, the court held, was that of equivalency of education. The defendant's motive was that she desired the pleasure of seeing her daughter's mind develop. The defendants also asserted that schools waste time, while home instruction is more efficient. Considerable evidence of proper teaching materials was introduced, together with reports of objective

89 *Id.*

90 *Id.*

91 7 N.J. Super. 608, 72 A.2d 389 (Cape May County Ct., L. Div. 1950).

92 *Id.* at 614, 72 A.2d at 392.

93 Law of April 14, 1914, ch. 223, § 8, [1914] N.J. Laws 460 (repealed 1968).

94 95 N.J. Super. 382, 231 A.2d 252 (Morris County Ct., L. Div. 1967).

95 Law of April 14, 1914, ch. 223, § 2, [1914] N.J. Laws 457 (repealed 1968).

academic tests of the child; as a result, the court was satisfied that there was an established program of teaching and studying in the Massa home. In reversing the conviction,[96] the court weighed the precedent of *Knox v. O'Brien* and explicitly refused to follow it, holding that the view advocated therein was untenable, in that it would require education to be given in a group, that is, in a "school." Why, then, asked the court rhetorically, did the Legislature make provision for an alternative to school? In finding the defendants not guilty, the court held that with regard to compliance by home instruction, New Jersey law "requires only a showing of academic equivalence."[97]

Where the compulsory education statute specifically requires attendance at a "school," the equivalency approach taken above, of course, will not suffice; it does not follow, however, that what appears on the surface to be home instruction is necessarily violative of such a statute. What, it may reasonably be asked, are the essential elements of a "school?" In the Illinois case of *People v. Levisen*,[98] a young girl was taught at home by her parents, devout Seventh-day Adventists, who believed that educating her in competition with other children in a conventional school tended to instill an unchristian pugnacity of character. They decried the fact that faith in the Bible could not be inculcated in the public school, and further believed that "for the first eight or ten years of a child's life, the field or garden is the best schoolroom, the mother the best teacher, and nature the best lesson book." There was no question that the intellectual atmosphere in the child's home was satisfactory. The father was a college graduate, and the mother had two years of college, including training 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. Upon examination, she showed a proficiency comparable to the average third grade student, although she was only seven years old. Nevertheless, the defendants were convicted since the Illinois compulsory education statute[99] did not specifically provide for home instruction. On appeal under agreed facts, the parties stipulated that the Levisen child was not attending a "private school." The state supreme court, however, ruled that this alleged fact was actually a conclusion of law, and thus a matter for determination by

96 Technically, the court's action was an acquittal on the trial de novo. There was no record to be reviewed, and the court sat in effect as one of first instance, taking testimony, since the appeal was from municipal court.

97 95 N.J. Super. at 390, 231 A.2d at 257.

98 404 Ill. 574, 90 N.E.2d 213 (1950).

99 ILL. ANN. STAT. ch. 122, § 26-1 (Smith-Hurd 1962).

the court itself. In reversing their conviction, the court held that the Levisens were in fact operating a "private school" within the intention of the Legislature.[100]

While some jurisdictions, as indicated, have progressed from statist rigidity to result-centered accommodation with individual rights and duties, others, such as Massachusetts, are regressing. In *Commonwealth v. Roberts*,[101] a case decided under an 1890 statute,[102] the defendant offered to prove at his trial that the private school to which he sent his child, though unapproved by the local school committee, nevertheless provided such instruction as would constitute compliance with the law, which exempted a child from its provisions

> if such child has been otherwise instructed for a like period of time in the branches of learning required by law to be taught in the public schools . . . .[103]

The proffered evidence was excluded and the defendant convicted. In reversing, the Massachusetts Supreme Court held that the evidence should have been admitted, observing that

> [t]he great object of these provisions of the statutes has been that all the children shall be educated, not that they shall be educated in any particular way. . . . This permits instruction . . . by the parents themselves, provided it is given in good faith and is sufficient in extent.[104]

Some years later, however, the 1890 statute was repealed and replaced with one requiring prior approval by the local school board for any private school. In *Commonwealth v. Renfrew*,[105] decided under the later statute,[106] the complaint alleged that the child involved had not "been otherwise instructed in the branches of learning required to be taught in the public day schools." This latter language was held to be mere surplusage by the Massachusetts Supreme Court, which affirmed the conviction of parents who had sent their child to an unapproved private school and who offered at their trial to prove the equivalency of the education imparted therein. The inadmissibility of such evidence was upheld on the ground that, the statute having been changed,

100 The court cited no legislative history to support its view, and it might just as well have been presumed that, had the legislature wished to allow home instruction to qualify as a "private school," it would have said so.

101 159 Mass. 372, 34 N.E. 402 (1893).

102 Law of June 4, 1890, ch. 384, [1890] Mass. Acts 343-44 (repealed 1939).

103 *Id.*

104 159 Mass. at 374, 34 N.E. at 403.

105 332 Mass. 492, 126 N.E.2d 109 (1955).

106 Law of April 12, 1939, ch. 461, § 2, [1939] Mass. Acts 623.

the equivalence of the education, even if proved, would not have established a defense.[107] Thus, although *Renfrew's* abrogation of the *Roberts* rule was directed specifically at private schools, it applies a fortiori to home instruction attempting to qualify as a "private school" under the type of construction employed in *Levisen*.

Perhaps the ultimate tragedy of state encroachment upon parental rights at the expense of a child's judicially determined best interests occurred in *State ex rel. Shoreline v. Superior Court*,[108] a 1959 Washington case. Following a lower court conviction for violating the compulsory education law[109] against parents whose religious convictions forbade organized school attendance, their child was declared delinquent and dependent, the parents contributing thereto. The lower court found that the parents' religious liberty was infringed by the requirement of school attendance,[110] but held this to be no defense. It further found as a fact that the education being given the child at home was academically equivalent to that available in a conventional school. Nevertheless, home instruction did not qualify as a "private school," the only lawful alternative to public school, and the child was made a ward of the court. Physical custody of the child, however, was ordered to remain in the parents, conditioned on their providing for her education in conformity to state law.

Subsequent to the entering of this order, the lower court found that the Washington Legislature had not promulgated standards for private schools. It thereupon ruled that, in view of the adequacy of the education being provided in the home, the child was attending a "private school." The state appealed. The supreme court reversed, holding that, regardless of the lack of any legislatively prescribed standards, there could be no school unless instruction were provided by a person holding a teacher's certificate from the state of Washington: "The Wolds had the place and the pupil, but not a teacher qualified to teach in the state of Washington."[111]

It seems very difficult to justify the *Renfrew* and *Shoreline* decisions. Even granting that the *Renfrew* court may have felt bound to acquiesce in the administrative implications of the Massachusetts statute

107 *Accord*, People v. Turner, 121 Cal. App. 2d 861, 263 P.2d 685 (App. Dep't, Super. Ct. 1953), *appeal dismissed*, 347 U.S. 972 (1954); State v. Garber, 197 Kan. 567, 419 P.2d 896 (1967); Rice v. Commonwealth, 188 Va. 224, 49 S.E.2d 342 (1948); State v. Counort, 69 Wash. 361, 124 P. 910 (1912).

108 55 Wash. 2d 177, 346 P.2d 999 (1959), *cert. denied*, 363 U.S. 814 (1960).

109 WASH. REV. CODE ANN. § 28.27.010 (July 1963).

110 55 Wash. 2d at 179, 346 P.2d at 1000 (1959). The parents' religious tenets proscribed any learning in organized school. *Id.* at 185, 346 P.2d at 1003-04.

111 *Id.* at 182, 346 P.2d at 1002.

requiring prior approval of private schools, such a hypothesis only shifts the need for reform onto the shoulders of the Legislature. The burden should not be upon parents exercising their rights to control the upbringing of their children to satisfy a political body that they are not shirking their duties toward their children. Rather, the burden should be upon those who accuse parents of malfeasance. Even if, for purposes of reasonable procedural convenience, lack of prior approval by the school committee is given the status of a presumption of inadequacy of education provided in an unapproved school,[112] that presumption should be rebuttable by clear and convincing evidence.

Whatever arguments may be mounted for *Renfrew* on administrative and legislative grounds, however, *Shoreline* appears quite indefensible. As the dissent therein noted,[113] it was the function of the superior court to determine what was in the best interests of the child and it had done so. There was no legislative mandate which the supreme court was constrained to follow, and it could have limited its holding to the particular facts, including wardship of the child then before it. The welfare of the child should be paramount, with the rights of the parents close behind, and the further aggrandizement of the public educational bureaucracy given short shrift. The *Shoreline* court, it is submitted, had its jurisprudential priorities badly jumbled.

Where the equivalency rule is liberally interpreted, as in *Massa* and *Levisen,* it tends not only to protect the individual rights of parent and child, but encourages genuine innovation in educational techniques as well. The "dual enrollment" program of the Chicago public schools,[114] whereby students spend part of the school day in public facilities and the remainder in such educational institutions as the parent may choose, not only relieves the public schools of a considerable burden, but fosters cultural pluralism. The transfer to private profit-making organizations of local responsibilities for the public educational system has provided superior instruction on a guaranteed basis to many children at a considerable savings to the taxpayers.[115] Neither of these

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112 N.Y. EDUC. LAW § 3212(2) (McKinney 1970) provides:

Every person in parental relation to a minor . . .

. . . .

d. 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.

113 55 Wash. 2d at 185, 346 P.2d at 1004.

114 This plan was held nonviolative of both statutory and constitutional provisions in Illinois. Morton v. Board of Educ., 69 Ill. App. 2d 38, 216 N.E.2d 305 (1966).

115 A Gary, Indiana elementary school is operated by a private corporation whose

innovations, however, is possible under a mechanistic interpretation of the equivalency rule.

CURRICULUM CHOICE AND PARENTAL RIGHTS

Some states prescribe the curriculum for the public school system, or make provision for its determination on the local level.[116] Others give almost total discretion in curriculum matters to local authorities, with only a few courses being required on a statewide basis.[117] Occasionally, parent-state conflicts have arisen out of a refusal by parents to permit a child to undertake some particular course of study offensive to the parent. Relatively few such conflicts appear to have reached appellate courts, however, perhaps because of widespread statutory provisions for excusing a child from certain courses of study.[118] Although parents have balked at such apparently innocuous activities as the study of singing,[119] the courts have in this area tended to emphasize parental rights:

> 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.[120]

Perhaps the most far-reaching ruling protecting parental rights to choose courses for a child was pronounced in the Colorado case of *People ex rel. Vollmar v. Stanley*:[121]

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fees for that service are dependent upon the scores achieved by the students on objective achievement tests. NEWSWEEK, Oct. 11, 1971, at 66.

116 Generally, when the curriculum is specified on the state level, it comprises the basic ten subjects: reading, writing, arithmetic, English, spelling, geography, history, civics, hygiene and physical training. *See, e.g.*, N.Y. EDUC. LAW § 3204(3) (McKinney 1970).

117 *See, e.g.*, ILL. ANN. STAT. ch. 122, § 27-1 (Smith-Hurd 1962).

118 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.

Governor's memorandum upon approving Law of March 14, 1950, ch. 135, [1950] N.Y. Laws 640, *cited in* N.Y. EDUC. LAW § 3204 (Historical Note) (McKinney 1970).

119 Other unusual objections have given rise to litigation. Trustees of School v. People *ex rel.* Van Allen, 87 Ill. 303 (1877) (parent would not permit child to study grammar); State v. Mizner, 50 Iowa 145 (1878) (eschewing algebra); State *ex rel.* Kelly v. Ferguson, 95 Neb. 63, 144 N.W. 1039 (1914) (domestic science).

120 School Bd. v. Thompson, 24 Okla. 1, 11, 103 P. 578, 582 (1909). *See* Sheppard v. State, 306 P.2d 346 (Okla. Crim. App. 1957).

121 81 Colo. 276, 255 P. 610 (1927).

> [T]he right of parents to have their children taught where, when, how, what, and by whom they may judge best, are among the liberties guaranteed by section I of the Fourteenth Amendment of the United States Constitution.[122]
>
> . . . .
>
> 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 biology, 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."[123]

Somewhat analogous to refusal to participate in certain portions of the prescribed curriculum are those conflicts brought about by the persistent and repeated absence of a child from school. In contrast to the attitude towards curriculum choice shown above, courts have tended to be very unsympathetic in the case of children who are regularly absent for entire days, perhaps because of the disruption of the learning program in many subjects taught on a daily basis.

If a child's religious background, for example, requires him to observe a Sabbath which regularly falls on a day when the public schools are in session, but his parents nevertheless wish to avail themselves of the public school, compulsory education or attendance problems are sure to arise. Typical was the case of *Commonwealth v. Bey*,[124] wherein Muslim parents kept their child at home every Friday, a day sacred to Islam and equivalent to the Christian Sabbath. In affirming their conviction for violation of the compulsory education laws, the court pointed out that those who exercise their option of attending the public rather than private schools are bound to observe the regulations of those schools in regard to scheduled sessions, and there is no right, based on religion or otherwise, to adhere to only part of a statute. The

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122 *Id.* at 280-81, 255 P. at 613. *Contra*, Lehew v. Brummell, 103 Mo. 546, 15 S.W. 765 (1891).

123 81 Colo. at 282, 255 P. at 614.

124 166 Pa. Super. 136, 70 A.2d 693 (1950). Either through statute or by judicial determination, most jurisdictions have drawn a distinction between irregular attendance, which is ground for disciplinary action, and mere occasional absence, requiring only a reasonable explanation. The power to distinguish the two is left in most instances to the discretion of the local school board. People *ex rel.* Lewis v. Graves, 127 Misc. 135, 215 N.Y.S. 632 (Sup. Ct. 1926), *aff'd*, 245 N.Y. 195, 156 N.E. 663 (1927).

same attitude was evident in *Commonwealth v. Rapine*,[125] wherein the court, despite taking judicial notice of the unusual talent of a girl who was absent every Wednesday afternoon in order to take ballet lessons, held that those who make use of the public schools must adhere to the regular schedules and not interrupt the regular course of study.

There would appear to be still further room for accommodation between parent and school authorities on the question of regular non-attendance. Where it is clearly shown that absence every Tuesday in fact disorganizes a child's educational program to the point of substantial noncompliance with the parent's duty to educate, then of course the parent may be compelled by law to fulfill his obligations through appropriate tutoring or private school arrangements. But absent such a showing, there is no reason that accommodation cannot be achieved at the local school level on an individual basis. As always, it is the welfare of the individual child that is controlling, not administrative convenience. Who is sufficiently foresighted to say with any reasonable degree of certainty that, for a talented youngster, ballet lessons are not as important as, say, home economics and typing? And if the ballet lessons interfere with the regular program to an extent requiring remedial work which the child is satisfactorily undertaking, then there should be no objection. Only if regular absences on the part of the child were to adversely affect the rights of others in the school should strict attendance be insisted upon, and in an atmosphere of administrative imagination rather than lethargy, such a situation is unlikely to occur. The philosophy espoused here is present, at least implicitly, in the decision of an Illinois court holding that a student may comply with the law by attending public school part-time and private school part-time, thus upholding the city of Chicago's experimental "dual enrollment" plan.[126] What really mattered, observed the court, is whether or not children were afforded a complete education.

HEALTH REGULATIONS

It is difficult to imagine, today, the scourge that smallpox once represented. Routine public health measures have largely obliterated this dread disease in every civilized country of the world. Under their "police powers," governmental agencies began offering free or nomi-

[125] 88 Pa. D. & C. 453 (Montgomery County Ct. 1954). An unusual religious belief that the true Sabbath begins at noon each Wednesday resulted in a charge of child neglect against a parent who kept her child from school. *In re* Currence, 42 Misc. 2d 418, 248 N.Y.S.2d 251 (Fam. Ct. 1963).

[126] Morton v. Board of Educ., 69 Ill. App. 2d 38, 216 N.E.2d 305 (1966).

nally priced immunization to the public at large toward the end of the nineteenth century. The overwhelming proportion of the populace was eager to be protected, of course, but there were pockets of resistance. In particular, there were certain religious sects, such as the Christian Scientists, whose theological principles conflicted with the received wisdom concerning disease and its prevention. Compulsory vaccination, which was soon imposed and made a precondition in many instances for school attendance, was not challenged until after the turn of the century.[127]

The settled law is that a state may lawfully compel a child to be inoculated as a precondition of school attendance;[128] that the existence or apprehension of epidemic need not be shown;[129] that any exemption on the grounds of religious objection is personal to the child rather than to the parent;[130] that where discretion to grant or withhold exemption is lodged in a local school board, the exercise of that discretion will not be judicially disturbed absent a showing of abuse;[131] and that whosoever renders a child unfit to attend school by reason of failure to have him vaccinated may be prosecuted under the compulsory education law.[132] These are the majority rules, and apply by implication at least to other immunizations which are prerequisite to school attendance.

A case illustrating several of these principles was *Mountain Lakes Board of Education v. Maas*,[133] wherein an injunction was granted in favor of the school board restraining the defendant from sending her foster children to school uninoculated. The defendant, a Christian Scientist, had sought exemption for the children under the provisions of the New Jersey statute[134] which vested discretion over such exemption in the district school board. There had been no case of epidemic disease in the community for a decade. After the exemption request was refused, the defendant had brought her foster children to

127 Jacobson v. Massachusetts, 197 U.S. 11 (1905).

128 Anderson v. State, 84 Ga. App. 259, 65 S.E.2d 848 (1951); State v. Drew, 89 N.H. 54, 192 A. 629 (1937); Sadlock v. Board of Educ., 137 N.J.L. 85, 58 A.2d 218 (Sup. Ct. 1948).

129 Bissell v. Davison, 65 Conn. 183, 32 A. 348 (1894); Mosier v. Barren County Bd. of Health, 308 Ky. 829, 215 S.W.2d 967 (1948); Sadlock v. Board of Educ., 137 N.J.L. 85, 58 A.2d 218 (Sup. Ct. 1948).

130 Mountain Lakes Bd. of Educ. 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).

131 *Id.*

132 Anderson v. State, 84 Ga. App. 259, 65 S.E.2d 848 (1951); People v. Ekerold, 211 N.Y. 386, 105 N.E. 670 (1914); Marsh's Case, 140 Pa. Super. 472, 14 A.2d 368 (1940).

133 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).

134 Law of May 8, 1952, ch. 153, § 1, [1952] N.J. Laws 514 (repealed 1968).

the school, with stools for them, and left them there. Photographers and the press were present, apparently at the defendant's instigation. The children were themselves Greek, and, to the extent that those of tender years can be said to have any religion at all, belonged to the Greek Orthodox Church, whose doctrines in no way forbid inoculation. The injunction was made permanent upon appeal, the court holding, *inter alia*, that, despite the absence of any epidemic or apprehension of one, the taking of precautions to the point of requiring all children to be immunized was not unreasonable, and that in the statute vesting discretion in the school board the use of the phrase "may exempt" did not imply "shall exempt."[135]

There is, however, a minority rule, as illustrated in the case of *State v. Miday*,[136] wherein a minister enrolled his unvaccinated son in the public school, claiming exemption from the compulsory vaccination statute[137] under its provisions for religious objections. The child was subsequently excluded, and the father convicted of violating the compulsory education law. The church to which the father belonged did not strictly proscribe vaccination, but did preach faith healing and left the propriety of medical treatment up to the conscience of its individual members. In reversing the conviction, the North Carolina Supreme Court held that so long as the father was asserting his rights as he conceived them, he was not guilty. Moreover, the question of whether or not the defendant was in fact correct in his conception of his rights was held to be a matter for determination by the jury.[138]

A respectable argument can be advanced for requiring parents to provide their children with certain preventative medical treatments, just as they are required to provide them with food and clothing sufficient to preserve their health. But such an argument rests not upon the state's power to regulate the schools but rather upon the child's right to an appropriate standard of medical care from his parents. It is settled law that no child may be deprived of medical treatment because of his parent's religious convictions.[139] Excluding the unvaccinated

135 A Board of Education may exempt the pupil from the provisions of this section if the parent or guardian of said pupil objects thereto in a written statement signed by him upon the ground that the proposed immunization interferes with the free exercise of his religious principles.

Id.

136 263 N.C. 747, 140 S.E.2d 325 (1965).

137 N.C. GEN. STAT. § 130-93.1 (Repl. 1964) (repealed 1971).

138 263 N.C. at 751, 140 S.E.2d at 329.

139 *In re* President & Directors of Georgetown College, 331 F.2d 1000 (D.C. Cir. 1964), *rehearing denied*, 331 F.2d 1010, *cert. denied*, 337 U.S. 978 (1964); Note, *Compulsory Medical Treatment and the Free Exercise of Religion*, 42 IND. L.J. 386 (1967); *see* State v. Perricone, 37 N.J. 463, 181 A.2d 751, *cert. denied*, 371 U.S. 890 (1962).

child from school merely punishes him for the sins of his parents, and compounds the injustice of denying him adequate medical care by denying him an education as well.

It cannot logically be argued that the rights of the majority of vaccinated children are involved here, since the unvaccinated obviously cannot infect them. It is the unprotected child who runs the risk. Considering the remoteness of that risk in today's world, it is at least arguable that compelling vaccination over the parent's objection is inadvisable as a matter of public policy. The burden of persuasion in resolving the matter, as always when the state seeks to encroach upon liberty in the name of necessity, should be upon the state.[140] In any event, the question of compulsory immunization from disease has no rational connection with school law, and the two should be divorced. It is understandable that the courts, in matters of public health, should be particularly strict, but it is submitted that a greater degree of emphasis upon the right of the child to a decent standard of medical care in general would be, in practice, more productive of justice for those who are seldom in a position to protest mistreatment.

Prosecution of Compulsory Education Offenses

Compulsory education statutes are, in general, penal in nature. Consequently, prosecutions under such statutes are governed by the usual rules of criminal procedure. There are, however, certain considerations peculiar to the enforcement of these statutes which have practical consequences worth examining.

The precise nature of the crime under compulsory education laws consists of a failure or refusal to act. It is the recalcitrance of the parent which is the essence of the offense.[141] Thus it is an omission[142] rather than a positive act which underlies the usual prosecution. It has been held in several jurisdictions that the omission must be accompanied by an unlawful intent, a mens rea, amounting to willfulness and de-

140 "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation" upon first amendment rights. Thomas v. Collins, 323 U.S. 516, 530 (1945).

141 Commonwealth v. Henry, 20 Pa. D. & C. 594 (Juniata County Ct. 1934); *see* People v. Levisen, 404 Ill. 574, 90 N.E.2d 213 (1950).

142 Where the parent is required to "send" his child to school, he is not under pain of crime required to place him in the classroom physically and keep him there, and need not insure that the child is in fact in school. Commonwealth v. Mosteller, 34 Pa. D. & C. 2d 711 (Lycoming County Ct. 1964). But the parent must take reasonable steps to assure that the child will be admitted. Anderson v. State, 84 Ga. App. 259, 65 S.E.2d 848 (1951) (parent's refusal to have child vaccinated is equivalent to refusal to enroll him in school).

fiance.[143] In the New York case of *In re Jones*,[144] a suit to have a nine-year-old girl declared delinquent and taken from her parents' custody, the court read into the relevant statute[145] a mens rea proviso not present on its face. The child had refused to salute the flag, believing such an act to be contrary to God's law. The school authorities construed this as insubordination within the meaning of the statute. The court held that "delinquency," like crime, involves an intent to do wrong,[146] which intent may be inferred from surrounding circumstances, and that in this case the circumstances did not obviate the inference that the refusal was not in good faith.

The courts have generally made a clear distinction between the acts or omissions of the child and those of the parents. Typical is the case of *People ex rel. Fish v. Sandstrom*,[147] arising when the Sandstrom child, who would not salute the flag, was excluded from school. Her parents repeatedly sent her back and the school continued to refuse admittance in the face of her persistent refusal to salute. The impasse was broken with the prosecution and conviction of the parents for violating the compulsory education law. The New York Court of Appeals reversed upon the ground that, since the parents did in fact send the child to school, it was not they who were responsible for the nonattendance.[148] Moreover, in a ruling unique to New York, it was held that "the action must be against the scholar, not the parents."[149]

A similar, though somewhat more subtle, distinction was drawn between the act of the parent and that of the child in another flag-salute case, *State v. Davis*,[150] wherein the Arizona Supreme Court held that parents might lawfully employ reasoning and persuasion to counteract the state's loyalties. The parents had appealed their conviction on the ground that the information under which they had been

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143 *In re* Richards, 166 Misc. 359, 2 N.Y.S.2d 608 (Child. Ct. 1938), *aff'd*, 255 App. Div. 922, 7 N.Y.S.2d 722 (1938); Maynard v. Shanker, 59 Misc. 2d 55, 57, 297 N.Y.S.2d 801, 804 (Fam. Ct. 1969); State v. Miday, 263 N.C. 747, 140 S.E.2d 325 (1965).

144 175 Misc. 451, 24 N.Y.S.2d 10 (Child. Ct. 1940).

145 N.Y. EDUC. LAW § 3214 (McKinney 1953).

146 Taken in full generality, the comparison between delinquency and crime, both requiring an intent to do wrong, is incorrect. There are in fact many *malum prohibitum* crimes requiring no *mens rea*. However, a crime punishable by loss of liberty requires *mens rea*: Smith v. California, 361 U.S. 147 (1959); Morissette v. United States, 342 U.S. 246 (1952).

147 167 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).

148 279 N.Y. 523, 18 N.E.2d 840 (1939); *accord*, People v. Chiafreddo, 381 Ill. 214, 44 N.E.2d 888 (1942).

149 279 N.Y. at 533, 18 N.E.2d at 844.

150 58 Ariz. 444, 120 P.2d 808 (1942).

charged failed to state a public offense. The court held, however, that since the information charged that they did "direct and command" the child not to salute, they were not protected by the "reason and persuasion" rule, and the information was sufficient.[151]

It has generally been held that the prosecution in a compulsory education case must show that the proceedings were initiated by the proper state authority,[152] but this rule has been rejected in New York. In *Maynard v. Shanker*,[153] growing out of a teachers' strike, a private person filed an information alleging violation of law. Said the court, "I know of no system where the enforcement of constitutional rights is entrusted solely to the public officials of the State."[154] The court went on to hold that any person may file an information before a magistrate unless forbidden to do so by statute, or unless the alleged crime is too remote from the complainant's interest.[155]

Since prosecutions under compulsory education laws may and often do arise out of circumstances peculiarly local, the situs of the offense and consequent venue of trial, particularly trial by jury, can be of considerable importance. In general, the offense is committed where the child resides,[156] not in the district where he should have attended school. Although a parent of several children will usually fail to cause any of them to attend school if he fails in a single instance, the offense nevertheless has been held to be single, rather than multiple, regardless of the number of children.[157]

There is a wide variation in the forms whereby prosecution is initiated, but the distinctions are in many cases as much terminological as substantive.[158] Regardless of the form, it has been repeatedly held

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151 *Id.* at 451, 120 P.2d at 810-12.

152 State v. Pettifield, 210 La. 609, 27 So. 2d 424 (1946).

153 59 Misc. 2d 55, 297 N.Y.S.2d 801 (Fam. Ct. 1969). This case and several others in New York illustrate the fact that a person not in a parental relation to a minor may violate compulsory attendance laws. Cavanagh v. Galamison, 31 App. Div. 2d 635, 297 N.Y.S.2d 651 (1968); People *ex rel.* Williams v. Shanker, 58 Misc. 2d 47, 295 N.Y.S.2d 10 (Fam. Ct. 1968); People *ex rel.* Belfon v. Anonymous, 44 Misc. 2d 392, 253 N.Y.S.2d 934 (Fam. Ct. 1964). *See* Duval County Bd. of Public Instruction v. NAACP, 28 Fla. Supp. 102 (Duval County Cir. Ct. 1967).

154 59 Misc. 2d at 56, 297 N.Y.S.2d at 804; *cf.* People v. Harrel, 34 Ill. App. 2d 205, 180 N.E.2d 889 (1962).

155 59 Misc. 2d at 56, 297 N.Y.S.2d at 802.

156 People v. Saddlemire, 180 N.Y.S. 257 (Schoharie County Ct. 1919).

157 People v. Himmanen, 108 Misc. 275, 178 N.Y.S. 282 (Chemung County Ct. 1934); Commonwealth v. Henry, 20 Pa. D. & C. 594 (Juniata County Ct. 1919).

158 Gingerich v. State, 226 Ind. 678, 83 N.E. 47 (1948) (affidavit); Commonwealth v. Meeks, 192 Ky. 690, 234 S.W. 292 (1921) (indictment); State v. Pilkinton, 310 S.W.2d 304 (Mo. Ct. App. 1958) (information); State v. Miday, 263 N.C. 747, 140 S.E.2d 325 (1965)

that, where the offense can be properly described only if certain conditions are negatived, then the charge must allege noncompliance with such conditions.[159] Difficulty may arise, however, in determining whether some provisions in a statute in fact constitute part of the definition of the offense, or, rather, are matters of exception which must be pleaded as affirmative defenses. A mechanical rule, having at least the virtue of definiteness, was set forth by the Kentucky Court of Appeals in *Commonwealth v. Meeks*:[160] if the exception is contained in the sentence or in the paragraph which creates and describes the offense, it must be negatived; if the exception is contained in a separate section or distinct proviso, it is a matter for defense.

Strictly delimiting its decision to the precise question of whether the prosecution must charge, and thus bear the burden of proving, noncompliance with each and every alternative for educating a child allowed by statute,[161] the New Jersey Supreme Court has held that the alternatives are matters of exception, to be proved by the defendant. Thus a complaint alleging violation of the compulsory education statute need only allege nonattendance at a public school in order to be sufficient.[162] However, as soon as evidence is adduced upon which compliance with one of the exceptions could reasonably be found, the onus shifts, since

> the ultimate burden of persuasion remains with the State with respect to whether the case comes within the exception, this in accordance with the usual rule applicable in penal cases that the ultimate burden of proof always remains with the prosecution.[163]

(complaint); State v. Johnson, 188 N.C. 591, 125 S.E. 183 (1924) (warrant); Sheppard v. State, 306 P.2d 346 (Okla. Crim. App. 1957) (information).

159 State v. Pettifield, 210 La. 609, 27 So. 2d 424 (1946) (a fortiori, in that exceptions were listed separately in statute; 3-2 decision, dissent on question of negativing exceptions); State v. Pilkinton, 310 S.W.2d 304 (Mo. Ct. App. 1958); State v. Cheney, 305 S.W.2d 892 (Mo. Ct. App. 1957); State v. Johnson, 188 N.C. 591, 125 S.E. 183 (1924); Sheppard v. State, 306 P.2d 346 (Okla. Crim. App. 1957).

160 192 Ky. 690, 234 S.W. 292 (1921). *But see* Commonwealth v. Renfrew, 332 Mass. 492, 126 N.E.2d 109 (1955):

> Where a statute creating a crime permits the act declared to be criminal to be performed under such conditions as not to be criminal, such conditions need not be negatived.

Id. at 494, 126 N.E.2d at 110.

161 Law of April 14, 1914, ch. 223, § 2, [1914] N.J. Laws 457 (repealed 1968).

162 State v. Vaughn, 44 N.J. 142, 147, 207 A.2d 537, 540 (1965); *accord,* People v. Turner, 121 Cal. App. 2d 861, 263 P.2d 685 (App. Dep't, Super. Ct. 1953), *appeal dismissed,* 347 U.S. 972 (1954):

> [T]he exemptions . . . do not constitute part of the definition or description of the offense, which is the failure of parents to send their children to a public school.

Id. at 864, 263 P.2d at 686.

163 44 N.J. at 147, 207 A.2d at 540.

As in all criminal prosecutions, of course, the guilt of a defendant in a compulsory education trial must be proved beyond a reasonable doubt,[164] not merely by a preponderance of the evidence. Some courts have been lax, however, in regard to another procedural safeguard for the rights of the accused, permitting amendments to or cure of defective charges after the start of trial.[165]

Because of the penal nature of compulsory education statutes, it has been held that criminal prosecution is the only remedy available for their enforcement. Thus, in *State ex rel. Chalfin v. Glick*,[166] Ohio officials sought to enjoin the continued operation of an Amish school, alleging insufficiency of the instruction, and further sought to enjoin the Amish teachers from continuing to teach their pupils on the grounds that "respondents are engaged in a conspiracy to subvert the morals of these children."[167] Despite such an incredible assertion,[168] the common pleas court granted the injunction, and was promptly reversed by the intermediate court of appeals.[169] In affirming the vacation of the injunction, the Ohio Supreme Court held to the traditional principle that equity has no criminal jurisdiction, and will not prohibit an act merely because its commission may constitute a crime.[170] This general rule, it is submitted, is jurisprudentially wise, but in practice sometimes unfortunate, since it hamstrings equity from granting relief designed to protect the rights and welfare of children. The fault, however, is not in the rule, but rather in the statutes which make

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164 State v. Massa, 95 N.J. Super. 382, 231 A.2d 252 (Morris County Ct., L. Div. 1967); Parr v. State, 117 Ohio St. 23, 157 N.E. 555 (1927).

165 Gingerich v. State, 226 Ind. 678, 83 N.E.2d 47 (1948), held that affidavit, even if defective for failure to charge an essential element of the offense, was cured by verdict of guilty and defendant's failure to move to quash or arrest judgment. In Sheppard v. State, 306 P.2d 346 (Okla. Crim. App. 1957) the court found unobjectionable the amendment of a defective information subsequent to the selection of the jury, on the ground that the defendant was not prejudiced thereby (dictum).

166 113 Ohio App. 23, 177 N.E.2d 293 (1960), *aff'd*, 172 Ohio St. 249, 175 N.E.2d 68 (1961).

167 172 Ohio St. at 250, 175 N.E.2d at 71.

168 Incredible in light of the fact that since their arrival in America in 1745, no Amishman has ever been convicted of a felony. Address by F. H. Littell, National Conference on Freedom and Control in Education, University of Chicago, Mar. 28, 1967.

169 113 Ohio App. 23, 177 N.E.2d 293 (1960). In the Iowa Amish school controversy, *see* note 54 *supra*, the county school superintendent's petition for an injunction against the continued operation of Amish schools was refused by the court of first instance. Jorgensen v. Borntrager, No. 22904 (Buchanan, Iowa Dist. Ct., Nov. 1962).

170 172 Ohio St. at 252-53, 175 N.E.2d at 72. But by statute, equity has been permitted to exercise its injunctive powers against certain crimes in the nature of public nuisances. Mugler v. Kansas, 123 U.S. 623 (1887). *But see* Hedden v. Hand, 90 N.J. Eq. 583, 107 A. 285 (Ct. Err. & App. 1919) (holding unconstitutional a statute authorizing injunction against public nuisances).

failure to educate one's child a purely criminal offense rather than a matter for equitable wardship and custody proceedings.

Because compulsory education violations, as indicated, are legally distinct from matters of child neglect, questions of double jeopardy have arisen. The general rule for determining whether a single act, violating two distinct statutes, is in actuality two offenses, is whether each offense would require the proof of a fact that the other does not,[171] and this rule has been applied in compulsory education cases.[172] There have been instances of acquittals in prosecutions under compulsory education laws followed by appeals on questions of law by the prosecution. While some courts have dismissed such appeals on the general rule that an acquittal of a criminal charge is conclusive in regard to all issues,[173] others have entertained such questions of law, reversing lower courts, but have of course barred any further prosecution of the original offense.[174]

RECOMMENDATIONS

Of all the judgments which can be pronounced upon any law, the most damning is "it doesn't work." To a large extent, this is the judgment which, in light of all the preceding discussion, must be made in regard to the compulsory education laws in the United States. In the abstract, compulsory education laws can indeed be justified. Parents who are responsible for the existence of a child freely undertake certain obligations. Among these, of course, are those of supplying the child with food, clothing, shelter and the other necessities of life until the period of helplessness is past. Yet, in no reasonable sense will the period of helplessness ever end unless the child is intellectually equipped to earn his way in the culture he will someday enter.[175] Education is the right of the child, just as the reasonable direction of that education is

171 United States v. Brisbane, 239 F.2d 859 (3d Cir. 1956); People v. Martinis, 46 Misc. 2d 1066, 261 N.Y.S.2d 642, *aff'd*, 268 N.Y.S.2d 964 (Sup. Ct. 1965).

172 *In re* Whitmore, 47 N.Y.S.2d 143 (N.Y. City Dom. Rel. Ct., Child. Ct. Div. 1944).

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

174 State v. Ghrist, 222 Iowa 1069, 270 N.W. 376 (1936) (trial court found maintenance of ungraded school for intellectually retarded children repugnant to state constitution's equal protection clause and was reversed by the state supreme court on this point).

175 It would obviously be absurd to require a Ugandan tribesman, whose language is wholly oral, to teach his child to read and write; but it may be quite reasonable that he be required to instruct his child in, say, lion-hunting. Then should the Ugandan government establish instructional game preserves for those children whose parents cannot or will not teach them to hunt lions? Should the state of Ohio force Amish children to learn to paint pictures, an activity forbidden by their religion?

the right of the parent.[176] The precise amount and kind of education which parents owe their children is a question of labyrinthine complexity, dependent upon a myriad of circumstances including their financial means,[177] their culture,[178] and the abilities of the child;[179] but the general principle holds that parents are obliged to prepare their children for self-sufficiency. The fundamental practical question is whether or not compulsory education laws, as they now exist and are applied, further the rights of children and their parents. Manifestly, they do not.

Foremost among the defects of compulsory education laws is that they are penal in nature. If the objective of the law is to assure that children shall be educated, is this objective served by jailing recalcitrant parents? One need not be an expert in the psychology of religious fanaticism, for example, to realize that penal sanctions, regardless of their severity, beget martyrs, not compliance. The futility of such sanctions against parents, as compared to the efficacy of direct judicial

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176 Under our system of government the family is the foundation of the social order, it does not spring from the state but the state springs from the family. The parents, unless their parental authority has been taken away by the courts, are the ones to decide the extent and character of the education of their children . . . .

Gordon v. Board of Educ., 78 Cal. App. 2d 464, 480, 178 P.2d 488, 498 (1947).

177 It is possible under certain circumstances that particular parents may not be able to afford the same quality of education for their children as others. This fact is often hidden from view because of the indirect methods whereby public schools are financed, deluding some persons into thinking that they are getting something for nothing. Wooldridge, *An Education of Choice*, in UNCLE SAM THE MONOPOLY MAN 75 (1970).

178 Although many Americans seemingly support the concept of cultural pluralism, the school systems we support are, at least in some instances, in conflict with this presumed ideal:

> For reasons which may have been valid in the 19th and early 20th centuries, schools were given the mandate to teach children a common language, common political and economic goals and common standards of behavior. In the process of monopolizing most of the child's time and energy . . . today's schools still encourage an unnecessary degree of cultural and psychologic uniformity . . . . [T]hey still risk destroying a healthy diversity in points of view, in styles of life, in underlying value commitments and innate capacities.

R. KAY, OUR AMERICAN EDUCATIONAL SYSTEM 8 (Center for Independent Education 1969). *See also* SATURDAY REVIEW, June 19, 1971, at 44. It is not the prerogative of the state to determine that a child will abandon the culture of his forefathers:

> Government is an organization for particular purposes. It is not almighty, and we are not to look to it for everything. The great bulk of human affairs and human interests is left by any free government to individual enterprise and individual action.

Board of Educ. v. Minor, 23 Ohio St. 211, 253 (1872).

179 State v. Ghrist, 222 Iowa 1069, 270 N.W. 376 (1936). Many compulsory education statutes exempt children whose intellectual capacities are so limited that the child will derive no benefit from schooling. *See, e.g.*, CAL. EDUC. CODE § 12152 (West 1969); N.Y. EDUC. LAW § 3208 (McKinney 1970).

protection of the rights of the child, may be illustrated in a pair of cases involving parental objections to vaccination.

In *Marsh v. Earle*,[180] suit was brought to enjoin the governor of Pennsylvania from enforcing that state's compulsory education law,[181] which provided for the exclusion of unvaccinated pupils. Marsh had been charged with violating the law in that, by refusing to have his son vaccinated, he had rendered the boy unfit to attend school.[182] The court noted that this arrest was but one of many, ever since Marsh's son had reached school age. Citing *Jacobson v. Massachusetts*,[183] and staying precisely within its bounds, the court held that it had no jurisdiction to restrain state officials from enforcing a state statute as interpreted by that state's highest court,[184] and that Marsh should have exhausted his remedies under state law, appealing if ultimately necessary to the United States Supreme Court on constitutional grounds.

While the federal suit was pending, Marsh, having been convicted and jailed, petitioned in the state court for a writ of habeas corpus against the warden, which was denied.[185] Two years later, the Marsh boy still had not been vaccinated, and was, of course, not in school. Since his father was constantly in and out of either the courtroom or the jail, the child was receiving little or no education. Thus, during his most formative years, the Marsh boy was a pawn caught between his father and a criminal statute, his right to an education tragically ignored. At last, an action was brought to declare him delinquent and neglected, with a view toward removing him, at least temporarily, from his father's custody.[186] Even then, the issue was clouded by the charge of "delinquency," inferring some moral fault on the child's part. Since the boy had repeatedly presented himself for admission to school, only to be refused, the court held that he could not be considered delinquent. Fortunately, however, the court also held that Marsh's refusal to have his son vaccinated constituted a refusal to educate him, and therefore justified a finding that the boy was "neglected." He was thereupon committed to the custody of the Pennsylvania Welfare Service, where it may be presumed that he was promptly vaccinated. What all the

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180 24 F. Supp. 385 (M.D. Pa. 1938).

181 Law of March 10, 1949, art. XIV, §§ 1423-1438, [1949] Pa. Laws 30 (repealed 1957).

182 24 F. Supp. at 386; *accord*, Anderson v. State, 84 Ga. App. 259, 65 S.E.2d 848 (1951); People v. McIlwain, 151 N.Y.S. 366 (Delaware County Ct. 1915).

183 Jacobson v. Massachusetts, 197 U.S. 11 (1905).

184 24 F. Supp. at 387.

185 *Id.* at 386-87; Commonwealth *ex rel.* Marsh v. Lindsey, 130 Pa. Super. 448, 198 A. 512 (1938).

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

powers of the criminal law had failed to accomplish by indirection, equity at last achieved by direct action to protect the rights of the child.

The same result was reached in *Cude v. State*,[187] which was based on almost identical facts. Cude, like Marsh, had been in previous difficulties for violating the compulsory education law. Suit was brought to have his children made wards of the court. Cude threatened that, if they were vaccinated, he would not accept them back into his home. The lower court entered a custody order, directed that the children be vaccinated and that, if Cude carried out his threat, adoption proceedings should be commenced. In affirming this order, the Arkansas Supreme Court agreed that the children were neglected, and pointed out that the fundamental purpose of the law is to get children into school, and not to fine obstinate parents. When parents are derelict in their duties towards their children, the court observed, the state is not without other remedies.[188]

In light of these two rather typical cases, it can be seen that proceedings in equity, protecting the rights of children through traditional injunctive relief, or, if the situation is critical, through the court's powers of wardship, have the advantage of directness and speed. If the actions of an incorrigible parent constitute a willful violation of a child's rights despite the court's commands, penal sanctions in the form of criminal contempt are still available.

In every proceeding under any type of compulsory education law, a guardian *ad litem* should be appointed by the court to safeguard the interests of the child. Ours is an adversary system of justice and all too often, particularly under the present penal compulsory educational laws, children's rights are ignored by the state or their parents. It is expecting too much under our system that antagonists, in the heat of battle, will be scrupulous in their regard for the rights of those who, in effect, are third parties under the present laws.

In supervising the fulfillment of parental obligations toward chil-

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187 237 Ark. 927, 377 S.W.2d 816 (1964).

188 *Id.* at 936, 377 S.W.2d at 821. The majority opinion still followed the *Reynolds* beliefs-acts distinction. The dissenting Justice objected to what he viewed as an enlargement of the penalties provided for violation of the compulsory education statute. An alternative view, however, is that making a neglected child a ward of the court is not a "penalty" against the parent at all, but rather a means of protecting the rights of the child. This concept is also subject to criticism, however, in that juvenile courts have been known to ride roughshod over the rights of children, depriving them of due process. The most practicable procedure, then, is the uniform appointment of guardians *ad litem* to represent the interests of children. *See In re* Winship, 397 U.S. 358 (1970); *In re* Gault, 387 U.S. 1 (1967).

dren, the state should beware that mere form in matters of equivalence of education does not take precedence over substance. It is required of parents that they feed and clothe their children, but it would be considered absurd for the state to mandate the menus that a family must follow and the wardrobe they must have. The same consideration applies in the field of education. It is not a proper function of government to prescribe that children must learn the received wisdom in matters of patriotism, nor is it the function of the schools to be experimental laboratories for the testing of peer group adjustment, with children in the role of guinea pigs. It is not method but results that count, and if the obligation to equip a child with sufficient knowledge to make his way in the world is in fact being discharged, it should be no concern of the state what means his parents may employ to that end. Objective methods of testing children have today attained a sufficient degree of accuracy and reliability that the question of whether or not a child is being adequately educated can be determined quickly, objectively, and inexpensively.

The emphasis upon state approval of schools, home instruction, curriculum, and teachers is often justified on the basis of presumed administrative difficulties which might arise if a more liberal approach were taken. In the California case of *People v. Turner*,[189] for example, this thesis was extended to the point of justifying a requirement that parents, teaching at home, hold a state teacher's certificate for the grade being taught, while instructors in conventional private schools were exempt from such requirement:

> The most obvious reason for such difference in treatment is . . . the difficulty in supervising without unreasonable expense a host of individuals, widely scattered, who might undertake to instruct individual children in their homes as compared with the less difficult and expensive supervision of teachers in organized private schools.[190]

Thus are individual rights so blithely sacrificed upon the altar of administrative expediency. Yet, in the unrelated New York case of *People v. Turner*,[191] it was held that the law of that state did not prohibit home instruction, nor did it require any teacher's certificates, nor was there any necessity for any kind of approval from any state official. Are the children in the state of New York demonstrably less

189 121 Cal. App. 2d 861, 263 P.2d 685 (App. Dep't, Super. Ct. 1953), *appeal dismissed*, 347 U.S. 972 (1954).

190 *Id.* at 867, 263 P.2d at 688.

191 277 App. Div. 317, 98 N.Y.S.2d 886 (1950).

well educated than those in California, or are the parents in California demonstrably less solicitous of their children's welfare than those in New York?

In summary then, the four major improvements advocated in the field of compulsory education are: 1) the decriminalization of the law; 2) uniform appointment of guardians *ad litem* for the protection of children's rights; 3) a revision of legislative and judicial attitudes so as to eliminate irrelevant considerations of the means whereby parents discharge their obligations; and 4) the acceptance of objective test results as evidence in the determination of equivalency of unconventional instruction.[192]

CONCLUSION

As the state of today apparently seeks through homogenization of the child to achieve docility in the adult, it is pertinent to recall the observation of Benjamin Disraeli on the subject of education and the state, made almost one hundred years ago:

> Wherever is found what is called a paternal government, there is found state education. It has been discovered that the best way to insure implicit obedience is to commence tyranny in the nursery.[193]

Robert P. Baker

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[192] Such tests were considered in People v. Levisen, 404 Ill. 574, 90 N.E.2d 213 (1950) and State v. Massa, 95 N.J. Super. 382, 231 A.2d 252 (L. Div. 1967).

[193] Address in the House of Commons, June 15, 1874 (quoted in MENCKEN, A NEW DICTIONARY OF QUOTATIONS 333 (1942)).

EDITORIAL NOTE

As this Comment goes to print, the Supreme Court has affirmed State v. Yoder, 40 U.S.L.W. 4476 (May 15, 1971). The decision was based on the religious infringement suffered by the Amish as a result of the compulsory education laws. The Court was careful to limit the decision to well-established religions. The constitutionality of such a limitation is in question and the issue of compulsory education which does not infringe upon religious freedom, or infringes upon religious beliefs not recognized by the courts, remains a viable one.