Marquette Law Review

Volume 39
Issue 3 *Winter 1955-1956*

Article 5

1956

Censorship of Textbooks

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CENSORSHIP OF TEXTBOOKS

INTRODUCTION

The purpose of this comment is to evaluate the legal issues presented to the textbook committees of American public schools when reading materials intended to be used in public school libraries contain attacks on religious groups.

This problem was clearly brought into focus when on June 24, 1948, the Board of Education of the city of New York suspended the magazine, *The Nation,* from the libraries of public schools by taking the magazine from the list of approved periodicals. The basis for the suspension was a series of articles written by Paul Blanchard which were highly critical of the Roman Catholic Church.[1] The purpose of the ban was stated to be that the "public school must keep scrupulously free from entanglements in the strife of sects."[2] The Superintendent of Schools of the city of New York, William Jansen, emphasized that *The Nation* was not banned because it criticized social and political views of Catholicism, but because it "criticized and 'ridiculed by innuendo' Catholic belief, dogmas, and practices."[3] This decision caused considerable animadversion.[4] The legal aspects were discussed by an unnamed commenter in the Yale Law Journal.[5] The author sees a danger to "Freedom to Learn." The article begins with the statement:

> "The book burning spectre ascribed to the past has experienced a modern revival. Its new setting is in American public schools where the local school board is playing censor with controversial ideas in books and magazines."[6]

The author inferentially compares the New York City School

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[1] The articles in question were the following:
Nov. 1, 1947: "The Roman Catholic Church in Medicine"; Nov. 8, 1947: "The Sexual Code of the Roman Catholic Church"; Nov. 15, 1947: "The Roman Catholic Church and the Schools; April 10, 1948: "The Roman Catholic Church and Fascism"; April 17, 1948: "The Roman Catholic Church and Fascism"; Nov. 24, 1948: "The Roman Catholic Church and Fascism"; May 1, 1948: "Roman Catholic Censorship"; May 8, 1948: "Roman Catholic Censorship"; May 15 ,1948: "Roman Catholic Science I, Relics, Saints, Miracles"; May 22, 1948: "Roman Catholic Science II, Apparitions and Evaluation"; May 29, 1948: "The Catholic Church and American Democracy"; June 5, 1948: "The

[2] *Should Religious Beliefs Be Studied and Criticized in an American Public School?* (A statement by William Jansen, Superintendent of Schools, City of New York, and Chairman of the Board of Superintendents), Oct. 1, 1948. The quotation was taken from the concurring opinion of Justice Douglas in State of Illinois ex rel McCollum v. Board of Education, 33 U.S. 203, 92 L. Ed. 49.

[3] *School and Society,* Nov. 26, 1948, p. 351.

[4] "Many Groups Fight City Ban on Nation," N.Y. Times, July 14, 1948, p. 25, col. 1.

[5] Comment; *School Boards, Schoolbooks and the Freedom to Learn,* 59 YALE L.J., 928, (1950).

[6] *Ibid.,* pp. 928-29.

Board's decision to the burning of twenty thousand "un-German" books in Berlin Square by Dr. Goebbels.[7]

The banning of *The Nation* and the arguments presented by the Yale commenter will be used as a focal point for this article.

School Boards and Schoolbook Selection

Public school education is the function of state governments[8] subject to the parents' more basic right to control the destiny of their offspring.[9] The state legislatures regulate their educational systems subject only to the limitations of the Federal Constitution[10] and of their particular state constitutions.[11] Much of the detail of school administration is left to local school boards. E. Edmund Reutter Jr., Associate Professor of Education, Teacher's College, Columbia University, has noted that "the local board of education is the legal body most closely associated with what is taught to boys and girls."[12] In about half of the 48 states local school boards have exclusive power over textbook selection.[13] New York is such a state.[14]

It is generally held that the courts will not interfere with a school board's exercise of discretionary powers in areas such as textbook selection unless there is a clear abuse of this discretion or a violation of law. They usually will not consider whether the regulations are wise or expedient but merely whether they arise from a reasonable exercise of the power and discretion of the board.[15] The Arkansas Court in an early decision stated:

> "While (the school directors) authority is not without limit; yet a wide range of discretion is vested in these boards by the statute in the matters of government and details of conducting the common school. Courts will not interfere in matters of detail and government of schools unless the officers refuse to perform a clear, plain duty or unless they unreasonably or arbitrarily exercise the discretionary power conferred upon them."[16]

The New York Court in *Fabricus v. Graves,* a more recent case, announces the same rule:

> "The judiciary will not interfere with executive or administrative officers in the performance of their duties which are discretionary in their nature or involve the exercise of judg-

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[7] *Ibid.,* footnote 1, p. 928.
[8] Reutter, *The Law and the Curriculum,* 20 Law and Contemp. Prob. 91 (1955).
[9] Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925).
[10] West Virginia State Board of Education v. Bennett, 319 U.S. 624 (1943).
[11] Leeper v. State, 103 Tenn. 500, 53 S.W. 962, 48 L.R.A. 167 (1899).
[12] *Supra,* note 8, at p. 91.
[13] For an evaluation of the advantages of local selection see Seitz, *Supervision of Public, Elementary and Secondary School Pupils Through State Control Over Curriculum and Textbook Selection,* 20 Law and Contemp. Prob. 116 (1955).
[14] N.Y. Educational Law §701.
[15] Am. Jur. Schools, §47, p. 328.
[16] Maddox v. Neal, 45 Ark. 121, 55 Am. Rep. 540 (1855).

ment, unless such judgment and discretion bear distinct earmarks of either malicious or arbitrary action."[17]

PUBLICATION BANNING AS "ABUSE OF DISCRETION"

The Yale Law Journal commenter argues that it is an unreasonable use of discretionary power to ban a magazine from the public schools because of an author's ridicule and criticism of the beliefs of a particular faith.

> "A ban imposed solely because of the author's point of view is an unconstitutional abuse of the school board's discretion."[18]

No citation is offered to support this view and this writer can find none. This position is supported by the argument that such a ban denies the student the "Freedom to Learn",[19] which is protected by the First Amendment to the Constitution as an adjunct to the Freedom of Expression.

> "Freedom to Learn thus transforms a publisher's well-recognized rights to speak and print freely into a school-child's right to serve as an audience. In this manner the benefits of the First Amendment penetrate to the classroom."[20]

This type of reasoning, applied to the facts in the New York situation, neglects entirely the significance of the First Amendment and recent United States Supreme Court decisions interpreting that clause.

THE "ESTABLISHMENT OF RELIGION" CLAUSE OF THE FIRST AMENDMENT

An analysis of recent United States Supreme Court decisions interpreting the "establishment of religion" clause of the First Amendment as it relates to public education is necessary for a consideration of the reasonableness of the New York School Board's decision.[21] The *Everson*[22] case held that a statute authorizing reimbursement to parents of money expended for bus transportation of their children to and from schools other than those operated for profit, did not, insofar as it permitted payment for transportation of children attending Catholic parochial schools, violate the provision of the First Amendment that no law shall be made "respecting an establishment of religion." The Court said the purpose of the statute was merely to

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[17] Fabricus v. Graves, 174 Misc. 130, 22 N.Y.S.2d 226, 229 (1940).
[18] *Supra,* note 4, p. 948.
[19] *Ibid.,* p. 945.
[20] *Ibid.,* p. 949.
[21] Illinois ex rel McCollum v. Board of Education, 333 U.S. 203, 92 L.Ed. 644, 68 S.Ct. 461, 2 A.L.R.2d 1338 (1947), Everson v. Board of Education, 330 U.S. 1, 91 L.Ed. 711, 67 S.Ct. 504, 168 A.L.R. 1392 (1946), Zorach v. Clauson, 343 U.S. 306, 96 L.Ed 954, 72 S.Ct. 679 (1951).
[22] *Ibid.*

provide for safe transportation of school children irrespective of their religious faith. However, the court did seem to set down a rule that there was a "wall of separation between the Church and State" which did not allow for any cooperation between the two:

> "The 'establishment of religion' clause of the First Amendment means at least this: neither a State nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called or whatever form they may adopt to teach or practice religion."[23]

The *Everson* case was expressly cited as authority in *Illinois ex rel McCollum v. Board of Education.*[24] There a program of released time for religious instruction in Champaign County, Illinois, was held to be violative of the doctrine of the separation of church and state as that doctrine was expressed in the *Everson* case. The court stressed that the facts showed that the religious education took place in the school; the selection of teachers was subject to approval of school authorities; the schools furnished registration cards; publicity concerning the program was given in the schools; and school authorities did invoke truancy laws for absences from religious classes.[25] This the Supreme Court held was "beyond all question a utilization of a tax supported and tax established public school system to aid religious groups to spread their faith."[26]

Zorach v. Clausen[27] also involved a "released time" program. In that case, however, the program was held not to violate the First Amendment. The Supreme Court attempted to distinguish the two cases on their facts:

> "This 'released time' program involves neither religious instruction in public school classrooms nor the expenditure of public funds. . . . The case is therefore unlike *Illinois ex rel McCollum v. Board of Education* which involved a 'released time' program from Illinois. In that case the classrooms were turned over to religious instructors."[28]

Some commenters have argued that the cases can be distinguished on their facts.[29] Another has stated that the issue has been left in a "muddle."[30] The most reasonable position seems to be, however, that there has been a significant "change of mood" on the part of the

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[23] *Ibid.*, 330 U.S. 10-15.
[24] *Supra*, note 21.
[25] *Ibid.*, 333 U.S. 207-9.
[26] *Ibid.*, at page 210.
[27] *Supra*, note 21.
[28] *Ibid.* 343 U.S. 308-9.
[29] 2 DEPAUL L. REV. 116, 119 (1952)
[30] 15 GA. B.J. 363, 366 (1953).

Supreme Court.[31] The "wall of separation" as interpreted in the *Everson Case*[32] does not seem nearly so high nor impregnable in the light of the reasoning of the court in the *Zorach* case.

> "We are a religious people. . . . When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs."[33]

The Supreme Court has probably come much closer to the philosophy of *Pierce v. Society of Sisters*[34] in this case than in its two earlier decisions. The *Zorach* decision also seems to be more in harmony with the intent of the framers of the Constitution.[35]

However, one basic theme does seem to be present in all three of these decisions. It would seem clear that direct tax aid to religious groups to support their functions as religious institutions will never be sanctioned. The *Zorach* case pointed out that the "released time" program there considered was allowed because there was no "expenditure of public funds."[36]

> "The principle of the *Zorach* case seems to be that, *absent expenditure of tax funds,* co-operation of a public school system with religious education groups will be permitted so long as the religious right of pupils and parents is respected."[37]

Under this interpretation the courts would not allow public funds to be used to pay for literature prepared by the different faiths to be used in the libraries of public schools. This would seem to give a school board a very logical basis for barring any literature which was intentionally critical of religious dogmas.

True, while the placing of Blanchard's articles in public school libraries through the expenditure of public funds cannot be considered direct aid to a particular faith, it is, in a sense, an aid to all faiths save the Catholic. Essentially, however, it can be banned because literature prepared by the Catholic Church to present its dogma cannot be placed in public school libraries and it would be inequitable to allow an attack upon a religion without allowing an answer. The public schools would not only be involved in "the strife of sects",[38] they would also be taking sides.

Indeed, one court seems to hold, in the only case which has directly

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[31] 66 HARV. L. REV. 118, 119 (1952).
[32] *Supra,* note 23.
[33] *Supra,* note 28 at 313.
[34] *Supra,* note 9.
[35] 27 NOTRE DAME LAW. 529, 539 (1952).
[36] *Supra,* note 28 at p. 312.
[37] 50 MICH. LAW REV. 1359, 1366 (1952).
[38] *Supra,* note 2.

considered this question, that the banning of literature highly critical of a religious faith by a school board would be reasonable. In *Rosenberg v. Board of Education of the City of New York*[39] the petitioners asked for an order reviewing the determination of the Board of Education of New York City which allowed the books *"Oliver Twist"* and *"The Merchant of Venice"* to be placed on the approved reading list. While holding that a work of fiction could never be barred, because a sensitive person or group was offended by the description of a particular character belonging to a certain race or religion, the court did clearly announce that school boards would be acting reasonably if they barred a book which had "been maliciously written for the apparent purpose of promoting and fomenting a bigoted hatred against a particular racial or religious group."[40] That a reasonable school board might find that Blanchard's articles had been written "for the apparent purpose of promoting and fomenting a bigoted hatred" against the Catholic faith would seem apparent.[41]

CONCLUSION

Not all books or magazines published can be approved for use in public schools. Those materials which would involve the public school in "the strife of sects" would seem to not only come under a constitutional ban but also involve the public schools in conflicts which could only lessen their efficiency as educational institutions. No reasonable person would argue that religious questions can or should be divorced from public education. Fair-minded evaluations of the tenets of the different faiths presented without attempts to influence are necessary in every student's education.[42] However, Blanchard's articles go far beyond any impartial evaluation of the principles of Catholicism. J. S. Herron, Superintendent of Schools of Newark, New Jersey, stated the position of his board of education after *The Nation* was banned from the Newark schools:

> "Publications which are patently anti-Catholic, anti-Protestant, anti-Semetic, anti-Negro, or anti-American have no place as teaching or reference materials in a public school. . . . All people of good will in the community applaud such action even though some critics will resurrect the term "censorship."[43]

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[39] Rosenberg v. Board of Education of the City of New York, 196 Misc. 542, 92 N.Y.S.2d 344.

[40] *Ibid.*, at page 346.

[41] "The church, even the American church of the present day, still operates a full blown system of fetishism and sorcery in which physical objects are supposed to accomplish physical miracles." *Nation,* May 15, 1948, p. 522.
"I am convinced that (1) American Catholics are good citizens who (2) are not responsible for the undemocratic policies of their own priests in the fields of medicine and education . . . ." *Nation,* Nov. 1, 1947, p. 466.

[42] *Supra,* note 13.

[43] N.Y. Times, Jan. 9, 1948, p. 2, col. 6-7.

No reasonable person could deny the school board's right to bar extreme expressions of obscenity or material which is patently seditious. A fair-minded textbook committee seems to be the best guard against such literature and also against those who would advocate the propaganda approach as to materials concerning the various faiths. This writer is in agreement with the philosophy of Judge Charles S. Desmond in his analysis of movie censorship:

> "Facile writers follow current fashion, but detour around logic and history when they deny to censorship any place in democratic governmental processes and describe all censorships as repressive and tyrannical interference with freedom to express ideas."[44]

The uses of emotionally weighted phraseology such as "book-burning"[45] does not aid a thoughtful analysis of this or any complex legal problem. When all of the cogent arguments are composed and weighed, only one conclusion seems reasonable. The local school boards of our nation must not be hindered in the efforts to keep the public schools free of the "strife of sects."

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[44] 29 NOTRE DAME LAW. 27, 30 (1953)