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The policy debate over the ramifications of proposed federal aid to religious education is continued in this article which points both to political experience and court decisison. The author, a graduate of a day school who received degrees at New York University and Columbia Law School, is presently general counsel to the New York State Department of Labor. The views expressed are those of the author and do not reflect the opinions of the Department of Labor or the State administration.

RELIGIOUS OBSERVANCE AND ECONOMIC HARDSHIP

A recent political "victory" for the New York Jewish community and the general acclaim with which it was greeted points up the logical and emotional inconsistencies and difficulties in the general approach to the question of religious observance and secular law in this country. Using the recent New York City experience as a point of departure, this paper will try to outline a way out of the logical dilemma with its innumerable ramifications.

After many years of effort, the largest Jewish community in the world, New York City, appears to have won a substantial, although limited, victory against economic oppression. The particular manifestation of economic oppression had not fallen with an equally heavy hand upon all the members of the Jewish Community. Indeed, only a few of the more religiously observant had been so burdened.

The wrong which has been partially corrected is the "Sabbath Law." This law made it a crime for a shopkeeper to sell his wares on Sunday. While many exceptions had been enacted to permit commercial activities in the field of recreation and works

of necessity, until a few weeks ago no exception permitted a person who celebrated Sabbath on a day other than Sunday to substitute his Sabbath for that of the statute. An observant Jewish merchant was thus required to abstain from working two days a week: on Saturday by reason of his religious scruples and on Sunday in obedience to the strictures of the New York Penal Law.

This has now changed to a limited but significant degree in New York City. Under State legislative authority, the City Council has passed a local ordinance exempting from the "Sabbath Law" Jewish shopkeepers, who employ only members of their immediate families, if they close their stores on Saturday. The plight of the religious Jewish merchant in other parts of the state and in other states still remains.

In the past, many more Jews supported themselves as shopkeepers than today. As more became able to enjoy the advantages of the now common five-day week, the difficulties had abated even without legislative relief. Although the problem was not as severe as it had been in the past, the Jewish community — including even elements not united on the matter of Sabbath observance itself — organized to gain the most recent statutory change.*

The movement for legislative reform is of comparatively recent vintage. At an earlier time the emphasis was directed to the judiciary and it was hoped that the courts would vindicate the Jewish position by declaring the "Sabbath Law" to be a

* An anomaly in the passage of the New York "Fair Sabbath" Law was the deletion of its statement of public policy. In its original draft, the bill stated that the ". . . . law prohibiting work, labor, or the conduct of business on Sunday has resulted in bringing undue hardship upon those who regularly keep a day other than Sunday as a holy time and . . . has produced what is tantamount to religious discrimination." In the contest which ensued in the State Senate after passage by the Assembly, two compromises were forced upon the supporters of the bill. The first — of theoretical significance — involved the deletion of the policy statement on the grounds that it exerted pressure on the municipalities; the second — of practical importance — limited the application of the bill to the single municipality of New York City. In its compromise form the bill passed. Although the policy statement was deleted, its spirit, the desire to withdraw financial discouragements to religious practice, continued to be basic to the amendment.

violation of constitutional principles. Although the courts of Ohio did declare the Sunday Blue Laws of that state unconstitutional insofar as they failed to exempt Sabbatareans; appeals to the judiciary have otherwise been of no avail. The concentration of effort shifted from the judicial to the political arena and the country came to recognize that not every unhappy law is unconstitutional. For a Blue Law to be unconstitutional it must specifically prohibit conduct that is religiously required or mandate an activity which a religion forbids. It is not enough that a group of people, even an identifiable religious group, is economically disadvantaged.

The lesson of the passage of the bill for the Jewish community has broader ramifications. It is surprising that many of those most active in the fight for the "fair Sabbath bill" reject in a different context the doctrine that no financial loss should result from religious observance. Jewish leaders who were motivated by that very principle rather than personal observance of the Sabbath are in the forefront of opposition to government aid for religious education. They do not differentiate between possible methods of aid, but consider them all morally indefensible, unconstitutional and generally imprudent.

They fail to perceive that the justification for aid to religious education is virtually the same as that for the "fair Sabbath law." They claim that the cause of religious freedom is adequately served as long as a parent has the right to provide his child with religious education at his own expense; any subsidy would be unconstitutional since it would give the religious parent a special bonus for his religiosity.** There is no significant difference between the religious principles involved in refraining from work on the Sabbath and in providing religious instruction to one's children, and there is no practical difference between the financial burden of being forced to keep one's shop closed on Sunday and that of paying tuition. The leadership of the Jewish community should therefore reconsider public assistance for the cost of religious education.

** Ironically, support for this theory can be found in Louisiana and Alabama court decisions which held that their Sabbath laws unconstitutionally discriminated in favor of Sabbath observing Jews, by permitting them to open

The proposition that public aid to religious education may be acceptable does not mean the question of the form that such aid takes in irrelevant. Obviously, even if such aid is, in principle, accepted as appropriate to relieve economic discrimination, the manner in which it is provided may be objectionable. In evaluating the technique of dispensation of support, one should consider legal and policy criteria. Three techniques have been debated recently: (1) scholarships to students, some of whom attend religiously oriented schools; (2) religious instruction and/or observance in the public school; and (3) direct aid to parochial education. Each should be considered separately on its own merits.

One of the more controversial programs of the present administration in New York State has been the expansion of scholarship grants, including scholarships to students attending colleges run by religious institutions. While some hostility to such scholarships is to be anticipated as a matter of course, the reaction was multiplied many times because of the magnitude of the program. Few people object to the Congressional practice of awarding its pages with scholarships to the schools of their choice. The Rockefeller program, however, was of such dimension as to amount to an obvious if indirect aid to the colleges themselves.

Much of the opposition, although motivated by objection to the policy of providing indirect assistance to church oriented schools, was expressed in terms of constitutional slogans. Actual-

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their shops on Sundays thereby giving them a commercial "advantage" over their competitors. Such an argument can be said to have its logic, but it has not been applied elsewhere and it is unlikely to upset those statutes based on the proposition that it is wrong to establish conditions which impose a financial burden upon an individual because of his religious observance. In fact, in June 1963 the U. S. Supreme Court reversed a decision of the South Carolina Supreme Court denying a Seventh Day Adventist unemployment insurance benefits. The disqualification had been based upon the refusal of the applicant to be "available" for work on Saturday. Reversing the disqualification, the Supreme Court said in 374 U. S. 398, 403:

> "It is true that no criminal sanctions directly compel appellant to work a six-day week. But . . . if the purpose or effect of a law is to impede the observance of one or all religions . . . that law is constitutionally invalid even though the burden may be characterized as being only indirect."

ly, the Supreme Court has already considered the technique used in New York State. In *Everson* v. *Board of Education,* 330 U. S. 1 (1946), it sanctioned aid to citizens in obtaining a state-approved education at a church school. The *Everson* case involved a New Jersey statute which authorized communities in that state to reimburse parents for money expended by them for bus transportation in sending their children to school. Part of this reimbursement was for payment of transportation of some children in the community to parochial schools. The decision was carried by the narrow vote of five to four but the most compelling argument of the minority related to the fact that except for public school students, only those attending parochial schools were eligible for the public assistance.

The New York State program is not subject to this criticism. The scholarship monies may be used at any recognized college within the state, whether or not it is under religious auspices. Unless the *Everson* decision is reversed, the constitutionality of the New York State scholarship program is established. Criticism may, however, be properly directed to its merits rather than to its legality. At a time when the cost of college education has become prohibitive for many families, the issues are sharply delineated. Is American society better served by a monolithic non-denominational educational system with its important contribution towards healthy intergroup understanding, or by a multilithic, multi-denominational system with its contribution to the preservation of the variegated tapestry of American life? Allowing my assumption that a more important public purpose is served by a pluralistic educational system, should one who elects to go to a religious school be required to pay a disproportionate and possibly prohibitive fee? The New York State scholarship program which affords assistance to students of all private schools, religious or otherwise is a constitutionally sound technique for avoiding this economic hardship.

Probably no recent decision of the Supreme Court except for those dealing with racial integration has elicited as much bitterness as the decision which declared unconstitutional the compulsory classroom reading of a prayer composed by the

New York State Board of Regents (*Engel* v. *Vitale*, 370 U. S. 421 [1962]).*

The decision that the public schools are not a proper place for religious education or instruction is as it should be. It is essential that there be a publicly supported school system in which all persons are equally welcome without being subjected to embarrassment or subtle persuasion by virtue of religious differences. Conversely, inclusion of diluted religious content in the curriculum which avoids offending any religious minority serves no purpose and is even detrimental. Religion is either central in human life or it is inconsequential. It is impossible to present religious material in a public school setting with fairness to the material without giving offense. This makes more imperative the discovery of a method of public aid to students attending schools under religious sponsorship.

The issue of possible direct public aid to parochial education is a recurrent one in connection with proposals for Federal aid to education. Since the close of the First World War, every Congress has seen bills introduced which called for Federal aid to education. By the late 1940's sufficient support for such a program had been organized to make its passage seem likely. At that time even the critical issue of aid to segregated school systems was apparently overcome as integrationist leaders de-

* In terms of academic analysis, the minority and concurring opinions in the Regents' prayer case appear to be less solidly lodged in constitutional history than was the dissenting opinion or the opinion written in the lower court in New York State. It is amusing that the concurring opinion implied that the opening of each session of the Supreme Court with a prayer may be unconstitutional. Fifteen years ago the same justice wrote the majority opinion for the Court which confirmed the constitutionality of the New York State Releaesd Time for Religious Education program. In the earlier opinion he stated: "A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: 'God save the United States and this Honorable Court.' " (*Zorach* case). If a historically developed legal argument against prayer or religious observance in the public school which is convincing to the objective reader was not made in the Regents' Prayer opinions, such a legal argument does in fact exist. It can be found in the dissenting opinions to the New Jersey School Bus and the New York Released Time cases. Interestingly, the majority opinions and these two cases were written by the authors of the majority and concurring opinions in the Regents' Prayer case respectively.

cided, for the moment, that the improvement of Negro education in the segregated schools took precedence. Just as passage appeared imminent, the issue of aid to parochial schools developed. One group would not vote for a bill which permitted such assistance, while a second considered a bill unworthy of support unless it required recipient states to distribute the monies among parochial as well as public schols. A compromise measure permitting each state to decide for itself passed the House but got no further. Since that time, Federal aid to education has never come so close to passage and the issue of the parochial school has continued to be its albatross.

As with the scholarship program and religious observance in the public school, the issue of state or federal aid to parochial education has been debated on policy and legal grounds. The policy argument in favor of such aid has much to recommend it. Just as all students are assured that no religious practices will be permitted in public school lest they be embarrassed or feel pressured, they should know that the parochial school is the proper home for religious education. If the principle that no person should be made to suffer economic hardship by reason of his fulfillment of a religious obligation is a valid one, its application logically extends to a parent who pays his full share of the tax burden to support the public school system and then pays tuition to send his child to a parochial school. It is difficult to distinguish this double burden from the parallel vexation inflicted upon the shop owner who, pursuant to state law may not work on Sunday and then, because of religious conviction, further refrains from gainful employment on Saturday.

On the other hand, however, direct state or federal aid to parochial education appears constitutionally questionable. The *Everson* case, the most liberal of all the Supreme Court decisions from the point of view of sanctioning such assistance, declared that a state "cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church." The solution, therefore, is to provide assistance in the same manner as that upheld as constitutional in the *Everson* case. Parents should be reimbursed for expenses

incurred in connection with parochial education just as New Jersey parents were reimbursed for the transportation of their children to church schools. In recognition of the merits of the claim and in order to avoid criticism for establishing a program solely for the purpose of giving aid to religious education, comparable support should be given in connection with other non-profit making private schools serving special student needs.

To forestall a general desertion of the public schools, a compromise suggestion could be worked out limiting reimbursement to a proportion of the cost of the secular education of the same child in the public school system. Special legislation should also be introduced forbidding reimbursements to students private schools which discriminate on the basis of race or color.

An alternate program* to relieve the economic pressure upon parents of parochial school students might be that of tax deductions or of tax credits for a proportion of the cost of the schooling. This is a simple technique to administer and probably the safest from the point of view of constitutional law, being the least likely to be barred by the prohibition in the *Everson* case against the use of "tax-raised funds to the support of an institution which teaches the tenets and faith of any church." It is comparable to the tax deductions which have long been applied to donations to religious institutions and to the exemption from taxation which the religious institutions themselves enjoy.

To summarize, some measure of financial assistance to parochial education is desirable in order to lessen an economic burden which derives from the fulfillment of a religious duty.

More broadly, it is desirable in order to enhance the diversity which enriches American life. Altough the Constitution prohibits many forms of public aid to parochial education it does not preclude all. Concern with possible problems of mechanics of constitutionally permitted programs should not allow us to lose sight of the ultimate policies and needs.

* This has been the subject of several suggestions made by Senator Ribicoff of Connecticut.