

Religious Education of Public School Pupils in Wisconsin[†]

WILLIAM W. BOYER, JR.*

Part I. Sectarian Instruction of Public School Pupils

Sectarian instruction of public school pupils, related as it is to the principles of religious freedom and separation of Church and State, has been a many-sided and highly controversial issue in Wisconsin's experience. Protestant and Catholic leaders alike have taken positions urging a more important role for religion in public schools. But, as will be illustrated, religious antagonisms have been released, and separation has been called for by both groups whenever either one claimed that sectarianism has become the offspring of the merger of the other's religion with public education. Separation of Church and State has been utilized as a convenient tool in opposition to certain public school practices. Implemented by Protestants on some occasions and by Catholics at other times, separation has proved very useful in serving particular interests of each. The latter, for example, have had success in opposing Bible reading in public schools by resort to this concept.

Besides Bible reading, other prominent issues have emerged within the context of sectarian instruction of Wisconsin's public school pupils, involving graduation and baccalaureate exercises, the use of religious buildings for public instruction, the use of public educational buildings for religious purposes, and religiously garbed teachers. The release of public school pupils from regular school hours for religious instruction, in public schools or elsewhere, comprises an issue that is treated separately from the subject of sectarian instruction.

BIBLE READING

In General

Anti-Catholic movements took many forms in the United States as Roman Catholic immigration increased during the third and fourth

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* B.A., College of Wooster, 1947; M.A., University of Wisconsin, 1949; Graduate Teaching Ass't in Political Science, University of Wisconsin, 1948-1951; Instructor in Political Science, University of Florida, 1950; Instructor in Political Science, Grinnell College, 1951-1952; Intern under Fund for Adult Education of the Ford Foundation, 1952-1953.

decades of the last century. Militant Protestant groups organized their efforts to prohibit alien officeholders and voters, restrict immigration, and generally to resist "foreign" influence which they identified with Roman Catholicism. The American Bible Society, for instance, had pledged itself during the early nineteenth century to labor until the King James version of the Bible was read in every classroom in the nation. The issue then moved into the political arena in New York City, where public schools were controlled by the Public School Society, which had as one of its stated purposes "to inculcate the sublime truths of religion and morality contained in the Holy Scriptures."¹ Anson Phelps Stokes in his recent monumental work, *Church and State in the United States*, has commented on the resulting controversy, as follows:

The Roman Catholics had ground for complaint, since not only was the King James version of the Bible alone used, but some of the textbooks, especially those in history, were both unfair and disrespectful to their Church. . . . The controversy is illuminating as showing the conditions and . . . reasons which led to the development of the parochial school system.²

During the early 1850's the Catholic Church petitioned the legislatures of a dozen states for laws against required reading of the "Protestant Bible." In response, another Protestant agency—the American Foreign Christian Union—declared that the Bible would not be expelled from the classrooms of the public schools "so long as a piece of Plymouth Rock remains big enough to make a gun flint out of."³

Thus, over a century ago, a heated controversy stirred the nation centering on the issue of Bible reading in the public schools. Protestant leaders regarded the reading of the Scriptures—or what Catholics called the "Protestant Bible"—as a first line of defense against the influence of Catholicism. Much litigation has arisen over the problem which is still with us, that of alleged public school sectarianism revolving about Bible reading without comment in the classrooms.

The basis of the conflict lies in the differences in the King James and Douay versions of the Bible, especially in the New Testament, adhered to respectively by Protestants and Catholics. It is understandable why the Catholic position should be against the reading of the King James version in the public school classroom where

¹ CONNORS, *CHURCH-STATE RELATIONSHIPS IN EDUCATION IN THE STATE OF NEW YORK* 1-15, 55-86 (1951); BILLINGTON, *THE PROTESTANT CRUSADE, 1800-1860*, 130 (1938).

² 1 STOKES, *CHURCH AND STATE IN THE UNITED STATES* 827 (1950).

³ *Id.* at 832, quoting from *FREEMAN'S JOURNAL* 295 (Nov. 23, 1850).

Catholic children are in attendance. But if the issue of reading the Douay version should ever arise, it is likely that the Catholic position would remain the same. For one of the major differences between the Roman Catholic and most Protestant faiths is that the former does not permit the Bible to be read and interpreted individually, but rather requires it to be authoritatively interpreted by one ordained to do so.⁴

The Catholic position with respect to reading the Bible to public school pupils, therefore, has been one that strictly adheres to a complete separation of Church and State because a different position would be inconsistent with the Church's concept of religious freedom. Protestant leadership, on the other hand, has often taken a contrary position.

State courts have been sharply divided on the matter. The courts of twelve states have approved Bible reading in public schools (Colorado, Georgia, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, New Jersey, New York, and Texas), while those of seven states have disapproved of such a practice (Illinois, Louisiana, Nebraska, Ohio, South Dakota, Washington, and Wisconsin).⁵ In some states Bible reading in the schools is required by

⁴ See, e.g., Binder, *Bible Reading in Public Schools*, 34 MARQ. L. REV. 297, 299-300 (1951), stating that "it would seem Bible reading without comment in public school classrooms is in fact sectarian upon at least three grounds. It is a matter of common knowledge that the Holy Bible is not accepted by all religious groups . . . , and legislation ordering its reading . . . is, therefore, necessarily prejudicial to those who do not accept the Bible. Moreover, there are only two widely known editions of the Holy Bible in use today, the King James, or 'Protestant version,' and the Douay, or 'Catholic version.' Use of one or the other would necessarily appear to be in preference of one religion over another. And if both editions should be held to be substantially objective (as might be true in the case of the Old Testament alone), yet the reading thereof without comment and without interpretation is certainly detrimental to those who believe the Bible is not to be interpreted by each in his own way but is to be authoritatively interpreted."

⁵ Cases which have approved Bible reading in public schools are: *Doremus v. Board of Education*, 5 N.J. 435, 75 A.2d 880 (1950), *appeal dismissed*, 342 U.S. 429 (1952); *Lewis v. Board of Education*, 157 Misc. 520, 285 N.Y. Supp. 164 (1935), *appeal dismissed*, 276 N.Y. 490, 12 N.E.2d 172 (1937); *Kaplan v. School Dist.*, 171 Minn. 142, 214 N.W. 18 (1927); *People ex rel. Vollmar v. Stanley*, 81 Colo. 276, 255 Pac. 610 (1927); *Wilkerson v. City of Rome*, 152 Ga. 762, 110 S.E. 895 (1922); *Church v. Bullock*, 104 Tex. 1, 109 S.W. 115 (1908); *Hackett v. Brooksville Graded Dist.*, 120 Ky. 608, 87 S.W. 792 (1905); *Billard v. Board of Education*, 69 Kan. 53, 76 Pac. 422 (1904); *Pfeiffer v. Board of Education*, 118 Mich. 560, 77 N.W. 250 (1898); *Moore v. Monroe*, 64 Iowa 367, 20 N.W. 475 (1884); *Spiller v. Inhabitants of Woburn*, 12 Allen 127, (Mass., 1866); *Donahoe v. Richards*, 38 Me. 379, 61 Am. Dec. 256 (1854); *Distinguish, Evans v. Selma Union High School*, 193 Cal. 54, 222 Pac. 801 (1924).

The cases which have disapproved Bible reading are: *State ex rel. Clithero v. Showalter*, 159 Wash. 519, 293 Pac. 1000 (1930); *State ex rel. Finger v. Weedman*, 55 S.D. 343, 226 N.W. 348 (1929); *State ex rel. Dearle v. Frazier*, 102 Wash. 369, 173 Pac. 35 (1918); *Herold v. Parish Board*, 136 La. 1034, 68 So. 116 (1915); *People ex rel. Ring v. Board of Education*, 245 Ill. 334, 92 N.E. 251 (1910); *State ex rel. Freeman v. Scheve*, 65 Neb. 853, 91 N.W. 846 (1902); *State ex rel. Weiss v. District Board*, 76 Wis. 177, 44 N.W. 967 (1890); *Board of Education v. Minor*, 23 Ohio St. 211 (1872).

statute or administrative order; in others it is specifically permitted by statute, court decisions or administrative orders; in still others it is prohibited, but not specifically, by statute or constitutional provision.⁶ Although no comprehensive statistics are available, one leading authority recently expressed his belief that "a majority of public schools in the country still open their daily sessions with reading without comment from the Bible, and that a substantial minority open with a hymn and the Lord's prayer."⁷

Wisconsin's Background

The framers of the Wisconsin constitution made no express provision relating to Bible reading in public schools, but they did provide that the legislature shall establish free district schools, to be as nearly uniform as practicable, "*and no sectarian instruction shall be allowed therein.*"⁸ Moreover, the legislature was empowered by the constitution to establish a state university near the seat of state government, but it was specifically provided that "*no sectarian instruction shall be allowed in such university.*"⁹

The first discoverable instance that a public official expressed an opinion on the matter of Bible reading, in Wisconsin public schools, happened in 1858. The Board of Education of Watertown had "unanimously resolved, that the reading of the Bible, and all forms of prayer, be discontinued." The Board assigned as its justification for this action the fact that Watertown was composed of "so many different national elements." Daniel Collins, a member of the Board,

⁶ JOHNSON and YOST, *SEPARATION OF CHURCH AND STATE IN THE UNITED STATES* 33-73 (1948); 2 STOKES, *CHURCH AND STATE IN THE UNITED STATES* 549-72 (1950); TORPEY, *JUDICIAL DOCTRINES OF RELIGIOUS RIGHTS IN AMERICA* 244-49 (1948). See, also, BINDER, *Bible Reading in the Public Schools*, 34 MARQ. L. REV. 297 (1951); T.V.K., *Reading the Bible in Public Schools*, 28 MICH. L. REV. 430-6 (1930); Stith, *Bible Reading in the Public Schools*, 32 LAW NOTES 225-8 (1929). See, also, KEESECKER, *LEGAL STATUS OF BIBLE READING AND RELIGIOUS INSTRUCTION IN PUBLIC SCHOOLS* (Wash. Govt. Print. Off., 1930); HOOD, *THE BIBLE IN THE PUBLIC SCHOOLS* (Wash. Govt. Print. Off., 1923); and more general in treatment: SELLERS, *THE CONSTITUTION AND RELIGIOUS EDUCATION* (1950); THAYER, *RELIGION IN PUBLIC EDUCATION* (1947).

⁷ 2 STOKES, *CHURCH AND STATE IN THE UNITED STATES* 551 (1950).

⁸ WIS. CONST. ART. X, § 3. Emphasis added. On January 14, 1848, the Constitutional Convention concerned itself with the proposed article on education which "Mr. Ramsey moved to amend . . . by striking out at the end of the section the words 'and no sectarian instruction shall be allowed in said schools.' . . ." which was decided in the negative by a vote of 57 to 2. JOURNAL OF THE CONVENTION TO FORM A CONSTITUTION FOR THE STATE OF WISCONSIN 336 (1848). The wording in the rejected constitution may be found: *id.* at 640.

⁹ WIS. CONST. ART. X, § 6. Emphasis added. See, JOURNAL OF THE CONVENTION TO FORM A CONSTITUTION FOR THE STATE OF WISCONSIN 345 (1848).

requested the State Superintendent of Public Instruction, Lyman C. Draper, for his opinion on the subject.¹⁰

Superintendent Draper answered that he regretted that the issue ever arose. He noted that the constitution prohibits sectarian instruction; "but this certainly cannot justly be construed," he said, "to mean the total exclusion of the Bible from the schools, or that simply repeating the Lord's Prayer . . . could . . . be regarded as sectarian." He felt quite confident that this was "the practical, common-sense view taken . . . by the great mass of the people of Wisconsin." Not only is it the common practice in Wisconsin, but it is also the practice in the public schools "of the most enlightened countries of the world," he observed. He cited for authority the views of Horace Mann, George Washington, Daniel Webster, and others to which he added his own personal observation of nearly forty years that "the happiest results would be likely to follow a discreet, unsectarian use of the Bible in public schools, the inculcation of moral duties and obligations, and the opening of daily sessions of school with prayer."

There could be no more beautiful spectacle, none more truly ennobling, than a teacher inculcating and enforcing moral duties upon the young—love to parents, brothers, sisters, companions—love to the race of man, and love to the Giver of all good; . . . —in a word, pressing upon their attention those foundation principles which alone can make them good children, good men, good women, and good citizens.

Such is the abiding conviction, and such the practices of the civilized world. I am sure that the people of Wisconsin, who are generally conceded to possess as much virtue and intelligence as

¹⁰ Draper, *Moral and Religious Instruction in Public Schools* (Office of Supt. of Public Instruction, Madison, May 31, 1858), a published letter to Daniel Collins, Watertown, Wis., in the Wisconsin State Historical Library; also reprinted in TENTH ANNUAL REPORT ON THE CONDITION AND IMPROVEMENT OF THE COMMON SCHOOLS AND EDUCATIONAL INTERESTS OF THE STATE OF WISCONSIN, for the Year 1858. A few years earlier, in his report to the Board of Regents for 1855, University of Wisconsin President Reed said: "The Constitution of the state is not atheistic; the very first line recognizes the existence and Providence of Almighty God. If by such constitutional provisions, all religious influences and instructions had been intended to be excluded, I could not with good conscience have served in them a single day. The man who is ignorant of the Bible . . . wants one of the highest requisites of an educated man. Shall it be excluded from the institutions of the University? No, never." Shedd, *Religion in the American State Universities: Its History and Present Problems* in RELIGION IN THE STATE UNIVERSITY: AN INITIAL EXPLORATION (H. E. Allen ed. 1950). See, also, CURTI AND CARSTENSEN, THE UNIVERSITY OF WISCONSIN; A HISTORY, 1848-1925 (2 vols. 1949) for discussion of the role of religion in the life of the University of Wisconsin. It should be noted that University of Wisconsin Professor William B. Hesseltine has written a biography of Lyman C. Draper entitled: A PIONEER'S MISSION: THE STORY OF LYMAN C. DRAPER to be published by the State Historical Society of Wisconsin in January, 1954.

the citizens of any of their sister States, would never consent to utterly banish the Bible from their schools, and thus virtually repudiate its unequalled teachings of virtue and morality as unfit for the instruction and guidance of the children of their love—children who, at no distant day, must become the rulers and law-givers of the State, and the custodians of all that we now hold dear and sacred, our homes, our country, Christianity and the Bible.¹¹

Superintendent Draper cautioned that he would not force the children or wards of parents, who conscientiously object, to attend the exercises of reading the Scriptures and offering prayer. In such cases, he advised, the exercises might be held a little before the regular hour for opening the school. Moreover, if the teacher deems it proper to make comments of a moral character, "he should be extremely cautious" not to say anything that could be construed into a sectarian tendency, for otherwise he would infringe the constitution which would be sufficient cause for his dismissal. Whether the "common version" of the Bible or the "Catholic edition" should be read depends upon the preference of a majority of the school board; "but let the Bible be read, whatever be the version, reverently and impressively, and the blessing of the God of the Bible will never fail to attend it." And he concluded:

But you may ask, may not a majority of the School Board, if they see fit, utterly refuse to tolerate the Bible, prayer, and moral instruction in the public school? We might obstinately and insanely refuse food for our perishing bodies, as well as for our craving immortal minds, but we should only spite and injure ourselves by so rash and suicidal an act. I have no doubt the Board might legally thrust the Bible from the schoolhouse, and stifle the voice of prayer, for these are not among the studies specially prescribed by law; but they may very properly be regarded as among the "such other branches of education as may be determined upon by the Board," as the law allows, if the Board thinks proper to include them. The District Board, too, under the advice of the Superintendent of Public Instruction, has power to determine the text-books to be used; and I should ever feel bound to regard with special favor the use of the Bible in public schools, as pre-eminently first in importance among text-books for teaching the noblest principles of virtue, morality, patriotism, and good order—love and reverence for God—charity and good will to man.¹²

The promise of Superintendent Draper, that both his and God's blessings would attend the mixture of religious exercises and public

¹¹ Draper, *op. cit. supra* note 10.

¹² *Ibid.*

education, was not sufficiently enduring to deter certain Wisconsin citizens from expressing a stricter interpretation of constitutional provisions in the name of religious liberty. In 1879, for example, Robert C. Spencer, President of the Milwaukee Liberal League, addressed a memorial to the Board of Regents of the State Normal Schools charging:

1. That in the State Normal Schools and Teachers' Institutes, religious exercises are held and conducted publicly by Presidents and Professors, who are appointed and paid by the State, and that attendance upon such exercises by students and teachers is expected and more or less obligatory. 2. That books for religious devotion are bought and paid for by the State, which students in said schools are requested and expected to use in social religious worship. 3. That complaints and remonstrances of students, parents, and others whose rights of conscience, sense of justice and propriety are violated by these practices are not duly regarded. . . . 5. That bibles, testaments and other religious books, gratuitously furnished by bible societies and kindred organizations, are distributed in these institutions by the faculty for use of students in connection with the religious exercises held therein.¹³

These facts, Spencer said, violated both state and federal constitutions, which make religion a strictly private and personal matter with which the State of Wisconsin cannot meddle, "not even to read any bible, or religious book, offer a prayer, sing any religious song or perform any act of religious worship, in the presence of the humblest, most simple and defenceless child in our public schools."¹⁴

The issue was destined therefore, to be sharply drawn before the Wisconsin Supreme Court, for only it had the ultimate authority to resolve conflicting interpretations of the constitution. Only it could balance the scales of justice between those who deemed it necessary to inculcate morals through Bible reading and those who feared thereby the loss of religious liberty.

The Weiss Case

The Wisconsin Supreme Court found the issue squarely presented in *State ex rel. Weiss v. District Board of Edgerton* (1890).¹⁵ Specifically, the basic question before the court was whether the adoption of the

¹³ Spencer, *Memorial Concerning Religious Exercises in State Normal Schools* (Milwaukee, June 23, 1879), a published letter to the Board of Regents of the State Normal Schools of Wisconsin, in the Wisconsin State Historical Library.

¹⁴ *Ibid.*

¹⁵ 76 Wis. 177, 44 N.W. 967 (1890); the case is often referred to as the *Edgerton* case, as well as the *Weiss* case.

King James version of the Bible, or any Bible, as a textbook in the public schools, and the reading from it in the classrooms, comprised "sectarian instruction" within the meaning of Article X, section 3 of the Wisconsin constitution. This section ordains that no sectarian instruction shall be allowed in the district schools of the state. The action consisted of a petition for a writ of mandamus to command the District Board of a school district of the City of Edgerton to compel the District's teachers to discontinue reading selections from the Bible.

Several taxpayers, who were Roman Catholics and parents of public school children, brought the petition. They claimed that the teachers selected portions from the King James version of the Bible and read them daily to the pupils during instruction hours. This version they believed to be incorrect and incomplete on the ground that the Catholic Church is the only infallible teacher and interpreter of the Bible by divine authority. Therefore, they alleged, this practice was contrary to Article X, section 3 of the Wisconsin constitution. They claimed they had requested the Board to stop the practice without success.

On its side, the District Board admitted that two teachers did follow the alleged practice, and some of the petitioners' children were among their pupils. But it insisted that (1) the children were at liberty to withdraw during the reading, and (2) contrary to the petition all the teachers did not follow the practice, nor was it done in all the departments. The Board denied, moreover, that the Catholic Church was the only infallible teacher or interpreter of the Bible maintaining that everyone has the right to read and interpret the Bible for himself. To claim otherwise, as do the petitioners, the Board countered, is itself sectarian and a violation of the constitution. Those teachers that did, and still do, read from the Bible, do so without comment, which is not illegal. Indeed, the Board has no lawful right to stop teachers from reading the Bible.

The Board admitted also that the King James version was read, but that it did not differ materially from the Douay version. The Bible, furthermore, was bought by the Board as a school textbook, and under state law textbooks cannot be changed for three years. The Board noted that the State Superintendent of Public Instruction had recommended the King James version in a list of textbooks. Besides, said the Board, of five-hundred children in the District, only a few were Catholics. The Board concluded its answer by asserting that (1) The Bible is an irreplaceable textbook, (2) Bible reading is

an important part of education, and (3) a majority of the parents in the District desire that it be read.

The court was unanimous in holding that Bible reading was unconstitutional. Three separate and lengthy opinions were delivered, with Judge Lyon filing the leading opinion. He refused to restrict his reasoning to merely a Catholic versus Protestant context. Judge Lyon dispensed with one of the Board's contentions by taking judicial notice of the fact that there are many different faiths that believe that the Douay and King James versions of the Bible differ materially. Rather he was concerned with the average citizen's right to be free from sectarian instruction. The term "sectarian" he defined as referring to the doctrine of one of the many sects not common to all other sects. He was concerned also with the Bible as a whole, for the Board implied that its whole contents might be read. "Yet it should be observed that some of the portions so read seem to inculcate the doctrines of the divinity of Jesus Christ and the punishment of the wicked after death, which doctrines are not accepted by some religious sects."¹⁶ This is "sectarian instruction," he adduced, for these Biblical teachings are doctrines believed in by some sects and rejected by others. When instruction goes beyond teaching the existence of a Supreme Being, to inculcate doctrines concerning which the sects are in conflict, then the instruction becomes sectarian within the meaning of the constitutional prohibition.¹⁷

Judge Lyon cautioned that this decision did not ban textbooks founded on the Bible from use in the instruction of pupils, for much of the Bible has "great historical and literary value."¹⁸ But the City of Edgerton's use of the Bible came under that statutory provision which provides that "no text-books shall be permitted in any free public schools which will have a tendency to inculcate sectarian ideas."¹⁹ The constitutional clause, moreover, was drafted with reference to attracting immigrants of many faiths to Wisconsin.

Many, perhaps most, of these immigrants came from countries in which a state religion was maintained and enforced, while some of them were non-conformists and had suffered under the disabilities resulting from their rejection of the established religion. What more tempting inducement to cast their lot with us could have been held out to them than the insurance that, in

¹⁶ 76 Wis. 177, 191, 44 N.W. 967, 972. "Among books on the Index . . . are non-Catholic Bibles. . . ." *The Catholic Herald Citizen*, Madison edition, Dec. 13, 1952, p. 23, col. 2.

¹⁷ 76 Wis. 177, 193-4, 44 N.W. 967, 973 (1890).

¹⁸ *Id.* at 195, 44 N.W. at 974.

¹⁹ Wis. Laws 1883, c.251, § 3; now Wis. STAT. § 40.53(15) (1951). See also, Wis. STAT. § 14.57(2) (1951).

addition to the guaranties of the right of conscience and of worship in their own way, the free district schools in which their children were to be, or might be, educated, were absolute common ground, where the pupils were equal, and where . . . sectarian intolerance, under which they had smarted in the old country, could never enter?²⁰

He rejected the inference drawn from the Board's point that those who wish may withdraw from the room at Bible reading time. This argument fails because "the excluded pupil loses caste with his fellows, and is liable to be regarded with aversion and subjected to reproach and insult."²¹ And Judge Lyon concluded:

The priceless truths of the Bible are best taught to our youth in the church, the Sabbath and parochial schools, the social religious meetings, and, above all, by parents in the home circle. . . . The constitution does not interfere with such teaching and culture. It only banishes theological polemics from the district schools.²²

Judge Cassoday, at the request of Judge Lyon, filed a separate opinion directed to another branch of the case. First, he addressed himself to the issue whether the reading of the Bible in this case constituted "worship" within the meaning of Article I, section 18 of the Wisconsin constitution, which provides: "nor shall any man be compelled to attend or support any place of worship, or to maintain any ministry against his consent." The reading of the Holy Scriptures as the eternal word of God, he observed, "is an essential part of divine worship," and when the Bible is read in the public school it becomes, therefore, "a place of worship."

Manifestly, the words "place of worship" were advisedly used, as applicable to any "place" or structure where worship is stately held, and which the citizen is "compelled . . . to attend," or the taxpayers are compelled to "erect or support." The mere fact . . . only a small fraction of the school hours is devoted to such worship, in no way justifies such use. . . . The relators, as taxpayers of the district, were compelled to aid in the support of the school maintained therein. . . . and . . . they have a legal right to object to its being used as a "place of worship."²³

Then Judge Cassoday addressed himself to another question, whether the District Board had violated that clause in Article I,

²⁰ 76 Wis. 177, 198, 44 N.W. 967, 974 (1890).

²¹ *Id.* at 200, 44 N.W. at 975. It would appear that this consideration would have been sufficient to reject Superintendent Draper's advice, *supra*, that "the exercises might be held a little before the regular hour for opening the school."

²² *Id.* at 202, 44 N.W. at 976.

²³ *Id.* at 213, 44 N.W. at 979.

section 18 which states: "nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries." If the reading of the Bible in the classroom as a textbook is not only "worship," but also "instruction," he reasoned, "then there is no escape from the conclusion that it is religious instruction; and hence the money so drawn from the state treasury was for the benefit of a religious school, within the meaning of this clause of the constitution."²⁴

Finally, Judge Orton filed a separate concurring opinion. He asserted that common schools are not common as being low in character or grade, but rather they are "common to all alike."²⁵ To the charge that public schools are "Godless" he replied: "They are Godless, and the educational department of the government is Godless, in the sense that the executive, legislative, and administrative departments are Godless." He continued:

There is no such source and cause of strife, quarrel, fights, malignant opposition, persecution, and war, and all evil in the state, as religion. . . . Let it once enter our common schools, they would be destroyed. . . . The common school is one of the most indispensable, useful, and valuable civil institutions this state has. It is democratic, and free to all alike, in perfect equality, where all the children of our people stand on a common platform, and may enjoy the benefits of an equal and common education.²⁶

An important principle was enunciated by Judge Orton when he concluded: "Religion needs no support from the state. It is stronger and much purer without it. . . . The connection of church and state corrupts religion, and makes the state despotic."²⁷

The *Weiss* decision met with some strenuous criticism. Reverend D.C. John, before a meeting of the Methodist Ministerial Association, characterized the decision as "a new menace to Christian civilization—one which threatens to sap the foundation of public morality and make good the taunt of the Romanist, that our schools are godless, and therefore unworthy of Christian patronage."²⁸ The court, he said, "has protected the conscience of the Romanist and violated that of the Protestant."²⁹

²⁴ 76 Wis. 177, 215, 44 N.W. 979, 980.

²⁵ *Id.* at 218, 44 N.W. at 981.

²⁶ *Id.* at 219, 44 N.W. at 981.

²⁷ *Id.* at 221, 44 N.W. at 981-982.

²⁸ John, *Bible in the Public Schools* (1890), an address before the Milwaukee District Ministerial Assoc. of the M.E. Church, held at Waukesha, Wis., May 12-14, 1890, published in the form of a pamphlet; in the Wisconsin State Historical Library.

²⁹ *Ibid.* "If Judge Cassoday's definition of worship is to be accepted, we must have no more chaplains for our legislatures, for our soldiers, and we must have

Subsequent History

The decision in the *Weiss* case has remained the definitive authority on the subject in Wisconsin. Bible reading, even without comment, to Wisconsin public school pupils is illegal as clearly violating the Wisconsin constitution. Whether it likewise violates the United States Constitution was the question presented to the Supreme Court of the United States in *Doremus v. Board of Education* (1952).³⁰

An action had been brought in the state courts of New Jersey for a declaratory judgment seeking to declare invalid a statute of that state³¹ which provided for the reading, without comment, of five verses of the Old Testament at the opening of each public school day. The act was claimed to violate the First Amendment's prohibition of an establishment of religion as it was made applicable to New

no more religious service in our prisons, asylums, reform schools If reading the Bible without note or comment makes a schoolhouse a place of worship, then praying, preaching, singing, makes our ships, drill-grounds, assembly chambers, asylums, prisons . . . places of worship—all of which are supported out of the public treasury." *Ibid.*

Although The Milwaukee Sentinel expressed "doubt if anybody will question the soundness of the [*Weiss*] decision" (March 20, 1890, p. 4, col. 2), it later reported opposition from Supt. Willis, of the Milwaukee Y.M.C.A., who regarded the Bible "as a good thing in public schools," and from Rev. Chreighton, of the Summerfield Methodist Church, who expressed the opinion that "the true cause of Romish hostility is not unreasonable hatred of the Bible, but more a hope that its exclusion will be a point gained toward the overthrow of the whole common school system." But the Sentinel found that the *Weiss* decision "seems to have met with general approval." The Milwaukee Sentinel, March 23, 1890, p. 12, col. 5. In approving the decision The St. Paul Pioneer Press was quoted as stating: "when it is understood that secular and religious education should and must be conducted by separate agencies, all controversy over the public school question will be near an end." The Wisconsin State Journal, March 26, 1890. But the State Journal almost wholly ignored the case, and the decision was obscured in other newspapers by the controversy, at the time, surrounding the so-called Bennett Law, (Wis. Laws 1889, c. 519) which was denounced by three Catholic bishops of Wisconsin. It was a compulsory school attendance law which had two provisions deemed offensive to the bishops, one requiring each school-age child to attend a public or private school "in the city, town or district in which he resides," and the other requiring that such child be taught in the English language in order that the "school shall be regarded as a school, under this act." The Chicago Tribune was quoted, on the latter point, as follows: "The Roman Catholic Church in Wisconsin is mostly German. Many of the teachers in the parochial schools are Germans and prefer to use that language. Still they would perhaps instruct in English in elementary branches if necessary. What they cannot tolerate is that the state shall claim the right to decide what the children must be taught and whether the parochial schools are teaching it. Their position is that the will of the bishops is superior to the law, and that the church is above the state, and that it is none of the state's business whether English instruction is given in the church schools or not." The Wisconsin State Journal, March 18, 1890, p. 2, col. 2. The Bennett Law was repealed and recreated by Wis. Laws 1891, c. 187, in which the controversial provisions were deleted. See, Kellogg, *The Bennett Law in Wisconsin*, reprinted from WISCONSIN MAGAZINE OF HISTORY (Sept., 1918).

³⁰ 342 U.S. 429.

³¹ N.J. REV. STATS. §§ 18:14-77 (1937).

Jersey by the Fourteenth Amendment as determined by the Court in the *McCullum* case.³² The New Jersey Supreme Court held that the statute did not violate the Federal Constitution, on the ground that the Old Testament is non-sectarian.³³

Upon appeal, the Supreme Court of the United States refused to consider the issue for the reason that it had no jurisdiction to do so. Justice Jackson complained, for the Court, that too many facts were missing to make a "case or controversy" in terms of which the Court's jurisdiction is cast. There were two parents suing; one merely as a parent, and the other as a taxpayer.

With respect to the appellant suing as a parent, Justice Jackson could not find any assertion that the seventeen-year-old pupil involved was injured or offended by the Bible reading, or that she was "compelled to accept, approve or confess agreement with any dogma or creed or even to listen when the Scriptures were read." He pointed out, moreover, that although there was a pretrial stipulation that any pupil could be excused from the Bible reading, at his own or his parent's request, no such request had been made here.³⁴ But the crucial fact was that the child had graduated from the public schools prior to the appeal to this Court. "Obviously," said Jackson, "no decision we could render now would protect any rights she may once have had, and this Court does not sit to decide arguments after events have put them to rest."³⁵

Concerning the other appellant, Justice Jackson observed that facts were lacking to support a taxpayer's action. On this point, he concluded:

It is apparent that the grievance . . . is not a direct dollars-and-cents injury but is a religious difference. If appellants established the requisite special injury necessary to a taxpayer's case or controversy, it would not matter that their dominant inducement to action was more religious than mercenary. It is not a question of motivation but of possession of the requisite financial interest that is, or is threatened to be, injured by the unconstitutional conduct. We find no such direct and particular financial interest here. If the Act may give rise to a legal case or con-

³² *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948).

³³ 5 N.J. 435, 71A.2d 732 (1950). This decision is discussed in Binder, *Bible Reading in Public Schools*, 34 MARQ. L. REV. 297-300 (1951), where he concludes that "the New Jersey decision cannot be reconciled with the *McCullum* and *Everson* cases nor with the *Edgerton* case decided by the Supreme Court of Wisconsin." *Id.* at 300.

³⁴ 342 U.S. 429, 432.

³⁵ *Id.* at 432-3.

troversy on some behalf, the appellants cannot obtain a decision from this Court by a feigned issue of taxation.³⁶

The question, then, whether Bible reading to public school pupils violates the United States Constitution, must remain in abeyance until the nation's highest court should decide to consider the issue on its merits. It should be emphasized, however, that a decision favorable to Bible reading by that court would not affect its status of unconstitutionality in Wisconsin as determined by the *Weiss* decision.

Wisconsin's attorney general has never delivered an opinion on the subject,³⁷ but certain corollary issues have been presented to the state superintendent of public instruction.

In May, 1952, State Superintendent of Public Instruction Watson received a letter from Reverend J. E. Noonan, pastor of St. Mary's Church in Altoona, Wisconsin. Enclosed with the letter was an unidentified newspaper photograph with the following caption underneath:

E. R. Steadman, first Wisconsin vice president of the Gideon Society, presents a Testament . . . to mark the end of distribution of 16,662 Testaments to 669 schools in 10 counties during the past three years. . . . The Gideons distribute Bibles to schools, hospitals, hotels, penal institutions and the armed forces, as well as to foreign countries.³⁸

Reverend Noonan claimed that since the Protestant religion is based entirely on the Bible, the Gideons were using the public schools for religious purposes. And he asked, "Would Catholic priests be allowed to distribute copies of the Catholic Bible (the Original New Testament) in Public Schools?"³⁹

³⁶ 342 U.S. 429, 434-5. Justice Douglas dissented, with whom Justices Reed and Burton concurred, on the ground that the case deserved a decision on the merits. Douglas reasoned that certainly if all the taxpayers brought a similar suit a justiciable case would be presented. "They would not be able to show, any more than the two present taxpayers have done, that the reading of the Bible adds to the taxes they pay. . . . If all can do it, there is no apparent reason why less than all may not, the interest being the same." He also said that the *Frothingham* rule, that a suit to enjoin a federal law cannot be maintained, does not apply here for the reason that if New Jersey permits this suit, "I see nothing in the Constitution to prevent it." *Id.* at 435-6.

³⁷ But see, 1 OPS. WIS. ATT'Y GEN. 418 (1912) where the question was presented whether a book agent selling Bibles in homes is obliged to secure a peddler's license. Attorney General Bancroft answered: "But, if the party in question carries the Bibles with him and goes from house to house offering them for sale and selling them and does this for a profit, it is my opinion that he is a peddler and . . . unless he takes out a peddler's license, he is violating our peddler's law." *Ibid.*

³⁸ Letter from Rev. J. E. Noonan, St. Mary's Church, Altoona, Wis., to Supt. Watson, dated May 26, 1952, in the files of the Dept. of Public Instruction.

³⁹ *Ibid.*

"To answer your question specifically," Superintendent Watson replied, "it is illegal for the Catholic Bible, the Protestant Bible, or any other Bible to be distributed in the public schools." He added:

We have so advised many public school people. The distribution of the Bible, however, does not necessarily mean that they are used in an instructional fashion as sectarian materials.⁴⁰

A few months later, a secretary of The Gideons International wrote Superintendent Watson asking for information as to the legality of distributing Bibles in the public schools. He admitted that sometimes Gideons violate the law, but they never do any instructing or commenting. "The Testaments are stacked or placed on a table or other place and the children pass by and only those that want one take. It is strictly up to the children."⁴¹

Superintendent Watson replied that he sincerely regretted that the Gideons included the public schools in their plans.

The public schools are schools for all the children including those who believe in the King James version of the bible and those who do not. Because of the fact that there are several different versions and because, as you well know, different religious denominations use different versions. . . , the bible has been held to be sectarian material by our own Wisconsin Supreme Court so far as its usage in the public schools is concerned.⁴²

He called attention to the fact that one of his statutory duties is to "exclude all sectarian books and instruction from the public schools."⁴³ And he added: "It would seem to me that under that statutory provision, it would be improper for testaments to be distributed in the public schools."⁴⁴

According to Wisconsin law, Bibles may neither be read nor distributed in the public schools. If the school day should be opened with certain exercises, therefore, they must not include the Bible. Public schools have engaged in other exercises to which Catholics have

⁴⁰ Copy of letter from Supt. Watson to Rev. J. E. Noonan, *supra*, note 38, dated June 2, 1952, in the files of the Dept. of Public Instruction.

⁴¹ Letter from Edwin Angelo, Secretary, The Gideons International, Wisconsin and Upper Michigan Division, 332 W. Wis. Ave., Milwaukee, Wis., to Supt. Watson, dated Sept. 12, 1952, in the files of the Dept. of Public Instruction.

⁴² Copy of letter from Supt. Watson, to Edwin Angelo, *supra*, note 41, dated Sept. 16, 1952, in the files of the Dept. of Public Instruction.

⁴³ WIS. STAT. § 14.57(2) (1951). Any book is excluded from adoption, also, which falsifies "the facts regarding the war for independence, or the war of 1812, or which defames our nation's founders, or misrepresents the ideals and causes for which they struggled and sacrificed, or which contains propaganda favorable to any foreign government." WIS. STAT. § 40.77(1) (1951).

⁴⁴ *Op. cit.*, *supra*, note 42.

objected, also, namely—graduation and baccalaureate exercises allegedly sectarian in nature.

GRADUATION AND BACCALAUREATE EXERCISES

Many public schools in Wisconsin lack facilities to accommodate the townspeople at graduation and baccalaureate exercises. It has been necessary on some occasions to find auditoriums elsewhere, and frequently this has meant church auditoriums. And if these exercises should assume a religious character with the singing of hymns and the offering of prayer, then conditions exist that may divide a small community with bitter conflict and tension. Certain faiths, especially the Roman Catholic, abide by a religious tenet that forbids their members from attending religious ceremonies held in churches other than their own, or from participating actively in joint religious exercises of any kind. Hence, Catholic children in certain instances might violate their consciences by participating in graduation or baccalaureate exercises. This is an issue that is presently assuming an increasing importance in Wisconsin.

The issue was first raised by Superintendent of Public Instruction Cary, in 1907, when he requested an opinion of the attorney general as to the validity of graduation exercises "in one of the cities of this state." He stated that the exercises were to be held in a local opera house, "and that the program for the occasion announces that they will be opened with prayer by a local church pastor." A citizen of the school district objected to the prayer and threatened to secure an injunction to prevent it.⁴⁵

Attorney General Gilbert replied that no statute related to the subject. Nor did he think that the proposed program violated Article I, section 18 of the Wisconsin Constitution. Simply because of the offering of prayer, the place where the exercises were to be held could not constitute "a place of worship."

With respect to Article X, section 3, which forbids "sectarian instruction," however, he could readily conceive of such a prayer "which would tend to inculcate sectarian doctrines," and he also could conceive of one that would have no such tendency. But relying on a passage from Judge Lyon's opinion in the *Weiss* case,⁴⁶ Attorney General Gilbert said:

⁴⁵ REPT. OF WIS. ATT'Y GEN. 326 (1908).

⁴⁶ State *ex rel.* Weiss v. District Board of Edgerton, 76 Wis. 177, 193-4, 44 N.W. 967, 973 (1890), where Judge Lyon remarked that "to teach the existence of a Supreme Being. . . is not sectarian, because all religious sects so believe and teach."

A prayer such as is ordinarily given on an occasion like this and which would be suitable to such exercises would leave no impress upon the minds of the listeners other than that the existence of a supreme being had been recognized. Such being the case, it would not constitute sectarian instruction.⁴⁷

The Conway Case

The issue was raised again in 1916 in *State ex rel. Conway v. District Board*.⁴⁸ Conway had filed a petition in the circuit court of Juneau County for a writ of mandamus to compel the District Board⁴⁹ to discontinue the practice of holding graduation exercises in any of the churches of the City of Elroy, or elsewhere within its jurisdiction, and the practice of allowing any minister or person to offer an invocation or prayer at the graduation. The lower court denied the writ, and Conway appealed.

Before the Wisconsin Supreme Court Conway claimed that it is part of the high school requirement, before pupils are granted diplomas, for the Board to conduct a part of the exercises in different Elroy churches and the opera house, at which ministers and priests are invited to officiate and give invocation. He insisted that these exercises have "wounded the sensibilities of both Protestant and Catholic patrons," subjected them to "humiliation," and forced upon them "the offense of conscience." Taxpayers, parents, and patrons of the school had protested for more than six years, he maintained, but to no avail. Certain Catholic taxpayers, Conway complained, refuse to allow their children, who are about to graduate, to attend the graduation exercises, and they must obtain their diplomas afterward by special request.

Conway charged that this was "sectarian instruction," in violation of the Wisconsin Constitution for the following reasons: (1) the exercises are an integral part of the school curriculum; (2) invocation by a minister of a certain sect amounts to the Board's sanction of that minister in preference to all others; (3) it amounts to teaching of certain religious doctrines of the sect so favored; and (4) the invocation in itself is "sectarian instruction," regardless of the words employed, the sect of the minister, or the manner of delivery.

The Wisconsin Supreme Court affirmed the lower court by denying the writ of mandamus. Judge Barnes, in delivering the court's

⁴⁷ REPT. OF WIS. ATT'Y GEN. 326, 327-8 (1908). "I am therefore of the opinion that . . . the injunction would be denied." *Ibid.*

⁴⁸ 162 Wis. 482, 156 N.W. 477 (1916).

⁴⁹ District Board of Joint School District No. 6 of Towns of Plymouth, Woneoc, and City of Elroy.

opinion, felt it was fortunate that the "hapless controversy" was of a "genus" that seldom made its appearance before the court. And he boldly stated: "The number of our people who do not believe in the existence of a Supreme Being and in Life Hereafter is almost negligible."⁵⁰ But he advised:

Nevertheless, we think it would be a wise exercise of official discretion to discontinue such practices as are here complained of when objection thereto is made by any substantial number of school patrons. We do not underrate the efficacy of prayer. Neither are we prepared to say that the average high school graduate may not need it. But whenever it is likely to do more harm than good, it might well be dispensed with. It is not at all times wise or politic to do certain things although no legal rights would be invaded by doing them.⁵¹

Apparently attempting to obviate criticism, Judge Barnes stated that the court was not trifling with the objection because the petitioner happened to be Catholic. "Reverse conditions and let a Catholic school board select a church or building devoted to Catholic services in which to hold graduating exercises and engage a Catholic clergyman to deliver a nonsectarian prayer or invocation, and the devout . . . member of a Protestant communion would be just as likely to take umbrage at what was done."⁵²

Judge Barnes denied the petitioner's allegation that holding graduation exercises in a church is in itself sectarian instruction. The petitioner did not show that the clergymen were paid public money to render invocations nor that anyone was compelled to attend the exercises. "Graduation exercises take place once a year," he observed. "Often in smaller places church auditoriums are more commodious and better calculated to take care of the overflow crowds that congregate at such times. . . . To say that a person attending such place once a year is compelled to attend a place of worship would be giving prominence to form rather than to substance." And he added, "It is what is done, not the name of the place where it is done, that is significant."⁵³

It is difficult to perceive how the decision in this case may be

⁵⁰ 162 Wis. 482, 487, 156 N.W. 477, 479 (1916). Judge Barnes cited no authority for this statement nor did he represent himself as formally taking judicial notice of this fact.

⁵¹ *Id.* at 488, 156 N.W. at 479.

⁵² *Id.* at 487-8, 156 N.W. at 479. The court held that mandamus was the wrong remedy to seek, but decided to consider the case, nevertheless, on its merits. *Id.* at 489, 156 N.W. at 479.

⁵³ *Id.* at 491, 156 N.W. at 480.

reconciled with that in the *Weiss* case.⁵⁴ The difficulty becomes apparent when one proceeds upon Judge Barnes' own hypothesis that, in determining questions involving the matter of religious freedom, substance should take prominence over form. If, indeed, it be true that "it is what is done, not . . . where it is done, that is significant," then it is possible that an argument could be made that Bible reading *in public schools* was relatively unimportant to the *Weiss* decision, a view which would have been likely to shock the judges in that case. On the contrary, prayers offered at graduation exercises appear incapable of easy separation from the fact that such exercises were held in churches. The "substance" of the matter was precisely that which was complained of—that the exercises were held in churches *where* prayers were offered. Judge Barnes, nevertheless, treated the matter of invocation as a wholly different and separate question. On this point, he said:

A prayer may be either sectarian or nonsectarian in character. The sessions of our national Congress, of our state legislature, and of our great party conventions are customarily opened with prayer. These prayers are almost invariably nonsectarian in character, so much so that a person rendering them or listening to them would be entirely at a loss to discover to what denomination the clergyman belonged. The enthusiast who places his desire to make proselytes to the faith he professes above his sense of propriety may occasionally "slop over," but it is only just to say that our clergy rarely offend in this regard. To be sure, offense may be very adroitly given if the clergyman is so minded, but there is no claim that any such thing has occurred in this case.⁵⁵

In this case, the court seemed to reason that the burden rests with the challenger of a district board's action to prove beyond any reasonable doubt that such action is invalid. In recent years the United States Supreme Court, in certain cases, has shifted this ordinary presumption in favor of the constitutionality of state action to a presumption of invalidity if such action is alleged to violate an individual's right of conscience.⁵⁶ Judge Barnes appears to have held

⁵⁴ State *ex rel.* Weiss v. District Board of Edgerton, 76 Wis. 177, 44 N.W. 967 (1890). No attempt was made to distinguish the *Weiss* case, but the court did distinguish *Dorner v. School District*, 137 Wis. 147, 118 N.W. 353 (1908); but see, *infra*, note 91.

⁵⁵ 162 Wis. 482, 493, 156 N.W. 477, 481 (1916).

⁵⁶ See Justice Rutledge's formulation of this doctrine in *Thomas v. Collins*, 323 U.S. 516 (1945), and the court's reasoning in: *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); *Gelling v. Texas*, 343 U.S. 960 (1952). See the discussion, *infra*, in reference to note 91. It would appear that the reasoning in two Jehovah's Witnesses cases is in accord: *Milwaukee County v. Carter*, 258 Wis. 139, 45 N.W.2d 90 (1950); and *Schneider v. State*, 308 U.S. 147 (1939), *reversing Milwaukee v. Snyder*, 230 Wis. 131, 283 N.W. 301 (1939).

to a contrary view. Conway, he said, had to make it appear, which he failed to do, that the invocations were in fact sectarian in character, and that the school board threatened to continue or permit such practices in the future, before the court would enjoin them as invalid.⁵⁷

The presumption doctrine, of course, may be rebutted by resort to the doctrine of judicial notice, and Judge Barnes did take notice that all but a "negligible" number of people believed in a Supreme Being, and that prayers at graduation exercises were "invariably nonsectarian." Evidently the court subscribed to the philosophy that enjoyment of religious freedom depends upon the *degree* to which such freedom has been proved to have been invaded, for Judge Barnes concluded:

Considering what has been done here and the *rare occasions* on which it has been or can be done, the matter complained of seems to be *too inconsequential* to furnish the subject of a law suit.⁵⁸

It should be pointed out, nevertheless, that the weight of judicial opinion in other states agrees that the use of a sectarian building for public educational purposes is valid (especially if the use is temporary) where there has been no intent to aid sectarian institutions thereby.⁵⁹

The *Conway* decision has remained the basic authority on the subject.⁶⁰ But a very similar issue is presently assuming vital importance in certain localities. It concerns high school baccalaureate exercises.

⁵⁷ 162 Wis. 482, 494, 156 N.W. 477, 481 (1916).

⁵⁸ *Id.* at 495, 156 N.W. at 481. Emphasis added.

⁵⁹ See, *e.g.*, *Crain v. Walker*, 222 Ky. 828, 2 S.W.2d 654 (1928); *Nance v. Johnson*, 84 Tex. 401, 19 S.W. 559 (1892); *Millard v. Board of Education*, 121 Ill. 297, 10 N.E. 669 (1887); *Scripture v. Burns*, 59 Iowa 70, 12 N.W. 760 (1882). But distinguish: *Knowlton v. Baumhover*, 182 Iowa 691, 166 N.W. 202 (1918); *Williams v. Board of Trustees*, 173 Ky. 708, 191 S.W. 507 (1917); *Pronovost v. Brunette*, 36 N.D. 288, 162 N.W. 300 (1917); *Dorner v. School District*, 137 Wis. 147, 118 N.W. 353 (1908). "In instances of the use of religious property for public school purposes, the judiciary has scrutinized the arrangements very carefully to discover possible abuses of administrative or legislative discretion." TORPEY, *JUDICIAL DOCTRINES OF RELIGIOUS RIGHTS IN AMERICA* 264 (1948).

⁶⁰ In an undated letter received by Supt. Watson on May 19, 1952, Rev. J. E. Noonan, St. Mary's Church, Altoona, Wis., claimed that "graduation exercises in public school auditoriums where [there are] Protestant Ministers . . . prayers and . . . 'benedictions,' etc., comes generically under the heading of 'Religion.' This is using the schools for 'religious purposes. . . ." Superintendent Watson replied: "Of course, in this particular category the courts of our state have held rather closely to the point of view that the presence of a minister of any religious affiliation is not improper on a graduation program." And he added: "I sincerely trust that in all the issues that are raised, we can hang on in Wisconsin to certain basic considerations, which if they are followed quite closely, will give all of us equal protection in our religious convictions and will keep the schools as such in their proper place. . . ." (From a copy of letter in the files of the Dept. of Public Instruction).

Baccalaureate in Brodhead, Wisconsin

It has been the custom in recent years for the members of the graduating class of Brodhead public high school to vote on the question as to which of the local clergymen should preside over their baccalaureate exercises. The exercises would then be held in the church of the chosen clergyman. This situation has given rise to a highly charged controversy in the small community of Brodhead in southern Wisconsin. The details leading up to the present state of affairs may illustrate (1) how a cleavage may develop within even a very small community when religious rights are alleged to be violated, (2) how a Church-State controversy capable of major proportions may originate from a lack of effective cooperation and communication within a local community, (3) how delicate and frustrating such an issue becomes to the administrator on the state level after local non-legal remedies have been exhausted, and (4) how such an issue remains suspended and abeyant as long as it is withheld from the judicial process.

Beginning in the fall of 1950 the father of one of the students to graduate from Brodhead high school approached a member of the school board and explained that the three Catholic graduates could not take part in baccalaureate services held in any church but their own without compromising their religious principles. The matter was brought to the attention of the superintendent of the high school, C. T. Pfisterer. He answered that the senior class had voted on the matter and it was therefore out of his hands. Reverend R. A. Boettcher, minister of the Evangelical Church, had been the pastor selected, and he announced, in the meantime, that the exercises would be held in his church. Catholic parents objected on the ground "that it was only reasonable to expect that a public school function be held in the public school auditorium without embarrassment to any of the participants."⁶¹ Two telephone conversations between Reverend Andrew Breines, the local Catholic pastor, and Reverend Boettcher failed to resolve any differences.⁶² "None of the three Catholic

⁶¹ Letter from Rev. Andrew R. Breines, Director, The Catholic Herald Citizen, to Rebecca C. Barton, Director, Governor's Commission on Human Rights, dated Sept. 6, 1951, in the files of the Commission. Reverend Breines is also the Catholic pastor in Brodhead, Wisconsin. "I am sending you a chronological summary, as I promised, in regard to the Brodhead High School Baccalaureate, June 6, 1951, which I have checked carefully with the parents of the Catholic graduates concerned." *Ibid.*

⁶² *Ibid.* "Fr. Breines explained that the baccalaureate would be unobjectionable for the Catholic graduates if held in the public school auditorium with invocation, sermon and benediction, as long as hymns commonly identified with a Protestant service were not sung." *Ibid.*

graduates, or their parents, or the six Catholic teachers in the Brodhead elementary and high schools, or Fr. Breines attended the Baccalaureate service held by Rev. Boettcher in the Evangelical Church June 6."⁶³

Shortly before the baccalaureate, Reverend Breines wrote "with deep regret" to Superintendent of Public Instruction Watson protesting "the ill-advised action of Mr. C. T. Pfisterer."⁶⁴ He characterized the incident as creating "much bitter feeling and misunderstanding in the community," and as setting "a precedent of religious discrimination and intolerance in Brodhead."⁶⁵

It has always been my understanding that the First Amendment protects American citizens from all establishment of religion and guarantees all its citizens the right to attend the church of their choice. The wisdom of the Constitution in this matter is shown in the present case for a minority of three could never successfully defend their religious rights in a class vote where the overwhelming majority is of another religious faith or where a public official arbitrarily invades the area of these basic human rights.⁶⁶

Superintendent Watson promptly replied that the matter "is within the province and power of the local school board." And he added:

Personally, in my years as a local school administrator, I preferred to have such programs in the high school auditorium, presided over by the High School Principal, with the attendance of seniors a voluntary matter.⁶⁷

Reverend Breines also sought to utilize the press. In the Catholic Herald Citizen he appealed to his analysis of the American tradition of religious freedom to support his position in the Brodhead controversy.

The preservation of our God-given rights has become the number one concern of all conscientious Americans these days.

⁶³ Letter from Rev. Andrew R. Breines, Director, The Catholic Herald Citizen, to Rebecca C. Barton, Director, Governor's Commission on Human Rights, dated Sept. 6, 1951, in the files of the Commission.

⁶⁴ Copy of letter from Rev. Breines, Pastor of St. Rose Church, Brodhead, to Supt. Watson, dated May 31, 1951, in the files of the Governor's Comm. on Human Rights.

⁶⁵ *Ibid.* "If the record shows that at the time this evil precedent was set, it was strongly objected to in the community by every peaceful means as being un-American and destructive of the basic human rights which are upheld both by the law of God and the supreme law of the land, perhaps it will be little easier to undo the harm done." *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ Copy of letter from Supt. Watson to Rev. Breines, *supra*, note 64, dated June 1, 1951, in the files of the Governor's Comm. on Human Rights.

Because as Americans we recognize these rights as coming from God, we view the right to worship God according to one's religious convictions as the cornerstone of our basic freedoms. Recent world experience has taught us . . . that. . . freedom of speech, freedom from fear, freedom from want, will be enjoyed and safeguarded in the measure that freedom of worship remains free. That is what "freedom under God" means . . . that under God the American formula of equal treatment and equal opportunity for all, regardless of race, color or creed, has preserved our freedoms for us for the past 175 years. When a public function is so arranged in a community as to make it impossible for all Americans to take part, because of race, color or creed, it can hardly be said to square with the American democratic tradition.⁶⁸

The active interest of the Wisconsin Governor's Commission on Human Rights was also solicited by Reverend Breines. Its director, Rebecca C. Barton, observed that the Brodhead arrangement "seems to work to the disadvantage of certain pupils who cannot participate for doctrinal reasons."⁶⁹ Both the Catholic and Protestant members of the Commission feel strongly, Director Barton said, in favor of holding baccalaureate exercises on "neutral territory," (implying a place other than church or public school property), as a means of furthering better human relations.⁷⁰

Superintendent Watson "did not believe that the baccalaureate services as presently conducted in the typical community were illegal."⁷¹ He was concerned, nevertheless, "whether or not baccalaureate services, as such, were legal in a high school building,"⁷² despite his previous assertion that such programs were held in the high school auditorium during his years as a local school administrator.⁷³ Superintendent Watson now believed, furthermore, that the problem would not be solved "if all were held in high schools . . . inasmuch as objections had been raised to *each* location for the services."⁷⁴ And he declared his position, as follows:

⁶⁸ Breines, "From Where I Stand," Catholic Herald Citizen, Madison edition, July 7, 1951, p. 1, col. 4.

⁶⁹ Copy of letter from Director Barton to Supt. Watson, dated Jan. 16, 1952, in the files of the Governor's Comm. on Human Rights.

⁷⁰ Copy of letter from Director Barton to Supt. Watson, dated March 10, 1952, in the files of the Governor's Comm. on Human Rights.

⁷¹ Letter from Supt. Watson to Mrs. Gertrude Anderson, Chm'n., Special Committee, Governor's Comm. on Human Rights, dated April 21, 1952, in the files of the Governor's Comm. on Human Rights.

⁷² Memorandum by Supt. Watson "dictated March 24, 1952," in the files of the Dept. of Public Instruction.

⁷³ *Op. cit.*, *supra*, note 67.

⁷⁴ *Op. cit.*, *supra*, note 71.

Personally, I would like to see some spiritual aspects retained with our commencement activities. I do not think that my best contribution will come in any form of a "directive" to the schools. In order to retain this spiritual essence, and to avoid any state department or official being unfairly charged with a desire to eliminate this spiritual characteristic, I would rather proceed informally with small groups of administrators and urge them to have individual churches or synagog plan "Recognition services" for the young people of each faith in the graduating classes.⁷⁵

Although state administrators exerted efforts to solve the problem, the graduating class of Brodhead high school again voted to hold its June, 1952, baccalaureate exercises in a Protestant church, this time in the Bethlehem Lutheran Church. School Superintendent Pfisterer, apparently acting upon State Superintendent Watson's advice, had proposed that Sunday, June 1, 1952, be designated "Baccalaureate Sunday" in all Brodhead churches, and that each church observe the occasion with appropriate services instead of a mass baccalaureate being held.⁷⁶ But this was not done. Instead, the graduating class went on record as accepting the full responsibility for its action.⁷⁷ Reverend Breines thereupon inserted a paid advertisement in the Brodhead Independent Register explaining the Catholic position of recognizing the baccalaureate as an "active" religious event in which Catholics could not participate.⁷⁸ Reverend R. W. Sachtjen, pastor of the Methodist Church, charged that this was an "intolerable position," and he asserted that, prior to the coming of Father Breines to Brodhead, priests had always defined baccalaureate participation as "passive participation."⁷⁹

⁷⁵ Letter from Supt. Watson to Mrs. Gertrude Anderson, Chm'n., Special Committee, Governor's Comm. on Human Rights, dated April 21, 1952, in the files of the Governor's Comm. on Human Rights. "It seems to me that if school administrators and religious leaders in each community consider the problem calmly and quietly that the present procedure, controversial in some spots, could be changed to a more satisfactory plan." *Ibid.*

⁷⁶ The Madison Capital Times, June 5, 1952.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ *Ibid.* Reverend Breines expanded on the Catholic position, as follows: "Protestants can worship formally with others without compromising their religious principles. But Catholics cannot. For Catholics, the obligation is a matter of divine law. Christ founded one Church and that Church alone has the authority to prescribe the manner in which God is to be worshipped. In the matter of cooperation with other Churches, Catholic teaching distinguishes between active and passive participation. Passive participation, such as, attendance at funerals and weddings in another Church is not forbidden them, as long as they are not expected to take an active part in the service. A baccalaureate, however, is a religious service in which graduates take an active part. For this reason, Catholics cannot in conscience take part in such a service in another Church without compromising their religious faith." Breines, *From Where I Stand*, Catholic Herald Citizen, Madison edition, May 31, 1952, p. 1, col. 3.

Baccalaureate and Separation

As with Bible reading in the public schools, the Roman Catholic position in Wisconsin remains inflexibly in support of a complete separation of Church and State with respect to the holding of baccalaureate exercises in churches. As with Bible reading, again, this position is taken for doctrinal purposes, to maintain the Catholic rights of conscience as inviolable.

In Rice Lake, Wisconsin, a local Catholic clergyman has clearly explained the underlying reason for his directive of non-participation in baccalaureate services, as follows:

For many years the question had been studied and discussed as to whether baccalaureate services at our public schools are merely school functions or civic exercises or religious services, and the conclusion has been definitely reached that where these exercises take the form of sacred hymns, Sacred Scripture Texts and quotations, and a religious sermon by a representative of some religious faith, they cannot be considered as merely school functions or civic exercises, but must be considered as religious services.

I believe it is quite generally known that a fundamental principle of Catholic Faith prohibits Catholics from actively participating in non-Catholic religious services or joint religious services. Much as this . . . has been . . . misunderstood, *we cannot compromise* without becoming disloyal to Jesus Christ, whom we believe to be the God-Man. . . .⁸⁰

Hence, pastors of the Catholic churches of Rice Lake and nearby Haugenm, Wisconsin, planned a joint baccalaureate service for Catholic seniors, requesting the superintendent of schools to excuse them from attending the public school baccalaureate "in order to preclude in so far as possible a repetition of the embarrassing situation of last spring."⁸¹

That baccalaureate services are in fact sometimes religious, if not sectarian, in character is illustrated by the following newspaper announcement of the 1952 high school baccalaureate program in Ashland, Wisconsin:

Baccalaureate services for the class of 1952 will be held this Sunday evening, June 1 . . . in the high school auditorium. . . .

⁸⁰ (Emphasis added.) Letter from Rt. Rev. Msgr. Peter F. Meyer, St. Joseph's Rectory, Rice Lake, Wis., to Louis M. King, Supt. of Public Schools, Rice Lake, dated May 1, 1951, in the files of the Dept. of Public Instruction.

⁸¹ Letter from Rt. Rev. Msgr. Meyer, *supra*, note 80, Rev. Benedict Bauer, O.S.B., Pastor, Holy Trinity Church, Haugenm, Wis., and Rev. Henry Keil, Pastor, Our Lady of Lourdes Church, Rice Lake, Wis., to Louis M. King, Supt. of Public Schools, Rice Lake, dated Feb. 14, 1952, in the files of the Dept. of Public Instruction.

The following program is scheduled for the services: . . . In-
 troit—Senior Choir. Invocation—Rev. Claude Millage. . . .
 Anthem, "How Lovely are the Messengers," Mendelssohn, from
 "St. Paul"—Senior Choir. Baccalaureate Address—Rev. Marvin
 E. Kausler. Anthem, Recessional, De Kohen—Senior Choir.
 Benediction—Rev. Claude Millage. Sevenfold Amen—Senior
 Choir.⁸²

Superintendent of Public Instruction Watson seems to have ample reason, therefore, to doubt the legality of baccalaureate services held in public school buildings. On the petition of a Roman Catholic clergyman, the New York State Commissioner of Education, moreover, has recently held that a baccalaureate service scheduled to be conducted in the town of Somers public school building "constitutes the teaching of a religious tenet" in violation of separation of Church and State clauses in both federal and state constitutions.⁸³ One possible solution is apparent from an account of events following the Commissioner's decision:

Although residents of Somers are reported to have stormed a meeting of the Board of Education demanding that the service be held notwithstanding the Commissioner's decision, classical and patriotic songs were substituted for religious items in the program. Thus, instead of the scheduled "God of Our Fathers" the processional will be "America;" substituting for "God Be Our Guide" there will be a choral selection from "The Lost Chord."

⁸² Ashland Press, May 31, 1952. It would appear that the editor of the Ashland Press, John B. Chapple, believes that religion ought to have an important role in public education. As a member of the Governor's Commission on Human Rights, he asked for the appointment of a committee of the Commission "to study whether or not there exists infringements upon the human rights of parents in Wisconsin seeking to bring up their children in an education that is free of secular or materialistic religion. . . . This looks toward the possibility of the reading of verses from the Bible . . . and . . . consideration of the recitation of the Lord's Prayer in our public schools. It also looks toward eliminating the restrictions now imposed against the use of school buses. . . ." Statement to the Commission, Oct. 17, 1950, in the files of the Governor's Commission on Human Rights. A special committee was formed to investigate the school bus issue; a memorandum was prepared discussing the legal aspects, and was published, in substance, viz.: Boyer, *Public Transportation of Parochial School Pupils*, 1952 Wis. L. Rev. 64-90. But no Commission policy was enunciated on the issue.

⁸³ *In the Matter of the Appeal of Rt. Rev. Msgr. Edward V. Dargin, etc.*, a decision rendered by Lewis A. Wilson, New York Commissioner of Education, June 12, 1951 (mimeographed), in the files of the Governor's Commission on Human Rights. "It should be noted, however, that it is not intended to hold that opening and closing of school functions with customary invocation and benediction is prohibited." *Ibid.* See also, *The New York Times*, June 14, 1951. *Distinguish*, *Miller v. Cooper*, 56 N.M. 355, 244 P.2d 520 (1952), where the Supreme Court of New Mexico held that the doctrine of separation of Church and State would not require the court to prohibit the holding of baccalaureate and commencement exercises of a public school in church buildings, where there were no other suitable places available.

Moreover, what was to have been called a baccalaureate will be known instead as a "pre-commencement exercise."⁸⁴

It is a matter of conjecture whether high school baccalaureate services held in churches would be considered legal as were similar graduation exercises in the *Conway* decision.⁸⁵ The issue has never been submitted to Wisconsin's judicial process. In the meantime, Superintendent Watson has pursued the moderate policy of recognizing that it is a matter of local control. "I have been bold enough," he said, "to recommend that educational and religious leaders of the community sit down together to discuss the whole problem. Some communities have abolished the service and some . . . have substituted several individual church services, each church recognizing the members of its congregation who are in the graduating class."⁸⁶

THE FACTOR OF SPACE

As already indicated, the legality of sectarian instruction of public school pupils concerns, in part, the place where such pupils are instructed. Bible reading in public schools, graduation and baccalaureate exercises of a religious character held in public schools or churches, the release of pupils during regular school hours for religious instruction in and out of school buildings,—these practices comprise special aspects of the general question of religious education of public school pupils. Another aspect deserving attention is related specifically to the factor of space. Does instruction become sectarian by virtue of the fact that space is reserved in a church or parochial school for public school classes? May a church reserve space in a public school building for religious instruction classes during the summer months, or would this comprise sectarian instruction in a public school? These are typical questions that could easily arise in many Wisconsin communities. Spatial considerations related to sectarian instruction, therefore, may be reduced to two facets: (1) use of religious buildings for public instruction, and (2) use of public educational buildings for religious purposes. Superintendent of Public Instruction Watson has assessed a major related problem in the following manner:

⁸⁴ Joint Memorandum of the American Jewish Committee, 386 Fourth Ave., New York, and The Anti-Defamation League of B'nai B'rith, 312 Fifth Ave., New York to CRC Offices, American Jewish Congress Area Offices, and Anti-Defamation League Regional Offices, dated June 29, 1951, and entitled: *Decision on Baccalaureate Services*.

⁸⁵ *State ex rel. Conway v. District Board*, 162 Wis. 482, 156 N.W. 477 (1916).

⁸⁶ Copy of letter from Supt. Watson to Rev. L. B. Keegan, St. Patrick's Church, Sparta, Wis., dated June 11, 1952, in the files of the Dept. of Public Instruction.

My own belief is that much of the relationship between non-public and public schools could be improved and clarified if all concerned were to remember and recognize that the operation of the public schools is a matter of statutory and constitutional regulation, that the operation of parochial or non-public schools, as such, without tax money is legal in Wisconsin and that our problems, if any, arise when the two organizations are confused. This confusion most often arises when the procedures and the functions of the two are intermingled.⁸⁷

Use of Religious Property

In 1908 the interesting case of *Dorner v. School District*⁸⁸ came before Wisconsin's Supreme Court involving the use of religious property for public instruction. For twenty years a school district in Brown County had rented certain rooms in the parochial school building of the Congregation of the Immaculate Conception, a Roman Catholic organization. The district paid, besides rent, for teachers, fuel, cleaning, and other necessities. In the so-called public school rooms, prayers were recited in class, hymns were sung, and the teachers "were nuns specially designated to the service by the superior of a Catholic sisterhood to which they belonged."⁸⁹ The public school pupils attended religious services in the adjoining church prior to classes, and school was suspended to permit attendance at weddings and funerals. During the twenty years, they were all children of Catholic parents with "occasional exceptions." Ironically, certain members of the Congregation, who were also resident taxpayers, brought suit: (1) to enjoin continuance of the arrangement, and (2) to recover in behalf of the district all sums previously paid to support the arrangement.

Judge Hastings of the circuit court of Brown County granted an injunction against the further continuance of sectarian instruction for the reason that the school was "pervaded and characterized by sectarian instruction contrary to law." But the injunction did not preclude the district board from renting rooms anywhere it chose; hence, the public school could remain in the same building. The lower court held, further, that since it was common knowledge how district funds were spent, and since no objections were ever made, the complainants could not recover for the district the sums paid.

Upon appeal, the Supreme Court affirmed the lower court's hold-

⁸⁷ Copy of letter from Supt. Watson to Father James P. Finucan, Secretary, Chancery Office, Diocese of La Crosse, La Crosse, Wis., dated Dec. 20, 1951, in the files of the Dept. of Public Instruction.

⁸⁸ 137 Wis. 147, 118 N.W. 353 (1908).

⁸⁹ *Id.* at 148, 118 N.W. at 354.

ing, but since the constitutional question of sectarian instruction had not been presented on appeal it was not discussed. Judge Dodge's opinion, for the court, dealt only with the narrower issues of the recovery of district funds and the continued use of the school building. He concluded:

We find nothing . . . to prevent the school district . . . or the school board from hiring a building or part of a building in which to maintain the public school. . . . Hence we think that . . . the district [can] maintain a common school in the parochial school building and its discretion in that regard should not be controlled by the court.⁹⁰

It should be noted, however, that by affirming Judge Hasting's ruling, the Supreme Court in effect affirmed that part of his order requiring discontinuance of those public school classroom activities which, according to the Supreme Court's own statement of facts, were "characterized by certain religious ceremonies."⁹¹

It would appear that the *Dorner* case ruled, then, that it is not illegal for a school district to use space on religious property for public school purposes so long as it is free from sectarian instruction. According to present statutes, the annual common school district meeting shall have power "to designate sites for district schoolhouses or teacherages," and "to vote a tax to purchase or lease suitable sites for school buildings, to build, hire or purchase schoolhouses or teacher-

⁹⁰ 137 Wis. 147, 151-2, 118 N.W. 353, 355.

⁹¹ *Id.* at 148, 118 N.W. at 354. Judge Barnes in the *Conway* case distinguished the *Dorner* case by stating, 162 Wis. 482, 492, 156 N.W. 477, 480-481 (1916), as follows: "To the lay mind there is very little difference in principle between the case before us and *Dorner v. School Dist.* . . . There a Catholic parochial school was built adjacent to a Catholic church and some of the school rooms were rented and used for the purpose of a public school. The Catholic school children attended church services before school hours . . . and prayers were recited and hymns were sung during school hours in the portion of the school building used for parochial school purposes and in rooms either adjoining or adjacent to those rented by the public school authorities. The parochial school was taught by Sisters clad in the conventional garb of the order to which they belonged." (Emphasis added.) With all due respect to Judge Barnes' legal mind, he clearly misinterpreted the facts of the *Dorner* case, 137 Wis. 147, 148, 118 N.W. 353, 354 (1908) to wit: "the public school conducted in the rooms rented by the school district was characterized by certain religious ceremonies, in that . . . prayers . . . were said . . . , church hymns were sung, and the teachers were nuns. . . ." (Emphasis added.) These religious activities were conducted in the public school part of the building, and were not restricted, as Judge Barnes said, to "the portion . . . used for parochial school purposes." If he had interpreted the facts in the *Dorner* case correctly, it is reasonable to assume that an opposite decision might have been reached in the *Conway* case. For if the *Dorner* case forbade prayers, hymns, etc., in public school classrooms, but permitted the rental of such classrooms in a parochial school building, correct analogy would have the *Conway* case forbidding invocation in high school graduation exercises, but permitting the conduct of such exercises in a church building.

ages or outbuildings, and to furnish, equip and maintain the same."⁹² It is readily apparent that the revenue received from the "tax to purchase or lease" such sites may not be expended in a manner equivalent to drawing money "from the treasury for the benefit of religious societies, or religious or theological seminaries."⁹³

In reply to a charge made in June, 1952, that "public school children are permitted to receive . . . instruction in a church auditorium" in Laona, Wisconsin,⁹⁴ Superintendent Watson set forth the policy of the Department of Public Instruction, as follows:

I think the whole situation can become clear if we recognize one basic fact involved. That basic fact is that the operation of the public schools of the state is circumscribed by the Constitution of the state and by the Statutes passed by the legislature. Our Constitution specifically declares that sectarian instruction is not proper within the public schools and that public school facilities cannot be used in any way at any time for religious purposes. The statutes are also clear in that under certain conditions local school boards may rent facilities in order to carry on

⁹² WIS. STAT. §§ 40.04(4),(5) (1951). For rulings in other jurisdictions, see cases cited *supra*, note 59. Compare, *State v. Boyd*, 217 Ind. 348, 28 N.E.2d 256 (1940); *contra*, *Knowlton v. Baumhover*, 182 Iowa 691, 166 N.W. 202 (1918).

⁹³ WIS. CONST. Art. I, § 18. In 1929, representatives of four parochial school parent teachers associations requested the school board of the city of Green Bay to furnish to the parochial schools a teacher to teach physical education therein for the school year of 1929-1930, for the reason that "there is no available space in the public school buildings where the parochial pupils may be taught." In declaring this plan as violative of Art. I, sec. 18, Attorney General Arnold said: "The word 'treasury' in this clause undoubtedly refers to the state treasury. It must not be forgotten, however, that the schools of the city of Green Bay are in part supported by state aid . . . which is paid out of the state treasury. The word 'seminary' includes institutions of learning or education of different grades, and clearly comprehends parochial schools." 18 OPS. WIS. ATT'Y GEN. 374, 375 (1929).

The Soldiers' Educational Bonus Law of 1919, WIS. STAT. § 37.25 (1919) was tested in relation to Art. I, sec. 18, of the Wisconsin constitution, in *State ex rel. Atwood v. Johnson*, 170 Wis. 251, 176 N.W. 224 (1919). The law provided in part that any honorably discharged resident of Wisconsin who desired to continue his education "in any of the public schools of the state . . . or in any other institution of high school or collegiate grade in the state not run for profit shall . . . be entitled to receive thirty dollars per month while in regular attendance as a student at any such institution . . ." and the service provided "shall be paid for by the state on the basis of the actual increased cost of operation in excess of the cost of the institution if such legislation had not been passed, and not at the ordinary rate of individual courses. . . ." (Now, WIS. STAT. § 45.39 (1951)) (Emphasis added.) For the court, Judge Vinje said: "The contention that financial benefit (Emphasis added) accrues to religious schools from the act is . . . untenable. Only actual increased cost to such schools occasioned by the attendance of beneficiaries is to be reimbursed. They are not enriched by the service they render. Mere reimbursement is not aid." 170 Wis. 251, 263-4, 176 N.W. 224, 228 (1919). *Cf.*, 13 OPS. WIS. ATT'Y GEN. 535 (1924).

⁹⁴ Letter from Miss A. Isabelle Gibbons, Wabeno, Wis., to Supt. Watson, dated June 16, 1952, in the files of the Dept. of Public Instruction.

their regular public school operations. These public school boards must operate within a very definite legal framework.⁹⁵

Religious Use of Public Educational Property

No Wisconsin Supreme Court decision exists which specifically rules that public school buildings may or may not be devoted to use by private organizations for religious or sectarian purposes. Nevertheless, entirely aside from any constitutional or statutory provision, express or implied, relating to sectarian instruction in public school property, the principle is well recognized in Wisconsin law that public school property cannot be devoted to private uses.⁹⁶

The attorney general ruled in 1927, moreover, that it is contrary to law for the University of Wisconsin to grant the use of one of its buildings or rooms to the student Christian Science Society for the purpose of holding Christian Science services.⁹⁷ Likewise, the attorney

⁹⁵ Copy of letter from Supt. Watson to Miss Gibbons, *supra*, note 94, dated June 18, 1952, in the files of the Dept. of Public Instruction.

Although no constitutional issue was raised, Attorney General Reynolds declared illegal certain agreements (1) relative to a ward placed for wages providing that during the time he or she shall remain in custody he or she shall attend the _____ church regularly, and (2) relative to a foster child providing that he or she shall be given regular religious instruction in the _____ church, on the ground that they violated Sec. 58.02 (2), Wis. Stats., 1929, stating that the "contract shall not contain any provision of a sectarian or partisan nature regarding the care, custody, or education of the child." 18 OPS. WIS. ATT'Y GEN. 253 (1929). WIS. STATS. §§ 58.02-58.04 (1927), relative to placing children in homes, were repealed by Wis. Laws 1929, c. 439, § 1.

⁹⁶ *School District v. Arnold*, 21 Wis. 657 (1867), held that school district electors had no authority to divert the use of the public school building for meetings of a temperance society; this case was quoted from with approval in *State ex rel. Weiss v. District Board of Edgerton*, 76 Wis. 177, 214, 44 N.W. 967, 979 (1890). Likewise, in *Tyre v. Krug*, 159 Wis. 39, 149 N.W. 718 (1914), it was held that a school board had no authority to permit school principals to use the school to conduct private school book and supply businesses for their personal profit and that such use could be restrained in a taxpayer's action; the court said, 159 Wis. 39, 44, 149 N.W. 718, 720 (1914): "We think that school boards have not been granted authority to permit school buildings to be devoted to uses other than to school purposes, aside from those expressly enumerated in the statutes. . . ." *Distinguish*, *Cook v. Chamberlain*, 199 Wis. 42, 225 N.W. 141 (1929), which held it was proper to permit the use of school buildings for the sale of books and supplies at cost as an aid to the efficient conduct of the school, especially where the statutes had expressly given the school board authority to adopt such measures as would promote the good order and public usefulness of the schools and to purchase textbooks and fix the terms and conditions upon which they should be furnished to pupils; but "this case should not be taken . . . as modifying the doctrine . . . that public school property is not to be made available for private purposes." 36 OPS. WIS. ATT'Y GEN. 522, 523 (1947).

The courts of some states (Arkansas, Connecticut, Indiana, Kansas, Michigan, Missouri, and Pennsylvania) hold that a public school building may not be used for sectarian purposes outside of regular school hours. 56 C.J. 472 (1932), n. 72-6. The courts of a few states (Illinois, Indiana, Iowa, Nebraska, and New York) hold that a public school building may be used for religious purposes after school hours. 56 C.J. 473 (1932), n. 78-81.

⁹⁷ 16 OPS. WIS. ATT'Y GEN. 308 (1927). Noting that WIS. CONST. ART. X, § 6, forbids "sectarian instruction" in the University in language similar to Art. X,

general ruled twenty years later that Milwaukee State Teacher's College could not divert the use of one of its buildings for religious instruction by a religious organization located near its campus.⁹⁸

The Department of Public Instruction has no specific compilations of state laws and regulations with respect to the question of public school facilities being used by religious groups.⁹⁹ But Superintendent Watson has ruled, under authority of the constitutional prohibition of sectarian instruction and his statutory duty to exclude such instruction, that "it is not legal for a school board to grant the use of public facilities to any religious group."¹⁰⁰ Consequently, the Department has exerted its authority to stop the holding of religious services in a public school house in High Bridge, Wisconsin,¹⁰¹ and to prevent the establishment of a parochial school in the district school building of Soldiers Grove, Wisconsin.¹⁰² Even when the religious use is under the auspices of a "nondenominational" organization¹⁰³ it is illegal, especially if the Bible is used; for "The State Superintendent does not have authority to waive the law. He is under oath to defend and support it."¹⁰⁴

It is true that a public school board has statutory authority to grant the use of the schoolhouse for "such public meetings as will . . . aid in disseminating intelligence and promoting good morals,"¹⁰⁵ for

sec. 3, which prohibits the same in public schools, the opinion relied heavily on the interpretation of the latter provision in *State ex rel. Weiss v. District Board of Edgerton*, 76 Wis. 177, 44 N.W. 967 (1890).

⁹⁸ 36 OPS. WIS. ATT'Y GEN. 522 (1947). The legislature in WIS. STAT. § 37.02 (1) (1947), "has made it very clear that the property of the state teachers colleges is to be used 'for educational purposes solely' and 'none other.'" *Id.* at 523-4.

⁹⁹ Copy of letter from Supt. Watson to Rev. J. R. Watson, Secretary, Sawyer County Ministerial Assoc., Stone Lake, Wis., dated July 17, 1952, in the files of the Dept. of Public Instruction.

¹⁰⁰ *Ibid.* Hence, Youth for Christ Rallies, sponsored by an interdenominational ministerial association, could not be held in high school auditoriums, citing WIS. CONST. Art. I, § 18 and WIS. STAT. § 15.57 (2) (1951).

¹⁰¹ Copy of letter from Ass't Supt. V. E. Kimball (Legal), to Rev. Roy Curless, Mellen Union Church, Mellen, Wis., dated Jan. 8, 1952, in the files of the Dept. of Public Instruction.

¹⁰² Copy of letter from Supt. Watson to Mrs. Pearl Swiggum, Soldiers Grove, Wis., dated June 2, 1952, in the files of the Dept. of Public Instruction.

¹⁰³ "The teachers and officers of the group represent three different denominations, and the majority of the students are from families that have no religious affiliate whatever. Besides those . . . there are students from three different Lutheran groups, Methodists, Baptists and children from the two Roman Catholic families attend with surprising regularity." Letter from Ralph Walker, Clerk of Dist. No. 1, Town of Seymour, Eau Claire County, Wis., to Supt. Watson, dated June 15, 1952, in the files of the Dept. of Public Instruction.

¹⁰⁴ Copy of letter from Ass't Supt. Kimball, for Supt. Watson, to Ralph Walker, *supra*, note 103, dated June 19, 1952, in the files of the Dept. of Public Instruction.

¹⁰⁵ WIS. STAT. § 40.16 (5) (1951).

"lectures, entertainments and school exercises,"¹⁰⁶ or for "the open presentation and free discussion of public questions."¹⁰⁷ But it is also true that the legislature has limited the use of school buildings to "nonsectarian" organizations.¹⁰⁸

In reply to the question, therefore, whether a public school building may be used for a religious school during part of the summer, the Department of Public Instruction has flatly ruled: "The use of public school buildings for sectarian instruction is in violation of both the Wisconsin Constitution and the Wisconsin Statutes."¹⁰⁹

One further aspect of sectarian instruction remains to be considered, concerning the most important instruments of public instruction, namely—public school teachers.

TEACHERS: THE CASE OF FOURTEEN SCHOOLS

Many public school teachers doubtlessly have close connections with religious organizations. But when teachers wear distinctive religious garbs in the public schools a question of sectarian instruction may be introduced.¹¹⁰ The laws of the state and the Constitution of Wisconsin specifically prohibit "sectarian instruction" in public schools. The same laws, however, are silent on the question whether or not a teacher may legally wear the garb of a religious order in a public school. Similarly, Wisconsin law does not forbid the hiring of garbed nuns as public school teachers. On the contrary, the legislature has expressly provided that:

¹⁰⁶ And "permit a fee to be charged;" WIS. STAT. § 40.16 (6) (1951). Hence, a school board may grant permission to hold Chautauquas, the proceeds of which are turned over to the school fund of the city, if such lectures are held under "auspices" of the school board. 9 OPS. WIS. ATT'Y GEN. 484 (1920).

¹⁰⁷ WIS. STAT. § 40.16 (7) (1951).

¹⁰⁸ WIS. STAT. § 40.16 (8) (1951).

¹⁰⁹ Copy of letter from Ass't Supt. Kimball (Legal) to P. H. Pederson, Clerk, Sands School, Dist. No. 1, Town of Pleasant Valley, Eau Claire County, Wis., Eleva, Wis., dated May 1, 1952, in the files of the Dept. of Public Instruction. In a letter from J. P. Hulterstrum, Pastor, Eleva Lutheran Parish, Eleva, Wis., to Supt. Watson, dated April 29, 1952, in the files of the Dept. of Public Instruction, it is written: "It has been customary in our community which is about 99% Lutheran for the public grade school to permit (*sic!*) our Lutheran Church to use their building for vacation Bible School during the early weeks of the summer." Superintendent Watson replied: "So from every standpoint which we have been able to determine here, it seems *absolutely clear* to us that it is improper for a school building to be used for religious instruction at any time." (Emphasis added). Copy of letter from Supt. Watson to Hulterstrum, *supra*, dated May 20, 1952, in the files of the Dept. of Public Instruction.

¹¹⁰ For discussion of authorities outside Wisconsin on this issue, see, e.g., TORPEY, JUDICIAL DOCTRINES OF RELIGIOUS RIGHTS IN AMERICA, 258-60 (1948); JOHNSON and YOST, SEPARATION OF CHURCH AND STATE IN THE UNITED STATES, 115-24 (1948); 2 STROKES, CHURCH AND STATE IN THE UNITED STATES, 589-92 (1950).

No discrimination shall be practiced in the employment of teachers in public schools because of their race, nationality or political or religious affiliations, and no question of any nature or form shall be asked applicants for teaching positions in the public schools relative to their race, nationality or political or religious affiliations, either by public school officials or by teachers' agencies and placement bureaus.¹¹¹

Nevertheless, where nuns are hired the question of sectarian instruction may be raised, as it was repeatedly raised in the fall of 1951. Many letters were written to Superintendent Watson of the Department of Public Instruction protesting the presence of teachers in public schools clothed in the religious dress of the Catholic Church. "Would not the presence of nuns in schools impress the pupils that religion might be injected into state public schools?"—has been a typical question confronting the Department.¹¹² But the issue has not been confined merely to teaching in public schools by nuns. Rather it has been submerged in the general problem of sectarian control of public schools wherein Catholic nuns were teaching. As recently stated by Superintendent Watson: "The situation simply is that over the past many years fourteen such schools have been . . . given approval by my two predecessors in this office."¹¹³ In October,

¹¹¹ WIS. STAT. § 40.775 (1) (1951). "The question of the presence of nuns in a garb being interpreted as religion has not been determined in the courts of Wisconsin." Copy of letter from Supt. Watson to John E. Hubel, 3057 N. Murray Ave., Milwaukee, Wis., dated Sept. 4, 1952, in the files of the Dept. of Public Instruction. "No child between the ages of 4 and 20 years shall be excluded from any public school on account of his religion. . . . No separate school or department shall be kept for any person or persons on account of his religion. . . ." WIS. STAT. § 40.777 (1951).

¹¹² Letter from John E. Hubel, *supra*, note 111, to Supt. Watson, dated Sept. 1, 1952, in the files of the Dept. of Public Instruction.

A previous issue relating to teachers was raised in 1949. In that year, Superintendent Watson, under his general authority to issue teacher certificates [Wis. STAT. § 14.57 (22) (1949)], reversed the policy of his predecessors in office by denying permanent certificates to parochial school teachers on the ground that his jurisdiction in this regard extends only to public schools, *viz.*: "When any such graduate [of a teachers college], after receiving such diploma, taught a public school in this state two years, the state superintendent may, after such examination as to moral character, learning and ability to teach as to him may seem proper, issue to such teacher an unlimited state certificate, and thereafter such unlimited certificate shall be evidence of his qualification to teach in any common school." WIS. STAT. § 37.13 (1951). (Emphasis added). The same section also authorizes the state superintendent to grant "limited" state certificates to graduates of teachers colleges, and, according to Supt. Watson, such certificate is issued by virtue of a person merely receiving a diploma from one of the teachers colleges in the state of which several are private colleges. Conversation with Supt. Watson in his office, State Capitol, Dec. 17, 1952. See, also, *infra*, note 165.

¹¹³ Copy of letter from Supt. Watson to Mrs. Conrad Failing, Waterloo, Wis., dated Oct. 19, 1951, in the files of the Dept. of Public Instruction. "It has been extremely difficult for me to properly express myself on this whole matter because anything that I might say could be construed as a criticism of some one of my several predecessors. That has not been my desire. . . . In other words, if

1951, the Department's concern was focused upon these fourteen so-called "public" schools by a rapidly developing crisis involving the status of one of them: the Lima Consolidated Grade School in Pepin County near Durand, Wisconsin.

Lima Consolidated School

In September, 1951, a resident of the Lima Consolidated School District, William Fox, was arrested and charged with failure to send his children to a public, private, or parochial school as required by Section 40.70 of the Wisconsin Statutes. Prior to signing the warrant for arrest District Attorney John G. Bartholomew was advised by the attorney general's office that "there was no other alternative than to proceed against Mr. Fox" for his refusal to comply with the law. Fox's defense was that no public school existed in his district and that the Lima Consolidated School was a Roman Catholic parochial school.¹¹⁴ In the District Attorney's effort to meet this argument he wrote to Superintendent Watson, before the trial, the following:

I hope that I will be able to keep the question out as to whether or not the Lima school is or is not a public school but in the event the Court wants testimony on this matter I will have to be prepared to show a prima facie case to the effect that the Lima school is a public school. Thus . . . I would like . . . a report from your office showing what investigations you have made on the Lima school and as to . . . whether such school is a public or parochial school. Also, I believe that if investigation has not been made in the last month, that one should be made prior to the hearing of this matter.¹¹⁵

Superintendent Watson replied that the Department's records revealed no act of specific approval of the Lima School as a public

there are 'definite plans for setting up a public school,' those . . . plans should have been applied when the individual situations had their origin. So far as I know there may have been a consideration of various aspects at that time and an approval given following that consideration. The problem now, however, is complicated by the fact that during the years they have operated as public schools and have received some state monies in this operation their propriety as public schools has been increased each year. To say it another way—it is a more difficult problem now to challenge their existence as proper institutions than it might have been to have challenged their annexation as public schools." Letter from Supt. Watson to Mrs. A. C. Brommer, 303 W. Newton St., Rice Lake, Wis., dated Oct. 9, 1951, in the files of the Dept. of Public Instruction.

¹¹⁴ Letter from John G. Bartholomew, Dist. Att'y, Pepin County, Durand, Wis., to Supt. Watson, dated Oct. 2, 1951, in the files of the Dept. of Public Instruction. Previously, in a speech to Wisconsin public school administrators, at Madison, Supt. Watson said that religiously garbed teachers had been present in Wisconsin public schools since 1914, and a check of the records of his department revealed 14 schools in 11 counties where they were employed. The Milwaukee Journal, Sept. 28, 1951.

¹¹⁵ Letter from Bartholomew to Watson, *supra*, note 114.

school, but state aids had been paid to the Lima District for a number of years. He explained:

State aids are paid annually on the basis of the annual report of the school board. Since 1945 the report form has required an affirmative showing that there has been no sectarian instruction in the school. While the state superintendent has been aware for at least ten years that the school has been taught, in part at least, by members of a religious order, there is nothing in our records establishing that there has been any sectarian instruction in the Lima School. Neither have we been advised by the county superintendent of Pepin County of anything of that nature.¹¹⁶

Staff limitations precluded "detailed investigation of each of the 5000 schools in Wisconsin." But the Department was willing "for the purposes of the case," he added, to "make a complete investigation of the instructional procedures and materials" of the Lima School.¹¹⁷

The Department's investigation of the Lima Consolidated Grade School was undertaken on October 16, 1951, with a visit to the school by Walter B. Senty, Assistant Superintendent of Public Instruction (Supervision), and H. I. Peterson, State Supervisor of Elementary Schools.¹¹⁸ They reported an enrollment of 203 pupils, in grades one to eight, and housed in a three-story building used jointly by the elementary school and the Holy Rosary Catholic Parochial High School. All grades were housed on the second floor except grades four, seven, and eight which occupied the third floor. The High School used classrooms on all three floors. The Lima School District paid the local Catholic parish \$1,000 for its share of the space in the building. It was found, moreover, that the school lunch was served in the basement of the parish church located about 300 feet from the school building. The only other buildings on the "premises" were those for the parish priests and the home and chapel for the sisters.¹¹⁹

¹¹⁶ Copy of letter from Supt. Watson to Bartholomew, *supra*, note 114, dated Oct. 3, 1951, in the files of the Dept. of Public Instruction.

¹¹⁷ *Ibid.* Supt. Watson had *previously* asserted that "The Lima school, operating as a public school, has been employing members of a religious order, wearing their garb, as teachers since 1939, according to the records of the department." The Milwaukee Journal, Sept. 28, 1951.

¹¹⁸ Report by Senty and Peterson to Supt. Watson (typewritten), dated Nov. 2, 1951, in the files of the Dept. of Public Instruction.

¹¹⁹ *Ibid.* "Of the 203 pupils attending . . . all except six or eight are transported to and from school daily. . . . Each contract has a clause stating that the driver is 'to transport all elementary pupils residing on the route' . . . We were informed that the busses also transport all the high school pupils, but board members stated that they do not know how much each parent of a high school child pays the bus driver. . . . They did say that parents of high school pupils pay this direct to bus drivers." *Ibid.*

The teaching staff comprised five sisters and two lay teachers all of whom were certified by the Department of Public Instruction. The report of Senty's and Peterson's investigation continued:

The question of selection of teachers was discussed with the board. The only information we received was that the board requested the mother house for six sisters and shortly before school opened they were informed that only five are available. . . . It was pointed out to the board that under present conditions they have no voice in the actual *selection* of teachers for their school. They do not know the individuals nor have they had the opportunity to interview the sisters prior to the time that they report for work. So far as we were able to determine by direct question that was put to Sr. Xavera, principal of the school, the only supervision that the teachers receive is from the State Department of Public Instruction and from the office of the County Superintendent of Schools. The entire staff attended a full day institute of parochial school teachers . . . held in Marshfield last year. The sister who teaches music in the high school on several occasions has assisted the elementary teachers. . . .¹²⁰

Among the textbooks in use the investigators found several published by companies which specialize in publishing Roman Catholic textbooks including one with a fly leaf containing the following inscription:

New York, Feb. 26, 1936—Nihil obstat:
Arthur J. Scanlan S.T.V. Censor Librarian
Imperator—Patrick Cardinal Hayes, Archbishop
of New York—Copyright 1936, 38, 41, 42, 43
by Phillip J. Furlong. NH-4-43-Edition I-M&L
Lima Consolidated State Graded

Lima Town—Pepin Co., Durand, Wisconsin
(stamped)

Copy No. 12¹²¹

A daily class schedule was posted indicating that the subject of "Ethics" was taught in the period from 8:30-9:30 A.M. This was in conflict with information filed with the Department of Public Instruction stating that the school day did not start until 9:30 A.M. The investigators began their visit by entering the building at 8:55 A.M.

¹²⁰ Report by Senty and Peterson to Supt. Watson (typewritten), dated Nov. 2, 1951, in the files of the Dept. of Public Instruction.

¹²¹ *Ibid.* "An examination of the library revealed a Dewey (*sic!*) version of the Holy Bible, a copy of the New Testament in the 8th grade room, and one copy of the Misericordia Reader on the teacher's desk in the 4th grade. . . . The district furnishes free textbooks." *Ibid.*

when they heard "the chanting of prayers" in rooms occupied by grades one and two. Upon inquiring of the whereabouts of Sister Xavera, the principal, they were informed that the upper grade pupils and sisters would be in church until 9:30 A.M. Assistant State Superintendent Senty took this opportunity to visit the third grade room to observe the "Ethics" class where he made the following observation:

Mrs. Rayburn was asking questions contained in *The New Revised Baltimore Catechism Number One* on pages 14 and 15 starting with question No. 26 about Adam and Eve. Each pupil had a copy of the Catechism on the desk and a child would be asked to give the answer to the question. In most instances the answers were read from the book. Some time was then devoted to a short discussion of the meaning of the answer. There is no question in the mind of the observer that this definitely was sectarian religious instruction even though it is listed "Ethics" on the daily class schedule. . . .¹²²

On the basis of factual information presented in the report, Supervisors Senty and Peterson recommended to State Superintendent Watson "that state and county aids to the Lima Graded School be denied."¹²³

Facts from this investigation could not plausibly have been introduced as evidence by District Attorney Bartholomew, to buttress prosecution of William Fox, tending to indicate as they did that the latter was apparently correct in his claim that the Lima School was not a public school. Since lower court procedures are unreported in Wisconsin no published court record of the Lima controversy exists. For some reason that eludes public knowledge William Fox has never been brought to trial. According to Superintendent Watson, the parochial versus public status of the school never was judicially considered and, of course, the court "did not rule on the propriety or non-propriety of Catholic sisters teaching in a public school."¹²⁴

¹²² Report of Senty and Peterson to Supt. Watson (typewritten), dated Nov. 2, 1951, in the files of the Dept. of Public Instruction. "In our opinion there was no evidence of the presence of religious pictures that might be objected to by the member of any religious faith." *Ibid.*

¹²³ *Ibid.*

¹²⁴ Copy of letter from Supt. Watson to Maurice H. Terry, Director, Nat'l Conf. of Christians and Jews, Inc., 759 N. Milw. St., Milwaukee, Wis., dated Jan. 17, 1952, in the files of the Dept. of Public Instruction. "The present controversy at Lima originated in a proposal to attach a one-room rural school district to the Lima School District. This attachment . . . was upheld by the circuit judge. While it is altogether probable that the basic opposition to the attachment was the make-up of the Lima School faculty, that aspect was never mentioned in the circuit court hearing of the case. . . . Judge White, who presided . . . simply ruled upon the processes used in the attachment of the school districts." *Ibid.* Parents of school children in the Averill rural school district, to be attached, had objected to the attachment for the reason that their Protestant

Thus Superintendent Watson was thwarted in his hope "that the question be determined in the courts which is proper in our way of life."¹²⁵ Instead, the question became his to determine, for he was deluged with protests against the Lima and like situations. Typical of such protests was that made by St. Paul's Lutheran Church of Bonduel, Wisconsin, urging him to correct those "intolerable" situations "permitting Roman Catholic nuns to teach in public schools in their garb as Catholic nuns, placing pictures of Roman Catholic design upon the walls, and forcing children of Protestant persuasion, or of no religious convictions, to attend a school permeated by the religious spirit of Catholicism."¹²⁶

Now fortified with information from the Lima investigation, Superintendent Watson could reply to the many complaints with the assurance that something was being done by his Department. "The only pertinent question," he wrote, "is whether the school is being conducted in accordance with the statutes and the Constitution of the state."¹²⁷ Although he lamented that "we have no specific Wisconsin judicial authority at the moment,"¹²⁸ he could soon assert that "we are getting all of the information that we can in each of these several situations."¹²⁹

Thirteen Other Schools

During the months of November and December, 1951, those schools, in which the Department of Public Instruction knew Cath-

children would be influenced by Catholicism in the Lima School. The Madison Capital Times, Aug. 9, 1951. The court's validation of the attachment proceedings prompted Ellis H. Dana, executive vice-president of the Wisconsin Council of Churches, to charge publicly that "Roman Catholic aggression in Wisconsin on the march." The Madison Capital Times, Aug. 14, 1951.

¹²⁵ Copy of letter from Supt. Watson to Mrs. A. C. Brommer, *op. cit.*, *supra*, note 113.

¹²⁶ Letter from St. Paul's Lutheran Congregation of Bonduel, Wis., by its pastor, W. J. Plischke, to Supt. Watson, dated Oct. 31, 1951, in the files of the Dept. of Public Instruction, indicating copies thereof sent to Hon. Walter Kohler, Senator Gordon Bubolz, and Assemblyman Robert Marotz. "Whereas, the encroachment of the Roman Catholic Church upon the school system will be enlarged until it spreads over the entire state, unless it is effectively checked," the annual convention of the Wisconsin District Brotherhood of the American Lutheran Church adopted a resolution protesting to Superintendent Watson "this violation . . . of the basic law of our land. . . ." Letter from Wilmer F. Klipstine, Secretary, 39 E. Cotton St., Fond du Lac, Wis., to Supt. Watson, dated Dec. 31, 1951, in the files of the Dept. of Public Instruction.

¹²⁷ Copy of letter from Supt. Watson to Rev. Robt. A. Edgar, Glenview Community Church, 1000 Elm St., Glenview, Ill., dated Dec. 19, 1951, in the files of the Dept. of Public Instruction.

¹²⁸ Copy of letter from Supt. Watson to Wilmer F. Klipstine, *supra*, note 126, dated Jan. 31, 1952, in the files of the Dept. of Public Instruction.

¹²⁹ Copy of letter from Supt. Watson to Mrs. Joseph Josa, Jr., 3428 E. Van Norman Ave., Cudahy, Wis., dated Nov. 6, 1951, in the files of the Dept. of Public Instruction.

olic nuns were employed, were investigated by the Department. There were thirteen such schools.

On November 7, 1951, Assistant Superintendent Senty accompanied by two county supervising teachers, visited St. Mary's School, Town of Jefferson, Monroe County. The so-called public school consisted of grades six, seven, and eight housed in one room of a four-room building owned by St. Mary's Catholic Parish and taught by a Catholic sister. The rest of the building was occupied by the St. Mary's parochial elementary school and a two-year parochial high school.¹³⁰

The investigators found Catholic edition textbooks, marked as having ecclesiastical approval, for use in reading, language, and history courses. "The Cathedral Readers . . . were used on the day of the visit." School was closed for holy days, although made up on several Saturdays. Report cards were those used for the entire school with the heading: "*Diocese of La Crosse*." Other evidences of sectarian instruction were indicated by Catholic books on the shelves of the classroom and the class activity at the time of the visit, the latter described as follows:

When we entered the room the pupils were preparing the outline at their seats for a theme on education. On the blackboard there were several words that apparently served as guides in these outlines.

Outline on Blackboard

Teacher—Apostle

Christ

Church

Parents—Children

Parochial

The above outline was not discussed in our presence but was on the blackboard all forenoon.¹³¹

The clerk of the school board disclosed, moreover, that the board had no contract with the teacher "because they never know who will be sent 'by the Mother House of the Order until school starts.' " Assistant Superintendent Senty recommended to Superintendent Watson that the St. Mary's School "is not a public school and should receive no state or county aids."¹³²

On November 13, 1951, Senty visited the North Creek Graded School at Arcadia, Wisconsin. It, too, was housed in a building

¹³⁰ Report by Senty to Supt. Watson (typewritten), dated Nov. 9, 1951, in the files of the Dept. of Public Instruction.

¹³¹ *Ibid.*

¹³² *Ibid.*

owned by a Catholic parish. The only information secured that tended to be prejudicial to its status as a public school was the following:

1. The sisters stated that religious instruction is given in the classroom before 9 a.m. on regular school days.

2. Sisters are assigned to the school by the mother order to which they belong. The board of education has no voice in the selection of the individuals.

3. Miss Sylfest [County Supt. of Schools] stated that she has been informed that two . . . Protestant families living in the district refused to send their child (*sic!*) to this school and the district is sharing payment of the tuition to neighboring districts. The district pays part and the parents pay part.¹³³

Senty visited the Askeaton School in Brown County on November 28, 1951. It consisted of a two-room building with grades two through eight taught by two sisters. First grade pupils attended a Catholic parochial school in a building owned by the local parish. Assistant Superintendent Senty found "some resentment" expressed because "last year's report . . . called attention to the fact that the pupils recited the prayer 'Hail Mary' as part of the opening exercise."

Sr. Virgines stated that in view of the fact that the school board had granted them permission to open with prayer and since there are only Catholics in attendance, they see no reason why the State Superintendent should object to prayer.

I told them that even though we are well aware that people should do more praying a Catholic prayer is out of place in a public school. I . . . was informed that it has been discontinued.¹³⁴

There was "no evidence of sectarian instruction" on the day of the visit "aside from these two facts": (1) the school closed for church holidays, but time was made up; and (2) the sisters were assigned to the school by the mother order.

Investigator Senty visited the Mt. Calvary School in Fond du Lac County on November 27th. Only ninth and tenth grade pupils were enrolled and were taught by one Catholic nun. "Among the periodicals . . . were noted: . . . Catholic Digest, several issues of Catholic Comics: (a) Truth about Cardinal Mindzenty (b) Sister Mary, a

¹³³ Report by Senty to Supt. Watson (typewritten), undated, in the files of the Dept. of Public Instruction.

¹³⁴ Report by Senty to Supt. Watson (typewritten), dated Nov. 30, 1951, in the files of the Dept. of Public Instruction. Senty was asked what he thought of the practice of a high school choir singing the *Ave Maria*. "I stated that in my experience as a school administrator the only person who had ever objected to the use of that song by a school choir was the Catholic priest at Plymouth who in one breath stated that the public school is training a generation of religious illiterates and in the next breath objected to the singing of *Ave Maria* and other sacred songs on the part of a high school choir." *Ibid.*

supply of Catholic Truth Leaflets."¹³⁵ Again, the sister was assigned to the district by the mother order. Although no state or county aid had been received by the district for several years, Assistant Superintendent Senty recommended:

1. This school is not a public school and is being operated by funds raised through taxation.

2. This department should not carry the school on its records because it is operated illegally. We should not recognize a ninth and tenth grade setup as a school.¹³⁶

Still another school visited by Senty on November 27, 1951, also in Fond du Lac County, was the Marytown School. It, likewise, consisted of only two grades, one and two, while the children of grades three through eight attended Marytown Catholic Parochial School. Aside from school being closed for religious holidays and assignment of the sisters by the mother house, it was found that religious instruction was given in the school before regular class work began.¹³⁷

On the following day, November 28, the Gray Hill School in the Town of Eaton, Brown County, was visited. All eight grades were taught by one sister assigned by the mother order. Some children of Protestant families were in attendance. This school, also, was closed for church holidays, but all religious instruction was "given in the church by the priest."¹³⁸ The New Franken School of Brown County was likewise investigated on November 28. The findings were practically the same as those in the Gray Hill School, except that here three sisters taught the eight grades. The investigator did not find any sectarian books or magazines, but he made note of the fact that "they were informed of the visit."¹³⁹

On November 29, 1951, Senty visited the Holy Cross School, Town of Belgium, Ozaukee County, operated in a building owned by the

¹³⁵ Report by Senty to Supt. Watson (typewritten), dated Nov. 29, 1951, in the files of the Dept. of Public Instruction.

¹³⁶ *Ibid.*

¹³⁷ Report by Senty to Supt. Watson (typewritten), dated Nov. 29, 1951, in the files of the Dept. of Public Instruction. "At present there are no protestant families in the district who have children of school age. In the past there have been protestant children, and they were admitted to the district school and were taught along with grades 1 and 2. . . . This school was started five or six years ago by employment of a nun when it was difficult to secure a regular teacher for the school. A letter came from Mr. Callahan [former State Supt. of Public Instruction] dated June 4, 1943, stating that the employment of a nun is legal but that religious instruction should not be given 'in the building, at least not during regular school hours.' " *Ibid.*

¹³⁸ Report by Senty to Supt. Watson (typewritten), dated Dec. 3, 1951, in the files of the Dept. of Public Instruction.

¹³⁹ Report by Senty to Supt. Watson (typewritten), dated Dec. 3, 1951, in the files of the Dept. of Public Instruction.

Holy Cross Parish and consisting of only grades six, seven, and eight. Grades one through five were housed in the same building as the Holy Cross Catholic Parochial School. There were "two or three pictures including one of George Washington, and one of Jesus on the cross hanging on the front wall" of the so-called public school classroom. The sister was assigned by the mother order and school closed for religious holidays.¹⁴⁰

H. I. Peterson, State Supervisor of Elementary Schools, investigated the Tennyson School in Grant County on December 3, 1951. Consisting of only grades three and four it was housed "in a building some distance from the parochial school which the rest of the children attend."¹⁴¹ Catholic approved textbooks were found in use in the reading, geography, science, and language courses and Catholic literature was found on the library table. Peterson's report continued:

In answer to a direct question Sister M. Wilfrid stated that the character training was mostly religion. The one protestant child usually does arithmetic during this period. . . .

The Sister informed me that she attended a one day [Diocese] session in Madison and participates in the teacher meetings held at St. Andrews. [She] is in her fourth year at this school. . . . She informed me that each spring she informs the board in writing that she will return or another Sister will take her place. She signed a contract in the fall when she returned to the school. . . assigned by the Mother House.¹⁴²

Supervisor Peterson went to the Middle Ridge School of La Crosse County on December 4, 1951. Operating as a public school and consisting of grades one through four it was housed "in a building across the road from the church and parochial school where the upper grades attend."¹⁴³ Religious holidays were observed by closing the school and religious instruction took place in the church forty-five minutes prior to the start of the regular school day. The single sister teacher was assigned by a mother house. "There was no evidence of religious pictures or symbols other than a picture of Christ Blessing Children and the motto 'Father We Thank Thee.' No magazines or books of a religious nature were in evidence."¹⁴⁴

¹⁴⁰ Report by Senty to Supt. Watson (typewritten), dated Dec. 3, 1951, in the files of the Dept. of Public Instruction.

¹⁴¹ Report by Peterson to Supt. Watson (typewritten), dated Dec. 6, 1951, in the files of the Dept. of Public Instruction. "The parochial school is part of the Madison diocese." *Ibid.*

¹⁴² *Ibid.* School closed for religious holidays. "No religious picture other than the head of Christ were visible. The motto 'Dearest Lord We Thank Thee' appeared on one wall." *Ibid.*

¹⁴³ Report by Peterson to Supt. Watson (typewritten), dated Dec. 6, 1951, in the files of the Dept. of Public Instruction.

¹⁴⁴ *Ibid.* "All texts are on the approved County List." *Ibid.*

One of the more interesting schools was the Odanah School, Ashland County, visited by Walter B. Senty on December 5, 1951. The two-story building was owned by the order to which the ten teachers, all Catholic nuns, belonged, and was rented to the district for a nominal sum. Of 238 pupils about 80% were Indian children for whose education the Federal Indian Agency reimbursed the State of Wisconsin part of the cost. Only about fifteen pupils were non-Catholics.¹⁴⁵

Although the textbooks were all of the standard edition used in the public schools, Catholic literature was in evidence in and about the classrooms. On the reading table of one classroom was a copy of *Mine*, a Catholic juvenile magazine. In another room on the teacher's desk was a copy of *Colored Harvest*, a magazine published "With Ecclesiastical Approval." In the central library were two boxes on a shelf each containing fifteen or twenty copies of the *Baltimore Catechism*. Senty discussed these items with the principal.

- I was informed that the catechisms are kept in those boxes during the day for the Catholic pupils who use them for religious instruction at the church before school opens in the morning. Every one of the Sisters was emphatic in the statement that there is no religious instruction in the school building at any time. The two magazines belonged to the sisters. . . .¹⁴⁶

Again, the sisters were assigned by the mother order, "but the local board has refused to re-elect sisters in several instances. All are under contract."¹⁴⁷

On the same day that Senty visited the Odanah School, Peterson visited the Germantown School in Richland County. Operating as a public school it comprised only grades five through eight and occupied one room of a two-room building owned by the district. The other room was devoted to a parochial school of grades one through four. It was found that religious instruction was given in the school building each morning before 9 A.M. School was dismissed for religious holidays and for the day Sister Nicolette, the teacher, attended a diocese conference at La Crosse; but all such days were made up. She was assigned by the Mother House at La Crosse. There was no evidence of religious pictures, symbols, or tracts, but "two copies of the 'St. Rose Hymnal' were seen."¹⁴⁸

¹⁴⁵ Report by Senty to Supt. Watson (typewritten), dated Dec. 6, 1951, in the files of the Dept. of Public Instruction.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ Report by Peterson to Supt. Watson (typewritten), dated Dec. 6, 1951, in the files of the Dept. of Public Instruction.

The last and fourteenth of the schools investigated in the fall of 1951, in which were employed Catholic sisters, was the Frey School, Town of Roxbury in Dane County. Assistant Superintendent Senty found this school as having only grades five and six located in a parish-owned building in which parochial school grades one through four, seven, and eight were also accommodated. In the room rented by the district for the public school grades there was "a crucifix with Jesus on the front wall and a motto above the front blackboard . . . 'I am the Emaculate (*sic!*) Conception.'"¹⁴⁹

In addition to the *Baltimore Catechism* and the *Cathedral Reader* being used as textbooks, the report card used had "Madison Diocese written on it and has a grade in religion entered by the sister and signed by both Sr. Dominic and Fr. Waldkirk." Religion was taught by the priest usually in another room of the building. Senty's report continued:

In a conference after school the report cards, Cathedral Readers and religious instructions were discussed with Sr. Dominic. She stated, "After all the priest wants this, and he is the principal of the school, so what am I to do?" I told her that if this is a public school the priest has no jurisdiction over it, but the school is directly under the supervision of the county superintendent.

"Should we change report cards now?" I advised her to discuss this with Miss Losinski [Dane County Superintendent of Schools].

This is not a public school and should not be recognized as such. It should not receive state nor (*sic!*) county aid.¹⁵⁰

State Aid Denied

Only one practice was common among all fourteen schools investigated by the Department of Public Instruction. This was the employment of garbed Catholic nuns as teachers, who were assigned to the schools by the Roman Catholic Church. After receiving the reports of the investigators, Superintendent Watson consulted with the Attorney General,¹⁵¹ and received a copy of the Religious Garb Statute of North Dakota: "Prohibiting Wearing of Religious Dress or Garb by Public School Teachers."¹⁵² Following these developments,

¹⁴⁹ Report by Senty to Supt. Watson (typewritten), dated Dec. 7, 1951, in the files of the Dept. of Public Instruction.

¹⁵⁰ *Ibid.*

¹⁵¹ Copy of letter from Supt. Watson to Governor Kohler, dated June 26, 1952, in the files of the Dept. of Public Instruction.

¹⁵² Letter from M. F. Peterson, Supt., Dept. of Public Instruction of the State of North Dakota, to Supt. Watson, dated Dec. 21, 1951, in the files of the Dept. of Public Instruction.

he was made the object of a comprehensively documented brief submitted by an organization calling itself the Bill of Rights Committee.¹⁵³

"It has come to our attention," stated the Committee, "that at least 14 schools within the state, (list enclosed), . . . are operated in violation of . . . constitutional provisions and . . . statutes designed to prevent sectarian influence." The Committee asked, therefore, that Superintendent Watson deny "public funds" to these schools.¹⁵⁴

Most if not all sectarian practices found by the investigators, Senty and Peterson, were set forth in summary manner, in the petition by the Bill of Rights Committee as "illegal practices pursued" in the fourteen schools. It charged that the wearing of distinctive religious dress by the teachers "is in itself a teaching of sectarianism."¹⁵⁵ The Committee claimed, moreover, that the mode of selection of the teachers violated Section 40.775, Wisconsin Statutes, prohibiting religious discrimination in the hiring of teachers. Such selection imposes "a religious test," was the reasoning, denies "equal opportunity for placement as teachers," and amounts to "subcontracting with a particular parish or religious order." The Committee believed, furthermore, that payment of public money for the services of Catholic nuns was "in substance" the drawing of money from the state treasury for the benefit of a religious society in contravention of the Wisconsin Constitution.¹⁵⁶

To employ the members of a religious order as a teaching staff of a public school, means that the effectual control of the personnel and of the teaching content is transferred from the elected representatives of the public school system to ecclesiastical authorities. When, pursuant to that practice, the teacher's

¹⁵³ Letter from E. C. Pommerening, Exec. Sec., Bill of Rights Committee, 231 W. Wisconsin Ave., Milwaukee, Wis., to Supt. Watson, dated Feb. 15, 1952, in the files of the Dept. of Public Instruction. According to The Milwaukee Journal of Oct. 11, 1951, the Bill of Rights Committee was formed by a vote of a meeting of the Lutheran Men in America which planned " 'eternal vigilance' and action to halt 'the Roman Catholic church's invasion of Wisconsin public schools.' "

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*, citing *Zellers v. Huff*, 55 N.M. 501, 236 P. 2d 949 (1951). For decisions in accord, see, also: *Knowlton v. Baumhover*, 182 Iowa 691, 166 N.W. 202 (1918); *Commonwealth v. Herr*, 229 Pa. 132, 78 Atl. 68 (1910), but see, *infra*, note 156; *O'Connor v. Hendrick*, 184 N.Y. 421, 77 N.E. 612 (1906). For untested statutes forbidding public school teachers wearing religious garb, see: *NEB. REV. STAT.* § 79-1403 (1943); and *Ore. Comp. Laws Ann.*, §§ 111-2106, 2109 (1940).

¹⁵⁶ *Op. cit.*, *supra*, note 153. The highest courts of Connecticut, Indiana, North Dakota, and Pennsylvania, in ruling that the employment of public school teachers clothed in religious dress is permissible, also ruled that their contributing part or all of their compensation to religious societies or orders is not the business of the state. *New Haven v. Torrington*, 132 Conn. 194, 43 A.2d 455 (1945); *State ex rel. Johnson v. Boyd*, 217 Ind. 348, 28 N.E.2d 256 (1940); *Ger-*

garments, accessories, and her demeanor and observances in and about the school proclaim her adherence to the doctrine of a particular church, the teaching becomes impregnated with the atmosphere of sectarianism. If nothing more, she is teaching by example, day by day, hour by hour, the worthiness and desirability of affiliation with her particular church.¹⁵⁷

It is not known how the fourteen reports came to the notice of the Bill of Rights Committee. One Catholic publication was later to accuse Superintendent Watson of having "obligingly cooperated with the Milwaukee Protestant group in supplying them with the list of 14 public schools 'dominated' by the Catholic Church."¹⁵⁸ Upon inquiry from State Senator Arthur A. Lenroot, Jr., Superintendent Watson replied:

My only letter from them [was] received during February. . . . I think it is unfortunate (because I know it to be untrue) that the inference is being repeatedly made that our action was caused by the petition from this group. This whole matter was discussed publicly by me last September following the series of incidents in the Lima School in Pepin County. Our official visits to these several schools were made during October, November and December, 1951.¹⁵⁹

hard v. Heid, 66 N.D. 444, 267 N.W. 127 (1936); *Hysong v. School District*, 164 Pa. 629, 30 Atl. 482 (1894). The North Dakota legislature has since prohibited the wearing of religious garb by public school teachers. N.D. Laws 1949, c.356 *op. cit.*, *supra*, note 152.

In August, 1952, the Logan County District Court in Colorado rendered a decision in the unreported case of *Outcalt v. Hoeffler* holding that the use of a former parochial school building as a tax-supported public school, at which the sister-teachers wore clerical dress and gave sectarian instruction before 9 A.M., violated the separation of Church and State clauses of both the United States and Colorado Constitutions. The court said: "The court in no way criticizes the Sisters for their religious beliefs or for their religious lives, but, on the contrary, they have its highest respect. But the religious sectarian influence exerted by them in their religious classes could not be laid off as a cloak when they took these same children into the school room for secular instruction. They were the same persons symbolizing the same ideal sectarian religious life and their devotion to the Catholic faith. Their wearing of the distinctive ecclesiastical garb cannot be wholly disregarded, but it must be considered as a circumstance of the school arrangement; and the fact must be recognized that while giving religious instruction and while they were serving as public school teachers, their garb held them before the children as sectarian ecclesiastical persons." Joint Memorandum of the American Jewish Committee and the Anti-Defamation League of B'nai B'rith, New York to CRC Offices, American Jewish Cong. Area Offices, and Anti-Defamation League Reg. Offices, dated, Nov. 7, 1952; see, *supra*, note 84.

¹⁵⁷ *Op. cit. supra*, note 153.

¹⁵⁸ An editorial of The Catholic Herald Citizen, official publication of the Madison and Milwaukee Catholic dioceses, as quoted in The Madison Capital Times, March 21, 1952, p. 1, col. 6. But The Milwaukee Journal had reported, on Sept. 28, 1951, that Supt. Watson had publicly listed the fourteen schools.

¹⁵⁹ Copy of letter from Supt. Watson to Arthur A. Lenroot, Jr., State Senator, 11th District, dated March 24, 1952, in the files of the Dept. of Public Instruction.

As Superintendent Watson reported to Governor Kohler, the procedure followed with respect to the fourteen schools was decided "after much consultation with the Attorney General and several of his assistants."

There was agreement in our discussions with the Attorney General's staff that if a school district was determined to be violating these statutes that the state superintendent had no choice about withholding aids. There was further agreement that there existed no statutory provision for paying school aids for a portion of a school year.¹⁶⁰

On March 14, 1952, Superintendent Watson made known his unprecedented decision to deny state aid to each of the fourteen schools. He sent letters to the clerk of each school district concerned.¹⁶¹ All were similar in content to his wording of the directive regarding the Askeaton School in Brown County:

It is my belief that your school board has violated the laws of Wisconsin relating to the employment of teachers. Section 40.775 of the Wisconsin Statutes, entitled *Race, religious, political discrimination as to teachers prohibited*. . . .

It is evident that your board has determined to hire a teacher of a specific religious faith. In so determining, you have engaged in a discriminatory act as defined above and have also abdicated from your statutory responsibility of *choosing* a teacher.

Therefore, on the basis of section 40.775 (1) of the statutes, I have decided that the operation of your school is contrary to the laws of Wisconsin governing public schools. . . .

Because your school is not being operated in accordance with the laws of the state of Wisconsin governing public schools, I have directed that any aids, which might otherwise be due, shall not be paid.¹⁶²

Where the investigations had uncovered definite evidence of sectar-

¹⁶⁰ Copy of letter from Supt. Watson to Governor Kohler, dated June 26, 1952, in the files of the Dept. of Public Instruction.

¹⁶¹ According to an opinion of Attorney General Fairchild addressed to Supt. Watson, "it is . . . the superintendent's responsibility to the public to correctly interpret and apply the law which defines his powers and duties. The attorney general's services are available to the superintendent whenever he feels in need of same. But the superintendent owes no duty to any individual to request an opinion of the attorney general merely because such individual differs with the superintendent upon a question of statutory construction. In situations where the superintendent is accountable in some manner for his actions, it is, of course, evidence of good faith on his part to seek an opinion in a doubtful case and to follow the advice. But he is not under any compulsion to follow an opinion." 39 OPS. WIS. ATT'Y GEN. 41, 43-4 (1950).

¹⁶² Copy of letter from Supt. Watson to Thos. Hanaway, Clerk of School Dist. No. Jt. 2, Holland, Route 1, Greenleaf, Wis., dated March 14, 1952, in the files of the Dept. of Public Instruction.

ian instruction, in eight¹⁶³ of the fourteen schools, the following paragraph was inserted in the directives, as in the case of the Frey School in Dane County:

Section 14.57 (2) of the statutes, pursuant to the constitution, directs the state superintendent as follows: "He (the state superintendent) shall exclude all sectarian books and instruction from the public schools."¹⁶⁴

Aftermath

The *Catholic Herald Citizen*, an official Wisconsin Catholic newspaper, labeled Superintendent Watson's action as "ill-advised, narrowly secularistic, and arbitrarily inconsistent." The editorial asked whether Watson intended to cut off state aid to schools in which "Protestant hymns are sung regularly in school programs;" Protestant Bibles "are distributed on public school premises with the approval of the school authorities;" and public high school baccalaureates "are held in Protestant churches on the grounds that it has become a tradition."¹⁶⁵ In conclusion, the editorial stated:

The whole question of public education is not merely constitutional and legal, as Mr. Watson seems to think. It is also moral and spiritual. Justice will not be done until the rights of all American school children are equally upheld, not only in the light of man-made law, but primarily in obedience to God's law.

Only then will there be social harmony and peace.¹⁶⁶

Other charges were leveled. Upon informing a sister teacher of the Askeaton School that her contract would not be renewed, Thomas Hanaway, the clerk of the district, told her that the only reason was that "Mr. Watson does not approve of your religion."¹⁶⁷ The state superintendent replied:

¹⁶³ Lima, St. Mary's, North Creek, Holy Cross, Marytown, Tennyson, German-town, and Frey schools.

¹⁶⁴ Copy of letter from Supt. Watson to Mr. Herbert Reuter, Clerk of School Dist. No. 2, Roxbury, Sauk City, Wis., dated March 14, 1952, in the files of the Dept. of Public Instruction. Where applicable the following statement was inserted, as in the Frey School letter: "The statutes also define a common school as one having the first eight grades." *Ibid.*

¹⁶⁵ As quoted in The Madison Capital Times, March 21, 1952, p. 1, col. 6. The Herald Citizen's editorial declared that "Mr. Watson chooses to see 'a religious test' being made in favor of religion," when rural public school boards prefer to hire Catholic school sisters. "But he seems oblivious to the fact that he is applying a similar test in favor of the religion of secularism each time his office refuses to grant licenses to teachers who have graduated from Catholic colleges and unlimited certificates to qualified parochial school lay teachers." *Ibid.* See note 112 *supra*.

¹⁶⁶ As quoted in the Madison Capital Times, March 21, 1952, p. 2, col. 4.

¹⁶⁷ Letter to the Editor, The Capital Times, Madison, Wis., for Supt. Watson from Thos. Hanaway, Clerk of Jt. Dist. No. 2, Town of Holland, Brown County, dated May 4, 1952, in the files of the Dept. of Public Instruction.

I expressed no approval or disapproval of the religion of your teacher. I did state that the law prohibits your board from discriminating in the hiring of a teacher, such discrimination being evident in the intent of your board to hire a teacher of a specific religious affiliation.¹⁶⁸

According to the *Green Bay Press-Gazette*, Mr. Hanaway also ascribed to Superintendent Watson the statement that "we must hire teachers of a different religion."¹⁶⁹ The superintendent flatly denied such authorship, and he added:

Section 40.775 of the statutes establishes the concept that the religious affiliation of the teacher shall not be a factor in the employment of teachers in the public schools. If a procedure of employment is followed wherein that knowledge of religious affiliation becomes a factor, then, in our opinion, the statutes have been violated. The question is not the religious affiliation of a teacher, but rather the evident intent of the board to restrict its employment to *any one religious affiliation*, whatever that faith may be.¹⁷⁰

By his action, Superintendent Watson denied state and county aids to the fourteen schools. In regard to the only source left for public funds, he said: "We have not entered into the question of local tax support of any of these schools because that is not our right or responsibility."¹⁷¹ He took the position that they were still public schools, which were "not operating in accordance with the statutes governing the operation of public schools."¹⁷² Accordingly, he had a "very pleasant and constructive meeting" with the Lima School Board in which "certain specific conditions were laid down for the proper operation of their school district affairs."¹⁷³

¹⁶⁸ Copy of letter from Supt. Watson to Thos. Hanaway, *supra*, note 166, dated May 7, 1952, in the files of the Dept. of Public Instruction.

¹⁶⁹ Editorial in the *Green Bay Press-Gazette*, May 6, 1952.

¹⁷⁰ Copy of letter from Supt. Watson to Editor, *Green Bay Press-Gazette*, dated May 9, 1952, in the files of the Dept. of Public Instruction. State Senator Lenroot wrote Watson that his action in shutting off funds to the Odanah School, "which almost exclusively serves the Indian children at Odanah, . . . raised a question of race discrimination by not furnishing or affording the children of that area the opportunity of attending School." Letter from Arthur A. Lenroot, Jr., to Supt. Watson, dated March 21, 1952, in the files of the Dept. of Public Instruction. The superintendent replied: "This department is not the responsible party in the furnishing of education or in the establishment of schools free to all without exception as to race and without sectarian instruction. That is a responsibility of the school district. Our solution is that the district should operate a school in accordance with the statutes free and open to all children in the district." *Op. cit. supra*, note 159.

¹⁷¹ Copy of letter from Supt. Watson to Rev. S. Herbert Austin, Minister, Methodist Church, Durand, Wis., dated May 9, 1952, in the files of the Dept. of Public Instruction.

¹⁷² Copy of letter from Supt. Watson to John S. Bartholomew, Dist. Att'y, Pepin County, Durand, Wis., dated March 29, 1952, in the files of the Dept. of Public Instruction.

¹⁷³ *Op. cit. supra*, note 171.

There is some evidence that the immediate monetary effect of Superintendent Watson's decision may have been exaggerated by those opposed to his order. Actually, seven of the fourteen schools were reported as not receiving state aid when the order was issued. They were supported by local school taxes. Any action to deny them funds from local school tax levies would presumably have to be taken by a local taxpayer's suit. At least four of these schools—the Tennyson, Middle Ridge, New Franken, and Marytown schools—continued operation on a local tax basis, with Catholic nuns still employed as teachers, during the fall of 1952. Their school clerks said that there would be no religious instruction in these schools. Three schools—the Lima, St. Mary's, and Holy Cross schools—were converted to Catholic parochial schools. Only one school was reported to have modified its arrangements to accord completely with the conditions implied by Watson's ruling. This was the Askeaton School in Brown County, which hired two lay teachers to replace the nuns. The Askeaton School had operated 51 years with nuns as teachers.¹⁷⁴

GENERAL CONCLUSIONS

Sectarian instruction of Wisconsin public school pupils is a very complex subject. It cannot be analyzed *generally* from *the* Protestant position in conflict with *the* Catholic position, if indeed such identifiable positions do exist. Claims that separation of Church and State is abridged and freedom of worship is violated find their source most often in the Catholic faith when Bibles are read or distributed in public schools, when high school baccalaureate or graduation exercises are held in churches, and when hymns are sung or prayers are rendered in public school programs. On the other hand, these constitutional principles have been invoked most often by non-Catholics when the propinquity of Catholic churches or parochial schools to public schools obscures their distinction, and when religiously garbed teachers are employed in the public schools.

Hence, the principle of separation as applied to all aspects of sectarian instruction of public school pupils cannot be reduced to simply a Catholic versus non-Catholic context. This may be further illustrated by comparison of two recent statements concerning religion and public education, both reported on the same day in the same newspaper:

¹⁷⁴ The Milwaukee Journal, Aug. 31, 1952. "There has been no decision on what to do at the Odanah school in Ashland county." *Ibid.*

We recognize that the state has a legitimate and even necessary concern with education. But if religion is important to good citizenship—and that is the burden of our national tradition—then the state must give recognition to its importance in public education. The state therefore has the duty to help parents fulfill their task of religious instruction and training.¹⁷⁶

The aim of education is not to produce children and youth who are merely informed and skilled, but without moral and religious commitments. The aim of education is rather to produce the citizen of deep and intelligent convictions. This is the heart of the public schools' task and without question it involves implications that are moral and religious in nature.¹⁷⁶

The first statement was made by the Roman Catholic bishops of the United States on November 15, 1952, and the second was uttered on the same day by the chairman of the New York University department of religious education before 1,250 members of the Protestant Teachers' Association of New York.

National Protestant leaders have criticized the bishops' statement.¹⁷⁷ It would appear, however, that Protestant churches in Wisconsin are not justified, on the basis of the record, in claiming more over-all consistency on the whole issue of sectarian instruction of public school pupils than the Roman Catholic Church. The principles of complete separation of Church and State and unabridged religious freedom have been appealed to and ignored by Catholics and non-Catholics alike according to the particular interests that each group was trying to serve when relevant disputes emerged. Wisconsin's experience seems to point to the conclusion that instruction becomes significantly *sectarian* when *religion* is meshed with public school education.

¹⁷⁶ The Milwaukee Journal, Nov. 16, 1952, p. 12, col. 2.

¹⁷⁶ *Id.* at p. 21, col. 3.

¹⁷⁷ The Milwaukee Journal, Nov. 23, 1952, State News Sec., p. 8, col. 1. Indeed, the National Council of Churches of Christ, a federation of 30 Protestant and Orthodox churches with 34 million members, proposed Dec. 12, 1952, that a constitutional way be found, if any, to promulgate Bible reading in the public schools. "The reverent reading of selection from the Bible in public assemblies or classes," said the statement, "would make an important contribution toward deepening" the awareness of pupils of the American "heritage of faith." The Milwaukee Journal, Dec. 12, 1952, p. 1, col. 8. The Journal thought the statement was "fuzzy" in the light of the "controversies" that would be raised, the *Weiss* decision of 1890, and the 90,000,000 membership in American churches. Its editorial raised these questions: "Aren't those thousands of churches and millions of homes and the religious schools the places to give children a knowledge of religion and an inclination toward its great moral concepts? Is religion wise to seek to lean upon the state as a crutch? What strange parent, himself neglecting the religious education of his child, would nevertheless expect the public school to attend it." The Milwaukee Journal, editorial page, Dec. 16, 1952. See also, The Madison Capital Times, editorial page, Dec. 18, 1952.

Part II: Release of Public School Pupils for Religious Instruction

Since World War II a manipulative practice of religious education has been gaining prevalence in many areas of the nation by which public school pupils have been dismissed during certain periods of the week to obtain religious instruction in churches or elsewhere. This practice has been referred to as "released time" or "dismissed time," the terms often used interchangeably. Although the former term is used generically herein, to avoid confusion, one authority has distinguished these terms with the following definitions:

"Dismissed" time is that which schools grant pupils to go to churches, parochial schools, or elsewhere for religious instruction. The public school, by the dismissed time plan, assumes no responsibility after the pupils leave the public school grounds. In more recent years the practice has developed in some instances of permitting the religious instructors, including ministers, priests, rabbis, and various Bible instructors, to come into the public school and take over the religious instruction in certain of the public schoolrooms. The public school officials *release* the pupils certain periods for such religious instruction, hence the term *released time*. It is recognized, however, that a clear distinction between the two terms is not always maintained and the terms are frequently used interchangeably.¹

It has recently been estimated that approximately forty states have some form of authorization for the release of public school pupils for religious instruction.² All states, on the other hand, have variously phrased constitutional clauses requiring a separation of Church and State. For instance, the constitutions of at least forty-five states prohibit the appropriation of public money to schools controlled by religious organizations.³ As a consequence of seemingly incompatible law, judges, attorneys general, and state school officers have frequently found themselves between the horns of a dilemma regarding the status of released time programs the solution of which, in either direction, has brought forth mass vituperation.⁴

¹ JOHNSON AND YOST, *SEPARATION OF CHURCH AND STATE IN THE UNITED STATES* 74, n. 1 (1948).

² *Id.* at 74; but no authority is cited.

³ The citations will be found in: Note, *Catholic Schools and Public Money*, 50 *YALE L. J.* 917 (1941). "Public aid for schools of a sectarian nature, either in the form of a grant of money or the use of public property, is prohibited either directly or indirectly by every state constitution." TORPEY, *JUDICIAL DOCTRINES OF RELIGIOUS RIGHTS IN AMERICA* 234 (1948).

⁴ Materials cited *infra* at note 25. For earlier works on released time, see, e.g., DAVIS, *WEEKDAY CLASSES IN RELIGIOUS EDUCATION* (1941); KEESECKER, *LAWS RELATING TO THE RELEASING OF PUPILS FROM PUBLIC SCHOOLS* (1933); GOVE, *RELIGIOUS EDUCATION ON PUBLIC SCHOOL TIME* (1926); COPE, *WEEK-DAY RELIGIOUS EDUCATION* (1922).

The Wisconsin Supreme Court has never had a released time case before it. This is not to say that the released time issue has been less important in this state. Typically, all major churches in a given community participate in such programs, which may help to account for the absence of complainants in Wisconsin courts and their rare appearance in courts elsewhere. Neither has the state legislature specifically authorized or prohibited such a program. It has fallen to the executive branch of the state government of Wisconsin, therefore, to attempt to resolve the issue of the validity or invalidity of particular released time programs. And among the executive departments that of the attorney general has been the most important.

Raising the Issue in Wisconsin

In 1926, John Callahan, State Superintendent of Public Instruction, requested an opinion of the attorney general as to the legality of a released time plan that had been brought to the former's attention.⁵ The State Superintendent did not disclose the community concerned. A school board plan involved an intricate system of management in which the children were excused for one hour during the week to go to their respective churches for religious instruction.

Cards were provided by the school superintendent to be signed by the parent. On one side of each card was an enrollment blank giving the name of the pupil and the church which was chosen. On the other side was an explanation of the program with a statement warning that the "privilege" would be withdrawn by the school authorities in case of truancy or other violation of the rules. The pupils received the cards from the teachers and took them home. If the parents chose to take advantage of the program they returned signed cards to the teacher who, in turn, gave them to the superintendent. He then sorted them and passed them on to the respective ministers. The legality of the program was raised when several ministers decided to have "one school in place of the several schools that had been running" that they might grade the children and thereby conduct a "better" program. The school board passed a resolution requesting the state superintendent of public instruction to secure an opinion from the attorney general

as to whether or not the school board has a right to dismiss pupils from their respective classes and at the request of parents, for the purpose of securing religious week-day instructions at

⁵ 15 Ops. WIS. ATT'Y GEN. 483 (1926); the opinion was prepared by Assistant Attorney General Suel O. Arnold for Attorney General Herman L. Ekern.

their respective churches for the period of one hour per week during the statutory school month period of twenty days.⁶

In reply, Attorney General Ekern noted that the Wisconsin Constitution prohibits in express terms the payment of any money from the state treasury for the benefit of religious organizations,⁷ and forbids the giving of sectarian instruction in public schools;⁸ and he cited the authority of the Wisconsin Supreme Court for the strict construction of the latter provision.⁹ Moreover, the Wisconsin statutes gave the state superintendent power to prohibit sectarian instruction in the schools.¹⁰

The attorney general proceeded to analyze in detail and with approval a decision by a New York court that had declared a similar program invalid on the grounds: (1) that the printing of the cards violated the New York constitutional provision "which forbids the granting of state aid to denominational schools, a provision similar to sec. 18, art. I of our constitution;" (2) that the New York education law prohibited religious instruction in the schools; (3) that it required the time of teachers "which should be devoted to regular school work;" and (4) that "the pupils who left the school for religious instruction" might fall behind those remaining, which "might cause embarrassment" to some pupils.¹¹

The Wisconsin compulsory school attendance law, he noted, provides that a parent of a school-age child

shall cause such child to . . . attend some public, parochial or private school regularly . . . during the full period and hours of

⁶ 15 OPS. WIS. ATT'Y GEN. 484 (1926).

⁷ *Id.* at 485. ". . . Nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries." WIS. CONST., ART. I, § 18.

⁸ 15 OPS. WIS. ATT'Y GEN. 483, 485 (1926). ". . . no sectarian instruction shall be allowed" in the public schools. WIS. CONST., ART. X, § 3.

⁹ 15 OPS. WIS. ATT'Y GEN. 483, 485 (1926), citing *State ex rel. Weiss v. District Board of Edgerton*, 76 Wis. 177, 44 N.W. 967 (1890), and quoting therein from Justice Orton's concurring opinion (76 Wis. at 220, 44 N.W. at 981) with approval as follows: "No state constitution ever existed that so completely excludes . . . the possibility of religious strife in the civil affairs of the state, and yet so fully protects all alike in the enjoyment of their own religion. All sects and denominations may teach the people their own doctrines in all proper places. Our constitution protects all, and favors none. But they must keep out of the common schools and civil affairs."

¹⁰ It shall be the state superintendent's duty "To prohibit . . . sectarian instruction in the public schools;" WIS. STAT. § 14.57(2) (1925), which now reads: "He shall exclude all sectarian . . . instruction from the public schools." WIS. STAT. § 14.57(2) (1951).

¹¹ 15 OPS. WIS. ATT'Y GEN. 483, 486-7 (1926); discussing *Stein v. Brown*, 211 N.Y.S. 822 in which "a question similar . . . was presented to the New York court." *Id.* at 486.

the calendar year . . . that the . . . school in which such child is enrolled may be in session.¹²

He observed that this statute does not contain a provision found in the New York law which defined a specified number of hours each day that pupils must attend school. "Our statute merely defines the term 'school month' as consisting of twenty days." Hence, the number of hours that pupils must attend school each day is left by the statute to the discretion of the school board. This broad statutory discretion includes the power "to dismiss all or any group of pupils for any reasonable period." Concluding, the attorney general said:

So long as neither the school board nor the teachers, as a part of their school work, have any connection whatever with the dissemination of religious instruction, there will be no violation of the constitution. As pointed out in this opinion the constitution is violated only when the teachers or the school machinery are connected either directly or indirectly with the dissemination of religious instruction.¹³

It would appear that this opinion did not comfort those favoring such a program, for it would require a considerable stretch of imagination to conceive of a released time program that would not entail some connection, however little, between the school board or teachers and those actually disseminating religious instruction. At some point, it would seem, the school machinery must, perforce, "either directly or indirectly" cooperate with the religious institutions or personnel involved. Especially would this appear to be true to get any such program started in the first instance. Yet this opinion of Attorney General Ekern was to remain the only Wisconsin legal authority on the subject until 1948, when the United States Supreme Court rendered a decision that has since stirred widespread controversy in Wisconsin and the nation as a whole.

The McCollum Case

Even if the Wisconsin Constitution could be construed to permit the adoption of a released time program such as that described in the opinion of the attorney general, it would still have to stand the test of validity under the United States Constitution. This considera-

¹² 15 OPS. WIS. ATT'Y GEN. 487; quoting WIS. STAT. § 40.73 (1925), now renumbered § 40.70 (1), WIS. STAT. (1951), with similar provision. The compulsory school attendance provisions of the Wisconsin statutes empower a truancy officer to pick up a child on the street and take him to the proper school, "public, parochial or private." 15 OPS. WIS. ATT'Y GEN. 452 (1926). But it is not necessary for a child to attend school if instructed by his mother, such instruction being equivalent to the manual drafted by the state superintendent. REPT. OF ATT'Y GEN. 343 (1908).

¹³ 15 OPS. WIS. ATT'Y GEN. 483, 488 (1926).

tion requires that reference be made to the famous *McCullum* case¹⁴ decided in 1948. The issue before the United States Supreme Court was the validity of a released time program of religious education in public schools adopted by the Board of Education of Champaign, Illinois, or more specifically—whether such program contravened the First Amendment as it is made applicable to the State of Illinois by the Fourteenth Amendment.

The Champaign Council on Religious Education, a voluntary association of Protestants, Catholics and Jews, obtained permission from the Board to offer religious instruction to public school pupils in grades four to nine inclusive. Like the Wisconsin program, analyzed by Attorney General Ekern, classes were made up of pupils whose parents signed printed cards requesting that their children be permitted to attend such classes. They were held weekly and lasted from thirty to forty-five minutes, depending on the grade. But unlike the Wisconsin program, the classes were taught in regular classrooms of the school building instead of the pupils being dismissed for classes taught on other than school property. The Council employed religious teachers at no expense to the school authorities. These teachers were subject, nevertheless, to the approval and supervision of the superintendent of schools. Pupils who did not choose to take religious instruction were required to remain in the school building and pursue their secular studies. On the other hand, those released for sectarian instruction were compelled to present themselves at religious classes and reports of their attendance were made to their secular teachers.¹⁵

The United States Supreme Court held eight to one, with Justice Reed the only dissenter, that the Champaign Plan violated the Constitution of the United States. The facts show, said Justice Black in delivering the majority opinion, that tax-supported property is used for religious instruction and that cooperation exists between the school authorities and the religious council in promoting religious

¹⁴ *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948).

¹⁵ *Id.* at 207-9. Mrs. Vashti McCollum, an avowed atheist, brought an action (as a resident, taxpayer, and parent of a pupil in the public school), for mandamus against the Board in the Circuit Court of Champaign County alleging that the segregation of public school pupils into sectarian groups for religious instruction during school time violated both state and federal constitutional guaranties of religious freedom. The trial court denied the writ and an appeal was perfected to the Illinois Supreme Court which unanimously affirmed the trial court decision. *Illinois ex rel. McCollum v. Board of Education*, 396 Ill. 14, 71 N.E.2d 161 (1947). The Illinois Supreme Court distinguished *People ex rel. Ring v. Board of Education*, 245 Ill. 334, 92 N.E. 251 (1910), and relied heavily on *People ex rel. Latimer v. Board of Education*, 394 Ill. 228, 68 N.E.2d 305 (1946) which upheld a Chicago dismissed time plan.

education. The operation of the state's compulsory education system, moreover, assisted and was integrated with this program of sectarian instruction.

Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment (made applicable to the States by the Fourteenth) as we interpreted it in *Everson v. Board of Education*. . . . There we said: "Neither a state nor the Federal Government can . . . pass laws which aid one religion, aid all religions, or prefer one religion over another" ¹⁶

It should be inserted here, however, that the majority of the Court reasoned that the establishment-of-religion prohibition controlled rather than the "child benefit" doctrine of the *Everson* case in which the Court upheld a New Jersey program of public transportation of parochial school pupils as aid to the child rather than aid to sectarian education.¹⁷

Justice Black insisted that to hold that a state may not utilize its public school system to aid any or all religious faiths or sects does not manifest governmental hostility to religion, but rather it accords with the basic First Amendment premise that both religion and government can achieve their aims if each is left free from the other within its respective sphere. And he concluded:

Here not only are the State's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery. This is not separation of Church and State.¹⁸

Justice Frankfurter, with whom Justices Jackson, Rutledge and Burton agreed, filed a lengthy concurring opinion in which he reviewed the history of the secularization of American education and the various released time plans that had been employed. Not all such plans are invalid, Justice Frankfurter maintained. "Released time" as a generalized conception, undefined by differences in details,

¹⁶ 333 U.S. 203, 209-10 (1948).

¹⁷ *Everson v. Board of Education*, 330 U.S. 1 (1947). For discussion of the "child benefit" theory, see Boyer, *Public Transportation of Parochial School Pupils*, 1952 Wis. L. Rev. 64, 80-87.

¹⁸ 333 U.S. 203, 212 (1948).

is not a constitutional issue for judicial determination, because there are many crucial differences between local programs. Some are under separate denominational auspices, he observed, while others are conducted jointly to embrace all religious affiliations of a community. In some a limited sectarianism is taught, while others emphasize democracy and moral values not restricted to a particular faith.

Insofar as these are manifestations merely of the free exercise of religion, they are quite outside the scope of judicial concern, except insofar as the Court may be called upon to protect the right of religious freedom. It is only when challenge is made to the share that the public schools have in the execution of a particular "released time" program that close judicial scrutiny is demanded of the exact relation between the religious instruction and the public educational system in the specific situation before the Court.¹⁹

Apparently Mr. Justice Frankfurter was serving warning that his vote with the majority in this instance might not preclude his future acquiescence to a so-called "released time" plan that differed in some "crucial" aspects.²⁰ But the Court does "not now attempt to weigh in the Constitutional scale," he said, "every separate detail or various combination of factors which may establish a valid 'released time' program."²¹ That the child is offered an alternative to being released in the Champaign arrangement does not diminish the inherent pressure by the school system in the interest of religious sects. Non-participating children, he added, "thus have inculcated in them a feeling of separatism when the school should be the training ground for habits of community." Hence, the Champaign Plan "sharpens the consciousness of religious differences."²²

Of the nine justices, eight concurred as to the result on the facts.

¹⁹ 333 U.S. 203, 225 (1948).

²⁰ It is interesting to note that this warning was used to buttress a later decision, in which Justice Frankfurter dissented, when Justice Douglas, for a majority, distinguished the *McCollum* case. *Zorach v. Clauson*, 343 U.S. 306 (1952) at 315, n. 8.

²¹ 333 U.S. 203, 231 (1948).

²² *Id.* at 227-8. Some authorities believe that this point deserves much more attention than was devoted to it in the *McCollum* decision; see, e.g., Fellman, *Separation of Church and State in the United States: A Summary View*, 1950 WIS. L. REV. 427 at 468, n. 210. This argument, moreover, appears fundamental to Justice Frankfurter's dissent in *Zorach v. Clauson*, 343 U.S. 306, 320-323 (1952). Justice Jackson also filed a separate concurring opinion in the *McCollum* case in which he doubted whether the Court had jurisdiction of the case. He could find no impairment of freedom by the plan, nor that it compelled anything, or deprived property. These and additional objections, to the majority opinions, has led one observer to remark: "How Justice Jackson managed to concur in the judgment of the Court, in the light of all these objections, is one of the major mysteries of the *McCollum* case." Fellman, *supra* at 469.

But half of the eight (and this is particularly significant in view of what has since transpired) emphasized that the court was not considering all released time programs on this occasion. Mr. Justice Reed dissented.

In his dissenting opinion Justice Reed referred to certain statements in the opinion of Mr. Justice Frankfurter and he thought that the various expressions on the majority side seemed to leave open further litigation concerning variations from the Champaign Plan. But he complained that he found it difficult to discover what there was in the Champaign Plan that was unconstitutional.

Is it the use of school buildings for religious instruction; the release of pupils by the schools for religious instruction during school hours; the so-called assistance by teachers in handing out the request cards to pupils, in keeping lists of them for release and records of their attendance; or the action of the principals in arranging an opportunity for the classes and the appearance of the Council's instructors? None of the . . . opinions say whether the purpose of the Champaign plan for religious instruction during school hours is unconstitutional or whether it is some ingredient used in or omitted from the formula that makes the plan unconstitutional.²³

From the "tenor" of the opinions Justice Reed concluded that the majority decision evidently forbade any use of a pupil's time "whether that use is on or off school grounds, with the necessary school regulations to facilitate attendance."²⁴

It is, perhaps, an understatement to say that the *McColum* decision left confusion in its wake. Certainly Mr. Justice Reed's complaints had some validity in view of the lack of explicit grounds being stated for the Court's decision. Moreover, it is difficult to reconcile the decision of the majority in the *McColum* case with that in the *Everson* case. How, indeed, could a majority of the Court decide that public transportation of parochial school pupils in New Jersey was an aid to the child and not an aid to religion, and hence did not violate the Federal Constitution, and then a year later decide that the release of public school pupils for religious instruction in Illinois was aid to religion and not the child, and thus violated the Constitution? The Court did not venture to shed light on this question. Furthermore, it is indeed difficult to discover, as Justice Reed vainly tried, what was invalid in the Champaign Plan. This is to say—that the Court's decision in the *McColum* case drew no certain line as to

²³ 333 U.S. 203, 240 (1948).

²⁴ *Ibid.*

precisely where Church and State were separated, although it is arguable whether the Court should draw such a line.

The *McCullum* decision, therefore, could not be utilized as a fair guide to those public school boards that were operating plans similar to the Champaign Plan throughout the nation yet differing therefrom in some minor particulars. Perhaps it is this element of indecision that helped to abet the storm of controversy that followed. As Mr. Justice Black himself was to later characterize the *McCullum* decision: "Probably few opinions from this Court in recent years have attracted more attention or stirred wider debate."²⁵

The Issue Raised Again in Wisconsin

In 1948, the Appleton Council of Religious Education made an "agreement" with the Superintendent of Appleton Public Schools for the release of pupils of grades four, five, and six of nine public schools in Appleton, Wisconsin, at 2:30 P.M. on a designated day each week to "be escorted to the nearest church and there given religious instruction by capable teachers until 3:30 in the afternoon."²⁶ But in response to an inquiry made by John P. Mann, the local superintendent, to John Callahan, State Superintendent of Public

²⁵ Dissenting in *Zorach v. Clauson*, 343 U.S. 306, 317 (1952).

For commentaries adversely critical to the decision in the *McCullum* case, see, e.g., Murray, *Law or Prepossessions?*, 14 LAW & CONTEMP. PROB. 23 (1949); Owen, *The McCullum Case*, 22 TEMPLE L. Q. 159 (1948); Lassiter, *The McCullum Decision and the Public School*, 37 KY. L. J. 402 (1949); Stout, *The Establishment of Religion under the Constitution*, 37 KY. L. J. 220 (1949); Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROB. 3 (1949). See also, O'NEILL, RELIGION AND EDUCATION UNDER THE CONSTITUTION 219-53 (1949); PARSONS, THE FIRST FREEDOM 158-78 (1948); VAN DUSEN, GOD IN EDUCATION (1951); and the statement of the Administrative Board of the National Catholic Welfare Council, N. Y. Times, Nov. 21, 1948.

For commentaries favoring the decision, see, e.g., Fellman, *supra*, note 22; Konvitz, *Separation of Church and State: The First Freedom*, 14 LAW & CONTEMP. PROB. 44 (1949); Pfeffer, *Religion, Education and the Constitution*, 8 LAW. GUILD REV. 387 (1948); Oxnam, *Church, State, and Schools*, 168 THE NATION 67 (Jan. 15, 1949); Pfeffer, *The Supreme Court as Protector of Civil Rights: Freedom of Religion*, 275 ANNALS OF AMER. ACAD. OF POL. AND SOC. SCI. 75, 81-5 (May, 1951). See also, MOEHLMAN, THE WALL OF SEPARATION BETWEEN CHURCH AND STATE (1951); DAWSON, SEPARATE CHURCH AND STATE NOW (1948); THAYER, THE ATTACK UPON THE AMERICAN SECULAR SCHOOL 179-99 (1951); BUTTS, THE AMERICAN TRADITION IN RELIGION AND EDUCATION 201-8 (1950); BLANSHARD, AMERICAN FREEDOM AND CATHOLIC POWER 94-6 (1949); SWANCARA, THE SEPARATION OF RELIGION AND GOVERNMENT (1950).

For general discussions of various released time programs in relation to the *McCullum* decision, see, JOHNSON AND YOST, SEPARATION OF CHURCH AND STATE IN THE UNITED STATES 74-90 (1948); STOKES, 2 CHURCH AND STATE IN THE UNITED STATES 500-48 (1950); TORPEY, JUDICIAL DOCTRINES OF RELIGIOUS RIGHTS IN AMERICA 264-7 (1948).

²⁶ Copy of letter from J. Raymond Chadwick, President of the Appleton Council of Religious Education, Appleton, Wis., to John Mann, Supt. of Appleton Public Schools, dated July 1, 1948, in the files of the Legislative Reference Library.

Instruction, the latter implied that the "agreement" was invalid on the ground that, under the compulsory school attendance provision of Section 40.70 (1) of the statutes, "the power of the board of education to excuse pupils from school during the regular periods and hours during which school is in session is limited to 'religious holidays.'"²⁷ School Superintendent Mann communicated with State Senator Gordon A. Bubolz (R-Appleton) that he would "be very happy to know whether the Attorney General might interpret released time on a different basis."²⁸

"To clarify this whole problem,"²⁹ Senator Bubolz introduced a resolution in the Wisconsin Senate in 1949, which passed as Resolution No. 19 S, requesting an opinion of the attorney general on this question: "Whether or not local school boards may release students during school hours for attendance at religious instruction conducted by religious groups outside the school."³⁰

Attorney General Fairchild could find no Wisconsin statute which specifically authorized or prohibited such a program. Local school boards in Wisconsin are given authority by statute, however, to make rules for the organization, graduation and government of schools under their control.³¹ These rules, he observed, could include the right for school boards to prescribe the number of hours in the school day as long as the school year comprises not less than nine school months (with twenty days constituting a school month), and not more than five Saturdays counted as school days in any school year.

The power to prescribe the number of hours in the school day would permit local school boards to adopt a rule or rules allowing pupils to leave the school premises for reasonable periods for such purposes as the board in its discretion might determine, provided any such rule or rules would not be contrary to any statute or constitutional provision. This would give the local school boards the authority to provide the machinery whereby children could be permitted to absent themselves from school

²⁷ Copy of letter from John Callahan, State Supt. of Public Instruction to J. P. Mann, Supt. of Appleton Public Schools, dated July 15, 1948, in the files of the Legislative Reference Library. "The . . . Department is without authority to exempt Boards of Education from the provisions of the statutes pursuant to which said boards are required to act." *Ibid.*

²⁸ Letter from J. P. Mann, Supt. of Appleton Public Schools, to Senator Gordon A. Bubolz, Wisconsin Legislature, Madison, Wis., dated June 6, 1949, in the files of the Legislative Reference Library.

²⁹ Memorandum from Senator Bubolz to Howard Ohm, Chief, Legislative Reference Library, received June 8, 1949, in the files of the Legislative Reference Library.

³⁰ 38 OPS. WIS. ATT'Y GEN. 281 (1949); the opinion was prepared by Assistant Attorney General Torkelson for Attorney General Fairchild.

³¹ WIS. STAT. § 40.21 (3), § 40.42 (2), and § 40.53 (1951).

for reasonable times. If the child utilizes such time for attendance at classes maintained for religious instruction, a constitutional question may arise.³²

After a thorough analysis of the *McCullum* case³³ and the single precedent of the 1926 opinion of Attorney General Ekern,³⁴ Fairchild proceeded to express his difficulty in rendering any categorical answer to the inquiry. Not only did the resolution fail to describe any particular released time plan, but even if all the material facts of such a plan had been supplied, "it is difficult to predict what result would be reached by the supreme court in any case other than one where the facts are the same as in the *McCullum* case."³⁵ He cited a statement to the effect that it was understandably difficult, "if not well-nigh impossible," to apply the principles of the *McCullum* decision to a particular situation, and that many questions must necessarily remain unanswered until future cases are presented to and answered by the United States Supreme Court.³⁶ Then he asserted:

The only conclusion that can be expressed with any degree of certainty on the basis of the present state of authorities is that any released time plan that utilizes the tax-established and tax-supported public school system to aid religious groups to spread their faith is in violation of the first amendment of the United States constitution made applicable to the states by the fourteenth amendment. . . . There is grave question as to the validity of any plan that makes use of a pupil's school time, whether off or on the school property, and makes use of school regulations to facilitate attendance for religious instruction. . . . There is also doubt as to the validity of any plan where school authorities cooperate to the extent of releasing the children for religious instruction, the children remaining under the technical jurisdiction of the public school.³⁷

Attorney General Fairchild recognized that there is an additional type of plan, frequently referred to as "dismissed time," under which students are dismissed from school at an earlier hour than would normally be the case. This plan calls for religious instruction classes being scheduled by religious groups for the same hour, students being free to attend them or not as they see fit. In assessing this type, he

³² 38 OPS. WIS. ATT'Y GEN. 281, 282 (1949).

³³ *Illinois ex. rel. McCollum v. Bd. of Education*, 333 U.S. 203 (1948).

³⁴ 15 OPS. WIS. ATT'Y GEN. 483 (1926).

³⁵ 38 OPS. WIS. ATT'Y GEN. 281, 285 (1949).

³⁶ *Ibid.*; citing Lassiter, *The McCollum Decision and the Public School*, 37 KY. L. J. 402, 405 (1949).

³⁷ 38 OPS. WIS. ATT'Y GEN. 281, 287-8 (1949).

guardedly said: "The probabilities are that such a plan would be valid, assuming of course that the facilities and compulsion of the public school system are not used."³⁸ Thus, he reached a conclusion similar to that reached by Attorney General Ekern when the latter stated that such a plan would not violate the Wisconsin Constitution "So long as neither the school board nor the teachers, as a part of their school work, have any connection whatever with the dissemination of religious instruction," and that the Wisconsin Constitution is only violated "when the teachers or the school machinery are connected either directly or indirectly with the dissemination of religious instruction."³⁹

Although the two statements, made twenty-three years apart, appear nearly identical in meaning, it should be noted that the Ekern statement was much more positive and certain than Fairchild's statement, which was addressed to "probabilities." But Attorney General Fairchild in 1949 was confronted with a problem that was alien to Attorney General Ekern in 1926—the problem of peering into a clouded crystal ball from the obscure crest of the *McCullum* decision. That this decision confused rather than clarified the issue of released time in Wisconsin is plain from Attorney General Fairchild's parting remark:

School authorities conducting released time programs which are less closely dependent upon the public school system than that considered in the *McCullum* case cannot be sure that they are not violating the constitution, but it cannot be said with certainty that they are.⁴⁰

The Zorach Case

Four years passed before the Supreme Court of the United States made an attempt in *Zorach v. Clauson*⁴¹ to clarify the *McCullum* decision. In the Spring of 1952, the Court addressed itself to the question whether New York City by its released time system had either prohibited the "free exercise" of religion or had made a law "respecting an establishment of religion" within the meaning of the First Amendment.

The New York City program permitted the release of public school pupils during the school day for religious instruction at religious centers, instead of public schools as in the Champaign Plan. Written

³⁸ 38 OPS. WIS. ATT'Y GEN. 288.

³⁹ 15 OPS. WIS. ATT'Y GEN. 483, 488 (1926).

⁴⁰ 38 OPS. WIS. ATT'Y GEN. 281, 288 (1949).

⁴¹ 343 U.S. 306 (1952).

requests from parents secured the release. Those not released stayed in the classrooms. The churches made weekly attendance reports to the schools.⁴² *Zorach* and others challenged the program on the following grounds: that the weight and influence of the school were put behind a religious instruction program; that public school teachers policed it, and kept tabs on students released; that the classroom activities ceased while released students received religious instruction; that the school became a "crutch" on which the churches leaned for support; and that this released time program, like the Champaign Plan, would have become futile and ineffective without the cooperation of the schools. The New York Court of Appeals sustained the program against these claims,⁴³ and the case was appealed to the nation's highest court.

The Court divided six to three in upholding the New York City Plan, with Justices Black, Jackson and Frankfurter dissenting separately. Justice Douglas delivered the majority opinion. At the outset he distinguished the *McCollum* case because it involved, unlike the instant case, religious instruction in public school classrooms and expenditure of public funds. Here religious instruction is held outside public school property, and all costs are paid by the religious organizations.⁴⁴ Consequently, it takes "obtuse reasoning" to inject any religious freedom issue into this case. The record contains no evidence that the system involves coercion. If it did, he insisted, "a wholly different case would be presented." The fact that the New York Court of Appeals declined to grant a trial on this issue, on the ground that the claim of coercion had not been properly raised according to state practice, precludes raising the issue in this proceeding.⁴⁵

⁴² Under N.Y. Education Law, sec. 3210 (b), regulations of the Commissioner of the State of New York [art. 17, sec. 154 (1 N.Y. Official Code Comp. 68)] provide: "Only one hour a week is to be allowed for such training at the end of a class session . . . , and where more than one religious school is conducted, the hour of release shall be the same for all religious schools;" regulations of the Board of Education of the City of New York provide: "No announcement of any kind will be made in the public schools relative to the program. . . . The religious organizations and parents will assume full responsibility for attendance at the religious schools and will explain any failures to attend on the weekly attendance reports. . . . Students who are released will be dismissed from school in the usual way. . . . There shall be no comment by any principal or teacher on attendance or nonattendance of any pupil upon religious instruction." 343 U.S. 306 at 308-9 n. 1. See also, *RELEASED TIME FOR RELIGIOUS EDUCATION IN NEW YORK CITY'S SCHOOLS* (Public Education Association, June 30, 1943); *RELEASED TIME FOR RELIGIOUS EDUCATION IN NEW YORK CITY'S SCHOOLS* (Public Education Association, June 30, 1945); *RELEASED TIME FOR RELIGIOUS EDUCATION IN NEW YORK CITY SCHOOLS* (Public Education Association, 1949).

⁴³ *Zorach v. Clauson*, 303 N.Y. 161, 100 N.E.2d 463 (1951).

⁴⁴ 343 U.S. 306, 308-9 (1952).

⁴⁵ *Id.* at 311-2 n.7; citing *Louisville & Nashville R. Co. v. Woodford*, 234 U.S. 46, 51 (1914); *Atlantic Coast Line R. Co. v. Mims*, 242 U.S. 532, 535 (1917); *American Surety Co. v. Baldwin*, 287 U.S. 156, 169 (1932).

Justice Douglas agreed that there can be no doubt that the First Amendment reflects the philosophy that the separation of Church and State should be "complete and unequivocal," and the prohibition "absolute." But the First Amendment does not say that "in every and all respects" there shall be a separation of Church and State. To maintain this would make the state and religion "aliens" to each other, "hostile, suspicious, and . . . unfriendly." It would mean that churches "could not be required to pay even property taxes;" municipalities could not render police or fire protection to religious groups; and "A fastidious atheist . . . could even object to the supplication with which the Court opens each session: 'God save the United States and this Honorable Court.'" ⁴⁶

To press this concept of separation to the extreme of condemning the New York system, he argued, would mean that a Catholic student could not receive permission to attend a Holy Day mass, a Jewish student excused for Yom Kippur, or a Protestant for a family baptismal ceremony. Whether a teacher cooperates occasionally for a few students or regularly pursuant to a systemized program for all students does not alter the character of the act that would be prohibited. But we are a religious people, said Justice Douglas, and

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. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. . . . But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here. ⁴⁷

The Court does not deviate from the *McCullum* decision, he insisted. "We follow the *McCullum* case." ⁴⁸ But to expand it to cover

⁴⁶ 343 U.S. 306, 312-3 (1952).

⁴⁷ *Id.* at 313-4.

⁴⁸ *Id.* at 315. "Three of us—THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS and MR. JUSTICE BURTON—who join the opinion agreed that the 'released time' program involved in the *McCullum* case was unconstitutional. It was our view at the time that the present type of 'released time' program was not prejudged by the *McCullum* case, a conclusion emphasized by the reservation of the question in the separate opinion by MR. JUSTICE FRANKFURTER in which MR. JUSTICE BURTON joined." *Id.* at 315 n.8.

the New York City program would mean that "public institutions can make no adjustments of their schedules to accommodate the religious needs of the people. We cannot read into the Bill of Rights such a philosophy of hostility to religion."⁴⁹

Justice Black filed a blistering dissent. He saw no "significant difference" between the New York City and Champaign plans. And as the Court attempted to make "categorically clear" in the *McColum* decision, the Champaign Plan would have been invalid if the religious classes had not been held in the school buildings. "*McColum* thus held that Illinois could not constitutionally manipulate the compelled classroom hours of its compulsory school machinery so as to channel children into sectarian classes. Yet that is exactly what the Court holds New York can do."⁵⁰

The sole question here, according to Justice Black, is whether New York can use its compulsory education laws to help religious sects get attendants who are "presumably too unenthusiastic to go unless moved to do so by the pressure of this state machinery."

The state thus makes religious sects beneficiaries of its power to compel children to attend secular schools. Any use of such coercive power by the state to help or hinder some religious sects or to prefer all religious sects over nonbelievers or vice versa is just what I think the First Amendment forbids. In considering whether a state has entered this forbidden field the question is not whether it has entered too far but whether it has entered at all. New York is manipulating its compulsory education laws to help religious sects get pupils. This is not separation but combination of Church and State.⁵¹

Justice Black objected strenuously to the Court's reasoning from the fact that Americans are religious people whose institutions presuppose a Supreme Being. This, he agreed, is true now, but it is no less true than when the First Amendment was adopted and when eight justices of the Court delivered the *McColum* decision on the ground that the state can no more render aid to all religions than it can aid one.⁵² Now, as when the First Amendment was adopted, the

⁴⁹ 343 U.S. 306, 315 (1952).

⁵⁰ *Id.* at 317.

⁵¹ *Id.* at 318.

⁵² 343 U.S. 306, 318 (1952). "A state policy of aiding 'all religions' necessarily requires a governmental decision as to what constitutes 'a religion.' Thus is created a governmental power to hinder certain religious beliefs by denying their character as such. See, e.g., the Regulations of the New York Commissioner of Education providing that, 'The courses in religious observance and education must be maintained and operated by or under the control of *duly constituted* religious bodies.' (Emphasis added.) . . . This provides precisely the kind of censorship which we have said the Constitution forbids. . . ." *Id.* at 318-9 n.4.

freedom of each and every sect and all nonbelievers can be maintained only by wholly isolating the state. The Court, in the instant case, has abandoned this neutrality which "is all the more dangerous to liberty because of the Court's legal exaltation of the orthodox and its derogation of unbelievers."

Under our system of religious freedom, people have gone to their religious sanctuaries not because they feared the law but because they loved their God. . . . The spiritual mind of man has thus been free to believe, disbelieve, or doubt, without repression . . . by the heavy hand of government. . . . Before today, our judicial opinions have refrained from drawing invidious distinctions between those who believe in no religion and those who do believe. The First Amendment has lost much if the religious follower and the atheist are no longer to be judicially regarded as entitled to equal justice under the law.⁵³

And Justice Black concluded with the warning that

State help to religion injects political and party prejudices into a holy field. It too often substitutes force for prayer, hate for love, and persecution for persuasion. Government should not be allowed, under cover of the soft euphemism of "co-operation," to steal into the sacred area of religious choice.⁵⁴

Justice Jackson spared the Court no less when he filed a separate dissent on the ground that the state's power of coercion determines the unconstitutionality of the New York City program. First, the state compels the child to yield a large part of his time for public secular education; and second, some of it is released to him on condition that he devote it to religious purposes. He warned that the same "epithetical jurisprudence" used by the Court in this instance to "beat down those who oppose pressuring children into some religion" can devise as good epithets in the future "against those who object to pressuring them into a favored religion."⁵⁵ The "passionate dialectics" indulged in by the Court in an attempt to distinguish the *McCullum* case he characterized as "trivial, almost to the point of cynicism, magnifying its nonessential details and disparaging compulsion which was the underlying reason for invalidity." And Justice Jackson concluded with biting words of wonderment:

A reading of the Court's opinion in that case along with its opinion in this case will show such difference of overtones and undertones as to make clear that the *McCullum* case has passed

⁵³ 343 U.S. 306, 319-20 (1952).

⁵⁴ *Id.* at 320.

⁵⁵ *Id.* at 325.

like a storm in a teacup. The wall which the Court was professing to erect between Church and State has become even more warped and twisted than I expected. Today's judgment will be more interesting to students of psychology and of the judicial processes than to students of constitutional law.⁵⁶

The State Department of Public Instruction

Regardless of the labored judicial exegesis of broadly phrased constitutional clauses, the Wisconsin Department of Public Instruction has been faced, in the meantime; with the plain fact of determining the validity of particular released time plans brought to its attention. This has been a peculiarly difficult task as a result of (1) the confused status of the issue as it has emerged from the United States Supreme Court, (2) the absence of Wisconsin Supreme Court decisions directly in point, and (3) the absence of details of management of plans brought to the attention of the Department. The state superintendent of public instruction is charged, nevertheless, with the statutory directive that he "shall exclude all sectarian . . . instruction from the public schools."⁵⁷

In September, 1951, the attorney for the Niagara Joint School District requested an opinion of the superintendent of public instruction as to the validity of a released time plan contemplated by the District. The pastor of St. Anthony's Church had petitioned the school board to authorize the release of Catholic children for religious instruction on the church premises "during certain periods of the school hours." The pastor was quoted as saying that "this arrangement would greatly facilitate religious education." Asked by the school board whether the plan would be constitutional, Attorney Irving Smith ventured to express his own opinion to State Superintendent George Watson in these words:

In my opinion, it would not. While the operation of the plan does not call for the direct use of public funds for religious in-

⁵⁶ 343 U.S. 306, 325 (1952). Mr. Justice Frankfurter also filed a separate dissent. He felt that the crucial aspect of the program was that the school system did not "close its doors" or "suspend its operations." There would be no conflict with the Fourteenth Amendment if all the students, instead of some, were released. He attacked the lower court for not permitting appellees to introduce evidence of coercion. "If we are to decide this case on the present record, however, a strict adherence to the usage of courts in ruling on the sufficiency of pleadings would require us to take as admitted the facts pleaded in the appellants' complaint, including the fact of coercion, actual and inherent." He agreed with Justice Black that the Court disregarded the principles of the *McCullum* case; *id.* at 320-323.

⁵⁷ WIS. STAT. § 14.57 (2) (1951). This provision dates from 1849 when it provided that: "It shall be his duty to . . . discourage the use of sectarian . . . instruction in the schools. . . ." WIS. REV. STAT. § 48 c. 9 (1849).

struction, it would necessarily interfere with the efficient operation and management of school activities, and to that extent, would make inefficient, the use of public funds employed in securing of teachers and plant equipment during the time the children were absent from school.⁵⁸

Superintendent Watson replied that the Department believed Attorney Smith to be entirely right in his conclusions "and would only add that sec. 40.70 (1) requires a child to be in attendance 'during the full period and hours' that the school is in session."⁵⁹ He noted that the "specific" question had not been referred to the attorney general, obviously alluding to the unusual fact that the program called for the release of only Catholic children. But he referred Attorney Smith to Attorney General Ekern's opinion of 1926 "which discusses in some detail a typical plan for released time and points out how it is in violation with the Constitution."⁶⁰

Another request for an opinion concerning released time was addressed to the Department of Public Instruction a month later, in November, 1951. The school board of Joint District No. 1, Ashland, Wisconsin, based its request on Attorney General Fairchild's opinion of 1949, which was interpreted by the board as meaning that Wisconsin school boards "may grant 'dismissed time' for religious instruction." Specifically, the board asked whether it had legal authority to dismiss students during school hours for religious instruction, for one hour a week, off school premises, and at the written request of parents. Only those with written requests would be dismissed while the others would remain in school which "would continue as usual." The school time lost, moreover, would be made up by the dismissed student "to the best of his ability."⁶¹

Replying for Superintendent Watson, Assistant Superintendent Kimball noted that Attorney General Fairchild's opinion had stated

⁵⁸ Letter from Irving W. Smith, Attorney, Niagara, Wisconsin to State Supt. of Public Instruction George E. Watson, dated Sept. 6, 1951, in the files of the State Dept. of Public Instruction.

⁵⁹ Copy of letter from Supt. Watson to Attorney Smith, *supra* note 58, dated Sept. 10, 1951, in the files of the Dept. of Public Instruction; citing WIS. STAT. § 40.70 (1) (a) (1951) which provides: "Any person having under his control a child between the ages of 7 and 16 years shall cause such child to attend some school regularly to the end of the school term, quarter, semester or other division of the school year in which he is 16 years of age (unless the child has a legal excuse) *during the full period and hours* (religious holidays excepted) *that the public, parochial or private school in which such child should be enrolled may be in session.*" (Emphasis added.)

⁶⁰ *Ibid.*, citing 15 OPS. WIS. ATT'Y GEN. 483 (1926).

⁶¹ Letter from Verner A. Peterson, Clerk of Jt. Dist. No. 1, Route 3, Ashland, Wis., to Supt. Watson, undated, received Nov. 28, 1951, in the files of the Dept. of Public Instruction; reference to 38 OPS. WIS. ATT'Y GEN. 281 (1949).

that school boards may grant dismissed time for religious instruction on condition that such dismissal would not cause any expenditure of district funds.

Hence, the opinion may as well have been held that the board could not grant such time. It is self-evident that the act of dismissing such children by the teacher, the keeping of the records related to such dismissals, and related to the making up the pupil's work constitutes teacher service that is compensated for by the use of public funds.⁶²

Superintendent Watson's legal assistant, V. E. Kimball, had the opportunity to render an even more closely reasoned opinion in January, 1952. It was then that G. W. Bannerman, Superintendent of Wausau Public Schools, wrote to Kimball the following: "Occasionally here in Wausau we hear rumors that some of the clergy may request released time for religious education. Do you know whether the state Supreme Court has rendered any interpretation . . .?" And he added, "We had released time ten or twelve years ago and it was not too satisfactory."⁶³

In reply, Kimball cited the compulsory school attendance provision of the statutes which requires every public school child to be in attendance "during the full period and hours . . . that the public . . . school in which such child should be enrolled may be in session."⁶⁴ Then he cited section 40.53 (1) (providing that the school boards shall have such powers as "are not otherwise provided for or limited by statute")⁶⁵ and section 40.16 (1) which reads, in part, as follows:

Subject to the authority vested in the district meeting and to the authority and possession specifically given to other officers, the common school board shall have the possession, care, control and management of the property and affairs of the district. . . .⁶⁶

⁶² Copy of letter from Supt. Watson, by V. E. Kimball, Ass't. State Supt. (Legal), to Verner A. Peterson, Clerk of Jt. Dist. No. 1, Route 3, Ashland, Wis., dated Jan. 29, 1952, in the files of the Dept. of Public Instruction. In reply to the question whether the school district would be liable for the safety of the pupil dismissed on written request of his parents, Ass't Supt. Kimball said that he was unable to find any legal authority directly in point. "However, in the event that liability should be found to lie with the district in the event of injury to a child under the described circumstances, the written request would act to absolve the district from liability to the child. This liability would in most circumstances be the greater. In such cases, the court appoints a guardian to act in the interest of the child." *Ibid.*

⁶³ Letter from G. W. Bannerman, Supt. of Wausau Public Schools, Wausau, Wis., to V. E. Kimball, Ass't State Supt. (Legal), dated Jan. 26, 1952, in the files of the Dept. of Public Instruction.

⁶⁴ WIS. STAT. § 40.70 (1) (a) (1951).

⁶⁵ WIS. STAT. § 40.53 (1) (1951).

⁶⁶ WIS. STAT. § 40.16 (1) (1951).

These latter two provisions, Kimball stated, must be read in reference to the compulsory school attendance provision plus still another provision—section 40.53 (16)—which empowers the school board “to adopt rules for its own meetings and deliberations; and for the government of the schools, the faculty, and other employes of the board.”⁶⁷ After consideration of these statutory provisions, Kimball asserted, it becomes “evident that the power of the board of education is limited” by the provisions of the compulsory school attendance section. “It is also necessary,” Kimball insisted, “to consider the provisions of Article I, section 18, and Article X, section 3 of the Wisconsin constitution in relation to this question.” And he concluded his reply with statements which appear to be in complete accord with the previous opinions of Attorneys General Ekern and Fairchild, as follows:

It is clear that the board of education can not disrupt the school periods and hours of the daily school program to permit pupils to participate in sectarian instruction classes without having directly or indirectly caused the expenditure of public funds for sectarian purposes.

It is also clear that the board may close the school periods at an earlier hour on one day each week and thus comply with the provisions of . . . [the compulsory school attendance section] with respect to full periods and hours. The effect of such a procedure upon the total school program, is, of course known to you.⁶⁸

It should be noted at this point that the above interpretations made by the Department of Public Instruction were rendered several months prior to the decision reached by the Supreme Court of the United States in *Zorach v. Clauson*. But the intervention of the *Zorach* decision prompted no deviation from the Department's construction of related Wisconsin law. Thus, on August 4, 1952, State Superintendent Watson, replying to an inquiry about “dismissed time” in Palmyra, Wisconsin, wrote: “I think you will detect upon reading the opinion [of the attorney general] that if public funds are spent in the process, it is an illegal situation.”⁶⁹ And again to a

⁶⁷ WIS. STAT. § 40.53 (16) (1951).

⁶⁸ Copy of letter from V. E. Kimball, Ass't State Supt. (Legal), to G. W. Bannerman, Supt. of Wausau Public Schools, Wausau, Wis., dated Jan. 28, 1952, in the files of the Dept. of Public Instruction.

⁶⁹ Copy of letter from Supt. Watson to E. R. Giese, Principal, Palmyra Public School, Palmyra, Wis., dated Aug. 6, 1952, in the files of the Dept. of Public Instruction. Superintendent Watson added that the “question cannot be answered in a general way. Each situation must be analyzed in terms of the only legal guide we have in Wisconsin.” The letter does not indicate to which opinion of Wisconsin's attorney general he referred; *ibid.* In reply to a newspaperman,

similar question, a month later, Assistant State Superintendent Walter Senty stated that as a personal opinion: "I can see some logical reason for setting up a program of that kind providing it can be done without involving public funds."⁷⁰

Present Status of Released Time in Wisconsin

The legal status of released time in Wisconsin may be summarized in the following manner. First, such programs must be able to stand the test of the First Amendment of the United States Constitution, which is made applicable to Wisconsin by the Fourteenth Amendment. Second, such programs must be able to stand the test of the relevant provisions of the Constitution and statutes of Wisconsin.

With regard to the first test the United States Supreme Court's decisions in the *McCullum* and *Zorach* cases may be reduced to this: if the program entails release for religious instruction held on tax-supported property it clearly violates the Constitution of the United States; if, on the other hand, it entails release for religious instruction held on non-public property, it may not violate the Federal Constitution. But proof of the elements of direct or indirect coercion or use of public funds will void the latter program, also.

It would appear at this point, therefore, that a Wisconsin released time program, like that of New York City, would be held valid as not infringing the "free exercise" of religion and as not constituting aid to "an establishment of religion" under the First and Fourteenth Amendments. But whether such a program could successfully pass the second test is completely another matter; for it is axiomatic under our federal system that a state's public policy may be valid under the United States Constitution and yet invalid under the constitution of that state.

It cannot escape easy recognition that the Wisconsin Constitution is much more explicit in its language than the broad phraseology of the United States Constitution. The former expressly forbids any

who was seeking information for a story on the incidence of released time programs in Wisconsin, Supt. Watson wrote that the Department does "not have any official listing or a complete listing of any kind of the school systems in the state which are using released or dismissed time for religious education programs. . . . As I have heard casually of different programs in different parts of the state, I would imagine that you will have a rather difficult assignment in getting a comprehensive coverage of the situation. I say that because there seem to be many variations in procedures." Copy of letter from Supt. Watson to Albert P. Pagner, *Marinette Eagle-Star*, Marinette, Wis., dated June 16, 1952, in the files of the Dept. of Public Instruction.

⁷⁰ Copy of letter from Walter B. Senty, Ass't Supt. (Supervision), for Supt. Watson, to Edwin B. Corrigan, County Supervising Teacher, Ashland County, dated Sept. 16, 1952, in the files of the Dept. of Public Instruction.

money being "drawn from the treasury for the benefit of" religion,⁷¹ and stipulates that "no sectarian instruction shall be allowed" in the public schools.⁷² This difference, plus the fact that Wisconsin's legal authorities quite consistently have rejected the "child benefit" theory which the United States Supreme Court in the *Everson* case held so close to its bosom, might appear crucial in crystallizing the federal axiom so far as released time in Wisconsin is concerned.

It is true that Wisconsin statutes permit local school boards to exercise a broad discretionary authority within state constitutional limits. And two opinions of the attorney general have interpreted this authority as possibly permitting a type of released time program so long as the teachers or the school machinery are not directly or indirectly connected with such a program. The State Department of Public Instruction, moreover, makes the same interpretation. But it appears more than difficult, if not impossible, to conjure the operation of such a program, with school authorities and public funds completely isolated therefrom.

Furthermore, the compulsory school attendance statute requires each school-age child to be in attendance during the full period and hours that the school is in session. This would seem to imply that the school must close its doors or suspend its operations and thus permit all the children to go to their religious classes or elsewhere according to the choice of each.

It would not be surprising to discover, after investigation, that Wisconsin experiences more interfaith tensions than many other states, for its religious complexion is highly heterogeneous. If a released time procedure could ingeniously be manipulated by any local school board that would not contravene some constitutional or statutory provision, moreover, no hint of such a scheme has yet emerged on the Wisconsin scene. If, on the other hand, the various religious and lay leaders of the state and its many communities were to abandon all attempts to secure the release of public school pupils for religious instruction during school hours, and instead urge the alternative and legal plan of closing the doors or suspending the operations of local schools during outside religious instruction classes, the inevitable result would be the reduction of interfaith tensions in the state. Mr. Justice Frankfurter stated this proposition well when he said:

⁷¹ WIS. CONST. Art. I, § 18.

⁷² WIS. CONST. Art. X, § 3.

The deeply divisive controversy aroused by the attempts to secure public school pupils for sectarian instruction would promptly end if the advocates of such instruction were content to have the school "close its doors or suspend its operations"—that is, dismiss classes in their entirety, without discrimination—instead of seeking to use the public schools as the instrument for securing attendance at denominational classes.⁷³

⁷³ Dissenting in *Zorach v. Clauson*, 343 U.S. 306, 323 (1952). He added: "The unwillingness of the promoters of this movement to dispense with such use of the public schools betrays a surprising want of confidence in the inherent power of the various faiths to draw children to outside sectarian classes—an attitude that hardly reflects the faith of the greatest religious spirits." *Ibid.*