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Release Time and Religious Liberty: A Reply

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RELEASED TIME AND RELIGIOUS LIBERTY: A REPLY

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IN his generous article-review[1] of this writer's book, *Church, State, and Freedom,* Paul G. Kauper justified the decision of the United States Supreme Court in *Zorach v. Clauson*[2] on the basis of its prior decision in *Pierce v. Society of Sisters.*[3] In the *Pierce* case, it will be remembered, the Supreme Court invalidated an Oregon statute whose purpose it was to require attendance of all children at public schools. In *Zorach v. Clauson,* the Court upheld the validity of a New York statute that permitted public schools to release children for one hour weekly to receive religious education in church schools off public school premises.[4] Professor Kauper argues that ". . . if release from all classes in the public schools is constitutionally required in order to protect the freedom of parents who wish to send their children to parochial schools, why does release for one hour per week from public school instruction in order to provide opportunity for religious education assume such extraordinary proportions as a form of coercion as to require its invalidation in the name of separation of church and state?"[5]

This argument was presented by counsel for the appellees in the *Zorach* case. Although not adopted by the Supreme Court, it has won favor in the New York Court of Appeals[6] and with a number of commentators besides Professor Kauper. A writer in the *Harvard Law*

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1 Kauper, "Church, State, and Freedom: A Review," 52 MICH. L. REV. 829 (1954).

2 343 U.S. 306, 72 S.Ct. 679 (1952).

3 268 U.S. 510, 45 S.Ct. 571 (1925).

4 In McCollum v. Board of Education, 333 U.S. 203, 68 S.Ct. 461 (1948), the Court held unconstitutional a released time program in Champaign, Illinois, whereunder the religious instruction was conducted within the public school building with substantial cooperation and supervision by public school authorities. Professor Kauper states that "All students of this subject may well agree that *Zorach* for all practical purposes overruled *McCollum.*" Kauper, "Church, State, and Freedom: A Review," 52 MICH. L. REV. 829 at 839 (1954). But the Court in Zorach distinguished McCollum on the ground that in the New York case "the public schools do no more than accommodate their schedules to a program of outside religious instruction." 343 U.S. 306 at 315, 72 S.Ct. 679 (1952). The Court expressly stated: "We follow the McCollum case. But we cannot expand it to cover the present released time program. . . ." Ibid.

5 Kauper, "Church, State, and Freedom: A Review," 52 MICH. L. REV. 829 at 841 (1954).

6 Zorach v. Clauson, 303 N.Y. 161 at 173-174, 100 N.E. (2d) 463 (1951): "Moreover, parents have the right to educate their children elsewhere than in the public schools, provided the State's minimum requirements are met (Education Law, §3204; *Pierce v. Society of Sisters, supra*), and thus, if they wish, choose a religious or parochial school where religious instruction is freely given. That being so, it follows that parents, who desire to have their children educated in the public schools but to withdraw them therefrom for the limited period of only one hour a week in order to receive religious instruction, may ask the public school for such permission, and the school may constitutionally accede to this parental request. . . ."

Review, for example, asserts, "Since a state must release children completely from their obligation to attend public schools if they desire to attend religious schools [citing the *Pierce* case] it is at least arguable that it should be constitutionally permissible for the state to release them for one hour a week for the same purpose. . . ."[7]

This may be called the Euclidean argument: the whole is greater than any of its parts and if a full school week of religious instruction can constitutionally pass through or over the wall of separation, a fortiori, one school hour can. It assumes another premise suggested by Professor Kauper[8] and accepted by many commentators[9] that the separation or "establishment" clause in the First Amendment[10] is not an absolute but merely a means to an end—the "free exercise" guaranty. When, as in a released time situation, effectuation of the separation principle would hinder rather than promote free exercise, the former must yield to the latter.[11]

If the Constitution is what the Supreme Court says it is, Supreme Court decisions are what constitutional writers say they are. The *Pierce* case is treated by writers as an important decision in the constitutional law of religious liberty[12] and, viewed in the light of later citations of it by the Supreme Court,[13] this is today a reasonable treatment of the decision. But when the *Pierce* case was decided, the liberty involved was not religious liberty at all. The issue was not whether the state could force upon a child a secular education offensive to his parents' religious convictions, but rather whether the state could constitutionally arrogate to itself a monopoly in furnishing secular education. "No question," said the Court, "is raised concerning the power of the State . . . to require that all children of proper age attend some school . . . [or] that certain studies plainly essential to good citizenship

[7] "The Supreme Court, 1951 Term," 66 HARV. L. REV. 89 at 119 (1952).

[8] Kauper, "Church, State, and Freedom: A Review," 52 MICH. L. REV. 829 at 841, 844 (1954).

[9] E.g., Katz, "Freedom of Religion and State Neutrality," 20 UNIV. CHI. L. REV. 426 at 428 (1953); Murray, "Law or Prepossessions?" 14 LAW & CONTEM. PROB. 23 at 32 (1949); CORWIN, A CONSTITUTION OF POWERS IN A SECULAR STATE 114 (1951).

[10] "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

[11] Kauper, "Church, State, and Freedom: A Review," 52 MICH. L. REV. 829 at 841 (1954).

[12] Professor Howe, for example, includes it in his CASES ON CHURCH AND STATE IN THE UNITED STATES (1952). It is also included in AMERICAN STATE PAPERS ON FREEDOM IN RELIGION (1949). See also PFEFFER, CHURCH, STATE, AND FREEDOM 513 (1953); Fahy, "Religion, Education, and the Supreme Court," 14 LAW & CONTEM. PROB. 73 at 74-76 (1949).

[13] E.g., United States v. Carolene Products Co., 304 U.S. 144 at 152, n. 4, 58 S.Ct. 778 (1938); Everson v. Board of Education, 330 U.S. 1 at 32-33, 67 S.Ct. 504 (1947) (dissent).

must be taught. . . ."[14] And in *Everson v. Board of Education,* the Court upheld expenditure of public funds to transport children to parochial schools because the state recognized that such schools supplied the children with the same secular education that the state was empowered to supply in its schools.[15]

The year before the *Zorach* case was decided, the Supreme Court found lacking of sufficient merit to warrant argument, a contention that, to borrow the language of the *Harvard Law Review* writer,[16] "a state must release children completely from their obligation to attend public schools if they desire to attend religious schools. . . ."[17] But the conclusive evidence that the *Pierce* case was not based on religious liberty lies in the identity of the appellants. What is commonly referred to as the *Pierce* case involved two separate cases[18] concerning two separate plaintiffs and two separate schools. One was the Catholic parochial school conducted by the Society of the Sisters of the Holy Names of Jesus and Mary. The other school was the Hill Military Academy in which, as far as the record shows, not even a Lord's Prayer was recited. Since a single opinion was written in both cases and no distinction was made in the opinion in respect to the two schools, it is clear that the liberty vindicated by the Supreme Court was not religious liberty.[19]

[14] 268 U.S. 510 at 534, 45 S.Ct. 571 (1925).

[15] 330 U.S. 1 at 18, 67 S.Ct. 504 (1947): "This Court has said that parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school if the school meets the secular educational requirements which the state has power to impose. See *Pierce v. Society of Sisters,* 268 U.S. 510. It appears that these parochial schools meet New Jersey's requirements."

[16] "The Supreme Court, 1951 Term," 66 HARV. L. REV. 89 at 119 (1952).

[17] Donner v. New York, 342 U.S. 884, 72 S.Ct. 178 (1951), dismissing for want of a substantial federal question, People v. Donner, 199 N.Y. Misc. 643, affd. 278 App. Div. 705, affd. 302 N.Y. 857. The New York courts upheld a conviction under the state's compulsory school attendance law of extremely Orthodox Jewish parents who insisted that their religious convictions precluded participation in secular education and who accordingly sent their children to an all-day school where only religion was studied.

[18] Pierce v. Society of Sisters, Pierce v. Hill Military Academy.

[19] A similar fate was experienced by West Virginia Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178 (1943), which is generally treated as a religious liberty decision [See, e.g., Prince v. Massachusetts, 321 U.S. 158 at 165-166, 64 S.Ct. 438 (1944)], although Justice Jackson took pains to point out that the issue was not whether Jehovah's Witnesses had a constitutional right to be exempted from the requirement of saluting the flag because their religious convictions forbade their participation in the ceremony, but whether the state could make the flag salute compulsory as to anyone. The issue, Justice Jackson said, was one of freedom of speech (which includes freedom to remain silent), not freedom of religion. The fact that the objectants were religiously motivated was immaterial, and the result would have been the same if the objectants had been atheists or agnostics. So, too, Jacobson v. Massachusetts, 197 U.S. 11, 25 S.Ct. 358 (1905), is treated as a religious liberty case (e.g., Prince v. Massachusetts, 321 U.S. 158 at 166, n. 12), even though no assertion was made in that case that the compulsory vaccination law violated any religious convictions of the defendant, and the question of religion does not appear anywhere in the Court's decision upholding the statute against the claim that it violated the due process clause.

This discussion of the *Pierce* case shows the fallacy of the Euclidean argument. The axiom that the whole is greater than any of its parts assumes that a particular part measured against the whole is part of that whole and not another whole. The whole in *Pierce* was twenty-five hours of *secular* education; the part in *Zorach* was one hour of *religious* education. If in the *Pierce* case only Hill Military Academy had appealed to the Supreme Court, the decision and opinion would have been the same; yet it would be difficult to argue that because a child had a right to be released twenty-five hours weekly for education at that institution, a release of one hour weekly for religious education was not constitutionally vulnerable.

Professor Kauper is aware that the holding of the *Pierce* case is not completely applicable to the *Zorach* situation. He concedes that public school boards are not "under a constitutional compulsion to enter into released time arrangements." But the *Pierce* case left no discretion to school boards; it ruled that they were under a compulsion to allow children to attend parochial and other non-public schools.[20]

Professor Kauper asserts that "It is not merely fanciful or frivolous to suggest that the parochial school system represents one hundred percent released time."[21] But this assertion is negated by the presence of the Hill Military Academy in the *Pierce* case. It is negated by the *Everson* case.[22] It is negated by the Court's dismissal of the appeal in *Donner v. New York*.[23] And it is negated by Professor Kauper's disclaimer of any intent to assert that "school boards are under a constitutional compulsion to enter into released time arrangements." It requires little imagination to contemplate the effects upon public school administration if the *Pierce* doctrine were held applicable to all requests for time off for religious education from one to twenty-five hours weekly.

Another religious liberty argument is suggested by Professor Kauper in support of the *Zorach* decision. "The author contends [says Professor Kauper] and rightly so, that public schools should be allowed to release children on certain days in order to attend special religious services of their faiths. This practice he defends on the grounds of religious lib-

[20] For a similar criticism of the Court's assertion in the Everson case that it did "not mean to intimate that a state could not provide transportation only to children attending public schools. . . ." [330 U.S. 1 at 16, 67 S.Ct. 504 (1947)], see PFEFFER, CHURCH, STATE, AND FREEDOM 477-478 (1953).

[21] Kauper, "Church, State, and Freedom: A Review," 52 MICH. L. REV. 829 at 841 (1954).

[22] Justice Jackson's dissent in the Everson case was based on his contention that all the education received in Catholic parochial schools was religious. But this contention was rejected by the majority of the Court which held that the purpose of the assailed expenditure of public funds was to "facilitate the opportunity of children to get a secular education. . . ." 330 U.S. 1 at 7, 67 S.Ct. 504 (1947).

[23] Supra note 16.

erty and he states a good case. But is this not another instance of release time but on a smaller scale?"[24]

This argument too was presented by counsel for the appellees in the *Zorach* case; but, unlike the *Pierce* argument, it achieved some acceptance by the Court which said:

> "... A Catholic student applies to his teacher for permission to leave the school during hours on a Holy Day of Obligation to attend a mass. A Jewish student asks his teacher for permission to be excused for Yom Kippur. A Protestant wants the afternoon off for a family baptismal ceremony. In each case the teacher requires parental consent in writing. In each case the teacher, in order to make sure the student is not a truant, goes further and requires a report from the priest, the rabbi, or the minister. The teacher in other words cooperates in a religious program to the extent of making it possible for her students to participate in it. Whether she does it occasionally for a few students, regularly for one, or pursuant to a systematized program designed to further the religious needs of all the students does not alter the character of the act."[25]

This "Yom Kippur" argument too has a Euclidean base in the axiom that things equal to the same or equal things are equal to each other. It might be put in terms of an algebraic equation something like this ("YK" representing Yom Kippur absence, "RT" released time, and "C" constitutional):

$$\begin{aligned} YK &= C \\ RT &= YK \\ \therefore RT &= C \end{aligned}$$

The fallacy of this reasoning may be shown, as in the other Euclidean argument, by applying the converse of the second Euclidean axiom: things equal to unqual things are unequal to each other. The "C" in the first equation means constitutionally *required*; the "C" in the third equation means constitutionally *permitted* and not (Professor Kauper agrees) constitutionally required. Thus testing the equation, we find:

[24] Kauper, "Church, State, and Freedom: A Review," 52 MICH. L. REV. 829 at 840 (1954).

[25] Zorach v. Clauson, 343 U.S. 306 at 313, 72 S.Ct. 679 (1952). The New York Court of Appeals expressed the argument thus: "... Excuses from attendance are permitted for many good reasons; among others, children are excused from school on holy days set apart by their respective faiths. ... Indeed we are all agreed that refusal to excuse children for that reason would be an unconstitutional abridgment of freedom of religion. If it be constitutional to excuse children of a particular faith for entire days for such a religious purpose, it seems clear, by a parity of reasoning, that it is also constitutional, under the circumstances here presented, to excuse children of whatever faith one hour a week for another and similar religious purpose. ..." 303 N.Y. 161 at 173, 100 N.E. (2d) 463 (1951).

$$YK = C^1$$
$$RT = C^2$$
$$C^1 \pm C^2$$
$$\therefore YK \pm RT$$

A Jewish child has a constitutional right to be excused from attending school on Yom Kippur because it would violate his religious convictions to attend school on that day and his absence presents no threat to a higher societal interest sufficiently immediate and grave to justify impairment of the free exercise of his religion.[26] No one, as far as this writer knows, has ever contended that it would violate the religious convictions of anyone to partake of religious education on Wednesdays between 3 and 4 o'clock in the afternoon after the close of school rather than from 2 to 3 before school closes. If the Jewish religion permitted its adherents to observe Yom Kippur on Sunday or weekdays at their election, it is far from certain that Jewish children would have a constitutional right to be excused from public school on a weekday to observe Yom Kippur. The obligations of the state and the religious group are equal and reciprocal. If the former is obligated to achieve its purposes by means which do not infringe upon the rights guaranteed by the First Amendment if such alternative means are available and practicable,[27] there would seem to be a reciprocal duty on the part of the individual to satisfy his religious requirements without infringing upon the state's functions if that is practicable.

There is, this writer believes, a religious liberty claim in the released time program and in the *Zorach* case. It is a claim which is consistent with rather than opposed to the separation claim. In the appellants' brief to the Supreme Court in the *Zorach* case, this writer contended that the released time program violated the free exercise no less than the establishment guaranty of the First Amendment. The contention was based on the argument that the state's compulsory school attendance laws operated to coerce children into participating in released time classes. Even if, as is sometimes suggested, the free exercise clause protects only the religious,[28] practical considerations frequently make

[26] Donner v. New York, 342 U.S. 884, 72 S.Ct. 178 (1951), makes it clear that religious convictions would not constitutionally require excused absences for 365 Yom Kippurs annually. Indeed, 52 Yom Kippurs a year may be too much. Cf. Commonwealth v. Bey, 166 Pa. Super. 136 (1950), where the court overruled a Moslem parent's plea of religious liberty in a prosecution under the compulsory school attendance law for keeping his child away from school every Friday.

[27] Schneider v. Irvington, 308 U.S. 147, 60 S.Ct. 308 (1939); Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900 (1940); Kunz v. New York, 340 U.S. 290, 71 S.Ct. 312 (1951).

[28] See, e.g., PARSONS, THE FIRST FREEDOM 79 (1948): "As for those who profess no religion, or who repudiate religion, it is difficult to conceive how they can appeal to the First Amendment, since this document was solely concerned with religion itself, not its

it impossible to provide released time instruction for children adhering to minority denominations,[29] with the result that these children are faced with the alternative of continued confinement in public school (pursuant to the compulsory school attendance law) or participation in instruction in a faith not their own.[30]

This argument was disposed of by Justice Douglas for the majority of the Court in the *Zorach* case with a summary, "It takes obtuse reasoning to inject any issue of the 'free exercise' of religion into the present case."[31] Professor Kauper is more charitable, but likewise rejects the argument. To him the fact that "the overwhelming majority of children continue to choose secular instruction . . . hardly supports the compulsion theory."[32] (Professor Kauper's argument is somewhat reminiscent of the suggestion by Arthur Krock of the New York *Times* that even if Senator McCarthy's investigations of James Wechsler, editor of the New York *Post,* was motivated by a desire to intimidate him and thus affect the paper's editorial policy, it did not constitute an infringement of the First Amendment's guaranty of the freedom of the press because in fact Wechsler was not intimidated.)

It is true that released time religious instruction has proved largely ineffective to attract public school children.[33] But the fact that most children find continued secular instruction less distasteful than religious instruction, while possibly a reflection upon religious pedagogical methods as compared with modern public school education, does not establish the absence of a restraint upon liberty nor remove the unconstitutional taint. Constitutionally proscribed conduct does not become permissible because it is inefficacious.

The writer has come across instances of criminal court judges suspending prisoners' sentences and warning the prisoners that the sus-

denial. By its very nature, as regards what it says about religion, they are outside its ken." See also statement in Gordon v. Board of Education, 78 Cal. App. (2d) 464, 178 P. (2d) 488 (1947), quoted in Zorach v. Clauson, 198 N.Y. Misc. 631 (1950), to the effect that the purpose of the amendment is to protect "freedom *of* religion, not freedom *from* religion."

[29] In the McCollum case, for example, there were no released time classes acceptable either to Lutherans or Jehovah's Witnesses, nor, except briefly when the program was launched, to Jewish children. See Transcript of Record in McCollum v. Board of Education, 333 U.S. 203, 68 S.Ct. 461 (1948).

[30] PFEFFER, CHURCH, STATE, AND FREEDOM 304 (1953).

[31] 343 U.S. 306 at 311, 72 S.Ct. 679 (1952).

[32] Kauper, "Church, State, and Freedom: A Review," 52 MICH. L. REV. 829 at 840 (1954).

[33] In McCollum, Justice Frankfurter quoted an estimate that 2,000,000 children participated in released time programs. 333 U.S. 203 at 224-225, 68 S.Ct. 461 (1948). This writer considers the estimate more than generous. PFEFFER, CHURCH, STATE, AND FREEDOM 319-320 (1953). The 1950 Statistical Abstract of the United States estimated that in 1947 there were 23,659,158 pupils enrolled in the nation's public schools.

pension would be revoked if they did not attend church services regularly every Sunday. Can it be fairly said that church attendance under these circumstances is truly voluntary?

The element of constraint in the released time program can be brought into sharper focus by viewing the compulsory school attendance and the released laws as parts of a single statute. Present law (either expressly or by regulation or practice) requires children to attend public school, let us say, twenty-five hours weekly. A separate law permits children attending religious instruction to be excused for one of those hours. Suppose, however, the law required children to attend public school twenty-four hours weekly, except that children who do not participate in religious instruction are required to attend public school an additional and independent hour weekly, absence wherefrom subjects the child's parents to criminal prosecution. Would not attendance at religious instruction be compulsive, and would the fact that nine out of ten children choose the extra hour of public school make it any less compulsive?

The promoters of released time religious instruction are under no illusions. They recognize that even the small measure of success attained by the program would be gravely threatened if the element of constraint were eliminated. It is for that reason that they reject every suggestion that children not choosing to attend religious instruction be permitted to go home.

The present writer believes that the released time program contains within itself the seeds of its own dissolution. With the steady improvement in the training of public school teachers and of educational methods, public school education is becoming increasingly attractive to children. More and more, children actually want to go to school, and more and more they will prefer to remain in school than go to the church for the weekly hour of religious instruction. When religious education likewise improves in teaching personnel and practice so that it becomes so attractive as to constitute a real competitor of public school education, it will be found that encroachment upon public school time will not be necessary and that children will be willing to visit the church school for religious instruction after public school hours.[34] Then religious education will be truly voluntary, and the religious liberty issue truly absent.

[34] There is substantial evidence that religious educators are becoming increasingly aware of this, and that adoption of modern teaching methods, improved training and standards of teachers and better school facilities have effected substantial increases in attendance at religious schools without recourse to the released time plan. See, e.g., Pilch, "The Status of Jewish Education," 21 CONGRESS WEEKLY, No. 12, p. 1 (March 22, 1954).