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RELEASED TIME AND RELIGIOUS LIBERTY: A FURTHER REPLY

*Paul G. Kauper**

IN his "Reply"¹ to the writer's review² of his excellent book, Mr. Pfeffer has singled out the part of the review in which the writer discussed the released-time problem and the position taken by Mr. Pfeffer with respect thereto. To prolong the arguments over this matter in the pages of this *Review* would be unprofitable, but the writer feels that a few comments on Mr. Pfeffer's reply would not be out of order.

Mr. Pfeffer correctly points out that the *Pierce* case³ as originally decided seemed to rest on the ground that parents could claim a constitutional freedom to send children to schools of their own choosing so long as these schools met general standards prescribed by law. It did not rest distinctly on the basis of religious freedom. But, as Mr. Pfeffer concedes, the case has come to be interpreted over the years as representing an important phase of religious liberty in so far as the freedom of parents to send their children to parochial schools is concerned.

The point is made, however, by Mr. Pfeffer that the constitutional position of the parochial school must be determined by the secular education that it affords children. It is because a parochial school provides a secular education that parents may properly discharge their obligation under the compulsory education laws by sending their children to parochial schools, and it is for this reason that school boards may constitutionally reimburse parents for their costs in transporting children to parochial schools. In short, according to this argument, the religious atmosphere of the parochial school, the avowed importance of the parochial schools in the church's whole scheme of things, and the specific instruction in religious subjects are all to be treated as irrelevant in appraising the constitutional significance of such schools.

Having established this premise, Mr. Pfeffer proceeds to criticize the writer's argument that the right of parents to send their children to parochial schools has some relevancy to the constitutional problem raised in regard to released time. Mr. Pfeffer charges the writer with

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¹ "Released Time and Religious Liberty: A Reply," 53 MICH. L. REV. 91 (1954).

² "Church, State, and Freedom: A Review," 52 MICH. L. REV. 829 (1954).

³ *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571 (1925).

employing the "whole is greater than any of its parts" argument and proceeds to demonstrate by the use of algebraic equations that the writer was comparing unequal things. The writer cheerfully concedes that parochial school education and released time instruction are not equals and do not stand in the same class. Indeed, the problem before the Court in the *McCollum*⁴ and *Zorach*⁵ cases would have been far simpler if the problem of released time had been seen to be a minor version of the parochial school problem, for apparently all members of the Court that decided these cases would have voted to affirm the *Pierce* case. The writer recognized the differences in his review when he stated that the right of parents to send their children to parochial schools was a constitutional right, whereas parents could claim no constitutional right to secure released time for their children.

The writer used the *Pierce* case as having some relevancy to the chief argument made by those who oppose released time on constitutional grounds, namely, that the state is compelling or coercing children to attend religious education classes. According to this argument a child is coerced to attend religious education classes because it is given the privilege of either attending such classes or remaining in the public school during this period. This argument rests on the penal theory regarding the nature of the public school. Having to stay there during the hour in question is a form of punishment or penalty for not attending religious education classes. Mr. Pfeffer finds an analogy in the case of a judge who threatens punitive consequences for a prisoner if he does not attend church services regularly every Sunday.

It is quite apparent that when Mr. Pfeffer speaks of "compulsion" as the constitutional infirmity of the released-time program he is not speaking of compulsion as a fact but as a legal conclusion. Certainly all should concede that if school teachers and officers put pressure on students to attend classes for religious instruction this would be objectionable on constitutional grounds. But Mr. Pfeffer speaks of compulsion in a different sense. According to his position, even if the school authorities are completely neutral and make no effort to influence the child's choice, indeed, even if the children were placed under strong pressure not to attend religious education classes, still there would be "compulsion" to attend such classes. It is even immaterial, according to this view, that in fact the majority of children elect not to attend the religious education classes. The writer adverted to this fact in his

⁴ *McCollum v. Board of Education*, 333 U.S. 203, 68 S.Ct. 461 (1948).

⁵ *Zorach v. Clauson*, 343 U.S. 306, 72 S.Ct. 679 (1952).

review, but now Mr. Pfeffer makes clear that he regards it as a very queer argument to suggest that children are not compelled to attend religious education classes if they are at liberty to attend other classes at the public school and if in fact the majority of them exercise this liberty.

The "compulsion" Mr. Pfeffer speaks of is a legal conclusion derived from analysis of the released-time program in the light of compulsory education laws. Because parents are required to send their children to some school for a minimum number of hours each week, it follows, therefore, whether a child during one of those hours stays at school or attends a class for religious instruction, he is being coerced by law to do one or the other, and, therefore, the state is using its coercive power to recruit children for religious education.

It is at this point that the parochial school situation becomes relevant in the opinion of this writer. In view of the compulsory education laws, a parent must send his child to some school. He may elect to send the child to a public school, to a parochial school or to a non-parochial private school. But if we adopt the "compulsion" argument made with respect to released time, it follows with equal force that children are "compelled" to attend parochial schools since if they do not attend these schools they face confinement in either public schools or other private schools. To paraphrase the statutory requirement we may make it read in effect that all parents are under a duty to send their children to parochial schools, provided, however, that they may be released from this obligation if they send their children to public or non-parochial private schools. To use the argument of the opponents of released time, this is coercing children to attend parochial schools. Yet it is recognized that not only is this permissible but that parents may insist on the constitutional right to send their children to any school of their choice.

Nor is it any answer to say that parents have the right to send their children to parochial schools only because such schools furnish a secular education equivalent to that offered by the public schools and that, therefore, there is no compulsion to attend religious education classes. Mr. Pfeffer himself severely criticized this argument in his comments⁶ on the *Everson* case⁷ where he endorsed Justice Jackson's dissent in that case and stated that "authoritative church writings leave little doubt that the education received in Catholic parochial schools is not the secular education which a state may constitutionally provide or pay

⁶ PFEFFER, CHURCH, STATE, AND FREEDOM 472-478 (1953).

⁷ *Everson v. Board of Education*, 330 U.S. 1, 67 S.Ct. 504 (1947).

for.”⁸ But now in his “Reply” Mr. Pfeffer, to prove his point that the parochial school and released-time programs have nothing in common, adopts the very arguments about the non-religious features of parochial school education which he so vigorously criticized in his book. The truth is that the parochial school’s orientation is religious in character. It is not simply that these schools teach religious subjects. The entire educational program in these schools derives meaning from religious faith and belief. And that the compulsory education laws contribute to the strength of the parochial system cannot be doubted. The logic of Mr. Pfeffer’s argument stated in his “Reply” should lead him to concede that since parochial schools provide a secular education, therefore, it should be permissible for the state to pay for the expense of operating these schools. But a reading of his book makes clear that he would not make such a concession and that he would look upon this as a clear case of an unconstitutional use of public funds in aid of religion.⁹

In the end, the critical constitutional issues with respect to released time cannot be solved by any play of language in using the word “compulsion” or by any argument that treats the public school system as though it were penal in character. The central problem is one of balancing of interests. The *Zorach* case stands for the proposition that the interest of parents in the religious education of their children is a legitimate legislative concern and that legislatures may fashion their school laws so as reasonably to accommodate this interest. The opposing consideration is that under the due process clause of the Fourteenth Amendment no person may be arbitrarily deprived of his life, liberty or property. It remains to be demonstrated that the optional released time privilege deprives anyone of these interests protected by the Fourteenth Amendment.

⁸ PFEFFER, *CHURCH, STATE, AND FREEDOM* 475 (1953).

⁹ *Id.* at 442-464.