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RECENT DEVELOPMENTS

CONSTITUTIONAL LAW—CHURCH AND STATE—FREE-DOM OF RELIGION—The Constitutionality Under the Religion Clauses of the First Amendment of Compulsory Sex Education in Public Schools

It has been said that “[s]ex education, once the domain of the church and the home, has by necessity, become a responsibility of the schools.”¹ Indeed, by the operation of most state education statutes, sex education can be made compulsory in public primary and secondary schools if it is taught as part of otherwise compulsory classes² or if the local school authorities have prescribed sex education courses as a compulsory part of the curriculum.³ While some of the state statutes authorize exemptions on religious grounds,⁴ most do not.⁵ Nevertheless, the introduction of sex education into public

1. C. JULIAN & E. JACKSON, *MODERN SEX EDUCATION, TEACHERS GUIDE 4* (1967). “[M]ore than half the public and parochial schools in the nation have some form of sex education . . .” Yunker, *Sex Education: Should It Be Taught in School?*, *FAMILY CIRCLE*, Jan. 1970, at 46.

2. For example, many states require that all schools have courses in subjects like biology, health, hygiene, or physiology. *See, e.g.*, CAL. EDUC. CODE § 8551 (West 1969) (health); ILL. ANN. STAT. ch. 122, § 27-6 (health), § 27-11 (sanitation and hygiene) (Smith-Hurd 1962); N.J. STAT. ANN. §§ 35-5, 35-7 (1968) (health); N.Y. EDUC. LAW § 3204 (McKinney 1969) (hygiene and science); OHIO REV. CODE ANN. § 313.60 (Page 1960) (health); PA. STAT. ANN. tit. 24, § 15-1511 (health and physiology), § 15-1513 (physiology and hygiene) (1962); TEX. EDUC. CODE § 21.101 (1969) (physiology and hygiene). Sex education taught as an integral part of these courses is thus compulsory for all students, unless there is an express statutory provision granting exemption. *See note 4 infra*.

3. Most states permit local school authorities to prescribe additional compulsory courses as well as those courses specifically made compulsory by statute. *See, e.g.*, ILL. ANN. STAT. ch. 122, § 27-1 (Smith-Hurd 1962); N.J. STAT. ANN. §§ 4-25, 33-1 (1968); OHIO REV. CODE ANN. § 3313.60 (Page 1960); PA. STAT. ANN. tit. 24, § 16-1605 (1962). Permissive statutes of this sort do not preclude local authorities from structuring additional courses in such a way as to grant exemptions. Additional courses such as sex education could be made optional by giving the student the choice of taking it or another course or by offering it during an otherwise free period.

4. *See, e.g.*, CAL. EDUC. CODE § 8701 (West Supp. 1970) (exemption from health and hygiene classes for religious reasons); ILL. ANN. STAT. ch. 122, § 27-11 (Smith-Hurd 1962) (exemption from instruction about diseases for religious reasons); N.Y. EDUC. LAW § 3204 (McKinney 1969) (exemption from health and hygiene classes for religious reasons); OHIO REV. CODE ANN. § 3313.601 (Page 1960) (exemption from periods of moral, philosophical, or patriotic meditation for religious reasons); TEX. EDUC. CODE § 21.104 (1969) (exemption from education about disease for religious reasons). In California and Michigan, exemptions from compulsory sex education courses are granted for any reason. CAL. EDUC. CODE § 8506 (West Supp. 1970) (exemption from discussion of human reproductive organs and their functions and processes upon parental request); MICH. COMP. LAWS ANN. § 340.789(c) (Supp. 1969) (exemption from sex education classes upon parental request). Although it might be argued that statutes providing exemptions on religious grounds violate the establishment clause, U.S. CONST. amend. I, it is probable that this argument is without merit. *See text accompanying notes 60-64 infra*.

5. Most state education statutes make no provision in their compulsory-attendance laws for exemptions from statutorily prescribed compulsory courses. *E.g.*, N.J. STAT. ANN. §§ 35-7, 38-25 (1968); OHIO REV. CODE ANN. §§ 3321.03, 3321.04 (Page 1960);

schools has not been accomplished without opposition. Certain religious groups have argued that compulsory sex education is violative of both the free exercise and establishment clauses of the first amendment,⁶ as applied to the states through the fourteenth amendment.⁷ This Recent Development will explore the substantive validity of those attacks.⁸

PA. STAT. ANN. tit. 24, § 13-1327 (1962). However, local school authorities, who have the power pursuant to most state statutes to prescribe sex education in addition to those courses required by statute, also have the power to make sex education optional. See note 3 *supra*. Considering the problems of religious freedom raised by sex education courses, particularly in view of the strong emotional and personal nature of the subject matter, the exercise of this power to grant exemptions or to structure the courses in such a way as to make attendance optional probably is desirable. See notes 8-10 *infra*. Indeed, exemptions on religious grounds may be constitutionally compelled. See text accompanying notes 51-54 *infra*.

6. See Complaint at 3, 6, 7, *Fette v. Board of Educ.*, No. 4681 (Cir. Ct., Washtenaw County, Mich., filed Feb. 16, 1970).

7. In *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the Supreme Court upheld the right of Jehovah's Witnesses ministers to solicit support for their views door to door, despite failure to comply with a state statute requiring licensing of such solicitors, as a right protected by the fourteenth amendment, which was held to embrace all the liberties secured by the first amendment.

8. Opposition to sex education is not exclusively religious. Some people believe it to be the work of communists or other leftist groups. See Ulman, *A Delicate Subject: Sex Education Courses Are Suddenly Assailed by Many Parent Groups*, WALL ST. J., April 11, 1969, at 1, col. 1; Zazzaro, *The War on Sex Education*, AM. SCHOOL Bd. J., Aug. 1969, at 7; McIntire, *Communism and the Moral Breakdown in the U.S.A.*, THE NEW SENSITIVITY 1, 3 (20th Century Reformation Hour). Many parents fear that sex education would cause children psychological harm if taught at too young an age. Some psychoanalytic writers believe that children pass through a period in middle childhood when sexual interests are latent and should not be brought to mind. P. MUSSEN, J. CONGER & J. KAGAN, *CHILD DEVELOPMENT AND PERSONALITY* 358 (2d ed. 1963); Yuncker, *Sex Education: Should It Be Taught in School?*, FAMILY CIRCLE, Jan. 1970, at 70-71; NEWSWEEK, June 2, 1969, at 102. Finally, it has been charged that sex education courses invade the privacy of home and family and cause children to question parental authority. "The State must refrain from so-called sex education in the public schools. . . . These areas, which the State must respect and not infringe upon, are personal intimacies and family responsibilities under God." McIntire, *The Bible and Sex Education*, Sex Education Report 1 (20th Century Reformation Hour).

See also Complaint at 2, 3, *Fette v. Board of Educ.*, No. 4681 (Cir. Ct., Washtenaw County, Mich., filed Feb. 16, 1970); Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Demurrer to First Amended Complaint, 9, *Citizens for Parental Rights v. San Mateo County Bd. of Educ.*, No. 139,710 (Super. Ct., San Mateo County, Cal., filed Nov. 1, 1968). The parents in these suits argue that the due process clause of the fourteenth amendment confers upon them the right to control the education of their children. Two United States Supreme Court decisions might support that proposition. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Court struck down a law forbidding the teaching of a foreign language or the teaching of any subject in a foreign language to a child who had not passed the eighth grade. It concluded that the "power of parents to control the education of their own [children]" was within the ambit of the due process clause. 262 U.S. at 401. Similarly, in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Court, faced with a law requiring attendance at public schools, upheld the right of parents to send their children to private schools which met state standards. In so holding, the Court stated that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." 268 U.S.

It is essential to begin by analyzing the doctrinal bases for the religious objections to compulsory sex education. In general, two types of objections are made. First, there are those objections based on the notion that sex education must be taught within a context of strict morality. According to that argument, knowledge of sex is synonymous with knowledge of evil and therefore must be presented in a religious context.⁹ Second, there is the view that the mere exposure to certain subjects which are covered in sex education courses is objectionable from a moral or religious standpoint.¹⁰ Under either of these doctrinal bases, there is not likely to be any question that compulsory attendance in sex education courses does transgress the honest, religious beliefs of those who object to such courses.¹¹

However, not all infringements of religious beliefs are constitutionally impermissible; for instance, in order to prevent the spread of diseases, the state may require vaccinations of those who object to such medical treatment as a transgression of their religious beliefs.¹² Similarly, the state may prohibit polygamy¹³ or require observance of child labor laws even if the result is to interfere with the exercise of an asserted religious practice.¹⁴ The issue, therefore, is not

at 535. Based on statements such as these, at least one state court has held that "the right of the parents to select, within limits, what their children shall learn is one of the liberties guaranteed by the Fourteenth Amendment . . ." *Vollmar v. Stanley*, 81 Colo. 276, 282, 255 P. 610, 613-14 (1927).

It is submitted, however, that even if there is a right of parents to control the education of their children, that right is limited by the state's power to enact laws bearing a rational relationship to a valid state interest. *Prince v. Massachusetts*, 321 U.S. 158 (1944). State statutes prescribing the curriculum of public schools have been held to be rationally related to the valid state interest of an educated citizenry. *See Epperson v. Arkansas*, 393 U.S. 97, 107 (1968). Indeed, in *Meyer v. Nebraska*, *supra*, the Court explicitly noted: "Nor has challenge been made of the State's power to prescribe a curriculum for the institutions which it supports." 262 U.S. at 402.

9. "For the teaching of sex without the teaching of sin is the work of Satan." McIntire, *The Bible and Sex Education*, Sex Education Report 1 (20th Century Reformation Hour). "Sex education cannot be taught without moral responsibility. And the ONLY guide book that true christians [*sic*] can accept is the HOLY BIBLE." Letter from Rev. Samuel E. Johnson, Pastor, First Apostolic Church, Ann Arbor, Mich., to David Woodward, Jan. 25, 1970. *See also Zazzaro, The War on Sex Education*, AM. SCHOOL Bd. J., Aug. 1969, at 8.

10. "This group [religious fundamentalists] usually abhors mention of premarital intercourse, petting, masturbation and homosexuality in sex education." Zazzaro, *The War on Sex Education*, AM. SCHOOL Bd. J., Aug. 1969, at 8. "The State must not be a party in any way to stimulating that which society has already condemned as an evil and even as a crime. This involves such matters as fornication, adultery, incest, sodomy, rape, homosexuality, and the like." McIntire, *The Bible and Sex Education*, Sex Education Report 1 (20th Century Reformation Hour).

11. When an exemption to a statute of general applicability is sought on religious grounds, a court must be convinced that the objection is a religious one, which is honestly held by the party seeking exemption. *United States v. Ballard*, 322 U.S. 78 (1944).

12. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

13. *Reynolds v. United States*, 98 U.S. 145 (1878).

14. *Prince v. Massachusetts*, 321 U.S. 158 (1944).

whether the objection to sex education is a matter of religious belief, but whether the conceded infringement of a religious belief violates the free exercise clause or the establishment clause, as construed by the Supreme Court.

The free exercise clause has often been invoked by religious groups to gain exemptions from laws of general applicability.¹⁵ The most recent expression by the Supreme Court of the standard to be applied when an exemption is sought is found in *Sherbert v. Verner*.¹⁶ That case arose under a South Carolina law, which provided that unemployment compensation benefits could be withheld from any applicant who refused to accept available employment.¹⁷ The petitioner, a Seventh-day Adventist, refused on religious grounds to accept a job which required her to work on Saturday. The Court held that the free exercise clause required South Carolina to carve out of its unemployment compensation law an exemption for the petitioner. It stated that the petitioner could not constitutionally be constrained to abandon her religious convictions regarding her religion's day of rest.¹⁸

In reaching its decision in *Sherbert* the Court reiterated the distinction, first enunciated in *Cantwell v. Connecticut*,¹⁹ between the freedom to believe and the freedom to act. While the first is absolute, the second cannot be; indeed, according to the Court in *Cantwell*, "[c]onduct remains subject to regulation for the protection of society."²⁰ The *Sherbert* Court then established a three-step analysis for determining when conduct prompted by religious belief may be regulated. Under that analysis, the restriction or regulation of overt conduct based on religious belief will be upheld without further inquiry if that conduct directly and substantially threatens the public safety, peace, or order.²¹ In *Sherbert*, since the petitioner's refusal to work on Saturday was not a direct or substantial threat to those public interests, the Court went on to set up two other standards under which the petitioner's conduct could be regulated and her claim to benefits denied. Regulation was valid, the Court stated, if disqualification from receipt of benefits did not impose any burden on the free exercise of the petitioner's religion,²² or if any incidental

15. See, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963); *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Jamison v. Texas*, 318 U.S. 413 (1943).

16. 374 U.S. 398 (1963).

17. 374 U.S. at 400.

18. 374 U.S. at 410.

19. 310 U.S. 296 (1940).

20. 310 U.S. at 304.

21. 374 U.S. at 403. This principle has been enunciated in numerous decisions. See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); cases cited in notes 12-14 *supra*.

22. 374 U.S. at 403.

burden on that free exercise was justified by a "compelling state interest."²³ The Court then held that disqualification from the receipt of benefits did impose a burden on the free exercise of the petitioner's religion:

The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.²⁴

Thus, the Court faced the question whether the denial of the petitioner's claim could be justified by a compelling state interest, and it concluded that the record failed to disclose any such interest.²⁵

The same three-step analysis can be applied to compulsory sex education. Just as, in *Sherbert*, the refusal to work on Saturdays did not directly threaten the public safety, peace, or order, so too the refusal of those opposing sex education to send their children to such classes does not directly threaten such interests of public concern. Furthermore, there is no question but that requiring attendance at sex education courses burdens the free exercise of the religion of those who honestly believe that exposure to certain subjects covered within those courses is sinful or that sex education must be accompanied by moral instruction. Thus, under the *Sherbert* reasoning, the fundamental issue in the instant controversy is whether compulsory sex education courses promote a "compelling state interest."

What constitutes a compelling state interest is unclear. In *Sherbert*, the Court indicated that, even if the state had proved—which it had not—that it had a valid interest in preventing claims for unemployment compensation by those feigning religious objections to work, that interest might not be compelling enough to sanction transgression of the petitioner's religious beliefs.²⁶ The Court's statement was based on the fact that the state would still have the burden of proving that there was no means of protecting that valid state interest

23. 374 U.S. at 406. See also *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). In *Barnette* the Court noted that first amendment freedoms are susceptible to restriction only to prevent grave and immediate danger to interests which the state may lawfully protect.

24. 374 U.S. at 404. Prior to *Sherbert*, only direct governmental compulsion in the form of fines or imprisonment supported an action under the free exercise clause. In *Sherbert*, however, the Court found that indirect compulsion in the form of economic disadvantage could support a claim based on the free exercise clause. The Court has not yet extended the notion of indirect compulsion in situations arising under the free exercise clause to incorporate informal social pressures such as those found in the classroom situation. See text accompanying notes 41-43 *infra*.

25. 374 U.S. at 407.

26. 374 U.S. at 407.

without infringing the petitioner's right to free exercise. At the same time, however, the Court reaffirmed its prior decision in *Braunfeld v. Brown*,²⁷ in which it held that the state did not have to grant an exemption to its Sunday closing laws to businessmen who observed a day other than Sunday as their day of rest. The state's interest in having one uniform day of rest for all workers was held to override petitioner's religious objections.²⁸ There appears to be no discernible rationalizing principle which explains why the promotion of a uniform day of rest is a compelling state interest for purposes of the free exercise clause, while the prevention of fraudulent unemployment claims may not be. Thus, determination of what constitutes a compelling state interest must be made on an ad hoc basis depending on the facts of the individual case.²⁹

Since freedom of religion is a preferred freedom,³⁰ however, the burden of justifying any infringement is on the state.³¹ In defending against an attack on compulsory sex education, the state might be required to demonstrate that a greater number of successful marriages, a lesser number of extramarital pregnancies, less sexual promiscuity, or a reduction in the number of sex crimes is likely to be fostered by sex education courses. Furthermore, the state may argue that there is a compelling interest in education per se and that imparting useful

27. 366 U.S. 599 (1961).

28. 366 U.S. at 608.

29. See *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), in which the Court held that the state's interest in promoting national unity was not sufficient to overcome religious objections to participation in compulsory flag salute ceremonies. See also *In re Jenison*, 375 U.S. 14 (1963), in which the Court considered the question whether an individual could refuse jury duty on religious grounds and, in a per curiam opinion, remanded that question for consideration in light of *Sherbert*. On remand, the Supreme Court of Minnesota, reversing its prior decision, upheld the individual's refusal because the state had failed to show an adequate "interest in obtaining competent jurors" which would "override relator's right to the free exercise of her religion." 125 N.W.2d 588, 589 (Sup. Ct. Minn. 1963). Compare *Sheldon v. Fannin*, 221 F. Supp. 766 (D.C. Ariz. 1963) (religious objection to standing during singing of national anthem in public schools held to be sufficient to override state's interest in maintaining order or discipline in classroom), and *State v. Everly*, 146 S.E.2d 705 (W. Va. 1966) (refusal on religious grounds to serve on jury upheld since state made no showing that it was unable to obtain an adequate number of competent jurors), with *In re Matz*, 296 F. Supp. 927 (E.D. Cal. 1969) (state's interest in choosing the individuals most suitable for citizenship held to justify denying naturalization to those whose religion precluded them from voting, serving on juries, or participating in governmental functions), and *People v. Woodruff*, 50 Misc. 2d 430, 270 N.Y.S.2d 838 (Sup. Ct. 1966) (state's interest in requiring testimony concerning commission of crime held to be a compelling interest as compared to defendant's religious belief that she could not give testimony harmful to others).

30. See, e.g., *Thomas v. Collins*, 323 U.S. 516, 529-30 (1945) ("the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment . . ."). But see *Kovacs v. Cooper*, 336 U.S. 77, 89-90 (1949) (Justice Frankfurter, concurring).

31. *Sherbert v. Verner*, 374 U.S. 398, 407 (1963); *Martin v. Struthers*, 319 U.S. 141, 144-49 (1943). See also P. KAUFER, *RELIGION AND THE CONSTITUTION* 19-21 (1964).

information to its citizens is a paramount value.³² Indeed, it can be argued that unless children learn about sex in the wholesome environment of the classroom, they will acquire incorrect information about sex in a prurient context. Certainly, it must be recognized that only one course is being attacked and that that course is in an area which traditionally has not even been included in public school curricula.³³ It might be argued that by allowing objections to one subject, the entire curriculum is rendered susceptible to attack. On the other hand, it may be that the preferred position which has been accorded to religious liberty³⁴ demands that each subject be examined separately to determine whether the state's interest in imparting that particular knowledge reaches the level of being a compelling interest. It is difficult to predict the outcome of this balancing. If the state is determined to have such a compelling interest in sex education as to outweigh the objections raised, a court will be required to refuse to grant an exemption from sex education courses. If, on the other hand, the state's interest is found not to be compelling, exemption from sex education courses will be required by the free exercise clause.³⁵

The opponents of sex education might argue further that, even if no compelling state interest is found and consequently the students who have religious objections to sex education courses must be granted an exemption from those courses, that exemption is still not enough to satisfy the requirements of the free exercise clause. According to this argument, requiring the affirmative election of an exemption from sex education classes places informal social pressures on a student to forgo the exercise of his exemption.³⁶ It is arguable that allowing such pressures to exist inhibits the student's right to elect the exemption and is thus very close, if not tantamount, to compelling a student to take the courses and thereby infringing his right to the free exercise of his religion. If that argument is accepted, the only viable remedy which will prevent the infringement is a total prohibition of sex education courses in public schools.³⁷

The Supreme Court has held, in cases arising under the establishment clause, that informal social pressures can constitute compul-

32. "Today, education is perhaps the most important function of state and local governments." *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

33. However, the mere fact a course has traditionally not been included in a curriculum does not mean that it is therefore unimportant. If that were the case, the process of education would stagnate.

34. See notes 30-31 *supra* and accompanying text.

35. As noted previously, it is probably desirable for local school authorities to grant exemptions on religious grounds from sex education courses if they have the statutory power to do so. See note 5 *supra*.

36. See text accompanying notes 44-46 *infra*.

37. See text accompanying notes 47-50 *infra*.

sion.³⁸ In *Engel v. Vitale*,³⁹ for example, the Court stated: "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."⁴⁰ The question arises, then, whether the concept that compulsion incorporates informal social pressures applies to cases arising under the free exercise clause. If the concept does apply, the inquiry with regard to sex education courses is whether the necessity of electing to exempt himself in fact creates such compulsion on the student as to inhibit his free exercise of the right so to elect.

The Supreme Court, in utilizing the notion that the informal social pressure to conform may constitute compulsion, has never applied that notion in cases arising under the free exercise clause.⁴¹ Furthermore, the Court has stated in dictum that such indirect social pressures are not sufficient to cause a violation of the free exercise clause.⁴² These informal social pressures to conform were clearly at work in *West Virginia State Board of Education v. Barnette*.⁴³ In that case, the Court held that those school children objecting on religious grounds could not be required to participate in compulsory flag salute ceremonies conducted in the classroom, but it did not hold that the objectors had to be excused from the classroom when the ceremony took place. Clearly, these children were subject to informal social pressures to participate in the ceremony. Thus, *Barnette* supports the proposition that the state is not required to eliminate the informal social pressures which children might feel to abandon their religious convictions. It may reasonably be concluded, then, that the concept of social pressure to conform as inhibiting an election to be exempted has no relevance to a case arising under the free exercise clause.

But even if notions of pressure to conform were applied in a situation involving the free exercise clause, it appears that there is not sufficient pressure accompanying the election of exemption from sex education courses to support a finding of compulsion. In *Engel v. Vitale*⁴⁴ and *Abington School District v. Schempp*⁴⁵—both establishment cases in which compulsion was found—the children had been

38. *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

39. 370 U.S. 421 (1962).

40. 370 U.S. at 431.

41. In *Sherbert v. Verner*, 374 U.S. 413 (1963), however, the Court did find that economic disadvantage was an indirect form of compulsion that was prohibited under the free exercise clause. See note 24 *supra*.

42. *Abington School Dist. v. Schempp*, 374 U.S. 203, 233 (1963).

43. 319 U.S. 624 (1943).

44. 370 U.S. 421 (1962).

45. 374 U.S. 203 (1963).

given the option of either temporarily leaving the classroom or remaining in the classroom but not participating in the religious exercises. The basis for the Court's finding of compulsion lay in the fact that by the former tactic the child had to make himself obviously different by leaving the classroom and returning at the completion of the religious exercise, and in the latter situation, the child had to bear a sense of isolation since he remained in the classroom but did not participate in the religious exercises. Significantly, in each of these cases, the child was in direct and immediate contact with his peers when he exercised his belief. The same degree of pressure may not be involved when a child can choose simply not to enroll in a particular class. At least in situations in which the school day is divided into periods, with breaks between classes, the child would not be required to focus the attention of his peers on himself by leaving the classroom. Of course, in a setting in which there are no breaks between classes, the pressures to conform are virtually the same as those condemned in *Engel* and *Schempp*. Nevertheless, as noted previously,⁴⁶ a trial court faced with this question should hold that all notions of social pressure are inapplicable and hence unavailable to support a finding of violation of the free exercise clause.

Assuming, however, that a court does find notions of pressure applicable to cases arising under the free exercise clause, and assuming further that it finds that there exist pressures sufficient to inhibit children in the exercise of their religious beliefs, that court would then have to fashion appropriate relief. The only remedy which a court can provide in these circumstances is to require the total abolition of all sex education courses in the public schools.⁴⁷ The Supreme Court has never required such a drastic remedy in a situation in which a program with secular educational objectives incidentally offends rights of a particular religious group in the free exercise of its religion. Thus, in *Barnette*, while the Court held that those objecting on religious grounds to compulsory flag salute ceremonies could not be required to participate in them,⁴⁸ it did not hold that the ceremonies had to be abolished. Furthermore, if a court did abolish sex education courses because such courses incidentally offend religious beliefs, that decision would arguably violate the establishment clause. In *Epperson v. Arkansas*⁴⁹ the Court struck down, on the basis of the establishment clause, an Arkansas statute which prohibited the teaching of evolution in the public schools. The Court stated that "[t]here is and

46. See text accompanying notes 42-43 *supra*.

47. Of course, the school could make sex education an extracurricular activity, available to students only at the close of the normal school day. Such a program would be free from objections based either on the free exercise clause or on the establishment clause.

48. See text accompanying note 43 *supra*.

49. 393 U.S. 97 (1968).

can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma."⁵⁰ Thus, under *Epperson*, the state is required to plan its curriculum primarily on the basis of educational considerations and without reference to religious sensibilities.

In summary, the doubtful relevance to the free exercise clause of the notion of informal social pressures,⁵¹ the uncertainty that compulsion would be found under that theory even if it were applied,⁵² and the possible violation of the establishment clause implicit in a total abolition of the program solely on the ground that it incidentally offends religious beliefs⁵³ all support the conclusion that granting exemptions from sex education courses is the only relief which may be required by the free exercise clause.⁵⁴

Permitting such exemptions, however, may not adequately satisfy yet another objection based on religious grounds. An attempt might be made to prevent sex education courses from being taught at all in the public school on the ground that the teaching of such courses violates the establishment clause. Indeed, the traditional remedy for a violation of that clause is the abolition of the program which constitutes the establishment of religion.⁵⁵

The argument that sex education courses violate the establishment clause turns upon the definition of religion. In *Torcaso v. Watkins*,⁵⁶ the Supreme Court held that religious liberty is not limited to theistic beliefs. Thus, the Court struck down a provision of the Maryland constitution which required that specified state officials, as part of their oath of office, declare a belief in God. In its opinion, the Court noted the fact that "[a]mong religions in this country which do not teach what would generally be considered a belief in the existence of God [is] . . . secular humanism . . ."⁵⁷ The argument can be advanced, then, that unless sex education courses are presented in a religious context, the state is thereby establishing the "religion" of secular humanism.

This establishment argument, however, is likely to be rejected. It fails to distinguish secular humanism, as the term is used to describe our culture and institutions, and secular humanism as a philosophy

50. 393 U.S. at 106.

51. See text accompanying notes 42-43 *supra*.

52. See text accompanying notes 44-46 *supra*.

53. See text accompanying note 50 *supra*.

54. Moreover, although a contrary argument can be made, granting exemptions to those who object to sex education on religious grounds is consistent with the establishment clause. See text accompanying notes 60-63 *infra*.

55. *Engel v. Vitale*, 370 U.S. 421, 430 (1962).

56. 367 U.S. 488 (1961).

57. 367 U.S. at 495 n.11.

or, according to the Court in *Torcaso*, a religion which holds that God is essentially irrelevant to man. Unless sex education courses affirmatively espouse the view that God is irrelevant to matters of sex and sexual behavior, they should not be vulnerable to the argument that they constitute an establishment of religion, even of a secular religion. The decision of the Court in *Abington School District v. Schempp*⁵⁸ supports this view:

It is insisted that unless these religious exercises are permitted a "religion of secularism" is established in the schools. We agree of course that the State may not establish a "religion of secularism" in the sense of affirmatively opposing or showing hostility to religion, thus "preferring those who believe in no religion over those who believe. . . ." We do not agree, however, that this decision in any sense has that effect.⁵⁹

Furthermore, a problem arises from a logical extension of the argument that sex education courses constitute an establishment of religion. Presumably, the teaching of many subjects without reference to God could be attacked as promoting secular values and hence as effectively establishing a religion of secular humanism. But if all such courses were required to be excluded from the curriculum, the state's ability to carry on an effective program of education would be seriously impaired. Thus, it is clear that the failure to present sex education in a religious context does not, by itself, establish a religion of secularism in violation of the establishment clause.

There is yet another argument based on the establishment clause. It has been seen that the free exercise clause may require exemption of individuals from sex education courses if they object to those courses on religious grounds.⁶⁰ Professor Kurland has argued, however, that religious considerations cannot be a basis for classification or for governmental action in any form:

The freedom and separation clauses should be read together as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses read together as they should be, prohibit classification in forms of religion either to confer a benefit or to impose a burden.⁶¹

Under this "neutrality" theory, the granting of exemptions from sex education courses in response to religious objections would violate the establishment clause.⁶²

58. 374 U.S. 203 (1963).

59. 374 U.S. at 225.

60. See text accompanying note 35 *supra*.

61. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 96 (1961).

62. Of course, if Professor Kurland's theory had been applied from the outset, the question whether granting the exemption violates the establishment clause would never

Although the Court has sometimes employed the language of neutrality,⁶³ that concept, as outlined above, has not been accepted as the controlling test of constitutionality under the religion clauses. The *Sherbert* decision is clear authority for the proposition that the state can, and in some cases must, grant exemptions on religious grounds from programs of general applicability.⁶⁴

Since granting exemptions on religious grounds from sex education courses does not create an establishment of religion, then, the validity of a person's claim to such an exemption turns on whether the free exercise clause of the first amendment is held to require such exemptions. That determination, in turn, depends upon whether a court reaches the conclusion that the state's interest is compelling⁶⁵ and consequently that those opposed to sex education do not have the right to remain selectively ignorant. Unless such a compelling interest can be found, a court presented with this issue must hold that the free exercise clause requires that those who object to sex education courses on religious grounds must be exempted from participating in those courses.

have been reached. Under his theory, those opposed to compulsory sex education on religious grounds would not be entitled to an exemption, because requiring attendance at such classes would not violate the free exercise clause. *See id.*

63. *See, e.g.,* *Abington School Dist. v. Schempp*, 374 U.S. 203, 218-23 (1963).

64. 374 U.S. at 409; *cf. Zorach v. Clausen*, 343 U.S. 306 (1952).

65. *See* text accompanying notes 26-50 *supra*.