1964

The Legal Status of Religion in Iowa Public Schools

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THE LEGAL STATUS OF RELIGION IN IOWA PUBLIC SCHOOLS

by

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A Thesis Submitted to the Faculty of the Graduate School of Loyola University in Partial Fulfillment of the Requirements for the Degree of Master of Arts

October

1964

LIFE

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After successfully completing one year of law at Northwestern University, the author spent the next four years as a high school instructor, teaching various subjects in the West Dubuque Public School System in Eastern Iowa and English at St. Viator High School in Arlington Heights, Illinois. He began his graduate studies at Loyola University in February, 1963.

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CHAPTER I

INTRODUCTION

The purpose of this study is to define the current legal status of religion in the public elementary and secondary schools of the state of Iowa. Recent decisions of the Supreme Court of the United States, cases yet destined for decision in that court, and others have catapulted the subject of religion in the public schools into national prominence. The issue has thus been magnified also in the various states.

Statement of Problem

We Americans are a religious people. We pride ourselves on being a fair people as well. The two traits clash when our religious diversity confronts our sense of justice and fairness to all in the common ground of our public school system. Because our diversity in religion is not matched by a diversity in school systems, our sense of fairness demands that we either teach a "common core" body of subject matter concerning religion and its place in our society or that we make some provision for teaching pupils, who belong to the many different denominations in our culture, more about their own religion separately and apart from

those pupils belonging to other creeds.

The school exists to transmit a knowledge of our present culture to our youth. Our religious principles are certainly a part of this culture. Can we, then, rightly ignore the transmission of these principles when formulating the curriculum of the public school? Can we relegate them entirely to the care of the home and the church? Or can we achieve a sensible balance, retaining some within the classroom and placing others in the hands of the family and the church? If so, where do we draw the line between the responsibility of the public school to impart some moral training and instruction and responsibility of the home and the church?

The problem is well stated by the Committee on Religion and Education of the American Council on Education, which refers to it as "the problem arising out of the secularization of American life and education." Becoming more specific, the Committee declares: "The problem is to find a way in public education to give due recognition to the place of religion in the culture and convictions of the people while safeguarding the separation of Church and State."[1] This is a problem faced by the nation as

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[1] The Function of the Public Schools in Dealing with Religion: A Report on the Exploratory Study Made by the Committee on Religion and Education: A Committee of the American Council on Education (Washington, D.C., 1953), p.2.

a whole and by each state in the administration of its own school system.

Delimitation of the Study

This study is limited to that portion of the general problem outlined above pertaining to the state of Iowa. Each state differs somewhat in the structure and administration of its school system. So too, each state has differed in its legislative and judicial reaction to the problem of religion in its public schools.

Although this investigation will draw upon judicial rationale laid down in cases occurring in other states or in the Federal courts, it will do so for the purpose of further explaining the reasoning of the Iowa courts which have assumed a given position in regard to a particular issue. In those areas yet unlitigated in the Iowa courts, non-Iowa cases will be examined, as well as opinions of Iowa attorneys-general, for possible prediction of the position which might prevail should such litigation occur.

This investigation is limited also in that it will attempt to ascertain only the <u>legal</u> status of religion in the public schools of Iowa. Laws define what may be done, and courts interpret the law. Anyone contemplating a course of action with regard to a particular religious exercise or practice must first be aware of the status of his course in the eyes of the law of his state and nation. It is hoped that this study will prove of practical

use to those wishing to learn the Iowa law and some of the law in general on this subject and to those who might desire to see the present law altered in this controversial area.

Since this study is limited to public schools, the place of religion in private or parochial schools is not included. The study is further limited to public schools of elementary and secondary rank, i.e., those included in grades K through twelve.

Timeliness of the Study

It is no secret that more litigation has arisen in this country relating to the subject of religion in the public schools in the past fifteen or twenty years than has arisen in the history of the nation up to the present time. The number and type of recent decisions in state courts show clearly that church-state controversies in the area of school law are increasing in number. For example, the Oregon State Supreme Court has recently held as unconstitutional under the state constitution a state statute providing Oregon parochial school pupils with textbooks financed from public funds.[2] This decision adds yet another chapter to the private school textbook controversy which was carried all the way to the Supreme Court of the United States in 1929 in the

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[2] Dickman v. School District No. 62C, 366 P.2d 533 (1961).

now-famous Cochran case.[3]

A recent Vermont statute permitting the payment of tuition by public school districts for students attending church-operated schools has been held violative of the First Amendment to the Federal Constitution by the Vermont Supreme Court.[4] And still other examples of state court rulings include a prohibition against the public transportation of private school pupils from their homes to a nearby public school en route to the private school,[5] and a decision abolishing films having religious content and the active observance of certain religious holidays in the Florida public schools.[6]

On January 9, 1964, the California State Superintendent of Public Instruction, in a televised interview appearing on the Walter Cronkite CBS News Program, announced his decision, upon the advice of California's Attorney General, to ban all text-books teaching the evolution of the human race as a scientific fact, not a theory, from the California public schools in order

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[3] Cochran v. Louisiana State Board of Education, 281 U.S. 370, 50 S.Ct. 335, 74 L.Ed. 913 (1930).

[4] Swart v. So. Burlington School District, 167 A.2d 514 (Vt. 1961).

[5] State ex rel. Reynolds v. Nusbaum, 17 Wis.2d 148 (1962).

[6] Chamberlin v. Board of Public Instruction, 143 So.2d 21 (Fla. 1962).

not to offend the religious beliefs of those who hold that evolution is but a theory.

The United States Supreme Court, within the past three years, has opened the church-state controversy even wider by outlawing state-composed prayers in the nation's public school classrooms,[7] together with the recitation of the Lord's Prayer and the reading of passages from the Bible.[8]

Even the recent issue of "released time," with all its variations, has given way in the courts to the newer controversies concerning "shared time" programs. These consist of agreements between parochial and public schools, usually on the secondary level, permitting pupils enrolled in the private institution to earn their credits in high school mathematics, science, health, and physical education along with the public school pupils in the public classroom, while still attending classes in the social studies and religion in the nearby private school. At this writing, the Chicago, Illinois Board of Education has decided to proceed with an experiment involving this type of dual program within the Chicago public school system. A case testing the

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[7] Engel v. Vitale, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962).

[8] School District of Abington Township, Pa. v. Schempp; Murray v. Curlett, 374 U.S. 203, 83 S.Ct. 1560 (1963).

legality of this program is expected to be filed in the Illinois courts soon.

Religion in public education is very much in today's news. In fact, should happenings in this area continue to multiply in the near future as rapidly as they have in the recent past, this study will become outdated very shortly.

Sources of Data

The basic sources of data for this study have been Federal and state constitutions, Federal and state statutes, Federal and state court decisions, opinions of attorneys general, and regulations of state and local boards of education. Secondary sources chiefly of value in obtaining references to original sources, consist of reporter systems, books, treatises, bulletins, theses, newspapers, and periodicals.

Method of Procedure

Reference was first made in this study to the Constitution of the state of Iowa and the Iowa School Code (derived from the Iowa Revised Statutes) for examination of pertinent statutory provisions. The Constitution of the United States, with special attention to the First and Fourteenth Amendments, was reviewed next. The remaining sources of data listed in the preceding section of this chapter were then thoroughly examined. Topic

headings and categories consulted in these source areas included "Schools" and "Church and State." Subtopics under these headings included "Bible-reading," "Use of Public School Property for Religious Purposes," "Use of Church-related Property for Public School Purposes," "Religious Garb," "Religious Instruction," "Flag Salute," "Baccalaureate Exercises," "Nativity Scenes," "Religious Classes for Credit," "Released Time," "Shared Time," "Vaccinations," "Evolution," "Compulsory Attendance," "Shared Facilities," "Textbooks," "Private Schools," and "School Bus Transportation." Some of these topics yielded little or no information; others yielded much, in addition to cross-references to other legal tools and additional sources. Cases cited under these topics were then read, briefed, and brought up to date by reference to Shepard's Citations in order to make certain that they had not been reversed, modified, or "distinguished away."

Although Iowa cases were used wherever they touched on the issue under consideration, cases from other jurisdictions were cited freely for comparison and contrast, for further explanation of the Iowa precedent and rationale on the issue, and for possible prediction of the stand Iowa courts might take on issues yet unlitigated in that state. Related cases in the Federal courts, expecially the Supreme Court of the United States, were cited and discussed in order to clarify precedent and review the legal history of the various issues.

Paralleling this procedure in the law library, an examination was made of those legal and educational treatises relating to the topics listed above. A close study of materials concerned with the history of religion in Iowa schools was carried out. Educational journal and law review articles pertinent to the above topics were also consulted. These yielded related cases in addition to the other sources mentioned previously.

Definition of Terms

Legal Status -- Black's Law Dictionary lists several definitions for this term, including "The legal relation of the individual to the rest of the community," "The rights, duties, capacities and incapacities which determine a person to a given class," and "A legal personal relationship, not temporary in its nature nor terminable at the mere will of the parties, with which third persons and the state are concerned."[9] The legal status of religion in this study thus consists of its legal relation to the public school as determined by present judicial opinion.

Religion -- Again, Black's Law Dictionary furnishes definitions which are probably the most applicable to

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[9]Henry Campbell Black, Black's Law Dictionary, ed. Editorial Staff of West Publishing Co. (St. Paul, Minn., 1951), p. 1580.

this topic, although there exist many legal definitions of this term which lend it defferent shadings for different purposes. Black defines religion as follows:

> Man's relation to Divinity, to reverence, worship, obedience, and submission to mandates and precepts of supernatural or superior beings. In its broadest sense includes all forms of belief in the existence of superior beings exercising power over human beings by volition, imposing rules of conduct, with future rewards and punishments.
>
> One's views of his relations to his Creator and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with cultus or form of worship of a particular sect, but is distinguishable from the latter.[10]

As the term is used in constitutional provisions forbidding an "establishment of religion," or as it may well be used in legal relation to the public school classroom, black defines it as "a particular system of faith and worship recognized and practised by a particular church, sect, or denomination."[11]

Mr. Justice Frankfurter of the United States Supreme Court, in a separate opinion in McGowan v. Maryland,[12] defined religion as "man's belief or disbelief in the verity of some transcendental

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[10] Ibid.

[11] Ibid.

[12] McGowan v. Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed. 2d 393 (1961).

idea and man's expression in action of that belief or disbelief."

The Supreme Court of Illinois in one famous Bible-reading case stated:

> Religion has reference to man's relation to Divinity; to the moral obligation of reverence and worship, obedience, and submission. It is defined by Webster as the recognition of God as an object of worship, love, and obedience; right feeling toward God, as rightly apprehended.[13]

The following year this court again formulated a definition:

> While religion, in its broadest sense, includes all forms of belief in the existence of superior beings capable of exercising power over the human race, yet in the common understanding . . . it means the formal recognition of God as members of societies and associations.[14]

The theory that the only expression of religion is sectarian is implied by the court in the Ring case where it states that: "It is no part of the duty of the state to teach religion, -- to take the money of all and apply it to teaching the children of all the religion of a part, only."[15]

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[13] People ex rel. Ring v. Board of Education, 245 Ill. 334 29 L.R.A. (U.S.) 442, 92 N.E. 251, Ann. Cas. 220 (1910).

[14] People v. Deutsche Evangelisch Luterische Jehovah Gemeinde, etc., 249 Ill. 132, 94 N.E. 162 (1911).

[15] People ex rel. Ring v. Board of Education, 245 Ill. 334, 29 L.R.A. (U.S.) 442, 92 N.E. 251, Ann. Cas. 220 (1910).

However, it is often insisted that there is a field of religious faith and practice that is entirely non-sectarian. There are a number of judicial opinions in which a distinction between religion and its sectarian expression is recognized. For example, the court which formulated one of the definitions of religion quoted above from Black's Law Dictionary has declared:

> The term "religion" has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the cultus or form of worship of a particular sect, but is distinguishable from the latter.[16]

The foregoing opinion which holds that there can exist a common core of religious principles and beliefs finds willing believers in those who claim that the public school can and does impart a form of moral training or religious instruction, even with all traces of sectarian teaching excluded from the classroom.

The Supreme Court of Iowa seems to impliedly concur in the "common core" principle of non-sectarian religious belief when it suggests the historical development of different theological interpretations of religion in the following words:

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[16] Gabrelli v. Knickerbooker, 12 Cal.2d 85, 82 P.2d 391 (1938).

> Theology, the science of religion -- that is, of formulating our thinking with respect to religion -- has steadily insisted upon connecting religion with the life men lead and the things they do in this world. Indeed, the great religious struggles of the past have come in most cases from the undertaking of men to impose on other men, not their religion, but their science of religion . . . .[17]

As can be seen, any single definition of religion, applicable in all cases and for all purposes, is very difficult to come by. For the purposes of this study, it will be assumed that religion includes all aspects of Christian faith and practice, both sectarian and non-sectarian.

Iowa -- This thesis will encompass only those public elementary and secondary schools subject to the jurisdiction of the Iowa State Department of Public Instruction. To the best of this writer's knowledge, this includes all public elementary and secondary schools located within the geographical borders of the state of Iowa

Public Schools -- The legal definition of this term can be best comprehended by a brief review of some of the cases which decide under what circumstances a school is controlled by a local school board, as an arm of the state, and under what circumstances it is subject to the control of someone other than the state or its legally authorized agents.

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[17] State v. Amana Society, 132 Iowa 304, 109 N.W. 894 (1906).

As will be noted, the deciding factor is the nature of the controlling authority.

It was decided in Jenkins v. Andover[18] that a free school, founded by charitable bequest, and maintained as a charity under the direction of trustees elected by the town, some of whom, although elected at town meetings, must be members of certain designated religious societies, was not a public school entitled, under the Massachusetts Constitution, to money raised by taxation for the support of schools.

Another court held that an orphanage or a school under the auspices of a church does not come within the definition of a "common school."[19]

However, when it became necessary for a public school board to lease a room in a building owned by a bishop of the Catholic Church, the court held that when the public schoolhouse is in disrepair or insufficient, the best interests of the public school might be served by renting a building, regardless of its ownership.[20] This was a holding by the Supreme Court of Iowa

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[18] Jenkins v. Andover, 103 Mass. 94 (1869).

[19] People v. Board of Education of Brooklyn, 13 Barb 400 (N.Y. 1851).

[20] Scripture v. Burns, 59 Iowa 70, 12 N.W. 760 (1882).

and will be further discussed in Chapter Three of this work.

Still another case involved a public school board's leasing a parochial school building and operating it as a part of the city's school system. Before the time for opening school, the city board of education was notified that a parochial school, which had been educating eight hundred of the city's children, would be unable to open due to the state of economic depression then existing in the country. The city had neither buildings nor teachers available for these additional pupils, so it contracted to rent the buildings and hire the teachers of the parochial school. The teachers were regularly certified and supervised and used the same course of study as that used in the other schools of the city. Religious instruction was given in a nearby church. The court held that the school was a legally operated public school.[21]

On the other hand, an application for pre-emptory writ of mandamus commanding the state superintendent of public instruction to recognize a school in a designated school district as an accredited high school and as a public school entitled to a share of money belonging to the state school fund was denied.[22]

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[21] State ex rel. Johnson v. Boyd, 217 Ind. 348, 28 N.E.2d 256 (1940).

[22] State ex rel. Public School District v. Taylor, 122 Neb. 454, 240 N.W. 573 (1932).

In this instance, the only school in the district in a rural community was on land belonging to the Catholic Church across the highway. Over the entrance of the school building, upon which was a cross, were the words "St. Boniface School" in stone. The pupils attended a daily Mass in a chapel in the school.

In Missouri, a Roman Catholic school, established a number of years before, was taken into the state public school system. From then on it was supported by public funds. The textbooks and course of study prescribed by the state department of public instruction were adopted, but otherwise the school continued as a parochial school in the same manner as before, retaining the same name, same building, and the same teachers. It was still referred to as the "Catholic School." Evidence disclosed that the pupils attended Mass, went to confession, and studied catechism. It was held that the plaintiff here was entitled to an injunction because this was not a public school under these conditions.[23]

These and similar cases appear to warrant the conclusion that the distinguishing feature of a public school is its complete subjection to the authority of the state or the legally authorized agents of the state. It must thus be operated according to state

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[23] Harfst v. Hoegen, 349 Mo. 808, 163 S.W.2d 609 (1941).

regulation in all matters. If the school is not controlled thus by the state but by another body, it does not meet the definition of a "public school."

Sect and Sectarian -- Although these terms are not included in the topic of this work, they do occur often enough in the literature concerned with religion in the public schools to deserve definition here.

In the Ring case, the Illinois court stated: "Christianity is a religion. The Catholic church and the various Protestant churches are sects of that religion."[24]

A Colorado court has declared:

> Sectarian means pertaining to a sect, and when put into the Constitution of 1875-76, was commonly used to describe things pertaining to the various sects of Christianity, and was not extended beyond the various religious sects. A sectarian doctrine or tenet then, would be one peculiar to one or more of these sects, . . .
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> If all religious instriction were prohibited no history could be taught . . . Further if we are to take the argument of the plaintiff that sectarian means more than the sects of religion and say that it means religious, we must push it to its logical limit, and say that believers are a sect, and that, in deference to atheists, no reference to God may be made and this would bar the singing of "America" and "The Star Spangled Banner"; . . .

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[24] People ex rel. Ring v. Board of Education of District 24, 245 Ill. 334, 29 L.R.A. (U.S.) 442, 92 N.E. 251, Ann. Cas. 220 (1910).

Religion and sectarian are not synonymous.[25]

Finally, the Supreme Court of Iowa has defined sects as "voluntary organizations, each dedicated to the promotion of the peculiar view of its adherents." In the same case, the court continues, elaborating on the legal definition of the term sect, especially in relation to religious instruction in the public schools:

> At the bar of the court every church or other organization upholding or promoting any form of religion or religious faith or practice is a sect, and to each and all alike is denied the right to use the public schools or the public funds for the advancement of religious or sectarian teaching.

And further on the Iowa court comments on the amount of sectarian instruction required to label a school, or to brand instruction also, as "sectarian": "To constitute a sectarian school or sectarian instruction which may not lawfully be maintained at public expense, it is not necessary to show that the school is wholly devoted to religious or sectarian teaching."[26] Like the term religion, it is difficult to locate a standard definition of the word sect in the law.

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[25] People ex rel. Vollmar v. Stanley, 81 Colo. 276, 255 Pac. 610 (1927).

[26] Knowlton v. Baumhover, 182 Iowa 691, 166 N.W. 202, 5 A.L.R. 841 (1918).

This concludes the definition of the more important terms surrounding this topic which lend themselves to reasonably accurate definition. This writer was tempted to hazard a definition of that flexible phrase separation of church and state but found its interpretation and application by the courts such a judicial jungle that any attempt here would be premature at best.

It is maintained by some that the Supreme Court of the United States, in its recent opinion concerning Bible reading and prayer recitation in the public schools,[27] has laid down a new test for determining such separation more accurately, the "public purpose" test. This will be discussed in greater detail in Chapter Four of this thesis in hopes that readers will come away with a clearer conception of the principle of separation of church and state as it bears on religion in public education. As will be observed, it will be involved to some extent in nearly every matter of dispute and judicial opinion throughout this work.

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[27] School District of Abington Township, Pa. v. Schempp; Murray v. Curlett, 374 U.S. 203, 83 S.Ct. 1560 (1963).

CHAPTER II

A HISTORY OF RELIGION IN IOWA PUBLIC SCHOOLS

When the Iowa country was attached to the Territory of Michigan in 1834 for the purpose of temporary government, the laws of the Michigan Territory were extended over the newly settled area west of the Mississippi. "It is, therefore, to the statutes of Michigan that one must turn for the earliest legislation concerning the organization and administration of schools in Iowa." The Michigan school laws were in turn influenced by the New England school laws, particularly those of Massachusetts, as is especially evident in the Michigan acts of 1827, 1828, 1829, and 1833.[1]

In addition to making provision for the care of school lands, these influential laws provided for the organization of school districts, the examination and employment of teachers, and for the schooling of children between the ages of five and fifteen.[2]

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[1] Clarence Ray Aurner, History of Education in Iowa (Iowa City, 1914), I, 1, 383.

[2] Ibid.

The Michigan law of 1827 provided that no books be used in the schools which might favor one religious sect or cult over another. This statute was obviously patterned after the Massachusetts School Law of 1827 which decreed that "school boards might not thereafter 'direct any school books to be purchased or used, in any of the schools . . . which are calculated to favour any particular religious sect or tenet.'"[3] Early nineteenth century Iowa school children thus used textbooks which, although not devoid of religious content, were by law non-sectarian in character.

Iowa achieved territorial status in 1838 with the passage of the Organic Act of the Territory of Iowa. The brief territorial bill of rights, as set forth in the Iowa Constitution of 1838, grants to Iowa citizens that legal status already held by citizens of the neighboring territory of Wisconsin; and the Constitution of the Territory of Wisconsin guaranteed all the rights contained in the Ordinance of 1787, also known as the Northwest Ordinance, which alluded to religion and the schools in the same clause: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools

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[3]As quoted in Footnote 7 of Mr. Justice Brennan's separate, concurring opinion in School District of Abington Township, Pa. v. Schempp; Murray v. Curlett, 374 U.S. 203, 83 S.Ct. 1560 (1963).

and the means of education shall forever be encouraged . . ."[4]

Iowa Constitutional Background

The constitution under which Iowa entered the Union on December 28, 1846, bade the General Assembly encourage moral improvement, among other types: "The General Assembly shall encourage by all suitable means the promotion of intellectual, scientific, moral and agricultural improvement."[5]

The Iowa Constitutional Convention of 1857, convened to revise the Constitution of 1846, passed Section 3 of Article I of the present Constitution which declares the policy of the state with respect to religion:

> The general assembly shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister of ministry.[6]

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[4]Benjamin F. Shambaugh, History of the Constitutions of Iowa, (Des Moines, 1902), pp. 116, 118.

[5]Charles Ashton, James O. Crosby, and J. W. Jarnagin, A Handbook of Iowa (Iowa Columbian Commission, 1893), p. 97.

[6]Wendell Jay Hansen, "An Iowa Experiment in Public School Bible Teaching," Unpublished Doctoral Thesis (State University of Iowa, Iowa City, 1947), p. 31.

Since there was no discussion or amendment offered after this passage, the present Fourth Section of Article I was read to those assembled:

> No religious test shall be required as a qualification for any office or public trust, and no person shall be deprived of any of his rights, privileges, or capacities, or disqualified from the performance of any of his public or private duties, or rendered incompetent to give evidence in any court of law or equity, in consequence of his opinions on the subject of religion.[7]

Hansen comments that these laws were characteristic of the usual constitutions of the period -- "no relationship between state and church, yet there are to be no hindrances placed upon the church."

Except for appropriation bills, Iowa school laws were to be enacted by the State Board of Education, according to Hansen, and he records a thorough account of the proceedings of such a Board meeting occurring on December 17, 1858. The subject under discussion was the presence of the Bible in Iowa public schools:

> . . . Mr. Cooper presented the following resolution, "Resolved that the Bible shall not be excluded from any school in the state." The following amendment was offered by Mr. Brainard:

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[7] Official Report, The Debates of the Constitutional Convention of the State of Iowa (Davenport, 1857), I, 118, as quoted in Hansen, Ibid.

"Provided it is not the true intent to introduce the Bible as a text book into the schools of this state, nor to exclude it therefrom, or to give any power to school officers so to do, but to leave the people thereof perfectly free to form and regulate this matter in their own way, subject only to the constitution of the United States."

This was lost, but the following amendment was accepted: "no pupil shall be compelled or required to use the Bible as a school book against his will or the will of his parents or guardian."

Mr. Mason offered the following amendment: "Provided that the Bible shall in all cases, be one of the standing text books in every school which receives any portion of the school fund; but no pupil shall be compelled to use such book against his will, or against the will of his parent or guardian." This resolution stirred up an "anlimated discussion" which unfortunately is not recorded in the official report or in the newspaper accounts. But we are told that six were in favor, and two opposed to the resolution.

The whole matter was a debatable subject. The bill to prohibit the exclusion of the Bible, was referred to the committee on revision. This committee reported back on December 21, recommending the bill's indefinite postponement. This motion was not concurred in. The minority report of the committee was therefore considered. This report was that the Bible should not be excluded from public schools.

Mr. Perry moved to amend by adding after the word Bible, "whether of the Catholic or Protestant version." Mr. Kimball was opposed to the amendment, he said that since he was soon coming up for reelection, he thought it improper to make a bid for the Catholic vote.

The Governor of the State, Ralph P. Lowe, then made a "glowing eulogy" of the Bible as "the foundation of civilization." He desired the adoption of the minority report. Mr. Rozelle then offered an amendment leaving the acceptance or rejection of the Bible to the people of the districts. He was opposed to legislation on the subject.

> Mr. Canfield said there was no effort made by himself, or by gentlemen operating with him on this question to oppress the Catholics. Several other amendments and forms of the bill were suggested. But on the following day the bill came up for its third reading in its original form and passed with the one amendment that none should be required to read it contrary to wishes of parent or guardian. The bill as it was finally passed December 22, 1858, and as it has remained through the code of 1939 is as follows:
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> "The Bible shall not be excluded from any public school or institution in the state, nor shall any child be required to read it contrary to the wishes of his parent or guardian." (Sec. 4258, C. 1939, Code of Iowa.) There were 8 votes in favor of the bill and 4 against.
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> The issue at the time, then, was a debatable one with concern given for the Catholics. But while there was a difference in opinion, this difference was apparently not deep-seated enough in the public mind to raise any comment. There does not seem to be any mention of the matter whatever in the newspapers of the state.[8]

Thus the Iowa State Board of Education in 1858 sanctioned the presence of the Bible in Iowa public schools. The constitutionality of this law, forbidding the exclusion of the Bible in the schools, was challenged in 1884, twenty-six years after its passage, in the case of Moore v. Monroe.[9]

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[8]Journal of the Board of Education at Its First Session, John Tresdale, State Printer (Des Moines, 1858), pp. 38 ff. See also The Iowa Citizen (Des Moines, December 22 and December 29, 1858), Proceedings of the Board of Education, as cited in Hansen, pp. 33-36.

[9]Moore v. Monroe, 64 Iowa 367, 20 N.W. 475, 52 Am.Rep. 444 (1884).

In this case, the plaintiff, a resident-taxpayer of the independent district of Bloomfield, Iowa, who also had children attending its public schools, objected to certain classroom exercises which included reading selections from the Bible, singing religious songs, and repeating the Lord's Prayer. He asked that these practices be discontinued, contending that religious activities such as these made the school house a place of worship and that he was thus being compelled, in violation of Section Three of Article I of the Iowa Constitution, to pay taxes to support a place of worship. By so pleading, he was attempting to have the above statute, permitting the presence of the Bible in the schools, declared unconstitutional.

The statute was upheld as constitutional by the Supreme Court of Iowa in a unanimous decision under its interpretation of Article I, Section Three, which states in part that no "person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, . ."

Although this case will be discussed much more thoroughly in the Fourth Chapter of this work, it is helpful to note here that, under the constitutional interpretation rendered above, religious practices and exercises other than the mere presence of the Bible in the public school were also sustained as constitutional.

This ruling seemed to solidify not only Bible reading in the schools but also additional activities of a religious nature,

which leads to present speculation as to their nature and to the historical circumstances surrounding their occurrance. Descriptions are available from a number of limited sources and will be reviewed in the next few sections herein.

Non-Sectarian Trend

In order to adequately clarify the reasons for the non-sectarian character of the aforementioned exercises, it becomes necessary to note the trend toward non-sectarian education occurring in the nation during the first half of the nineteenth century. Clear examples of this trend are furnished in the Massachusetts and Michigan school laws, cited here in the above section, which provided that no books be used in the schools which might favor one sect or cult over another. The build-up to the enactment of these and like laws is aptly described by Mr. Justice Brennan of the Supreme Court of the United States in Footnote 7 of his separate, concurring opinion in the Murray and Schempp cases:[10]

> Efforts to keep the public schools of the early nineteenth century free from sectarian influence were of two kinds. One took the form of constitutional provisions and statutes adopted by a number of States

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[10] School District of Abington Township, Pa. v. Schempp; Murray v. Curlett, 374 U.S. 203, 83 S.Ct. 1560 (1963).

> forbidding appropriations from the public treasury for the support of religious instruction in any manner . . . The other took the form of measures directed against the use of sectarian reading and teaching materials in the schools. The texts used in the earliest public schools had been largely taken from the private academies, and retained a strongly religious character and content . . . In 1827, however, Massachusetts enacted a statute providing that school boards might not thereafter "direct any school books to be purchased or used, in any of the schools . . . which are calculated to favour any particular religious sect or tenet." . . . As other states followed the example of Massachusetts, the use of sectarian texts was in time as widely prohibited as the appropriation of public funds for religious instruction.

The movement was given strong impetus also during the 1830's and 1840's by Horace Mann who influenced educational practice in the nation by his persistent support of non-sectarian textbooks in the Massachusetts public schools. The case for Mann is well made by Miller, quoting Fleming:

> It is often suggested that he opposed religion in the schools and tried to exclude it, but the exact opposite is the truth . . . He opposed sectarian books that certain financial interests sought to get into school libraries and incurred the bitter enmity of those interests . . . Three of his twelve annual reports give large space to the subject of religion: 1843, 1847, and 1848.[11]

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[11] W.S. Fleming, God in Our Public Schools (Pittsburgh, 1944), pp. 27-31, as quoted in Raymond R. Miller, "The Legal Status of Religion in the Public Elementary and Secondary Schools of the United States," Unpublished Doctoral Dissertation (Indiana University, Bloomington, Ind., 1949), p. 77.

> In the report of 1847, "The use of the Bible in the schools is not expressly enjoined by law, but both its letter and its spirit are consonant with that use, and, as a matter of fact, I suppose there is not, at the present time a single town in the commonwealth in whose schools it is not read."
>
> In his final report, 35 pages are devoted to moral and religious instruction. "Moral education is a primal necessity of social existence. The grand result in practical morals . . . can never be attained without a religious education . . . Had the board required me to exclude either the Bible or religious instruction from the schools, I certainly should have given them the earliest opportunity to appoint my successor."[12]

The movement for religious neutralization of public education reached a peak in the latter half of the century in President Grant's Des Moines, Iowa speech before the Army of the Tennessee on September 29, 1875, in which he advocated a public school system completely separated from ecclesiastical control. In the following year, in his annual message to Congress, the President recommended an amendment to the Federal Constitution forbidding the teaching of religion in the public schools and prohibiting the granting of public funds to any institution under the control of any religious sect. The President's recommendation resulted in the proposed "Blaine Amendment," which passed in the House on August 4, 1876, but failed to receive the necessary two-thirds vote in the Senate by a narrow margin. Its wording is reproduced here because it is quite similar to that of Article I, Sections Three and Four of the Iowa Constitution:

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[12] Ibid.

> No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no religious test shall ever be required as a qualification to any office or public trust under any State. No public property, and no public revenue or, nor any loan of credit by or under the authority of the United States, or any State, Territory, District, or municipal corporation, shall be appropriated to, or made or used for, the support of any school, educational or other institution, under the control of any religious or antireligious sect, organization, or denomination, or wherein the particular creed or tenets shall be read or taught in any school or institution supported in whole or in part by such revenue or loan of credit; and no such appropriation or loan of credit shall be made to any religious or antireligious sect, organization, or denomination to promote its interests or tenets. This article shall not be construed to prohibit the reading of the Bible in any school or institution; and it shall not have the effect to impair rights of property already vested. Congress shall have power by appropriate legislation to provide for the prevention and punishment of violations of this article.[13]

What were some of the major forces producing this nonsectarian trend in the public schools? Samuel C. Parker recognized four:

1. Improved method and new discoveries in natural science.
2. The spirit of religious toleration.
3. The development of strong centralized paternal governments.
4. The development of democracy, which furnished a new nonreligious basis for universal education.[14]

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[13] C. H. Moehlman, The American Constitutions and Religion (Berne, Indiana, 1938), as quoted in Miller, pp. 107-108.

[14] Samuel C. Parker, The History of Modern Elementary Education (Boston, 1912), p. 111, as quoted in Miller, p. 76.

Within these forces and as a part of this trend moved the individual teacher, and George F. Parker, Iowa historian, describes the trend's effect on the teacher of nineteenth century Iowa:

> Despite the universal prevalence and discussion of religion, its contentious questions were not permitted to enter the schools. Even a director, however narrow a sectarian he might be, would seldom go out of his way to employ a teacher of his own persuasion. Generally speaking, no questions were asked. It was assumed that an applicant for a school would not be what was known as an infidel; beyond this, there was no interest in his religious alignment . . . Indeed, the average teacher seemed rather inclined to avoid participation in such exercises and to congratulate himself that custom had almost excluded him from them.[15]

However, Iowa historian Clarence Ray Aurner notes that the non-sectarian trend did not diminish the importance of moral and religious instruction in Iowa public schools of the time:

> There was, however, no hesitation in emphasizing the importance of moral and religious instruction in the schools; and so, there was persistent effort to find some common ground on which all might agree to the end that the schools would not neglect the important function of training in morals.[16]

It is also worthy of attention that a committee of notable

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[15]George F. Parker, Iowa Pioneer Foundations (Iowa City, 1940), pp. 479-480.

[16]Clarence Ray Aurner, History of Education in Iowa (Iowa City, 1914), I, 97.

Iowa educators, visiting a Davenport exhibition of the new "intuitive method" of teaching in June, 1864, "was 'happy to observe the prominence' which was given to religious instruction as well as the 'new and pleasing methods, by which Bible truth is communicated to the minds of the children.'"[17] And Aurner adds: "On January 1, 1872, Superintendent Abram S. Kissell submitted his final report to the General Assembly . . . He . . . gave fifteen pages to the subject of moral and religious education . . . "[18]

Nineteenth century Iowa children were thus receiving "moral and religious education" in the schools, and every effort was being made to keep it non-sectarian. But what form did this type of instruction assume in the schools of the last century? What was its nature and the historical circumstances surrounding it?

Exercises and Practices

Materials and sources answering the above questions concerning the nature and circumstances of early religious instruction in the public schools of Iowa are scarce, and Reith cites one probable reason for this: "Religious instruction, . . . was not made a matter of record. There seemed to be no evidence

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[17] Ibid., 309.

[18] Ibid., II, 47.

of controversy which might indicate local option in the absence of a strict policy prohibiting or requiring religious instruction. Early history of the schools was limited to isolated cases."[19] And Reith, quoting from a Knoxville, Iowa newspaper, refers to one of these cases in showing how moral and religious education in the pioneer school curriculum was effectuated by the use of "opening exercises":

> A great many of the older people of today will recall the opening exercises of the school of their youth. Opening exercises were a part of the Knoxville schools. . . . The teachers were to conduct a brief period each day which was to consist of the reading of the Bible, singing, or lessons of a moral scripture. . .[20]

Iowa historian George F. Parker, who stated above that religion's "contentious questions were not permitted to enter the schools" of early Iowa, admits the presence of Bible reading and, in so doing, describes in further detail the content of the typical "opening exercise" referred to above:

> The only recognition of religion in the schools was the reading of a chapter in the Bible at the beginning of each day. Generally each pupil above certain

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[19] Roy J. Reith, "Effect of Reorganization of School Districts on Religious Education in Three Selected Iowa Elementary Schools," Unpublished Master's Thesis (Drake University, Des Moines, 1961), pp. 23-24.

[20] Knoxville Journal (Centennial Edition), August 5, 1955, cited in Reith, p. 22.

> grades would read a verse; . . . In many cases the teacher himself would prefer to read with clearness and natural expression the whole chapter, but there was no comment, no explanation beyond the definition of a word, nothing to give any twist to the text for or against any of the favorite interpretations of the day.[21]

Other historians would possibly contest Parker's statement that Bible reading was the "only recognition of religion in the schools"; for example, Reith, above, refers to "singing, or lessons of a moral scripture," as well as Bible reading.

The content of the opening exercises changed with the turn of the century and seemed to be especially influenced by the First World War, or at least America's participation in it: "The 'American Creed' and the 'Pledge of Allegiance' were popular during World War I as an opening exercise, but following the war, the 'Creed' continued to be used off and on until today when it is referred to only on special days."[22]

The pattern of the religious instruction in general also changed from time to time in the present century, according to a former Pella, Iowa school board member; and Reith comments that this "may be considered typical of the times":

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[21]George F. Parker, Iowa Pioneer Foundations (Iowa City, 1940), pp. 479-480.

[22]Knoxville Journal (Centennial Edition), August 5, 1955, cited in Reith, p. 22.

> The pattern of religious instruction in the Public schools had changed from time to time. The amount of time devoted to teaching the Bible had changed. There was a time when Bible was taught every day in school by a minister. Later lay people came in and did the teaching. For a while the students went to church for instruction and then came back to the school house for classes in the secular subjects. In the rural schools circuit riders, usually lay people or retired ministers, assisted with the Bible instruction. Those pupils whose parents objected to the instruction were either allowed to go home or go out and play during the Bible class.
>
> Many of the lay people and, in some cases, ministers were not able to cope with the discipline attached to their teaching duties. Pressure from the parents did not always solve the problem. This made it necessary for a change away from the church building and back to the school houses where the teachers could help with the discipline. Teachers who were qualified to teach other subjects as well as Bible seemed to do much better with the instruction.[23]

Although it seems that there was general public acceptance of the religious practices and exercises conducted in the public schools, it is only reasonable to assume that there was some opposition, however slight, from elements of the community who thought the non-sectarian exercises to be not so non-sectarian. Such opposition usually developed, whenever it did develop, among the Catholic elements which considered the King James Version of the Bible at least as sectarian as the Douay Version;

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[23]Reith, p. 35: Information from a personal interview of the author (Reith) with a former Board member who served forty years previously.

and, since the King James Version was the one usually read during opening exercises, its use was often opposed by those Catholics whose children attended the public schools. Rather than have either of the two versions used, with an accompanying uproar, these elements preferred none at all. They were often opposed in this, of course, by many who advocated the use of the King James Bible in the public schools. It seems that whenever such use was sustained by decision of authority, therefore, it was termed a victory for "the Bible," leaving the King James Version unspecified as such, thus creating the impression that those opposed to such use were anti-Bible generally. An article published in the Winterset, Iowa Sun on June 1, 1870, gives at least one instance where the reading of the Bible created such discord in a school district:

> Sub district 4, Crawford township of this county, has a large Catholic population. The director, however, is Mr. Wm. Shannon, a staunch Protestant. Last summer the school was taught by Miss Emma De Cou, of this city. Miss D. was accustomed to read a chapter of the Bible each morning at the schools. They attempted to frighten the lady into discontinuing the use of the Bible, but as the De Cou stock don't scare worth a cent they changed tactics and applied to the director. The director sustained the teacher, and an appeal was taken to the County superintendent. That officer sustained the decision of the director, and there the matter rested with the Bible triumphant.[24]

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[24] Herman A. Mueller, History of Madison County and Its People (Chicago, 1915), I, 373, cited in Reith, pp. 46-47.

The next term a different teacher was employed in Sub district 4. An account of what happened is also given by the Sun:

> The teacher in the district this summer is Miss Emma Lahman, a young lady of German extraction, lately from Pennsylvania. She is highly accomplished and a very successful teacher. When the school commenced, a few days since, Miss Lahman was waited upon by several men and threatened with dire disaster if she should continue the custom of reading the Bible in the school. But again the blustering bullies were met by the conscientious courage of a woman whom they could not terrify, and returned home with the full assurance that she would continue to read the Bible in the school until ordered by the directors to desist. A few days afterward a brawny Catholic woman called at the school room while school was in session and demanded of Miss L. a positive promise that she would descontinue the objectionable custom. The rirago (sic) received the same reply as was given to her male conjurors. Threats were as freely and as vainly employed as before, but the brave girl would not swerve a single iota from her ideas of right, and the baffled champion of infallibility left the field. Some of the Catholics have taken their children out of school, and the remainder threaten to do so. This is the condition of affairs at the present. The director, Wm. Shannon, from whom we get these particulars informs us that he will sustain Miss Lahman.[25]

This episode, accurate or inaccurate as the account may be, is the only one uncovered by this writer showing any religious objection to the reading of the Bible in the public schools of Iowa. However, those teachers engaging in this practice sometimes faced opposition from other elements in the community. One

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[25] Ibid.

such account, recorded by the Marion County Historical Society, demonstrates some of the trials encountered by early pioneer teachers in their attempts to uphold moral and religious standards in the schools. This somewhat comical incident occurred in the first school taught at Red Rock, Iowa, which is now part of the Knoxville Community Schools:

> The winter of 1845-46 Doniel (sic) Hickey, a young man of good report, organized and taught the first school in Red Rock. The school house was a log cabin near the river. The daily attendance was twenty, about equally divided between the town and surrounding country. Mr. Hickey was a temperate man, a teetotaler and the only one to be found. In this community it was impossible to live with such principles undisturbed. A majority of the men decided to punish him and force him to recant. A committee of six was appointed to notify him before New Years that he was to provide two gallons of whiskey and the sugar for sweetening as a treat for the school. He refused. Early next morning three young men came to school and took their places as scholars. Trouble was brewing. At noon the demand for whiskey was again made and again he refused whereupon they attempted to seize him for a ducking in the river. As he fled up the ice-covered river he was followed by a noisy group of young men. When captured he was taken to a hole in the ice and told to comply or be put under and be swept away. Finding it impossible to frighten by threats, they reduced the quantity but his reply was "Not one drop." Their efforts being fruitless his persecutors were convinced of his principles. He was released and was unmolested. There is a record that Mr. Hickey went from Red Rock to Monroe and taught there till 1870.[26]

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[26]Reith, p. 23.

Recent Conditions

To bring this history of religion in Iowa public schools more up to date, there were at least ten Iowa communities which conducted courses in Bible study in their public schools during the 1940's, according to Hansen. Undoubtedly there were more than these. The courses were taken on a voluntary basis and were taught by teachers well qualified to teach Bible study. Some of the communities listed included Ainsworth, Burlington, Danville, Des Moines, Fairfield, Geneseo, Sioux Center, Traer, Waterloo, and Winterset.[27]

Hansen devotes his doctoral thesis to recording the "work and results" of an experiment which placed "regular staff Bible teachers . . . in the schools of Columbus and Conesville (Orono Township School)" in Iowa. In his Conclusion, he states, "That experiment has been completed. Bible teachers were put in the schools with complete acceptance of the communities and to the four schools of this territory."[28] This study was completed in 1947.

A study completed in 1955 by Lewiston, in which he summarizes data gleaned from approximately one hundred questionnaires

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[27]Hansen, p. 127.

[28]Hansen, p. 149.

returned to him answered by "administrative personnel in some selected high schools of Iowa" relative to religious education in Iowa public high schools, presents a fairly accurate picture, in this writer's opinion, of the status of religion in Iowa public education immediately prior to 1955. Some of Lewiston's conclusions are quoted here:

1. Regardless of the size of the community surveyed, more than 70 per cent of the administrators report that religious instruction is not permitted in their schools.

2. Fifty-seven of the ninety-nine responses indicate that the administrators do permit clergymen to address the students concerning religious topics during school hours. Sixty-five per cent do not put a limitation upon the topics or kinds of content that may be used in these talks . . . .

3. Seventy-seven per cent of the administrators permit a religious organization to distribute the New Testament to the students . . . .

4. Twenty-two per cent of those schools reporting read the Bible as a part of an "assembly" or home room program. Only two of these schools have a discussion about what has been read.

5. The Bible is most often used in literature class with history class rating second. Forty-five per cent of the schools do not use the Bible in any class.

6. Ninety-one percent of the schools have at least one version of the Bible in their library. Sixty-eight schools have the King James version of the Bible and fourteen have the Revised Standard edition.

7. Only 21 per cent of the administrators indicated that any of the classes offered a prayer during school hours.

8. Seventy-three per cent of the schools permit activities by religious groups in the school building. Services and group meetings of religious organizations rate highest, . . .

9. Seventy-two per cent of the schools indulge in the singing of hymns, other than in music class.

10. While over 70 per cent of the administrators do not permit religious instruction in their schools, only 39 per cent answered "no" when asked if they thought some type of religious education should be followed in public schools. Twenty-three per cent thought it should be taught with reservations.

11. Eighty-eight per cent of those answering the question, "How should religious education be handled?" thought that it should be offered but not required. . . .

17. Seventy-six per cent of the administrators believe that the separation of the church and the state as it has been applied to religion in public schools should be maintained.[29]

Recently a lack of student interest in Bible study courses has been noted in Iowa public schools. One possible reason for this is cited by Reith in his description of a typical Bible study situation, this found in the Pella public schools:

> A policy of the Pella Board of Education passed in August, 1957, made it necessary for a qualified teacher to be employed for Bible instruction. The Pella Ministerial Association employed a qualified teacher to teach Bible in the first six grades. Twenty minutes once a week was devoted to Bible study. Each year there seemed to be a trend away from formal teaching of the Bible in the junior high school. The

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[29]James Philip Lewiston, "Religious Education in Some Selected High Schools of Iowa," Unpublished Master's Thesis (Drake University, Des Moines, 1955), pp. 46-47.

> materials did not seem to meet the interests of the pupils. A system of home room devotions was set up so that pupil participation was increased. Those who wished to conduct devotions were given the opportunity to conduct them under the supervision of the home room teachers. The success of this method depended upon the type of the teacher and the room personnel. Usually the services were interesting and afforded an opportunity for sound educational practices for teaching speech, reading, group activity, and listening skills.[30]

Although the major portion of this study is concerned with the law surrounding religious elements in Iowa's public schools, this chapter has dealt principally with the history of the practices and exercises themselves, their evolution and form. Certainly no history of religion in Iowa public education would be complete without a consideration of the judicial decisions rendered in the Iowa Supreme Court which are imbedded in the history of Iowa's schools. These pertain to Bible reading, use of public school buildings by religious groups, use of church-owned buildings by public school boards, and school bus transportation of parochial school children. These, however, will be given thorough consideration from both a legal and historical standpoint in Chapter Three and Chapter Four of this study. They are reserved for these chapters because, with the sole exceptions of prayer and Bible reading, they are still good law in Iowa.

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[30]Reith, Interview with Bible teacher in Pella schools and President of Pella Ministerial Association, pp. 35-36.

CHAPTER III

AREAS WHEREIN RELIGIOUS INFLUENCE HAS PRODUCED LITIGATION

It will be the purpose of this chapter to present the legal position assumed by Iowa courts, particularly the Supreme Court of Iowa, on the various issues surrounding the problem of religion in public education today. The legal status of religion in Iowa public schools will thus be seen through these rulings.

Although Iowa cases and opinions will be used wherever they bear on the issue under study, rulings from other jurisdictions will be cited freely for comparison and contrast, for further explanation of the Iowa precedent and rationale on the issue, and for possible prediction of the stand Iowa courts may take on issues yet unlitigated in that state. Related cases in the Federal courts, expecially the United States Supreme Court, will be cited and discussed in order to clarify precedent and review the legal history of the various issues.

The procedure employed in this chapter will consist of beginning each section with a brief legal history or explanation of the issue under study followed by an account of the Iowa position on the particular issue, be that account an Iowa court ruling, an attorney general's opinion, or an opinion of the legal

counsel for the Iowa State Department of Public Instruction. Although the latter two do not carry the force of a court ruling, they may constitute the only legal opinion to date on the issue under discussion, as it applies to Iowa. Where no evidence of an Iowa stand on an issue can be found, the rulings of other states and the Federal courts will be resorted to; the Iowa position then becomes a matter of conjecture. Each section of this chapter will attempt to present an exhaustive account of only the Iowa law and rationale on the topic, and not of Federal law or that of the remaining states.

Use of Public School Property for Religious Purposes

In most states the use of school buildings and facilities is permitted, not only for the use of church organizations, but for other civic organizations out of school hours, when such use does not interfere with the regular program of the school. Even in those states in which the use of school buildings is still forbidden to churches or religious groups, an exception is made when a church burns down or in some similar emergency.[1]

State law ranges all the way from a Pennsylvania prohibi-

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[1]Raymond R. Miller, "The Legal Status of Religion in the Public Elementary and Secondary Schools of the United States," Unpublished Doctoral Dissertation (Indiana University, Bloomington, Ind., 1949), p. 136.

tion of the use of its public schoolbuildings for any sectarian purpose, such as the holding of Sunday school and church therein outside of school hours with the permission of the school directors,[2] to the Iowa position which clearly permits school districts to allow religious groups to conduct services within the public school house when school is not in session.[3] Those courts which deny such use usually interpret the particular state constitution as prohibiting any public tax money to be used toward the support or repair of buildings in which sectarian services of a religious nature are held. Courts consenting to such use usually state that "such occasional use does not convert the school house into a building for worship, within the meaning of the constitution."[4] This is the Iowa position.

The first Iowa case to be concerned with religious services conducted within the local public school building was that of Townsend v. Hagan,[5] arising in 1872.

The case was brought about by the dearth of church buildings in the years immediately following the Civil War and arose more

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[2]Bender v. Streabich, 182 Pa. St. 251, 37 Atl. 853 (1897).

[3]Davis v. Boget, 50 Iowa 11 (1878).

[4]Ibid.

[5]Townsend v. Hagan, 35 Iowa 194 (1872).

specifically when a resident taxpayer in the district township of Belmont in Warren County brought suit to enjoin the defendant "sub-directors" of the district township from permitting the people therein to use the public school houses for religious meetings and "Sabbath-schools."

In addition to charging that these religious groups were damaging some of the school houses and their appendages, the plaintiff taxpayer argued basically that the conducting of religious meetings and Sabbath-schools in the school houses of the district constituted an illegal use of these public buildings and that neither the "sub-directors" nor the "electors" of the district township had any power to permit or authorize such use.

After finding that the alleged damage to the premises consisted of nothing more than ordinary wear, the Supreme Court of Iowa held that, under a statute conferring authority on the electors of a district, when legally assembled, "to direct the sale or other disposition[6] to be made of any school house," these electors "may permit any reasonable and proper use of them."[7] The court then concluded: "That the use in the present case is reasonable clearly appears from the facts agreed upon,

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[6]Italics are the court's.

[7]Chap. 172, § 6, Iowa Laws of 1862

and that it is proper, ought not to be questioned in a christian State . . . In this case we hold that there has been no abuse of discretion whatever."[8]

In the only other Iowa case on the subject, Davis v. Boget,[9] decided six years after Townsend, the Townsend ruling, allowing religious services to be conducted in the public school houses, was affirmed. Here, a resident taxpayer of the district township of Lenox, in Iowa County, requested a writ of mandamous, requiring the board of directors to release into his possession the key to the local public school house so that he and others might occupy the building for Sabbath-school and religious worship on the Sabbath. The plaintiff claimed that there was no church building near enough to be conveniently used for services and offered security for the proper care of the school house while in use, but the board of directors continued to refuse to release the key because, as the court put it, "a small majority of the electors of the sub-district are opposed to the use of the house for religious worship."

It was alleged by the plaintiff, who desired possession of the school house key for services, that the electors of the district (not a "sub-district") township had, by a resolution

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[8]Townsend v. Hagan, 35 Iowa 194 (1872).

[9]Davis v. Boget, 50 Iowa 11 (1878).

duly adopted at a regular meeting, placed the control of the school house in question in the board of district township directors and ordered that it should be opened for Sabaath-school, religious worship, and lectures on moral and scientific subjects, at such times as would not interfere with the regular progress of the public schools. This change of control was effected, apparently, because the sub-director of the sub-district in question had originally refused to allow the school house to be used for the purpose named, and the district electors disagreed with this.

The Supreme Court of Iowa, in affirming the right of the district electors to permit use of their school houses for religious purposes under the Townsend decision, noted that the statute granting school district electors this right had been re-enacted by the Iowa General Assembly since that ruling, and "presumably with a knowledge of the construction put upon it" by the Iowa court at that time.

Next, the Davis defendants charged that the use of a public school building for religious purposes, as was done here, conflicted with Article I, Section Three of the Iowa Constitution of 1857, which stated then and now:

> The General Assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister, or ministry,

The defendants argued that the permanent use of a public school house for religious worship was indirectly compelling the taxpayer to pay taxes for the building or repairing of places of worship, since the use of the building by any group would cause even normal wear.

The Iowa Supreme Court answered this statement by declaring:

> . . . the use of a public school building for Sabbath-schools, religious meetings, debating clubs, temperance meetings and the like, and which, of necessity, must be occasional and temporary, is not so palpably a violation of the fundamental law as to justify the courts in interfering. Especially is this so where, as in the case at bar, abundant provision is made for securing any damages which the taxpayer may suffer by reason of the use of the house for the purposes named. With such precaution the amount of taxes any one would be compelled to pay by reason of such use would never amount to any appreciable sum.[10]

And, in showing that the use of the school building was not "permanent," as the defendants had charged, the court concluded:

> . . . the use for the purposes named is but temporary, occasional, and liable at any time to be denied by the district electors, and such occasional use does not convert the school house into a building for worship, within the meaning of the constitution. The same reasoning would make our halls of legislation places of worship, because in them, each morning, prayers are offered by chaplains.[11]

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[10] Davis v. Boget, 50 Iowa 11 (1878).

[11] Ibid.

Article I, Section Three of the Iowa Constitution, still in effect today, has thus been interpreted by the Supreme Court of Iowa as permitting religious groups the use of public school buildings for the conduct of their services, providing: (1) the school district electors vote approval; (2) such services occur at times not interfering with the regular progress of the school; (3) such use can be classified as "temporary" and "occasional"; and (4) abundant provision is made for securing damages to the premises. These are not absolute conditions automatically insuring such permission, but their fulfillment will undoubtedly enhance greatly the legal position of any religious group seeking that permission.

Use of Church Property for Public School Purposes

The practice of some school boards of designating a parochial school as a public school and allocating public money to maintain it is not covered specifically by statutory law in most states. The cases involving this practice are are decided by the courts largely on the basis of "sectarian influence in public education" statutes. Notable among these statutes is that of the Missouri School Code which states: "The title of all schoolhouse sites and other school property shall be vested in the district in which the same may be located; and all property leased or rented for school purposes shall be wholly under the

control of the board of directors during such time . . ."[12]

State case law furnishes no unanimity of opinion in this area. In some cases the use of such property was ruled to have sectarian influence and not in others. Sectarian influence usually is held to include employment of religious personnel and the imparting of religious instruction during school hours on the premises in question; these elements will usually void a school board lease of such property. Absence of religious personnel and religious instruction will usually render the rental constitutionally valid in the eyes of the court.[13]

Iowa fortunately possesses clear-cut case law in this area because it has had two seemingly similar situations involving a school board's rental of parochial school property for public school purposes, situations which have been challenged in the courts and which have resulted in two opposing opinions, both of which clarify the case law on the subject because of the marked situational differences of the first from the second.

The first case, holding that such a lease was constitu-

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[12]Richard B. Dierenfield, Religion in American Public Schools (Washington, D.C., 1962), p. 24.

[13]Ibid. p. 36.

tionally permissible, was that of Scripture v. Burns.[14] The school board involved was that of a Dubuque, Iowa district; the rented building in question was owned by the Catholic Church; and the party bringing suit against the school district directors was a citizen-resident of the school district. He had enrolled his children in the public school affected and brought suit because the defendant directors, as he alleged, were permitting public school classes to be held "in a private school-house owned by the bishop of the Catholic church . . ." He alleged also that these directors allowed "the Catholic catechism" to be studied in this public school and that when he had requested the directors to cease this practice and also remove the public school classes from this building to another, they had refused to comply.

Investigation revealed that the directors had decided to hold public school classes in the building because, by so doing, they could hold school for ten months instead of six. It appeared that public money was sufficient to maintain the public school for only six months and that private donations enabled the school to remain in session an additional four. Testimony implied that the Catholic Creed was taught only for the four months that the school was privately supported.

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[14] Scripture v. Burns, 59 Iowa 70, 12 N.W. 760 (1882).

In answer to the plaintiff's demand that the school district directors remove the public school classes to another building, the Supreme Court of Iowa held:

> It cannot be doubted that the directors of a school-district may, in a proper case, or when the public school-house is out of repair, or insufficient, and in other cases when the best interest of the school would be subserved thereby, cause the school to be taught in a rented house instead of the public-school building. Their action in such a case would depend upon the determination of facts and the exercise of discretion which they may lawfully exercise.[15]

The court dismissed the plaintiff's charge of religious instruction in this public classroom, not because such teaching may have been legally permissible, but because the court was not convinced that the plaintiff had made sufficient demand upon the defendant directors to perform their duty by prohibiting such instruction as illegal; this procedure is necessary, under Iowa law, to sustain a writ of mandamus, the legal plea under which this plaintiff was proceeding. The court stated in this regard: ". . . plaintiff did not aver and show that he had demanded of the defendants that they perform their duty by prohibiting the acts complained of as illegal. This is required by the statute, to authorize a writ of mandamous. Code, Section 3378."[16]

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[15] Scripture v. Burns, 59 Iowa 70, 12 N.W. 760 (1882).

[16] Ibid.

The Iowa Constitution was thus interpreted in 1882 as permitting the board of directors of a public school district, in the exercise of that discretion which they lawfully hold, to conduct public school classes in a rented building not the property of the school district, even though that building be leased from a religious body, which conducts schools of its own; such a lease is legally permissible "when the best interest of the school would be subserved thereby, . . ."

That such a constitutional interpretation was not to be universally applied to every such situation, however, was seen when it was abruptly limited some thirty-six years after Scripture in the case of Knowlton v. Baumhover.[17] This Iowa landmark case again involved the leasing of a parochial school classroom by the board of directors of a public school district for the purpose of conducting public school classes therein.

The decision to lease the classroom occurred at the March, 1905 meeting of the board of directors of the Maple River district (legally classified as a "subdistrict") in Carroll County, Iowa. The resolution adopted was to the effect that, because of the "inadequacy" of the school building and for the "saving of expense," it was advisable to rent for school purposes a certain room in a particular building in the town of Maple River for a

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[17] Knowlton v. Baumhover, 182 Iowa 691, 166 N.W. 202, 5 A.L.R. 841 (1918).

period of ten years at a yearly rental of $2.50. This was done, and the school house property was sold and disposed of. From that time forward the only public school in the Maple River district was maintained in the rented room.

In the year 1914, a resident taxpayer brought suit against the directors of the Maple River district, charging that the school was not a public school within the meaning of the law, but was, in fact, a parochial or religious school, conducted by the Roman Catholic Church. The plaintiff's allegation continued to the effect that the directors and treasurer of the district were paying public money, two dollars and fifty cents per year, in the form of rent to this church for the benefit and support of a parochial school.

The trial court issued an injunction, "perpetually enjoining" the defendant directors from continuing this practice. The directors appealed this decision, and the Iowa Supreme Court affirmed it, with two of the judges dissenting for procedural reasons. This constituted the Knowlton case.

One wonders immediately why the school district directors in the Scripture case could rent a part of a parochial school building legally and the directors in the Knowlton case not. The difference in the results of the two cases seems to stem from the individual circumstances present in each case more than from any other reason. Although the Scripture opinion

makes no mention of the surrounding circumstances contributing to the character of the classroom environment, the Knowlton case appears to base its outcome, directly opposed to the result in Scripture, almost entirely on the influences and conditions existing inside the classroom under discussion. In Knowlton, the court distinguishes the public school classroom from the parochial, not so much by the content of the subject matter taught orally in class or even out of textbooks, but by the material taught tacitly by means of environmental influences, such as pictures, statues, and the particular clothing or garb of the teacher, in this case, a nun belonging to a Roman Catholic religious order. In fact, the Knowlton court, in its opinion, mentions artifacts such as these when it describes the differences between the public and parochial school classrooms in outward, visible character, differences which, in the parochial classroom, were designed "to keep those of Catholic parentage loyal to their faith and to bias in the same direction those of non-Catholic parentage." The court explains itself more fully in the paragraph containing the above statement:

> Every influence of association and environment, and of precept and example, to say nothing of authority, were thus continued to keep those of Catholic parentage loyal to their faith and to bias in the same direction those of non-Catholic parentage. In short, so far as its immediate management and control were concerned, the manner of imparting instruction, both secular and religious, and the influence and leadership exercised over the minds of the pupils, was as thoroughly and completely a religious parochial

> school as it could well have been had it continued in name as well as in the practice the school of the parish under the special charge and supervision of the church, its clergy and religious orders.

And the court reiterates at another point:

> In short, it must be said that with the abandonment of the public schoolhouse and the transfer of the school into the parochial building and its organization and conduct as there perfected the school ceased to have a public character in the sense contemplated by our laws, and became, has since been, and now is a religious school, maintained and conducted with a special view to the promotion of the faith of the church under whose favor and guardianship it was founded.[18]

As to the validity of these environmental influences as evidence to be used in distinguishing the parochial from the public classroom, the court states: "That these are proper matters of evidence affording light upon the issues thus joined is not only manifest to every person of common observation and common sense, but also . . . have been so treated by the courts over and over again."

With these considerations in mind, the court explains the practical end result of the action of the board of directors:

> The act of the board in thus surrendering its proper functions and duties is not to be

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[18] Knowlton v. Baumhover, 182 Iowa 691, 166 N.W. 202, 5 A.L.R. 841 (1918).

> explained as a change in the location of the public school or a mere exercise of discretion which the law gives to the board to rent a schoolhouse when circumstances render it necessary. It was a practical elimination of the public school as such and a transfer of its name and its revenues to the upper department of the parochial school.[19]

The court then holds that the board of directors of the Maple Rover public school district had no authority to place a public school classroom in a parochial school setting; or, as the court states its holding in different words: "The board of directors had no authority to clothe a religious school with the character of a public school . . ."

Religious Garb in the Public Classroom

The matter of public school teachers wearing garb of a distinctively religious nature in the classroom is one upon which state courts have not been uniform in their results. Courts allowing this practice often do so on the theory employed by a Pennsylvania decision which held that the mere act of wearing religious garb was not a sectarian influence but merely "an announcement of a fact -- that the wearer holds a particular religious belief."[20] This decision was probably

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[19] Ibid.

[20] Hysong v. Gallitzin School District, 164 Pa. 629, 30 Atl. 482, 26 L.R.A. 203, 44 Am. St. Rep. 632.

responsible for the later enactment by the Pennsylvania Legislature of a law forbidding Pennsylvania public school teachers from wearing a "dress, mark, emblem, or insignia indicating the fact that such teacher is a member or adherent of any religious order, sect, or denomination."[21] Thus legislatures differ with the judiciary on this issue also.

Courts forbidding the wearing of such garb usually adopt the reasoning of the New York court which viewed religious attire, worn at all times in the presence of a teacher's pupils, as tending to inspire respect, if not sympathy, for the religious denomination to which they so manifestly belonged, and to that extent the influence was sectarian, even if it did not amount to the teaching of denominational doctrine.[22]

The wearing of religious attire in Iowa public schools seems to be outlawed by the court in the Knowlton case.[23] That court, in deciding that the atmosphere in the Maple River classroom in question was too sectarian in character, classifies the ecclesiastical robe worn by the nun as one of these sectarian influences. For its reasoning, the court relies

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[21] Pa. Stat. Ann. (Purdon, 1930), Tit. 24, § 1129, as cited in Miller, p. 59.

[22] Sargent v. Board of Education of Rochester, 35 Misc. 321, 71 N.Y. Supp. 954 (1901), 76 App. Div. 588, 79 N.T. Supp. 127 (1902), 177 N.Y. 317, 69 N.E. 722 (1904).

[23] Knowlton v. Baumhover, 182 Iowa 691, 166 N.W. 202, 5 A.L.R. 841 (1918).

heavily on the dissenting opinion of Williams, J. in the Pennsylvania Hysong decision.[24] In an attempt to isolate and crystalize the question, he is quoted as follows:

> The question presented in this state of facts is whether a school which is filled with religious or ecclesiastical persons as teachers, who come to the discharge of their daily duties wearing their ecclesiastical robes and hung about with rosaries and other devices peculiar to their church and order, is not necessarily dominated by sectarian influences and obnoxious to our constitutional provisions and the school laws. This is not a question about taste or fashion in dress nor about the color or cut of a teacher's clothing. It is deeper and broader than this. It is a question over the true intent and spirit of our common school system . . .

What seems to offend to a sectarian degree, according to Williams, J. is the loud proclamation heralded by these religious robes that their wearers have voluntarily accepted control by one particular church and have erected a wall of separation between themselves and normal society. On this he is quoted with approval by the Knowlton court:

> They come into the schools, not as common school teachers, or as civilians, but as the representatives of a particular order in a particular church whose lives have been dedicated to religious work under the direction of that church. Now the point of the objection is not that their religion disqualifies them. It does not . . . It is not that holding an ecclesiastical office or position disqualifies them, for it does not. It is the introduction into the schools as teachers of

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[24] Hysong v. Gallitzin School District, 164 Pa. 629, 30 Atl. 482, 26 L.R.A. 203, 44 Am. St. Rep. 632.

> persons who are by their striking and distinctive ecclesiastical robes necessarily and constantly asserting their membership in a particular church, and in a religious order within that church, and the subjection of their lives to the direction and control of its officers.

And further on in his dissent he feels it necessary to reiterate even more specifically, stressing the complete separation of the wearers from the secular world:

> They have renounced the world, their own domestic relatives, and their family names. They have also renounced their property, their right to their own earnings, and the direction of their own lives, and bound themselves by solemn vows to the work of the church and to obedience to their ecclesiastical superiors. They have ceased to be civilians or secular persons. They have become ecclesiastical persons known by religious names and devoted to religious work. Among other things by which their separation from the world is emphasized and their renunciation of self and subjection to the church is proclaimed is the adoption of a distinctively religious dress. This is strikingly unlike the dress of their sex, whether Catholic or Protestant. Its use at all times and in all places is obligatory. They are forbidden to modify it. Wherever they go this garb proclaims their church, their order, and their separation from the secular world as plainly as a herald could do if they were attended by such person.[25]

Williams, J. seems to argue that religious garb cries, "One particular church!" too loudly. The Knowlton court agrees,

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[25] Hysong v. Gallitzin School District, 164 Pa. 629, 30 Atl. 482, 26 L.R.A. 203, 44 Am. St. Rep. 632.

at least in principle, when it concurs with a New York court[26] whose majority also agreed with the Williams dissent in Hysong. The Iowa court states: "We unite with the New York court in accord with the true spirit and principle of the law." However, this statement does not make clear to the reader whether it is to be considered a part of the Knowlton holding or whether it is merely dictum. Nor does the remainder of the opinion help to clarify this. Nowhere in the decision is religious garb specifically banned in Iowa public schools, unless the above statement and accompanying quoted rationale are considered by the court to state such a ban specifically enough.

It should be kept in mind that the Knowlton case was concerned with the holding of public school classes in a classroom containing many sectarian influences. The court referred to "Every influence of association and environment" to show that the school "was as thoroughly and completely a religious parochial school as it could well have been . . ." The religious garb was treated as constituting only one of these influences, while the case seemed to turn also on the inclusion of additional influences. It is at least implied in the opinion that, since the case was one of holding public school classes in a parochial school building, the many other sectarian in-

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[26] O'Connor v. Hendrick, 184 N.Y. 421, 7 L.R.A. (N.S.) 402, 6 Ann. Cas. 432, 109 App. Div. 361, 96 N.Y. Supp. 161 (1906), aff'd 184 N.Y. 421, 77 N.E. 612 (1906).

fluences could have produced the same outcome even without the religious garb element. Otherwise, why not simply oust the nun or the garb itself and permit the classroom to stay where it was? However, the court did not do this, which action relegates religious garb to but one of a number of sectarain influences. And this leads the reader to interpret the court's lengthy involvement with the Williams dissent and its hearty approval of it as nothing more than mere dictum, judicial incidence, and not Iowa law.

The court's obscurity here raises the question of the religious habit in the public classroom that is devoid of all other possible religious influences. This precise situation, of course, exists in many states whose courts insist that the religious robes do not constitute a sectarian influence in the public classroom. If the Knowlton court's use of the Williams dissent is not merely dictum but good law, part of the Knowlton holding, then religious garb is already prohibited in Iowa classrooms. If, however, it is only dictum, then in Knowlton can be seen the probable position which the Iowa court will assume when a clear-cut case, isolating the religious garb issue, presents itself for decision.

Religion in the Curriculum

The material in this section, although closely allied,

is not to be confused with that which will be considered in later sections entitled "Baccalaureate Exercises and Other Religious Observances," "Patriotic Ritual," and "Compulsory Attendance." This section covers practices ranging all the way from incidental references to religion in coursework to the factual study of religion in pre-planned units. The practice of Bible reading will be considered at length from a legal standpoint in the next chapter.

Mr. Justice Jackson in the McCollum case said of incidental references to religion in the public classroom:

> Perhaps subjects such as mathematics, physics or chemistry are, or can be, completely secularized. But it would not seem practical to teach either practice or appreciation of the arts if we are to forbid exposure of youth to any religious influences. Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view . . .[27]

Despite the deletion of sectarian material from the public school curriculum, however, most educators maintain that the public school can and does in fact impart moral, if not spiritual values, which of themselves are free of sectarian trappings and differences and which are commonly held by most of the sects to which our people belong. Probably the most controversial of the educational programs formulated on a large scale to promote this

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[27]McCollum v. Board of Education, 333 U.S. 203 (1948).

end recently has been the program established by the regents of the University of the State of New York. Dierenfield aptly enumerates some of the program's principal highlights:

> The "fundamental beliefs" set forth by the regents include: (1) Liberty under God. (2) Respect for the dignity and rights of each individual. (3) Devotion to freedom. In the longest section entitled "The Brotherhood of Man under the Fatherhood of God" there are many references to God in our national life. Among suggestions for implementing programs of religious emphasis are:
> 1. Frequent periods of study devoted to the great American documents and pronouncements. . .
> 2. The development of moral and spiritual values through all the activities of the day and especially by the good examples furnished by teachers . . .[28]

Aside from the now-famous "regents' prayer" abolished by the United States Supreme Court,[29] no case involving this program has been presented to the courts, to this writer's present knowledge.

Programs similar to this exist in other large school systems in hopes of countering the "godless" charge so often leveled at the public school. Various plans have been operative in Iowa schools. Some of these, examined and analyzed in master's and doctoral theses, were referred to and cited in Chapter Two of this work.

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[28]Richard B. Dierenfield, Religion in American Public Schools (Washington, D.C., 1962), pp. 41-42.

[29]Engel v. Vitale, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed. 2d 601 (1962).

Religious references in textbooks used in public schools constituted the subject of a Yale study mentioned by Dierenfield, and he cites four conclusions drawn about the trends of religious reference in texts:

1. The number and volume of religious references increases with advancing school grades.
2. The concepts used are inadequately described, defined, and interpreted. Apparently the students are expected to bring religious background to their textbook reading.
3. It is possible to deal objectively and informatively with controversial religious matters. Some of the textbooks do so.
4. The closer we get to textbook descriptions of present day life and literature the fewer religious references there are.[30]

About those groups seeking to ban some or all religious reference from the school curriculum, Mr. Justice Jackson had this to say in the McCollum case: "But how one can teach, with satisfaction or even with justice to all faiths, such subjects as the story of the Reformation, the Inquisition, or even the New England effort to found 'a Church with a Bishop and a state without a King,' is more than I know . . ."[31]

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[30]Harold A. Pflug, "Religion in Missouri Textbooks," Phi Delta Kappan, Vol. 36, No. 7 (April, 1955), pp. 259-260, as cited in Dierenfield, p. 60.

[31]McCollum v. Board of Education, 333 U.S. 208 (1948).

At present there is a movement afoot in the vicinity of Phoenix, Arizona to eliminate the Darwinian theory of evolution from the curriculum of that state's public schools; and Chapter One of this study related how California's state superintendent of public instruction has just recently issued an order, based upon an opinion by California's attorney general, banning the use of all textbooks teaching evolution as a scientific fact and not as a theory only. Both of these events seem to be prompted by the complaints of groups offended religiously by the teaching of evolution factually in the public schools.

The historical and cultural impact of religion on our society is often the subject around which course units are organized in the classroom. This is often termed the "factual study of religion." It is described by a committee of the American Council on Education:

> 3. Factual study of religion is characterized by deliberate aim and definite plan to deal directly and factually with religion wherever and whenever it is intrinsic to learning experience in social studies, literature, art, music, and other fields. The aims of such study are to develop religious literacy, intelligent understanding of the role of religion in human affairs, and a sense of obligation to explore the resources that have been found in religion for achieving durable convictions and personal commitments. These aims arise from the requirements of

> general education which, to be effective, must view culture, human life, and personality whole.[32]

Such study of religion has also been upheld recently by the Supreme Court of the United States in these words:

> In addition, it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.[33]

An Iowa opinion has been rendered in regard to religious instruction in Iowa public schools by one R. A. Griffin, the legal advisor to the Iowa State Department of Public Instruction under Jessie M. Parker, a former State Superintendent of Public Instruction. While definitely discouraging any religious instruction affiliated with the school itself, the opinion does accept completely non-sectarian courses in religion in connection with history, social problems, or literature, thus placing itself in line with the U. S. Supreme Court statement quoted above:

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[32] The Function of the Public Schools in Dealing with Religion: A report on the Exploratory Study Made by the Committee on Religion and Education: A Committee of the American Council on Education (Washington, D.C., 1953).

[33] School District of Abington Township, Pa. V. Schempp; Murray V. Curlett, 374 U.S. 203, 83 S.Ct. 1560 (1963).

> If the courses in religious education were wholly non-sectarian, they might well be taught by some member of the regular school faculty, either as history, social problems, or literature. The local school board could include such instruction in the course of study as an elective, give credit therefor when taught by a regularly certificated teacher, and so long as such courses were taught in a non-sectarian manner by a teacher regularly employed on the faculty, obviously no one could offer a legal objection.[34]

Many such courses consist of the study of Bible history and literature, and as such have usually been praised by the courts, as seen above. However, as was noted in Chapter Two of this work, and as can be surmised from the titles of many of the studies cited in this work, some Iowa schools have conducted courses in "Bible study" which were not limited solely to studying the Bible as a literary work or the Bible studied from an historical point of view. The teacher was certificated in many cases but was employed to teach this course specifically as a result of special training in this area. The legal status of courses such as these may now be rendered more uncertain due to the ban placed on Bible reading by the Murray and Schempp cases. The degree to which the course at bar stresses the moral and spiritual lessons to be derived from the Bible study will probably determine whether or not it will be labeled "Bible reading" and banned or "history or

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[34]Full text quoted in William T. Jochumsen, "A Survey of Religion in Education in Iowa Public Schools: Practices and Legal Regulations," Unpublished Master's Thesis (State College of Iowa, Cedar Falls, 1958), Appendix.

literature" and retained.

Baccalaureate Exercises and Other Religious Observances

Unlike the religious practices relating directly to the curriculum considered in the preceding section of this chapter, the present section examines those practices in the public school pertaining less to the classroom and more to the school as a whole. These would include baccalaureate services, religious holiday programs, religious films, lunch-time blessings, taking a religious census of pupils, and religious tests for teacher employment. None of these, save for the prohibition against religious tests for offices of public trust stated in Article I, Section Three of the Iowa Constitution, to this writer's present knowledge, has been given a definite legal interpretation in Iowa to date; however, many have recently undergone court action in the state of Florida in the case of Chamberlin v. Dade County Board of Public Instruction.[35] In keeping with the policy stated at the beginning of this chapter, since there is no Iowa law in this area, the law in other jurisdictions will be consulted for possible prediction of the stand Iowa courts might take in the future in this area.

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[35] Chamberlin v. Dade County Board of Public Instruction, 143 So. 2d 21 (Fla., 1962).

The Dade County case seems to present the most inclusive and most recent reassessment of the religious observances, from a legal viewpoint, which will be examined in this section. It encompasses the above-mentioned practices and also Bible reading and the recitation of the Lord's Prayer. The United States Supreme Court, only a few months prior to this writing, reversed the Dade County case but only in reference to the latter two issues which were originally banned in the Murray and Schempp decisions. The remaining practices considered by the Florida court stand as decided by the Dade decision.[36]

The Florida Supreme Court has banned the showing of films with religious content and the religious observance of religious holidays; although this last statement seems somewhat redundant, it seems that the schools may dismiss the students on religious holidays but may not conduct any religious observance in connection with the holiday. The public school may be passive but not active here.

In the opinion, Mr. Justice Millard Caldwell stated: ". . . the chancellor (in the lower court)[37] enjoined: Sectarian comments on the Bible by public school teachers, the use of school premises after school hours for Bible instruction; the exhibition of films

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[36] The New York Times, "High Court Voids School Prayers in Florida Case," June 2, 1964, p. 1, col. 3.

[37] Parentheses inserted.

with religious content and the religious observance in the public schools of Christmas, Easter and Hannukka holidays."[38] The Florida Supreme Court affirmed the lower court ruling here.

The Dade opinion also affirmed the lower court's approval of many other religious practices:

> The chancellor rejected the complaints alleging: The reading of the Bible; the distribution of sectarian literature to school children; the recitation of the Lord's Prayer, grace and other sectarian prayers; the singing of religious hymns; the display of religious symbols; baccalaureate programs; the conducting of a religious census and the use of religious tests for employment and promotion of school employees, all upon grounds hereinafter discussed . . . the decree of the chancellor should be and it is hereby affirmed.[39]

The reading of the Bible and recitation of the Lord's Prayer were definitely banned by the recent U. S. Supreme Court's reversal of the Dade case. The ban probably applies also to "grace and other sectarian prayers" because the order reversed with respect "to the issues of the constitutionality of prayer and of devotional Bible-reading."[40]

The Florida court, in affirming the chancellor, did not

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[38] Chamberlin v. Dade County Board of Public Instruction, 143 So.2d 21 (Fla., 1962).

[39] Ibid.

[40] The New York Times, "High Court Voids School Prayers in Florida Case," June 2, 1964, p. 1, col. 3.

elaborate on its approval of the distribution of sectarian literature to school children, the conducting of a religious census, and the use of religious tests for employment and promotion of school employees. It did, however, compare the principles upholding recitation of the Lord's Prayer and Bible reading to those favoring the holding of baccalaureate exercises and hymn singing, stating: "The principles governing the recitation of the Lord's Prayer, the singing of religious hymns and the holding of baccalaureate programs are much the same as those applicable to the reading of the Bible."[41]

If the Florida court is correct, then the Supreme Court of the United States may very well strike down hymn singing and baccalaureate services when such cases are presented.

The Florida court, in its affirmation of the lower court, did, however, elaborate at length on its rationale in approving the display of religious symbols in the public classroom:

> The appellants' prayer to enjoin the display of religious symbols in the schools was denied by the chancellor ". . . upon the ground that the religious displays were found by this court to be works of art created by the school children and were displayed on a temporary basis and not of a permanent nature." It is our opinion that this holding of the chancellor is well grounded both in fact and in law. . . . Are school children to be forbidden from expressing their natural artis-

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[41] Chamberlin V. Dade County Board of Public Instruction, 143 So.2d 21 (Fla., 1962).

> tic talents through media including religious themes? Or, are the results of their efforts to be excluded from public display and recognition merely because they choose to adopt a religious, rather than a secular subject? The answer should be obvious. To impose such a restriction would more nearly approach a restraint upon the free exercise of religion than does the present practice of the school board in permitting such displays.[42]

And as to displays and works not of the children's own creation but yet of a religious flavor, the Florida court in another part of its opinion declared that it seemed "ridiculous" to allow the faintly offended feelings of a minority to dictate the cultural climate of the majority:

> To say that the vast majority of students in the Dade County public school system are to be foreclosed of the privilege of . . . observing in the classroom, if such were possible, the magnificent painting of the Last Supper, or of listening to Caruso's recording of Adeste Fidelis, because a minority might suffer some imagined and nebulous confusion, is to approach the ridiculous.

The court continues, noting the "anti-religious attitude" in those schools barren of these religious symbols:

> . . . we cannot agree that banishing the Bible and music and paintings of religious connotation will benefit the plaintiffs' children in any material way. We are of the opinion that erasing the influence of the best literature, music and art and gentler aspects of American life in general would be to create an anti-religious attitude in the schools and substantially injure

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[42] Chamberlin v. Dade County Board of Public Instruction, 143 So.2d 21 (Fla., 1962).

the well being of the majority of the school children.[43]

It has recently been announced that rather than risk running afoul of the United States Supreme Court's decision against official recitation of prayers in public schools, Camden, New Jersey school authorities have decided not to hold traditional baccalaureate services for graduating seniors but instead will in the future work out arrangements to conduct the services at the respective places of worship of the students who need attend only voluntarily. It was said that this decision was made because prayers had always been a part of the baccalaureate services at Camden's high schools.[44]

Thus on one side of the baccalaureate issue alone there exists a strongly-worded state supreme court case, now only partly reversed, upholding baccalaureate exercises on the same principle, the opinion states, as the existence of Bible reading; and on the other hand there is an actual instance in practice where the prayer ban has prompted school officials to remove the traditional baccalaureate services out of the local high schools, possibly indicating the beginning of a trend in keeping with the thrust of the Federal Supreme Court's prayer decisions and with

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[43] Chamberlin v. Dade County Board of Public Instruction, 143 So.2d 21 (Fla., 1962).

[44] The Telegraph-Herald, Dubuque, Iowa, June 7, 1964, "New Jersey School Drops Baccalaureate," p. 8, col. 2.

the Florida court's opinion that such services rest upon the same principles that Bible reading and prayer recitation do. What this means for Iowa and other states is at present a matter of mere conjecture.

Released Time

A complete, blow by blow account of the legal history of released time, since its inception in 1913 in Gary, Indiana, and with all its subsequent variations, is precluded here because of space limitations. An excellent account of its origin and development is given in Mr. Justice Frankfurter's separate opinion in the McCollum case, however.[45]

By now most educators are somewhat familiar with the essentials of a legally acceptable released time program, and many such programs are now operating throughout the nation. The United States Supreme Court, by handing down two seemingly opposing opinions straddling the subject, made it possible to distinguish between the legal and illegal program by noting the differences between the two case situations. In general, the Illinois program struck down in McCollum was found wanting because it depended too heavily on the existing public school structure for its success. The high court considered it a "utilization of

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[45] McCollum v. Board of Education, 333 U.S. 203 (1948).

the tax-established and tax-supported public-school system to aid religious groups to spread their faith." However, the New York program in Zorach v. Clauson[46] did away with practically all reliance on the public school system in many of its features, notably finance and location of the classes, and was approved by the same court, although that decision was close, five to four, and could someday easily be reversed.

A list of characteristics existing in the released time plan of greater New York and upheld by the court of first instance in New York State was compiled before the plan reached the Federal Supreme Court; these characteristics could now be considered as ratified by the Zorach decision. They are of definite value for school systems desiring to operate a legally approved released time program:

1. The sanction of a statute which contains no element of coercion and is based upon the recognition of parental rights;
2. The religious instruction is given outside of the school buildings and grounds;
3. The pupils are excused for the purpose only upon the written request of the parent or the guardian;
4. The absence is limited to one hour a week, such hour to be the last hour of the school session;
5. The religious organizations, in cooperation with the parents, must assume full responsibility for attendance at the religious center and for the program of religious instruction thereat;
6. The released pupils must be dismissed from school in the way usual in the case of permitted absences;

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[46] Zorach v. Clauson, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954 (1952).

7. The school authorities have no responsibility beyond that assumed in regular dismissals;
8. The parent's written request is filed with the school and will not be available or used for any other purpose;
9. The religious organization or center will file with the school a card attendance record for each pupil excused from school pursuant to the parent's request;
10. There must be no comment by any principal or teacher on the attendance or non-attendance of any pupil upon religious instruction;
11. There is no recruiting on the school premises;
12. There is no outlay of public funds;
13. There is no authority by school officers over the religious program or the religious teachers.[47]

Those released time situations presently in the state courts are concerned chiefly with their legal proximity to the standards set forth above.

Iowa law permits released time for religious instruction. The Iowa School Code, Section 299.2, containing exceptions to Section 299.1, the Attendance Requirement, states: "4. Religious services or instruction, The Board of directors of an Iowa School District may make provisions to excuse pupils for one hour per week on written request of their parents so that such pupils may attend religious instruction given by non-school personnel at places which are not part of school premises."[48] The above is contained in a footnote explaining Subsection 4 of Section 299.2

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[47]Thomas H. West, "The Legal Aspects of Religious Education on Released Time," Religious Education, XLIV (November-December, 1949), pp. 327-328, as cited in Jochumsen.

[48]School Laws of Iowa, § 299.2, 1960, p. 554.

and was taken originally from a ruling by the Attorney General of Iowa on August 18, 1953 in reply to Mr. Robert L. Oeth, County Attorney of Dubuque County, who had requested an opinion concerning the legality of a released time program for the Independent School District of Dubuque, Iowa. The rationale of the ruling granting permission for the operation of such a released time program is quoted in part here:

> As observed by the Supreme Court of the United States, we are a religious people whose institutions pre-suppose a Supreme Being. We guarantee the freedom of worship as one chooses. We make room for as wide a diversity of beliefs and creeds as the spiritual needs of man may deem necessary. We sponsor a duty on the part of Government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents.
>
> Encouragement of religious instruction by the state and its cooperation with religious authorities in the adjustment of the schedule of public events to sectarian needs, follows the best of our traditions. A contrary view must find in the Constitution a requirement that the Government show callous indifference to religious groups. Such a finding would favor those who believed in no religion over those who do believe.
>
> There is no law of the state of Iowa which forbids such arrangement as is involved in your question administered upon an impartial basis. Nor is such an arrangement offensive to the Constitution of the United States or the State of Iowa.[49]

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[49] Attorney General of Iowa Ruling, Aug. 18, 1953, as quoted in Jochumsen.

Shared Time

"Shared time," an emerging concept considered by some to be an enlargement of or a logical extension to the "released time" programs, is currently receiving much attention as a possible solution to the impasse over the public school and religious education. Presently operating in various forms in an estimated three hundred school districts in no fewer than thirty-five states, including communities such as Racine, Wisconsin and Pittsburgh, Pennsylvania, "shared time," also called "dual enrollment," finds students enrolled in private schools for one half of the school day taking courses in social studies, English, religion, art, and music, for example; the other half of the school day the same students are attending a nearby public school taking science, mathematics, laboratory courses, industrial arts, and physical education. It is claimed that "this whole shared time idea arose in Protestant circles."[50] Experiments in this program are currently endorsed by the National Council of Churches, a federation of major Protestant and Orthodox churches, and the Roman Catholic Church.[51]

Opponents of the program charge that its operation is a

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[50] Dr. Edgar H. S. Chandler, executive secretary of the Church Federation of Greater Chicago, in an interview with The New World, March 27, 1964, p. 1, col. 4.

[51] The New World, (Chicago), June 12, 1964, p. 1, col. 1.

violation of the principle of separation of church and state in that it interferes "with the best possible education, full time education, the regular public high school program." Also, the resulting division of administrative responsibility between a public and a private school is alleged to violate separation of church and state.[52]

Opponents also claim that the fact that shared time enables the parochial or private school to serve a greater number of students means that "public tax money which supports the public schools is, in effect, going to the private school and supporting the private purposes of that school."[53] This "support," of course, is violative of the Federal Constitution.

A more serious argument as to the constitutionality of shared time is that the program does not meet the requirements of the "secular purpose" test laid down in the Murray and Schempp opinion by the United States Supreme Court recently.[54] The argument runs that if the shared time program does not serve a public purpose primarily, if its first effect is not secular, then the program must fall constitutionally as breaching the barrier separating church and state.

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[52] Ibid., March 13, 1964, p. 14, col. 3.

[53] Ibid.

[54] School District of Abington Township, Pa. v. Schempp; Murray v. Curlett, 374 U.S. 203, 83 S.Ct. 1560 (1963).

This writer believes that shared time will show that it does indeed serve a secular purpose in that it makes available to all student-citizens of the nation the tax-supported facilities of the public school, while, at the same time, avoiding the accusation that the denial of these high quality facilities subjects certain pupils to a "religious test" prior to admission to a public school. Also, private schools are often charged with promoting a type of patriotic or cultural "divisiveness" in a society which is seen as attempting to educate all youth in a common American heritage; shared time will certainly serve a public or secular purpose in doing away with this "divisiveness," since eventually almost all parochial school pupils would be enrolled in the public schools.

Turning to established legal opinion, Illinois has thus far reacted favorably to released time in connection with an experiment soon to be attempted in the Chicago public schools. Although no Illinois court has yet passed on the constitutionality of released time, a legal opinion written by N. E. Hutson, legal advisor to the Illinois Superintendent of Public Instruction, states: ". . . with the apparent weight of authority in this country, we have come to the conclusion that share (sic) time program is legal in so far as boards of education are required to receive resident pupils of the district on a special enrollment in courses which the parochial or other private school may not offer its pupils." Noting that shared time had not been

tested in Illinois courts, Hutson stated further: "but we do have authority in some other states, practically all of which is to the effect that the parochial school child is entitled to attend the public school for a part of his required school program." He also cited a 1962 opinion by the Attorney General of Oklahoma to the effect that enrollment in another school, public or non-public, "did not in itself disqualify the child from enrolling in a public school for a particular course even if that nonpublic school were maintained by a church."[55]

National attention is presently focused on a shared time experiment involving the public and parochial schools of Pittsburgh. Pennsylvania has already passed favorably on the constitutionality of shared time. A part of the opinion declares:

> It must be borne in mind that the entire common school system in Pennsylvania was created and devised for the elevation of our citizenship as a whole. It is often termed a public or free school system, thereby meaning that it is supported by the public, and to be open to all of lawful age who will avail themselves of its advantages, subject only to necessary regulations and limitations essential to its efficiency.[56]

The same court said further on that a part time student is to be given "the same training and advantages as are or may be furnished the other pupils in said school, without distinction or discrimin-

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[55] The New World (Chicago), March 27, 1964, pp. 1, 2.

[56] Commonwealth ex rel Wehrele v. Truman, 88 Atl.2d 481

ation against him by reason of his previous or present attendance at a private sectarian school."

The only Iowa law bearing directly on shared time, to this writer's knowledge, is an opinion written by one Joseph S. Davis, a former Administrative Assistant to the Iowa Department of Public Instruction.[57] Mr. Davis first cites Knowlton v. Baumhover[58] to the effect that the Iowa public school system shall not be used, directly or indirectly, for religious instruction. He then reviews two instances wherein parochial school children were refused transportation on Iowa public school buses, one instance involving their transportation to common swimming classes. Both cases here were resolved by Iowa Attorney General opinions.

A third situation reviewed by Mr. Davis more nearly approximates the shared time situation, although the report given lacks details. The legal opinion, apparently forbidding the sharing of facilities, is equally vague:

> On May 17, 1939, John M. Rankin, Assistant Attorney General, State of Iowa, in passing on a question presented by Jessie M. Parker, Superintendent of Public Instruction, of whether or not the superintendent of a parochial school could "take over about 20 high school pupils for manual

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[57]Joseph S. Davis, "Use of Public School Facilities by Private School Pupils," Memorandum No. 18 To Iowa Public School Officials, January 12, 1961.

[58]Knowlton v. Baumhover, 182 Iowa 691, 166 N.W. 202, 5 A.L.R. 841 (1918).

training, agriculture and mathematics, and arrange to employ a teacher and conduct in the high school, as they are not equipped with teachers, equipment, no room in the school."

In his opinion Mr. Rankin stated:

> It is the policy of this state that neither the public property nor credit nor money may be used directly or indirectly in the aid of any school, wholly or in part under the control of any religious denomination.[59]

Then, after noting that pupils formerly attending a parochial school could be admitted to Iowa public schools as individuals should the parochial school abandon its course of instruction in one of its grades, Mr. Davis offers the following conclusion, the purpose of this memorandum:

> In my opinion, there seems little doubt but that the great weight of authority mandates a distinct separation between public and private schools. Private schools cannot profit either directly or indirectly from the public school funds. Under the law as it currently exists, it would be necessary for private school pupils to enroll full time in public schools to take advantage of public school facilities. A private school pupil cannot be enrolled part time in a private school and part time in a public school.[60]

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[59]Joseph S. Davis, "Use of Public School Facilities by Private School Pupils," Memorandum No. 18 To Iowa Public School Officials, January 12, 1961.

[60]Ibid.

Mr. Davis, grounding his opinion on opinions rendered by former Iowa Attorneys General, thus includes himself and Iowa in that group which views shared time as at least an indirect aid or benefit to parochial schools because it permits them to instruct a larger number of pupils in a smaller number of school subjects. Even if one admits this to be a positive "benefit," one must objectively look to the thirty-five states which apparently consider it a benefit so indirect as to work no harm to the wall of separation of church and state. In his reference to "the great weight of authority," Mr. Davis cannot be considering authority outside the boundaries of Iowa. Even then, his clear and direct authority regarding shared time's legality in Iowa is limited to Attorneys General at best. As cited above in this section, the weight of legal authority in this country seems to consider shared time programs constitutional.

If a shared time program in Iowa is to be viewed by Iowa jurists as only an indirect benefit to parochial schools, the primary "secular purpose" test laid down in the Murray and Schempp opinion would be sufficient authority to overrule the "no direct or indirect aid" mandate given in Iowa's Knowlton opinion some forty-six years ago; the "indirect" prohibition would be struck down in favor of a secular purpose to be served in Iowa schools.

Iowa shared time promoters might investigate the possibilities, remote as the parallel may be, of Chapter 289 of the Iowa Code,[61] the Iowa "Part-Time Schools" statutes. Iowa children enrolled in a sectarian school would not have to be "in regular attendance in a full-time day school" if not all regular courses were offered. The "secular purpose" theory behind these statutes and that in support of shared time might be more closely allied than many jurists and educators have thought to date.

No Iowa court has yet passed on shared time. It may well be that when the issue is litigated in Iowa, the high court will align the state with the great weight of authority outside Iowa for the reasons advanced by that authority. To do otherwise would lay the court open to charges of imposing a religious test on pupils seeking admittance to the public schools; it is well to remember that the Iowa Constitution clearly forbids the imposition of any religious test on teachers in the public schools.[62] A decision adverse to shared time would also subject the court to the charge of intensifying and perpetuating the so-called "divisiveness" created by the private schools which are now attempting to rectify this by resort to shared time.

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[61] School Laws of Iowa, Chap. 289, 1960, p. 526-527.

[62] Constitution of Iowa, Art. I, § 4.

Compulsory Attendance

Compulsory attendance alone is not directly concerned with this study, but it does assume legal importance when pupils are compelled to attend school programs or exercises offensive to their religious beliefs.

Perhaps the "ultimate" in offensive compulsory attendance occurred in Oregon in the early 1920's when a state constitutional amendment was approved on the basis of which a statute was enacted which required all children in the state between the ages of eight and sixteen years to attend Oregon's public schools. The Supreme Court of the United States, in the now-famous Pierce v. Society of Sisters, struck down the statute, declaring:

> The fundamental theory of liberty upon which all governments of the Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The 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.[63]

For pupils who have an alternate school to repair to when conditions in a public classroom become offensive, the above ruling is excellent, but those without such a school may then

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[63] Pierce v. Society of Sisters, 268 U.S. 510 (1925).

find compulsory attendance a very real problem.

The morning exercises, which have now been banned for the most part, by the United States Supreme Court, created so many problems in the area of compulsory attendance that most states made attendance at them voluntary. An Iowa statute, which has probably not been affected to any great degree by the recent decisions because it did not require reading the Bible aloud in the public classroom, related to morning exercises, states that the Bible shall be read only voluntarily in Iowa schools: "The Bible shall not be excluded from any public school or institution in the state, nor shall any child be required to read it contrary to the wishes of his parent or guardian."[64]

For those compelled to attend a public school for lack of one of their own religious faith nearby, released time has offered at least a partial solution. In Iowa, as in most states, the statutory authority for the released time program has taken the form of an amendment to the existing attendance law. Chapter 299 of the Iowa Code of 1958 makes provision for compulsory attendance. Section 299.1 sets out the requirements, and Section 299.2 notes the exceptions to the requirements, one of which states that a child may be excused from school "4. While attending religious services or receiving religious instructions." This exception

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[64]Iowa School Laws, 1958, § 280.9; School Laws of Iowa, 1960, § 280.9, p. 491.

was added as a result of the 1953 opinion by the Iowa Attorney General concerning the legality of released time. This opinion is quoted above in this chapter in the section on released time.

Shared time offers yet another solution to the problem of compulsory attendance when it is related to religious offence, either through school exercises or in the "value-laden" subjects. There are those who claim that the problems involved in registering and scheduling a part of the public school student body in two different schools will become administratively insurmountable; however, according to Dr. Harry L. Stearns, former superintendent of schools at Englewood, New Jersey, and other authorities, the administrative problems in sharing time -- transportation, transferring credits, grading and discipline -- are "not insoluble."[65] Dr. Edgar H. S. Chandler, executive secretary of the Church Federation of Greater Chicago, has agreed: "Yes, the administrative obstacles are there. But they are not insuperable."[66] Iowa has created an exception to its compulsory education law in the case of released time; whether it will do so again for shared time remains to be seen, as has been noted in the section just prior to this one.

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[65] The New World (Chicago), March 27, 1964, p. 3, col. 1.

[66] Ibid., p. 2, col. 4.

A part of the morning exercises in most schools that has now assumed an even greater importance since prayers and Bible reading are gome is the Pledge of Allegiance to the Flag or the Flag Salute, especially also now that the words "under God" have been inserted. The legality of requiring children who have objections for religious reasons to salute the Flag will be discussed in the next section of this chapter. It will suffice here to mention that compulsory attendance in the classroom during the Pledge of Allegiance to the Flag has led to a re-examination of the compulsory education laws in some states. The next section of this chapter will concern itself somewhat with the connection between compulsory attendance and patriotic ritual but to a greater extent with the legality of a Flag Salute requirement when it conflicts with one's religious beliefs.

Patriotic Ritual and Religious Offense

For many years the practice of having pupils pledge allegiance to the Flag was accepted without challenge. Even after certain religious groups, notably the Jehovah's Witnesses, began to object, claiming that the Flag Salute was a violation of the Biblical injunction against idolatry, and instructed their children to refuse to participate, the courts were uniform in taking the position that religion was not involved. Judges insisted that the practice constituted a ceremony clearly designed

to inculcate patriotism and to instill a recognition of the blessings conferred by orderly government; it in no way violated the constitutional guarantee of freedom of religion. Sincerity of religious belief did not enter in because this was held not to be a religious exercise.

The United States Supreme Court upheld this rationale in the case, Minersville School District v. Gobitis,[67] which the Third Circuit Court of Appeals had decided in favor of the plaintiff school children, denouncing the practice of requiring a salute when there were sincere religious scruples. But sincere religious scruples was not involved, and in reversing the circuit court, the Federal Supreme Court declared: "The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities. . . . National unity is the basis of national security."

However, a problem of compulsory attendance soon arose in cases of this type. If the child was sent home each time he refused to salute the Flag, was he truant? Most state court decisions involving this question did declare the child truant but not delinquent and therefore he could not be sent to a state training school for delinquent and habitual school offenders.

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[67] Minersville School District v. Gobitis, 310 U.S. 586, 60 S.Ct. 1010, 84 L.Ed. 1375 (1940)

This problem, as well as complaints of impairment of the constitutional protection of freedom of religion, led the Supreme Court of the United States to reverse its holding in the Gobitis case just three years after that decision. Again the controversy came up through a federal court, this time a U. S. District Court, which agreed to restrain laws making failure to salute the Flag "insubordination," leading to "unlawful absence," and then to delinquency proceedings. The school board involved brought the case to the U. S. Supreme Court, and that court reversed its earlier holding and affirmed the district court's injunction. The high court explained its reversal by distinguishing the question in this case from that presented in Gobitis:

> It is not necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty.
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> The Gobitis decision, however, assumed, as did the argument in that case and in this, that power exists in the State to impose the flag salute discipline upon school children in general. . . . We examine rather than assume existence of this power. . . .[68]

The eventual ruling in this case, reversing Gobitis, was put in these words:

> We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades

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[68] West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943).

> the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.[69]

As the result of this reversal, the law of the land now upholds those who, because of sincere religious convictions, refuse to salute the Flag. Such refusal for the reason specified is constitutional. This writer knows of no Iowa situation or case in this area.

Vaccination

Immunization programs carried out through the school have provided another source of controversy involving those religious groups which do not believe in vaccination as a health measure. Here it is usually the Christian Scientists who have been concerned. In Texas, an ordinance that no person should be permitted to attend the public or private schools of the city without presenting a physician's certificate of vaccination within six years was held not to undertake to control or interfere with any rights of conscience in matters of religion.[70] The court said that the religious freedom guaranteed by the Constitution of the United States does not deprive Congress of legislative power whereby actions may be reached which violate social duties.

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[69] Ibid.

[70] New Braunfels v. Waldschmidt, 109 Tex. 302, 207 S.W. 303 (1918)

A similar opinion was rendered in a case in Indiana.[71] There it was held that a resolution of a city board of health, excluding unvaccinated children from the city schools, passed in view of a threatened epidemic, did not infringe constitutional provisions as to religious and civil liberties.

Although Iowa law makes no specific mention of controversies connected with religion and vaccination in the schools, it does provide for exceptions in the schools to participation in physical education courses and medical or surgical treatment for disease because of religious scruples. For example, Section 280.14 of the Iowa 1958 Code specifies in part that ". . . no pupil shall be required to take such instruction (physical education) whose parents or guardian shall file a written statement with the school principal or teacher that such course conflicts with his religious belief."

Regarding religious convictions opposing medical treatment in the schools, Section 281.8 in part states:

> No provision of this chapter shall be construed to require or compel any person who is a member of a well-recognized church or religious denomination and whose religious convictions, in accordance with the tenets or principles of his or her church or religious denomination, are opposed to medical or surgical treatment for disease to take or follow a course of physical

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[71] Vonnegut v. Baun, 206 Ind. 172, 188 N.E. 677 (1934); See also Jacobson v. Massachusetts, 197 U.S. 11, 25 S.Ct. 358, 49 L. Ed. 643 (1905).

> therapy, or submit to medical treatment, nor shall any parent or guardian who is a member of such church or religious denomination and who has such religious convictions be required to enroll a child in any course or instruction which utilizes medical or surgical treatment for disease.

There is little doubt, in this writer's opinion, that the above code section would be inapplicable should an epidemic situation, such as that related in the Indiana case above, be presented to an Iowa community. Waiving such a code section, at least in regard to immunization by vaccination or other recognized medical or surgical treatment, would certainly be upheld by Iowa courts and would not constitute an infringement of freedom of religion, in such a case.

Textbooks and Supplies for the Private School Child

Technically this section does not concern religion in the public school. If public tax money is used to supply children attending non-public schools with books and materials and the public school system is already receiving all the tax funds it is entitled to, such supplying injects no form of religion into the public school as such. The public "purse" may be affected, but the public school is not deprived of any of its rightful revenues. The same can be said of the last section in this chapter, Bus Transportation for the Private School Child. The public school is in no way hindered or affected, provided that nothing

is taken from the funds normally allotted to it. The church - state charge leveled against these two practices is only the possible indirect "aid" that might result to the private school unconstitutionally. This, then, is not a question of religion in public education but one of private schools and public funds -- church and state. Textbooks, supplies, and transportation are thus only included in this study because most chapters on public schools and religion include them and because this work would then seem incomplete without them. Their consideration herein, however, will be briefer than that of the other topics covered.

In the now-famous case of Cochran v. Board of Education of Louisiana,[72] the Supreme Court of the United States held that public tax money might be constitutionally given to children attending non-public schools for textbooks and materials on the theory that it is the child who benefits, in addition to the community at large, and not the particular school. This is the "child-benefit" theory which has been made applicable also in the area of school bus transportation for non-public school children.

The Federal Supreme Court refuted the charge that taxpayers were, in effect, being taxed to support sectarian instruction by such state grants for texts and materials by answering:

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[72] Cochran v. Board of Education of Louisiana, 281 U.S. 370, 50 S.Ct. 335, 74 L.Ed. 913 (1930).

> One may scan the acts in vain to ascertain where any money is appropriated for the purchase of school books for the use of any church, private, sectarian, or even public school. The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. . . The school children and the state alone are the beneficiaries.[73]

Cochran held that the Fourteenth Amendment does not prevent a state from supplying secular textbooks to public and parochial school children, but of course state constitutions may prohibit this practice.[74] And recently the Oregon Supreme Court interpreted that state's constitution as prohibiting the practice there, declaring a state statute which provided Oregon private school pupils with textbooks of secular nature paid for out of public funds unconstitutional.[75] The Oregon court claims in a footnote to its opinion that Cochran permitted public payment for parochial school textbooks under the Fourteenth Amendment on the theory that the Louisiana law was not taking private property for a private purpose in violation of that amendment in so paying for textbooks for all pupils. The applicability of a church-state controversy under the First Amendment to the Federal Constitution was not even considered in Cochran, in the opinion

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[73] Ibid.

[74] Zellers v. Huff, 55 N.M. 501 (1951).

[75] Dickman v. School District No. 62C, Oregon City, 366 P.2d 533 (1961).

of the Oregon court; consequently, the Cochran case, which might have been decided differently had it been presented as a church-state question under the First Amendment, is not considered authority by the Oregon court as to whether or not furnishing private children with publicly-financed textbooks violates the principle of separation of church and state.

On the other side of the textbook and materials issue, Rhode Island, under a constitution which does not specify that the state must aid only public schools, but rather that its General Assembly may "adopt all means which they deem necessary and proper to secure to the people the advantages and opportunities of education," has recently enacted into law a statute granting specified secular textbooks to pupils in private schools on the same basis as these books are provided for students in public schools. A decision is pending as to the statute's constitutionality.[76]

The textbook question has not yet been litigated in Iowa, but reference to similar issues in regard to religion and education prompt this writer to predict that any plan to grant all Iowa children tax funds for secular educational materials, regardless of the school attended, would be unsuccessful.

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[76] Robert F. Drinan, S.J., Religion, the Courts, and Public Policy, (New York, 1963), pp. 158-159.

Mr. John M. Rankin, an Assistant Attorney General of Iowa in 1939, in passing on the possibility of permitting students registered in a private school to take one class in a public school building because the private school could not offer it, wrote: "It is the policy of this state that neither the public property nor credit nor money may be used directly or indirectly in the aid of any school, wholly or in part under the control of any religious denomination."[77]

The Iowa Supreme Court in Knowlton v. Baumhover,[78] a case involving the holding of public school classes in a parochial school building, declared: "We have also a statute forbidding the use or appropriation or gift or loan of public funds to any institution or school under ecclesiastical or sectarian management or control. Code, § 593."

The Iowa Constitution provides that the perpetual support fund for schools "shall be inviolably appropriated to the support of Common schools throughout the State."[79] The public schools, open to all, are often termed "common schools," and the word

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[77] Quoted in Joseph S. Davis, "Use of Public School Facilities by Private School Pupils," Memorandum No. 18 To Iowa Public School Officials, January 12, 1961, p. 2; also, code No. C 73 in the files of the Iowa State Department of Public Instruction at Des Moines.

[78] Knowlton v. Baumhover, 182 Iowa 691, 166 N.W. 202, 5 A.L.R. 841 (1918).

[79] Constitution, Iowa, Art. IX, 2nd, § 3.

inviolably used here would probably be interpreted as limiting such funds to the public schools alone, especially in light of these last three paragraphs above.

Transportation for the Private School Child

As the title of this section states, the material below will pertain more to the private school child than to religion in the public schools. This area is similar also to the textbook problem in that its clarification and solution have been sought by recourse to the "child-benefit theory," as in the textbook controversy.

In its employment of this theory to rule favorably on the constitutionality of the use of public tax money to help finance school bus transportation for private school children in Everson v. Board of Education,[80] the Supreme Court of the United States most certainly did not conclude once and for all the legal complexities surrounding bus rides to private schools in the separate states. Since Everson, those states permitting such transportation have relied on that case and the child-benefit theory. Connecticut and Maine are in this camp. Opposing or disregarding this theory, New Mexico, Missouri, Washington,

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[80] Everson v. Board of Education, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947).

Alaska, and Wisconsin deny public school bus rides to private school pupils. Factors overriding the child-benefit theory in this area have been held to be the "indirect aid" given to the private school by the increased enrollment in them made possible by public bus rides, also the possibility that the child-benefit theory would then be used to legalize any and all aid now forbidden to the private school, and finally the particular state court's interpretation of the language contained in the state's constitution.

Whereas many state statutes on this subject are vague when referring to the types of pupils or schools which may "benefit" from public transportation, the Iowa statute specifies that school bus contracts concern only "children who attend public school": "Contracts for school bus service with private parties shall be in writing and be for the transportation of children who attend public school."[81]

Whatever doubt existed as to the exact meaning of this statute was dispelled when it was construed and clarified in Silver Lake Consolidated School District v. Parker,[82] the Iowa case which barred transportation of pupils attending private schools on public school buses in the same year that Everson

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[81] School Laws of Iowa, ch. 285, § 5 (1), 1960, p. 514.

[82] Silver Lake Consolidated School District v. Parker, 238 Iowa 984, 29 N.W.2d 214 (1947).

was being decided the opposite way.

The Iowa court outlawed public transportation of private school pupils in these words:

> The school laws of the state concern only the public schools, unless otherwise expressly indicated, and do and can apply only to the schools within the purview of the school statutes, or under the control or jurisdiction of the school officials, and this would apply to transportation . . . limiting the power of the local board to provide for the transportation only of those who attend public school necessarily eliminates the transportation of others.[83]

In looking back over this chapter, it can be seen that Iowa cannot be classified an ultra-liberal or an ultra-conservative state in its attitude toward religion and its public schools. Its laws permit certain practices in this area which other states do not, such as allowing religious groups to use public school property for religious services, certain types of religious instruction in the public classroom, and released time for religious education. However, its laws and opinions also preclude practices which other states allow: as just noted above, Iowa public school buses do not transport private school children; other states allow this type of transportation. Religious garb, also permitted in many other states, is probably outlawed in Iowa's public school classrooms. And, whereas the weight of

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[83] Silver Lake Consolidated School District v. Parker, 238 Iowa 984, 29 N.W.2d 214 (1947).

present legal opinion seems to support "shared time," Iowa opinion thus far tends to frown upon it, a minority view.

The next chapter will concentrate on Bible reading and prayer recitation, areas formerly supported in Iowa public schools, but now declared illegal by the United States Supreme Court for reasons which will be closely examined.

CHAPTER IV

PRAYERS AND BIBLE READING IN IOWA PUBLIC SCHOOLS

The purpose of this chapter is to clarify the changes in Iowa law and educational practices effected by the recent decisions of the Supreme Court of the United States concerning Bible reading and prayers in the public schools. To do this effectively, it becomes necessary to examine in some detail the Iowa law affecting these practices in the classroom as it existed prior to these landmark decisions. This entire chapter, then, can be considered a natural extension of Chapter Two of this work, which reviews the history of religion in Iowa public schools. It also completes, rather than concludes, Chapter Three of this thesis in that the Iowa position regarding Bible reading and classroom prayers was not considered therein.

The first section will accordingly take up the former Iowa legal position, prior to 1962, the second and third sections will examine the two principal prayer cases in turn, and the fourth and final section will contrast these two Federal Supreme Court cases with the former Iowa law on prayer and Bible reading, emphasizing the changes worked in Iowa law.

Former Iowa Position

Until 1962, the legal status of Bible reading and prayers in Iowa public school classrooms was determined by the holding in Moore v. Monroe,[1] reinforced by dictum in Knowlton v. Baumhover.[2] The Moore result upheld both prayer and Bible reading.

The plaintiff in Moore was a taxpayer-resident of the independent district of Bloomfield, Iowa, having children enrolled in the public schools of that district. He brought suit against the teachers and directors of the district, praying for an injunction to "prevent the reading or repeating of the Bible, or any part thereof, in the school, and to prevent the singing of religious songs in the school." The trial court refused to grant the injunction.

The trial court noted that the teachers of the school were accustomed to occupy a few minutes each morning in reading selections from the Bible, in repeating the Lord's Prayer, and singing religious songs, and that under the statute passed by the Iowa State Board of Education in 1858,[3] it was a matter of individual

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[1] Moore v. Monroe, 64 Iowa 367, 20 N.W. 475, 52 Am. Rep. 444 (1884).

[2] Knowlton v. Baumhover, 182 Iowa 691, 166 N.W. 202, 5 A.L.R. 841 (1918).

[3] For the Board's passage of this statute, see Chapter Two of this study, pp. 24-26.

option with school teachers as to whether they would use the Bible in school or not, such option being restricted only by the provision that no pupil shall be required to read it contrary to the wishes of his parent or guardian. The court commented:

> It was doubtless thought by the legislature that an attempt on the part of school-boards to exclude, by official action, the Bible from schools, would result in unseemly controversies, to be decided ultimately at the polls, and that such controversies would naturally disturb the harmony of school-districts, and impair the efficiency of schools.[4]

The plaintiff, however, insisted that Section 17645 of the Iowa Code was in conflict with Article I, Section Three of the Iowa Constitution in that the use of "the school-house as a place for reading the Bible, repeating the Lord's Prayer, and singing religious songs" makes the school house a place of worship; that his children were compelled to attend a place of worship; and that he, as a taxpayer, was compelled to pay taxes for building and repairing a place of worship. Article I, Section Three of the Iowa Constitution states in part: ". . . nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship."

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[4] Moore v. Monroe, 64 Iowa 367, 20 N.W. 475, 52 Am. Rep. 444 (1884).

[5] Section 280.9 of the present Iowa Code (1958); see School Laws of Iowa, p. 491, (1960).

The Supreme Court of Iowa, in approving the practices complained of, held that the constitutional provision quoted above was designed not to exclude all worship from the public school but to prevent the school from being used "distinctively as a place of worship":

> We can conceive that exercises like those described might be adopted with other views than those of worship, and possibly they are in the case at bar; but it is hardly to be presumed that this is wholly so. For the purposes of the opinion it may be conceded that the teachers do not intend to wholly exclude the idea of worship. It would follow from such concession that the school-house is, in some sense, for the time being, made a place of worship. But it seems to us that if we should hold that it is made a place of worship, within the meaning of the constitution, we should put a very strained construction upon it. The object of the provision, we think, is not to prevent the casual use of a public building as a place for offering prayer, or doing other acts of religious worship, but to prevent the enactment of a law whereby any person can be compelled to pay taxes for building or repairing any place designed to be used distinctively as a place of worship. The object, we think, was to prevent an improper burden.[6]

In further clarifying its position, the Iowa court decided that the people of Iowa did not mean to abolish all religious worship from the public school, calling this an "extreme view," and that the tax burden thus imposed is very light:

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[6] Moore v. Monroe, 64 Iowa 367, 20 N.W. 475, 52 Am. Rep. 444 (1884).

> It is, perhaps, not to be denied that the principle, carried out to its extreme logical results, might be sufficient to sustain the appellant's position; yet we cannot think that the people of Iowa, in adopting the constitution, had such extreme view in mind. The burden of taxation by reason of the casual use of a public building for worship, or even such stated use as that shown in the case at bar, is not appreciably greater.

The court notes also that the plaintiff's children are not required to be in attendance at the exercises complained of, and it seems to reprimand the plaintiff for in reality claiming that his children are being made to appear singular or being subjected to some inconvenience by their refusal to participate in the exercises, an argument so often resorted to by plaintiffs today:

> We do not think, indeed, that the plaintiff's real objection grows out of the matter of taxation. We infer from his arguments that his real objection is that the religious exercises are made a part of the educational system, into which his children must be drawn or made to appear singular, and perhaps be subjected to some inconvenience. But, so long as the plaintiff's children are not required to be in attendance at the exercises, we cannot regard the objection as one of great weight. Besides, if we regarded it as of greater weight than we do, we should have to say that we do not find anything in the constitution or law upon which the plaintiff can properly ground his application for relief.[7]

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[7] Moore v. Monroe, 64 Iowa 367, 20 N.W. 475, 52 Am. Rep. 444 (1884).

This result was upheld in Knowlton v. Baumhover,[8] a case concerned primarily with the legal right of a school board to sell a public school house and transfer public school classes to a room in a nearby parochial school. In referring to Moore, the Knowlton court confirmed the legality of Bible reading and prayer recitation in Iowa schools:

> Nothing in this opinion is to be construed as a departure from the decision of this court in Moore v. Monroe, where, while admitting the logical soundness of the opposing view, it was held that the constitutional provision against taxation for the support or maintenance of a house of worship was not violated by permitting the teacher of a public school to include in the daily exercises of such school the reading of the Scriptures and recitation of the Lord's Prayer; for, whatever might be our view of the question as an original proposition, we have no desire to introduce confusion into our cases by overruling that precedent. Nor is there any occasion at this time to point out or discuss the limitations of the rule so laid down. If, therefore, the plaintiff in the case at bar had done no more than to show that the reading of the Bible in any version or the use of the Lord's Prayer was practiced in this school, his complaint would, of course, be dismissed, . . .

With the above dictum, the constitutionality of Bible reading and prayer recitation in Iowa public schools remained secure until 1962. In that year, the Supreme Court of the United States, in a new application of the Establishment Clause in the First Amendment to the Constitution, handed down an

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[8] Knowlton v. Baumhover, 182 Iowa 691, 166 N.W. 202, 5 A.L.R. 841 (1918).

historic decision outlawing the recitation of state-composed prayers in the public schools of the nation. One year later another like decision banished Bible reading and the Lord's Prayer from public elementary and secondary classrooms.

In order to further clarify the alterations these cases produced in Iowa law and resulting educational practice, as well as that of all other states, these two opinions will be examined in the two sections which follow. They will be considered in the order of their occurrence.

Engel v. Vitale[9]

"Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country." On November 30, 1951, this prayer was adopted by, and has since been attributed to, the Board of Regents of the State of New York, with the intent that it be recited by public school pupils in that state in their classrooms at the opening of each school day. The prayer's constitutionality was challenged in court several years later and upheld by the New York Supreme Court on August 24, 1959. Its legality was again stated by the Appellate Division; and then New York's highest court, hearing a

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[9] Engel v. Vitale, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed2d 601 (1962).

further appeal, sustained the decisions of the two lower courts, finding in favor of constitutionality.

The United States Supreme Court on June 25, 1962, in a majority opinion written by Mr. Justice Black, reversed the New York courts and held that it was a violation of the wall of separation of church and state for government officials "to compose official prayers for any group of the American people to recite as part of a religious program carried on by government."

The majority opinion begins with a review of certain early English and American sixteenth and eighteenth church-state controversies and the lessons learned from them. This introduction sounds similar in tone to that of Everson,[10] also written for the majority by Mr. Justice Black, in which he recalls how the religious persecution of the old world was transplanted to the new. Mr. Justice Black states in Engel: "Indeed, as late as the time of the Revolutionary War, there were established churches in at least eight of the thirteen former colonies and established religions in four of the other five." And again, as in Everson, he calls upon James Madison's Memorial and Remonstrance against Religious Assessments[11] for support of his claim that a true

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[10] Everson v. Board of Education, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947).

[11] II Writings of Madison, 187, as cited in Engel.

religion does not require the support of law and that church-state collaboration weakens the state and degrades religion. Throughout the opinion, the state is pictured as "encroaching" upon religion by permitting prayer in the public school classroom. By allowing this practice, the state is accused of invading an area where the constitutionally protected freedom is absolute.

Further on, Mr. Justice Black reiterates a theme appearing often in his opinions, namely, that the Establishment Clause of the First Amendment, "unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not."[12] This interpretation of the First Amendment makes the Establishment Clause itself a reason for the invalidation of a law or religious practice. No longer need a plaintiff be hindered in the free exercise of his religion by an establishment of religion, at least to any great extent;[13] he may now seek to enjoin the challenged law or practice simply because it is there. Engel has thus erected a wall of separation between the Establishment Clause and the Free Exercise Clause,

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[12] Engel v. Vitale, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed2d 601 (1962).

[13] There is growing debate on this point by jurists.

or at least it has freed violations of the Establishment Clause from any real dependence on the Free Exercise Clause. Perhaps this is as it should be. As it now stands, a governmental "establishment" of religion may still invade the free exercise of one's religion and be struck down because of this; however, since Engel, it need not even perform such an invasion in order to be struck down. Any law or practice capable of being proved a governmental "establishment of religion" can now be toppled, whether it coerces the individual physically, psychologically, or not at all. Since such a governmental "establishment" poses a potential harm, a plaintiff's standing to complain has become "preventive" in this area.

Since the Court's interpretation of the Establishment Clause here seems to admit that the Regents' prayer is a "relatively insignificant" invasion of the free exercise of religion, one is led to wonder what will happen legally to the many other official references to the Christian God in our government and public life, as well as in our public schools. Mr. Justice Black takes care of these in a footnote:

> There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity, or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life

> of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance.[14]

The footnote, as can be clearly seen, is riddled with hypothetical possibilities for litigation in the field of governmental "establishment." This writer agrees with Mr. Justice Douglas and Mr. Justice Stewart, finding it difficult to understand just how "Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise . . . in this instance." How does the Court distinguish the patriotic from the religious? The opinion does not say. No test is laid down. Perhaps Mr. Justice Black has drawn a correct line here, but he does not reveal, in this opinion, how he distinguishes between the practices he lists in his footnote and the case at bar. Such distinctions will remain for Mr. Justice Brennan to draw a year later in dicta in his lengthy and scholarly concurring opinion in the Schempp and Murray cases.

As to the general import of Engel or the rule of law laid down, one commentator claims to have isolated five "restrictions on state activity in the field of religion found by Justice Black in the establishment clause and made obligatory on the states in the Engel decision":

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[14] Footnote 21 of Engel's majority opinion.

(1) The state may not use "its public school system to encourage recitation" of a prayer composed by public officials. (2) It is a violation of the wall of separation between church and state for government officials "to compose official prayers for any group of the American people to recite as part of a religious program carried on by government." (3) ". . . neither the power nor the prestige of the Federal government" may "be used to control, support or influence the kinds of prayer the American people can say. . . ." (4) ". . . government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity." (5) ". . . each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance."[15]

The inquiries do not end here, however, for those who immediately restricted the thrust of Engel to only state-composed prayers were soon beset with the Schempp and Murray cases.

School District of Abington Township, Pa. v. Schempp; Murray v. Curlett[16]

These two "companion cases," decided June 17, 1963, only one year after Engel, and reported in one opinion, both arose out of

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[15]Robert F. Drinan, S.J., Religion, the Courts, and Public Policy, (New York, 1963), p. 106.

[16]School District of Abington Township, Pa. v. Schempp; Murray v. Curlett, 374 U.S. 203, 83 S.Ct. 1560 (1963).

complaints by citizen-taxpayers, having children enrolled in the public schools, seeking to enjoin the practices of Bible reading and recitation of the Lord's Prayer in these schools during the normal school day. The exercises were authorized by state statute, so both petitioners contended that "their rights under the Fourteenth Amendment to the Constitution of the United States are, have been, and will continue to be violated unless this statute be declared unconstitutional as violative of these provisions of the First Amendment."

Mr. Justice Clark, author of the majority opinion, begins with a brief reference to the manifestations of a belief in God in the official acts and practices of our government and then touches upon our historical and present religious heritage. In Parts III and IV of the opinion, he reviews with approval some of the majority and some of the dissenting opinions in previous cases decided by the Federal Supreme Court concerning religion and schools. He concludes Section IV with an affirmation of the doctrine so often propounded by Mr. Justice Black in his opinions, namely, that the Establishment Clause of the First Amendment "does not depend upon any showing of direct governmental compulsion" to be violated by laws establishing an official religion. This position was reviewed in this chapter in the section just prior to this one.

The heart of the opinion, that portion which actually out-

laws Bible reading and prayer recitation, is to be found in Section V. Here, instead of first explaining how the Court finds these two practices to be religious in and of themselves (this comes later), Mr. Justice Clark merely states that the Court agrees with a finding of the trial court in the Schempp case that the inclusion of these practices in a classroom's opening exercises constituted "a religious ceremony and was intended by the State to be so. . . .Given that finding, the exercises and the law requiring them are in violation of the Establishment Clause." Then he continues:

> There is no such specific finding as to the religious character of the exercises in No. 119 (Murray), and the State contends (as does the State in No. 142) that the program is an effort to extend its benefits to all public school children without regard to their religious belief. Included within its secular purposes, it says, are the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature.

The Court refutes this contention by the state that Bible reading and prayer recitation are retained in the classroom for secular purposes by pointing out distinctly religious features of the challenged practices:

> But even if its (the exercise's) purpose is not strictly religious, it is sought to be accomplished through readings, without comment, from the Bible. Surely the place of the Bible as an instrument of religion cannot be gainsaid, and the State's recognition of the pervading religious character of the ceremony is evident from the rule's specific permission of the alternative use of the Catholic

> Douay version as well as the recent amendment permitting nonattendance at the exercises. None of these factors is consistent with the contention that the Bible is here used either as an instrument for nonreligious moral inspiration or as a reference for the teaching of secular subjects.

These arguments by the Court are convincing; and, in this writer's opinion, the conclusion that the practices, proven religious, must be banned follows logically from this line of reasoning.

In quick succession, Mr. Justice Clark disposes of other contentions which were presented by attornies for the states:

> Nor are these required exercises mitigated by the fact that individual students may absent themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause.
>
> Further, it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent . . .
>
> . . . we cannot accept that the concept of neutrality, which does not permit a State to require a religious exercise even with the consent of the majority of those affected, collides with the majority's right to free exercise of religion. (Footnote 10 of the opinion here exempts the military chaplain dilemma as not presented to be passed upon here.) While the Free Exercise Clause clearly prohibits the use of free exercise to <u>anyone</u>, (emphasis the Court's) it has never meant that a majority could use the machinery of the State to practice its beliefs.

The Court's answer to the "religion of secularism" contention leaves much to be desired, in this writer's opinion, because it

in no way demonstrates how such a pervasion will not occur once these religious influences are withdrawn from the public school classroom. The Court merely states that it does not agree that "this decision in any sense has that effect":

> 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 do believe." . . . We do not agree, however, that this decision in any sense has that effect.

One of the brighter spots for religionists in the opinion might be the Court's encouragement of nonsectarian courses in comparative religion or the history of religion in the public schools:

> In addition, it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment. But the exercises here do not fall into those categories.

Before his consideration of the above contentions in Section V of the majority opinion, Mr. Justice Clark laid down a test determinative of the constitutionality of statutes and practices

in the field of religion and education. It will undoubtedly be applied in future cases of this sort on both the state and federal levels. It is not a new test, having been previously presented in somewhat similar form in Everson in the first phase of the due process contention; however, it is stated more emphatically and compactly here by Mr. Justice Clark:

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[17]

Iowa Changes Resulting from These Decisions

Although Engel jeopardized the presence of all public school prayers and religious exercises, it took the Schempp and Murray cases to directly reverse the holding in Iowa's Moore v. Monroe[18] which, until these cases were handed down, had staunchly upheld both Bible reading and prayer recitation in Iowa's public schools. Iowa's Moore case was specific in its endorsement; the Schempp and Murray opinion was specific in its destruction. A comparison

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[17] Ibid.

[18] Moore v. Monroe, 64 Iowa 367, 20 N.W. 475, 52 Am. Rep. 444 (1884).

of the rationale of the two case opinions reveals where they collide head-on.

The plaintiffs in both the Iowa and Federal cases pleaded the unconstitutionality of conducting religious exercises, specifically Bible reading and prayer recitation, in the public school classroom. In answer to this, the Supreme Court of Iowa admitted that "the school-house is, in some sense, for the time being, made a place of worship. But it seems to us that if we should hold that it is made a place of worship, within the meaning of the (Iowa) constitution, we should put a very strained construction upon it." The Iowa court thus interpreted the Iowa Constitution as permitting a small or incidental amount of religious "worship" or practices within Iowa schools under Section Three of Article I which reads in part: ". . . nor shall any person be compelled to attend any place of worship, . . ." The Iowa high court grounded its logic here on a tax burden basis:

> The object of the provision, we think, is not to prevent the casual use of a public building as a place for offering prayer, or doing other acts of religious worship, but to prevent the enactment of a law whereby any person can be compelled to pay taxes for building or repairing any place designed to be used distinctively as a place of worship. The object, we think, was to prevent an improper burden.

And further on, the Iowa court of 1884 labels the abolishment of all religious activities in the public school an "extreme view" not held by the people of Iowa: "It is, perhaps, not to

be denied that the principle, carried out to its extreme logical results, might be sufficient to sustain the appellant's position; yet we cannot think that the people of Iowa, in adopting the constitution, had such extreme view in mind."

Apparently the Supreme Court of the United States, almost eighty years later, did not think that this was such an extreme view, or, if so, was ready to defend it as an extreme view sanctioned by the Federal Constitution for those who wished to see it enforced, for this court stated in Schempp and Murray, after outlawing all such religious worship:

> Surely the place of the Bible as an instrument of religion cannot be gainsaid . . . Further, it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today trickling stream may all too soon become a raging torrent . . .

The Iowa Supreme Court defended its permission of such "worship" from another angle, namely, that the plaintiff's children could absent themselves from the exercises, as they were not required to be in attendance at them: "But, so long as the plaintiff's children are not required to be in attendance at the exercises, we cannot regard the objection as one of great weight."

The answer of the Federal Supreme Court to this position was explicit: "Nor are these required exercises mitigated by

the fact that individual students may absent themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause." Note here that the Federal majority opinion did not even refer to the much-discussed psychologically harmful effects of certain children leaving the classroom during the exercises and thus appearing different in the eyes of their peers; it based its reply here solely on constitutional grounds. However, Mr. Justice Brennan, in his concurring opinion, discussed the psychological aspects of this separation at length and well.[19]

In spite of the defense of prayer recitation and Bible reading by the Iowa Supreme Court of 1884, there exists the possibility that the court of 1918 was giving some consideration to the view expressed by the United States Supreme Court above, opposed to the two practices in the public schools, when in Knowlton v. Baumhover,[20] it affirmed the Moore defense more on the basis of precedent than on personal opinion by stating: ". . . whatever might be our view of the question as an original proposition, we have no desire to introduce confusion into our cases by overruling that precedent."

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[19]This discussion and the above Federal statements are to be found in the Schempp and Murray opinion, cited previously. The Iowa statements in this section come from Moore v. Monroe, also cited above.

[20]Knowlton v. Baumhover, 182 Iowa 691, 166 N.W. 202, 5 A.L.R. 841 (1918).

As the comparison of the opposing rationale of the Iowa Moore and Federal Schempp and Murray cases clearly demonstrates, the reasons given in Moore for sustaining prayer and Bible reading in the public schools are considered unsound by the United States Supreme Court; it refutes each of them in turn. Where the Iowa Moore court sees no harm in making the school "in some sense, for the time being, ... a place of worship," the Federal Court clamps the constitutional curtain down hard, allowing no "trickling stream" to dampen the secular program of the public school. Because the above practices are considered violative of the First Amendment to the Federal Constitution by the High Court, they are to be discontinued in the public schools of Iowa and of the entire nation.

CHAPTER V

LEGAL CONCLUSIONS AND RECOMMENDATIONS

Since the recommendations for future conduct of school policy grow naturally out of the legal conclusions reached in this study, the two areas will be considered together in this chapter. However, the conclusions and recommendations themselves will be divided into two classifications, one for school personnel and the other for further study.

For School Personnel

The cases reviewed in the previous chapter certainly emphasize the conclusion that Bible reading and prayer recitation are banned in the public schools of the nation, with the Federal Supreme Court's reservation that the Bible may be used as a literary work or as a part of a course teaching religious history or comparative religion. This ruling certainly alters the character of many of the "morning exercises' formerly held in Iowa public schools, and its academic effect on the different courses in "Bible Study" offered in some Iowa public elementary and secondary schools will probably depend ultimately on the substantive nature of the individual course itself.

The test here will probably be whether the Bible is being used as an instrument of religious instruction, promotive of religious faith, or whether it is being employed as part of a course in comparative religion, religious history, or studied for its literary value. Any course tending toward religious instruction will fall under the ban. The United States Supreme Court, as quoted in the previous chapter, recommends the others.

In regard to school officials permitting religious groups the use of public school buildings for the conduct of their services, the Iowa Supreme Court has held this practice to be consistent with the State Constitution. The court mentioned in its defense of the practice four qualities appearing in the case situation at bar which seemed to lend the situation additional legal standing. It would be advisable for school districts and religious groups to make these four standards prerequisites to such agreements: (1) The school board should approve such arrangements before their inception; (2) The religious services should be conducted at such times as will not interfere with the regular progress of the school; (3) Such use can be classified as "temporary" and "occasional," in the words of the court; and (4) Abundant provision should be made for securing damages to the school premises. It should be noted that these are not absolute conditions automatically insuring such permission, but their fulfillment will greatly strengthen the legal position of school boards and religious groups participating in

such agreements.

School districts may, in the eyes of the Iowa courts, use property belonging to religious organizations when necessary, so long as there is no sectarian influence on pupils while the property is being used for public school purposes. Such influence has been held to include the employment of personnel wearing religious garb, the imparting of religious instruction during school hours on the premises, and the presence of religiously sectarian artifacts such as pictures, statues, crucifixes, and similar objects, all of which tend to create a decidedly religious atmosphere. Although it is not clear exactly what stand Iowa courts would take on the issue of religious garb in the public classroom devoid of the other religious influences, the Iowa Supreme Court, as quoted in Chapter Three of this thesis, frowned darkly on the practice when it occurred in conjunction with the other religious influences listed above.

Released time programs stand approved in Iowa on the strength of an Iowa Attorney General's opinion rendered in 1953. However, "shared time" has been described as unconstitutional by an administrative assistant to the Iowa Department of Public Instruction in a 1961 memorandum to Iowa public school officials, cited in Chapter Three herein. The legal status of this issue is certainly very much in doubt at this time in Iowa. Shared time programs currently are in effect in about thirty-five states.

Regarding health measures and threatened religious beliefs, Iowa law provides for exceptions in the schools to participation in physical education courses and medical or surgical treatment for disease because of religious scruples. Also, because of a Constitutional interpretation by the Supreme Court of the United States, no student in U.S. public schools may be required to salute the Flag when his parents notify school authorities that such salutation violates the religious scruples of the family.

Iowans who attend non-public schools are barred transportation to their schools on public school buses by Iowa statute. The United States Supreme Court has declared such transportation constitutional; however, state statutes forbidding it are also constitutional because of differing state constitutions and court interpretations in this area. Public financing of private school non-sectarian textbooks and school supplies, under the "child benefit" theory, has also been upheld as constitutional, but here again state constitutions and statutes may differ. Basic constitutional rights are not infringed by denial of public transportation, textbooks, and supplies. Iowa law has assumed no definite position yet on this issue, except to forbid all direct or "indirect" aid to parochial schools.

Iowa school personnel are encouraged to consult the main body of this thesis and even the sources cited for more detailed information on each of the above issues summarized legally in this chapter.

For Further Studies

Although the recommendations herein will be stated in terms of their effects on Iowa law and practice, their application can be made similar in any or all states. For example, studies similar to this particular one can, and perhaps should, be compiled in the remaining forty-nine states due to the fact that more of the issues reviewed in this work are being litigated in the various state courts today, and these courts are not turning out uniform results. Studies of this type should prove of value to educators and jurists desiring to compare policies and laws of other states with their own, with a view toward possibly establishing some measure of national uniformity or at least locating the majority and minority rules with regard to a particular issue. This recommendation flows naturally from the limited topic under study here.

Studies similar to this thesis are often compiled and utilized by those particularly concerned about the alleged diminishing influence of moral or religious values in the public schools of the nation and the corresponding increase in strength of the so-called secularistic values. The two recent decisions of the Supreme Court of the United States banning prayer recitation and Bible reading in the public schools have given new cause for this concern, in the opinion of many. Consequently, the remaining recommendations for further study herein will

center around possible research topics concerned with reversing this "trend" in the schools. Studies such as these should not be undertaken for the sake of scholarship alone but with a view toward being used as "seeds" in the fertile minds of those in a position to act influentially who do not possess the time or facilities to research the necessary background.

It has been said that so long as there are final exams, there will be prayers in the schools. School-sponsored prayers, however, are now prohibited. Bible reading, sponsored by the school for religious purposes, is also prohibited. Any form of sectarian instruction on school premises directed toward pupils is prohibited. These practices have been banned by the United States Supreme Court. That same court, however, in its Schempp and Murray opinion, has encouraged school courses in comparative religion, the history of religion, and the Bible as a literary and historical work. The initiation of courses of this type, especially at the secondary level, in Iowa public schools and those of other states, constitutes the second recommendation for further study in this section.

Graduate studies which would concern themselves with courses of this type could prove useful by probing the probable content of these courses, even going so far as to include suggested course outlines and curriculum guides. Such studies would be valuable also in helping determine the content of

textbooks in both history of religion and comparative religion. Studies would have to be completed in defense of certain teacher certification requirements necessary to teach such value-laden and possibly controversial courses. Other projects, such as justifying the content value of such courses to educators, legislators, religious leaders, and communities, would have to be undertaken. And finally, follow-up studies would be necessary to ascertain how effectively such courses are meeting the needs of students in the areas of knowledge of the world's major religions and possibly resulting improvement in moral standards and conduct generally.

It is the opinion of this writer that such courses as those suggested by the Federal Supreme Court, in the hands of capable teachers and supervisors, could do much to teach non-sectarian values common to most religions, with a resulting elevation of student moral conduct generally, attributable to no single sect or denomination. Courses of this type would also help destroy the current "Godless" concept of the public school now existing in the minds of many. However, such courses would have to be specifically defined, outlined, and prepared in detail well in advance of teaching. Such definition and preparation would certainly necessitate thorough and scholarly studies completed on every phase of the operation. Studies of this type comprise the heart of this second recommendation.

The third and final recommendation for further study emerging from this thesis involves an attempt to look beyond the ban on Bible reading and prayer recitation in the typical "morning exercise" to the remainder of the school day. Surely children in the classroom are exposed to moral and even spiritual values resulting in an improved code of conduct at other times during their day in addition to the morning exercise. In fact, one is led to wonder just how valuable a brief recited prayer or a short passage read from the Bible is, when compared to the fine example set by a good teacher who is with the same pupils constantly throughout the school day or meeting with the same group of pupils at an appointed time each day of the semester or year. If actions really do "speak louder than words" and one of the two must be banned, let the words be banned and the actions remain for all the children to see. This is, in effect, what has been done, and so now the actions must be capitalized upon and seen for what they really can be and often are -- powerful sources of character formation rubbing shoulders with yet incompletely formed personalities. In this sense, much more is being transmitted in the teaching-learning situation than mere isolated subject matter. In a teacher, children view a living system of values and code of conduct in action and thus become, after a time, more disposed to adopt a like system or code for their own lives.

The recommendation submitted here, then, would call for fur-

ther studies concerning improvement of teacher selection and recruitment, studies defending teacher education and selection, not only on the basis of knowledge of subject matter, but with as much emphasis on above-average moral character as demonstrated by references and any additional means available. Since character formation is taught in the classroom to some extent as well as subject matter, an above-average knowledge of subject matter should only be matched by a like level of character development in the instructor of children.

A plea for further studies leading to more accurate personnel recruitment and training is of its very nature more general and difficult to describe than either of the two foregoing recommendations, but it is felt that the heavy responsibility the classroom instructor bears, especially today, in the area of promoting moral development by example more than justifies the request here. In fact, if this concluding recommendation has articulated the above need clearly enough to inspire only one reader-writer to further action in this area, this thesis will have been justified.

Prayer recitation and Bible reading are gone from the public schools, but the deep-rooted moral and spiritual values and the conduct resulting from them, of which these former practices were merely external manifestations, will continue in force so long as the personnel instructing our school children are the type of people parents desire their children to be.

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APPROVAL SHEET

The thesis submitted by Stephen John Voelz has been read and approved by three members of the Department of Education.

The final copies have been examined by the director of the thesis and the signature which appears below verifies the fact that any necessary changes have been incorporated, and that the thesis is now given final approval with reference to content, form, and mechanical accuracy.

The thesis is therefore accepted in partial fulfillment of the requirements for the Degree of Master of Arts.

Jan 21 1965
Date

Signature of Adviser