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Constitutional Law -- Schools and School Districts -- School Bus Transportation for Parochial School Students

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courts where a free and voluntary plea of guilty is held to constitute an intelligent and competent waiver. It is submitted that should Carter succeed in getting before the Supreme Court of the United States the fact that he had no formal education, and was wholly unfamiliar with court procedure, it will be held that he did not intelligently and competently waive his right to counsel.[23]

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Constitutional Law—Schools and School Districts—School Bus Transportation for Parochial School Students

The United States Supreme Court, in *Everson v. Board of Education of Ewing Township*,[1] held it not unconstitutional for a state to provide transportation to students attending private schools. A New Jersey statute[2] authorized the boards of education of the school districts of the state to make rules and contracts for the transportation of children to and from school when the children lived remote from any schoolhouse. The statute specifically included transportation for school children to and from school other than a public school, except such school as is operated for profit in whole or in part. The township of Ewing had no school past the eighth grade, after which grade children attended schools in nearby communities. The township provided no transportation to the other schools but, pursuant to the statute, the school board adopted a resolution recommending the transportation of pupils to three public high schools and to *Catholic schools* by way of public carrier.[3] In accordance with this resolution, the school board periodically reimbursed parents of children attending the three public high schools and Catholic schools outside the township for fares expended for transportation. The plaintiff, as a district taxpayer, challenged the constitutionality of the statute and the resolution of the board of education pursuant to it. The Court of Errors and Appeals, reversing[4] the Supreme Court[5]

[23] The four dissenting justices stated that the record, with these facts included, shows a denial of due process, although the majority withheld an opinion on this point until such time as the question was properly before the court.

[1] —— U. S. ——, 67 Sup. Ct. 504, 91 L. ed. (Adv. Ops.) 472 (1947).

[2] NEW JERSEY LAWS 1941, c. 191, p. 581; N. J. REV. STATS. 18:14-8 NJSA.

[3] (Italics supplied.) An interesting difference in viewpoints concerning this resolution developed. Mr. Justice Black, for the majority, was of the opinion that, since the appellant did not allege, and there was nothing in the record to show, that there were any children in the township who attended or would have attended, but for want of transportation, any but public and Catholic schools, the statute and resolution would not be found unconstitutional on a postulate neither charged nor proved but which rested on nothing but a possibility. Mr. Justice Rutledge was of the opinion that it could not be assumed that there were no such children, but the resolution should be held discriminatory on its face unless it were positively shown that no other sects sought, or were available to receive, the same advantages.

[4] 133 N. J. L. 350, 44 A. (2d) 333 (1945).

[5] 132 N. J. L. 98, 39 A. (2d) 75 (1944).

of the state by a majority of six to three, held that neither the statute nor the resolution violated the Constitution.

From this decision the plaintiff appealed to the United States Supreme Court, alleging that the statute and resolution violated the due process clause of the Fourteenth Amendment in that public funds were used to carry out private purposes; and the First Amendment in that the taxpayer was forced to contribute to the support and maintenance of the schools dedicated to teach the Catholic Faith. The majority of the court sustained the Court of Errors and Appeals. Four justices dissented.[6]

The rationale of the court's opinion was that the New Jersey legislature and highest court had concluded that a public need was to be served by using the tax-raised funds to pay the bus fares of school children,[7] and the fact that the object of the law and the desires of those most directly affected by the law coincided was an inadequate reason for the court to say that the state legislature had erroneously appraised the public need. Further, the legislation in question having been determined to be public welfare legislation, individual citizens could not be excluded from its benefits because of their faith or lack of it. The First Amendment prohibiting the establishment of a religion does not make it more difficult for parochial or private schools to operate; and it does not bar services such as this, "so separate and so indisputably marked off from the religious function."[8]

Every state has some form of compulsory educational statute requiring parents, or those in control of children, to provide a suitable education for them.[9] It has been held that a statute compelling attendance at public schools is an unreasonable interference with the liberty of parents and guardians to direct the upbringing of their children.[10] If the private school meets the requirements of the law in the particular state with respect to standards of education, the parent has the constitutionally protected right to send his child to that school.[11] Nor does it seem that, in exercising this right to send his child to the school of his preference, the parent, who is a citizen of the state, should be deprived of his participation in those benefits which may accrue to him as a citizen.[12]

[6] Justices Jackson, Rutledge, Frankfurter, Burton.

[7] Violation of the equal protection clause because of discrimination between private schools not operated for profit and those operated for profit in whole or in part was not urged by the appellant and had not been passed on in New Jersey; hence, it was held to have no relevancy to any constitutional question presented.

[8] —— U. S. ——, 67 Sup. Ct. 504, 512, 91 L. ed. (Adv. Ops.) 472, 481 (1947).

[9] State v. Jackson, 71 N. H. 552, 53 A. 1021, 60 L. R. A. 739 (1902). *See* State v. Wolf, 145 N. C. 440, 59 S. E. 40 (1907). *See* N. C. CONST., Art. IX, §11, and N. C. GEN. STAT. (1943) §115-302.

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

[11] *Ibid. Cf.* N. C. GEN. STAT. (1943) §115-302.

[12] *See* Chance v. Mississippi T. R. and P. Board, 190 Miss. 453, 467, 200 So. 706, 710 (1941).

Therefore, the question to be answered is whether a citizen, by virtue of his citizenship, may participate in an appropriation to transport children to school. This question would seem answered by determining whether such an appropriation is in furtherance of a public need. At least fifteen states[13] have concluded that it is in furtherance of a public need to see that all children, whatever school they attend, are transported when necessary. The interest of the state in the health of the child and in protecting him from the dangers of highway traffic on his way to and from school in compliance with the compulsory educational statute are matters of public concern.[14] But some states have held to the contrary on the ground that carrying parochial school children to school is giving aid to a religious organization.[15] However, the effect of these decisions has been overcome in New York by constitutional amendment,[16] and in Kentucky by legislation which appropriated money

[13] California, CAL. EDUC. CODE (Deering, 1944) §§16624, 16257, held constitutional in Bowker v. Baker, 73 Cal. App. (2d) 653, 167 P. (2d) 256 (1946). Illinois, ILL. ANN. STAT. (Smith-Hurd, 1936) Ch. 122 §128a. Indiana, IND. ANN. STAT. (Burns, 1933) §28-2805. Kansas, KAN. GEN. STAT. (Corrick, Supp. 1943) §72-606. Kentucky, Ch. 156, Acts 1944, held constitutional in Nichols v. Henry, 301 Ky. 434, 171 S. W. (2d) 963 (1946). Louisiana, LA. GEN. STAT. (Dart, 1939) §2248. Maryland, Ch. 185, Laws 1937, held constitutional in Board of Education of Baltimore County v. Wheat, 174 Md. 314, 199 A. 628 (1938), and in Adams v. County Commissioners, 180 Md. 550, 26 A. (2d) 377 (1942). Massachusetts, c. 390, STATS. 1936. Michigan, MICH. STATS. ANN. (Henderson, 1937) §392, as amended by Pub. Acts 1939, No. 38. Missouri, MO. REV. STATS. ANN. (1939) §10326, as amended by Laws 1939, p. 718. New Hampshire, N. H. REV. LAWS (1942) c. 135 §9. New Jersey, see notes 1 and 2 *supra*. New York, N. Y. CONST. Art. XI, §4. Oregon, ORE. COMP. LAWS ANN. (1940) §111-874. Washington, Chap. 141, Sec. 13, Laws of 1945, p. 399.

In two states, Mississippi and Louisiana, textbooks are provided for all school children without regard to attendance at private or public schools. In Louisiana, see Act No. 100 of 1928, held constitutional in Cochrane v. Louisiana State Board of Education, 168 La. 1005, 123 So. 655 (1929) *affirmed*, 281 U. S. 370 (1930). In Mississippi, see Chap. 202, Sec. 23, Laws 1940, held constitutional in Chance v. Mississippi T. R. and P. Board, 190 Miss. 453, 200 So. 706 (1941). *But cf.* Smith v. Donahue, 202 App. Div. 656, 195 N. Y. S. 715 (1922).

[14] Board of Education v. Wheat, 174 Md. 314, 199 A. 628 (1938); Adams v. County Commissioners, 180 Md. 550, 26 A. (2d) 377 (1942). *See* Bowker v. Baker, 73 Cal. App. (2d) 653, 167 P. (2d) 256 (1946); Note (1938) 51 HARV. L. REV. 935.

[15] Judd v. Board of Education, 278 N. Y. 200, 15 N. E. (2d) 576, 118 A. L. R. 789 (1938); State *ex rel.* Traub v. Brown, 36 Del. 181, 172 Atl. 835 (1934); Mitchell v. Consol. Sch. Dist., 17 Wash. (2d) 61, 135 P. (2d) 79, 146 A. L. R. 612 (1943); Gurney v. Ferguson, 190 Okla. 254, 122 P. (2d) 1002 (1941); Sherrard v. Jefferson County Bd. of Ed., 294 Ky. 469, 171 S. W. (2d) 963 (1942); State *ex rel.* Van Straten v. Milquet, 180 Wis. 109, 192 N. W. 392 (1923); *cf.* Hlebanja v. Brewe, 58 S. D. 351, 236 N. W. 296 (1931); Schlitz v. Picton, 66 S. D. 301, 282 N. W. 519 (1938); *but see* Chance v. Mississippi T. R. and P. Board, 190 Miss. 453, 469, 200 So. 706, 710 (1941) where the court said, ". . . The freedom inherent in the mutual independence of the church and the state includes the right of the state to freedom from unwarranted hinderance in the name of religion. Eternal vigilance is not exhibited by injecting false issues into a question which concerns only the general welfare of all its citizens."

[16] Judd v. Bd. of Ed., 278 N. Y. 200, 15 N. E. (2d) 576, 118 A. L. R. 789 (1938) held unconstitutional a statute designed to give transportation to all schools legally attended (Sec. 206 of Education Laws as amended by ch. 541 of the Laws

from one fund rather than from another.[17] Attempts have been made in Washington and Wisconsin to overcome the effects of earlier decisions by changing the language of applicable statutes.[18] Thus the majority opinion is amply supported by judicial precedent and legislative action.

Indeed, it is difficult to understand how the court could have held otherwise without in effect overruling its previous decisions. A parent may comply with compulsory educational laws by sending his child to a parochial school.[19] The state may supply textbooks to all students without regard to attendance at public or private schools,[20] on the basis that the aid is to the student and not to the school. If there is a difference between supplying textbooks and furnishing transportation it would seem to be one of words.[21]

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of 1936). Following this decision, the Constitution was amended to include "but the legislature may provide for transportation to and from any school or institution of learning." (N. Y. CONST. Art. XI, §4.)

[17] In Sherrard v. Jefferson County Bd. of Ed., 294 Ky. 469, 171 S. W. (2d) 963 (1942) the court held appropriations from the public school fund unconstitutional, whereupon the legislature enacted Ch. 156, 1944 Acts (KY. REV. STAT. 158.115), permitting the county to supplement the school fund from the general fund. This was held constitutional in Nichols v. Henry, 301 Ky. 434, 191 S. W. (2d) 930 (1946).

[18] Mitchell v. Consol. Sch. Dist., 17 Wash. (2d) 61, 135 P. (2d) 79 (1943) held unconstitutional a provision, Chap. 51, Laws of 1941, p. 120, entitling parochial and private school students to transportation when the school is along or near the route designated by the school board. Expenses were to be taken from the permanent school fund. Four justices held the statute unconstitutional as an aid to religion; four held that it was constitutional. Grady, J., in deciding with the majority, affirmed the lower court on the ground that the statute was unconstitutional only because the fund used was the school fund, when the Constitution prohibited use of this fund for any purpose other than for common schools, and not because it was in aid of religion. The legislature then enacted Chap. 141, Sec. 13, Laws of 1945, p. 399, entitling all children attending school under the compulsory school attendance law to use transportation facilities provided by the school district in which they reside. It is not apparent to the writer how this is to overcome the objection raised by Grady, J.

In *Van Straten v. Milquet,* 180 Wis. 109, 192 N. W. 392 (1923), the appropriation was from the county general fund and was held unconstitutional. Amendments were enacted to §4034 (1) WIS. STATS., to enable *all* children to be eligible for transportation where found necessary. This statute was declared not to extend to parochial school students in 23 OPINIONS ATTORNEY-GENERAL of Wisconsin 622. However, in *Rutz v. Marek,* in a circuit court of the state, Wickham, Judge, declared the statute did extend to parochial students. (SCHOOL BUS TRANSPORTATION LAWS IN THE UNITED STATES, by National Catholic Welfare Conference, Legal Dept., p. 251 (1946)) Wisconsin defeated a proposal to amend the Constitution to provide free transportation for private school students. N. Y. *Times,* Nov. 7, 1946, p. 12, col. 5.

[19] See note 10 *supra.*

[20] Cochrane v. Louisiana State Bd. of Ed., 168 La. 1005, 123 So. 655 (1929); *affirmed,* 281 U. S. 370 (1930); Chance v. Mississippi T. R. and P., 190 Miss. 453, 200 So. 706 (1941). In the *Cochrane* case, on appeal, the issue did not concern the effect of the state's action with respect to the First Amendment but, under the due process clause, whether the state was engaged in a private function. Since the religious issue was brought up in the state court it must be considered to have been waived on appeal.

[21] In appellant's brief in the *Cochrane* case it was argued, "If the furnishing of textbooks free is not considered an aid to such private schools, but as incidental

One aspect of the case offers a field for future litigation, and demands an investigation of the North Carolina Constitution[22] and of pertinent state statutes.[23] The principal case holds that the state cannot exclude individuals, because of their faith or lack of it, from receiving the benefits of public welfare legislation.[24] Some of the court's language indicates it will consider legislation to transport school children as public welfare legislation.[25] Yet the court declares that it does not mean to intimate that a state cannot provide transportation only to children attending public schools.[26] It is possible that this question will be left to the state's discretion and if the state does transport private school children no one can be heard to complain. Nor can anyone complain if transportation is not furnished. However, if a state provides transportation for public school children, as is done in many states, the legislature having determined that expenditures therefor fill a public need, it is at least doubtful, under the present holding, whether the state may discriminate against children attending non-profit private schools, without encroaching upon the equal privileges guaranteed to all under the Fourteenth Amendment.

MILES J. MCCORMICK.

Courts—Jury—Exclusion of Women from the Jury List

In *Ballard v. United States*,[1] a mother and son were convicted in the Federal District Court in the Southern District of California for

to the state educational system, then it logically follows that . . . their [the children's] transportation to and from such schools could be paid. . . ." Cochrane v. Louisiana State Bd. of Ed., 281 U. S. 370, 372 (1930).

[22] N. C. CONST. Art. IX, §1: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Art. IX, §4: "The proceeds . . . shall be faithfully appropriated for establishing and maintaining in this state a system of free public schools, and for no other uses and purposes whatsoever." Art. IX, §11: "The General Assembly is hereby empowered to enact that every child . . . shall attend the public schools . . . unless educated by other means."

[23] N. C. GEN. STAT. (1943) §115-302: "Every parent, guardian or other person in the state having charge or control of a child between the ages of seven and sixteen, shall cause such child to attend school. . . . The term 'school' as used in this section is defined to embrace all public schools and such private schools as have tutors or teachers and curricula that are approved by the superintendent of public instruction or the State Board of Education." §115-374: "The control and management of all facilities for the transportation of public school children shall be vested in the State of North Carolina under the direction and supervision of the State Board of Education. . . . The tax levying authorities in the various counties of the state are authorized and empowered to provide in the capital outlay budget adequate buildings and equipment for the storage of all school busses. . . . The use of school busses shall be limited to the transportation of children to and from school for the regularly organized school day."

[24] Everson v. Ewing Township, —— U. S. ——, 67 Sup. Ct. 504, 512, 91 L. ed. (Adv. Ops.) 472, 480 (1947).

[25] —— U. S. ——, 67 Sup. Ct. 504, 513, 91 L. ed. (Adv. Ops.) 472, 481.

[26] —— U. S. ——, 67 Sup. Ct. 504, 513, 91 L. ed. (Adv. Ops.) 472, 481. —— U. S. ——, 67 Sup. Ct. 504, 512, 91 L. ed. (Adv. Ops.) 472, 480.

[1] —— U. S. ——, 67 Sup. Ct. 261, 91 L. ed. (Adv. Ops.) 195 (1946).