cape outlook
Council for American Private Education
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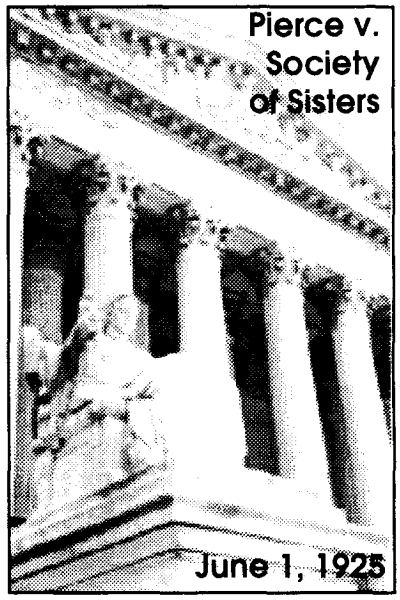
75th Anniversary of Pierce v. Society of Sisters

Landmark Decision Affirmed Right of Parents to Choose Private Schools

This month the private schools of the United States celebrate the 75th anniversary of their salvation. It was on June 1, 1925, that the Supreme Court granted said salvation, and upheld parental rights and educational liberty, by striking down an Oregon law designed to destroy private schools. Oregon's Compulsory Education Act, which had been approved by voters in 1922, required parents to send their school-age children to public schools and prescribed a fine or imprisonment in the county jail if they didn't.

Now if the term "salvation" seems to overstate the stakes in *Pierce v. Society of Sisters*, consider the words of William D. Guthrie, the Columbia Law School professor who defended private schools in the case. In his brief before the high court, he described Oregon's anti-private-school law, which was to take effect in September 1926, as a peremptory directive to private schools to send their students to other schools, discharge their teachers, dispose of their property, and "make themselves ready for their doom." The schools that petitioned the court, as well as many private schools across the country, had no doubt their very existence was on the line.

As with many landmark cases, the issues, questions, and forces at play in *Pierce* are fundamental and enduring. Echoes of the arguments against school choice in 1925 can be heard in debates about school choice today, and private schools are still defending themselves against those who believe, as did Oregonians in the 20's, that the best schools for America are the public schools. Thus, an examination of some key elements of *Pierce* serves not as an abstract academic excursion, but as a refresher course for contemporary issues in American education.



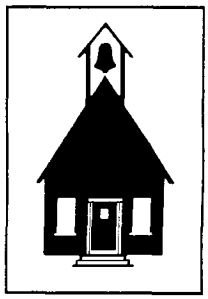
Underlying Sentiment

"There is only one really American schoolroom, that is the PUBLIC schoolroom. There is only one typically American school, and that is the American PUBLIC SCHOOL." So screamed a paid political advertisement in an Oregon newspaper in 1922 urging voters to support the Compulsory Education Act. The ad captures not only the embarrassing tendency of the Act's proponents to overreach (at one point the establishment of the public schools is described as "the greatest event in all the history of the human race") but also, and more importantly, the underlying sentiment at work during the campaign to get the law enacted.

The public school, according to the ad, is "DEMOCRATIC" (these folks liked uppercase). It "receives and treats all alike," offers children "an education IN CITIZENSHIP" and gathers students "AS EQUALS," providing the "genuine equality that comes from mingling with all classes." The innuendo throughout is that schools other than public are somehow not authentically American.

Perhaps most revealing of the attitudes beneath the campaign is the ad's litmus test for a politician or officeholder: "If he hesitates, if he departs one inch from the bold idea that the public school is the SCHOOL OF AMERICA and the ONLY school, if he hesitates in his loyalty to THAT school, he is a traitor to the spirit of the United States and your vote should tell him so."

Now before dismissing this sentiment as the embarrassing prejudice of a bygone era, recall that in 1997 the U.S. Department of Education published a paper in which public schools were similarly described as



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"fundamentally American," "the foundation of democracy," "the open door to American success and good citizenship," and "the American way to achievement and freedom." Private schools continue to face the suggestion that they are not quite the best kind of school for this country.

The Decision

(Excerpt)

The inevitable practical result of enforcing the Act under consideration would be destruction of appellees' primary schools, and perhaps all other private primary schools for normal children within the State of Oregon. These parties are engaged in a kind of undertaking not inherently harmful, but long regarded as useful and meritorious. Certainly there is nothing in the present records to indicate that they have failed to discharge their obligations to patrons, students or the State. And there are no peculiar circumstances or present emergencies which demand extraordinary measures relative to primary education.

Under the doctrine of *Meyer v. Nebraska*, 262 U.S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control: as often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this 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.

Brief by Governor Pierce

In his brief before the high court, Oregon Governor Walter M. Pierce offered a number of mind-boggling arguments in support of the Compulsory Education Act. Requiring children to attend public schools was a way, he said, to keep a lid on juvenile crime, since it was reasonable to assume that the rise in crime was related to "the great increase in the number of children in the United States who were not attending public schools." He also argued that the Act would serve to decrease religious suspicions stemming from the "separation of children along religious lines during the most susceptible years of their lives." Oregonians would experience less community discord if children of all backgrounds were mingled together in public schools. And the Act would also serve to Americanize the children of "ignorant foreigners, unacquainted with and lacking in sympathy with American institutions and ideals."

Anyone who has ever defended choice in education against the charge that some parents are sure to select schools harmful to society (e.g. schools operated by the Ku Klux Klan, the Ayatollah, witches, whatever) will recognize the 1920's version of that argument. Then the bogeymen du jour were communists, prompting Governor Pierce to argue that absent the Act, future private schools might be "organized and controlled by believers in certain economic doctrines entirely destructive of the fundamentals of our government." Shouldn't the state be allowed to prevent the education of its citizens by "bolshevists, syndicalists and communists?" he asked. Indeed, the Chicken Little award for the most hysterical and baseless prediction connected with *Pierce* must go to the governor, who argued in his brief, apparently unabashedly, "If the Oregon School Law is held to be unconstitutional, it is not only a possibility but almost a certainty that within a few years the great centers of populations in our country will be dotted with elementary schools which, instead of being red on the outside, will be red on the inside."

Woven throughout the brief and carried across the campaign for the Act was the thread of xenophobia. Without a public school education, foreigners, especially Catholics, could not be trusted to become patriotic Americans and to forego loyalties to leaders in distant lands. "Children," argued Pierce, "may be taught that their true allegiance is to

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The Law

(Excerpt from the Compulsory Education Act)

Any parent, guardian or other person in the State of Oregon, having control or charge or custody of a child under the age of sixteen years and of the age of eight years or over at the commencement of a term of public school of the district in which said child resides, who shall fail or neglect or refuse to send such child to a public school for the period of time a public school shall be held during the current year in said district, shall be guilty of a misdemeanor and each day's failure to send such child to a public school shall constitute a separate offense....

If any parent, guardian or other person having control or charge or custody of any child between the ages of eight and sixteen years shall fail to comply with any provision of this section, he shall be guilty of a misdemeanor, and shall, on conviction thereof, be subject to a fine of not less than $5, nor more than $100, or to imprisonment in the county jail not less than two nor more than thirty days, or by both such fine and imprisonment in the discretion of the court.

This Act shall take effect and be and remain in force from and after the first day of September, 1926.

(Adopted by voters of Oregon on November 7, 1922.)

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some country other than the United States, that the claims upon them of the religion to which they belong are superior to the claims of the United States, that it is wrong to take up arms in defense of the United States, and that the Government of this country is a wicked and tyrannical one."

Appellees Respond

Realizing the perilous consequences of the Act, various branches of the private school community, including Catholics, Episcopalians, Jews, Lutherans, and Seventh-day Adventists, took action to protect the rights of parents by challenging the Act in court and the public square.

Gov. Walter M. Pierce

In his brief for the Sisters of the Holy Names of Jesus and Mary, which at the time operated a dozen Catholic schools in Oregon, attorney William D. Guthrie, charged that the Act threatened the right of the parent to choose private or parochial schools and the right of the schools to "carry on a legitimate and lawful calling." He decried as "inexcusable and cruel" the insinuations that private schools were not fully American. "The private and parochial schools teach the same subjects as the public schools — whatever one does to inculcate and foster patriotism, the other can and does do quite as well." And he said it was "unreasonable and unjust in the extreme" for the governor to link private schools with the terms "red" or "communist" and to suggest "obliquely and by innuendo that the religious schools of the state, Catholic, Episcopalian, Presbyterian, Methodist, Lutheran, etc., do not inculcate reverence and righteousness."

It is worth noting that Guthrie addressed head-on a sentiment which he said served as a foundation for the Act, namely, the "notion that private and public schools cannot exist in peace and harmony side by side." He said such sentiment was "contradicted by long experience" and was "probably held by no competent educator." Guthrie also argued that private schools, through the competition and educational progress they provided, were good for public schools. To bolster his point, he provided the court with a quote from Philander Claxton, former U.S. Commissioner of Education: "I believe in the public school system. It has been the salvation of our democracy, but the private schools and colleges have been the salvation of our public schools. These private institutions have their place in our educational system; they prevent it from becoming autocratic and arbitrary and encourage its growth along new lines."

Episcopal Church

In an amicus curiae brief, the Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America raised concerns, similar to the governor's, about the "alarming increase in the criminality of the young." But while the governor attributed the phenomenon to the growing number of children in private schools, the Society ascribed it to "the exclusion of religious influences from the public schools." Its brief noted that "with unanimity, thoughtful people attribute this weakening of the moral fiber of our time to the lack of religious and moral training, particularly in children." The Society bolstered its position with a quote from George Washington's Farewell Address: "Let us with caution indulge the supposition that morality can be maintained without religion....[R]eason and experience both forbid us to expect that national morality can prevail in exclusion of religious principles."

The Society said it was striving to revive virtuous behavior in the soul of youth, but its efforts were being "seriously menaced" by the Compulsory Education Act. And it portentously predicted, "If this attempted amendment becomes the law, it is almost inevitable that similar attempts will be made in other states, threatening the whole structure of religious education and morality."

The Society advised the court that its members had adopted a resolution affirming that "instruction in religion is an essential element in all true education." The resolution went on to oppose "any and all movements seeking to secure legislation having as its natural result the injury, and perhaps the destruction, of the Church schools of our land."

Seventh-day Adventists

The North Pacific Union Conference of Seventh-day Adventists argued in their amicus brief that the "statute attempts to extinguish natural rights, infringes the provisions of the Constitution, and is void." Religious schools in Oregon are not "inherently dangerous to the peace, morals or happiness of society." What's more, a parent has the "common law, or natural, right to direct the education of the child." With considerable literary flourish, the brief in its closing paragraph declared: "This is the same old contest of the ages between prince and people, governors and governed, majorities and minorities — the encroachment of misguided power upon natural and inalienable rights; and to this tendency of power we owe every defense erected across its path, as the Magna Charta, the Declaration of Independence, the Constitution of the United States, and, finally the Supreme Court, and these, one and all, have said, 'Thus far, and no farther.'"

American Jewish Committee

The American Jewish Committee (AJC) in its amicus filing boldly answered the charge that public schools best serve the public welfare with this reminder, "The Fathers

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of the Republic and a large proportion of those who from the beginning were its finest citizens never attended a public school." The AJC also took on the theory that attendance at private schools breeds prejudice. Prejudice is not stimulated, said the AJC, "in a truly religious atmosphere or in a genuine cultural environment." And in response to the claim that public schools would provide a standardized education through which all students "shall stand upon one common level," the AJC simply said this: "God forbid that shall be the case." Mincing no words, it counseled the nation to resist deadly uniformity. "Everything that is interesting or inspiring or elevating would depart out of our national life if all of the mountain peaks were to disappear, and our horizon would be that of a boundless, monotonous and unvarying prairie."

Evangelical Lutheran Synod

The Oregon and Washington District of the Evangelical Lutheran Synod of Missouri, Ohio and other States published, on the Act's official ballot, a paper arguing against the measure. It raised the question of whether the state or the parent is primarily responsible for a child. (State control of children was a recurring theme of the Act's opponents, who occasionally invoked and denounced the *Republic*, in which Plato proposed that children be taken from their parents and raised by the state.) The Synod concluded that the state has no right to choose the school a child must attend. "If you see fit to send your child to a school in which the religion of your choice is taught, not one day in the week, but every day, and the whole training of the child is permeated by such religion, the state, under the Constitution must not prohibit you from doing so." It urged voters in no uncertain terms to oppose that which would "drive a splitting wedge between us by proposing an abridgement of parental rights, of religious liberty, and of educational freedom."

Decision

In the closing paragraph of his oral argument before the Supreme Court, William Guthrie said that whatever decision it rendered, the court was destined "to do incalculable good or harm in maintaining or subverting religious liberty and the freedom of education for centuries to come."

Justice McReynolds

In the end, the court chose to do incalculable good by ruling that a state has no right to "standardize its children by forcing them to accept instruction from public teachers only." Justice James Clark McReynolds, who wrote the decision, left us with the most momentous sentence in the legal history of American private education when he declared, "The child is not the mere creature of the state." The historic sweep of those words is impossible to capture, but their implications are clearly present even today as judges and lawmakers grapple with current issues involving the right of parents to choose a child's school.

As significant elements within the private school community stood together in 1925 to protect the rights of parents in private schools, they stand together today to defend against current attacks on educational freedom. CAPE is proud to serve as *Voice of the Nation's Private Schools*.

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