

Cross-Border Reflections: Parents' Rights to Direct Their Children's Education under the U.S. and Canadian Constitutions

By J. Paul R. Howard

I do some of my better, more creative thinking when I'm gazing out a window. Or in the shower. As I was sitting in a lecture hall at the University of Detroit Mercy School of Law one rainy day last October 2000 listening to some leading American constitutional law scholars address those of us assembled for "75 Years After *Pierce v. Society of Sisters*: A Colloquium on Parents, Children, Religion and Schools"¹, I opted for the former. *Pierce* is the 1925 decision of the U.S. Supreme Court generally said to stand for the proposition that parents have a constitutionally protected right to make decisions concerning the education of their children. So while I sat there gazing out that window two thoughts struck me.

The first, admittedly somewhat shallow, question that occurred to me was why anyone would want to celebrate the 75th anniversary of a court decision. But, in fairness, I realized that Canadians mark their own judicial celebrations and I was willing to bet that few if any of my American colleagues would understand why, say, many Canadians remember October 18th every year as "Person's Day" to commemorate the 1929 decision of the Judicial Committee of the Privy Council in the *Senate Reference* case, in which the English Law Lords allowed the appeal brought by Nellie McClung and the rest of the "Famous Five" and overturned the judgment of the then not-so-supreme judges of the Supreme Court of Canada, who had earlier decided that women were not "persons" for the purposes of the *British North America Act's* eligibility criteria for appointment to the Senate. To each its own.

The notion truly intrigued me was how the Supreme Courts in two different jurisdictions can take essentially the same issue and approach the question from different perspectives, arriving at different conclusions, as a result of different cultural, social and temporal dimensions. A case in point is the U.S. and Canadian courts' quite markedly different treatments of whether parents have a constitutionally protected "liberty interest" to direct their children's education.

For the U.S. Supreme Court in 1925, the issue in *Pierce v. Society of Sisters*² was whether an Oregon statute requiring every parent or guardian of a child between eight and sixteen years of age to send that child "to a public school" violated the liberty interest protected by the 14th Amendment to the American Bill of Rights, which guarantees that: "No State shall ... deprive any person of life, liberty, or property, without due process of law". The Society of Sisters was a religious organization which maintained orphanages for young children and operated primary and high schools and junior colleges, providing a curriculum similar to that offered in Oregon public schools except that it also offered "systematic religious instruction and moral training according to the tenets of the Roman Catholic Church". The requirement of Oregon's Compulsory Education Act of 1922 that all school-age children attend "public schools" would have put the Society of Sisters out of business, and thus they commenced suit in state court to have the Oregon law declared invalid.

The Sisters' proceeding was commenced at a time when the campaign against parochial schools, which was inextricably bound up with the compulsory public school movement in the United States that began in the late 19th century, was at its zenith. Confronted by increasing waves of immigrants

in the late 19th century and World War I period, the native American – mostly Protestant – populace became alarmed at the growth of private and religious schools. Casting the school in its familiar role as socializing agent, the American public turned to the public schools to “Americanize” the immigrant children, and the materials used by the public schools heavily reflected a pro-Protestant and anti-immigrant, and particularly anti-Catholic, flavour.³

In allowing the challenge brought by the Sisters (and a military academy in a companion proceeding), the U.S. Supreme Court struck down the Oregon law as unconstitutional and, in fairly ringing terms, held that a state law compelling a child’s attendance at a public school constitutes an impermissible violation of the parent’s liberty interest under the 14th Amendment:

Under the doctrine of *Meyer v. Nebraska*, 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. ... 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 instructions 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.

Over the years *Pierce* has assumed greater significance within American constitutional jurisprudence, far beyond the education context. Indeed, not only were *Pierce* and *Meyer* the first two cases where the U.S. Supreme Court used the Due Process Clause of the 14th Amendment to invalidate state laws, the expanded concept of individual liberty articulated in those decisions formed the basis in part for the broad expansion of civil liberties engineered by subsequent courts, including the Warren and Burger Courts. “The line of cases protecting, as unenumerated aspects of liberty, the right to teach one’s child a foreign language [*Meyer*], the right to send one’s child to a private school [*Pierce*], the right to procreate, the right to be free of certain bodily intrusions, and the right to travel abroad, had set the stage for the most important substantive due process decision of the modern period, *Griswold v. Connecticut* [state law cannot prohibit married couples from using birth control].”⁴ As part of the Supreme Court’s development of the larger, unenumerated right to privacy under the 14th Amendment, the expanded concept of personal liberty first articulated in *Pierce* and *Meyer* lay at the foundation of the Warren Court’s decision in *Griswold* and the Burger Court’s landmark ruling in *Roe v. Wade* that a woman has a constitutionally protected right to have an abortion during the period in which the fetus is not viable, and *Pierce* was expressly referenced as precedent in both such cases.

The expansive notion of individual liberty reflected in *Pierce* and its proud progeny is, however, something that remains rather foreign to the interpretation given to the liberty interest under section 7 of the *Canadian Charter of Rights and Freedoms*, which grants everyone in Canada “the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”. Outside of the criminal context, generally speaking, our courts have not been willing to define the notion of liberty in such generous terms as have their American counterparts. Lower courts have held, for example, that the “right” of a parent to raise her child is not a liberty interest intended to be protected by section 7’s guarantees⁵ and that section 7 of the *Charter* “does not encompass the ‘liberty’ of parents to choose how their children will receive religious instructions”.⁶

What is most disappointing, however, is that in the only case where the issue of whether a parent has a liberty right under s. 7 to educate his child as he thinks fit was squarely placed before the Supreme Court of Canada for consideration, a majority of that Court avoided the thorny question altogether. In *Jones v. The Queen*, the accused, a pastor of a fundamentalist Christian church, who educated his own and other children in his church's basement, was accused of violating Alberta's compulsory education provisions because he had not obtained from the local school board or the provincial Department of Education the proper exemption available for instruction in the home setting or private schools. Pastor Jones argued that his right to liberty under section 7 entailed "the right to bring up – and educate – his children in a manner he sees fit". But the majority of the Supreme Court of Canada found it "unnecessary to deal with" this contention because, even if the pastor did have such a right, the impugned legislation did not deprive him of same in a manner that violated the principles of fundamental justice or otherwise contravened section 7.⁷

The notion that parents should have a constitutionally protected right to direct their children's education has many intriguing consequences, such as, if the state cannot prohibit a parent from sending a child to a private, parochial or alternative school does that also necessarily mean that the state must fund those placements; the implications of the *Pierce* line of reasoning for the school voucher debate; and, more fundamentally, whose right is this anyways – the parent's or the child's? But none of these or other contentious issues will ever be addressed if our courts adopt a "decide-only-if-necessary-and-duck-if-possible" demeanour.

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1. University of Detroit Mercy School of Law & The Michigan Catholic Conference presentation of "75 Years After *Pierce v. Society of Sisters*: A Colloquium on Parents, Children, Religion and Schools" (Friday, October 6, 2000).
 2. *Pierce, Governor of Oregon, et al. v. Society of Sisters; Pierce, Governor of Oregon, et al. v. Hill Military Academy*, 268 U.S. 510 (1925).
 3. See generally W.G. Ross, *Forging New Freedoms: Nativism, Education, and the Constitution, 1917-1927* (Lincoln: University of Nebraska Press, 1994).
 4. L.H. Tribe, *American Constitutional Law* 2d ed. (Mineola, New York: Foundation Press, 1988) at p. 775.
 5. See, for e.g., *Catholic Children's Aid Society of Metropolitan Toronto v. M.(C.)* (1991), 37 R.F.L. (3d) 208 (Ont. Ct. (Prov. Div.)) and *Children's Aid Society of Hamilton-Wentworth v. K. (L.)* (1989), 70 O.R. (2d) 466 (U.F. Ct.).
 6. *Black v. Metropolitan Separate School Board* (1988), 65 O.R. (2d) 598 at p. 608 (Div. Ct.).
 7. *Jones v. The Queen* (1986), 31 D.L.R. (4th) 569 at p. 596 (S.C.C.). Only Madam Justice Wilson, in dissent, dealt expressly with the issue, finding that a parent ought to have a right to educate one's children, and Her Ladyship expressly cited *Pierce* as authority for the proposition.

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