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Richard F. Duncan*

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I. INTRODUCTION

Suppose a public school requires all students in a certain grade to read a particular book or take part in a particular lesson that some parents object to on the basis of religious or other conscientious grounds. Should the school excuse the children of objecting parents from the required readings or lessons? *Must* the school grant the requested opt-out accommodation?

I believe the answer to the first question, which is a public policy issue, is that there are many good reasons for public schools to be liberal in accommodating religious and conscientious objections to required curricular materials and lessons. I also believe that the answer to the second question, which is a question of law, is that public schools in Nebraska have a legal duty to excuse students from required exposure to objectionable curriculum. Indeed, the Nebraska Constitution has long been interpreted by the Nebraska Supreme

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* Welpton Professor of Law, University of Nebraska College of Law. This Article is dedicated to John Gradwohl, the Ross McCollum Professor of Law at the University of Nebraska College of Law. John is a great friend, a wonderful colleague, and an excellent comrade-in-arms in support of the Law College that we both love dearly. This Article is also dedicated to the teacher and principal of the Sunset Meadows Christian Home School, Kelly Duncan, and to her students, the Duncan Kids.

Court as protecting the right of parents to require public schools to excuse their children from any "prescribed branch"[1] in the curriculum. The purpose of this Article is to briefly address both the policy and the legal issues concerning the right of parents to protect their children from exposure to objectionable curriculum in Nebraska's public schools.

II. ACCOMMODATING PARENTAL REQUESTS FOR EXCUSALS IS GOOD PUBLIC POLICY

In a wonderful essay entitled *The Right Not to Read a Book with Whores in It*,[2] Nat Hentoff, a widely-respected journalist and civil libertarian, tells the story of two Christian students at Girard High School in Pennsylvania who refused to read a book[3] because of its chapter on the "work" life of prostitutes and its frequent use of profane and blasphemous language.[4] The boys were not demanding that the book be banished from the curriculum. All they requested was to be excused from reading that particular book because it deeply "offended their moral and religious beliefs."[5] This case was thus not about censorship or "book burning," but rather about "book forcing,"[6] or as Hentoff puts it, about the right "to differ as to things that touched the heart of [the boys'] beliefs."[7]

Although the boys were willing to perform an alternative reading assignment — and, without a doubt, "there is a whole world of wonderful readings from which such an assignment could have been made"[8] — the school authorities refused to relent and both boys received failing grades for their English course because they had not done their assignments on *Working*. Hentoff characterizes the decision to flunk the boys an "act of meanness" and continues:

> And I suppose that for some teachers and administrators, this power to be mean — with near impunity — provides a psychic income of no small value. What a pleasure it must have been to stamp the two F's on the records of those Bible-spouting misfits![9]

1. State *ex rel.* Sheibley v. School Dist. No. 1, 31 Neb. 552, 557, 48 N.W. 393, 395 (1891).
2. This essay comprises Chapter II of Hentoff's extraordinary book on freedom of speech. *See* NAT HENTOFF, FREE SPEECH FOR ME — BUT NOT FOR THEE: HOW THE AMERICAN LEFT AND RIGHT RELENTLESSLY CENSOR EACH OTHER 42 (1992).
3. The book in question was Studs Terkel's *Working*, a journalistic narrative of the lives and voices of American working people including "farmers, hookers, garbage men, cops, dentists, housewives" and others. HENTOFF, *supra* note 2, at 43.
4. *See id.* at 45.
5. *Id.* at 47.
6. *Id.* at 45 (quoting First Amendment lawyer William Ball).
7. *Id.* at 48.
8. *Id.* at 54.
9. HENTOFF, *supra* note 2, at 54.

Although it does indeed seem that the school authorities in the Girard case were mean-spirited and intolerant in their response to a reasonable request for a substitute reading assignment,[10] this attitude is not typical of the great majority of educators and administrators. Most educators want to do what is best for their students, and when they deny an opt-out request it is likely because they sincerely believe that the required curriculum is in the best educational interests of their students. However, this "we know what's best" attitude may be too narrow a view as to both the educational issues and concerning the well-being of the child.

As Hentoff said about the Girard High School case, there is a whole world of wonderful books and educational activities that could be substituted for almost any required part of the curriculum. There is no reason to think that any particular book or assignment is the "best" way to educate a child whose parents have requested a substitute. Moreover, if the public schools are serious about their commitment to cultural diversity and religious pluralism, a liberal excusal policy seems logically required. As Kimberlee Colby wrote in a newsletter published by the National School Boards Association, when school officials adopt a liberal opt-out policy, they teach their students by example that "a pluralistic democracy values diversity of opinion" and liberty of conscience "over coerced uniformity of opinion."[11] Colby argues that a liberal religious opt-out policy teaches four critically important lessons about life and liberty in a pluralistic democracy:

> Lesson one: America is a haven of religious liberty for all religions, including ones that the political majority does not agree with, understand, or like.
>
> Lesson two: The religious values of each student and parent are to be respected by government officials, including public school officials.
>
> Lesson three: Respect requires action, not lip service. School officials must be willing to make real efforts to accommodate the religious values of parents and students, even at some administrative costs, if religious liberty is to be realized in the public schools.
>
> Lesson four: Coercing students to violate their religious convictions by reading material or by participating in assemblies or lessons to which they object is a characteristic of totalitarianism, not pluralistic democracy.[12]

Rather than ridicule, isolate or punish students for religious or conscientious objections to required readings or assignments, school

10. Hentoff quotes the boys' teacher, Kay Nichols, as gloating that the boys were "scorned" and "alienated from the rest of the class" as a result of their refusal to read *Working*. *Id.* at 48.

11. Kimberlee W. Colby, *Reaffirmation of The Right of Religious Excusal*, INQUIRY & ANALYSIS, May 1996, at 2.

12. *Id.* at 3. Forcing parents to chose between publicly-funded education benefits for their children and exposing their children to religiously-objectionable books, assemblies or assignments imposes an "intolerable" burden on religious liberty. George W. Dent, Jr., *Religious Children, Secular Schools*, 61 S. CAL. L. REV. 864, 901 (1988).

officials would be wise to respect diversity and respond with tolerance to reasonable requests for substitute assignments. A liberal opt-out policy is not only the "right thing to do,"[13] it is also the prudent and efficient thing to do. It not only creates a climate of tolerance and respect for diversity and religious pluralism in the school and the community, but it also saves school districts time, money, and political capital by preventing unnecessary and divisive disputes concerning the curriculum.[14] With justice and utility both pointing in the same direction, Nebraska school officials should not hesitate to adopt a liberal policy governing religious excusals from objectionable curriculum.

III. THE NEBRASKA CONSTITUTION PROTECTS PARENTAL OPT-OUTS

A liberal religious excusal rule may well be wise public policy, but do parents in Nebraska have a right to demand that their children be excused from objectionable parts of the public school curriculum? In this section, I will focus primarily on two landmark cases decided under the Nebraska Constitution and will not attempt to discuss potential rights under the United States Constitution. Suffice it to say that although some scholars believe that parental opt-outs are protected by the Free Exercise Clause,[15] other commentators have concluded that parents have no such right to demand a religious or conscientious excusal.[16] I believe that the case in favor of a free exercise right to opt-out is quite strong,[17] but I will say no more about it here.

In this post-modern world of computer research, double-clicks, and surfing the Net, there is something wonderful and exhilarating about pulling Volume 31 of the Nebraska Reports off the shelves in the law library stacks. The dust is thick, the pages are yellowed and cracking, but the Nebraska Supreme Court's cut-to-the-chase opinion in a landmark decision reported in that volume is a breath of fresh air and common sense from time out of mind. The landmark case is *State* ex

13. Colby, *supra* note 11, at 2.
14. *See id.* As Colby observes, a liberal opt-out policy is actually "an effective preventative measure to head off challenges to controversial curricula." *Id.* For a powerful account of a bitter opt-out dispute that nearly destroyed an entire community, see STEPHEN BATES, BATTLEGROUND (1993).
15. *See* George W. Dent, Jr., *Of God and Caesar: The Free Exercise Rights of Public School Students,* 43 CASE W. L. REV. 707, 711-23 (1993); Dent, *Religious Children, Secular Schools, supra* note 12, at 880-912.
16. *See* Michael W. McConnell, *The New Establishmentarianism,* 75 CHI.-KENT L. REV. 453, 472 (2000).
17. *See* Richard F. Duncan, *Free Exercise is Dead, Long Live Free Exercise:* Smith, Lukumi *and the General Applicability Requirement,* 3 U. PA. J. CONST. L. (forthcoming 2001).

rel. *Sheibley* v. *School District No. 1*,[18] and the issue presented in that ancient case is as relevant today as it was when it was decided in 1891.

In *Sheibley*, a student, Annie Sheibley, was expelled from a public school because her father had instructed her not to participate in one part of the school's curriculum, the course in grammar. The Nebraska Supreme Court ordered the school district to reinstate her as a pupil in the school, and explicitly upheld the "right of the parent . . . to determine what studies his child shall pursue."[19] What makes this case remarkable to the modern reader is the Nebraska Supreme Court's profound respect for parental rights even when the parent's claim seems to be based on a trivial objection to the required curriculum. Mr. Sheibley's objection to his daughter's grammar course was not based upon religious or conscientious reasons, but rather upon his assertion that the course was not being taught "as he had been instructed when he went to school."[20] Although Sheibley's arguments were weak, perhaps even subrational, the Nebraska Supreme Court respected his status as a concerned parent and wrote a powerful opinion proclaiming "the right of the parent . . . to determine what studies his child shall pursue . . . [as] paramount to that of the trustees or teacher."[21] The Court's opinion was animated by its recognition of the bond of love and concern between a parent and his or her child:

> Now who is to determine what studies she shall pursue in school: a teacher who has a mere temporary interest in her welfare, or her father, who may reasonably be supposed to be desirous of pursuing such course as will best promote the happiness of his child?
>
> The father certainly possesses superior opportunities of knowing the physical and mental capabilities of his child.[22]

Although *Sheibley* appears to recognize an absolute right for parents to remove their children from objectionable curriculum, it does not give parents the right to demand that the curriculum be redesigned at the whim of each dissenting parent. Indeed, the Court specifically stated that a parent's right to opt-out of a particular part of the curriculum does not entail the right to demand that his or her children be allowed "to use text books different from those required by the trustees"[23] or to demand accommodations that undermine "efficiency in the school."[24]

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18. 31 Neb. 552, 48 N.W. 393 (1891).
19. *Id.* at 556, 48 N.W. at 395.
20. *Id.* at 554, 48 N.W. at 394.
21. *Id.* at 556, 48 N.W. at 395. Thus, "any rule or regulation that requires the pupil to continue such studies" over the objection of the parent "is arbitrary and unreasonable." *Id.* at 557, 48 N.W. at 395.
22. *Sheibley*, 31 Neb. 552, 556, 48 N.W. 393, 395.
23. *Id.*, 48 N.W. at 394.
24. *Id.*

Sheibley remains the law of the land in Nebraska. Moreover, it is clear that the enactment of mandatory attendance laws in 1901[25] did not undermine the Court's recognition of parental rights, because *Sheibley* was reaffirmed and perhaps even extended by the Supreme Court in *State* ex rel. *Kelley* v. *Ferguson*.[26]

In *Kelley,* a 12-year-old girl was expelled from sixth grade in the Lincoln public schools after her father instructed her not to attend a required class in domestic science.[27] The school authorities took the position that the punishment was appropriate because "no pupils are excused from taking any subjects in said grade except for good cause."[28]

The Nebraska Supreme Court followed *Sheibley* and reaffirmed "[t]he right of the parent to make a reasonable selection from the prescribed course of studies"[29] in the public schools.[30] This right, said the Court, is "both [a] . . . God-given and constitutional right"[31] of parents and is based upon the notion that "governmental paternalism" goes too far when it loses sight of the notion that "the prime factor in our scheme of government is the American home."[32]

The Court in *Kelley* arguably went beyond the holding in *Sheibley*, which involved only a parental right to demand a child be excused from objectionable curriculum but not a right to require that a different assignment or textbook be substituted for the objectionable assignment.[33] In *Kelley*, the Court acknowledged the "power and authority" of school officials to control and regulate the public school system, but held that, "[t]hey should not too jealously assert or attempt to defend their supposed prerogatives. If a reasonable request is made by a parent, it should be heeded."[34] Thus, if parents make a reasonable request for a substitute text or assignment for their child, school authorities should relax their grip on the reins of power and give "due regard [to] . . . the desires and inborn solicitude of the [child's] par-

25. See NEB REV. STAT. § 79-201 (Reissue 1996), which was initially enacted in 1901.
26. 95 Neb. 63, 144 N.W. 1039 (1914).
27. *See id.* at 64-65, 144 N.W. at 1040. The "domestic science" course apparently was a vocational class studying the art of "cooking." *Id.* at 67, 144 N.W. at 1041.
28. *Id.* at 65, 144 N.W. at 1040. The school authorities took the position that Mr. Kelley had not shown "good cause" for removing his daughter from the domestic science class. *Id.* Mr. Kelley desired to have his daughter "take music lessons from a private instructor . . . in lieu of the modern lesson of cooking in the public school." *Id.* at 74, 144 N.W. at 1044.
29. *Id.* at 72, 144 N.W. at 1043.
30. This parental right "exists at all times and in every grade" in the public schools. *Id.*
31. *Kelley*, 95 Neb. 63, 73, 144 N.W. 1039, 1043 (1914).
32. *Id.* at 74, 144 N.W. at 1044.
33. *See supra* notes 23-24 and accompanying text.
34. *Kelley*, 95 Neb. at 74, 144 N.W. at 1044.

ents."[35] In Nebraska, it is not only good policy to respect parental rights, it is the law.

IV. CONCLUSION

Old law is good law. *Sheibley* and *Kelley* are thus both old and good.

It is good policy for school officials to make reasonable efforts to accommodate parental objections to required books, assignments, assemblies, or other parts of the curriculum. But it is much more than good policy: it is the law. *Sheibley* and *Kelley* recognize a God-given, constitutional right of parents to exercise reasonable control over their children's studies in the public schools. Although this right is not absolute, it requires public school officials to "heed" reasonable requests by parents for excusals and for substitute assignments. I am proud to live in a state with a constitution that recognizes the primary role of parents in matters touching upon the education of their children.

35. *Id.*