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# The Making of the Moral Child: Legal Implications of Values Education

JOEL S. MOSKOWITZ\*

## SUMMARY

The development of moral character in children is at once one of education's most ancient offices and most recent vogues.

In simpler times, the socialization of children consisted of the straightforward process of indoctrinating them with generally accepted precepts, values and virtues. The modern incarnation of values education in state-run compulsory schools, however, is the product of constant buffeting by contradictory legal and social forces. On the one hand, as Justice Powell noted "in an age when the home and church play a diminishing role in shaping the character and value judgments of the young, a heavier responsibility falls upon the schools."<sup>1</sup> The various state legislatures have unreservedly turned to moral education as the patent medicine for a vast array of social ills. On the other hand, the schools are less well armed than formerly to undertake this awesome task. Not only are instruction in, and the sanctions of religion no longer available,<sup>2</sup> but the very lack of social cohesion which makes moral instruction seem imperative has generated a legal and political battleground concerning whose values, virtues and lifestyles, if any, ought to be imposed on the young.<sup>3</sup>

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1. *Goss v. Lopez*, 419 U.S. 565, 593 (1974) (Powell, J., dissenting).

2. *Infra* note 35.

3. *Cf. Wisconsin v. Yoder*, 406 U.S. 205 (1972), in which the apparently unique quality of Amish life, the capacity of the Amish community to shape responsible individuals, and the "inseparable and interdependent" nature of their

American education has responded to these contrary demands with great inventiveness, placing renewed emphasis on values education and infusing such education throughout the curriculum, while at the same time adopting a relativistic stance and draining the instruction of any substantive content, in an attempt not to offend either the Supreme Court's view of the Constitution or the views of angry parents on proper moral instruction.

It is the thesis of this article that the schools, in attempting to satisfy everyone will in the end satisfy only a few, least of all the courts, and that certain facets of the new moral instruction pose palpable threats to religious liberty, parental rights and the privacy rights of children.

It may be that the societal mandate is contradictory which proposes "that students be indoctrinated with accepted values while being taught that freedom permits departure from these values."<sup>4</sup> It may be that no final resolution is possible between the competing claims of those who assert a prior right to attempt to mold the character of children so long as "public education actively attempts to shape a child's personal development in a manner chosen not by the child or his parents but by the state."<sup>5</sup> It may finally be that values education will be unproductive or counter-productive so long as it proceeds on the belief "that man can do what God cannot, namely, manipulate others for their own salvation."<sup>6</sup>

Despite these uncertainties, indeed because of them, this article concludes with a proposed map of this constitutional no-man's

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religious faith and mode of life combined to support the Court's unusual decision to exempt Amish children from Wisconsin's compulsory education laws. It was held that secondary schooling unduly impinged an Amish free exercise by exposing Amish children to worldly influences in terms of attitudes, goals and values contrary to beliefs and by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent stage of development," 406 U.S. at 218. J. Moskowitz, *Parental Rights and State Education*, 50 WASH. L. REV. 623 (1975) [hereinafter cited as Moskowitz]; identifying the recent trend to return control over the education of children to their parents on constitutional, rather than statutory, grounds; G. L'ANOUÉ & B. SMITH, *THE POLITICS OF SCHOOL DECENTRALIZATION* 19 (1973), noting the hopes of some advocates of school decentralization "to use the schools to encourage ethnic solidarity and challenge traditional American myths."

4. M. Rosenfeld, *Religious Rights of Public School Teachers*, 23 U.C.L.A. L. REV. 763, 764 (1976); See *James v. Board of Ed. of Central Dist. No. 1*, 461 F.2d 566, 567 (2d Cir. 1972); *cert. denied*, 409 U.S. 1042 (1972), which tries to locate that narrow ground, between the unreasonable censorship of a teacher's classroom speech and the dangerous lack of sufficient restraint, where a student can be exposed to and benefit from the *free marketplace of ideas* and yet avoid the indoctrination of the views of an individual teacher.

5. *Serrano v. Priest*, 5 Cal. 3d 584, 610, 487 P.2d 1241, 1259, 96 Cal. Rptr. 601, 619 (1971).

6. I. ILLICH, *DESCHOOLING SOCIETY* 73 (1970).

land and advances a test against which governmental attempts to impose state-approved emotional, philosophical or spiritual characteristics on children, or to negate those taught by parents, may be measured. While it is submitted that values education is essential in public education, and that the proposed test fully accommodates any reasonable collectivist interest of the state in the values and ethics of the young, much of what is today called "values education" fails this test and should be expelled from our public schools.

### I. BEYOND THE "THREE R'S": A BRIEF HISTORY OF VALUES EDUCATION IN AMERICA

No court to date has seriously questioned the proposition that the public schools might rightfully attempt to pass on more than intellectual skills and knowledge to their students. To the contrary, those courts which have considered the matter have indicated in dicta that educating children for the improvement of their moral and psychological development is a laudatory, even essential activity. Thus, the Supreme Court could take notice in *Brown v. Board of Education*<sup>7</sup> of the following proposition, which is apparently regarded as self-evident: "Today [education] is a principal instrument in awakening the child to cultural values. . . and in helping him to adjust normally to his environment." School instruction has been seen not only as a means of instilling "democratic values,"<sup>8</sup> but as a prime force in "shaping the student's emotional and psychological make-up."<sup>9</sup> Indeed, some courts view the molding of the child's psyche as more important than teaching him basic knowledge or skills.<sup>10</sup>

While the courts do not cite authority to support these observa-

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7. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

8. As the California Supreme Court noted in *Serrano*, *supra* note 5 at 608: "The United States Supreme Court has repeatedly recognized the role of public education as a unifying social force and the basic tool for shaping democratic values." [citing *McCullum v. Board of Education* 333 U.S. 203, 216 (1948) and *Abington School Dist. v. Schempp* 374 U.S. 203, 230 (1963) (Brennan, J., concurring)]

9. *Hobson v. Hansen*, 269 F.Supp. 401, 483 (D.C. 1967), *aff'd sub. nom.*, *Smuck v. Hobson*, 408 F.2d 175 (1969), *quoted in Serrano v. Priest*, *supra* note 5, at 610. Here there was a focus on aptitude tests used in placing students in different programs and their tendency to reinforce existing systems of racial and economic segregation.

10. For example, in *Stephens v. Bongart*, 15 N.J. Mic. 80, 92 189 A. 131, 137 (1937), the court remarked that "the instilling of worthy habits, attitudes, appreciation and skills is far more important than [the] mere imparting of subject matter."

tions, other than occasional references to each other, perhaps this is because these views are a truism in light of American educational history.

As a corollary of the close relationship between church and state, schools in the colonial period were dominantly religious in purpose and content, were controlled by established religions, and existed largely to inculcate orthodoxy in their students.<sup>11</sup> As an example, a seminal educational law, the "old Deluder Satan Act" of 1647, was premised on the proposition that reading and writing must be taught because "the one chief project of the old deluder Satan [is] to keep men from the knowledge of the scriptures."<sup>12</sup>

Not only were children in our early schools often required to attend chapel and say prayers,<sup>13</sup> but a survey of their courses of instruction indicates that character development was a primary purpose of education.<sup>14</sup> For example, an early textbook, the *New England Primer*, published in 1690, contained the following representative lesson:

Fear God all Day  
Parents obey  
No False thing say  
By no Sin Stray  
Love Christ alway  
In Secret Pray  
Mind little Play  
Make no Delay<sup>15</sup>

The dominance of public education by religious groups weakened with the disappearance of established churches, increased pluralism of religious groups and mounting pressure for the

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11. R. BUTTS & L. CREMIN, *A HISTORY OF EDUCATION IN AMERICAN CULTURE* 98, 120, 191 (1953) [hereinafter cited as BUTTS & CREMIN]. The reaction to control of public education by established religions led to, among other things, a demand for alternative, private forms of education. *Id.* at 98.

12. A. MEYER, *AN EDUCATIONAL HISTORY OF THE WESTERN WORLD* 189 (1965) [hereinafter cited as MEYER], which traces Puritan concern for the inculcation of Calvinism in Massachusetts schools. See L. CREMIN, *AMERICAN EDUCATION, THE COLONIAL EXPERIENCE, 1607-1783* 394 (1970), which briefly examines the *NEW ENGLAND PRIMER* and other elementary textbooks; BUTTS & CREMIN, *supra* note 11, at 119-20, noting the highly moral and religious tone of reading exercises found in colonial primers. Likewise, the Northwest ordinance of 1787 encouraged schools to foster "religion, morality and knowledge," presumably in that order. This task was to be accomplished by earmarking the sixteenth section out of every township for public schools and their maintenance. R. Simpson, *Church and State Implications for Educators Continue*, 4 *NOLPE SCHOOL L. J.* 170, 171 (1974); Butts & Cremin, *supra* note 11 at 245.

13. D. Thomas, *A Short History of Moral Education*, in *CAL. SCHOOL BOARDS 4* (Sept. 1976) [hereinafter cited as THOMAS]; *Abington School Dist. v. Schempp*, 374 U.S. 203, 267-68 (1962) (Brennan, J., concurring), which reviews the requirement of prayer in public schools in this country since the colonial period.

14. Note 13 *supra*.

15. Quoted in MEYER, *supra* note 12, at 192.

teaching of "practical knowledge" needed in an expanding economy.<sup>16</sup> By 1833, the separation of church and state was an almost universally accepted legal injunction in America.<sup>17</sup>

This is not to say, however, that moral and religious teachings were removed from the classroom. Rather, to accommodate the increased religious pluralism, the schools endeavored to teach the "common elements of Christianity," and stressed reading of the Bible without comment.<sup>18</sup> This compromise, however, offended both Catholics and the more orthodox Protestants.<sup>19</sup> Notwithstanding, the schools progressively barred the teaching of religious tenets, while striving to instill basic Christian morality.<sup>20</sup>

Renewed emphasis began to be placed on teaching values when, in the nineteenth and early twentieth centuries, large groups of immigrants introduced cultural values, mores and religious beliefs which differed from those of the prevailing American culture.<sup>21</sup> In responding to this development, some American educators were motivated by an altruistic desire to help the immigrants adjust to their new society. Others saw in these diverse peoples not only the importation of the political and religious strife of their native lands, accentuated as they clashed with each other, but also the erosion of peculiarly American values, institutions and beliefs as the existing population was deluded with alien "huddled masses yearning to breathe free, [t]he wretched

16. BUTTS & CREMIN, *supra* note 11, at 98-100, 222.

17. *Id.* at 215.

18. *Id.*; Horace Mann, in his Twelfth Annual Report, brought a popular and distinctly Protestant outlook to bear on what he saw as essentially non-sectarian moral instruction in the public schools. "[O]ur system earnestly inculcates all Christian morals; it founds its morals on the basis of religion; it welcomes the religion of the Bible; and, in receiving the Bible, it allows it to do what it is allowed to do in no other system,—to *speak for itself*." *Id.*; Abington School Dist. v. Schempp, *supra* note 13, at 268-70, which notes that controversy over religious instruction in public schools centered principally "about the elimination of plainly sectarian practices and textbooks, and led to the eventual substitution of non-sectarian, though still religious, exercises and material."

19. BUTTS & CREMIN, *supra* note 11, at 216, 272-73. Roman Catholic clergy objected that reading the Bible without comment was only a sly inculcation of Protestant principals, in that a Catholic outlook demanded that religion be taught under clerical authority. On the other hand, more conservative Protestant elements worried that a lack of accompanying comment would invariably "leave the mind in a state of doubt and *skepticism*." *Id.* at 216.

20. *Id.* at 273.

21. C. Douglas, *Parental Rights in Public Schools*, LIBERTY 19-20 (Sept.-Oct. 1976) [hereinafter cited as Douglas]; M. Rothbard, *Historical Origins*, THE TWELVE YEAR SENTENCE 20-22 (W. Rickenbacker ed. 1974); BUTTS & CREMIN, *supra* note 11, at 191-92.

refuse of a teeming shore.”<sup>22</sup> Both schools of thought united in viewing the public schools as the principal means of insuring that America would indeed be a “melting pot,” as increased emphasis was placed on instruction in citizenship and loyalty to a national state.<sup>23</sup>

In light of this strong and pervasive effort, it is remarkable that by the 1920’s, and certainly by the 1930’s and 1940’s, religious—as well as moral and ethical—instruction had all but disappeared from the public schools.<sup>24</sup>

Several reasons have been given for this. One of the most easily verifiable, and perhaps therefore the most overemphasized, is the Supreme Court’s reaction to some of the more zealous integrative efforts and its warnings concerning extreme manifestations of the “melting pot” philosophy of values education. Thus, in 1922, the Court struck down a statute prohibiting the teaching of foreign languages in public or private schools below the eighth grade.<sup>25</sup> The statute was passed in furtherance of values education dogma, pursuant to the quaint idea that those who learn a

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22. Quotation from Emma Lazarus, *The New Colossus* (inscribed on the Statue of Liberty, New York Harbor). See L. CREMIN, *THE AMERICAN COMMON SCHOOL, AN HISTORIC CONCEPTION*, 22-23, 44-47 (1951); BUTTS & CREMIN, *supra* note 11, at 191-92; ROTHBARD, *supra* note 21 at 20-22.

For example, Benjamin Larabee, president of Middlebury College, expressed concern about the multitude of immigrants who were “rapidly changing the identity of the American character,” and worried that these people “will prove to our republic what the Goths and Huns were to the Roman Empire,” in the absence of the intercession of the “wisdom and fidelity of our teachers.” CREMIN (1970), *supra* note 12 at 45; BUTTS & CREMIN, *supra* note 11, at 192; ROTHBARD, *supra* note 21, at 20-21.

Horace Mann opined that unless society were rendered more cohesive by American values being “sedulously inculcated upon all the children of the Republic,” violence and rebellion might erupt. ROTHBARD, *supra* note 21, at 22. George Cheever wrote of the “great danger from the dark and stolid infidelity and vicious radicalism of a large portion of the foreign immigrating population,” and prescribed the public schools as the means to “defeat the working of that malignant, social, anti-Christian poison.” GEORGE B. CHEEVER, *RIGHT OF THE BIBLE IN OUR PUBLIC SCHOOLS*, 112-13 (1859); *quoted in* CREMIN, *supra* note 12, at 47, and *in* ROTHBARD, *supra* note 21, at 21.

23. BUTTS & CREMIN, *supra* note 11, at 191.

Some scholars condemn this effort as one of “rubber-stamping children of newly arrived immigrants and turning out millions of standardized Americans” (Douglas, *supra* note 21, at 20), and as being an attempt to “shape and render uniform all American citizens . . . to stamp all citizens as Americans, and to impose cohesion and stability on the often unruly and diverse aspirations of the disparate citizens who make up the country.” ROTHBARD, *supra* note 21, at 22. At least as to some aspects of this effort, the Supreme Court has shared this skepticism. See text at notes 25 *et. seq.*

24. R. Graham, *Moral Education: A Child’s Right to a Just Community*, *ELEMENTARY SCHOOL GUIDANCE AND COUNSELING* 299 (May, 1975) [hereinafter cited as Graham]; D. Purpel & K. Ryan, *Moral Education: Where Sages Fear to Tread*, *PHI DELTA KAPPAN* 659 (Jun. 1975); Thomas, *supra* note 13, at 4.

25. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

foreign language too soon "must always think in the language, and, as a consequence, [this will] naturally inculcate in them the ideas and sentiments foreign to the best interests of this country."<sup>26</sup>

In rejecting this measure, the Court took the occasion to warn educators that they should not attempt to go too far in their efforts "to submerge the individual and develop ideal citizens."<sup>27</sup> Citing the repressive efforts toward standardization advocated by Plato and practiced in ancient Sparta, the Court cautioned that "[a]lthough such measures have been deliberately approved by men of great genius, their ideas touching the relation between the individual and the State were wholly different from those upon which our institutions rest."<sup>28</sup>

Two years later, in *Pierce v. Society of Sisters*,<sup>29</sup> the Court was even more explicit. In striking down a statute which outlawed attendance at private schools, including parochial schools, by students below the eighth grade, the Court warned that "[t]he child is not the mere creature of the State," and denied that there was any "general power of the State to standardize its children."<sup>30</sup> Nothing more on this subject was heard from the Court for almost two decades, but when the Court again spoke, it delivered its strongest and most eloquent attack on the schools as "melting pots."

In *Board of Education v. Barnette*,<sup>31</sup> the Court declared that students could not be required to salute the flag. This holding was remarkable: First, because the Court reversed its own holding issued only three years previously;<sup>32</sup> and secondly, in that it was rendered in the midst of World War II. Perhaps because of these factors, the Court felt a special burden to justify this deci-

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26. *Id.* at 398.

27. *Id.* at 402.

28. *Id.*

29. 268 U.S. 510 (1925).

30. *Id.* at 535.

31. 319 U.S. 624 (1943). At issue was a West Virginia statute requiring a flag salute (admitted by the U.S. Flag Association to be "quite similar" to the Nazi-Facist salute) and prescribing expulsion for those failing to conform. *Id.* at 627-29. Suit was brought to enjoin enforcement of the statute by parents of non-conforming Jehovah's Witnesses who considered it a violation of the divine injunction against the worship of graven images. *Id.* at 629.

32. *Minersville School District v. Gobitis*, 310 U.S. 586 (1940). The Court had grounded its opinion on the important legislative goals of "national cohesion," "national unity," and "national security." *Id.* at 595.

sion, and discharged this burden in large measure by a ringing attack on the "melting pot" school of values education:

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public education officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.<sup>33</sup>

Are these cases sufficient to explain in significant part the precipitous decline in values education? It seems unlikely. Their holdings were quite limited and their dicta, while strongly worded, were far from certain in their application.

It is also unlikely that the cases decided in the early 1960's outlawing religious exercise—such as praying and Bible reading—in the public schools<sup>34</sup> were a primary cause for a development dated decades earlier.<sup>35</sup>

While other factors have been cited,<sup>36</sup> the most plausible explanation for this decline is that the interaction between the educa-

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33. 319 U.S. at 640-41. In further response to educationists such as Larabee, Mann, and Cheever, who viewed with alarm the influx of those with alien cultures and philosophies (*supra* note 22), the Court proclaimed that there was no reason to "fear that freedom to be intellectually or spiritually diverse or even contrary will disintegrate the social organization." *Id.* at 641. Far from desiring a "melting pot," the Court praised the country's "intellectual individualism and [its] rich cultural diversities." *Id.* at 641-42. Finally, it declared that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion." *Id.* at 642. Obviously, values education, as it had been practiced, would be hard to reconcile with these dicta.

34. *Engel v. Vitale*, 370 U.S. 421 (1962). Still operating on Mann's thesis that a denominationally neutral religious exercise could be achieved, the New York State Board of Regents recommended the following prayer be said aloud at the beginning of each school day: "Almighty God we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country." *Id.* at 422; *Abington School Dist. v. Schempp*, 374 U.S. 203 (1962).

35. Of course, these decisions were presaged by opinions of some state courts and state attorneys general. See *Abington School Dist. v. Schempp* 374 U.S. at 275-76 (Brennan, J., concurring); e.g., *Board of Educ. v. Minor*, 23 Ohio 211 (1872).

36. One such too-simple answer is that "moral education all but disappeared in the 1930's and 1940's not so much because it transgressed rights but because it was ineffective. Beginning with the Hartshorne and May (1928-1930) studies there has been evidence that attempts to instill culturally approved moral virtues in

tional system and the millions of immigrants was not one-sided. While the schools labored to indoctrinate children with American cultural values, the immigrants introduced a large dose of pluralism into that culture.<sup>37</sup> Non-protestant immigrants reacted to the moral curriculum not only by establishing parochial schools, but also by vigorously protesting teachings and practices not in harmony with their religious views.<sup>38</sup> Always sensitive to controversy, the schools gradually learned to steer far wide of the disputed zone.<sup>39</sup> The moral consensus upon which values education had been based was not only diluted by the addition of immigrants from without, it was eroded from within as well, as industrialization accelerated urbanization and caused a weakening of family ties and church influence.<sup>40</sup>

The very loss of social cohesion which made moral education so controversial, so unsuccessful and so sparse, ironically made it more necessary. State legislatures, facing dramatic increases in crime, drug use and other symptoms of social malaise, turned to the public schools to somehow "educate" their captive audience to avoid these behaviors. They drafted impressive catalogues of moral beliefs and behaviors<sup>41</sup> and enjoined educators to infuse these desiderata into their charges. A representative example of such legislation is section 87705 of the California Education Code, which provides:

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schools has had little effect on behavior." Graham, *supra* note 24, at 299, citing 1-3 H. HARTSHORNE & M. A. MAY, STUDIES IN THE NATURE OF CHARACTER (1928-1930).

There is scant evidence or logical appeal supporting the proposition that a national mission so vigorously begun would be so quickly abandoned once the above conclusions were made public. More to be expected would be an increase in effort or a change in method, rather than the relegation of moral education to a museum of failed, hopeless tasks. As an analogy, should a study reveal that the compositions of high school graduates manifest little application of their studies of grammar, one would hardly expect the schools to give up in despair further attempts to teach grammar.

Another view, advanced by Professor Michael Walzer of Harvard University, who associates the decline in moral education with the emergence of a culture dedicated to individualism and scientific objectivity; which regards morals as deeply personal, rather than the manifestation of shared commitments, and perceives discussion of moral questions as "unscientific, [and] a sign of weakness and sentimentality." M. Walzer, *Teaching Morality*, THE NEW REPUBLIC 12 (June 12, 1978).

37. Purpel & Ryan, *supra* note 24 at 659, 660.

38. *Id.*

39. *Id.*

40. *Id.*

41. A comprehensive review of these enactments is to be found in L. Edelman, *Basic American*, 6 NOLPE SCHOOL L. J. (1976) [hereinafter cited as Edelman].

Each instructor shall endeavor to impress upon the minds of the students the principles of morality, truth, justice, patriotism, and a true comprehension of the rights, duties, and dignity of American citizenship, including kindness toward domestic pets and the humane treatment of creatures, to teach them to avoid idleness, profanity, and falsehood, and to instruct them in manners and morals and the principles of free government.<sup>42</sup>

Other states require inculcation of such virtues as "temperance, purity, public spirit, patriotism [and] international peace," "deference to old age," "the practice of every Christian virtue," and "the obligation of every citizen to stand ready to defend our country at all times from infiltration or aggression by those whose acts and ideologies are contrary to our American philosophy of life."<sup>43</sup> This emphasis on moral instruction is reflected in the fact that 16% of all statements related to goals developed by state departments of education are devoted to moral education.<sup>44</sup>

The problem with these laudatory laws is that virtually none of them indicate how the task of turning out students permeated with these often abstract virtues is to be accomplished.<sup>45</sup> Not only did the new crop of teachers lack the training, knowledge or experience to undertake this task, but the contrary forces which had caused moral instruction to become all but obsolete were still present, if not intensified.<sup>46</sup> The result of the buffeting of the schools by these conflicting demands and forces has been, until recently, inertia, if not paralysis.<sup>47</sup>

Educators, however, still believed that morals should be taught,<sup>48</sup> and the demands of the legislatures could not be wholly ignored. Therefore, within the last few years, a large and eager market for new curricula of moral education has emerged. It is to an examination of the nature and legal implications of these curricula which have moved in to fill the moral vacuum in education that we now turn our attention.

#### A. *The New Values Education: Process Without Product*

At least a dozen books, with total sales of over a million copies, as well as scores of articles, have recently been published dealing

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42. CAL. EDUC. CODE § 87705 (West 1978).

43. Edelman, *supra* note 41, at 91-92, 94.

44. R. Hill, *Rationales for Moral Education*, in CALIFORNIA SCHOOL BOARDS 8 (Sept. 1976).

45. Edelman, *supra* note 41, at 91.

46. Thomas, *supra* notes 13 & 14.

47. *Id.*

48. *Id.*; D. Peckenpaugh, *Moral Education: The Role of the School in Public and Individual Morality*, (Proceedings of the National Conference on Citizenship Education, Salt Lake City, 1976) *excerpted* in CALIFORNIA SCHOOL BOARDS (Sept. 1976) [hereinafter cited as Peckenpaugh].

with the subject of values education.<sup>49</sup> Their influence on a public school system under legislative and societal mandate to redirect its energies and attention to the subject has been enormous. As a result, courses, units and workshops on values have proliferated.<sup>50</sup>

Two rival schools of thought have dominated this renaissance. After a description of each through the eyes of its proponents, we will explore their legal implications.

The first of these, and the more influential, is known as "Values Clarification."<sup>51</sup> Its aim, as its name implies, is to teach students to "clarify" their values, while assiduously avoiding "imposing" or "indoctrination" of values.<sup>52</sup>

Values Clarification is "not based upon the assumption that absolute goods exist and can be known."<sup>53</sup> Its task "is not to identify and transmit the 'right' values,<sup>54</sup> but to help a student clarify his own values so that he can obtain the values that best suit him and his environment."<sup>55</sup> This aim is carried out by assisting students to (1) choose beliefs and behaviors, (2) prize (publicly affirm) the beliefs and behaviors they have chosen and (3) act on

49. H. KIRSCHENBAUM, *ADVANCED VALUE CLARIFICATION*, 1, 153-87 (1977) [hereinafter cited as KIRSCHENBAUM]. This book contains an annotated bibliography of 185 publications from 1965-1975.

50. D. Loggins, *Clarifying What and How Well?* *HEALTH EDUCATION* 2 (March-April, 1976) [hereinafter cited as Loggins]; KIRSCHENBAUM, *supra* note 49, at 1.

51. For a historical background of the development of this approach, see KIRSCHENBAUM *supra* note 49 at 139-43.

52. S. SIMON, L. HOWE, & H. KIRSCHENBAUM, *VALUES CLARIFICATION, A HANDBOOK OF PRACTICAL STRATEGIES FOR TEACHERS AND STUDENTS* 15-17 (1972) [hereinafter cited as SIMON, HOWE & KIRSCHENBAUM], which discusses the shortcomings and dangers of attempting to instill values by "moralizing" or "direct inculcation"; J. Goodman, *Sid Simon on Values: No Moralizers or Manipulators Allowed*, in *NATIONS SCHOOLS* 40 (December 1973), an interview with one of the leading proponents of values clarification.

53. M. Harmin & S. Simon, *Values*, in *THE TEACHER'S HANDBOOK* 694 (D. Allen & E. Seifman eds. 1971) [hereinafter cited as Harmin & Simon]. While allowing that some proponents of Values Clarification entertain absolute values, its premise is that the validity of values is not subject to proof and thus "To the church, we must say, 'We don't know.'" KIRSCHENBAUM, *supra* note 49 at 13; H. Kirschenbaum, M. Harmin, L. Howe, & S. Simon, *In Defense of Values Clarification, A Position Paper*, 5 (monograph, National Humanistic Education Center, 1975) [hereinafter cited as Kirschenbaum, Harmin, Howe & Simon (1975)].

54. Note 53 *supra*; S. Simon, *Three Ways to Teach Church School*, in *READINGS IN VALUES CLARIFICATION* 237-40 (H. Kirschenbaum & S. Simon eds. 1973) [hereinafter cited as Simon] ("Values are very complex and very personal: there are not 'right values.'"); L. HOWE & M. HOWE, *PERSONALIZING EDUCATION, VALUES CLARIFICATION AND BEYOND* 19 (1975) [hereinafter cited as HOWE & HOWE].

55. Harmin and Simon, *supra* note 53, at 694.

the basis of these beliefs.<sup>56</sup>

Unlike many abstract educational theories, whose operational meaning in concrete classroom activities is a matter of some conjecture, proponents of Values Clarification have developed extensive classroom activities ("strategies") designed to implement the theory.<sup>57</sup> These exercises consist of questions posed to students which encourage them to state their value preferences. Initial value choices may elicit further questions, such as whether the student freely chose the value, whether he or she is proud to hold it, whether he or she acts on it and what the consequences of that value might be in given situations.<sup>58</sup>

The questions posed are addressed to such diverse areas as "politics, religion, work, leisure time, school, love, sex, family, material possessions, culture [art, music, literature], personal taste [clothes, hair style, etc.], friends, money, aging, death, health, race, war-peace, rules [and] authority."<sup>59</sup>

A competing school of moral education, one which shares much in common with Values Clarification,<sup>60</sup> and is likewise increas-

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56. SIMON, HOWE & KIRSCHENBAUM, *supra* note 52, at 19-20; HOWE & HOWE, *supra* note 55, at 19. These three steps are elaborated into seven sub-steps of (1) choosing values freely, (2) choosing from alternatives, (3) choosing after consideration of consequences, (4) prizing and cherishing these values, (5) sharing and publicly affirming these values, (6) acting upon these values, and (7) acting upon these values repeatedly and consistently. *Id.* Also KIRSCHENBAUM, *supra* note 49, at 8-9.

57. *E.g.*, SIMON, HOWE & KIRSCHENBAUM, *supra* note 52; E. MORRISON & M. PRICE, *VALUES IN SEXUALITY, A NEW APPROACH TO SEX EDUCATION* (1974); HOWE & HOWE, *supra* note 55.

58. SIMON, HOWE, & KIRSCHENBAUM, *supra* note 52 at 20.

59. *Id.* at 15. Some few examples from this work are extracted here, and while admittedly not a random sample, illustrate that the classroom questioning can be quite personal:

How many of you . . . go to church or temple regularly? . . . enjoy going to church or temple? . . . are in love right now? . . . would choose to die and go to heaven if it meant playing a harp all day? . . . have a hole in your sock right now? . . . use a spray deodorant? . . . like to look at pictures of nude women/men? . . . would be upset if organized religion disappeared? . . . think that parents would be upset if organized religion disappeared? . . . think that parents should teach their children to masturbate?"

*Id.* at 41-52; "Are you . . . More like a 'No Trespassing' sign or a 'Public Fishing' sign?" *Id.* at 95-6. Students are asked to rate themselves on a continuum as to whether their feelings about premarital sex are more like "Virginal Virginia—wears white gloves on every date" or "mattress Millie, wears a mattress strapped to her back." *Id.* at 123; "What disturbs you most about your parents?" *Id.* at 148; "Did you ever write a love letter to a girl (or boy)?" *Id.* at 153; "Do you love your parents?" *Id.* at 155; "What do you think happens to people after they die?" *Id.* at 157; "Tell where you stand on the topic of masturbation . . . Share the most intense religious experience of your life . . . Tell something about a frightening sexual experience." *Id.* at 180; "Recall the last ten times you cried. What was each about?" *Id.* at 239; "Are you someone who . . . will change your religion? . . . is a thoughtful lover?" *Id.* at 369, 371.

60. KIRSCHENBAUM, *supra* note 49, at 43-44.

ingly popular,<sup>61</sup> is based upon cross-cultural research which concludes that the ways in which people think about moral issues progress universally from lower to higher "stages."<sup>62</sup> The aim of education under this theory is to lead students to evaluate moral questions from progressively more advanced perspectives. This is accomplished by posing "moral dilemmas" and then by stimulating discussion at stages just beyond the students' present level of development.<sup>63</sup>

Like Values Clarification, this theory eschews moralizing and, indeed, devotes its entire attention to the process and structure of moral reasoning, with no direct concern for the product. Unlike Values Clarification, we are given few concrete examples of how this cross-cultural-process abstraction operates in the classroom. Unless a distinction is clearly called for, however, both theories will be addressed *sub nom* "modern values education."

## II. A LEGAL ASSESSMENT OF MODERN VALUES EDUCATION

As has been set forth, modern values education is the response

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61. J. Fraenkel, *The Kohlberg Bankwagon: Some Reservations*, SOCIAL EDUCATION 216 (April 1976) [hereinafter cited as Fraenkel]. Fraenkel finds at least four serious problems with the Values Clarification theory: first, that a morality based on the concept of justice, which underlies the theory, has been shown by anthropologists to be far from universal; second, that it is impossible to prove that "higher" stages of moral development are necessarily *better*, and, therefore, there is little justification for trying to "improve" a child's moral reasoning; third, that since, by the estimation of a leading proponent of the theory, only ten percent of the population reach the highest stages of moral development, some effort should be directed to more firmly entrench whatever degree of conventional morality can be achieved by the individual; and fourth, that the requirement of values clarification theorists that "the teacher's verbalizations must be one step above the level of the child" places unrealistic demands on the moral capacity of most classroom teachers. *Id.* at 217-18.

62. Graham, *supra* note 24; L. Kohlberg, *Stage and Sequence: The Cognitive-Developmental Approach to Socialization*, in HANDBOOK OF SOCIALIZATION THEORY AND RESEARCH 376 (D. A. Goslin ed. 1969) [hereinafter cited as Kohlberg] which contains a table of stages; Fraenkel, *supra* note 61, at 216.

Simply put, at Stages 1 and 2, moral questions are resolved on the basis of avoiding physical punishment and obtaining rewards. At Stages 3 & 4, moral value resides in obtaining the approval of others and maintaining the conventional social order. At Stage 5, values are seen as having an arbitrary element and being the subject of a "social contract." Those values which have been examined and democratically accepted are seen as "right." At the highest stage, Stage 6, individuals respond to their own consciences, looking not to existing social rules, but to universal principles. Graham, *supra*, note 24, at 301-08; Fraenkel, *supra* note 61, at 216-17; Kohlberg, *supra* at 376; E. Fenton, *Moral Education: The Research Findings*, SOCIAL EDUCATION 189 (April 1976).

63. Graham, *supra*, note 24, at 303-04.

of the schools to opposing legal and social forces. On the one hand, there is the requirement of the legislatures, reflecting the common concern that children be inculcated with certain essential moral and social values; and on the other hand, there is the concern of the courts and parents of pluralistic backgrounds that such values, and the manner in which they are taught, be inoffensive. The fairest assessment of such educational innovations, and the one most predictive of their legal future, is the degree to which these efforts have been properly responsive to the legal forces which spawned them.

#### A. *Values Education v. Values Legislation*

It requires no depth of analysis to conclude that the public schools have translated quite specific legislation requiring that enumerated values be taught<sup>64</sup> into an abstract injunction that they give "more attention" to values education in the curriculum. Except in the most superficial sense the effort has been nonresponsive, for both schools of modern values education express no concern for whether students emerge from their programs imbued with the legislatively prescribed values or their opposites, as they shun all ["indoctrination"] and focus exclusively on the "structure" and "process" of valuing, to the exclusion of directing children to predetermined values.<sup>65</sup> Criticizing this aspect of Values Clarification, one commentator noted: "It is possible to conceive of one going through the several value criteria [the seven valuing processes] and deciding that he values intolerance or thievery."<sup>66</sup> In the same vein, a British professor of education observed of the "moral stage" theory, that "[t]he policeman cannot always be present, and if I am lying in the gutter after being robbed it is somewhat otiose to speculate at what stage the mugger is. My regret must surely be that he had not at least got a conventional morality well instilled in him."<sup>67</sup> The problem is not merely however, that modern values education is nonresponsive to the legislative mandates—it appears to be consciously counter-responsive. It is not consistent to operate on the premise that values are "relative, personal [and] situational,"<sup>68</sup> and yet "impress upon the minds of the students" that they

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64. See text at notes 41-44 *supra*.

65. See text at notes 51-54, 59-62 *supra*. "[Values Clarification] is not concerned with the *content* of people's values, but the *process of valuing*." SIMON, HOWE & KIRSCHENBAUM, *supra* note 52, at 19.

66. Loggins, *supra* note 50 quoting G. Forcinelli, *Values Education in the Public Schools*, THRUST 14 (Mar. 1974), [hereinafter cited as Forcinelli].

67. R. Peters, *A Reply to Kohlberg, 'Why Doesn't Lawrence Kohlberg Do His Homework?'* PHI DELTA KAPPAN 678 (Jun. 1975) [hereinafter cited as Peters].

68. Harmin and Simon, *supra* note 53.

"ought" to believe in "the principles of morality, truth, justice, patriotism. . . kindness toward domestic pets. . ." etc.<sup>69</sup> What is in fact learned is "moral relativism which holds that any deeply held view of right and wrong is as good as any other."<sup>70</sup> As one professor observed:

[One gets] the distinct impression that all decisions arrived at through the prescribed process are equally defensible and acceptable. The advocates of values clarification do not seriously entertain such fundamental questions as: assuming Adolph Hitler, Charles Manson, Martin Luther King and Albert Schweitzer held values which met the seven criteria, are their values equally valid, praiseworthy, and/or good?<sup>71</sup>

It appears, then, that to the extent a student presented with modern values education arrived at legislatively prescribed values, he would have done so quite by accident. Further, he would hold those values without any conviction that they were "right," but pursuant to a tentative conclusion that they "best suit him and his environment."<sup>72</sup>

While it does not appear that a writ of mandate has yet been brought against a school district to compel it to comply with the statutorily prescribed curriculum; nor that a legislature has imposed sanctions for noncompliance, or even taken note of the situation and appended ". . . and we mean it!" to its legislation, this problem, combined with the constitutional problems outlined *infra*, make a judicial challenge of modern values education seem inevitable.

### *B. Modern Values Education v. Religion*

At least in a superficial sense, modern values education seems an adequate response to courts and parents who objected to the public schools indoctrinating students in the dogmas and

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69. CAL. EDUC. CODE § 88705 (West 1978).

70. Graham, *supra* note 24 at 300.

71. A. Lockwood, *A Critical View of Values Clarification*, TEACHERS COLLEGE RECORD 46 (Sept. 1975) [hereinafter cited as Lockwood]. Apparently stung by this criticism, proponents of Values Clarification have taken pains to deny that a person could pursue a Values Clarification curriculum and become like Hitler. Kirschenbaum, (*supra* note 49, at 46) replied that "Hitler was clearly paranoid and could not effectively use the choosing process of valuing." KIRSCHENBAUM, HARWIN, HOWE & SIMON (1975), (*supra* note 53, at 4) assert that it was "the heavy 'moralizing, inculcating and indoctrination' which dominated values education before World War II [which], in its extreme form, led to the horrors of the Nazi regime." These replies could not be said to entirely address the objection.

72. Harmin and Simon, *supra* note 54.

precepts of state-approved religions.<sup>73</sup> Modern values education does not attempt to influence character or behavior through religious exercises, nor does it preach that any one religion's teachings or commandments are preferable to those of any other religion. Thus, it can be argued that it does not "aid one religion, aid all religions, or prefer one religion over another. . . or force [a person] to profess a belief or disbelief in any religion."<sup>74</sup> To the contrary, it fosters "[f]reedom of thought, which includes freedom of religious belief, [and] is basic in a society of free men."<sup>75</sup>

Nevertheless, can it be said that modern values education theories "establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion"?<sup>76</sup>

Certainly a religion of secularism is not established in the most obvious sense. If anything is anathema to modern values education it is "[m]oralizing. . . the direct, although sometimes subtle, inculcation of the adult's values upon the young."<sup>77</sup> If "[t]he teacher must never use values clarification strategies to moralize or teach 'correct values' "<sup>78</sup> it inexorably follows that the teacher will not employ the theory to overtly preach the renunciation of "incorrect values," whether religiously or otherwise derived.

Nevertheless, the facts that (1) there is considerable overlap between the domains of "moral education" and religion; (2) modern values education, particularly Values Clarification, employs its analytic method upon religious beliefs and practices themselves, sometimes with thinly veiled skepticism; (3) the relativistic premise of the modes of analysis of modern values education is contrary to the absolutistic premise of most Western religions and it has been argued that it affects the way in which students will come to approach their religions; and (4) the "secular purposes" of modern values education, unlike statutorily prescribed values education, are rather ill-defined, conjunctively raise serious questions concerning whether some aspects of modern values education can successfully clear the hurdles erected by the Establishment Clause.<sup>79</sup>

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73. See text at notes 11, 19 & 25.

74. *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947).

75. *United States v. Ballard*, 322 U.S. 78, 86 (1944).

76. *Abington School Dist. v. Schempp*, 374 U.S. at 225; *Epperson v. Arkansas* 393 U.S. 97, 104 (1968).

77. SIMON, HOWE & KIRSCHENBAUM, *supra* note 52, at 15-16.

78. HOWE & HOWE, *supra* note 54, at 112; See Simon, *supra* note 54.

79. As was set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), a governmental action must pass three tests to be valid under the Establishment Clause of the first amendment. First it "must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally [it] . . . must not foster 'an excessive government entanglement with religion.'" *Id.* at 612-13; *Meek v. Pittenger* 421 U.S. 349, 358 (1974).

First, it can scarcely be denied that values education is deeply involved in an area which is a traditional and principal concern of religion. As the Executive Director of the Center for Moral Education at Harvard University acknowledged:

Moral education can hardly avoid dealing with matters that have long been the concern of religion; the right to life, personal obligation, and the like. Nor can moral education escape questions of standards of moral behavior and the authority upon which they are based, whether that authority stems from the dictates of social or religious institutions, of custom, law, or moral principle.<sup>80</sup>

Secondly, not only do values education and religion share a concern for the ethical standards which govern relations between a person and the secular world, but modern values education and, in particular, Values Clarification, devotes considerable attention to encouraging students to "clarify" their religious beliefs so that they might "choose freely," and "publicly affirm," their religious convictions.<sup>81</sup> Some of the questions asked impliedly challenge certain religious ideas (*e.g.*, "How many of you . . . would choose to die and go to heaven if it meant playing a harp all day?"),<sup>82</sup> while others are more neutrally phrased (*e.g.*, "Do you believe in God?"<sup>83</sup>; "What do you think happens to people after they die?"<sup>84</sup>). Of course, the answers to these questions, like all others, may be followed up by "clarifying questions," so that if, for example, a student answered a question by indicating that he believed in God, he might then be asked whether he "freely chose" that belief, or whether it was impressed on him by his parents, whether he is "proud of it," etc.<sup>85</sup>

A less obvious but more pervasive interface between modern

80. Graham, *supra* note 24, at 299. See *Abington School Dist. v. Schempp*, 374 U.S. at 606 (Goldberg, J., concurring). Justice Goldberg warns that "untutored devotion to the concept of neutrality" can result in "a brooding and pervasive devotion to the secular" and "hostility to the religions." He insists that "[g]overnment must inevitably take cognizance of the existence of religion and, indeed, under certain circumstances the first amendment may require that it do so."

81. *Supra* notes 56 & 59.

82. SIMON, HOWE, AND KIRSCHENBAUM, *supra* note 52, at 43. As other examples, students are asked, "How many of you would be upset if organized religion disappeared?" *Id.* at 51; "Are you getting anything out of [Sunday school or religious class]?" *Id.* at 140.

83. *Id.* at 143.

84. *Id.* at 157. Other representative questions include, "Are you more or less religious than you were three years ago?" *Id.* at 144; "How many of you . . . would approve of a marriage between homosexuals being sanctioned by [a] priest, minister or rabbi?" *Id.* at 49.

85. See text at note 58 *supra*.

values education and religion radiates from the fact that in rejecting authoritarian indoctrination, modern values education has moved to the opposite pole and embraced ethical relativism and its holdings that values are "relative, personal, [and] situational."<sup>86</sup> Therefore, "one person's values are as good as another's . . . and when it comes to morality, there is no way of showing that one opinion is better than another."<sup>87</sup> By contrast, religions, at least virtually all Western religions, make statements concerning external spiritual reality, rather than personal preference, and their ethics are premised on the existence of God having "a very pronounced interest in good moral behavior"<sup>88</sup> and therefore "laying down a code for daily observance."<sup>89</sup>

Modern values education, in line with its agnostic premise,<sup>90</sup> eschews "the assumption that absolute goods exist and can be known"<sup>91</sup> and asserts that no proof exists as to the validity of any value.<sup>92</sup> It therefore advocates that a person should "choose freely" and "from alternatives" values which happen to "best suit him and his environment,"<sup>93</sup> much as one might choose produce in a supermarket.

From a religious perspective, this is incorrect. As God has prescribed what constitutes good moral behavior, one's task is not to choose values from a range of alternatives, but to discover the true values, and the validity of a person's moral obligations depends not at all on whether it "suits him,"<sup>94</sup> still less on whether

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86. Harmin and Simon, *supra* note 53.

87. Lockwood, *supra* note 71, at 47; *see* note 53 *supra* and accompanying text.

88. J. NOSS, *MAN'S RELIGIONS*, 342 (1969).

89. *Id.*

90. *See* note 53 *supra*.

91. Harmin and Simon, *supra* note 53.

92. KIRSCHENBAUM, *supra* note 49 at 14.

93. Harmin and Simon, *supra* note 53, at 694; note 56 *supra*.

94. There is a subtle but profound difference between teaching that people have a democratic right to their own opinions on moral and religious questions, and teaching that "one person's values are as good as another's." Lockwood, *supra* note 71. In the words of an old saying "People have a right to be wrong but that doesn't make it right to be wrong."

Put another way, if a teacher instructed children that "There is no God," few would have trouble seeing that this violates the Establishment Clause. Is it qualitatively different to teach that "If God exists, he imposes no moral obligations on you; no one can know what He wants us to do, so you should do what best suits you and your environment," or "Even if you believe in God and think you know what moral standards He requires, your neighbor is not behaving in a morally objectionable way if he violates those standards"? The religious tenets of most Americans are premised on the opposite belief, that God has imposed moral obligations applicable to all and demands obedience to them. *E.g.*, Deut. 11:28; Jonah 1, 3; John 15:10, II Cor. 10:5-6.

While the legal standards which govern such conflicts are analyzed *infra*, suffice it to posit here that if the above lessons are being taught and learned (Lockwood *supra* note 71 at 48) and if they do constitute a prohibited "indoctrination in ulti-

it suits his environment.<sup>95</sup>

Of course, Values Clarification extends beyond moral and religious issues to weighty questions such as whether the students "like yogurt?"<sup>96</sup> "use a spray deodorant?"<sup>97</sup> "would like to change (their) hair style?"<sup>98</sup> and "like frozen custard better than regular ice cream?"<sup>99</sup> Critics of this theory have charged that not only has it "confused nonmoral issues with moral ones,"<sup>100</sup> but that it applies the same method to both and teaches that they are to be resolved in the same manner—on the basis of personal preference.<sup>101</sup> It is thus asserted that study in a discipline grounded in ethical relativism will increase "the possibility that . . . students will embrace ethical relativism as their moral point of view—clearly an achievement of dubious merit."<sup>102</sup>

This leads us to the justifications advanced for teaching modern values education methods in the public schools. Not surprisingly, no claim is made for modern values education, as could be made for a fair amount of legislatively prescribed values education, that it "precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests."<sup>103</sup> As was set forth above, modern values education is not directed toward the inculcation of any particular values, regardless of their importance to society. Therefore, it would not be inconsistent with the premise of such methods if the student were to adopt values considered by society to be deviant.<sup>104</sup>

For Values Clarification, the justification is psychological. Prior to being trained in Values Clarification, young people are said to experience "values confusion," which manifests itself in the symptoms of "apathy, flightiness, extreme uncertainty, and inconsistency; drift, overconformity, overdissension, and chronic pos-

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mate values" (Reed v. Van Hoven, 237 F.Supp. 48, 53 (W.D. Mich. 1965), it can make no difference whether they are explicitly set forth in hornbooks, or implicit in the method used, or even subliminal. See text at note 179 *infra*.

95. See Wisconsin v. Yoder, 406 U.S. at 216 citing Romans 12:2 "be not conformed to this world;" see e.g., John 15:18-19, 17:14.

96. SIMON, HOWE & KIRSCHENBAUM, *supra* note 52 at 45.

97. *Id.*

98. *Id.* at 55.

99. *Id.* at 56.

100. Graham, *supra* note 24 at 300.

101. *Id.*

102. Lockwood, *supra* note 71 at 48.

103. Wisconsin v. Yoder, 406 U.S. at 215-16.

104. See text at notes 66-70 *supra*.

ing, and, frequently, underachievement.”<sup>105</sup> Those who attain value clarity, on the other hand, rid themselves of these ailments and are “positive, purposeful, enthusiastic, [and] proud.”<sup>106</sup>

The “moral stage” theory, on the other hand, proceeds on the assumption that the higher stages, being more advanced, are “better” and therefore ought to be attained.<sup>107</sup>

Scant case authority guides us to a resolution of the question of whether these theories are sufficiently hostile to religion as to violate the Establishment Clause, or whether the posited conflicts are ‘indirect,’ ‘remote,’ or ‘incidental.’”<sup>108</sup> Some few guidelines can be stated, but the conclusions must ultimately rest on opinion, or more accurately, prediction.

First, it is no defense to a charge that modern values education violates the Establishment Clause to say that it does not “promote a ‘state religion.’”<sup>109</sup> Similarly it is no defense to argue that students are not forced to respond to questions they disapprove of.<sup>110</sup> It is, however, settled that “the state has no legitimate interest in protecting any or all religions from views distasteful to them.”<sup>111</sup>

But does modern values education offend the tests for validity under the Establishment Clause synthesized by *Lemon v. Kurtzman*?<sup>112</sup> To the extent that Values Clarification turns its guns on the tenets of religion itself, it would appear to be prohibited. Obviously, those questions which impliedly scorn tenets

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105. L. RATHS, M. HARMIN, & S. SIMON, *VALUES AND TEACHING*, 8 (1966) [hereinafter cited as RATHS, HARMIN, & SIMON], *quoted in* Lockwood, *supra* note 71, at 35.

106. RATHS, HARMIN & SIMON, *supra* note 105, at 5.

107. Fraenkel, *supra* note 61; *see* Peters, *supra* note 67.

108. *Committee for Public Educ. v. Nyquist*, 413 U.S. 756, 771 (1973).

109. *Id.* at 771, *citing* *Lemon v. Kurtzman*, 403 U.S. at 612. Nonetheless it is an interesting question whether ethical relativism might constitute a “religion” in light of (1) the absence of a widely accepted legal definition of “religion”; (2) that belief in God has been held to no longer be the *sine qua non* of religious belief; and (3) that it does conform to several definitions which have been advanced. *See Defining Religion: Of God, the Constitution and the D.A.R.*, 32 U. CHI. L. REV. 533 (1965); A. MORRIS, *THE CONSTITUTION AND AMERICAN EDUCATION*, 374, 437 (1974), *reprinting* Note: “Sectarian Books, The Supreme Court; *but see* *Wisconsin v. Yoder*, 406 U.S. at 216, distinguishing choices which are “philosophical and personal” such as those of Thoreau which lead him into temporary isolation at Walden Pond, and those which are “religious,” such as those of the Amish which lead them to keep their children over the age of fourteen out of public school.

110. *Abington School Dist. v. Schempp*, 374 U.S. at 221. Whether students are, in legal cognizance, so forced, is discussed *infra*. So long as the message is clear, it does not matter whether it is overtly preached or part of the “hidden curriculum.” *Yoder*, 406 U.S. at 211-19; (*see also* notes 176-180 *infra*).

111. *Epperson v. Arkansas*, 393 U.S. 97, 107 (1968), *quoting* *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505 (1952). The *Epperson* Court struck down an Arkansas statute forbidding instruction in the theory of evolution in state-supported schools and universities.

112. *See* note 79, *supra*.

which may be held by various religions<sup>113</sup> are invalid. Questions which show hostility to religious institutions or their doctrines as their primary purpose, cannot be justified.<sup>114</sup> Likewise, those questions which seek to probe the content or origin of a student's religious beliefs, and practices, and his feelings of "pride," "enjoyment" or lack of same concerning them would seem to be prohibited, if not on the ground that they are hostile to religious beliefs, at least on the ground that they constitute "excessive entanglement" of religion and the educational system. It may or may not be that students whose religious beliefs are unclear show "apathy, flightiness, extreme uncertainty." Notwithstanding the content of the questions, any serious effort by the state to guide students in "clarifying" their relationships with God and their churches cannot but involve government in religious matters to an impermissible degree.<sup>115</sup>

Whether imbuing children with ethical relativism contrary to the teachings of their religions violates the Establishment Clause presents a closer question, a question which turns on the validity of the posited "secular purpose"<sup>116</sup> and whether it can be justly said that the "principal or primary effect" of such instruction "inhibits religion."<sup>117</sup>

At the outset, there is no requirement that the "secular justification" for modern values education be accepted at face value. In *DeSpain v. DeKalb Community School District 428*,<sup>118</sup> for example, a school prayer was defended on the ground that reciting it would promote "'good manners' and 'gratitude'."<sup>119</sup> The court refused to accept the proposition that any activity "of whatever nature could be justified by public officials on the basis that the activity has beneficial secular purposes,"<sup>120</sup> otherwise the Supreme Court's admonitions in *Engel* and *Schempp* would be-

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113. See text at note 82 *supra*.

114. Note 76 *supra*.

115. At least one court has recognized the incompatibility of such classroom exercises with the Establishment Clause. In *Reed v. Van Hoven*, 237 F.Supp. at 56, the court ordered that "no themes will be assigned on such topics as 'Why I believe or disbelieve in religious devotions.'"

116. *Lemon v. Kurtzman*, 403 U.S. 601; see e.g., *Epperson v. Arkansas*, 343 U.S. 495.

117. *Lemon v. Kurtzman*, 403 U.S. 601.

118. *DeSpain v. DeKalb County Community School Dist. 428*, 384 F.2d 838 (7th Cir. 1967), *cert. denied*, 390 U.S. 906 (1968).

119. *Id.* at 839.

120. *Id.*

come meaningless. As a factual matter, it is doubtful that those who "live in mental confusion or moral anarchy and seek vaguely for truth and beauty and moral support"<sup>121</sup> will be much comforted by the tenets of ethical relativism.

Whether the schools have been entrusted by the legislatures with providing generally dispensed patent therapy for "apathy, flightiness, extreme uncertainty, and inconsistency; drift, overconformity, [and] overdissension. . ." <sup>122</sup> may also be justly questioned.

As previously noted,<sup>123</sup> little attempt has been made to justify modern values education on the ground that it instills values important to society, especially in light of the fact that this "educational system can produce a dishonest and potentially dysfunctional product, and then merely say that these are legitimate expressions of individual preferences."<sup>124</sup> If the courts accord little weight to such secular justifications as have been proffered, then the remaining "principal or primary effect" will be the inhibition of religious belief.<sup>125</sup>

### C. Modern Values Education v. The Right of Privacy

No doubt few Americans would express outrage should a government employee, say a census taker, query whether they "like yogurt."<sup>126</sup> Perhaps some would wince should the inquiry be: "Do you use a spray deodorant?"<sup>127</sup> Should the question be, however: "Are you more like a 'No Trespassing' sign or a 'Public Fishing'

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121. *United States v. Ballard*, 332 U.S. at 95 (Jackson, J., dissenting).

122. RATHS, HARMIN & SIMON, *supra* note 105. The striking similarity between Values Clarification and Rogerian client-centered therapy is explored at some length in Lockwood, *supra* note 71. One of the more troubling aspects of this "treatment" is that the proponents of Values Clarification recommend that a child with actual emotional problems not participate in Values Clarification because it "may even add to his disturbances." *Id.* at 41, quoting RATHS, HARMIN & SIMON, *supra*, note 105 at 82. Yet students are not screened for "emotional problems," nor is parental consent typically obtained prior to subjecting students to the program.

123. See text at notes 103-104 *supra*.

124. Forcinelli, *supra* note 66, at 14. See text at notes 71-72 *supra*.

125. The justifications for modern values education curricula can be profitably compared with those which have been proffered for factual instruction in the areas of health, family life and sex education. See *Citizens for Parental Rights v. San Mateo County Bd. of Educ.*, 51 Cal. App. 3d 1, 124 Cal. Rptr. 68 (1975), *appeal dismissed*, 425 U.S. 908 (1976). Here the court upheld a program of factual instruction where teachers were instructed to refer students to their parents and religious counselors for moral guidance on sensitive issues on such topics as abortion, birth control and divorce. The program was found to be justified in that it primarily involved education in public health matters. See *Hopkins v. Hamden Bd. of Educ.*, 29 Conn. Supp. 397, 289 A.2d 914, 921 (1971); *Sex Education: The Constitutional Limits of State Compulsion*, 43 So. CAL. L. REV. 548 (1970).

126. SIMON, HOWE & KIRSCHENBAUM, *supra* note 52, at 45.

127. *Id.*

sign?"<sup>128</sup> or, "What was your most intense religious experience?"<sup>129</sup> or even, "Are you a thoughtful lover?"<sup>130</sup> all but the most polite or intimidated would reply "none of your business!" Should the response be different if these questions are asked of children by those in authority?

This problem has not gone entirely unrecognized. The California Legislature, for example, enacted the following statute:

No test, questionnaire, survey, or examination containing any questions about the pupil's personal beliefs or practices in sex, family life, morality and religion, or any questions about his parents' or guardians' beliefs and practices in sex, family life, morality and religion, shall be administered to any pupil in kindergarten or grade 1 through grade 12, inclusive, unless the parent or guardian of the pupil is notified in writing that such test, questionnaire, survey or examination is to be administered and the parent or guardian of the pupil gives written permission for the pupil to take such test, questionnaire, survey or examination.<sup>131</sup>

Is there a constitutional right for children to be free of intrusive questioning on intimate personal and family matters? In *Merriken v. Cressman*<sup>132</sup> the court reviewed a questionnaire which posed such questions as "whether the student's family is 'very close, somewhat close, not too close, or not close at all'<sup>133</sup> . . . whether (the parents) 'hugged and kissed him good-night when he was small' . . . whether they told him how 'much they loved him or her' . . . whether the parents 'seemed to know what the student's needs or wants are' . . . and whether the student 'feels that he is loved by his parents' . . ."<sup>134</sup>

The court held that this questionnaire violated both the parent's and the child's "right to privacy inherent in the penumbras of the Bill of Rights of the United States Constitution."<sup>135</sup> The court determined that there was a violation of the right to privacy despite the fact that a good reason was presented for administering the test (to identify potential drug abusers).<sup>136</sup>

128. *Supra* note 59.

129. *Id.*

130. *Id.*

131. CAL. EDUC. CODE § 60650 (West 1978). Unfortunately this statute, which would appear on its face to outlaw a sizeable segment of the Values Clarification curriculum, is, in the author's experience, little known nor long remembered.

132. *Merriken v. Cressman*, 364 F.Supp. 913 (E.D. Penn. 1973).

133. *Id.* at 918.

134. *Id.* at 922.

135. The court held that the consent was not "informed." *Id.* at 919.

136. The court ruled that insufficient evidence was presented that the test would, in fact, fight drug abuse, and that the results of the test might be misused. *Id.* at 921.

Similarly, in *Prince v. Massachusetts*<sup>137</sup> the Supreme Court recognized that there is a "private realm of family life which the state cannot enter."

There can be no meaningful distinction between the questions posed in *Merriken*<sup>138</sup> and such Values Clarification questions as whether the student is "completely indifferent to family; would rather be rid of them";<sup>139</sup> "What disturbs you most about your parents"?<sup>140</sup> or "How many of you . . . feel closer to one of your parents than the other."<sup>141</sup> There is also no basis for distinguishing between family life as within the realm protected by the right of privacy and other "fundamental interests" such as beliefs and practices in the areas of sex, morality and religion.<sup>142</sup>

Finally, and for the same reasons that no valid "primary secular purpose" was demonstrated to justify interference with religious rights,<sup>143</sup> no "compelling state interest" can be demonstrated to justify such prying into intimate areas of the lives of school children; nor, for that matter, is the curriculum so "narrowly drawn [as] to express only the legitimate state interests at stake."<sup>144</sup>

The problem extends beyond the fact that intimate questions are asked, however. It is a fundamental tenet of Values Clarifications that a value is not really a "value" until it is expressed openly. The approach therefore consists of questions "which help students learn to . . . [s]hare and publicly affirm their values"

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137. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). The court, however, found an overriding state interest in child protection laws, thus narrowing the extent of that "private realm."

138. *Supra* note 133.

139. SIMON, HOWE & KIRSCHENBAUM, *supra* note 52, at 121.

140. *Id.* at 148.

141. *Id.* at 48. Other examples abound, e.g., "How many of you . . . would like to have different parents? . . . feel embarrassed when your friends meet your parents? . . . feel free to discuss sex with your parents? . . . are the favorite child in your family?" *Id.* at 46-55.

142. Justice Brandeis thought privacy "the most comprehensive of rights," which extended to protect persons from prying into "their beliefs, their thoughts and their sensations." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (dissenting opinion), quoted in *Application of President & Directors of Georgetown Col.*, 331 F.2d 1010, 1016-17 (D.C. Cir. 1964) (Burger, J., concurring). However, recent cases seem to have limited its application to "fundamental" interests. Cf. *Roe v. Wade*, 410 U.S. 113, 152-53 (1973). The above areas are well within the protected zone. See, e.g., *Population Services International v. Wilson*, 398 F.Supp. 321, 330 (S.D.N.Y. 1975), stating that although "the reach of the constitutional right of privacy has yet to be determined," Supreme Court decisions "have made it clear that protection extends to 'the most intimate phases of personal life' having to do with sexual intercourse and its possible consequences." See also *Roe v. Wade*, 410 U.S. 113, 152-53 (1973).

143. See text at notes 116-124 *supra*.

144. *Roe v. Wade*, 410 U.S. at 155; see *Doe v. Bolton*, 410 U.S. 179, 211-12 (1972) (Douglas J., concurring).

before their classmates.<sup>145</sup>

A proponent of Values Clarification might agree that there exists a "right to remain silent as respects one's own beliefs,"<sup>146</sup> and yet vigorously insist that this right is not abrogated as the teacher "must allow students to 'pass' or not participate in any personal inquiry and values activities."<sup>147</sup> Does this eliminate any problems?

In *Merriken v. Cressman*<sup>148</sup> "the children [were] never given the opportunity to consent to the invasion of their privacy; only the opportunity to refuse to consent by returning a blank questionnaire."<sup>149</sup> While the court was not required to rule on the constitutionality of this procedure, it was termed "questionable."<sup>150</sup> Of course, in *Merriken*, the children were only responding to a written questionnaire, and would not have been required to refuse to answer the questions in the presence of their classmates.

Several jurists have recognized the compulsion inherent in the latter situation. As Justice Frankfurter, in an opinion subscribed to by three other justices, stated:

That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and nonconformity is not an outstanding characteristic of children.<sup>151</sup>

Justice Brennan, concurring in *Abington School Dist. v. Schempp*,<sup>152</sup> voiced a similar concern:

[R]eluctance to seek exemption seems all the more likely in view of the fact that children are disinclined at this age to step out of line or flout 'peer-group norms.' Such is the widely held view of experts who have studied the behaviors and attitudes of children.<sup>153</sup>

Justice Brennan also cited a Wisconsin Supreme Court case which held that "the excluded pupil loses caste with his fellows,

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145. HOWE & HOWE, *supra* note 54 at 177; Kirschenbaum, Harmin, Howe & Simon (1975), *supra* note 53 at 3; RATHS, HARMIN & SIMON, *supra* note 105, at 28; Lockwood, *supra* note 71, at 36.

146. Doe v. Bolton, 410 U.S. at 211 (Douglas J. Concurring).

147. HOWE & HOWE, *supra* note 54 at 113; SIMON, HOWE & KIRSCHENBAUM, *supra* note 52, at 26.

148. *Merriken v. Cressman*, 364 F.Supp. 913.

149. *Id.* at 919; compare *Citizens for Parental Rights v. San Mateo County Bd. of Educ.*, *supra* at note 125.

150. *Merriken v. Cressman*, 364 F.Supp. at 919.

151. *McCullum v. Board of Educ.*, 333 U.S. 203, 227 (1948).

152. 374 U.S. 203.

153. *Id.* at 290. See majority opinion at 208 n.3, noting parental fear that dissenting children might be labeled "oddballs."

and is liable to be regarded with aversion, and be subjected to reproach and insult."<sup>154</sup> Many other cases are to the same effect<sup>155</sup> and recognize, with Justice Douglas, that "[c]ompulsion which comes from circumstances can be as real as compulsion which comes from a command."<sup>165</sup>

Compulsory education laws and the placing of the teachers *in loco parentis* over the children<sup>157</sup> indicate that the premise of public education is hardly voluntarism, and "it cannot be accepted as a premise that the student is voluntarily in the classroom and willing to be exposed to a teaching method."<sup>158</sup>

Beyond this, it has been forcefully argued<sup>159</sup> that students who must publicly respond to intimate questions will give responses believed to be acceptable to their classmates. Supporters of this argument cite research that has shown that when people take public positions or are forced to act they tend to cling to the beliefs or values involved, even if those beliefs or values are tentative or not genuinely held at the time of the commitment or action."<sup>160</sup> Thus inducing children to alter their beliefs in intimate areas of their lives is a far more serious invasion of personal privacy than inducing them to reveal those areas to public scrutiny. It may be questioned whether the courts will sanction such an enterprise in the name of "clarification."<sup>161</sup>

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154. *Id.* at 292, citing *State ex rel. Weiss v. District Bd. of School Dist. No. 8*, 76 Wis. 177, 200, 44 N.W. 967, 975 (1890). See other cases cited at 374 U.S. at 292-93.

155. See cases cited in J. Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329, 344-45 (1963) [hereinafter cited as Choper].

156. *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 468 (1952) (dissenting opinion). See *Engel v. Vitale*, 370 U.S. at 431, discussing the "indirect coercive pressure" of governmental support. As was noted in *Citizens for Parental Rights v. San Mateo County Bd. of Educ.*, 51 Cal. App. 3d at 18, 124 Cal. Rptr. at 81, the degree of pressure is greater when the students are "in direct and immediate contact with their peers when they exercise their beliefs" than when their parents excuse them from a discrete course. The "pass" system (*supra* note 147) is a subspecies of the former situation, and the infusion of modern values education throughout the curriculum (Kirschenbaum, *supra* note 49, at 120 *et. seq.*) may make the latter option impracticable.

157. See generally Moskowitz, *supra* note 3, at 648 n.119, which discusses the decline of the *in loco parentis* doctrine as a means of implying a parental delegation of authority in an age of compulsory attendance laws.

158. *Mailloux v. Kiley*, 323 F.Supp. 1387, 1392 (D. Mass. 1970), *aff'd* 448 F.2d 1242 (1971) See also *Reed v. Van Hoven*, 237 F.Supp. 48, 52 (1965). ("Children attending public grade schools are effectively captives").

159. J. Stewart, *Clarifying Values Clarification: A Critique*, PHI DELTA KAPPAN 160 (1975).

160. *Id.* at 685; See generally W. SARGANT, *BATTLE FOR THE MIND* (1957).

161. As former California Chief Justice Traynor once wrote, "Great as a state's police power is, however, the United States Supreme Court has yet to sanction its breaking into people's minds to make them orderly." *First Unitarian Church v. County of L.A.*, 48 Cal. 2d 419, 448, 311 P.2d 508, 526 (1957) (dissenting opinion).

#### *D. Values Education v. Parental Rights*

As we have seen,<sup>162</sup> to the extent that public schools attempt to mold the personal values of their charges, they run the risk of parental ire should those values be contrary to those taught in the home.<sup>163</sup> As one court asked, in a case involving compulsory sex education:

Is the State, through the educational system, permitted to encroach upon the patterns and molding of a child's behavior in personal, family or religious beliefs? Parental discipline, authority and respect diminish as the great sovereign state forces its way into the home as a foster parent. Some parents may be happy to be relieved of the obligation and responsibility. Others may feel that the constant eroding of their usefulness as parents portends great danger, and youth will look to the state, rather than the parent, for guidance.<sup>164</sup>

The dilemma here, of course, is that not all parents establish a climate of "discipline, authority and respect," and thus, the task of socialization falls heavily upon the schools.<sup>156</sup>

The courts have, for the most part, resolved this dilemma by allowing parents to excuse their children from programs which offend parental values,<sup>166</sup> at least where the request is not unreasonable and no strong state interest in the subject matter can be demonstrated.<sup>167</sup> In *Hardwick v. Board of School Trustees*,<sup>168</sup> for example, a father refused to permit his children to participate in dance classes on moral grounds, and they were expelled from school. The California court ordered their reinstatement, stressing that the case "involves the right of parents to control their own children—to require them to live up to the teachings and the principles which are inculcated in them at

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162. See text at notes 16, 19 & 39.

163. Modern values education, of course, is not immune from this problem. KIRSCHENBAUM, *supra* note 49, at 53 observes: "A minority of parents tend to oppose value clarification. They see it as a threat to their authority at home, which is partly true. A thinking person is always a threat to authoritarian leadership."

164. *Valent v. New Jersey State Bd. of Educ.*, 114 N.J. Super. 63, 76, 274 A.2d 832, 839 (1971).

165. *Goss v. Lopez*, 419 U.S. at 593 (Powell, J., dissenting). *Purpel and Ryan*, *supra* note 24, at 660.

166. See, e.g., *Morrow v. Wood*, 35 Wis. 59 (1874); *Trustees of Schools v. People ex rel. Van Allen*, 87 Ill. 303 (1877); *Rulison v. Post*, 79 Ill. 567 (1875); *State ex rel. Sheibley v. School Dist. No. 1*, 31 Neb. 552, 48 N.W. 393 (1891); *State v. Ferguson*, 95 Neb. 63, 144 N.W. 1039 (1914); *People ex rel. Vollmar v. Stanley*, 81 Colo. 276, 255 P. 610 (1927). These cases did not involve religious values, but the result in such cases is not different. *Wisconsin v. Yoder*, 406 U.S. at 216.

167. *People ex rel. Vollmar v. Stanley*, 81 Colo. 278, 255 P. at 613.

168. 54 Cal. App. 696, 205 P. 49 (1921).

home under the parental authority.”<sup>169</sup> The court asked:

Has the state the right to enact a law or confer upon any public authorities a power the effect of which would be to alienate in a measure the children from parental authority? . . . [T]o answer . . . in the affirmative would be to give sanction to a power over home life that might result in denying to parents their natural as well as their constitutional right to govern or control, within the scope of just parental authority, their own progeny.<sup>170</sup>

A different question is, of course, presented where parents use this ground as a basis, not for excluding their own children, but for removing the allegedly offensive subject matter from the curriculum, thus giving them a veto power over what is presented to the children of others. The courts have refused to recognize parental rights in this context.<sup>171</sup> Where exemptions from the course of instruction are not otherwise available,<sup>172</sup> however, some viability remains in this ground of objection.

### III. VALUES EDUCATION AND THE LAW: A PROPOSED RECONCILIATION

American public schools have often defended extreme positions in the area of values education. These positions have ranged from the overt endorsing of religious indoctrination of colonial days, when children were taught to “By no Sin Stray”<sup>173</sup> to more subtle indoctrination in the position that there are no “right” values and that children ought to reject the values of their parents or their church except insofar as they have freely chosen them from alternatives,<sup>174</sup> to the position that “education should be concerned exclusively with the development of cognitive rationality and

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169. *Id.* at 709, 205 P. at 54.

170. *Id.*

171. *Medieros v. Kiyosaki*, 52 Haw. 436, 478 P.2d 314 (1970); *Rosenberg v. Board of Educ.* 196 Misc. 542, 92 N.Y.S. 2d 344 (1949); *Cornwell v. State Bd. of Educ.*, 314 F.Supp. 340 (D. Md. 1969), *aff’d*, 428 F.2d 471 (1970); *Citizens for Parental Rights v. San Mateo County Bd. of Educ.*, *supra* note 125; *Hopkins v. Hamden Bd. of Educ.*, *supra* note 125.

172. Some states, in particular response to objections to sex education curricula, have fashioned statutory exemptions to instruction in conflict with parental values. CAL. EDUC. CODE § 51240 (West 1978), for example, provides:

Whenever any part of the instruction in health, family life education, and sex education conflicts with the religious training and beliefs of the parent or guardian of any pupil, the pupil, on written request of the parent or guardian, shall be excused from the part of the training which conflicts with such religious training and beliefs.

As used in this section, “religious training and beliefs” includes personal moral convictions.

In other states, excusal is a matter of local option, or is disallowed. *Constitutionality under the Religion Clauses of Compulsory Sex Education in Public Schools*, 68 MICH. L. REV. 1050 (1970).

173. Text at note 15, *supra*.

174. Text at notes 53-55 *supra*.

intellectual skills, eschewing values and ideologies of all kinds."<sup>175</sup>

The first two positions have been found to stand on legally indefensible grounds, and the third position, in the event it is thought to be desirable, is unattainable. "Education is simply not value-free. One cannot involve a child in schooling from the time he is 6 until he is 17 or 21 and not affect the way he thinks about moral issues and the way he behaves."<sup>176</sup> Overt moral instruction may be eliminated from the curriculum, but values will nevertheless be taught through the medium of the "hidden curriculum"—the rules and regulations which govern the operation of the schools, the models which are held up to the children for emulation, and the attitudes of approval or disapproval with which those in authority greet certain behaviors and attitudes.<sup>177</sup> The Supreme Court in *Wisconsin v. Yoder*<sup>178</sup> recognized the existence of such a "hidden curriculum" in the high school, with its emphasis on "intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students"<sup>179</sup> which, although not overtly taught, was found to be

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175. R. Rhineland, *Can Integrity Be Taught?*, THE STANFORD MAGAZINE, 48 (Fall-Winter 1976); text at note 24 *supra*.

176. Purpel and Ryan, *supra* note 24, at 662.

177. See *Education and the Law: State Interests and Individual Rights*, 74 MICH. L. REV. 1373, 1424 n.265 (1976). As was illustrated by Purpel and Ryan, *supra* note 24, at 661-62:

Schools certainly do 'teach' about authority, about what is right and wrong, and about priorities in the maze of school policies, practices, and traditions.

There are, of course, explicit rules and regulations in the schools about attendance ('unexcused absences will result in suspension'), behavior ('no running in the halls or on the stairs'), dress ('no hats, no bare mid-ribs, no bare feet'), punctuality ('two times late equals one hour detention') . . . and the like. The quality and flexibility of these rules and regulations vary from school to school, but they convey a particular set of values held strongly enough to warrant their enforcement.

More difficult to discern and capture, but of undoubted significance, are the moral dimensions of the countless personal interactions among teachers, administrators, and students. Teachers reward and punish children for a variety of things: classroom performance ('those finished with their assignment may take a recess'), classroom behavior ('I wish all of you were as courteous and polite as Hilary'), some personality characteristics ('I do not recommend Nancy as a cheerleader because she has an uncooperative and negative attitude'), effort ('no one in my classroom who has really tried has ever gotten an F'), responsibility ('if the person who wrote the note does not own up, all of you will have to stay after school').

See Peckenpaugh, *supra* note 48, at 11.

178. *Supra* note 3.

179. 406 U.S. at 211.

incompatible with competing Amish values. As Lawrence Kohlberg, one of the chief protagonists of values education aptly stated:

The most common system of moral education in America is neither "character education," not "values clarification," nor a cognitive-developmental approach, instead, it is no conscious system at all—the "hidden curriculum."<sup>180</sup>

Even if values education could be eliminated from the schools, such a move would be contrary to the oft-neglected commands from the legislatures that the schools proceed with this difficult and controversial enterprise.<sup>181</sup> The question, then, is not whether there shall be values education in the public schools, but how it may be accomplished lawfully, and hopefully, wisely.

The basic, and legally most critical, foundation of a defensible values education program is the identification of a valid, clearly articulable, adequate, and preferably compelling, governmental interest which is being served by the program. The shoals on which existing and prior programs have foundered may be reinterpreted as the absence of any obvious state interest.

Those programs which involved religious exercises or indoctrination,<sup>182</sup> may be said to have failed because the first amendment removed the advancement of religion as a legitimate interest of the state. Those programs designed to "standardize" children through restricting the teaching of foreign languages,<sup>183</sup> outlawing attendance at private schools,<sup>184</sup> or compelling participation in patriotic exercises,<sup>185</sup> may be said to have failed because the Supreme Court rejected the proposition that there is any state interest in "[c]ompulsory unification of opinion,"<sup>186</sup> and because no other legitimate state interest, nor reasonable probability that the program would contribute to that interest, was demonstrated. The *Yoder* case<sup>187</sup> may be explained on the basis that no state interest requiring children to attend secondary schools was shown to be of sufficient importance to justify the harm done to the religious interests of the Amish.<sup>188</sup> The search for a strong state interest is the heart of our quest, for if no state interest in a school program is delineated, the program will fall on due process

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180. L. Kohlberg, *Special Section in Perspective*, SOCIAL EDUCATION, NATIONAL COUNCIL FOR THE SOCIAL STUDIES 215 (April 1976) quoted in R. Hill, *Schools of Thought, Part II*, CALIFORNIA SCHOOL BOARDS 13 (Sept. 1976); See note 62 *supra*.

181. See text at notes 42-43 *supra*.

182. *Supra* note 35.

183. *Supra* note 25.

184. *Id.*

185. *Supra* note 31.

186. Text at note 34 *supra*.

187. *Supra* note 3.

188. 406 U.S. at 222, 224-25, 228-29, 234.

grounds.<sup>189</sup> However, if a compelling state interest can be demonstrated, few claims alleging violations of individual rights will be able to prevail.<sup>190</sup>

How, then, can we articulate the interest of the state in values education so that a new program might be built around it? Why are the schools, whose employees have been trained to be purveyors of knowledge, not philosophies,<sup>191</sup> involved in this volatile enterprise?

The courts, in setting forth the interests of the state in requiring education have often been less than lucid, and their formulations of the "state interest" have not often been broad enough to encompass values education.<sup>192</sup>

One formulation, taking into account the role of values education is that:

The state seeks through its educational system to achieve two goals: the development of the basic reading, writing and other academic skills that any productive member of society must possess; and the inculcation of values deemed essential for a cohesive, harmonious and law-abiding society.<sup>193</sup>

However, this formulation of the role of values education is incomplete, for in stressing only its socializing role in helping achieve "a cohesive, harmonious and law-abiding society" this test would countenance the efforts at "[c]ompulsory unification of opinion"<sup>194</sup> repeatedly condemned by the Supreme Court as achieving "only the unanimity of the graveyard,"<sup>195</sup> and would be equally applicable to the purpose of values education under a totalitarian regime. The Supreme Court has recognized that it is not solely conformity to essential rules but "hazardous freedom . . . openness . . . that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society."<sup>196</sup> Closer to the mark in setting forth the role of values education is the formulation of the California Supreme Court, which defined "the role of public education as a unifying social force and the basis

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189. *E.g.*, *In re R.* 357 N.Y.S. 2d 1001, 1003 (1974).

190. *E.g.*, *Wisconsin v. Yoder*, 406 U.S. at 220.

191. *Supra* note 46.

192. Moskowitz, *supra* note 3, at 626-27, n.17.

193. 74 MICH. L. REV. at 1373, *supra* note 177.

194. *Supra* notes 184-85.

195. *Board of Educ. v. Barnette*, 319 U.S. 624.

196. *Tinker v. Des Moines Community School Dist.* 393 U.S. 503, 508-09 (1969).

tool for shaping democratic values.”<sup>197</sup>

Perhaps these conceptions can be synthesized by positing that the compelling state interest in values education as such is that it is “an element necessary for the sustenance and preservation of our modern state [and] one of the bulwarks of democratic government.”<sup>198</sup> Under this test, there could be no valid objection, on religious, or privacy grounds, or any other, should the schools teach, for example, that theft is “wrong,” or that democratic freedoms are “better” than totalitarian repression, or that it is “wrong” to attempt to achieve even needed reforms through violent means in a democratic society.

There is no reason to suppose that teaching “such universally accepted values as justice, property rights, respect for law and authority, and brotherhood”<sup>199</sup> would either conflict with religious teaching or require theological doctrine or religious sanctions to be persuasive.<sup>200</sup> As one example:

The public school teaches brotherhood as part of the democratic ideal. The churches teach it as a response to God's commandment to love one's neighbor. The secular humanist practices it as an expression of a purely human value.<sup>201</sup>

While this conception is quite basic, it serves to return educators to the purpose of their curricula and provides courts with a ready yardstick against which to measure claims of constitutional infringement. While it will still, on occasion, be difficult to determine close questions concerning whether one educational innovation or another is necessary and proper to the attainment of this end, it clearly reveals the banal irrelevance of “Do you like yogurt?”<sup>202</sup> and the voyeuristic impropriety of “Are you a thoughtful lover?”<sup>203</sup>

A fresh examination of values education will not only require consideration of the written course of instruction, but will necessitate a long-neglected reordering of the “hidden curriculum,”<sup>204</sup> for its lessons are the most lasting: “[T]here is persuasive authority for the view that moral values are better learned through con-

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197. *Serrano v. Priest*, *supra* note 8.

198. *Manone v. Haden*, 329 Pa. 213, 233, 197 A. 344, 352, (1938); *E.g.* *People v. Stanley*, 81 Colo. 276, 280, 255 P. 610, 613, (1927). “The state, for its own protection, may require children to be educated. This needs no citation.”

199. *Choper*, *supra* note 155 at 377.

200. *Id.* at 377-78.

201. *Id.* at 377 n.301, *citing* COMM'N ON RELIGION AND PUBLIC EDUCATION OF THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST, *Relation of Religion to Public Education—A Study Document*, INTERNATIONAL J. OF RELIGIOUS EDUCATION, 21, 25 (Apr. 1960).

202. *Supra* note 95.

203. *Supra* note 130.

204. *Supra* notes 176-179.

crete examples during the school day than through lessons that preach them."<sup>205</sup> Given the importance of values education, we must at least be certain that the "hidden curriculum" does not contradict the formal one.<sup>206</sup> As one superintendent told the National Conference on Citizenship Education:

The most important learning that the schools foster are in the way they treat people, rather than what they say about behavior. The examples are numerous. We often talk of the dignity of man while destroying it in our students. We talk of the virtue of kindness and are sarcastic. We talk of honesty and truth and demonstrate in our daily life that we subscribe to a different set of values. It slowly becomes obvious as to which values we hold. Children model after the real us, and the moral education that we really teach takes hold. They become "as we do, not as we say."<sup>207</sup>

The law, of course, can only remedy certain wrongs, it cannot make people right. For all its excesses, Values Clarification has recognized that the beginning of that task is self-examination, a process which the courts are forcing upon education itself.

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205. Choper, *supra* note 155 at 378.

206. *Shanley v. Northwest Ind. School Dist.*, 462 F.2d 960, 978 (5th Cir. 1972); R. MASTERS, *WHY EDUCATION FAILS* (1974); SIMON, HOWE & KIRSCHENBAUM, *supra* note 52, at 17.

207. Peckenpugh, *supra* note 48 at 11.

