

The Catholic University of America, Columbus School of Law
CUA Law Scholarship Repository

Scholarly Articles and Other Contributions

Faculty Scholarship

1993

Cover Your Ears

John H. Garvey

The Catholic University of America, Columbus School of Law

Follow this and additional works at: <https://scholarship.law.edu/scholar>



Part of the [Constitutional Law Commons](#), and the [First Amendment Commons](#)

Recommended Citation

John H. Garvey, Cover Your Ears, 43 CASE W. RES. L. REV. 761 (1993).

This Article is brought to you for free and open access by the Faculty Scholarship at CUA Law Scholarship Repository. It has been accepted for inclusion in Scholarly Articles and Other Contributions by an authorized administrator of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

COVER YOUR EARS

*John H. Garvey**

*Lee v. Weisman*¹ holds that public schools cannot offer prayers at graduation ceremonies. It has another curious implication: according to George Dent, it also means that public schools must excuse religious dissenters from offensive parts of the curriculum. I think this is an astute observation. The issues are not alike doctrinally *Weisman* is an Establishment Clause case; the curriculum cases are Free Exercise cases.² But the schools cause similar harms in both cases; they do so mostly by exposing children to unwelcome ideas. Why is this so upsetting? Why object to hearing people talk? I want to make three observations: the first is about harms; the second is about causation; and the third is about justifying rules that shield children from ideas.

A.

First as to harms, I contend that they are similar in the two cases I am comparing. School prayer can cause a variety of harms. Some are institutional. An approved mode of worship sows discord by favoring some sects over others. It also undermines religious pluralism, which Madison said is our best safeguard for religious liberty³ But *Weisman* focuses on individual rather than institutional harms. I can think of four types of individual harm. They don't all happen in every case; they vary with the pressure the school

* Ashland Professor of Law, University of Kentucky; A.B., 1970 Notre Dame; J.D., 1974 Harvard University.

1. 112 S. Ct. 2649 (1992).

2. There are actually two kinds of curriculum cases. Some children assert a free exercise right to be excused from instruction that contravenes their religious beliefs. *E.g.*, *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988). Some children assert that public schools violate the Establishment Clause by teaching a religion of secular humanism. *E.g.*, *Smith v. Board of Sch. Comm'rs*, 655 F. Supp. 939 (S.D. Ala.), *rev'd*, 827 F.2d 684 (11th Cir. 1987). I am interested in the first kind of case; I find the second claim implausible.

3. THE FEDERALIST Nos. 10, 51 (James Madison).

exerts and the beliefs the dissenter holds.

The first type of harm occurs only when the school acts coercively, and it has a different significance for religious and nonbelieving dissenters. It is the humiliation that attends being forced to do something against one's will. The secular version of this harm is what the schoolboy suffers when he loses a fight. Here is what happened in *Tom Sawyer*⁴

In an instant both boys were rolling and tumbling in the dirt, gripped together like cats; and for the space of a minute they tugged and tore at each other's hair and clothes, punched and scratched each other's noses, and covered themselves with dust and glory. Presently the confusion took form and through the fog of battle Tom appeared, seated astride the new boy, and pounding him with his fists.

"Holler 'nuff!" said he.

The boy only struggled to free himself. He was crying — mainly from rage.

"Holler 'nuff!" — and the pounding went on.

At last the stranger got out a smothered "Nuff!" and Tom let him up and said:

"Now that'll learn you. Better look out who you're fooling with next time."

The religious version is the harm that occurs when a believer is forced to renounce, by word or deed, a faith that she still believes in her heart. Here in addition to humiliation there is something like the religious equivalent of desertion — abandoning the service of a sovereign God. This is the point of the biblical story about the mother and her seven sons put to death by Antiochus.⁵

It happened also that seven brothers and their mother were arrested and were being compelled by the king, under torture with whips and cords, to partake of unlawful swine's flesh. [After her first six sons were put to death the mother was asked to plead with the seventh. She said to him:] "I beseech you, my child, to look at the heaven and the earth and see everything that is in them, and rec-

4. MARK TWAIN, *THE ADVENTURES OF TOM SAWYER* 17 (Signet Classic 1980) (1876).

5. 2 Macc. 7:1-29.

ognize that God did not make them out of things that existed. Thus also mankind comes into being. Accept death, so that in God's mercy I may get you back again with your brothers."

This is what the Jehovah's Witnesses complained about in *West Virginia State Board of Education v. Barnette*⁶ and in *Wooley v. Maynard*.⁷ And it was an issue in *Weisman*: "the dissenter of high school age is being forced by the State to pray in a manner her conscience will not allow"⁸

The second type of harm is closely related to the first but it happens, I think, only to the religious dissenter. It is that by participating in an objectionable ceremony the believer causes scandal to others of her faith.

This may be what the Court was hinting at when it said that "a reasonable dissenter in this milieu could believe that [by standing and remaining silent during] the group exercise [she] signified her own participation or approval of it."⁹ The Court conceded that one could stand and remain silent out of "simple respect for the views of others."¹⁰ One who does so is guilty of no renunciation. But she might fear that others of her religion could read her intentions wrongly, and commit the sin of renunciation by imitating her deed (not her thought). This is the point of another story about Antiochus — the death of the scribe Eleazar.¹¹

Eleazar, a man now advanced in age and of noble presence, was being forced to open his mouth to eat swine's flesh.

Those who were in charge of that unlawful sacrifice took the man aside, because of their long acquaintance with him, and privately urged him to bring meat of his own providing, proper for him to use, and pretend that he was eating the flesh of the sacrificial meal which had been commanded by the king, so that by doing this he might be saved from death, and be treated kindly on account of his

6. 319 U.S. 624 (1943) (requiring children to say the Pledge of Alligiance in school violates the First and Fourteenth Amendments).

7. 430 U.S. 705 (1977) (state cannot require individual to display "Live Free or Die" on automobile liscense plate).

8. 112 S. Ct. at 2658.

9. *Id.*

10. *Id.*

11. 2 *Macc.* 6:18-25.

old friendship with them.

"Such pretense is not worthy of our time in life," he said, "lest many of the young should suppose that Eleazar in his ninetieth year has gone over to an alien religion, and through my pretense, for the sake of living a brief moment longer, they should be led astray because of me, while I defile and disgrace my old age."

The third type of harm, like the first, has a religious and a secular version. Whether or not the school engages in coercion, parents may fear that exposure to prayer will cause their children to hold false beliefs. Coercion makes this more likely. But even if participation is voluntary, the teaching authority of the institution and its agents gives the message an air of credibility. And even if we set aside the school's teaching authority, it may happen that simple exposure to a particular message (especially if it is frequently repeated) will suffice to convince students of its truth. TV and popular music have no teaching authority, but the religious right objects to their programming content because children will come to believe what they hear.

For the religious believer, holding a false belief is heresy. In heresy there is no humiliation or insincere denial (as there is when one has to say 'uncle'). The harm is that the heretic, even if honestly persuaded, affronts God by denying God's truth, and may lose his soul (or at least have a harder time saving it). This is a common theme in school prayer cases, where the dissenters are often religious parents worried about the effect that unorthodox prayers will have on their children. The plaintiffs in *Abington School District v. Schempp*,¹² for example, were Unitarians who said that the Lord's Prayer and the Bible portrayed God anthropomorphically, at variance with their beliefs.

The secular version of heresy is simple error. We might say that holding any false belief is a bad thing. It is better to know that Hank Aaron holds the record for career home runs than to think that Babe Ruth does. But schoolteachers lead children into lots of errors that the Constitution says nothing about. Is there, from a secular point of view, any special harm in holding false

12. 177 F. Supp. 398, 400 n.11 (E.D. Pa. 1959), *vacated and remanded*, 364 U.S. 298 (1960); *on remand*, 201 F. Supp. 815 (E.D. Pa. 1962), *aff'd*, 374 U.S. 203 (1963). See also *Engel v. Vitale*, 370 U.S. 421 (1962) (plaintiffs included a Unitarian, a Jew, a member of the Society for Ethical Culture, and a nonbeliever).

religious beliefs? It is possible that there are some truths (e.g., that God exists) intrinsically more worth knowing than others (e.g., that Hank Aaron hit 755 home runs). It is also likely that correct belief about some truths has more important consequences. If there is a God, we wouldn't want to be mistaken about *that*. If there *isn't*, that knowledge could also have important ramifications for our life plans. And parents who hold the latter belief would naturally want their children to be correctly informed.

The fourth type of harm is closely related to the third, but it happens only to religious believers. One whose religion condemns school prayer, and who joins in willingly, is guilty of idolatry. This person differs from Weisman, Barnette, and Maynard in that her participation is voluntary: she worships idols because she has come to believe in them. And she comes to that belief through the teaching of the school and the influence of her fellow students.

I have been talking about the individual harms that school prayer may cause. Let me now show how the harms in curriculum cases are similar.

The first harm that I mentioned was forced renunciation. This will happen in curriculum cases when children are required to recite (or repeat on tests) secular truths that they deny. Professor Dent gives an example: a child may be given a failing mark in biology for reciting that "God created the World, and God created man."¹³ If the state requires her to recite some other formula, it is acting like Antiochus or the West Virginia State Board of Education. There is something particularly obnoxious about this kind of harm, and I think that where it happens courts will be willing to grant exemptions. The Sixth Circuit in *Mozert v. Hawkins County Board of Education*¹⁴ took pains to point out that that case involved no affirmation of belief.

The second type of harm — causing scandal — will probably occur less often in curriculum cases than in the school prayer cases. Prayer is an exercise that students can actively join in. This is not always true with classroom teaching. Unless the student is asked to affirm her belief in the subject, her real complaint is that it's being taught, not that people will think she believes it. Of course if the school does require an affirmation, this harm is a second reason for holding the requirement unconstitutional.

13. George W. Dent, Jr., *Of God and Caesar: The Free Exercise Rights of Public School Students*, 43 CASE W. RES. L. REV. 707, 713, n.42 and accompanying text (1993).

14. 827 F.2d 1058, 1063-64 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988).

By and large, though, I think that the third and fourth types of harm are what people worry about in curriculum cases. The third is the problem of false belief. Sometimes this is heresy in the standard sense: what science says about evolution or the earth's age is inconsistent with what (some people say) the Bible says. Bowdlerized accounts of the middle ages or the Pilgrim settlements can tell a false story about (what some people say is) God's role in history. Sometimes the problem is moral rather than theological error. Professor Dent mentions a variety of beliefs — about AIDS, divorce, sex education, family roles, and moral relativism — that schools teach and religious conservatives reject.¹⁵ Simple exposure to this point of view may be enough to persuade children that it is right, especially if the exposure is constant. Add to the exposure the deference that school authorities command and the danger increases.

The fourth harm is that students will begin to act in conformity with false beliefs. In the case of school prayer this is, from a religious point of view, idolatry. But classroom teaching is not a religious service, and parents aren't worried about idolatry as such. The greater danger here is that children will act in conformity with moral error — i.e., commit sin. The subliminal message behind "Limit the number of sexual partners" is "It's OK to have a few sexual partners." If children act on that counsel, many people would say that they act wrongly.

B.

I have been talking about harm. Let me now turn to my second point, causation. It is Professor Dent's observation about this issue that I find so interesting. Religious traditionalists maintain that school prayer causes no harm because it is voluntary. School officials argue, in a like vein, that classroom teaching causes no harm because it does not require any affirmative response from the student.¹⁶ Dent says that if the first group is wrong (as *Weisman*

15. Dent, *supra* note 13, at 708-09 nn.3-19 and accompanying text.

16. *E.g. Mozert*, 827 F.2d at 1065:

The requirement that students read the assigned materials and attend reading classes, in the absence of a showing that this participation entailed affirmation or denial of a religious belief, or performance or non-performance of a religious exercise or practice, does not place an unconstitutional burden on the students' free exercise of religion.

holds), then the second is also. *Weisman* would thus support a free exercise right to be excused from classes.

The defenders of the prayer in *Weisman* argued that it caused no harm because the exercise was entirely voluntary. *Weisman* could avoid praying in any one of three ways: (1) she could skip the commencement — attendance was not mandatory; (2) she could remain seated and make her nonparticipation publicly clear; or (3) she could remain silent during the prayers, and “meditate on her own religion, or let her mind wander.”¹⁷ There is some truth to each of these points, but the interesting thing about the Court’s decision is its willingness to find that *Weisman* was coerced despite these alternatives.

The Court observed that option (1), though formally correct, was not a realistic possibility. Skipping graduation is a pretty high price to pay for a student who doesn’t want to pray. The Court is quite right about this.

As for options (2) and (3), the Court said they can’t stand up to peer pressure. Of course *Weisman*’s peers are not subject to the Establishment Clause; theirs is private (not state) action. But the school is responsible for creating the environment (the assembly, the speaker, the invocation and benediction) in which the pressure can operate.

The interesting question is not whether there is state action but whether peer pressure actually exerts a coercive force on the student who wants to sit and ignore the service. I would concede the pressure to stand. It’s hard enough to sit through the wave or a standing ovation; it’s harder still in this situation, because remaining seated bespeaks disrespect. For that very reason, though, the act of standing has an uncertain social meaning. It can signify participation; but it can mean something else. My grandfather always stood up when a lady came into the room; standing while others pray can have that kind of meaning. A person who stands out of respect has not been forced to suffer the first kind of harm (to say ‘uncle’). And because standing has an ambiguous social meaning it is unlikely to cause the second kind of harm (scandal to a dissenter’s coreligionists).

I would also concede that *Weisman* is forced to hear the rabbi’s prayer. She could in theory “meditate on her own religion, or let her mind wander” instead. She could try to think about pink elephants, but she wouldn’t succeed unless the invocation really

17. 112 S. Ct. at 2658-59.

didn't matter to her. She could cover her ears, but that would be more offensive than sitting, and she shouldn't have to insult people to maintain her own integrity. So suppose she hears it. This does not cause either the first or the second type of harm (saying "uncle" or causing scandal), because hearing is not an act that communicates meaning to others. Hearing can cause the third and fourth type of harm (false belief and idolatry) if the student likes what she hears and joins in because she is won over. The rabbi would have to be a pretty good speaker to accomplish this. But we shouldn't just look at his prayer. If we approve his prayer, then we will have prayers on other occasions. We need to consider the consequences of allowing a social practice, not a single event. The more interesting point about having to hear is that anything we say here carries over with more force to the school curriculum — a point I will take up shortly.

Is there further pressure on Weisman to break her silence — to say "amen"? I think not. Nobody's checking, and the time for saying it is fleeting, so people can remain silent and not be noticed. It's not quite like the recitations in *Engel*¹⁸ (the Regents' Prayer) and *Schempp*¹⁹ (the Lord's Prayer), which lasted longer. At graduation students may also sit with their parents, so they don't even have to worry about the people next to them. There is a kind of herd instinct that can sweep the audience up in the enthusiasm of the moment. I can imagine a student thinking, "Everyone's doing it, so I'll join in." This once happened to me at a James Brown concert. But it is more like exposure than coercion.

In sum, I think that the objectionable feature of graduation prayer is that it forces children to hear an unwelcome message. This can result in two kinds of harm: they might come to believe what they hear; and they might even act on it.²⁰ These are not trivial harms. In fact they are, as Professor Dent points out, the cause of complaint in the school curriculum cases, to which I now turn.

In one way the curriculum cases are more coercive than *Weisman*. Weisman's graduation was in theory optional; school is

18. 191 N.Y.S.2d 453, 468 (N.Y. Sup. Ct. 1959).

19. 177 F. Supp. 398 (E.D. Pa. 1959).

20. I should reiterate what I said at the outset: school prayer causes institutional as well as individual harms. My own feeling is that the former are a better reason for holding it unconstitutional. *Weisman* is interesting for what it says about individual harms, which carry over more easily to Free Exercise cases.

not. Private schools are available, but they are very expensive (certainly a higher price to pay than foregoing commencement). So attendance is not voluntary. But there may be no coercion once you're there. Classes don't stand en masse and recite Darwin. The only real danger of coercion comes from the teacher, who can mark people down for giving wrong answers on a test. Unless this happens there is no type one or type two harm (renunciation, scandal). The more likely harms come from simple exposure. Some students will naturally come to believe, and to act on, what they hear day after day. In this they run a risk rather like Deborah Weisman's.

C.

Suppose I am right about all this. *Weisman* holds that forced exposure to religious ideas is a bad thing. Others say that forced exposure to anti-religious ideas is also a bad thing. Both advocate protecting our children against exposure.²¹ Is this idea as antediluvian as it sounds?

No. It is not even *prima facie* illiberal. Notice that in each case we're talking about limiting speech by the government. There is no question of limiting the rights of willing private speakers. Moreover we are talking about forced, not voluntary, exposure. The audience is free to hear prayers (or Darwin) if they want. Finally, the audience is made up of children, and even people with impeccable liberal credentials (like Mill²²) allow that children's freedoms don't have the same scope as an adult's.

Still, limiting a child's exposure seems inconsistent with other things we believe. The Supreme Court has said several times that "The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"²³ Wide exposure and limited exposure are different things. Why would anyone want to limit a child's exposure?

Let me begin with the religious dissenters in curriculum cases. On one point they agree with the free speech tradition of Milton,

21. *Weisman* would protect a larger group (all children in public schools). Parents in curriculum cases just want to protect their own.

22. JOHN S. MILL, ON LIBERTY 9 (Rapaport ed. 1978).

23. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 512 (1969). (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

Mill, and Popper: they believe that there are true and false ideas about God, science, history, and right conduct, and that it is important to hold the true ones. In fact we might say that they believe more firmly in the truth than their liberal counterparts: they believe that it is more important to hold the truth blindly than falsity with one's eyes open. It is better, for example, to hold with child-like faith to the truth found in Genesis than to choose (maybe wrongly) from among all available theories about the origin of life.

There are things to be said for this point of view I put to one side as unworthy the feeling of infantile security that this gives the believer. Apart from that I can think of at least three arguments for the religious stance of willful ignorance. One is that it may be better for the community, if not for the individual believer: it reduces the chance that the individual, by falling into error, will mislead others. Aquinas said that we could execute heretics for causing this very kind of trouble. "For it is a much graver matter to corrupt the faith than to forge money Wherefore if forgers of money [can be] condemned to death by the secular authority, much more reason is there for heretics to be put to death."²⁴

A second is that knowledge is not the only virtue. Those who know God have other obligations to him: worship, obedience to his commandments, etc. One who holds the truth blindly carries out these other obligations. One who errs while searching will not.

The third argument holds that sometimes it is easier to lead people to the truth than it is for them to find it on their own — or to put it more bluntly, "authoritative selection" is sometimes a better path to real understanding than "wide exposure." This is something that many different churches tell their members. My own church used to maintain an index of books that people should not read. It still requires authors to get approval for certain publications (though the range is now pretty narrow).²⁵ This argument rejects the liberal assumption that truth will always prevail in a free and open encounter with falsehood. And there are respectable reasons for doing so. The usual claim on freedom's behalf is that truth will prevail over the long run. "But the validity of this re-

24. ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE* 2-2, Q.11, art. 3 (Burns Oates & Washington Ltd. 1916).

25. See generally James A. Corden, *The End of the Imprimatur*, 44 *THE JURIST* 339 (1984); Code of Canon Law, can. 823-832 (1983); *Censorship of Books*, 1 *SACRAMENTUM MUNDI* 280 (1968).

sponse depends on just how long the long run is."²⁶ Where the salvation of individual souls is at stake we may not have the luxury of waiting for truth to win out.

This system can't work for everybody. We can't all hold the truth blindly and help one another (the blind leading the blind) to a better understanding. There has to be some authoritative guide for the rest of the group to rely on. This is the role that religious hierarchies sometimes claim for themselves, and that a literal understanding of the Bible plays among Christian fundamentalists. But we don't need to go that deep to address our present problem. The question here is just whether there is a reason for covering children's ears; never mind about the rest of the population.

I have been talking about why a religious person might want to limit her child's exposure to the public school curriculum. Can we give the same reasons for shielding children from school prayer? To a certain extent, yes. People with religious scruples could make the very same (willful ignorance) arguments against prayer as they do against the curriculum. But some of these arguments are inherently religious; they do not work well for secular objectors. The sole exception may be the last one. It doesn't take a religious experience to make a parent believe that truth will not prevail over falsehood in his child's mind, and that limiting exposure can be a good idea.

26. FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 27 (1982).

