People who cherish freedom must dare to resist the monopolists of governmental bureaucracy

Mediating Structures and Constitutional Liberty

William Bentley Ball

There are those of us whose job seems always to be immediate problem-solving. We are like people frantically busy piling up rocks with the fleeting notion that perhaps they are building something. *To Empower People: The Role of Mediating Structures in Public Policy* by Peter Berger and Richard Neuhaus (American Enterprise Institute, 1977) offers a portrait in which resemblances can be seen between the haphazard rock pile and the city of good "mediating structures" there portrayed.

Approaching the subject as a lawyer, the question at once comes to mind: Do we need mediating structures (family, church, voluntary association, neighborhood, racial and ethnic subgroups) in a society governed by the American Constitution? If the "mediating structures" are thought to be necessary to protect the individual from the state, is that not precisely the function of the Constitution? Neuhaus and Berger suggest that the Constitution (at least under some interpretations that are given some of its provisions) does not suffice—indeed they say that its protections in some instances have the effect of enforcing the anarchic wills of individuals at the expense of community. Jacques Maritain notes in *Man and the State* that strains of eighteenth-century rationalism, still active in our constitutional life, indeed promote such results. At the same time, he observes that forms of nineteenth-century liberalism have produced an opposite tendency: statism. So today we see in America two forces moving across our social fabric: anarchic individualism and growing state social monopoly. Both, of course, militate against the values that mediating structures would sustain.

There is, I believe, taking place today a war to obliterate mediating structures, and there is not even a beleaguered battleline at which their defenders attempt a stand. There are almost no defenders. Where the structures are institutions, many of their custodians are abandoning them—schools, hospitals, child-caring institutions. I will presently inquire why those who should be mounting a counteroffensive are taking to their heels. But first I will note briefly why it is that the attack is so intensive.

Government in America has become an industry, greater, more dynamic, wealthier, and more expansionist than ever the capitalism of the Harrimans and Rockefellers was in its nineteenth-century heyday. Government is the direct source of livelihood to a substantial portion of our population. Coupled with this is a sort of religious view—increasingly pervasive in government—that individuality, to the extent that it is allowable, may exist only within prescriptions written by government. Government agents are therefore trained to recite respect for pluralism, for example in health care or education, just so long as the particular manifestation of pluralism is not an initiative taking place *outside* governmental purview.

In the health care area, under new federal law, local health agencies are neither mandated nor empowered to take into consideration the religious character of a particular hospital nor the religious needs of the community to be served. So while many nice things are said by legislators about "the distinctive contributions of the voluntary sector," one of the chief contributions of that sector—namely, its capacity to respond to the needs of particular groups of individuals (and thus to be a mediating stucture)—is ignored in the fact.

In the education field recent attempts of government to promote monopoly by talking pluralism represent new heights in the progress of doublethink. Consider, for example, a passage from Kentucky's "Standards for Accrediting Elementary Schools," which that state seeks to apply to all private schools. Standard II is entitled "Statement of Philosophy and Objectives" and says in part: "Each school shall develop educational beliefs and objectives which reflect: (1) the unique needs of all the pupils it serves; (2) the

WILLIAM BENTLEY BALL is partner of the law firm Ball & Skelly, Harrisburg, Pa., and has argued landmark cases before the Supreme Court on the issues discussed in this article. From a paper delivered in March, 1978, at a conference on "religion as a mediating structure" held in New York City.

values of human traditions; and (3) the involvement of parents/guardians and the community at large."

This paragraph, however, is set in the midst of a comprehensive regulatory program whereby the state defines to a considerable extent the education that may be offered by the private school. Even apart from that, the above quoted standard *itself* puts private education within state confines. Aside from the rather odd command that a private school (or any *school*) develop educational "beliefs," is the fact that the state tells the school that those beliefs must reflect "the involvement of the community at large." That is to say, a Seventh-Day Adventist school located in a large city would apparently be required to conduct a city-wide consultation, which that school's beliefs and objectives would then have to reflect. (Should not then a public school located in a 90 per cent Polish Catholic neighborhood, or a Hasidic school located in a largely black Protestant community, be forced to reflect those settings?)

When I speak of the governmental "attack" on mediating structures existing in the health, educational, and charitable fields, I do not mean to suggest that state authorities manifest a conscious design to single out and penalize or obliterate these structures. The governmental endeavors usually originate in a totally innocent presumption of total governmental competency. Hostility usually sets in only when the assumption of superiority is questioned.

Such questioning is depicted as a demonstration of both ignorance and disobedience. It is also seen as a threat to the industry—the industry of regulating (the same industry being the source of the income, security, perquisites, and social rank of the government administrator). In addition there are, of course, some mendacious public servants, nor should it be denied that there are movements within government that deliberately push for ideological goals suppressive of the freedom that mediating structures support. Obviously it is a mixed picture. We who would save mediating structures, and indeed advance them, should not assume evil intentions on the part of government servants who act against them, nor should we assume that such intentions do not exist.

We, the People—for the sake of better union, for justice's sake, to have domestic tranquility, to defend ourselves, to promote our general welfare, and to "secure the blessings of liberty"—have made our Constitution. There are natural groupings in society that also promote those ends, some being so intimately related to the enjoyment of those ends as to be indispensable. It is all very well, for example, to say that the First Amendment protects a person to worship in the way he pleases, but if we were to say that this individual right does not include his doing so as part of a worshiping church, we have obviously denied him one of the prime "blessings of liberty."

But "blessings of liberty," as the phrase appears in the Preamble, does not exist merely for individuals. The broad phrasing is "for ourselves and our posterity." The courts have long recognized that at least some natural groupings enjoy liberties *as groupings* and apart from the individuals who make them up. The Supreme Court, for example, has held that the Constitution protects the religious liberty of churches. As recently as 1976, the Court, in the *Serbian Orthodox* case, reiterated its century-old insistence that "It is the essence of these religious groups, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for" (*Serbian Orthodox Diocese* v. *Milivojevich* 426 U. S. 696 [1976]).

As we shall see, however, in one of the most important of all mediating structures in our American life—that of the schools—both educational liberty *and* the liberty of churches are threatened. If all education becomes state, or state-dictated, education we will then have destroyed that mediating structure which is the keystone of our entire structure of human liberty.

A nonpublic school* is a mediating structure in several ways. For many parents, it is, next to the family itself, the chief area of life in which parents exercise what the Supreme Court has recognized as their "primary role" in the upbringing of their children (*Wisconsin* v. *Yoder*, 406 U.S. 205, 232 [1972]). They exercise that primary right, not directly in day-to-day instruction,** but in the important matter of the choice of the school. While some statist lawyers attempt to pass off *Yoder* as an offbeat decision regarding an ancient and unique social phenomenon in our midst, the Court looked upon the Amish very differently. It scrutinized carefully the Amish parents who had taken the stand at the trial, seeing them not as characters in a costume play but as twentieth-century parents seeking liberty—liberty of eduation for their children in a way that parental conscience demanded. This was a different way indeed from what the State of Wisconsin defined as needful for these children; it was different, too, from what the community of New Glarus, Wisconsin, believed was best for them. It was in fact an education that did not even involve schooling, as most understand that term. Here is what the Court had to say:

> But in this case, the Amish have introduced persuasive evidence undermining the arguments the State has advanced to support its claims in terms of the welfare of the child and society as a whole. The record strongly indicates that accommodating the religious objections of the Amish by foregoing one, or at most two, additional years of compulsory education will not impair the physical or mental health of the child, or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society.

*Education, of course, can take place in situations or in encounters that are not "schools" in the popular usage of that term.

**Some parents do undertake the job of educating their children in the home—a matter that involves constitutional and other considerations not relevant here.

Religious News Service Photo

Parents provide one factor in the private school as mediating structure; children provide another. It is in schooling that the child's opportunity to have what is best for him in education may be realized. In the child this is a sort of derivative right exercised for him by the parent. He is enabled to have an educational experience distinct from the state's program, and one that is linked, because of parental choice and perhaps also because of religion, to the family. In *Yoder* Mr. Justice Douglas, in his separate opinion, fretted over whether the Amish children's rights had really been protected. Acting for the Amish, we had put the children on the stand and they were fair game for the prosecution (which, perhaps wisely, did not choose to match wits with these innocent and well-spoken witnesses). We put them on the stand, however, not because we espoused "child rights" inde-

pendent of parental rights, but in order to put on the record that these children were fulfilled and happy by virtue of that distinctive nonstate education which is the Amish Way.

Now we introduce into this mediating structure the factor of religion. We then see the structure at its maximum importance: The religious school is unique in enabling religious parents and children to know, love, and serve God. It is thus an instrument indispensable to the free—and full—exercise of religion. Let those (I shall speak more of them presently) who press for government regulation of religious schools, or who would manipulate the tax structure to starve them out, note that well. Also let those who quail in the face of government threats, or who would secularize the religious schools in return for public aid, also take note.

The *religious* school is a mediating structure because it is a manifestation (sometimes heroic) of the religious faith of a community. Community consists of the believers, or church, whose faith and whose sacrifices bring the school into being. The school would not exist except as an extension of, an expression of, the faith community. (Of course, if it begins to see itself as a secular endeavor with religious aspects, it has not only lost its soul but it is no longer a mediating structure. It becomes in fact the opposite. Instead of acting as an enabler of religious freedom in the presence of the state, it acts as a promoter of state ends, to which it is willing to modulate the religious presence.)

In the face of the present assault on mediating structures, their natural protectors appear to be in flight. In the case of private schools, instances at the hour are myriad. Looking only at federal assaults, we see, for example, HEW's Title IX Guidelines on sex discrimination. Those were not Congress-mandated; they were homemade by administrators. These preposterous departures from statute forbade a school to dismiss a student from its education program on the basis of such student's "pregnancy, childbirth, false pregnancy, [or] termination of pregnancy" (40 CFR 24128, §86.40 Nondiscrimination on Basis of Sex [June 4, 1973]). What is more important about the Title IX Guidelines is not their substance but the reaction to that substance. It would hardly be correct to say that private educational groups (including major religious groups) got in line with government regulation; in fact, they led the parade. They promptly sent out detailed memoranda to their memberships on how to comply. None of them apparently paused to ask those legally obvious questions that ought to come naturally to citizens of a free society: (1) "Did Congress give HEW power to impose all these specific requirements?" (2) "If it did, did the Congress act within our Constitution?"A few months ago, and continuing to the present, the federal Census Bureau circulated to religious schools throughout the nation Form CB-82, marked "Census of Service Industries." The form demands that seminaries and other church entities furnish the Government its total annual 1977 payroll, 1977 operating receipts and/or total revenue. This is odd. The statute cited as authority for this remarkable religious exploration by the Department of Commerce is 13 United States Code, Section 131, which requires the Secretary of Commerce to take censuses of "...manufactures, of mineral industries, and of other *businesses*, including the distributive trades, service establishments, and transportation..." (emphasis supplied). Again, major religious groups jumped through the Government's hoop. They saw no need to fuss over churches being classed as "businesses." They feared moreover that if they made a fuss, these public servants might *really* get tough.

Altogether too many other examples can be cited of current governmental assaults upon private religious schools and other religious endeavors as well as of the supineness of religious representatives in response. Perhaps "supineness" is not the proper term. On the part of some it seems a virtual eagerness to accept the intrusions. One can only guess why. Perhaps it is the pathetic desire, so manifest today among leaders of once-religious colleges, to be part of the "mainstream"—the love of appearances. I am sure that it is due, in part, to real but utterly misplaced fear. To those who fear the evil thing that public servants may do, "Don't make waves!" is the standard to observe. This is not the place to respond at length to either of these mentalities, beyond advising the image-conscious that the highest calling may sometimes consist in moving from the mainstream of contemporary fad to the mountain top of principle and integrity, and advising the fearsome that we are not yet a People's Republic and that we do *not* have to live by sufferance of public servants.

"The religious school is...an instrument indispensable to the free—and full—exercise of religion."

There is also a picture of resistance, and it is a glowing one. In a series of litigations now in the courts, mediating educational structures that have come under attack are engaged in vigorous counterattack. They are cases on the cutting edge of civil liberty in education, and how they ultimately turn out will have close bearing on how free our people will be in the future.

The first group of cases involves governmental aid to children attending private religious schools. The children receive the aid upon the premises of these schools. Several organizations have challenged such programs in

court, contending that they constitute an establishment of religion forbidden by the First Amendment. In their view the main effect of the aid programs is to advance religion. They also claim that it creates excessive entanglements between Church and State. These arguments are familiar and have achieved success in prior Supreme Court decisions, which have held that most of the really workable and practical forms of aid to the educating of children in religious schools are barred by the "Establishment Clause." Five Justices of the present Court appear to subscribe to the view that the Founding Fathers would have been most upset over the notion of a publicly owned bus being used to provide a field trip for a child who meets compulsory attendance requirements in a religious school, if the school teacher chooses the destination. Mr. Justice Blackmun said that "it is the individual teacher who makes the trip meaningful" and "where the teacher works within and for a sectarian institution, an unacceptable risk of fostering of religion is an inevitable by-product" (*Wolman* v. *Walter*, 433 U.S. 229 [1977]). Here the Supreme Court, once again, provides the sectarian school teacher as an automaton, an image it first presented to the nation in *Lemon* v. *Kurtzman* (403 U.S. 602 [1971]).* So in a field trip, although the statute is designed "to enrich the secular studies of student," and although the teacher is both intelligent and law-abiding, he will compulsively convert the countryside into a maze of religious objects and willy-nilly direct the bus driver to the nearest shrine.

Thus the mind of the present Court on the "Establishment Clause" in this grouping of cases. Assuming, *arguendo*, that the services in question are good for children, and that the school believes that certain services may be "neutrally" rendered to children, how should the programs be defended? There is only one theory of defense compatible with religious liberty, and that is as follows: (a) there is a right, guaranteed by the "Free Exercise Clause" of the First Amendment, to have a child's education in a religious school; (b) there is a parental right, protected by the Constitution, to choose the form of education one desires for one's child; (c) most parents today are oppressed by excessive taxation and inflation and find it most difficult to exercise those rights without some form of economic accommodation to them by government; (d) the programs are beneficial to children; and (e) while they entail aid to religious institutions in only an indirect and minimal way, the resulting "Establishment Clause" considerations are vastly outweighed by the "Free Exercise Clause" considerations. In other words, government is constitutionally obligated to make accommodations to Free Exercise and parental choice.

Amazingly, instead of that defense, some would propose a wholly different theory—namely, that it be represented to the courts that the religious schools aren't all that "religious," that they are not "narrowly sectarian," that they are in fact so religiously "neutral" as to be aidable with public funds—*indeed within the strictures laid down by the Supreme Court in the prior cases denying aid*—and even within the bizarre doctrine on field trips! This "defense" of certain programs throws away the real defense of religious liberty. For religious schools to claim that "There ain't nobody here but us neutrals" denies the true nature of those schools and trades off integrity in return for public aid.

A second grouping of cases relates to efforts of government, through the National Labor Relations Board (NLRB), to regulate employment relationships in private religious schools. The opening targets have been Catholic schools, which have numerous employees. Unhappily, at the outset a number of those schools capitulated to the NLRB demands. Justifying these surrenders on hazily stated grounds of "social justice" as well as the "inevitability" of governmental success, oblivious to the inheritance which was theirs to protect, and blind to the real significance of NLRB demands, the schools in question helped build crippling precedents for other Catholic schools that had a higher vision of themselves and their liberties and were willing to fight for them.

Happily, some schools have decided to resist in court. In the Diocese of Gary the bishop took NLRB to court, and in the Archdiocese of Philadelphia five pastors of parish schools sued NLRB and secured an injunction against that body. The Supreme Court has agreed to consider in its coming term the question of NLRB jurisdiction over religious schools.** Supremely at stake in the NLRB litigation are the "Free Exercise of Religion" rights of religious schools. These cases are not merely instances of governmental entanglements with these schools; although, because of the entanglements the liberties of the schools to self-government are precluded. But at a more profound level is the question of what constitutes "religion" within the meaning of the First Amendment. The Government contends that the Catholic schools are "only partly religious." If this mischievous view were accepted by the Supreme Court, we would have established in American constitutional law a truly secularist view of religion—the "religion of the sacristy," to borrow the phrase borrowed by John Courtney Murray. That is the kind of religious freedom the constitutions of various People's Republics provide for. From Roger Williams to Jesse Jackson it has been repudiated in our tradition.

The third grouping of cases is of perhaps the most

*In *Meek* v. *Pittenger*, 421 U.S. 349 (1973), the trial record disclosed the testimony of a Lutheran children's psychologist who was hired by the state to provide psychological services in nonpublic (including Catholic) schools. His sworn testimony showed him a competent professional who considered himself bound by the code of ethics of the American Psychological Association *not* to introduce religion into his services. In the face of the record six justices held that, once he crossed the threshold of the religious school, "the potential for [his] impermissible fostering of religion...is nonetheless present" (*Id.* at 371). The Court did not make it clear whether the Catholic school would beam Catholic notions at him or whether he would beam Lutheran notions at the children. The record showed that neither had happened. But the six justices were dead sure that one or both would.

**More recently, the Lutheran Church—Missouri Synod, which operates the second largest system of religious schools, has joined vigorously in the resistance.—*The Editors*

"The Court has agreed to consider...NLRB jurisdiction over religious schools."

critical significance of all. It is the effort of fundamentalist Christian schools to survive in the face of state attack. They have managed thus far to resist successfully the efforts directed against them. In three of the four chief cases that have come to the courts, the attack on the schools has been in the form of criminal prosecutions against parents for having their children in non-state-approved schools; in a fourth case the state has sought an injunction against the schools themselves. Two of the cases resulted in victory for the parents (*State of Ohio* v. *Whisner, et al.*, 47 Ohio St. 2d 181 [1976]; *State of Vermont* v. *LaBarge, et al.*, 134 Vt. 276 [1976]); the other two cases are about to go to trial (*Hinton, et al.* v. *Kentucky State Board of Education, et al.; State of North Carolina, et al.* v. *Columbus Christian Academy, et al.*). Without going into the lengthy details of these cases, let me touch upon them only as they relate to mediating structures.

First, we note the presence of maximum governmental pressure on these fundamentalist schools. In three cases, in fact, the pressure has consisted in criminal prosecutions. In the fourth case, where an injunction is sought, the state has made pointed reference to its compulsory attendance statute under which, of course, criminal proceedings may be brought. One asks, Why such pressure? It is obvious that, if people must pay fines or go to jail because they choose particular schools for their children, it is the schools themselves that are doomed. The next question then is, What sort of schools must these be that they must be run out of business? Surely they must be places of disease or physical danger, or schools of vice or subversion, or frauds that take tuition from people and then turn out incompetents, illiterates, or non-law-abiding graduates.

The facts are overwhelmingly to the contrary. The schools are decent places, safe and sanitary, and not racially segregated. The pupils are well-mannered and happy. They have learned prayer, love of God, neighbor, and country—and that's obvious. They achieve a feat remarkable these days: They speak and read English. They test well in nationally standardized basic-skill tests. Their parents are law-abiding folk, and the children promise to be. Once you have become familiar with these schools, you know them as true mediating structures—few and small, it is true, though growing. They are places in which people realize a way of life, fulfill hopes, and seek good things for their children. Thus they *enable* freedom. Why then the government pressure? One can but guess.

There is, of course, the "government-as-industry" point to which I have already alluded. There is also observable, however, an undeniable *animus* that helps fuel these cases—a righteousness without being right. After all, the fundamentalists are often vulnerable—few in number, few of wealth. Perhaps powerlessness attracts harshness. Again, it may be that when public servants remain prudently silent about the major corruptions that are everywhere, it is a relief to be able to denounce evil when the evil consists of resistance to a petty regulation by people who have few political friends.

I suspect, however, that there may be another factor that propels great state exertions against these innocent people: money. Behind the public schools lies a vast industry. Public schools are declining in population and approbation. Bricks, cement, furniture, plumbing, air conditioning, equipment—all these industries gain when a public school is built; and they lose when building declines. Then there is the book industry and the electronic media manufacturers. Nonpublic schools often use old buildings and often (good) old books. If they build, it is inexpensively, and when they buy it is with frugality. There are other money factors; for example, the loss of state reimbursement to school districts when nonpublic schools are established. And the job factor. Nonpublic schools absorb child populations that would otherwise afford the basis for the hiring of teachers, administrators, and maintenance personnel in public schools.

Perhaps these factors go a distance toward explaining the hysteria that routinely greets resistance to state absorption of nonpublic schools or the affording of any sort of relief to nonpublic school parents or aid to their children. Public school leaders, lobbyists, and attorneys, with histrionics rarely seen outside Verdi operas, predict the imminent and cataclysmic doom of the public school. They have reason for concern; in some states more than 50 percent of all state monies goes to public education.

In most of the court cases in which mediating structures are now fighting for their existence what may we expect? Attorneys who predict litigation outcomes for clients usually speak foolishly. What we may expect in these cases can be seen only in light of the basic test the Supreme Court has laid down in those cases in which the state seeks to restrict personal liberty: "the State may prevail only upon showing a subordinating interest which is compelling" (*Bates* v. *City of Little Rock*, 361 U.S. 516, 524 [1960]). The mediating structures must put the state to the test; not the other way around. Government must be made to show precisely how the interests that it asserts are compellingly superior to the healthful, innocent, and freedom-accommodating life of a mediating structure. While the mediating structure must demonstrate the reality of its constitutional claim, it must never, in its own defense, strike its colors, depart from principle, settle for less than true liberty. If penalties and prisons may be the immediate reward for resistance, freedom for our posterity may be its ultimate gift.