Teaching the Republican Child: Three Antebellum Stories about Law, Schooling, and the Construction of American Families

Michael Grossberg

Indiana University -Bloomington, grossber@indiana.edu

Follow this and additional works at: https://www.repository.law.indiana.edu/facpub

Part of the Educational Methods Commons, Education Law Commons, and the Family Law Commons

Recommended Citation


https://www.repository.law.indiana.edu/facpub/896
Teaching the Republican Child: Three Antebellum Stories about Law, Schooling, and the Construction of American Families

Michael Grossberg

As my contribution to this Symposium, I want to tell three stories from the past. But before telling stories from long ago, I would like to preface them with one from the present.

Recently Fran Cook, a Spanish teacher in the Cincinnati suburb of Alexandria, Kentucky, confronted an unruly student named Andy Bray. She talked with Bray's mother, met with school officials, and tried a variety of ways of keeping him from disrupting her class. But neither negotiations with his mother nor detentions deterred Bray. Exasperated, Cook turned to the law. She secured a restraining order, filed a charge of terroristic threatening in juvenile court, and sued Bray. Deciding that Bray's conduct had "clearly exceeded the bounds of common decency," the jury awarded Cook $8700 for emotional distress and medical bills and $25,000 in punitive damages.

In a story on the case, an Associated Press reporter tried to put the case in context: "The old way of handling troublemakers was to haul them outside for a paddling, keep them after school or suspend them. The new way is to haul them into court—to file a lawsuit or press criminal charges." The reporter went on to contend that in the past it had been parents and students who went to court, now it is teachers.

The story of teacher Cook and student Bray and the reporter's assertion of changed legal practices highlight the three interrelated points I want to make. First, the story is but the most recent in a series of struggles over the intergenerational transfer of values and skills that date from the dawn of the republic. Second, it is also the product of a past in which the law has been a crucial site and an equally crucial language for battles over the allocation of power.

---

* Professor of History, Indiana University, and Editor, American Historical Review; B.A. 1972, University of California, Santa Barbara; Ph.D. 1979, Brandeis University.

1. Mark R. Shellgran, Teachers Turn to Courts to Control Students, THE COM. APPEAL (Memphis), Sept. 18, 1995, at 1A.
2. Id.
3. Id.
between American families and the state. Third, cases like this one have long been critical to the construction of popular and legal conceptions of families and schooling. Through these assertions, I want to offer my response to the symposium question: What is a family? My answer is that a family is, at least in part, a legal construction forged in conflicts like the one between Cook and Bray.

I want to make that argument by going back to the 1840s and 1850s to tell the tales of three students: Sarah Roberts, Lewis Winchell, and Thomas Wall. Only one of their stories would be long remembered, yet all three are worth retelling because they represent a particular kind of story. Like Cook's tale, they are courtroom stories about schooling; that is, trial tales with interrelated but distinct lessons about the role of law in battles over how to educate the young. Then and now, such conflicts raise critical questions about public definitions of families. In doing so, they also bring to the fore concerns about the allocation of power between families and the state, as well as the autonomy and authority of individual family members and public agents, like teachers and school administrators. Always more than merely a place to learn rudimentary skills, the school has been a primary site for such conflicts since at least the late eighteenth century.

Together, these three stories raise important questions about how contests over the authority of families and schools and the agency of individual children, parents, and teachers helped construct the American family. In particular, I think the stories highlight a persistent problem identified by Lee Teitelbaum in another essay in this Symposium: "reconciling respect for the 'sovereignty' of the family—its intimacy, particularity, and variety—with the operation of public power." And I do not want to repeat the standard storyline of family change, which posits the inevitable erosion of family authority as a result of the assumption of family functions, from education to value transmission, by other institutions and the rise to dominance of affection as a central household bond. Instead, I would like to use these stories to suggest a more complicated experience in which families remain powerful institutions though constantly buffeted by change, always interacting with other institutions, and are in the process of being continually redefined. Therefore, I will explain why I think these stories are worth telling, then briefly tell the three tales, finally suggesting the moral I find in them.

I. WHY TELL COURTROOM STORIES?

Let me begin by suggesting that this trio of students found themselves in courtrooms because questions about how, where, and what to teach the young became highly charged in antebellum America. A new environmentalism and a new sense of the importance of childrearing combined with a republican vision of the young as the perpetuators of political progress to invest great importance in the intergenerational transmission of skills, knowledge, and values. Schools became the repository of a new faith in education as the engine of individual mobility and source of equal opportunity. They were invested with multiple, often clashing missions: producing an educated, disciplined workforce; attacking poverty and crime; and inculcating Christian morality. Parents generally accepted the growing control of the schools over teaching these lessons and acquiesced in their consequent loss of authority. However, they resisted a complete transfer of responsibilities and instead fought over the creation of new boundary lines between the autonomy of the family and the authority of state agencies like the schools. The legal system became a major forum for boundary skirmishes. Out of courtroom contests like these came legal rules and phrases that helped define the place of the young in antebellum society and helped create an American law of education. Those legal rules and phrases, in turn, became building blocks in the larger construction project of the era: redefining the family.

These particular cases went to law because of unresolvable conflicts between the students, their parents, their teachers, and school officials over the three R's—not reading, 'riting, and 'rithmetic, but rather race, religion, and the rod. They were not typical cases. Most school litigation concerned questions of finances, property, and administrative authority. And only Sarah Roberts's case was deemed important enough to become a major legal precedent. Nevertheless, these cases are significant not because of statistical representativeness or doctrinal importance but because they offer us telling glimpses of the legal construction of children, families, and education in a critical era.


6. For the most useful discussion of school changes in the era, see id. at 66-225; RUSH WELTER, POPULAR EDUCATION AND DEMOCRATIC THOUGHT IN AMERICA 90-97 (1962) (discussing faith in education).

7. See AARON BENAVOT, LAW AND SHAPING OF PUBLIC EDUCATION, 1785-1954, at 43-76 (1987) (discussing 19th-century education); see also id. at 70 (charting distribution of various categories of school litigation).
The cases are useful sources largely because a trial that attracted attention and inflamed passions is the centerpiece of each story. As a result, each case is best understood as "a precedent of legal experience." Unlike precedents of legal rules and more meaningful than the label "popular trial," the phrase is intended to suggest the multidimensional impact of trials like these three. Such cases enter the collective memory as ways for both laypeople and lawyers to construct legal claims and conceive of legal relationships. Though difficult to measure in precise and verifiable terms, precedents of legal experience affect not only the people directly caught up in the dramatic trials themselves. Their influence continues long after the particulars of a case are forgotten. They become embedded in the very fabric of our legal culture as ways to translate individual and collective problems into legal disputes.

Cases like these are, obviously, particular kinds of experiences; and "experience" is one of the troubling words whose seemingly clear meaning masks confusion. I want to use the term to mean both the external influences to which people react and the interior consciousness of that reaction. I would also like to add the recognition that these influences combine to create individuals through their experiences. Using such a conception of experience underscores the reality that individuals are constituted through their experiences. In other words, the evidence of experience includes both records of individual agency and of the social systems that affect individual action. Adding a legal prefix suggests that legal experiences must be explained as both reactions to past events and as events that themselves help create particular legal identities for those who undergo them, directly and indirectly.

Thinking of law, then, in such constitutive terms compels us to address issues of individual agency and to ask how this trio of students and their families became active agents in the legal process. I argue that the experiences of students like Sarah, Lewis, and Thomas should be included in the legal history of childhood, families, and education. These children and their parents and advisors were active agents in the legal process, yet the evidence of experiences like theirs has been generally lost in larger studies or ignored by historians of law, schooling, and households.


As a partial corrective, I suggest that storytelling is one way to recover the meaning of individual legal experiences. Narratives allow us to incorporate subjective, contextualized, and particular accounts into our understanding of the dynamics of social change. They open up issues about who uses the law and how and why. In doing so, stories underscore the often neglected point that what happens in a courtroom is intimately connected to a larger world and set of events beyond the courthouse door. Consequently, courtroom stories allow us “to discover the existence of a much wider range of lived institutional formations as well as a wider range of routes by which the present emerged from the past.”

Like other courtroom stories, the timing and setting of the three tales I want to tell are critical to how and why they occurred and to their meaning. The stories all come from the public schools of Massachusetts in the last decades before the Civil War. The Bay State already had a long-established tradition of educating the young. Its public and private schools served a growing student population and sustained one of the highest attendance rates in the republic. By the 1840s, the state’s ethnic, racial, and geographic diversity challenged its educational commitments and methods.

Equally significant, Massachusetts schools spawned conflicts like those which would erupt into courtroom contests between schools.
and families around the republic.

A central focus of those conflicts was the tendency of "the state, through local school committees and fledgling state education agencies, strenuously to assert an increasing authority for teachers over children, in competition with parents." Consequently, recalling the setting and the sequential way in which the cast of characters in these stories were drawn into the courtroom, and their fate once there, not only returns a necessary indeterminacy to their tales but suggests that cases like these ought to be considered, in Richard Wightman Fox's phrase, "culture-shaping and culture-disclosing" events.

These three Massachusetts courtroom stories are significant, then, not in conventional social science terminology as case studies or representative examples that somehow reflect the larger society, but rather in microhistory terms as experiences that are both the products of, and sources of, change. In their details they help identify the critical individual and social forces that produce interactions like these. Thus, despite the tendency of most courtroom storytellers to make trials simply mirrors of society, cases like these three are not mere reflections of the broader culture at a particular time. They are specific kinds of social dramas that illustrate the interactive reality of legal experiences. In trials like these three, external beliefs, interests, and other forces are siphoned through the particular rules, practices, and institutions of the law. As a result, inside the courtroom they acquire distinctive meanings, which are then broadcast to the public through client stories, lawyers' arguments, witness testimony, and judges' verdicts. These in turn help construct popular images of social relations. It is in this interactive manner that trials become active shapers of a culture, not merely its reflections. For that reason, trials like these three can be used to reconstruct "the relationship (about which we know


14. See EDWARD BERENSON, THE TRIAL OF MADAME CAILLAUX 6-12 (1992) (noting this approach to understanding history through "one exemplary event or person"); Giovanni Levi, On Micro History, in NEW PERSP. IN HIST. WRITING 93 (demonstrating significance of microhistory). Critically, Frank Munger argues that narratives must go beyond making the point that historical actors create institutions and simultaneously their actions are constructed by forces produced by those institutions: "Historical work is full of such simultaneous mutual construction, but the hard part is choosing which elements beyond the historical actor's own consciousness are important. And this is where the shouting begins." Munger, supra note 9, at 12.
so little) between individual lives and the context in which they unfold."

In summary, then, I want to argue that a microhistory of courtroom stories that concentrates on the courtroom as a site for both cultural revelation and cultural shaping can suggest how trials enter popular and professional consciousness to become part of the process of legal change. Such an approach, I hope, makes the stories of trials as precedents of legal experience worth recovering and retelling.

A. Sarah Roberts

Sarah Roberts was five years old in 1849 and ready for school. Much like another African-American girl in Topeka, Kansas, a century later, Sarah had to walk past five primary schools before arriving at one of two schools reserved for Boston's black children. Sarah's father, printer Benjamin Roberts, had had enough. He considered the choice of schooling for his daughter a fundamental parental right and duty, so he decided to challenge the city's policy of racial segregation and enrolled Sarah in a school for whites. She attended that school for a month but was expelled solely because of her race. Her father sued the city claiming that expulsion from the neighborhood school violated his daughter's constitutional rights. The suit raised troubling questions about the role of schools in determining the status of families and the opportunities of individuals. Roberts v. City of Boston would become the legal title for Sarah's courtroom story.

Her case was the culmination of growing agitation over racially segregated schools in Boston; it also initiated a new series of conflicts. Separate schools for black Bostonians dated from the 1790s,

---


17. 59 Mass. (5 Cush.) 198 (1849).

when racial insults and mistreatment drove a group of African-American parents to demand their own schools. Local officials at first resisted the demand, but in 1804 a private school was established and soon public funds were devoted to separate schools. Conflicts continued, however, particularly over the school committee's decision to hire white teachers and complaints of poor instruction and inadequate facilities. By the early 1840s, when African Americans constituted about two percent of Boston's population, growing numbers of the city's blacks began to see integration as the solution. The city's rising abolitionist cadres, already engaged in what would be successful campaigns against the last vestiges of formal segregation—separate public accommodations and bans against interracial marriage—joined their struggle. By pinpointing the use of race as a basis of legal distinctions and citizenship rights, abolitionists made all forms of segregation suspect. African-American parents and their allies petitioned the school committee and, when met with rejection, organized boycotts. Their protests arose while the Boston schools were already under fire from reformers, most notably the secretary of the state school board, Horace Mann, for incompetent, archaic, and often brutal teaching. At the same time, school desegregation campaigns triumphed in several Massachusetts towns and cities.

As would happen again in the future, the growing campaign against Boston's segregated schools split the community.\(^1\) Though apparently most African Americans supported the integration demands, many did not. Equally important, much of the effective opposition to desegregation came from wealthy Whigs, not just from the usually suspected lower-class whites.\(^2\) As the conflict heated up, the combatants voiced the full array of charges and counter-charges that would echo in debates over racial segregation in schools into our own time. Integrationists argued that separate schools were arbitrary and unlawful, reinforced prejudices, stymied needed interracial cooperation, and resulted in inferior schools often at long distances for black children. In addition to racist arguments of African-American inferiority, segregationists countered that removing the color line would be detrimental for blacks who needed special education and would generate white flight from the schools and the city. They also insisted that the black schools were just as good and convenient as the white schools and that only a minority

\(^1\) Derrick A. Bell Jr., Race, Racism and American Law 364-68 (2d ed. 1980).

\(^2\) See Kousser, supra note 18, at 982-85 (providing systematic analysis of the case).
of agitators wanted change. At base, both sides agreed not only that all children should be educated but that education should be equal. Just as critical, both also subscribed to the growing conviction that education was the key to life success. Popular ideology encouraged most American families to define childrearing as preparation for, in Isaac Kramnick's telling phrase, the "race for life." Believing in the possibility of generational advancement through education, mothers and fathers demanded that every restraint on their children be removed before they entered the race; doing so became part of the their parental responsibilities. Indeed it may well have been that "[d]uring the nineteenth century no group in the United States had a greater faith in the equalizing power of schooling or a clearer understanding of the democratic promise of public education than did black Americans."

Finally, both sides in the debate also turned to the increasingly important political dialect of rights talk to express their clashing meanings of equal education. Even then, rights talk offered an already rich and varied vocabulary through which groups could explain their separate identities and needs. For example, an August 1849 meeting of African Americans resolved "[t]hat believing as we do, that special legislation, regulated by complexion or any physical differences, is anti-Republican and anti-Christian, we shall ever be found using our best exertions for the supremacy of equal rights." Other black Bostonians, however, much like the original creators of the separate schools, argued that equal rights could only be found in separate schools. They sought equality through better facilities and control over instructors. For example, John H. Roberts, a black day-laborer, defended segregated schools as necessary retreats in a viciously racist society and contended that "colored schools, properly constructed [were] characterized by the spirit of equality, of enterprise, emulation, and friendship. Conversely, Thomas P. Smith, a graduate of a segregated Boston school and

---

21. Id. at 970–92.
24. Kousser, supra note 18, at 941 (quoting Resolution introduced by William C. Nell, adopted by a meeting of blacks at the Bellknap Street Independent Baptist Church (Aug. 27, 1849) in THE LIBERATOR (Boston), Sept. 7, 1849, at 143, col.1) (emphasis omitted).
25. Id. at 367.
26. JIM CROW, supra note 18, at 132.
former superintendent at Phillips Academy in Andover, explained that if he thought that “colored schools stood directly in the way of our rights” then he would fight to close them. But he discerned “no baleful influences, no degradation, no oppression or prejudice, caused by colored schools.” Whites parroted both these arguments.

Faced with an intransigent school committee, Benjamin Roberts resorted to law. Relying on an 1845 statute, he asked the Common Pleas Court to assess damages against the city for unlawfully excluding Sarah from her neighborhood school. Rebuffed, he appealed the decision to the state’s high tribunal, the Supreme Judicial Court, and turned his plea into a constitutional challenge that invoked the state’s “Declaration of Rights” and its promise of equality.

As Sarah’s case wound its way through the system, it not only became the symbol of division within the city over racially separated schools, it revealed that what Martha Minow has called “the dilemma of difference” lay at the heart of the emerging American educational order. That dilemma, she argues, arises with two fundamentally contradictory and irresolvable questions: “[W]hen does treating people differently emphasize their differences and stigmatize or hinder them on that basis? and when does treating people the same become insensitive to their difference and likely to stigmatize or hinder them on that basis?” She rightly notes that the “problems of inequality can be exacerbated both by treating members of minority groups the same as members of the majority and by treating the two groups differently.” Resolution of this policy conundrum became critical to legal definitions of family rights and duties at any particular moment in time. Through legal experiences like Sarah’s, the courtroom became a place that reinforced and institutionalized, without ever permanently resolving, the dilemma. Such experiences would help make the law a primary language for contests over its meaning.

In the Roberts case, the power of the law to articulate issues of equal opportunity was most apparent in the august chambers of the Supreme Judicial Court. In a widely reported courtroom clash, Sarah’s lawyers and those of the school committee agreed that the

27. Darling, supra note 18, at 136.
28. MASS. GEN. L. ch. 214 (1845); see also Kousser, supra note 18, at 969 (noting that Roberts relied on 1845 statute for relief).
30. Id.
31. Id.
state’s Declaration of Rights guaranteed equal treatment to all citizens. They also agreed that the school committee had the authority to make distinctions among students. But they differed fundamentally about the use of race, or as both put it, “complexion,” as a basis for distinctive treatment.

In a lengthy brief, future United States Senator Charles Sumner and Robert Morris, the state’s second black lawyer, told Sarah’s story. They are credited with first articulating the idea of “equality before the law,” later enshrined in the Fourteenth Amendment that then-Senator Sumner helped enact.32 Sarah’s lawyers insisted that the schools were to be

maintained for the benefit of the whole town, as it is the wise policy of the law to give all the inhabitants equal privileges for the education of their children in the public schools. Nor is it in the power of the majority to deprive the minority of this privilege.33

Sumner and Morris also addressed one side of the dilemma of difference: “The separation of the schools, so far from being for the benefit of both races, is an injury to both. It tends to create a feeling of degradation in the blacks and of prejudice and uncharitableness in the whites.”34 Attacking the caste system created by segregation and proclaiming their commitment to an integrationist ideal, Sumner and Morris concluded that

[t]he school is the little world in which the child is trained for the larger world of life. It must, therefore, cherish and develop the virtues and the sympathies which are employed in the larger world, . . . beginning there those relations of equality which our Constitution and laws promise to all . . . . Prejudice is the child of ignorance. It is sure to prevail where people do not know each other. Society and intercourse are means established by Providence for human improvement. They remove antipathies, promote mutual adaptation and conciliation, and establish relations of reciprocal regard.35

Peleg Chandler, lawyer for the school committee, conservative Whig, foe of abolition, and a leading law writer, told a far different story. He championed the right of school authorities to classify students in the manner they thought most appropriate. Race, he argued, was a legitimate basis for distinctive classification. He then

---

32. Darling, supra note 18, at 129.
33. Charles Sumner, Argument of Charles Sumner, Esq., Against the Constitutionality of Separate Colored Schools, in the Case of Sarah C. Roberts vs. the City of Boston. Before the Supreme Court of Massachusetts 13 (Dec. 4, 1849) (transcript available in State University of N.Y. Library).
34. Roberts v. City of Boston, 59 Mass. (5 Cush.) 198, 204 (1849).
35. Sumner, supra note 33, at 30.
helped coin another long-lived legal phrase, "separate but equal," by seizing the other horn of the dilemma to contend that separation aided, not harmed, black students. Chandler further argued that the committee had "a right to maintain special schools for colored children, such schools being, in all respects, as good as those for white children."  

Faced with these starkly different stories of equal rights, the court, speaking through Chief Justice Lemuel Shaw, emphatically rejected the arguments of Sarah's lawyers. Like all judges of competing courtroom stories, Shaw not only had to choose one tale over the other but also craft his own. As in most of his seminal opinions, "reasonableness" served as the cornerstone of his opinion. Segregation earned his stamp of approval as a reasonable use of the school committee's power to classify students. He accepted that "upon great deliberation" the committee had "come to the conclusion, that the good of both classes of schools will be best promoted by maintaining the separate primary schools for colored and for white children, and we can perceive no ground to doubt, that this is the honest result of their experience and judgment." Conversely, he dismissed Morris and Sumner's contentions that this policy violated the Massachusetts constitutional right of equal protection under the law. Shaw reasoned that equality did not require the same treatment for all groups. Indeed, he specifically rejected such an expansive reading of the state's constitution:

The great principle, advanced by the learned and eloquent advocate of the plaintiff, is, that by the constitution and laws of Massachusetts, all persons without distinction of age or sex, birth or color, origin or condition, are equal before the law. This, as a broad general principle, such as ought to appear in a declaration of rights, is perfectly sound; it is not only expressed in terms, but pervades and animates the whole spirit of our constitution of free government. But, when this great principle comes to be applied to the actual

36. Darling, supra note 18, at 132–33.
37. Kim Lane Scheppel argues, for example, that the "resolution of any individual case relies heavily on a court's adoption of a particular story, one that makes sense, is true to what the listeners know about the world, and hangs together." Kim L. Scheppel, Foreward, 87 MICH. L. REV. 2073, 2080 (1989) (introducing legal storytelling symposium). She adds, "Stories may diverge, then, not because one is true and the other false, but because they are both self-believed descriptions coming from different points of view informed by different background assumptions about how to make sense of events." Id. at 2082.
38. For the most thorough discussion of Shaw's judicial career, see LEONARD W. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW passim (1957).
40. Id. at 206.
41. Id. at 206–07.
and various conditions of persons in society, it will not warrant the assertion, that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law, for their maintenance and security. What those rights are, to which individuals, in the infinite variety of circumstances by which they are surrounded in society, are entitled, must depend on law adapted to their respective relations and conditions.\textsuperscript{42}

Finally, though often eager to use law as an instrument for reallocating economic rights and even criminal penalties, Justice Shaw resisted using it to aid Sarah. "It is urged," he sagely concluded,

that this maintenance of separate schools tends to deepen and perpetuate the odious distinction of caste, founded in a deep-rooted prejudice in public opinion. This prejudice, if it exists, is not created by law, and probably cannot be changed by law. Whether this distinction and prejudice, existing in the opinion and feelings of the community, would not be as effectually fostered by compelling colored and white children to associate together in the same schools, may well be doubted."\textsuperscript{43}

In consigning Sarah to a segregated school, the leading state jurist of antebellum America used her story to enter the notion of "separate but equal" in the American legal and educational lexicon and to legitimate segregation as a way to resolve the dilemma of difference. Thus, his decision gave legal sanction to a caste system for American families that promoted the construction of separate racial tracks in the "race for life."\textsuperscript{44}

Though critical for the way that law would henceforth frame the debate about racial segregation and the educational rights of minorities, the encounter in Shaw's courtroom was only part of Sarah's legal experience. Her father, Benjamin Roberts, and many other integrationists refused to accept the court's conclusion as either the legitimate meaning of equal educational rights or the final expression of the law. Benjamin Roberts went on a speaking tour promoting school integration as he and his allies continued their campaign. They staged boycotts, lobbied, and even organized another test case. But try as they might, the integrationists could not escape Shaw's words. By going to law, they had allowed him to

\textsuperscript{42} Id. at 205–06.
\textsuperscript{43} Id. at 209.
\textsuperscript{44} See id. at 205–06.
use his power to define the meaning of equal rights. Consequently, legally sanctioned segregation could only end with a legislative directive striking down the Chief Justice's "separate but equal" dictum and thereby denying the school committee the right to classify students according to race. Such a legislative edict came in 1855 when the Massachusetts state legislature passed a school integration bill decreeing that in the common schools "no distinction shall be made on account of the race, color, or religious opinions, of the applicant or scholars." The integrationist ideal of equal opportunity to education as a legitimate family claim had finally triumphed. Bay State parents could claim the right to equip their children for the "race for life" without the hobbles imposed by formally segregated schooling.

Yet the nature of this victory is ambiguous, as indeed is the meaning of Sarah's legal experience. The school committee reacted to the law by closing the black schools and firing black teachers. Even more telling, despite the legislation, a decade later northern-style de facto segregation had sprouted in Boston. And, not surprisingly, over a century later, Boston families would once again fill the streets with protests for and against segregation. At the same time, Shaw's "separate but equal" doctrine led a long doctrinal life, particularly after being enshrined in Plessy v. Ferguson. Indeed, as recent critiques of the 1954 Brown v. Board of Education decision illustrate, Shaw's doctrine still helps frame debates about equal education today.

More fundamentally, Sarah's courtroom story illustrates how deeply embedded the dilemma of difference became in the legal construction of children's educational rights and family duties. Contests over the meaning of equality, which phrased the issue as one between segregation and integration, became chronic and subject only to generational solutions. These fights had clear consequences for the status of minority families and opportunities of children in those families. Indeed Sarah's story suggested how deeply embed-

45. Kousser, supra note 18, at 989 n.225.
46. BELL, supra note 19, at 368.
48. 163 U.S. 537, 544 (1896); see also Chesapeake & Ohio Ry. Co. v. Kentucky, 179 U.S. 388 (1900) (following Plessy); Bell, supra note 19, at 368-77 (discussing Plessy).
ded the segregation impulse was in those constructions. It is worth emphasizing that only racial classifications came under attack. Classifications by class, age, gender, or intelligence not only won approval, but were even used with little controversy both to reinforce and to contest the racial line and thus to help construct individual identity and family status. The integration ideal had a much more tenuous foothold in the law and society, yet its place in the debate suggests the inherent instability of all time-bound solutions that relied on law to resolve the dilemma of difference, as the recently renewed debate over school integration reminds us.

Sarah lived through the entire process of segregation, integration, and resegregation. Her legal experience was, and would be, shared by other Boston students, black and white. Her story, broadcast widely in the abolitionist press and many daily newspapers, helped construct theirs. For that reason it is best thought of as a precedent of legal experience. "The antebellum Massachusetts civil rights campaigns strike familiar chords," Kousser argues, "partly because ideas, tactics, and theories have—unbeknownst to us—been passed from generation to generation as folk wisdom, and partly because only a limited number of rather obvious strategies exist for dealing with the continuing dilemma of racial discrimination."51

Like most children in critical courtroom stories, though unlike the other two tales I will tell, Sarah's voice is silent in the historical record. Yet some children may well have voiced her sense of what was at stake in her case. At a December 17, 1855, celebration of the passage of the integration statute, student Frederick Lewis delivered a congratulatory address to the legislative leader of the campaign. He voiced the hope of family-sponsored individual success, which lay at the heart of the continuing battle over equal education: "Champion of Equal School Rights, we hail thee! . . . Noble friend! thou hast opened for us the gate that leadeth to rich treasures."52

B. Lewis Winchell

The same year that Sarah Roberts's story unfolded in the Massachusetts courts, Lewis Winchell had his own legal experience many miles away in a Chicopee township common school. It began on January 10 when he refused to change seats as his teacher ordered. Resistance brought a beating. Lewis then charged his teacher, S.M. Cook, with assault and battery. Lewis's charges were hardly unique. Complaints against the overzealous use of the rod domi-
nated public criticism of the schools. Yet few students or parents translated their concerns into legal complaints. By doing so, Lewis and his parents not only raised the stakes in his own struggle, but forced a courtroom confrontation and a clear declaration of the complicated tangle of rights and duties that governed the new and ambiguous relationship between parents, students, and teachers in an era when diverse family practice challenged school officials' assumptions of a common standard of behavior and discipline. As a result, his case helped demarcate the boundaries between the autonomy of families and the authority of schools. Lewis's case became a criminal-law story in which Lewis played the accuser.

Lewis had engaged in a test of wills with his teacher, Cook.\textsuperscript{53} After Lewis refused to change seats, Cook had seized the youth by the collar and threw him down on the teaching platform in the front of the room. Lewis dared Cook to do it again. When he did, Lewis called him a "damned fool." The teacher then pushed him into another room. Lewis escaped through a window yelling, "[T]ell Cook from me that he is a damned fool; my father will attend to the case." Lewis returned the next day telling a classmate that his father had told him "not to take it from the schoolmaster or anybody else—old Cook would not dare to touch him—and if he did the old man would be up there and turn him out pretty quick." Once again Lewis sat in his old seat. This time, though, when Cook asked him to move, he grudgingly complied. The teacher, however, was not satisfied. After the morning lessons, Cook lectured the class on the consequences of resisting authority, the right of a teacher to seat pupils for the best interest of the school, and Lewis's offenses of profane language and insubordination. He then said he would make an example of Lewis so that others would realize that misconduct would not and should not go unpunished. Cook brought Lewis up to the platform and demanded that he stick out his hand to be caned. Lewis refused, but Cook started whipping his legs with an apple tree limb. Lewis still refused to hold out his hand; the teacher continued the whipping. Finally, after what witnesses reported as anywhere from 50 to 132 blows, Lewis cried out, "[Y]ou have conquered me." He apologized and Cook sent him to his new seat. A few days later, Lewis's father had a warrant served on Cook.\textsuperscript{54}

Unlike Sarah's, but like most cases, Lewis's courtroom story began and ended in a trial court. Lewis's story would have sunk into the legal oblivion reserved for most cases had it not been for

\textsuperscript{53} Schoolmaster and Pupil, THE MASS. TEACHER, Sept. 1849, at 257-59. The facts are taken from the text of the article.

\textsuperscript{54} For another version of the story, see KATZ, supra note 11, at 129-30.
The Massachusetts Teacher. The state's leading professional journal turned Commonwealth v. Cook into a precedent of legal experience when it plucked the case from the legal dustbin because it presented "principles involving the rights of both teacher and pupil, in a clear and lucid manner, which render it valuable for reference in any other occurrence of similar character." The Boston-based journal insisted that teachers, not parents, must govern the classroom, and that every teacher "should understand his rights as well as duties, and require, with judgment and firmness, that they shall be respected..." 55

The caution was necessary because corporal punishment had become a highly contested issue in schools around the state and the nation. The age-old use of the rod to discipline the young suddenly came under attack. 56 Though linked to other humanitarian struggles of the era, especially campaigns against excessive punishments, the contest over corporal punishment in the schools became a distinct controversy. It drew on new ideas and practices about the home as well as the school. The central issues were whether school children under any circumstances had the right to be undeferential, uncooperative, or aggressive in school and whether parents under any circumstances had the right to intervene on the side of their children in disciplinary matters. 57

The struggle over punishment was additionally a fundamentally gendered debate about male violence. Critics and proponents alike agreed that the rod should rarely, if at all, be used on girls. Finally, almost no one argued for an absolute ban on corporal punishment; instead, debate focused on questions of abuse: physical abuse and abuse of power. 58

Two concerns were tantamount and turned the controversy into a clash of rights. First, the contradictory commands that schools both mold the child into a disciplined worker and also set him or her free to be a responsible citizen of the republic challenged the use of the rod as a means of maintaining order. To an increasing number of parents, reformers, and students, frequent reliance on corporal punishment seemed an arbitrary means of achieving order at the expense of liberty and was seen as a practice that stunted independent growth. Moreover, it seemed a violation of students'

55. Schoolmaster and Pupil, supra note 54, at 257.
56. For a broad discussion of the emergence of corporal punishment as an issue in the Massachusetts schools, see KAESTLE & VINOVSKIS, supra note 11, at 150-85.
rights, a set of legal protections being articulated on a mass scale for the first time. And, as has been the case ever since, student rights emerged as a particular dialect of rights talk. This turned children's distinct need for nurture and training into a form of rights, while discounting the importance of the autonomous claims of the young against the state and other individuals that characterized adult rights. Lawyer and writer of school texts, Lyman Cobb made the peculiar status of juvenile rights clear in an 1847 polemic against corporal punishment:

Many parents and teachers treat children or pupils as though they have no rights, in common with their other fellow-citizens, and sometimes as if they were not even human beings .... Children, in consequence of their inexperience and helplessness have a right to claim the exercise of patience and forbearance toward them by their parents and teachers. ... All parents and teachers will agree in this—that children have a right to breathe the air of heaven. If so, then, they have a right to food and clothing. The right to have amusement. The right to receive moral and religious instruction. The right to be heard in their own defense, when they are charged with any offense or crime. The right to weep, and the right to laugh.

Reformers like Cobb admonished teachers, and parents, to use moral suasion rather than the rod to quell student disobedience whenever possible.

Second, the conflict over corporal punishment in the schools provoked a clash over the boundaries between parental and teacher authority, and thus, rights. As Kaestle suggests, "Conflict over school discipline centered not so much upon what values were to be taught, but on how much authority the teacher should have over children and what authority the parents retained." Equally important, the conflict stemmed from the new assertion that the teacher stood in loco parentis. Such claims generally had been associated only with residential colleges, but battles with parents led other educators to claim that right as well. Many teachers and school committees, particularly in urban schools, placed the blame for student insubordination squarely on parents. A textbook for normal school children lamented: "[G]ood government in the family


60. LYMAN COBB, THE EVIL TENDENCIES OF CORPORAL PUNISHMENT AS A MEANS OF MORAL DISCIPLINE IN FAMILIES AND SCHOOLS, EXAMINED AND DISCUSSED 196 (1847) (emphasis omitted).

61. Kaestle, supra note 12, at 8.
is the exception and not the rule. Parents indulge their children at home, nay, indirectly train them to utter lawlessness." Similarly worried about the slippery slope to rebellion, the Lawrence, Massachusetts, school committee warned that children

first learned to trample upon authority in the sanctuary of the home; parental overfondness looked on with indifference. . . . They next violated the authority of the school; the parent permitted it unrebuked, and, in some cases, with the smile of approbation. The last and legitimate step, was, to throw the reins upon their own necks and bid defiance to all law, human and divine.62

In defending their use of the rod, teachers like Cook emphasized the need to maintain order in classrooms and the need to instill discipline in their charges to make them model workers and citizens. They too turned needs into rights: the teacher’s right to maintain order in the classroom. Though few took their complaints against excessive punishment to court like Lewis’s father, many parents did object to specific uses of corporal punishment as violations of their rights and those of their children. In response, teachers and school officials defended corporal punishment as a necessary last resort to prevent classroom rebellion and to uphold the rights and authority of instructors.

A few years before Lewis’s struggle with Cook, disagreement over the answers to those questions had boiled over in Boston. In his famous Seventh Report in 1843, Massachusetts Secretary of Education Horace Mann questioned the utility and morality of corporal punishment. A two-year pamphlet war ensued with corporal punishment the stalking horse for larger questions of individual, family, and school governance and rights as well as for religious conflicts between liberal Christians and orthodox Calvinists over schooling and punishment.64

Though he did not favor total abolition, Mann placed restricting the rod alongside other attempts to professionalize the state’s teaching corps. He considered schools “families away from home” and, like his professional foes, regarded teachers as substitute parents: “[A]s the master stands in place of the parent; he should perform the duty of a parent; and examine closely the characters, morals

62. Id. at 10.
63. Id. (quoting Lawrence School Report, Lawrence, Mass. 1848).
64. For a collection of Mann’s work, including his exchanges with the schoolmasters, see HORACE MANN, LIFE AND WORDS OF HORACE MANN 2, 4 (1891). See also GLENN, supra note 59, at 103–12, 121–25 (detailing recent account of conflict); HAROLD SCHWARTZ, SAMUEL GRIDLEY HOWE: SOCIAL REFORMER, 1801–1876, at 120–36 (1955) (same).
and habits of each pupil.\textsuperscript{65}

However, Mann wanted teachers and parents alike to lay down the rod and make greater use of reason and moral suasion. He campaigned to make discipline through voluntary compliance, rather than abject submission, one measure of a successful teacher. Significantly, he phrased it in terms of the rights of children, and made the anti-republican consequences of too great a reliance on the rod clear: "He who has been a serf until the day before his twenty-one years of age, cannot be an independent citizen the day after; and it makes no difference whether he has been a serf in Austria or America . . . . The fitting apprenticeship for self-government consists in being trained to self-government."\textsuperscript{66}

The Association of Boston Schoolmasters immediately rejected Mann's call to lay aside the rod as they did his demands for new standards of professional competence and limits on school-district autonomy. They accused Mann of opposing necessary government in the classroom. Proper schooling, the Association argued, required that students understand their duty to obey all "rightful authority, wherever it exists in the great chain, from the highest to the lowest."\textsuperscript{67} Obedience must be "entire, unqualified submission" that only the rod could ensure.\textsuperscript{68} The schoolmasters dismissed out of hand the claim that moral suasion alone could effectively govern students. Insubordination like Lewis's had to be repressed through physical punishment. Only the rod would save boys like him from the "dungeon and the halter in maturer life."\textsuperscript{69} To resist Mann's attempt at bureaucratic centralization as well as other constraints on their authority, the schoolmasters formed a statewide organization, the Massachusetts Teachers Federation in 1845. The Massachusetts Teacher became its official journal and Commonwealth v. Cook a courtroom story worth reprinting.

Subscribers learned that Lewis had carried the fight over corporal punishment to the courtroom. They also discovered, as had Lewis and Cook, that the law had its own particular way of presenting and resolving the issues. Where constitutional claims of equality and counterclaims of administrative discretion had dominated Sarah Roberts's courtroom story, the doctrine of \textit{in loco parentis} and the criminal law of assault and battery scripted Lewis's courtroom experience. As Judge Hooker made clear in rendering his summary

\footnotesize{65. SCHULTZ, supra note 11, at 67. 
66. WELTER, supra note 6, at 98. 
67. GLENN, supra note 59, at 109. 
68. \textit{Id.} 
69. \textit{Id.} at 110.}
judgment at the end of a two-day trial, these laws allowed clashes over corporal punishment to be redefined as legal matters involving the reasonableness of individual acts and the proper balancing of rights claims.  

Judge Hooker accepted Cook's version of the story and used it to stake out the line between the authority of families and schools over the young. He concluded that the teacher had acted "in the lawful and necessary discharge of his duty in sustaining his authority in the school, and in correcting said Winchell for offenses committed by him." Hooker defended Cook's authority by declaring that a teacher, being in loco parentis, must be considered to have the same powers as a father, including the right of correction. Like a father, a teacher must maintain "good government in the little community over which he presides," and "the law ought never interfere with either, except in extreme cases of wrong doing." Judge Hooker advised teachers to preserve order through moral suasion and mild punishments whenever possible, but declared that "the law sanctions a resort to corporal chastisement, whenever it becomes necessary for maintaining his authority and preserving order in the school." He even made the use of corporal punishment to preserve order "an imperative duty" of teachers and a necessary prerequisite to expulsion.

Besides demarcating teachers' common-law rights, the judge also explained their criminal liability. Intent was the issue, and intent could only be determined by the circumstances of the stories told in the courtroom. Like other commentators on the legality of corporal punishment from Samuel Johnson to Cobb, Judge Hooker insisted that criminal liability flowed only from acts of passion, malevolence, or vindictiveness. However, the judge warned teachers that while errors in judgment would not be punished by criminal penalties, they could be subject to civil damages for negligence.

Hooker admitted that his defense of Cook's punishment of Lewis might well leave students and parents without a legal remedy "when a schoolmaster is rigorous in his punishments beyond what

---


71. Schoolmaster and Pupil, supra note 54, at 259.

72. Id. at 260.

73. Id.

74. Id. at 260–61.
is reasonable and injudicious and rash in his modes of discipline."\textsuperscript{75} However, like Justice Shaw in Sarah’s case, he trumpeted public opinion as the most effective control on school officials’ authority. Indeed, Judge Hooker counseled that complaint to a school committee served far better as a mode of redress for aggrieved parents “both in its bearings upon the good of the child and the interests of the school, than to make an appeal to the law, either in a civil or criminal proceeding.”\textsuperscript{76}

By relying on the doctrine of \textit{in loco parentis}, the rules of criminal law, and the force of public sentiment, Judge Hooker not only supported Cook’s story of the conflict, he silenced Lewis just as Shaw had silenced Sarah. Students’ rights had no place in this judge’s understanding of law. In his construction of the relationship between the family and the school, the only rights clash was that of parent and teacher. To emphasize that point, Hooker ended his opinion with a stern rebuke to Lewis: “The boy, Lewis Winchell, assumed at the outset an attitude of defiance; and through the whole manifested a determined spirit of rebellion against the authority of the master, by open and violent acts of resistance, and the most insolent and profane language.”\textsuperscript{77} Cook, on the other hand, had acted in a suitably “calm and deliberate manner” and, “though marked with some degree of severity,” his punishment was not “disproportionate to the offence [sic], nor continued beyond what was necessary to subdue the boy.”\textsuperscript{78} Consequently, the judge would not substitute his judgment for the teacher’s and consider whether a different course of action might have been preferable. Instead, he ruled in Cook’s favor.\textsuperscript{79}

Judge Hooker’s verdict echoed the appellate cases of the era.\textsuperscript{80} Not all teachers were as fortunate as Cook in escaping guilty verdicts. However, teachers and the students and parents who accused them faced the same legal constructions of their courtroom stories. At law, the debate over corporal punishment created more than a

\textsuperscript{75} Id. at 261.
\textsuperscript{76} Id.
\textsuperscript{77} Id. at 261–62.
\textsuperscript{78} Id. at 262.
\textsuperscript{79} Id.
\textsuperscript{80} See, e.g., Cooper v. McJunkin, 4 Ind. 290, 292 (1853); Stevens v. Fassett, 27 Me. 266, 278–79 (1847) (finding that teacher has authority “to reduce [a pupil] to obedience”); State v. Pendergrass, 19 N.C. 348, 349 (1837) (finding that teachers may exercise discretion in meting out punishment); Commonwealth v. Fell, 11 Haz. Reg. 179 (Pa. Com. Pl. 1833); Lander v. Seaver, 32 Vt. 113, 114–15 (1859) (finding that teacher has authority to discipline child in parents’ absence); JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 169–70 (1827) (noting that teachers assume authority of father in classroom).
body of rules to determine the reasonable use of violence in the classroom. Experiences like Lewis’s were also used to make the school a distinct patriarchal preserve, similar but separate from the home on which it was modeled. In the school, as in the home, the law sanctioned the use of the rod and other forms of traditionally paternal power by teachers, male or female, to fulfill the mission of educating the young. Courtroom victories helped school officials resist challenges from students and parents alike. The legal construction of the rights of students, parents, and teachers thus ensured that the power of the rod always stood behind a teacher’s command. And coming as it did at a crucial time in the conceptualization of students’ rights, judgments like Hooker’s decision in Lewis’s case also gave legal justification to the subordination of students. The legal rules assumed that students like Lewis were immature, incompetent, and thus in need of steady supervision and that virtue must be taught in the classroom because it could not be learned in either the home or the community. These assumptions were part of an ongoing process of Anglo-American educational change that had begun in the seventeenth century and in which “[e]very subsequent increment of protective affection for the child had been simultaneously an invasion of the child’s competence and an augmentation of his incapacity.” For these reasons, The Massachusetts Teacher publicized the lessons of Lewis’s story as widely as possible.

But the law stood only partially apart from society, and the power of popular sentiment that Shaw and Hooker invoked so easily could in fact alter the distribution of power in the schoolhouse. Equally important, reprinting Commonwealth v. Cook had multiple consequences because The Massachusetts Teacher did not have a monopoly on the story’s interpretation. Thus, despite judicial vindication of teachers’ rights and campaigns by the Boston schoolmasters and their allies, the protests of parents, students, and reformers did have an impact. In fact, Kaestle suggests that “parents who protested corporal punishment by teachers may have played a more important role than pedagogical reformers in the eventual limitation of school beatings.” Whatever the exact sources, corporal punishment fell under a cloud of illegitimacy from which it would never re-emerge, and its use declined after 1840. Even The Mas-

82. Kaestle, supra note 12, at 16.
83. GLENN, supra note 59, at 136.
sachusetts Teacher, though it continued to defend the legitimacy of corporal punishment, urged teachers to replace "the debasing and repulsive bond of fear" with the "silken cord of love." In schools, disciplining the mind slowly displaced punishing the body. Nevertheless, public sentiment would wax and wane, and the rod would never disappear from the classroom nor would struggles between teachers, students, and parents over the line between the family and the school.

C. Thomas Wall

Ten years after Sarah and Lewis's experiences with the law, Thomas Wall had his own courtroom encounter. In many ways, Thomas's experience replicated both Sarah's and Lewis's because it raised questions about the constitutional protection of family values and the legitimacy of corporal punishment. His story began on Monday morning, March 7, 1859, when the Catholic student refused to recite portions of the King James version of the Bible and the Protestant version of the Ten Commandments. Repeated resistance led first to his being kept after school, then to a shouting match between the school principal and his father, and finally to a confrontation with submaster, or assistant principal, McLaurin Cook. When Thomas again refused, Cook began beating him with a rattan rod until he complied. Cook, like his namesake in Chicopee, found himself in a police court arraigned on charges of assault and battery. He had become the defendant in a courtroom story that would be called The Eliot School Case.85

Like the stories of Sarah and Lewis, Thomas's story also arose out of long-standing conflicts over the intergenerational transfer of values and skills as well as the clashing authority of families and schools. His case erupted into public consciousness as a precedent of legal experience because of the volatility of the issue of religious instruction in the public schools and its direct relationship to unsettling questions about the meaning of constitutional guarantees of religious freedom and separation of church and state. Bible reading in the public schools became the focus of popular and legal contention in Massachusetts and other states, particularly after the massive immigration of Irish Catholics in the 1840s and 1850s.86 These

84. Id. at 126 (quoting The Influences of the Teacher's Example, THE MASS. TEACHER, Apr. 1849, 109–11).
85. The case is recoverable only through newspaper accounts. See 2 ROBERT H. LORD ET AL., HISTORY OF THE ARCHDIOCESE OF BOSTON IN THE VARIOUS STAGES OF ITS DEVELOPMENT, 1604 TO 1943, at 587–601 (1944) (providing most thorough discussion of the case).
86. See WILLIAM K. DUNN, WHAT HAPPENED TO RELIGIOUS EDUCATION? THE
struggles posed particular problems of minority and majority rights. Unlike some other religious and utopian groups in the era, such as the Mormons and the Shakers, who retreated from active engagement in public life, Irish Catholics were among a "number of ethnocultural groups that wanted to participate in the mainstream of American political and economic life but resisted the attempts of Americanizers to promote a homogeneous culture and rejected the demands of evangelical Protestants that schools use Bible reading as the basis of 'nonsectarian' moral training." Boston, which in 1855 included almost 50,000 Irish among its citizenry of 160,000, became one of the main battle grounds of this religious war.

The seeds of Thomas's confrontation with Cook had been planted years before. Though in most states Bible reading was a customary practice, it had been required in the Boston schools since 1789. Reaffirmed in 1826, this policy provoked a clash among Protestants in the 1840s. Intertwined with the struggles over professionalizing the schools, the issue raised knotty problems about the definition of nonsectarianism. Despite widespread agreement that the schools should teach values and that moral instruction must inevitably be grounded in religion, differences emerged over just how sectarian the instruction should be. Fights erupted over whether denominational books could be used in the schools and over the manner in which Bible readings were conducted. By the 1850s, however, an uneasy compromise had been engineered by the secretary of the state school board, Horace Mann. A Protestant consensus decreed that nonsectarianism would mean reading the King James Bible without comment—that is, in Mann's words, letting it "speak for itself."

Catholics, of course, thought it spoke blasphemy and challenged the policy as an obvious attempt to proselytize their children and an invasion of their parental right to teach their faith to their offspring. They rejected the Protestant version of nonsectarianism and advanced their own: Catholic students should be given the right to

---

87. BENAVOT, supra note 7, at 130.
89. See, e.g., RAYMOND B. CULVER, HORACE MANN AND RELIGION IN THE MASSACHUSETTS PUBLIC SCHOOLS passim (1929) (discussing Mann's role in compromise); see also KENNETH CMIEL, DEMOCRATIC ELOQUENCE: THE FIGHT OVER POPULAR SPEECH IN NINETEENTH-CENTURY AMERICA 96–110 (1990) (discussing debate over King James Bible).
read and recite their version of scriptures, the Douay Bible. Parents and priests threatened boycotts and court challenges. Many Catholic parents simply kept their children home despite an 1852 law mandating school attendance for at least twelve weeks a year. Their newspaper, The Boston Pilot, called the enforcers of Protestantism "bigots" and portrayed the struggles as a rights contest: "We have a constitutional right to demand that all sectarian matter be banished from the schools, and that the faith of Catholic children shall not be either openly or covertly assailed."

Protestant school leaders and legislators responded by tightening the rules. Riding the high tide of antebellum xenophobia, they enacted a series of regulations imposing compulsory attendance at Bible classes and specifying how Bible reading would take place. The policies assumed that the majority had a right to dictate the religious instruction of the minority against the will of their parents. For these officials, family rights did not include the power of minorities to determine what values would be taught to children in the public schools. The Boston school committee made its position clear in 1853: "The ends of government therefore require that religious instruction should be given in our Public Schools ... The whole character of the instruction given, must be such and such only, as will tend to make the pupils thereof, American citizens, and ardent supporters of American institutions." Schoolmasters used punishment and expulsions to enforce the policy.

Catholic resistance to what they considered a violation of their religious and family rights led to Thomas's refusal to recite the King James version of the Lord's Prayer. A compromise had been worked out at Eliot School, where three-fourths of the 800 students were Irish Catholic. These students had been allowed to make whatever changes conformed to Catholic texts. On March 7, though, Thomas's teacher, Miss Shepard, refused to let Thomas make the substitution. The confrontation escalated. Thomas's father tried to get the school to return to the earlier policy. Then on Sunday, the 13th, the local parish priest reportedly warned students not to say the Protestant version. Thomas complied, vowing: "Faith and I wan't agoin to repate thim damned Yankee prayers." The next day the crisis erupted when Thomas and hundreds of other Catholic

90. Differences between the two versions included clashing word choices. For instance, the Catholic "hallowed" versus the Protestant "sanctified," and the King James version's lack of the apocryphal books of the Douay version.
91. THE BOSTON PILOT, Nov. 26, 1852.
93. Id. at 308.
students remained silent. The students were whipped with a heavy rattan rod after their refusal. Labeling Thomas the ringleader, Cook entered Shepard's class and declared, "Here's a boy who refuses to repeat the Ten Commandments, and I'll whip him till he yields if it takes the whole afternoon." Thomas held out for thirty minutes until, with cut and bleeding hands, he finally repeated the Commandments. He and 300 other students were expelled. The next day, Thomas's father made good on the long-standing threat to resort to the law by filing charges against Cook and thereby linked the constitutional claim to religious freedom to the criminal law complaint of abusive behavior.

Catholic claims of a right to nonsectarian education, however, faced a frosty legal reception. In case after case, judges around the republic had rejected a Catholic reading of federal and state constitutions, just as school committees had rejected their version of the Bible. Three questions dominated the litigation: Was the Bible a sectarian book? If not, and most courts said it was not, could it be used without note or comment as a textbook? Lastly, could students be compelled to participate in Bible reading? Affirmative answers to the last two questions came in most cases as courts rebuffed Catholic challenges to school committees.

The judges who would hear Thomas's story had to interpret it according to the precedent of Donahue v. Richards. Five years before the Eliot School confrontation, a Maine school board had expelled fifteen-year-old Bridget Donahue for refusing to read the King James Bible. Her priest and father had told her it was sinful to use the Protestant Bible. Her lawyers argued that the requirement preferred Protestants over Catholics and amounted to a religious test. The result, they contended, was an unconscionable majority rule:

[As protestants regard instruction in protestant christianity as the most essential branch of education, therefore if the majority of the school be protestants, the committee may enforce such a system of instruction upon all; and Mahomedans, catholics, or Mormons may follow their example if they get power. "The greatest good of the greatest number." This tyrannical doctrine of pure democracy, we generally hear only from the lips of demagogues.]

---

94. 2 LORD, supra note 86, at 592-94.
95. See OTTO T. HAMILTON, THE COURTS AND THE CURRICULUM 73-113 (1927) (analyzing court decisions relating to religion and Bible in public schools); see also DONALD E. BOLES, THE TWO SWORDS: COMMENTARIES AND CASES ON RELIGION AND EDUCATION 83-117 (1957) (same).
96. 38 Me. 379 (1854).
97. Id. at 387.
The court disagreed, and concluded that the Bible was not used for sectarian instruction but as a textbook properly calculated to fulfill the state constitutional mandate to instruct children in virtue. The court also accepted the assimilationist goals of the Bible-reading policy and declared that mandating the King James Bible did not infringe on freedom of worship. Lastly, the Maine justices emphatically rejected Bridget's claim to exercise her right of freedom of conscience. Students, the court ruled, had no right to review the curriculum; only the state had such authority. As Sarah and Lewis had learned, student-rights claims like Bridget's were simply too inchoate to secure recognition from the American bench. The juryless Boston police court treated Thomas's story of victimization and violated rights in a similar fashion. The trial, prominently reported in the Boston press, made Bible reading, not corporal punishment, the central issue. *Donahue v. Richards* controlled the proceedings. The prosecutors, Sidney Webster and Wilder Dwight, tried to restrain the passions of the moment. They only argued that Thomas should not have been forced to use a version of the Bible forbidden by his church or punished for disobeying his teacher at the order of his father.

Henry F. Durant, representing the school committee, showed no such caution. He ridiculed Thomas and his father and called them liars. Durant refused to accept the proposition that they had acted, or even could have acted, out of conscience. With equal vehemence he rebuffed Thomas's claims to student rights. Citing *Donahue*, he declared:

> It is idle to say that the Catholics do not have equal rights because we do not give them *supreme rights*; that they do not have equal rights because they cannot, at the will of their priests, compel us to forbid the use of the Bible in our public schools.

In fact, Durant addressed the dilemma of difference quite differently than Shaw had in Sarah's case, spurred in part perhaps by rising fears that Catholics might demand public funds for parochial schools. In Thomas's case Durant argued that equal education for the Irish meant forced integration, not mandatory segregation. He appealed to the Irish to abandon as most dangerous and injurious to the true welfare of their children, the counsels of those who would array them in op-

---

98. *Id.* at 379, 387, 409, 413.
position to the laws, who would teach them to separate their children from those free schools where all meet beneath the same roof, speak the same language, learned from the same books and enter together the great republic of letters.  

Insisting that the “Saxon Bible” was nonsectarian, he proclaimed that it “had been the household god of the schoolroom from the infancy of the country. The schools which make us free, which will make worthy and true citizens of your children, have grown up under its influences.” Durant ended his tirade by warning Thomas and his fellow Catholics: “Banish the vain delusion forever that our Saxon Bible can be taken away; neither foreign tyrants nor foreign priests will ever have that power.”

Durant’s story convinced Police Court Judge Maine. Like most other judges, he believed mandatory readings of the Protestant Bible to be perfectly legitimate. Such instruction, he argued, did not violate Thomas’s constitutionally protected religious liberty and freedom of conscience. He also refused to concede a parental right to determine children’s religious education in the public schools and defined equal education as the right to schooling, not the protection of minority rights. In addition, as in other corporal punishment cases, Maine relied on the in loco parentis doctrine to contend that by sending Thomas to the Eliot School, Thomas’s father had given up his right to question the school committee’s authority over punishment or even the curriculum. Judge Maine upheld Cook’s right to punish Thomas for insubordination and to flog the boy’s hands until he complied. The judge sent Thomas back to school with the order that he follow all the rules. The trial ended when the judge dropped the charges against Cook.

However, Thomas’s legal experiences, like Sarah’s and Lewis’s, did not end in the courtroom. Thomas returned to school, but Protestant and Catholic leaders arranged a compromise. Teachers, not students, would recite the Lord’s Prayer and read from the King James Bible. However, the problem persisted. Some teachers resisted the compromise and continued to force Catholic students to read the Protestant verses. Finally, in 1862, the legislature repealed the law making Bible reading compulsory, and the Boston School Committee declared its willingness to grant students the right to refuse as an act of conscience. Even so, the state courts continued to uphold the constitutionality of Bible reading. Indeed, Bible reading

100. Id.
101. Id. at 43.
102. 2 LORD, supra note 86, at 600.
103. 2 Id. at 594–601; see also Spiller v. Woburn, 94 Mass. (12 Allen) 127, 128
in the public schools remained the most litigated religious issue for the rest of the century. Catholics waged and lost most of the cases.104 And they responded, in part, by rejecting Durant’s advice and the example of black Bostonians like Benjamin Roberts and embracing segregation. By exercising the right to create their own schools, despite the obvious severe financial consequences for the parishioners and their church, religious education and indeed the relationship between family and school would be given a Catholic meaning.105 By so doing, they adopted a strategy of struggle in the public arena based on the conclusion that, as Lucie White argues, “subordinated groups must create cultural practices through which they can elaborate an autonomous, oppositional consciousness.”106

Thomas’s courtroom story had laid bare the problems that arose as the schools tried to draw a new boundary line between family autonomy over the transmission of values and state authority over educational content to fulfill the seemingly contradictory mandates of moral instruction and religious neutrality thought necessary to educate children. The persistent refusal of Protestant leaders to recognize Catholic concerns intensified the problem and made the Bible-reading policy yet another example of a child-helping impulse in America. Zuckerman argues that this policy has been in some substantial measure a history of a slightly sublimated but nonetheless real and relentless class and ethno-religious warfare. Under cover of law—a very special sort of law with a very special disregard for the rights and liberties of its objects, who were rarely criminals in any orthodox sense— . . . [such policies took children from their families] and attempted their forced resocialization to middle-class Protestant modes.107

The struggles would go on in various guises because of the inherent instability and indeterminacy of equal education, religious freedom, student’s rights, teacher authority, and family autonomy. The Eliot School Case revealed just how intractable the conflicts over the meaning of those words could be.

104. BENAVOT, supra note 7, at 163.
105. Id.
107. Zuckerman, supra note 82, at 383.
II. CONCLUSION

The stories of Sarah, Lewis, and Thomas, like other stories, can be told in many ways. They also have multiple meanings. My renditions of the tales highlight how law has helped define the family in critical struggles between families and school officials over what and how to teach the children of the republic. They are thus stories about how law became a way to express, contest, and legitimate the new educational order. In the process, they suggest how the American resort to legal means also constructed crucial elements in the identities of students, parents, and teachers. Equally important, considering these tales about the "three R's" of race, religion, and the rod as precedents of legal experience helps us understand how and why widely publicized legal contests like these broadcast rules and phrases that helped define the place of the young in antebellum society. In that way, these cases were building blocks in the creation of an American law of education and helped determine the relative authority of families and schools over the intergenerational transmission of values and skills. Depicted in such terms, these three courtroom stories also demonstrate the centrality of rights consciousness in all discussions of education, family, and law.108

The tales of Sarah, Lewis, and Thomas also suggest why a general commitment to education could not be easily translated into a stable right to education. Instead they demonstrate why giving meaning to that right has become a never-ending struggle. The three students and those who heard their stories learned two fundamental, perhaps even contradictory, lessons from their legal experiences. First, they discovered, to their chagrin, what anthropologist Sally Merry would mean by asserting that "[o]ne aspect of the power of law is its ability to establish a dominant way of construing events and to silence others, thus channeling and determining the outcome of legal proceedings."109 In these stories it is clear that legal constructions helped ensure that families, especially parents, lost, and continued to lose, much of their control over schooling the young. Second, the Roberts, Winchells, Walls, and many other families also learned something about the limits of the law's power. Despite the combined efforts of teachers, school officials, and judges to silence them, their individual and collective struggles continued. The law also offered them alternative sites, most notably the legislature, and means to contest and assert their rights. Parents like

these did not passively accept the hegemony of schools over their children or relinquish all of their authority over educating their offspring to the schools. Instead, school officials constantly had to negotiate policies with parents and sometimes even students themselves. As Kaestle reminds us, "Although we must acknowledge a gradual loss of parental power and responsibility in many aspects of education, and although we must guard against romanticizing 'common' people, we can yet redress some past oversights and understand educational history better by exploring those situations in which parents have been crucial agents." These three stories are examples of such experiences. They record how and why the balance of power between families and schools shifted and show that conflicts over that balance continued within the new framework.

These courtroom stories tell us that in the past, as in the present, Americans have always used the law to shape and contest public schooling. As a result of the resort to law, the forums and rules of the American legal order have helped frame the presentation and resolution of fundamental educational conflicts. Because of the growing importance of schooling in the lives of children, the resulting legal solutions have played a critical role in marking out the boundaries between families and the state. At the same time, those resolutions have always been generational, not permanent; and thus inherently unstable and time bound. These struggles as well as the search for legal resolutions go on, as Fran Cook and Andy Bray have just learned. Consequently, I think the basic moral of these stories is the antebellum creation of a legal right to education that was very often uniform in rhetoric but contested and variegated in practice. That is one reason why the stories of Sarah, Lewis, and Thomas are worth recovering and telling.

110. Kaestle, supra note 12, at 16–17; see also Teitelbaum, supra note 4, at 617.
111. See supra text accompanying note 1 (discussing 1995 case involving teacher's attempt to secure restraining order and recover damages against unruly student).