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RELIGIOUS DISCRIMINATION IN INSTITUTIONS AND SERVICES

J.P. DARROUZET*

What this is all about is very simple. When the young lady comes to your hospital (that has been funded by Hill-Burton) and says: I want a tubal ligation, or I want a abortion; or a young man comes in and says: I want a vasectomy; you are going to tell her or him, NO.

And a suit is going to be filed; and at that particular stage, what I would like to encourage you to do is give some serious thought to the idea of going into Court and saying: Listen, Judge, hang on a minute will you, my hospital has a right to discriminate; a constitutional right to discriminate on the basis of religion.

That probably sounds a bit rough to start with, but hang on a minute and we will see.

First of all, I want to tell you briefly how the problem came about. Just after the *Roe*¹ and *Doe*² cases appeared on the scene, our Bishop in Austin called a meeting of all the local hospitals in the area and some other people showed up, including some Houston lawyers who represent some hospitals down there. And during the course of the meeting, one lawyer made a statement. Now I don't know if you act the way I do or not, but once in awhile I hear a statement and the hairs go up on the back of my neck, and I say: Something is wrong with that. But I don't know what it is. So I immediately go back to my three book federal library and begin looking.

What the lawyer had said was: Catholic hospitals cannot discriminate on the basis of creed, and that is the law.

This is what bugged me, because I couldn't figure out where he got it from. So I checked, and this is what I found out:

The Hill-Burton Act doesn't say a word about non-discrimination on the basis of creed.³ The only thing it does say that even closely resembles this, is what Vince told you, namely: that you have to serve everyone in

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¹ *Roe v. Wade*, 410 U.S. 113 (1973).

² *Doe v. Bolton*, 410 U.S. 179 (1973).

³ 42 U.S.C. § 291 *et seq.* (1970).

the area. Of course, if you have funds which have been given for a specific out-patient facility (like we were dealing with, a cancer clinic), you don't have to serve everybody, just those who have the illness which the out-patient facility is directed to (i.e., it has got to serve everybody, but it doesn't say anything about serving others than those it was designed for).

Now if you have been involved in Hill-Burton (and incidentally, I hadn't been when the application was made), you are aware of the fact that you have to fill out an application form where you give a number of "assurances". You send in the application form and soon you get back from the State Health Department a letter saying, okay, you have been cleared for Hill-Burton funds; and they attach a copy of your application.

I had the letter and attached copy of the application, and neither the letter nor the attached copy of the application had anything about creed, or discrimination on the basis of creed. There was, in the application (assurances), however, a reference to the 1964 Civil Rights Act, and it says there that in a federally funded project nobody shall discriminate against anyone seeking aid thereunder, on the basis of race, color or place of origin. Nothing about creed, only race, color or place of origin.⁴ The copy of the application also referred to regulations at 45 C.F.R. Part 80,⁵ so I looked there and all it referred to was race, color and place of origin.

I was at a loss, so I wrote to the lawyer in Houston to ask for the basis of his remark. He sent me in return, a copy of another set of regulations, 42 C.F.R. Part 53, and finally, there, it said, you shall not discriminate as to anyone seeking aid, on the basis of creed.⁶ This reference to "creed" was in a separate paragraph and "race, color or place of origin" was referred to in another paragraph. How did this phrasing get there? Why didn't our application have anything in it with reference to "CREED"?

After getting my spies to work, I managed to solve the problem:

It appeared that when they sent back the copy of the application with the letter of approval, they sent back a Xerox copy of the application; and in Xeroxing same, they had Xeroxed out paragraph Q, which assures the United States that the applicant won't discriminate on the basis of "creed". I further found out what had happened was, that before the 1964 Amendment to the Hill-Burton Act, there was a provision in the Act which said that you couldn't discriminate on the basis of creed. But when they amended the Act in 1964, this provision was taken out.

That, of course, raises an interesting question; and I am not sure that I can give you the answer.

But, however, I can give you a place you can get started with the research on it; and that is in the area which deals with the question of what is the effect on the law of an amendment removing a requirement or stan-

⁴ 42 U.S.C. § 2000(d) (1970).

⁵ See 45 C.F.R. § 80.1 *et seq.* (1972).

⁶ See 45 C.F.R. § 53.1 *et seq.* (1972).

dard set by the prior law.⁷

In short, what happens to a regulation enacted in accordance with a prior existing law, when the law is amended to eliminate the requirement that the regulation goes to?

I don't really know the answer, but I am inclined to think that the regulation is no longer any good.

Why? In the Administrative Law Act, you find that the department head has the right to make regulations to implement the applicable act.⁸ If you look at the Hill-Burton Act, you find that the Secretary of HEW and the Surgeon General (no longer extant) have the right to make regulations to implement the Hill-Burton Act.⁹ Now if the Act to be implemented gives standards, then the Department head charged with regulation-making can't go beyond the standards set by the Act. There are some Supreme Court cases dealing with the subject of the extent of the regulations as related to the Act from which they stem. One such case is *United States v. George*,¹⁰ which goes all the way back to a 1913 case, where, among other things, the Court said that if the Secretary (Department head) may add, by regulation, one condition, may he not then add another? Implicitly the Court was saying if it were permissible for the Department head to add one thing which wasn't in the Act, then he could keep on adding and adding and adding and adding. This, the Court said, the Department head could not do. A more recent case on the subject is *United States v. Southwest Cable Company*.¹¹

Anyway, this is what brought the problem up. In other words, can an institution, like a hospital, that is funded by Hill-Burton, act to discriminate? Okay, first of all, I would like to say this, the government, the United States Government and the state governments, clearly discriminate, both from the ridiculous, I suppose you might say, to the real serious. Let me give you an example. I hold a title in the United States as Grand Mullet of the hand-ball players; which means that in more sanctioned tournaments I have been beaten quicker than anybody else in the United States. Can you imagine what would happen to me if I went over, just out of the clear blue, and said I want to play in the handball courts of the Pentagon? They do have government handball courts over there. They would probably throw me out. This is an act of discrimination, because discrimination has been defined legally as treating somebody differently than somebody else.

Sex discrimination in the ridiculous: Can you imagine what would happen if I went into the ladies toilet in the Capital? You laugh at that? I

⁷ 2 AM. JUR. 2D ADMINISTRATIVE LAW § 300 *et seq.* (1962).

⁸ 5 U.S.C. § 301 (1970).

⁹ 42 U.S.C. § 291(c) (1970).

¹⁰ 228 U.S. 14 (1913).

¹¹ 392 U.S. 157 (1968). Another, and even later case, is *Mourning v. Family Pub. Serv.*, 411 U.S. 356 (1973).

know incidences where women have, you know, protested on the business of separate toilets. That is a form of discrimination. Moving on, suppose you had a fellow with a physical problem that needed physical therapy, a poor fellow, and he went over to the gym in the Sam Rayburn Building. Do you imagine they would let him in? Of course the answer is no. One of the forms of government discrimination that I consider very serious, and I am sure there have been things written on it, although I don't know them offhand, is the idea of competitive contracts. I think that is discrimination. But perhaps the worst discrimination in government, that I know of (at least I think of it this way, because perhaps, I have had clients who have been involved with it), is the discrimination that the government levels against ex-convicts. This is really so, and all of you know it. How many states today in the Union keep ex-convicts (even ones that have been ex-convicts for 10, 15, or 20 years) off juries. They all do. If any of you know a case which says that a man cannot fire an ex-convict just because he is an ex-convict, in other words, cannot fire him on that basis alone, let me know, I would love to know the case, I really would. A couple other instances of government discrimination which have occurred; one in Florida, one in Oklahoma, are where you have the situation of the recognition of groups in state colleges or universities. In Florida there was a case where the young socialists sought recognition in a government college and they were turned down.¹² The Court said they didn't have to recognize them. In Oklahoma the same thing happened with the gays, and the Court said you did have to recognize them. I don't know if there is a significance there or not.

What I am going to do now is discuss a few cases that deal with discrimination in the form of government discriminating, private institutions discriminating on other bases; and private institutions discriminating on the basis of religion. And when I do, I would like you to keep two or three things in mind. First of all, the idea of two balls hitting against each other. The second idea is that in all these cases somebody acts. There is an actor and an actee, and the religious motive is in one of those two, so bear that in mind. And the third thing is the intensity. The intensity of the action. By intensity I mean, how do you personally react to this as being an awful thing (really serious), or not so awful thing (ridiculous).

Let's start out and I'll give you an example of what I am talking about in the field of government in religion. First case I would like to call your attention to is again one that is kind of funny, I think. This happened somewhere in the Seventh Circuit where, at the district court level, the bailiff came in and said, everyone stand up, and Mr. Chase sat down; he didn't stand up, and the court came in and saw the fellow sitting there, and among other things, he said to him, why don't you stand up, and he said, it's a matter of religion with me; very seriously, he says, it's a matter

¹² *Merkey v. Board of Regents of Fla.*, 344 F. Supp. 1296 (N.D. Fla. 1972).

of religion with me.¹³ He says, I just believe in my soul that we are created equal and that you are no better than I am and I don't have to stand up, and the judge said, you are in contempt of court and the Seventh Circuit says he sure was. This was kind of facetious, but it is still the government discriminating in the field of religion.

Take religion in prison cases. Now those are cases where the government interferes with religion in prison. They are cases where the government discriminates on the basis of religion. There is the Moslem religion; the Jewish religion in the case of food; there is even a case of a religion which was made up in prison and the court said that the prisoners had to be given the right to practice their own religion, even if it was made up, and even if the court thought it was funny (and the court did think it was funny). Finally, you have the case which went to the Supreme Court, which was *Cruz v. Beto*¹⁴ where the Buddhists in the Texas prisons had to be let practice their religion in prison, even though it posed a real problem.¹⁵ (And even though, as one of the judges noted, if everybody in prison had to be let practice their religion, you would really disrupt the prison system.)

Those are cases of government discriminating in religion. There was another one of importance to note, which was the case of *Anderson v. Laird*.¹⁶ I am sure most of you are familiar with that case, which is where Anderson sued Laird (who was the Secretary of Defense at the time); because they were requiring the students at West Point and Annapolis to go to chapel on Sunday. The Court said the students didn't have to do this. That was discrimination and a violation of the students' first amendment rights. Again government in religion.

Moving over into the area of private institutions discriminating in matters other than religion; I would like to call your attention to the following cases; and some of them are very interesting. Of course, probably the foremost one is the case of *Moose Lodge*¹⁷ which came out in 1972 in the Supreme Court. Where a man, Irvis was his name, was a black man and some fellow who was in the Moose Lodge took him in as a guest and the Lodge refused to serve him. Irvis sued saying that they violated his constitutional rights as a guest, on racial grounds. (This is discrimination on bases other than religion, that we are now dealing with, *i. e.*, discrimination in private institutions not on the basis of religion). The Supreme Court

¹³ *In re Chase*, 468 F.2d 128 (7th Cir. 1972).

¹⁴ 405 U.S. 319 (1972).

¹⁵ See *Hoggro v. Pontosso*, 456 F.2d 917 (10th Cir. 1972); *Rowland v. Jones*, 452 F.2d 1005 (8th Cir. 1971); *Bethea v. Daggatt*, 329 F. Supp. 796 (N.D. Ga. 1970). See also *Tinker v. Des Moines Community School Dist.*, 393 U.S. 503 (1969); *Williams v. Eaton*, 443 F.2d 422 (10th Cir. 1971); *Williams v. Eaton*, 310 F. Supp. 1342 (D. Wyo. 1970), *on remand*, 333 F. Supp. 107 (D. Wyo. 1971).

¹⁶ 466 F.2d 283 (D.C. Cir.), *cert. denied*, 409 U.S. 1076 (1972).

¹⁷ *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

said you can do this. This was a private act of discrimination.

Now when you start dealing in this area, you get into the area of the so-called state action, and that is a bugaboo. I am telling you if you read the cases on state action in the field of discrimination; as to what constitutes state action (both when you do act, and when you don't act), you are really in a pickle. The concept of "state action" has been severely criticized.

In this area, Vince mentioned a particular case where they, I believe, had a private club which was denied tax exemption because it discriminated on the basis of race; but the court did that solely by a statutory interpretation. In *McGlothen v. Connelly*,¹⁸ the Court did the same thing on a constitutional basis; and in *Pitts v. Wisconsin*,¹⁹ the Court did it to a state law which gave a tax exemption; they threw the private club out of the tax exemption, because it discriminated on race. But in a very recent case, *McClory v. Shultz*,²⁰ the Court refused to deny the private club its tax exemption on the basis of sexual discrimination (because they wouldn't let women go into the private club). (Again bear in mind what I was mentioning above, the intensity of the act of discrimination).

In this regard, I would like to call your attention to a case which I think comes pretty far in being the height of a court not finding state action. And it is *Braden v. University of Pittsburgh*.²¹ This was a 1972 case. The University of Pittsburgh was established by a state statute which declared it to be a "state-related" school. The State of Pennsylvania appointed 1/3 of the board of directors, and gave 1/3 of the budget to the University. There were a bunch of feminine activists in the University; and they were fired. They sued to get back in, alleging both political discrimination as well as feminine discrimination, and the Court said that there was no state action. Now I don't know if that was a finding of law, no state action; or whether they had a bunch of misogynists sitting on the court of appeals. Suffice it to say that they did not find state action in that case.

Of course there are many cases similar to that in firing of teachers, for example, the *Columbia* case;²² *Brownley v. Gettysburgh College*;²³ and a very recent case called *Grafton v. Brooklyn Law School*.²⁴

Moving on to this next area, I want to call your attention to where a private religious institution is doing some action on (or to) its own members, and then the state comes in. Now this is based on religion. Religious

¹⁸ 338 F. Supp. 448 (D.D.C. 1972).

¹⁹ 333 F. Supp. 662 (E.D. Wis. 1971).

²⁰ 73-1 CCH Tax Ct. Mem. 12,906.

²¹ 343 F. Supp. 836 (W.D. Pa. 1972) *vacated*, 477 F.2d 1 (3d Cir. 1973).

²² *Grossner v. Trustees of Columbia Univ.*, 287 F. Supp. 535 (S.D.N.Y. 1968).

²³ 338 F. Supp. 725 (M.D. Pa. 1972).

²⁴ *Grafton v. Brooklyn Law School*, 41 U.S.L.W. 2314 (U.S. Nov. 27, 1972). *Cf. Bright v. Isenbarger*, 445 F.2d 412 (7th Cir. 1971); *Coleman v. Wagner College*, 429 F.2d 1120 (2d Cir. 1970).

discrimination if you will, in a sense of religious preference. First there is *Unitarian Church v. McConnell*,²⁵ which is an interesting case because the Unitarian Church was using pornography for sex education on a religious basis. (That is a great church. Want to take that up with the bishops, Bud?). Anyway, it must have been some juicy pornography because the district attorney moved in to hold them on an obscenity charge and the Church went into court and stopped him. And not only did they stop him, (to declare what he was doing wrong), but they put him under an injunction, (the Federal Court did), which is pretty good.

Then you have cases like *Kennedy v. Bureau of Narcotics*,²⁶ where a group tried to come in and have the law changed so that they could use peyote (just like the North American Indian Church) for their religious ceremonies, and the Bureau refused to let them do it. *People v. Crawford*,²⁷ is where a fellow was accused of possession of LSD, he says no, its a matter of religion with me. And they said, oh yea, you're on a trip baby.

Then of course there was the case of the Amish children, which all of you know about where the Amish wanted to take their children out of school.²⁸ Again this is a form of the state stepping in, saying you can't discriminate that way on a religious basis, and the Supreme Court said they could. That coincides similarly with *Pierce v. Society of Sisters*.²⁹

And finally you get down to the question of a private institution acting against an individual and the individual saying, hey, wait a minute, you can't do that; or I want something done and the private institution says, no, you can't do it for religious reasons (where the religious reasons rest with the institution); and this type of case is reflected by the tubal ligation cases.

Now what is the answer to all of this? I am not sure I know, if you start looking into the area of state action, you are going to find the concept of "state action" severely criticized and probably rightfully so.³⁰

In the article written by Jerre Williams from Texas University, on *The Twilight of State Action*,³¹ he suggests that the real way of testing this is to see how rights compare. How they balance. How they push against each other. That was the idea of the ball. Which side is which? Is it better to weigh this side against that side or not? Which rights are going to survive? Secondly, I think that another way of looking to the solution to this problem is to draw yourself a scale. Go back to your basic law school philoso-

²⁵ 337 F. Supp. 1252 (E.D. Wis. 1972).

²⁶ 452 F.2d 415 (9th Cir. 1972).

²⁷ 69 Misc. 2d 500, 328 N.Y.S.2d 747 (Dist. Ct. Suffolk County 1972).

²⁸ *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

²⁹ 268 U.S. 510 (1925).

³⁰ See Williams, *The Twilight of State Action*, 41 TEX. L. REV. 347 (1963); Black, Jr. *Foreward: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967); 7 U. RICHMOND L. REV. 343 (1972).

³¹ See note 30, *supra*.

phy, and say on the one hand we have "rights", by this I mean a secured interest with a collateral duty in someone else which you can enforce. And on the other hand we have a "liberty", about which the only thing I can enforce is non-interference by the state. And then ask yourself where does the action lie, is it closer to the "right" end, you can bet your bottom dollar, that somebody is going to say, okay, it has got to be enforced. If it's closer to the "liberty" end, there is a chance that the state might not do anything about it. I think, for instance, in the abortion cases you have the Supreme Court finding that these girls have, what I would call a "liberty". If there is a "liberty," there is no correlative duty which can be enforced, except non-interference by the State. That is just one way of looking at it.

(If you want the better verbiage; don't call it a right to discriminate, call it a right of preference. That is a much better sounding way, you know. It is like when you are talking about tubal ligations. If you are for them, you call it "sterilization surgery"; if you are against them, you call it "contraceptive surgery").

Are you over on the "right" side; or are you over here on the "liberty" side? Let me give you one case to illustrate the point, and that is *Palmer v. Thompson*.³² *Palmer* was a case about swimming pools, because five of them were white and one was black, and these people sued to have them opened up again. The Supreme Court refused to require Jackson, Mississippi to open them up. Now of course I know what the Court said; they said that we find that Jackson did it only for economic reasons. This is what we find, that is what we are saying. But, suppose it had been a school. Suppose there were five white schools and one black school, and Jackson had shut them all down because "we can't run them for economic reasons." What do you think the Court would have said? It would have said, you open them up on an integrated basis; that is most probably what the Supreme Court would have said. Well, now that is an illustration of what I have referred to as the difference between a "right" and a "liberty". In the education field, discrimination on race basis, rights. In the field of recreation by swimming, that is a "liberty".

Another case illustrative of the same scale, is *Mulvehill v. Julia Butterfield Memorial Hospital*,³³ which was a case incidentally similar to the *Simkins* case³⁴ that Vince was talking about. *Simkins* found state action (via Hill-Burton) in a specified act of discrimination on the basis of race; whereas, in *Mulvehill* the Court refused to find state action (via Hill-

³² 403 U.S. 217 (1971).

³³ 329 F. Supp. 1020 (S.D.N.Y. 1971).

³⁴ *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 95 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964); *see Sams v. Ohio Valley Gen. Hosp. Ass'n*, 413 F.2d 826 (4th Cir. 1969) (state action via Hill-Burton for a specified act of discrimination of a geographical basis).

Burton) for an unspecified (and done without hearing) act of not rehiring doctors (no reasons being given), rather the Court found that it was a challenge to due process and that you did not have state action for the purpose of due process. It's a good case to read.

Finally, in the last case I wanted to mention (and I want to bring this up, because I think this case is, in a way quite serious) is *Holms v. Silver Cross Hospital of Joliet*.³⁵ This was a case in which a woman and her husband got into an automobile wreck and he was seriously hurt. They went to a private hospital (Methodist or Baptist, I forget which), and she said don't give him a blood transfusion because we don't believe in it; and the hospital went into court and they got a conservator appointed, whose only function was to say yea or nay to a hospital blood transfusion. He said, yea. They gave the blood transfusion, the fellow died, and they brought a cause of action in the federal court. The hospital and everybody connected on the defendant's side, came in and moved to dismiss. The court in writing about it, said no, they are not going to permit them to dismiss, because a cause of action was stated. The court said the conservator was out, because he had judicial immunity, but that the hospital was in. There was no statement showing that it had or had not received Hill-Burton. Now that is important to remember. There was no statement to the effect that they had or had not received Hill-Burton; so the court could not take it as shown that they had received Hill-Burton. But without this, the court looked to the state law showing the governance of hospitals, and they found state action and because it was alleged that the doctor was acting under the guidance of the hospital, they found state action in the doctor. And they said we are going to permit this to be filed. It is a very interesting case, and you might want to read it.

I think, finally, that the last thing is this. When that young lady comes into your hospital, and when you are faced with this court thing, I think you are going to have to go to the court with some kind of argument on this basis. Any hospital has a right to prefer (or a right to discriminate, if you want to call it that). It is a greater right; it is better for society to let this "right" stand against her "liberty" to have a tubal ligation (or abortion). That is the real question. Frankly, I think a good case can be made for the situation that under the law, private institutions have a right to discriminate.³⁶ Thank you.

³⁵ 340 F. Supp. 125 (N.D. Ill. 1972).

³⁶ See *Doe v. Bellin Memorial Hosp.*, 479 F.2d 756 (7th Cir. 1973) which suggests indirectly, that the hospital has a constitutional right to discriminate against Jane Doe who wanted an abortion. It even goes so far as to suggest that the *Doe* and *Roe* cases held that a personal right to refuse to participate in an abortion was constitutionally protected. See also, *Allen v. Sisters of Saint Joseph*, 361 F. Supp. 1212 (N.D. Tex. 1973).