

Civil Rights Impact on the Church

Stuart D. Hubbell

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



Part of the [Catholic Studies Commons](#)

Recommended Citation

Stuart D. Hubbell (1975) "Civil Rights Impact on the Church," *The Catholic Lawyer*: Vol. 21 : No. 4 , Article 10.

Available at: <https://scholarship.law.stjohns.edu/tcl/vol21/iss4/10>

This Diocesan Attorneys' Papers is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in The Catholic Lawyer by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact lasalar@stjohns.edu.

CIVIL RIGHTS IMPACT ON THE CHURCH

STUART D. HUBBELL, ESQUIRE
HUBBELL, BLAKESLEE, McCORMICK & HOULIHAN
TRAVERSE CITY, MICHIGAN

Catholic Civil Rights in Jeopardy

I take it that I would not be seen as an extremist or one who is misinformed if I were to begin this little talk on a very large subject with the assertion that Catholics and Catholic institutions, today perhaps more than ever before in the history of this country, are under very concerted pressures, and even to some degree attacked, by private agencies and individuals, government agencies, and the courts. The reasons for this increase in activity against things Catholic—if it does exist as I believe—can be speculatively traced to a number of sources: the Church's position on birth control, abortion, school aid, and, I suppose, the plain fact that we are in a society which is more and more aggressively and militantly secular in outlook. The ideal of tolerance of religious viewpoints of others does not today hold the high place in the scale of civic values it once seemed to, even if that value scale may have been more evidenced by expression than by deeply held belief.

Under attack, too, it seems to me beyond question, are social values and institutions that Catholics and others as well hold as fundamental to a stable and civilized society. Particularly under attack, of course, is the family and parental rights in the area of sex education with specific challenges of parents' rights to control abortion and distribution of birth control devices and information to minors without their knowledge or consent.

I don't believe I need to elaborate too extensively on the existence of these issues, but let me cite some current examples:

- (a) *Doe v. Ingham Board of Health* (W.D. Mich.). Birth control devices to minors by county and state without knowledge or consent of parent;
- (b) ZPG (Zero Population Growth) teacher-physician prior right to teach challenging Michigan right of parent to withdraw from sex education and prohibiting the teaching of birth control in the public schools; *Alexander R. Mercer, et al. v. Michigan State Board of Education, et al.*;
- (c) Dr. Bolles' case: Colorado statute making it a crime for a person to communicate to another person "with intent to harass, annoy, or alarm another person . . . in a manner likely to harass or cause alarm." Trial court held unconstitutional violation of rights of free speech; appellate court re-

versed on grounds that there were present some factual issues; Colorado Supreme Court granted certiorari, *State of Colorado v. Bolles*;

(d) *State v. Koome*, 84 Wash. 2d 901, 530 P.2d 260 (1975) (en banc). Minor's right of privacy exceeds parental right to be advised or consent to abortion. See to same effect *Foe v. Vanderhoof*, No. 74-418 D. Colo. (2/5/75).

(e) *Washington St. Patrick's Episcopal case* . . . court required that before expansion of a nonpublic school be allowed the impact upon attendance at the public school be determined by the Zoning Appeal Board. The Zoning Appeal Board has apparently rejected this as an inappropriate standard for its consideration notwithstanding the reviewing court's position. Case may be under appeal;

(f) The right of a wife to have an abortion notwithstanding her husband's objection upheld in Massachusetts, *Doe v. Doe*, No. 74-35 Eq. Mass. Sup. Ct. . . . husband estranged, argued that to compel her to have the baby was a violation of 13th antislavery amendment;

(g) Federal injunction requiring expenditure of county funds to pay physicians for performance of abortions out of public general relief monies. *Doe v. Ceci*, No. 74-C-406, decided 10-21-74. (Couldn't get a doctor to perform. He ordered hospital to perform abortions or find an abortionist or to close down the OB unit);

(h) State tuition grants to college students was held violative of the first amendment by a three-judge federal constitutional court in Tennessee. *Americans United for Separation of Church and State v. Dunn*, 43 U.S.L.W. 2227 (D.C. Tenn., Nov. 8, 1974), *vacated sub nom. Blanton v. Americans United for Separation of Church and State*, 95 S. Ct. 1943 (1975). Combined with Maryland case which provided direct aid to college, private. *Roemer v. Board of Public Works of State of Maryland, et al.* . . . lower court upheld;

(i) Husband's consent not necessary for wife's sterilization and no suit will lie against physician who proceeds without consent. *Murray v. Vandevander*, 522 P. 2d 302, (Okla. App. 1974);

(j) Within the last two weeks the Michigan Supreme Court denied participation of nonpublic school children in a state wide program of public school textbooks for all school children in all schools adopted by our state legislature last summer. This, in spite of the *Allen* textbook case. *Advisory Opinion re Constitutionality of 1974 PA 242*, No. 56354 (4-29-75).

(k) Too many cases to cite have held that the state must fund abortion payments out of Medicaid. *Doe v. Westby*, 383 F. Supp. 1143 (D.S.D 1974). *Doe v. Mundy*, ____ F. Supp. ____ No. 74-C-224 E.D. Wis. (7-2-74); *Doe v. Wohlgemuth*, 376 F. Supp. 173 (W.D. Pa. 1974). Latter case stated: "We do not hold that the state must finance a fundamental right, but we do hold that the expression of that fundamental right cannot be the basis for invidious discrimination."

(Query: how does this doctrine of the right to payment out of public funds for abortion because it is a fundamental right square with the refusal to pay for secular education of children attending nonpublic schools out of religious conviction as a matter of fundamental right? In other words, it is a state obligation to pay for the killing of unborn babies but not for their secular education after they are born.)

We are all aware, I assume, of the so-called litigation kit which has been prepared and disseminated by proabortion, prosterilization forces seeking to provide an impetus for widespread litigation which has produced sporadic litigation in various localities across the country.

Finally, the entire history of the school aid question's treatment by the courts, and in particular the birth of the repressive concept (which apparently is applicable to Catholics alone in this country) that legislation violates the first amendment if it leads to political division along religious lines.

There are two other areas of concern which I would call to your attention before suggesting some potential vehicles for remedial action. Both the IRS and the Department of Health Education and Welfare are proposing—and appear about ready to adopt—regulations which could have far-reaching and possibly adverse impact upon Catholic institutions.

Proposed IRS Affirmative Action Policies

As a condition for continued exemption under IRC §§ 501(a) and 501(c)(3), the proposed IRS regulations would require all private schools to adopt an affirmative action program of nonracial discrimination.

That the IRS has the authority to impose such a policy and to deny tax-exempt and tax deductible status on a private educational institution was set to rest when the IRS successfully defended just such an action in the Supreme Court case of *Bob Jones University v. William E. Simon, Secretary of Treasury* (May 15, 1974).

The IRS is now simply extending its position down to the elementary and secondary private educational level.

Of course, it is not an issue here of the Catholic Church opposing such a policy because it believes in or practices racial discrimination. Quite the contrary can be established by statistical evidence and policy statements of Catholic authorities of long standing.

Rather, objections arise as to the inappropriateness and burden of the IRS requirements, if implemented.

First of all, the proposed regulations would seem to be written as requiring each school separately to perform the tasks of notice and reporting rather than recognizing the fact that Catholic schools are a part of a system—Diocesan or Archdiocesan-wide. The burden of each of our 10,000 Catholic schools having to publish annually a notice of its nondiscrimination policies—as opposed to one publication by the Diocese, for example—means the difference in cost of several millions of dollars annually.

But the policy requires more than mere notice and reporting—it requires an affirmative action program to, in effect, desegregate. Indeed, the regulations seem to be written more with regard to private academies than our parish schools requiring, for example, that records be kept of all cata-

logues, brochures, announcements, and other printed advertisements. Our schools, being maintained primarily for our parishioners, simply don't engage in such publications.

Must they now start? The artificiality and waste entailed in such an effort would seem to answer the question but that is not what the regulation says.

Other portions of the regulations require a reporting of the ownership, donors of land, record keeping for three years of all applications for students and employment for admission with annotated reasons for rejected applications, copies of contributions received—apparently, giving the IRS the right to audit Church funds since most of the funds for our parish schools, as we know, come from our parishes themselves.

As you are aware, USCC's General Counsel has brought these inconsistencies and unreasonable burdens to the attention of the IRS—particularly citing the inappropriateness of lumping together Catholic schools (which make up the bulk of private education and have proven their commitment to desegregation of the races) within a set of regulations apparently written to bring controls to bear upon that small and distinct area of private education—the private academy which is quite a different animal from our schools as we know. We can hope these objections will be appreciated and revisions achieved by the IRS in response. If not, a very substantial burden will be added to our parish schools' task if they are to remain exempt.

At the college level the impact of these regulations is seen as severely burdensome. For example, it is not uncommon for a law school to receive 2500 applications annually for the 150-200 seats in its entering class; a number of private law schools receive over 6000 applications. The storage burden alone of three years of such applications, annotated and otherwise, is of considerable concern to these schools.

Proposed HEW Rule Under Title IX of Educational Amendments of 1972

On June 23, 1972 the Congress by Public Law 92-318 (20 U.S.C. §§ 1681, 1683) adopted Title IX of the Educational Amendments of 1972 to eliminate discrimination on the basis of sex in any educational program or activity receiving federal financial assistance.

Previously, Title IX of the Civil Rights Act forbade discrimination on the basis of race, etc., but failed to include sex as within its proscriptions.

On June 20, 1974, the Office of Civil Rights of the Department of Health, Education and Welfare published proposed rules implementing this statutory enactment. Broad as are the obvious implications of the Act itself for religiously affiliated institutions, the rules would appear to go even further into areas generally considered as being protected by our

nation's constitutional principle of government neutrality. Certain ambiguities and serious conflicts appear inevitable and to some degree these exacerbate and further confuse the issues at hand.

Let me cite one very significant instance: Section 901(a) of Title IX states:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance

In a paper discussing this entire subject as it impinges upon the collegiate level particularly, Professor Frohnmayr, (*Journal of College and University Law*, 1974) notes that the guidelines written by HEW broaden the coverage of this prohibition by including not just "education programs receiving Federal financial assistance," but "to each education program or activity which receives or benefits from Federal financial assistance."

Under the statutory language it can be argued that nonpublic schools under ESEA and ESAA are not the recipients of federal financial assistance—that such assistance flows to children attending such schools. But under the regulations can such a position be maintained?

Another example: Subsection 901(a)(3) of Title IX exempts from its coverage "religiously controlled" educational institutions to the extent that Title IX prohibitions would be inconsistent with the "religious tenets" of the organization. The regulations (subsection 86.12(b)) implement this section by placing the burden on the religious organization, in effect, to prove that such a conflict and invasion of religious beliefs would occur and then, most serious of all, leave to "the Director [the determination] whether the institution qualified for the exemption." But how can such an exercise of judgment, an examination and evaluation, if you will, of the meaning and commitment of a given religious faith by a government official be squared with the Supreme Court's oft-stated principle that the first amendment mandates governmental neutrality and forbids governmental surveillance of religion? Or is this principle only existent when it comes to providing our children with their share of their parents' educational tax dollar?

Just what is at stake here?

Well, there are the obvious matters with which we are all familiar and, given time to achieve, generally support, *e.g.*, elimination of sex based discrimination in pay, pension benefits, and job opportunities. HEW is not mandating the teaching of sex education but will require that, otherwise, no classes can be segregated by sex. But, of far greater concern to us HEW will prohibit the termination of disciplining students or teachers based upon pregnancy, childbirth or abortion, discrimination on the basis of grooming codes, or the hiring of one sex for given positions in preference to another.

I do not have to detail to you the impact such far-reaching requirements have in respect to our schools and colleges but let me cite just the obvious if we are not held exempt:

1. We have many Catholic schools at various levels that are attended only by one sex or the other.

2. Our schools are staffed by religious orders—nuns, priests, and brothers—what about the requirement of equality of hiring regardless of sex here? Is this not a violation of their religious mission?

3. What of the lay teacher who chooses notoriously to cohabit out of wedlock, who has an abortion, who teaches our children birth control or abortion as an acceptable moral concept. The regulations, if they apply to us, would prohibit discipline or discharge.

4. Our seminaries prepare only males to become priests. The National Organization for Women (NOW) in its official bulletin entitled *Revolution: Tomorrow is NOW* demands that seminaries be opened up to women and immediately stop their "sexist" doctrines which assign different roles to men and women. It further advocates the equal employment of women theologians in seminaries and that tax exemption be withdrawn on failure to comply.

5. While we may be able to sustain the burden of proof that our elementary and secondary schools are "religiously controlled," what can be said about the status of some of the Catholic colleges which in the aftermath of several of the U.S. Supreme Court aid cases restructured themselves and passed control from the orders to lay boards of trustees broadly chosen from the community? What price—federal aid?

6. Finally, if these regulations are imposed on our schools and colleges, what of the effect of such burdens on religious belief and practice. How about *Speiser v. Randall*; *Spevack v. Klein*; *Sherbert v. Verner*? Can a free government of a free people require the surrender of religious conviction as a cost of uniformity and equality?

The grave political truth we have to face is that ours is not the favored position in today's world. That from within and without we face serious opposition as the product of recent debates and that, politically, religious freedom is a poor second at this moment to sexual equality.

So there is a lot going on and as the foregoing would indicate not all of it has been overwhelmingly favorable to our team. My association with the newly formed Catholic League for Religious and Civil Rights has occurred because of my concern that some positive steps be taken to provide an agency to defend the rights of individuals and religious institutions where such protection is lacking or where the League might prove a better vehicle to act than, let us say, a Bishop of a Diocese, from a public relations standpoint.

And there are things we can do. The trouble is, principally, we aren't doing them. We are sitting on our rights or, at best, assuming a most defensive and apologetic posture concerning them.

You know down in Texas, a Dallas physician set up an abortion clinic across the street from a Catholic high school. Some of the students and their parents and others began picketing this clinic and the good doctor filed a lawsuit seeking an injunction and \$1 million in damages. The doctor not only ended up dropping the lawsuit but he moved the clinic. The high school leadership had stated when the suit began "Jesuit Prep as a school did not sponsor the pickets but we certainly approve it. I don't know what the doctor hopes to accomplish from this [litigation]. The pickets were just expressing what they feel and that is that abortion is immoral." They never waived from that position and students, their parents, and supporters ultimately routed the doctor from the court and neighborhood.

Our Catholic physicians and nurses are under continuing pressure because of the abortion decision and because of threatened loss of employment or staff position unless they participate in such operations as abortion, sterilization, and the like in violation of their religious views.

Conscience Clauses

A number of states in enacting legislation to regulate the practice of abortion since *Roe v. Wade* and *Doe v. Bolton*, have included provisions to protect medical personnel conscientiously opposed to this practice. These provisions differ extensively, but in general provide that such medical personnel shall not be required to participate in abortions on penalty of discharge, nor be discriminated against with respect to hiring, promotion, pay, and other incidents of employment because of such objection.

These conscience provisions have, thus far, not been specifically or seriously jeopardized as far as I am aware. However, in a recent case, *Wolfe v. Schroering*, 386 F. Supp. 631 (W.D. Ky. 1974) a three-judge federal court held unconstitutional most provisions of that State's abortion regulation statute. A conscience provision, designed to protect medical personnel, was included in section 11 of this statute. This section also provided that no hospital could be required to make its facilities available for abortions, there being no differentiation between public and nonpublic hospitals. On the authority of *Nyberg v. City of Virginia*, 495 F.2d 1342 (8th Cir. 1974), this section relative to hospitals was held unconstitutional. The court, in its opinion, made no reference to the conscience clause as affecting individual medical personnel having conscientious objection to the practice. The *Wolfe* decision then must not be construed as affecting conscience clauses. On appeal, however, the League on behalf of a number of Kentucky physicians is endeavoring to intervene to clarify this issue and make certain it does not become by misconception an adverse precedent.

In a Minnesota case, *Hodgson v. Anderson*, 378 F. Supp. 1008 (D. Minn.), *appeal dismissed*, 420 U.S. 903 (1974), an attack being made on the conscience clause as not being available to corporations, *i.e.*, that

"Hospital corporations . . . are unlikely candidates for the exercise of such First Amendment rights of conscience as envisioned by the Free Exercise of Religion." (Brief of Plaintiff, page 8). The ultimate purpose, of course, is to require all hospitals, public, private, or denominational, to provide facilities for abortions. All of this despite Justice Blackmun's clear approval of a conscience clause in the Georgia abortion case.

But, generally, the conscience clause exempting both hospital and individual (with the exception of the purely public hospital) has proven immune from suit. *Doe v. Bellin*, 479 F.2d 756 (7th Cir. 1973); *Doe v. Hale Hospital*, 369 F. Supp. 970 (D. Mass.), *aff'd*, 500 F.2d 144 (1st Cir. 1974), *cert. denied*, 420 U.S. 907 (1975). *Watkins v. Mercy Medical Center*, 364 F. Supp. 799 (D. Idaho 1973).

Catholic medical personnel in any state having a conscience clause may accordingly invoke the same in appropriate administrative or judicial proceedings if demand is made for their participation in an abortion.

Most conscience provisions have reference to moral as well as religious scruple, and would therefore be available to personnel who have such conscientious objection to abortion, regardless of denominational affiliation.

These conscience clauses are generally keyed only to the practice of abortion, and would probably not be applicable relative to sterilization, contraception, and other medical practices objectionable to Catholics.

Civil Rights Act

Hospital personnel are also protected in respect to their civil rights by Title VII of the Civil Rights Act of 1964. 42 U.S.C. §§ 2000e *et seq.* (1970), *as amended* (Supp. III, 1973).

Section 2000e-2 provides it shall be "an unlawful employment practice for an employer . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges or employment because of such individual's race, color, religion, sex or national origin"

Enforcement provisions include restitution of employment, injunction and in some cases damages. Section 2000e-5.

It is specified that: "The term 'religion' includes all aspects of religious observance and practice, as well as belief" Section 2000e-(j). Section 2000e-2 has been held applicable to hospitals. *Wilson v. Sibley Memorial Hospital*, 340 F. Supp. 686 (D.D.C. 1972); *United States v. Medical Society*, 298 F. Supp. 145 (D.S.C. 1969).

Section 2000e-2 has not been judicially tested relative to an employee's objection to participation in abortion, or similar objectionable procedures, but it is felt that such should be considered as an "aspect" of the employee's "religious observance and practice."

This section has been applied, relative to religious belief and practice, most frequently in cases involving the refusal of employees to work on a day held sacred in their denomination. See *Dewey v. Reynolds Metal Co.*, 300 F. Supp. 709 (W.D. Mich. 1969), *aff'd*, 429 F.2d 324 (6th Cir. 1970) and by an equally divided Supreme Court, 402 U.S. 689 (1971). See also *Shaf-field v. Northrop Worldwide Aircraft Services*, 373 F. Supp. 937 (W.D. Ala. 1974); *Reid v. Memphis Publishing Company*, 369 F. Supp. 684 (W.D. Tenn. 1973).

A weakness of section 2000e-2 is that the employer might be excused from accommodating the employee's religious objection in event of "undue hardship," *Reid v. Memphis Publishing Company, supra*. This is a very general term, of course, and its construction would be difficult to forecast, particularly in smaller hospitals, having limited staffs.

It might be noted also that section 2000e-1 exempts from Title VII "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."

Although this was apparently intended to allow religious institutions to discriminate in favor of their own denomination, it *might* be construed as withdrawing the protection of Title VII from medical personnel employed in hospitals conducted by religious organizations (other than Catholic) which have no rule against abortion, and other practices prohibited in Catholic practice.

Section 2000e-5 outlines the procedure for enforcement of the Civil Rights Act, implemented by section 1601.19 *et seq.*, Regulations, Equal Employment Opportunity Commission. 29 C.F.R. §§ 1601.19 *et seq.* (1975).

Action Before State Agency—EEOC Prerequisite

Most states, of course, have their own civil rights commission or similar agencies which are established to protect against religious and other discrimination. In the state in which the alleged unlawful employment practice alleged the aggrieved person must *first* commence proceedings under the state law before proceeding before the EEOC.

A charge may be filed with the EEOC either within 180 days of the alleged unlawful practice, or at expiration of 120 days time for action by the state agency. Subsection 2000e-5(f)(1).

The EEOC is required to investigate the charge. If it finds there is reasonable ground that the charge is true it "shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion." *Supra*. Filing such a conciliation agreement the Commission may file a civil action or, if it does not, then the aggrieved party may do so. EEOC does not have cease and desist

authority itself and is, unfortunately, very greatly understaffed with a huge and growing backlog of cases. Consequently, while EEOC potentially is a vehicle for assistance as a practical matter, it will probably prove inadequate unless it is presented with a whole pattern of religious discrimination cases. In any event, if the charge is sustained under the civil suit, the court may enjoin the prohibited conduct, order reinstatement of the employee in employment, and grant back pay. Attorneys' fees may be included in court costs. Subsection 2000e-5(g).

While not mentioned in the U.S.C. text, cases cited indicate that damages may be awarded in addition.

The advantage, of course, of acting through the EEOC or a state civil rights commission is that the remedy is available without charge to the aggrieved party. As I have indicated the EEOC processes present serious practical problems of delay and even, ultimately, enforcement. State civil rights agencies vary in their effectiveness, their case load and their orientation on these issues, so their availability and usefulness will have to be tested first hand.

There remains, of course, self-help in the form of litigation of the issue by the aggrieved party under state or federal court procedures. Section 1983 of the Civil Rights Act of 1871, of course, presents a basis for challenging unlawful employment discrimination. A cause of action can be made out at common law even in the absence of a state statute under which the matter could be pursued within state courts. Such litigation necessarily entails substantial costs and attorneys' fees which most individuals are reluctant to or simply cannot bear. For the most part all of the pressure of recent litigation which has proven so detrimental to our interests, rights and beliefs has been brought by well funded groups having a philosophy antagonistic to that of the Church—the ACLU, ZPG groups, NOW, etc.—and, consequently, we find the law being etched under extremely adverse factual situations and often times not defended aggressively, effectively or, at times, at all. (Recall ZPG attorney's statement). The Catholic League for Religious and Civil Rights is hardly in a position at this point to take on all of these opponents or assume all these responsibilities, but it is one vehicle which can be employed and, given adequate support, we hope at least to fill part of the gap which is now so greatly jeopardizing Church interests. It is our conviction, where action is called for, that a positive and aggressive program of litigation, carefully selected to achieve maximum and hopefully the most favorable results should be the manner of proceeding. We believe, further, that the League can be a most useful and effective tool available to the Church's needs while avoiding the involvement of the Church itself institutionally in resolving some of these critical issues regarding the protection of the civil rights of our people and our religious faith.

We are in an environment which no longer affords the religious neu-

trality which was ours in the past. Our views, our rights and our beliefs are being litigated, legislated and much of the time at taxpayer—your and my—expense. All I am saying is that, historically, every other minority in the past history of this country has risen to its own defense, organized and fought with skill within our democratic machinery.

We have yet to do so adequately or with determination. But others have been able to do so; surely we should try.

