

The Catholic Lawyer

Volume 32
Number 3 *Volume 32, Number 3*

Article 7

October 2017

OGC Issues Roundtable

Phil Harris

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



Part of the [Litigation Commons](#)

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 selbyc@stjohns.edu.

OGC ISSUES ROUNDTABLE

PHIL HARRIS, Esq., NCCB/USCC

The topic of my discussion is the separation of church and state. I would like to begin by turning to a psychiatrist turned evangelist turned best seller author. He wrote a book called *The Road Less Traveled*, which apparently has set all kinds of records on the best seller list. His name is Scott Peck and he has a new book out called *The Different Drum: Community And Peace Making* in which he says: "Our heritage of religious freedom is one of the greatest blessings of this nation. The requirement for government to restrain itself from imposing a particular religious-belief system on its citizens is both a cornerstone of democracy and an evolutionary step in the history of civilization." Think about that: he calls it "an evolutionary step in the history of civilization."

However, he goes on to say that if separation of church and state causes citizens to refrain from expressing their religious views on social, economic and political issues, then what it leads to is superficial religion. In a sense, I think he is saying in a different way some of what our speakers were saying this morning. What he is afraid of is that separation of church and state may lead to nothing but a Sunday morning ritual. He believes that "[t]he profession of a religious belief is a lie if it does not significantly determine our economic, political, and social behavior." So, here's the problem. The blessings of religious freedom on the one hand, but the problem of the possible effect of church-state separation on the other. Peck puts it this way: "No separation means the demise of religious freedom. Total separation means the demise of genuine religion." Well, what is the solution?

I think as lawyers we have all come across many situations where the solution is a balance and you must try to reach a middle ground. But finding and maintaining the middle ground is where the problem lies. One person's middle ground is another person's end zone. The battle goes on for the middle ground in most of the cases we have in the courts. In each case, each side tries to claim more ground for their version of what constitutes the middle. As the battle rages, what often gets lost are the victims. So what I want to talk about for a moment are the victims in the battle over where church-state separation should lie.

One area of victims is pregnant teenagers: adolescents who need help coping with their sexuality in this permissive society where terms like parental responsibility have become dirty words. That is the *Bowen v. Kendrick* case; it has the possibility of being one of the true landmark cases in this area, for good or for bad. We filed an *amicus* brief in *Bowen* in which we basically took the position that the lower court's decision, which was couched in terms of separation of church and state and in terms of neutrality, was actually a decision of discrimination against religiously affiliated organizations solely because they were religiously affiliated.

The district court's decision took the metaphor of a "wall of separation" and turned it into a "wall of exclusion." It took the term "neutrality" and instead of sticking with the benevolent neutrality of Justice Burger, talked about scrupulous neutrality, which effectively made the only neutral ground the ground that excluded religious organizations entirely from the Adolescent Family Life Act. Hopefully the Supreme Court will think otherwise.¹

Another group of victims in this battle is the educationally disadvantaged children. The young people in our schools who have little hope of coping in our society unless they can get the remedial education which has been promised them over and over again by Congress since the days of the Great Society. There are several cases here where the battle rages: one is the *Helms v. Clausen* case down in New Orleans, which involves a battle over giving bus transportation, loaning books, and providing other programs, to students in private schools. In *Helms*, most of the motions to dismiss were recently denied. However, one of your members had success in getting a dismissal. But with regard to the other defendants the case looks like it is headed for trial. The plaintiff is Americans United for Separation of Church and State.

In the *Barnes v. Bennett* case in Kentucky, a case that lay dormant for a long time, the court has recently allowed an amendment to the complaint. *Barnes* is now basically a battle over mobile vans and their use for delivery of services. *Barnes* now has a new judge and it looks like it may be headed for trial. There is also the *Pearl v. Bennett* case; everyone has heard of Pearl, and Pearl has a new case up in New York, filed in the Southern District, transferred to the Eastern District. The district court judge up there, Judge McLaughlin, formerly of Fordham, just denied motions to dismiss filed by the government, claiming that the plaintiff taxpayers did not have standing. Those motions were denied, maybe understandably if you know the *Flast v. Cohen* case because one of the plaintiffs in that case is Mrs. Flast. So it was hard to imagine that she did not have standing and, yet, the complaint in that case sounds more like

¹ The Supreme Court has since reversed this decision. See 108 S. Ct. 2562 (1988).

the Supreme Court's *Valley Forge* case than it does the *Flast* case. Nevertheless, motions were denied and that case is headed for trial.

In Missouri there is *Pulido v. Bannett*, which provides a ray of hope. The district court dismissed, saying the plaintiffs did not have standing. The case was argued to the Eighth Circuit and we are currently awaiting a decision on the standing of the *Pulido* taxpayers.

In San Francisco, there is another case called *Walker v. San Francisco Unified School District*. Americans United are the plaintiffs. In *Walker* the motions to dismiss on standing and other grounds were also denied. However, the case presents a new wrinkle. In it the Bishop was found by the judge to be engaging in state action for purposes of federal civil rights laws because of the cooperation with the Department of Education in administering these programs.

These cases are all the aftermath of *Aguilar v. Felton* and *School District of the City of Grand Rapids v. Ball*, and will eventually lead to a more definite understanding of what is and is not permitted in trying to help disadvantaged students.

The last group of victims is, of course, the unborn children who are under relentless attack by the abortionists now seeking to use the court as a weapon to silence those who would speak out in favor of the unborn. This is *USCC/NCC v. A.R.M.* which was argued to the Supreme Court a week ago today. We like to think the argument went well; we like to think we are going to win that case. We certainly came out with that impression. The Justices' questioning suggested that the Supreme Court was not buying the plaintiff's argument that, as witnesses, we can't raise their standing.

Thus, there is the possibility in *A.R.M.* that the case will simply go back to the Second Circuit and could eventually be back in the Supreme Court again three years hence. Nevertheless, we are optimistic. There is the battle. There are the victims. What we are trying to do by continuing to participate in these cases is to keep in mind the victims.