What Churches Can Expect from "Gay Rights" Laws: A Preview of Iowa's Sexual Orientation Bill

Lincoln C. Oliphant
WHAT CHURCHES CAN EXPECT FROM “GAY RIGHTS” LAWS: A PREVIEW OF IOWA’S SEXUAL ORIENTATION BILL

LINCOLN C. OLIPHANT*

Iowa’s Civil Rights Act forbids discrimination on the basis of race, creed, color, sex, national origin, religion, disability, and age in employment, accommodations and services, housing, education, and credit. The Iowa act is similar to hundreds of civil rights acts at the national, state, and municipal levels. Like the vast majority of these jurisdictions, Iowa does not protect “sexual preference or orientation,” but, like every jurisdiction within earshot of an ACLU chapter, Iowa is being spurred to expand its civil rights act to encompass “sexual minorities.” Last year Iowa nearly acceded.

On March 29, 1989, the Iowa House of Representatives passed a bill that would have outlawed discrimination on the basis of sexual orientation, but because the State Senate did not act, the bill died at the end of the session. The matter has been postponed, but it has not gone away. Homosexual activists and their allies within what is now commonly called the civil rights community are well organized and determined, and they will continue to demand their “rights” until they either prevail or are decisively turned away. If they prevail, there will be losers, including those churches and congregations that cling to the Bible and traditional morality in lieu of the “progressive” and intellectually fashionable idea.

---

*Mr. Oliphant is a lawyer working in the United States Senate. He received his law degree from the University of Utah.


2 C.S. Lewis once cautioned against the “fashionable outcry” that warns “each generation
that homosexuality and bisexuality are mere “preferences,” like bow ties and argyle socks, or morally insignificant “orientations,” like being left-handed.

Many members of the civil rights community are loathe to speak of winners and losers. They figure that if “sexual preference” wins, then everyone wins; there will be no losers—with the possible exception of that new-sprung yet malevolent creature, the “homophobe.” Unfortunately, the evidence does not point to that blissful future. It points instead to a future where religious morality will shrivel and religious liberty will shrink because of state trespasses against the churches.\(^3\)

I. Religious Liberty and “Sexual Orientation” in Iowa

The “sexual orientation bill,” as originally introduced in the Iowa House, would have accomplished two objectives. First, it would have added “sexual orientation” to the current list of categories for which discrimination is forbidden in employment, education, housing, and the like. Second, it would have defined the term “sexual orientation” to include “heterosexuality, homosexuality, or bisexuality” but not “participation in acts which are prohibited by law.” On the House floor, the bill was amended (by a one-vote margin) to create a statutory exemption for religious organizations. Then, on March 29, 1989, by a vote of 57-to-41, the Iowa House of Representatives passed the “sexual orientation bill” (“Bill”).\(^4\) The Bill did not move through a Senate committee in a timely manner and was not, therefore, cleared for Senate floor action in 1989.

A. The Statute

1. Iowa’s Prohibition on Discrimination in Employment and the Religious Exemption

\(^{3}\) Throughout this article I refer to “church” or “churches” for the sake of simplicity, but the argument applies with equal force to synagogues, temples, mosques, and other religious congregations and activities. It must be remembered also that the amended statute will cover individuals and non-religious organizations and that bona fide religious disputes will arise in these other contexts, as well. For example, when a homosexual couple tries to rent a private apartment and the landlord objects to a lease on religious grounds, who will prevail? This precise problem is arising (with respect to unmarried heterosexuals who are living together) in states where the law forbids discrimination based on “marital status.” See Religious Rights of Tenants, Landlords in Dispute, V RELIGIOUS FREEDOM ALERT 1 (March 1989).

The Iowa Civil Rights Act is to "be construed broadly to effectuate its purposes," and the Bill would have added "sexual orientation" to the current list of categories for which discrimination is forbidden. In the important area of employment decisions, for example, it would have added the term "sexual orientation" to section 601A.6(1) of the Iowa Code as follows:

1. It shall be an unfair or discriminatory practice for any:
   a. Person to refuse to hire, accept, register, classify, or refer for employment, to discharge any employee, or to otherwise discriminate in employment against any applicant for employment or any employee because of the age, race, creed, color, sex, sexual orientation, national origin, religion, or disability of such applicant or employee, unless based upon the nature of the occupation.6

Iowa's prohibition against discrimination in employment does not apply to certain kinds of religious employment. Subsection 601A.6(6), the religious exemption paragraph, provides in pertinent part:

6. This section shall not apply to:
   d. Any bona fide religious institution or its educational facility, association, corporation or society with respect to any qualifications for employment based on religion when such qualifications are related to a bona fide religious purpose. A religious qualification for instructional personnel or an administrative officer, serving in a supervisory capacity of a bona fide religious educational facility or religious institution, shall be presumed to be a bona fide occupational qualification.7

In 1978, before the General Assembly added the presumption in the second sentence of paragraph 601A.6(6)(d), the Iowa Attorney General construed the first sentence of that paragraph8 as follows:

Under the Iowa Civil Rights Act, a religious institution may not discriminate based on religion in the hiring of all of its employees. Rather, a religious institution in Iowa may use religion as an employment criteria only where qualifications for a position "are related to a bona fide religious purpose" of such religious institution. Thus, in filling positions which relate to the institution's religious purpose, a church may choose its employees on the basis of religion. Therefore, the religious discrimination provisions of

8 I suspect the second sentence was added in response to the Attorney General's opinion. The opinion was issued on February 23, 1978, and the second sentence was added by 1978 Iowa Acts, ch. 1179, effective Jan. 1, 1979.
601A.6(1) never apply to employees holding church offices, conducting religious services or ceremonies, doing church oriented counseling, translating scriptures, or performing similar religion connected employment activities.

... [O]n the other hand, [the religious exemption paragraph] does not serve to allow a religious institution to use religion as an employment criteria for positions involving work of a secular, as opposed to a religious, nature. Thus, it would appear to be illegal for a religious institution in Iowa to consider religion in hiring someone for a position of custodian or accountant. Similarly, it would not be legal for a religious institution to consider religion in employing someone to operate the church's physical plants, or to serve as an administrator of church run programs or businesses, unless the position in question involved duties related to the spiritual mission of the institution or its Free Exercise of religion.

[The question is] whether a religious institution may consider the "moral character" of an applicant for employment in deciding whether to hire that individual. The answer is that it is legal, under the Iowa Civil Rights Act, for a religious institution to consider the "moral character" of an individual in making employment decisions. In employment not related to a religious purpose, however, religion may not serve as an employment criteria. Therefore, when applying a criteria [sic] of "moral character" to employment not related to a religious purpose, the institution must apply standards of good moral character accepted by society in general, not a theological or doctrinal standard.

It is appropriate, in closing, to interject a word concerning the prohibitions of discrimination, besides religious discrimination, which are contained in 601A.6(1). [The religious exemption paragraph] specifies that when "related to a bona fide religious purpose," the provisions of 601A.6(1) shall not apply "with respect to any qualifications for employment based on religion." This means that the provisions of 601A.6(1) relating to age, race, color, sex, national origin and disability, generally apply to all employment by a religious institution. [The paragraph] does not relieve a religious employer from its obligation not to discriminate, unless a religious doctrine or teaching requires disparate treatment of one of the protected classes. 601A.6(1)'s prohibitions of discrimination based on age, race, color, sex, national origin or disability are applicable to employment by religious institutions, even religion oriented employment, unless a religious reason justifies exclusion of persons of a particular age, race, sex, national origin or disability from the particular job.

* 1977-78 Op. Att'y Gen. Iowa 436. At the time the Iowa opinion was written, the Attorney General reasonably believed that a broader interpretation of § 601A.6 might be unconstitutional. That belief has since proven erroneous. See Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987) (unanimous court). Amos taught that a similar but broader federal act is not an unconstitutional establishment of religion. The holding in Amos does not affect the validity of the Iowa Attorney General's opinion.

Generally, Amos is regarded as a victory for religious liberty. One commentator, however, is not convinced:

Amos lost, but it is hard to conclude that religion won. ... For one thing, Amos
If the Bill is enacted, religious institutions will be prohibited from discriminating with respect to a person’s sexual orientation, and the last sentence of the Attorney General’s opinion (quoted immediately above) would have to be amended to read: “601A.6(1)’s prohibition[] of discrimination based on . . . sexual orientation . . . [is] applicable to employment by religious institutions, even religion oriented employment, unless a religious reason justifies exclusion of persons of a particular . . . sexual orientation . . . .”

To take a concrete example from the Iowa Attorney General’s opinion, the Bill would prohibit a church from insisting that its custodians and accountants be heterosexuals.10

But will the religious exemption added on the floor of the Iowa House change this result? The House floor amendment amended paragraph 601A.6(6)(d) as follows:

6. This section shall not apply to:

   . . .

   d. Any bona fide religious institution or its educational facility, association, corporation or society with respect to any qualification for employment based on religion or sexual orientation when such qualifications are related to a bona fide religious purpose . . . .”11

This amendment, which passed by one vote,12 may not provide any additional protection to a religious institution because for a religious organization that regards homosexuality, bisexuality, and heterosexuality as important moral issues a “qualification based on sexual orientation” is a “qualification based on religion.” In other words, the current language—“any qualification for employment based on religion when such qualification[] [is] related to a bona fide religious purpose”—may already

established no defense whatsoever to a hostile takeover of the field by statute, and thus articulated no constitutional doctrine of “church autonomy.” The majority opinion does seem to contemplate some constitutionally mandated . . . “noninterference” in religious practices, but neither in Amos nor in any other case has the Court squarely held that religious organizations possess constitutional rights.

... What is truly remarkable about the Amos case is that there is an Amos case at all. How did we arrive at a point where Congress may (or may not) “grant” church autonomy, and where a court seriously considers whether Congress “establishes” religion if it does?


12 The following amendment failed: “This section [prohibiting unfair employment practices] shall not apply to . . . any educational institution if a student or a student’s parent objects to employment of administrative or instructional staff, based upon homosexuality or bisexuality.”
include a qualification based on "sexual orientation." If this interpretation is correct, then the Iowa Attorney General's reasoning remains sound and, even after enactment of the Bill, a religious organization would have to demonstrate "a bona fide religious purpose" for excluding a homosexual from a position. To reiterate the Attorney General's position:

   In employment not related to a religious purpose, however, religion [or, after enactment of the Bill, sexual orientation] may not serve as an employment criteria. Therefore, when applying a criteria of "moral character" to employment not related to a religious purpose, the institution must apply standards of good moral character accepted by society in general, not a theological or doctrinal standard.13

I reject the alternative way of interpreting the amendment because it requires one to believe that, without the House floor amendment, the Iowa Civil Rights Act would have meant that a religious institution could impose a religious qualification but not a sexual orientation qualification, i.e., that a Catholic institution could restrict certain positions to persons of the Catholic faith but could not differentiate between a homosexual Catholic and a heterosexual Catholic for bona fide religious purposes. I think (and hope) the Act allows more than a mere denominational preference. I interpret the Act to mean that a Catholic institution can require an employee to be a Catholic and a good Catholic.

Regardless of the meaning of the present act, however, the House floor amendment is important and will have the beneficial effect of eliminating or minimizing, at least, arguments over whether a qualification based on sexual orientation is based on religion. Of course, whether a qualification is "based on religion" or "based on sexual orientation" Iowa law requires that it be "related to a bona fide religious purpose."

2. Iowa's Prohibition on Discrimination in Education and the Religious Exemption

   With respect to education, which is of abiding concern to many religious institutions, section 601A.9 of the Iowa Code reaches all educational programs and activities. This section now reads in pertinent part: "It is an unfair or discriminatory practice for any educational institution to discriminate on the basis of race, creed, color, sex, national origin, religion or disability in any program or activity. . . ."14 The Bill would insert "sexual orientation" after "sex" and thereby forbid educational institutions to have practices that "discriminate on the basis of . . . sexual orientation . . . in any program or activity."

   Iowa also recognizes a religious exemption for educational institu-

SEXUAL ORIENTATION BILL

...tions. Section 601A.9 provides an exception for religious schools that is not limited to employment but is otherwise identical to the general exemption for employers. Therefore, because the operative language in the two cases is identical, the Attorney General’s analysis of Iowa’s statutory exemption for bona fide religious employment presumably applies with equal force to educational institutions.

The House floor amendment to the Bill changed the religious school exception of section 601A.9 as follows: “Nothing in this section shall be construed as prohibiting any bona fide religious institution from imposing qualifications based on religion or sexual orientation when such qualifications are related to a bona fide religious purpose.”

To summarize, the religious exemption in section 601A.6(6)(d) is limited to employment and the religious exemption in section 601A.9, second unnumbered paragraph is limited to the programs and activities of educational institutions.

In order for a religious institution to be exempt in its employment or educational activities all three of the following requirements must be met: First, the organization itself must be a “bona fide religious institution”; second, the institution’s qualification must be “based on religion or sexual orientation” (sexual orientation being added by the House floor amendment); third, the qualifications must be “related to a bona fide religious purpose.”

B. Interpreting the Statute


---

16 Id.
18 There are other exceptions to the Iowa Civil Rights Act of 1965 that we are not specifically concerned with in this article. See IOWA CODE ANN. § 601A.7(2)(a) (accommodations or services); id. § 601A.12(1) (housing).


To qualify for a religious exemption under the Iowa Civil Rights Act an organization must be a "bona fide religious institution."20 Determining what qualifies as a "bona fide religious institution" is not always easy and may require a careful judicial weighing of religious and secular elements. Madsen v. Erwin21 provides an example of such a determination.

In Madsen, the plaintiff was a reporter for the Christian Science Monitor. When it was learned that Ms. Madsen was a homosexual, she was told to "heal herself," and when she refused, she was fired.22

Ms. Madsen sued the Monitor, the First Church of Christ, Scientist, and various individuals for "wrongful discharge, defamation, invasion of privacy, intentional infliction of mental distress, sexual and affectional preference discrimination, and breach of fiduciary responsibilities."23 None of the claims were based on a sexual orientation statute. The trial court denied the Monitor's motion for summary judgment and the defendants appealed.24 The state supreme court sustained the Monitor's motion for summary judgment with respect to about one-half of Madsen's claims but allowed her to amend her complaint and plead anew her other claims. The court held that the Monitor was a religious activity of the Christian Science Church.25 That holding was specifically limited, however:

Our conclusion on the status of the Monitor is, of course, strictly limited to the case before us. It is clear that "[n]ot every enterprise cloaking itself in the name of religion can claim the constitutional protection conferred by that status[,]"26 [and] "not every endeavor that is affiliated, however tenuously, with a recognized religious body may qualify as a religious activity of that body and come within the scope of the protection from governmental..."27

20 See id.
21 395 Mass. 715, 481 N.E.2d 1160 (1985). A student author summarized the case as follows: The Massachusetts Supreme Court held that while a church's decision to fire a lay employee who violated religious doctrine was beyond judicial scrutiny, tort claims arising out of the dismissal proceeding could be regulated. Before Madsen, courts could regulate a church's decision to discharge lay employees; however, the discharge procedure was generally beyond judicial review. Therefore, the Madsen decision has significantly altered church autonomy over its secular employees.

22 Madsen, 395 Mass. at 721, 481 N.E.2d at 1168.
23 Id. at 716, 481 N.E.2d at 1161.
24 Id.
25 Id. at 719, 481 N.E.2d at 1164.
involvement that is afforded by the First Amendment.”

The plaintiff's position was adopted by a dissenting justice. According to this view, the status of the religiously affiliated institution coupled with the nature of the employee's work "requires a judicial balancing of the competing Church and State interests." The dissent reasoned as follows:

It is true, as the court says . . . that the First Amendment prohibits civil courts from intervening in disputes concerning religious doctrine, discipline, faith, or internal organization . . . and that courts cannot question the verity of religious doctrines or beliefs . . . However, whether Madsen, a writer . . . for a church-affiliated newspaper is entitled to continued employment despite her nonconformity to the Church's beliefs, does not appear to be a dispute about religious doctrine, discipline, faith, or internal organization, within the decided cases . . . While the beliefs and practices of a minister are of critical importance to the church in which the minister functions, making judicial involvement in decisions affecting a minister's tenure inappropriate, it is far from clear that the same is true with respect to a sports-writer on the staff of a church-affiliated newspaper.

If the Iowa Act is amended, each church-affiliated school, camp, newspaper, and shelter will have to show, case by case, fact upon fact, that it is a "bona fide religious institution" eligible for the statutory exemption regarding sexual orientation. Administrative agencies and civil courts will conclude in some cases that institutions which the church regards as legitimately religious are not in fact "bona fide religious institutions" for purposes of the statute. Such institutions then will be compelled to change their policies with respect to sexual orientation.

2. The Second Prong, Part A: What is a "Qualification Based on Religion"?—The Father Buchanan Case

Under the Iowa Act, a bona fide religious institution may establish a "qualification based on religion." The qualification must be based on religion; it may not be based on whim, prejudice, or secular philosophy.

In the summer of 1974, St. Paul, Minnesota adopted an ordinance prohibiting discrimination based on "affectional or sexual preference." The ordinance was repealed by initiative in the spring of 1978 but not

---

26 Id. at 719, 481 N.E.2d at 1164 n. 2 (citations omitted).
27 Madsen was supported by amici Gay and Lesbian Advocates and Defenders, Civil Liberties Union of Massachusetts, and Lesbian Rights Project. Id. at 1161.
28 Id. at 723, 481 N.E.2d at 1171.
29 Id. at 722, 481 N.E.2d at 1170. (O'Connor, J., concurring in part and dissenting in part) (citations omitted).
in time to save Father Buchanan from a lawsuit.\textsuperscript{33}

Father Buchanan was the Pastor of the Church of the Holy Childhood, which operated a parochial school. Mr. Thomas J. Murphy applied for a job teaching music at the school. He was offered the job, but asked for a week to think it over. When Murphy called back to accept the job he was told that the offer had been withdrawn. According to the stipulated facts, "Father Buchanan had withdrawn the offer of employment based upon information which he had received that Mr. Murphy was of a homosexual nature. . . . [He] had no proof of any actual homosexual practices on the part of Mr. Murphy."\textsuperscript{33}

Mr. Murphy went to the St. Paul Department of Human Rights and alleged that he had been discriminated against in violation of the City's human rights ordinance. Father Buchanan resisted the ensuing investigation and finally had to be subpoenaed to testify. After the investigation, the City's Department of Human Rights sued Father Buchanan on behalf of Mr. Murphy. Father Buchanan prevailed on first amendment grounds.

The government attempted to show that Father Buchanan misunderstood Catholic doctrine.\textsuperscript{34} The Commission was attempting to show that Father Buchanan was acting on personal belief, not religious doctrine, and that his act was not, therefore, entitled to protection under the first amendment. The court stated:

\begin{quote}
[The City] admits the sincere religious motivation for [Father Buchanan's] act, but claims that the act was not in accord with the teaching of the church in which he is ordained. Therefore [the City] argues, [Father Buchanan] is not entitled to constitutional protection.

Citing theological treatises, [the City] argues in [its] brief that the mere state of being a "homosexual" is a morally neutral condition, and that only specific homosexual practices are contrary to Catholic moral teaching. In this narrow respect [the City] appears to be correct.\textsuperscript{35}
\end{quote}

Father Buchanan had to rely on the court's balancing of values to win, but a sexual orientation statute opens a religious institution to losing (as demonstrated by the Georgetown case in part II) and the constitution will not always stand in the way.

\textsuperscript{33} See Lewis ex rel. Murphy v. Buchanan, 21 Fair Empl. Prac. Cas. (BNA) 696 (D. Minn. 1979).

\textsuperscript{34} One would not have thought that the St. Paul Human Rights Commission was competent to catechize a priest on Catholic doctrine.

\textsuperscript{35} Buchanan, 21 Fair. Empl. Prac. Cas. (BNA) at 698.
3. The Second Prong, Part B: What is a “Qualification Based on Sexual Orientation”?—The Watkins and Sommers Cases

If the Bill is enacted, “sexual orientation” will mean “heterosexuality, homosexuality, or bisexuality, but not participation in acts which are prohibited by law.” Unlike the District of Columbia ordinance quoted in part II, the Iowa bill does not specify whether the legislature intends the term to mean preference, practice, or both, and unlike the Wisconsin definition, the Iowa Act does not define the term to include “having a history of ... or being identified with” hetero-, homo-, or bisexuality.36

The Iowa definition is not free from ambiguity (what definition is?), but in comparing the Iowa definition only to the District of Columbia's and Wisconsin's, two questions seem particularly prominent. First, does “sexual orientation” include both conduct and preference? A panel of the United States Court of Appeals for the Ninth Circuit elevated this distinction to constitutional significance in Watkins v. United States Army,37 where the court said:

In this opinion we use the term “sexual orientation” to refer to the orientation of an individual's sexual preference, not to his actual sexual conduct. Individuals whose sexual orientation creates in them a desire for sexual relationships with persons of the opposite sex have a heterosexual orientation. Individuals whose sexual orientation creates in them a desire for sexual relationships with persons of the same sex have a homosexual orientation.

In contrast, we use the term “homosexual conduct” and “homosexual acts” to refer to sexual activity between two members of the same sex whether their orientations are homosexual, heterosexual or bisexual.38

Second, does the Iowa definition include a lifestyle where there is a nexus between the lifestyle and a sexual orientation? For example, the Iowa Supreme Court has held that its Civil Rights Act's proscription of sex discrimination does not protect transsexuals.39 Will the Bill change that result? Will the Bill protect transvestites whose behaviour is, perhaps, included within the undefined statutory terms “heterosexuality, homosexuality, or bisexuality”?

---

37 847 F.2d 1329 (9th Cir. 1988), withdrawn, 875 F.2d 699 (9th Cir. 1989) (en banc). In Watkins, the en banc court withdrew the opinion of the merits panel on the ground that the case could be decided the same way on principles of equitable estoppel, thus avoiding a constitutional determination. 875 F.2d at 711.
4. The Third Prong: What Does It Mean To Be “Related to a Bona Fide Religious Purpose”? — The Presbyterian Organist Case

Any qualification imposed on a bona fide religious institution, whether based on a religious or sexual orientation, must still be tied (“related”) to a “bona fide religious purpose.”40 In Walker v. First Presbyterian Church,41 the plaintiff, Kevin Walker, was hired as the organist for the First Orthodox Presbyterian Church of San Francisco. When the pastor learned that Mr. Walker was a homosexual he met with Walker and exhorted him to repent. The organist replied that he did not feel the need to repent, and Walker was fired.

Walker sued the church. He alleged a violation of various sections of the San Francisco Police Code which made it unlawful for an employer to discharge any individual “for a discriminatory reason wholly or partially based on sexual orientation.”42 Unlike the Iowa Bill, the San Francisco code did not have an express exception for religious activities. The church had to defend itself on constitutional grounds, which it did successfully.43 Walker's suit failed because he was the organist, and the court found that in the Orthodox Presbyterian Church the organist is part of the “worship team.”44 The court also gave weight to the church's judgment that Walker was an unrepentant sinner.45

If a similar lawsuit were to arise in Iowa after enactment of the Bill, the court would have to determine whether excluding a homosexual as an organist constitutes a “bona fide religious purpose.” If so, then the church would have a statutory exemption; if not, the court would have to apply the statute unless the church was able to assert successfully a constitutional defense under the federal or state constitution.46

Remember, the Iowa Attorney General opined that church custodians and accountants do work of “a secular, as opposed to a religious, na-

42 Id. at 764.
43 Id. Unlike the court in Gay Rights Coalition of Georgetown Univ. Law Center v. Georgetown Univ., 536 A.2d 1 (D.C. 1987), the California court was unable to find a compelling state interest to override the church's free exercise rights.
44 Walker, 22 Fair Empl. Prac. Cas. (BNA) at 763. The plaintiff denied that he was part of the worship team, apparently taking the position that he was just a keyboard man. See id.
45 Id. at 764.
If the Bill is adopted, lawyers will argue that playing the organ is just like being an accountant: you sit down, you move your fingers, and when you are finished you put on your coat and hat and go home. There is not, they will say, a Presbyterian or Catholic or Jewish way of playing the organ just as there is not a Protestant or Catholic or Jewish accountancy. Being a homosexual is, they will say, as irrelevant to playing the organ as it is to balancing books or mopping floors.

II. SEXUAL ORIENTATION LAWS AND RELIGIOUS SCHOOLS: THE CASE OF GEORGETOWN UNIVERSITY

If Iowa enacts a sexual orientation statute, it must expect results that are similar to those in other jurisdictions that have sexual orientation laws. A recent decision in the District of Columbia should give Iowa pause.

In the spring of 1988, Georgetown University concluded litigation that had dragged on for eight years with two homosexual student organizations. Georgetown claimed victory but had to pay its opponents' attorney's fees, which reportedly totaled more than $640,000. Georgetown's own legal fees were probably more than $640,000. Not many religious institutions can afford "victories" where the attorney's fees alone run to some $1.5 million, and fewer can afford "victories" at the expense of their moral tenets. Georgetown's tenets were toppled by a sexual orientation ordinance that trumped the first amendment.

A. The District of Columbia Ordinance

In 1977, the District of Columbia enacted a Human Rights Act that, among other things, made it unlawful for "an educational institution [to] deny, restrict, or to abridge or condition the use of, or access to, any of its facilities and services to any person otherwise qualified, wholly or partially, for a discriminatory reason, based upon the . . . sexual orientation . . . of any individual." "Sexual orientation" means male or female homosexuality, heterosexuality and bisexuality, by preference or practice.

Similar to the Iowa bill, the District of Columbia Act contains an exception for certain religious activities, which reads in pertinent part:

Nothing contained in the provisions of this chapter shall be construed to

---

47 See supra note 9 and accompanying text.
49 Since winners do not ordinarily pay attorney's fees for losers it is difficult to credit Georgetown with a win.
51 Id. § 1-2502(28).
bar any religious or political organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious or political organization, from limiting employment, or sales, or rental of housing accommodations, or admission to or giving preference to persons of the same religion or political persuasion as is calculated by such organization to promote the religious or political principles for which it is established or maintained.\(^\text{52}\)

In November 1987, the District of Columbia Court of Appeals construed the District of Columbia Human Rights Act to mean that a university that has "invariably defined itself as a Roman Catholic institution" cannot lawfully deny funds, services, or facilities to homosexual student groups even though the Roman Catholic Church regards homosexual acts as sinful and Georgetown University regarded the activities of the student groups as inappropriate for a Catholic institution.\(^\text{53}\)

### B. Georgetown's System for Recognizing Student Groups

Before the Gay Rights Coalition complaint was filed, the homosexual student groups already had Georgetown's "Student Body Endorsement"—a status that issues from the student senate and allows a group to "(a) use University facilities; (b) apply for lecture fund privileges; (c) receive financial counseling from the comptroller; (d) use campus advertising; and (e) petition to receive assistance from Student Government."\(^\text{4}\)

But the homosexual student groups were not satisfied with "Student Body Endorsement." They wanted what Georgetown calls "University Recognition," which entitles a group to four additional benefits, viz., to "(f) use a mailbox in the [Student Activities Commission] office and request one in Hoya station; (g) use the Computer Label Service; (h) use mailing services; and (i) apply for funding."\(^\text{5}\) On religious grounds Georgetown refused to give "University Recognition."

In court, the homosexual student groups were joined by some dozen advocacy groups, including the Women's Legal Defense Fund, the Center for Constitutional Rights, Equal Rights Advocates, Lesbian Rights Project, National Women's Political Caucus, American Civil Liberties Union,

\(^{52}\) Id. § 1-2503(b).


\(^{4}\) Gay Rights Coalition, 536 A.2d at 10.

\(^{5}\) Id.
and Lambda Legal Defense and Education Fund. Also joining the student groups were the Governor's Council on Lesbian and Gay Issues of the State of Wisconsin and the City of Seattle, Washington. Amici are cited here to demonstrate what certain influential civil rights and homosexual rights advocacy groups believe a statute means. I have yet to find a case where one of these groups sided with the religious institution and said, "No, the sexual orientation statute doesn't go that far." Additionally, the District of Columbia intervened on the students' behalf.

C. Georgetown as a Religious School

Since its founding in 1789, Georgetown has been a Catholic university, and all of its presidents have been Roman Catholic clergymen. Its undergraduate bulletin says, "Georgetown is committed to a view of reality which reflects Catholic and Jesuit influences. As an institution that is Catholic, Georgetown believes that all men are sons of God, called to a life of oneness with Him now and in eternity." The Catholic Church teaches that homosexual activity is sinful. The following statements taken from the court's opinion express the position of the University and the Roman Catholic Church on the questions of homosexuality and recognizing the homosexual student groups.

Father Timothy S. Healy, the President of Georgetown University, said that based upon his understanding of the student groups:

[T]he University's official recognition and endorsement of these organizations would be contrary to and in conflict with the traditional and consistent teachings of the Roman Catholic Church on the question of human sexuality. Organizations such as those at issue, which are based on a view of human nature which emphasizes the sexual aspects of human nature as dominant to the exclusion of other values, and which encourage and foster homosexuality, are totally incompatible with the teachings of the Roman Catholic Church on human sexuality, teachings which are central to the beliefs of Roman Catholics.

Reverend Richard J. McCormick, S.J., Georgetown's theological expert, said that a Roman Catholic university

---

66 Id. at 3-4.
67 Id. at 4. Wisconsin has a state-wide prohibition on discrimination with respect to sexual orientation. "Sexual orientation" means having any preference for heterosexuality, homosexuality or bisexuality, having a history of such a preference or being identified with such a preference." Wisc. Stat. Ann. § 111.32 (13)(m) (West 1981). In the four years following the enactment of the law, there were some 150 complaints of sexual orientation discrimination filed with the State's Human Rights Commission. See Legality, Psychology and the homosexual Rights Bill, N.Y. Times, Mar. 16, 1986, at E6, col.1.
68 Gay Rights Coalition, 536 A.2d at 6.
69 Id. at 64.
“has a duty to act in a way consistent with [Catholic] teachings and not to undermine them in its public policies. . . .” Thus, “in its public policies and public acts,” the University “ought not to adopt a public policy of explicit endorsement or implicit endorsement” of, for example, abortion, premarital intercourse, or homosexual conduct. Georgetown should not “in its public actions, policies, decisions, take a position that would equivalently establish another normative lifestyle [as] equally valid with the one that is [taught by the Church].”

Georgetown combines the religious and the secular, and both elements were considered at length by the court. Notwithstanding this duality, the University was held to be sufficiently religious to claim the protection of the First Amendment. The court said it “accept[ed] that the threat of enforcement of the Human Rights Act with regard to the tangible benefits imposes a burden on Georgetown’s religious practice sufficient for it to invoke the Free Exercise Clause.”

Even so, the court found that the District of Columbia Council had a compelling interest in eliminating discrimination based on sexual preference which superseded and overrode the University’s right to free exercise of religion.

D. The Georgetown Opinion

The court did not order Georgetown to grant formal “University Recognition” to the homosexual student groups but did order the University to give the groups all the tangible benefits and services to which they would be entitled if they had such formal recognition. (The phrase “a distinction without a difference” has never been more applicable than here.) The Court summarized its opinion in this way:

The Human Rights Act does not require a grant of “University Recognition” because, in the particular scheme at Georgetown University, that status includes a religiously based on “endorsement” of the recipient student group. But the Human Rights Act does demand that Georgetown make its “facilities and services” equally available without regard to sexual orientation. Those “facilities and services” include the tangible benefits that come with “University Recognition.” Georgetown denied tangible benefits on the basis of sexual orientation and in so doing violated the Human Rights Act. The University’s [First Amendment] free exercise defense does not exempt it from compliance with the statute, because the District of Columbia’s compelling interest in eradicating sexual orientation discrimination outweighs any burden that equal provision of the tangible benefits would im-

60 Id. at 19.
61 Id. at 31.
62 Id. at 33.
63 Id. at 39.
pose on Georgetown's religious exercise.\textsuperscript{44}

All seven judges of the District of Columbia Court of Appeals wrote opinions. For our purposes, there were two major questions: Must Georgetown grant full "University Recognition" status to homosexual groups? And, if the answer to the first question is "no,"\textsuperscript{45} must the University nevertheless grant all tangible benefits associated with "University Recognition"? Judges Ferren and Terry answered the first question "yes."\textsuperscript{46} Judges Belson and Nebeker answered both questions "no."\textsuperscript{47} Judges Pryor, Mack and Newman answered the first question "no" and the second question "yes." Therefore, one majority (Pryor, Mack, Newman, Belson, and Nebeker) answered the first question "no" and held the University did not have to grant full "University Recognition," but another majority (Pryor, Mack, Newman, Ferren, and Terry) answered the second question "yes" and held that the University did have to grant all tangible benefits that "University Recognition" entails. The two votes were 5-to-2, but those votes mask the fact that on the rationale the court was split 2-3-2. It is not possible to more cleanly divide a seven member court.

Georgetown came within two votes of having to grant full, formal "University Recognition" to campus homosexual groups. Then again, it also came within two votes of winning totally on first amendment grounds. As it is, Georgetown has to extend all privileges of "University Recognition" without actually attaching the imprimatur.

Many champions of religious liberty regarded the Georgetown decision as tragically wrong, and in 1988 Congress ordered the District of Columbia City Council to amend the statute to protect religiously affiliated institutions.\textsuperscript{48} However, for reasons that are unrelated to the issues ad-

\textsuperscript{44} Id. (emphasis added)
\textsuperscript{45} For those who answer "yes" to the first question, the second is answered automatically in the affirmative.

\textsuperscript{46} See Gay Rights Coalition, 536 A.2d at 46-47 (Ferren, J., concurring in part and dissenting in part). "Georgetown University may not lawfully refuse to accord the plaintiff gay rights groups 'University [R]ecognition,' which means (1) status equal to that of the other student groups formally recognized by the university, including permission to use the university name, and (2) the tangible benefits uniformly available to other recognized groups." Id. (Ferren, J., concurring in part and dissenting in part).

\textsuperscript{47} Id. at 67 (Belson, J., concurring in part and dissenting in part). "Even if there were a valid finding that Georgetown had violated the Human Rights Act, Georgetown should prevail in this litigation on the basis of its constitutional rights under the free speech and free exercise clauses of the first amendment." Id. (Belson, J., concurring in part and dissenting in part).

dressed here, a federal district court stayed Congress's order. In 1989, Congress took matters into its own hands and changed the law itself.

The Georgetown decision teaches two vital lessons. First, a “sexual orientation” statute, even one that has a statutory exemption for religious organizations, can be used to command a church-affiliated school to provide benefits to homosexual groups even when the school raises bona fide religious objections. Neither the statutory exemption nor the Constitution will protect the school. Second, less obvious but perhaps more important, a “sexual orientation” statute transfers to the judiciary the duty to review a religious institution’s policies on human sexuality—and even the most conscientiously drafted statute cannot eliminate judicial surprises.

After Georgetown, Iowans cannot assume that the first amendment will protect religious institutions from the commands, express or implied, of a sexual orientation statute. Georgetown demonstrates how a sexual orientation statute can adversely affect the programs and activities of a religious school—and “programs and activities” means everything from the senior prom to campus newspaper advertisements to military recruiting.

President Reagan wrote the following to Senator William L. Armstrong, the chief sponsor of the Religious Liberty Act: “Your defense of religious liberty through your amendment to the D.C. Appropriations bill was admirable. It is intolerable that any jurisdiction in this country would force church-related institutions and religious schools to contravene their own religious tenets. I applaud your leadership in defending not just religious institutions within the District of Columbia but the freedom of religion throughout the country.” Letter from President Ronald W. Reagan to William L. Armstrong (Jul. 15, 1988).


See Fricke v. Lynch, 491 F. Supp. 381, 388 (D.R.I. 1980) (public school ordered to allow male high school senior to bring male date to high school prom), vacated and remanded with directions to dismiss for mootness, 627 F.2d 1088 (1st Cir. 1980).

See Sinn v. Daily Nebraskan, 638 F. Supp. 143, 150 (D. Neb. 1986) (state university newspaper's right to refuse to publish sexual orientation in classified advertisements upheld on first amendment grounds), aff’d, 829 F.2d 662 (8th Cir. 1987). But suppose after enactment of H.F. 351 a religiously affiliated school in Iowa refused to allow its bulletin boards to be used for posting of notices that begin, “gay roommate wanted”? See United States v. City of Philadelphia, 798 F.2d 81, 86 (3d Cir. 1986). Because the Armed Services of the United States do not recruit homosexuals, the City of Philadelphia Commission on Human Rights ordered Temple University to stop allowing military recruiters on its campus. See id. Holding that federal law preempted the City ordinance, the third circuit told the commission to withdraw its order. See id. The case shows that a school's program or activity can include allowing a third party to use a campus if the third party discriminates with respect to sexual orientation.
A few years ago, the Catholic Diocese of New York, the Salvation Army, and Agudath Israel, which provide New York City with such things as shelters for the homeless, the abused, and the wayward, fought the City over the Mayor’s executive order requiring city contractors to certify that they do not discriminate with respect to sexual orientation.\textsuperscript{4}

The State’s highest court did not reach the sexual orientation issue but held that the mayor had exceeded his executive authority.\textsuperscript{5} The intermediate appellate court did reach the merits of the sexual orientation issue, however, and upheld the executive order. The Appellate Division’s approach demonstrated how a court can discount a church’s moral requirements:

Where sexual proclivity does not relate to job function, it seems clearly unconstitutional to penalize an individual in one of the most imperative of life’s endeavors, the right to earn one’s daily bread.

Executive Order 50 does not prohibit the exercise of religious belief. This Order does not attempt to infringe on the right of any religious organization to maintain its religious tenets. Nor is it a restriction on a private group using its own funds for its own purposes. However, when any organization contracts to perform secular services for the City, the Mayor has the power and the authority, and the constitutional obligation, to require non-

\textsuperscript{4} See Under 21 v. City of New York, 65 N.Y.2d 344, 353-54, 482 N.E.2d 1, 3, 492 N.Y.S.2d 522, 524 (1985). Writing of his refusal to comply with the Mayor’s executive order, John Cardinal O’Connor stated:

From the outset, I tried to make it clear that we were not knowingly excluding anyone from employment because of homosexual orientation. I repeatedly stated that we would be willing to consider for employment even an individual who had actively engaged in homosexual behavior in the past, and who might, through human weakness, do so again in the future. As long as such an individual was sincerely trying to be chaste, we would willingly consider employment. The “rules” would be the same for those who, unmarried, have engaged in or might in the future engage in, what we would consider to be illicit heterosexual relations. We are profoundly aware of human weakness, and it may well be that we already employ people who have slipped homosexually or heterosexualy. We engage in no witch hunts. All of which is quite different from recruiting the homosexually oriented or being told by the city that we must employ them. That, I believe, is “excessive entanglement” in Church affairs on the part of the State. I was adamant. We would not, we could not, yield our right to employ individuals ready, willing and able to support the Church’s values in providing child care.


\textsuperscript{5} See Under 21, 65 N.Y.2d at 364, 482 N.E.2d at 10, 492 N.Y.S.2d at 531. Later, the City Council passed a “Gay Rights Law” and the Mayor issued a revised order on authority of the new law. New York City, N.Y. ADMIN CODE § 8-108.1 (1986). The law contains a religious exemption. Id. § 8-108.1(2)(c). The city and the churches continue to disagree over the law’s meaning. See J. O’CONNOR & E. KOCH, supra note 74, at 103.
discriminatory hiring policies based exclusively upon fitness for job performance.⁷⁴

Of course, religious institutions may believe (and some in fact do believe) that there are moral components or moral requirements for all jobs within their churches and affiliated organizations. In the view of these institutions, there are no jobs—no matter how lowly, no matter how distant from the altar—"where sexual proclivity does not relate to job function."

Consider this example: Under a sexual orientation statute, may a religiously-affiliated boys' home which houses, counsels, and educates troubled boys require its employees to adhere to the following pledge?

I understand that my duties and responsibilities include providing proper training, example, and image to boys under my supervision. Since homosexual activity or orientation is contrary to the generally recognized and accepted standards of morality and the standards of the church that sponsors this boys' home, I understand that if I engage in any homosexual activity or if I have a homosexual orientation that such activity or orientation will be considered to have a substantially adverse effect on the performance of my duties and be grounds for my dismissal.⁷⁷

Religious organizations wish to preserve their right and prerogative to say where "sexual proclivity" does or does not "relate to job function" within their own organizations. A sexual orientation act transfers that prerogative to administrative officers, lawyers, and judges. The question then is whether the statutory exemption or constitutional guarantee is large enough to encompass those rights and prerogatives which the religious organizations claim and which properly belong to them.

In commenting on the New York City dispute, Michael Novak wrote:

The real issue is whether the state may exact a moral pledge from a church or other free association. If the state may do so on a clearly moral issue such as sexual "preferences and practices," on what moral matters would its powers be ruled excessive?

Moreover, moral "preferences" do not so easily lie down side by side, lion with lamb, as extreme versions of moral relativism imagine. Moral visions clash, one denying what the other affirms, one finding evil what the other finds good. A declaration that citizens cannot discriminate among moral "preferences" would be self-contradictory. Nondiscrimination itself is a moral "preference." Moral relativism is not open to civilized people.

Pluralism requires that each player—the church, too—have its own integrity. It is not for the state to tell the church what to hold moral or how to


conduct itself morally. The state must uphold its own laws—but, in the area of moral choice, very carefully.  

This article has reviewed four principal cases where homosexuals brought suit against religious organizations: In Georgetown, the church-affiliated university lost (but claimed victory); in Christian Science Monitor, the church-affiliated newspaper lost in part; in Father Buchanan and Presbyterian Organist the churches won. But the simpler truth is that in each of these cases the churches lost by reason of having to face their accusers in judicial forums.

When Father Buchanan survived a motion that he be ordered to hire a homosexual in his church school, it wasn’t a victory, just Catholic endurance coupled with a sigh of relief. When the First Orthodox Presbyterian Church of San Francisco was told it did not have to keep a homosexual at the organ, that wasn’t a victory, but Presbyterian perseverance joined with thanksgiving. No church can litigate over homosexuality and be victorious. The church loses when it walks into the courthouse to submit its moral authority on sexual matters to the oversight of a civil magistrate. After the hearing or trial, if the church should “win,” it gains only a verdict, not a victory.

It is not true that everyone wins when “civil rights” bills are enacted. Churches, and the moral authority that they shoulder and the sexual restraint that they preach, will be big losers under sexual orientation statutes.

---

78 Novak, Church, State, and the Times, 37 Nat’l Rev. 46 (Feb. 8, 1985). As one commentator has explained:

Democratic government is limited government. It is limited in the claims it makes and in the power it seeks to exercise. Democratic government understands itself to be accountable to values and to truth which transcend any regime or party. . . . Limited government means that a clear distinction is made between the state and the society. The state is not the whole of the society, but is one important actor in the society. Other institutions—notably the family, the Church, educational, economic and cultural enterprises—are at least equally important actors in the society. They do not exist or act by sufferance of the state. Rather, these spheres have their own peculiar sovereignty which must be respected by the state.
