

## Legal Issues in a New Political Order

William P. Barr

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



Part of the [Catholic Studies Commons](#)

---

### Recommended Citation

William P. Barr (1995) "Legal Issues in a New Political Order," *The Catholic Lawyer*: Vol. 36 : No. 1 , Article 2.  
Available at: <https://scholarship.law.stjohns.edu/tcl/vol36/iss1/2>

This Article 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](mailto:lasalar@stjohns.edu).

# LEGAL ISSUES IN A NEW POLITICAL ORDER

WILLIAM P. BARR\*

## INTRODUCTION

This discussion addresses the challenge of representing Catholic institutions in this day and age. Rather than deal with this topic on a technical, legal plane by addressing the latest ways of protecting tax exempt status or handling charges of clergy misconduct, it takes a broader view by examining the overall challenge confronting the Church that affects us as lawyers for Catholic institutions.

### I. BREAKDOWN OF TRADITIONAL MORALITY

We live in an increasingly militant, secular age. We see an emerging philosophy that government is expected to play an ever greater role in addressing social problems in our society. It is also expected to override various private interests as it goes about this work. As part of this philosophy, we see a growing hostility toward religion, particularly Catholicism. This form of bigotry has always been fashionable in the United States. There are, today, even greater efforts to marginalize or "ghettoize" orthodox religion.

---

\* The author is a partner in the law firm of Shaw, Pittman, Potts & Trowbridge, where his practice concentrates primarily on litigation, regulatory, and administrative matters, as well as corporate investigations, compliance reviews, and independent committee assignments. Prior to rejoining Shaw Pittman, Mr. Barr served as the 77th Attorney General of the United States. Mr. Barr also served as Deputy Attorney General and as Assistant Attorney General in charge of the Office of Legal Counsel. Before joining the Justice Department, Mr. Barr practiced law with Shaw Pittman for nine years and spent four years with the Central Intelligence Agency. From 1982 to 1983, he served on the Domestic Policy staff at the White House, handling legal and regulatory matters. Mr. Barr received his undergraduate degree in Government and his masters degree in Chinese Studies from Columbia University, and his law degree with highest honors from George Washington University.

Recently, in coverage of the Waco, Texas incident,<sup>1</sup> many of us saw the media's subtle efforts to equate the cult in Waco with the Church.<sup>2</sup> Stories in the news regarding cults showed Catholic priests involved in the work of the Church.<sup>3</sup> Two thousand years ago, the Church was a strange cult on the periphery of a great pagan empire.<sup>4</sup> Some among us may feel that we might be headed in the same direction; this time not as an ascending, but as a declining faith. Indeed, a growing number of historians say that we are embarking on the "post-Christian era."<sup>5</sup> In this hostile environment, it is critically important that lawyers work to preserve the integrity of the Church and fend off encroachments on its beliefs and practices.

However, as important as this is, in many ways this legal jousting is really a rear-guard action. We are being pushed steadily off the battlefield, or have been for the last few decades. Occasionally, we are jabbing back and poking back as we backpeddle off the field. What is our larger strategy for preserving the Church and seeing it prevail? How will we get back on the battlefield? How are we going to see the Church transform the world for the better?

We are locked in a historic struggle between two fundamentally different systems of values. In a way, this is the end product of the Enlightenment.<sup>6</sup> On the one hand, we see the growing ascendancy of secularism and the doctrine of moral relativism.<sup>7</sup> On the other, we see the steady

<sup>1</sup> See Sue Anne Pressley, *Koresh's Body Identified Among Victims in Waco: Cult Leader Died of Gunshot to Head*, WASH. POST, May 3, 1993, at A1. On February 28, 1993, the Branch Dividian cult compound in Waco, Texas was raided by the Bureau of Alcohol, Tobacco, and Firearms. *Id.* The government agency besieged the cult and its leader, David Koresh, for 51 days. *Id.* Ultimately, the standoff ended when a fire caused by officials engulfed the compound. *Id.* Seventy-seven people died by either fire or gunshot wound. *Id.*

<sup>2</sup> Cf. ANTI-CATHOLICISM IN THE MEDIA (Patrick Riley & Russell Shaw eds., 1993) (examining media bias against Church).

<sup>3</sup> See Bob Harvey, *Government's Role in Tragedy at Waco*, OTTOWA CITIZEN, Apr. 24, 1993, at C6 (discussing work of Catholic clergy and noting some believe Waco incident "can be explained by the fact that religion is dangerous and synonymous with fanaticism"); cf. Jon Nordheimer, *Ex-Members Compare Campus Ministry to a Cult*, N.Y. TIMES, Nov. 30, 1994, at B1 (describing high-pressure tactics used by campus ministry to indoctrinate members).

<sup>4</sup> See generally PHILIP HUGHES, A POPULAR HISTORY OF THE CATHOLIC CHURCH (1954) (relating history of Catholic Church).

<sup>5</sup> See, e.g., HAROLD BLOOM, THE AMERICAN RELIGION: THE EMERGENCE OF THE POST-CHRISTIAN NATION (1992).

<sup>6</sup> See HENRY STEELE COMMAGER, THE EMPIRE OF REASON: HOW EUROPE IMAGINED AND AMERICA REALIZED THE ENLIGHTENMENT (1977). The Enlightenment was a period of European intellectual development during the seventeenth and eighteenth centuries in which art, philosophy, science, and politics were revolutionized. *Id.*

<sup>7</sup> See Michael J. Perry, *Moral Knowledge, Moral Reasoning, Moral Relativism: A "Naturalist" Perspective*, 20 GA. L. REV. 995, 1049-58 (1986); Raymond A. Belliotti, *Law and Revolution: The Formation of the Western Legal Tradition*, 50 BROOK. L. REV. 351, 360 n.39

erosion of the traditional Judeo-Christian moral system. Although we are all familiar with the tenets of Judeo-Christian tradition, they sound increasingly jarring to the modern ear when set forth.

Traditional Judeo-Christian doctrine maintains that there is a transcendent moral order with objective standards of right and wrong that exists independent of man's will. This transcendent order flows from God's eternal law—the divine will by which the whole of creation is ordered. This eternal law is impressed upon and reflected in nature and all created things. This is the natural law. Man can know God's law, not only through revelation, but also through the natural law, which he can discern by reason and experience.

The great insight of the Judeo-Christian tradition is that these rules of right and wrong that make up traditional morality—and which modern secularists dismiss as otherworldly superstition—are, paradoxically, the ultimate utilitarian rules for human conduct. They are the rules that are best for man—not in the by and by, but in the here and now. These are the rules that accord with the true nature of man. Therefore, adherence to them promotes what is good for man in the long run, both individually and in society. By the same token, deviation from these principles and moral laws have bad practical, real world consequences for man and society. We may not pay the price immediately, but we will eventually.

The American government, as Father John Courtney Murray wrote, was predicated precisely on this Judeo-Christian system.<sup>8</sup> Its demise would have grave consequences for the future of self-government in the United States.<sup>9</sup> We are already seeing some of the consequences of the weakening of the Judeo-Christian tradition. The Founders believed that popular government and its laws necessarily rested on an underlying moral order that was antecedent to both the state and man-made law.<sup>10</sup> For the Republic to work, the Founders thought, people must be guided by inwardly possessed and commonly shared moral values.<sup>11</sup> Self-government did not mean the mechanism by which one elected representatives to a legislative body. Self-government referred to the capacity of each individual to restrain and govern themselves. In the words of James Madison, "We have staked our future on the ability of each of us to govern ourselves according to the Ten Commandments of God." The

---

(1984). In contrast to natural law's adherence to objective moral principles, moral relativism suggests that there are no moral principles that are applicable in a universal manner. Belliotti, *supra*, at 360 n.39.

<sup>8</sup> JOHN COURTNEY MURRAY, S.J., *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION IX* (1960).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 36-37.

<sup>11</sup> *Id.*

greatest threat to free government, the Founders believed, was not governmental tyranny, but personal licentiousness—the abandonment of Judeo-Christian moral restraints in favor of the unbridled pursuit of personal appetites.

Thus, the Founders believed the choice was clear. We could govern ourselves guided by religion and morality, or we could lose our liberty altogether. In the words of John Adams, “We have no government armed with power which is capable of contending with human passions unbridled by morality and religion. Our Constitution was made only for a moral and religious people. It is wholly inadequate for government of any other.”

The Founders viewed themselves as embarking on this great experiment: Could a free people retain the moral values that would promote self-discipline and the public virtues needed to restrain licentiousness and promote the public good? After two hundred years of this experiment, I think our liberty appears indeed to be threatened. It is undeniable that, since the mid-1960s, there has been a steady and mounting assault on traditional values. We have lived through thirty years of permissiveness, the sexual revolution, and the drug culture. Moral tradition has given way to moral relativism. There are no objective standards of right and wrong. Each individual has his or her own tastes and we simply cannot say whether or not those tastes are good or bad. Everyone writes their own rule book. So, we cannot have a moral consensus or moral culture in society. We have only the autonomous individual.

After thirty years of this upheaval, what can we say about its results? Has it contributed to the sum total of human happiness? The facts speak for themselves. We are all familiar with them. We have had unprecedented violence.<sup>12</sup> We have had soaring juvenile crime,<sup>13</sup> widespread drug addiction,<sup>14</sup> and skyrocketing venereal diseases.<sup>15</sup> In fact, the more we educate people about venereal disease, the more it has in-

---

<sup>12</sup> See *Southern States Top List of Highest Murder Rates; About 70 People are Slain Each Day in U.S.*, WASH. POST, Feb. 2, 1995, at A16. Based on statistics from the National Center for Health and the Federal Bureau of Investigation's Uniform Crime Reports, one study concluded that approximately 70 people are murdered each day in the United States, which averages 25,500 homicides each year. *Id.* The United States' homicide rate is 17 times that of Japan and Ireland, 10 times that of Germany, France, and Greece, and 5 times that of Canada. *Id.*

<sup>13</sup> See Sonia Nazario, *Many Teen-agers Facing Harder Lives, Study Finds*, L.A. TIMES, Apr. 25, 1994, at A3. The number of American teens arrested for violent crimes increased 50% between 1985 and 1991. *Id.*

<sup>14</sup> See, e.g., Sally Squires, *A Profile of Area Drug Use*, WASH. POST, Nov. 8, 1994, at Z8. In a survey of Washington, D.C. area residents, 40% had taken one or more illicit drugs during their lifetime. *Id.* Twelve percent had used illicit drugs in the past year. *Id.*

<sup>15</sup> See Shari Roan, *America's Silent Epidemic; Despite Publicity About AIDS, Sexually Transmitted Diseases Are Flourishing Among Young; Experts Blame Ignorance, Double*

creased.<sup>16</sup> We have 1.5 million abortions per year<sup>17</sup> and record psychiatric disorders.<sup>18</sup> Teenage suicide has tripled in just twenty years.

An example from the California school system really drives home how much things have changed in the past twenty-five or thirty years. Several decades ago, in a California school system, the top seven problems were talking out of turn, chewing gum, making noise, running in the halls, cutting into line, dress code violations, and littering. By the mid-1980s, in that same school system, the top seven problems were drug abuse, alcohol abuse, pregnancy, suicide, rape, robbery, and assault.

Of course, the most significant feature of contemporary society has been the battering that the family has taken. Today in America, we have soaring illegitimacy rates. Almost thirty percent of children are born out of wedlock<sup>19</sup>—quadrupling in just twenty-five years. In many inner city areas, the illegitimacy rate is eighty percent.<sup>20</sup> We have among the highest divorce rates in the world. Divorce is as common as marriage.<sup>21</sup> As a consequence, we now have the highest percentage of children living in single parent households.<sup>22</sup>

This breakdown of the family is particularly distressing because the family is the principal institution by which we conduct moral education and transmit values from one generation to the next. As the family is weakened, so is our ability to transmit those values. We are sitting, right now, on top of a time bomb—a whole generation of disturbed and dis-spirited children. I can discuss at length the fruits of the new secular age, but the point is clear—the trashing that traditional morality has taken over the past twenty-five years has brought immense suffering, wreckage, and human misery.

There have been other times and places where the traditional moral order has been shaken and societies have lapsed into periods of licentiousness. But, it seems that today we are facing something quite unprecedented. In the past, society, like the human body, has had built-in,

---

*Standards and a Lack of Honest Discussion*, L.A. TIMES, Oct. 26, 1994, at A1. Each year, there are 12 million new sexually transmitted disease infections. *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> See *A Goal For All: Fewer Abortions*, WASH. POST, Feb. 3, 1995, at E3.

<sup>18</sup> See *Survey: Mental Illness Strikes 48% of United States Population*, N.Y. TIMES, Jan. 14, 1994, at A1. Forty-eight percent of Americans have suffered from a mental disorder at some point in their lives, while thirty percent suffer from one in any given year. *Id.*

<sup>19</sup> *Reaffirming the Family*, CHRISTIAN SCI. MONITOR, Feb. 2, 1994, at 22.

<sup>20</sup> Mary McGrory, *Low-Caliber Protection*, WASH. POST, Jan. 31, 1995, at A2.

<sup>21</sup> See Nancy Ross-Flanigan, *Bliss or Bust; Simple Formulas Can Tell if a Union Will Succeed or Fail*, DETROIT FREE PRESS, Feb. 14, 1995, at F8 (suggesting marriages are more likely to end in divorce, rather than succeed).

<sup>22</sup> See *Half of U.S. Children Live in Nontraditional Families*, DETROIT FREE PRESS, Aug. 30, 1994, at 2A.

self-corrective mechanisms that help things get back on course if the society gets too far adrift. Decent people rebel; people coalesce and rally against obvious excess; eternal truths are rediscovered. The analogy is to the pendulum. We've all thought that somehow the pendulum will naturally swing back. Are we sure now that it will? Today, I think we face a number of factors that are unprecedented—which may mean that we cannot count on the pendulum swinging back.

## II. BARRIERS TO THE RETURN OF TRADITIONAL MORALITY

### A. *High-Tech Popular Culture*

First and foremost, we face the immense power of mass communications, popular culture, the entertainment industry, academia, and so forth. The power and pervasiveness of our high-tech popular culture not only fuels the collapse of morality, but also drowns out the scattered voices that are raised against excess. When those people who seek to restore some traditional morality stick their heads up above the trenches, they suffer what amounts to a saturation bombing of ridicule. A good example of this experience is the response to Cardinal O'Connor in New York.<sup>23</sup>

### B. *Government's Subsidization of Social Problems*

Another modern phenomenon that makes it harder for society to restore itself is the new role of governmental power. When past societies had deviated too far from sound moral principles regarding how to conduct themselves, they ended up paying a very high price. They recoiled from the excess and readjusted their paths. This corrective mechanism relates back to the concept of natural law being the ultimate utilitarian rule. Venereal disease is the price that we pay for sexual licentiousness in terms of health costs and other losses.<sup>24</sup> Dis-spirited children, violent crime, and poverty are the price we pay for the breakdown of the family

---

<sup>23</sup> See, e.g., Judy Foreman, *Abortion Foes Want Hecklers Arrested; Activists Disrupted Cardinal's Speech*, BOSTON GLOBE, Jan. 21, 1992, at 18 (describing "planned disruption" by gay-rights activists at speech given by Cardinal O'Connor regarding his religious beliefs opposing abortion); Peter Steinfeld, N.Y. TIMES, Sept. 14, 1991, at A25 (describing dispute over telecast of documentary, "Stop the Church," featuring disruption of mass given by Cardinal O'Connor at St. Patrick's Cathedral).

<sup>24</sup> See Roan, *supra* note 15, at A1 (citing increasing promiscuity as factor in alarming rate of sexually transmitted diseases among youths); Sidney Callahan, *Society Needs Sexual Evolution: Permissiveness vs. Authentic Liberation*, NAT'L CATH. REP., June 4, 1993, at 19 (reporting 56 million cases of sexually transmitted diseases per year as negative consequence of "serial sexual encounters").

structure.<sup>25</sup> Today, there is something new. The state no longer sees itself as a moral institution, but a secular one. It takes on the role of the alleviator of bad consequences. The state is called upon to remove the inconvenience and the costs associated with personal misconduct. Thus, the reaction to disease and illegitimacy is not sexual responsibility, but the distribution of condoms; our approach to the decomposition of the family is to substitute the government as the "breadwinner;" the reaction to drug addiction is to pass out needles.<sup>26</sup> While we think we are solving problems, we are actually subsidizing them. By lowering the cost of misconduct, the government serves to perpetuate it. The corrosive impact on society continues, and like most solutions that deal with symptoms rather than causes, it only makes matters worse.

This phenomenon of the government serving as the alleviator of bad consequences has gained much impetus by the emergence of a new moral code. There are essentially three different competing moral codes in the marketplace of ideas these days. There is the concept of rampant autonomous individualism at the vanguard of the secularist movement: Everyone "does their own thing."<sup>27</sup> Unless one can point to an immediate victim, don't bother me. I'll write my own rules. We also have the traditional Judeo-Christian morality that focuses on private action, but requires each individual to exercise self-control in their personal lives and to sacrifice their own interests and appetites when necessary for the greater good. This approach seeks to transform the world by focusing on the individual person and on private morality.

The new morality might be termed "macro-morality." To impose strictures on private conduct would be in bad taste. We do recognize, however, that some of the licentiousness goes too far since there are social problems that result. So, we have to act collectively to deal with manifestations of social problems. Morality is thus gauged by one's com-

---

<sup>25</sup> See James H. Andrews, *Cities Identify 'Risk Factors' that Lead to Juvenile Crime*, CHRISTIAN SCI. MONITOR, Nov. 18, 1986, at 25 (suggesting correlation between absence of fathers and juvenile crime).

<sup>26</sup> See *Focus on Prevention Tools, Mayoral AIDS Tasks Force Told*, 2 HEALTH CARE POL'Y REP. (BNA) No. 5, at D-34 (Jan. 31, 1994) (citing AIDS Task Force Chairman Hector Luis Acevedo as recommending condom distribution and needle exchange programs as principle prevention methods). At a meeting of the House Energy and Commerce Subcommittee on Health and the Environment on July 12, 1994, Subcommittee Chairman Henry Waxman (D-Calif.) "warned his colleagues to ignore 'right wing politicians' who refuse to provide federal funding for condom and hypodermic needle distribution programs." *House Panel Told Local Approach to Halt Spread of HIV Necessary*, 2 HEALTH CARE POL'Y REP. (BNA) No. 29, at D-19 (July 18, 1994).

<sup>27</sup> See STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 171 (1993) (noting that, although secular humanism is not properly a religion, it might be considered an ideology that is "characterized by an emphasis on moral relativism and the celebration of self").



mitment to social action that ameliorates the consequences of misconduct. This system tolerates and encourages individuals to ignore strictures on personal conduct and suggests, in effect, that one can find salvation on the picket line, by being involved in the environmental movement, by promoting condom distribution or a host of other causes. That's the gauge of morality.

### C. *Law as a Weapon for Promotion of Secularization*

The third phenomenon that makes it difficult for the pendulum to swing back is the way the law is being used as a weapon to break down traditional morality and establish moral relativism as the new orthodoxy. This use of law as a legal weapon is what should concern us most as lawyers. Since we are a very legalistic society, it should not surprise us that the law has become one of the principal battlegrounds for this struggle. The law is being used in several ways.

First, through legislative action, litigation, or judicial interpretation, secularists continually seek to eliminate laws that reflect traditional moral norms. Decades ago, we saw the barriers to divorce eliminated.<sup>28</sup> Twenty years ago, we saw the laws against abortion swept away.<sup>29</sup> Today, we are seeing the constant chipping away at laws designed to restrain sexual immorality, obscenity, or euthanasia.<sup>30</sup>

These developments are very serious and cannot be viewed with equanimity. We cannot just worry about our own private morality. The content of the law plays a very important part in framing and shaping the moral culture of the society—morality will follow the law. What is made legal will ultimately be viewed, by most people, as moral. There is no better example of this than abortion. Prior to the United States Supreme Court's decision in *Roe v. Wade*,<sup>31</sup> the vast majority of Americans believed that abortion was a moral evil, an abomination, and a scandal. Since *Roe*, the number of Americans, including Catholics, who consider abortion a moral evil is steadily declining.

The second way in which secularists use law as a weapon is to pass laws that affirmatively promote the moral relativist viewpoint. Such laws seek to ratify, or put on an equal plane, conduct that previously was

---

<sup>28</sup> See GLENDA RILEY, *DIVORCE: AN AMERICAN TRADITION* 156 (1991). By 1970, all states allowed divorce. *Id.* By the beginning of the 1980s, 50% of all marriages ended in divorce. *Id.*

<sup>29</sup> See *Roe v. Wade*, 410 U.S. 113 (1972).

<sup>30</sup> See, e.g., *In re Quinlan*, 355 A.2d 647, 662-64 (N.J.), *cert. denied sub nom. Garger v. New Jersey*, 429 U.S. 922 (1976) (holding woman in persistent vegetative state had constitutional right of privacy to terminate treatment); *Belchertown State School v. Saikewicz*, 370 N.E.2d 417, 424 (Mass. 1977) (withholding chemotherapy from terminally ill, mental incompetent based on right of privacy and informed consent).

<sup>31</sup> 410 U.S. 113 (1972).

considered immoral. For example, laws are proposed that treat a cohabitating couple exactly as one would a married couple. Landlords cannot make the distinction, and must rent to the former just as they would to the latter.<sup>32</sup> This kind of law declares, in effect, that people, either individually or collectively, may not make moral distinctions or say that certain conduct is good but another is bad. Another example was the effort to apply District of Columbia law to compel Georgetown University to treat homosexual activist groups like any other student group.<sup>33</sup> This kind of law dissolves any form of moral consensus in society. There can be no consensus based on moral views in the country, only enforced neutrality.

The third way in which the law is used to promote secularization is as a weapon directly against religion and religious institutions. Increasingly, we can expect efforts to use the Establishment Clause<sup>34</sup> to exclude religiously motivated citizens from participation in public benefits and from the public square generally. *Lee v. Weisman*<sup>35</sup> was a very disappointing setback for those who had hoped for more reasonable Establishment Clause jurisprudence—less hostile to religion and more faithful to its original intent.<sup>36</sup> The psychological coercion test embraced by Justice Kennedy<sup>37</sup> is susceptible to radical expansion in ways that will continue to press religion to the margins.

Two recent decisions, however, indicate that the Supreme Court may not be willing to go to extremes. In *Lamb's Chapel v. Center Moriches Union Free School District*,<sup>38</sup> the Court held that the denial of access to a

---

<sup>32</sup> See, e.g., *Attorney General v. Desilets*, 636 N.E.2d 233, 235 (Mass. 1994) (applying state statute prohibiting discrimination by landlords on basis of marital status to cohabitating couple); *Foreman v. Anchorage Equal Rights Comm'n*, 779 P.2d 1199, 1203 (Alaska 1989) (declaring landlord's refusal to rent to unmarried couple constituted unlawful discrimination based on marital status).

<sup>33</sup> The United States Court of Appeals for the District of Columbia held that Georgetown University's refusal to grant a homosexual rights organization equal status constituted a violation of D.C.'s Human Rights Act. See *Gay Rights Coalition v. Georgetown Univ.*, 536 A.2d 1, 39 (D.C. Cir. 1987).

<sup>34</sup> U.S. CONST. amend. I.

<sup>35</sup> 112 S. Ct. 2649 (1992).

<sup>36</sup> In *Lee*, the United States Supreme Court held that a Long Island school system's practice of including invocations in graduation ceremonies violated the Establishment Clause of the First Amendment. *Id.* at 2655. As Professor Carter points out, however, "this was not daily prayer of the sort with which earlier decisions were concerned." CARTER, *supra* note 27, at 188.

<sup>37</sup> 112 S. Ct. at 2657-59. "[T]he school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the Invocation and Benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion." *Id.* at 2658.

<sup>38</sup> 113 S. Ct. 2141 (1993).

school premises after hours to show a Dobson film, *Turning Our Hearts Home*, that addressed family issues from a religious perspective was unconstitutional.<sup>39</sup> In *Zobrest v. Catalina Foothills School District*,<sup>40</sup> the Court held that the state's provision of an interpreter to a profoundly deaf student did not violate the Establishment Clause.<sup>41</sup>

Nevertheless, other battles over participation in public problems are brewing. Perhaps the most important are the proposals for various school choice programs, many of which are limited to public schools or secular private schools.<sup>42</sup> We can also expect to see laws of general applicability used to encroach on religious practices and the autonomy of religious institutions. In the wake of the "peyote case," *Employment Division, Oregon Department of Human Resources v. Smith*,<sup>43</sup> it remains to be seen just how much protection is actually afforded by the Free Exercise Clause.<sup>44</sup> Unfortunately, we may see a trend toward increasing constraints on religious belief and practices to promote competing secular values that are deemed more "worthy" of protection and advancement. A favorite device among facially neutral laws are the laws prohibiting discrimination on the basis of religion, marital status, and sexual orientation.<sup>45</sup> There will be an effort to apply those laws to Catholic institutions and override matters of conscience. Much depends on the character of the judiciary over the next several years to see just how that process works.

#### CONCLUSION

In the face of such a pervasive popular culture, mass media, and powerful state that sees itself as a secular institution alleviating the consequences of misconduct and often promoting moral relativism, how can

---

<sup>39</sup> *Id.* at 2145-48.

<sup>40</sup> 113 S. Ct. 2462 (1993).

<sup>41</sup> *Id.* at 2467.

<sup>42</sup> See CARTER, *supra* note 27, at 192-95 (discussing voucher programs and Catholic schools).

<sup>43</sup> 494 U.S. 872 (1990). In *Smith*, the Court held that the Free Exercise Clause did not prohibit the state of Oregon from denying unemployment benefits to individuals who had ingested peyote as part of a ceremony at a Native American church. *Id.* at 890. The Court reasoned that exempting certain conduct on the basis of a constitutional exercise of religious freedom alone would open the door to exemptions from laws regarding military service, payment of taxes, and even manslaughter and child neglect laws. *Id.*

<sup>44</sup> U.S. CONST. amend. I.

<sup>45</sup> See, e.g., CAL. HEALTH & SAFETY CODE § 1365.5 (Deering Supp. 1995) (prohibiting refusal to provide health care plans based, in part, on religion, marital status, or sexual orientation); MINN. STAT. ANN. § 363.03 (West Supp. 1995) (prohibiting labor organizations from discriminating based, in part, on marital status, religion, or sexual orientation); MASS. GEN. LAWS ANN. ch. 151B, § 4 (prohibiting employers from discriminating based on sexual orientation or religion).

we be confident that the pendulum will swing back? In a sense, I have painted a very bleak but realistic picture. The real message is that we are going to have to do more than joust around the margins. We must re-enter the fray in an effective way; take the battlefield and enter the struggle, rather than just retire in good order. The key is a return to basics—in a sense, to reassemble the flock.

The key is Catholic education.<sup>46</sup> Failing to prepare Catholics to hold their own has led to an erosion of the Catholic base. In a sense, the power of our numbers is dwindling. Poll after poll show that Catholic views are indistinguishable from the general views of the secular public.<sup>47</sup> In fact, in many areas, we appear less faithful to traditional morality than do many other denominations. The fundamental mission of the Church is precisely to transmit faith from one generation to the next. We have relaxed in this mission, just at the time where the counter-propaganda has reached its peak. As a consequence, Catholics are less and less equipped to deal with the marketplace of ideas that exists today. What good is it for us to charge up a hill and fight issues—whether abortion, tax exemption, or foster care—when there are fewer and fewer people following the leadership of the Church? This seems to have grave consequences for the Church as a whole. If the Catholic faithful do not take the hierarchy seriously, why should anybody else in the political structure? It is no accident that the homosexual movement, at one or two percent of the population, gets treated with such solicitude while the Catholic population, which is over a quarter of the country, is given the back of the hand. How has that come to be?

We need to go back to basics and reassemble the flock. We may be frittering away our limited moral capital on a host of agenda items. Ultimately, it will make very little difference unless we eventually train the next generation in the Catholic faith. From a legal standpoint, our initial focus should be on education and efforts to strengthen and finance education. This means vouchers at the state level and ultimately at the federal level to support parental choice in education. We should press at every turn for the inclusion of religious institutions. We need to fight those cases in the states up to the Supreme Court. Whether or not we prevail on programs should make no difference. The message will get stronger.

---

<sup>46</sup> See 1983 CODE c.798. "Parents are to entrust their children to those schools in which Catholic education is provided; but if they are unable to do this, they are bound to provide further suitable Catholic education outside the schools." *Id.*

<sup>47</sup> See, e.g., *Washington Post-ABC News Poll*, WASH. POST, Aug. 13, 1993, at A15 (reporting that 76% of Catholics aged 31 to 44 do not consider Pope's stance against artificial birth control personally binding); *id.* (reporting that 70% of Catholics aged 18 to 30 do not feel bound by Pope's opposition to divorce); *id.* (reporting the 71% of Catholics aged 18 to 30 do not consider Pope's opposition to premarital sex personally binding).

Even without legal change, we need to restructure education and take advantage of existing tax deductions for charitable institutions to promote Catholic education. We must rethink some changes implemented in Catholic education over the last twenty or thirty years. Education in the basics of faith should again be the primary mission of the parish Church. We should reaffirm the mission and duty of Catholic parents to educate their children in the faith,<sup>48</sup> and we should help change laws to reduce the costs to parents who want that choice. That is the single most important thing we could do; the ramifications carry far beyond mere education. Such change would give renewed vigor to many of the other things that we are pursuing as a Church in both political and other realms. It would accomplish more than any other single thing we could do.

---

<sup>48</sup> 1983 CODE c.798.