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Constitutional Law -- Religious Segregation of Public Schools -- The Wearing of Distinctive Religious Garb by Public School Teachers While Teaching

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adequate representation. In the majority of cases the erring lawyer is reputable and professionally competent; he has merely committed error that made him ineffective in the disputed case. It would seem obvious that disciplinary action is warranted only if the performance of the attorney is such that it reflects on the integrity of the profession. Assuming that decisions in recent years are indicative of the trend, courts will become more objective and more demanding as to the quality of representation required by the Constitution. The organized bar should begin now to take steps that will aid the courts in formulating an adequate and workable standard. The efforts of the bar have been highly successful in solving problems for providing counsel to indigent defendants. It can be assumed that they will be successful in devising objective standards in evaluating the defense rendered in a given case.

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Constitutional Law—Religious Segregation of Public Schools—The Wearing of Distinctive Religious Garb by Public School Teachers While Teaching

In *Moore v. Board of Educ.*[1] a parent-taxpayer sought a declaratory judgment to the effect that defendant school board's method of operating three of the schools in the district violated the first amendment and Ohio constitutional prohibitions[2] against the establishment of religion. Also, a declaratory judgment was sought against the placement plan, the effect of which was to create three schools totally Catholic and one predominantly non-Catholic, on the ground that it was a denial of equal protection of the law under the fourteenth amendment as applied in *Brown v. Board of Educ.*[3] Prayer for an injunction to prohibit these practices was joined with the request for declaratory relief. The plaintiff further sought an injunction against the wearing of religious garb by nuns while teaching in public schools on the ground that it introduced sectarianism into the schools.

The court held that there was a governmental establishment of religion and issued an injunction accordingly, stating that the total effect of all of defendant's practices was to use public school funds

[1] 4 Ohio Misc. 257, 212 N.E.2d 833 (C.P. 1965).
[2] OHIO CONST. art. 1, § 7. See note 23 *infra*.
[3] 347 U.S. 483 (1954).

for the operation of parochial schools.[4] The court, however, did not grant injunctive relief against the religious segregation effectuated by the placement plan, holding that *Brown v. Board of Educ.* was not applicable.[5] The court also refused to enjoin the practice of wearing religious garb by public school teachers while teaching, stating that such practice did not convert the school where they taught into a sectarian institution.[6]

The court is no doubt correct in its determination that there had been an establishment of religion. Taking into consideration the total effect of the defendant's released time program and other practices, no other result could have been reached on this issue.[7] It is felt that the court adequately discussed this aspect of the case in its opinion; consequently, it will not be further considered in this note.

In determining that *Brown v. Board of Educ.*[8] was not applicable, the court found lack of evidence that religious segregation adversely affected the students' motivation to learn or that the student in the segregated school received educational opportunities substantially inferior to those of the nonsegregated school. It will be recalled that the court in *Brown* reacted to a large volume of evidence showing the psychological, sociological, and economic impact that racially segregated schools have on the Negro child. Similar evidence might have been introduced in the principal case.[9] But even

[4] 4 Ohio Misc. at 271-77, 212 N.E.2d at 842-45.

[5] *Id.* at 268-69, 212 N.E.2d at 839-40.

[6] *Id.* at 269-71, 212 N.E.2d at 840-41.

[7] These practices included (1) providing a released-time religious program one hour per day, five days per week, with religious instruction given by the classroom teachers at a Catholic church nearby; (2) determination of attendance at the several schools on basis of religion rather than geography, supposedly under a parental choice plan; (3) allowing pupils from outside the district to attend such schools with tuition paid by their parish; and (4) renting from the Roman Catholic Church for ninety-nine years at a rental of one dollar per year the properties upon which three of the schools were constructed. *Id.* at 268-77, 212 N.E.2d at 839-45.

[8] 347 U.S. 483 (1954).

[9] The usual makeup of the Catholic parochial school encompasses students from all ethnic and cultural backgrounds. FICHTER, PAROCHIAL SCHOOL: A SOCIOLOGICAL STUDY 451 (1958). Therefore, it could be reasoned that religious segregation is not detrimental to the students' education. However, parochial schools have been criticized as contributing to a divisiveness in America and promoting religious bigotry. If so, they may be considered to have adverse effects upon the students. See MCCLUSKEY, CATHOLIC VIEWPOINT ON EDUCATION 36-38 (1959). See also Thomas, *Voluntary Religious Isolation—Another School Segregation Story,* 40 PHI DELTA KAPPAN 347 (1959).

without such evidence, it is submitted that *Brown* should apply. *Brown,* in its broader meaning, seems to stand for the proposition that the Constitution does not permit artificial classifications by the state whether they be made on the basis of race, color, status, or religion. These factors are said to be constitutionally irrelevant;[10] consequently, any classification founded upon them should be a violation of equal protection of the laws.[11]

Congress categorized these classifications as unlawful in the Civil Rights Act of 1964.[12] It would seem that the practices of the defendant school board violate this act.[13] The act defines desegregation as the assignment of students to public schools "without regard to their race, color, *religion,* or national origin. . . ."[14] The statute has no provision requiring any proof of equal or unequal facilities or that the students' motivation to learn has been impaired in any way. The inference seems to be that the classification itself is a violation of equal protection. Assuming the constitutionality of the relevant provisions of the act, the *Moore* court should have taken cognizance of them and stricken down the placement plan.

The religious garb question turns on the legality of the religious segregation. If the garbed teacher instructs only those of his own religion, as in *Moore,* then the objections to the garb would seem to have little merit.[15] But since the religious segregation would

[10] Edwards v. California, 314 U.S. 160, 184 (1941) (Jackson, J., concurring).

[11] Tussman & tenBroek, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341, 353 (1941). A case very similar to *Moore* on its facts is Harfst v. Hoegen, 349 Mo. 808, 163 S.W.2d 609 (1942). There the Missouri Supreme Court found religious segregation of public schools to be a violation of complete *religious freedom* and did not consider the equal protection argument. The court did, however, recognize the unconstitutionality of the religious classification. See also Plessy v. Ferguson, 163 U.S. 537, 558 (1896) (Harlan, J., dissenting). "[I]f this statute of Louisiana [requiring racial segregation] is consistent with the personal liberty of citizens, why may not the state require the separation . . . of *Protestants* and *Roman Catholics*?" (Emphasis added.) Justice Harlan's dissent is essentially the view espoused by the Supreme Court today. The present Court, if faced with religious segregation, would probably answer his rhetorical question in the negative.

[12] 78 Stat. 240, 42 U.S.C. § 1981 (1964).

[13] 78 Stat. 248, 42 U.S.C. 2000c-6(a)(1), (2) (1964).

[14] 78 Stat. 246, 42 U.S.C. § 2000c(b) (1964). (Emphasis added.)

[15] *But see* Harfst v. Hoegen, 349 Mo. 808, 163 S.W.2d 609 (1942), indicating that religious garb and insignia are impermissible in the school even when the garbed teacher and his pupils are of the same faith.

seem to be unconstitutional, the garb question will here be treated as though the classroom were religiously integrated.

The court followed what it stated to be the majority rule: the wearing of religious garb by public school teachers while teaching cannot be prevented in absence of a statute or regulation expressly prohibiting it.[16] The religious garb question seems to place two highly regarded constitutional provisions—the guarantee of free exercise of religion and the prohibition against governmental establishment of religion—in opposition to each other.[17] If a teacher is dismissed because of his religious dress, such dismissal would seem tantamount to denying him free exercise of his religious beliefs. However, to allow the teacher to wear his religious habit in the public school could be to favor one religion over others and thus to "establish" the favored religion.[18]

The leading case for the majority view is *Hysong v. Gallitzin Bourough School Dist.*[19] There it was held that to deny teachers

[16] 4 Ohio Misc. at 469-70, 212 N.E.2d at 841. *Quaere*: If the teacher has a constitutionally protected right to teach while wearing the garb, would not a statute or regulation prohibiting it be unconstitutional?

[17] Both provisions are set out in U.S. CONST. amend. I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." These provisions are made applicable upon the states through U.S. CONST. amend. XIV, § 1. Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943). All states have somewhat similar provisions. See PFEFFER & BAUM, MEMORANDUM ON DISPLAY OF CROSSES, CRUCIFIXES, CRECHES, AND OTHER RELIGIOUS SYMBOLS ON PUBLIC PROPERTY 2 (1957).

[18] See notes 20-23 *infra* and accompanying text. *"It is only necessary that the practice or enactment have the net effect of placing the official support of the local or national government behind a particular denomination or belief."* Reed v. Van Hoven, 237 F. Supp. 48, 53 (W.D. Mich. 1965). (The emphasis is that of the court.)

[19] 164 Pa. 629, 30 Atl. 482 (1894). It is to be noted that *Hysong* represents the majority *in absence* of statute or regulation. Several jurisdictions have prohibited the practice by statute or regulation, and the trend seems to be moving in this direction. BUTTS, THE AMERICAN TRADITION IN RELIGION AND EDUCATION 197-99 (1950). See NEB. REV. STAT. § 79-1274 (1958); N.D. CENT. CODE § 15-47-29 (1959); ORE. REV. STAT. §§ 342.650-.655 (Supp. 1965), applied in 1926-28 ORE. OPS. ATT'Y GEN. 237. *But see* WIS. STAT. ANN. § 40.435 (1957), which seems to indicate that garbed nuns can be hired as public school teachers. This statute is discussed by Boyer, *Religious Education of Public School Pupils in Wisconsin*, 1953 WIS. L. REV. 181, 214.

Even the *Hysong* case was overturned by PA. STAT. ANN. tit. 24, § 11-1112 (1962), which was upheld in Commonwealth v. Herr, 229 Pa. 132, 78 Atl. 68 (1910). Adhering to the *Hysong* rule are City of New Haven v. Town of Torrington, 132 Conn. 194, 43 A.2d 455 (1945); State *ex rel.* Johnson v. Boyd, 217 Ind. 348, 28 N.E.2d 256 (1940); Rawlings v. Butler, 290 S.W.2d 801 (Ky. 1956); Gerhardt v. Heid, 66 N.D. 444, 267 N.W. 127 (1936).

employment because of their distinctive religious dress would be to impose a high penalty upon one for a particular religious belief. The dissent felt that such teachers could be excluded in that "the common schools cannot be used to exalt any given church or sect. . . ."[20] The leading case for the minority is *Knowlton v. Baumhover*,[21] which expressly adopted the dissenting opinion in *Hysong*. The *Baumhover* principle was later more explicitly set forth in *Zellers v. Huff*.[22] This court said that

> the wearing of religious garb and religious insignia must be henceforth barred, during the time the Religious are on duty as public school teachers. . . . Not only does the wearing of religious garb and insignia have a *propagandizing* effect for the Church, but by its very nature it introduced sectarian religion into the school.[23]

North Carolina has no case, statutory, or administrative law relative to religious garb in public schools. Public school authorities in North Carolina could apparently regulate the dress of teachers by analogy to a recent North Carolina Attorney General's opinion that school authorities could require students to conform to "a sensible personal appearance" or face expulsion. Greensboro Daily News, Sept. 25, 1965, p. 1, col. 1.

[20] 164 Pa. at 661, 30 Atl. at 485.

[21] 182 Iowa 691, 166 N.W. 202 (1918).

[22] 55 N.M. 501, 236 P.2d 949 (1951).

[23] *Id.* at 525, 236 P.2d at 964. (Emphasis added.) *Huff* should have been strong authority for the *Moore* court in that the applicable sections of the constitutions of Ohio and New Mexico are nearly identical. *Huff* was based in part upon N.M. CONST. art. 2, § 11, forbidding that any "preference be given by law to any religious denomination or mode of worship." OHIO CONST. art. 1, § 7, provides that "no preference shall be given, by law, to any religious society . . . ."

The *Huff* court relied extensively upon O'Connor v. Hendrick, 184 N.Y. 421, 77 N.E. 612 (1906), that upheld an administrative regulation prohibiting the wearing of religious garb by public school teachers while teaching. The court in *O'Connor* said:

> [T]he effect of the costume worn by these sisters of St. Joseph at all times in the presence of their pupils would be to inspire respect if not sympathy for the religious denomination to which they so manifestly belong.

Id. at 428, 77 N.E. at 614 (1906).

See also Outcalt v. Hoefler, (unreported), Logan County Dist. Court, Colo. (Aug. 1952), cited in Boyer, *supra* note 19, at 227 n.156; Harfst v. Hoegan, 349 Mo. 808, 163 S.W.2d 609 (1942); State *ex rel.* Pub. School Dist. v. Taylor, 122 Neb. 454, 240 N.W. 573 (1932).

See generally BOLES, THE BIBLE, RELIGION, AND THE PUBLIC SCHOOLS 157-59 (1963); DIERENFIELD, RELIGION IN AMERICAN PUBLIC SCHOOLS 84-85 (1962); PFEFFER, CHURCH, STATE, AND FREEDOM 412-27 (1953); TORPEY, JUDICIAL DOCTRINES OF RELIGIOUS RIGHTS 258-60 (1948). For a close look at the church-state problems of Kentucky in education, see COLLIER, EDUCATION, RELIGION, AND THE KENTUCKY COURT OF APPEALS (1960).

There is merit to the *Baumhover-Huff* doctrine. The *Moore* court, while indicating that the dress of the sisters did denote their membership in a religious sect, felt that the garb itself did not teach and that it merely represented "modesty, unworldliness, and an unselfish life."[24] It is true that the garb does not "teach" in the traditional sense. Even courts adhering to the *Hysong* doctrine would not allow the oral interjection of religious dogma into the classroom by the teacher.[25] Yet speech is only one form of communication. In *West Virginia State Bd. of Educ. v. Barnett*[26] the Supreme Court observed that "symbolism is a primitive but effective way of communicating ideas."[27] Going further, the Court said "the Church speaks through the Cross, the Crucifix, the altar and shrine, and *clerical raiment.* Symbols of State often convey political ideas just as religious symbols come to convey theological ones."[28]

The establishment clause is said to require a complete wall of separation between church and state, thus compelling governmental neutrality in regard to religion.[29] It would seem difficult to maintain this neutrality if public school teachers are allowed to bring their religion into the classroom by way of their religious habit. The school is second only to the family in the development of the child's personality, and the teacher plays an important role in the influence of the school.[30] Children seem to identify with the teacher and to take on his characteristics.[31] The result could be an inclina-

[24] 4 Ohio Misc. at 270, 212 N.E.2d at 841.

[25] See, *e.g.*, Rawlings v. Butler, 290 S.W.2d 801, 804 (Ky. 1956). It is difficult to believe that a nun could teach without openly interjecting her religion into the classroom. See CUSHING, THE MISSION OF THE TEACHER (1962).

[26] 319 U.S. 624 (1943).

[27] *Id.* at 632.

[28] *Ibid.* (Emphasis added.)

[29] There is no Constitutional language per se calling for "a wall of separation." This phrase was first used by Jefferson years after the adoption of the first amendment. He declared its purpose was to create a wall of separation. See Comment, 63 COLUM. L. REV. 73, 82 n.66 (1963). The courts have quoted him extensively. See, *e.g.*, Engel v. Vitale, 370 U.S. 421 (1962); Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948); Everson v. Board of Educ., 330 U.S. 1 (1947).

[30] BAUGHMAN & WELSH, PERSONALITY: A BEHAVIORAL SCIENCE 226-35 (1962). See also BERENDA, THE INFLUENCE OF THE GROUP ON THE JUDGMENTS OF CHILDREN (1950).

[31] Amatora, *Similarity in Teacher and Pupil Personality*, 37 J. OF PSYCHOLOGY 45 (1954). *Cf.* POUNDS & BRYNER, THE SCHOOL IN AMERICAN SOCIETY 271 (1959). It seems that the younger the child is, the greater influence the teacher has upon him. See BERENDA, *op. cit. supra* note 30.

tion to favor the religion of the teacher, especially if the teacher constantly keeps his or her religion before the child by means of symbolic dress.

This problem could take on added complexity if the student were of agnostic parentage or if the parents were adamantly opposed to the religion represented by the teacher. A somewhat parallel situation was presented in *Abington School Dist. v. Schemp*.[32] There the Supreme Court was in part concerned about the well-being of the nonbelieving students who were subjected to Bible reading as authorized by a state statute.[33] The Court indicated that the child who sought exemption from the Bible readings would be treated as an "odd ball" and would be under peer group pressure to conform to the beliefs of the majority.[34] Ohio has an education statute requiring mandatory school attendance that in a sense creates a captive audience for the teacher.[35] If the nonbelieving student could be psychologically impaired by pressures resulting from the daily recitation of the Bible, could not the conflicting pressures from the home, from the group, and from the teacher clothed in religious paraphenalia have at least an equal effect upon the student?

Apparently there has been no federal litigation regarding the wearing of religious garb by public school teachers while teaching.[36] If such litigation should occur, it is hoped that the Supreme Court would follow its present trend requiring a complete separation of church and state and adopt the minority rule, barring the wearing of religious garb. Such rule would avoid favoritism of any religion and could also alleviate any possible harmful effects to the students.

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The Missouri Supreme Court in Berghorn v. Reorganized School Dist., 364 Mo. 121, 132, 260 S.W.2d 573, 578 (1953) (per curiam), said "children of grade school age are under-developed and are particularly susceptible to the influence of their teachers and surroundings and the actions of the children with whom they are associated."

[32] 374 U.S. 203 (1963). See Hanft, *The Prayer Decisions*, 42 N.C.L. REV. 567 (1962).

[33] PA. STAT. ANN. tit. 24, § 15-1516 (1962).

[34] 374 U.S. at 289-91 nn. 68 & 69.

[35] OHIO REV. CODE ANN. §§ 3321.03-.04 (Supp. 1965).

[36] The only time this problem has ever been encountered within the federal government was by virtue of a regulation promulgated by the Commissioner of Indian Affairs in 1912. This regulation prohibited the wearing of religious insignia and garb by teachers employed in the Indian schools. A public controversy ensued, and President Taft permanently revoked the regulation. See JOHNSON & YOST, SEPARATION OF CHURCH AND STATE 119-22 (1948).