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THE FORGOTTEN HATRED: ANTI-CATHOLICISM IN MODERN AMERICA

I. INTRODUCTION

There are over fifty million Roman Catholics in the United States today,¹ forming the largest single minority group in the nation, and far outnumbering such recognized minority groups as blacks or Hispanics.² Surveys report that America's Catholics are among the highest achievers in the nation³ and yet, for many Catholics, the American dream goes unfulfilled.

Unseen by most of the population, but strongly recognized by a growing number of American Catholics, is the specter of resurgent anti-Catholicism. American Catholics see their values under assault, their clerical leaders mocked in the media, and their socio/moral positions stigmatized by the press for being inherently suspect as "Catholic" positions. Consequently, many Catholics are coming to see themselves as strangers in their own land.

Nativist anti-Catholicism is America's most persistent type of group hatred.⁴ For more than three hundred years nativism has existed, seldom flaring up but never far from the social surface. While not necessarily the most violent or blatant bias, anti-Catholicism is the one which runs deepest in the American psyche.⁵

It is precisely because anti-Catholicism is not as blatant or

1. American membership in the Roman Catholic Church as of 1979 was 49,836,176 THE OFFICIAL CATHOLIC DIRECTORY (1979). By 1985 this figure was up to 52.7 million or twenty-two percent of the nation's population, a slight decrease percentagewise from the twenty-three percent share of the American population made up by Roman Catholics in 1960. *America's Catholics: Who they are, what they think*, U.S. NEWS & WORLD REPORTS, Nov. 17, 1986, at 68.

2. U.S. DEPT. OF COMMERCE, BUREAU OF CENSUS, Supplemental Report to the 1980 Census of Population, *Residence in 1975 for States by Age, Sex, Race, and Spanish Origin*. The total black population above five years of age was 24,000,883, *id.* at 3; for Americans of Spanish origin, the population was 12,883,674, *id.* at 6.

3. *Room at the Top: No Catholics Need Apply*, CATHOLIC LEAGUE NEWSL. SUPP., Oct. 1979.

4. M. SCHWARTZ, THE PERSISTENT PREJUDICE at 13 (1984).

5. *Id.* at 13-15.

violent as racism or anti-Semitism that it is most dangerous. As a forgotten hatred, or "ugly little secret,"⁶ it is not acknowledged by society and thus has never been explicitly and consciously rejected. There has never been a sustained campaign to combat this bias the way other prejudices have been attacked.⁷

Anti-Catholicism is alive and well in modern America. While "artistic" presentations which are racist or anti-Semitic are condemned by the public at large, the media perpetuates stereotypes which negatively portray Catholic teachings and/or ethnic groups.⁸ In a nation where recognized minority groups are statutorily protected from the effects of past and present discrimination, there is a gross underrepresentation of Catholics in many fields which can only be explained by conscious or unconscious bigotry.⁹ Finally, although America prides itself on maintaining an open political system, Catholics often find their principles considered suspect or "un-American" and issues they consider crucial removed from the public forum.¹⁰

II. HISTORY

The roots of American anti-Catholicism are long and deep, predating the establishment of the United States by over a century.¹¹ Indeed, anti-Catholicism was the earliest prejudice in America,¹² a fact which should not be surprising considering that the first groups to colonize British America were children of the Reformation.¹³

The anti-Catholic sentiment of these early colonists was manifested through a number of "anti-papist" or "no popery"

6. A. GREELY, AN UGLY LITTLE SECRET, at 1 (1977).

7. *Id.* at 9.

8. While there are numerous examples, *see infra* text accompanying notes 76-125, perhaps one of the most glaring examples of the past fifteen years is the portrayal of Italo-Americans in *The Godfather* films as faithful Catholic churchgoers who plot murder while at mass. *The Godfather* (Paramount 1972); *The Godfather Part Two* (Paramount 1974).

9. A. GREELY, *supra* note 6, at 6-9. Whether this policy is conscious or not is highly debatable.

10. This is known as the "divisiveness doctrine". *see* Catholic League, Anti-Catholicism in the Eighties (1980) (draft manuscript available from the Catholic League, Milwaukee, Wisconsin) [hereinafter Catholic League].

11. *Id.*

12. *Id.* at 21.

13. *Id.*

laws which rivaled those extant in England in terms of their severity.¹⁴ In all of the colonies except Rhode Island, and to a lesser extent Pennsylvania, Catholics were denied virtually every civil or religious right.¹⁵

These anti-popery laws stretched the entire length of British America: from Massachusetts Bay¹⁶ through New England¹⁷ and the mid-Atlantic colonies¹⁸ down to the South.¹⁹ In almost all of the colonies, Roman Catholics were second-class citizens entitled to few, if any, of the rights or privileges of the day.²⁰

Ironically, the most repressive anti-Catholic laws appeared in Maryland, a colony originally meant to be a haven for Catholics escaping from persecution in the United Kingdom.²¹ As a proprietary colony governed by a Catholic, Lord Calvert, it had perhaps the most liberal religious policy of any part of the British Empire in its "Act Concerning Religion" of 1649.²² How-

14. R. BILLINGTON, *THE PROTESTANT CRUSADE 1800-1860*, 8 (1938).

15. *Id.*

16. Laws were passed prohibiting Catholic priests from entering the colony, prohibiting the "importation of Irish Catholics" and mandating an oath of allegiance which specifically ridiculed the Pope. *Id.*

17. "In New Hampshire, Catholics were considered outlaws. Any priest caught conducting religious services was liable to a large fine and subject to deportation. If he returned, he could be executed. In fact, laws prohibiting Catholics from holding public office remained on New Hampshire's books until 1877". Catholic League, *supra* note 10, at 25.

18. In New York, following the "Glorious Revolution" of 1688, the normal series of anti-Catholic laws were passed. Indeed, in 1714, a Catholic priest was burned in New York City as punishment for the crime of being a "papist." *Id.* at 21-22, M. SCHWARTZ, *supra* note 4, at 28-29.

19. Throughout the south, Catholics were forbidden to vote, hold public office, inherit property, own firearms, or educate their own children in the Catholic faith. Additionally, heavy fines were imposed upon priests who offered the sacrifice of the Mass in public. R. BILLINGTON, *supra* note 14, at 7-10. With all of these restrictions placed upon them, it is questionable that many "free" Catholics of the period considered their position to be much better than that of black slaves.

20. *Id.*

21. J.P. DOLAN, *THE AMERICAN CATHOLIC EXPERIENCE*, 72-77, (1985).

22. In part the Act read:

[N]oe person or persons whatsoever within this province, or the Islands, Ports, Harbors, Creekes, or havens thereunto belonging professing to believe in Jesus Christ, shall from henceforth bee any waies troubled, Molested, or discountenanced for or in respect to his or her religion nor in the free exercise thereof within this Province or the Islands thereunto belonging nor in any way compelled to the beliefe of exercise of any other Religion against his or her consent.

Id. at 77.

ever the "Glorious Revolution"²³ replaced this policy of toleration and made Maryland as repressively anti-Catholic as were the other colonies. The colonial government passed a number of statutes, particularly during the first two decades of the eighteenth century, which were expressly meant to "prevent the growth of popery" within the province.²⁴

Anti-Catholicism subsided greatly during the War of Independence for a number of reasons. Not the least of these was the outstanding contribution to the patriot cause made by such individual Catholic volunteers as Lafayette of France, Pulaski and Kosciuszco of Poland, and Barry of Ireland.²⁵ Furthermore, the minority Catholic population already living in America contributed to the patriot cause "far in excess of its numerical presence or its stake in society."²⁶

The spirit of toleration that accompanied the Revolution did not bring an end to institutional and statutory anti-Catholicism. Seven of the post-independence State constitutions excluded Catholics from holding political office.²⁷ While all of these offensive provisions were eventually removed, some lasted into the 1830s, long after the federal Constitution guaranteeing religious freedom had gone into effect.²⁸

At roughly the same time that formal legal obstacles were being removed, a more pervasive and emotional form of bigotry known as "nativism" was developing.²⁹ Nativism was largely a response to the mass immigration, primarily by penniless Irishmen escaping the potato famine and the English Penal laws³⁰, of

23. The so-called "Glorious Revolution" of 1688 in England resulted in the expulsion of Britain's last Catholic King (James II) and ended the Stuart dynasty on almost purely religious grounds. M. SCHWARTZ, *supra* note 4, at 21-23.

24. J.P. DOLAN, *supra* note 21, at 84-86.

25. In addition to the services rendered by individual Catholics such as these, the Continental Congress' two greatest allies were Catholic France and Catholic Spain.

26. M. SCHWARTZ, *supra* note 4, at 34.

27. The seven were Massachusetts, New Hampshire, New Jersey, Connecticut, North Carolina, South Carolina, and Georgia. (In addition to these specific provisions against holding office, additional states included general anti-Catholic provisions in their constitutions.) R. BILLINGTON, *supra* note 14, at 20-21.

28. *Id.* at 23.

29. The three main strands of American nativism are anti-Catholicism, fear of foreign radicals, and a Spencerian notion termed "Anglo-Saxonism." They vary in relative importance with the times. J. HIGHAM, *STRANGERS IN THE LAND—PATTERNS OF AMERICAN NATIVISM 1860-1925*, at 3-11 (1971).

30. The English "Penal Laws" were a series of measures enacted during the late

the 1830s and 1840s.

The main weapon in the nativist's arsenal was literary propaganda.³¹ These writings utilized two major themes. The first being conspiratorial plots reminiscent of Reformation Protestant propaganda such as *The Downfall of Babylon*, which detailed Jesuit plans to overthrow the Republic,³² and *The Foreign Conspiracy*, wherein Austria and the Papacy united to destroy American liberty.³³ The second literary avenue was pornographic "confessional" tales of life within Roman Catholic religious communities. The most successful of these confessional novels was Maria Monk's *Awful Disclosures of the Hotel Dieu Nunnery of Montreal* first published in 1836.³⁴

The *Awful Disclosures*, allegedly the account of life in a convent, was filled with accounts of violence and sexual misconduct between priests and nuns (included were accounts of priests engaging in "sacramental" rape of the nuns, nuns being held as virtual slaves, and of "secret" tunnels between the rectory and convent which was lined with the aborted remains of the children conceived through these illicit encounters).³⁵ The sensational appeal of the book led to a sequel and a nationwide speaking tour for Monk sponsored by nativist groups. When independent investigations of the convent were made, Monk's claims were declared fraudulent.³⁶ Nativists, in response to these investigations, branded the investigators paid tools of the Jesuits and stood behind the stories.³⁷

While the "pornographic" approach zeroed in on life within the religious orders, the conspiratorial novels concentrated upon

1700s and early 1800s aimed at eradicating, or at least seriously weakening, Roman Catholicism in the British Isles. Most severe enforcement took place in British-occupied Ireland where the price put on a priest's head was the same as that put on a wolf's. For descriptions of these laws and their effect upon society, see S. MACMANUS, *THE STORY OF THE IRISH RACE*, at 454-70 (1944).

31. For example, no fewer than thirty newspapers of a "distinctly anti-Catholic tone" were founded in 1827. Catholic League, *supra* note 10, at 28-29.

32. R. BILLINGTON, *supra* note 14, at 120.

33. *Id.* at 123.

34. *Id.* at 99.

35. *Id.* at 99-101.

36. *Id.* at 106-07.

37. *Id.* at 107. Though discredited as a complete fabrication, the book endured for yet another printing with the announcement of John F. Kennedy's nomination for the Presidency more than 100 years later." Catholic League, *supra* note 10, at 30.

the "un-American" dual loyalty inherent in Roman Catholicism. Since the Pope, as supreme head of the Church, demanded absolute loyalty from the faithful, it was reasoned that no Catholic could ever be a "real" American or give his primary allegiance to the Republic.³⁸ Morse, in *The Foreign Conspiracy*, summarized this line of thought, writing that "The Protestant Religion and Liberty were identical, and liberty keeps no terms with despotism."³⁹ Other popular stories of the time alleged that the Pope was sending agents, usually described as Jesuits, to America in hopes of overthrowing the Republic.⁴⁰

Publications, while a major part of the nativist assault, were not the only manifestation of nativist strength. There was another, uglier, side evidenced by the great anti-Catholic riots of the 1830s and 1840s. The first great outburst of violence took place in Boston on August 11, 1834.⁴¹ That night a nativist mob, which had been whipped into a frenzy by Protestant ministers earlier in the evening, burned down an Ursuline convent school.⁴² The trial of the rioters turned into an anti-Catholic farce and resulted in the conviction of only one of the rioters.⁴³

In 1844 riots broke out in Philadelphia when Catholic par-

38. The notion of divided loyalty, as a means of attacking Catholics, dates back to the Reformation. The concept of absolute obedience to the Pope as supreme head of the Church stems from Christ's bestowal of authority upon St. Peter:

Thou art Peter, and upon this rock I will build my church; and the gates of hell shall not prevail against it. And I will give unto thee the keys of the kingdom of heaven: and whatsoever thou shalt bind on earth shall be bound in heaven: and whatsoever thou shalt loose on earth shall be loosed in heaven.

Matthew 17:18,19.

The concept is also enshrined in Canon Law. see DOGMATIC CONSTITUTION OF THE CHURCH ch. III. It is interesting to note that the loyalty of America's Anglicans who hold the Queen of England as the Supreme Head of their Church has never been questioned in the same manner. For a short examination of how this notion of divided loyalty has been used by nativists see J.P. DOLAN, *supra* note 21, at 319-20, see also J. HIGHAM, *supra* note 29, at 6. For a Catholic perspective on this issue see, M. SCHWARTZ, *supra* note 4, at 197-213 (The Foreign Potentate Myth).

39. Catholic League, *supra*, note 10, at 30.

40. Numerous stories developed along these lines often including warnings such as "[T]he Papists were making plans for that day by building inquisitorial chambers beneath their churches and by arming their religious edifices for use in the final attack." R. BILLINGTON, *supra* note 14, at 127; see also J.P. DOLAN, *supra* note 21, at 295-96.

41. R. BILLINGTON, *supra* note 14, at 73-75.

42. *Id.* at 74-75.

43. Twelve defendants were found not guilty and the one remaining convict was pardoned after the Catholics of Boston presented a petition asking for his release. *Id.* at 89.

ents requested that their children be allowed to use the Douay version of the Bible in the public schools rather than the school-system approved Protestant King James version.⁴⁴ Nativists, who saw this as an attempt to suppress the Bible, marched on the predominantly Irish Catholic section of the city known as Kensington.⁴⁵ In riots during that spring and summer sixteen people died, numerous Catholic homes and shops were destroyed, and two Catholic churches and schools were burned to the ground.⁴⁶ Other anti-Catholic violence flared up in San Francisco in the 1850s.⁴⁷ In New England "mob attacks. . . became so frequent that many [Catholic] congregations posted regular armed guards on patrol to protect their property."⁴⁸ New York avoided anti-Catholic riots through the actions of Archbishop John Hughes who warned the nativist Mayor that if a single Catholic church was burned, New York would become a "second Moscow."⁴⁹

The day's popular publications, combined with fear of the rising number of Irish immigrants, drove nativists into organized political activity for the first time around mid-century. The Know-Nothing Party, which revolved around anti-Catholic and anti-immigrant concerns, made major inroads in the political arena during the 1850s.⁵⁰ Although the Party disbanded by mid-decade due to sectional differences, it did manage to run former

44. M. SCHWARTZ, *supra* note 4, at 50.

45. *Id.* at 50-51.

46. Ironically a formal inquiry into the riots laid blame for the violence on the Catholic community. *Id.* at 51.

47. J. P. DOLAN, *supra* note 22, at 200-02.

48. *Id.*

49. Perhaps Bishop Hughes' finest hour came in 1844, when nativist mobs waged violent attacks against Catholics. In Philadelphia, the scholarly but mild Bishop Kenrick met this threat with moderation saying "Rather let every church burn than shed one drop of blood." His city experienced three days of unbridled nativist rioting: Catholic churches and homes were burned and 13 Catholics killed. When the nativists in New York got wind of these doings, they arranged for a mass meeting in Central Park to decide how to deal with the "Catholic problem." Hughes countered this threat with one of his own: "If a single Catholic Church were burned in New York, the city would become a second Moscow." Irish volunteers were dispatched to guard the churches. At the last moment, the nativist meeting was called off, and New York was spared the tragedy of sectarian violence.

M. SCHWARTZ, *ADVENTURES IN AMERICA: THE CATHOLIC HERITAGE* 36 (1984).

50. In 1854 the Party captured 43 Congressional seats as well as several statehouses. Catholic League, *supra* note 10, at 31.

President Millard Fillmore for President in 1856 and it accused Republican nominee Charles Fremont of being a "closet Catholic."⁵¹

As had happened during previous wars, the need for national unity drove nativism underground during the War Between the States and the Reconstruction period. During the "Gilded Age," however, nativist bias returned in full force. The American Protective Association (A.P.A.) founded in 1887 revived the stories of Papal plots against the Republic.⁵²

While the A.P.A. was reviving many of the old fears, a new form of nativism was appearing, primarily interested in the problems arising out of immigration. During the last decades of the nineteenth century, the tide of immigration turned away from northern and western Europe and toward southern and eastern Europe thus bringing with it a number of new cultural and ethnic strains.⁵³ Among intellectual circles the belief in "Anglo-Saxonism," a vaguely Romantic and Spencerian notion of race,⁵⁴ took hold as did the idea of "Social Darwinism."⁵⁵ These ideas led to Italian and Slavic immigrants being stereotyped⁵⁶ and limited to the most dangerous and lowest paying types of work.⁵⁷

51. M. SCHWARTZ, *supra* note 4, at 60.

52. The A.P.A. forged a Papal encyclical leading to fears of a Catholic insurrection taking place on the feast of St. Ignatius Loyola (founder of the Society of Jesus which is also known as the Jesuits) in 1894. When there was no insurrection, nativists explained this as evidence of Jesuit cunning. Catholic League, *supra* note 10 at 31-32; J. HIGHAM, *supra* note 29, at 85.

53. For a social profile of the different waves of immigrants see J.P. DOLAN, *supra* note 22, at 127-57.

54. This was more of a literary and intellectual appeal than a true mass movement. Emerson, for example, stated that he was thankful that immigration brought "the light complexion, the blue eyes of Europe," and that "the black eyes, the black drop, the Europe of Europe, is left." J. HIGHAM, *supra* note 29, at 65.

55. The application of Darwin's idea of "survival of the fittest" to the human condition. The underlying assumption was that Anglo-Saxons were the "fittest" and all other races necessarily inferior. *Id.*

56. As one old New Yorker said in a statement fairly typical of the popular mood, "a dirty Irishman is bad enough, but he is nothing comparable to a nasty. . . Italian loafer." *Id.*

57. "By 1900 the successive waves of immigrants to America had drastically changed its neighborhoods, the labor force, and many of its public and private institutions. However, to many, acceptance of an element into society that was not Protestant or from an acceptable ancestry was impossible." Catholic League, *supra* note 10, at 32; see also J. HIGHAM, *supra* note 29, at 48-49.

Anti-Catholicism subsided during the period of the First World War, once again following the normal pattern during periods of national crisis, but was revitalized in the 1920s. The two main forces at that time were the Presidential campaign of New York Governor Al Smith and the rebirth of the Ku Klux Klan.⁵⁸

More than three hundred years of anti-Catholic hatred was unleashed in 1928, all directed against, and focused upon, one man—Al Smith. The Klan held cross burnings from coast-to-coast and distributed countless pieces of literature warning that a Smith victory would mean a victory for the Pope.⁵⁹ Typical of the propaganda spread during the election was a card sent by nativist publisher William Lloyd Clark (who had begun his career with the A.P.A.) stating that a vote for Smith meant “the Pope above the President, the canon law above the Constitution, and the Papal rag above the American flag.”⁶⁰

Coinciding with the nativist attacks on Al Smith was a revival of the Ku Klux Klan. Reborn in 1915, the Klan spread its message of nativism and racism all over the nation until it reached such strength that, by the mid-1920s, it had virtually gained control of the Democratic Party.⁶¹ Through the use of such tactics as boycott, intimidation, and political activity the Klan was able to gain power in many states, both above and below the Mason-Dixon line and work its nativist program onto the statute books.⁶²

While the Klan's enemies and victims were numerous, it was Catholics who bore the greatest share of its hatred at that time.⁶³ The Klan engaged in many of the same propaganda cam-

58. M. SCHWARTZ, *supra* note 4, at 95-97.

59. *Id.* at 101.

60. *Id.*

61. J. HIGHAM, *supra* note 29, at 328.

62. During the 1920's there were an estimated four or five million members of the Ku Klux Klan including at least twelve (12) governors, a score of Senators and Congressmen, and countless local officials. Historians claim that the Klan's greatest strength was in the north with over 400,000 members in Ohio and roughly 100,000 in Pennsylvania. At that time membership in the Klan cut across all social and economic barriers. Among those who were reportedly members of the Klan at the time were Hugo Black and Harry S. Truman. P. SIMS, *THE KLAN* 2 (1982). An example of the type of legislation passed by the Klan controlled statehouses is the law struck down by the Supreme Court in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

63. “The Klan's victims, white as often as black in those days, included anyone, anything, the Klan didn't like, and its dislikes were many; . . . [B]ut it was Catholics—from

paigns as had the A.P.A. a generation before; indeed, many of the same charges, such as political plots by the Papacy, scandals in convents, the dual allegiance of American Catholics, and the doctrinal impurities of Catholicism were repeated.⁶⁴ A virtual flood of books and leaflets outlining the dangers of Catholicism can be attributed to the Klan.⁶⁵

The 1920s represented the highwater mark for nativists. It was driven underground by the Depression and the Second World War and was pronounced dead when a Roman Catholic was elected President in 1960 despite the fact that his religion cost him an estimated one and one-half million votes.⁶⁶ During the early 1960s, sometimes known as the "era of the two Johns" for the young and energetic President Kennedy and the genial and reformist Pope John XXIII, the nation's perception of the Catholic Church and the position of American Catholics changed.⁶⁷ The era of Camelot and the ecumenical reforms of the Second Vatican Council presaged a new stage in American/Catholic relations. However, this era of good feelings was not to last, and once again anti-Catholicism would rear its head.

III. ANTI-CATHOLICISM IN MODERN AMERICA

If there is a single lesson that can be drawn from the more than three hundred year history of nativism in America, it is that the hatred is both resilient and extremely adaptable. Over the past twenty years a new form of anti-Catholicism has evolved which is suited to the modern age. While it is almost impossible to state with any authority when this new nativism began, there can be no doubt that it is a strong and growing pres-

Presidential hopeful Al Smith to Pope Pius XI—who bore the biggest brunt of their hatred." P. Sims, *supra* note 62, at 3.

64. A Klan lecturer once warned his audience in North Manchester, Indiana: The Pope may be on the north-bound train tomorrow! He may! Be warned! Prepare! . . . The next day, more than a thousand people mobbed the station to meet the Chicago bound train and its one passenger: a corset salesman who talked a frantic half-hour before convincing the crowd he was not the Pope in disguise. *Id.*; see also SCHWARTZ, *supra* note 4, at 93.

65. *Id.*

66. *Id.* at 122-23, see also J.P. DOLAN, *supra* note 22, at 421-26. For a discussion of President Kennedy's meeting with the Baptist Ministers during the 1960 campaign, see P. COLLIER & D. HOROWITZ, *THE KENNEDYS* 296-97 (1984).

67. J.P. DOLAN, *supra* note 22, at 421-26.

ence. Pollster Louis Harris, for example, found fairly low levels of overt prejudice in a 1979 study but fairly high levels of "latent" anti-Catholic prejudice.⁶⁸ This was exactly the same pattern he found as regards blacks, Jews, and Hispanics.⁶⁹ In his interpretation of the study, Harris stated that the belief that "Catholics [are] not being discriminated against, or [are] not being the victims of prejudice, does not hold water."⁷⁰

Furthermore, anti-Catholicism is a cyclic phenomenon.⁷¹ According to Michael Schwartz, former Director of Public Affairs for the Catholic League for Religious and Civil Rights, there are three factors which seem to accompany each wave of nativist renewal. These are a religious revival among "fundamentalist" Protestants, a period of "social dislocation" in the nation, and a growing number of immigrants, particularly those from predominantly Catholic nations.⁷² Each of these factors exists in modern America and could be a contributory cause for the new nativist revival. There is no reason to believe that the same circumstances which led to nativist strength in the past could not lead to nativist advances in the present or near future.

Since the election of President John Kennedy in 1960 the popular perception has been that anti-Catholic nativism is a thing of the past. The denial that a problem exists, by Catholics and non-Catholics alike, has compounded the situation. Statistically verifiable accounts of Catholic underrepresentation in the higher reaches of America's corporate and academic arenas are available but ignored.⁷³ Charges of anti-Catholic defamation are

68. M. SCHWARTZ, *supra* note 4, at 9. For example, only 4% of non-Catholics surveyed believed that anti-Catholicism was a problem in modern America. Only 2% admitted to being anti-Catholic. Yet 35% agreed that "Catholics tend to be narrowminded and under the influence of church dogma," a view that was rejected by only 50% of the survey population. The survey was commissioned by the National Conference of Christians and Jews and was an in-depth study of America's attitudes toward racial and religious minorities. *Id.* at 9-11.

69. *Id.* at 9.

70. *Id.* at 11. Harris further concluded that "the basis of latent anti-Catholicism is evident."*Id.*

71. This fact is evidenced by the pattern of going underground during periods of national crisis and then resurfacing when the crisis is over. See *supra* text accompanying notes 11 to 67.

72. M. SCHWARTZ, *supra* note 4, at 39.

73. A. GREELEY, *supra* note 6, at 5-9. Fr. Greeley contends that the three greatest sources for modern anti-Catholicism are inattention to the problem of anti-Catholicism, ignorance regarding the status and condition of America's Catholics, and a residual bias

met with inattention.

Evidence that would be sufficient to establish at least a *prima facie* case of discrimination if its victims were black, brown, or female is ignored when the victims are Roman Catholic. The long history of nativism in this country is likewise ignored. If, as Father Andrew Greely says, the evidence in itself is not enough to show bigotry, then the inattention that it receives does: "I make my charge of discrimination not on the grounds that Catholics are underrepresented but on the grounds that nobody gives a damn about it."⁷⁴ It is exactly this inattention which makes anti-Catholicism the "forgotten hatred," the last remaining acceptable and unrenounced bias in America.

For the purposes of this study, modern anti-Catholicism can be divided into three major areas. They are defamation, discrimination, and a systematic attack upon Catholic issues and teachings (aimed at isolating and defeating such so-called "Catholic" positions) which can be termed the "divisiveness doctrine."⁷⁵

IV. DEFAMATION

Defamation usually has been defined as communication which tends to hold a person up to "hatred, contempt, or ridicule, or to cause him to be shunned or avoided."⁷⁶ That definition may be a bit narrow, as communications which excite adverse, derogatory or unpleasant feelings or opinions against a subject, or which tend to injure reputation, have been found actionable in both slander and libel, the two torts which constitute defamation.⁷⁷

Since its earliest common law origins, defamation has been concerned with the idea of individual reputation and honor, thus making it difficult to bring suit for attacks made against a group. While defamation of a small group may lead to legal actions by one of its individual members, provided the individual member can show that he is indeed a member of the defamed group and

deeply embedded in society against the church.

74. *Id.*

75. See generally Catholic League, *supra* note 10 (unpaginated section on the divisiveness doctrine).

76. W. PROSSER, *LAW OF TORTS*, 739 (4th ed. 1971).

77. *Id.* at 737, 739.

that there is a reasonable application of the words to himself,⁷⁸ there is currently no civil action possible in large scale defamation of minority groups.⁷⁹

Currently, the only remedy available is criminal libel. Such statutes however are presently part of the criminal code in only five states.⁸⁰ The Supreme Court's last ruling on the constitutionality of a group-libel statute was thirty-five years ago in *Beauharnais v. Illinois*⁸¹ wherein the court upheld the constitutionality of the statute. Justice Frankfurter, writing for the majority stated that:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words. . . It has been well observed that such utterances are no essential part of any exposition of ideas and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.⁸²

Although the court was split five-four in *Beauharnais*, only Justice Black considered the defendants conduct to be constitutionally protected; all of the other dissenters conceded that group-libel laws could be enacted and pass constitutional muster.⁸³ While the case has never been specifically overturned, there is a serious question regarding its merit as good law when it is considered in the light of later libel and obscenity cases.⁸⁴

78. *Id.* at 750.

79. The traditional reasons for not recognizing group libel are a belief that there is no individual injury inflicted by a group defamation, and further any such recognition would damage first amendment free speech/press rights. *But see* Lasson, *In Defense of Group-Libel Laws, or Why the First Amendment Should Not Protect Nazis*, 2 N.Y.L.S. HUM. RTS. ANN. 289 (1985).

80. *Id.* at 298-99. *See* CONN. GEN. STAT. § 53-37 (West 1985), MASS. ANN. LAWS ch. 272 § 98C (West 1970), MONT. CODE ANN. § 45-8-212 (1985), NEV. REV. STAT. 200.510 (1985).

81. 343 U.S. 250 (1952).

82. *Id.* at 255-57.

83. *See generally*, Beth, *Group Libel and Free Speech*, 39 MINN. L. REV. 167 (1955).

84. *Compare*, Lasson, *supra* note 78, who still believes the case to be good law, with J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 944 (2nd ed. 1983) who believe that in light of decisions in analogous cases it has been effectively negated.

Even if criminal group-libel statutes are considered good law, their effect is mainly symbolic. In all of the statutes extant, the punishment is slight.⁸⁵ Since current laws are rarely enforced, it is extremely difficult to determine what effect, if any, they are having in deterring or punishing large scale defamation.⁸⁶

The few criminal group-libel laws which are currently on the statute books protect minority groups in toto, such as Catholics qua Catholics, from attack. The normal laws of libel can be used, in most instances, to protect sub-groups within that minority, but generally there is no criminal sanction against attacking such sub-groups.⁸⁷ This was not always true. In three cases which date back more than sixty years, criminal libel statutes were used when the Knights of Columbus (a Catholic laymen's fraternal organization) was defamed.⁸⁸ During the same era, the Oregon Supreme Court upheld the conviction of a newspaper editor under a criminal libel suit for publishing a defamatory pamphlet about a local convent.⁸⁹ Since sub-groups are, arguably, not covered by the criminal group-libel laws now existing, it is likely that there would be no available remedy if the Knights of Columbus cases were brought today. This is due to the extreme difficulty involved in having the individual mem-

85. See *supra* note 79. Montana's code calls for imprisonment for not more than six months and/or a \$5,000.00 fine (the same penalty is demanded for cruelty to animals). Massachusetts' penalty is a maximum fine of \$1,000.00 and/or up to one year imprisonment. In Connecticut the penalty is a mere \$50.00 fine and/or up to thirty days imprisonment.

86. See generally, Lasson, *supra* note 78.

87. Except for Montana's statute, the laws generally punish defamation "because of" or "on account of" creed or religion. There is a question therefore as to whether or not these laws would apply as regards defamation of sub-groups (such as the Knights of Columbus). Is such an attack upon Catholics as Catholics or on Catholics as members of the Knights of Columbus? See generally Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727, 749 (1942).

88. See *People v. Turner*, 28 Cal. App. 766, 154 P. 34 (1915); *Crane v. State*, 14 Okla. Crim. 30, 166 P. 1110 (1917); *People v. Gordon*, 63 Cal. App. 627, 219 P. 486 (1929). In each of these cases a false Knights of Columbus oath was published which required members to renounce their allegiance to the United States, discriminate against Protestants, and, in the last two, murder Protestants. Convictions were upheld in all three cases despite the large size of the injured group.

89. *State v. Hosmer*, 72 Or. 57, 142 P. 581 (1914). The pamphlet involved, entitled "The Escaped Nun from Mt. Angel Convent, or the Last Stand of Desperate Despotism" was remarkably similar in content to *Awful Disclosures* printed eighty years before. As with the Knights of Columbus cases, it is highly questionable as to whether or not any civil remedy would have been available.

ber who files suit being able to show a personal application to the defamatory material.

Due to the weakness of the criminal group-libel laws and the inapplicability of civil libel remedies, anti-Catholic defamation has grown in recent years. There are currently two basic types of anti-Catholic defamation: blatant, or that which has existed since the earliest nativists, and subtle, or "sophisticated" defamation which treads the very thin line between satire/criticism and "group villification."⁹⁰

There are numerous examples of blatant anti-Catholic defamation. One of the leading exponents of this type of material is Tony Alamo, a Texas based fundamentalist preacher.⁹¹ In 1982 Alamo published an eight page flyer entitled "The Pope's Secrets" and distributed more than five million copies of the tract nationwide.⁹² In the flyer, Alamo alleges that the Roman Catholic Church was responsible for "World War II, the Holocaust, Communism, the 'gay rights' movement, and the drug traffic."⁹³ Two years later, Alamo put out a poster that was distributed nationwide alleging that the Vatican controlled everything from organized crime to the United Nations.⁹⁴

There are two major dangers inherent in the blatant defamation typified by Tony Alamo's publications is the very real possibility that "less vituperative manifestations of anti-Catholic bigotry will gain respectability by comparison with Alamo."⁹⁵ Further danger is raised due to the lack of condemnation for other, more subtle, forms of anti-Catholic "literature."⁹⁶

For example, David Yallop's 1984 book *In God's Name*,

90. The term "vilification" has been suggested to separate group defamation which is targeted against racial, religious, or ethnic groups from other types of group defamation. This has been done as a way to avoid the courts' traditional aversion to the concept of group libel by stressing the psychological differences between group vilification and other forms of group libel. See Note *Group Vilification Reconsidered*, 89 YALE L.J. 308 (1979).

91. M. SCHWARTZ, *supra* note 4, at 139-41.

92. *Id.*

93. *Id.* at 140 (which includes a short list of Alamo's allegations).

94. The poster is reprinted in Schwartz, *Prejudice: From sow's ear to silk purse*, CATHOLIC LEAGUE NEWSL. SUPP., vol. 12, no. 5.

95. *Id.* at 4. Seven Catholic churches were vandalized in the fall of 1984 shortly after anti-Catholic literature appeared in their areas. In early 1984, shortly after the Alamo posters appeared, a Tennessee church recieved a bomb threat.

96. *Id.* at 4.

which alleged that Pope John Paul I was assassinated,⁹⁷ was filled with the same descriptions of Vatican power politics and financial misdealings as the nativist works of the A.P.A. The book received bad reviews based upon the author's flimsy evidence, but not one reviewer mentioned the latent anti-Catholicism underlying the work.⁹⁸

Yallop's book is far from being the only example in recent years of works of popular culture tinged with latent anti-Catholicism.⁹⁹ An area of concern here is where to draw the line between legitimate entertainment through satire and exaggeration and illegitimate vilification through the fostering of negative stereotypes.¹⁰⁰

Portrayals of Catholics and Catholic ethnic groups which serve to foster and perpetuate negative stereotypes have been a part of America's cultural landscape almost since the first Catholic landed on American shores. With the advent of modern means of mass communication in the 1880s this stereotyping gained renewed vigor.¹⁰¹ Elements of popular culture such as comic strips,¹⁰² advertisements,¹⁰³ music sheets,¹⁰⁴ and films,¹⁰⁵ all presented images of Catholic ethnics as being either ignorant,

97. M. SCHWARTZ, *supra* note 4, at 143.

98. *See generally id.* at 143-45.

99. While most stereotypes in the media seem to be fading, stereotypes of Catholic ethnics and (particularly) clergy abound. Examples include the bumbling Fr. Mulcahey of "M*A*S*H" and the manipulative Jesuits in "Shogun". *See* Lynch & Quinlan, *Anti-Catholicism in the U.S.A.*, CATHOLIC LEAGUE NEWSL. SUPP., vol. 10, no. 6.

100. Any attempt to draw such a line will, of course, walk the thin line between protected first amendment speech and slander/libel. While there are no specific cases attempting to draw the line, it can be argued that the entire field of defamation is an attempt to draw this line.

101. *See generally* BALCH INSTITUTE FOR ETHNIC STUDIES, *ETHNIC IMAGES IN ADVERTISING* (1984)[hereinafter *ADVERTISING*]; BALCH INSTITUTE FOR ETHNIC STUDIES, *ETHNIC IMAGES IN THE COMICS* (1986)[hereinafter *COMICS*] (The Institute, based in Philadelphia, sponsored an exhibit on ethnic images in the comics from Sept. 15 through Dec. 20, 1986, the latter booklet accompanied this exhibit, and the former booklet accompanied an exhibit that took place in 1984).

102. *A Brief History of Ethnicity in the Comics*, in *COMICS*, *supra* note 100, at 7-10.

103. *ADVERTISING*, *supra* note 100, at 3-12.

104. *Id.* at 23-28.

105. *Id.* In addition to the examples noted in the Balch Institute's study, it is interesting to note that in most gangster films of the 1930s the mobsters were given Italian names (such as Edward G. Robinson's "Ricco" in *Little Caesar*) and the Irish were portrayed in countless films as honest but simple lower-working class residents of the cities' "tough" districts (for examples, see almost any Frank McHugh, Pat O'Brien, or James Cagney film of the early to mid-1930s).

lazy, dirty, or in some other way "un-American."

Particular ethnic groups were singled out for special treatment in the mass media. Italians, for example, were almost always linked to images of organized crime and in the few instances that they escaped that image they were generally portrayed as ignorant laborers speaking "pidgin" English.¹⁰⁶ The Irish, who according to at least one observer "have probably enjoyed one of the most positive images" over the years,¹⁰⁷ are nonetheless normally portrayed as "strong, two-fisted, no-nonsense fighters," alcoholics, or else as sentimental "blarney" buffoons.¹⁰⁸ An exception is the Eastern Europeans who, other than Jews, rarely appear in instruments of mass culture. This omission has been attributed to the inability of Anglo-Americans to tell the differences between the various Slavic groups.¹⁰⁹

While the ethnic images that were presented up to the 1950s were generally crude and condescending, modern images usually tend to be more positive. This is not to say that ethnic stereotypes no longer hold a prominent place in the American cultural landscape, but rather that they have become more subtle, more refined, and more sanitized.¹¹⁰

While resurgent nativism and sanitized defamation are dangerous by themselves, the danger is even greater when govern-

106. The image of the Italian laborer on the songsheet cover, "I Break-A Da Stones", is comical, alien, and childlike. He is a cartoon character: short, stocky, arched eyebrows, pointed mustache, floppy hat and patched, baggy trousers; his tools thrown jauntily over one shoulder. The lyrics, in "pidgin" English, tell of a humorously nonsensical way of life. The circularity of his reason: "I break-a da stones, to make-a da mon', to break-a da stones-" in a sense expresses his inability to become an American, for a "real" American's social logic is one of self-improvement and upward mobility. All the visual elements indicate not only the inability, but also the lack of desire of the Italian laborer to escape his inferior economic and social position. This image of the immigrant as a comical, unthreatening, and contented alien, in a way, explained and condoned his situation. *Id.* at 23-24. See also, M. SCHWARTZ, *supra* note 4, at 167-82 (discussing what he terms "the Organ Grinder Myth" that Catholic Americans are naturally inferior to "real" Americans).

107. COMICS, *supra* note 100, at 43.

108. *Id.* The no-nonsense fighters are typified, according to the observer, by the character "Dum Dum Dugan" of *Sgt. Fury and his Howling Commandos*. The "go-get-'em" Irish types, however, are "shot through with images of the 'barstool' or 'stage' Irishman, ready to 'rise from the grave at any moment for a fight or a drink!'" *Id.* at 44. If this character type is considered the most positive ethnic image presented in the comics, it is easy to imagine how bad other images were.

109. ADVERTISING, *supra* note 100, at 2.

110. *Id.*

ment becomes involved in funding defamatory projects. Over the past few years there have been a number of examples of state sponsored or supported anti-Catholic defamation including, but by no means limited to, an exhibition of anti-Catholic paintings entitled "Lady of Babylon" by Douglas Van Dyke at the University of Illinois,¹¹¹ the play *Haunted by the Holy Ghost* supported by grants from the Minnesota State Art Board,¹¹² and the film *Hail Mary* presented at the 1985 New York Film Festival.¹¹³

The main Catholic response to such works so far has been picketing and calls for boycotts.¹¹⁴ However, two measures have been proposed in recent years to eliminate, or at the least sharply curtail, tax-payer sponsored defamation.

The first measure was proposed in 1983 and at that time was unanimously rejected by the Minnesota State Arts Board in September of that year.¹¹⁵ The proposal would have prohibited the granting of tax funds to support any "project which, taken as a whole, defames any racial, ethnic or religious group."¹¹⁶ The State Arts Board's rationale for rejecting the proposal was that minority groups are sufficiently protected by federal and state laws of libel and slander.¹¹⁷

The second proposal was put before the Idaho State legislature by Representative Ron Slater in the spring of 1986.¹¹⁸ The

111. CATHOLIC LEAGUE NEWSL., June 1983. Thirty-four out of forty paintings are termed blatantly anti-Catholic. Included are paintings of the Pope as the Devil, priests as Nazi's, and a figure of Christ on the cross with a pig's head.

112. The plot is basically a rehashing of the old convent-scandals canard as put forward in the *Awful Disclosures*, *supra* notes 34-37 and accompanying text (nuns beaten and raped by priests). See CATHOLIC LEAGUE NEWSL., Nov. 1983.

113. The New York Film Festival receives tax funds through the New York State Council on the Arts.

114. See, e.g., *League Leads 'Hail Mary' Protest*, CATHOLIC LEAGUE NEWSL., Dec. 1985, at 2 (articles dealing with boycotts of *Hail Mary*).

115. *Anti-Defamation Proposal Rejected*, *supra* note 112.

116. *Id.*

117. *Id.*

118. *Idaho Legislature Takes On Anti-Catholic Bigotry*, CATHOLIC LEAGUE NEWSL., Dec. 1985, at 3. In an interview with the Catholic League for Religious and Civil Rights, Slater said "The bill will be geared to protecting religious freedom rights by preventing state agencies or groups using state funds to defame any religious or ethnic group." *Id.* at 4. The measure was first brought about as a response to the Idaho Shakespeare Festival's presentation of *Sr. Mary Ignatius Explains It All For You*. Slater stated in the same interview "the ISF has a right to insult my faith, but I don't believe that freedom of speech entitles the ISF to use tax dollars to peddle religious bigotry. . ." *Id.* at 3.

measure was essentially the same as the failed Minnesota proposal, and, if passed, would have been the first state law in the nation which prohibited state agencies, or private groups receiving state funds, from using public monies to defame a religious or ethnic group.¹¹⁹ The proposal appeared to be on its way toward passage when Slater was forced to remove the bill, following an adverse advisory opinion by the State's Attorney General.¹²⁰ The opinion stated that the measure "might be successfully challenged as being unconstitutional on grounds of prior constraint"¹²¹ and based upon that opinion, support for the measure waned. Consequently, it was removed from the legislature's consideration.¹²²

It was this fear of censorship or prior constraint, which contributed in 1952 to the Supreme Court striking down a provision of the New York Education Law which forbade the commercial showing of a film without a license and authorized the denial of a license based upon a censor's determination that a film was "sacrilegious."¹²³ While the court struck down the statute in *Joseph Burstyn, Inc. v. Wilson* as unconstitutional on prior restraint and vagueness grounds, dictum in the majority opinion could affect current legal efforts to combat anti-Catholic defamation.

The New York Court of Appeals had upheld the statute and read it as meaning "that no religion, as that word is understood by the ordinary, reasonable person, shall be treated with contempt, mockery, scorn and ridicule. . . ."¹²⁴ However, Justice Clark writing for the Supreme Court majority which overruled the New York Court wrote, "[i]t is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures."¹²⁵

119. *Id.*

120. Telephone interview with Stephen Barry, author (Nov. 1986).

121. *Id.*

122. *Id.*

123. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952)(quoting N.Y. Educ. Law § 129 (McKinney 1947)).

124. 303 N.Y. 242, 258; 111 N.E.2d 665, 672. Compare this language with the Minnesota proposal. See *supra* notes 115-17 and accompanying text.

125. 343 U.S. at 505. Justice Clark also wrote in that case: "However from the standpoint of freedom of speech and press, it is enough to point out that the state has no

Considering the lack of recent cases, and the uproar caused by "book banning" efforts around the nation, there is no way of possibly foretelling how the courts would approach a measure like Slater's, should one ever make it through the political system.

V. DISCRIMINATION¹²⁶

The issue of anti-Catholic discrimination is perhaps the most complicated, and certainly the most unseen, aspect of the nativist problem due to the fact that Catholics suffer from two separate and distinct forms of discrimination, neither of which is particularly obvious to the casual observer. According to Michael Schwartz, Catholics are discriminated against "both for who we are [Catholics as Catholics or Catholics as members of particular ethnic groups] and for what we are [Catholics as adherents of certain canons]."¹²⁷ A similar comment is made by Prof. Robert Destro who states that religious and ethnic discrimination in general, and anti-Catholic discrimination in particular, has long been the "weak sister of civil rights and affirmative action."¹²⁸ According to Destro, anti-Catholic discrimination cases can be analyzed in two ways. First are cases dealing with representation, such as the hiring of Catholics, and the second being cases dealing with accommodation, whereby employers create or fail to create situations in which employees can work and still meet their religious obligations.¹²⁹ Echoing Schwartz' who/what dichotomy, Destro describes the problem as "less a matter of who you are than a matter of what you think— being Catholic is alright so long as you are not too serious about it."¹³⁰

legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views." *Id.* (footnote omitted). However there is a very real difference between distasteful views and defamatory views.

126. For the purposes of this section in particular, black and Hispanic Catholics are excluded from this study because as members of multiple minority groups, it is impossible to determine with any accuracy the degree to which they are victims of strictly anti-Catholic prejudice.

127. M. SCHWARTZ, *supra* note 4, at 3.

128. Telephone interview with Stephen Barry, author (Oct. 1986). Prof. Destro was Attorney General to the Catholic League from 1977 to 1982 and since 1982 has been a member of the United States Civil Rights Commission.

129. *Id.*

130. *Id.*

According to the United States Supreme Court, a *prima facie* case of discrimination is established when a plaintiff presents evidence "adequate to create an inference" that a decision was made based upon discriminatory criteria.¹³¹ Exactly how such an inference would be created is a matter of interpretation, but statistical evidence of a discriminatory effect in seemingly neutral hiring practices has been held sufficient to support a *prima facie* case of racial discrimination.¹³² The same should be true for cases of religiously motivated discrimination. Such statistical evidence can be used for a number of purposes ranging from illustrating an underrepresentation of the group in a specific area, or field of employment (thus creating an inference of a tendency toward that group's exclusion), to a specific showing of a systemic exclusion of the group by a particular employer.

Although federal policy is clear on the issue of religiously motivated discrimination, there has been very little effort by the federal government to use Title VII¹³³ or other civil rights laws to combat this problem.¹³⁴ The same pattern of action, or inaction, may be found with regard to state human rights or equal employment statutes.

One of the reasons that anti-Catholic discrimination is not forcefully attacked is that its victims do not, at first blush, appear to be victims.¹³⁵ Fifty to one hundred years ago nativist discrimination was much more blatant.¹³⁶ At that time such items as N.I.N.A. (No Irish Need Apply) signs, the three-tiered wage scale (different rates of pay for whites, blacks, and Italians), and the relegation of Slavs to the lowest paying, most dangerous jobs were part of the common everyday experience.¹³⁷ Today, how-

131. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 (1977).

132. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 575, 579-80 (1978). Whether or not it would apply in cases of religious discrimination is questionable since religion is not a "suspect class," and therefore, not accorded the same level of scrutiny.

133. 42 U.S.C. § 2000(e) (1981).

134. See generally J. NOWAK, R. ROTUNDA, & J. YOUNG, *CONSTITUTIONAL LAW*, ch. 16 Sect. 1 (2d ed. 1983).

135. Since World War II, American Catholics have made great leaps up the socioeconomic ladder so that by 1979 "they are generally above the national average in educational attainment and income." *Room at the Top: No Catholics Need Apply*, *supra* note 3, at 1.

136. See *supra* note 53 and accompanying text.

137. *Id.*

ever, anti-Catholic discrimination is not as much a matter of blanket exclusion from the workplace but rather exclusion from the upper levels of corporate, professional, and academic life. Surveys conducted by the Harvard Business Review, the Ethnic Heritage Studies Center of the University of Michigan, and others have found consistent patterns of Catholic underrepresentation.¹³⁸ This underrepresentation of Catholics in "prestige" positions,¹³⁹ in light of the relatively high socio-economic success of Catholics, is such that "the only reasonable explanation for this is a continuing bias against Catholics in the upper reaches of business, professional, and academic communities."¹⁴⁰

Surveys conducted throughout the 1970s support this position. A 1973 survey of the 106 largest corporations in the Chicago area was conducted to determine the number of persons of black, Hispanic, Italian, and Polish backgrounds serving among their officers and directors.¹⁴¹ The survey showed that both Italo-Americans and Polish-Americans were severely underrepresented.¹⁴² A 1974 survey of Detroit firms showed the same pattern of underrepresentation, with Polish-Americans ranking below both blacks and Hispanics at the largest corporations.¹⁴³ This underrepresentation would appear to be nationwide, based upon the results of a *Harvard Business Review* study, published in 1976, which reported that eighty-five percent of top executives surveyed stated that they were Protestants.¹⁴⁴ Indeed the

138. The evidence is, however, far from exhaustive. Some studies zero-in on graduates of Catholic colleges and universities, others examine predominantly Catholic ethnic groups, while still others focus on members of the Catholic Church. *Room at the Top: No Catholics Need Apply* *supra* note 3, at 1.

139. Prestige positions may be defined as senior management in corporations, tenured faculty in academia, and partners in large law firms.

140. Catholic League, *supra* note 10, at 139.

141. *Id.*

142. For example, Italo-Americans make up 8% of the population of metropolitan Chicago, but account for only 1.9% of the corporate directors and 2.9% of corporate officers. *Id.*

143. Of the 100 largest corporations, Italo-Americans represented 3% of the directors and 2.5% of the officers, while Polish-Americans constituted 1.9% of the directors and only 1.4% of the officers. Among the corporations with annual sales in excess of \$500 million, Polish-Americans held only 4 out of 554 positions (0.7%). The Polish-American community represented approximately 14% of the metropolitan Detroit population at that time. *Id.*

144. Sturdivant & Adler, *Executive Origins: Still A Gray Flannel World?*, HARV. BUS.

authors of that study concluded that, in great measure, the corporate boardrooms of the 1970s were not very different from the "old-boy," Anglo-Saxon network of a century ago.¹⁴⁵

The issue of Catholic underrepresentation was presented to the courts in *Lucido v. Cravath, Swaine & Moore*.¹⁴⁶ In that case, an Italian-American attorney alleged that his employment with the defendant-law firm was unlawfully terminated because of his religion and national origin and, further, that while he was an employee he was unlawfully discriminated against in terms of career advancement due to his religion and national origin.¹⁴⁷ While the court confronted only the issue of whether or not Title VII could apply to professionals,¹⁴⁸ papers filed with the court addressed the merits of the discrimination complaint.¹⁴⁹ Surveys of the twenty largest law firms in seven major cities which were conducted at the time found that only 2.3 percent of the partners and 3.6 percent of the associates in these firms were Italo-Americans.¹⁵⁰ This survey also concluded that attorneys who were educated at law schools affiliated with Catholic Universities were markedly underrepresented in the major law firms.¹⁵¹ Shortly after the court ruled that Title VII protections were available to professionals, the law firm settled with Lucido, and the merits of the discrimination charges were never fully litigated.

The major problem facing Catholics who claim that they are victims of exclusionary discrimination lies in convincing courts that there actually is such a thing as anti-Catholic discrimination. Two New York cases involving faculty members at the City University of New York highlight this point. In both *Lombardo*

REV., Nov.-Dec. 1976, at 128.

145. *Id.* at 125.

146. 425 F.Supp. 123 (S.D.N.Y. 1977).

147. *Id.* at 125.

148. *Id.*

149. The *amicus curiae* brief filed by the Catholic League for Religious and Civil Rights is particularly relevant to the merits. *Id.* (No. 75 Civ. 6341).

150. *Room at the Top: No Catholics Need Apply*, *supra* note 3. Polish-Americans made up only 0.7% of the partners and 1.5% of the associates. At Cravath, Swaine & Moore, the defendant in Lucido, there had never been an Italo-American partner.

151. *Id.* Of the twenty largest law firms in New York, only 62 partners or associates were graduates of law schools affiliated with Catholic institutions of higher learning while over 59 were graduates of the University of Virginia Law School alone.

*v. Board of Higher Education*¹⁵² and *Brooklyn College v. State Division of Human Rights*,¹⁵³ university professors alleged that the City University system engaged in anti-Catholic discrimination in the granting of promotions.¹⁵⁴

In *Lombardo*, the State Commission Against Discrimination (S.C.A.D., later known as the State Commission for Human Rights) found that there had been discriminatory "resistance" and "instances of discrimination" against Catholic teachers¹⁵⁵ but the courts reasoned that since there was no "systemic exclusion or restriction, or generalized pattern of unlawful discrimination,"¹⁵⁶ the professors would not be granted a trial on the merits.¹⁵⁷

Nine years after *Lombardo*, and following the passage of Title VII, this same issue was raised in *Brooklyn College*. As in the earlier case, the State Division of Human Rights found that the college had discriminated against the professor by "refusing to reappoint him and recommend him for tenure because of ethnic and religious reasons."¹⁵⁸ But the reviewing court, in a memorandum decision, annulled the Division's decision and dismissed the claim, citing again the necessity of proving "systemic exclusion."¹⁵⁹

The problem with measuring discrimination by the "systemic exclusion" test was discussed by Judge Scilleppi of the Court of Appeals, dissenting in the court's affirmance of the Appellate Division's order dismissing the *Lombardo* claim.¹⁶⁰ According to Judge Scilleppi, the systemic exclusion test is only

152. 37 Misc. 2d 436, 235 N.Y.S.2d 1010 (Sup. Ct. N.Y. Co. 1962), *rev'd* 18 A.D.2d 444, 240 N.Y.S.2d 119(1963), *aff'd* 13 N.Y.2d 1097, 246 N.Y.S.2d 631, 196 N.E.2d 266 (1963).

153. 39 A.D.2d 707, 331 N.Y.S.2d 786 (1972).

154. 13 N.Y.2d at 1098, 246 N.Y.S.2d at 631-32, 196 N.E.2d at 267; 39 A.D.2d at 708, 331 N.Y.S.2d at 787.

155. 18 A.D.2d 444, 445, 240 N.Y.S.2d 119, 121.

156. *Id.* at 446, 240 N.Y.S. at 122.

157. *Id.*, 240 N.Y.S.2d at 122.

158. 39 A.D.2d 707, 331 N.Y.S.2d 786.

159. *Id.* at 708, 331 N.Y.S.2d at 787. The court quoted from Judge Breitel's decision in *Lombardo*, 18 A.D.2d at 446, 240 N.Y.S.2d at 122. However, research conducted by the Italian-American Faculty Association at C.U.N.Y. showed that Italo-Americans are less likely to have tenure and are more likely to be appointed as instructors than the average faculty member, an example of systematic underrepresentation. A. GREELY, *supra* note 6, at 5-6.

160. 13 N.Y.2d at 1097, 246 N.Y.S.2d at 631-32, 196 N.E.2d at 266-67.

one of a number of methods available for proving unlawful discrimination, and should not be the watershed test.¹⁶¹ Therefore, since the matter is an issue of fact and there are allegations of "specific instances tending to show the existence of bias and prejudice," the matter should go to trial.¹⁶²

Due to the limited number of claims that arise, and the frequency of out of court settlements, the current state of the law on the issue of anti-Catholic "exclusionary" discrimination is uncertain.

While underrepresentation, or exclusionary discrimination, of Catholics in "prestige" positions corresponds to the who of the who/what discrimination dichotomy,¹⁶³ then non-accommodation discrimination completes the field of nativist anti-Catholic discrimination. Under Title VII, employers not only are prohibited from using discriminatory criteria in making hiring decisions but also have a mandatory duty to make "reasonable accommodations" to the religious needs of their employees.¹⁶⁴

Under guidelines put forward by the Equal Employment Opportunity Commission (EEOC), employers have a duty to make reasonable accommodation to the religious practices and beliefs of employees and prospective employees unless the employer can show that accommodation would result in an undue hardship to the conduct of its business.¹⁶⁵ In determining what type of activities are protected, the EEOC "will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views."¹⁶⁶ Using this definition, a Roman Catholic's belief not only in the basic tenets of Christianity, but also in

161. Although not stated in Judge Scileppi's dissent, other methods are either a study of the employment process itself, or an effect of that process. Recently, statistical proof of discriminatory impact has been held to be sufficient to have Title VII strictly enforced. *See Board of Education v. Harris*, 444 U.S. 130, 151-52 (1979)(dealing with racially disproportionate faculty assignments).

162. 13 N.Y.2d at 1100, 246 N.Y.S.2d at 632, 196 N.E.2d at 267.

163. *See supra* note 127, Schwartz telephone conversation.

164. Title VII protections have been strengthened by guidelines issued by the Equal Employment Opportunity Commission which outline specific rights of employees and responsibilities of employers. 29 C.F.R. §§ 1600-1691(1985).

165. 29 C.F.R. § 1605.2 This duty also applies to labor unions and employment agencies.

166. 29 C.F.R. § 1605.1. This standard was developed in *United States v. Seegar*, 380 U.S. 163 (1965) and *Welsh v. United States*, 398 U.S. 333 (1970).

the Magisterium (teaching authority) of the Church as expressed through Papal Encyclicals, tradition, Canon Law, and the writings of the Church Fathers would seem to be included.¹⁶⁷

The same EEOC guidelines which mandate "reasonable accommodation" to religious practices and beliefs also cover discrimination based upon national origin, ethnicity.¹⁶⁸ "National origin" discrimination is defined broadly by the Commission, and includes denial of equal opportunity for such reasons as membership in organizations associated with particular ethnic groups, attendance in schools or churches generally used by persons of a particular ethnic group, and having a name which is generally associated with particular ethnic groups.¹⁶⁹

In addition to the protection from discrimination *per se*, the EEOC guidelines also impose a mandatory duty upon employers to "maintain a working environment free of harassment on the basis of national origin."¹⁷⁰ This harassment-free working environment means that the employer must ensure that a workplace is free of ethnic slurs or other verbal or physical conduct relating to an employee's national origin.¹⁷¹ The employer is responsible not only for his own actions in this regard, but also for the ac-

167. The magisterium of the Roman Catholic Church is the teaching authority of the Church and the formalization of developing doctrine. The magisterium as a way of approaching faith based on receiving rather than constructing religious truth. This is perhaps the greatest difference between Catholic and Protestant theology. *See generally* A. FREMANTLE, *THE PAPAL ENCYCLICALS IN THEIR HISTORICAL CONTEXT* 9-20 (1963).

168. 29 C.F.R. § 1606.1-.2.

169. National origin discrimination is defined:

The Commission defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group. The Commission will examine with particular concern charges alleging that individuals within the jurisdiction of the Commission have been denied equal employment opportunity for reasons grounded in national origin considerations, such as (a) marriage to or association with persons of a national origin group; (b) membership in, or association with an organization identified with or seeking to promote the interests of national origin groups; (c) attendance or participation in schools, churches, temples or mosques, generally used by persons of a national origin group; and (d) because an individual's name or spouse's name is associated with a national origin group. In examining these charges for unlawful national origin discrimination, the Commission will apply general Title VII principles, such as disparate treatment and adverse impact.

29 C.F.R. § 1606.1

170. 29 C.F.R. § 1606.8(a).

171. 29 C.F.R. § 1606.8(b).

tions of all agents, employees, supervisory staff and, under certain circumstances, non-employees.¹⁷²

While these guidelines establish a formal legal and administrative framework for combating religious and ethnic discrimination, and therefore would appear to solve the problem of nativist anti-Catholic discrimination, the problem refuses to go away.¹⁷³

Much like exclusionary discrimination, there are very few suits brought by Catholics alleging non-accommodation or ethnic discrimination. There are various reasons for this, but those most often cited are ignorance of their rights by Catholics who may be the victims of discrimination, the lack of an awareness that a problem exists by civil rights agencies, and a desire on the part of many Catholics who may be aware of discrimination to avoid being considered "whiners."¹⁷⁴

The few cases which have been decided on the issue of accommodation¹⁷⁵ generally rule against the party claiming that his or her religious practices or beliefs are being interfered with.¹⁷⁶ As with anti-Catholic "exclusionary" discrimination, the state of the law on this issue is unclear. While it is true that statutes and regulations explicitly prohibit religiously motivated discrimination, it is equally evident that these measures are

172. 29 C.F.R. § 1606.8(c)-(e).

173. Just as it would be naive to state that racism died following the passage of the Civil Rights Act of 1964 or the Voting Rights Act of 1965, it would be naive to expect nativist anti-Catholicism to fade away due to legislative enactments. If one examines, however, the great improvement in race relations in this country over the past twenty-five years and contrasts it to the nativist problem over the same time period, it is relatively easy to see that there has not the same type of advance nor has there been the same type effort made to combat nativism.

174. For a discussion of the problem of "whiners" see M. SCHWARTZ, *supra* note 4, at 4-7; see also A. GREELEY, *supra* note 6, at 107 (dealing with the Catholic non-response).

175. Most cases either settle out of court or reach a final outcome in the lower state courts. For these reasons, a majority of these cases do not get reported. For a list of pending cases in which the Catholic League is involved see the League Court Calendar section of CATHOLIC LEAGUE NEWSL. (any issue).

176. See *Struck v. Secretary of Defense*, 460 F.2d 1372 (9th Cir. 1971) *cert. denied* 409 U.S. 947 (dealing with a Catholic Army officer's assertion that Air Force Regulations denied her first amendment right to freedom of religion. She stated that abortion, as one method of terminating the discharge proceedings against her, was not available to her because she was a Roman Catholic and her religious convictions did not permit her to have an abortion); see also *Haring v. Blumenthal*, 471 F. Supp. 1172 (D.D.C. 1979) (Roman Catholic employee of the Internal Revenue Service who wished to be reassigned so that there would be no question of bias in determination of tax-exempt status for abortion clinics).

rarely enforced. Due to this lack of vigorous enforcement, the society's sincerity in combating this particular prejudice should be questioned.

VI. THE "DIVISIVENESS DOCTRINE"

The internal tension inherent in the first amendment—between the "establishment" and "free exercise" clauses,¹⁷⁷ has led the courts to intensely scrutinize any governmental support for religious organizations or principles.¹⁷⁸ One of the major tools used for looking at cases involving such governmental support or involvement is the political divisiveness standard—or the divisiveness doctrine.¹⁷⁹

The divisiveness doctrine was first proposed by Prof. Paul Freund in his 1969 *Harvard Law Review* article "Public Aid to Parochial Schools."¹⁸⁰ Prof. Freund argued against any such aid on the grounds that it would be a source of perpetual conflict between persons of different religious faiths.¹⁸¹ He wrote "political division along religious lines is one of the principal evils the first amendment sought to forestall."¹⁸² This line of thinking was first utilized by the courts in *Walz v. Tax Commissioner*.¹⁸³ In that case Justice Harlan, writing about which standards should be used to govern the application of the two religion clauses in the first amendment, stated that "[w]hat is at stake as a matter of policy is preventing that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point."¹⁸⁴ Later, citing Prof. Freund's article, he wrote "governmental involvement, while neutral, may be so direct or in such degree as to engender a risk of politicizing religion."¹⁸⁵

177. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . ." U.S. CONST. amend. I.

178. *Lemon v. Kurtzman*, 403 U.S. 602, 614-15 (1971).

179. See generally Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement Of The Court In Sloppy History And Bad Public Policy*, 24 ST. LOUIS U.L.J. 205 (1980).

180. 82 HARV. L. REV. 1680 (1969).

181. *Id.*

182. *Id.* at 1692.

183. 397 U.S. 664 (1969).

184. *Id.* at 694 (Harlan, J., concurring).

185. *Id.* at 695.

Finally, driving home the point of potential political division after mentioning conflicts respecting birth control and abortion laws, Harlan reiterated the point, "history cautions that political fragmentation on sectarian lines must be guarded against."¹⁸⁶

Just two years after Prof. Freund's article was published, his line of thinking was enshrined, almost verbatim, as a doctrine of constitutional law in *Lemon v. Kurtzman*.¹⁸⁷ In addition to establishing a three part test to determine when governmental aid would result in unconstitutional excessive entanglement with religion,¹⁸⁸ the Court stressed that state aid to parochial schools is, inherently, politically divisive.¹⁸⁹ Chief Justice Burger, writing for the majority, stated that programs of significant ongoing aid to parochial, elementary and secondary schools created an explosive political issue which caused division along religious lines.¹⁹⁰ Furthermore, these programs virtually guarantee public debate and political conflict between religious groups each year as each group fought for increased appropriations.¹⁹¹ Echoing Prof. Freund, the Chief Justice stated that such division was to be eliminated by the establishment clause of the first amendment.¹⁹² The *Lemon* decision expanded upon the divisiveness doctrine by stating that governmental aid not only makes political division possible but that due to such programs "[p]olitical fragmentation and divisiveness on religious lines are thus likely to be intensified."¹⁹³ The political divisiveness test, first articulated in *Walz*, and then formalized in *Lemon*, was quickly taken up by the Court and used to invalidate state aid to non-public school provisions in a number of cases during the 1970s and early 1980s.¹⁹⁴ Since the vast majority of non-public elementary and secondary schools and students are Roman

186. *Id.*

187. 403 U.S. 602 (1971).

188. The three factors are the character and purpose of the institution benefitted, the nature of the aid, and the resulting relationship between government and religious authorities. *Id.* at 615.

189. *Id.* at 622-24.

190. *Id.* at 622.

191. *Id.* at 623.

192. *Id.* at 622. The two school aid programs involved in *Lemon* were state subsidies for a percentage of the salaries of parochial school teachers for those who teach secular school subjects.

193. *Id.* at 623.

194. See *Sloan v. Lemon*, 413 U.S. 825 (1973), *Meek v. Pittinger*, 421 U.S. 349 (1975).

Catholic,¹⁹⁵ any decision about such schools will have great importance to the Roman Catholic community.¹⁹⁶ Furthermore, these decisions have a historical importance to those concerned with anti-Catholicism, since attacks upon the Catholic school system has long played a major part in nativist appeals.¹⁹⁷

In cases involving aid to non-public schools, the Supreme Court has long shown a particular concern about the unique position and purpose of Roman Catholic schools. Beginning with Justice Douglas' dissent in *Board of Education v. Allen*¹⁹⁸ and continuing to the present day,¹⁹⁹ Catholic schools have been considered especially permeated with religion.²⁰⁰ Approaching the issue of aid to non-public schools with the attitude that "[i]t is well known that everything taught in most parochial schools is taught with the ultimate goal of religious education in mind"²⁰¹ has made it extremely difficult for state aid to be upheld.

In *Meek v. Pittinger*²⁰² the Supreme Court struck down new forms of aid given by the State of Pennsylvania. The aid took three basic forms: textbook loans, secular materials loans, and

195. In 1965-66 there were 5.57 million students in Catholic schools nationwide, representing 87% of the total non-public enrollment. In 1982-83, there were 3.02 million students in Catholic schools representing 58% of the total non-public enrollment. This decrease is partly due to the declining number of school age children and the rapidly expanding Evangelical School system. B. Cooper, *The Changing Universe of U.S. Private Schools* (Oct. 1984)(unpublished draft of a conference paper).

196. Such decisions also have great importance to the non-Catholic community since if the Catholic school system were to fail the public school would probably collapse under the weight of the added responsibility that millions of new students would cause.

197. Perhaps the most blatant example of this was the Klan-sponsored measure in Oregon which would have eliminated all non-public schools completely. This law was declared unconstitutional before it became operational in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

198. 392 U.S. 236, 254 (1968)(Douglas, J., dissenting). Justice Douglas writes for a number of pages about the various ways in which Catholic social teachings are worked into history and social science texts. Furthermore, he seems to have an unnatural interest in the *imprimatur* and *nihil obstat*.

199. See *Aguilar v. Felton*, 105 S.Ct. 3232 (1985).

200. 403 U.S. at 634-36 (Douglas, J., dissenting). Part of Douglas's opinion of Catholic schools is based upon the book *Roman Catholicism* by Boettner. This work is perhaps the most successful nativist hate tract of the 20th century. Douglas's use of this work as authority is the equivalent of using *The Protocols of the Elders of Zion* in a case dealing with aid to Jewish institutions.

201. *Id.* at 635. Characterizing the entire parochial school system in this manner makes it almost impossible to find a non-sectarian, and thus constitutionally permissible, area for state aid.

202. 421 U.S. 349 (1975).

provision of auxiliary services by public school employees.²⁰³ The majority upheld the textbook loan provision but invalidated the other sections, holding that the establishment clause was meant to protect against "sponsorship, financial support, and active investment of the sovereign in religious activity."²⁰⁴ Justice Stewart, writing for the majority, also held the view that the politically divisive nature of the aid required invalidation of the statute.²⁰⁵ However it is unclear from the decision whether the divisiveness doctrine is a separate test, part of the entanglement test, or the rationale for strictly applying the other tests. In *Meek*, Chief Justice Burger dissented and charged that the decision "penalizes children. . .because of their parents choice of religious exercise."²⁰⁶ This parental free exercise argument would in the future become a favored point for those supporting state aid to non-public schools.²⁰⁷ Throughout the 1970s the Supreme Court invalidated numerous forms of state aid. In such cases as *Sloan v. Lemon*,²⁰⁸ *Committee for Public Education v. Nyquist*,²⁰⁹ and *Levitt v. Committee for Public Education*,²¹⁰ the Court struck down tuition reimbursements to parents, funds for repair and maintenance, and payments for administrative services mandated by state law.²¹¹ Despite the fact that many aid programs have been struck down, most states still offer some sort of aid to non-public schools.²¹²

By the late 1970s, the divisiveness doctrine and assaults upon the non-public schools seemed to be over. However, the late seventies and early eighties proved to be merely the calm

203. *Id.* at 351-52.

204. *Id.* at 359.

205. *Id.* at 372.

206. *Id.* at 386.

207. The Catholic League, in numerous publications, has picked up on this argument stating that first amendment free exercise rights are threatened when the government, by withdrawing support, makes parochial schools prohibitively expensive. See *When the Supreme Court Fears Religion, children pay the price!* CATHOLIC LEAGUE NEWSL. SUPP., vol.12, no. 9.

208. 413 U.S. 825 (1973).

209. 413 U.S. 756 (1973).

210. 413 U.S. 472 (1973).

211. See cases cited *supra* notes 207-09.

212. According to a 1982 survey conducted by American's United for Separation of Church and State, the following programs are provided: textbook loans (25 states), health services (23 states), meal subsidies (17 states), special education programs (15 states) and bus transportation (26 states).

before the storm. In 1985, the Supreme Court returned to the issue of aid to non-public schools in *Aguilar v. Felton*.²¹³

In *Aguilar* the court invalidated programs devised under a federal statute²¹⁴ which paid the salaries of public school teachers who teach "educationally deprived" low income students in parochial schools.²¹⁵ The majority opinion, written by Justice Brennan, centered on the excessive entanglement issue, mentioning the divisiveness doctrine only in passing.²¹⁶ Justice Powell, in his concurrence, however, concentrated on the divisiveness question.²¹⁷ Indeed he devoted most of his concurrence to the issue, despite stating early in his opinion that there is no chance that "the Title I program or similar parochial aid plans could result in the establishment of a state religion."²¹⁸ Powell's worry was that such aid programs would lead to sharp political conflict between sectarian groups, each trying to receive a share of limited governmental resources.²¹⁹ This conflict, he suggested, could lead to extreme measures by the groups involved and thereby result in civil unrest.²²⁰

Chief Justice Burger, in a sharp dissent illustrative of his movement away from the standards he expounded in *Lemon*, recognized the latent anti-Catholicism underlying the Court's decision stating that "[i]t borders on paranoia to perceive. . .the Bishop of Rome lurking behind programs that are just as vital to the nation's school children as textbooks."²²¹ For the Chief Justice, the Court has fallen into the trap of being obsessed with tests and standards, and thereby failing to identify any real

213. 105 S.Ct. 3232 (1985).

214. Title I of the Elementary and Secondary Education Act of 1965, codified at 20 U.S.C. §§ 2701-2854 (1983 & Supp. III 1985).

215. *Id.*

216. 105 S.Ct. at 3239.

217. *Id.* at 3239-42.

218. *Id.* at 3240.

219. *Id.* This is almost a classic restatement of the doctrine.

220. "In short, aid to parochial schools of the sort at issue here potentially leads to 'that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain the political system to the breaking point.'" *Id.* at 3241 (Powell, J., concurring)(citation omitted).

221. *Id.* at 3242 (Burger, C.J., dissenting). Later the Chief Justice writes, "[r]ather than showing the neutrality the Court boasts of, it exhibits nothing less than hostility toward religion and children who attend church sponsored schools." *Id.* at 3242-43.

threat to religious liberty.²²²

With the *Aguilar* decision, the issue of state aid to non-public schools enters a new era, and the battle-lines clearly are drawn. On the one side are those who would invalidate almost any sort of aid, and on the other those who view each case individually, on the merits.²²³ Furthermore, since the specter of anti-Catholicism in these cases has been fully exposed, it will have to be addressed in future school aid cases.²²⁴

The divisiveness doctrine applies to more than just cases of aid to parochial schools. It has evolved to the point where almost any measure which is supported by a religious group is immediately suspect. Similarly, any action by a religious group which can be considered political is attacked as violative of the establishment clause.

This line of attack has been most often used against Roman Catholics in connection with the abortion issue. In 1980 the prototypical example of this took place when the "Hyde Amendment" was challenged, in part on the grounds that it was an establishment of the Roman Catholic religion.²²⁵ The basis for this attack was that the measure, which restricted federal funding of abortions, reflected Roman Catholic teaching on the matter and was introduced in Congress by Rep. Henry Hyde, who is a devout Roman Catholic.²²⁶ This approach was seriously considered by the district court but ultimately rejected.²²⁷ The issue was raised again in even clearer terms when the case was reviewed by the Supreme Court—"It is the appellee's view that the Hyde Amendment violates the Establishment Clause because it incor-

222. *Id.*

223. *See id.* at 3243 (O'Connor, J., dissenting).

224. The Chief Justice's remarks, *supra* note 221, are at least a recognition of the latent anti-Catholicism underlying these decisions. When combined with the educational efforts of the Catholic League, *supra* note 207, it seems likely that the issue will need to be addressed in future cases on the issue.

225. *See* *McRae v. Califano*, 491 F.Supp. 630 (E.D.N.Y. 1980).

226. *Id.* In the district court the ACLU claimed that since Congressman Hyde was a devout Roman Catholic the measure was an establishment of religion. In its attempt to show this the ACLU entered into evidence various facts about Congressman Hyde's life including the name of the church he attends, descriptions of the religious artwork in that church, descriptions of sermons delivered in the church, and details of the Congressman's activities in the parish. *See* Catholic League, *supra* note 10, unpaginated.

227. For a critique of the district court's handling of this matter, see Gaffney, *supra* note 179, at 208.

porates into law the doctrines of the Roman Catholic Church concerning the sinfulness of abortion and the time at which life commences."²²⁸ The Court held the mere fact that a statute coincides with the religious tenets of a particular sect is not, in and of itself, a per se violation of the establishment clause.²²⁹

The issues of abortion and political involvement have led to an even more direct attack upon the Catholic Church in the ongoing *Abortion Rights Mobilization, Inc. v. Regan* litigation.²³⁰ In this case, the tax exempt status of the Roman Catholic Church is being challenged on the grounds that the Church's stand on the abortion issue places it outside the bounds of tax exemption, since it is engaged in partisan political activities.²³¹ The challenge alleges that "the political activities of the Roman Catholic Church and the inaction of the [Treasury] Secretary and the [Internal Revenue Service] Commissioner violate the Constitution and the Code."²³² The alleged Constitutional violation states that by granting tax-exempt status, the government is giving tacit approval to the Roman Catholic position on abortion and thereby violating the establishment clause.

While the United States Catholic Conference and the National Conference of Catholic Bishops have been removed from the action,²³³ the case is still proceeding against the Treasury Secretary and the Internal Revenue Service. Since a revocation of tax-exempt status would impose a crippling liability upon the Church,²³⁴ its eventual outcome is of great importance to future Catholic ministerial functions. Furthermore, the case, if decided in favor of the plaintiffs, could have a significant chilling effect

228. *Harris v. McRae*, 448 U.S. 297, 319 (1980).

229. *Id.*

230. The case was filed in the Southern District of New York in 1980 and has gone through a series of pre-trial motions. See 544 F. Supp. 471 (1982) and 603 F. Supp. 970 (1985).

231. 544 F.Supp. at 475.

232. *Id.* at 476. These "political" activities include electioneering, support for anti-abortion candidates, and official statements made by the clergy regarding "political matters."

233. *Id.* at 487. The judge found it impossible for these two groups to violate the establishment clause.

234. This is obvious when one considers the great number of grammar schools, high schools, universities, cemeteries, hospitals, churches, etc., owned by the church and what the property tax assessments for all of these institutions, many of which are located in highly desirable urban areas, would be.

upon other churches.²³⁵ In a nation where issues of morality and politics are often intermingled, a victory for the plaintiffs could result in the prohibition of religious bodies from fulfilling their responsibility to speak out on moral issues for fear of facing an unfavorable tax assessment. The logical continuation of the argument put forward in this case is that all religious organizations which wish to maintain large-scale social service institutions, and thus need to maintain tax-exempt status, must surrender their constitutionally protected rights of free speech.

Cases involving aid to parochial schools merely make it more difficult for Catholic institutions to exist, but the new nativist tactics evidenced in *McRae* and *Abortion Rights Mobilization* would effectively destroy Catholic institutions unless they lessen their Catholicism. According to this new nativism, if it wishes to be treated like other religious bodies, and desires to maintain an active teaching authority, the Catholic church must tone down its Catholicism and, in effect, surrender its responsibility to its faithful. If Catholics wish to avoid breaching the establishment clause, they must tone down their free exercise rights.

VII. CONCLUSION

Anti-Catholicism is alive and well in the 1980s. Unless that fact is accepted and confronted, nothing can be done to correct the problem. Ignorance and acceptance by the society-at-large are two of the greatest obstacles facing those who would fight against the nativist revival.

Unlike anti-Semites who dream of extermination, or racists who dream of mass submission, anti-Catholic nativists simply want Catholics to "stop being" Catholic.²³⁶ Through defamation, discrimination, and attacks upon Catholic institutions, values, and teachings, the nativists are accomplishing their goal.

In order to combat this forgotten hatred, a number of reforms must take place. Group libel laws must be completely revamped so that attacks upon ethnic and religious minorities can

235. If the Catholic clergy is forced to be silent on issues of faith and morality such as abortion, euthanasia, capital punishment and nuclear weapons, it would follow that black clergymen would have to be silent on issues of civil rights and Jewish clergymen would have to be silent on issues pertaining to Israel.

236. M. SCHWARTZ, *supra* note 4, at 260.

be responded to. Laws against discrimination must be more strongly enforced. The courts must act with greater responsibility and sensitivity when dealing with the nation's largest minority. Until these reforms are made, the legal system will be little less than a willing partner in the nativists' attempt to isolate America's Catholics. Until these reforms are made, this nation's longest lasting and deepest prejudice will continue to be America's forgotten hatred and forgotten shame.

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