

Canonical Responsibilities for Public Aid to Private Education

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In the ongoing debate concerning government aid to private education there has seldom been a “canonical perspective” on this important issue. This fine essay by Mr. Peters examines the question as it pertains to the obligation of Catholics as found in the Church’s new code of canon law.

It is axiomatic in sound Catholic social thought that Catholics *qua* citizens should make appropriate use of the social and political means by which the rights of the Church and its faithful can be better secured. In the American political context, furthermore, it is widely recognized that one of the most contested Church-state matters deals with governmental aid to religiously-sponsored education. It is not surprising, of course, that educational matters, particularly parental rights to educational assistance, should be so widely debated. The many issues surrounding the education of youth touch upon the very core of family identity and social well-being.¹ But it is not the

¹An excellent multi-disciplinary study of parental rights in modern civil society, with special emphasis on issues pertaining to the education of children, is *Parental Rights: The Contemporary Assault on Traditional Liberties*, ed. by S. Krason and R. D’Agostino (Front Royal, VA: Christendom Press, 1988).

purpose of this study to examine the civil arguments which Catholics *qua* citizens can offer on behalf of governmental aid to private education,² nor event to examine the nature and degree of their obligation as citizens to make such arguments. Rather, this inquiry seeks to investigate whether Catholics *qua* Catholics have an ecclesial, specifically, a canonical, obligation to engage in legitimate secular efforts to secure governmental assistance for religiously affiliated education.

We begin by observing that a canonical directive to engage in secular civil activities would be highly unusual for a Code which is primarily concerned with the internal regulation of ecclesiastical affairs. Although there are a few key declarations of ecclesiastical rights over and against the contrary claims of certain political systems,³ as well as some other canons which freely defer certain matters to the legitimate regulation of civil authorities,⁴ the 1983 Code generally avoids canonical directives which are to be exercised in the civil arena. Thus, all the more brightly will those few canons stand out which, as we shall see, positively direct the faithful to exercise their civil rights in the secular domain.

Although several canons from the 1983 Code of Canon Law⁵ will bear upon our topic, Canon 797 is certainly the most

²For examination of these arguments see Kenneth Whitehead, *Catholic Colleges and Federal Funding* (San Francisco, CA: Ignatius Press, 1988).

³See, for example, Canons 1254 and 1259 which affirm the right of the Church to hold property, or Canon 1401 on the right of the Church to adjudicate cases dealing with spiritual affairs.

⁴See, for example, Canon 1059 which recognizes state regulation of the merely civil effects of marriage, as well as the general provisions of Canon 22.

⁵*Codex Iuris Canonici Auctoritate Ioannis Pauli PP. II Promulgatus* (Vatican City: Libreria Editrice Vaticana, 1983) (hereafter, 1983 CIC). Note that Latin remains the official language of the Code of Canon Law. Translations (this author's unless noted otherwise) are provided for convenience.

important.⁶ That canon states: “It is necessary that parents enjoy true freedom in the selection of schools; therefore the Christian faithful must be solicitous that civil society acknowledges this freedom of parents and, in compliance with distributive justice, even protects it with subsidies.”⁷

Canon 797 is taken from the 1983 Code’s Book III *The Teaching Office of the Church*, Title III *Catholic Education*, Chapter I *Schools*, and opens with a declarative preamble on the necessity of parental freedom in education.⁸ The normative section of the canon follows: the Christian faithful⁹ are to be

⁶The Committee on the Ecclesiastical Magisterium, (a division of the Pontifical Commission for the Revision of the [1917] Code of Canon Law), to which was assigned the task of revising the Church’s canons on, among other things, education, referred to this canon as a “fundamental principle” relating to educational rights. See W. Onclin, “[Relatio] De Opera Consultorum in Apparandis Canonum Schematibus: Coetus de Magisterio Ecclesiastico,” *Communicationes* 7 (1975) pp. 149-160, p. 156.

⁷1983 CIC 797 — *Parentes in scholis eligendis vera libertate gaudeant oportet; quare christifideles solliciti esse debent ut societas civilis hanc libertatem parentibus agnoscat atque, servata iustitia distributiva, etiam subsidiis tueatur.* This canon, as did most other canons of the 1983 Code, went through two prior drafts in the course of the revision process. The present Canon 797 appeared as Canon 49 of the (1977) *Schema Canonum Libri III: De Ecclesiae Munera Docendi*, and later was Canon 752 of the 1980 *Schema* of the same Book. Except for the addition of the reference to distributive justice into the 1980 *Schema*, no significant changes were made in the formulation of this canon, and all commentary may be addressed to its final promulgated form.

⁸Actually, the 1983 Code contains numerous affirmations of the importance of parental freedom and rights in education. But rather than develop this important point here, may I simply refer the reader to my *Home Schooling and the New Code of Canon Law* (Front Royal, VA: Christendom Press, 1988), esp. pp. 10-24.

⁹The term “christifideles” (Christian faithful) can encompass a broader class of persons than merely Catholics. See 1983 CIC 204.1. With, however, the exception of material referred to in fn. 13, we have chosen to limit this discussion to Roman Catholics.

attentive that government actively protects this parental freedom in education. Two observations are in order.

First, we note that Canon 797 presumes that the state itself is to support actively the rights of parents in the education of their children. For this presumption, the canon rests securely on a statement by the Second Vatican Council in its *Declaration on Christian Education*: "Parents, who have a primary and inalienable duty and right in regard to the education of their children, should enjoy the fullest liberty in their choice of school. The public authority, therefore, whose duty it is to protect and defend the liberty of the citizens, is bound according to the principles of distributive justice to ensure that public subsidies to schools are so allocated that parents are truly free to select schools for their children in accordance with their conscience."¹⁰

But the 1983 Code takes a marked step beyond the Council's admonition *to the state* that it recognize the educational rights of parents, and through Canon 797 explicitly directs *the faithful themselves* to engage the government in its duty to respect parental rights. In so doing, the Code departs from its usual practice of refraining from directives which carry civil implications and at the same time widens the ecclesiastical responsibility for civil educational policies from just parents, teachers, and Church leaders, and places it in the *entire* Christian community. For the time being we shall describe this canonical

¹⁰Second Vatican Council, "*Gravissimum educationis*" (Declaration on Christian Education), No. 6, (28 October 1965). Translation from *Vatican Council II: The Conciliar and Post-Conciliar Documents*, ed. by A. Flannery (Northport, NY: Costello, 1975), p. 731. See also, Vatican II, "*Dignitatis humanae*" (Declaration on Religious Liberty), No. 5, (7 December 1965). For several post-Conciliar reaffirmations of this point, see, for example, Sacred Congregation for Catholic Education, "*Malgre les declarations*" (Catholic Schools), Nos. 81-82, (24 June 1977); John Paul II, "*Familiaris consortio*" (The Christian Family in the Modern World), No. 40, (22 November 1981); and, John Paul II, "*Christifideles laici*" (The Lay Members of Christ's Faithful People), No. 62 (30 December 1988).

obligation as positive though unspecified.¹¹ Now, as Dr. James Coriden observes, "In a complex, pluralistic society this governmental duty is both hotly disputed and difficult to fulfill . . ."¹² Nevertheless, a canonical obligation is presented. As Coriden concludes, "Believers are here urged to press their case for a just distribution of educational subsidies."¹³

The second canon which imposes a positive though unspecified obligation on the faithful in regard to education is Canon 799, which is drawn from the same section of the 1983 Code as is Canon 797. Canon 799 states "The Christian faithful are to strive so that the laws which regulate the formation of youth in society provide a religious and moral education in the schools themselves, in accord with the conscience of the parents."¹⁴ In much the same manner as Canon 797, Canon 799

¹¹We shall discuss the notion of a "positive though unspecified obligation" shortly.

¹²See J. Coriden, "Commentary on Book III: The Teaching Office of the Church," in *The Code of Canon Law: A Text and Commentary*, ed. by J. Coriden, et. al. (New York, NY: Paulist, 1983) (hereafter, CLSA Comm.), pp. 545-589, p. 566.

¹³*Ibid.* The reader should also note that the Legislator's concern for parental rights to public assistance in education will not be limited to those expressed in the (Latin) Code of Canon Law. The Eastern Code of Canon Law, now awaiting final promulgation, contains this remarkably similar provision: "[Parents] are to enjoy true freedom in the choice of the means of education . . . [T]herefore the Christian faithful are to see that their right is recognized by the state and promoted by suitable assistance in accordance with the requirements of justice." See Pontificia Commissio Codicis Iuris Canonici Orientalis Recognoscendo, *1986 Schema Codicis Iuris Canonici Orientalis*, Canon 624.3. (Because the Eastern Code is not yet promulgated, only that English translation prepared in 1987 by the United States Eastern Catholic Bishops Consultation is provided here.)

¹⁴1983 CIC 799 — *Christifideles enitantur ut in societate civili leges quae iuvenum formationem ordinant, educationi eorum religiosae et morali quoque, iuxta parentum conscientiam, in ipsis scholis prospiciant.* This canon appeared as Canon 51 in the 1977 *Schema*, and as Canon 754 in the 1980 *Schema*.

presumes that public schools should and do impart religious and moral education. The ecclesial obligation which the canon imposes on the Christian faithful, however, is that they work so that the education so provided is in accord with the conscience of the parents. In brief, the faithful are again directed to engage in legitimate secular activities aimed at assuring that the state recognizes its duties in regard to parental rights in education. As was the case with Canon 797, the specific content of this obligation, which also applies to *all* the faithful, remains indeterminate. But this is no way mitigates the fact that *some* participation in the social processes which determine educational policy is a canonical obligation of the faithful.¹⁵

The third canon of importance for our discussion is actually the canon which opens the 1983 Code's treatment of Catholic education, namely Canon 793.2, which declares that "It is also the right of parents to make use of those aids in civil society which they need to procure the Catholic education of their children."¹⁶ As was the case with the two previous canons, "There is no attempt to specify exactly what the responsibilities of civil government are in this regard," notes Coriden, "but it is an assertion that the civil society *has* responsibilities even in the matter of religiously oriented education."¹⁷ Canon 793.2 does not, of course, impose an obligation on the part of parents or

¹⁵Note that Coriden, CLSA Comm., p. 567, states that "This canon is another *exhortation* for action in the public sphere. . . ." (emphasis added). Presumably, the first "exhortation" was that of Canon 797. We shall discuss later more precisely whether these canons are merely salutary exhortations or actually impose juridic obligations.

¹⁶1983 CIC 793.2 — *Parentibus ius est etiam iis fruendi auxillis a societate civili praestandis, quibus in catholica educatione filiorum procuranda indigeant*. This canon appeared as Canon 43.4 in the 1977 *Schema*, and as Canon 748.2 in the 1980 *Schema*.

¹⁷Coriden, CLSA Comm., p. 565. See also Dr. James Provost, "Commentary on Book II: The People of God," CLSA Comm., pp. 117-173, p. 162.

schools to make actual use of any particular assistance,¹⁸ nor, strictly speaking, does it present an actual obligation on the part of the faithful to work that such aids be made available. Rather, when considered in light of Canons 797 and 799 (canons which do impose obligations to work for the provision of such aid), Canon 793.2 and its affirmation of parental rights to use such aid may fairly be read as lending important juridic support for the canonical obligations asserted in Canons 797 and 799.

Canons 793.2, 797, and 799, taken, as we have seen, from the Code's treatment of education, declare the rights of parents to receive assistance from the state as they educate their children, and impose a positive though unspecified obligation on all the Christian faithful to see to it that their government recognizes its duty in this matter. The 1983 Code, however, provides yet one more expression of the faithful's obligation to engage in these secular efforts when it discusses the broader rights and obligations of the laity in Canon 225.2.

Canon 225.2 is taken from Book II, *The People of God*, Title II, *The Obligations and Rights of the Lay Christian Faithful*, and states that "Each lay person in accord with his or her condition is bound by a special duty to imbue and perfect the order of temporal affairs with the spirit of the [G]ospel; thus they give witness to Christ in a special way in carrying out those affairs and in exercising secular duties."¹⁹ For most practical purposes, this

¹⁸In a review of the Whitehead book (see fn. 2), Mark McShurley, Director of Financial Aid for Christendom College, confirms this point notwithstanding the current practice of that college in refusing federal aid. McShurley explains that Christendom College refuses federal aid "only in prudence . . . [Christendom] does not hold in principle that government cannot aid education . . ." See M. McShurley, "Principle before Profit," *Reflections* . . . (Vol. 7, No. 4), p. 10, (Fall, 1988).

¹⁹1983 CIC 225.2 — *Hoc etiam peculiari adstringuntur officio, unusquisque quidem secundum propriam condicionem, ut rerum temporalium ordinem spiritu evangelico imbuant atque perficiant, et ita specialiter in iisdem rebus gerendis atque in muneribus saecularibus*

is the only canon which indicates canonical responsibilities on the part of the faithful to engage in temporal affairs. Of course, in such a canon it is obvious that a vast range of secular activities (educational affairs being just one of them) falls within its scope; indeed, the duties expressed herein go to the very heart of the lay vocation and apostolate.²⁰ As before, there is no attempt by Canon 225.2 to specify how any particular person is to work for the perfection of the temporal order. For our purposes, though, we note that this statement on the general obligation of the laity to engage in temporal and secular affairs, a statement which is located in a "quasi-constitutional" section of the Code,²¹ is consistent with and supportive of their more specific obligations to foster governmental aid to education outlined in Canons 797 and 799.²²

Before concluding these remarks, a few words should be offered on the *degree* of the canonical obligations outlined above. We have used the expression "positive though unspecified" to describe the ecclesial obligations contained in Canons 225.2, 793.2, 797, and 799. But we have also noted that at least one commentator used the term "exhortation" instead of "obligation"

exercendis Christi testimonium reddant. (Translation of the Canon Law Society of America.) See also 1983 CIC 211, 227, and 768.2.

²⁰The reader might consult Vatican II, "*Gaudium et spes*" (Pastoral Constitution on the Church in the Modern World) No. 43 (7 December 1965); *ibid.*, "*Apostolicam actuositatem*" (Decree on the Apostolate of the Laity), nos. 5-8 (18 November 1965).

²¹See this description of this section of the 1983 Code offered by Coriden in his "A Challenge: Making Rights Real," *The Jurist* 45 (1985), pp. 1-23, p. 8.

²²Provost points out that Canon 224 was careful to recognize that the rights and obligations of the faithful are indeed located throughout the entire Code of Canon Law. See Provost, CLSA Comm., pp. 160-161. 1983 CIC 224 states in pertinent part "*praeter eas obligationes et iura . . . quae in aliis canonibus statuuntur . . .*" (beyond those obligations and rights which are established in other canons). Canons 797 and 799, as well as Canon 793.2, should certainly be considered as some of those other canons.

or some similar jussive term, to describe Canons 797 and 799.²³ Of course, an exhortation — however wise the source or beneficial the act — to perform some task would impose considerably less in the way of moral and legal obligation to perform that task than, for our purposes, a canonical directive.²⁴ Thus the question of whether these canons, particularly Canons 797 and 799, are simple exhortations or actual obligations is of some consequence for our study.

It is widely recognized that the 1983 Code uses a variety of “literary forms” to express its provisions, and that not all of these forms, and the canons they convey, are of equal weight.²⁵ There are indeed numerous exhortations, as opposed to obligations, contained in the 1983 Code. Canon 904, for example, “strongly recommends” that priests celebrate the Eucharistic Sacrifice once a day,²⁶ Canon 1186 “recommends the Blessed Mary ever Virgin . . . to the particular and filial devotion of the faithful”²⁷ and Canon 280 states that “some community of life for clerics is highly recommended.”²⁸ Although the appropriateness of these canonical exhortations is patent, it is also clear that none of these canons establish a juridic obligation the violation of which would be canonically cognizable.

It is suggested, therefore, that true exhortatory canons should stand in some distinction from provisions such as Canon

²³See fn. 15.

²⁴One should not, of course, belittle the importance of ecclesiastical exhortations. They are, if nothing else, official manifestations of the importance of the subject matter, and consequently merit close attention by the faithful.

²⁵For a brief introduction to this topic, see Ladislav Orsy, “Commentary on Book I General Norms,” CLSA Comm., pp. 23-45, pp. 41-42. The term “literary forms” is Orsy’s.

²⁶1983 CIC 904 — *[I]mmo enixe commendatur celebratio cotidiana . . .*

²⁷1983 CIC 1186 — *[P]eculiari et filiali christifidelium venerationi commendat Beatam Mariam semper Virginem . . .*

²⁸1983 CIC 280 — *Clericis valde commendatur quaedam vitae communis . . .*

797 which states that the faithful “must be solicitous” (*solliciti esse debent*) that civil society come to the aid of parents, or Canon 799 which directs that the faithful “strive” (*enitentur*) that civil society takes appropriate steps in the formation of children. As such, neither of these canons makes a mere recommendation; both direct an active albeit unspecified secular effort on the part of the faithful. Even such basic norms as Canon 255.2 declare that the (lay) faithful “are bound by a special duty” (*peculiari adstringuntur officio*) to perfect the world in accord with the Gospel. Special duties are not the simple equivalent of praiseworthy options.

Having concluded that there are indeed canonical obligations on the part of the faithful to see to it that civil society recognizes the rights of parents in education, we hasten to add, as indicated earlier, that these obligations are not specified and hence open to considerable flexibility in interpretation and implementation. That is why we have chosen to describe these canonical obligations as “positive though unspecified.” The Legislator chose not to attempt detailed prescriptions for actions which, because the Code of Canon Law would have force in scores of nations, would have to be implemented in a wide variety of social and political climates. The 1983 Code respects the dictates of prudence at the local level and gives individuals wide discretion in the determination of specific activities. Certainly, in the absence of more specific or particular legislation, no member of the faithful can be considered delinquent for failure to perform any specific acts aimed at accomplishing the goals outlined above. But that each member of the faithful is required to make *some* positive effort that government recognize its duties toward parents in the education of their children is, I suggest, an accurate interpretation of the canons outlined above. *Salvo sapientiorum iudicio . . .*

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