

### *Symposium on Church and State*

## State Regulation of Social Services Ministries of Religious Organizations

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**STATE REGULATION OF SOCIAL  
SERVICES MINISTRIES OF  
RELIGIOUS ORGANIZATIONS**

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The government is seeking to confine the "church" to only those activities carried on in a building with a steeple on the roof.<sup>1</sup>

The church does not have a right to wholesale dispensation from the obligation of reasonable civil laws. Christ came to save us, not exempt us.<sup>2</sup>

INTRODUCTION

Religiously motivated civil disobedience in the area of social and human services ministries of religious organizations has become increasingly widespread. With growing governmental involvement in the lives of citizens and moves by federal and state agencies to narrowly confine and define religious activities,<sup>3</sup> it comes as no surprise that conflict over the proper role of the state has crept as well into the arena of social and human services conducted from religious motivation. The current litigation and legislation is principally focused on state regulation by certification or licensing requirements that are expanding from health, fire, and safety concerns into the sensitive areas of program and personnel.

Historical Judeo-Christian faith has long insisted that it involves the full range of life's activities. Implementing the biblical im-

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3. See, e.g., Carlson, *Regulators and Religion: Caesar's Revenge*, REGULATION 27 (May-June 1979); Durso and Brice, *NLRB v. The Catholic Bishop of Chicago: Government Regulation Versus First Amendment Religious Freedoms*, 24 ST. LOUIS L.J. 295 (1980); Neuberger and Crumplar, *Tax Exempt Religious Schools Under Attack: Conflicting Goals of Religious Freedom and Racial Integration*, 48 FORDHAM L. REV. 229 (1979); Comment, *Bringing Christian Schools Within the Scope of the Unemployment Compensation Laws: Statutory and Free Exercise Issues*, 25 VILL. L. REV. 69 (1980).

peratives found in both the Old and New Testaments to assist the poor, the elderly, the orphaned, the widowed, and others who are more vulnerable to the whims of fate, religious organizations have traditionally endeavored to meet social obligations to their community by ministries whose immediate objectives are to satisfy earthly, human needs.

Most of these religious organizations would hasten to add that having served as a "witness" to their faith by meeting the more immediate human needs, they gain the opportunity to evangelize and serve the spiritual needs of the same individuals. The difficulty, indeed, near impossibility, of defining where the temporal ends and the spiritual begins, and regulating the former but not the latter, is one of the most complex ongoing controversies.<sup>4</sup>

Separating the secular from the sacred, with only the latter being afforded protection under the religion clauses of the first amendment, is only the threshold problem. A subset of this first question is establishing the limits to be placed on the courts in marshalling the evidence to make this definitional determination.<sup>5</sup> Because the courts have been instructed to look to neutral principles of law and objective criteria,<sup>6</sup> a ministry's organizational structure may determine the degree of protection afforded from overzealous regulation.

The types of these ministries are myriad, but the principal ones fall within one of the following categories: (1) children's homes and orphanages; (2) child-care, day-care, and preschool programs; (3) foster home and adoption placement agencies; (4) charities, such as storehouses of food and used household goods and temporary meals and lodging; (5) alcohol and drug treatment programs; (6) counseling and chaplaincy services; (7) youth recreational programs, camps, and retreat centers; (8) maternity shelters for expectant unwed mothers; (9) hospitals and medical clinics; (10) prison ministries and halfway houses for criminals; (11) nursing and invalid homes for the elderly; and (12) centers for the handicapped, retarded, or mentally ill.

The organizational structures of social and human services ministries vary widely. Some are tightly integrated into a church or synagogue with no existence apart from the body that conducts wor-

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4. See text accompanying notes 145-51 *infra*. The theological position of some faiths would be offended by the suggestion that life could be separated into the religious and the secular.

5. See text accompanying notes 158-64 *infra*.

6. See, e.g., *Jones v. Wolf*, 443 U.S. 595 (1979).

ship services. Others exist as lay religious groups or parachurch organizations, often incorporated under section 501(c)(3) of the Internal Revenue Code,<sup>7</sup> with operations worldwide that owe allegiance to no particular organized denomination. The differences in organization result from varying doctrine, structure imposed by founders, structure favored by tax considerations, state corporation law and other positive law, and, more recently, legal advice on how to operate with the greatest freedom from state regulation.<sup>8</sup>

Once it is determined that certain activity is religious, the burden then shifts to the state to demonstrate that it has a compelling interest that justifies limiting or prohibiting the religiously motivated activity.<sup>9</sup> Further, the state must show that the selected means of regulation are the least intrusive possible to achieve its stated interest.<sup>10</sup> Rather than carry this heavy burden, government has often sought to define the regulated activity as "secular." This position by the state has caused perhaps the greatest outcry among social and human services religious organizations, for they are unable to accept their vocation as anything less than a religious calling. The argument of the religious organization is weakened, however, since many of the ministries have counterparts in both the private and public sector, often operated or funded by state or local government, seeking to serve the same community needs.

After identifying the issues, this article surveys the litigation and legislation regarding the social and human services activities of religious organizations, with particular focus on state licensing and regulatory schemes.<sup>11</sup> Next, the issues are discussed within the framework

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7. 26 U.S.C. § 501(c)(3) (1976).

8. See, e.g., R. TOMS, *WHAT IS A CHURCH: THE DILEMMA OF THE PARACHURCH* (1978); Morgan, *The Significance of Church Organizational Structure In Litigation And Government Action*, 16 VAL. U.L. REV. 145 (1981).

9. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

10. See text accompanying notes 165-67 *infra*.

11. Federal, state, and local government interrelate with religious organizations in numerous ways other than comprehensive licensing and regulatory schemes. No attempt is made here to address equal employment, unemployment compensation, workmen's compensation, occupational health and safety, minimum wage and maximum hours, and other labor legislation; securities regulation; tax laws; retirement and pension plan regulation; charitable solicitation laws; zoning and land use planning ordinances; professional and occupational licenses; or, state corporation registration and filing requirements.

For a recent article that focuses on federal funding and concomitant regulation of church activities in social welfare, see Pickrell & Harwich, "*Religion as an Engine of Civil Policy*": *A Comment on the First Amendment Limitations on the Church-State Partnership in the Social Welfare Field*, 44 L. & CONTEMP. PROB. 111 (1981).

of the federal constitutional rights derived from the first and fourteenth amendments. Finally, the article suggests an approach that accommodates both legitimate state concerns and the values undergirding the free exercise and establishment clauses.

### I. THE MATTERS IN DISPUTE

It is helpful to think of the activities of religious organizations falling into one of three classifications. The first classification includes those activities that are unmistakably "secular."<sup>12</sup> The second includes those religious or religiously motivated activities that arguably infringe upon the concerns of society. Where society has an interest, the state is often led to step forward and police the activity. The third classification includes those activities that even the narrowest of "religion" definitions must embrace: worship, prayer, the reading of sacred literature, preaching, and evangelizing. If conducted privately or in a house of worship, these engagements enjoy as absolute a protection as our legal system can provide.

Taking the generalization a step further, most social and human services ministries come within the second classification: those where the state arguably should exercise its police power. The impetus toward regulation is strengthened by two additional factors. First, there are counterparts to the religious ministries operated by public or private secular organizations. Accordingly, the state sees itself as neutral when it regulates the activity similarly regardless of whether it is operated by a secular or religious body. The mere neutrality of the state is often asserted to constitutionally sanction its regulatory interference.<sup>13</sup> Second, often the very reason a religious organization is motivated to minister to a certain community is that the people are vulnerable and in need of help: for example, the young, the handicapped, or the poor. The state, for the same reason, exercises its power to protect those who are not as able to help themselves. With both the religious organization and the state moving to assist or protect the same community of people, interests often collide.

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12. See, e.g., *De La Salle Inst. v. United States*, 195 F. Supp. 891 (N.D. Cal. 1961) (activities of winery operation by Catholic Christian Bros. was not religious and, thus, subject to taxation); 26 U.S.C. § 511 (1976) ("unrelated business income" provisions of the Internal Revenue Code).

13. Neutrality alone will not ensure that a regulation passes constitutional muster. A regulation neutral on its face may offend the free exercise clause in its application if it unduly burdens religious practice. *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972).

Challenging the power of the state to license or otherwise control the activities of social and human services ministries primarily raises the excessive entanglement facet of the establishment clause and free exercise clause issues.<sup>14</sup> The argument against excessive entanglement of the state in church affairs is that state licensing creates an organic relationship between religion and the state. The free exercise claim is that certain regulations unreasonably and unnecessarily burden certain religious convictions.

Regulations promulgated by the state typically address at least the following: (1) purposes, policies, and procedures of the organization; (2) staff positions and responsibilities; (3) personnel qualifications; (4) financial practices and records; (5) insurance; (6) fees or other charges; (7) criteria or qualifications for assistance or admission; (8) case records; (9) minimum space and personnel requirements; and, (10) nutritional, health, building, and fire codes. No objection is raised to compliance with reasonable nutritional, health, building code, or fire protection requirements.<sup>15</sup> However, the pervasive regulatory activity

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14. Parental rights and concern for individual privacy may be implicated as well. The parental rights theory is discussed in the text accompanying notes 240-51 *infra*.

15. Health and safety concerns include: (1) compliance with state and local fire and building codes; (2) health certification of staff; (3) immunization against specified diseases; (4) fire drills and inspections; (5) compliance with food sanitation laws; (6) compliance with clean water and sewage disposal laws if not serviced by a public utility; (7) minimum standards as to available space and lavatories; (8) nutritional standards; and (9) minimum standards as to housekeeping and maintenance of buildings and grounds.

In *State Fire Marshall v. Lee*, 101 Mich. App. 829, 300 N.W.2d 748 (1980), the pastor of a fundamentalist Baptist church was convicted for violations of state fire and safety regulations in the operation of a church school. The church had purchased modular classrooms from the local public schools and had remodeled them for use as a church and church school. The state fire marshal cited the church for five violations. The pastor noted extensive efforts to assure fire safety for the occupants. The pastor further argued that he would comply with fire regulations for the building's primary purpose as a church, and that such compliance is sufficient to cover "incidental" use as a church school. The appeals court held that the building was a school building and that the church school was not "incidental" to the church's ministry, but an integral part of it. The state's compelling interest in assuring the health and safety of all school children is sufficient to apply the school fire codes to the church school. The church's free exercise rights were held not to be violated. The court ordered certain code violations corrected. The court noted with puzzlement that, according to the code provisions, the building was "unsafe for 17 people Monday through Friday" but met the requirements when 90-100 were in attendance on Sunday mornings. The court noted as well that the record indicates that the buildings were safe when used by the Linden School District, but were held to be unsafe when used by the church school. The court observed, "Somehow, this logic escapes this Court. This could appear in some minds to be harrassment of the Liberty Baptist Church."

of the state is said to create an ongoing relationship with resulting surveillance by the state of religious concerns. Such continual supervision or organic relationship, it is argued, is contrary to establishment clause values.<sup>16</sup>

Concerning the free exercise contentions, social ministries readily concede the power of the state to establish minimum standards regarding the health and safety aspects of their ministries.<sup>17</sup> However,

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16. A number of decisions have held that a law that involves the government in the continuing surveillance of a religious institution violates the required neutrality. *Lemon v. Kurtzman*, 403 U.S. 602, 615, 621 (1971) (prohibiting state parochial aid); *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970) (taxing property of church prohibited). See *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (finding no congressional intent to subject parochial schools to jurisdiction of the National Labor Relations Act).

17. This is especially true where the health and safety of children is concerned. In *Prince v. Massachusetts*, 321 U.S. 158 (1944), a state statute prohibiting parents of minors from compelling their children to sell literature was held not to offend the free exercise and equal protection clauses. The statute withstood attack by a Jehovah's Witness who was the guardian of a minor sent to distribute religious literature on public streets out of religious conviction or duty. *Prince* is one of the early decisions of the Supreme Court where the state's power as *parens patriae* prevailed over claims of parental rights and the religious upbringing of their children:

[T]he family itself is not beyond regulation in the public interest, as against a claim of religious liberty. *Reynolds v. United States*, 98 U.S. 145 (1878) (upheld polygamy as a crime notwithstanding it was a Mormon religious tenet); *Davis v. Beason*, 133 U.S. 333 (1890) (upheld crime of advocating polygamy notwithstanding it was pursuant to Mormon beliefs). And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways, its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death. . . . The catalogue need not be lengthened. It is sufficient to show what indeed appellant hardly disputes, that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction.

321 U.S. at 166-67 (footnotes omitted).

The holding in *Prince v. Massachusetts* was tempered in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). *Yoder* recognized *Prince* as follows:

To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.

406 U.S. at 233-34. The Court went on to hold that on the record before them state

the state encounters stiff resistance when it crosses over into areas of program and personnel.<sup>18</sup> A list of recurring areas of conflict between social ministries and the state, that many contend burden the free exercise of religion, is as follows:<sup>19</sup>

— *Regulation*: Requiring a written statement of a ministry's purposes and policies and submission of character references on behalf of the operator to obtain a license.

— *Objection*: Because a ministry's purposes and policies are integrated with its religious beliefs and organizational structure, this requirement is tantamount to a religious test. A statement of purposes would repeatedly cite scripture and denominational documents, matters in which the state should have little involvement. The regulation either expresses or implies that authority lies with the state to assess the quality and content of a ministry's program, under the threat of licensure denial. A church or parachurch, not the state, should set the scope and limits of its ministry. The requirement of character references or showings of "good moral character" are vague, and could result in the state sitting in judgment over a rabbi, priest or pastor.

— *Regulation*: Requiring a license for operation of the ministry.

— *Objection*: The ministry is not separate from the church or parachurch organization. For the state to refuse to license the ministry is to close down part of the church. For the state to license the church implies that the state is

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compulsory school attendance laws must yield to the religious concerns of an Amish community that formal education beyond the eighth grade would gravely endanger if not destroy the free exercise of their religious beliefs.

Even where children are not involved, the police power of the state to regulate matters of concern to the health and safety of its citizens has been clearly acknowledged:

Some relationship between government and religious organizations is inevitable. . . . Fire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws are examples of necessary and permissible contacts.

*Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971) (citations omitted).

18. Where to draw this line of encroachment is also disputed. For example, what constitutes "mental health" to some state officials is a matter of "religious curriculum" to a faithful adherent, and what is "safety" to one is biblically mandated discipline to another.

19. The list is not exhaustive. Indeed, such would not be possible because of the many variances in religiously held beliefs.



superior; whereas, one doctrinal position is that church and state are coequals, with each assigned a separate sphere of authority.<sup>20</sup> When children are involved, the ministry is principally responsible to the parents, not to the state.

—*Regulation*: Requiring professional certification of staff, minimum education, and minimum job experience for supervisors. Staff cannot be employed on a discriminatory basis.

—*Objection*: The staff are considered religious employees serving in a lay ministry position, even though some have no formal religious training. The staff are under the direct supervision of the church or religious authorities, and it is they who determine who has the gifts to minister. Because the program or training is religious, state certification requirements may conflict with the selection standards of the religious body. To discriminate on a religious basis in staff employment is the very essence of propagation of a particular faith.

20. The argument was rejected in *Roloff Evangelistic Enterprises, Inc. v. Texas*, 556 S.W.2d 856 (Tex. Civ. App. 1977), *appeal dismissed*, 439 U.S. 803, *reh. denied*, 439 U.S. 998 (1978); *Oxford v. Hill*, 558 S.W.2d 557 (Tex. Civ. App. 1977), *see text accompanying note 59 infra*, and *Kansas v. Heart Ministries, Inc.*, 227 Kan. 244, 607 P.2d 1102, *appeal dismissed*, 449 U.S. 802 (1980), *see text accompanying note 144 infra*, but affirmed in *Texas v. Corpus Christi People's Baptist Church, Cause No. 297,248* (200th Jud'l D. Ct., Travis City, Tex. Jun. 30, 1981), *appeal docketed*, No. 13,575 (Tex. Civ. App. Sep. 4, 1981), *see text accompanying notes 48-50 infra*.

*See Dowell, Missouri Seeks to License Church PreSchool Ministries*, 4 THE CLA DEFENDER 12-13 (Iss. 3 1981), where one pastor summarized the rationale for his opposition to licensing of child day-care facilities as follows:

1. We oppose in principle the authority of the state to license any ministry of the church (would place the state over the church).

2. We oppose in principle the authority of the state to define what is or is not a ministry of the church in such a way as to license one ministry and not another.

3. We oppose licensing of church day-care because of the inevitable expansion to other ministries of the church affecting children (V.B.S., camps, nurseries, etc.).

4. We oppose licensing because existing laws provide adequate legal tools to correct any alleged cases of obvious child abuse or neglect (if in fact such a case ever did occur in a church operated day-care).

5. We oppose licensing because of inevitable attempts of the state to protect the child not only physically but psychologically (thus the state would define what is psychologically harmful and potentially dictate what could be taught in a church ministry). The church and state do not always accept the same values or agree on what is good or bad for a child.

—*Regulation*: Requiring retention of case records on the individuals served and availability of the records to the state.

—*Objection*: The records of a church or religious organization are confidential and protected by the clergyman-parishioner or priest-penitent privilege.<sup>21</sup> Where children are involved, no records should be available to the state without permission of the parents.

—*Regulation*: Requiring the provision of the service without discrimination; the organization is to be open to all of the public.

—*Objection*: Certain organizations choose to make their ministry available only to members of their faith, church, or organization. The church is “called” of God to serve certain needs, not “told” by the state. When privately funded, the state should not be able to interfere in this decision; participation in the ministry is a privilege, not a right.

—*Regulation*: Requiring periodic reports and inspections.

—*Objection*: Health and safety matters are not objected to. However, where the regulations address broader concerns, then reports and inspections are resisted because they enforce objectionable regulations.

—*Regulation*: Where children are involved, prohibiting corporal and other means of punishment, for example, withholding of mail and isolation.

—*Objection*: In certain instances of last resort, corporal punishment is required, but never so as to physically harm a

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21. Although judicial recognition of the existence of a common law clergyman privilege may be found in scattered decisions, the privilege was not afforded general recognition as a common law rule, and was in fact more often denied. See *Mullen v. United States*, 263 F.2d 275 (D.C. Cir. 1958); 8 WIGMORE, EVIDENCE § 2394 (McNaughton Rev. Ed. 1961). However, in a vast majority of jurisdictions the privilege has been sanctioned by statute or court rules. Annot., *Matters To Which The Privilege Covering Communications To Clergyman Or Spiritual Advisor Extends*, 71 A.L.R.3d 794 (1976). Application of the privilege to the confidentiality of church records raises numerous questions such as (1) does the privilege apply to entities or only natural persons; (2) who is a clergyman; and (3) what type of communications is protected? See *United States v. Luther*, 481 F.2d 429 (9th Cir. 1973); Annot., *Who Is “Clergyman” Or The Like Entitled To Assert Privilege Attaching To Communications To Clergyman Or Spiritual Advisors*, 49 A.L.R.3d 1205 (1973).

child. Corporal punishment in extreme cases is required by scripture. Certain forms of discipline are used to teach the child the consequences of improper conduct. Existing child abuse laws are sufficient to control any excesses.

—*Regulation*: Requiring certain financial records and an annual audit which may be inspected by the state.

—*Objection*: Financial records of a church or religious organization are confidential; subject only to reasonable disclosure to tax authorities or, upon investigation, to law enforcement officials upon probable cause that a fraud or other criminal act has been committed. The ministry takes no public funds, and, thus, is accountable to only its members.

—*Regulation*: Requiring liability insurance.

—*Objection*: Some religious faiths oppose insurance. In any event, this is an intrachurch financial decision in which the state has no compelling interest.

—*Regulation*: Enforcing health, safety, fire, and building codes that are more stringent than codes applicable to the same building when used only for a church on Sunday.

—*Objection*: A ministry using church facilities during the week is just as much a church activity as the Sunday worship. If the building is safe enough for use on Sunday, it is safe for use during the balance of the week.<sup>22</sup>

—*Regulation*: Instituting a state grievance investigation and resolution procedure upon receipt of a complaint from a parent or member of the public.

—*Objection*: A church or religious organization has a right to establish and set its own procedures for resolving disputes, at least when the complainant is a member of the religious group.<sup>23</sup>

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22. See *State Fire Marshall v. Lee*, 101 Mich. App. 829, 300 N.W.2d 748 (1980), discussed at note 15 *supra*.

23. Because of the variances in religious ministries, beliefs and practices, these objections to state regulations are not summarized in any one place. Moreover, the recitation of the claimed burden on religious exercise recorded in judicial opinions is often not well articulated. See, e.g., text accompanying notes 33-34, 36, 44-46 *infra*. A letter detailing many of these concerns written by a fundamentalist Baptist minister,

Not all of the regulations summarized above are objectionable to every religious organization, and those objected to would not always be opposed for the same reasons. Further, in addition to their more direct burden on religious beliefs and practices, legislation and the underlying regulations are often opposed because of poor draftmanship in this sensitive constitutional area<sup>24</sup> and because of the unnecessary financial burden of compliance.<sup>25</sup>

## II. A SURVEY OF LITIGATION AND LEGISLATION

### A. *The Case Law*

The initial venture of the courts into the area of state licensing of social ministries is found in the twin cases of *Roloff Evangelistic Enterprises, Inc. v. Texas*<sup>26</sup> and *Oxford v. Hill*.<sup>27</sup> Both suits involved the Texas Department of Public Welfare and other state officials and included attempts to enjoin application of the Child Care Licensing Act<sup>28</sup> in certain Christian children's homes. Although *Roloff* and *Oxford* were decided adversely to the children's homes on the merits, facets of

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Dr. David Innes, is reprinted at *The Pulpit: Letter to a Senator*, 3 THE CLA DEFENDER 24-27, 29 (Iss. 9 1980). The letter comments upon the day-care licensing regulations in California.

24. Cf. W.BALL, LITIGATION IN EDUCATION: IN DEFENSE OF FREEDOM (1977). In the context of state regulation of religious schools Mr. Ball observed:

Much of the legislation . . . has been sloppily drafted, especially at the state level. Much of the regulatory matter—rules, regulations, guidelines, norms, forms—is incredibly poor stuff, embracing leaking definitions, internal contradictions, resolute departures from statutory authority, vagueness, all manner of unenforceable precatory language, and, withal, greedy, unconstitutional over-reaching in every direction.

*Id.* at 10-11.

25. Again citing Ball on state licensing of religious elementary and secondary schools:

Sometimes these regulations are common sensical, unpretentious and worthwhile. But more and more we see the tendency in governmental regulation to reach out to embrace every facet of the educational process—even the non-tax-supported religious schools . . . . The multiple "standards" are often "higher" in nothing but cost. The perfectionism of bureaucrats appears at times as though designed to drive non-tax-supported schools out of existence.

Pierce: *The Dramatis Personae Live On*, FREEDOM AND EDUCATION: *PIERCE V. SOCIETY OF SISTERS* RECONSIDERED 7-8 (1978).

26. 556 S.W.2d 856 (Tex. Civ. App. 1977), *appeal dismissed*, 439 U.S. 803 (1978), *reh. denied*, 439 U.S. 998 (1978).

27. 558 S.W.2d 557 (Tex. Civ. App. 1977).

28. Current statutes on child-care facilities are found at TEX. HUMAN RES. CODE ANN. tit. 2, §§ 42.001-42.076 (Vernon 1980) (formerly TEX. REV. CIV. STAT. ANN. art. 695a-3 (Vernon 1964)).

this protracted litigation are still working their way through the state courts of Texas.<sup>29</sup>

In *Roloff*, the Department of Public Welfare sued Roloff Evangelistic Enterprises, Inc., seeking to require compliance with the Child Care Licensing Act in three children's homes operated by Roloff. Upon motion for summary judgment, the trial court granted the relief requested by the department, ordering Roloff to secure licenses and to permit inspections by departmental employees.<sup>30</sup>

Because of the procedural posture of the case on appeal, the appellate court declined to reach Roloff's free exercise claims.<sup>31</sup> At the trial level, the department admitted that Roloff operated the homes pursuant to religious convictions, and that these religious beliefs were sincerely held.<sup>32</sup> When requested by the trial judge to produce evidence creating issues of fact for trial concerning the conflict between the act and their religious beliefs, counsel for the homes proffered testimony that the appeals court characterized as "nothing more than a bald conclusion entirely unsupported by any factual evidence."<sup>33</sup> The thrust of the testimony by Reverend Lester Roloff and Reverend Gary Coleman was twofold: for the ministry to accept a license from the state implied state superiority or headship over a Christian ministry; and compliance with state minimum standards implied an admission that the state had a role in the upbringing of children, whereas Roloff and Coleman admitted responsibility only to God and the parents who placed children in the home.<sup>34</sup>

Unable to see how these asserted conflicts, assuming they exist, actually impaired Roloff's activities, the Texas Court of Civil Appeals affirmed. In doing so, the court noted that the act was addressed solely to the physical and mental well-being of the children involved, with concern expressed in Section 1(b) not to encroach on areas of religious beliefs or training:

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29. The related case of *Texas v. Corpus Christi Peoples' Baptist Church*, Cause No. 297,248 (200th Jud'l D. Ct., Travis Cty., Tex. Jun. 30, 1981), *appeal docketed*, No. 13,575 (Tex. Civ. App. Sep. 4, 1981), is discussed at text accompanying notes 37-39 *infra*. See also *Corpus Christi Peoples' Baptist Church v. Texas Dept. of Human Resources*, 481 F. Supp. 1101 (S.D. Tex. 1979), *aff'd*, 621 F.2d 438 (5th Cir. 1980). The federal district court abstained from jurisdiction and refused to enjoin state court proceedings. A helpful recitation of the Reverend Lester Roloff litigation is found at 481 F. Supp. at 1104-05.

30. 556 S.W.2d 856 (Tex. Civ. App. 1977).

31. *Id.* at 858.

32. *Id.*

33. *Id.*

34. *Id.* at 857.

It is the further legislative intent that the freedom of religion of all citizens shall be inviolate. Nothing in this Act shall give any governmental agency jurisdiction or authority to regulate, control, supervise, or in any way be involved in the form, manner, or content of any religious instruction or the curriculum of a school sponsored by a church or religious organization.<sup>35</sup>

As with *Roloff*, the *Oxford* case did not present a frontal conflict between the Child Care Licensing Act and religious exercise. In *Oxford*, the plaintiff was an employee and director of one of the children's homes operated by Roloff. The court below dismissed the action without trial, having found the act constitutional. Because of the lack of a factual record on appeal, no coercive effect on Oxford's religious conduct could be cited. The court, however, apparently assumed that had some coercion been shown, the act on its face was a proper exercise by the state of its authority to regulate conduct, notwithstanding claims of religiously delegated parental authority to control a child's upbringing.<sup>36</sup>

The tactical error of failing to raise establishment clause concerns and of failing to develop an adequate factual record was not repeated in the recent Roloff decision of *Texas v. Corpus Christi People's Baptist Church*.<sup>37</sup> In a letter opinion filed April 17, 1981, the trial court announced that all issues were being resolved in favor of the children's homes and the related parties.<sup>38</sup> In *Corpus Christi*, the Texas Department of Human Resources sought to enjoin the operation of unlicensed religious child-care facilities and to impose civil fines. In his letter opinion, the judge distinguishes *Roloff* on the basis of the new parties and new issues.<sup>39</sup> The Department of Human Resources has appealed.

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35. TEX. HUMAN RES. CODE ANN. tit. 2, § 42.001 (formerly TEX. REV. CIV. STAT. ANN. art. 695a-3, § 1(b) (Vernon 1964)).

36. 558 S.W.2d 557, 559 (Tex. Civ. App. 1977). Numerous quotations were lifted from *Prince v. Massachusetts*, 321 U.S. 158 (1944), which upheld an attack on child-labor laws in the face of a free exercise claim by a Jehovah's Witnesses parent. See note 17 *supra*.

37. Cause No. 297,248 (200th Jud'l D. Ct., Travis Cty., Tex. Jun. 30, 1981), *appeal docketed*, No. 13,575 (Tex. Civ. App. Sep. 4, 1981). Full trial on the merits was held on Nov. 17-19, 1980 before Judge Charles Mathews of the 200th District Court in Austin. Judge Mathews ruled against the children's ministry in *Roloff*.

38. Because of a pressing docket the court noted that it would not write an opinion stating its rationale. Cause No. 297,248, letter op., p. 4 (200th Jud'l D. Ct., Travis Cty., Tex., Apr. 17, 1981).

39. *Id.* The parties included the church operating the children's home, parents of the children, employees of the home, and some of the children served. The federal

In the only decision on the merits involving a child day-care center, an intermediate state appellate court in *North Carolina v. Fayetteville Street Christian School*<sup>40</sup> upheld the authority of a state to regulate church-operated day-care facilities for the protection of the children's health, safety, and moral environment.<sup>41</sup> However, the opinion is at best of merely persuasive value, since the Supreme Court of North Carolina has vacated the opinion and remanded to the trial court for further proceedings, holding that the interlocutory appeal was improvidently granted.<sup>42</sup>

In *Fayetteville*, the Child Day-Care Licensing Commission and other state officials sued several church day-care centers and their directors after they refused either to obtain licenses or to renew licenses that had expired. The day-care ministries of the churches, although refusing to be licensed, had agreed to provide the state with evidence of their compliance with fire, health, and safety regulations.<sup>43</sup>

Cross-motions were filed by the parties soon after the suit was initiated. The state sought a preliminary injunction to stop operation of the child-care centers as long as they did not have a license. The child-care centers moved to dismiss, arguing that the licensing statutes violated the free exercise rights of church-owned day-care facilities.<sup>44</sup> No evidentiary hearing was held. The churches filed affidavits stating that the operation of their centers was a ministry of their churches, that the religious and secular activities of the day-care centers were indivisible components, and that state licensing violated their religious liberty. In equally bald and conclusionary assertions, the state's affidavits said that the Day-Care Facilities Act's requirements applied only to health and safety, and thus did not interfere with any religious practice or religious education.<sup>45</sup> The trial court denied the churches' motion to dismiss and granted the state's request for a preliminary injunction. The North Carolina Court of Appeals affirmed. The statute grants to the Child Day-Care Licensing Commission the authority to

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issues included the free exercise and establishment clauses, parental rights, and due process clause rights to utilize private property for the common good. *Id.* at pp. 2-3.

40. 42 N.C. App. 665, 258 S.E.2d 459 (1979), *vacated and remanded on other grounds*, 299 N.C. 351, 261 S.E.2d 908, *vacated and remanded following rehearing*, 299 N.C. 731, 265 S.E.2d 387, *appeal dismissed*, 449 U.S. 807 (1980).

41. *Id.* at 672, 258 S.E.2d at 463-64.

42. 299 N.C. 351, 360, 261 S.E.2d 908, 914; 299 N.C. 731, 734, 265 S.E.2d 387, 389 (1980).

43. 42 N.C. App. 665, 666, 258 S.E.2d 459, 461 (1979).

44. *Id.*

45. *Id.*

license all day-care facilities meeting health and safety standards, conduct inspections and review inspection reports by other agencies, provide educational and consultation services, and promulgate regulations.<sup>46</sup> The health and safety standards are not determined by the commission, but rather appear in other sections of the act,<sup>47</sup> or are developed by the Commission for Health Services (medical and sanitation) and the State Insurance Department (fire prevention), or are found in the North Carolina Building Code.

Other than the general allegation that their religious liberty was abridged by the act, the only assertion of the day-care centers was the abstract contention that the state may not require a church to obtain a license as a condition precedent to its performing an important part of its ministry. The court in *Fayetteville* rejected this assertion with these findings:

(1) that the wording of the Act in question does not grant to the State any authority to interfere with the religious belief or freedom of defendants; (2) that the day care licensing requirements speak only to minimum standards of health and safety and do not interfere with any religious practices or contain any educational requirements for staff or children; (3) that all of the defendants have heretofore been licensed by the Commission without any objections; and (4) that defendants do not contend or show that it is contrary to their sincere religious belief to seek licenses.<sup>48</sup>

Because the case has now been remanded to the trial court, presumably for a full trial on the merits, these findings may no longer be supported once an evidentiary record is fully developed. However, it is interesting to contemplate the implications of these findings. For example, would the act be unconstitutional if it went beyond health and safety requirements, and delved into specifying the educational requirements of staff or setting minimum requirements for the program content of a child-care center? Presumably so, or at least in the opinion of the *Fayetteville* court a serious free exercise defense would be raised that could not be summarily dismissed.<sup>49</sup>

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46. N.C. GEN. STAT. § 110-88 (1978).

47. See, e.g., N.C. GEN. STAT. § 110-90.1 (qualifications of staff), § 110-91(6) (space requirements), § 110-91(7) (staff-child ratio), and § 110-91(9) (record keeping) (1978).

48. 42 N.C. App. 665, 670-71, 258 S.E.2d 459, 463 (1979).

49. In another case concerning a church day-care center, a state trial court held that a separately incorporated church-operated child-care center did not require a



The court held that the mere requirement that a church obtain a license, without more, before proceeding with its ministry, does not rise to a free exercise violation. *Roloff* and *Oxford* are in accord. Moreover, all three courts—*Fayetteville*, *Roloff*, and *Oxford*—were unmoved by the argument that state licensure of a church ministry may affect that church's autonomy.<sup>50</sup> At this juncture only *Corpus Christi* is to the contrary.<sup>51</sup>

*Kansas v. Heart Ministries, Inc.*<sup>52</sup> is the only reported appellate case to be decided with the benefit of a full trial record. In *Heart Ministries*, the state sued a nonprofit religious corporation, Heart Ministries, Inc., and its principal operators, Reverend and Mrs. Cowell. The activities of Heart Ministries challenged by the state were: (1) acting as a child-placement agency;<sup>53</sup> (2) acting as a foster home;<sup>54</sup> (3) preparing to operate a children's home;<sup>55</sup> (4) acting as a home for unwed mothers and placing the newborns for adoption;<sup>56</sup> and (5) bringing children into the state for placement in foster homes.<sup>57</sup> All of the above activities required approval and licensure by the state,<sup>58</sup> which the Cowells refused out of religious conviction.

Heart Ministries operated the Victory Village Home for Girls. At the time of trial, the children's home consisted of thirteen girls placed with Heart Ministries by their parents or guardians. They were housed in private homes, with four of the girls residing with the Cowells. A large dormitory was under construction on a 117 acre site. The children had come from Kansas and several surrounding states. Some of the girls were pregnant and unmarried.<sup>59</sup>

The Victory Village Home for Girls was only one aspect of Heart Ministries. Other ministries included a church, of which Rev-

special use permit under city zoning ordinances. The day-care center was found to be "religious activity" within the terms of the zoning ordinance with which the church already was in compliance. Further, day care was held to be religious activity protected by the first amendment. *Unitarian Universalist Church v. Shorten*, 63 Misc. 2d 978, 314 N.Y.S.2d 66 (1970).

50. See text accompanying note 20 *supra* and notes 144, 170-74 *infra*.

51. See text accompanying notes 37-39 *supra*.

52. 227 Kan. 244, 607 P.2d 1102, *appeal dismissed*, 449 U.S. 802 (1980).

53. KAN. STAT. ANN. § 65-503 (1980).

54. *Id.*

55. *Id.*

56. KAN. STAT. ANN. § 65-502 (1980).

57. Interstate Compact on the Placement of Children, KAN. STAT. ANN. § 38-1202 (Supp. 1980).

58. KAN. STAT. ANN. § 65-504 (1980). Failure to obtain the required license is punishable as a misdemeanor. KAN. STAT. ANN. § 65-514 (1980).

59. 227 Kan. 244, 245-49, 607 P.2d 1102, 1104-06 (1980).

erend Cowell was pastor, a nonaccredited school with grades one through eight that used the Accelerated Christian Education system, counseling of the girls and others, evangelism, and a radio ministry.<sup>60</sup>

Under the statutory scheme, considerable discretion to promulgate regulations to "promote the health, safety and welfare of the residents" is delegated to the Secretary of Health and Environment, with the cooperation of the Secretary of Social and Rehabilitation Services.<sup>61</sup> The state officers apparently so fully exercised their directive to issue regulations that the court did not attempt to summarize the great bulk of them. Only the regulations concerning residential children's homes accommodating more than four children were discussed.<sup>62</sup> Despite violations having been charged, the court did not explain why the regulations of child-placement agencies, foster homes, and maternity homes were not discussed.<sup>63</sup>

The regulations concerning residential children's homes mixed health and safety concerns with the more troublesome area of program and personnel. Those falling in the latter area required: (1) a written proposal detailing the purpose of the home and the administration, financing, staffing, and services to be offered; (2) a governing board of at least six members representing a variety of community interests; (3) an annual financial statement to be filed with the state; (4) an annual audit by a public accountant; (5) minimum staff qualifications; and (6) the prohibition of certain kinds of discipline, including corporal punishment.<sup>64</sup>

The state supreme court assumed the correctness of the trial court's finding that the religious convictions of the Reverend Cowell and others employed at Heart Ministries were sincerely held, and that compliance with the state licensure statutes and regulations would violate their religious convictions.<sup>65</sup> Apparently, the supreme court believed it unnecessary to test the assertions of Reverend Cowell that the regulations violated his religious convictions as follows: (1) corporal punishment was required by scripture; (2) financial disclosure and audits were not necessary, since he believed that God will provide; (3) budgets and pledges were inconsistent with his faith; (4) disclosure to the state of a child's records was a breach of ethics;

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60. *Id.* at 247, 250-51, 607 P.2d at 1105, 1107.

61. KAN. STAT. ANN. § 65-508 (1980).

62. 227 Kan. at 248-49, 607 P.2d at 1106.

63. *Id.*

64. *Id.*

65. *Id.* at 254, 607 P.2d at 1109.

and (5) he interpreted the regulations to prohibit evangelism of the children, a duty which was biblically imposed.<sup>66</sup>

In its discussion of the law, the court in *Heart Ministries* determined initially that, under the doctrine of *parens patriae*, the state had a legitimate and vital interest in protecting minor children within its jurisdiction,<sup>67</sup> presumably satisfying the compelling state interest test of *Sherbert v. Verner*.<sup>68</sup> Next, the court ventured into a discussion of a series of United States Supreme Court cases primarily addressing the dissemination of religious ideas and invoking principally the free speech aspect of the first amendment.<sup>69</sup>

The court offered no treatment of the burden on free exercise, direct or incidental, suffered by Reverend Cowell and other employees, as *Sherbert* and *Wisconsin v. Yoder*<sup>70</sup> require. Nor did the court discuss whether the state's interests related to some substantial threat to public safety, peace, or order, thus warranting the burden. Instead, having already acknowledged that compliance with the regulations would violate the defendants' religious convictions, the court inexplicably characterized the operation of a children's home as "usually a secular activity."<sup>71</sup> Moreover, the court went on to diminish the compelling state interest test to a mere "balancing process" between valid state interests and free exercise rights.<sup>72</sup>

Nowhere in *Heart Ministries* did the court consider whether the same vital state interest in the protection of minor children away from parental oversight could be satisfied by less intrusive means. For example, the court stated that absent the licensing procedure, the state officials lack the knowledge required to protect the children from harm.<sup>73</sup> Could the same goal not be achieved by less onerous regulations? Clearly some formal reporting requirement by children's homes, stopping short of the pervasive regulations of program and personnel, would meet the state's concern as *parens patriae*.<sup>74</sup>

In the only case dealing with first amendment challenges to state regulation of social and human services ministries filed in a federal

66. *Id.* at 250, 607 P.2d at 1107.

67. *Id.* at 253, 607 P.2d at 1109.

68. 374 U.S. 398 (1963).

69. 227 Kan. at 253-56, 607 P.2d at 1109-11. The cases discussed were *Cantwell v. Connecticut*, 310 U.S. 296 (1940), and *Kunz v. New York*, 340 U.S. 290 (1951).

70. 406 U.S. 205 (1972).

71. 227 Kan. at 256, 607 P.2d at 1111.

72. *Id.*

73. *Id.* at 257, 607 P.2d at 1111-12.

74. See text accompanying notes 255-59 *infra*.

court, the South Carolina Child Welfare Agencies Act and regulations promulgated thereunder were found to be unconstitutional when applied to a church-operated children's home. The lawsuit, *Tabernacle Baptist Church v. Conrad*,<sup>75</sup> was brought by the church seeking declaratory and injunctive relief against the Department of Social Services, administering the Child Welfare Agencies Act,<sup>76</sup> and the Children's Foster Care Review Board, charged with the duty of reviewing and coordinating the activities of local foster care review boards.<sup>77</sup>

Upon cross-motions for summary judgment, the court granted the two motions in part, and made findings of fact and conclusions of law. The church was found to be an unincorporated religious association, which, as part of its ministry, operated a home for neglected and disadvantaged children. An integral part of the home's program was that the children received fundamentalist Christian training and discipline.<sup>78</sup> The home did not object to compliance with the local fire and health regulations or to inspection by the department.<sup>79</sup>

The Child Welfare Agencies Act authorizes broad departmental discretion to make and enforce regulations relating to the licensing of child care agencies "as may be necessary to carry out the purposes" of the act.<sup>80</sup> In furtherance of this delegated authority, the department promulgated rules which: (1) required licensing of children's homes; (2) set minimum standards for the homes, including that a home's program be "well rounded" with "appropriate community activities" available; (3) required a home to submit a report which "clearly defined and explained" its purpose and that it met a "demonstrated need"; and (4) allowed inspection by the department.<sup>81</sup>

The federal district court nullified the act and implementing regulations as applied to the religious children's home. In so doing, the court noted that a more tightly drawn statutory scheme might have been acceptable:

Although of the opinion that the application of a licensing provision setting forth certain well-defined health and safety standards and containing a proviso prohibiting the licensing authority from interfering with the Home's reli-

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75. C/A No. 79-149 (D.S.C. Oct. 27, 28, 1980).

76. S.C. CODE §§ 43-15-10 to 43-15-90 (1976).

77. S.C. CODE §§ 43-13-10 to 43-13-80 (1976 Supp. 1980).

78. C/A No. 79-149, slip op. at 6 (D.S.C. Oct. 27, 1980).

79. *Id.* at 4.

80. S.C. CODE § 43-15-30 (1976).

81. C/A No. 79-149, slip op. at 3, 6 (D.S.C. Oct. 27, 1980).

gious beliefs or practices would be within the State's power . . . the licensing scheme under consideration is not so limited.

. . .

[The regulations are] replete with broadly phrased provisions giving [the department] virtually unlimited discretion in assessing compliance with its mandates. For example, if the [departmental] representative assigned to visit the Home was to determine that its program of care was not sufficiently "well rounded," or that "appropriate community activities" had not been made available, a license could be denied, despite the fact that what the [departmental] representative considered a well rounded program of care of appropriate community activities would fly in the face of the [church's] religious beliefs.<sup>82</sup>

Although finding no present impermissible burden on free exercise values, the court's opinion is properly interpreted as reading the regulatory scheme to be so vague that it is void when dealing with sensitive constitutional rights.

In a second memorandum filed the following day, the court upheld the act establishing the Foster Care Review Board.<sup>83</sup> The act defines "foster care" broadly enough to include the church's children's home operation.<sup>84</sup> The act gives local foster care review boards with weighty powers of persuasion over the church operated home, but grants no authority that must be obeyed.<sup>85</sup> Accordingly, the court con-

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82. *Id.* at 5-6 (footnotes omitted). The quoted language permits a well-defined licensing scheme of limited scope. Accordingly, this dicta may well be utilized to support the state's position in such cases as *Corpus Christi*, discussed in text accompanying notes 37-39 *supra*.

83. C/A No. 79-149 (D.S.C. Oct. 28, 1980).

84. S.C. CODE § 43-13-80 (Supp. 1980).

85. S.C. CODE § 43-13-40 (1976) reads as follows:

The functions and powers of the local review boards shall be as follows:

(1) To review every six months cases of children who have resided in public or private foster care for a period of more than six months to determine what efforts have been made by the supervising agency or child caring institution to acquire a permanent home for such child.

(2) To encourage and facilitate the return of all such children to their natural parents or, upon a determination that such return is not in the best interest of the child, to initiate such procedures pursuant to law as would make the child eligible for adoption or direct the appropriate

cluded that the plaintiff had failed to show that the mere advisory or persuasive powers of the local review boards violated the first amendment religion clauses.

Because the church failed to raise a question of fact on the issue of coercion by the review board which affected the home's religious freedom, it is understandable that the court would grant the state's motion concerning the free exercise clause. The failure of the court to hear further evidence on the establishment clause claim is not so easily understood. The contention was summarily brushed aside with the conclusion that the legislation "lacks any capacity to foster excessive government entanglement with religion."<sup>86</sup> The statutory functions of the local foster care review boards suggest that a contrary conclusion is probable, depending on how zealously a given board pursues its mandate. It is easy to imagine how a local board armed with a statutory directive to "review," "encourage," "facilitate," "promote," "direct," and "report" could get inextricably involved with the religious training and policies of a church-operated home.

*Michigan Department of Social Services v. Emmanuel Baptist Pre-School*<sup>87</sup> is the most recent of cases to be filed concerning state licensure of a social ministry. The case follows the now-familiar pattern of seeking to close a church-operated day-care center for refusal to apply for a state license. The state Child Care Organizations Act<sup>88</sup>

agency to take such action followed by a maximum effort to place the child adoptively.

(3) To promote and encourage all agencies and institutions involved in placing children in foster care to place children with persons both suitable and eligible as adoptive parents.

(4) To advise foster parents of their right to petition the appropriate court for the termination of parental rights and the right of adoption for any child who has been in their care for a period of more than six months and to encourage such foster parents to initiate such proceedings in an appropriate case.

(5) To direct a child-caring institution or agency and exert all possible efforts to make arrangements for permanent foster care or guardianship for children for whom return to natural parents or adoption is determined to be unfeasible or impossible.

(6) To report to the State office of the Department of Social Services and other adoptive or foster care agencies and institutions deficiencies in such agencies' efforts to secure permanent homes for children discovered in the board's review of such cases as provided for in item (1) of this section.

86. C/A No. 79-149, slip op. at 3 (D.S.C. Oct. 28, 1980).

87. No. 80-24984-CZ (Mich. Cir. Ct., Ingham Cty., Apr. 1, 1981).

88. MICH. COMP. LAWS ANN. §§ 722.111-722.128 (Supp. 1981).

was recently amended to remove any doubt that it was intended to include the regulation of organizations with the primary function of religious education. With any statutory ambiguity removed, the department moved for summary judgment asserting that no valid defenses had been interposed by the church preschool. The court denied the state's motion finding that the first amendment defenses asserted by the church preschool raised genuine questions of fact for fuller development at trial.<sup>89</sup> The affirmative defenses of the church preschool raised both free exercise values and the excessive entanglement facet of the establishment clause.

The court noted two free exercise issues raised by the preschool that needed factual development. First, an administrative rule requires that a licensed preschool employ a program director that has completed a minimum number of semester hours at an "accredited college or university." Because the church selected its staff from certain schools, many of which reject state accreditation on biblical grounds, the regulation had the potential to burden religious exercise in the selection of staff that the church deemed suitable.<sup>90</sup>

Second, provisions of the Child Care Organizations Act are sufficiently broad to empower the state to arbitrarily and capriciously deny the church preschool the right to propagate its religious views.<sup>91</sup> For example, the court quoted a section of the act that grants considerable authority and discretion to the department to deny or revoke a license:

If satisfied as to the need for a child organization, its financial stability, the good moral character of the applicant, and that the services and facilities are conducive to the welfare of the children the license shall be issued or renewed.<sup>92</sup>

Referring to the excessive administrative entanglement defense under the establishment clause, the court observed the possibility of surveillance and pervasive monitoring of church affairs, especially the authority to inspect and evaluate church financial records.<sup>93</sup> Holding that all of the defenses raised genuine issues of material fact under both free exercise and establishment clause jurisprudence, the court denied the state's motion for summary judgment. In anticipation of a

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89. No. 80-24984-CZ, slip. op. at 3-4 (Mich. Cir. Ct., Ingham Cty., Apr. 1, 1981).

90. *Id.*, slip. op. at 3-4.

91. *Id.*, slip. op. at 5-6.

92. MICH. COMP. LAWS ANN. § 722.115(1) (Supp. 1981).

93. No. 80-24984-CZ, slip. op. at 4-5 (Mich. Cir. Ct., Ingham Cty., Apr. 1, 1981).

See MICH. COMP. LAWS ANN. § 722.112(3) (c) (Supp. 1981).

well-presented defense at trial, the *Emmanuel Baptist Pre-School* case should be carefully watched.

In a decision characterized as "strange, shocking, unprecedented"<sup>94</sup> by W. Stanley Mooneyham, President of World Vision International,<sup>95</sup> a California-based Christian foster and adoptive home placement agency lost the right to place children exclusively with families who were active members of an evangelical Protestant church. *Scott v. Family Ministries*<sup>96</sup> involved twenty orphans air-lifted from Cambodia on the eve of its fall to the Khmer Rouge in April 1975 and brought to the state-licensed Family Ministries in California for adoptive placement. When the children first arrived in the United States, one of the attending physicians was Dr. Richard Scott. Dr. Scott inquired of Family Ministries about adopting one of the children, but was told that he and his wife were ineligible because they were not members of an evangelical Protestant church. Dr. and Mrs. Scott sued, seeking to adopt one of the children and to enjoin Family Ministries from enforcing its religious eligibility requirement in selecting adoptive homes for any of the twenty children.<sup>97</sup>

The trial court required that the state Department of Health be notified as a party in interest having jurisdiction over adoptive placement. However, the department made it clear that it took no position in the matter.<sup>98</sup> Following trial on the merits the lower court found for the Scotts and granted the requested injunction against Family Ministries.

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94. Phillips, *Babylift: Just Look At You Now*, 32 ETERNITY 25 (No. 3 1981). Dr. Mooneyham's entire statement was:

I risked my life to save those babies from certain death, and I'm not going to remain silent and simply let them be "kidnapped" by the State of California or anyone else. . . . The decision is strange, shocking, unprecedented. If allowed to stand, no religious agency will ever be able safely to bring orphaned children into California for adoptive placement.

95. World Vision International is a nonprofit interdenominational Christian corporation conducting global wide relief services to third world countries.

96. 65 Cal. App. 3rd 492, 135 Cal. Rptr. 430 (1976). World Vision sued in federal district court seeking declaratory and injunctive relief against all the parties to the state suit. *World Vision International v. The Superior Court of the State of California*, Case No. CV-75-3776 I H (C.D. Cal., filed Nov. 11, 1975). World Vision sought to protect its interests in the children which it had brought to the United States and which had been surrendered to Family Ministries only because World Vision did not hold a license in California to be an adoptive placement agency. The federal district court abstained from interfering in the state's handling of the matter and dismissed the suit.

97. *Id.* at 499, 135 Cal. Rptr. at 434.

98. *Id.* at 500, 135 Cal. Rptr. at 435.



On appeal the judgment was affirmed. California law, like that of most states, embodies religious matching preferences in adoptive placement. Religious matching requires or prefers adoption by parents of the same religious faith as that of the natural parents of the child or of a religion for which the natural parents express a preference.<sup>99</sup> This policy arose out of the common law right of a natural parent to control the religious upbringing of his child.<sup>100</sup> The state remains neutral in this religious matter by simply honoring the desires of the natural parent.

The appellate court ventured farther than ever before in declaring that the state licensing scheme over private adoptive agencies made the actions of private agencies also "state action in the context of the establishment clauses."<sup>101</sup> Thus, it reasoned, if the state must be neutral in matters of religion, so must private agencies such as Family Ministries! The case is ill-considered because it confuses "state action" for purposes of the fourteenth amendment due process clause<sup>102</sup> with that which is impermissible state sponsorship of religion or non-neutrality toward religion for purposes of the establishment clause of the first amendment.<sup>103</sup> The implications are far reaching. Family

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99. As the court noted, about 95 percent of the population of Cambodia is Buddhist. However, at the time when World Vision took custody of the children concerned, the parents, if available, were told that the baby might be placed for adoption in a Christian home and were asked to sign a written "relinquishment." *Id.* at 498, 135 Cal. Rptr. at 433.

100. *Id.* at 505, 135 Cal. Rptr. at 437.

101. *Id.* at 506, 135 Cal. Rptr. at 438.

102. State action exists for purposes of the fourteenth amendment where the state and a private party or entity maintain a sufficiently interdependent or symbolic relationship (*Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961)); where the state requires, encourages or is otherwise significantly involved in nominally private conduct (*Lombard v. Louisiana*, 373 U.S. 267 (1963)); and where the private person or entity exercises a traditional state function (*Smith v. Allwright*, 319 U.S. 738 (1943) and *Marsh v. Alabama*, 326 U.S. 501 (1946)).

103. Although it can be hoped that *Scott v. Family Ministries* will be given a quick burial, the story for the twenty children has a happier ending. In return for not appealing the decisions to a higher court, the Los Angeles County Department of Adoptions approved the adoptions of the children by the families chosen by Family Ministries. Phillips, *Babylift: Just Look at You Now*, 32 *ETERNITY* 25-26 (No. 3 1981).

Protracted litigation concerning a state foster care funding statute is reported at *Wilder v. Sugarman*, 385 F. Supp. 1013 (S.D.N.Y. 1974) (*Wilder I*), and *Wilder v. Bernstein*, 499 F. Supp. 980 (S.D.N.Y. 1980) (*Wilder II*). The State of New York passed an act providing for public assistance to private foster care. The act provided for religious matching in the placement of children in foster homes. In *Wilder I* the plaintiffs challenged the religious matching provisions as having the effect of religious and racial discrimination. The theory of religious and racial discrimination in the act's application was that in New York City the number of Protestant, black children needing

Ministries exists for the very purpose of discriminating in favor of its particular religious persuasion, as do other adoptive agencies sponsored by other faiths. What about the free exercise and establishment clause rights of Family Ministries, its employees and sponsoring churches? The court of appeals makes no mention of having considered these rights.<sup>104</sup>

Should the holding of *Scott* be followed elsewhere and applied to state-licensed or certified social and human services religious ministries, then their religious activities and underlying motivations will be hopelessly frustrated. Not only could a ministry not discriminate on a religious basis in defining the community it sought to serve, but the further aim of evangelization and spiritual counseling after immediate physical needs are met would be prohibited altogether.

No decisions concerning comprehensive state regulatory schemes have been reported that have allegedly burdened the religious activities of charities,<sup>105</sup> counseling and chaplaincy serv-

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placement far exceeds the number of openings in Protestant agencies. This is not the case with Roman Catholic and Jewish children needing placement. The result is that a disproportionate number of Protestant, black children must go to public shelters and state training schools that are "grossly inadequate." The court in *Wilder I*, limiting its consideration to the single issue of whether the religious matching provision of the act facially violates the establishment clause, held that it did not.

In *Wilder II* the plaintiffs have amended the complaint to also allege claims of favoring religion over "non-religion" and the funding of religious organizations as contrary to the free exercise and establishment clauses. The amendments were found by the court to state a claim. The matter has not yet been tried on the claims in the amended complaint.

104. The court did dispose of the claim by Family Ministries that it stands in the relationship of *loco parentis* and thus expresses a religious preference on behalf of the natural parents. Under state law an adoptive agency to which a child has been released does not thereby acquire all the rights of a natural parent. 65 Cal. App. 3d at 507, 135 Cal. Rptr. at 438-39.

105. It is beyond the scope of this article to discuss the considerable litigation over the application of charitable solicitation statutes and ordinances to religious groups. See, e.g., *Larson v. Valente*, 637 F.2d 562 (8th Cir. 1981), *prob. jur. noted*, \_\_\_ U.S. \_\_\_, 49 U.S.L.W. 3893 (Jun. 1, 1981). Although having a possible incidental effect on the social and human service activities of a religious organization, the thrust of the challenged laws is toward fund raising endeavors and fiscal accountability.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1976), has affected the employment practices of charities. In *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972), the court declined to apply Title VII to the employment relationship between a church and one of its ministers. However, in *EEOC v. Pacific Press Publishing Ass'n*, 482 F. Supp. 1291 (N.D. Cal. 1979), the court found that first amendment considerations did not preclude the application of Title VII to a charge of sex discrimination against a religious publishing house by a clerical employee. See also *EEOC v. Southwestern Baptist Theological*

ices,<sup>106</sup> nursing and invalid homes;<sup>107</sup> alcohol and drug treatment programs; hospitals and medical clinics;<sup>108</sup> halfway houses and other

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*Seminary*, \_\_\_ F.2d \_\_\_ (5th Cir. 1981); *Mississippi College v. EEOC*, 626 F.2d 477 (5th Cir. 1980), *cert. denied*, No. 80-1703, 49 U.S.L.W. 3969 (1981).

A ministry that collected used goods, refurbished them, and then sold the items to raise money to assist the poor and to propagate its faith was held subject to a city ordinance requiring all secondhand and junk dealers to obtain permits. *Gospel Army v. City of Los Angeles*, 27 Cal. 2d 232, 163 P.2d 704 (1945). The governmental interest was the prevention of secondhand dealers "fencing" stolen goods.

106. A police chaplaincy program provided to a city by a local church was held to violate the establishment clause in *Voswinkel v. City of Charlotte*, 495 F. Supp. 588 (W.D.N.C. 1980).

The court in *In re Bartha*, 63 Cal. App. 3d 584, 134 Cal. Rptr. 39 (1976), upheld the conviction of a woman prosecuted under a city ordinance prohibiting fortunetelling as a business. The ordinance did not prohibit the exercise of the defendant's religion of witchcraft, because the tenets of her religion did not require that she practice fortunetelling for a fee. *See Annot., Regulation of Astrology, Clairvoyancy, Fortunetelling, and the Like*, 91 A.L.R.3d 766 (1979).

107. In *Mid American Health Serv., Inc.*, 247 N.L.R.B. No. 109, 103 L.R.R.M. 1234 (1980), the National Labor Relations Board determined that it had jurisdiction over an extended-care nursing home owned and operated by the Seventh-Day Adventist Church. The Board declined to reach the first amendment defenses asserted by the church, stating that any final determination of the constitutionality of the National Labor Relations Act would have to come from the courts.

Despite vigorous protest from the unincorporated associations of churches, the court in *Barr v. United Methodist Church*, 90 Cal. App. 3d 259, 153 Cal. Rptr. 322, *cert. denied*, 444 U.S. 973 (1979), *reh. denied*, 444 U.S. 1049 (1980), held that the association of churches could be sued along with a retirement home which it promoted with its name under the legal theory of *alter ego* or agency. The claims were by present and former residents of the home and alleged fraud, breach of contract, and statutory violations. Following this decision, the suit was settled for twenty-one million dollars by the United Methodist Church. *THE NATIONAL LAW JOURNAL*, Dec. 29, 1980, at 10.

108. The right of Roman Catholic hospitals to refuse patients who requested abortions and sterilization operations has been vindicated. *Taylor v. St. Vincent's Hosp.*, 523 F.2d 75 (9th Cir. 1975); *Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308 (9th Cir. 1974); *see Doe v. Bolton*, 410 U.S. 179, 197-98 (1973); *Doe v. Bellin Memorial Hosp.*, 479 F.2d 756 (7th Cir. 1973); *Allen v. Sisters of St. Joseph*, 361 F. Supp. 1212 (N.D. Tex. 1973), *appeal dismissed*, 490 F.2d 81 (5th Cir. 1974); *Watkins v. Mercy Medical Center*, 364 F. Supp. 799 (D. Idaho 1973).

A state attorney general's authority existing under a state statute to supervise the activities of a nonprofit, charitable hospital were upheld in *Queen of Angels Hosp. v. Younger*, 66 Cal. App. 3d 339, 136 Cal. Rptr. 36 (1977). However, the hospital, operated by a Roman Catholic order, was protected from interference by the attorney general in controversies over the hospital's operation that involve religious doctrine or practice.

*Compare Wisconsin Health Facilities Auth. v. Lindner*, 91 Wis. 2d 145, 280 N.W.2d 773 (1979), wherein a Roman Catholic hospital successfully proved that its operation is not so religiously pervasive that state aid in the form of tax exempt bonding authority does not run afoul of the establishment clause, *with St. Elizabeth Community Hosp. v. NLRB*, 626 F.2d 123 (9th Cir. 1980), wherein a Roman Catholic hospital is resisting the jurisdiction of the National Labor Relations Board over its

prisoner ministries;<sup>109</sup> and youth recreational programs; camps and retreats.<sup>110</sup>

### B. Legislative Developments

Recent legislation has recognized the difficult first amendment issues involved when the state seeks to regulate religious ministries and has sought to accommodate these concerns while still protecting the health, safety, and welfare of its citizens. The legislation has been solely in the area of child-care and child-welfare activities. The statutory schemes have taken two approaches. Indiana,<sup>111</sup> Virginia,<sup>112</sup> Louisiana,<sup>113</sup> South Carolina,<sup>114</sup> and Alabama<sup>115</sup> have eliminated licensing requirements and the accompanying battery of regulations for certain religious organizations, and have substituted a registration and notice provision with specified limited authority retained by the state to inspect the ministry's activities. New Mexico<sup>116</sup> and Texas<sup>117</sup> have written into their statutes a general statement that the act and regulations promulgated thereto are not to burden the exercise of religious beliefs or activities except where the safety or health of the children is endangered.

The comprehensive child-welfare acts of Indiana, Virginia, Louisiana, and Alabama have by later, separate legislation carved out

employees on religious freedom grounds.

109. Although no litigation has been reported concerning private ministries to prisoners, in the face of an establishment clause challenge the court in *Rudd v. Ray*, 248 N.W.2d 125 (Iowa 1976), upheld the expenditure of public funds to provide chaplains and religious facilities at prisons as a proper accommodation of a prisoner's free exercise rights.

110. Zoning and land use controls have been held to be a sufficient public interest to deny special use permits to retreat centers and youth camps. See *Holy Spirit Ass'n v. Town of New Castle*, 480 F. Supp. 1212 (S.D.N.Y. 1979); *Christian Retreat Center v. Board of Cty. Comm.*, 28 Or. App. 673, 560 P.2d 1100 (1977).

In *Kollasch v. Adamany*, 99 Wis. 2d 533, 299 N.W.2d 891 (Ct. App. 1980), *rev'd on other grounds*, \_\_\_ Wis. \_\_\_, \_\_\_ N.W.2d \_\_\_, No. 79-1579 (Dec. 1, 1981), fees collected for meals served at a retreat center operated by a monastic community of Roman Catholic sisters were held to be subject to a state sales tax. Although finding that the serving of meals to their guests was a religious activity, the appellate court said that the sales tax was neither a tax on religion nor a burden to their exercise of religion.

111. IND. CODE ANN. § 12-3-2-12.7 (Burns 1981).

112. VA. CODE § 63.1-196.3 (1980).

113. LA. REV. STAT. ANN. § 46:1404 (West Supp. 1981).

114. S.C. CODE §§ 43-35-710 to 43-35-780 (Supp. 1980).

115. ALA. CODE § 38-7-3 (Supp. 1981).

116. Child Placement Agency Licensing Act, N.M. STAT. ANN. §§ 40-7A-1 to 40-7A-8 (Supp. 1981).

117. TEX. HUMAN RES. CODE ANN. tit. 2, § 42.001 (Vernon 1980).

special exemptions to accommodate religious ministries operating in the child-welfare field. The South Carolina act was entirely rewritten with a separate article dealing with day-care centers operated by religious groups. The exemptions in Indiana, Virginia, South Carolina and Alabama apply only to child day-care centers,<sup>118</sup> whereas Louisiana has exempted not only day care, but children's group-care homes, maternity homes and child agencies for foster-home or adoptive home placement.<sup>119</sup> The special exemption applies to a "religious organization" in Indiana<sup>120</sup> and to a "religious institution" under the Virginia act.<sup>121</sup> The Alabama exemption attempts greater precision by applying only to preschool programs that are an integral part of a local church ministry or a religious nonprofit elementary school. These preschool programs must be recognized in the church's or school's documents, whether operated separately or as a part of a religious nonprofit elementary school unit, secondary school unit, or institution of higher learning under the governing board or authority of the local church or its convention, association, or regional body to which it may be subject.<sup>122</sup>

Perhaps desiring not to favor sectarian organizations over private, secular child-welfare agencies, the Louisiana legislation ex-

118. IND. CODE ANN. § 12-3-2-12.7(a) (Burns 1981); VA. CODE § 63.1-196.3A (1980); ALA. CODE § 38-7-3 (Supp. 1981).

119. LA. REV. STAT. ANN. § 46:1404(A) (West Supp. 1981).

120. IND. CODE ANN. § 12-3-2-12.7(a) (Burns 1981). The statute further defines a "religious organization" as one "exempt from Federal income taxation under Section 501 of the Internal Revenue Code." No doubt this is a short hand attempt to define "religion," a difficult and perilous task. See Worthing, "*Religion*" and "*Religious Institutions*" Under the First Amendment, 7 PEPPERDINE L. REV. 313 (1980); Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978). However, simply referring to § 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3) (1976), is no solution. The Internal Revenue Service is perhaps more confused about the issue than others. See Whelan, "*Church*" in the Internal Revenue Code: *The Definitional Problem*, 45 FORDHAM L. REV. 885 (1977).

121. VA. CODE § 63.1-196.3(A) (1980). A "religious institution" must either have "tax exempt status as a nonprofit religious institution in accordance with § 501(c) of the Internal Revenue Code of 1954" or that the "real property owned and exclusively occupied by the religious institution is exempt from local taxation." The Virginia exemption recognizes that many independent or nondenominational churches do not obtain a § 501(c)(3) exemption from the Internal Revenue Service. However, they generally do claim a local property tax exemption.

122. ALA. CODE § 38-7-3 (Supp. 1981). As is the case with the Indiana and Virginia legislation, this exemption language is vague and difficult to apply in the borderline case. For example, what elements must be present for a preschool to be an "integral part" of a church or school beyond the bare recognition of such status in the organizational documents?

empts an agency "if it receives no state or federal funds."<sup>123</sup> Because of the availability of public funds for child-care programs under federal social legislation<sup>124</sup> and similar acts in many states, few private child-welfare agencies would qualify under the Louisiana exemption other than centers operated by religious organizations. However, some religious centers accept public funds and thus would not be exempt. The constitutionality of such public funding is presently being challenged under the establishment clause.<sup>125</sup>

The exemption provision is more appropriately drawn in the Louisiana legislation. If a child-care agency is so "pervasively religious"<sup>126</sup> that it is prohibited from receiving public support consistent with the establishment clause, then the agency should be free from state regulation of its program and personnel consistent with free exercise values. The reverse is also true. If a child-care center is so "secular" that its financial support by taxpayers is permissible, although operated by a church or religious organization, it is fair that it should comply with many of the same state regulatory concerns as do private nonsectarian agencies.

Under all five statutes the states retain an interest in the religiously-operated child-care activity by requiring compliance as follows:

1. The agency must give written notice to the state that it is in operation.<sup>127</sup>

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123. LA. REV. STAT. ANN. § 46:1404(A)(2) (West Supp. 1981). Cf. S.C. § 43-35-710 (Supp. 1980), which is a mixture of these two exemption provisions. It provides for registration only if the day-care facility is a "local church congregation or established religious denomination . . . which does not receive state or federal financial assistance."

124. See, e.g., The Child Nutrition Act, 42 U.S.C. §§ 1771-688 (1976). The act applies to private preschool programs and residential child-care institutions such as orphanages. *Id.* at § 1784(c). Religious centers can receive benefits if tax exempt under 26 U.S.C. § 501(c)(3) (1976). Other examples of federal social welfare legislation in which religious organizations may participate and receive public funds are cited in Pickrell & Horwich, "Religion as an Engine of Civil Policy": A Comment on the First Amendment Limitations on the Church-State Partnership in the Social Welfare Field, 44 L. & CONTEMP. PROB. 111, 113 n.16 (1981).

125. See *Wilder v. Bernstein*, 499 F. Supp. 980 (S.D.N.Y. 1980), discussed in note 103 *supra*.

126. See text accompanying notes 260-66 *infra*.

127. IND. CODE ANN. § 12-3-2-12.7(c) (Burns 1981), requires registration with the state Board of Health and state Fire Marshall. VA. CODE § 63.1-196.3(A) (1980), requires filing with the state Commissioner of Welfare. LA. REV. STAT. ANN. § 46:1404F (West Supp. 1981), requires registration with the Department of Health and Human Resources. ALA. CODE § 38-7-3 (Supp. 1981) requires filing a notice with the Department of Pensions and Security. S.C. CODE § 43-35-720 (Supp. 1980), requires giving notice to the Department of Social Services.

2. The agency must comply with applicable building, fire and sanitation codes, allow inspection by officials to determine compliance, and submit proof of the results of these inspections.<sup>128</sup>

3. Indiana, Virginia and Alabama require written notice of the agency's unlicensed status to the public and parents and require furnishing information concerning its facilities.<sup>129</sup>

4. Virginia sets a minimum ratio of employees to children.<sup>130</sup>

5. Virginia and Louisiana provide a procedure whereby a citizen can lodge a complaint with a public official that will investigate.<sup>131</sup>

6. Any agency not in compliance may be enjoined from operating and/or be prosecuted for a misdemeanor.<sup>132</sup>

The Virginia legislation has already come under attack by operators of secular day-care centers on equal protection and establishment clause grounds.<sup>133</sup> The merits of the claims were not reached, however, because the court found that since the injury was speculative, the plaintiffs lacked standing.<sup>134</sup>

The statutory and regulatory approaches by the states of Texas<sup>135</sup> and New Mexico<sup>136</sup> provide no exemption from licensure for child-care

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128. IND. CODE ANN. § 12-3-2-12.7(f) (Burns 1981); VA. CODE § 63.1-196.3(A)(2) (1980); LA. REV. STAT. ANN. § 46:1404A, E and F (West Supp. 1981); ALA. CODE § 38-7-3 (Supp. 1981); S.C. CODE § 43-35-720 (Supp. 1980).

129. IND. CODE ANN. § 12-3-2-12.7(f) and (g) (Burns 1981); VA. CODE § 63.1-196.3(A)(4) (1980); ALA. CODE § 38-7-3 (Supp. 1981).

130. VA. CODE § 63.1-196.3(A)(3) (1980).

131. VA. CODE § 63.1-196.3(C) (1980); LA. REV. STAT. ANN. § 46:1404B, C and D (West Supp. 1981).

132. IND. CODE ANN. §§ 12-3-2-12.7(h), 12-3-2-15 (Burns 1981); VA. CODE § 63.1-196.3(C) (1980); LA. REV. STAT. ANN. § 46:1404F (West Supp. 1981); S.C. CODE §§ 43-35-730, 43-35-780 (Supp. 1980).

133. *Forest Hills Early Learning Center v. Lukhard*, 480 F. Supp. 636 (E.D. Va. 1979), and *Forest Hills Early Learning Center v. Lukhard*, 487 F. Supp. 1378 (E.D. Va. 1980), *vacated and remanded without opinion*, 642 F.2d 448 (4th Cir. 1981). These are separate actions involving the same parties. The equal protection argument alleged that the legislation gave the religious day-care centers a "significant competitive advantage." The court characterized the establishment clause claim as "a serious charge and a serious concern." 480 F. Supp. at 640. Nevertheless, the court found that the alleged economic loss was central to the plaintiffs' claims, not the entanglement of the state in religious matters. *Id.*

134. 480 F. Supp. at 640, 487 F. Supp. at 1379. Because of the remand by the court of appeals, the issue is again before the trial court, this time to address frontally the establishment clause claim.

135. TEX. HUMAN RES. CODE ANN. tit. 2, §§ 42.001-42.076 (Vernon 1980).

136. Child Placement Agency Licensing Act, N.M. Stat. Ann. §§ 40-7A-1 to 40-7A-8 (Supp. 1981).

agencies operated by religious entities. Rather, the acts acknowledge free exercise and establishment clause values and seek to accommodate them by placing directly in the statute a legislative "codification" of how the state's interest in the health and welfare of children within its borders is limited by religious concerns.

The Texas statute deals with children's group-care homes, child day-care centers, foster homes, and child agencies for foster home and adoptive home placement.<sup>137</sup> The purpose of the act, which embodies language protecting religious ministries in the child-care business, is set forth as follows:

The purpose of this chapter is to protect the health, safety, and well-being of the children of the state who reside in child-care facilities by establishing statewide minimum standards for their safety and protection and by regulating the facilities through a licensing program. It is the policy of the state to ensure the protection of all children under care in child-care facilities and to encourage and assist in the improvement of child-care programs. It is also the intent of the legislature that freedom of religion of all citizens is inviolate, and nothing in this chapter gives a governmental agency authority to regulate, control, supervise, or in any way be involved in the form, manner, or content of religious instruction or the curriculum of a school sponsored by a religious organization.<sup>138</sup>

The language places a limit on the scope of any regulations promulgated under the act by the Department of Human Resources. Moreover, by distinguishing the regulatory mandate as being in the area of "safety and protection," but not "religious instruction," at a religious facility, the act clearly steers away from all regulations involving program and personnel. Any regulation that sought involvement in program or personnel of religious organizations would exceed the department's statutory authority. This language was cited in *Roloff Evangelistic Enterprises, Inc. v. Texas*<sup>139</sup> and *Oxford v. Hill*<sup>140</sup> in support of the court's conclusions that the act did not unduly burden free exercise concerns.

The recently-enacted New Mexico Child Placement Agency

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137. TEX. HUMAN RES. CODE ANN. tit. 2, § 42.002 (Vernon 1980).

138. *Id.* at § 42.001. This limit on regulatory power is repeated in § 42.042 (K).

139. 556 S.W.2d 856 (Tex. Civ. App. 1977). See text accompanying notes 26-35 *supra*.

140. 558 S.W.2d 557 (Tex. Civ. App. 1977). See text accompanying notes 27, 36 *supra*.



Licensing Act,<sup>141</sup> provides for the licensing and regulation of agencies involved in foster home and adoptive home placement. Section 40-7A-4 E limits the regulatory authority of the Human Services Department by the following language:

The regulations shall not proscribe or interfere with the religious beliefs or religious training of child placement agencies and foster homes, except when the beliefs or training endanger the child's health or safety.<sup>142</sup>

Potential problems with the Texas and New Mexico models are twofold. First, the approach leaves to a government agency, in the first instance, to decide where "health and safety" ends and "religious training and instruction" begins. Given the tendency of officials to expand their jurisdiction to the very limits of delegated authority, there is a danger that the legislative intent will be frustrated by overzealous civil servants.<sup>143</sup> The religious child-care organization may resort, however, to judicial relief on a claim that the department has exceeded its statutory authority. This is an easier claim to establish than one under the religion clauses of the first amendment.

Second, the Texas and New Mexico models fail to accommodate religious groups who object in principle to a church or parachurch group having to license one of their ministries. The compulsion of requiring a piece of paper entitled "LICENSE," without more, it is argued, suggests an inferior position *vis-a-vis* the state and impermissibly burdens religious activity.<sup>144</sup>

One pragmatic consideration favors the approach of the Texas and New Mexico statutes. The legislation in these two states passed with relative ease, whereas massive lobbying efforts by evangelical and fundamentalist Christian groups were required to enact over stiff opposition the Indiana, Virginia, Louisiana and Alabama legislation.

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141. N.M. STAT. ANN. §§ 40-7A-1 to 40-7A-8 (Supp. 1981).

142. Section 40-7A-4 D(1) of the act limits the scope of the department's regulatory authority to the "shelter, health, diet, safety and education of the child served."

143. On occasion the actions of these civil servants is in bad faith, but generally not. It is more often the result of their training and focus being in the field of child care, and their having little or no understanding of religious organizations or sensitivity to religious concerns. Additionally, overregulation is often due to the unwarranted assumption by bureaucrats that they, not the private sector, are the "experts" and know what is "best."

144. This argument was rejected in *Roloff, Oxford, and Fayetteville*, see text accompanying note 50 *supra*, but affirmed in *Corpus Christi*, see text accompanying notes 37-39 *supra*. The contention is discussed at text accompanying note 20 *supra* and notes 170-74, 258-59 *infra*.

## III. THE ISSUES IN A FIRST AMENDMENT CONTEXT

Within the framework of our constitutional jurisprudence, the issues of state regulation noted above are dealt with by the courts under the following legal theories: (1) do the statutes and underlying regulations violate the free exercise clause because they require the religious organizations and their employees to subordinate their beliefs to civil authority; (2) do the statutes and underlying regulations have the primary effect of inhibiting religion and fostering excessive government entanglement with religion contrary to the establishment clause; (3) do some of the regulations involve civil authorities, and eventually the courts, in ecclesiastical intrachurch disputes; and (4) do the statutes and underlying regulations violate parental rights or concerns of privacy?

A. *What is "Religion"?*

A question that crops up throughout this subject is the meaning of "religion." As previously noted,<sup>145</sup> if the state can successfully categorize the activity in question as being exercised by an organization that is not a "church" or "religious" organization, or, although being carried out by a religious organization, as "secular" rather than "spiritual" in nature, then first amendment protections have been circumvented.<sup>146</sup>

The courts have long struggled with this definitional problem. More traditional perceptions of religion being grounded in theism<sup>147</sup> have given way to the pluralistic view found in *United States v. Seeger*<sup>148</sup> that the faith be "sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent." Nonetheless, the United States Supreme Court has been careful not to erase this threshold determination altogether. For example, in *Wisconsin v. Yoder*<sup>149</sup> it scrutinized the record on appeal to insure that the exemption re-

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145. See text accompanying notes 4-6, 71 *supra*.

146. The trend to classify the regulated activity as "secular," thus obviating first amendment problems, is most disturbing to social and human services ministries. In large part this happens because the establishment clause analysis requires a determination of whether an organization is pervasively religious. See text accompanying notes 209-16 *infra*.

147. *United States v. Macintosh*, 283 U.S. 605, 633-34 (1931) (Hughes, C.J., dissenting); *Davis v. Beason*, 133 U.S. 333, 342 (1890).

148. 380 U.S. 163, 176 (1965).

149. 406 U.S. 205 (1972).

quested was not merely culturally or philosophically based.<sup>150</sup> Growing governmental involvement and increasing pluralism in the nation's view of religion has engendered a theory of a variable definition of "religion" in the free exercise and establishment clauses.<sup>151</sup>

#### B. *Free Exercise Clause*

Case law has long distinguished between the absolute freedom to hold religious beliefs from the freedom to act upon religious beliefs, the latter freedom being subject in some circumstances to curtailment for the protection of societal interests.<sup>152</sup> The test for determining when a governmental restraint has unduly burdened religious activity was established by *Sherbert v. Verner*.<sup>153</sup> In *Sherbert* the Supreme Court held that a Seventh-Day Adventist who was unwilling to accept a job that required some work on Saturday could not be denied state unemployment compensation. The Court quoted *Braunfeld v. Brown*<sup>154</sup> for the rule that: "[I]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect."<sup>155</sup> The Court further indicated that if governmental action was to be upheld:

[I]t must be either because . . . [it] represents no infringement by the State of [the] constitutional rights of free exercise, or because any incidental burden on the free exercise of . . . religion may be justified by a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate. . . ."<sup>156</sup>

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150. *Id.* at 215-16. *Cf.* *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 49 U.S.L.W. 4341, 4343 (Apr. 6, 1981), where the Supreme Court indicated that where possible the "difficult and delicate task" of determining what is a religious belief or practice should be avoided by the courts. Further, the Court said that the resolution of what is religious "is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."

151. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-6 (1978) [hereinafter cited as TRIBE]; Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978).

152. *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940) (unreasonable restraint on religious solicitation).

153. 374 U.S. 398 (1963).

154. 366 U.S. 599, 607 (1961).

155. 374 U.S. at 404.

156. *Id.* at 403, quoting, *NAACP v. Button*, 371 U.S. 415, 438 (1963).

The compelling state interest and the accompanying power to regulate must arise from some substantial threat to public health, safety, peace, or order.<sup>157</sup>

To meet the first part of the *Sherbert* test, it is incumbent upon the church or religious organization to establish an adequate factual record proving the sincerity and centrality of the religious beliefs that are allegedly burdened.<sup>158</sup> The twin inquiries of sincerity and centrality present difficult factual determinations, the resolution of which threaten separation of church and state. How does one prove the sincerity of a religious belief? The individual cannot be put to the burden of proving the truth of the belief: "Men may believe what they cannot prove."<sup>159</sup> Nevertheless, some objective evidence is required lest a

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157. *Wisconsin v. Yoder*, 406 U.S. 205, 221-29, 235-36 (1972); *Gillette v. United States*, 401 U.S. 437, 462 (1971).

158. *TRIBE*, *supra* note 151, at § 14-11. For discussion of the sincerity and centrality concepts see *Wisconsin v. Yoder*, 406 U.S. 205, 215-19 (1972).

159. *United States v. Ballard*, 322 U.S. 78, 86-87 (1944). Justice Douglas, writing for the Court in *Ballard* sounded a ringing tribute to freedom of thought:

Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. *Board of Education v. Barnette*, 319 U.S. 624. It embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom. The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position.

claim of freedom of religion become a ready excuse for avoiding many unwanted legal obligations.<sup>160</sup>

The concept of centrality deals with the importance a particular faith places on a given activity.<sup>161</sup> An examination of church documents and traditions is a helpful starting point.<sup>162</sup> However, those factors cannot be determinative or less traditional religions will remain unprotected.<sup>163</sup> On the other hand, if religion is left wholly free to define its own boundaries, some might seek exemption from all civil obligations by maintaining that activity central to their faith was inseparably interwoven with all of life's activity.<sup>164</sup>

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Murdock v. Pennsylvania, 319 U.S. 105. As stated in *Davis v. Beason*, 133 U.S. 333, 342, "With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with."

160. See *TRIBE*, *supra* note 151, at § 14-11.

161. There has been debate among students of the Religion Clauses whether proof of centrality is required at all to avail oneself of free exercise clause protection. Those who have argued that centrality is not required are buoyed by the recent Supreme Court decision of *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 49 U.S.L.W. 4341 (Apr. 6, 1981). In *Thomas* a Jehovah's Witness had refused out of religious conviction to work on tank turrets because they were instruments of war. The Court brushed aside testimony in the record that other Jehovah's Witnesses had no problem being so employed with these words:

Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill-equipped to resolve such differences in relation to the Religion Clauses. One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause; but that is not the case here, and the guarantee of free exercise is not limited to beliefs which are shared by all the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.

450 U.S. at 715, 49 U.S.L.W. at 4343. Read literally the Court is saying that only the religiously bizarre is without protection under the free exercise clause.

162. See *TRIBE*, *supra* note 151, at § 14-11.

163. The great danger to religious freedom of only affording protection to written "canons" or "tenets" of a religion, or "activity that lies at the core of religious practice, second only to worship itself" is explained in Ball, *What Is Religion?*, 8 *THE CHRISTIAN LAWYER* 7 (1979).

164. Tests of centrality, overly restrictive for universal application, are the findings in *Sherbert v. Verner*, 374 U.S. 398, 406 (1963), that not working on Saturday is "a cardinal principle of her religious faith," and in *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972), that compulsory school attendance was "at odds with fundamental tenets of their religious beliefs."

Once an infringement of free exercise has been shown, the inquiry shifts to the second part of the *Sherbert* test wherein the state must demonstrate a compelling interest in the regulation. Moreover, the regulated conduct must pose "some substantial threat to public safety, peace or order."<sup>165</sup> "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, [o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation."<sup>166</sup> Finally, the regulatory means utilized by the state must be the least restrictive to achieve a compelling end.<sup>167</sup>

Returning to the battery of regulations<sup>168</sup> which states typically impose on social services ministries of religious organizations, each will be examined in light of the free exercise concepts of sincerity, centrality, compelling state interest and least restrictive means.

### 1. Sincerity and Centrality.

Assuming that a *bona fide* religious organization is involved,<sup>169</sup> the most difficult hurdle for a church or parachurch ministry is demonstrating that the religious conduct involved is central to the faith and sincerely held. Consider, for example, the church day-care centers in *North Carolina v. Fayetteville Street Christian School*.<sup>170</sup> The appellate court noted that all of the churches had previously obtained licenses from the state but had let them expire.<sup>171</sup> From this fact alone the court concluded "that all of the defendants have heretofore been licensed by the Commission without any objections; and [there-

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165. *Sherbert v. Verner*, 374 U.S. 398, 403 (1963), citing as examples, *Cleveland v. United States*, 329 U.S. 14 (1946) (criminal prosecution of Morman for transporting a woman across state lines for polygamous practices); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (criminal prosecution for violation of child-labor laws); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (criminal prosecution for refusal to obtain smallpox vaccination); *Reynolds v. United States*, 98 U.S. 145 (1878) (criminal prosecution of a Mormon for polygamy).

166. 374 U.S. at 406, *quoting*, *Thomas v. Collins*, 323 U.S. 516, 530 (1945) (regulation of labor union activities struck down in face of free speech and assembly challenge).

167. "[I]t would plainly be incumbent upon the [state] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." *Id.*, 374 U.S. at 407. See *TRIBE*, *supra* note 151, at § 14-10, pp. 846-59.

168. See text accompanying notes 19-23 *supra*.

169. See text accompanying notes 145-51 *supra*.

170. 42 N.C. App. 665, 258 S.E.2d 459 (1979). See text accompanying notes 40-50 *supra*.

171. *Id.* at 666, 258 S.E.2d at 460-62.

fore failed to] show that it is contrary to their sincere religious belief to seek licenses."<sup>172</sup> In the view of the *Fayetteville* court, the church's "new found" belief compelling them to open day-care centers was given the same credibility as a prisoner's professed "jail-house religion." The failure to prove that a belief was central to the religious practices of the operators of the children's homes was also at work in *Roloff Evangelistic Enterprises, Inc. v. Texas*<sup>173</sup> and *Oxford v. Hill*.<sup>174</sup>

The children's home in *Tabernacle Baptist Church v. Conrad*<sup>175</sup> cleared the sincerity and centrality tests presumably by testimony or examination of church documents. The court found as a fact that:

Plaintiff's beliefs are based upon fundamentalist [Baptist] principles. Among these principles is a firmly held conviction that the church is obligated to provide care and sustenance to deprived children. An integral part of this perceived obligation is that those children should receive fundamentalist training and discipline.<sup>176</sup>

Accordingly, the court was impressed with the claim that the vagueness of the South Carolina legislation and regulations could be applied to oppress the operation of the children's home and frustrate religious training. Propogating the fundamentalist Baptist faith to children was found to be central,<sup>177</sup> as indeed propogation of the faith to children is central to most religions.

An examination of the regulations being resisted by some religious ministries reveals few objections that burden specific religious convictions that are centrally and sincerely held. For exam-

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172. *Id.* at 670-71, 258 S.E.2d at 463.

173. 556 S.W.2d 856 (Tex. Civ. App. 1977). *See* text accompanying notes 26, 28-35 *supra*.

174. 558 S.W.2d 557 (Tex. Civ. App. 1977). *See* text accompanying notes 27, 36 *supra*.

175. C/A No. 79-149 (D.S.C. Oct. 27, 1980).

176. *Id.*, slip op. at 2. In granting the summary judgment motion of the church, the court stated that the judgment was based on arguments presented at a hearing and "other documents filed with this Court." Either testimony was allowed at the hearing or documents were presented by affidavit or stipulation.

177. *Id.*, slip op. at 6. The statutes and regulations found unconstitutional in *Tabernacle Baptist Church v. Conrad* were so vague and poorly drafted that the possible breadth of their application permitted the court to imagine regulatory applications and abuses that would burden religious conduct. Thus, without any showing that these abuses had actually taken place, the court found in favor of the church. The case is best seen as being grounded in the free exercise requirement that the least restrictive means be utilized to achieve a compelling end.

ple, requiring professional staff,<sup>178</sup> the keeping of orderly financial records which are available for auditing in certain limited instances,<sup>179</sup> and compliance with more stringent fire and building codes for church facilities utilized as day-care centers during the week<sup>180</sup> would be surprising subjects of opposition to centrally held religious beliefs. A long-standing principle of strict separatism from the affairs of the world has not been found specific and central enough to occasion protection under free exercise analysis.<sup>181</sup>

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178. Consider the related litigation involving state accreditation and regulation of primary and secondary religious schools. In *North Dakota v. Shaver*, 294 N.W.2d 883 (N.D. 1980), the court upheld the conviction of parents for failing to send their children to state accredited schools in compliance with state compulsory-attendance laws. The parents had been sending the children to a school associated with their church, Bible Baptist School, that was not state approved. The court found the religious beliefs and actions of the parents "inseparable and interdependent," and thus sincerely held. *Id.* at 891. However, the required certification of teachers in sectarian schools was held to be a matter in which the state had a compelling interest, *id.* at 893, and not contrary to the parent's religious beliefs. *Id.* at 892.

The opinion in *North Dakota v. Shaver* was noted with approval in *Nagle v. Olin*, 64 Ohio St. 2d 341, 415 N.E.2d 279 (1980). *Accord*, *Nebraska ex rel Douglas v. Faith Baptist Church*, 207 Neb. 802, 301 N.W.2d 571, *cert. denied*, \_\_\_ U.S. \_\_\_, No. 80-1837, 50 U.S.L.W. 3243 (1981). *See also* *Board of Educ. v. Allen* 392 U.S. 236, 245-46 (1968) (footnote omitted), wherein the Supreme Court observed that "a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction."

By recent legislation, the state of North Carolina no longer requires state certified teachers in sectarian schools. N.C. GEN. STAT. §§ 115-257.6 to 115-257.13. For discussion of merits of the legislation, *compare* Note, *State Regulation of Private Religious Schools in North Carolina—A Model Approach*, 16 WAKE FOREST L. REV. 405 (1980) with Comment, *The State and Sectarian Education: Regulation To Deregulation*, 1980 DUKE L.J. 801.

179. A broader requirement of periodic audits available to the state upon request was objected to in *Kansas v. Heart Ministries, Inc.*, 227 Kan. 244, 250, 607 P.2d 1102, 1107 (1980), because of the religious belief that "God will provide." The court never challenged the belief, but accepted the finding at trial that Reverend Cowell's convictions were sincerely held and practiced. *See* text accompanying note 65 *supra*.

180. The more stringent safety, fire, and building code requirements are largely justified by the increased usage and traffic occasioned by heavy use of the church facilities throughout the week, rather than only for worship services a few hours each weekend. *Cf.* *State Fire Marshall v. Lee*, 101 Mich. App. 829, 300 N.W.2d 748 (1980), discussed at note 15 *supra*.

181. *See, e.g.*, text accompanying notes 20, 50, 144 *supra*. However, separatist religious beliefs prevailed in *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and *Ohio v. Whisner*, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976). The successes in *Yoder* and *Whisner* were achieved in large part due to counsel's careful and extensive development of a factual record at trial.



Other regulations, however, directly and substantially contradict commonly recognized and long held religious tenets, for example, the requirements of liability insurance; non-discrimination on a religious basis in the selection of those served by the ministry;<sup>182</sup> a governing board representative of the community;<sup>183</sup> case records open to the state without parental permission;<sup>184</sup> and state-mandated procedures for, and involvement in, grievances by members of the church or organization providing the ministry.<sup>185</sup> Although these objections probably would afford religious exemptions from the specific regulations involved, nonetheless they would not afford an exemption from state licensing and regulation altogether. Only where the regulatory scheme became "so persuasive and all-encompassing that total compliance with each and every standard . . . would effectively eradicate"<sup>186</sup> the distinctive religious character and purpose of the social ministry, would the religious beliefs be frontally impaired, violating free exercise values.

## 2. Compelling Interest and Least Restrictive Means.

The free exercise analysis next focuses on the state's burden to prove a compelling interest in the matter it seeks to regulate and to show that it has done so by the least restrictive means. It is far too late to deny that the state has a substantial, even vital interest in the young, the poor, the helpless, and others more subject to the whims of fate. Few would deny that many of the communities served by social

182. *But see* Scott v. Family Ministries, 65 Cal. App. 3d 492, 135 Cal. Rptr. 430 (1976), discussed at text accompanying notes 94-104 *supra*.

183. This requirement was objected to in Kansas v. Heart Ministries, Inc., 227 Kan. 244, 249, 607 P.2d 1102, 1106 (1980). The Kansas regulation stated that the governing board must have at least six members representing a variety of community interests.

Often a social ministry's board is also the church council, board of deacons or elders of the sponsoring church. State involvement with the makeup of church governance bristles with impairment of theological convictions and practices.

184. The religious conviction is spawned by a belief that the parents direct the religious upbringing of the child. As to parental rights theories see text accompanying notes 240-51 *infra*.

185. The religious conviction finds legal expression in the prohibition against the involvement of civil authorities in ecclesiastical disputes. See text accompanying notes 230-39 *infra*.

186. Ohio v. Wisner, 47 Ohio St. 2d 181, 211, 351 N.E.2d 750, 768 (1976). *Wisner* held that the minimum standards for private elementary schools, compliance being a requisite for issuance of a state charter, were of such an extensive and comprehensive nature that forced adherence to the "minimum standards" infringed the parental right to exercise freely their beliefs and to direct the religious upbringing of their children by sending them to a sectarian school.

and human services ministries are also proper subjects of the state's protection. Consider, for example, young children<sup>187</sup> in day-care centers, orphans, foster children, alcoholics and drug addicts, expectant unwed mothers and their newborns, those in need of medical care or hospitalization, the elderly and invalids, the retarded or mentally ill, and criminal offenders seeking rehabilitation.<sup>188</sup>

The need for state protection of other communities served by social and human services ministries is not nearly so established or obviously compelling. Consider, for example, youth recreational programs; camps and adult retreat centers;<sup>189</sup> counseling services; and charities offering storehouses of food and used household goods, monetary assistance, and temporary meals and lodging.<sup>190</sup> Any given case will turn on the particular facts and circumstances involved. However, this latter list of social ministries certainly presents a less compelling case for justification of a comprehensive and persuasive state regulatory scheme, including mandatory licensing or certification.

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187. See *Prince v. Massachusetts*, 321 U.S. 158 (1944), which upheld child-labor laws in the face of a challenge of free exercise and free speech by a Jehovah's Witnesses parent.

188. In much the same manner the state's strong interest in the education of children is well established. *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Nebraska ex rel Douglas v. Faith Baptist Church*, 207 Neb. 802, 811, 301 N.W.2d 571, 579, *cert. denied*, \_\_\_ U.S. \_\_\_ No. 80-1837, 50 U.S.L.W. 3243 (1981); *Nagle v. Olin*, 64 Ohio St. 2d 341, 352-53, 415 N.E.2d 279, 287 (1980); *North Dakota v. Shaver*, 294 N.W.2d 883, 895-97 (N.D. 1980).

189. See note 110 *supra*. When members of Congress proposed to regulate youth camps, including those operated by churches, the religious community was aroused and handily defeated the proposed bill. Youth Camp Safety Act, S. 258, 95th Cong., 1st Sess. (1977). As proposed, the act would:

(1) Create a division of Youth Camp Safety within the Department of Health, Education and Welfare. The director of this division would have the power to prepare and promulgate such standards and regulations as would accomplish the purpose of making youth camps safe.

(2) This division (which would have \$7.5 million appropriated to run it the first year) would encourage states to pass their own laws and resolutions, and to undertake their own regulation of youth camps within their borders.

(3) Should the state choose not to enact a Youth Camp Safety Law, the division would be empowered to come in and administer the federal standards on its own. These powers include the power to set safety standards, relating to the choice of a camp director, camp counselors, campsights and their environs and equipments.

The bill died largely because no one had demonstrated a clear need for the governmental oversight.

190. See note 105 *supra*.

The courts in *Roloff Evangelistic Enterprises, Inc.*,<sup>191</sup> *Oxford v. Hill*,<sup>192</sup> and *Kansas v. Heart Ministries, Inc.*<sup>193</sup> had little trouble with the state's assertion of a compelling interest in licensing children's homes in order to protect the physical and mental well-being of the children residing in such facilities. The state's interest in protecting the "physical safety and moral environment" of young children left in day-care centers was also found to be compelling in *North Carolina v. Fayetteville Street Christian School*.<sup>194</sup>

More difficult to resolve is whether the state has achieved its interests by the least restrictive means. It was this final facet of the free exercise analysis that tipped the scales in favor of the church that operated the children's home in *Tabernacle Baptist Church v. Conrad*.<sup>195</sup> The federal district court distinguished the *Roloff* and *Fayetteville* cases by noting that the Texas and North Carolina regulations were directed only at "certain well-defined health and safety standards."<sup>196</sup> In contrast, the licensing scheme in South Carolina was "replete with broadly phrased provisions giving [the state] virtually unlimited discretion" thus "fly[ing] in the face of [the church's] religious beliefs."<sup>197</sup>

Curiously, the court in *Heart Ministries* neglected to consider the least restrictive means requirement in its free exercise analysis.<sup>198</sup> This is particularly disturbing because the regulations were so comprehensive and persuasive that the court declined even to labor to summarize all of them.<sup>199</sup> In the court's muddled approach, seemingly focused on free speech rather than free exercise values,<sup>200</sup> it was apparently deemed sufficient to baldly assert that:

Absent the existence of licensing procedure, applicable to sectarian and nonsectarial establishments alike, the State

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191. 556 S.W.2d 856, 859 (Tex. Civ. App. 1977). See text accompanying notes 26, 28-35 *supra*.

192. 558 S.W.2d 557, 559 (Tex. Civ. App. 1977). See text accompanying notes 27, 36 *supra*.

193. 227 Kan. 244, 252-53, 607 P.2d 1102, 1108-09 (1980). See text accompanying notes 52-74 *supra*.

194. 42 N.C. App. 665, 672, 258 S.E.2d 459, 463 (1979). See text accompanying notes 40-50 *supra*.

195. C/A No. 79-149 (D.S.C. Oct. 28, 1980).

196. *Id.*, slip op. at 5.

197. *Id.*, slip op. at 6.

198. 227 Kan. 244, 256-57, 607 P.2d 1102, 1111 (1980).

199. *Id.* at 248, 607 P.2d at 1106 ("The regulations, as would be expected, are lengthy and quite detailed, and we will make no attempt to summarize all of them here.")

200. *Id.* at 253-56, 607 P.2d at 1109-10.

lacks essential knowledge required for the exercise of its power and duty to protect children from physical and mental harm. Absent licensing, the fire and safety regulations, with which defendants are willing to comply, could not be effectively enforced and their purpose would be compromised.<sup>201</sup>

No reasoning is tendered by the court to disclose why these vital concerns cannot be met absent licensing.<sup>202</sup> Obviously they can be. Only a little imaginative thought would have been necessary to see that the models offered by the Indiana<sup>203</sup> and Virginia<sup>204</sup> child day-care acts point the way toward limited intrusion into this sensitive constitutional area, with the state's oversight in the health, fire, safety, and child abuse matters retained and effectively enforced.

### C. *Establishment Clause*

The establishment clause has been repeatedly construed by the federal courts as ensuring what is popularly called "separation of church and state." Chief Justice Burger has observed that:

[F]or the men who wrote the Religion Clauses of the First Amendment the "establishment" of a religion connotated sponsorship, financial support, and active involvement of the sovereign in religious activity.<sup>205</sup>

The Court has not, however, held to the notion of an impregnable wall of separation or strict neutrality between church and state. "Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. . . . [T]he line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."<sup>206</sup>

The tripartite test announced in *Lemon v. Kurtzman*<sup>207</sup> is the starting point of establishment clause analysis:

201. *Id.* at 257, 607 P.2d at 1111-12.

202. Equally troubling was the court's suggestion that it should treat sectarian and nonsectarian establishments alike. The United States Supreme Court has already stated that in an appropriate free exercise case this "neutral" treatment is not permitted. *See* note 13 *supra*.

203. *See* text accompanying notes 111, 118, 120, 127-32 *supra*.

204. *See* text accompanying notes 112, 118, 120, 127-32 *supra*.

205. *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970).

206. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). *See also* *Roemer v. Board of Pub. Works*, 426 U.S. 736, 745-46 (1976).

207. 403 U.S. 602, 612 (1971).

1. The legislation and underlying regulations must have a secular purpose;
2. The legislation and underlying regulations must neither advance nor inhibit religion, thus having a neutral effect; and
3. The legislation and underlying regulations must not foster excessive entanglement between government and religion by ongoing and intrusive administrative relationships or by creation of political divisiveness.<sup>208</sup>

The first part of the *Lemon* test—secular purpose—is rarely at issue when evaluating state licensing of social and human services ministries of religious organizations because secular and sectarian organizations are generally treated the same.

In consideration of the primary effect facet of the analysis, the Supreme Court has offered a further refinement of the factors to consider. In *Roemer v. Maryland Public Works Board*,<sup>209</sup> the court turned back a challenge to the constitutionality of a state funding program which afforded noncategorical grants to eligible colleges and universities, including sectarian institutions which awarded more than just seminarian or theological degrees. In discussion focused on the fostering of religion, but equally applicable to the inhibition of religion, the Supreme Court said:

[T]he primary-effect question is the substantive one of what private educational activities, by whatever procedure, may be supported by state funds. *Hunt [v. McNair]*<sup>210</sup> requires (1) that no state aid at all go to institutions that are so “pervasively sectarian” that secular activities cannot be

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208. *Id.* See Ball, *What is Religion?*, 8 THE CHRISTIAN LAWYER 7, 12-13 (1979), wherein the dubious origin of the “political divisiveness” facet of the entanglement test is noted.

209. 426 U.S. 736 (1976).

210. 413 U.S. 734 (1973). The challenged state aid in *Hunt* was for the construction of secular college facilities, the plan being one of authority to issue state revenue bonds. The Court upheld the legislation with this commentary on the primary effect test:

Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.

*Id.* at 743. The college in *Hunt*, although subject to substantial control by its sponsoring Baptist church, was nevertheless found not “pervasively sectarian.” *Id.* at 743-45.

separated from sectarian ones, and (2) that if secular activities *can* be separated out, they alone may be funded.<sup>211</sup>

As with the Baptist college in *Hunt v. McNair*,<sup>212</sup> the Roman Catholic colleges in *Roemer* were held not to be "pervasively religious."<sup>213</sup> The record supported findings that the institutions employed chaplains who held worship services on campus, mandatory religious classes were taught, some classes started with prayer, there was a high degree of autonomy from the Roman Catholic church, faculty were not hired on a religious basis and had complete academic freedom except in religious classes, and students were chosen without regard to their religion.

A comparison of *Roemer* and *Hunt* with the elementary and secondary schools in *Committee for Public Education v. Nyquist*<sup>214</sup> will help to clarify the term "pervasively religious." The parochial schools in *Nyquist*, found to be "pervasively religious," conformed to the following profile: the schools placed religious restrictions on student admissions and faculty appointments, they enforced obedience to religious dogma, they required attendance at religious services, they required religious or doctrinal study, the schools were an integral part of the religious mission of the sponsoring church, they had religious indoctrination as a primary purpose, and they imposed religious restrictions on how and what the faculty could teach.<sup>215</sup>

In determining what is "pervasively religious," it must be remembered that some authorities suggest that "religion" as defined for establishment clause purposes is considerably constricted from the concept of "religion" in free exercise jurisprudence.<sup>216</sup> If this is a cor-

211. 426 U.S. at 755 (plurality opinion). For a comprehensive discussion of the dangers inherent in civil authorities attempting to separate the "mostly religious" from the "primarily secular," see Worthing, "Religion" and "Religious Institutions" *Under the First Amendment*, 7 PEPPERDINE L. REV. 313 (1980).

212. 413 U.S. 734 (1973). See note 210 *supra*.

213. 426 U.S. at 758 (plurality opinion).

214. 413 U.S. 756 (1973).

215. *Id.* at 767-68.

216. See TRIBE, *supra* note 151, at § 14-6; Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978).

Consider, for example, the charitable solicitation ordinance struck down in *Espinosa v. Rusk*, 634 F.2d 477 (10th Cir. 1980), *cert. filed*, No. 80-1207, \_\_\_ U.S. \_\_\_, 49 U.S.L.W. 3547 (1981), pursuant to a free exercise clause analysis. The ordinance had classified the collection of money for religious purposes as solicitation for "evangelical or missionary but not secular" ends. A secular purpose was said to be "not spiritual or ecclesiastical, but rather relating to affairs of the present world, such as providing food, clothing, and counseling." Thus, a church's program to solicit funds for the poor

rect statement of the law, then the establishment clause is of diminished utility to religious organizations in holding at bay an increasingly growing and affirmative state.

Evaluation of the final element of the analysis in *Lemon* requires consideration of four subparts. Assessing the administrative entanglement requires looking at:

- (1) the character and purposes of the benefited [or inhibited] institutions, (2) the nature of the aid [or state intrusion] provided, and (3) the resulting relationship between the State and the religious authority.<sup>217</sup>

Assessing the fourth subpart, "[p]olitical fragmentation . . . on religious lines,"<sup>218</sup> dictates a look at whether the community served is local or widely dispersed, the intrusion is primarily with religious bodies or with those of no religious affiliation, and the degree of autonomy from the sponsoring church.<sup>219</sup>

Before embarking on the entanglement analysis, the Court warned:

There is no exact science in gauging the entanglement of church and state. The wording of the test . . . itself makes that clear. The relevant factors we have identified are to be considered "cumulatively" in judging the degree of entanglement.<sup>220</sup>

Apparently the church day-care centers in *North Carolina v. Fayetteville Street Christian School*<sup>221</sup> and the children's homes in

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required a permit. The ordinance was deemed a religious test prohibited by *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

The broad definition of religion in *Espinosa* seems correct, certainly for free exercise purposes. It can readily be seen, however, why some have urged a narrower definition for establishment clause use. With the increase of fraud and the spawning of religious cults, some of which may abuse the body and the mind, a state left helpless to initiate any involvement in that which is arguably religious is in no one's long term interest.

217. 426 U.S. at 748 (plurality opinion); *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971).

218. *Lemon v. Kurtzman*, 403 U.S. 602, 623 (1971).

219. *Roemer v. Board of Pub. Works*, 426 U.S. 736, 765-66 (1976) (plurality opinion); *Tilton v. Richardson*, 403 U.S. 672, 688-89 (1971).

220. *Id.*, 426 U.S. at 766.

221. 42 N.C. App. 665, 258 S.E.2d 459 (1979). See text accompanying notes 40-50 *supra*.

*Roloff Evangelistic Enterprises, Inc. v. Texas*<sup>222</sup> and *Oxford v. Hill*<sup>223</sup> did not argue the establishment clause. As previously discussed,<sup>224</sup> the federal district court summarily brushed aside the excessive entanglement claim in *Tabernacle Baptist Church v. Conrad*.<sup>225</sup> From all appearances a genuine issue of fact was raised concerning excessive administrative entanglement with the local foster care review boards, thus, rendering the grant of summary judgment in favor of the state erroneous.

Surprisingly, the religious ministry in *Kansas v. Heart Ministries, Inc.*<sup>226</sup> neglected to assert establishment clause defenses as well. Nevertheless, one comment by the court suggests that had the "pervasively religious" issue been before it, the children's home ministry would have been deemed primarily secular:

[Heart Ministries] is equating the operation of homes for children, usually a secular activity, with the dissemination of religious ideas. The teaching of religious doctrine to children simply cannot be equated with every aspect of the physical care of children on an around-the-clock basis for First Amendment purposes.<sup>227</sup>

The court finding the children's home "secular" simply cannot be reconciled with *Roemer, Hart*, and *Nyquist*. Comparing the relevant elements as discussed by the Supreme Court with the institution in *Heart Ministries*, clearly the entity established by Reverend and Mrs. Cowell was "pervasively religious." There was religious restriction on staff selection, enforced obedience to religious dogma, required attendance at worship services, and required religious or doctrinal study. Further, the children's home was an integral part of the religious mission of the sponsors, and religious evangelization was a primary purpose of the home, although there were no religious restrictions on the admission of the children.<sup>228</sup>

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222. 556 S.W.2d 856 (Tex. Civ. App. 1977). See text accompanying notes 26, 28-35 *supra*.

223. 558 S.W.2d 557 (Tex. Civ. App. 1977). See text accompanying notes 27, 36 *supra*.

224. See text accompanying notes 83-86 *supra*.

225. C/A No. 79-149 (D.S.C. Oct. 28, 1980).

226. 227 Kan. 244, 607 P.2d 1102 (1980). See text accompanying notes 52-74 *supra*.

227. *Id.* at 256, 607 P.2d at 1111.

228. *Id.* at 245-50, 607 P.2d at 1104-07. Presumably there was no indicated religious restriction on the admission of the children because once in the home the staff sought to convert them to fundamentalist Christianity.



The court in *Heart Ministries* incorrectly assumed that the protected exercise of religion is no broader than activities usually religious in nature. Because the ministry functioned as a children's home, a service that has both public and private nonsectarian counterparts in society, it was to this court "usually secular." Simply because a majority of children's homes are operated by nonsectarian organizations does not make Reverend Cowell's work nonreligious. Proper establishment clause analysis steers a court not to organizational structure, nor to whether it has secular counterparts in society, but rather to the nature, character, and underlying purposes of the entity.

A finding that the children's home in *Heart Ministries* was "pervasively religious" would not have precluded state regulation altogether. It would have required, however, that the State of Kansas be less intrusive in its oversight. This, of course, leads to the entanglement facet of the *Lemon* test. Given the character and purpose of Reverend Cowell's ministry, the extensive nature of the state's regulation, and the resulting relationship of continuous state surveillance, the Kansas regulatory scheme should have been found unconstitutional as applied to the children's home. However, less intrusive regulations pertaining to fire, health, and safety inspections; required professional certification of staff; and minimum educational, medical, and nutritional standards would withstand establishment clause analysis.<sup>229</sup>

#### D. *Civil Involvement in Ecclesiastical Disputes*

Certain state regulations of social and human services ministries of religious organizations may impermissibly interfere with intra-church discipline or disputes. This may occur in: (1) disputes concerning the terms and conditions of employment, including discrimination; (2) the discipline or discharge of an employee; (3) the discipline of an individual served by the ministry, including suspension or withholding of services to the individual; (4) complaints from members of the public

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229. Cf. *Nebraska ex rel Douglas v. Faith Baptist Church*, 207 Neb. 802, 301 N.W.2d 571, cert. denied, \_\_\_ U.S. \_\_\_ No. 80-1837, 50 U.S.L.W. 3243 (1981); *North Dakota v. Shaver*, 294 N.W.2d 883 (N.D. 1980). These cases uphold the authority of the state to provide for licensing of sectarian schools in order to effectuate limited educational standards such as certification of teachers, offering courses in a prescribed range of subjects, and compliance with all municipal and state health, fire and safety laws. For an opposing view, see Bird, *Freedom from Establishment and Unneutrality in Public School Instruction and Religious School Regulation*, 2 HARV. J. L. & PUB. POL'Y 125, 193-95 (1979). Any overbearing state standards would, however, be impermissible. *Ohio v. Whisner*, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976). See note 186 *supra*.

concerning a ministry's refusal to admit them or otherwise offer its services on a nondiscriminatory basis; and (5) disputes within the governing board over the ministry's policies and direction.

It is not unusual for a church-operated day-care center or children's home to be open only to families who are members of that church. Such a restriction runs counter to state regulations that prohibit discrimination on specified bases, including religion. In like manner, most church-operated ministries employ workers on a religious basis because they view them as lay ministers. Such workers are subject to church discipline and dismissal for violation of religious canons or beliefs. Participation in the ministry, either as a worker or as one served, is regarded as a privilege, not a right. The church must be free to determine the scope of its ministry without state interference.

Upon receipt of a complaint from a private citizen or a parent concerning a ministry, state regulations often mandate a grievance procedure. If the complainant is a member of a church having its own internal government for dispute resolution, compliance with the state grievance procedure may impermissibly interfere with religion by subordinating matters of ecclesiastical cognizance to civil judgment.

Invoking the doctrine of civil nonintervention in church disputes, the Supreme Court in *Serbian Orthodox Diocese v. Milivojevich*<sup>230</sup> rejected a defrocked bishop's objection to his ouster by the highest body of the Serbian Orthodox Church and to reorganization of the American-Canadian diocese by this same tribunal. The Court stated that inquiry by civil authorities into ecclesiastical decisions was inconsistent "with the constitutional mandate that civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law."<sup>231</sup>

In *Milivojevich* there was no dispute that the church involved was other than a hierarchical church, and that the sole power to remove clerics rested with the governing body that had decided the bishop's case.<sup>232</sup> Nor was there a question that the matter at issue was a religious dispute of ecclesiastical concern.<sup>233</sup> The Illinois Supreme Court agreed with these conclusions, but the court decided in favor of the defrocked bishop because, in its view, the church's adjudicatory

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230. 426 U.S. 696 (1976).

231. *Id.* at 713.

232. *Id.* at 715.

233. *Id.* at 709.

procedures had been applied in an arbitrary manner.<sup>234</sup> On appeal the United States Supreme Court rejected the "arbitrariness" exception to the rule of nonintervention in religious disputes.<sup>235</sup>

The Supreme Court also reversed the state court's disapproval of the diocesan reorganization, holding that the Illinois court's opinion had impermissibly relied on its "delv[ing] into the various church constitutional provisions" relevant to "a matter of internal church government, an issue at the core of ecclesiastical affairs."<sup>236</sup> The enforcement of the provisions in controlling church documents could not be accomplished "without engaging in a searching and therefore impermissible inquiry into church polity."<sup>237</sup>

The opinion in *Milivojevic* leaves several questions unanswered. Does the rule of noninterference apply only to a hierarchical church? Does it apply only to a church, and not to a parachurch or lay religious organization? Does it apply only to matters where clerics are concerned, or also to disputes involving lay religious employees or church members? How does one distinguish matters of "secular" concern to the state from the religious topics of "discipline, faith, internal organization, or ecclesiastical rule, custom, or law"?

Proper application of the noninterference rule in *Milivojevic* requires a return to the analysis of more general application under the free exercise clause.<sup>238</sup> However, clearly older, more established religions would be favored if *Milivojevic* applied only to hierarchical churches. Moreover, serious free exercise questions are involved when civil authorities are given the task of deciding who is a "cleric" and who is a "lay employee" more subject to state regulation.<sup>239</sup>

### E. Parental Rights

Where those served by a religious ministry are children, and those children are placed in the care or custody of the religious

234. See *Serbian E. Orthodox Diocese v. Milivojevic*, 60 Ill. 2d 477, 328 N.E.2d 268, 281-82 (1975).

235. 426 U.S. at 713. The "arbitrariness" exception had been established in dictum in *Gonzalez v. Archbishop*, 280 U.S. 1, 18 (1929).

236. *Id.*, 426 U.S. at 721.

237. *Id.* at 723.

238. See text accompanying notes 152-67 *supra*.

239. Cf. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), wherein the Supreme Court acknowledged the role of parochial school teachers as lay religious ministers. Accordingly, subjecting the employment relationship of parochial school teachers to the jurisdiction of the National Labor Relations Act would "give rise to serious constitutional questions." *Id.* at 501.

organization by the parent or guardian, the concept of parental rights may come into play. Common examples are church camps, day-care centers, and children's homes.

In the course of resisting state regulation and licensing schemes, the religious organization often will assert the defense that having been delegated certain authority by the parents, it must defer to the primary rights of the parents rather than the regulatory dictates of the state. A recent example of this defense may be found in *Kansas v. Heart Ministries, Inc.*<sup>240</sup> where Reverend Cowell refused to permit the state to inspect the case records of children in his care without the permission of the parents.<sup>241</sup>

The concept of parental rights draws from' and doctrinally depends upon the more established principles of free exercise, freedom of association, due process, and equal protection. The counter-vailing doctrine is the plenary police power of the state as *parens patriae*. In the context of the subject of this article, parental rights are often considered in conjunction with free exercise analysis. Accordingly, in *Meyer v. Nebraska*,<sup>242</sup> a state law forbidding the teaching in public or private schools of any modern language other than English to any child who had not passed the eighth grade was found to be contrary to substantive due process rights. In reversing the conviction of a parochial school instructor, the Court said:

Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life . . . .

. . . [The instructor's] right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the [Fourteenth] Amendment.<sup>243</sup>

Two years later in *Pierce v. Society of Sisters*<sup>244</sup> a state compulsory education act requiring children to attend a public rather than parochial school was held to be an unreasonable interference with the liberty of parents to direct the upbringing of their children, and thus

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240. 227 Kan. 244, 607 P.2d 1102 (1980).

241. *Id.* at 250, 607 P.2d at 1107. Reverend Cowell testified that compliance with the state's requirement to keep records on each child and to disclose them to the state, would be a "breach of ethics of his Christian ministry."

242. 262 U.S. 390 (1923).

243. *Id.* at 400.

244. 268 U.S. 510 (1925).

contrary to substantive due process concerns. In an often quoted passage, the Supreme Court said:

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.<sup>245</sup>

In *Griswold v. Connecticut*,<sup>246</sup> the Supreme Court spoke of *Pierce* as resting on the first amendment. Later, in *Wisconsin v. Yoder*,<sup>247</sup> the Court referred to *Pierce* as "a charter of the rights of parents to direct the religious upbringing of their children." A still later decision mentioned "the right to choose nonpublic over public education" in *Pierce* as an aspect of free exercise.<sup>248</sup> Thus, subsequent cases have brought the holding of *Pierce* within the free exercise rights of the first amendment.

Although religious ministries resisting state regulation do not have standing to assert the rights of parents leaving children in their charge, parents are often joined as parties for strategic reasons.<sup>249</sup> When joinder is accomplished, the rights of the parents to direct the religious upbringing of their children may be central. Consider the case of *Michigan v. Nobel*<sup>250</sup> involving the related area of state regulation of education. In *Nobel*, parents who refused to send their children to public school or a private school outside their home were charged with violating a state compulsory education law. The court held that the state statutes must give way to the documented and sincere religious beliefs of the parents regarding the education of their children. The parents prevailed in *Nobel* notwithstanding the state's strong in-

245. *Id.* at 535.

246. 381 U.S. 479, 482-83 (1965).

247. 406 U.S. 205, 233 (1972).

248. *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 788 (1973).

249. *See, e.g., Texas v. Corpus Christi Peoples' Baptist Church*, Cause No. 297, 248 (200th Jud'l D. Ct., Travis Cty., Tex. Jun. 30, 1981), *appeal docketed*, No. 13,575 (Tex. Civ. App. Sep. 4, 1981); *Corpus Christi Peoples' Baptist Church v. Texas Dept. of Human Resources*, 481 F. Supp. 1101, 1103 (S.D. Tex. 1979). For like reasons the employees of religious ministries may seek intervention in order to argue their right to freely exercise their religious calling unhindered by the state.

250. Nos. S-791-0114-A and S-791-0115-A (57th D. Ct. for the City of Allegan, Mich. Dec. 12, 1979). *See also Nebraska v. Rice*, 204 Neb. 732, 285 N.W.2d 223 (1979).

terest in education, in contrast to recent cases elsewhere upholding compulsory attendance laws challenged by unlicensed church schools.<sup>251</sup>

#### IV. A SUGGESTED APPROACH

There is some evidence of judicial deference to the bureaucratic assumptions of a social science "elite" that the program and personnel of religious service organizations no longer enjoy the traditional rampart of freedom that normally accompanies religious action.<sup>252</sup> However, because so few cases have been decided after full trial on the merits, insufficient returns are available to suggest a trend.<sup>253</sup>

Where a "substantial threat to public safety, peace or order"<sup>254</sup> is implicated, the state can and should monitor the activity involved. The battle is not over whether the state has a regulatory interest, for it clearly does, but over the nature and degree of that involvement. The legislation in Indiana, Virginia, Louisiana, Alabama, and South Carolina<sup>255</sup> suggests an approach that accommodates both legitimate state concerns and the values undergirding the free exercise and establishment clauses. Legislation satisfies the state's compelling interests in health, fire, and safety by permitting exempt religious organizations to comply as follows:

1. The organization must give periodic written notice to the state that it is in operation, including addresses of all places of business, telephone numbers, officials in charge, sponsoring church or religious group, and copies of incorporation or organizational papers. This notice or registration is necessary for the state to be adequately informed and to properly exercise its interests.<sup>256</sup>

251. See notes 178, 229 *supra*.

252. See, e.g., *Kansas v. Heart Ministries, Inc.*, 227 Kan. 244, 607 P.2d 1102 (1980).

253. *Roloff, Oxford, Fayetteville, and Tabernacle Baptist Church* were all decided on pretrial motions. The outcome may well have been different had the courts had a fully developed factual record. *Fayetteville* and *Emmanuel Baptist Preschool* are presently before courts of original jurisdiction for trial on the merits. See note 29 and text accompanying notes 37-39 *supra*. *Corpus Christi* is on appeal following a full trial. See text accompanying note 39 *supra*.

254. *Wisconsin v. Yoder*, 406 U.S. 205, 221-29 (1972).

255. See text accompanying notes 111-15, 118-34 *supra*.

256. Although registration is a prior restraint on religious exercise, it is slight. Moreover, the restraint is justified by the state's compelling interest in the fire, health, and safety area. No matter how extreme one's separatist views on church and state, they must give way to this proper but limited role of the state protecting its citizens.

2. The organization must submit to inspection by appropriate local or state fire, health, and safety officials, and file with the state certificates of compliance. The inspection codes should be reasonable and no more stringent than those applicable to the organization's secular counterparts.

3. The organization must post a notice concerning its exempt status in a conspicuous place and furnish written notice thereof to those it serves. Additional information on facilities, policies, governing board, and staffing must be available upon request. The notices shall give a government address and telephone number to contact in the event an individual has questions of the state or desires to file a complaint. This requirement follows the practice of consumer-oriented legislation which requires the disclosure of sufficient information to enable a potential customer to make an informed and deliberate choice.

4. Upon receipt of a sworn written complaint from a member of the public, the state may inspect for violations of fire, health, and safety codes and for physical abuse. The state shall submit the sworn complaint to the appropriate local or state official for investigation and, if appropriate, prosecution. For example, allegations of child abuse would be submitted to the local district attorney and fire code violations to the municipal fire marshal.

5. When appropriate, certain minimum standards for health and safety should be written into the legislation. For example, a minimum ratio of employees to number of children in a day-care center.<sup>257</sup>

6. The organization will be issued a letter of compliance certifying that the appropriate registration form and other documents have been filed with the state. Only a letter of compliance is issued, not a state license.<sup>258</sup> A license is not required because it implies to some that

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257. Minimum standards in the statutes rather than in regulations afford an additional degree of insulation from state entanglement. Regulations are more subject to amendment and reinterpretation than is a statute. Moreover, under this suggested approach the statute is enforced, if violated, by a court. This results in a limited intrusion by civil authorities, as opposed to a continued organic relationship with an administrative body.

258. "License" is defined as a "right or permission granted in accordance with law by a competent authority to engage in some business or occupation, to do some act, or to engage in some transaction which but for such license would be unlawful." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED, 1304 (1976). Thus, licensing certain religious activity does indeed imply that the state has the power to prohibit engaging in the religious activity altogether. *Cf. Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (municipality may not impose a license tax requirement on door-to-door distribution of religious literature). Whether a state would ever attempt such a complete ban is at present only hypothetical.

the ministry must have the permission of the state to operate.<sup>259</sup>

7. Failure to comply with the registration requirements of the legislation is cause for the state to file an action in the local court of general jurisdiction to enjoin its operation. Further, noncompliance is a misdemeanor punishable in accord with local practice by fine or imprisonment.

8. The legislation shall not prevent the religious organization from waiving the exemption, thus requiring that it be licensed by the state upon compliance with the more extensive regulatory scheme of the state applicable to secular organizations.

Perhaps the most difficult question to resolve is how to define those "religious" organizations to which the exemption applies. As previously noted, reference to section 501(c) (3) status in the Internal Revenue Code is a legal *cul-de-sac*.<sup>260</sup> Nor can newly formed churches or religions be eliminated by exempting only established or orthodox religious organizations.<sup>261</sup> Since the establishment clause test requires that entanglement be avoided if an organization is "pervasively religious,"<sup>262</sup> and such an organization cannot receive public funding, the better definition of an exempt organization is that applied in the Louisiana legislation.<sup>263</sup> The Louisiana statute exempts an organization

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259. Notwithstanding extreme separatist views on church and state, the requirement that a church or religious organization obtain a license to operate, without more, has been found a sufficient burden on religious activity to violate the free exercise clause only in *Corpus Christi*. See text accompanying notes 20, 50, 144, 170-74 *supra*. However, under this suggested approach only a letter of compliance is issued in order to avoid impermissible administrative entanglement and political fragmentation along religious lines.

Research studies have shown state licensing or permit schemes to be ineffectual. Baron, *Licensing: The Myth of Government Protection*, 8 BARRISTER 46 (Winter 1981). Common defects in licensing regulation are: (1) in many instances permits are issued almost automatically with little review of whether an applicant meets stated qualifications; (2) standards frequently bear no relationship to legitimate government interests, but rather are used to restrict competition; (3) the agencies charged with responsibility devote the bulk of their resources to permit issuance and renewal, and have little remaining time for monitoring and enforcement; and (4) violators are rarely punished and licenses revoked. *Id.* at 48. Baron advocates an enforcement system without licensing. Under such a system all standards for conduct within an industry are set out in positive law. Violators receive sanctions, either civil or criminal depending on the severity of the public harm. The enforcement system would permit greater resources devoted to monitoring and swift prosecution of violators.

260. See notes 120-21 *supra*.

261. For this reason the exemption language in the Alabama legislation is inadequate. See note 122 *supra*.

262. See text accompanying notes 209-16 *supra*.

263. See text accompanying note 126 *supra*.



“if it receives no state or federal funds.”<sup>264</sup> Any organization accepting public funds, and thus not “pervasively religious,” should have little difficulty submitting to a comprehensive state licensing and regulatory scheme.<sup>265</sup> Of paramount concern, however, is avoiding where possible state involvement in the sensitive and perilous task of defining that which is and is not religious.<sup>266</sup>

The foregoing approach reconciles the regulatory concerns of the welfare state with the pursuit of social justice by our still vital voluntary religious institutions. Thus, the approach evidences an application of the classic liberal philosophy that views with suspicion and, wherever possible, avoids government intervention.

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264. LA. REV. STAT. ANN. § 46:1404A(2) (West Supp. 1981).

265. This is not to say that individual regulations would not impermissibly offend religious beliefs. Consider the examples of Roman Catholic hospitals and medical schools that received public assistance but are exempt from performing abortions and sterilizations. *See* note 109 *supra*.

266. *See* text accompanying notes 145-51 *supra*.