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Racial Discrimination in Church Schools

William W. Pugh

lent crimes in devising punishments.[27] The Court would not have so readily excluded a consideration of these factors if it had relied on the utilitarian goals— deterrence and retribution to prevent anarchy—put forth in *Gregg*. Clearly, aggravating factors such as multiple offenses are relevant in determining a sentence designed to deter future crime.[28]

Not only is *Coker* disturbing because of the opinion's unconvincing combination of subjective and objective factors which result in the decision's indeed "appear[ing] to be merely the subjective views of individual justices,"[29] but the *Coker* decision also seems to have ramifications beyond prohibiting the death penalty for rape. The dissenters interpreted the plurality opinion as implying that death cannot be imposed as a penalty for crimes not resulting in the death of the victim,[30] and this conclusion is certainly consistent with the plurality's language. Therefore, if the Court adheres to the reasoning employed in *Coker*, it will conclude that present state and federal statutes imposing the death penalty for such crimes as the rape of a child,[31] armed robbery,[32] kidnapping,[33] airplane hijacking[34] and treason[35] are violations of the eighth amendment.

Constance R. LeSage

RACIAL DISCRIMINATION IN CHURCH SCHOOLS

Plaintiffs, black parents and their two children, brought suit against defendant, a church school operating on church property,[1] seeking damages and an injunction in response to defendant's refusal to admit the

27. 97 S. Ct. at 2874 (Burger, C.J., dissenting).

28. *See id.*; Gregg v. Georgia, 428 U.S. 153, 183 n.28 (1976) (Stewart, J., concurring).

29. 97 S. Ct. at 2865-66; see text at note 10, *supra.*

30. 97 S. Ct. at 2880 (Burger, C.J., dissenting).

31. *See, e.g.*, FLA. STAT. ANN. § 794.011(2) (1976); MISS. CODE ANN. § 97-3-65 (Supp. 1974).

32. *See, e.g.*, GA. CODE ANN. § 26-1902 (1968).

33. *See, e.g.*, 18 U.S.C. § 1201 (1970); GA. CODE ANN. § 26-1311 (1968); LA. R.S. 14:44 (1950).

34. 49 U.S.C. § 1472(i)(1)(B) (Supp. V 1975). The statute provides the death penalty in hijacking cases only when a person is killed, but requires no intent to kill.

35. 18 U.S.C. § 2381 (1970).

1. Defendant, Dade Christian Schools, Inc., was founded by the New Testament Baptist Church and both the school and the church use the same building. Brown v. Dade Christian Schools, Inc., 556 F.2d 310, 325-26 (5th Cir. 1977).

children because of their race. Plaintiffs' suit was based on the contention that 42 U.S.C. § 1981[2] prohibited discrimination by private schools on the basis of race. While denying the statute's application to private schools, defendant contended in the alternative that its admission policy was based on the religious beliefs of its members and that their right to the free exercise of their religion excused defendant's discrimination. The trial court held that the statute did apply to private schools and granted the relief prayed for after focusing on defendant's institutional beliefs and finding that the policy of exclusion was based on a social policy or philosophy rather than a religious tenet. In an en banc hearing, a plurality of the Fifth Circuit Court of Appeals affirmed the reasoning and judgment of the trial court. Concurring in the result, one judge found that the admissions policy was based on the religious beliefs of the individual members, but concluded that the free exercise claim was outweighed by the substantial public interest represented by section 1981. *Brown v. Dade Christian Schools, Inc.*, 556 F.2d 310 (5th Cir. 1977).

The first amendment to the United States Constitution provides in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." The establishment clause has been interpreted as creating a wall of separation between church and state,[3] while the free exercise clause was originally interpreted as providing complete protection for religious beliefs, but no protection for unlawful actions based on religious beliefs.[4] This interpretation of the free exercise clause granted no more protection to religious adherents than is presently provided by the first amendment guaranty of free speech.[5] Gradually the free exercise clause has been interpreted as

2. 42 U.S.C. § 1981 (1970): "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

3. *E.g.*, Lemon v. Kurtzman, 403 U.S. 602 (1972); Walz v. Tax Comm'n, 397 U.S. 664 (1970); School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963); Everson v. Board of Educ., 330 U.S. 1 (1947). In *Schempp*, the Supreme Court stated that "to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." 374 U.S. at 222. Since *Schempp*, *Walz* and *Lemon* have added a further requirement that there not be an excessive entanglement between government and religion.

4. Reynolds v. United States, 98 U.S. 145, 166-67 (1878).

5. U.S. CONST. amend. I provides in part: "Congress shall make no law . . . abridging the freedom of speech . . . ." This guaranty provides full protection for expression of religious belief. Schneider v. State, 308 U.S. 147, 158-61 (1939); Lovell v. Griffin, 303 U.S.

providing more and more protection for religiously based action where such action does not seriously undermine the public good.[6] The result of this gradual development has been a balancing test that weighs the interests of society against the individual's right to the free exercise of his religion.[7]

Reynolds v. United States,[8] the first case to construe the free exercise clause, involved a challenge to a bigamy conviction as a violation of the free exercise right on the basis that the bigamous marriage was entered into in compliance with what was conceived to be religious duty. The Supreme Court held that the purpose of the religion clauses was to prevent the federal government from infringing on religious beliefs, but that no protection was afforded illegal conduct, regardless of its religious motivation.[9] This belief/action distinction remained completely intact until *Cantwell v. Connecticut*.[10] Although deciding the case on free speech grounds as well, the Supreme Court held that the religion clauses included both absolute protection for beliefs and some protection for actions, with the proviso that the state had the power to regulate actions for society's protection as long as the state did not unduly infringe upon the protected freedom.[11]

The first major decision to extend the protection of the religion clauses to religiously motivated actions was *Sherbert v. Verner*.[12] In that case a Seventh Day Adventist who was unable to find work because her religion forbade her to work on Saturday was denied unemployment compensation on the ground that she had refused to accept available work. The Supreme Court held that denying benefits on this basis constituted an unconstitutional burden on her right to the free exercise of her

444, 448-51 (1938); Pfeffer, *The Supremacy of Free Exercise*, 61 GEO. L.J.1115, 1123 (1973). The free speech guaranty protects expression of religious belief, so the free exercise clause, if limited to protection of belief only, provides no additional protection.

6. *See* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972); Sherbert v. Verner, 374 U.S. 398, 403 (1963); Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940). *But see* Braunfeld v. Brown, 366 U.S. 599, 607 (1961). As the extent of governmental regulation increased there also developed an increased need for protection of religiously motivated action in order to preserve religious liberty. Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part I. The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1383 (1967).

7. Gianella, *supra* note 6, at 1386.

8. 98 U.S. 145 (1878).

9. *Id.* at 166.

10. 310 U.S. 296 (1940). In *Cantwell*, the Court held that the religion clauses of the first amendment were included in the liberty protected by the fourteenth amendment and were therefore applicable to the states. *Id.* at 303.

11. *Id.* at 304.

12. 374 U.S. 398 (1963).

religion. *Sherbert* reflected a much greater concern for the right to free exercise than any of the previous cases,[13] in that the Court formulated a test which required either that there be no infringement of the free exercise right, or that "any incidental burden on the free exercise of appellant's religion . . . be justified by a 'compelling state interest . . . .'"[14] This test required a balancing of the individual's interests against those of the state with the scales weighted in favor of the individual.

A solid reaffirmation of *Sherbert* came nine years later in *Wisconsin v. Yoder*.[15] The Wisconsin Supreme Court had reversed the convictions of several Amish parents who because of religious beliefs had violated the state's compulsory attendance law by refusing to send their children to secondary schools. The Supreme Court affirmed after undertaking a delicate balancing of interests and stating that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[16]

In both *Sherbert* and *Yoder*, cases involving well-established religions, the Supreme Court had no difficulty determining that the beliefs in question were religious beliefs. However, in other instances, particularly cases involving conscientious objectors and tax exemptions for religious institutions, the courts have been forced to struggle with the difficulties of defining religion in order to distinguish protected religious

13. Only two years earlier, in *Braunfeld v. Brown*, 366 U.S. 599 (1961), the Supreme Court had demonstrated far less concern for infringements on the right of free exercise. The burden on Braunfeld was perhaps even greater than the burden on Sherbert. Sherbert v. Verner, 374 U.S. 398, 417-18 (1963) (Stewart, J., concurring). Despite this, the Court in *Braunfeld* denied the free exercise claim, holding that an incidental infringement on an individual's free exercise was constitutional where the challenged statute was a general secular regulation within the state's power, unless its purpose could be accomplished without a burden on the right of free exercise. Braunfeld v. Brown, 366 U.S. 599, 607 (1961).

14. Sherbert v. Verner, 374 U.S. 398, 403 (1963), *quoting from* NAACP v. Button, 371 U.S. 415, 438 (1963).

15. 406 U.S. 205 (1972). Between *Sherbert* and *Yoder* two state cases had followed *Sherbert*'s more protective approach. Prior to *Sherbert*, the Minnesota Supreme Court had denied a claim that the right of free exercise allowed an exemption from jury duty. *In re* Jenison, 265 Minn. 96, 120 N.W.2d 515 (1963). The Supreme Court vacated and remanded for further consideration in light of *Sherbert*. *In re* Jenison, 375 U.S. 14 (1963). On remand the Minnesota Supreme Court upheld the free exercise claim until it was shown that the granting of the exemptions would place a significant burden on the functioning of the jury system. *In re* Jenison, 267 Minn. 136, 125 N.W.2d 588 (1963).

The California Supreme Court followed *Sherbert* in *People v. Woody*, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Reptr. 69 (1964) (granting the Native American Church an exemption from the prohibition of the use of peyote and allowing the church members to use the drug for religious purposes).

16. 406 U.S. at 215.

beliefs and actions based upon them from other beliefs and actions that are not protected by the free exercise clause.[17] The courts have only reluctantly inquired into what constitutes a religion because of the inherent tension between such an inquiry and the establishment clause.[18]

For many years it was accepted that the touchstone for finding the existence of a religion was a belief in a Supreme Being,[19] but eventually some courts held that such a belief was not an essential prerequisite to statutory tax exemptions for buildings used solely for religious worship.[20] In this context, one court developed an institutional definition of religion requiring that there be some sort of belief, not necessarily including a belief in a supernatural power, held by a group that openly expresses the belief, derives a moral practice from it, and is organized in a fashion designed to foster adherence to its tenets.[21] In the selective service context, the debate has centered around the statutory exemption from the draft for conscientious objectors.[22] In *Seeger v. United States*,[23]

17. Boyan, *Defining Religion in Operational and Institutional Terms*, 116 U. PA. L. REV. 479, 480 (1968); Hollingsworth, *Constitutional Religious Protection: Antiquated Oddity or Vital Reality?*, 34 OHIO ST. L.J. 15, 16 (1973); Comment, *Defining Religion: Of God, the Constitution and the D.A.R.*, 32 U. CHI. L. REV. 533, 534 (1965) [hereinafter cited as *Defining Religion*].

18. There is an inherent tension between the free exercise clause and the establishment clause in cases in which the former is interpreted as extending some protection to religiously based action. So interpreted, the free exercise clause requires that a particular belief be examined to determine whether it is religious and that its importance to the adherent be examined in order to balance the adherent's interests against society's interests. It has been suggested that any exemption from a general law for religiously motivated action would violate the establishment clause. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 96 (1961). However, the Supreme Court has held that where the free exercise clause requires an exemption the establishment clause does not forbid it. Wisconsin v. Yoder, 406 U.S. 205, 234 n.22 (1972); Sherbert v. Verner, 374 U.S. 398, 409 (1963). However, the tension still remains because the establishment clause forbids favoring one religion over another. Fowler v. Rhode Island, 345 U.S. 67, 69 (1953); see note 3, *supra*. Whenever a particular belief is examined to determine whether it is religious and how important it is to the individual there is a risk that one religion will be treated differently than another, thereby violating the establishment clause's prohibition of favoritism.

19. United States v. MacIntosh, 283 U.S. 605, 633-34 (1931) (Hughes, C.J., dissenting on another point); Davis v. Beason, 133 U.S. 333, 342 (1890); Boyan, *supra* note 17, at 481-82; *Defining Religion, supra* note 17, at 535.

20. Washington Ethical Soc'y v. District of Columbia, 249 F.2d 127 (D.C. Cir. 1957); Fellowship of Humanity v. County of Alameda, 153 Cal. App. 2d 673, 315 P.2d 394 (1957).

21. Fellowship of Humanity v. County of Alameda, 153 Cal. App. 2d 673, 692-93, 315 P.2d 394, 406 (1957).

22. Section 5(g) of the Selective Training and Service Act of 1940 exempted those who are "by reason of religious training and belief . . . conscientiously opposed to participation in war in any form." 54 Stat. 889, § 5(g) (1940) (codified in 50 App. U.S.C. § 305 prior to expiration in 1947). The Second Circuit Court of Appeals had implied that a belief in a

the Supreme Court interpreted the requirement of a belief in a Supreme Being as being only explanatory and developed the psychological role test for religion which requires that the belief occupy the same role for the individual as is occupied by the more traditional religions in the lives of their adherents.[24] In both *Seeger* and *Welsh v. United States*,[25] a later case, the interpretations of the statutory exemptions were so broad that it appeared that any constitutional definition of religion would have to be based on the psychological role that it played for the individual rather than on some kind of content requirement such as a belief in a Supreme Being.[26] *Yoder*, however, appears to have retreated somewhat from the psychological role test, relying more on a content requirement test.[27]

In *Yoder*, Chief Justice Burger upheld the claim to free exercise in reliance on the three hundred year history of the Amish faith, the unquestioned sincerity with which the Amish held the religious belief that secondary schooling would expose their children to detrimental worldliness, and the centrality of this particular belief to the Amish religion and way of life.[28] While *Yoder* increased protection for conduct based on religious belief, language in the opinion seems to require that the religious belief have some kind of institutional quality about it and that it not

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Supreme Being was not required to qualify for the exemption. United States v. Kauten, 133 F.2d 703 (2d Cir. 1943). The Ninth Circuit Court of Appeals had held, however, that the existence of a religion depended on a belief in a Supreme Being. Berman v. United States, 156 F.2d 377 (9th Cir.), *cert. denied*, 329 U.S. 795 (1946). Congress amended the exemption in 1948 to require a belief in a Supreme Being. 62 Stat. 609 (1948) (codified in 50 App. U.S.C. § 456(j) prior to 1967 amendment). The Senate Armed Services Committee Report indicated the adoption of *Berman*'s interpretation of what constituted a religion. S. REP. No. 1268, 80th Cong., 2d Sess. 14 (1948). *See* Denno, *Welsh Reaffirms Seeger: From a Remarkable Feat of Judicial Surgery to a Lobotomy*, 46 IND. L.J. 37, 39-40 (1970); *Defining Religion, supra* note 17, at 537 n.23.

23. 380 U.S. 163 (1965).

24. *Id.* at 176.

25. 398 U.S. 333 (1970).

26. *See* Gianella, *supra* note 6, at 1425; Hollingsworth, *supra* note 17, at 30; Pfeffer, *supra* note 5, at 1136; *Defining Religion, supra* note 17, at 550-52.

Such an interpretation would have been in accord with the statement in *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961), that the establishment clause prohibited either a state or the federal government from aiding "those religions based on a belief in the existence of God as against those religions founded on different beliefs." In a footnote the Court referred to several religions that did not believe in God, such as Buddhism, Taoism, Ethical Culture and Secular Humanism, and approvingly cited *Washington Ethical Soc'y v. District of Columbia*, 249 F.2d 127 (D.C. Cir. 1957), and *Fellowship of Humanity v. County of Alameda*, 153 Cal. App. 673, 315 P.2d 394 (1957). 367 U.S. at 495 n.11.

27. *See* Wisconsin v. Yoder, 406 U.S. 205, 247-49 (1972) (Douglas, J., dissenting in part).

28. *Id.* at 235 (opinion of the Court).

be based on a personal belief or philosophy.[29] This language may simply reflect an attempt to determine the sincerity of the belief and its centrality to the religion, but taken at face value these requirements appear to be a retrenchment from the very broad psychological role definitions of religion used in the conscientious objector cases.[30]

As the protection for conduct based on religious beliefs increased, the Supreme Court was also affording more protection for persons who were being discriminated against on the basis of race. *Brown v. Board of Education*[31] and its progeny not only prohibited segregation in public schools, but gradually extended the prohibition to any racial discrimination supported by state action. As attempts to integrate the public schools became more successful, more and more of those opposed to integration placed their children in private schools. In *Runyon v. McCrary*,[32] the Supreme Court held that 42 U.S.C. § 1981[33] prohibited private non-sectarian commercially operated schools from excluding students on the basis of race. The schools' refusals to contract with applicants because of their race violated the provision of section 1981 that all persons shall have the same right to make and enforce contracts as do white citizens. The schools were granted standing to litigate the free association claims of the parents who sent their children to the schools,[34] but the Court held that the parents' rights of free association did not include protection for the schools' exclusion of blacks.[35] One of the questions specifically re-

29. One of the factors that the Court noted was that the beliefs were shared by an organized group. *Id.* at 216. The Court also said that "if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses." *Id.*

30. Justice Douglas pointed out that the majority's contention that Thoreau's choice was merely personal and philosophical and therefore not entitled to protection under the Religion Clauses was a retreat from the Court's opinions in *Seeger* and *Welsh*. *Id.* at 247-49 (Douglas, J., dissenting in part).

31. 347 U.S. 483 (1954).

32. 427 U.S. 160 (1976).

33. See note 2, *supra*. Section 1981 is based on the thirteenth amendment to the United States Constitution which provides:

> Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Congress shall have power to enforce this article by appropriate legislation.

34. Runyon v. McCrary, 427 U.S. 160, 175 n.13 (1976).

35. *Id.* at 176. In granting standing to the schools in *Runyon* to litigate the constitutional rights of the parents, the Court relied on *Pierce v. Society of Sisters*, 268 U.S. 510

served was whether section 1981 applied to private schools that practiced racial exclusion on the basis of a religious belief.[36]

In *Brown v. Dade Christian Schools, Inc.*,[37] the full Fifth Circuit Court of Appeals was asked to answer this question regarding conflicts between section 1981 and the right to the free exercise of religion.[38] The plurality avoided the question by finding that the evidence was sufficient to support the trial court's conclusion that the discrimination at issue was not based on a religious belief, but rather on a social policy or philosophy.[39] In reaching this conclusion the trial court isolated and analyzed the beliefs attributed to the institution rather than those of the individual parents, teachers and church members. The plurality agreed with the trial court's approach, reasoning that a focus on the individual beliefs of members would allow the institution to pick and choose which of its members' religious beliefs it desired to exercise.[40] The plurality felt that the existence of one individual who believed that his religion required segregation should not authorize the entire institution to practice illegal segregation. On the other hand, if an institution sincerely believed that its religion mandated exclusion of blacks from the church school, the existence of one member whose antipathy to integration was not religiously based should not preclude the institution from claiming a right to the free exercise of its religion.[41]

(1925). In *Pierce*, a statute prohibited parents from sending their children to a private school, and the result would have been to abolish the private schools. The Court held that the statute unconstitutionally infringed on the parents' liberty under the fourteenth amendment to direct the upbringing of their children, relying on *Meyer v. Nebraska*, 262 U.S. 390 (1923). 268 U.S. at 534-35. In *Runyon*, the Court stated that the parents' rights of free association only encompassed the right to send their children to a school that *espoused* segregation, and did not include protection for the school's *practice* of segregation. 427 U.S. at 176. Since the right of free association only protected the right to associate to promote a particular belief, and since the school was not inhibited from teaching any beliefs that it wished, the right of free association had not been violated.

36. 427 U.S. at 167.

37. 556 F.2d 310 (5th Cir. 1977).

38. The court summarily affirmed the trial judge's holding that 42 U.S.C. § 1981 prohibited discrimination by private schools in light of the United States Supreme Court decision in *Runyon*. *Id.* at 312.

39. *Id.* at 313.

40. *Id.*

41. *Id.* at 313-14. The issue whether an institution can claim an independent right of free exercise was admitted by both the plurality and the concurring opinion to be a difficult one. *Id.* at 313; *id.* at 316 (Goldberg, J., concurring). The plurality did not need to decide the issue because it found the institution's policy to be a social policy. *Id.* at 313. The concurring opinion did not have to decide the issue because it focused on the beliefs of the individuals rather than the beliefs of the institution. *Id.* at 316 (Goldberg, J., concurring).

In focusing on the beliefs of the institution, the plurality examined the testimony of the school's officers that racial discrimination was a policy that had only gradually evolved in the church.[42] Based on this testimony, and the lack of any written evidence that segregation was a religious tenet of the church or school, the plurality found that the policy of discrimination was in fact just that, a social policy.[43] A statement by the church pastor that he would follow the previous decisions of the church unless instructed to do otherwise further convinced the plurality that the exclusion of blacks was not religiously based.[44]

In his concurrence, Judge Goldberg differed from the plurality by focusing on the beliefs of the individuals rather than those of the institution and concluding that the school's exclusion of blacks was religiously based.[45] While declining to define religion, he criticized the plurality's emphasis on written doctrine and found that "whatever the outer perimeters of the concept of 'religion,' the beliefs at issue here do not exceed them."[46] The Biblical basis for the ideas, coupled with the testimony that admission of blacks would constitute disobedience to God, made it clear to Judge Goldberg that the individual beliefs were religious.[47] As long as

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The issue has not been directly faced, but there have been cases indicating that a church itself has protected freedoms under the first amendment. In *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America*, 344 U.S. 94, 119 (1952), the Court said that the statute at issue in the case prohibited the "free exercise of an ecclesiastical right, the Church's choice of its hierarchy." *See also* Goodson v. Northside Bible Church, 261 F. Supp. 99, 103 (S.D. Ala. 1966), *aff'd*, 387 F.2d 534 (5th Cir. 1967); United States v. Article or Device "Hubbard Electrometer," 333 F. Supp. 357, 363 (D.D.C. 1971).

42. 556 F.2d at 312-13.

43. *Id.* at 313.

44. *Id.* at 312. In a footnote, the plurality acknowledged that the trial judge might have found this statement to be simply a reflection of a congregational religion in which every member was his own priest, but held that it was the trial judge's function to weigh the evidence, while the appellate court's function was to determine whether the evidence was sufficient to support his conclusions. *Id.* at 312 n.4. Judge Goldberg criticized the plurality's standard of review, maintaining that the issue whether particular beliefs were religious was a mixed question of law and fact necessitating an independent analysis of the evidence by the court of appeals. He stated that the argument for independent review was especially strong in this case since it involved first amendment rights. Further, because the trial court had heard no live witnesses, but decided the case on the basis of depositions and exhibits alone, the court of appeals was in just as good a position as the trial court to determine facts. *Id.* at 316-17 (Goldberg, J., concurring).

45. *Id.* at 315-16, 319-20. Judge Brown concurred in Part V of Judge Goldberg's concurrence in which Judge Goldberg articulated the principles of balancing and concluded that the "governmental interest in desegregation of schools outweighs the First Amendment claim, if any, of the school, the church, or both." *Id.* at 314 (Brown, J., concurring).

46. *Id.* at 317-18 (Goldberg, J., concurring).

47. *Id.* at 319-20. Each of the administrators and the church pastor expressed a belief

some members held a religious belief mandating exclusion of blacks, Judge Goldberg maintained that the school had standing to litigate their free exercise claims; the extent to which these beliefs were or were not generally held within the church would be one factor to be considered in deciding the free exercise claim on its merits.[48]

Having found the actions to be religiously motivated, the concurring opinion undertook a balancing of the religious and societal interests involved.[49] Courts have been reluctant to undertake this kind of balancing because of the inherent subjectivity of religious beliefs and the danger that an individual judge's biases might influence his analysis of the importance of the interests involved.[50] The inquiry in this case, however, was aided by one witness's statement that the belief forbidding racial "socialization" was only a "very minor" part of the religion.[51] Although admitting blacks would constitute disobedience to God, it would not endanger salvation, and consequently would not endanger the church's survival.[52]

Turning to the societal interests supporting the prohibition of racial discrimination in private schools, Judge Goldberg found them to be of the highest order because they drew strength not only from the congressional judgment manifested in section 1981 but also from the thirteenth amendment's abolition of slavery and involuntary servitude.[53] In response to the school's argument that the governmental interest was lim-

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that the Bible prohibited interracial marriage; consequently "socialization" that could lead to interracial marriage, such as having blacks attend the school, was also prohibited. *Id.* at 318-19.

48. *Id.* at 315 & nn.1 & 2, 316 & n.4.

49. *Id.* at 321-24.

50. The resultant danger of favoritism again illustrates the tension between the free exercise clause and the establishment clause. See note 18, *supra.*

51. Brown v. Dade Christian Schools, Inc., 556 F.2d 310, 321 (5th Cir. 1977) (Goldberg, J., concurring).

52. *Id.*

53. *Id.* at 323. "In ensuring blacks an equal opportunity to enter contracts, § 1981 seeks to eradicate some of the badges and incidents of slavery." *Id.*

Since section 1981 is undergirded by the thirteenth amendment, it would be possible to phrase the balancing question in terms of whether the thirteenth amendment outweighs the first amendment. Simply phrasing the question in this fashion illustrates the extreme difficulty of balancing such enormous rights in the abstract. It is more realistic to focus on the actual interests involved than to make a futile attempt to determine which right is more important.

One possible way of dealing with the two rights in the abstract would be to say that the thirteenth amendment, coming later, amended the first amendment pro tanto. A possible response to this argument would be that the fourteenth amendment incorporated the rights and liberties of the first amendment without any possible modifications by the thirteenth

ited to having these two black children go to this particular church school, Judge Goldberg discussed the possible institutional consequences of a decision in favor of Dade Christian.[54] He maintained that such a decision would provide an avenue to avoid *Runyon* that many would use in less than good faith, and might provoke a multitude of similar claims.[55] When faced with these future claims, courts either would have to undertake a delicate case-by-case analysis of each claim, requiring the courts to act as a "board of religious arbiters"[56] by drawing "fine and searching distinctions,"[57] or would have to recognize the validity of most of the resulting similar claims, thereby seriously undermining the public interest reflected in section 1981.[58] Applying the test of *Yoder* that only "those interests of the highest order and those not otherwise served" can overcome a claim to free exercise,[59] Judge Goldberg determined that in this case the free exercise claim was outweighed since drawing fine and searching distinctions in future cases would possibly violate the establishment clause.[60]

The plurality's approach of focusing on the institutional beliefs rather than the beliefs of the individual members appears sound. Although the school has standing to litigate the free exercise rights of its members, those individuals' rights should not protect the school's illegal

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amendment. It is to be seriously doubted that any court would allow itself to be forced into resolving a conflict between the two amendments in this fashion.

54. 556 F.2d at 323 (Goldberg, J., concurring).

55. *Id.*

56. *Id.*

57. *Id.* at 324.

58. *Id.*

59. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

60. 556 F.2d at 323-24 (Goldberg, J., concurring).

The dissenters agreed with Judge Goldberg that the policy was based on a religious belief but voted to remand for further consideration. *Id.* at 324 (Roney, J., dissenting with Judges Gewin, Coleman, Ainsworth, Clark and Tjoflat). For the dissenters, a religious belief required a sincerely held belief "based on a theory 'of man's nature or place in the Universe,' " (*id.*, *quoting* Founding Church of Scientology v. United States, 409 F.2d 1146, 1160 (D.C. Cir.), *cert. denied*, 396 U.S. 963 (1969)), that was not "merely a personal preference but [had] an institutional quality about it." *Id.*

In attempting to determine whether the belief had an institutional quality about it, the dissent focused on the institutional expressions of the belief in the church teachings and the operation of the school. These institutional expressions—editing teaching materials, losing a tax exemption and a sermon by the church pastor— proved that the institution held the belief, but not that the belief was a religious belief.

Judge Goldberg was not willing to accept completely the dissenters' definition of religion. *Id.* at 317-18. However, a majority of the court agreed that the practice at issue was based on a religious belief.

discrimination. It is the school that is violating section 1981 by refusing to contract with black applicants, not the individuals, and therefore it is the school's illegal conduct that must be justified by some exception to the general law. If a private tutor were to refuse to teach blacks for non-religious reasons, the free exercise claim of one of his pupils' parents that integration was forbidden by God surely would not be sufficient to protect the tutor's illegal discrimination. The analogy is somewhat different from the instant case because Dade Christian is composed of individuals whose free exercise rights it desires to exercise, whereas the relationship between the tutor and his pupils' parents is only that of businessman and client. However, Dade Christian should be viewed as a separate entity that represents a single composite picture of its membership; when the institution wishes to take action contrary to general laws it should be required to show that such action is supported by a general religious tenet of the institution and is thereby protected by the institution's free exercise right.[61] The right freely to exercise one's religion may excuse a religious adherent from conduct which is required of or forbidden to all others in the society; such an extensive right ought not to be conferred lightly on a group unless there is evidence that the group's action is in accord with its belief.

If focusing on institutional beliefs is proper when the institution is seeking the religious exemption, the question then becomes how to determine which beliefs the institution adheres to and whether such beliefs are truly religious. Beliefs the institution holds should normally be reflected either in writings or in long-standing practice. Contrary to Judge Goldberg's fears,[62] in unusual instances allowances could be made to prevent this approach from becoming a burden on newly established religions simply by permitting the members of a newly established religion to testify about the group's beliefs and the reasons for the religion's existence.[63]

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61. It is not clear whether an institution can have an independent right of free exercise (see note 41, *supra*), but it is logical to assume that a religious group or institution that wishes to take institutional action should have a free exercise right that is protected by the first amendment. Such an interpretation would be in accord with the cases that have held that a corporation is a person for the purpose of qualifying for the fourteenth amendment's provision prohibiting deprivation of liberty or property without due process of law. *See* NAACP v. Button, 371 U.S. 415, 428 (1963); Grosjean v. American Press Co., 297 U.S. 233, 244 (1936); Smyth v. Ames, 169 U.S. 466, 522 (1898); Covington & Lexington Road Turnpike Co. v. Sanford, 164 U.S. 578, 592 (1896).

62. Brown v. Dade Christian Schools, Inc., 556 F.2d 310, 317 (1977) (Goldberg, J., concurring).

63. Even a new religious institution will have some set of beliefs that acts as a cohesive

When determining whether a particular institutional belief is religious it would seem preferable to examine the content of the belief rather than the psychological role that it plays for the institution.[64] Application of the psychological role test would be unworkable because the existence of an institution revolves around the purpose for which it was formed and, consequently, an institution's purpose will always appear to occupy the "psychological role" of a religion. For a business corporation the creed of making money could be said to occupy the "psychological role" of a religion. The most appropriate method of determining whether an institution's beliefs are religious would be to discover whether the group openly expresses sincere beliefs "based on a theory 'of man's nature or his place in the Universe' "[65] (not necessarily including a belief in a supernatural power), and whether the group derives a moral practice from the belief and is organized in a manner designed to foster adherence to its tenets.[66] If the court found that the institution was organized around such a set of beliefs,[67] the only remaining inquiry would be whether the belief at issue was within this set of religious beliefs.

Judge Goldberg's focus on the beliefs of the individuals rather than the institution does not present serious balancing problems only because of his conclusion that the free exercise claim would be outweighed by the governmental interest expressed in section 1981 regardless of how many people share the religious belief. His reasoning, following *Runyon*, is that if one member believes that the particular action is religiously mandated, then the institution has standing to litigate its members' rights and the

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force among its members. These beliefs will either be recorded or recognized by the individual members as the beliefs of the institution.

The focus on the institutional beliefs for the purposes of examining an institutional claim to free exercise will not violate the establishment clause by discriminating against religions without institutional form because this focus will only be necessary where institutional action is contemplated and those religions without institutional form will be incapable of institutional action.

64. For a discussion of the psychological role definition of religion, see note 26, *supra*, and accompanying text.

65. Brown v. Dade Christian Schools, Inc., 556 F.2d 310, 324 (1977) (Roney, J., dissenting), *quoting* Founding Church of Scientology v. United States, 409 F.2d 1146, 1160 (D.C. Cir.), *cert. denied*, 396 U.S. 963 (1969).

66. This test is a combination of the tests used in *Brown v. Dade Christian Schools, Inc.*, 556 F.2d 310, 324 (1977) (Roney, J., dissenting) and *Fellowship of Humanity v. County of Alameda*, 153 Cal. App. 2d 673, 315 P.2d 394, 406 (1957).

67. This type of inquiry has already been faced in the tax exemption cases and has not proved insurmountable. *See* Washington Ethical Soc'y v. District of Columbia, 249 F.2d 127 (D.C. Cir. 1957); Fellowship of Humanity v. County of Alameda, 153 Cal. App. 2d 673, 315 P.2d 394 (1957).

court should reach the merits of the free exercise claim.[68] Apparently, considerations such as the number of people who share this religious belief or oppose the conduct at issue are simply factors to be included in the balancing process.[69] This approach is unsatisfactory because if an institution were allowed an exemption from a generally applicable law provided the pertinent religious beliefs were held by enough members, the court would be required to make the difficult determination of what percentage of members must share the belief in order to justify the exemption for the institution. The determined percentage would surely vary depending on whether there were other members who actually opposed the conduct (whether religiously or otherwise), and upon whether there were some who approved of the conduct, but only for nonreligious reasons. These formulas seem to be only a disguised and not very accurate method of determining whether the particular belief is held by the institution or the group as a whole. A religion's tenets are not generally determined by a vote of a majority and the courts should not examine them in that light, but should focus instead on the institution as an entity.[70]

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68. Brown v. Dade Christian Schools, Inc., 556 F.2d 310, 315 n.2 (5th Cir. 1977) (Goldberg, J., concurring). "The *Runyon* court required no showing of whether the students and parents universally ascribed to the views espoused, and we should follow that lead. If some students disagree with the rights that the school espouses on behalf of others, the balance of substantive interests may be affected, but the right ever to litigate the interests should not be foreclosed." *Id.*

In another footnote, Judge Goldberg asserted that the difference between the associational rights at issue in *Runyon* and the religious rights asserted in the instant case is irrelevant to the standing issue. *Id.* at 315 n.1. However, this may not be true. If, in *Runyon*, one parent had been held to have an associational right to send his child to a school that practiced segregation, then all of the other parents would have had that same right and the schools would have been allowed to segregate. However, in the case of a free exercise claim, a finding that one person has a right to do something does not mean that others have the same right. In fact, upholding a free exercise claim means that that particular person has a right that is not shared by those who do not share his religious convictions. Therefore, a finding in the instant case that one person has the free exercise right to send his child to a segregated school ought not necessarily to mean that the school he wishes to attend will be allowed to segregate. Even assuming that the free exercise rights of individuals could justify allowing an exemption for another entity (*i.e.* the institution), there should certainly be a requirement that more than one individual hold the particular religious belief. Judge Goldberg contends that this problem should be dealt with in the balancing process. *Id.* at 315 n.2. Perhaps the problems are an indication that the institution ought to be required to make the free exercise claim on the basis of its institutional beliefs. At the very least, the problems indicate that a resolution of the standing issue is very far from a resolution of the free exercise claim itself.

69. *Id.* at 315 n.2.

70. In the case of a congregational religion where the members actually vote on the

To justify his all or nothing approach, Judge Goldberg contended that drawing fine distinctions between religions in future cases would embroil the courts in religious questions that they are ill equipped to handle.[71] However, the most important differentiating factor in any case-by-case analysis is the determination of the centrality of the belief at issue. Judge Goldberg himself undertook such an inquiry in the instant case before he ever reached the institutional problems that a decision in favor of Dade Christian would entail. Having found the beliefs to be religious and sincerely held, he focused on their centrality to the religion and determined that the prohibition of "socialization" "occupies a minor position in its adherents' religion"[72] and is not essential to the church's survival.[73]

Both the plurality and Judge Goldberg were probably correct in denying Dade Christian an exemption: using the plurality's approach, the belief was not religious; even accepting Judge Goldberg's approach, the belief did not play a central role in the religion. However, Judge Goldberg fails to present a convincing argument that the societal interest represented by section 1981 outweighs every single claim that the right to free exercise allows exclusion of blacks. The rights at issue are both of extreme importance: the right to contract without regard to the color of one's skin, and the right to practice one's religion without state interference. Where these two rights conflict only a delicate balancing of interests can justly resolved the conflict; a flexible rule is essential for a fair result.

The case-by-case analysis required has been undertaken by other courts in the context of free exercise claims.[74] The essential prelude to the balancing, despite its dangers, is the search for centrality, which is the critical factor in determining the strength of the free exercise claim. The outcome of the balancing should depend on the centrality of the particular belief to the religion as a whole, weighed against the extent to which important societal interests would be harmed by upholding the free exer-

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church beliefs there will be no difference between looking at the institutional beliefs of the church and taking a head count of what the individual members believe to be a part of their religion. However, in that instance the group will have agreed that the beliefs of the group will be whatever a majority of the group believes.

71. 556 F.2d at 323 (5th Cir. 1977) (Goldberg, J., concurring).

72. *Id.* at 322.

73. *Id.* at 321.

74. Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963); People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964); *In re* Jenison, 267 Minn. 136, 125 N.W.2d 588 (1963).

cise claim.[75] The harm that will be caused to the particular religion by denying the free exercise claim increases in proportion to the centrality of the belief at issue, while the societal interests in preventing an exemption increase in proportion to the number of schools that might escape the general prohibition against discrimination in private schools. Perhaps under some circumstances, where there is a central religious belief mandating the exclusion of blacks from one particular church school, allowing an exemption would not seriously undermine the societal interest in assuring that all children, regardless of race, can attend the school of their choice.[76] Unless and until the free exercise exemptions multiply enough to effect some serious detriment to the societal interest in promoting equality for people of all races, the courts ought to fulfill the promise of the first amendment by allowing discrimination in such cases.[77] As long as the courts require the belief to be both sincere and central to the religion, there seems little chance that the resulting free exercise claims would be numerous enough to impair substantially the important interests promoted by section 1981.[78] To deny these free exercise claims in all instances appears to constitute discrimination against some religions based on the fact that a particular religious tenet is at odds with what many in this country believe. A delicate case-by-case

75. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), for example, the Supreme Court focused on the centrality of the beliefs to the religion and, in light of the belief's centrality and the minimal effect of the desired exemption, found the governmental interest outweighed.

76. The interests of the free exercise claimants would very likely outweigh the governmental interest if the institution that wished to exclude blacks limited its school enrollment to church members.

77. This is the test that was used by the Minnesota Supreme Court in allowing a free exercise claimant to be exempted from jury duty after the United States Supreme Court had remanded for further consideration in light of *Sherbert*. *In re* Jenison, 267 Minn. 136, 125 N.W.2d 588 (1963).

78. One problem that may arise is that a church that has obtained an exemption might be flooded with new members wishing to take advantage of the exemption. One possible remedy to such a situation would be for a court to rescind the exemption on the basis that the religious nature of the institution's belief had become a sham because of a dramatic change in the membership of the church. Although counting heads is not a good way to determine the content of an institutional belief, it is relevant to the issue whether the institutional belief is sincere. An alternative approach to this type of abuse is the argument that changing circumstances had shifted the balance so that the free exercise claim was not outweighed by the governmental interest. If the abuse was serious then a court would probably be able to withdraw the exemption on one of these two grounds.

balancing is the only way to implement the protection for the free exercise of religion afforded by the first amendment.

William W. Pugh

DEFENDANT-WITNESSES, CONFESSIONS, AND A LIMITED SCOPE OF CROSS-EXAMINATION

Appellant was indicted for first degree murder and, prior to trial, moved to suppress a statement made to police.[1] An evidentiary hearing on this motion was held at which appellant testified and was cross-examined on whether the statement was voluntary. The trial judge denied the motion, finding the confession to have been voluntary, and the prosecution introduced evidence at trial to show that the confession was freely given.[2] Appellant's motion to testify for the limited purpose of rebutting the prosecution's evidence concerning the confession's voluntariness was denied, and defendant appealed to the Louisiana Supreme Court on that question alone. In a prospective decision,[3] the court *held* that in order to enable a jury to determine the weight to be given a confession, an accused must be allowed to testify on the voluntariness and validity of the confession, and may be cross-examined only on the issues of voluntariness and credibility, including prior convictions. *State v. Lovett*, 345 So. 2d 1139 (La. 1977).

Louisiana criminal procedure entitles a defendant in a criminal prosecution to a hearing outside the presence of the jury on the question of the admissibility of his confession.[4] This determination of admissibil-

1. It was appellant's contention that the statement given to the police was involuntary because the police took at least one other unrecorded statement from him prior to giving the *Miranda* warnings. Furthermore, appellant alleged that he was promised leniency if he would cooperate by confessing and was threatened with physical harm. 345 So. 2d at 1144.

2. LA. CODE CRIM. P. art. 703(B) requires the state to show at trial the circumstances surrounding the making of a written confession or inculpatory statement where a ruling on a motion to suppress is adverse to the defendant. This showing is to enable the jury to determine the weight to be given the statement.

3. The court reached its decision on January 24, 1977, and applied it prospectively, thus affirming appellant's conviction. On rehearing, however, appellant's conviction was reversed. This reversal was in response to the complaint that the prospective nature of the decision constituted dicta, which, said the court, was error in law. 345 So. 2d at 1144.

4. In *Brown v. Mississippi*, 297 U.S. 278 (1936), the United States Supreme Court held that the fourteenth amendment to the federal constitution prohibits the use of an involuntary confession to convict a defendant in a state criminal proceeding. The minimum stan-