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Survey of Selected Contemporary Church-State Problems

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SURVEY

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I. Introduction

This survey discusses how the first amendment's religion clauses affect four areas of contemporary concern. The areas were selected because they are representative of the difficult questions posed by the concept of separation of church and state, and the interplay of the free exercise and establishment clauses. Section one examines the question of whether government should define religion and analyzes the Supreme Court's definition. The second section considers the question of the role the state should play when medical treatment is refused on religious grounds: Should the state stay its hand and allow physical suffering or death, or should it intervene and thereby confront the practice of a citizen's religion? Section three analyzes the role of the establishment clause as a limit on the types of public aid which states may provide church-related schools. Finally, the fourth section deals with the emergence and development of religious freedom for prisoners. No attempt was made to discuss all areas which give rise to religion clause issues, and the areas discussed do not treat all the conceivable problems. Within the available framework we have attempted to outline in a useful and thorough manner the most salient issues raised by the constitutional command of separation of church and state.

II. What is Religion?

A. *Can Government Ask This Question?*

Before inquiring as to the legal definition of religion, the threshold question of whether a government which repeatedly espouses the notion of separation of church and state may legitimately undertake the task of developing a definition must be considered.[1] Indeed, a definition separates that which is included in a concept from that which is not. If government can legitimately make this determination, then there is the potential for favoring one group with the legally recognized status of "religion" while oppressing another by labeling it "non-religious." Is religion any less established by government in a state which may choose freely among alleged beliefs to determine which are "religious" than in a state which openly declares that among all religions only certain ones are to enjoy the protection of the government? It has also been suggested that the very

1 There is no right in a state or an instrumentality thereof to determine that a cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protecton of the Fourteenth Amendment.
Kolbeck v. Kramer, 84 N.J. Super. 569, 574, 202 A.2d 889, 892 (1964) *modified*, 46 N.J. 46, 214 A.2d 408 (1965).

existence of a definition would serve to inhibit the development of religion in the future. By forcing groups in the formative stage to modify their doctrine to comply with a government-written definition in order to enjoy legal recognition, the state might narrow the focus of an ever-expanding concept.[2]

If government determination of what is "religion" seems to threaten foreboding consequences, the alternative is even less promising. We run the risk of trivializing the whole concept of religion if courts are unable to reject the claim that a certain belief is religious and therefore entitled to first amendment protection. If any individual could secure for himself the concessions granted those motivated by bona fide religious concerns because the law was required to take him at his word and accept his claim of religious motivation, one of two undesirable consequences would follow. Either government would lose substantial control over the actions of society or free exercise would mean nothing as a practical matter.[3] Assume courts were not constitutionally competent to distinguish between the claim of a serious responsible religious group that use of certain drugs was central to their religious practice and therefore protected by the free exercise clause[4] and another group who concocted a "religion" only to secure protection for abuse of drugs.[5] The government would then either have to stay its hand in all drug prosecutions where the defendant however frivolously asserted a religious motivation or refuse the exemption from prosecution to all and thus destroy the bona fide religion.[6] It is possible to argue that these two claims are distinguishable by government on the grounds that one is sincerely felt while the other is a sham not entitled to first amendment protection and therefore no definition is necessary. But sincerity alone does not make a belief religious in the sense in which the term is usually understood. A belief that drug use is a pleasant experience, without more, is not religious in any generally accepted use of the word no matter how sincerely it is held. If government is constitutionally required to treat this claim as religious merely because it is labeled as such by an adherent, even one who is clearly sincere in his belief, either social control or religious freedom is dissipated. Thus it seems best to allow government some latitude in deciding which claims are entitled to first amendment protection; not because this is theoretically satisfying but rather because the alternative is even less promising.

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2 Weiss, *Privilege, Posture and Protection: "Religion" in the Law,* 73 YALE L.J. 593, 604 (1963-1964).

3 Hollingsworth, *Constitutional Religious Protection: Antiquated Oddity or Vital Reality?* 34 OHIO ST. L.J. 15, 18 (1973).

4 In People v. Woody, 61 C.2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) the California Supreme Court upheld the claim of the Native American Church that the free exercise clause protected its use of peyote in religious services.

5 In U.S. v. Kuch, 288 F. Supp. 439 (D.D.C. 1968) the court rejected the claims of a member of the Neo-American Church that the free exercise clause protected her use of drugs. The Neo-American Church had the following characteristics: the church symbol was the three-eyed toad, the church key was a bottle opener, the church motto was "Victory Over Horseshit," and the title of the highest church official was the Chief Boo Hoo. The title of the defendant was Primate of the Potomac.

6 People v. Woody, 61 C.2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964); *cf.* Wisconsin v. Yoder, 406 U.S. 205 (1972) (refusal to grant partial exemption from compulsory education law would threaten destruction of the Amish religion).

B. *The Supreme Court's Definition of Religion*

1. *United States v. Seeger* and *Welsh v. United States*

The current Supreme Court definition of religion was developed in cases interpreting § 6(j) of the Selective Service Act of 1948.[7] As originally enacted, it read as follows:

> (j) Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.[8]

In *United States v. Seeger,*[9] the Court considered whether this definition of religious training and belief was underinclusive. It was argued that since the exemption required belief in a Supreme Being, the definition discriminated among religions in violation of the first amendment religion clauses. This claim was bolstered by the Court's earlier decision in *Torcaso v. Watkins*[10] that the right of free exercise was violated by a state constitutional provision requiring declaration of a belief in the existence of God as a prerequisite to holding public office. In *Torcaso,* the Court reasoned that the state was prohibited from aiding those religions based on belief in God as against those founded on different beliefs. Yet if read literally the congressional definition of "religious training and belief" in § 6(1) discriminated on that specific basis.

The Court avoided this inconsistency by refusing to read the statute literally.

> Within that phrase [religious training and belief] would come all 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. The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition. This construction avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and is in accord with the well-established congressional policy of equal treatment for those whose opposition to service is grounded in their religious tenets.[11]

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7 Ch. 625, § 6(j), 62 Stat. 612.
8 *Id.*
9 380 U.S. 163 (1965).
10 367 U.S. 488 (1961).
11 380 U.S. 163, 176 (1965). Note the similarity of language to that of Fellowship of Humanity v. County of Alameda, 153 Cal. App.2d 673, 315 P.2d 394 (1957), which decision the Court did not mention.

As the Court explained it, this test was supposed to be objective. If the belief claimed by the registrant operated in his life as the more traditional belief operated in the lives of its adherents, *i.e.* as an aspect around which all else revolved or upon which all else depended, then the registrant was entitled to the exempt status. Local draft boards and courts were precluded from examining the content of the belief: they could not reject a claim merely because it was incomprehensible to them. Their function was merely to examine the role of the belief in the life of its holder and to determine whether it was sincerely held, giving deference to the claim of the adherent.[12] This definition excluded two groups; those whose beliefs were not truly held and those whose beliefs did not serve the necessary central function in their lives.

Yet the definition given by the Court in *Seeger* was not without problems. While the Court stated that those whose objection to war was based on political, sociological or economic considerations did not qualify for exempt status because "[t]hese judgments have historically been reserved for the Government,"[13] these "nonreligious" beliefs might conceivably hold as central a place in the lives of some persons as traditional religion holds in the life of its adherents. Moreover, as for the statutory language that objection to war did not qualify for the § 6(j) exemption if based on a "merely personal moral code," the Court again performed an interpretative sleight of hand.

> The use by Congress of the words "merely personal" seems to us to restrict the exception to a moral code which is not only personal but which is the sole basis for the registrant's belief and is in no way related to a Supreme Being. It follows, therefore, that if the claimed religious beliefs of the respective registrants in these cases meet the test we lay down then their objections cannot be based on a "merely personal" moral code.[14]

This passage seems to entirely abolish the limitation on exemption Congress sought by the words "merely personal moral code." As interpreted by the Court, a belief is not "merely personal" if it is "in a relation to a Supreme Being." But, as previously defined, all that is required to be "in relation to a Supreme Being" is that the belief be of ultimate importance to its possessor. Therefore, no belief is excluded by the words "merely personal moral code" that could meet the requirement of being of ultimate importance to the registrant. Even Seeger classified his belief as a "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed."[15]

Five years later in *Welsh v. United States*,[16] Mr. Justice Black, writing the majority judgment in an opinion joined by three other members of the Court,

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> Thus the only inquiry in such a case is the objective one of whether or not the belief occupies the same place in the lives of its holders that the orthodox beliefs occupy in the lives of believing majorities. . . .

Id. at 692, 315 P.2d at 406.

12 380 U.S. 163, 184-85 (1965).

13 *Id.* at 173.

14 *Id.* at 186.

15 *Id.* at 166; *see* U.S. v. St. Clair, 293 F. Supp. 337 (E.D. N.Y. 1968) (Defendant's belief was in Pantheism, his only duty was to live according to his own conscience. Indictment for refusal to submit to induction dismissed.)

16 398 U.S. 333 (1970).

made explicit that which was implicit in *Seeger, i.e.* that a purely ethical or moral code could serve as the basis for conscientious objector status. Welsh had stated his objection to all war but expressly denied that it was based on a religious belief. As he explained it in a letter to his local board, his belief showed significant political content.

> I can only act according to what I am and what I see. And I see that the military complex wastes both human and material resources, that it fosters disregard for (what I consider a paramount concern) human needs and ends; I see that the means we employ to "defend" our "way of life" profoundly change that way of life. I see that in our failure to recognize the political, social, and economic realities of the world, we, *as a nation,* fail our responsibility *as a nation.*[17]

Black argued that these policy concerns by themselves did not disqualify a registrant under the act. What excluded one from conscientious objector status was an objection to war which was not deeply held or which was not based on moral, ethical or religious principle ". . . but instead rests solely upon considerations of policy, pragmatism, or expediency."[18]

As Justice Harlan argued in his concurring opinion, this interpretation clearly was not an exercise in culling congressional intention from the statute. It was justified, he argued, on the grounds that it was necessary to preserve the policy of exempting conscientious objectors from compulsory military service. If the statute were read literally, it clearly discriminated between theistic and nontheistic religions and between well-recognized and established sects and more personal ethical beliefs like that of Welsh. Without an overriding secular justification, this congressional definition was clearly contrary to the first amendment's religion clauses and therefore the conscientious objector exemption would necessarily fail. The Court's action was consistent, Harlan argued, with other cases where the Court's interpretation was strained in order to uphold congressional policy.[19]

2. Recent Applications

Although purportedly an interpretation of congressional intent, the definition set out by the Court in *Seeger* and *Welsh* was more. Absent a compelling state interest, Congress was constitutionally prohibited from using the term "religion" in drafting the conscientious objector exemption in a more narrow sense than that in which it was used in the first amendment. Otherwise the exemption would discriminate against some religions, such as nontheistic or more personally derived forms, without justification.[20] Therefore, the Court's definition is broader than the mere language of the conscientious objector exemption: it defines religion for other first amendment cases. Accordingly, the *Seeger-*

17 *Id.* at 342.
18 *Id.* at 342-43.
19 *Id.* at 365-67.
20 *See* Gillette v. U.S., 401 U.S. 437 (1971) (secular purpose for discriminating between religions upheld).

Welsh definition has been applied in interpretation of the 1964 Civil Rights Act prohibition against religious discrimination, determination of whether an alleged belief is religious and therefore subject to free exercise rights in prisons, and interpretation of the oath requirement of the Immigration and Nationality Act. The following examples illustrate application of the Supreme Court's definition in concrete cases not involving § 6(j).

a. *The Civil Rights Act of 1964*

Section 703(a) of the Civil Rights Act makes it an unlawful employment practice for an employer to discriminate against any individual on the grounds of religion.[21] When a complainant under this section alleges religious discrimination and the defense is raised that the belief is not religious within the meaning of the statute, the *Seeger-Welsh* definition has been relied upon for guidance. For example, in one case a nurse, who gave her religion as "Old Catholic" resigned when transferred to an area of the hospital where she would not have been allowed to wear a scarf to cover her head. She argued that it was a tenet of her faith that her head remain covered completely at all times. The E.E.O.C. found that, applying the *Seeger-Welsh* test, the nurse's belief was religious because it was as sincerely held as more traditional religious beliefs. The decision noted that a belief, under *Seeger,* cannot be rejected merely because it is "incomprehensible."[22]

b. *Prisoners' Rights*

Prisoners who have demanded recognition of alleged religious beliefs by prison officials so that they might share in the right to use chapel facilities and other accommodations given other religious groups have sometimes been met with the defense that these beliefs are not religious. For example, prisoners in the Federal Correctional Institution at La Tuna, Texas sued prison officials in federal district court alleging denial of their right to free exercise.[23] The court after an evidentiary hearing found that the "Church of the New Song" was not a religion within the scope of the first amendment. Citing the language of *Seeger,* the court held that the beliefs were not, in the petitioners' scheme of things, religious and were not sincerely held. This was based on the finding that the alleged religion was a "masquerade" to obtain constitutional protection for otherwise impermissible activities.

> Petitioner and his cohorts have formed an organization whose purpose is to improve the position of member prison inmates vis-à-vis the prison administrations. To obtain leverage for the organization and to enable it to operate more freely within the Federal Penitentiaries, petitioner has

21 42 U.S.C. § 2000e-2(a) (1970).

22 E.E.O.C. Dec. No. 71-779 (1970) CCH EEOC Decisions ¶ 6180; *accord,* E.E.O.C. Dec. No. 72-1301 (1972) CCH EEOC Decisions ¶ 6338; E.E.O.C. Dec. No. 71-2620 (1971) CCH EEOC Decisions ¶ 6283.

23 Theriault v. Silber, 391 F. Supp. 578 (W.D. Tex. 1975). The origin of the "Church of the New Song" is outlined in Theriault v. Carlson, 339 F. Supp. 375 (N.D. Ga. 1972).

> christened it a "religion" and endowed it with the trappings thereof. Thus, it is that the unmistakable stench of the skunk is found emanating from that which petitioner has declared a rose.[24]

Other courts have been more reluctant to dismiss prisoners' claims. The attitude of the federal district court in *Remmers v. Brewer*[25] is characteristic. There, the court, considering prison inmates in Iowa, held that although there was a real chance that the "Church of the New Song" was a hoax, it was willing to recognize the prisoners' claims that it was a religion. But the court added a caveat that if it later proved to be a hoax, "that eventually can be dealt with by both the prison administration and this Court."[26]

c. *The Immigration and Nationality Act*

As a prerequisite to being admitted to citizenship as a naturalized American, 8 U.S.C. § 1448(a) requires taking an oath renouncing prior allegiance to another country or ruler and swearing allegiance to the United States. The statute requires taking an oath "to bear arms on behalf of the United States when required by law," except that "a person who shows by clear and convincing evidence to the satisfaction of the naturalization court that he is opposed to the bearing of arms . . . by reason of religious training and belief," may fulfill the oath requirement by promising alternative service. Religious training and belief is defined as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."[27]

In construing the phrase "religious training and belief," the courts have adopted the *Seeger-Welsh* definition. In *Rafferty v. United States*,[28] the fifth circuit reversed a district court denial of a petition for naturalization. The lower court had found that petitioner's refusal to take the oath to bear arms stemmed from a purely personal moral code and therefore he had failed to meet the statutory requirement for naturalization. The court of appeals reversed arguing that

> The question to be answered is whether or not an individual's opposition to the bearing of arms stems from his moral, ethical or religious beliefs about what is right and wrong, and whether or not these beliefs are held with the strength of traditional religious convictions.[29]

Thus, although Rafferty's belief was purely based on personal convictions, it was religious as defined in the statute.

24 391 F. Supp. 578, 582 (W.D. Tex. 1975).
25 361 F. Supp. 537 (S.D. Iowa 1973) *aff'd* 494 F.2d 1277 (8th Cir. 1974).
26 *Id.* at 543.
27 8 U.S.C. § 1448(a) (1970).
28 477 F.2d 531 (5th Cir. 1973); *accord, In Re* Weitzman, 426 F.2d 439 (8th Cir. 1970); *In Re* Thomsen, 324 F. Supp. 1205 (N.D. Ga. 1971).
29 477 F.2d 531, 533-34 (5th Cir. 1973).

C. *Conclusion*

While defining religion is a difficult undertaking, especially in a nation which prides itself on religious freedom, it is necessary as a practical matter. The Court has adopted a functional definition which focuses on the status of the alleged belief in the life and values of the adherent. A belief is entitled to protection if it is sincerely held and if it serves the same function in the life of its possessor which traditional religion serves in the lives of its faithful. The belief may be merely personal or ethical without reference to a Supreme Being of any kind so long as it serves the necessary central function in the life of its adherent. This functional approach allows a great deal of variety in the claims which it embraces. Because of this, the judicial system is able to retain the necessary social control and, at the same time, recognize legitimate claims of exemption from generally applicable laws when necessary to protect free exercise.

III. Religion and the Refusal of Medical Treatment

A. *Introduction*

When religious beliefs dictate the refusal of medical treatment, well-intentioned courts have sometimes ordered the treatment over the patient's objection. Other courts, however, have recognized a right to refuse such medical aid; overall, the decisions most frequently turn upon the particular facts of the case. While the Supreme Court has neither disavowed nor defined a right to refuse medical treatment, there are decisions establishing guidelines as to when the state may curb the free exercise of religion in this area.

In *Reynolds v. United States,*[30] the Supreme Court established that while laws may not interfere with religious beliefs and opinions, they may limit the practice of those beliefs.[31] Guidelines for determining the scope of the right to practice religion were set out by the Court in *West Virginia State Board of Education v. Barnette.*[32] There, the Court strongly supported the individual's right to freely practice his religion when in conflict with a state interest of questionable merit.[33] The Court held that since freedom of religion is a preferred right, in applying it to the states through the fourteenth amendment, more than a mere rational basis must be found before a state may impose restrictions on the first amendment right of freedom to practice. This freedom is ". . . susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect."[34] The Court continued:

> . . . [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the

30 98 U.S. 145 (1879).
31 *Id.* at 166.
32 319 U.S. 624 (1943).
33 Jehovah's Witnesses refused to recite the pledge of allegiance to the flag because it violated the tenets of their faith.
34 319 U.S. 624, 639 (1943).

right to differ as to things that touch the heart of the existing order.[35]

Since the Supreme Court has not decided a case specifically involving the limits on free exercise when a patient refuses to accept medical treatment, the courts are obliged to apply the balancing test of *Barnette* to the facts of each case. The courts must determine whether a state interest is present, and whether that interest is of sufficient magnitude to justify the subjugation of the preferred first amendment right of free exercise. The cases may be categorized into three general areas. The first area involves controversies in which the life and health of the community at large are threatened. The second concerns a parent or guardian asserting a right to refuse to consent to medical treatment for a child. The final group of cases considers an adult refusing treatment on his own behalf.

B. *Community Health v. Free Exercise*

While there is no Supreme Court case involving conflicting interests of the community's health and the individual's right to freely practice his religion by refusing medical treatment, dictum in *Prince v. Massachusetts*[36] alludes to this situation: "[T]he right to practice religion freely does not include liberty to expose the community . . . to communicable disease."[37] State courts which have decided cases involving community health have followed the *Prince* dictum. In *Board of Education of Mountain Lakes v. Maas*,[38] a Christian Scientist foster mother objected, on religious grounds, to the immunization of her foster children against diphtheria. The court delivered alternative holdings: It stated that the foster mother had no standing to assert her own right to religious freedom since the immunization requirement did not apply to her; neither could she assert the right of her foster children under the circumstances, since the children were reared in a faith which had no objection to immunization.[39] More importantly, on the substantive question, the court held that the guarantee of religious freedom was not intended to prohibit legislation with respect to the general public welfare. The court incorporated the above-quoted dictum of *Prince* into its holding.[40]

More recently, the Supreme Court of Arkansas reached a similar conclusion in *Mannis v. State ex rel. Dewitt School District*,[41] when the parents of a ten-year-old child refused to have him vaccinated.[42] The family subscribed to a religious group which holds as a tenet of its faith that vaccination is against the will of God. After the children had been excluded from public schools, their church eventually established a school of its own, which it characterized as "parochial" and therefore exempt from the statute which required vaccination

35 *Id.* at 642.
36 321 U.S. 158 (1944). The Court upheld a child labor statute which was challenged as unconstitutional because it restricted a child from selling religious literature.
37 *Id.* at 166-67.
38 56 N.J. Super. 245, 152 A.2d 394 (App. Div. 1959), *aff'd* 31 N.J. 537, 158 A.2d 330 (1960), *cert. denied*, 363 U.S. 843 (1960).
39 *Id.* at 259, 152 A.2d at 401.
40 *Id.* at 269, 152 A.2d at 407.
41 240 Ark. 42, 398 S.W.2d 206 (1966).
42 *Accord*, Cude v. State, 237 Ark. 927, 377 S.W.2d 816 (1964).

for all children attending public and private schools. The child, however, was declared neglected by the lower court and ordered vaccinated. The Supreme Court of Arkansas affirmed, holding that the law mandated vaccination before the child could attend *any* school and that this health regulation was a valid exercise of the state's police power.[43]

Thus, the community interest in being free from communicable disease outweighed the individual's right to freely practice his religion by refusing medical treatment. The courts have decided that under these circumstances the right to practice must be curbed to protect the larger community's overriding interest in being free from exposure to serious disease.

C. *The Life or Health of a Child v. Free Exercise*

Traditionally, the judiciary has been reluctant to interfere with the family unit. As the Supreme Court concluded in *Prince v. Massachusetts,*[44] "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. . . ."[45] However, Justice Rutledge noted that the family itself is not immune to regulation in the public interest even where a claim of religious freedom is asserted.

Prince involved a child selling religious literature under the guidance and approval of her guardian in violation of a Massachusetts child labor law. The Supreme Court upheld the Massachusetts statute, stating that neither religious rights nor the rights of parenthood are completely above state regulation. The Court clearly indicated, however, that it did not intend to lay the groundwork for the state to routinely interfere with the teaching of religion and participation therein by children whenever the health or welfare of the child might be involved.[46]

Can the state intervene, then, over the protests of parents who assert a claim of religious liberty, when a minor is in need of medical attention? In *Jehovah's Witnesses v. King County Hospital,*[47] a federal district court in the state of Washington considered this question. The court upheld the constitutionality of a statute which allowed a child to be declared a ward of the state if a blood transfusion was or would be vital to save his life.[48] Jehovah's Witnesses had brought the action to obtain injunctive and declaratory relief precluding the state from declaring their children neglected for the purpose of appointing a guardian who would consent to blood transfusions. The court quoted from *Prince*:

> Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.[49]

43 240 Ark. 42, 44, 398 S.W.2d 206, 207 (1966).
44 321 U.S. 158 (1944).
45 *Id.* at 166.
46 *Id.* at 171.
47 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd mem.*, 390 U.S. 598 (1968).
48 *Id.* at 503 n.10.
49 *Id.* at 504.

Prince was further quoted: "The right to practice religion freely does not include liberty to expose . . . the child to communicable disease, . . . ill health or death."[50] The United States Supreme Court affirmed the decision in a per curiam memorandum decision that also cited *Prince*.[51]

It has been settled, therefore, that the states can have a sufficient interest in cases of this nature to intervene. Unsettled is under what circumstances the state may interfere. The cases dealing with this question fall into three general factual patterns: first, where there is an emergency situation and an imminent danger of irreparable, serious injury or death; second, where there is a threat of eventual irreparable injury; and third, where there is no emergency and the treatment would be merely beneficial to the child.

1. Imminent Danger of Irreversible Serious Injury or Death

When an emergency exists and a life or death decision must be made by a court in spite of parental religious objections to treatment, there has been little controversy. The language in *Prince* has made it quite clear that the Supreme Court considers this an area where the state has an interest greater than the individual's first amendment right to freely practice his religion and to raise his children in that religion.

In *State v. Perricone*,[52] the court declared a child neglected and appointed a guardian for the purpose of consenting to blood transfusions necessary to save the minor's life. The parents had refused to consent because of their faith. In an exhaustive opinion the Supreme Court of New Jersey upheld the lower court order, quoting extensively from *Prince*.[53] The court noted that the parents' obvious sincere affection for their child was not a controlling factor.[54] The contention that blood transfusions are not universally recognized as beneficial or safe was also dismissed, since the court relied on prevalent medical opinion that the transfusion was necessary.[55]

Similarly, in *Raleigh Fitkin—Paul Morgan Memorial Hospital v. Anderson*[56] the Supreme Court of New Jersey upheld a lower court order for blood transfusions to save the life of an unborn child. The court noted that the child was quick, the pregnancy being beyond the thirty-second week, and there was danger that the mother would hemorrhage, and both she and the child would die.[57] The court was satisfied that the unborn child was entitled to the protection of the law, and that the welfare of the mother and the child was so intertwined as to make it impractical to distinguish them. The court specifically made no finding as to whether a transfusion for an adult could be ordered under other circumstances.[58]

50 *Id.*
51 390 U.S. 598 (1968).
52 37 N.J. 463, 181 A.2d 751 (1962), *cert. denied*, 371 U.S. 890 (1962).
53 *Id.* at 472-74, 181 A.2d at 756-57.
54 *Id.* at 477, 181 A.2d at 759.
55 *Id.* at 479, 181 A.2d at 760.
56 42 N.J. 421, 201 A.2d 537 (1964), *cert. denied*, 377 U.S. 985 (1964).
57 *Id.* at 422-23, 201 A.2d at 537-38.
58 *Id.* at 423, 201 A.2d. at 538.

In *Muhlenberg Hospital v. Patterson,*[59] a Superior Court in New Jersey ordered a blood transfusion for a child whose parents refused to consent on religious grounds. Though the child's life was not imperiled, he was in danger of severe and irreparable brain damage. Both *Prince* and *State v. Perricone* were seen as controlling. While the court recognized the important question these cases present, namely, where will the state's intrusion end,[60] it avoided reaching a solution. It conceded that there was a difference of opinion as to whether or not it was improper for a court to intervene to protect a human life through means contrary to religious beliefs, but made no distinctions as to the different facts involved in the cases it cited. It concluded that the majority of opinion favored intervention, and decided that it was proper in the instant case. Thus, the scope of permissible state intervention is still undefined.

2. Serious Threat of Eventual Irreparable Injury

The facts in these cases are often similar to those in the previous section, but the significant element of emergency is lacking. If intervention here results in a greater intrusion than the Supreme Court contemplated in *Prince* and *Jehovah's Witnesses v. King County Hospital,* the Supreme Court of Iowa did not recognize it. In *In Re Karwath,*[61] the trial court ordered tonsillectomies over the religious objection of the father of the minors. Because the mother was emotionally ill and the father was indigent and unemployed, the minors had been in the legal custody of the state for a substantial period prior to the issuance of the court order mandating medical care. Though the children were under the care of the state, the parents retained some residual rights.[62] Despite this, the Supreme Court of Iowa held that the trial court was not in error.

The court cited *Prince* and *Jehovah's Witnesses v. King County Hospital* in deciding that the order for surgery should be upheld, making clear that each case will depend on its facts.[63] However, the court ignored the question of how serious the medical problem need be before the state can interfere. The court simply asserted that a medical crisis involving life and limb is not a prerequisite to state intervention. The fact that the children were dependent on the state constituted a significant element in the court's decision, but did not seem to be the controlling factor.

The analysis of the Iowa supreme court is workable within the Constitutional framework of *Prince* and *Jehovah's Witnesses* discussed above. However, the Iowa court may have erred when it stated that: "Reasons given for believing surgery necessary must be weighed against reasonableness of parental objection."[64] This may have been mere carelessness in using terms, but if the court meant that it is proper to inquire into the reasonableness of the objection of parents, in this case their religious beliefs, then the court erred. The Supreme

59 128 N.J. Super. 498, 320 A.2d 518 (Law Div. 1974).
60 Id. at 501, 320 A.2d at 520.
61 ..... Iowa ....., 199 N.W.2d 147 (1972).
62 *Id.* at ....., 199 N.W.2d at 150.
63 *Id.*
64 *Id.*

Court clearly established in *Barnette v. West Virginia State Board of Education*[65] that there can be no inquiry into the reasonableness of religious beliefs. The court, though, may inquire into the sincerity with which the beliefs are held, and that may be what the court actually did in this case. If not, the court was plainly at variance with the Supreme Court on this issue.

In sum, it appears though that *Karwath* is arguably within the *Barnette* guidelines. Moreover, a case could arise where the parents' beliefs are established to be more firmly held than they apparently were in *Karwath,* and where the children have not previously been made wards of the state. If in that case the children's health were imperiled to the same extent as in *Karwath,* a court might find it more difficult to order treatment. Precisely how far courts have gone to protect the health of children despite parental religious objections is explored in the succeeding section.

3. Merely Beneficial Treatment

The courts have found it most difficult to meet the criteria of *Prince* where medical attention is not necessary to save the life of a child, or to prevent serious irreversible damage to the child's health. Typically, these cases involve congenital defects for which surgery can be used to improve the appearance or health of a deformed child.[66]

A representative case is *In Re Sampson.*[67] Surgery which would improve the child's appearance by partially correcting a facial disfigurement was objected to by his mother because of their religious beliefs. The operation could be performed at any time, though it was established that psychologically it was important to have it done at an early age. The child was socially isolated, and did not attend school.[68] In addition to the mother's religious objection and the lack of immediate need for the surgery, the considerable risk involved was another factor militating against state intervention.[69]

Despite this, the court held that the operation should be performed as soon as the physicians determined it would not pose an unacceptable risk to the child's life. The psychological and social development of the child tipped the scales in favor of state intrusion. The New York Court of Appeals in a per curiam opinion affirmed the family court, yet went further than the lower court in adding an observation that religious objections to blood transfusions are not at ". . . present a bar at least where the transfusion is necessary to the success of the required surgery."[70] The court cited *Jehovah's Witnesses v. King County Hospital,* stating that any doubt as to this was settled by that case.

In so doing the New York court has misinterpreted *Jehovah's Witnesses.* That case involved a life-and-death situation, and therefore is distinguishable

65 319 U. S. 624 (1944).
66 *In Re* Seiferth, 309 N.Y. 80, 127 N.E.2d 820 (1955); *In Re* Hudson, 13 Wash.2d 673, 126 P.2d 765 (1942).
67 65 Misc.2d 658, 317 N.Y.S.2d 641 (Family Ct. 1970), *aff'd* 37 App. Div.2d 668, 323 N.Y.S.2d 253 (1971), *aff'd* 29 N.Y.2d 900, 278 N.E.2d 918, 328 N.Y.S.2d 686 (1972).
68 *Id.* at 660, 317 N.Y.S.2d at 644.
69 *Id.* at 672, 317 N.Y.S.2d at 655.
70 29 N.Y.2d 900, 901, 278 N.E.2d 918, 919, 328 N.Y.S.2d 686, 687 (1972).

factually from *Sampson,* where only beneficial treatment is involved. *Sampson* went beyond what was contemplated in *Jehovah's Witnesses,* and represents the current judicial outpost in finding sufficient state interest mandating medical care for a child over parental religious objection.

Not all courts have been as willing as the New York court to subjugate religious freedoms in this context. The court in *In Re Green,*[71] for example, came to a different conclusion. There, the child would have benefited greatly from surgery, but his life was not in danger. The child had suffered two attacks of polio and consequently his spine had collapsed. A spinal fusion would relieve his bent position which prevented him from standing or walking.[72] There was no need to perform the surgery immediately, although if it were not performed eventually, the child's condition would continue to deteriorate, and he would be confined to bed for life.[73] The operation was dangerous, and the infant's mother refused to consent to blood transfusions essential to the operation because of her religious beliefs. The Supreme Court of Pennsylvania held that the child was not neglected, and therefore no guardian could be appointed to consent to a transfusion. The court recognized that it was bound by *Jehovah's Witnesses,* but distinguished it on the facts, determining that religious freedom, under the circumstances of *Green,* could not be curbed since there was no life-or-death situation.[74]

Additionally, the court recognized the nonbinding precedent of the recently decided New York Court of Appeals case, *In Re Sampson,* admitting that the facts of the two cases were essentially parallel. However, the Pennsylvania court differed with the New York Court of Appeals' statement that religious objections to blood transfusions do not preclude a court order authorizing surgery where those transfusions are essential to the success of the needed surgery. The *Green* court reasoned that the state's interest is only of sufficient magnitude to outweigh parental religious objections when the child's life is immediately endangered. This decision was supported by the practical consideration, which the New York court failed to discuss, that courts should avoid deciding when surgery is "required" absent a danger of death.[75] The Pennsylvania court reasoned that if it could order spinal surgery, as urged in this case, it could also order a hernia or gall bladder operation or a hysterectomy when characterized as "required."[76] *Sampson* opened a host of new questions which the court in *Green* was unwilling to deal with.

However the court's inquiry continued: The thoughts of the sixteen-year-old minor had not been explored in the record, which the court felt was essential to a decision in light of the recent recognition of children's rights, including the right to bring a personal injury action against their parents.[77] The court therefore remanded the case for a hearing to determine whether the child held the religious

71 448 Pa. 338, 292 A.2d 387, 52 A.L.R.3d 1106 (1972).
72 *Id.* at 340, 292 A.2d at 388.
73 *Id.*
74 *Id.* at 345, 292 A.2d at 390.
75 *Id.* at 348, 292 A.2d at 392.
76 *Id.*
77 *Id.* at 349-50, 292 A.2d at 392.

beliefs of his mother, and reserved any decision with respect to a possible parent-child conflict, thus suggesting another possible avenue to relief.

4. Conclusion

Given the Supreme Court's posture thus far on the issue of parents' religious belief when in conflict with a child's health, the decision in *Green* seems most logical. The Supreme Court, in its affirmance of *Jehovah's Witnesses,* sanctioned state limitation on the practice of religion when a child's life is imminently in danger. Likewise, a good argument can be made for state intervention from the dictum in *Prince* when the child is in immediate danger of brain damage which would significantly lessen the opportunity for a useful life. To go beyond this and find that the state's interest in protecting the child's general health must supersede the parents' right to practice their religious faith is not equally supported by Supreme Court decisions. The practicalities of applying this standard also counsel caution as noted in *Green.* However, as indicated by *Sampson,* lower courts have sometimes found a sufficient state interest to intervene even in those situations. The decisions in this area are severely split with the peculiar facts involved being dispositive.

The courts have found it significantly more difficult to ascertain an overriding state interest which justifies curbing free exercise in cases concerning minors, than in cases involving the community. In dealing with religious beliefs and treatment of adults, the task is even more difficult, as the following discussion reveals.

D. *The State's Interest in an Adult's Life or Health v. Free Exercise*

In this area the courts have grappled with difficult questions. While the state may be able to show sufficient interest under some circumstances to curb an adult's religious practice when a child's health is endangered, are there circumstances under which an adult can himself be protected from the consequences of the practice of his religion? A split of authority on the question exists.

1. The State's Interest Found Insufficient to Compel Treatment

When an adult who is unquestionably competent refuses medical treatment the courts have been hard-pressed to find the "grave and immediate danger to interests which the State may lawfully protect" which *Barnette* requires.[78] *In Re Brooks' Estate*[79] considers this precise question. There, an adult Jehovah's Witness notified her doctor and the hospital of her religious convictions and desire not to be given a blood transfusion. The patient and her husband signed statements releasing the doctor and hospital from any civil liability which might

78 319 U.S. 624, 639 (1943).
79 32 Ill. 2d 361, 205 N.E.2d 435 (1965).

result from withholding transfusions.[80] In spite of this, her doctor and the hospital successfully sought the appointment of a guardian by the probate court in order to obtain consent for a transfusion. No notice of this proceeding was given to any member of the patient's family.[81]

The state argued before the Supreme Court of Illinois that society has an overriding interest in protecting the lives of its citizens. The court reversed the probate court order, finding ". . . no clear and present danger to society."[82] The Supreme Court of Illinois characterized the action of the lower court as a judicial attempt to determine the best course of action for a person notwithstanding that individual's religious conviction; this was clearly impermissible state action in light of the first amendment.[83] The court held that even if the patient were to become incompetent, she was nonetheless entitled to refuse treatment because of her religious beliefs.[84] Her incompetence would, under these circumstances, have had no effect on her religious beliefs which the court found to be sincerely held for years before she became incapacitated and therefore incompetent. The opinion also emphasized that the judiciary cannot inquire into the reasonableness of the belief, since every religion has some belief which someone else would consider tenuous.[85] Therefore, if religious liberty is to be meaningful, all sincere beliefs must be respected.

The court did not state unequivocally that a competent adult's assertion of a right to refuse medical treatment may never be denied by the state. It was noted that in the instant case, no minor children were dependent upon the patient, implying that if the patient had been the parent of minors, the state's interest would be greater and the court would reinquire into whether interference with free exercise could be appropriate.[86]

Brooks was persuasive, though not binding,[87] in *Holmes v. Silver Cross Hospital*[88] where relatives of the decedent asserted his constitutional right to freedom of religion in a suit under the Civil Rights Act of 1871.[89] The court considered a motion to dismiss for failure to state a claim upon which relief could be granted. The decedent was a twenty-year-old married male who, when fully conscious and competent, informed his doctors of his religious convictions which precluded blood transfusions. The doctors then attempted to persuade other members of his family to consent. They unanimously refused, and both the family and the decedent signed waivers of liability for the hospital. The doctors and hospital, however, successfully obtained a court order, whereby the decedent was given a blood transfusion.[90]

In discussing *Brooks,* the *Holmes* court noted that while in the former case there were no dependents, the case at hand involved a wife and infant. However,

80 *Id.* at 363, 205 N.E.2d at 437.
81 *Id.*
82 *Id.* at 373, 205 N.E. 2d at 442.
83 *Id.*
84 *Id.* at 372, 205 N.E.2d at 442.
85 *Id.*
86 *Id.* at 372-73, 205 N.E.2d at 442.
87 340 F. Supp. 125, 129-30 (N.D. Ill. 1972).
88 340 F. Supp. 125 (N.D. Ill. 1972).
89 42 U.S.C. § 1983 (1970).
90 340 F. Supp. 125, 128 (N.D. Ill. 1972).

there was no evidence on the record as to their dependency or as to whether the lower court which issued the order allowing the transfusion considered whether the decedent was a husband and father. The court therefore held that this point alone did not warrant dismissing the complaint for failure to state a claim upon which relief could be granted. In applying the *Barnette* balancing test, *i.e.*, weighing the state interest against the preferred first amendment right of freedom of religion, the *Holmes* court stressed that the test was difficult for a state to meet when dealing with an adult.[91] The state must proffer substantial interests which must be protected at the cost of the free exercise of religion before the right to practice can be limited by the state.[92] The state failed this test in *Holmes*.

Similarly, in *Winters v. Miller*[93] the Second Circuit Court of Appeals found that an adult who claimed she had refused medical care and was subsequently forced to accept it, could bring an action pursuant to federal civil rights statutes. In *Winters* the patient, a fifty-nine-year-old woman who was unmarried and had no children, was involuntarily committed to a mental institution. Though she was examined by two staff psychiatrists and certified as needing care, she was never adjudicated incompetent. Upon admission to the hospital she stated that she was a Christian Scientist and that her religious beliefs prohibited medical care. Nonetheless, she was continually given medication over her objections until the time of her discharge.[94] The trial court granted the defendant's motion for summary judgment, but the court of appeals held that if the patient had been subjected to involuntary medical treatment, her first amendment rights had been violated, and she was entitled to relief.

The court found that the state had not shown a clear interest on the part of society as a whole which would be affected by allowing the patient to exercise what she claimed to be her first amendment right. Similarly, no such third-party interest had been shown. The court rejected the argument that the plaintiff had been found to be "possibly" dangerous to herself and others. A prerequisite for making this legal determination is an adjudication of incompetence, which was lacking in this case. Further, in dictum the court relied upon *Brooks* for the proposition that even if she had been adjudicated incompetent, it was questionable whether the state could then interfere, since the illness causing her incompetence would not in any way affect her religious beliefs, which she had held for years before her illness.[95] The plaintiff further contended that even if a state interest of sufficient weight existed to subordinate her first amendment rights, there was no justification for summary denial of those rights. The court agreed that the plaintiff was entitled to a hearing before being forced to violate her religious tenets. Finally, the court held that more than a rational basis must be shown by the state before a first amendment right can be denied, since first amendment rights do not rest on slender grounds.[96]

91 *Id.* at 129.
92 *Id.*
93 446 F.2d 65 (2d Cir. 1971), *cert. denied*, 404 U.S. 985 (1971).
94 306 F. Supp. 1158, 1160-61 (E.D.N.Y. 1969).
95 446 F.2d 65, 69 (2d Cir. 1971).
96 *Id.* at 70.

2. State's Interest Found Sufficient to Compel Treatment

Brooks, Winters and *Holmes* taken together seem to indicate that the courts are reluctant to find that the state's interest in preserving human life outweighs the individual's right to free exercise when dealing with a competent adult who does not have dependents. However, there is some precedent for ordering compulsory medical care for adults who cannot consent because of their religious beliefs.

a. *Religious Beliefs Prohibiting Consent to Treatment*

In *Application of the President and Directors of Georgetown College, Inc.*,[97] a Jehovah's Witness patient who was the mother of a minor required life-saving blood transfusions. Her husband insisted that he could not consent for her because of their religious beliefs. The hospital applied to the district court, which refused to issue an order. An appeal was then taken to the District of Columbia Court of Appeals where a single judge, due to the emergency, ordered blood transfusions only as necessary to save her life.

The court emphasized that its decision meant life or death: had the court not issued the order the patient would have died and the question would have been mooted.[98] The order was necessary to maintain the status quo. In addition, the court held that the state as *parens patriae* will not allow a parent to abandon a child, and since death would result in abandonment it must be prevented.[99] The court also argued by analogy to suicide: since the state had an interest in preventing its citizens from killing themselves by a positive act, so too, the state has an interest in preventing its citizens from killing themselves by a failure to act.

Also considered relevant was the hospital's responsibility for the patient's life. If she died the hospital and doctors would perhaps be liable on criminal and civil charges. Thus the hospital could be liable if they administered the transfusion on religious freedom grounds, and could also be liable on tort and/or criminal grounds if they failed to administer the transfusion and she consequently died. The court in questioning whether the patient could place the hospital in this dilemma[100] found that although the patient could have signed a release, purporting to relieve the hospital of all such potential liability, the effect of such a release would be doubtful, considering the patient's condition.

Finally, the court emphasized that the patient did not want to die. Aside from the other legal rationales employed by the court this fact appears to be the focal point of the decision.[101] The judge who decided the case visited the patient in the hospital and asked both the patient and her husband to consent to the transfusions. Both of them indicated that they could not because of their religion, but that if the court ordered a transfusion, it would be out of their

97 331 F.2d 1000 (D.C. Cir. 1964), *rehearing denied*, 331 F.2d 1010 (D.C. Cir. 1964).
98 *Id.* at 1003.
99 *Id.* at 1008.
100 *Id.* at 1009.
101 *Id.* at 1007.

hands. The court concluded that the patient's death ". . . was not a religiously commanded goal, but an unwanted side effect of a religious scruple."[102] The effect of the order, as the court viewed it, was to sustain the life she wanted without causing her to sacrifice her religious beliefs. Here, the court seemed to distinguish between the patient's refusal to consent to a transfusion and her refusal to accept a transfusion. This distinction is tenuous at best, and must logically be limited to only those cases where the patient desires to live and feels that to consent to medical treatment would violate his faith, while to accept the treatment when compelled to by the courts would not violate his religious beliefs.

The court carefully and necessarily limited this case to its facts. To apply the court's analysis to a case where the patient believes that medical care per se violates his religious beliefs, regardless of who gives consent would make consent meaningless. Whether or not the patient consented to the treatment, he would receive it. In that situation the patient would have a right to refuse to consent, but not a right to be free from the treatment. Surely this anomaly is not contemplated by the free exercise clause.

b. *Religious Beliefs Prohibiting Acceptance of Medical Treatment*

In a different factual situation the Supreme Court of New Jersey also found a state interest of sufficient gravity to warrant curbing free exercise. In *John F. Kennedy Memorial Hospital v. Heston*[103] an adult was injured, unconscious, and near death, and was therefore unable to give consent to medical treatment. The patient's next of kin refused to give consent because of the patient's religious beliefs, but a release was signed, relieving the hospital of possible tort or criminal liability. The hospital, upon notification to the next of kin, applied to court for appointment of a guardian to consent to transfusions as needed to save the patient's life. The guardian was appointed pursuant to a court order, consent was given and the transfusions were administered, resulting in the survival of the patient. The Supreme Court of New Jersey decided, though it found the controversy moot, that public interest warranted a resolution of the case.[104]

The court determined that "[i]t seems correct to say that there is no constitutional right to die."[105] The court compared the situation at hand to a suicide attempt. Though suicide is no longer a crime in New Jersey, the court noted that police and other citizens often use force to thwart a suicide. By saving someone from himself these citizens do not violate the constitutional rights of the aided person, and are not subject to civil or criminal penalties. Thus the state has an interest in protecting its citizens from themselves and the court found, quoting *Reynolds v. United States,* that even the added presence of religion did not diminish the interest. The state can regulate the practice of religion; it cannot interfere with beliefs.[106] The court determined that the state's interest would only be lessened if the medical treatment itself were fraught with the

102 *Id.* at 1009.
103 58 N.J. 576, 279 A.2d at 670 (1971).
104 *Id.* at 579, 279 A.2d at 671.
105 *Id.* at 580, 279 A.2d at 672.
106 *Id.*

risk of death or serious injury, a risk not present with blood transfusions. Thus, despite existence of the preferred first amendment right of freedom of religion, the court failed to distinguish this case from a suicide.

The reasoning of the court is not satisfactory; the interest of the state in protecting its citizens from themselves is not unlimited. As seen in *Winters,* the state cannot use its power of *parens patriae* in ordering medical treatment unless the patient has been adjudicated incompetent. Since the court in *Heston* failed to recognize any limitations on the state's power to protect its citizens from themselves, the holding of the case is open to wider applicability than is appropriate. The holding in *Heston* failed to take note of the fact that the woman involved was unconscious; she could neither consent to nor specifically request that she not be given blood transfusions. The patient herself did not clearly indicate what her religious beliefs were and what they would and would not allow her to do. Granted, in a case such as this, the court is justified in assuming that the patient would choose life over death. Yet while the court came to a justifiable result it did not support that result with proper reasoning. Without limiting this holding to its facts, the result could conceivably be that courts will order medical treatment for patients over their expressed religious beliefs and desires to the contrary.

Though the court in *Heston* attempted to distinguish *Brooks,*[107] the practical effect of its decision places it squarely in conflict with *Brooks* and *Holmes.* In weighing state interests against religious freedom, the court in *Heston* found that the preservation of the life of the patient alone was a sufficient state interest to warrant interference with free exercise, while the courts in *Holmes* and *Brooks* found it to be insufficient.

In sum, *Winters* holds that a patient has a right to refuse medical aid when her life is not in danger, and such aid is contrary to her religious beliefs. *Brooks* and *Holmes* hold that the life of the patient alone is not an adequate state interest to warrant intrusion upon the religious rights of the patient, while the *Heston* court indicates the contrary. *Georgetown* also stands for the proposition that the state's interest can be great enough to override religious freedoms, but that case should be limited to its peculiar facts.

Thus, the question of whether and under what circumstances an adult can be forced to accept medical aid which violates his religious beliefs is unsettled. Cases are few since they are often mooted by the death or recovery of the patient. More decisions, however, may be reported if, as in *Heston,* the courts conclude that public interest warrants a decision, notwithstanding mootness.

The emotional content of the issue often hinders clear legal thinking as to the constitutionality of the decisions that violate religious tenets to preserve a life. The caveat of Justice Jackson in *Barnette* that freedom to differ is not limited to things that do not matter much should be remembered; it compels finding that a competent adult may risk his life, voluntarily, when his religious beliefs require it.

107 *Id.* at 583-84, 279 A.2d at 674.

E. *Conclusion*

The courts have unanimously recognized that the right to practice one's religion is a preferred right deserving the utmost protection. However, this recognition has not always translated into action upholding that right, but has quite often amounted to mere lip-service. When a life hangs in the balance it is particularly difficult for a court to deny an order to save that life, whatever role religion may play. Typically, the courts will scrutinize the situation in an attempt to find something which it can characterize as a legitimate overriding state interest, and therefore justify issuing the lifesaving order. Under emergency conditions the job of the trial judge is most difficult. If he decides to issue the order and his decision is later overturned by an appeals court, he finds himself in the awkward position of having attempted to save a life and at the same time violated that person's first amendment rights. It is probably because of this anomaly that few of these decisions have been reviewed; appeal can be denied due to mootness because of the death or recovery of the patient. Thus, this unsettled area of the law is likely to remain so in the future.

IV. Public Aid to Church-Related Schools

A. *Introduction*

The present constitutional status of public aid to church-related schools is obscured in a tangle of conflicting Supreme Court decisions. The Court has rejected some programs while approving others which are substantially indistinguishable. These decisions are pervaded by unconvincing distinctions and unrealistic arguments. The Court's failure to defend its decisions adequately has resulted from a reluctance to consistently apply its basic underlying assumption. In the past the Court has accepted the argument that church-related schools provide both secular education and religious training and that these dual functions are sufficiently separate that the secular function can be aided without aiding the religious. Until the Court either applies this notion consistently or rejects it entirely, it is unlikely to write opinions which are any more convincing than those written in the past eight years.

The Court's reluctance to employ a consistent interpretation is understandable in light of the far-reaching impact inherent in such a course of action. If the dual functions of church-related schools are separable, then there is no logical objection to complete subsidization of the secular aspect. On the other hand, if separability is an illusion, presently recognized forms of aid are clearly unconstitutional and therefore the financial pressures on church-related schools will increase significantly.[108] The recent decision in *Meek v. Pittinger*[109] demon-

108 For example, Justice Stewart pointed out in *Meek v. Pittinger* that Pennsylvania appropriated $16,660,000 in 1972-1973 for supplying just instructional materials and equipment and textbooks to the state's nonpublic schools, most of which were church-related. This appropriation was increased to $17,560,000 for 1973-1974. 421 U.S. 349, 365 n.15 (1975).

109 421 U.S. 349 (1975).

strates the reluctance of the Court and the confusion it has engendered. Analysis of the major cases over the past eight years will follow discussion of *Meek* to show what the present state of the law is and how the tangle of precedent on this issue developed.

B. *Meek v. Pittinger*

The question before the Court in *Meek* was whether a Pennsylvania statutory plan which provided aid to nonpublic elementary and secondary schools violated the establishment clause of the first amendment. The plan authorized the state to loan nonpublic schools textbooks, instructional materials, including periodicals, maps, charts, films and sound recordings, and instructional equipment such as projection, sound recording and laboratory equipment.[110] The Court split into three factions. Justices Marshall, Douglas and Brennan found the entire program objectionable,[111] while Justices White, Rehnquist and Chief Justice Burger approved the total plan.[112] Justice Blackmun, Powell and Stewart agreed with the first group that the auxiliary services and instructional materials and equipment loans were unconstitutional, but agreed with the second group that the textbook loans were permissible.[113] As a result, the majority opinion came under telling attack from two directions.

Justice Stewart, with whom Justices Blackmun, Powell, White, Rehnquist and the Chief Justice agreed, approved the textbook loans based on the determination that this program was constitutionally indistinguishable from that upheld in *Board of Education v. Allen*.[114] However, he found the remainder of the loan program objectionable because its primary effect was ". . . the direct and substantial advancement of religious activity. . . ."[115] Justices Blackmun, Marshall, Douglas and Brennan joined in this judgment, with Burger, White and Rehnquist dissenting. This later conclusion was based on rejection of the claim that the secular and sectarian functions of these schools were separable. Mr. Justice Stewart wrote:

> [F]aced with the substantial amounts of direct support authorized by Act 195, it would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many of Pennsylvania's church-related elementary and secondary schools and to then characterize Act 195 as channeling aid to the secular without providing direct aid to the sectarian. Even though earmarked for secular purposes,

110 Act No. 195 (P.L. 863) [1972], Laws of Pa. (codified as PA. STAT. ANN., Tit. 24, § 9-973 (Supp. 1975)). In addition, the Court considered another Pennsylvania statute which authorized the state to provide the nonpublic schools with auxiliary services which included counseling, testing and psychological services for exceptional, remedial and educationally disadvantaged children. Act No. 194 (P.L. 861) [1972], Laws of Pa. (codified as PA. STAT. ANN., Tit. 24, § 9-972 (Supp. 1975)). The Court found this program in violation of the establishment clause on the grounds that it resulted in excessive entanglement between the state and religious institutions, with Justices Rehnquist, White, and Chief Justice Burger dissenting. 421 U.S. 349, 369-73 (1975).

111 421 U.S. 349, 373 (1975).

112 *Id.* at 385, 387.

113 *Id.* at 373.

114 392 U.S. 236 (1968).

115 421 U.S. 349, 366 (1975).

> "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," state aid has the impermissible primary effect of advancing religion.[116]

The two other factions of the Court were quick to point out the inconsistencies in Stewart's opinion. Brennan, joined by Marshall and Douglas, assailed the finding that the secular function was inseparable from the religious for purposes of instructional materials and equipment loans, yet apparently separable for purposes of textbook loans. He argued that if loans of instructional equipment and materials were barred because aid to the secular program of these schools was necessarily aid to the religious program, then the same objection was manifest where textbooks were involved.[117] Rehnquist, on the other hand, argued that instructional materials and equipment were constitutionally indistinguishable from textbooks, the loan of which had been upheld in *Allen*. Like textbooks, the other materials remained technically the property of the state and were only bailed to nonpublic schools. Furthermore, they were ideologically neutral and therefore not readily divertible to use in religious training. Therefore, Rehnquist argued, the materials loans were as constitutional as the textbook loans in *Allen*, which decision Stewart had himself relied upon.[118] The key to understanding why *Meek* was decided as it was lies in the development of precedent in this area over the past eight years.

C. *Historical Development*

1. *Board of Education v. Allen:* Introduction of the Separability Argument

Board of Education v. Allen[119] was perhaps the genesis of the confusion apparent in *Meek*. The majority in *Allen* rejected the notion that the process of secular education in church-related schools was so much a part of the religious training that aiding it necessarily aided the sectarian mission. This supposed dichotomy later caused the Court to grope for limits beyond which state authorities might not go in aiding this secular function.

The issue in *Allen* was whether, by amending its Education Law to require local school boards to lend secular textbooks to students in both public and private schools, the state legislature of New York had passed a law respecting an establishment of religion. The statutory scheme required local school boards to purchase textbooks approved for use in secular subjects and to lend them without charge to all of the district's schoolchildren enrolled in grades seven to twelve.[120] The earlier version of the law had provided books only for students in public schools.[121]

Mr. Justice White, writing for the majority, upheld the law as revised,

116 *Id.* at 365-66.
117 *Id.* at 384.
118 *Id.* at 391.
119 392 U.S. 236 (1968).
120 N.Y. EDUC. LAW § 701 (McKinney 1969).
121 Ch. 239 [1950], Laws of N.Y. 754.

relying principally on the decision in *Everson v. Board of Education.*[122] That case involved a state statute which authorized local school boards to reimburse parents for money spent to transport their children to school, whether public or nonpublic, on regular commercial bus lines.[123] By a 5-4 margin the Court had upheld the statute largely on the premise that the program was a general welfare measure designed to protect the health of all children, much the same as police, fire, sewage, highway and sidewalk services. Admitting that attendance at church-related schools might increase as an indirect result of the reimbursement program, the majority had argued that this benefit, like that which arguably results from providing police and fire protection to these schools, was only incidental and therefore permissible.[124]

White argued that the textbook loan program in *Allen* was essentially the same as the transportation reimbursement approved in *Everson.* "The law merely makes available to all children the benefits of a general program to lend school books free of charge. . . . Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in *Everson* and does not alone demonstrate an unconstitutional degree of support for a religious institution."[125] He rejected the contention that the teaching of secular subjects in sectarian schools was inextricably bound up with religious training.

> [W]e cannot agree with appellants . . . that all teaching in a sectarian school is religious or that the process of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion.[126]

Rejection of this argument caused the Court problems in later cases. If the dichotomy is valid, then there is no apparent limit on state subsidy short of direct aid to the religious function. The Court, however, proved unwilling to go that far, and in later cases it attempted to set limits on the apparent reach of the separability argument.

2. *Lemon v. Kurtzman* and *Earley v. DiCenso:* The Excessive Entanglement Limitation

Three years after *Allen* in *Lemon v. Kurtzman*[127] and *Earley v. DiCenso,*[128] the Supreme Court faced another establishment clause challenge to state aid programs. It avoided reexamination of the separability argument in holding that

122 330 U.S. 1 (1947).
123 Ch. 191 [1941], Laws of N.J. 581 (repealed 1967).
124 330 U.S. 1, 17-18 (1947). Everson involved the question of permissible state action. It has been unsuccessfully argued, on free exercise and equal protection grounds, that the state must provide the students of church-related schools with benefits equal to those provided public school pupils. Luetkemeyer v. Kaufmann, 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd mem.*, 419 U.S. 888 (1974); Brusca v. Missouri, 332 F. Supp. 275 (E.D. Mo. 1971), *aff'd mem.*, 405 U.S. 1050 (1972).
125 392 U.S. 236, 243-44 (1968).
126 *Id.* at 248.
127 403 U.S. 602 (1971).
128 *Id.*

the precautions which the state had taken in order to be certain that aid to the secular function would not further the religious function were themselves constitutionally defective. These decisions left undisturbed the distinction recognized in *Allen* between the secular and religious aspects of church-related schools.

Lemon and *Earley* were consolidated cases questioning the constitutionality of Pennsylvania and Rhode Island statutes providing aid to nonpublic schools. The Pennsylvania scheme[129] authorized the State to "purchase" certain secular educational services from nonpublic schools. In effect the state reimbursed the schools directly for their expenses for teachers' salaries, textbooks and instructional materials. To qualify, a nonpublic school was required to maintain specified accounting procedures in order to identify the secular costs it incurred. Reimbursement was limited to the costs of teaching certain enumerated secular subjects and instructional materials were subject to state approval.[130]

The Rhode Island program[131] provided direct payments to teachers of secular subjects in nonpublic schools. The payments were limited to 15% of the recipient teacher's current annual salary and supplemented salaries could not exceed the maximum paid public school teachers. In order to qualify a teacher was required to work for a nonpublic school which provided the state with financial data demonstrating that the school's average per pupil expenditures for secular education were below a given level or that the school was otherwise eligible. Teachers could instruct in secular classes only and instructional materials were subject to state approval.[132]

The Court found the plans of both states unconstitutional for similar reasons. In attempting to ensure that public money would aid only secular education, the states had instituted a system of checks which the majority held resulted in excessive entanglement between government and religion. The restrictions imposed on teachers and instructional materials would require "[a] comprehensive, discriminating, and continuing state surveillance . . . to ensure that these restrictions are obeyed and the First Amendment otherwise respected."[133] Likewise, the accounting restrictions and the necessity to separate religious from secular expenditures was ". . . fraught with the sort of entanglement that the Constitution forbids."[134] In short, the program threatened to put religious institutions and the state in continuous contact, making future conflict inevitable.

In addition, the majority argued that programs such as these are a potential danger to the political system itself. Considerable political activity was necessary to secure their passage in the first instance. This activity could cause political divisions along religious lines as voters align according to their religious preference. Furthermore, these divisions could be exacerbated by the need for annual appropriations. The majority pointed out the danger inherent in this.

129 Act No. 109 (P.L. 232) [1968], Laws of Pa. 232 (codified as PA. STAT. ANN. Tit. 24, §§ 5601-5610 (Supp. 1975)).
130 403 U.S. 602, 607-09 (1971).
131 Ch. 246 [1969], Rhode Island Acts and Resolves 1306 (codified as R.I. GEN. LAWS ANN. §§ 16-51-1 to 16-51-9 (Supp. 1970)).
132 403 U.S. 602, 609-11 (1971).
133 *Id.* at 619.
134 *Id.* at 620.

> Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. . . . It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems that confront every level of government.[135]

These two excessive entanglement defects, the administrative and the political, are limits on the states' power to aid nonpublic schools and therefore restrict the reach of the separability argument recognized in *Allen*. However, in a related case decided on the same day, the separability notion itself was reaffirmed.

3. *Tilton v. Richardson:* Separability Reaffirmed

In *Tilton v. Richardson*,[136] the Court considered whether federal construction grants authorized by the Higher Education Facilities Act of 1963[137] could constitutionally be given to certain church-related colleges and universities. The funds were given to construct academic facilities to be used solely for secular functions. During a period of twenty years the government would enforce these restrictions by on-site inspections. Should the federally financed facility be used for sectarian instruction or worship during this period of "federal interest," the institution would forfeit an amount equal to the proportion of the facility's present value that the federal grant bore to its original cost. After twenty years use of the building was to be unrestricted.

Chief Justice Burger announced the judgment of the Court in an opinion joined by three other justices.[138] He argued that because the federal scheme had a valid secular purpose, the principal effect of which was not the advancement of religion, and because it avoided excessive church-state entanglement, it did not violate the establishment clause. In discussing the principal effect, the Court was again faced with the claim that because of a pervasive religious atmosphere at these schools the religious and secular functions were not separable. Chief Justice Burger noted, however, that Congress had debated then rejected this claim. Furthermore, the record disclosed that the four recipient institutions at bar had faithfully followed the statutory restrictions and ". . . the schools were characterized by an atmosphere of academic freedom rather than religious indoctrination."[139] He did not rule out the possibility that some schools might

135 *Id.* at 622-23. However much this is true, it seems as applicable to the textbook loan program approved in Board of Educ. v. Allen, 392 U.S. 236 (1968) as to the aid program here. *See* Meek v. Pittinger, 421 U.S. 349, 381, 382, n.3 (1975) (Brennan, J., dissenting in part and concurring in part).

136 403 U.S. 672 (1971).

137 20 U.S.C. §§ 711-721 (1970).

138 Justices Harlan, Stewart, and Blackmun joined in the opinion of the Chief Justice. Justice White concurred in the result. Justice Douglas wrote a dissenting opinion joined by Justices Black and Marshall. Justice Brennan wrote a separate dissenting opinion.

139 403 U.S. 672, 681 (1971).

actually have such a pervasive religious influence that separation was not possible, but only found that the record in this case failed to establish that claim with respect to these schools.

One aspect of the program, however, failed to pass constitutional concerns. By limiting the period of "federal interest" to an arbitrary period of years without regard to the actual value of the facility twenty years after its construction, Congress had left open the possibility that the facility would then be used for sectarian purposes. This possibility would be foreclosed if the government required compliance with the restrictions on use as long as the facility had substantial value. The defect did not require invalidation of the entire scheme, however, since Burger found it severable from the balance of the program.[140]

The collective impact of *Lemon, DiCenso,* and *Tilton* was to encourage future state legislative attempts to aid elementary and secondary nonpublic schools. These cases assumed the secular function-sectarian function dichotomy. Furthermore, the entanglement limitation appeared surmountable since the Court was clearly principally concerned with state contact with the religious institution itself. The plan which reached the Court in *Committee for Public Education v. Nyquist*[141] answered the entanglement objection and required the Court to again consider the scope of the separability argument.

4. *Committee for Public Education v. Nyquist:* Further Limits on the Separability Argument

Nyquist considered the constitutionality of a New York State statutory plan which provided a three-tiered program of state aid to elementary and secondary nonpublic schools. Qualifying nonpublic schools received direct money grants earmarked for use in maintenance and repair of school facilities and equipment.[142] The grants were designed to ensure the health, welfare and safety of enrolled pupils. To qualify a school was required to enroll a specified number of low-income families. Grants to any school were not to exceed the total maintenance expenditures of that school for the previous year and in no case could the total grant to all qualifying nonpublic schools be more than 50% of the average per pupil cost in the public schools for equivalent services.[143] The other two programs[144] provided parents of students in nonpublic schools with plans to help offset the nonpublic school tuition. Low income parents received tuition reimbursement of a stated amount per child, not to exceed 50% of the total tuition actually paid by that parent. Parents whose income disqualified them from receiving tuition reimbursements were eligible for income tax relief which provided benefits in inverse proportion to the amount of income.[145]

Mr. Justice Powell wrote the opinion of the Court which held that the

140 *Id.* at 684.
141 413 U.S. 756 (1973).
142 Ch. 414, § 1 [1972], Laws of N.Y. 1693.
143 413 U.S. 756, 762-64 (1973).
144 Ch. 414, § 2 [1972], Laws of N.Y. 1696 (tuition reimbursement); Ch. 414, §§ 3-5, [1972], Laws of N.Y. 1699 (tax relief).
145 413 U.S. 756, 764-67 (1973).

entire plan was in violation of the establishment clause. It failed because the statute did not ensure that public money would not be used for sectarian purposes. Beginning by discussing the maintenance and repair provisions, on which all but Mr. Justice White agreed, Powell found that the state plan failed to sufficiently limit use of the public money. Because the only restrictions on the funds were that they not exceed 50% of the comparable public school expenditures per pupil, nonpublic schools were free to use the money to maintain sectarian facilities such as a chapel or classrooms in which religion was taught. This potential use of the money clearly violated the establishment clause. Justice Powell distinguished *Everson, Allen,* and *Tilton* on the grounds that the aid approved of in those cases was carefully limited to the secular function.

> These cases simply recognize that sectarian schools perform secular, educational functions as well as religious functions, and that some forms of aid may be channeled to the secular without providing direct aid to the sectarian. But the channel is a narrow one, as the above cases illustrate. Of course, it is true in each case that the provision of such neutral, nonideological aid, assisting only the secular functions of sectarian schools, served indirectly and incidentally to promote the religious function by rendering it more likely that children would attend sectarian schools and by freeing the budgets of those schools for use in other nonsecular areas. But an indirect and incidental effect beneficial to religious institutions has never been thought a sufficient defect to warrant the invalidation of a state law.[146]

He reasoned that if the twenty-year limit invalidated by the plurality in *Tilton* failed adequately to ensure the necessary restriction because of the possible use for sectarian purposes twenty years in the future, then the New York maintenance grants which allowed present use of the money for similar purposes was necessarily objectionable. Powell recognized that the funding was statistically limited, since the total could not exceed 50% of the comparable per pupil public school expenditures, but this would not prevent any one school from financing its total maintenance budget with public money; mere statistical limitations are not sufficient. The states must be certain that no state funds go to sectarian uses.[147]

The tuition reimbursement and tax relief plans failed for the same reasons as the maintenance and repair grants. Writing for himself and five other justices, Justice Powell maintained that his previous discussion of the maintenance and repair provisions demonstrated that this money could not have been constitutionally given directly to the nonpublic schools, therefore the question was whether it was of constitutional significance that it was paid instead to the parents. He held it was not.

> There has been no endeavor to "guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former." . . . Indeed, it is precisely the function of New York's law to provide assistance to private schools, the great majority of

146 *Id.* at 775.
147 *Id.* at 778-79.

> which are sectarian. By reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools. And while the other purposes for that aid—to perpetuate a pluralistic educational environment and to protect the fiscal integrity of overburdened public schools—are certainly unexceptionable, the effect of the aid is unmistakably to provide desired financial support for nonpublic sectarian institutions.[148]

Everson and *Allen* were distinguished on the grounds that bus rides and secular textbooks were inherently unsuitable as tools of teaching religion.[149]

With the decision in *Nyquist* the law in this area developed a paradox. The Court purportedly accepted the notion that the dual functions of church-related schools were sufficiently separate that the secular could be aided consistent with the establishment clause. Bus rides and secular textbook loans were, by their nonideological nature, acceptable forms of channeling aid just to the secular aspect. Direct grants to the schools themselves were objectionable, however, because they threatened to entangle the religious institutions with the state. Yet, direct grants and tax relief given to parents who were paying tuition to non-public schools, programs designed to answer the entanglement criticism by avoiding contact with the religious school, also fell short of constitutional standards. These plans did not guarantee use of public money only for secular education because the Court concluded that mere statistical restrictions were not consistent with the necessary separation. Any attempt to institute more severe limitations, however, raised the spectre of excessive entanglement. Thus, although aid was theoretically possible, there seemed to be no way to avoid entanglement and at the same time to limit the aid specifically to the secular function, except for textbook loans and bus rides. The question which the Court had not convincingly settled was why textbook loans and bus rides were permissible while other programs were not. The distinction was apparently result-oriented.

Justice Powell argued in *Nyquist* that the plans approved in *Everson* and *Allen* involved aid in nonideological forms and therefore the state's assistance was so narrowly channeled that religion was not advanced to an impermissible degree. However, the practical effect of these programs is indistinguishable. Whether the burden of the parents is lightened by money for bus rides, money for secular textbooks or money for tuition seems of little moment. If the state reimburses $10 for bus expenditures or loans $10 worth of books or reimburses $10 for tuition the practical effect is the same: $10 which would have been paid by the parent before is now being paid by the state. That "frees up" $10 of the parent for any use, secular, sectarian or otherwise.

Chief Justice Burger, dissenting in *Nyquist*, recognized this practical effect. He argued that the tuition reimbursement and tax relief programs were not distinguishable from the programs approved in *Allen* and *Everson*. Each merely attempted ". . . to equalize the costs incurred by parents in obtaining an education for their children."[150] That these tuition relief programs were made avail-

148 *Id.* at 783.
149 *Id.* at 781-82.
150 *Id.* at 803.

able only to parents of nonpublic school pupils, while the *Everson* and *Allen* programs applied to all parents, was not significant since the parents of public school pupils were receiving the benefit of a state-financed education for their children; these statutes sought merely to equalize that benefit. "It is no more than simple equity to grant partial relief to parents who support the public schools they do not use."[151]

Powell's failure to answer this argument convincingly reflects the reluctance of the majority to confront squarely the ramifications of the separability argument which they still recognized as valid.

> We do not agree with the suggestion in the dissent of the Chief Justice that tuition grants are an analogous endeavor to provide comparable benefits to all parents of school children whether enrolled in public or nonpublic schools. . . . The grants to parents of private school children are given in addition to the right they have to send their children to public schools "totally at state expense."[152]

The fallacy in this distinction is obvious. In both *Everson* and *Allen* the parents of nonpublic school pupils had a right to the transportation reimbursements and textbook loans in addition to their right to send their children to public schools totally at state expense. Powell may have recognized the frailty of his argument because he further defended his position:

> And in any event, the argument proves too much, for it would also provide a basis for approving through tuition grants the *complete subsidization* of all religious schools on the ground that such action is necessary if the State is fully to equalize the position of parents who elect such schools—a result wholly at variance with the Establishment Clause.[153]

Thus, he begs the question. Tuition grants violate the establishment clause because they are "wholly at variance with the establishment clause."

Powell was forced into this entirely inadequate defense because of the assumption that church-related schools have a separable secular function. Having accepted this proposition the majority could not find a logical objection to complete subsidization of that secular function. Yet the quantity of aid surely is irrelevant. Donation of even one penny of state money to any church is as obvious an establishment clause violation as any larger amount. The majority, however, was reluctant either to approve complete funding or to reject the separability argument which would undermine *Allen*.

D. Conclusion

As was mentioned at the outset, Mr. Justice Stewart's opinion for the majority in *Meek* rejected the instructional materials and equipment loans on the premise that the separability argument "ignores reality."[154] He failed, how-

151 *Id.*
152 *Id.* at 782 n.38.
153 *Id.*
154 421 U. S. 349, 365 (1975).

ever, to explain why that argument did not also invalidate the textbook loans. Unlike *Nyquist,* the Court in *Meek* could not distinguish *Allen* on the grounds that the aid approved in *Allen* was nonideological. Indeed, Stewart even admitted that the instructional materials and equipment involved here were self-policing because they need be inspected only once to determine that their uses were purely secular.[155] Neither could Stewart distinguish *Allen* on the grounds that there textbooks were provided to all children under one law and here the public school pupils were provided for in one law and the nonpublic school pupils in another; in upholding the textbook part of the Pennsylvania statute in *Meek* Stewart had said ". . . it is of no constitutional significance whether the general program is codified in one statute or two."[156] Finally, the argument that in *Allen* the books were loaned to pupils but here the materials and equipment were loaned to the nonpublic schools is not convincing. In each scheme ownership remained technically with the state but in *Allen,* as here, the nonpublic school actually chose the materials it wanted and kept them on the premises.[157] In any case, the practical effect of giving the materials, whether textbooks or other instructional materials, is precisely the same: the financial burden on parents of nonpublic school pupils is partially shifted to the state.

Thus, the line drawn by the opinion of the Court in *Meek* is no more satisfactory than that drawn in *Nyquist.* The Court was again unwilling to resolve the more basic issue, *i.e.,* whether or not the secular educational and religious training aspects of these schools really are separable. Until the Court is willing to either accept the separability concept and apply it consistently or reject it entirely, the patently inconsistent opinions of the past eight years are likely to be repeated in the future.

V. Religion and Prisoners' Rights

A. *Introduction*

Since the development of the Black Muslim religion there have been a myriad of cases concerning the religious liberty of prisoners. Prison officials were initially reluctant to recognize Muslimism as a religion, for fear of the religion's philosophy advocating Black supremacy and physical violence.[158] Muslims were therefore denied privileges which were routinely granted to members of more established faiths. Muslims responded with several claims of religious discrimination and courts were confronted with various questions: (1) whether inmates generally have a right to religious freedom; (2) if prisoners have this right, what restrictions, if any, may be imposed by the state on that freedom; and (3) does the state have an affirmative duty to provide for the practice of a prisoner's religion.

155 *Id.*
156 *Id.* at 360 n.8.
157 392 U.S. 236, 256 (1968); Act No. 195 (P.L. 863), § 1(e) [1972] Laws of Pa.
158 See Cooper v. Pate, 324 F.2d 165 (7th Cir. 1963), for a discussion of the reservations courts and prison administrators have had about granting free exercise privileges to Black Muslims.

B. *Recognition of Prisoners' Rights*

1. Introduction

The courts have recognized that our penal system necessitates withholding or limiting many privileges and rights.[159] However, in *Procunier v. Martinez*[160] the Supreme Court stated that if prison regulations or practices violate a fundamental constitutional guarantee, federal courts will intervene to protect that constitutional right. Freedom of religion was recognized as one of those constitutionally protected rights by the Supreme Court in *Cooper v. Pate*.[161] Clearly, prisoners have no greater rights with respect to freedom of religion than free citizens; therefore, while prisoners have the right to be free from all state interference with their religious beliefs, their practice of religion may be restricted by the state.

2. Procedures Available To Obtain Relief

Until the Supreme Court decided *Cooper v. Pate* in 1972 the federal courts had been reluctant to entertain prisoners' first amendment claims because they were uncertain that prisoners possessed these rights.[162] After *Cooper* held that prisoners could obtain relief for denial of free exercise, the question of what procedures were available to obtain relief arose. Typically, prisoners had been required to exhaust state remedies before seeking federal relief. In *Cruz v. Beto*,[163] the Supreme Court drastically altered this situation.

The Court held that when a state prisoner alleged that he was denied the opportunity to practice his religion, he had stated a claim upon which relief could be granted under a federal civil rights statute, 42 U.S.C. § 1983;[164] consequently, state remedies need not be exhausted before a prisoner can seek relief in a federal court. Thus, the burden of obtaining relief has been significantly lightened by the Supreme Court for the substantial number of prisoners who prefer to seek relief in a federal court rather than in state courts. The path to relief, however, is not without obstacles: the federal courts have consistently expressed a reluctance to interfere with prison administration,[165] and consequently it has been held that administrative remedies must be exhausted before a federal court will hear the case.[166]

159 Price v. Johnston, 334 U.S. 266 (1948).
160 416 U.S. 396 (1974).
161 378 U.S. 546 (1964), *rev'g* 324 F.2d 165 (7th Cir. 1963).
162 United States *ex rel.* Morris v. Radio Station WENR, 209 F.2d 105 (7th Cir. 1953); *see also* United States *ex rel.* Atterbury v. Ragen, 237 F.2d 953 (7th Cir. 1956); Morris v. Igoe, 209 F.2d 108 (7th Cir. 1953).
163 329 F. Supp. 443 (S.D. Tex. 1970), *aff'd.* 445 F.2d 801 (5th Cir. 1971), *vacated,* 405 U.S. 319 (1972).
164 42 U.S.C. § 1983 (1970).
165 Gittlemacker v. Prasse, 428 F.2d 1 (3d Cir. 1970); O'Brien v. Blackwell, 421 F.2d 844 (5th Cir. 1970).
166 Brown v. United States Attorney General 457 F.2d 938 (5th Cir. 1972); O'Brien v. Blackwell, 421 F.2d 844 (5th Cir. 1970).

C. *Development of Tests to Determine When Free Exercise May Be Limited*

1. Lower Federal Courts Formulate Tests

Once it was settled that prisoners could obtain relief in federal courts, the courts turned to the task of developing standards to determine when relief is appropriate. The tests have consistently required that a substantial state interest be evident before a prisoner's religious practices can be constricted.[167] Generally, state interests which have been recognized by the courts as justifying a limitaton on free exercise in the context of prison life include security,[168] discipline,[169] good order,[170] safety,[171] health,[172] and personal identification.[173]

In *La Reau v. MacDougall,*[174] the Second Circuit advocated using the test developed by the Supreme Court in *Sherbert v. Verner*[175] to determine whether the free exercise clause has been violated by a secular prison regulation: "[T]he state can deny a person participation in religious exercises if the state regulation has an important objective and the restraint on religious liberty is reasonably adapted to achieving that objective."[176] The Supreme Court denied certiorari in *La Reau v. MacDougall.*

The Third Circuit developed a somewhat more stringent test in *O'Malley v. Brierly:*[177] The court found that a regulation is reasonable if it is the least restrictive alternative consistent with the prisoners' right of free exercise and prison discipline. This means that the state must not only formulate a regulation which is reasonably related to its objective, but that regulation must effect the state's objective with the least possible interference with free exercise.

2. The Supreme Court's Test in *Procunier v. Martinez*

The Supreme Court seemed to substantially agree with the Third Circuit's test in *O'Malley v. Brierly* when it decided *Procunier v. Martinez.*[178] Here the

167 Neal v. Georgia, 469 F.2d 446 (5th Cir. 1972); Battle v. Anderson, 376 F. Supp. 402 (E.D. Okla. 1974).
168 Gittlemacker v. Prasse, 428 F.2d 1 (3d Cir. 1970); Battle v. Anderson, 376 F. Supp. 402 (E.D. Okla. 1974); United States *ex rel.* Goings v. Aaron, 350 F. Supp. 1 (D. Minn. 1972).
169 O'Malley v. Brierly, 477 F.2d 785 (3d Cir. 1973); Neal v. Georgia, 469 F.2d 446 (5th Cir. 1972); Gittlemacker v. Prasse, 428 F.2d 1 (3d Cir. 1970); Battle v. Anderson, 376 F. Supp. 402 (E.D. Okla. 1974).
170 LaReau v. MacDougall, 473 F.2d 974 (2d Cir. 1972), *cert. denied* 414 U.S. 878 (1973); Neal v. Georgia, 469 F.2d 446 (5th Cir. 1972); Cooper v. Pate, 382 F.2d 518 (7th Cir. 1967); Battle v. Anderson, 376 F. Supp. 402 (E.D. Okla. 1974); Clark v. Wolff, 347 F. Supp. 887 (D. Neb. 1972), *aff'd sub nom.* Anderson v. Wolff, 468 F.2d 252 (8th Cir. 1972).
171 Gittlemacker v. Prasse, 428 F.2d 1 (3d Cir. 1970).
172 Brooks v. Wainwright, 428 F.2d 652 (5th Cir. 1970), United States *ex rel.* Goings v. Aaron, 350 F. Supp. 1 (D. Minn. 1972).
173 Brooks v. Wainwright, 428 F.2d 652 (5th Cir. 1970), United States *ex rel.* Goings v. Aaron, 350 F. Supp. 1 (D. Minn. 1972).
174 473 F.2d 974 (2d Cir. 1972), *cert. denied,* 414 U.S. 878 (1973).
175 374 U.S. 398 (1963).
176 473 F.2d 974, 979.
177 477 F.2d 785 (3d Cir. 1973).
178 416 U.S. 396 (1974).

Court, in analyzing mail censorship regulations of the California Department of Corrections, developed a test to evaluate prisoners' first amendment claims:

> First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression. Prison officials may not censor inmate correspondence simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements. Rather, they must show that a regulation authorizing mail censorship furthers one or more of the substantial governmental interests of security, order, and rehabilitation. Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved. Thus a restriction on inmate correspondence that furthers an important or substantial interest of penal administration will nevertheless be invalid if its sweep is unnecessarily broad.[179]

This test, like the test of *O'Malley v. Brierly,* requires both a substantial state interest *and* a narrow regulation; though the "least restrictive alternative" language of the lower court test is stricter than the Supreme Court's requirement that the regulation not be unnecessarily broad. Although the Supreme Court was considering the right of free expression, it indicated that its test would apply to other first amendment freedoms as well.

It was not surprising then, that in *Teterud v. Gillman,*[180] a federal district court, faced with a prisoner's free exercise claim, applied the *Procunier* test. The *Teterud* court struck down a regulation requiring short hair on grounds of overbreadth. Scrutinizing the regulation, it found that its purposes of sanitation and safety were easily served by a narrower regulation requiring the use of hairnets. This case indicates that *Procunier,* in the view of the lower federal courts, is controlling in the area of freedom of religion. Currently, then, courts can deny a prisoner's claim for free exercise when there is a substantial state interest and the regulation is not unnecessarily broad.

3. The Additional Requirement of Sincerity

There is an additional basis for denying a free exercise claim of prisoners as well as the general population: when a court finds that the religious belief is not held sincerely, first amendment protection can be denied.[181] *U.S. ex rel. Goings v. Aaron*[182] denies relief on this ground. An Indian prisoner sought to return to an old tribal religious custom of letting his hair grow. He failed on a free exercise argument when the court found his belief was insincere. The court discussed the elements which weighed against a finding of sincerity: there were only 55 days remaining in the prisoner's sentence; the prisoner had practiced this religion for only six months; and no other Indians in the institution were similarly motivated. The court gave prime consideration to the brief duration

179 *Id.* at 413-14.
180 385 F. Supp. 153 (S.D. Iowa, 1974), *aff'd* 522 F.2d 357 (8th Cir. 1975).
181 United States v. Seeger, 380 U.S. 163 (1965).
182 350 F. Supp. 1 (D. Minn. 1972).

of the claimed belief.[183]

Thus, in recent years it has been recognized that prisoners do have a right to free exercise of religion which is not absolute, but may be restricted by substantial state interests such as discipline and security. Regulations protecting substantial state interests while restricting free exercise will be tolerated by the courts only if they are narrowly tailored to serve the state interest and do not unnecessarily curb religious practice. Additionally, if it is found that the religious belief is not sincerely held, the prisoner is not entitled to first amendment protection.

D. *Prisoners' Religious Liberty and the Establishment Clause*

In addition to the free exercise claims, prisoners have recently raised several questions concerning the establishment clause. These challenges arise in two contexts: first, where a prisoner challenges a policy of prison administration as violative of the establishment clause, and second, where a court refuses to recognize the plaintiff's free exercise claim because allowing such a claim would be tantamount to establishment of religion.

Horn v. People of California[184] concerns the first type of situation. In this case, the prisoner challenged the institution's policy of paying chaplains as violative of the establishment clause. The court granted a motion to dismiss for failure to state a claim upon which relief could be granted, citing Justice Brennan's concurring opinion in *Abington School District v. Schempp*[185] as authority.[186] In dictum, Justice Brennan argued that since the state must be neutral in matters of religious faith, and since the state has restricted prisoners' opportunity to practice their faiths at a place of their own choosing, the state can provide chaplains at its expense in order to guarantee the right of free exercise. Hostility, not neutrality would characterize the refusal to provide chaplains and places of worship for prisoners. Justice Brennan did, however, explicitly indicate that the government need not necessarily supply prisons with chaplains. While there has been considerable debate about whether it is proper for the government to supply chaplains, the practice has been generally accepted[187] and can be justified by the rationale of Justice Brennan in *Schempp*. *Gittlemacker v. Prasse*[188] illustrates the second type of establishment problem. Here, the inmate claimed that the prison was required to supply a chaplain of his faith in order to comply with the free exercise clause. The court stated that the requirement that the state interpose no unreasonable obstacles to the prisoner's free exercise can in no way be equated with the idea that the state has a positive duty to furnish every prisoner with a chaplain or religious services of his choosing.[189] The court determined that by supplying facilities for worship and the opportunity for clergy to visit the institution, the state had satisfied free exercise. To go beyond this, the court con-

183 *Id.* at 4.
184 321 F. Supp. 961 (E.D. Cal. 1968), *aff'd* 436 F.2d 1375 (9th Cir. 1970), *cert. denied*, 401 U.S. 976 (1971); *accord*, Theirault v. Carlson, 495 F.2d 390 (5th Cir. 1974).
185 374 U.S. 203, 296-99 (1963).
186 321 F. Supp. 961, 965 (E.D. Cal. 1968).
187 374 U.S. 203, 296 n.71 (1963).
188 428 F.2d 1 (3d Cir. 1970).
189 *Id.* at 4.

tinued, and require the state to supply clergymen, comes dangerously close to violation of the establishment clause.[190]

In *Clark v. Wolff*,[191] the court reached substantially the same conclusion when it refused to accommodate prisoner demands for a diet consisting exclusively of milk, and only between the hours of four and six in the afternoon on certain and varied days. The court stated that it was the duty of the state to avoid prohibiting religious acts, not to provide the means for carrying out those acts.[192] In the court's view, the state's providing assistance for religious activities posed a serious threat to the establishment clause.

E. *Conclusion*

Thus, prison authorities must strike a balance between the establishment clause on one side and the free exercise clause on the other. A reasonable accommodation in light of the exigencies of prison life must be made to an inmate's religion in order to satisfy free exercise, but drastic departure from normal institutional routine risks infringement of the establishment clause. Additionally, prison officials must be mindful of possible judicial review of administrative decisions, and the propensity of courts to scrutinize carefully any allegations of religious discrimination. The courts in recent years have recognized prisoners' rights to religious liberty which cannot be denied without a showing of a substantial state interest, and even then a restriction must not be unnecessarily broad.

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190 *Id.*
191 347 F. Supp. 887 (D. Neb. 1972).
192 *Id.* at 890.