D. SERVING HUMAN NEED

Religious bodies have often undertaken to respond to hunger, illness, privation, homelessness, illiteracy and other human needs by ministering to the needy in acts of direct service, and such ministries often become organized and perpetuated in service institutions such as hospitals, schools, homes for orphans and the aged, settlement houses, etc. The story of the development of church-related service and social-welfare institutions is a subject worthy of an extensive literature in itself.[1] The impulse to help the less fortunate is intrinsic to the Judeo-Christian tradition and has inspired the creation of great helping institutions that are today taken for granted as a necessary part of civilized society. Such was not always the case.

An important aspect of Judaism has always been its concern for the poor, the widow, the fatherless, the stranger or sojourner. "When you reap the harvest of your land, you shall not reap your field to its very border, neither shall you gather the gleanings after your harvest.... [Y]ou shall leave them for the poor and for the sojourner: I am the Lord your God."[2] Throughout their history Jewish people have been outstanding in their philanthropy, typified by the words inscribed over the door of a Jewish hospital in Denver, "None pay who enter. None enter who can pay."

Central to Christian discipleship are the words of Jesus about the Good Samaritan and the Last Judgment:

> A man was going down from Jerusalem to Jericho, and he fell among robbers, who stripped him and beat him, and departed, leaving him half dead. Now by chance a priest was going down that road; and when he saw him he passed by on the other side. So likewise a Levite, when he came to the place and saw him, passed by on the other side. But a Samaritan, as he journeyed, came to where he was; and when he saw him, he had compassion, and went to him and bound up his wounds, pouring on oil and wine; then he set him on his own beast and brought him to an inn, and took care of him. And the next day he took out two denarii and gave them to the innkeeper, saying, "Take care of him; and whatever more you spend, I will repay you when I come back." Which of these three, do you think proved neighbor to the man who fell among the robbers?[3]

* * *

1. See, e.g., Miller, Haskell, *Compassion and Community: An Appraisal of the Church's Changing Role in Social Welfare* (New York: Association Press, 1961), and Coughlin, Bernard J., S.J., *Church and State in Social Welfare* (New York: Columbia University Press, 1965).
2. Lev. 19:9-10, RSV.
3. Luke 10:30-6, RSV.

> When the Son of man comes in his glory, and all the angels with him, then he will sit on his glorious throne. Before him will be gathered all the nations, and he will separate them one from another as a shepherd separates the sheep from the goats, and he will place the sheep at his right hand, but the goats at the left. Then the King will say to those at his right hand, "Come, O blessed of my Father, inherit the kingdom prepared for you from the foundation of the world; for I was hungry and you gave me food, I was thirsty and you gave me drink, I was a stranger and you welcomed me, I was naked and you clothed me, I was sick and you visited me, I was in prison and you came to me." Then the righteous will answer him, "Lord, when did we see thee hungry and feed thee, or thirsty and give thee drink? And when did we see thee a stranger and welcome thee, or naked and clothe thee? And when did we see thee sick or in prison and visit thee?" And the King shall answer them, "Truly, I say to you, as you did it to one of the least of these my brethren, you did it to me." Then he will say to those at his left hand, "Depart from me, you cursed, into the eternal fire prepared for the devil and his angels; for I was hungry and you gave me no food, I was thirsty and you gave me no drink, I was a stranger and you did not welcome me, naked and you did not clothe me, sick and in prison and you did not visit me." Then they also will answer, "Lord, when did we see thee hungry or thirsty or a stranger or naked or sick or in prison, and did not minister to thee?" Then he will answer them, "Truly, I say to you, as you did it not to one of the least of these, you did it not to me." And they will go away into eternal punishment, but the righteous into eternal life.[4]

These passages, particularly the Parable of the Last Judgment, are among the most powerful words in the world. Though not heeded by all Christians, they have launched innumerable acts of mercy and sharing through the ages since they were uttered.

Christians certainly did not invent human kindness, but they have helped to make it a social norm and have institutionalized it to a degree that is now generally accepted as indispensable throughout the world. The modern mind forgets that throughout most of human history and in most parts of the world most handicapped, impoverished, deranged, senile, diseased, and otherwise incompetent and vulnerable persons were usually shunned, feared, ridiculed, abused, killed or driven out of human communities rather than cared for, and that when any provision was made for them—as began to be done only in the past few centuries—they were usually lumped together with criminals and all kept in the same facility, often under harsh and unsanitary conditions.

4. Matthew 25:31-46, RSV.

1. Is Serving Human Need "Evangelism"?

In treating this subject under the general heading of "Outreach Activities," care must be taken to avoid confusing different types of outreach, which have different purposes and objectives. As explained above,[5] evangelism—seeking to share one's faith and even to win converts to it—is an important and legitimate outreach activity of religious bodies. But there are other outreach activities that do not (necessarily) have the objective of winning converts to the faith, such as serving human need and influencing public policy,[6] and they should not be confused with evangelism, as they often are, even by the religious folk engaged in them.

The Good Samaritan did not succor the man who fell among thieves in order to convert him to the Samaritan faith or to prevail upon him to worship at Mt. Gerizim, but just to help a fellow human being in need. If the victim should later be attracted to Samaritanism because of his gratitude to, and admiration for, his rescuer, that would be a by-product of the encounter. To engage in good deeds for the sake of winning converts is to introduce an element of "ulterior" motive that can cast doubt upon the disinterestedness, and thus even the "goodness," of the deeds themselves.

Ministering to human need is an attractive mode of behavior for a religious group and will tend to make the group more inviting to potential converts. For this reason, some Christians like to equate humanitarian ministries with evangelism, contending that it is not necessary to *preach* to people if they can see one's faith in *action*. Other Christians criticize this approach for its seeming reluctance to "name the name of Christ" in connection with the humanitarian ministries sponsored by the church.

The church-state question related to this difference of opinion among Christians is the degree to which humanitarian service sponsored by churches can or should be aided or enabled by public funds, regulated by public law, accepted by public and nonreligious private agencies as a peer. And if it is so aided, regulated and accepted, to what degree can it properly (and effectively) continue to carry out its religious teachings, proclaim its gospel, and perform its ministrations through persons adhering to the faith? This dilemma will be seen running through what follows.

2. Health Care

The development of health-care institutions is instructive. Although facilities for the care and shelter of the sick did exist in ancient times, they were usually little more than rest homes. There were hospitals in Ceylon in 437 B.C. and in India even earlier, where cleanliness was stressed, the sick were treated with kindness, and special diets were provided as an aid to healing. Priests of Aesculapius, the god of healing, ministered to the sick in connection with medical schools conducted at their temples

5. See §§ A and B above.
6. Discussed below at § E.

in ancient Greece, although these probably benefited but a small fraction of those needing such care.

Christianity gave new and consistent attention to the care of the sick, establishing hospitals that became integral parts of the church. The first Christian emperor, Constantine, issued a decree in 335 that led to the setting up of Christian hospitals at Rome, Constantinople, Ephesus and elsewhere. A hospital was opened in Lyons in 542 and one in Paris in 660. Monasteries had infirmaries to care for their members that often included a pharmacy and herbal garden for medicinal plants. In connection with the Crusades (and with pilgrimages to holy places) hospitals were developed, often by religious orders devoted to ministering to the sick, such as the Knights Hospitallers of St. John of Jerusalem, also known as the Knights of Malta. During the Middle Ages hospitals were founded in England to serve lepers, the aged, infirm or homeless, most of them maintained by monastic orders or other religious foundations. Henry VIII set up a religious foundation in London named St. Mary of Bethlehem, which became a hospital for the insane, from which derived the term "bedlam."

Gradually the maintenance of hospitals came to be seen as a public responsibility. When Henry VIII confiscated the properties of religious orders, their hospitals became in effect municipal institutions. Other hospitals in the British Isles and in America were built and maintained by public subscription. Benjamin Franklin obtained a grant of £2,000 from the provincial legislature to match an equal amount raised by the citizens of Philadelphia for the building of Pennsylvania Hospital, the first and oldest continually functioning general hospital in the United States. The second was New York Hospital, opened in 1791, likewise erected by public subscription. Thus the original development of hospitals in this country was not directly dependent upon religious initiatives, although church-related hospitals soon appeared on the scene, where they remain prominent, unlike in other countries, where most hospitals were owned and operated by government, though often staffed by nurses from Roman Catholic orders or Protestant deaconess houses.

Another approach to human illness was prominent at the beginning of the Christian movement that is not well remembered today. Its emphasis was not so much on easing the sufferings of the sick as on *healing* them. Jesus was probably best known in his time as a healer, and his principal followers were also characterized as healers. Healing by spiritual means was a prominent part of the early church's missionary appeal, and charismatic healing began to recede only with the replacement of charismatic leaders by ecclesiastical officials. In recent times, with renewed interest in the linkage between healing of the soul and healing of the body and the medical recognition of psychosomatic illness, some of the chief branches of the Christian church have reinstituted healing services.

A more common course by which churches have become involved in operating hospitals is typified by an event that took place in New York City in the latter part of the nineteenth century.

> While the Rev. Dr. James Monroe Buckley was pastor at the Methodist Episcopal Church in Stamford, Connecticut, an accident occurred that touched him deeply. One day his organist visited New York City. A team of horses panicked and, roaring down the avenue, struck the man and left him mortally wounded. It was an hour before an ambulance could be found to transport him to "an unhomelike institution" where his arm was amputated. Within hours, he died.
>
> Dr. Buckley grieved over the loss of this dear friend all the more, for he believed the death to be unnecessary. He resolved to so something about this when it came within his power.[7]

Buckley was instrumental in raising the funds to erect a hospital in Brooklyn, which was chartered by the State of New York in 1881 and opened its doors in 1887. It is now one of the largest private nonprofit hospitals in New York City and one of many across the country bearing a religious name.

In this paradigmatic event we see the confluence of two typical dynamics: the Christian impulse to give an effective and continuing outlet to compassion for the needy and the suffering, and the American propensity to remedy a problem by collective, voluntary action. The result, too, is typical: *the building of an institution* to meet the need, to remedy the problem, not only for the moment, but for the future.[8] With the founding of an institution come the impedimenta of an institution: structure, personnel, financing, continuity, flexibility, public relations, clientele, position among peer institutions, relationships to law and government, and relationship to the church that founded it. The last two aspects are perhaps the most perplexing and the ones that bring the matter within the purview of this work.

The "outreach" character of this undertaking is also paradigmatic: Rev. Buckley did not build Methodist Hospital solely to succor Methodists or to win converts to Methodism, but to help whoever needed medical care in that part of the city. To the degree that its work is commendable, the hospital's name is a kind of advertisement for Methodism, but it makes no credal requirements for admission or employment. Incoming patients are asked their religious affiliation for purposes of providing religious ministries if desired, but patients are not required to identify their faith or to receive religious ministries if they do not wish them. The hospital employs a (Methodist) chaplain who visits all patients to inquire whether they wish to have spiritual counsel or prayer, or whether they would like the chaplain to notify a particular minister, priest or rabbi that they are in the hospital. The chaplain also conducts services at a chapel on the premises, which patients are free to attend if

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7. *100 Years: 1980 Annual Report of the Methodist Hospital*, A.C. Miller, "A Mission of Mercy," p. 12.

8. Jewish hospitals were often built because Jews were unwelcome as patients or physicians in other hospitals. M. Stern, written communication, Jan. 30, 1992.

they wish to do so, whether they are Methodist or not. No effort is made to convert them to Methodism. This arrangement is typical of many church-related hospitals.

a. The Church-Related Hospital. When a religious body institutes a hospital (or other service institution), the problem continually arises: what is the meaning and nature of its relationship to the church? Is it to be simply a replica of the conventional public general hospital, or is there to be something distinctive about it attributable to its ostensible religious character and motivation? In order to obtain accreditation by the organization of existing hospitals that grants such accreditation to newcomers in the field, it must meet the standards set by those already in existence. That is, it must employ reputable, competent, certified medical staff, it must have at least minimal therapeutic equipment, operating facilities, nursing staff, support staff, medical records, and it must meet the prevalent standards of antisepsis, record-keeping, medication-control, etc. Thus it must strive to fulfill the expectations of an existing peer group of institutions that define what it means to be an acceptable, modern general hospital, and that is the primary test for its coming into existence and maintaining its accreditation to operate in its chosen field of activity.

On the other hand, the founding church often wishes to make sure that its creation meets, and continues to meet, the needs for the alleviation of which it was brought into being, and that it remain responsive to the needs, interests and concerns of the body that created it. A not-unimportant consideration is that its existence, activity and hoped-for achievements also redound to the greater glory of God *and* the church. These understandable concerns often are sought to be met by naming the hospital after the church or one of its saints or holy concepts, by providing for religious ministrations to be prominently available within it, and by one or another structural mechanism written into its corporate charter and designed to preserve legal control in the church, as through a provision that a majority of the trustees shall be designated or approved by the church.

The hospital enjoys certain putative benefits from this relationship, such as access to a body of church adherents who are potential contributors and clients and a public-relations advantage of the imputation of some degree of charitable, non-self-seeking motivation in its services. These are somewhat intangible and imponderable benefits compared to the many more importunate demands that a hospital must face in its day-to-day operations, so that if the church relationship should eventually prove onerous, the hospital may find itself tempted to cut its ties to the church and go its own way as an independent private nonprofit charitable institution, and many have done exactly that.

The church, for its part, may enjoy some benefits from the relationship, such as reduced rates for medical care of its clergy, one or more positions for hospital chaplains to be appointed by the church and paid by the hospital, and certain public-relations advantages already mentioned. But the church is often inclined to feel that it does not have the resources, energy or expertise to take full operational

responsibility for running a hospital, that that is best done by professional medical people, and that its concerns are fulfilled by launching a "good" hospital—as that term is conventionally defined—and letting it proceed largely on its own. The persons designated or approved by the church as "its" representatives on the board of trustees are often already more responsive to the interests of the hospital than to those of the church, or—to the degree they take any active part in its affairs—soon become so.

The hospital, absorbed in meeting the needs of its patients, the standards of accreditation, the expectations of its medical staff, the demands of its payroll and other rising costs, has less and less time to devote to the cultivation of its relationship with the church, and the church tends to lose track of the rather technical and specialized preoccupations of the hospital. The two gradually drift apart, and their connection becomes increasingly tenuous. Finally, they may go their separate ways.

This may happen without the church or the hospital ever asking whether they are making the best contribution to human health that could be made by combining modern medical science with the scarcely explored powers of whole-personality healing latent (for many centuries) in the Christian tradition. Recent explorations in this area suggest an untapped reservoir of spiritual power available for combatting illness and death that is only intimated (and somewhat sensationalized and therefore perhaps unjustifiably discredited) in the work of Oral Roberts, Elizabeth Kuhlman, and others.

It should be kept in mind that there are many people who, for various reasons and with varying degrees of cogency, reject or distrust the whole panoply of modern medical practice. Christian Scientists consider the all-too-human preoccupation with sickness and death to be "error," from which they seek to help people free themselves. The undoubted existence of a substantial amount of iatrogenic illness (ailments or complications caused by the physician) lends some credence to the anxieties of people who wish to have nothing whatever to do with doctors or hospitals. Whether these views are rational or justified is not the question; they exist, and should not be dismissed out-of-hand as nothing but ignorance or superstition, especially when arising from, or related to, religious beliefs.

After all, there is much that is not yet known about how the human person—not just the body—functions, about what true "health" is, and how to maintain and enhance it. A person's mental and emotional and *spiritual* condition has profound bearing upon resistance or susceptibility to disease, the development of ulcers, high blood pressure, and other malfunctions of the body, and even the remarkable remissions of cancer and other life-threatening maladies that sometimes occur spontaneously or as a result of unconventional means such as prayer, anointing, laying on of hands, etc.

Of course, there is a lot of nonsense and superstition that sometimes enters into nonmedical efforts to treat illness, such as the little girl found by the visiting nurse

with an old horse-collar around her neck as a folk-remedy designed to cure the croup. And many times the most earnest and responsible of devout spiritual interventions do not succeed. Those errors and shortcomings do not nullify the contentions (1) that there are diverse approaches to the riddle of health; (2) that modern medical practice—focused as it is on the physical and physiological aspects of the human being—may be unaware of, or not know how to deal with, other important and relevant dimensions of human life bearing on health; and (3) that there is a whole range of what could be called "whole-personality healing" that can be addressed—with varying and unpredictable degrees of success—through ministrations arising from, or identified with, religion.

It is no discredit to modern, scientific medicine to say that its success in treating broken bones, bacteriological infections, organic malformations and contagious diseases does not mean that it is omniscient or omnipotent in dealing with the whole range of human sickness and health; far from it. The increasing medical recognition of the importance of *psychosomatic* causes in the many malfunctions through which people incapacitate themselves suggests the contrary. Modern medicine is not so infallible nor its methods so invariably successful that there is not room for other understandings of, and approaches to, human health. While ideally they should be supplements to, rather than substitutes for, the indisputable body of modern medical knowledge and practice, they too have venerable roots in human experience and its accumulated wisdom.

Frequently small religious communities, bound together by intense faith and commitment, try to live out a pattern of total discipleship that includes relying upon God to a degree that would be difficult in dispersion in the secular world, and among the modes of their reliance may be resort to faith healing for the illnesses or injuries that may occur. In some instances, this reliance may be, or appear to be, misguided, as when children may die of ailments that resort to a physician would probably have cured. It is easy to second-guess such tragedies after the fact, but the press and public seem prone to conclude that such events are the result of nothing more than ignorance, negligence, superstitition or wrong-headedness. Misjudgments they may be, but they usually arise from conscious and conscientious efforts to obey the will of God as that body of believers understands it. To the devout believer death may not be as alarming as it seems to be to the general public, and it may be much less objectionable to the faithful than a failure to trust in God.

The ultimate meaning of freedom of religion is that people must be allowed to pursue an obedience to God's will that is more important for them than suffering or death. Society and its law should not make that choice for them. On the other hand, the law can require that they not undertake to make that life-or-death choice for others, even for their own minor children. That vast range of delicate dilemmas of law and religious conscience is discussed in another volume.[9] It is an important element

9. See IVC.

underlying the activities of religious bodies in offering health care to their members and others.

Another important element is the spirit of compassion that motivates such work and that ideally permeates the ministrations of church-related health-care institutions erected out of such motivation. Whether it does in fact permeate the work of the institution in caring for the sick depends in large part on whether the actual "hands-on" care of patients is carried out by persons so motivated. It is a truism to say that one doesn't have to be religious to be compassionate, and another to say that not all religious people are compassionate. Beyond these truisms is the harder question of how any health-care institution, particularly a religiously inspired one, can sustain a spirit and practice of compassion on its wards, round-the-clock, and at the hands of its least-remunerated employees.

The development of the profession of nursing, from its beginning in religious orders, spread to secular institutions, sometimes by means of the importation of nursing nuns or deaconesses, as already noted. But all too often the lowest ranks of hospital staff are paid very little and are filled by people drawn largely from the lowest levels of the employment market. Hospitals often feel, perhaps mistakenly, that they cannot require much in the way of skills or experience in these entry-level positions and must rely on on-the-job training for attendants and nurse's aides. Such training is often derived more from peers already on the job than from nurses or medical staff, and may therefore simply perpetuate existing errors, shortcuts and omissions.

If on-the-job training in sanitation, antisepsis and hospital routines may leave much to be desired, training in the practice of compassion is virtually nonexistent. Many employees exhibit an innate aptitude in caring for the sick, but others may not, and the constant demands of invariably understaffed wards of patients preoccupied with their own immediate pains and importunate needs are likely to produce in even good-hearted workers a certain degree of callousness and inurement to others' sufferings in the absence of inner spiritual resources, institutional support and reinforcement for high standards of care, or unusual natural gifts. There is no substitute for compassionate motivation, whether religious or not, and it is not always easy (in advance) to discern that motivation—or its absence—in applicants for employment.

One very imperfect way to try to identify that important attribute is to employ persons of known religious affiliation on the supposition that such affiliation is a reliable indicator of compassionate disposition and that such compassion could and would be applied to care of the sick under difficult conditions—two suppositions not always justified in practice. But other attributes observable at an employment interview are no better indicators of the most important qualification for "hands-on" care of the suffering, if as good, and so this inexact approximation has been relied upon perhaps more than it should be. But the complete abandonment of any effort to

discern compassionate motivation in applicants for these positions is no better, and can be much worse. At the very least, callousness or lack of consideration for patients should be grounds for immediate discipline or discharge of hospital personnel, but that is often hard to detect and harder to act upon.

Recent laws against racial, religious and other kinds of discrimination have made it harder for health-care institutions to be selective in their hiring and firing practices, even on the basis of "bona fide occupational qualifications" or below-standard on-the-job conduct, particularly in public institutions. But even private and church-related hospitals are likely to encounter lawsuits charging discrimination on the basis of race, religion, gender or age if they seek to discharge an employee for what the hospital may consider good reason. This has led to a willingness to try to find other solutions short of discipline or discharge for problem employees rather than to risk defending a lawsuit. These other solutions may sometimes be more constructive for the employee, but may also lead to a lowering of standards of care and a decline of morale among other employees, who see substandard workers seeming to "get away with it." This poses a real perplexity for church-related institutions in trying to maintain their standards of compassionate care.

This brief and cursory sketch of a very complex subject should suggest that it is not easy for a church-related hospital to maintain a stable and effective role in the midst of cross-pressures from the world of religious idealism and the world of medical practicality. But beyond the institution's problems of trying to be true to both worlds lies a deeper question for the religious organization: Is it making its best contribution to human healing by launching and (to some degree) controlling, or purporting to control, conventional general hospitals, thus perhaps doing poorly what others could do as well or better, and not doing at all what it uniquely might be able to do?

Instead, too many religious bodies may be too easily content with an unstable and not-very-satisfactory compromise, in which "their" hospitals are distinguishable from any other general hospitals only by the name on the door, a few nominal religious representatives on the board of trustees (who would never dream of questioning the expertise of the medical staff or its assumptions about the nature of sickness and health), a chaplain who offers prayers for the patients (and even a public hospital often has a chaplain), and possibly inflated claims to be more compassionate than secular hospitals. Such possibilities should be kept in mind in reviewing some of the law arising from church-related hospitals (and other institutions) in the pages that follow. But whether religious bodies are imaginative or prosaic in their approach to health care, they are entitled to engage in that kind of humane outreach in whatever way they think best, so long as they do not directly or actively endanger human life in the process. (And even if they should attempt some unconventional therapies and fail to achieve 100 percent success, one should remember that even the best of modern, scientific medical institutions has its failures too.)

One problem that seems to plague the law of church and state is whether church-related hospitals are "church" or "hospital." Are they entitled to exemptions extended to churches but not to hospitals, such as not having to file annual informational returns with the Internal Revenue Service,[10] or are they to be treated like their "secular counterparts"? Does church control of a hospital make it ineligible for public funding because of the Establishment Clause of the First Amendment? If not, what if the hospital carries out the medical policies of the sponsoring church with respect to prohibiting sterilization or abortion? Does that disqualify it for public support? What if it discriminates in hiring or in extending residencies to physicians on the basis of their religious affiliation or their willingness to conform to church canons of medical practice? These and many other intransigent conundrums have arisen in the law of church and state, and few clear-cut and generally accepted solutions have yet been found.

b. *Bradfield v. Roberts* (1899). One of the early church-state decisions of the U.S. Supreme Court arose at the end of the nineteenth century over the question whether public funds could be given to a church-related hospital without violating the prohibition against an establishment of religion. Providence Hospital, operated by the Sisters of Charity of the Roman Catholic Church, was given a grant by the commissioners of the District of Columbia to construct and operate an "isolating" building on its premises with funds provided to the District by act of Congress (thus bringing the case within the purview of the First Amendment's limitations upon congressional action[11]). The complaint charged that such an expenditure "of the funds of the United States for the use and support of religious societies" was not only a violation of the Establishment Clause but "also a precedent for giving to religious societies a legal agency in carrying into effect a public and civil duty which would, if once established, speedily obliterate the essential distinction between civil and religious functions."[12] The complaint was dismissed by the Court of Appeals, and its decree was affirmed by the Supreme Court in a unanimous decision per Justice Rufus Peckham, who approached the case in the rather formalistic manner common at that time.

Referring to the charter granted by act of Congress in 1864 to "The Directors of Providence Hospital," the court noted that it empowered the incorporators to erect "a hospital in the city of Washington for the care of such sick and invalid persons as may place themselves under the treatment and care of the said corporation."

> Nothing is said about religion or about the religious faith of the incorporators.... It is simply the ordinary case of the incorporation of a

10. See discussion of "integrated auxiliaries" at IF5.

11. Prior to the 1940s, the religion clauses of the First Amendment were held to apply solely to Congress and not to the states. See discussion at § A2a above.

12. *Bradfield v. Roberts*, 175 U.S. 291 (1899).

> hospital for the purposes for which such an institution is generally conducted.

The complainant had contended that the hospital was operated by "members of a monastic order or sisterhood of the Roman Catholic Church, and is conducted under the auspices of said church; that the title to its property is vested in the Sisters of Charity of Emmitsburg, Maryland," but the court was not persuaded.

> The... allegations... do not change the legal character of the corporation or render it on that account a religious or sectarian body. Assuming that the hospital is a private eleemosynary corporation, the fact that its members... are members of a monastic order or sisterhood of the Roman Catholic Church, and the further fact that the hospital is conducted under the auspices of said church, are wholly immaterial, as is also the allegation regarding the title to its property.... The facts above stated do not in the least change the legal character of the hospital, or make a religious corporation out of a purely secular one as constituted by the law of its being. Whether the individuals who compose the corporation under its charter happen to be all Roman Catholics, or all Methodists, or Presbyterians, or Unitarians, or members of any other religious organization, or of no organization at all, is of not the slightest consequence with reference to the law of its incorporation, nor can the individual beliefs upon religious matters of the various incorporators be inquired into. Nor is it material that the hospital may be conducted under the auspices of the Roman Catholic Church.... The meaning of the allegation is that the church exercises great and perhaps controlling influence over the management of the hospital. It must, however, be managed pursuant to the law of its being. That the influence of any particular church may be powerful over the members of a nonsectarian and secular corporation, incorporated for a certain defined purpose and with clearly stated powers, is surely not sufficient to convert such a corporation into a religious or sectarian body.... There is no allegation that its hospital work is confined to members of that church or that in its management the hospital has been conducted as to violate its charter in the smallest degree. It is simply the case of a secular corporation being managed by people who hold to the doctrines of the Roman Catholic Church, but who nevertheless are managing the corporation according to the law under which it exists.... As stated in the opinion of the court of appeals, this corporation "is not declared the trustee of any church or religious society. Its property is to be acquired in its own name and for its own purposes; that property and its business are to be managed in its own way, subject to no visitation, supervision, or control by any ecclesiastical authority whatever, but only that of the government which created it...."

This rather wooden and disingenuous disposition of a potentially troubling question—which upholds the right of the church to receive public funding only by relinquishing its right to be unique—is quoted at some length because it is a case of

first impression and still exercises some precedential weight in church-state cases in the field of social welfare (as distinguished from education)[13] and because it reveals some curious assumptions that continue to be entertained by some members of the judiciary. Among them are the following:

1. That perusal of an organization's corporate documents reveals all that needs to be known about its nature and operation;

2. That the mode of operation of a hospital is commonly known and generally recognized;

3. That the religious beliefs of the proprietors thereof do not have any effect upon that mode of operation;

4. That ecclesiastical supervision or control of the institution is not present, or that, if present, does not affect its mode of operation;

5. That the religious beliefs of the proprietors are not only irrelevant to the operation of a hospital, but that it would be improper for the court to take cognizance of them;

6. That the concern of the court with establishment of religion is exhausted if:

   a. The charter makes no mention of religion, and

   b. The benefits of the hospital's services are not "confined to members of that church."

7. That the institution in question is subject to the control, not of the church, but "of the government which created it."

These assumptions would probably not be as generally accepted today, and should not have been in 1899. Certainly no religious body should accept the assumption that its ethical teachings and religious requirements do not have, cannot have and should not have any consequences for the operation of a hospital it owns and ostensibly controls. And experience has shown that a religious body with strong policies on certain medical procedures may admit patients of various religious persuasions, or none, for treatment, but then enforce its own medical policies upon them, even if contrary to the patient's own religious convictions, and do so in hospital facilities financed in part by tax funds from the populace at large, thus employing taxes of persons of all faiths to advance the medical norms based upon the religious doctrines of one particular sect, even to the disadvantage of patients of differing religious views, who may have no other medical facilities available as options to effect their own religious views. The following cases arose out of such a situation.

c. The Hill-Burton Cases. *Bradfield v. Roberts*, whatever its shortcomings, seems to have quieted church-state litigation in the hospital field for several decades. In fact, Congress adopted an ambitious program for hospital construction in 1946,

13. See *Bowen v. Kendrick* at § d below.

called the Hill-Burton Act,[14] that made federal construction funds available (through the states) to private hospitals as well as public, including church-related private hospitals. The infusion of federal funds to church-related hospitals did not precipitate lawsuits alleging violation of "separation of church and state," as did public aid to parochial schools in the 1960s[15] and 1970s,[16] but it did produce a curious by-product in the form of numerous lawsuits challenging the practices of private hospitals on the ground that receipt of federal funds had in effect made them "public" institutions in the sense of being obliged to respect certain canons of due process and non-discrimination as public entities would have to do.

One of the first such suits was *Simkins v. Moses H. Cone Memorial Hospital*[17] (involving a private, non-church-related hospital), in which a black physician sued the hospital under the 1871 Civil Rights Act,[18] for depriving him of "rights, privileges, or immunities secured by the constitution and laws," in refusing to grant him staff privileges at what was then an all-white facility. In order to state a cause of action under Section 1983, one must show that the alleged deprivation of rights was brought about by action "under color of state law," and the Fourth Circuit concluded that the private hospital, through seeking and accepting Hill-Burton funds, as part of a state plan to create and maintain a racially segregated "separate but equal" dual hospital system, had acted under color of state law, and therefore it was bound by the requirements of federal law not to engage in racial discrimination. This set a precedent in the Fourth Circuit for treating the receipt of Hill-Burton funds as clothing private hospitals with the quality of "state action" sufficient to bring them under Section 1983, but this precedent was not widely followed in other circuits, where suits against private hospitals usually did not arise in a context of state-orchestrated racial discrimination.

Much more common became litigation in which physicians or other hospital personnel challenged the right of the private hospital to discipline or discharge them without "due process of law," or patients sued because the private hospital denied them treatment to which they felt they were entitled. In this latter category are cases of denial of sterilization or abortion by church-related hospitals because of religious principles. The complaint in such cases was that the hospital had benefited from grants of tax funds paid by all citizens, of every faith and none, and used the facilities constructed with such funds to impose its credal doctrines upon patients and physicians who did not share them.

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14. 42 U.S.C. § 291, named for its sponsors, Senator Lister Hill (D.-Ala.) and Senator Harold H. Burton (R.-Ohio).

15. E.g., *Flast v. Cohen*, 392 U.S. 83 (1968), which decided only the issue of standing of federal taxpayers to challenge a congressional appropriation.

16. *Lemon v. Kurtzman*, 403 U.S. 602 (1971) and its progeny: see IIID7.

17. 323 F.2d 959 (CA4 1963).

18. 42 U.S.C. § 1983.

(1) *Taylor v. St. Vincent's Hospital* (1973). Exactly such a suit was brought by James and Gloria Taylor against St. Vincent's Hospital in Billings, Montana, because it refused to permit Mrs. Taylor to be sterilized by tubal ligation at the time of delivery of her second child by cesarean section. The hospital was operated by a religious order of Roman Catholic nuns, and this medical procedure was not permitted in the hospital because it conflicted with "Ethical and Religious Directives for Catholic Hospitals" issued by the Roman Catholic Church and incorporated into the by-laws of the medical staff of St. Vincent's.

The federal district court for Montana initially found that the hospital had acted "under color of state law" because of certain state tax benefits and because of receipt of Hill-Burton funds, and it issued an injunction requiring the hospital to permit the tubal ligation, which was carried out at the end of October 1972. In June of 1973, Congress amended the Hill-Burton Act to prohibit any court from construing the Act to mean that a private hospital receiving funds under it was acting under color of state law.[19] The district court thereupon dissolved its prior injunction and denied all relief.[20] Although Mrs. Taylor had already had the operation, the Taylors appealed because theirs was a class action undertaken in part for the benefit of other women patients of St. Vincent's who might be similarly situated.

(2) *Chrisman v. Sisters of St. Joseph of Peace* (1974). Before the appeal was decided, a similar case was resolved by another panel of the same circuit. The panel reviewing *Taylor v. St. Vincent's Hospital* adopted the reasoning of the other case. *Chrisman v. Sisters of St. Joseph of Peace* was brought by a twenty-three-year old married woman against the proprietors of Sacred Heart General Hospital in Eugene, Oregon, because of the hospital's refusal to permit a tubal ligation after the birth of her second child. The plaintiff contended that the recently passed "Church Amendment" was constitutionally infirm as a violation of the Establishment Clause of the First Amendment, since it created an exception from a general law for a particular religious doctrine and practice. The appellate court disagreed.

> Plaintiff fails to distinguish between action taken to preserve the "government['s] neutrality in the face of religious differences"[21] and action which affirmatively prefers one religion over another.[22]

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19. Ironically known as the "Church Amendment" from its sponsor, Sen. Frank Church (D.-Idaho), § 401(b) of the Health Programs Extension Act of 1973, P.L. 93-45, 87 Stat. 91, reads in pertinent part: "The receipt of any grant, contract, loan, or loan guarantee under the [statute] by any individual or entity does not authorize any court or any public official or other public authority to require...such entity...to make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions."

20. 369 F.Supp. 948 (1973).

21. Citing *Sherbert v. Verner*, 374 U.S. 398 (1963), discussed at IVA7c.

22. Citing *Everson v. Bd. of Ed.*, 330 U.S. 1 (1947), discussed at IIID2.

> Here Congress sought to retain its neutrality in the debate over the morality of voluntary sterilizations by preventing the reception of federal health program funds from being used as a basis for compelling a hospital to perform such surgery against the dictates of its religious or moral beliefs.[23]

A special case might be created where a private hospital aided by Hill-Burton funds was the only one in the area. Several courts held such hospitals to have "acquired a quasi-public character" and thus to be subject to constitutional standards.[24] But "Sacred Heart Hospital is not in such a dominant or monopoly situation. Indeed plaintiff can scarcely make this argument since she in fact availed herself of the services of one of the other hospitals in the city in obtaining a tubal ligation."

The *Taylor* court, summarizing *Chrisman* with approval, noted one difference: "St. Vincent's Hospital had the only maternity department in Billings... where the plaintiff could secure a tubal ligation at the time of her cesarean delivery."[25] However, the court noted, the U.S. Supreme Court had decided a case about a month after *Chrisman* that held:

> private conduct may not be regarded as that of the state unless the state is involved in the specific activity complained of, and that the monopoly status of a private utility company did not in itself or in combination with state regulation and the fact than an essential public service was involved, constitute "state action."[26]

That is, the state's action had not necessarily created a monopoly for the private utility company. *A fortiori*, the state of Montana, in allotting Hill-Burton funds to St. Vincent's Hospital, had not arranged for it to have a monopoly position in Billings, nor for it to provide or refuse to provide sterilizations. Therefore, the hospital, in setting and effectuating its policy against sterilization was not acting for, on behalf of, or in lieu of, the state, and its action consequently was not "state action."

In actuality, the court noted, there probably was no monopoly situation in Billings, anyway. There was another hospital in town, Deaconess Hospital. In 1972 the maternity departments of both hospitals were combined at St. Vincent's, and notice was given to all obstetricians that surgical sterilizations would not be allowed at St. Vincent's. However,

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23. *Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308 (CA9 1974).

24. Quotation is from *Shulman v. Washington Hospital Center*, 319 F.Supp. 252 (D.C. 1970); others in accord were *O'Neill v. Grayson County Hospital*, 472 F.2d 1140 (CA6 1973), *Sams v. Ohio Valley General Hospital*, 413 F.2d 826 (CA4 1969), *Meredith v. Allen County Hospital*, 397 F.2d 33 (CA6 1968).

25. *Taylor v. St. Vincent's*, 523 F.2d 75-77 (1975).

26. Referring to *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

> The record shows that an agreement was entered into between St. Vincent's Hospital and Billings Deaconess Hospital prior to the hearing in the district court providing for a procedure whereby after a woman had been admitted to St. Vincent's Hospital she could be transferred by ambulance approximately two and a half city blocks to Deaconess Hospital, where the cesarean section and tubal ligation could be performed and the baby delivered. It provided for the maintenance and transportation of intensive care equipment (a Kreiselman and Armstrong incubator and adapter) to Deaconess Hospital the evening before the scheduled surgery, and the transportation back to St. Vincent's Hospital of the intensive care equipment and newborn child, after surgery.

One wonders whether this agreement was worked out in view of the impending litigation, whether it was made use of in Mrs. Taylor's case (under the district court's preliminary injunction), and whether it did not represent a rather casuistic (and tedious) circumvention of the nuns' principles. If they were opposed to sterilization for moral reasons, was it any better to go to such exertions to enable it to be performed at a nearby hospital?

One can see in these cases two opposing dynamics at work: (1) the effort to protect the rights of patients to medical treatments they want, need, or (in some cases) must have to obviate risk of life for mother and/or future children, and (2) the effort to protect the rights of the proprietors of medical facilities, who have undertaken the monumental task of establishing and maintaining a large institution because of their religious motivation to serve human need and who wish to operate it in conformity with what they understand to be God's will. From the standpoint of the patient, the medical facilities are seen to be providing an essential health service to people who may have no other options to obtain it, and doing so, in part at least (13 percent in the case of St. Vincent's Hospital), with funds drawn by force of law from the whole populace ostensibly being served; yet some of the populace dependent upon that facility for medical care could not obtain certain services because of the religious scruples of the proprietors, when they—the patients—do not share those scruples, and when their physician(s) may prescribe such treatments but be unable to provide them. From the standpoint of the hospital and its founders, are they obliged, by the utilization of public funds for a part of the huge obligation involved in building and operating a large modern hospital, to abandon their religious convictions? Congress, in the "Church Amendment," said no, they cannot be so required.

Somehow that same logic did not not seem to operate in the case of Bob Jones University, which for religious reasons prohibited interracial dating or marriage among its students and faculty. It had never accepted government funds in *any* amount. Yet because it enjoyed tax exemption (and deductibility of contributions), this was

deemed to be "federal financial assistance" that could not be allowed to support what was deemed to be racial discrimination on campus.[27]

d. *Bowen v. Kendrick* (1988). The Supreme Court of the United States took occasion to visit this difficult church-state area in 1988—for the first time since *Bradfield v. Roberts* (1899)[28]—when it ruled on the participation of church-related agencies in the Adolescent Family Life Act (AFLA).[29] Its lucubrations were not a great improvement over *Bradfield*, though they did elicit a spirited dissent.

(1) The Adolescent Family Life Act was passed by Congress in 1981 in an effort to stem the growing tide of premarital pregnancies among adolescents. It was a program of federal grants to public and nonprofit private agencies "for services and research in the area of premarital adolescent sexual relations and pregnancy."[30] The grants were for two types of services: "care services" for the provision of care to pregnant adolescents and adolescent parents, and "prevention services" for the prevention of adolescent pregnancy. Among the latter were some described as "necessary services": pregnancy testing and maternity counseling, adoption counseling and referral services, prenatal and postnatal health care, nutritional information, counseling, child care, mental health services and "educational services relating to family life and problems associated with adolescent premarital sexual relations." The program was designed to serve several purposes, including the promotion of "self discipline and other prudent approaches to the problem of adolescent premarital sexual relations," the promotion of adoption as an alternative for adolescent parents, etc.

In addressing the problems cited, Congress looked beyond governmental action, stating:

> [S]uch problems are best approached through a variety of integrated and essential services provided to adolescents and their families by other family members, religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives.[31]

Grant applicants must describe how they would "as appropriate in the provision of services involve families of adolescents[, and] involve religious and charitable organizations, voluntary associations, and other groups in the private sector...."[32] Congress also stipulated that funds were not to be used for family planning services (other than counseling and referral) unless such services were not available elsewhere in the community, nor for abortions or abortion counseling (except that referrals

27. *Bob Jones University v. United States*, 461 U.S. 574 (1983), discussed at VC6c(4)-(6).
28. 175 U.S. 291 (1899), discussed at § b above.
29. P.L. 97-35, 95 Stat. 578, 42 U.S.C. § 300z *et seq*.
30. S. Rep. No. 97-161, (1981), p. 1.
31. § 300z(a)(8)(B).
32. § 300z-5(a)(12).

could be made if requested by the adolescent and her parents), nor for any projects or programs that advocated, promoted or encouraged abortion.

Suit was filed in 1983 against the Secretary of Health and Human Services (who at the time the case reached the Supreme Court was Otis R. Bowen) by a group of federal taxpayers, clergymen and the American Jewish Congress, charging violation of the religion clauses of the First Amendment. The federal district court applied the three-pronged test of establishment of religion set forth in *Lemon v. Kurtzman*,[33] and found that AFLA did not survive the second prong since it had the "direct and immediate" effect of advancing religion, in that (a) it expressly required grant applicants to involve religious organizations in the provision of servcies, (b) permitted religious organizations themselves to be grantees, thus enabling them with federal funds to teach adolescents on issues that can be considered "fundamental elements of religious doctrine" and (c) contained no restrictions whatsoever against the teaching of "religion *qua* religion" or the inculcation of religious beliefs with federal funds. The district court also ruled that because AFLA funds were used largely for counseling and teaching, it would require overly intrusive monitoring to insure that religion was not advanced in such programs, thus violating the third prong of *Lemon* as well by creating excessive entanglement between religion and government. For these reasons the district court found the statute unconstitutional on its face and as applied.[34] An appeal was taken directly to the Supreme Court (since a federal statute had been invalidated), and the Supreme Court noted probable jurisdiction.

(2) A Split in the Religious Community. An interesting sidelight to this case was the split it caused in the religious community. One of the plaintiffs was the American Jewish Congress, and a brief *amicus curiae* urging affirmance of the district court's finding of unconstitutionality was entered by the Baptist Joint Committee on Public Affairs, the American Jewish Committee and Americans United for Separation of Church and State (the separationist wing of the religious community). The argument of that brief was that, meritorious as the efforts of religious groups might be in encouraging self-discipline and sexual restraint in preventing premarital pregnancy, they could not conceivably do so without invoking their central religious teachings on the virtues of chastity, the sinfulness of promiscuity and premarital sexual relations, and even on family planning, birth control and abortion, the result of which would unavoidably be the promulgation of religious doctrine with taxpayers' money.

On the other side were arrayed the U.S. Catholic Conference, which submitted a brief *amicus curiae* urging reversal of the district court, and the Center for Law and Religious Freedom of the Christian Legal Society, which, with the Americans United for Life Legal Defense Fund, represented "United Families of America," an organization of parents of minor children eligible for services under the AFLA. The

33. 403 U.S. 602 (1971), discussed at IIID5.
34. 657 F.Supp. 1547 (1987).

district court allowed United Families to intervene as defendants, and on its behalf a brief and a reply brief were submitted in the Supreme Court by the counsel mentioned, composed predominantly of conservative Protestant evangelicals. The Roman Catholic and the Protestant evangelical voices were alike in contending that religiously affiliated service agencies, along with other private voluntary and charitable organizations, have long participated in governmentally funded social-welfare programs and should not be categorically excluded because of their religious connections so long as they carried out the services in accordance with the statutory requirements.

(3) The Supreme Court's Decision. The opinion of the Supreme Court was delivered by Chief Justice William Rehnquist, who was joined by Associate Justices White, O'Connor, Scalia and Kennedy. After accepting the district court's distinction between unconstitutionality of the statute "on its face" and "as applied," the court addressed the facial constitutionality of the Act, using the three-prong *Lemon* test, as had the district court, but reached a different conclusion. It agreed with the district court that the Act had a legitimate secular purpose—the elimination or reduction of social and economic problems caused by teenage sexuality, pregnancy and parenthood. Then came the hard part.

> As usual in Establishment Clause cases...the more difficult question is whether the primary effect of the challenged statute is impermissible. Before we address this question, however, it is useful to review again just what the AFLA sets out to do. Simply stated, it authorizes grants to institutions that are capable of providing certain care and prevention services to adolescents. Because of the complexity of the problems that Congress sought to remedy, potential grantees are required to describe how they will involve other organizations, including religious organizations, in the programs funded by the federal grants.... There is no requirement in the Act that grantees be affiliated with any religious denomination, although the Act clearly does not rule out grants to religious organizations. The services to be provided under AFLA are not religious in character..., nor has there been any suggestion that religious institutions or organizations with religious ties are uniquely well qualified to carry out those services. Certainly it is true that a substantial part of the services listed...involve some sort of education or counseling..., but there is nothing inherently religious about these activities[,] and appellees do not contend that, by themselves, the AFLA's "necessary services" somehow have the primary effect of advancing religion. Finally, it is clear that the AFLA takes a particular approach toward dealing with adolescent sexuality and pregnancy—for example, two of its stated purposes are to "promote self discipline and other prudent approaches to the problem of adolescent premarital sexual relations" and to "promote adoption as an alternative,"—but again, that approach is not inherently religious, although it may coincide with the approach taken by certain religions.

Given this statutory framework, there are two ways in which the statute, considered "on its face," might be said to have the impermissible primary effect of advancing religion. First, it can be argued that the AFLA advances religion by expressly recognizing that "religious organizations have a role to play" in addressing the problems associated with teenage sexuality. In this view, even if no religious institution receives aid or funding pursuant to the AFLA, the statute is invalid under the Establishment Clause because, among other things, it expressly enlists the involvement of religiously affiliated organizations in the federally subsidized programs, it endorses religious solutions to the problems addressed by the Act, or it creates symbolic ties between church and state. Secondly, it can be argued that the AFLA is invalid on its face because it allows religiously affiliated organizations to participate as grantees or subgrantees in AFLA programs. From this standpoint, the Act is invalid because it authorizes direct federal funding of religious organizations which, given the AFLA's educational function and the fact that the AFLA's "viewpoint" may coincide with the grantee's "viewpoint" on sexual matters, will result unavoidably in the impermissible "inculcation" of religious beliefs in the context of a federally funded program.

* * *

Putting aside for the moment the possible role of religious organizations as grantees, [the provisions of the statute referring to religious organizations] reflect at most Congress' considered judgment that religious organizations can help solve the problems to which the AFLA is addressed.... Nothing in our previous cases prevents Congress from making such a judgment or from recognizing the important part religion or religious organizations may play in resolving certain secular problems. Particularly when, as Congress found, "prevention of adolescent sexual activity and adolescent pregnancy depends primarily upon developing strong family values and close family ties," it seems quite sensible for Congress to recognize that religious organizations can influence values and can have some influence on family life, including parents' relations with their adolescent children. To the extent that this Congressional recognition has any effect of advancing religion, the effect is at most "incidental and remote".... In addition, although the AFLA does require potential grantees to describe how they will involve religious organizations in the provision of services under the Act, it also requires grantees to describe the involvement of "charitable organizations, voluntary associations, and other groups in the private sector." In our view, this reflects the statute's successful maintenance of "a course of neutrality among religions, and between religion and non-religion."

This brings us to the second grounds for objecting to the AFLA: the fact that it allows religious institutions to participate as recipients of federal funds. The AFLA defines an "eligible grant recipient" as a "public or nonprofit private organization or agency" which demonstrates the capability of providing the requisite services. As this provision would indicate, a fairly wide spectrum of organizations is eligible to apply for

> and receive funding under the Act, and nothing on the face of the Act suggests the AFLA is anything but neutral with respect to the grantee's status as a sectarian or purely secular institution. In this regard, then, the AFLA is similar to other statutes that this Court has upheld against Establishment Clause challenges in the past. In *Roemer v. Maryland Board of Public Works*,[35] for example, we upheld a Maryland statute that provided annual subsidies directly to qualifying colleges and universities in the State, including religiously affiliated institutions. As the plurality stated, "religious institutions need not be quarantined from public benefits that are neutrally available to all...."

Here the court reminisced about other decisions in *higher education* cases (like *Roemer*): *Tilton v. Richardson*[36] and *Hunt v. McNair*,[37] in which similar results were reached by a similar rationale.

> In other cases involving indirect grants of state aid to religious institutions, we have found it important that the aid is made available regardless of whether it will ultimately flow to a secular or sectarian institution.[38]
>
> We note in addition that this Court never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs. To the contrary, in *Bradfield v. Roberts* (1899),[39] the Court upheld an agreement between the Commissioners of the District of Columbia and a religiously affiliated hospital whereby the Federal Government would pay for the construction of a new building on the grounds of the hospital. In effect, the Court refused to hold that the mere fact that the hospital was "conducted under the auspices of the Roman Catholic Church" was sufficient to alter the purely secular legal character of the corporation..., particularly in the absence of any allegation that the hospital discriminated on the basis of religion or operated in any way inconsistent with its secular charter. In the Court's view, the giving of federal aid to the hospital was entirely consistent with the Establishment Clause, and the fact that the hospital was religiously affiliated was "wholly immaterial." The propriety of this holding, and the long history of cooperation and interdependency between governments and charitable or religious organizations is reflected in the legislative history of AFLA. ("Charitable organizations with religious affiliations historically have provided social services with the support of their communities and without controversy.")
>
> Of course, even when the challenged statute appears to be neutral on its face, we have always been careful to ensure that direct government aid to religiously affiliated institutions does not have the primary effect of

35. 426 U.S. 736 (1976), discussed at IIID8b.

36. 403 U.S. 672 (1971), discussed at IIID6.

37. 413 U.S. 734 (1973), discussed at IIID8a.

38. Citing *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986), discussed at IIID8d, and *Mueller v. Allen*, 463 U.S. 388 (1983), discussed at IIID7j.

39. 175 U.S. 291 (1899), discussed at D2b above.

advancing religion. One way in which direct government aid might have that effect is if the aid flows to institutions that are "pervasively sectarian." We stated in *Hunt* that

> "[a]id normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission...."

The reason for this is that there is a risk that direct government funding, even if it is designated for specific secular purposes, may nonetheless advance the pervasively sectarian institution's "religious mission...." Accordingly, a relevant factor in deciding whether a particular statute on its face can be said to have the improper effect of advancing religion is the determination of whether, and to what extent, the statute directs government aid to pervasively sectarian institutions....

In this case, nothing on the face of the AFLA indicates that a significant proportion of the federal funds will be disbursed to "pervasively sectarian" institutions. Indeed, the contention that there is a substantial risk of such institutions receiving direct aid is undercut by the AFLA's facially neutral grant requirements, the wide spectrum of public and private organizations which are capable of meeting the AFLA's requirements, and the fact that, of the eligible religious institutions, many will not deserve the label of "pervasively sectarian...." [W]e do not think the possibility that AFLA grants may go to religious institutions that can be considered "pervasively sectarian" is sufficient to conclude that no grants whatsoever can be given under the statute to religious organizations. We think that the District Court was wrong in concluding otherwise.

Nor do we agree with the District Court that the AFLA necessarily has the effect of advancing religion because the religiously affiliated AFLA grantees will be providing educational and counseling services to adolescents. Of course, we have said that the Establishment Clause does "prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith," and we have accordingly struck down programs that entail an unacceptable risk that government funding would be used to "advance the religious mission" of the religious institution receiving aid.... But nothing in our prior cases warrants the presumption by the District Court that religiously affiliated AFLA grantees are not capable of carrying out their functions under the AFLA in a lawful, secular manner. Only in the context of aid to "pervasively sectarian" institutions have we invalidated an aid program on the grounds that there was a "substantial" risk that aid to these religious institutions would, knowingly or unknowingly, result in religious indoctrination.... In contrast, when the aid is to flow to religiously affiliated institutions that were not pervasively sectarian, as in *Roemer*, we refused to presume that it would be used in a way that would have the primary effect of advancing religion.... We think that the type of presumption that the District Court applied in this case is simply unwarranted.

We also disagree with the District Court's conclusion that the AFLA is invalid because it authorizes "teaching" by religious grant recipients on "matters [that] are fundamental elements of religious doctrine," such as the harm of premarital sex and the reasons for choosing adoption over abortion... [T]he possibility or even the likelihood that some of the religious institutions who receive AFLA funding will agree with the message that Congress intended to deliver to adolescents through the AFLA is insufficient to warrant a finding that the statute on its face has the primary effect of advancing religion.... The facially neutral projects authorized by the AFLA—including pregnancy testing, adoption counseling and referral services, prenatal and postnatal care, educational services, residential care, child care, consumer education, etc.—are not themselves "specifically religious activities," and they are not converted into such activities by the fact that they are carried out by organizations with religious affiliations.

As yet another reason for invalidating parts of the AFLA, the District Court found that the involvement of religious organizations in the Act has the impermissible effect of creating a "crucial symbolic link" between government and religion. If we were able to adopt the District Court's reasoning, it could be argued that any time a government aid program provides funding to religious organizations in which the organization also has an interest, an impermissible "symbolic link" could be created, no matter whether the aid was used solely for secular purposes. This would jeopardize government aid for religiously affiliated hospitals, for example, on the ground that patients would perceive a "symbolic link" between the hospital—part of whose "religious mission" might be to save lives—and whatever government entity is subsidizing the purely secular medical services provided to the patient. We decline to adopt the District Court's reasoning and conclude that, in this case, whatever "symbolic link" might in fact be created by the AFLA's disbursement of funds to religious institutions is not sufficient to justify striking down the statute on its face.

A final argument that has been advanced for striking down the AFLA on "effects" grounds is the fact that the statute lacks an express provision preventing the use of federal funds for religious purposes.... Clearly, if there were such a provision in this statute, it would be easier to conclude that the statute on its face could not be said to have the primary effect of advancing religion..., but we have never stated that a *statutory* restriction is constitutionally required.... In this case, although there is no express statutory limitation on religious use of funds, there is also no intimation in the statute that at some point, or for some grantees, religious uses are permitted. To the contrary, the 1984 Senate Report on the AFLA states that "the use of Adolescent Family Life Act funds to promote religion, or to teach the religious doctrines of a particular sect, is contrary to the intent of the legislation...." We note in addition that the AFLA requires each grantee to undergo evaluation of the services it provides, and also requires grantees to "make such reports concerning its use of Federal funds as the Secretary may require...." These provisions, taken together, create a

mechanism whereby the Secretary can police the grants that are given out under the Act to ensure that federal funds are not used for impermissible purposes.... Given this statutory scheme, we do not think that the absence of an express limitation on the use of federal funds for religious purposes means that the statute on its face, has the primary effect of advancing religion.

This, of course, brings us to the third prong of the *Lemon* Establishment Clause "test"—the question whether the AFLA leads to "an excessive government entanglement with religion." There is no doubt that the monitoring of AFLA grants is necessary if the Secretary is to ensure that public money is to be spent in a way that comports with the Establishment Clause. Accordingly, this case presents us with yet another "Catch-22" argument: the very supervision of the aid to assure that it does not further religion renders the statute invalid.... Most of the cases in which the Court has divided over the "entanglement" part of the *Lemon* test have involved aid to parochial schools... [where] the Court's finding of excessive entanglement rested in large part on the undisputed fact that the elementary and secondary schools receiving aid were "pervasively sectarian" and had "as a substantial purpose the inculcation of religious values...." Here, by contrast, there is no reason to assume that the religious organizations which may receive grants are "pervasively sectarian" in the same sense as the Court has held parochial schools to be. There is accordingly no reason to fear that the less intensive monitoring involved here will cause the Government to intrude unduly in the day-to-day operation of the religiously affiliated AFLA grantees. Unquestionably, the Secretary will review the programs set up and run by the AFLA grantees and undoubtedly this will involve a review of, for example, the educational materials that a grantee proposes to use. The Secretary may also wish to have government employees visit the clinics or offices where AFLA programs are being carried out to see whether they are in fact being administered in accordance with statutory and constitutional requirements. But in our view, this type of grant monitoring does not amount to "excessive entanglement," at least not in the context of a statute authorizing grants to religiously affiliated organizations that are not necessarily "pervasively sectarian."

In sum..., we have concluded that the statute [on its face] has a valid secular purpose, does not have the primary effect of advancing religion, and does not create an excessive entanglement of church and state. We note, as is proper given the traditional presumption in favor of the constitutionality of statutes enacted by Congress, that our conclusion that the statute does not violate the Establishment Clause is consistent with the conclusion Congress reached in the course of its deliberations on the AFLA....

For the foregoing reasons we conclude that the AFLA does not violate the Establishment Clause "on its face."

* * *

We turn now to consider whether the District Court correctly ruled that the AFLA was unconstitutional as applied.

* * *

On the merits of the "as applied" challenge, it seems to us that the District Court did not follow the proper approach in assessing appellees' claim that the Secretary is making grants under the Act that violate the Establishment Clause.... Although the District Court stated several times that AFLA aid had been given to religious organizations that were "pervasively sectarian"..., it did not identify which grantees it was referring to, nor did it discuss with any particularity the aspects of those organizations which in its view warranted classification as "pervasively sectarian." The District Court did identify certain instances in which it felt AFLA funds were used for constitutionally improper purposes, but in our view the court did not adequately design its remedy to address the specific problems it found in the Secretary's administration of the statute. Accordingly, although there is no dispute that the record contains evidence of specific incidents of impermissible behavior by AFLA grantees, we feel that this case should be remanded to the District Court for consideration of the evidence presented by appellees insofar as it sheds light on the manner in which the statute is presently being administered....

In particular, it will be open to appellees on remand to show that AFLA aid is flowing to grantees that can be considered "pervasively sectarian" religious institutions, such as we have held parochial schools to be. As our previous discussion has indicated, it is not enough to show that the recipient of a challenged grant is affiliated with a religious institution or that it is "religiously inspired."

The District Court should also consider on remand whether in particular cases AFLA aid has been used to fund "specifically religious activit[ies] in an otherwise substantially secular setting." *Hunt, supra*.... Here it would be relevant to determine, for example, whether the Secretary has permitted AFLA grantees to use materials that have an explicitly religious content or are designed to inculcate the views of a particular religious faith....

If the District Court concludes on the evidence presented that grants are being made by the Secretary in violation of the Establishment Clause, it should then turn to the question of the appropriate remedy. We deal here with a funding statute with respect to which Congress has expressed the view that the use of funds by grantees to promote religion, or to teach religious doctrines of a particular sect, would be contrary to the intent of the statute. The Secretary has promulgated a series of conditions to each grant, including a prohibition against teaching or promoting religion.... Should the Court conclude that the Secretary has wrongfully approved certain AFLA grants, an appropriate remedy would require the Secretary to withdraw such approval.... Should the Court conclude that the Secretary's current practice does allow such grants, it should devise a

> remedy to insure that grants awarded by the Secretary comply with the Constitution and the statute.[40]

Perhaps the majority's opinion suggests a willingness to toss to the wolves from the fleeing droshke the hapless parochial schools in order that religiously affiliated hospitals, colleges and social welfare agencies might escape unscathed. The "pervasively sectarian" rubric was used as a kind of talisman to divide the two categories of constitutional from unconstitutional without looking too closely at either of them. This distinction is worth further discussion after consideration of the concurring opinions.

(4) Justice O'Connor's Concurrence. Justice O'Connor was clearly the "swing vote" in this situation, whose favor transformed into a five-vote majority what would otherwise have been a four-vote minority. Her concurring opinion, unlike that of Justice Kennedy (joined by Justice Scalia), showed some sympathy for the minority's position, suggesting she might easily have gone with them if certain concessions had not been made to her views in the opinion that—with her vote—became the opinion of the court.

> This case raises somewhat unusual questions involving a facially valid statute that appears to have been administered in a way that led to violations of the Establishment Clause. I agree with the Court's resolution of those questions, and I join its opinion. I write separately, however, to explain why I do not believe that the Court's approach reflects any tolerance for the kind of improper administration that seems to have occurred in the government program at issue here.
>
> The dissent says, and I fully agree, that "[p]ublic funds may not be used to advance the religious message." As the Court notes, "there is no dispute that the record contains evidence of specific incidents of impermissible behavior by AFLA grantees." Because the District Court employed an analytical framework that did not require a detailed discussion of the voluminous record, the extent of this impermissible behavior and the degree to which it is attributable to poor administration by the Executive Branch is somewhat less clear. In this circumstance, two points deserve to be emphasized. First, *any* use of public funds to promote religious doctrine violates the Establishment Clause. Second, *extensive* violations—if they can be proved in this case—will be highly relevant in shaping an appropriate remedy that ends such abuses. For that reason, appellees may yet prevail on remand, and I do not believe that the Court's approach entails a relaxation of "the unwavering vigilance that the Constitution requires against any law `respecting an establishment of religion.'"[41]
>
> The need for detailed factual findings by the District Court stems in part from the delicacy of the task given to the Executive Branch by the Adolescent Family Life Act (AFLA). Government has a strong and

40. *Bowen v. Kendrick*, 487 U.S. 589 (1988).

41. Quotation is from the dissent, *infra*.

> legitimate secular interest in encouraging sexual restraint among young people. At the same time, as the dissent rightly points out, "[t]here is a very real and important difference between running a soup kitchen or a hospital, and counseling pregnant teenagers on how to make the difficult decisions facing them." Using religious organizations to advance the secular goals of the AFLA, without thereby permitting religious indoctrination, is inevitably more difficult than in other projects, such as ministering to the poor and the sick. I nonetheless agree with the Court that the partnership between governmental and religious institutions contemplated by the AFLA need not result in constitutional violations, despite an undeniably greater risk than is present in cooperative undertakings that involve less sensitive objectives. If the District Court finds on remand that grants are being made in violation of the Establishment Clause, an appropriate remedy would take into account the history of the program's administration as well as the extent of any continuing constitutional violations.[42]

Justice O'Connor seemed to be serving notice that the district court was to look very closely at what was going on under the AFLA, not only currently but throughout its operation, presumably including contracts that had run their course, with the implicit proviso that her vote could swing the other way if and when the case returned to the Supreme Court with evidence of extensive hanky-panky in the administration of the Act. It is not clear whether she intimated that the lower court might find that the Act, though constitutional on its face, was so riddled with inherent problems that it could not be administered constitutionally and therefore would have to be struck down anyway. There seems to be that possibility in the comment that "appellees may yet prevail on remand," which must mean more than that some grantees would have to refund their grants to the government, since that scattershot outcome would hardly be viewed by appellees as "prevailing."

One may conjecture that Justice O'Connor's insistence on the dissent's theme that "public funds may not be used to advance the religious message" may have wrung from the other four members of the majority the grudging concessions of the final pages of its opinion that *Congress* had indicated in the Senate Report that AFLA funds were not to be used to promote or teach religion and that the *Secretary* had issued regulations against grantees' using federal funds for teaching or promoting religion. One waits in vain for a firm assertion from the majority that the *Constitution* prohibits such usage, whether Congress or the Secretary does or not. The majority dropped one shoe when it observed that "we have never stated that a *statutory* restriction is constitutionally required" (against use of tax funds to promote religion), but it never dropped the other shoe by stating firmly that the Constitution contains such a restriction that applies to all statutes and all programs.

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42. *Bowen v. Kendrick, supra*, O'Connor concurrence.

Instead, the majority went off on two tangents, first describing the "mechanism whereby the Secretary can police the grants"—applications, reports, evaluations (all of which are essentially *self*-policing by the grantee, which writes the applications and reports and supplies the data for evaluation)—and then focusing on the *character* of the grantee: the district court was to concern itself with "pervasively sectarian" institutions. Apparently the majority seemed to think that teaching or promoting religion would not occur in less-than-pervasively sectarian institutions, a supposition in the social-welfare field running back to *Bradfield v. Roberts*[43] and not necessarily true then or now.

The majority had instructed the District Court to focus its attention "on the manner in which the statute is *presently* being administered." Justice O'Connor's final sentence may have been intended to qualify that limitation by suggesting that "the *history* of the program's administration" might be relevant in fashioning a remedy for any shortcomings. The district court's task was not made easier by another concurring opinion from two other members of the majority pointing in a different direction.

(5) Justice Kennedy's Concurrence. Justice Kennedy made his debut in the church/state field with a concurrence that was joined by Justice Scalia.

> I join the Court's opinion, and write this separate concurrence to discuss one feature of the proceedings on remand. The Court states that "it will be open to appellees on remand to show that AFLA aid is flowing to grantees that can be considered `pervasively sectarian' religious institutions, such as we have held parochial schools to be." In my view, such a showing will not alone be enough, in an as-applied challenge, to make out a violation of the Establishment Clause.
>
> Though I am not confident that the term "pervasively sectarian" is a well-founded juridical category, I recognize the thrust of our previous decisions that a statute which provides for exclusive or disproportionate funding to pervasively sectarian institutions may impermissibly advance religion and as such be invalid on its face. We hold today, however, that the neutrality of the grant requirements and the diversity of the organizations described in the statute before us foreclose the argument that it is disproportionately tied to pervasively sectarian groups. Having held that the statute is not facially invalid, the only purpose of further inquiring whether any grantee institution is pervasively sectarian is as a preliminary step to demonstrating that the funds are in fact being used to further religion. In sum, where, as in this case, a statute provides that the benefits of a program are to be distributed in a neutral fashion to religious and non-religious applicants alike, and the program withstands a facial challenge, it is not unconstitutional as applied solely by reason of the religious character of a specific recipient. The question in an as-applied

43. 175 U.S. 291 (1899), discussed at § D2b above.

> challenge is not whether the entity is of a religious character, but how it spends its grant.[44]

This concurrence did not add a great deal of illumination to the subject, nor did it reveal much about Justice Kennedy's stance on church/state issues in general. His skepticism about the well-foundedness of "pervasively sectarian" as a juridical category is well-founded, since that term was a discriminator devised to explain how aid to church-related colleges was constitutional while aid to church-related elementary and secondary schools was not—a distinction that has never been entirely persuasive.[45] It has served—especially in this very case—to create a peculiar pariah category of institutions not eligible for government aid because they are too religious. Since church-related colleges and universities were found in *Tilton v. Richardson* and its progeny[46] not to be thus disabled, and church-related hospitals had been so found in *Bradfield v. Roberts*,[47] newly reaffirmed in *Kendrick*, and *Kendrick* itself had drawn a broad array of church-related health-and-welfare agencies likewise into the charmed circle, the only church-related entities left out—besides, presumably, churches themselves—were parochial schools.

If the "pervasively sectarian" distinction were to break down, one of two consequences would seem to follow: either all church-related entities are disqualified, or none are. Some commentators lean toward the latter option because they do not see religious bodies as necessarily excluded from what is fondly referred to as "partnership" with government (a term used by Justice O'Connor in her opinion in this case, though that does not necessarily mean she shared that wistful view of church-government interrelationship). Justice Kennedy and Justice Scalia may belong to that school, since their concurrence urged that religious applicants not be disqualified "by reason of [their] religious character." Rather, the decisive question is not their character, said they, but what they do with the money. If they perform the services for which the grant is given in a manner acceptable under neutral, secular standards, it is not pertinent what else they may be doing at the same time—presumably with their own resources.

This way lies the contention that parochial schools are entitled to public aid because they provide a secular general education that meets the standards of state compulsory education laws; if they also provide at the same time to the same pupils a religious education, that is "no skin off the public's nose." The perplexity about discerning which part of the education is being paid for by the public and which part by private funds produced the so-called Catch-22 of the parochial school cases—

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44. *Bowen v. Kendrick, supra*, Kennedy concurrence.

45. See *Tilton v. Richardson*, 403 U.S. 672 (1971), discussed at IIID6, where it originated.

46. *Hunt v. McNair*, 413 U.S. 734 (1973), discussed at IIID8a, and *Roemer v. Maryland Board of Public Works*, 426 U.S. 736 (1976), discussed at IIID8b.

47. 175 U.S. 291 (1899), discussed at § D2b above.

Lemon v. Kurtzman,[48] *et seq*.—that the degree of monitoring necessary to sort the one kind of education from the other would result in "excessive entanglement" between church and state—meaning that the courts understandably did not want to get into it and so found aid requiring that sort of sorting to be impermissible at the threshold. (The dissent offered a better characterization of the Catch-22 dilemma, *q.v. infra*.)

The courts have not been too successful in dealing with activities and institutions of a *mixed* character, where religious functions and purposes are mingled with secular functions and purposes. They have rather trustingly embraced the notion that the secular can be sorted from the religious simply and confidently in "religiously affiliated" hospitals, colleges and social-welfare agencies, though not in parochial schools. That amiable dichotomy may be one of those judicial fictions that the courts use to simplify their difficult task. But in thus dividing the aid-eligible sheep from the noneligible goats, this fiction may do a disservice to both.

Parochial schools do perform secular functions, and in some those may be more easily separated from the religious than in others. (Some follow the "classical" theory that the best service the church can perform for young students is to give them a good solid education in the best secular sense, and let them pick up the religion in catechism classes at the church outside of "school" time—a view not too different from that of nonreligious private "prep" schools that qualify for aid.) On the other hand, church-related welfare institutions and colleges are not as devoid of religious purposes and activities intermingled with the secular as the judicial fiction might suggest. That is one reason, presumably, that Congress thought religious agencies might have a uniquely effective contribution to make to the work envisioned by the Adolescent Family Life Act. But if only those church-related agencies are eligible to participate in the program that are indistinguishable from their "secular counterparts," how is the unique contribution of the *religious* agency to be made? The expectation that religious agencies, in order to qualify for federal aid under the Act, will duly "sanitize" themselves of any religious elements is the other half of the judicial fiction. If that fiction becomes fact, and the religious agencies *are* sanitized of any religious elements, then the unique contribution that religion might make could well be eliminated.

The solution is not simply to wink at the religious elements and allow them to persist in the presence of tax aid, since that would result in the promulgation of religion with public support and the aggrandizement of the particular religious enterprises that are able to attract that support through governmental subvention—an arrangement the Founders thought contrary to their experience and their intention for the new nation they were instituting, where the linkage between the civil standing of citizens and their religious affiliations was to be severed, and none would be advantaged or disadvantaged because of the latter.

48. 403 U.S. 602 (1971), discussed at IIID5.

This paradox simply underscores the unstable anomaly of government's hiring churches to perform "secular" services. If the churches remain true to their religious mission, the government will be paying for religious as well as secular services and inflating the religious institution as well. If they drop the religious part of their work, they will be failing their own distinctive role and function, which they alone can do, for the sake of secular good works that others may be able to do as well or better.

(6) The Dissent. Needless to say, the majority's reasoning in this case did not go unchallenged. A vehement, articulate dissent of the kind that Justice Brennan was wont to indite in what he considered particularly regressive decisions (such as *Marsh v. Chambers*[49] or *Lynch v. Donnelly*[50]), was forthcoming in this instance as well, except that this time it was written by Justice Blackmun, joined by Justices Brennan, Marshall and Stevens. The dissent led off with excerpts from the record of services performed by religious grantees under AFLA that contained unmistakably homiletic material.

> It is unclear whether Congress ever envisioned that public funds [under AFLA] would pay for a program during a session of which parents and teenagers would be instructed:
>
> "You want to know the church teachings on sexuality.... You are the church. You people sitting here are the body of Christ. The teachings of you and the things you value are, in fact, the values of the Catholic Church."
>
> Or of curricula that taught:
>
> "The Church has always taught that the marriage act, or intercourse, seals the union of husband and wife, (and is a representation of their union on all levels). Christ commits Himself to us when we come to ask for the sacrament of marriage. We ask Him to be active in our life. God is love. We ask Him to share His love in ours, and God procreates with us, He enters into our physical union with Him, and we begin a new life."
>
> Or the teaching of a method of family planning described on the grant application as "not only a method of birth regulation but also a philosophy of procreation," and promoted as helping "spouses who are striving...to transform their married life into testimony[,]...to cultivate their matrimonial spirituality[, and] to make themselves better instruments in God's plan," and as "facilitat[ing] the evangelization of homes."
>
> Whatever Congress had in mind, however, it enacted a statute that facilitated and, indeed, encouraged the use of public funds for such instruction, by giving religious groups a central pedagogical and counseling role without imposing any restraints on the sectarian quality of the participation. As the record developed thus far in this litigation makes all too clear, federal tax dollars appropriated for AFLA purposes have been used, with Government approval, to support religious teaching.

49. 463 U.S. 783 (1983), discussed at VD3.
50. 465 U.S. 668 (1984), discussed at VE2d.

> Today the majority upholds the facial validity of this statute and remands the case to the District Court for further proceedings concerning appellees' challenge to the manner in which the statute has been applied. Because I am firmly convinced that our cases require invalidating this statutory scheme, I dissent.

Justice Blackmun questioned the majority's use of the distinction between constitutionality of the Act "on its face" and "as applied."

> [W]hile confirming that the District Court was justified in analyzing the AFLA both ways, the Court fails to elaborate on the consequences that flow from the analytical division.
>
> While the distinction is sometimes useful in constitutional litigation, the majority misuses it here to divide and conquer appellees' challenge. By designating appellees' broad attack on the statute as a "facial" challenge, the majority justifies divorcing its analysis from the extensive record developed in the District Court, and thereby strips the challenge of much of its force and renders the evaluation of the *Lemon* "effects" prong particularly sterile and meaningless. By characterizing appellees' objections to the real-world operation of the AFLA an "as-applied" challenge, the Court risks misdirecting the litigants and the lower courts toward piece-meal litigation continuing indefinitely throughout the life of the AFLA. In my view, a more effective way to review Establishment Clause challenges is to look to the type of relief prayed for by the plaintiffs, and the force of the arguments and supporting evidence they marshal. Whether we denominate a challenge that focuses on the systematically unconstitutional operation of a statute a "facial" challenge— because it goes to the statute as a whole—or an "as-applied" challenge—because we rely on real-world events—the Court should not blind itself to the facts revealed by the undisputed record.
>
> As is evident from the parties' arguments, the record compiled below, and the decision of the District Court, this case has been litigated primarily as a broad challenge to the statutory scheme as a whole, not just to the awarding of grants to a few individual applicants. The thousands of pages of depositions, affidavits, and documentary evidence were not intended to demonstrate merely that particular grantees should not receive further funding. Indeed, because of the 5-year grant cycle, some of the original grantees are no longer AFLA participants. This record was designed to show that the AFLA had been interpreted and implemented by the Government in a manner that was clearly unconstitutional, and appellees sought declaratory and injunctive relief as to the entire statute.
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> * * *
>
> The majority declines to accept the District Court's characterization of the record, yet fails to review it independently, relying instead on its assumptions and casual observations about the character of the grantees and potential grantees. In doing so, the Court neglects its responsibilities

> under the Establishment Clause and gives uncharacteristically short shrift to the District Court's understanding of the facts.

Justice Blackmun chided the majority for its use of the category of "pervasively sectarian" as a kind of label that relieved the court of the necessity of examining the programs funded by the Act. In the parochial-school-aid cases from which the term was derived, it did provide a short-cut for Establishment Clause analysis: if a recipient of direct aid was "pervasively sectarian," no further inquiry was needed. The aid was unconstitutional. But that did not mean that aid to other religiously affiliated institutions was consequently and automatically constitutional. It simply meant that further inquiry was needed into whether such aid would result in governmental support of religion in those institutions.

> The voluminous record compiled by the parties and reviewed by the District Court illustrates the manner in which the AFLA has been interpreted and implemented by the agency responsible for the aid program, and eliminates whatever need there might be to speculate about what kind of institutions *might* receive funds and how they *might* be selected; the record explains the nature of the activities funded with government money, as well as the content of the educational programs and materials developed and disseminated. There is no basis for ignoring the volumes of depositions, pleadings and undisputed facts reviewed by the District Court simply because the recipients of the government funds may not in every sense resemble parochial schools.
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> III
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> As is often the case, it is the effect of the statute, rather than its purpose, that created Establishment Clause problems. Because I have no meaningful disagreement with the majority's discussion of the AFLA's essentially secular purpose, and because I find the statute's effect of advancing religion dispositive, I turn to that issue directly.
>
> A
>
> The majority's holding that the AFLA is not unconstitutional on its face marks a sharp departure from our precedents. While aid programs providing nonmonetary, verifiably secular aid have been upheld notwithstanding the indirect effect they might have on the allocation of an institution's own funds for religious activities..., direct cash subsidies have always required much closer scrutiny into the expected and potential uses of the funds, and much greater guarantees that the funds would not be used inconsistently with the Establishment Clause. Parts of the AFLA prescribing various forms of outreach, education and counseling services specifically authorize the expenditure of funds in ways previously found unconstitutional. For example, the Court has upheld the use of public funds to support a parochial school's purchase of secular textbooks already approved for use in public schools..., or its grading and administering of state-prepared tests.... When the books, teaching materials, or examinations were to be selected or designed by the private schools themselves, however, the Court consistently has held that such

> government aid risked advancing religion impermissibly.... The teaching materials that may be purchased, developed, or disseminated with AFLA funding are in no way restricted to those already selected and approved for use in secular contexts.

In a footnote Justice Blackmun gave examples from the record:

> 7. Thus, for example, until discovery began in this lawsuit, St. Ann's, a home for unmarried pregnant teenagers, operated by the Order of the Daughters of Charity and owned by the Archdiocese of Washington, purchased books containing Catholic doctrine on chastity, masturbation, homosexuality, and abortion, using AFLA funds, and distributed them to participants. Catholic Family Services of Amarillo, Texas, used a curriculum outline guide for AFLA-funded parent workshops with explicit theological references, as well as religious "reference" materials, including the film "Everyday Miracle," described as "depicting the miracle of the process of human reproduction as a gift from God."

There is nothing wrong with teaching such religious understandings of the spiritual meaning and moral significance of sexuality; quite the contrary. Such teaching is certainly preferable—for purposes of the Act and for purposes of human morality—to the clinical "neutrality" or hedonistic amorality of some secular treatments of the same subject-matter. What is at issue here is not the merit but the dissemination of the material at public expense. Justice Blackmun continued:

> Notwithstanding the fact that government funds are paying for religious organizations to teach and counsel impressionable adolescents on a highly sensitive subject of considerable religious significance, often on the premises of a church or parochial school and without any effort to remove religious symbols from the sites, the majority concludes that AFLA is not facially invalid. The majority acknowledges the constitutional proscription on government-sponsored religious indoctrination but, on the basis of little more than an indefensible assumption that AFLA recipients are not pervasively sectarian and consequently are presumed likely to comply with statutory and constitutional mandates, dismisses as insubstantial the risk that indoctrination will enter counseling. Similarly, the majority rejects the District Court's conclusion that the subject matter renders the risk of indoctrination unacceptable, and does so, it says, because "the likelihood that some of the religious institutions who receive AFLA funding will agree with the message that Congress intended to deliver to adolescents through the AFLA" does not amount to the advancement of religion. I do not think the statute can be so easily and conveniently saved.
>
> (1)
>
> The District Court concluded that asking religious organizations to teach and counsel youngsters on matters of deep religious significance, yet expect them to refrain from making reference to religion is both foolhardy

and unconstitutional. The majority's rejection of this view is illustrative of its doctrinal misstep in relying so heavily on the college-funding cases.... The majority rejects the District Court's assumptions as unwarranted outside the context of a pervasively sectarian institution. In doing so, the majority places inordinate weight on the nature of the institution receiving the funds and ignores altogether the targets of the funded message and the nature of its content.

I find it nothing less than remarkable that the majority relies on statements expressing confidence that administrators of religiously affiliated liberal arts colleges would not breach statutory proscriptions and use government funds earmarked "for secular purposes only," to finance theological instruction or religious worship...in order to reject a challenge based on the risk of indoctrination inherent in "educational services relating to family life and problems associated with adolescent premarital sexual relations," or "outreach services to families of adolescent to discourage sexual relations among unemancipated minors." The two situations simply are not comparable.

The AFLA, unlike any statute the Court has upheld, pays for teachers and counselors, employed by and subject to the direction of religious authorities, to educate impressionable young minds on issues of religious moment. Time and again we have recognized the difficulties inherent in asking even the best-intentioned individuals in such positions to make "a total separation between secular teaching and religious doctrine."

* * *

By observing that the alignment of the statute and the religious views of the grantees do[es] not render the AFLA a statute which funds "specifically religious activity," the majority makes light of the religious significance in the counseling provided by some grantees. Yet this is a dimension that Congress specifically sought to capture by enlisting the aid of religious organizations in battling the problems associated with teenage pregnancy. Whereas there may be secular values promoted by the AFLA, including the encouragement of adoption and premarital chastity and the discouragement of abortion, it can hardly be doubted that when promoted in theological terms by religious figures, those values take on a religious nature. Not surprisingly, the record is replete with observations to that effect. It should be undeniable by now that religious dogma may not be employed by government even to accomplish laudable secular purposes....

It is true, of course, that the Court has recognized that the Constitution does not prohibit the government from supporting secular social-welfare services solely because they are provided by a religiously affiliated organization. But such recognition has been closely tied to the nature of the subsidized service: "the State may send a cleric, indeed even a clerical order, to perform a *wholly secular task*" (emphasis added). *Roemer v. Maryland Public Works Board*. There is a very real and important difference between running a soup kitchen or a hospital, and counseling pregnant teenagers on how to make the difficult decisions facing them. The risk of advancing religion at public expense, and of creating an appearance that

> government is endorsing the medium and the message, is much greater when the religious organization is directly engaged in pedagogy, with the express intention of shaping belief and changing behavior, than where it is neutrally dispensing medication, food or shelter.
>
> There is also, of course, a fundamental difference between government's employing religion *because* of its unique appeal to a higher authority and the transcendental nature of its message, and government's enlisting the aid of religiously committed individuals without regard to their sectarian motivation. In the latter circumstance, religion plays little or no role; it merely explains why the individual or organization has chosen to get involved in the publicly funded program. In the former, religion is at the core of the subsidized activity, and it affects the manner in which the "service" is dispensed. For some religious organizations, the answer to a teenager's question, "Why shouldn't I have an abortion?" or "Why shouldn't I use barrier contraceptives?" will undoubtedly be different from an answer based solely on secular considerations. Public funds may not be used to endorse the religious message.

At this point, Justice Blackmun noted in the margin:

> 12. Employees of some grantees must follow the directives set forth in a booklet entitled "The Ethical and Religious Directives for Catholic Health Facilities," approved by the Committee on Doctrine of the National Conference of Catholic Bishops. Solely because of religious dictates, some AFLA grantees teach and refer teenagers for only "natural family planning," which ""has never been used successfully with teenagers," App. 535, and may not refer couples to programs that offer artificial methods of birth control, because these programs conflict with the teachings of the Roman Catholic Church. One nurse midwife working at an AFLA program was even reprimanded for contravening the hospital's religious views on sex when she answered "yes" to a teenager who asked, as a medical matter, whether she could have sex during pregnancy.

Continuing with the text of Justice Blackmun's dissent:

> B
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> The problems inherent in a statutory scheme specifically designed to involve religious organizations in a government-funded pedagogical program are compounded by the lack of any statutory restrictions on the use of federal tax dollars to promote religion. Conscious of the remarkable omission from the AFLA of any restriction whatsoever on the use of public funds for sectarian purposes, the Court disingenuously argues that we have "never stated that a *statutory* restriction is constitutionally required."

Justice Blackmun then recited a series of cases in which the court had repeatedly cited such statutory restrictions as central factors in determining the constitutionality

of an aid program: *Tilton v. Richardson*,[51] *Committee for Public Education and Religious Liberty v. Regan*,[52] *PEARL v. Nyquist*,[53] *Roemer v. Maryland Public Works Board*,[54] *Hunt v. McNair*,[55] etc.

> Despite the glaring omission of a restriction on the use of funds for religious purposes, the Court attempts to resurrect the AFLA by noting a legislative intent not to promote religion, and observing that various reporting provisions of the statute "create a mechanism whereby the Secretary can police the grants." However effective this mechanism might prove to be in enforcing clear statutory directives, it is of no help where, as here, no restrictions are found on the face of the statute, and the Secretary has not promulgated any by regulation. Indeed, the only restriction on the use of AFLA funds for religious purposes is found in the Secretary's "Notice of Grant Award" sent to grantees, which specifies that public funds may not be used to "teach or promote religion," and apparently even that clause was not inserted until after this litigation was underway. Furthermore, the "enforcement" of the limitation on sectarian use of AFLA funds, such as it is, lacks any bite. There is no procedure pursuant to which funds used to promote religion must be refunded to the Government....
>
> Indeed, nothing in the AFLA precludes the funding of even "pervasively sectarian" organizations, whose work by definition cannot be segregated into religious and secular categories. And, unlike a pre-enforcement challenge, where there is no record to review, or a limited challenge to a specific grant, where the Court is reluctant to invalidate a statute "in anticipation that particular applications may result in unconstitutional use of funds," *Roemer*..., in this litigation the District Court expressly found that funds have gone to pervasively sectarian institutions and tax dollars have been used for the teaching of religion. Moreover, appellees have specifically called into question the manner in which the grant program was administered and grantees were selected. These objections cannot responsibly be answered by reliance on the Secretary's enforcement mechanism....
>
> C
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> By placing unsupportable weight on the "pervasively sectarian" label, and recharacterizing appellees' objections to the statute, the Court attempts to create an illusion of consistency between our prior cases and its present ruling that the AFLA is not facially invalid. But the Court ignores the unwavering vigilance that the Constitution requires against any law "respecting an establishment of religion," which, as we have recognized time and again, calls for fundamentally conservative

51. 403 U.S. 672 (1971), discussed at IIID6.
52. 444 U.S. 646 (1980), discussed at IIID7i.
53. 413 U.S. 756 (1973), discussed at IIID7a.
54. 426 U.S. 736 (1976), discussed at IIID8b.
55. 413 U.S. 734 (1973), discussed at IIID8a.

decisionmaking: our cases do not require a plaintiff to demonstrate that a government action *necessarily* promotes religion, but simply that it creates such a substantial risk.... Given the nature of the subsidized activity, the lack of adequate safeguards, and the chronicle of past experience with this statute, there is no room for doubt that the AFLA creates a substantial risk of impermissible fostering of religion.

IV

While it is evident that the AFLA does not pass muster under *Lemon's* "effects" prong, the unconstitutionality of the statute becomes even more apparent when we consider the unprecedented degree of entanglement between Church and State required to prevent subsidizing the advancement of religion with AFLA funds. The majority's brief discussion of *Lemon's* "entanglement" prong is limited to (a) criticizing it as a "Catch-22," and (b) concluding that because there is "no reason to assume that the religious organizations which may receive funds are `pervasively sectarian' in the same sense as the Court has held parochial schools to be," there is no need to be concerned about the degree of monitoring which will be necessary to ensure compliance with the AFLA and the Establishment Clause. As to the former, although the majority is certainly correct that the Court's entanglement analysis has been criticized in the separate writings of some members of the Court, the question whether a government program leads to "an excessive government entanglement with religion" nevertheless is and remains a part of the applicable constitutional inquiry. I accept the majority's conclusion that "[t]here is no doubt that the monitoring of AFLA grants is necessary...to insure that public money is to be spent...in a way that comports with the Establishment Clause," but disagree with its easy characterization of entanglement analysis as a "Catch-22." To the extent any metaphor is helpful, I would be more inclined to characterize the Court's excessive entanglement decisions as concluding that to implement the required monitoring, we would have to kill the patient to cure what ailed him.

As to the Court's conclusion that our precedents do not indicate that the Secretary's monitoring will not be exceedingly intensive or entangling, because the grant recipients are not sufficiently like parochial schools, I must disagree. As discussed above, the majority's excessive reliance on the distinction between the Court's parochial-school-aid cases and college-funding cases is unwarranted. *Lemon*, *Meek*, and *Aguilar*[56] cannot be so conveniently dismissed solely because the majority declines to assume that the "pervasively sectarian" label can be applied here.

To determine whether a statute fosters excessive entanglement, a court must look at three factors: 1) the character and purpose of the institutions benefited; 2) the nature of the aid; and 3) the nature of the relationship between the government and the religious organization. Thus, in *Lemon*, it was not solely the fact that teachers performed their duties within the four

56. *Lemon v. Kurtzman*, *supra*; *Meek v. Pittenger*, 421 U.S. 349 (1975), discussed at IIID7f; *Aguilar v. Felton*, 473 U.S. 402 (1985), discussed at IIID7m.

walls of the parochial school that rendered monitoring difficult and, in the end, unconstitutional. It seems inherent in the pedagogical function that there will be disagreements about what is or is not "religious" and which will require an intolerable degree of government intrusion and censorship.

> "What would appear to some to be essential to good citizenship might well for others border on or constitute instruction in religion.... Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment."[57]

* * *

In *Roemer*, *Tilton*, and *Hunt*, the Court relied on "the ability of the State to identify and subsidize separate secular functions carried out by the school, *without on-the-site inspections being necessary to prevent diversion of the funds to sectarian purposes*," *Roemer*...(emphasis added), and on the fact that one-time grants require "no continuing financial relationships or dependencies, no annual audits, and no government analysis of an institution's expenditures on secular as distinguished from religious activities." *Tilton*.... AFLA grants, of course, are not simply one-time construction grants. As the majority readily acknowledges, the Secretary will have to "review the programs set up and run by AFLA grantees [, including] a review of, for example, the educational materials that a grantee proposes to use." And, as the majority intimates, monitoring the use of AFLA funds will undoubtedly require more than the "minimal" inspection "necessary to ascertain that the facilities are devoted to secular education...." Since teachers and counselors, unlike buildings, "are not necessarily religiously neutral, greater governmental surveillance would be required to guarantee that state salary aid would not in fact subsidize religious instruction."

V

The AFLA, without a doubt, endorses religion. Because of its expressed solicitude for the participation of religious organizations in all AFLA programs in one form or another, the statute creates a symbolic and real partnership between the clergy and the fisc in addressing a problem with substantial religious overtones. Given the delicate subject matter and the impressionable audience, the risk that the AFLA will convey a message of Government endorsement of religion is overwhelming. The statutory language and the extensive record established in the District Court make clear that the problem lies in the statute and its systematically unconstitutional operation, and not merely in isolated instances of misapplication. I therefore would find the statute unconstitutional without remanding to the District Court. I trust, however, that after all its labors thus far, the District Court will not grow weary prematurely and read into the Court's decision a suggestion that the AFLA has been constitutionally implemented by the Government, for the majority deliberately eschews any review of the facts. After such further proceedings as are now to be

57. *Lemon v. Kurtzman*, *supra*, at 619.

> deemed appropriate, and after the District Court enters findings of fact on the basis of the testimony and documents entered into evidence, it may well decide, as I would today, that the AFLA as a whole indeed has been unconstitutionally applied.[58]

In a footnote Justice Blackmun addressed a parting shot to his two most junior colleagues:

> 16. Justice Kennedy, joined by Justice Scalia, would further constrain the District Court's consideration of the evidence as to how grantees spent their money, regardless of whether the grantees could be labeled "pervasively sectarian," asserting that "[t]he question in an as-applied challenge is not whether the entity is of religious character." This statement comes without citation to authority and is contrary to the clear import of our cases. As ill-defined as the concept behind the "pervasively sectarian" label may be, this Court has held, and reaffirms today, that
>
> "aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission..."
>
> Indeed, to suggest that because a challenge is labeled "as-applied," the character of the institution receiving the aid loses its relevance is to misunderstand the very nature of the concept of a "pervasively sectarian" institution, which is based in part on the conclusion that the secular and sectarian activities of an institution are "inextricably intertwined." Not surprisingly, the Court flatly rejects Justice Kennedy's suggestion, observing that "it will be open to appellees on remand to show that AFLA aid is flowing to grantees that can be considered `pervasively sectarian' religious institutions."[59]

Thus ended some sixty-five pages of judicial jousting (counting all four opinions) on the constitutional propriety of a congressional scheme for coping with premarital adolescent pregnancy and parenthood with the help of various church-related agencies. Some sharp divergences within the court were sketched without too clearly coming into contact. Rather, the several schools of thought seemed to talk past one another, suggesting not only differences in perception of the problem but wide divergences in reading the court's own precedents.

The majority's rather wooden and disingenuous reasoning was a worthy successor to *Bradfield v. Roberts*, which is not a high tribute. It represented a definite departure from the court's previous cases—at least in the parochial-school sequence. It was even more lax than the higher-education-aid cases, which at least made gestures toward safeguarding the no-establishment principle, such as voiding the twenty-year limit on the ban on religious use of college buildings constructed with state funds in

58. *Bowen v. Kendrick, supra*, Blackmun dissent.
59. Ibid., n. 16.

Tilton. But perhaps the main thrust of the majority's opinion was precisely that welfare programs are different from (elementary and secondary) education programs, despite the obvious reality that AFLA was not just a "welfare" program. But the majority conjured up a set of amiable fictions in lieu of the evidence amassed by the District Court and rested its conclusions on those. It was probably due to the need to win Justice O'Connor's vote that the court even bothered to send the case back for further evidence rather than just approving AFLA without further ado.

3. Child Care

Human societies have not always been solicitous for the care of children. Although some primitive tribes are marked by a general concern on the part of all or most adults for all or most children, others are not. In more "civilized" societies—of the earlier eras at least—children who did not have one or more specific adults to look after them were usually "on their own," left to "sink or swim" as best they could. In ancient Greece and Rome, as well as in medieval Europe, the customary method of dealing with "unwanted" infants was "exposure," i.e., abandoning them to the elements rather than disposing of them more conclusively. Though some people were willing to undertake care of infants related to them, even distantly, not many seemed constrained to be concerned about what happened to someone else's children, let alone "no one's" children.

A significant departure from this prevailing indifference, and one which in this respect has had a formative influence in human history, was the Judeo-Christian tradition, expressed in such terms as the following.

> Father of *the fatherless* and protector of widows is God in his holy habitation.[60]
>
> When you reap your harvest in your field, and have forgotten a sheaf in the field, you shall not go back to get it; it shall be for the sojourner, *the fatherless*, and the widow; that the Lord your God may bless you in all the work of your hands. When you beat your olive trees, you shall not go over the boughs again; it shall be for the sojourner, *the fatherless*, and the widow. When you gather the grapes of your vineyard, you shall not glean it afterward; it shall be for the sojourner, *the fatherless*, and the widow.[61]
>
> Religion that is pure and undefiled before God... the Father is this: to visit *orphans* and widows in their affliction, and to keep oneself unstained from the world.[62]

Within the early Christian church, any child who had lost one or both parents was cared for by the community of faith. Early church fathers advised that collections should be taken in the church for the care of orphans. Some churches kept records of

60. Psalm 68:5, RSV; emphasis added.
61. Deut. 24:19-21, RSV; emphasis added.
62. James 1:27, RSV; emphasis added.

the persons assisted, and non-Christian orphans were not discriminated against in the distribution of alms.[63] These "orphans" were usually children able to walk and talk and look after themselves to come extent. Another category was that of "foundlings"—infants abandoned by their parents, whose identities were unknown. These infants were often left on the doorstep of a church, and some churches institutionalized the care of such "found" infants. Foundling hospitals were established at Montpelier in 1070, in Rome in 1212, in Paris in 1362, and in Vienna in 1380. In England children not given lodging in central institutions were often left to the none-too-tender mercies of the "parish," a quasipolitical subdivision, where the poor and afflicted of all ages were entrusted to lay officers designated for that responsibility. Their connection with the Church of England did not necessarily insure a spirit of tender lovingkindness, nor the means, skill or motivation to carry out their duties responsibly.

> One of the tragedies of the eighteenth century was the high death rate among children. Official records show that in London, three out of four children of all classes died before their fifth birthday. But the mortality among the poor was higher, made so by the callousness of those who cared for orphans and foundlings in the work-houses, namely, the church-wardens. The parish register in Greater London for 1750-1755 shows that in many places all the children died within twelve months of entry. Some wardens took bastard children off their mothers' hands at so much per head, spent the money in hilarious living and let the babies die. In one parish in Westminster, out of five hundred bastards so received, over a series of months, only one survived.[64]

Gradually public consciousness of responsibility for the care of the unfortunate—in this field as in others—has improved, and the whole society has made some provisions for their care. One of the major advances came about when dependent, neglected or handicapped children were no longer housed in the public workhouse, almshouse or poorhouse along with incapacitated adults, the insane and human derelicts of all sorts, but were cared for separately in orphanages or foundling asylums. A further advance came when provisions were made for foster home care and public assistance programs (such as Aid to Dependent Children) that enabled children to be cared for in family settings rather than in large institutions.

The child-welfare world is periodically swept by shifting methods and emphases, one of the more recent being to empty the state institutions and relocate their occupants in "the community," often with little or no advance resettlement arrangement and with inadequate continuing care and oversight. This trend has been

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63. See Justin Martyr, *Apol.* 67, Tertullian, *Apol.* 39, and *Const. Apost.* 4:1-2.

64. Bailey, Albert Edward, *The Gospel in Hymns* (New York: Scribners, 1950), pp. 75-6, summarizing material derived from Bready, J.W., *England Before and After Wesley* (1938) and other sources.

assisted by the pressure on state governments to economize on the immense expense of maintaining state institutions for the care of dependent populations, by the pressure of childless couples wanting children to foster or adopt (that is, wanting young and attractive children, not older and less attractive ones), and by occasional scandals of inhuman conditions of neglect or abuse in state (and private) institutions (such as the exposé of conditions in a state institution for the retarded called "Willowbrook" on Staten Island, N.Y., by federal district judge Orrin Judd).

The upshot of this overview is that:

1. Children are a very vulnerable sector of society in need of protection and nurture if they are to reach healthy maturity and take their rightful place as productive members of society;

2. Christian churches (and some other religious bodies) have pioneered in the care of dependent children and have been chiefly responsible for the spread and now general acceptance of the idea that society as a whole has a responsibility for the care of children whose parents (for whatever reason) are unable to care for them adequately;

3. Neither church nor state agencies (nor private, nonsectarian ones) have found the ideal and always efficacious technique for the care and nurture of dependent children, and all such kinds of agencies are occasionally found to have erred in one way or another, resulting in brief flurries of scandal and outrage, after which the public's attention turns to other things, and the collective care of dependent children again sinks to its customary level of low social priority.

Whether in the public or the private sector, the religious or the secular, the care of numbers of assorted children, round the clock, day in and day out, is the hardest work there is, particularly when some of them, because of their troubled histories or physical or mental deficits, may exhibit various behavioral problems, the acting-out of inner dramas and distresses. This task is not eased by the fact that there is as yet no adequate body of knowledge of the most effective mode of care for various special needs or for the skilled nurturing of this dependent population. Still, much can be accomplished for troubled and vulnerable children if their care is guided and supported by conscientious, consistent and insightful leadership. Child-care workers, though often minimally trained, can show remarkable devotion to their dependent charges, coming to work through driving snowstorms, working additional shifts without advance notice when emergencies arise, spending their own meager funds to buy toilet paper or soap for the children when the state or private management fails to replenish the supplies.

But amiable good intentions are not sufficient for this work.[65] Many a willing worker with a love of children has been "burned out" by the combination of intense involvement and lack of insight into what is going on in the interpersonal dynamics of

65. See Bettelheim, Bruno, *Love Is Not Enough: The Treatment of Emotionally Disturbed Children* (Glencoe, Ill.: Free Press, 1950).

a child-care community. Some grasp of the developmental tasks being performed at each age level is needed as well as a professional degree of detachment from individuals and their problems such that one can "see the forest rather than just the trees." A certain amount of sophistication is also helpful to avoid being "taken in" by the various games that children run on their elders, yet without animus against them for trying to "con" the Management. And above all, the staff should not be indulged in the ever-present propensity to get rid of (transfer out) the less attractive and more intractable children, which can take the form of unconsciously provoking difficult behavior rather than developing coping skills to deal with it constructively.

The elements that make for good child care are not unique to public or to private, to religious or to secular, institutions. There are model units and there are "snakepits" in all three categories—public, private nonsectarian and religious—and most are somewhere in between. When the state seeks by regulation to require private child-care institutions to reach a level of perfection that state-operated child-care institutions themselves have not attained, it is misusing the instrument of regulation. The state has a legitimate and important responsibility to make sure that no child-care institutions—public or private—fall below a certain level of performance with respect to the more obvious criteria of health and safety. That is the proper task of regulation.

Beyond that, regulation becomes artificial, intrusive and inhibiting because it cannot generate the inspiration and insight, the know-how and elan, that alone can bring about good child care. Even "staff-child ratio" requirements and training standards for staff have limited usefulness. Thirty preschool children to one adult is obviously inadequate, but three adults cannot care for five children if the adults are all in another room having a snack. And some highly schooled persons sometimes seem to consider that their advanced degrees entitle them to delegate to less trained persons the task of taking the kiddies to the toilet, where some of the prime problems of child care occur.

There are some governmental regulations that are sensible and constructive; there are others that are gratuitous, intrusive, self-contradictory or downright life-threatening, such as the New York State regulation requiring wire-mesh glass in the windows of child-care institutions (rather than plexiglass) even though several children had been severely injured or killed by cutting themselves in breaking through wire-mesh glass windows. The mere fact that a governmental agency has adopted regulations for child-care facilities does not insure that those regulations will be helpful or justifiable in advancing the care of children, and may in fact sometimes be the opposite, such as the requirement in some such codes that retarded children should be accorded privacy in having their own individual enclosed sleeping chambers—which effectively prevents the child-care staff from being able to see and remedy epileptic seizures or other emergencies that were more readily visible in dormitory-type settings. Another such regulation stipulated that retarded children

should enjoy privacy in the shower and not be assisted by staff-persons. Such a requirement seems a sensible safeguard against sexual exploitation, to be sure, except that many such children are unable to wash themselves, and thus the whole purpose of showering can be defeated.

There is a limit to what state licensing and regulation can accomplish. Many of the child-care facilities in which scandals of sexual abuse arose in the early 1980s were fully licensed and regulated by the state, but such licensing and regulation did not prevent the development of not only incidents but *patterns* of abuse. On the other hand, some state regulations can disrupt or destroy the ethos and regimen that make some church-sponsored child-care facilities especially effective in dealing with exceptionally difficult populations. When the institution is organized around a theologically focused and impelled system of nurture, a requirement that it must hire persons who do not share that theological commitment can vitiate the whole undertaking.

a. Resistance to State Regulation. Beginning in the 1970s, a number of fundamentalist Protestant churches began to resist regulation by the state of their educational and social-service ministries. Some which had previously been licensed by the state returned their licenses or refused to renew them when they expired.[66] Others refused from their inceptions to apply for licenses or submit to state regulation.[67] To some people this viewpoint seemed unreasonable and obtuse, and when carried to an extreme, it was. But the more moderate position of resistance is worthy of respect and some accommodation, as may be seen in the following discussion.

b. The Roloff Litigation. Lester Roloff was a fundamentalist Baptist minister in Southern Texas who set up two homes for wayward boys and one for girls. He refused to obtain a license from the State of Texas to operate these child-care institutions. The State Department of Public Welfare sued Roloff Evangelistic Enterprises, Inc., operator of the homes, to compel compliance with the Child Care Licensing Act,[68] and prevailed in the trial court and on appeal.[69] The same issue arose again when the director of one of the Roloff homes sued the state for interference with his free exercise of religion, but again the state prevailed.[70] In both cases there was no factual evidence to support the alleged state interference with religious freedom.

Rather than subject the homes to state licensing and regulation, Roloff turned them over to Corpus Christi People's Baptist Church, of which he was pastor, and the State Department of Human Resources (DHR) in due course went to court to compel the church to comply with the statute. The church this time employed an

66. See *North Carolina v. Fayetteville Street Christian School*, 258 S.E. 459 at 460-461 (1979).
67. See discussion of state regulation of church-related schools at IIIB3.
68. Texas Human Res. Code Ann. Tit. 2, §§ 42.001-42.076 (Vernon 1980).
69. *Roloff Evangelistic Enterprises v. Texas*, 556 S.W.2d 856 (Tex.Civ.App. 1977).
70. *Oxford v. Hill*, 558 S.W.2d 557 (Tex.Civ.App. 1977).

able champion, William B. Ball of Harrisburg, Pennsylvania, who developed an extensive factual record at trial that resulted in a decision adverse to the state. On appeal, the Tenth Judicial District Court of Appeals at Waco adopted the 140 Findings of Fact plus several Conclusions of Law of the trial court, and affirmed the ruling of the lower court. Because these findings and conclusions are so typical of a well-evidenced case for the church—and because the decision was ordered not published—it is reproduced at length here.

> FINDINGS OF FACT
>
> **I. Mission and Operation of the Church Homes**:
>
> (1) The operation of shelters for the needy, and Homes for the rescue of children is enjoined upon the Corpus Christi People's Baptist Church by its organizational documents....
>
> (3) The Homes are operated as an integral part of the religious ministry of the Church and would not otherwise exist....
>
> (5) The mission of the Church's Homes is to produce a conscious turning away from sin [by] the children who reside there.
>
> (6) The Church and the Homes, for Biblical reasons, do not accept any local, state or federal funds.
>
> (7) The children at the Homes are placed there by their parents; the Homes carry out a Scriptural responsibility to these parents for the care and Christian nurture of the children.
>
> (8) Parents of the children who reside at the Homes often have turned to the Homes in desperation over the failure of public institutions to aid their children.
>
> (9) In operation of the Homes for the rescue of children, the Church is religiously commanded to employ only those methods which are based upon and are consistent with [its] beliefs [such as]:....
>
> (i) The only permanent solution for crime, drug abuse and general rebellion against society is a transformed life made possible through personal faith and trust in Jesus Christ....
>
> (12) The practice of saving and nurturing lost children which has been undertaken at the Church's Homes is one which is historically traceable to the early days of the Christian Church and is an expression or manifestation of the Christian religion....

(Paragraphs 18-25 described the organization structure of the church and the homes.)

> **II. The Care Provided to the Children at the Church's Homes**:
>
> (26) Every aspect of the Homes operated by the Church is based on Biblical principle and is designed to inculcate, strengthen and enforce religious instruction and religious formation in the residents and staff of the Homes.
>
> (27) The Church bases its treatment of the children on its recognition that their problems, whether dope addiction, alcohol or rebellious behavior, are only symptoms of spiritual disorder.

(28) In keeping with the beliefs of fundamentalist Christianity, the Church's Homes view the source of the problems of distressed children as rooted in the sinful nature of man. This contrasts with the medical model of dealing with delinquent children whereby the problems are seen not as sin but as a lack or imbalance in education or environment and the thrust of treatment is to remedy that lack. The difference between the two approaches is religious....

(31) Expert testimony establishes that effecting a conscious turning away from sin has been proven to be an effective method in overcoming the problems in which aberrant behavior is rooted.

(32) The children who are brought to the Church's Homes are suffering from the most severe problems imaginable.

(33) Such children have various types of behavior disorders, problems with alcohol, drugs, sex problems, exhibit anti-social behavior, are runaways, and have academic problems.

(34) When children come to the Homes, they are often rebellious and opposed to any form of authority.

(35) Expert testimony established it is essential that children who are severely distressed be treated in a situation where discipline and authority are important components of the community.

(36) There is a distinctly Christian approach to the discipline of unruly adolescents. Such approach is characterized by love, respect for the dignity of the person of the child, a sense of community, the opportunity for fellowship, sharing and service, prayer, and belief in the power of prayer....

(38) Corporal restraint is occasionally, but rarely, used when a child come to the Homes in a state of violence, or with self-destructive impulses.

(39) Mild corporal punishment is used as part of the Biblically-based teaching and function of the Homes, but only as a last resort when non-corporal means have failed.

(40) Residence in a "therapeutic community" is best for treatment of adolescents with problems, and involves full-time residence in a long-term closed community with emphasis on the changing of behavior, where all rules, personnel and programs are geared to the treatment of the child for 24 hours per day. Such treatment, practiced at the Church's Homes, addresses the intellectual, social, spiritual, emotional, and physical as part of a unified whole.

(41) Spiritual treatment bears a great deal of importance to the mental health of disturbed adolescents.

(42) In the spiritual regeneration of children, it is vital to have persons who act as religious role models, such as staff and teachers.

(43) The staff at the Homes is chosen on the basis of Scriptural beliefs. Only Christians who claim to have been "born again" are employed.

(44) The program for treatment of children at the Homes is rooted entirely in the commands of the Bible.

(45) The children are exposed to a religious way of life which is based on love and caring.

(46) As part of the program for spiritual regeneration, the children go to school during the day, attend church 3 times a week, have Bible study and Bible memorization the remainder of the week....

(49) Despite severe educational deficiencies in many cases when entering the Homes, the children have been achieving scores, on nationally recognized standardized tests, which average 1.7 grades above their grade level, and the educational program as a whole has received commendations.

(50) The children learn to live "a separated life" or a life which is in accordance with Biblical mandates and does not include involvement with worldly pursuits.

(51) The children are limited in their contacts with the outside world. This restriction is part of the treatment used by the Homes.

(52) The children learn to lead productive lives and to choose Christ as their Saviour.

(53) The children are expected to assume responsibility for the cleanliness and tidiness of their personal living space.

(54) The Homes do not use drugs or tranquilizers in the care of children.

(55) Activities undertaken at the Rebekah Home include sewing, cooking, sports, choral activities and counseling....

(62) It has been the experience of the Homes that children who have undergone a spiritual conversion to Christianity, turn away from unproductive and self-destructive attitudes and practices.

(63) Experiences at the Homes help to form the lives of those who live there. Those who graduate are able to lead useful, productive Christian lives.

(64) Approximately 90% of those who remain at the Homes from 3 to 12 months are helped dramatically.

(65) Parents of children who have resided at the Homes believe the Homes are places where children with problems can get away from pressures they experience in the public schools and receive the supervision and discipline they need.

III. Operation of the Licensing Process and Application of State Standards:

(66) To be licensed by the State, child care institutions must meet Minimum Standards adopted and administered by the Texas Department of Human Resources.

(67) The DHR in enforcing the Minimum Standards requires 100% compliance therewith, even where the standard is trivial, unless it grants a variance or waiver.

(68) There are approximately 240 separate Minimum Standards which must be met by each child care institution in Texas....

(70) The DHR has no standards or regulations relating solely to religious institutions, but applies its standards and regulations to all child care facilities alike.

(71) The DHR views it as its responsibility to supervise the moral and emotional development of all children residing in child care facilities....

(74) Application of the Minimum Standards gives DHR ultimate control of the plan of care at a child care facility, whether that facility is religious or secular....

(78) The DHR determines in its own judgment whether the mode of dress at a licensed institution is acceptable....

(80) Since all children in the Church's Homes have problems of adjustment in the social environment, DHR Minimum Standards requires all of those children be given "professional consultation and treatment," which in discretion of DHR must include psychiatric treatment.

(81) DHR evaluates the adequacy of in-service training for child care personnel, whether at religious or secular institutions and whether or not the training is religious training....

(83) Only persons who meet all State requirements and who pass a State-developed examination are permitted to be administrators of child care facilities.

(84) The examination, developed and administered by DHR by which is judged a person's "competence" to administer a child care facility, contains questions to which answers involving endorsement by [of?] State-chosen values in the provision of child care are required. These questions and answers evidence State judgments, affecting religious and secular administrators, as to:

(a) The "essential personal qualities of a good child care administrator;"

(b) DHR's view that an "effective" administrator does not counsel children;

(c) DHR's view that "effective" administrators solicit "policy" ideas from children;

(d) DHR's view that an "effective" administrator must involve himself in the life of the outside community;...

(f) DHR's view that an "effective" administrator does not attempt to develop an image of an "authority figure" to the children;

(g) DHR's view that "group decision" is effective and useful;...

(i) DHR's view that providing "employee centered leadership opportunities" is necessary to overcome their "submissiveness;"

(j) DHR's view that permitting boys and girls to live together in the same cottage is "generally healthy" and does not encourage sexual activity;...

(l) DHR's view that child care personnel should "resist being assigned the role of punishing children";...

(85) The DHR, which controls who shall or shall not be an administrator of a child care facility, does not base its judgments as to qualifications of a person to be an administrator upon any standards contained in statutes, or regulations, but rather relies upon subjective personal judgments....

(88) DHR does not grant variances from the requirement to keep all records open to it based on religious objection to investigations of

confidential material (which may include records of communications to clergy) maintained at a religious child care facility.

(89) Minimum Standards require that "the personal qualifications of employees shall be verified," and the records of that required verification, including references as to religious character, are open to State inspection and evaluation.

(90) Inspections of religious child care facilities are not tailored in any way in order to accommodate the statement in the Code that the agency shall not involve itself in the form, manner or content of religious instructions in a religious facility.

(91) It is the policy of DHR, when making inspections of child care facilities, whether the inspection is announced or unannounced, to interview children residing in the Homes.

(92) In the past, representatives of the predecessor agency to DHR have fomented unruly behavior by suggesting to children at the Homes that the program of care is not in their best interest.

(93) Surveillance by DHR of the Homes operated by the Church has been continuous and extensive. Reports of these surveillances indicate that undercover investigators go so far as to pose as church members to gain access to worship services at the Homes operated by the Church. These reports detail contents of sermons and the hymns sung at the worship services.

(94) The surveillance techniques employed by DHR personnel relative to the Church's Homes have included contacting children inside the Homes and soliciting communications from them in which the children are instructed to use code words which would have a special meaning to DHR personnel.

(95) Investigative personnel of the DHR, who carried out surveillance of the Church's Homes, are trained in physical surveillance methods which stress surreptitious techniques.

(96) The surveillance of the Church's Homes by DHR has included the use of binoculars, cameras, tape recorders and the soliciting of information from persons connected with the Homes.

(97) The DHR exercises ultimate control over licensed child care institutions in the areas of care provided the children; the qualifications, competence and performance of the administrators; finances; volunteer workers; and staff. In enforcing this control DHR makes unannounced inspections of facilities, and requires facilities to open all records concerning staff, children and finances to DHR. Failure to submit to inspection and evaluation, or having submitted to such, being found lacking in any regard by DHR, can result in refusal or withdrawal of permission to operate as a child care facility.

(98) The DHR has constituted a church relations advisory group to which are referred requests for variances from, or waivers of, regulations which relate to religious issues.

IV. Objections By the Church to the Licensing Process:

(99) The Church's objection[s] to the application of the Human Resources Code to the program and employees at the Homes are rooted in the need to protect the religious nature of the Homes.

(100) The DHR's judgments concerning adequacy of child care are informed by current theories of child care, and its complete discretion in applying those can result in advancement of one theory of child care over another. This can bring the DHR into conflict with pervasively religious theories of child care.

(101) Institutional licensing representatives of the DHR to assess the appropriateness of child placements are trained in concepts of human development which are inimical to fundamentalist Christian belief.

(102) For Biblical reasons, fundamentalist Christians believe God is sovereign over religious functions, and the province of the State is to assure justice in the civil order. This has been so since the earliest times when Christians were martyred for proclaiming Christ Sovereign rather than Caesar.

(103) The Church believes, on scriptural grounds, that ultimate authority to determine whether or not a religious ministry shall exist over the Church's Homes belong[s] to the Lord Jesus Christ and not to government.

(104) In Fundamental Christianity the concept of separation of Church and State is Biblically based.

(105) The Church objects on Scriptural grounds to any State licensing that would involve inspection, regulation or evaluation of any of the religious aspects of the operation of the Homes.

(106) The Church, and those individuals responsible for administration and operation of the Homes, believe the State has the right to require license, permits or certificates of churches in the areas of physical health and safety.

(107) The facilities operated by the Church presently meet all applicable fire, safety and health regulations, and the Church does not object to inspections by fire, safety and health agencies to verify compliance with reasonable regulations....

(109) The Minimum Standards requires outside evaluation of communications between children and their parents; the Church opposes on Scriptural grounds such interference with the parent-child relationship.

(110) Although Texas law requires administrators of child care institutions to be licensed, such licensing is objected to by the Homes because it is necessary for those pursuing a religious vocation to do so without first securing permission from the State.

(111) Many of the questions on the DHR child care administrators licensing examination are entirely irrelevant to practices which are followed at pervasively religious child care facilities.

(112) For religious reasons the Church objects to a provision of the Human Resources Code which permits the State to assess capabilities and qualifications of employees of the Homes since the qualities needed to perform the work of the Homes are spiritual in nature.

(113) The licensing requirements would make it difficult for the Homes to employ "born again" Christians who they require as staff members.

(114) For reasons of its religion, the Church opposes State requirements which would compel the Homes to make financial disclosures to the State.

(115) The Church believes, on scriptural grounds, that the just shall live by faith and depend on God for finances. For this reason the Homes cannot formulate the type of financial plan contemplated by State requirements....

(117) The Minimum Standards states: "Children in care shall not be required to perform at public gatherings." This would prohibit children from being required to perform at religious services if any part of the public is present.

(118) The Minimum Standards provision requiring children to participate in community activities would undermine the methods of treatment used in the Homes.

(119) The Minimum Standards provision prohibiting "belittling" of the child would interfere with the religiously-based manner in which children at the Homes are taught to recognize their sinful nature.

(120) The Minimum Standards prohibiting the Homes from teaching the children to acknowledge their dependency interferes with the established practice of the Homes to teach children to depend on the Lord....

(122) The closing of the Homes would put the residents back with the troubled lifestyle they pursued previously and would have a devastating impact on them....

(124) Expert testimony establishes closing of the Homes will severely harm the children who are being helped by the Homes. These children, who now live in an atmosphere where religious authority pervades, could become sufficiently confused so as to consider the State, in claiming to exercise a power superior to the Church's relating to the religious mission of the Church, to have become God.

(125) Closing of the Homes would adversely affect the staff of the Homes in that they believe they have a religious calling to serve in these functions.

(126) Closing the Homes would adversely affect the parents of the children, as many believe the last avenue of hope for their children will have been closed.

V. Lack of Compelling State Interest in Affixing the Licensing Requirement to Church Homes:

(127) Expert testimony established that when spiritual regeneration is employed to treat troubled children, it is not wise to subject children who are in a state of violence or extreme emotional upset to psychiatric or psychological counseling or treatment.

(128) Expert testimony established that in the case of a child who is undergoing spiritual conversion after a life of crime or maladjustment, it is not beneficial for the child to be required to participate in functions outside the institution or to form friendships with persons outside the institution.

(129) Expert testimony establishes children with personality problems could become anti-social if not reformed before reaching adulthood.

(130) The treatment of children with severe behavioral disorders is the traditional province of social work, however, the discipline of social work does not have any settled method for dealing with these problems.

(131) The discipline of social work is incapable of acknowledging sin as the cause of aberrant behavior and of recognizing a conscious turning away from sin by conversion to Christ as a remedy for that behavior.

(132) Any person who engages in the spiritual regeneration of troubled children, to be effective, must possess special personal qualities, a belief in his or her ministry, and a belief in his or her call to serve God in this manner.

(133) Traditional social work training, because it ignores the spiritual dimension of life, is not adequate preparation for a person who engages in the practice of the spiritual regeneration of children. Nor would that training adequately prepare anyone for the task of evaluating that spiritual process.

(134) Expert testimony established that a degree in social work or other behavioral science is not necessary to provide good child care and, in fact, may be counterproductive of that end.

(135) Expert testimony established that the State is not capable of engaging in inspection or evaluation of the spiritual regeneration of children....

(137) It is not necessary for a child care institution to be State licensed in order to provide good child care.

(138) The Church's Homes are operating successfully without State supervision or control.

(139) Expert testimony established no system of government or regulation of child care facilities can guarantee the promotion of a child's welfare.

(140) The only requirements of a government agency with respect to provision of child care which can be demonstrated to be necessary and not harmful are those relating to health, safety and sanitation. The State should also be permitted to require persons employed in child care not [to] have been convicted of a crime involving moral turpitude.

CONCLUSIONS OF LAW

(1) The Free Exercise Clause of the First Amendment to the Constitution of the United States protects the rights of the Corpus Christi People's Baptist Church and the pastor to exercise their ministry for the regeneration of distressed children without the necessity to submit to the prior restraint of licensing as mandated by the Texas Human Resources Code.

(2) The Establishment Clause of the First Amendment to the Constitution of the United States prohibits the excessive entanglements between church and state which would result from the application of the licensing requirements of the Texas Human Resources Code to the non-tax supported homes of the Corpus Christi People's Baptist Church.

> (3) The Free Exercise Clause... protects the rights of staff members employed in the homes... to pursue and exercise a religious vocation through service at the homes.
>
> (4) The Free Exercise Clause... protects the rights of distressed children to enjoy a Bible-centered means of regeneration at the homes....
>
> (5) The Free Exercise Clause of the First Amendment, the Due Process Clause of the Fourteenth Amendment, and the Ninth Amendment of the U.S. Constitution protect the rights of parents of distressed children to choose the Bible-centered means of regeneration offered by the Corpus Christi People's Baptist Church for their children.
>
> (6) The Due Process Clause of the 14th Amendment... protects the right of the Corpus Christi People's Baptist Church to utilize its properties in ways which are promotive of the common good.
>
> * * *
>
> Government may not infringe upon religious liberty in the name simply of the public interest; only in the extremely rare situation in which government can from [form? frame?] a State interest of sufficient magnitude to override the interest claiming protection under the free exercise of religion clause. The State must prove a compelling State interest to prevail. In the record in this case the State of Texas has proved no supreme governmental interest which would be served by applying the Human Resources code to the Church's homes. Indeed it has instead been shown that the intended shut-down of the homes, while destroying the enjoyment of basic constitutional liberties, would do so pursuant to a regulatory mass which the Chief Administrator of the Code could not justify, or in important instances, even explain. The public interest is plainly served by leaving the Church homes alone.[71]

The majority opinion was signed by Chief Justice Frank G. McDonald of the Court of Appeals for the Tenth Supreme Judicial District of Texas. A dissenting opinion was entered by Associate Justice Bob L. Thomas, which was very similar to the decision discussed in the next section.

c. *Texas v. Corpus Christi People's Baptist Church* (1984). When this case reached the Supreme Court of Texas, a unanimous decision was announced by Chief Justice Pope.

> The issue is not whether People's Baptist is performing a service that falls beneath licensing standards. The three homes have a good record of high quality service. People's Baptist, from this record, could no doubt easily satisfy licensing requirements, but has chosen not to do so. It reasons that licensing interferes with religious freedom. People's Baptist does not, however, resist all licensing to do business in Texas. In fact, it does its business and service as a corporation..., and it complies with all business licensing requirements.

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71. *Texas v. Corpus Christi People's Baptist Church*, Court of Appeals for the Tenth Supreme Judicial District of Texas at Waco, slip op., unpublished, April 26, 1984.

The issue, therefore, is a narrow one. It is one that Texas courts have twice before decided adversely to People's Baptist or its predecessor in title.... This third effort to achieve a different result was occasioned by a transfer of ownership of the homes to Corpus Christi People's Baptist Church, Inc., by the former owner, Roloff Evangelistic Enterprises, Inc. Reverend Lester Roloff forthrightly explained the reason for the transfer to the corporate church: "Instead of (the State) jumping on the (Evangelistic) Enterprises, you will be fighting with the church from here on...." We have substantially the same cause before us again, prompted only by a change of ownership.

The licensing of child-care facilities operating in Texas is required as a part of the state program to protect the health, safety and well-being of children residing in those facilities. The declared purpose of the licensing requirement is to establish statewide minimum standards through a licensing program.... The licensing act includes this statement:

> It is also the intent of the legislature that freedom of religion of all citizens is inviolate, and nothing in this chapter gives a governmental agency authority to regulate, control, supervise, or in any way be involved in the form, manner, or content of religious instruction or the curriculum of a school sponsored by a religious organization....

People's Baptist contends that the Texas licensing scheme violates the Establishment Clause of the United States Constitution's First Amendment because it creates "excessive entanglement" between church and state....

People's Baptist's reliance on the Establishment Clause is misplaced. The Establishment Clause addresses the issue of whether some form of government *aid*, either direct or indirect, to a religious institution violates the Establishment Clause....

Unlike the traditional Establishment Clause cases, this case involves government *regulation* of a child-care institution which is part of the church ministry.... Requiring nonreligious child-care facilities to comply with the state licensing and regulatory scheme while exempting religious facilities would result in unequal state treatment of the two classes of institutions. This unequal treatment could, arguably, be impermissible under the second prong of the Establishment Clause because the primary effect would be to advance religion.

[S]tate licensing and regulation is a type of entanglement that differs from the entanglement discussed in the traditional Establishment Clause cases. In those cases, the State must examine and determine what programs are religious and what programs are secular to ensure that government aid reaches only the nonreligious ones. In our case, the state regulatory scheme prohibits inquiry into the religious content of the homes' curriculum. The purpose of these regulations is to assure that all child-care facilities, secular and nonsecular, meet certain minimum standards in areas such as financial solvency, staff-child ratio, nutrition and medical care.

> We hold that the licensing requirement does not offend the Establishment Clause.[72]

The court's idea that the Establishment Clause is satisfied if the government does not concern itself with the religious *content* of the homes' *teaching* is typically intellectualist in its view of religion as a matter of belief and teaching rather than of conduct and function. It was commendable that the state was prohibited by statute (as well as by the Establishment Clause) from interfering with religious instruction. The most important part of the homes' mission, however, was not the relatively superficial element of a few hours' religious instruction but the pervasive, round-the-clock embodiment of Christian concern for the *spiritual* (as well as physical) care and nurture of the children, as described in the lower courts' findings of fact. It was this regime that differentiated the homes from other, secular child-care institutions to which the regulations might more appropriately apply. The two kinds of institutions are not alike for purposes of state regulation. The church homes thus do not have "secular counterparts."[73]

The court went on, however, to indicate that state regulation challenged under the "entanglement" prong of the *Lemon* test of Establishment could more suitably be reached under the Free Exercise Clause—which was certainly cogent, but did not follow the Supreme Court's interpretation of the two clauses at that time, and William Ball, the Homes' attorney, was trying to conform to the Supreme Court's understanding of the religion clauses.

> A more appropriate and direct means of questioning the constitutionality of this government regulation is through the First Amendment's other religion clause, the Free Exercise Clause.... The Free Exercise test contains all of the safeguards required to protect People's Baptist's interest without the inherent traps found in an Establishment Clause review.... Under the Free Exercise Clause analysis, the problem of "excessive entanglement" between church and state will, in effect, be addressed....
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> * * *
>
> The trial court based its judgment, in part, on the State's failure to prove a compelling interest. We hold that, as a matter of law, the State has a compelling interest of the highest order in protecting the children in child-care facilities from physical and mental harm. This compelling interest outweighs the burden imposed upon People's Baptist by the licensing requirements.... The State must be especially concerned with the welfare of children residing in child-care facilities. The parents of those children are absent. The children who reside in these homes are entirely dependent upon the operators and employees for their food, shelter and care. Communication with those outside the facility is wholly controlled

72. *Texas v. Corpus Christi People's Baptist Church*, 683 S.W.2d 692 (1985).

73. See similar contention successfully advanced by *Tennessee Baptist Children's Home*, discussed at IF5c.

> by the institution. The staff of the homes exercise total supervision over the children's health, safety and well-being. They direct even the smallest details of the children's daily lives....
>
> * * *
>
> If the State is prohibited from licensing these child-care facilities on religious grounds, it will be prohibited from licensing other facilities claiming the same religious exemption. Children in the homes of some institutions may become the victims of neglect, injury, cruelty or degradation in the name of spiritual regeneration. The State would, under People's Baptist's theory, be powerless to intervene.
>
> Licensing and regulation of child-care facilities are the least restrictive of the alternatives that the State could provide for the protection of children. Without these procedures the State could not gather vital information about a child-care facility that it must have to fulfill its duty to protect the health and well-being of the children residing there. No entity other than the State can carry out these responsibilities for the public.
>
> These cases have been debated and litigated for a number of years upon the claim that the State seeks to regulate religion. This record and those of the two prior cases show that the issue is a spurious one. The State has manifested complete disinterest in the religious doctrines that People's Baptist has in the past or may in the future expound. The homes can comply with the law's modest requirements that are mandatory for all other homes. A decision to close the homes will be that of People's Baptist, not the State.[74]

It is important to note the subtle step in the court's logic that underlay this decision. The court held "as a matter of law" that "the State has a compelling interest of the highest order in protecting the children in child-care facilities from physical and mental harm." With this assertion few would disagree, though some might have reservations about what "mental harm" might cover in the way of spiritual nurture. But the defendant church did not necessarily disagree with that assertion. Finding of Fact No. 106 conceded the "The Church, and those individuals responsible for administration and operation of the Homes, believe the State has the right to require license, permits or certificates of churches in the areas of physical health and safety." Finding of Fact No. 140 added that "The only requirements of a government agency with respect to provision of child care which can be demonstrated to be necessary and not harmful are those relating to health, safety and sanitation. The State should also be permitted to require persons employed in child care facilities not have been convicted of a crime involving moral turpitude."

From this broadly acceptable assertion, however, it was a huge leap to the court's conclusion that, *therefore*, the *means* chosen by the State to achieve its compelling interest in "protecting the children in child-care facilities from physical and mental harm" were valid, effective and the least restrictive available for accomplishing its

74. *Texas v. Corpus Christi People's Baptist Church* (1985), *supra*.

compelling interest. The entire thrust of the detailed record built in the court below was directed to challenging that precise conclusion. Perhaps because it had reviewed earlier suits by the same parties, the Supreme Court of Texas did not trouble itself with that extensive array of Findings of Fact and Conclusions of Law; it simply asserted, *ipse dixit*, that "licensing and regulation of child-care facilities are the least restrictive of the alternatives that the State could provide for the protection of children."

The "least restrictive" alternative would be for the state to be supplied by the Homes with a roster of the children under their care and for the state to give them physical examinations from time to time, perhaps at random and unannounced times, perhaps supplemented by standardized educational and/or psychological tests, and to inspect the premises periodically for compliance with (general and reasonable) fire, safety and sanitation standards. Anything beyond that is not the "least restrictive" means, and the Texas regulations go far, far beyond that, as spelled out in the trial record and the Findings of Fact. Thus the Supreme Court of Texas arrived at its conclusions in disregard—if not in defiance—of the facts in the case as determined by the finder of fact—the trial court—and contained in the record before it. It simply accepted the state's contention that what had been prescribed in the way of licensing requirements was the necessary minimum and effective means of attaining the state's compelling interest, undeterred by copious evidence to the contrary.

This case was marked by extensive Findings of Fact about one of the more presentable religious child-care facilities (in the opinion of the intermediate appellate court) and one of the more wooden and obtuse affirmations of wide state regulatory powers untrammeled by any restrictions of the First Amendment (on the part of the state supreme court). The state's ultimate responsibility for the welfare of all children not being given tolerable care by parents or various institutions can be recognized without needing to concede the sweeping and unrestrained panoply of powers of regulation claimed by the Texas Department of Human Resources and uncritically and unanimously endorsed by the state supreme court.

Admittedly the field of child care is a complicated, delicate and highly controverted area today, and there are no generally recognized theories or solutions to which to repair. All the more reason, then, not to foreclose the options of some of the more effective child-care facilities to follow their (religious) insights, even if they do not coincide with some ideas currently popular in secular social work.

It takes a tremendous amount of effort, energy and ego strength to assert and maintain a consistent level of purpose and standards in any institutional endeavor, and it is all too easy on difficult days to relax and let things slide a little. Therefore, any institution tends to deteriorate over time and to lose some of the initial genius it may have had. Church-related institutions are no exception to this entropy and should not be idealized as having some secret, mystical reservoir of inspiration just because they are religious. They do have potential sources of spiritual regeneration

that nonreligious institutions may not have, but lapses and recoveries occur in both categories because of new injections of purpose and self-awareness from various sources. Assessment of effective child care is not advanced by comparing the best of either genre with the worst of the other. But neither should it be assumed that state regulators invariably "know best" as against religious practitioners, heirs of the people who "invented" systematic care of needy children long before the state took any substantive responsibility in the matter.

d. *Kansas v. Heart Ministries* (1980). A similar case involving a Christian ministry of care for unmarried pregnant girls had meanwhile reached the supreme court of Kansas. It involved Heart Ministries, Inc., founded and operated by the Reverend William Cowell and his wife Carol. Located on a tract of 117 acres seven miles east of Hutchinson, Kansas, it included a church, a school, offices, trailers used as residences by the pastor and staff members, and a radio station. One of the central activities of this cluster of operations was the Victory Village Home for Girls, in which twenty-one girls were placed by their parents at various times between the initiation of the work in 1972 and the intervention of the state in 1977. They came from Kansas and six other states and stayed for periods up to a year, living in the homes of the Cowells and other families nearby while awaiting completion of a dormitory building begun in 1973. The Ministry provided "food and shelter, schooling, counselling, and religious training.... Thirteen girls, in grades one through eight, were attending the school at time of trial."[75] (Not all were unwed mothers, of course. Many were presumably "wayward, homeless or delinquent individuals."[76])

In 1977 the juvenile authorities took into custody four girls who were living in the Cowell's home, two age fourteen and two age sixteen, acting on the complaint of an out-of-state acquaintance of one of the girls. The state then proceeded against the Ministries for operating as a child placement agency without a license, acting as a residential center or group boarding home for children without a license, and bringing children into the state for placement in violation of the Interstate Compact on the Placement of Children. The defendants replied that they "do not intend to apply for any license to operate a foster home or a boarding home for children or to abide by any rules or regulations adopted by the Kansas [authorities] which would make them disobedient to God's command."[77] The defendants' specific objections were expressed at trial by the Reverend Mr. Cowell.

> [He] testified that he had no religious objection to reasonable regulations pertaining to health and safety, but he objects on religious grounds to many of the regulations. He believes that corporal punishment is required by scripture; this includes beating children with belts and boards. He objects to the requirement that sound and sufficient finances be disclosed,

75. *Kansas v. Heart Ministries, Inc.*, Kan., 607 P.2d 1101 (1980) at 1105.
76. Ibid., the court's quotation from the Ministry's 1971 articles of incorporation, at 1104.
77. Ibid., quoting defendants' answer to pretrial interrogatories.

> that an annual financial statement be prepared, and that the accounts be audited, believing that God will provide.... The requirement of the keeping of records of each child and the disclosure of those records to the State, would be a breach of ethics of his Christian ministry. He objects to the requirement that medical and other professional consultants be arranged for in advance, believing that as the need arises someone can be found to meet that particular need. Finally, he reads the regulations as prohibiting the defendants from attempting to convert to the Christian faith all residents in the Village, a duty which is Biblically imposed upon all Christians.

The trial court found that the defendants had indeed been involved in "the housing of pregnant girls; the placing of the offspring up for adoption; the housing of children under sixteen years of age...; the beating of children; the restriction of childrens' mail, communication, mode of dress, freedom of religion, and even limiting their education; the placing of children from outside the State... to foster homes in this State; using children to raise funds for its ministry," and granted the injunction.

The Supreme Court of Kansas reviewed the case on appeal, including challenges to the constitutionality of the statutes involved.

> The first question before us is whether the State has an interest in the children's care, when provided by other than parents, sufficient to warrant control by way of license, inspection, and regulations.... [In a 1915 decision, *In re Turner*,[78] we quoted from *Wisconsin Industrial School for Girls v. Clark County* (1899):]
>
> > Every statute which is designed to give protection, care, and training to children, as a needed substitute for parental authority and performance of parental duty, is but a recognition of the duty of the State, as the legitimate guardian and protector of children where other guardianship fails. No constitutional right is violated, but one of the most important duties which organized society owes its helpless members is performed just in the measure that the law is framed with wisdom and is carefully administered.[79]

This principle is an important attribute of civilization, and represents a historic advance over the days when unwanted infants could be exposed to die or when orphaned urchins had to fight for survival in the alleys. But two equally important qualifications are included in this statement: (1) "where other guardianship fails"; that is, the state's concern is one of last resort; when there are other (suitable) guardians able and willing to take responsibility for children, the state should let them. What other guardians are "suitable" is, or course, the nub of the question at issue here, dealt with in part by the other proviso: (2) "just in the measure that the law is framed with wisdom and is carefully administered." Criticism in this section of

78. 145 P. 871 (1915).
79. 79 N.W. 422 (1899).

laws that are unwise and/or administered with bureaucratic arrogance should not be understood to nullify the underlying and essential principle enunciated by the Wisconsin court. The Kansas Supreme Court continued:

> The parents of the children in the defendants' facilities are absent and cannot look after them. The children are dependent upon the operators and employees of the home in which they reside for food, care, and shelter. Their welfare is a matter of State concern. Historically the State has protected children from injury and injustice, from harmful employment and environment, and from abuse in all forms. Under the doctrine of *parens patriae*,[80] the State has power to legislate for the protection of minor children within its jurisdiction.

The next question was whether the state, in exercising this power via statute and regulation, had violated the defendants' right to free exercise of religion.

> Appellants rely upon the trial court's finding that the activities and ministries of the defendants, including the operation of the home, are religious in nature and constitute the exercise of religion. They then challenge the licensing and fee requirements as "prior restraints" on the exercise of a constitutionally protected right, the free exercise of their religion as exemplified by their ministry to children in the operation of the home.
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> * * *
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> Appellant is equating the operation of homes for children, usually a secular activity, with the dissemination of religious ideas. The teaching of religious doctrine to children simply cannot be equated with every aspect of the physical care of children on an around-the-clock basis for First Amendment purposes. The free exercise clause permits reasonable regulation of otherwise protected religious activity when imposed pursuant to a compelling State interest....
>
> While religious beliefs cannot be regulated, some overt acts, though in the exercise of one's religious convictions, are not totally free from legislative restriction....
>
> We have previously discussed the interest and the duty of the State as *parens patriae* in the care of minor children. Some regulation of establishments proposing to provide such care is absolutely necessary; even appellants make no objection to the State's fire and safety regulations.
>
> But appellants adamantly and unequivocally refuse to apply for any State license, or to pay the required fee. Absent the existence of licensing procedure, applicable to sectarian and nonsectarian establishments alike, the State lacks essential knowledge required for the exercise of its power and duty to protect children from physical and mental harm....

80. "Parent of the nation," a term first applied to the monarch and later to the state in its role as responsible for the welfare of children without parent(s).

> The compelling interest of the State, as *parens patriae*, is the protection of its children from hunger, cold, cruelty, neglect, degradation, and inhumanity in all its forms. To fulfill this responsibility, the legislature has elected to impose licensing and inspection requirements. To these requirements the defendants' free exercise rights must bow....
>
> The defendants have no license, and they have not sought one. They state that they do not intend to apply for a license, or to abide by any regulations which they find objectionable on religious grounds. Since we hold that licensing is necessary and the fee reasonable, and defendants have no intention of becoming licensed, the reasonableness of each and every regulation as balanced against defendants' religious objections need not be determined.... The trial court's grant of injunctive relief was proper.[81]

The Court of Appeals of North Carolina had reached a similar conclusion in a similar situation involving a church-operated child day-care center in a 1979 opinion written by Judge Sam Erwin III, son of the senator of the same name, *North Carolina v. Fayetteville Street Christian School*,[82] citing *Roloff Evangelistic Enterprises v. Texas*, *q.v.*, *supra*.[83]

Because of such decisions as the foregoing, the operators of (some) church-related child-care facilities turned to the legislatures for relief, and some states responded by exempting them from regulations that non-church-related child-care facilities had to meet. This pattern of exemption led to a different kind of litigation, in which the nonexempted facilities sued the state for putting them at a competitive disadvantage, charging violation of the Establishment Clause of the First Amendment.

e. *Forest Hills Early Learning Center v. Lukhard* (1984). Such a case developed in Virginia, where the legislature had made an accommodation to (some) religious day-care providers, exempting them from many of the requirements imposed by the Commonwealth's Department of Welfare on all other providers. Several of the nonexempt providers—Forest Hills Early Learning Center, Inc., Academy Day Care, Inc., and Holloman Child Care Centers, Inc.—sued William Lukhard, director of the Department of Welfare and Institutions, alleging that the exemption created an establishment of religion.

A significant split in the religious community was signalized by two *amicus* briefs filed in this case and referred to in the text by the Fourth Circuit Court of Appeals. The Christian Law Association (not to be confused with the Christian Legal Society) filed in support of the state's accommodating exemption, and the Virginia Council of Churches entered a brief on the other side, urging state regulation of *all* child day-care facilities, including religious ones!

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81. *Kansas v. Heart Ministries, Inc., supra*.

82. 258 S.E.2d 459 (1979).

83. 556 S.W.2d 856 (1977), discussed above.

The Fourth Circuit Court of Appeals, in an opinion written by Judge James Dickson Phillips for a unanimous panel composed of himself and Circuit Judges Emory Widener and Francis Murnaghan, summarized the effect of the exemption:

> In the critical areas of licensing itself, and of program, insurance, financial resources and management, staff qualification, and internal administration following licensure, the sectarian centers are wholly relieved of offical state regulation, while the nonsectarian centers remain subject in all these areas to extensive regulation under standards enforceable by state agency inspection and legal sanctions. In place of the extensive state inspection and enforcement mechanisms which remain available to enforce compliance by the nonsectarian centers with these standards, there has been substituted for the sectarian centers only limited disclosure and certification requirements respecting the qualifications (unspecified) of its staff personnel, its tax-exempt status, its liability insurance coverage, its current compliance with applicable health and safety laws, and a written description of its physical facilities, enrollment capacity, food service and staff health requirements. Although the disclosure and certification requirement is itself enforceable, no sanctions with respect to the matters required to be disclosed or certified remain for the sectarian centers, as they do with respect to the nonsectarian.
>
> In the general areas of child health and safety, the sectarian centers are relieved of a wide range of special regulatory standards related to nutrition, space, heat, light, ventilation, and physical safety which still apply to the nonsectarian centers and are enforceable against those centers by state level inspection and sanctions. In place of these special standards related to child health and safety there has been substituted for the sectarian centers only those health and safety standards already applicable to the general population through local and state fire, safety, and sanitation codes.
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> * * *
>
> The essence of the matter is simply stated. The "religious institutions" exemption is challenged on the basis that it violates the establishment clause: that in its sphere of operation the exemption impermissibly favors "religion over nonreligion...." [T]he appropriate standard for assessing this establishment clause challenge is the three-part guideline test of *Lemon v. Kurtzman*[84].... Under that analytical test, the challenged legislation fails constitutionally unless it is found to have a secular legislative purpose, to have a primary effect that does not advance or inhibit religion, and to have no potential for fostering excessive governmental entanglement with religion.... Seeking to justify the statutory exemption under this test, the state has advanced as the "secular purpose" of the exemption the constitutionally compelled or permitted accommodation it makes to the free exercise rights of the exempted institutions.
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> * * *

84. 403 U.S. 602 (1971), discussed at IIID5.

> Where free exercise rights... exist, the state is constitutionally obligated to accommodate them, even if this entails some degree of disparate treatment of religious activity; by definition, constitutionally compelled accommodation of free exercise rights cannot abridge the establishment clause.[85] And, indeed, to provide the necessary "play in the joints productive of a benevolent neutrality,"[86] the range of permissible state accommodation to free exercise rights runs beyond that constitutionally compelled—out to limits ultimately imposed by the establishment clause. Where those limits of permissible accommodation lie in a particular case involves a "value judgment" guided only by historical inquiry and prior authoritative judicial decisions.
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> * * *
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> But when we look to the totality of the evidence marshaled and to the activities exempted from former regulation, it simply cannot be held that this burden [of demonstrating free exercise rights justifying the exemption] was carried. In the first place it could not be thought carried on the basis that *all* activities, or at least all "good works" activities, of concededly religious institutions, are *per se* "religious," hence entitled to free exercise protections. This simply is not the law.... The rule instead is that some activities of undoubtedly "religious" institutions may fall completely outside the realm of protected "religion," notwithstanding their undoubted legitimacy or manifest social virtue.[87] Neither, obviously, does the whole sweep of exempt activities here lie so manifestly at the core of religious practices—such as prayer, worship, and ritual—as to be entitled *per se* to protection.
>
> These possibilities aside, the existence of free exercise rights justifying the full sweep of legislative protection afforded by the exemption here could only have been demonstrated by evidence—historical, ecclesiastical, and other—that sufficiently related the particular activities exempted to sincerely and centrally held religious beliefs of the sectarian sponsors of child care centers.
>
> The record is simply devoid of evidence from which any such specific relationship between beliefs and conduct could have been found to exist across the range of the now-exempted activities.... [The evidence] actually demonstrated the converse—that some at least of the exempted activities were not entitled as a matter of law to free exercise protections. For purposes of our review it suffices to identify only the most obvious. On no possible view could the requirement that child care centers contain a minimum area of space per child, that they provide suitably spaced and covered cots and cribs, and that they provide nutritious meals, be held to impinge upon any currently known or practiced religious beliefs under

85. Citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972), n. 22, and *Sherbert v. Verner*, 374 U.S. 398, 409 (1963).

86. Quoting *Walz v. Tax Commission*, 397 U.S. 644, 664 (1969).

87. Citing *De la Salle Institute v. U.S.*, 195 F.Supp. 891 (1961) (operation of a winery by a Roman Catholic religious order), a rather weak reed on which to lean such a heavy point.

> free exercise protection.... The exemption, on its face, and as a matter of law was overbroad in relation to the secular legislative purpose claimed for it.... The defendant was therefore not entitled to summary judgment.[88]

The court did not, however, award summary judgment to the plaintiffs but remanded the case to the district court to determine whether the state could demonstrate a free-exercise justification for a narrower exemption, directing the district court to notify and invite members of the exempted class, who were not parties to the case, to intervene and submit evidence to justify their claims that exemption was necessary to protect their free exercise of religion. Failing to receive such evidence sufficient to persuade it to sustain any elements of the exemption, the district court was directed to grant summary judgment to the plaintiffs, thus striking down the Act.

As an interesting footnote to this case, the court referred to the two *amici* in the margin.

> Taking the most extreme position possible, Christian Law Associates, as *amicus curiae* aligned in interest with the state, apparently contends that total accommodation is compelled by the mere fact that religious institutions are the sponsors of the exempt centers.
>
> * * *
>
> [The exemption] is also arguably overbroad in its inclusion of all "religious institutions" in the exempt category. As... the *amicus* brief of the Virginia Council of Churches forcefully emphasizes, a significant number of the facially exempted sectarian sponsors have expressly disclaimed any felt entitlement to exemption or any felt burden upon their free exercise rights under the pre-exemption regulations. This attitude was known to the legislature at the time the exemption was under consideration, and posed an obvious dilemma for that body.... The legislature's attempted solution was to exempt all and then give any exempted institution the right nevertheless to opt for licensure and full regulation along with the nonsectarian operators.... The awkward—if not cruel—Hobson's choice thereby imposed upon sectarian sponsors forced to choose between relinquishment of an unsought but gratuitously conferred competititve advantage over their nonsectarian counterparts and the maintenance of religious and constitutional principles at odds with those of their other sectarian counterparts may well involve still another basis for constitutional challenge. The potential that this device posed for exacerbation by the state of religious differences among the sectarian operators is obvious, and may well involve quite another set of "entanglement" problems for the exemption as presently structured.

But the last word had not been spoken on this case. For further developments see § h below.

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88. *Forest Hills Early Learning Center v. Lukhard*, 728 F.2d 230 (CA4 1984).

f. *Michigan Department of Social Services v. Emmanual Baptist Pre-School* (1986). Emmanual Baptist Church operated a preschool child-care facility beginning in 1974. It sought and obtained a license from the Department of Social Services in 1976 permitting it to enroll and care for up to twenty children, ages two and a half to six years. In 1979 the Church decided it no longer wished to be licensed to operate a child-care facility because of its religious principles, and in that year it was accordingly delicensed. But it continued to operate its preschool without a license, contrary to state law. The state took the church to court to require compliance with the statute. The trial court ruled that the church must obtain a license in order to operate its preschool but exempted the church from complying with state regulations regarding (1) qualifications of program director, (2) fostering a "positive self-concept" in children, (3) prohibiting corporal punishment, and (4) requiring inspection of financial records. Both the church and the Department of Social Services (DSS) took appeals, and the Michigan Court of Appeals issued a decision written by Judge D. P. Kerwin on behalf of himself, Presiding Judge Harold Hood and Judge Donald Holbrook.

The opinion held that licensure did not violate the free exercise of religion of the church.

> While the church has shown that it abhors licensure as a general proposition, it has presented no evidence that the DSS has ever attempted to regulate the religious program or suppress the exercise of religious beliefs at the pre-school.
>
> Even had a specific burden been demonstrated, we are of the opinion that the state's compelling interest in protecting and nurturing its very young children... and in licensing and regulating day-care facilities for minors, renders any burden on the church's exercise of religion a constitutionally permissible one.

Therefore it affirmed the lower court's ruling requiring licensure. On the other matters it reversed.

> (1) The church selects its pre-school director and teaching staff from fundamentalist Christian colleges such as Bob Jones University and Tennessee Temple University, which shun accreditation on Biblical grounds. Persons who attend accredited schools are acceptable if they are born-again Christians.... There was evidence that DSS has developed certain steps to determine whether a college or university is "accredited" for the purpose of enforcing [the statute]. Under the policy, the many in-state and out-of-state colleges which accept credits from institutions such as Bob Jones University... provide a means for "accreditation" for those schools. Moreover,... a license applicant may be exempted from any administrative rule if there is clear and convincing evidence that an alternative complies with the intent of the administrative rule. These rules, if used by the church, provide a way of avoiding the burdens posed by

[licensure].... Moreover, the state's compelling interest in assuring that program directors possess minimal qualifications is of sufficient magnitude to override any burden imposed upon the church....

(2) [The licensing rules] require child care centers to provide a program which fosters a "positive self-concept" among children.... The church claims this rule unlawfully burdens the free exercise of its religious beliefs. The church teaches children the doctrine of innate depravity of mankind, which holds that all human beings are sinners in need of salvation.... [T]he church expressed concern that a DSS inspector might misinterpret the teaching of this doctrine as being contrary to [the rule], and deny or revoke licensure on that basis. The church also assails the rule as promoting "secular humanism," as opposed to fundamentalist doctrine....

However, at trial it was established that the church does *not* oppose a child's having a positive self-concept, so long as it is within its religious framework.... A DSS representative testified that the doctrinal position that each individual is depraved would not contradict the "positive self-concept" rule. The rule... speaks to the way children are handled, *i. e.*, whether they are belittled or demeaned by adults, or made to feel inferior to other children. DSS did not oppose the teaching of doctrine so long as it is age-appropriate. There was also testimony that almost any reasonable program would stand the test of this rule. Under it, a day care center may adopt the methodology of its choice.

The church evidences great concern about the *potential* for abuse in the "positive self-concept" rule, but fails to show any actual infringement which has burdened its free exercise of religion. We will not invalidate a statutory scheme merely because it may be subject to an unconstitutional interpretation.... [Therefore] the church must be required to abide by it.

(3) [The state] prohibits corporal punishment by a child care center staff member.... [But on] May 19, 1980, the DSS issued an interpretive guideline which permits the use of spanking in child care centers under specific circumstances....: [only on] the buttocks... protected by the child's clothing,... [only by] the program director,... [and only with] the open palm of the... hand.

The church adheres to a literal interpretation of the Biblical admonition: "Spare the rod, spoil the child." At the pre-school, teachers spank children using a ping-pong paddle, as it is believed that the Biblical injunction requires the use of a "rod" as opposed to the hand.... In our view, the lower court erred in ruling that the church need not refrain from corporal punishment using a ping-pong paddle...

The state's interest is clear and compelling. The rule protects very young children from physical harm by prohibiting potentially abusive forms of discipline. Child abuse by adults is a major risk to children receiving daily out-of-home care in day-care centers.... Thus, although the prohibition against spanking with a ping-pong paddle burdens the church's free exercise of its religious beliefs, the state's interest in protecting its very young outweighs the burden. In so holding, we recognize that some practices rooted in religious principle may be dangerous to the health and

> welfare of certain members of the community.... It is not beyond the power of government to prevent such practices through regulation.
>
> (4) [The rule] authorizes the DSS to inspect the financial records of child care organizations.... We do not find evidence in the record to support the notion that [the rules], as applied to the church, burden its free exercise of religion. The church asserts that "the above-cited provisions, without question, present the potential of government intrusion into church affairs" and "they are vague and standardless provisions."
>
> In August, 1974, Pastor Harold Asire completed DSS's then-existing financial form as part of his application for a license to operate the pre-school. Pastor Asire did not testify as to how complying with this requirement infringed upon the pre-school's free exercise of religion....
>
> We reverse the holding of the lower court that these sections, to the extent that they allow plaintiff to inspect the church's financial records, should not be strictly enforced against the church.[89]

Thus the state prevailed on all counts. According to Carl Esbeck, professor of law at the University of Missouri—Columbia, who keeps careful count of these matters, of all cases dealing with the issue of state regulation of child day-care centers operated by churches at the time of writing, only one had been favorable to the church party, and that was an unreported and unappealed decision from a federal district court in South Carolina: *Tabernacle Baptist Church v. Conrad*.[90] This was in marked contrast to the pattern of litigation of state regulation of church-related schools of general elementary instruction discussed in Volume III, Part B, in which approximately half of the decisions were favorable to the church party. The difference may be due in part to the distinction between church institutions of *education* and church institutions of "*welfare*" that dates back to *Bradfield v. Roberts* (1899).[91] Under that distinction, welfare activities sponsored by churches are not only subject to a greater degree of state regulation but are eligible for many forms of state aid, whereas educational activities sponsored by churches are not eligible for most forms of state aid[92] and are free of many kinds of state regulation in various jurisdictions.[93] But the situation may have changed with developments reported in § h below.

When church institutions of welfare (or education) seek and accept state financial assistance, of course, they open themselves to a much greater degree of state supervision and regulation, which represents an entirely different category from the regulation of private undertakings not supported by the state. Unfortunately,

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89. *Michigan Department of Social Services v. Emmanuel Baptist Pre-School*, 388 N.W.2d 326 (1986), 330-331.

90. C/A No. 79-149 (D.S.C. Oct. 28, 1980); oral communication from C. Esbeck, July 31, 1986.

91. 175 U.S. 291 (1899), discussed at D2b above.

92. See discussion at IIID.

93. See discussion of cases under IIIB, as well as *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), discussed at ID3a.

eschewing state support does not exclude the possibility of regulation by the state anyway.[94] That, of course, is because the state has the authority and the responsibility under the police power to regulate private entities and activities where necessary to protect and promote the public health, safety, order and (an increasing number of forms of supposed) welfare even where it does not provide financial assistance under the spending power. Nevertheless, some religious bodies wish to keep such regulation (whether in welfare or education) at a minimum. Where government provides substantial funding for the care of children, the case is indeed different, but even here the government may benefit by preserving some degree of variety and uniqueness in the various private religious institutions it subsidizes. (One of the most searching legal struggles over the proper role of government in managing and financing a citywide system of child care and placement occurred in New York City from 1974 to 1988 and should be read in conjunction with this section.[95])

g. *Faith Mission Home* (1986). A somewhat related area is care of the retarded. In the Blue Ridge Mountains of Virginia the Beachy Amish Mennonites operated a home for severely and profoundly retarded children and adults called Faith Mission. The State of Virginia brought an action against the home—which is licensed—because of the use of corporal punishment (e.g., spanking). In October 1985 Judge Gerald Tremblay of Albemarle County Circuit Court denied the state's request to close the home, but ordered the home to cease using corporal punishment. In June 1986 the home petitioned the judge to lift the ban on corporal punishment because it unconstitutionally infringed on the right of the Mennonite proprietors to obey their religious principles. "It's a Bible command," claimed Reuben Yoder, one of the two brothers who managed the school.

A group of parents of children in the home hired a lawyer to help the Mennonites keep the home open and to run it according to their long-standing Biblical beliefs. The parents asserted that the home was "a great institution" which had provided "a well-run, loving haven for children who have been rejected elsewhere."[96]

The judge dismissed the Free Exercise arguments and decided the case solely on whether physical punishment was necessary in the treatment of mentally retarded children.[97] After hearing expert witnesses on both sides of this question, Judge

94. See, e.g., *Grove City College v. Bell*, 687 F.2d 648 (1982), 465 U.S. 555 (1983), in which a college that had deliberately eschewed all forms of state aid except student "Pell" grants, nevertheless found itself subject to federal regulation, at least of the student financial aid department, and the Civil Rights Restoration Act was enacted by Congress to make such regulation applicable to the entire institution in such instances.

95. See *Wilder v. Sugarman* and *Wilder v. Bernstein* at VC5.

96. Washington *Post*, "Spankings at Home Pit Religion, Rights of the Disabled," June 30, 1986, A1, A4; first quotation is from one of the parents; second is from author of the news article, Leah Latimer, paraphrasing the parents.

97. Washington *Post*, "Religion Argument Dismissed," July 1, 1986.

Tremblay found corporate punishment permissible, but suspended his judgment for ninety days to allow the state opportunity to appeal.[98]

Since the judge had eliminated the claim of religious freedom, this case was removed from the purview of this work, strictly speaking. But should he have dismissed that claim? How should one sort the permissible from the impermissible in such an esoteric and controverted area, where even "experts" dispute whether corporal punishment is permissible, while some advocate the systematic use of "aversive therapy" (which in its effect is often indistinguishable from corporal punishment)? What of the testimony of the parents that the Mennonite home is a "great institution"? Certainly they were not urging the state to close it; quite the contrary.

One assessment of this situation was offered by a psychiatric social worker who was the chief of service in charge of a large unit for highly functioning adolescents in a state institution for the retarded for five years, and who is also very sympathetic toward minority religious groups, especially the Amish. Her assessment was that the home should be closed because the Yoders did not have more than a commonsense idea of what severely and profoundly retarded persons were able to do or what effect could reasonably expect to be accomplished by corporal punishment. While *un*sympathetic to the doctrines of "behavior modification" (with its "aversive therapy"), she contended that corporal punishment can become all too readily an outlet for child-care staff to vent their frustration on hapless residents without exerting themselves to find more constructive means of coping with problems. She characterized the Mennonite brothers (as portrayed in the news stories) as "ignorant and stubborn," and therefore unlikely to explore other options beyond spanking for leading retarded persons through developmental stages.

She also discounted the parents' testimony, contending—from her own experience with parents' groups—that their primary concern often was to find a residential treatment center far from their own abode that would *take* their impaired offspring and *keep* them.[99] The particular conditions of care in such an institution would be an important consideration, but secondary. The operant terms in the parents' view would be the fact that the Mennonites had been willing to take "children who have been rejected elsewhere." Whether this assessment is correct or not, the point is that religious claims should not be romanticized or idealized, but should be weighed in a sophisticated perspective with other important considerations. Claims under the Free Exercise Clause should be given great weight—perhaps more than the Albemarle County Court gave them—but not necessarily conclusive or dispositive weight,

98. *Virginia Circuit Court v. Faith Mission Home*, No. 53-37-C, Albemarle City Circ. Ct., July 3, 1986.

99. Maryon H. Kelley, M.S.W., Columbia Univ., 1967, Unit Chief, Suffolk (N.Y.) Developmental Center, 1974-79.

especially against the welfare of dependent third parties not members of the group claiming Free Exercise.

h. ***Forest Hills Early Learning Center v. Grace Baptist Church*** **(1988).** The Virginia arrangement (discussed at § e above) was given a new lease on life by a 1988 decision. The scene of church-based child day care was somewhat altered by the Supreme Court's unanimous decision in a church employment case, *Corporation of the Presiding Bishop v. Amos* (1987),[100] at least in the view of the Fourth Circuit Court of Appeals, when it had occasion to revisit the *Forest Hills Early Learning Center* case. The court executed a rather abrupt about-face per Judge John D. Butzner, Jr.

> This challenge to the constitutionality of Virginia's exemption of religiously affiliated child care centers from state licensing requirements has been before this court before. Acting on our earlier instructions, the district court concluded that the statute exempting churches from obtaining licenses and from complying with regulations governing child care centers violates the First Amendment's Establishment Clause. Because the U.S. Supreme Court's recent decision in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos* (1987), requires an analysis different from that which we have previously employed, we reverse the judgment of the district court and hold the challenged statute constitutional.
>
> * * *
>
> Our earlier analysis of the statutory exemption was guided by the three-prong test of *Lemon v. Kurtzman*.[101] The Supreme Court's decision last term in *Amos* adheres to the *Lemon* test, but explains and clarifies it in ways that require us to revise our analysis.
>
> At issue in *Amos* was a statute specifically exempting religious organizations from the ban on religious discrimination imposed on all other employers by Title VII of the 1964 Civil Rights Act. The Supreme Court held that the exemption of religious employers from Title VII's mandate passed each of the elements of the *Lemon* test.... The court held it a permissible and sufficient legislative purpose "to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." The government interference to be avoided includes both positive statutory mandates to which a religious group would have to conform its practices, and the "significant burden on a religious organization" caused by forcing it to defend its beliefs and practices in extended free exercise litigation before "a judge [who may] not understand its religious tenets and sense of mission."
>
> The potential for just the sorts of burdens the *Amos* court was concerned with is clear in this case. Absent the exemption, some church leaders

100 . 483 U.S. 327 (1987), discussed at ID4b.

101 . 403 U.S. 602 (1971), discussed at IIID5.

> would be forced to violate their convictions against submitting aspects of their ministries to state licensing or face legal action by the state.
>
> The interference that the Supreme Court sought to avoid is apparent in the district court's declaration that "while the [churches] may characterize this activity as part of their ministries, the court is not bound to accept this characterization," and that "operation of child care centers by these sectarian institutions is a secular, and not religious, activity." The district court, noting that child care centers are relatively recent phenomena, suggested that "sectarian groups, in establishing day care centers, were responding to secular economic need rather than expanding the scope of their ministries." *But religious groups throughout history have reshaped their ministries to respond to changed circumstances*. [Emphasis added.] *Amos* clarifies that it is a legitimate legislative purpose to avoid interference with the execution of religious missions in a non-profit area in which a church operates, without reference to the role played by churches in the past.
>
> The *Amos* court distinguished laws that positively aid, endorse, and advance religion from laws that, by adopting a hands-off policy, leave the way open for churches to advance their own teachings. Virginia, in exempting religious child care centers from its licensing requirements, cannot be said to be advancing religion through its own activities and influence.
>
> Finally, the court in *Amos* held that such exemptions actually lessen the risk of entanglement between church and state. The burdensome issue-by-issue free exercise litigation that would be necessary absent a general exemption results in considerable ongoing government entanglement in religious affairs. This would both chill and interfere with religious groups, enmeshing judges in intrusive and sometimes futile attempts to understand the contours, sincerity and centrality of the religious beliefs of others.[102]

If other lower courts follow this course in applying *Amos* to (legislatively created) exemptions for church-related ministries, it will have a significant effect in shifting the slope of regulatory litigation—such as that described in this section—to a stance more favorable to churches. *Amos* may increasingly come to be seen as a watershed decision with respect to legislatively crafted accommodations for free exercise, and some of the struggle may move from courts to legislatures. The *Amos* watershed, however, does not mean that the courts are going to craft such accommodations on their own initiative. But where a legislature has done so, the courts may begin to show greater deference to its judgment. On the other hand, since *Oregon v Smith*,[103] legislatures may be less inclined to carve out exemptions for religious bodies if the Free Exercise Clause poses no threat of successful litigation against government for enforcing "laws of general application" against religious groups.

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102 . *Forest Hills Early Learning Center v. Grace Baptist Church*, 846 F.2d 260 (CA4 1988).

103 . 110 S.Ct. 1595 (1990), discussed at IVD2e.

i. A Commentator's Proposal. Carl Esbeck has commented on some of the foregoing cases and offered a possible solution to the problem of state regulation of religious social service ministries. With reference to *Kansas v. Heart Ministries*, he wrote:

> Curiously the court... neglected to consider the least restrictive means requirement in its free exercise analysis. This is particularly disturbing because the regulations were so comprehensive and persuasive [pervasive?] that the court declined even to labor to summarize all of them. In the court's muddled approach, seemingly focused on free speech rather than free exercise values, it was apparently deemed sufficient to baldly assert that:
>
> > Absent the existence of licensing procedure, applicable to sectarian and nonsectarian establishments alike, the State lacks essential knowledge required for the exercise of its power and duty to protect children from physical and mental harm. Absent licensing, the fire and safety regulations, with which defendants are willing to comply, could not be effectively enforced and their purpose would be compromised.
>
> No reasoning is tendered by the court to disclose why these vital concerns cannot be met absent licensing. Obviously they can be. Only a little imaginative thought would have been necessary to see that the models offered by the Indiana and Virginia child day-care acts point the way toward limited intrusion into this sensitive constitutional area, with the state's oversight in the health, fire, safety, and child abuse matters retained and effectively enforced.[104]

Esbeck offered the following proposal for a suitable mode of accommodation of the legitimate interests of the state and the Free Exercise interests of religious ministries:

> Where a "substantial threat to public safety, peace or order"[105] is implicated, the state can and should monitor the activity involved. The battle is not over whether the state has a regulatory interest, for it clearly does, but over the nature and degree of that involvement. The legislation in Indiana, Virginia, Louisiana, Alabama and South Carolina[106] suggests an approach that accommodates both legitimate state concerns and the values undergirding the free exercise and establishment clauses. Legislation satisfied the state's compelling interests in health, fire, and safety by permitting exempt religious organizations to comply as follows:

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104. Esbeck, Carl, "State Regulation of Social Services Ministries of Religious Organizations," 16 *Valparaiso L. Rev.*, Fall, 1981, 1, 42-3, quoting ***Kansas v. Heart Ministries, Inc.***, 607 P.2d 1102, 1111-1112.

105. The quotation is from *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972).

106. Described earlier in the Esbeck article and similar to the model outlined in the quotation, *infra*.

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

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

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

4. Upon receipt of a sworn written complaint from a member of the public, the state may inspect for violations of fire, health, and safety codes and for physical abuse. The state shall submit the sworn complaint to the appropriate local or state official for investigation and, if appropriate, prosecution....

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

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

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

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

Any organization accepting public funds, and thus not "pervasively religious," should have little difficulty submitting to a comprehensive state licensing and regulatory scheme.[107]

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107 . Esbeck, *supra*, pp. 53-56. Used with permission.

4. Counselling and "Clergy Malpractice"

For as long as there have been religious leaders (which is "always"), people have been coming to them for help with spiritual (and other) problems. In recent centuries—since there has come to be some competition among rival, mutually exclusive religious groups, and adherence to any one of them is (more or less) voluntary—one of the common modes of "outreach" by which a religious group interacts with the world outside its doors is to offer spiritual counsel to anyone who seeks it.

This service is not necessarily intended as "evangelism," though it may actually be one of the more effective ways of bringing new members into the fold. Here, as in the other sections above on "serving human need," the primary object is just that: to help reduce the store of human misery by assuaging the spiritual pain of human beings, whether they belong to the church or not.

One of the common and central expectations about the clergy is that they are available to counsel with those in need of guidance, forgiveness, consolation. And that service is usually not limited to members of the existing flock, although in some communions it may be. The legal problems arising from pastoral counselling could be treated either as an "internal" or an "outreach" activity of religious bodies, and indeed a lengthy treatment of confidentiality of communications to clergy does appear under internal activities.[108] But so-called clergy malpractice is discussed under "outreach" because the pastor is most vulnerable to attack on this score from persons outside the church, at least with respect to legal liability. In the case that follows, the counselee was—or had become—a member of the church, but suit was brought by nonmembers, the counselee's parents.

a. ***Nally v. Grace Community Church*: History.** The leading—and virtually *only*— "clergy malpractice" case at this writing (although others may follow if the courts indulge this kind of litigation) arose in southern California, a region of uniquely rich and varied religious—as well as legal—proliferation. Grace Community Church of the Valley was the largest Protestant congregation in Los Angeles County, a booming evangelical church with a staff of over twenty pastors. To this church in 1973 came one Kenneth Nally, a young man who was attending the University of California at Los Angeles. The history of his pathetic hegira is summarized from the hearing record in the dissenting opinion of Thaxton Hanson, acting presiding judge of the Court of Appeal for Division One of the Second Appellate District of the State of California, filed June 28, 1984:

> Kenneth... became depressed after breaking up with his girlfriend.... Kenneth decided to convert from catholicism to protestantism. He began attending Grace Community Church soon thereafter. Kenneth's conversion became a source of tension between him and his family,

108 . See IG.

especially his father, Walter Nally.... After graduation from UCLA, Kenneth attended Logos Bible Institute at Grace Community Church from September 1976 to June 1977....

In January 1978, Kenneth approached Grace Community Church's pastor, Leslie Rea, and requested "discipleship" time. The two men met on an irregular basis for the next six months.... Pastor Rea concluded that Kenneth would not follow the advice given him and would always discuss the same basic problems, i.e., his relationships with his girlfriend and father....

In February 1979, Kenneth told his mother, Maria Nally, that he could not cope. She arranged for him to see Dr. Julius Milestone, who prescribed Elavil, an anti-depressant....

On the afternoon of March 11, 1979, Kenneth spoke with a classmate, Jeffrey Zippi, concerning his frustration with his life. Jeffrey Zippi encouraged Kenneth to seek professional counseling including psychological help. Kenneth indicated that he had seen a psychologist in the past and that counseling did not work because the counselor wanted to discuss his past. Upon being told that no one would be able to help him until he wanted help, Kenneth stated that the problem was that he probably really did not want help. That evening, Kenneth attempted to kill himself. His parents discovered him the following day and had him rushed to Verdugo Hills Hospital. He was admitted in a comatose state.... Pastor Lynn Corey visited Kenneth in the hospital and encouraged him to cooperate with the psychiatrist at the hospital. Kenneth was similarly encouraged by Pastor Rea.... Kenneth stated that he would attempt suicide again if given the chance.

On March 16, 1979, psychiatrist David Hall met with Kenneth and his father, Walter Nally. Dr. Hall discussed psychiatric hospitalization with them but they were resistant to the idea....

On March 17, 1979, Kenneth was released from the hospital. Due to tensions at the Nally home, it was agreed that Kenneth would stay at Pastor John MacArthur's home for a few days. During his stay with the MacArthurs, Kenneth was encouraged to follow through with his out-patient therapy appointment.... Kenneth did not want to [meet with the doctor and psychiatrist at Verdugo Hills Hospital] because they were not christians....

On March 23, 1979, the MacArthurs arranged for Kenneth to be examined by Dr. John Parker. Dr. Parker recommended immediate psychiatric hospitalization. Kenneth rejected this recommendation. [Dr. Parker] telephoned Walter Nally urging him to obtain psychiatric care for Kenneth immediately even if Kenneth objected. Dr. Parker stated that Walter Nally indicated he would call Dr. Hall to make the necessary arrangements. (Walter Nally denied ever receiving this recommendation.)

[Mrs. MacArthur] telephoned Walter Nally and urged him to force Kenneth to undergo psychiatric hospitalization. (Walter Nally denied receiving this phone call.)

> Kenneth Nally did not keep his scheduled [out-patient] appointment with Dr. Hall on March 23, 1979. Walter Nally telephoned Dr. Hall that evening and they discussed psychiatric hospitalization. Dr. Hall offered to send an ambulance to pick up Kenneth but Walter Nally was reluctant to have his son taken against his will. Maria Nally was opposed to placing Kenneth in a "crazy hospital...."
>
> On March 27, 1979, Kenneth saw Dr. Alban Bullock. Dr. Bullock suggested that Kenneth undergo tests at Holy Cross Hospital to determine if there were any physical causes for his depression....
>
> On March 28, 1979, Kenneth met with Dr. Richard Mohline. Dr. Mohline referred Kenneth to the Fullerton Psychological Clinic....
>
> On March 29, 1979, Kenneth saw Charles Raup, a state-registered psychological assistant at Fullerton Psychological Clinic.
>
> On March 31, 1979, according to Walter Nally's deposition, Kenneth's brother made a comment to Kenneth which hurt Kenneth's feelings. Walter Nally tried to talk to Kenneth and show him the love he had for him, but Kenneth refused to listen stating, "No, I don't want to listen. Nobody loves me." It was then that Walter Nally realized that Kenneth was in need of commitment. Walter Nally told his wife he needed to take a walk, and did so. Maria Nally sent Kenneth to retrieve his father. Kenneth drove down the street in his car, stopped briefly by his father. Walter Nally told his son "wait a minute, wait a minute. Where are you going? Why don't you come away with me? We can go together." Kenneth drove off.

On April 1, 1979, Kenneth entered a friend's apartment and committed suicide. "In late May 1979, [Kenneth's onetime girlfriend] visited the Nallys. In a conversation with Mr. Nally, concerning Grace Church, Walter Nally told [her] that `They wanted me to put my son in a mental hospital, and I just couldn't do that. It would have killed Kenneth and I just couldn't do that to my son...."[109]

b. *Nally v. Grace Community Church*: Summary Judgment and Appeal. Almost exactly one year later the Nallys filed suit against the church and its ministers charging them with responsibility for the "wrongful death" of Kenneth Nally. The complaint alleged that they "negligently discouraged Kenneth Nally from receiving psychiatric or psychological counseling" and that he committed suicide because he did not receive "essential psychiatric or psychological care and treatment." A second count charged them with "intentional infliction of emotional distress" through exacerbating Kenneth Nally's feelings of guilt, anxiety and depression, knowing that he had suicidal tendencies and that this conduct would increase the likelihood that he would take his own life. The complaint alleged that this was done "with reckless disregard of the health, safety and well-being of Kenneth Nally," and that this

109 . *Nally v. Grace Community Church*, *supra*, dissent.

conduct caused him to commit suicide. The complaint also alleged that the church failed to require adequate training of its counsellors.[110]

The Superior Court of Los Angeles County, on motion by the defendants, granted summary judgment in favor of the church and its pastors. The plaintiffs appealed, and the appellate court, by vote of two to one, reversed and remanded for trial.

c. *Nally v. Grace Community Church*: Grounds of Reversal. A majority of the appellate court found that there were triable issues of fact and sent the case back to the lower court to try them. The majority opinion noted that the California legislature had shown "concern with the danger inherent in encouragement of suicide" by including in the state's Penal Code the provision, "Every person who deliberately aids, or advises, or encourages another to commit suicide, is guilty of a felony."[111] Viewing the charges in the (civil) complaint thus gravely, the majority concluded that "a trier of fact might well find that defendants engaged in extreme or outrageous conduct by deliberately encouraging Kenneth Nally to commit suicide or by either deliberately or recklessly increasing his intense feelings of guilt with full knowledge of his past attempts at suicide."

What persuaded the majority that this might be the case? They appear to have been alarmed by an excerpt from a tape-recording of a talk given by one of the defendant pastors entitled "Principles of Biblical Counselling," which excerpt is taken from the pastor's extemporaneous reply to a question about counseling suicidal persons:

> "`And the suicidal says, "I am under such tremendous pressure, now I've got to have to [*sic*] pleasure of release! Now! I don't care about the future."... In fact, suicide is one of the ways that the Lord takes home a disobedient believer. We read that in the Bible. That death is one of the ways that the Lord deals with us. In the First Corinthians Eleven, verse 30 it says, "For this reason because you are not judging sin in your own life, many among you are weak and sick" and what, "a number sleep!" What's that mean? They've gone to bed? They've gone to bed for the night! What's that mean? Sleep? They're dead! That's right. And suicide for a believer is the Lord saying, "Okay, come on home. Can't use you any more on earth. If you're not going to deal with those things in your life, come on home."'"

The majority was apparently so appalled by this idea that it concluded something very nefarious might be afoot in Grace Church.

> From this evidence, a reasonable inference could be drawn that Grace Community Church and each of the individual defendants either followed a policy of counselling suicidal persons that, if one was unable to

110. Summary of the complaint in majority opinion, Court of Appeal, Second Appellate District, Division One, State of California, June 28, 1984, pp. 2-3, slip opinion, ordered unreported by California Supreme Court.

111. Ibid., citing § 401, Calif. Penal Code.

> overcome one's sins, suicide was an acceptable and even desirable alternative to living or recklessly caused such persons extreme emotional distress through their counselling methods if those persons did not measure up to the pastors' religious ideals.

One might suppose that it would be one of the responsibilities of clergy to try to motivate people to measure up to the ideals of the religion, and that the effort might include adjuring them to straighten out their lives. This might indeed exacerbate some persons' guilt feelings and precipitate or increase depression in those unable or unwilling to take corrective action. But are persons with supposed suicidal tendencies to be excused from exhortations to "shape up"? Are they to be spared "extreme emotional distress," when the root of their problems may be the very spiritual sickness to which the exhortations are addressed? Is it better to refer them to psychological or psychiatric counselling, which may attempt—often with the help of antidepressant drugs—to alleviate the feelings of guilt rather than to correct the guilt itself, as by repentance, atonement, forgiveness and amendment of life? Is it impermissible for those who believe that the canker of sin is more serious than temporary "peace of mind," and can indeed affect one's eternal salvation, to try to remedy that fatal flaw even at the risk of precipitating "emotional distress," severe depression, even (earthly) death itself for the sake of the immortal soul? Is psychiatry to be the norm for dealing with moral and spiritual sickness? If so, *which* psychiatry (since psychiatry and psychology are divided among as many "jarring sects" as religion!)? Are pastoral counsellors to be hauled before civil courts and made to answer in damages for their beliefs about the nature of sin and the proper methods for its cure?

The appellate court's majority seemed to entertain no misgivings about that prospect:

> We are thus confronted with the question whether a clergyman or church should be immune from liability for intentional infliction of emotional distress caused by the nature or content of counseling simply because the counseling may have a spiritual aspect. The free exercise clause of the First Amendment to the United States Constitution "embraces two concepts, freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."[112] Counseling falls within the latter category.
>
> * * *
>
> [R]emedies should exist for harm caused by extreme and outrageous conduct even when such conduct involves the expression of religious beliefs.
>
> * * *
>
> We hold that, while defendants' religious beliefs are absolutely protected by the First Amendment, the free exercise clause... does not

112 . Quotation is from *Cantwell v. Connecticut* (1940) 310 U.S. 296, 303-304.

> license intentional infliction of emotional distress in the name of religion and cannot shield defendants from liability for wrongful death for a suicide caused by such conduct.

Thus stated Judges Dalsimer and Gutierrez. But the third member of the court saw the case very differently and, in a dissent more than twice as long as the majority opinion, explained why.

d. *Nally v. Grace Community Church*: Hanson Dissent. Acting Presiding Judge Thaxton Hanson summarized the complaint, the responses, and the factual background as it appeared in affidavits and depositions, and then assessed the responsibility of the Grace Church and its pastors under the law. He quoted from a declaration in the record, submitted by plaintiffs, written by a psychiatrist named Stephen Wilson, who had undertaken a posthumous diagnosis of Kenneth Nally on the basis of his parents' description of events. The doctor concluded:

> First, it is my opinion that Kenneth Nally was suffering from severe mental illness prior to his death. It is apparent by history that there were numerous[113] suicide attempts and that his thinking was considerably disturbed. The attitude and naivete of the members of GRACE COMMUNITY CHURCH towards someone as severely disturbed as Kenneth Nally is incomprehensible to this evaluator. It has been my experience on numerous occasions that Rabbis, Clergy, and other ecclesiastical persons who recognize severe emotional disturbances rapidly involved mental health professionals in their care. This was not done by the members of GRACE COMMUNITY CHURCH. Indeed, the consequence of their attempts to salvage a fellow church member resulted in increasing despair and anguish and ultimately in Kenneth Nally's suicide.
>
> It is my opinion that the members of GRACE COMMUNITY CHURCH mishandled Kenneth and that he had been unduly influenced in his thinking by members of the Church. This undue influence contributed to his inability to leave the Church and seek adequate treatment on his own.

The dissenting judge observed: "Dr. Wilson is, in essence, making declarations with reference to the standard of care owed to Kenneth by Grace Church. While Dr. Wilson may be qualified to comment upon the standard of care owed to someone by the medical profession, he is not competent to state what the standard of care is for a lay[114] counsellor at a church." He then referred to several recent cases determining the liability of a hospital or a physician for a patient's suicide. In two instances where liability was found, the patient was hospitalized.[115] But in a third case, a psychiatrist

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113. Only *one* suicide attempt was reported in the history recounted by Judge Hanson from the record.

114. "Lay" in the sense of not being a member of the *medical* profession.

115. *Vistica v. Presbyterian Hospital*, 67 Cal.2d 465 (1967), and *Meier v. Ross General Hospital*, 69 Cal. App.3d 614 (1968).

was not held liable for a patient's suicide where the patient was not hospitalized but was being treated on an outpatient basis (that is, came in to see the doctor periodically on her own volition and at other times was not under the doctor's direct care or control).[116]

> Here, it was uncontradicted that Kenneth Nally was not living in defendant MacArthur's home at the time of his suicide but was living with his parents, plaintiffs herein. It is further uncontradicted that Kenneth Nally took his own life in a friend's apartment, which apartment, contrary to the allegations in the plaintiffs' unverified complaint, was never owned, operated or controlled by Grace Church.
>
> Clearly, if a duty cannot be imposed upon a psychiatrist (trained and paid for analyzing, evaluating and treating patients with serious suicidal tendencies) to prevent the suicide of a patient being treated on an out-patient basis as in *Bellah*, such a duty certainly cannot and should not be imposed upon functionaries or lay counselors of various religious faiths. Moreover, as a practical matter, to hold otherwise would pose a dangerous threat to federal and state guarantees of religious freedom and freedom of speech and could seriously inhibit ministers, priests, and rabbis and other ecclesiastical persons of various religious denominations from seeking to help a person overcome suicidal tendencies through spiritual guidance.

The dissenting opinion noted that a case relied upon by the majority to justify holding a person liable for wrongful death in the case of a suicide caused by intentional infliction of emotional distress actually contains a condition not present in the instant case: "It is applicable only where the actor *intended to cause injury*, and the injury is a substantial factor in bringing about the suicide, i.e., is really a cause, in fact, of the suicide."[117]

> In the case at bench, the uncontroverted evidence was that the church members attempted to disuade [*sic*] Kenneth from committing suicide and encouraged him to seek psychological assistance. There was no evidence that the church intended for Kenneth to take his own life. The majority bases its holding upon the slenderest of reeds since there is no evidence whatsoever that Kenneth either heard the tape, which allegedly discussed suicide as a favorable alternative, or was told this by any church member.[118]
>
> Here, in the final analysis, the tragic story that develops is one of a youth who *prior to and subsequent to becoming affiliated with Grace Church* was suffering from emotional problems stemming from his relationships

116. *Bellah v. Greenson*, 81 Cal. App. 3d 614 (1978).

117. *Nally, supra*, Hanson dissent, quoting *Tate v. Canonica*, 180 Cal.App.2d 898 (1960), emphasis in original.

118. Not only did he not hear the tape in question, but it had not yet been recorded at the time of his death, being a transcription of a conference that occurred *over a year later*.

> with women and his family. He constantly sought advice from people he respected prior to his affiliation with Grace Church and those connected with Grace Church as well as persons in the medical and psychiatric field, yet consistently rejected such advice. His parents, the plaintiffs herein, themselves, were clearly aware of Kenneth's suicidal tendencies and his consistent rejection of help from all sources, and took no steps to have him committed for psychiatric hospitalization against his will.
>
> The plaintiffs have failed to show that the Grace Church deterred Kenneth from seeking professional psychological help. To the contrary, the declarations reveal that Kenneth was urged by the members of Grace Church to cooperate with the psychiatrist during his stay at Verdugo Hills Hospital and thereafter. Regarding the intentional infliction of emotional distress..., there was no evidence that the church acted intentionally or in such a reckless manner as to constitute intentional conduct to cause injury, or that this injury, if any, was a substantial factor in bringing about Kenneth's suicide.
>
> To hold otherwise, under the facts of this case, could have the deleterious effect of opening up a virtual Pandora's box of litigation by subjecting all of the various religious faiths and their clergy... to wrongful death actions and expensive full-blown trials simply because they were unsuccessful in their sincere efforts through spiritual counseling to help or dissuade emotionally disturbed members of their congregations, who may be suicide prone, from carrying out such a predisposition.[119]

e. *Nally v. Grace Community Church*: The Trial and Outcome. As required by the majority of the appellate court, the case went to trial in the spring of 1985. The judge who had granted summary judgment to the church declined to hear it again, and another judge, Joseph R. Kalin, presided. He heard evidence presented by the plaintiff, but ruled out the tape recording that had been the basis for remanding on the ground that there was no link between it and Ken Nally's suicide, since it had been made a year and a half after his death. He also ruled out the other basis for remand, the statement allegedly made by "people at the church" that the self-inflicted injury to Ken's arm made in his first suicide attempt was "God's punishment" on the ground that plaintiffs had not connected that statement (if made) to any of the defendants or to anyone else connected with the church.

At the conclusion of the plaintiff's evidence, the court was moved by the defendants for a ruling of "nonsuit"—that the plaintiffs had not succeeded in establishing a cause of action. The court ruled on that motion in open court outside the presence of the jury in the following illuminating way:

> As to Count 1 and Count 2, the plaintiffs argue that there should be applied to defendants certain judicially created duties: The duty to investigate Ken Nally's suicidal manifestations, the duty to inform other

119 . *Nally, supra*, Hanson dissent; emphasis in original.

> professionals of his suicidal manifestations, the duty to refer Ken Nally to a psychiatrist or psychologist or other professionals, the duty to warn the family of Ken Nally's potential suicidal threat, the duty to train or employ competent counselors in the pastoral field, and the duty to make the counselors available to Ken Nally. The defendants argue that these duties cannot be judicially imposed and that their conduct is protected by the First Amendment of the United States Constitution.
>
> * * *
>
> I think it's appropriate perhaps to make a few comments on this history of pastoral counseling. The history of pastoral counseling can be traced back to Biblical times and various religions and faiths and precedes any concept of psychotherapy or psychoanalysis. It should be noted that the State of California, through its Business and Professional Code (which regulates various professions from attorneys to Z, whatever that might be, and includes physicians, psychiatrists and psychologists), specifically excludes regulation of religion. It excludes treatment by prayer and does not apply to priests, rabbis, ministers, or any religious denomination in performing counseling services as part of their pastoral duties.
>
> ...There has been no incidence introduced in this trial of any standards that would apply to pastoral counseling, although there has been testimony of standards for other types of counselors. Thus, if there are to be any standards and resulting duties in this field, they must be judicially imposed and inserted into the existing vacuum.
>
> The question that is then presented to this court is Can this court impose judicial standards and duties on pastoral counselors, or is their activity protected from the imposition of state control, review, or interference by the First Amendment...?

That question is the one posed by this section of this work and goes to the heart of the guarantee of religious freedom for pastoral work in this country. The court answered it as follows:

> Religious freedom is the result of a long and intensive struggle that is measured, not only in the countless centuries, but in personal persecutions and innumerable religious wars. This struggle visited upon the shores of our country and raged for years before the adoption of the Bill of Rights. For James Madison, Thomas Jefferson, religious freedom was the crux of the struggle for freedom itself. Prior to 1776, most of the thirteen colonies had some form of state-sponsored church.
>
> The search of history will bring forth innumerable examples of the folly of combining religion and government, and I quote only a few at this time:
>
> The Emperor Theodosius in 300 A.D. enumerated the basic doctrines of the Catholic faith and then decreed: "We order those who follow this doctrine to receive the title Catholic Christians, but others we judge to be mad and raving and worthy of incurring the disgrace of heretical teaching, nor are their assemblies to receive the name of churches. They are to be

punished, not only by divine retribution, but also by our own measures that we have decided in accordance with divine inspiration."

In the Old Testament, Moses ordered in the name of the Lord that the sons of Levi put to death those brothers and friends and neighbors who had been guilty of worshiping idols.

Our forefathers, who created and nurtured the Bill of Rights, and its First Amendment, erected a wall between the church and the state and they intended it to remain high and impregnable to prevent history of both the abuse of the state by the church and abuse of the church by the state.

The question before this court is whether there is a strong public policy reason to intrude upon the religious area of pastoral counseling which has been free from governmental interference in this country for two hundred years. Should there be secular involvements in pastoral counseling, or is this a field of religion protected from state interference and the interference of this court? It is apparent that clinical psychology and pastoral counseling do not spring from the same well. Various writers have defined pastoral counseling over the years, and I quote some of those:

"Pastoral counseling is a supernatural relationship, which through the grace of God (assuming one believes in God, because a right not to believe in God is also protected by the First Amendment), which unites the counselor and the counselee in his faith, and in their faith, a human dialogue is undertaken and carried on in the name of God. It is two human beings whose salvation and spiritual progress open themselves up to the grace of God."

"It is a function of pastoral counseling to give spiritual direction."

"Pastoral counseling is shepherding the people into a deeper level of faith, to instill Christian realities and values."

The problem which must be surmounted by this court is what standards or restrictions can the state place upon that relationship without entwining the state in the process of religious beliefs of the counselor and counselee. It is not for this court, or any court in the United States, to pass judgment on the beliefs of Grace Community Church, or any church. Men may believe that which cannot be proved, and they need not prove their beliefs.[120]

It is immaterial what the defendants preached, wrote, or counseled. The First Amendment safeguards the free exercise of religious freedom and religious belief. Certain beliefs of Grace Community Church, or any church, may be totally repugnant to many or the majority, but that is the

120 . This was probably a paraphrase of Justice William O. Douglas' words, in *U.S. v. Ballard*, 332 U.S. 78 (1944), discussed at § B6a above. (The court admitted having sat up until 3 AM before delivering this opinion, reading Supreme Court opinions on church and state contained in a copy of Miller and Flowers' *Toward Benevolent Neutrality*, 1982, supplied by defendants' counsel.)

price that is paid for religious freedom.[121] A failure to recognize these concepts would eventually result in religious persecution in this country.

To attempt to regulate and impose standards upon pastoral counseling could open the courts to a flood of clergy malpractice suits which many established religions would be able to challenge; however, the effect upon the costs of these churches by the cost of defense of such lawsuits upon a small church or the traditional itinerant preacher as evidenced by the religious history in the United States would have a chilling effect upon the exercise of the freedom of religion. The guarantee of religious freedom requires the government to create an atmosphere of hospitality and accommodation to individual beliefs, and if there be, disbeliefs.

Ken Nally sought the counsel of various members and pastors of Grace Community Church, and he did this of his own free will. Men should have the liberty to seek counsel from the pastor whose teaching he chooses to follow, and the state should not interfere in his choice of pastor or teachings which he wishes to accept from the pastor. There is no compelling state interest for this court to interfere in pastoral counseling activities of Grace Community Church. Such interference would result in excessive entanglement of the state in church and religious beliefs and teachings. The court would by necessity, if it made such interferences, have to set standards of competence, standards of training of counselors, determine what may or may not be counsel, determine if the problems counseled were moral or mental, and monitor the counseling for all time to come.

There is no compelling state interest to climb the wall of the separation of church and state and plunge into the pit on the other side which certainly has no bottom. Therefore, the court finds the defendants had no legally recognizable duty in law to, number one, investigate Ken Nally's alleged suicidal manifestation; two, inform the professionals and his family of his suicidal manifestations; three, to refer Ken Nally to a psychologist or psychiatrist or other professional; four, to train and employ competent counselors to secular standards; and five, to make counselors available to Ken Nally.

Even if these duties existed, the plaintiffs have failed to show the defendants breached these duties; however, assuming that the defendants may have breached these duties, there is not sufficient evidence to present to the jury that said breach was a proximate cause of Ken Nally's death as a matter of law.[122]

The court therefore granted the motion of nonsuit on all counts.

Although this opinion is somewhat naive, unnuanced and unpolished, it addressed the essence of the problem and resolved it in the way compatible with the free exercise of religion. It may be that a cause of action might lie against a pastoral

121 . This may be an echo of Justice Jackson's dissent in *U.S. v Ballard, supra*.

122 . Decision of Joseph R. Kalin of the Superior Court of the State of California for the County of Los Angeles in *Nally v. Grace Community Church*, May 16, 1985.

counselor who deliberately and diabolically drove a counselee to suicide by playing upon the counselee's feelings of guilt and anxiety, but this was certainly not such a case, despite the strained efforts of the plaintiffs (and the appellate court majority) to make it seem so. The notion that the civil courts should supervise pastoral counseling, while not necessarily a bottomless pit, is an undoubted and egregious invasion of a significantly religious function.

Despite all this, the defendants appealed Judge Kalin's decision to the appellate court, with results that were even more appalling than the earlier appeal.

f. The Second Appeal: Majority Opinion. A different panel of the Court of Appeal for the Second Appellate District, Division Seven, State of California, heard the second appeal, and its opinion was delivered by Justice Earl Johnson for himself and Acting Presiding Justice Leon Thompson. A stinging dissent was filed by Los Angeles Superior Court Judge John L. Cole, sitting with the panel by assignment (see next section). The court took cognizance of a spate of books and law review articles that had appeared since the *Nally* case began,[123] and then made its own unique contribution to that area of law.

> [Those writings] called it [the *Nally* case] the seminal case in a new cause of action most frequently labeled "clergy malpractice." This court, however, does not view the causes of action discussed in our opinion to involve "clergy malpractice." Instead we see tham more accurately characterized as "negligent failure to prevent suicide" and "intentional or reckless infliction of emotional injury causing suicide"—which negligent or reckless acts happen to have been committed by church-affiliated counselors. In our view this case has little or nothing to say about the liability of clergymen for the negligent performance of their ordinary ministerial duties or even their counseling duties except when they enter into a counseling relationship with suicidal individuals.... We find established principles of California law impose a duty of due care on those who undertake a counseling relationship with suicidal individuals, whether those counselors are affiliated with a religious institution or not.

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123 . *Nally v. Grace Community Church of the Valley*, 240 Cal.Rptr. 215 (Cal.Ct.App. 1987), n. 3: "Malony, Needham & Southard, *Clergy Malpractice* (1986); Augspurger, *Legal Concerns of the Pastoral Counselor* (1980) 29 Pastoral Psychology 109; Bergman, *Is the Cloth Unraveling? A First Look at Clergy Malpractice* (1981) 9 San Fernando Val.L. Rev. 47; Berstein, *A Potential Peril of Pastoral Care: Malpractice* (1980) 19 J. Religion and Health 48; Breecher, *Ministerial Malpractice: Is It a Reasonable Fear?* (July 1980), 16 Trial 11; Ericsson, *Clergyman Malpractice: Ramifications of a New Theory* (1981) 16 Val.U.L.Rev. 163; McMenamin, *Clergy Malpractice*, (Sept.-Oct. 1985) 90 Case & Comm. 3; Note: *Intentional Infliction of Emotional Distress by Spiritual Counselors: Can Outrageous Conduct Be "Free Exercise?"* (1986) 84 Mich.L. Rev. 1296; Note, *Seeing in a Mirror Dimly? Clergy Malpractice as a Cause of Action: Nally v. Grace Community Church*, (1986) 15 Cap.U.L.Rev. 349; Case Note, *Religious Counseling--Parents Allowed to Pursue Suit Against Church and Clergy for Son's Suicide* (1985) Ariz.St.L.J. 213; Comment, *Made Out of Whole Cloth? A Constitutional Analysis of the Clergy Malpractice Concept* (1983) 19 Cal.Western L.Rev. 507."

For those counselors not authorized to prescribe medication or initiate involuntary hospitalization the standard of care may require them, in appropriate cases, to refer counselees to those who possess these powers to prevent an imminent suicide. A reasonable juror could have found from the available evidence that the counselors in the instant case failed to satisfy this standard of care. We then hold the First Amendment does not immunize the church's counselors from liability for failure to meet this standard of care. Accordingly, the trial court erred in granting nonsuit as to the allegations of negligent failure to refer a suicidal individual to those authorized and suited to prevent suicide.

* * *

We first recognize with the sole exception of homicide that suicide is by far the most serious consequence which can flow from mental illness. Thus someone who chooses to counsel a person exhibiting suicidal tendencies may assume a duty which does not attach to the counseling of persons with lesser mental or emotional problems. That is the duty to take appropriate measures to minimize the likelihood that suicide will take place.

It is a question of law whether one person has a duty of due care toward another—as is the more specific question of whether he has assumed such a duty by establishing a "special relationship" with that person. Under general principles of Anglo-American law applicable in California it is clear a bystander watching someone about to leap off a cliff has no duty of care to attempt to prevent that suicide. Nor would he have a duty to suggest the suicidal individual see a psychotherapist or enter a psychiatric hospital.... The law simply does not require anyone to be a "good samaritan"....

* * *

For two decades, [California] has imposed a duty on psychiatrists (and presumably all varieties of licensed psychotherapists) to prevent suicide among their patients.

* * *

[T]he duty [California courts] announced applies likewise to counselors, other than licensed psychotherapists, who hold themselves out as capable of dealing with mental and emotional illness severe enough to lead to suicide. We find no grounds in reason or policy for considering psychiatrists to have a "special relationship" with their suicidal counselees but other varieties of counselors not to have assumed a "special relationship" with their suicidal counselees. The person being counseled has a similar if not identical dependence on the counselor—whether the latter is a psychiatrist or some other type of counselor. The counselor, in turn, has voluntarily undertaken that relationship. Indeed, whether a psychiatrist or not, the counselor usually has invited the counselee's dependence by holding himself out as especially competent to treat serious emotional problems. Accordingly, we hold the non-therapist counselor who has held himself out as competent to treat serious emotional problems and voluntarily established a counseling relationship

with an emotionally disturbed person has a duty to take appropriate precautions should that person exhibit suicidal tendencies.

We emphasize this duty does not extend to personal friends emotionally disturbed people may consult for advice and counsel about their problems. Unlike counselors—therapists and non-therapists alike—the ordinary person has not held himself out as possessing any expertise in treating emotional problems and invited a special relationship of dependence with seriously disturbed individuals. Similarly, it is easy to distinguish "teen hotlines" or analogous services which only offer short-term "band-aid" counseling since they have not undertaken a sufficient "special relationship" with the counselee to justify imposition of a duty to prevent foreseeable suicides. Nor do we hold a duty arises when a parishioner approaches a pastor after morning services for some casual advice about his emotional problems....

Once the suicide is foreseeable, the lesser standard of care imposed on non-therapist counselors... may affect the precautions against suicide they reasonably can be expected to take. These counselors lack the authority to hospitalize a potential suicidal individual or to administer anti-depressants or other drugs that might forestall a suicide.... However, once they have diagnosed the individual counselee as a foreseeable suicide they do have the ability to refer the person to those who have the authority and the expertise to prevent suicide. Accordingly, the minimal standard of care a non-therapist owes to a counselee he diagnoses as suicidal is to take steps to *place him in the hands* of those to whom society has given the authority and who by education and experience are in the best position to prevent the suicidal individual from succeeding in killing himself. [Emphasis added.]

* * *

The physician treating the physically ill but mentally healthy patient ordinarily fulfills his duty to refer merely by telling the patient he has a life-threatening illness which can only be cured by a certain kind of specialist. Almost invariably the patient will head for the specialist's office by the fastest means of transportation he can find. A counselor treating a mentally ill person—especially one who wants to die and die soon—can make no such assumptions. Frequently, the counselee is too mentally disturbed to accept and follow this advice. And indeed the advice often is contrary to the counselee's own expressed wishes. Nevertheless, in many instances, the standard of care expected of counselors treating suicidal counselees indeed can be satisfied merely by telling the counselee he should see a psychiatrist or go to a psychiatric facility about his suicidal feelings. But where it becomes apparent the counselee is resistant a jury could reasonably find the counselor should have taken further steps, which on occasion may include informing those in a position to prevent the counselee's suicide about the factors suggesting the counselee harbors imminent plans to kill himself.

The appellate court majority thus created a new "duty of care" for nontherapist counselors that implied some curious suppositions: (1) that suicides are invariably "foreseeable"—or at least that a jury can determine retrospectively that they should have been foreseen by a defendant counselor; (2) that, if indeed foreseen, the suicidal tendencies can be forestalled by referring the counselee to licensed psychotherapists or psychiatric facilities; (3) that, if the counselee proves refractory to referral, the nontherapist counselor can—and legally *must*—nevertheless "place him in the hands of those to whom society has given the authority... to prevent the suicidal individual from... killing himself." This duty conjures up some engaging visions of the pastoral counselor—who may be a slightly-built woman—physically dragging the recalcitrant counselee to the nearest psychiatrist and "placing" the counselee "in the hands of" that psychiatrist. This scenario blandly assumes that the psychiatrist is "IN," that he or she is available without long-previous appointment to see the counselee, and that she or he is willing to take on the duty of care of the ostensibly suicidal person from that moment. For if the putative psychiatrist declines to do so—without extensive examination, case history, diagnosis and assurance of suitable remuneration—the nontherapist counselor is not "off the hook" created by the Court of Appeals, and must try to tug the reluctant counselee on to the next licensed psychotherapist or psychiatric facility until one agrees to take responsibility for the counselee.

The court's suggestion that the nontherapist counselor can devolve the "duty of care" upon others by "informing" them of the counselee's symptoms does not necessarily comport with the court's somewhat firmer vision of "placing in the hands" of higher authority, and a jury might endorse that vision by finding lesser steps still negligent. Much as the psychiatric profession might relish the esteem implicit in the court's view of their omnipotent capabilities, they might not equally relish the court's apparent expectation that they will forthwith take on responsibility for all and sundry troubled souls dropped on their doorsteps by lesser counselors anxious to unload them lest they prove suicidal.

The court's imaginative new "duty of care" would certainly create such justifiable uneasiness on the part of all "nontherapist counselors" to hand on any troubled, troublesome, or trouble-making counselees who might precipitate huge liabilities upon them under the new court-created standard. Further, because of the difficulty of diagnosing suicidalness—except retrospectively, after it's too late—many pastoral counselors might readily conclude that the ministry of counseling was becoming too freighted with risk to be worth the cost. Most of them derive little additional remuneration from such activity anyway, certainly none proportionate to the potential liabilities or the costs of "risk-management" prospective in the court's decree. Would the plight of troubled people seeking help be ameliorated by pastors' taking down their counseling shingles and putting up notices advising all seekers of counseling help to "Consult Your Family Psychiatrist" instead?

The appellate court added a none-too-helpful dictum to the effect that "[n]either the psychotherapist-patient privilege nor the clergyman-penitent privilege applies to communications between a pastoral counselor and his counselee"—citing *People v. Edwards*,[124] which doesn't exactly stand for that conclusion. In that case a clergyman agreed to testify about information given him by a church employee that led to the employee's conviction for embezzlement; the defendant employee objected to his divulging a "confession," but the clergyman insisted that he had not received a confession but rather a confidence that the employee had consented to have divulged to church officers to prevent checks from "bouncing," thus dissipating any confidentiality. The *Edwards* court simply held that the defendant could not bar the clergyman's testimony in the fact situation of that case. It was thus not "on all fours"—or even threes or twos—with *Nally* or the hypothetical the court was addressing.

The *Nally* court also addressed the free-exercise claims of Grace Church and its pastors.

> Grace Community Church and its counselors argue they are constitutionally exempt from any duties or standard of care the law may impose on secular counselors.... According to their argument, counseling by "pastoral counselors" is a form of communication of religious belief analogous to preaching from the pulpit. To impose liability for negligent counseling would "chill" the pastoral counselors in their communication of religious belief and thus would impinge upon their right to "free exercise of religion."
>
> * * *
>
> Before the "free exercise clause" even comes into play it must be established that the governmental policy in question indeed asks a person to do something against his religious beliefs or to desist from doing something his religious beliefs require him to do.
>
> * * *
>
> In the instant case, the evidence fails to establish the Grace Community Church or its counselors hold any religious belief which would preclude them from fulfilling any responsibility... to refer suicidal counselees to those authorized and best suited to prevent young Nally from taking his life.
>
> * * *
>
> [But even if the counselors did entertain religious beliefs against referring suicidal counselees to psychotherapists, w]ould the "free exercise" clause immunize the counselors and their Church from liability for failing to comply with the minimal duties of referral and warning which the law imposes on other counselors who are treating foreseeably suicidal persons?
>
> * * *

124 . See 248 Cal. Rptr. 53 (1988), discussed at § j below.

We have no difficulty holding California has a *compelling* interest in preventing its citizens from commiting suicide. Society has a profound interest in preserving life and preventing death. Thus we treat murder as the most serious of crimes. Yet suicide has the same end result—the premature death of a healthy human being.... [The state's] commitment is evidenced by Penal Code Section 401 which makes it a *crime* to participate in any way in another's suicide.... It is further evidenced by the statutes calling for the restraint and commitment of mentally disturbed persons who are a danger to themselves, that is, suicidal. Significantly, these laws authorize certain professionals—but not "pastoral counselors"—to initiate involuntary commitment of suicidal persons.

California's compelling state interest in suicide prevention is served by imposing liability on all those who undertake to counsel mentally disordered people and whose negligence allow[s] counselees to commit suicide. Indeed as discussed earlier, the courts of this state already have extended this liability to hospitals and psychiatrists.

The lives of mentally disturbed people who happen to go to a pastoral counselor are just as precious as those who go to a psychiatrist or some other mental health practitioner. The only way the public can guarantee the former will have as good a chance of surviving as the latter is if pastoral counselors have the same legal duty to take care that their counselees not kill themselves.... Accordingly, we hold exempting pastoral counselors from this duty would defeat a compelling state interest in suicide prevention while including them within the compass of this duty furthers this same compelling state interest.

* * *

The instant case does not involve a "direct" burden on religious expression. The legal duty and reasonable standard of care recognized in this opinion in no sense prohibits the Church and its counselors from holding or expressing their religious views through the counseling of parishioners or others. They remain free to counsel anyone, including those with the most serious mental disorders and even those who exhibit suicidal tendencies....

Likewise none of the legal responsibilities recognized in this opinion prohibit the Church's counselors from relying on religious doctrine to deal with the counselees' mental disorders and emotional problems.... Nor have we held a cause of action could be stated for negligently choosing the "wrong" scripture to answer the particular problem of a given suicidal counselee, when other passages or other forms of religious advice might have forestalled his death. As a result, neither the trial court nor this court need probe the *content* of [the Church's] religious counseling or attempt to judge its validity. Nor do we have to determine whether it is feasible—or wise—to articulate a "standard of reasonable counseling" which can be applied to religious counselors of all faiths or to set different standards for each religion....

What this opinion has recognized instead is that the standard of care expected of religious or secular non-therapist counselors may in

> appropriate circumstances require them to refer suicidal counselees to those authorized to administer medication and initiate involuntary hospitalization. This responsibility exists independent of and in addition to the religious content of the pastoral counselors' other communications with their counselees. True, in those instances where a given religious counselor has a religious belief it is wrong for anyone to be treated by mental health professionals or to be committed to a mental health facility, we impose a burden on his religious expression by imposing financial liability if he fails to refer a suicidal counselee to this form of treatment. But this represents a rather minor and indirect burden far less intrusive than an outright ban on religious counseling of suicidal people or a requirement the religious counseling be that best calculated to inhibit suicide.
>
> We find this duty not only "narrowly tailored" but actually the bare minimum required to achieve the state's compelling interest in preventing suicide among the sizeable population of mentally disturbed people who have elected to go to religious counselors rather than mental health professionals...
>
> No serious contention has or could be made the legal responsibility recognized in this opinion discriminates against religion in general or against Grace Community Church in particular. To be discriminatory against religion, it would have to apply only to religious counselors or to the pastoral counselors of this Church. Instead... we recognize the responsibility to refer in appropriate cases extends not only to religious counselors but also to other counselors who are not licensed psychotherapists. Indeed to exempt religious counselors from this comprehensive duty to prevent suicide would represent an act of discrimination *in favor of* religion; to include them, however, in no sense discriminates *against* religion.... As a consequence, we hold the First Amendment would not be offended even if this duty were imposed on a religious counselor who held a religious belief suicidal individuals should not be referred to or treated by mental health professionals.[125]

g. The Dissent. The majority opinion might have passed muster in uncritical circles as being at least plausible had it not been for the dissent of Judge John L. Cole of Superior Court sitting by assignment of the chairperson of the Judicial Council, Chief Justice Malcolm Lukas of the Supreme Court of California.

> Conceding that it ventures "along a largely uncharted path" and that no court has ruled one way or the other on the issue, the majority holds that non-therapist counselors, whether pastors or not, have a duty to refer suicidal individuals to trained psychotherapists and that failure to do so constitutes negligence. In my view the holding simply is wrong, for a number of reasons.

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125. *Nally v. Grace Community Church*, 240 Cal. Rptr. 215 (1987); emphasis in original unless otherwise noted.

I

Courts in general, and especially intermediate appellate courts, have no business making policy decisions of this nature on inadequate factual records of the sort here involved. The courts have no power to make law, but only to declare it as it exists. It is for the Legislature to enact law. The Legislature is equipped to hold fact-finding hearings and determine the impact of proposed legislation before adopting it. We are not.

Nevertheless, the majority here purports to establish standards of conduct not just for those carrying out their religious duties at Grace Community Church, but for all persons of the cloth and, as well, for all whose professional work brings them into contact with suicidal people. There is no way at all for us to know the extent of the impact on such other people.... While the majority, in dictum, distinguishes services which offer only "band aid counseling," the suggestion, implicit in the majority opinion, of potential liability of an indeterminate nature can only have a chilling effect on the giving of counsel at all.

The obligation imposed by the majority is variously, and loosely, phrased. As set out, some of [its] requirements are impossible of attainment. The majority recognizes that the requirements come into play only when the suicidal person refuses to cooperate with a warning given to him or her by the counselor to consult with a psychotherapist voluntarily. So recalcitrance is indicated at the outset of the "duty" imposed. I fail to see how a counselee can be compelled to consult a psychiatrist or other licensed psychotherapist.... Short of an involuntary commitment by force of law, [Kenneth Nally] simply could not have been compelled by anyone to see a licensed psychotherapist.

Apart from this, there is no legal obligation on anyone, including doctors, to take affirmative steps to prevent one who is not a patient from committing suicide. A doctor to whom a referral might be made by the counselor may well reject the referral. And, under applicable statutes... a person "may" but is not required to institute proceedings seeking an involuntary commitment. If the majority means that a counselor must institute proceedings under the Act then, of course, it is rewriting the statute, a matter which I would have thought was for the Legislature.

Apart from this, who is the pastor or other counselor to call? If the suicidal person has a licensed psychotherapist presumably that doctor would be be contacted. But the doctor, in turn, can do no more than wait for the counselee to come in, short of starting involuntary [commitment] proceedings. If the counselee has no licensed psychotherapist, the pastor's obligation, as created by the majority[,] is very difficult. Contacting a doctor who does not know the counselee and who has no relationship with that person is futile, unless the counselee agrees to see the doctor. Each question asked about the extent of the duty spawns ten others.

* * *

II

Entirely apart from any other reasons why the majority incorrectly holds that potential liability can exist on the part of the defendants, familiar First

Amendment principles clearly stand in the way of liability. I have no quarrel with the professorial and exegetical discussion of the Amendment undertaken in the abstract by the majority. But the application of the Amendment to the facts of this case ignores the record and in particular ignores the fact that to reach their conclusion the majority must end up by preferring the ecclesiastical views of some of the defendants... to those of at least one of the defendants.

In the first place... Mr. Thomson, one of the defendant pastors, testified to religious beliefs that make it clear that he would not, for theological reasons, refer a counselee to a psychiatrist or psychologist except in the most limited circumstances.... Thus, the majority's imposed obligation of referral... would directly impinge on Mr. Thomson's beliefs. It would pick and choose between those beliefs and the beliefs of others..... It also ignores the fact that a counselee himself might have firm religious convictions committing him or her, as an individual, to the views of someone such as Mr.Thomson....

In the second place, the burdens placed upon religion by the majority do not meet at least one, if not more, of the criteria stated as necessary to be met in curtailing expressions of belief on the theory that an important state interest must be protected. Thus, *United States v. Lee* (1981) held "The State may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest."[126] But, as shown above in discussing the duty to refer, there is no showing that this duty is "essential" because there is great doubt that it would work at all, short, at least, of also making mandatory the involuntary confinement of all potentially suicidally inclined persons.

In the third place, recognizing that in limited circumstances *conduct* in the name of religion may be regulated even though beliefs, as such, may not be suppressed, here the majority *compels* action, while transgressing belief. The difference is crucial, and is well illustrated in *Reynolds v. United States* (1878).... In looking at the history of the events which led to the [First] Amendment, the [Supreme] court quoted a Virginia statute which had been drafted by Thomas Jefferson, noting that "after a recital `that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty,' it is declared `that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order!..." The Supreme Court then said, "In those two sentences is found the true distinction between what properly belongs to the church and what to the State."[127] In the present case, no principles have broken out into overt acts against the public peace or good order. Instead, the majority form the opinion that because suicide ought to be prevented it is up to them to determine how to

126 . 455 U.S. 252 (1981), discussed at IVA9b.

127 . 98 U.S. 145, 163 (1878), discussed at IVA2a.

> do that, because of what the majority concludes to be "the ill tendency" of defendants' religious counseling. "...The test for upholding a direct burden on religious practices is as stringent as any imposed under our Constitution. Only in extreme and unusual cases has the imposition of a direct burden on religion been upheld...." (*Paul v. Watchtower... Society* [9th Cir. 1987])[128] The danger must be grave and immediate. The present case is not of that character.
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> IV
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> One more matter deserves attention. Upon granting the motion for nonsuit, the trial court observed that even if all plaintiffs' evidence... was considered, plaintiff still had not proved any conduct of defendants caused Kenneth Nally's death. Defendants are correct in suggesting that to find causation a jury would have had, first, to infer that suicide was a concept religiously acceptable to Grace Community Church. Next, it would have had to make the... assumption that... [the counselors] expressed the same idea to Nally.... Then, the jury would have to infer that because of those comments Nally committed suicide. This is far too tenuous a factual path to support a judgment.
>
> I would affirm the judgment of the trial court. It was right the first time when it granted summary judgment [to the Church]; it clearly was correct the second time when it granted the motion for nonsuit. There should be no third time.[129]

In religious circles there was consternation over the amorphous and open-ended "duty of care" created by the *Nally II* court. A number of church groups supported with briefs *amicus curiae* the church's appeal to the Supreme Court of California, which agreed to hear the case in 1988.

h. Decision by the Supreme Court of California. Chief Justice Lukas wrote the opinion for a unanimous Supreme Court of California.

> Although we have not previously addressed this issue [clergy malpractice?], we have imposed a duty to prevent a foreseeable suicide only when a special relationship existed between the suicidal individual and the defendant or its agents. For example, we imposed such a duty in wrongful death actions after plaintiffs proved that the deceased committed suicide in a hospital or other inpatient facility that had accepted the responsibility to care for and attend to the needs of the suicidal patient. We disagree that that duty applies to non-therapist counselors as well. Neither case suggested extending the duty of care to personal or religious counseling relationships in which one person provided non-professional guidance to another seeking advice and the counselor had no control over the environment of the person being counseled.

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128 . 819 F.2d 875 (1987), discussed at IC5a(2).

129 . *Nally v. Grace Community Church*, *supra*, Cole dissent; emphasis in original.

* * *

> Other factors to consider in determining whether to impose a duty of care include the closeness of the causal connection between the defendants' conduct and the injury suffered, and the foreseeability of the particular harm to the injured party.
>
> The parents argue that the deceased's statement to the pastors that he was sorry he wasn't successful in committing suicide was a hidden danger that would have affected his prognosis and treatment, and that, accordingly, the pastors should have warned the hospital that the patient was still contemplating suicide. We disagree. The closeness of the connection between the pastors' conduct and the suicide was tenuous at best. The deceased was examined by five physicians and a psychiatrist during the weeks following his suicide attempt. The pastors correctly assert that they arranged or encouraged many of these visits and encouraged the patient to continue to cooperate with all doctors.
>
> Nonetheless we are urged that mere knowledge on the part of the pastors that the deceased may have been suicidal at various stages of his life should give rise to a duty to refer. Such a duty would necessarily imply a general duty to all non-therapists to refer all potentially suicidal persons to licensed medical practitioners. Mere foreseeability, however, is insufficient to create a cognizable special relationship giving rise to a legal duty to prevent harm.
>
> Imposing a duty on the pastors or other non-therapist counselors could have a deleterious effect on counseling in general. Such a duty could deter those most in need of help from seeking treatment out of fear that their private disclosures could subject them to involuntary commitment to psychiatric facilities. Furthermore, extending liability to voluntary, non-commercial, and non-custodial relationships is contrary to the trend in the legislature to encourage private assistance efforts.[130]

Justices Kaufman and Broussard concurred, expressing their view that the evidence was sufficient to establish a minimum duty of care, but there was no evidence that the pastors breached that duty. Thus the intermediate appellate court's decision was reversed and the trial court's judgment of nonsuit reinstated. The Nallys petitioned the U.S. Supreme Court to hear the case, but it declined to do so, thus bringing to a close a nine-year struggle in the courts and putting a definite damper on the prospect of a promising new field of litigation for the personal-injury bar under the rubric of "clergy malpractice." Several other ventures in this field also sputtered out at about the same time.

i. "Clergy Malpractice" and Confidentiality. There was a rumor in the mid-1980s that "clergy malpractice" was a growth field for insurance companies. The *Wall Street Journal* ran an article to that effect in 1985,[131] and in August 1986 the

130. *Nally v. Grace Community Church*, 763 P.2d 948 (1988).

131. "Churches Are Taken to Court More Often in Internal Disputes," *Wall Street Journal*, Apr. 9, 1985, 1, 21. See other sources cited in Esbeck, C., "Tort Claims Against Churches and Ecclesiastical

author received a call from the religion editor of *Newsweek*—typical of many inquiries from the press over the intervening months—asking whether (as a consultant to an insurance group had just announced in a press release) the expected spate of clergy malpractice suits had begun to appear. The answer was *no*. There was at the time only one true clergy malpractice case in the field: *Nally v. Grace Community Church*,[132] and "one swallow doth not a summer make." Even it eventually wound down without creating the expected tort cause of action, as chronicled in the preceding section. Other cases sometimes characterized as "clergy malpractice" were not such. Professor Carl Esbeck distinguished them as follows:

> [T]ort claims against churches for premises liability and the now commonplace negligence action arising out of the use of church-owned motor vehicles, matters for which churches are rightly accountable since the virtual abandonment of immunity for charitable organizations, are of no concern [under this category]. Moreover, there can be little question that religious officers and organizations are liable in tort for assault, battery, false imprisonment, and the like, all claims which involve coercive and often violent activity.[133]

True clergy malpractice does not involve these ordinary torts that are not unique to the practice of the ecclesiastical profession. Within that area there are several kinds of alleged torts arising from the pastoral counseling situation. Esbeck classified these as follows: (1) breach of confidential communication, (2) sexual seduction or molestation, (3) "alienation of affection," and (4) "clergy malpractice." In addition, there are tort claims arising under the exercise of church discipline pertaining to the reprimand, punishment, removal or expulsion of church officers or members,[134] alleged slanders or libels of outsiders not connected with the church (which are no different from similar charges unconnected with religion, protected to some extent by the Free Speech clause of the First Amendment), and allegations of religious fraud, intentional infliction of emotional distress, etc.[135]

"Malpractice," properly described, exists only where "a particular standard of conduct undertaken by a given profession" is breached. The definition of malpractice in the *Restatement (Second) of Torts* is as follows: "Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge

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Officers: The First Amendment Considerations," *West Virginia Law Review*, 89:1 (1986), nn. 480, 481.

132. A possible exception was *Neufang v. Cahn*, Fla. Cir. Ct., Broward Cty., No. 79-8143, filed May 2, 1979, with third-party complaint against church and minister for failure to notify relatives of dangerous tendencies of counselee.

133. Esbeck, Carl, "Tort Claims Against Churches..." *supra*.

134. See IC5.

135. Ibid. This last category is treated in § B above.

normally possessed by members of that profession or trade in good standing in similar communities."[136]

Whether there *is* such a generally accepted standard that civil courts can apply to clergy is another question—and one the *Nally* trial court answered in the negative. But most of the cases loosely characterized as "clergy malpractice" do not invoke a standard peculiar to that profession. Seduction, alienation of affection and sexual molestation are ordinary torts that are actionable without reference to any professional standard (though such a standard would surely make them more reprehensible).

"Breach of confidentiality" comes closest to being akin to "clergy malpractice," but here one must distinguish the evidentiary privilege afforded under the "seal of the confessional" from a violation of a professional standard of clergy confidentiality. That is, a member of the clergy—in most jurisdictions—cannot be required to testify in a court of law as to the content of communications made to him or her in the course of confession or counseling carried out in a professional capacity, at least not without the consent of the penitent or counselee.[137] That is an evidentiary privilege designed—for the sake of the cure of souls—to protect the pastor-parishioner relationship from compelled disclosure. It does not necessarily imply that a clergyperson *must* keep in confidence communications made in the course of counseling. That obligation—to the degree it exists—usually arises from sources other than the law, viz., theological or professional principles. Some rabbis and independent Baptist ministers have testified that they do not recognize such a theological or professional obligation.[138] (They still should not be permitted to testify in court without the consent of the counselee, but that does not mean they are required to keep the confidence in other settings.)

Whether divulging such a confidence in other settings is actionable depends upon a number of other factors, foremost among which are:

1. Was the communication intended to be confidential, and was that intention shared by both parties?

2. Were there countervailing considerations that outweighed the claim of confidentiality, such as possible danger to others?

3. Was the noncourt setting itself privileged (such as an ecclesiastical tribunal)?

4. Did the clergyperson recognize a professional obligation of confidentiality?

With respect to the last factor, this author, as a pastor and clergyman, considers that protecting the confidentiality of communications arising within the church, especially in the pastoral counseling relationship, is *essential* to the pastoral role irrespective of what the civil law may provide or protect, and breach of a pastoral

136. *Restatement (Second) of Torts*, § 299A (1965).

137. See § IG1.

138. See *Ball v. Indiana*, 419 N.E.2d 137 (1981), discussed in Tiemann, Wm.H., and John Bush, *The Right to Silence* (Nashville: Abingdon Press, 1983), p. 30.

confidence is a cardinal offense against the sacred calling of the clergy.[139] That does not make it actionable at law, however, if such a standard is not accepted by any substantial party of practitioners, such as a particular denomination. Even if it were generally accepted in the profession, it does not necessarily follow that civil courts are equipped to enforce such a standard under the law of torts because of considerations arising under the other factors. A recent case may clarify this contention.

j. *People v. Edwards* (1988). In a much publicized suit filed in August 1985, a Mrs. Sheridan Edwards sued her pastor, William Rankin, and their church for emotional distress, fraud, negligent misrepresentation, concealment, invasion of privacy, negligence and breach of fiduciary duty, all of which was summarized in the press as "clergy malpractice." She had admitted to Rankin that, as treasurer of the church's women's guild, she had embezzled some $28,000 from the guild. Rankin immediately informed church authorities, and they informed the police. Edwards was charged with theft, and at her trial Rankin testified—over objections from Edwards' counsel—as to her oral admission to him. She was convicted and given a jail sentence of seven months, which was appealed (one of the issues raised being whether the priest's testimony was admissible). The civil action charged that the priest wrongfully injured the plaintiff by divulging her confidential confession to him.

The priest defended on the ground that it was not a sacramental act of penitence, since she had already confessed to an associate pastor and received absolution. She came to the pastor because she wanted to prevent the checks she had written from bouncing, and he said he could not do that without informing the vestry, to which she agreed. The pastor contended that he was not bound by an obligation not to divulge what she had told him. The appellate court ruled that the pastor's evidence was admissible. Thus the case seemed to turn on whether the communication was a sacramental confession or not, and civil courts may not be the best authorities to determine such questions.[140]

Whether breach of confidentiality is a form of clergy malpractice or not, it should be apparent that neither allegation lends itself readily to settlement by civil courts in the absence of clear and generally accepted standards for the profession, for reasons suggested by Judge Kalin in the *Nally* case above.[141]

5. Feeding the Hungry, Housing the Homeless

A number of churches in various parts of the country have undertaken to serve the needy by direct helping ministries, such as operating soup kitchens, food pantries, homeless shelters, clothing closets and other services. These have not always found favor with the neighbors, and complaints about what are thought to be unsavory

139. Reasons for this view are discussed in IG1.

140. *People v. Edwards*, 248 Cal. Rptr. 53 (1988).

141. See § e above.

transients have sometimes goaded local civil authorities to take restrictive actions under the zoning regulations or other ordinances that inhibit such activities. Municipal building and sanitation codes are suddenly enforced with new and uncharacteristic rigor. Offenses against the fire and health laws are discovered in conditions never before noticed by public servants.

Douglas Laycock has described the crackdown on a group of nuns.

> Mother Teresa's order of nuns was ordered to close its shelter for the homeless in New York. Why? Because it was on the second floor, and it had no elevator. "What about the handicapped homeless?" the City said. The nuns responded that they would carry any handicapped homeless up the stairs. The City's response: "You don't carry people up and down in our society. That's not acceptable here." That is my nominee for the most frivolous compelling government interest ever asserted: better that they sleep in the street than be carried up to bed. But compelling interests are no longer required [under *Oregon v. Smith*]. The shelter is closed.... [I]f all new ministries require notice to the neighbors and approval from the zoning board; in short, if churches are neutrally subjected to the full range of modern regulation, it is hard to see how they can sustain any distinctive social structure or witness.[142]

Professor Angela Carmella provided another example of restriction on a social ministry.

> The Salvation Army runs intensive alcohol and drug rehabilitation programs serving about eighty thousand addicts each year, all of whom voluntarily admit themselves. The program is strictly supervised, and runs for thirty to ninety days. The addicts are accountable twenty-four hours a day; they are fed, clothed, given medical treatment and a small stipend, and their schedules are tightly controlled for residential, social, and spiritual activities as well as job training. Because most are not employable, they become part of a program called "work therapy" in which they are taught job skills by doing tasks in the Salvation Army warehouse or picking up donations at Salvation Army drop-off points. The goals of this comprehensive program are recovery and reentry into society, reunion with family, and permanent employment....
>
> In the summer of 1990, the Department of Labor issued an order to discontinue the program unless the Salvation Army agreed to pay these men and women the minimum wage for what was essentially skills training. The Department of Labor, looking at the program as a neutral observer, saw people riding on a truck and picking up donated clothing,

142. Laycock, D., "Summary and Synthesis: The Crisis in Religious Liberty," 60 *Geo. Wash. L. Rev.* 852-3 (Mar. 1992), citing Roberts, Sam, "Fight City Hall? Nope, Not Even Mother Teresa" *N.Y. Times*, Sept. 17, 1990, B1. Laycock's article was commissioned by this author and originally presented as the conclusion of a three-day Bicentennial Conference on the Religion Clauses at the University of Pennsylvania School of Law in 1991.

> and people taking inventory in a warehouse and repairing appliances. These people, it said, are employees and should be treated as such. It disregarded the full scope of the program—that these people have no skills and are learning the basic behaviors such as dressing for work and being on time.
>
> The Salvation Army was stunned. It objected to the government's characterization of recovering addicts as employees and the legal and practical implications of such a characterization of the program. This would have transformed a comprehensive healing ministry into a mere economic relationship, and would have destroyed the Salvation Army's ability to maintain around-the-clock attention to the addicts' recovery because they would be considered employees, not beneficiaries, of the program.
>
> The order to discontinue the program was withdrawn after public outcry in the face of the possible abandonment of the program, and after the Salvation Army filed for injunctive relief. But a court never had the opportunity to undertake a free exercise analysis. Had the Department of Labor wanted to press the matter, would a burden [on religious practice] have been found? Not necessarily, if a narrow understanding of burden had been employed. The Salvation Army did not have a conscientious objection to paying minimum wage to employees, nor was there a religious mandate that the work therapy program, or the entire rehabilitation program, be structured as it was. The Salvation Army objected instead to the government's characterization of its religious activity—its work therapy program— as employment, and to the government's attempt to regulate it like its closest secular counterpart.[143]

a. *City of Tulsa v. Neighbor-for-Neighbor* (1969). St. Jude's Roman Catholic Church operated an antipoverty project called "Neighbor-for-Neighbor" on its premises in the late 1960s, which consisted of a food pantry, a collection of donated clothing and other outreach services. What excited particular umbrage in the neighborhood, however, was an auto-repair project that accumulated old cars on the church property. These vehicles were rehabilitated and given to low-income families in the vicinity, who needed transportation in order to be able to get to work. But some of the "neighbors" complained that the church was turning its grounds into a junkyard and lowering their property values. The city attorney sought an injunction prohibiting the operation of a nonconforming use under the residential zoning code, which permitted churches and "auxiliary uses." But car repair was not an "auxiliary use" for a church, maintained the city attorney.

The author was one of several witnesses called from afar by the defense to testify as to what was acknowledged to be legitimate usage of churches as part of their

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143 . Carmella, A., "A Theological Critique of Free Exercise Jurisprudence," 60 *Geo. Wash. L. Rev.* 800-1 (1992). Reprinted with permission of the author. (This article was also part of the program of the Bicentennial Conference on the Religion Clauses at the University of Pennsylvania School of Law in 1991.)

mission. He explained to the court that churches have long carried out activities they felt necessary to their religous duty that might be unconventional or unsettling to the neighbors, such as inviting "sinners" into their precincts for confession, reform and rehabilitation. Monastic orders engaged in agriculture or handicrafts to occupy their members with constructive tasks, earn a livelihood and provide goods for the needy. Churches have sometimes offered "sanctuary" for criminals or political fugitives. Wesleyan chapels in England and Wales were meeting places for the first trade unions and thus aided the beginnings of the labor movement. Today they sometimes inconvenience their neighbors with tent meetings, bingo games, carnivals, revivals, ecstatic pentecostal services that go on into the night with loud singing and shouting. During the Depression, churches operated soup kitchens for the destitute. During the periods of heavy immigration, some churches offered citizenship education for new arrivals. The Salvation Army in the nineteenth century set up match factories in its "churches" to employ poor people who were subjected to phosphorus poisoning in commercial match factories. Many churches offer meeting-space for Alcoholics Anonymous, and the largest outpatient counseling clinic for alcoholics is located in the First Methodist Church of Dallas, Texas. Judson Memorial Church in New York City runs a reception center for runaway adolescents attracted to Greenwich Village, as well as an abortion referral program and a semiprofessional experimental theater. The East Harlem Protestant Parish has long held clinics for narcotic addicts. Glide Memorial Methodist Church in San Francisco ministers to unmarried mothers, homosexuals and other "street people" on "skid row." Many churches house day-care centers for children of working mothers, Head Start programs and Neighborhood Youth Corps work-training projects under OEO [Office of Economic Opportunity]. Job-training for settling migrant agricultural workers is carried on by churches of the Arizona and New Mexico Councils of Churches. Christ Presbyterian Church in New York City, whose pastor is a former prison inmate, provides a program to give a new start to released convicts. In El Reno, Oklahoma, local churches sponsor work-release programs for convicted youthful offenders from the Federal Correctional Institution there, with social activities for the youths they sponsor, as well as pick-up points for employers of releasees. In East Lansing, Michigan, a church served as the site for a series of meetings between police and black militants from the ghetto to develop understanding between the two groups.

Churches also operate "coffeehouses" for students, servicemen and other singles, as well as draft-counseling centers, tutorial services for disadvanteaged children and "alternative schools" for adolescent dropouts and kickouts (such as the John F. Kennedy School operated by the East Oakland, California, Parish). First Presbyterian Church in Chicago provided a home for a teenage urban gang, the Blackstone Rangers. Churches in Wilmington, Delaware, Washington, D.C., and elsewhere were the sites of deployment centers for organizing medical, legal and humanitarian services to victims of urban riots in the middle 1960s. Wherever

churches see a human need that is not being met by other institutions, some of them will respond by trying to meet that need, often in unconventional ways. Such activity is not something other than, or different from, their "religious" ministry; it is *part* of it, no less religious than more conventional church activities. Neighbor-for-Neighbor fitted perfectly into that tradition and was a typical example of a church trying to meet human needs that others were not meeting. As such, its work should have been welcomed by the city as a contribution to strengthening its social fabric rather than being restricted, punished or curtailed.

Despite this eloquent exposition, the judge found that the auto-repair work was being carried out on lots that were not even zoned for *church* use, and therefore required the church to seek rezoning before it could even contend that working on junk cars was an auxiliary use. The issue then disappeared into the dim labyrinths of municipal bureaucracy, and the church turned to other helping ministries rather than expending further energies and resources on coping with red tape.

b. *Western Presbyterian Church v. Board of Zoning Adjustment* (1994). At the other end of the spectrum was a case decided in Washington, D.C., involving a feeding program for the homeless. Western Presbyterian Church began a feeding program in 1984 in conjunction with the non-profit corporation Miriam's Kitchen, Inc. in response to the "dramatic upsurge in homelessness... in the early 1980s and the inability of federal and state authorities to deal with the problem."[144]

The zoning administrator advised the church that its feeding program was not a use permitted in a residential zone. The church sought an injunction in federal court to preserve its feeding program. The decision was given by Federal District Judge Stanley Sporkin.

> The plaintiffs maintain that ministering to the needy is a religious function rooted in the Bible, the constitution of the Presbyterian Church (USA), and the Church's bylaws. Passages from the Church's bylaws and the Bible lend support to their position.... [They] also point to passages in the Bible that support the view that the Church's ministry is not merely a matter of personal choice but is a requirement for spiritual redemption.[145]...

144. *Western Presbyterian Church v. Board of Zoning Adjustment*, 862 F.Supp. 538, 540 (D.D.C. 1994).

145. In the footnote the court quoted several passages from the Bible: "For I was an hungred [*sic*], and ye gave me meat; I was thirsty, and ye gave me drink; I was a stranger, and ye took me in... Verily I say unto you, Inasmuch as ye have done *it* unto one of the least of these my brethren, ye have done *it* unto me.

Then shall he say also unto them on the left hand, Depart from me, ye cursed, into everlasting fire, prepared for the devil and his angels: For I was an hungred, and ye gave me no meat; I was thirsty and ye gave me no drink; I was stranger, and ye took me not in... And these shall go away into everlasting punishment; but the righteous into life eternal. Matthew 25:35, 40-43, 46..." Also quoted by the court were Ezekiel 18:5-9 and James 2:14-17.

> The [Church has] made a more than adequate showing that their feeding program... is motivated by sincere religious belief. Indeed, the [City has] not challenged [them] on this point. Accordingly, the Court finds the Church's feeding program to be religious conduct falling within the protections of the First Amendment and the [Religious Freedom Restoration Act]....
>
> It is difficult to imagine a more worthwhile program. The federal government and the District of Columbia have been unable to deal with the problem of the homeless, but here, a private religious congregation is spending its own funds to help alleviate a serious societal problem. It is paradoxical that local authorities would attempt to impede such a worthwhile effort.
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> The [congregation here seeks] protection for a form of worship their religion mandates. It is a form of worship akin to prayer. If the zoning regulations cannot be applied to ban prayer in a church, they cannot be used to exclude this type of religious activity. The Church may use its building for prayer and other religious services as a matter of right and should be able, as a matter of right, to use the building to minister to the needy. To regulate religious conduct through zoning laws, as done in this case, is a substantial burden on the free exercise of religion. The [Church has] demonstrated that the [City's] actions substantially burden their right to free exercise of religion in violation of the First Amendment and the Religious Freedom Restoration Act of 1993. Accordingly, [the Church is] entitled to prevail....[146]

In this decision, Judge Sporkin gave short shrift to the NIMBY (Not In My Back Yard) theme that actuates much of the resistance to unconventional religious ministries, while recognizing that the neighbors are entitled not to be subjected to actual, as distinguished from speculative, nuisance. The court seemed to be properly appreciative of the public service the church was conducting, and that it had done so at a nearby location for ten years "without incident." Even isolated incidents of disorder—which do occur even in the refined precincts of Foggy Bottom in the absence of a feeding program for the homeless in the vicinity—should not affect this rationale unless repeated, willful and actually attributable to the feeding program.

146. *Western Presbyterian Church v. Board of Zoning Adjustment*, 862 F.Supp. 538, 544, 546-547 (1994). This case is discussed more fully at IB14g.