RELIGIOUS FRAUD AND THE FIRST AMENDMENT

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With unquestioned confidence in an earlier age's reliance upon the self-evident truth of "the law," the Supreme Court announced in *Reynolds v. United States*,[1] that although the federal government could not punish religious beliefs, it could regulate religious practices. Unfortunately, the explication of this clear and distinct idea merely outlines an area for adjudication and does not unravel the complexities of specific situations. At what point does a "belief" become a "practice"? I may believe that I am God and can cure cancer, etc. Under our Constitution the civil magistrate has no interest in my private thoughts, and governmental action cannot touch this area. Yet, even in Russia and Red China a man is theoretically as free to think what he wants as he is in the middle of Iowa. In other words, the "absolute freedom" to interiorly believe as one chooses may be a relatively meaningless freedom.[2]

The immediate conclusion, then, is that the frequently quoted distinction between "beliefs" and "practices" is rather meaningless. If a "practice" embraces any and every expression of a belief, the free-exercise clause of the First Amendment to the United States Constitution must have been intended to exclude some areas of religious practice from the competence of the civil government. And even in *Reynolds* the Court took a qualifying step in that direction, stating that the state can reach actions which are ". . . in violation of social duties or subversive of good order."[3] Presumably, all other religious practices are constitutionally protected.

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1 98 U.S. 145 (1879).

2 The inquiry into beliefs brings to mind the background of the Spanish Inquisition. In 1492, when Granada was captured, the first Archbishop, Talaveras, made intelligent, honest efforts to convert the Moors. In 1499, however, his successor, Archbishop Cisneros, commenced a program of "conversion or else." As a result, thousands of Moors were baptized and converted; however, they secretly remained Moslems. These unregenerate Moors were a serious problem to both Church and State. The Inquisition was instituted to inquire into or ascertain their true religious beliefs. Hence, indefensible tortures were utilized, not to punish the Moors for being Moors, but to ascertain their secret thoughts. Fliche & Martin, *Histoire de l'Eglise*, Vol. XV, p. 100 (1946).

3 98 U.S. at 148.

This clear answer contains no hint as to who is to decide when an action violates social duties or subverts good order. The liberalism of Justice Holmes gave great weight in this matter to the determination of the legislative majority.[4] Holmes does leave the impression that he suspected that people would want something quite different if only they were better informed—but he was content that the judiciary sit back and allow the people to rule and educate themselves in the hard school of experience.

The activist liberals on the present Court occasionally seem to assert a special knowledge which logically would be more at home in an aristocracy. In effect this means that they, and they alone, can be entrusted with the task of deciding (and thus educating the multitude) what are the social duties and corresponding limitations upon freedom that government may impose. And, Mr. Justice Black, at least, has gone even further in espousing an absolute immunity for the "preferred freedoms."[5]

THE BALLARD CASE

United States v. Ballard,[6] for all the procedural defects it contains, seems to best illustrate the divergent views. Guy Ballard and other members of the "I Am" movement were indicted under the mail fraud statutes[7] and charged with fraudulently soliciting funds. Ballard, alias Saint Germain, Jesus, George Washington and Godfre Ray King, along with his wife Edna, claimed to have the power to cure persons afflicted with incurable diseases. The Ballards demurred to the twelve counts in the indictment, asserting that ". . . the indictment attacked [their] religious beliefs . . . and sought to restrict the free exercise of their religion."[8] At the conclusion of the trial, the district court charged the jury as follows:[9]

> The question of the defendants' good faith is the cardinal question in this case. You are not to be concerned with the religious belief of the defendants, or any of them. The jury will be called upon to pass on the question of whether or not the defendants honestly and in good faith believed that the representations which are set forth in the

[4] See e.g., Emery v. Burbank, 163 Mass. 326, 328, 39 N.E. 1026, 1027 (1895); Otis v. Parker, 187 U.S. 606 (1903); Lochner v. New York, 198 U.S. 45, 74 (1905) (dissenting); Tyson Bros. v. Banton, 273 U.S. 418, 445 (1927) (dissenting). *But see* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

[5] See *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549 (1962).

[6] 322 U.S. 78 (1944).

[7] 18 U.S.C. § 338 (1909) and 18 U.S.C. § 88 (1909).

[8] 322 U.S. at 80-1.

[9] *Id.* at 82.

> indictment, and honestly and in good faith believed that the benefits which they represented would flow from their belief to those who embraced and followed their teachings, or whether these representations were mere pretenses without honest belief on the part of the defendants or any of them, and, were the representations made for the purpose of procuring money, and were the mails used for this purpose.

Found guilty of the crimes charged, the Ballards appealed to the Ninth Circuit Court of Appeals. That court reversed the convictions,[10] taking the position that the district court had improperly withdrawn from the jury the question of the truth or falsity of the defendants' alleged religious beliefs.[11]

Granting certiorari, the Supreme Court, in a 5-4 decision, reversed the Ninth Circuit, and held that the circuit court had erred in ruling that the jury could decide the truth or falsity of the Ballards' religious beliefs. Speaking for the majority, Mr. Justice Douglas declared that ". . . we do not agree that the truth or verity of respondents' religious doctrines or beliefs should have been submitted to the jury."[12] The opinion concludes that "the District Court ruled properly when it withheld from the jury all questions concerning the truth or falsity of the religious beliefs or doctrines of respondents."[13] The majority opinion does not expressly hold that the sincerity of a person's religious beliefs is a proper subject of judicial inquiry. That such an inquiry is not precluded by the free exercise clause of the First Amendment seems, however, to be implied in the *Ballard* result.[14] Moreover, the Supreme Court, in the recent conscientious

[10] Ballard v. United States, 138 F.2d 540 (9th Cir. 1943).

[11] *Id.* at 545. It should be noted that the circuit court framed its holding in terms of the truth or falsity of the defendants' *representations*, and not *religious beliefs*. In this case, the distinction is illusory because the Ballards elected to meet the charges of mail fraud by their defensive use of the free exercise clause.

[12] 322 U.S. at 86.

[13] *Id.* at 88.

[14] Concurring in the second *Ballard* case, Ballard v. United States, 329 U.S. 187, 196 (1946), Mr. Justice Jackson in commenting on the first *Ballard* decision stated that "this Court previously ruled that it is improper for the trial court to inquire whether the religious professions and experiences as represented by defendants were true or false *but that it can inquire only as to whether they were represented without belief in their truth.*" (Emphasis added.) The quoted language in *Seeger, infra* note 16, represents one of two direct expressions by the Court on the question of judicial inquiry into the sincerity of religious beliefs since the *Ballard* cases. The other is found in Sherbet v. Verner, 374 U.S. 398, 407 (1963). This case involved a claim that the denial of state unemployment compensation to the appellant restricted the free exercise of her religion. As a Seventh-Day Adventist, she had refused to be available for work on Saturdays. The state argued that the possibility of fraudulent claims by persons feigning religious objections to Saturday work would greatly hamper the state's unemployment compensation program. This contention was not made at the trial level, and in commenting thereon, the Court stated:

> Even if consideration of such evidence is not foreclosed by the prohibition against judiciary inquiry into the truth or falsity of religious beliefs [citing Ballard]—a question as to which we intimate no view since it is not before us—it is highly

objector decision, *United States v. Seeger*,[15] reads *Ballard* as so holding. The court stated:[16]

> The validity of what he believes cannot be questioned. Some theologians, and indeed some examiners, might be tempted to question the existence of the registrant's 'Supreme Being' or the truth of his concepts. But these are inquiries foreclosed to government. United States v. Ballard, 322 U.S. 78 (1944). Local boards and courts in this sense are not free to reject beliefs because they consider them 'incomprehensible.' But their task is to decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious.
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> But we hasten to emphasize that while the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held.' This is the threshold question of sincerity which must be resolved in every case. It is, of course, a question of fact—a prime consideration to the validity of every claim for exemption as a conscientious objector.

Thus, the *Ballard-Seeger* rationale can be said to stand for this proposition: Government can punish insincerity of belief, but not belief itself.

Dissenting in *Ballard*, Mr. Chief Justice Stone, joined by Mr. Justices Frankfurter and Roberts, expressed the view of Holmes' school of liberalism:[17]

> doubtful whether such evidence would be sufficient to warrant a substantial infringement of religious liberties.

In People v. Woody, 61 Cal.2d 899, 394 P.2d 813 (1965), the California supreme court, in reviewing a conviction for the illegal possession of peyote, declared that "as the Court in United States v. Ballard [citation omitted] held, although judicial examination of the truth or validity of religious beliefs is foreclosed by the First Amendment, the courts of necessity must ask whether the claimant holds his beliefs honestly and in good faith or whether he seeks to wear the mantle of religious immunity merely as a cloak for illegal activities." *See also* Note 1 UNIV. OF SAN FRANCISCO L. REV. 131, 140 (1966); In re Estate of Supple, 55 Cal. Rptr. 542, 545 (1966); New v. United States, 245 Fed. 710, 712 (1917).

In Cohen v. United States, 297 F.2d 760, 765 (1962), the Ninth Circuit in a tax evasion case, noted that *Ballard*

> does not hold that a court or jury cannot decide that the profession of a belief is fraudulent. What the District Court has submitted to the jury was 'Did these defendants honestly and in good faith believe these things?' The Supreme Court did not hold this was improper.

This language from *Cohen* can probably be considered as taking a middle-of-the-road approach to the question whether sincerity of belief is subject to scrutiny under the *Ballard* rationale.

Taking a contrary view in perhaps the most comprehensive analysis of the *Ballard* decision, Jonathan Weiss argues persuasively that the Court in *Ballard* did not reach what he characterizes as the trial court's *deceitful defendant* view, *i.e.*, whether the Ballards made false representations to obtain the funds. Weiss, *Privilege, Posture and Protection "Religion" in the Law*, 73 YALE L. J. 593, 599 (1964). *See also* Corbin (ed.) CONSTITUTION OF THE UNITED STATES: ANALYSIS AND INTERPRETATION 857, U.S. Gov't Printing Office (1964).

[15] 380 U.S. 163 (1965).

[16] *Id.* at 184.

[17] 322 U.S. at 80 and 90.

> I am not prepared to say that the constitutional guaranty of freedom of religion affords immunity from criminal prosecution for the fraudulent procurement of money by false statements as to one's religious experiences, more than it renders polygamy or libel immune from criminal prosecution.
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> The state of one's mind is a fact as capable of fraudulent misrepresentation as is one's physical condition or the state of his bodily health.

Mr. Justice Jackson also dissented in a separate opinion, and wanted to move free exercise of religion into a "preferred position" in the area of religious fraud prosecutions. Arguing the difficulty of separating "what is believed from considerations as to what is believable,"[18] he stated:[19]

> The most convincing proof that one believes his statements is to show that they have been true in his experience. Likewise, that one knowingly falsified is best proved by showing that what he said happened never did happen. How can the Government prove these persons knew something to be false which it cannot prove to be false? If we try religious sincerity severed from religious verity, we isolate the dispute from the very considerations which in common experience provide its most reliable answer.

The Justice went on to conclude that:[20]

> Prosecutions of this character easily could degenerate into religious persecution. I do not doubt that religious leaders may be convicted of fraud for making false representations on matters other than faith or experience, as for example if one represents that funds are being used to construct a church when in fact they are being used for personal purposes. But that is not this case, which reaches into wholly dangerous ground. When does less than full belief in a professed credo become actionable fraud if one is soliciting gifts or legacies? Such inquiries may discomfort orthodox as well as unconventional religious teachers, for even the most regular of them are sometimes accused of taking their orthodoxy with a grain of salt.
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> I would dismiss the indictment and have done with this business of judicially examining other people's faiths.

The main thrust of Mr. Justice Jackson's argument was directed at the majority in *Ballard*—just how "sincere" and free from doubt does a religious leader have to be before he is fraudulently representing his beliefs—a problem which the majority chose to ignore. (See Appendix)

The logic of the *Ballard-Seeger* line of reasoning was urged in the

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[18] *Id.* at 92.
[19] *Id.* at 92-3.
[20] *Id.* at 95.

California courts in the 1966 case of *In re Estate of Supple*.[21] David Supple dies testate, leaving the bulk of his estate to various charitable organizations affiliated with the Roman Catholic Church. A grand-nephew of the deceased contested the will, claiming that the testator had not been of sound mind in executing the will and that undue influence had been exerted upon him to procure his signature to the will. The grand-nephew then assigned one-quarter of his interest in the estate to Terence Hallinan. Hallinan, in turn, filed a "contest in intervention" alleging that the signature had been procured by fraud and undue influence only. Hallinan's pleading set out various doctrines of the Roman Catholic Church in which the decedent had been instructed during his lifetime.[22] It was further argued:[23]

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[21] 55 Cal. Rptr. 542 (1966).

[22] *Id.* at 543. The California court set forth the alleged representations in great detail:

"It was further alleged that the testator had been a devout Roman Catholic from his earliest childhood until the time of his death and that the charitable beneficiaries named in the will had educated and instructed him continuously throughout his life, and in so doing had acted as agents for the Church and for each other. Allegedly the testator was taught that every human being has an immortal soul which can experience both pleasure and pain and which, upon the death of the body, is consigned either to Heaven, Hell or Purgatory; that Heaven is a place of complete and eternal bliss, Hell is a place of complete and eternal torment, and Purgatory is a place of temporary torment; that the consignment of a person's soul to one of these three regions is dependent upon the degree to which the person complied during his lifetime, with certain rules and commands which were prescribed by God but as to which the Roman Catholic Church, God's Vicar and representative on earth, has been appointed the depository, interpreter and promulgator; that the soul of a person who dies while wilfully guilty of violating any important rule will be consigned to Hell and to Purgatory until his offenses shall have been expiated; that in order for a person's soul to enter Heaven, he must have faith and must also have performed certain good works, which may include the bestowal of gifts, legacies and devises upon the Church and its divisions or agents; that as a reward for such good works, the priests or agents of the Church will recite prayers and perform ceremonials which will have the effect of facilitating the consignment of his soul to Heaven or shortening the period within which his soul, or that of another person whom he may designate, shall be required to spend in Purgatory. It was further alleged that the testator firmly believed all of the above representations and executed his will in reliance upon them and in the belief that the salvation of his soul and the souls of his predeceased relatives might be procured if he left the bulk of his estate to the Church and its agents, agencies and divisions. . . .

Certain of the charitable beneficiaries named in the will filed answers to the Smith pleading and, in response to the fraud and undue influence allegations thereof, denied that they were agents, agencies or divisions of the Roman Catholic Church but admitted that they operated under the general auspices of said Church and that their members belonged to said Church. They also admitted, on information and belief, that the testator had been taught and educated in the doctrines and tenets of the Roman Catholic Church and that such doctrines included a belief in the immortality of the soul and in the existence of Heaven, Hell and Purgatory, although not as places existing in the visible universe. They further admitted that the Roman Catholic Church taught that Heaven is reserved for the souls of persons free from mortal sin and Hell for the souls of persons guilty of such sin, and that a soul may attain salvation only through faith supplemented by good works, which may include the bestowal of gifts upon the Church or its divisions or agents. However, they denied that the Church taught that it could in any way help a soul consigned to Hell or that as a reward for the bestowal of gifts, legacies and devises, the Church would recite prayers and perform ceremonials which would facilitate the consignment of the soul to Heaven or shorten the period which the soul might be required to spend in Purgatory."

[23] *Id.* at 543-44.

> [T]he testator firmly believed all of the above representations and executed his will in reliance upon them and in the belief that the salvation of his soul and the souls of his predeceased relatives might be procured if he left the bulk of his estate to the Church and its agents, agencies and divisions. It was also alleged that all of the above representations were in fact false and untrue, constituting childish superstitions incompatible with man's advanced position in science and technology, and that the charitable beneficiaries who made these representations were guilty of unduly influencing the testator and were also guilty of fraud because they had made positive assertations which, although they believed them to be true, were not warranted by the information which they had and because they had breached a duty which, without an actually fraudulent intent, gained them an advantage by misleading the testator to his prejudice and the prejudice of his heirs at law.

The trial court dismissed the complaint in intervention on the ground "that the pleadings in question were fatally defective in that they contained no allegations to the effect that those responsible for such teachings did not, in good faith, believe them to be true."[24] Following the dismissal, the intervenor appealed, contending for the first time that "the contestants are entitled to have a jury determine whether or not the doctrines which procured the execution of the will were believed 'in good faith' by the proponents and their agents."[25]

It was further alleged that in the past the California courts have had no scruples in revoking a will executed by a Spiritualist for the benefit of the Spiritualist Church on the ground of undue influence exerted by a member of the Church. There was no hesitation on the part of the court in *In re Bishop's Estate*[26] to inquire into the good faith of a Spiritualist who had defrauded the decedent. The intervenor-appellant argued that no essential difference existed between[27]

> Frank Bishop, upon advice from the spirit world, turning over his estate to Mrs. Dickson, so she could use it 'in furtherance of the

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[24] *Id.* at 544.

[25] Appellant's Opening Brief, p. 9.

[26] 2 Cal.2d 132, 39 P.2d 201 (1934). The court stated in part:

> The contestants presented testimony which gave substantial support to their contention that the proponent, a spiritualist, together with her husband, also a spiritualist, succeeded in making the decedent a regular attendant at their seances, convinced him that he was in communication with the spirit of his deceased wife, and produced spirit messages purporting to come from his wife, urging him to join her, and telling him to make his will in favor of Mrs. Dixon, so that she could use it in furtherance of the Spiritualist Church. A number of witnesses testified that the decedent became wholly engrossed with spiritualism and acted only in accordance with directions from his 'guides' who appeared in spirit form at the seances. It is true that there were other witnesses who testified that the decedent appeared rational and able to take care of his business. However, we think that the record sustains the verdict.

[27] Appellant's Opening Brief pp. 13-14.

> Spiritualist Church,' and David Supple, to comfort his sisters and himself in that same spirit world, turning his over to Archbishop McGucken so that he could 'use it in furtherance of the Roman Catholic Church.'

The California court of appeals adopted the view that while the First Amendment prevents courts from determining the truth or falsity of a person's religious beliefs it does not foreclose inquiry into the sincerity or good faith of these beliefs, but affirmed the lower court's dismissal on the ground of the failure of the intervenor's pleadings to allege insincerity of religious belief.[28]

Although *Hotema v. United States*,[29] was not called to the Court's attention in *Ballard*, the principles enunciated in this earlier case seem to be pertinent to a full discussion of this type of problem. In *Hotema*, a Choctaw Indian was convicted of killing a woman whom he believed to be a witch. Hotema's reading of the Scriptures had convinced him that witches existed and that it was his religious duty to exterminate this particular witch in order to save his tribe from further catastrophe.

At the trial, Hotema's counsel argued that these religious convictions were insane delusions and that his client should be found not guilty by reason of insanity. Within the context of M'Naghten's rule, the trial court instructed the jury:[30]

> Upon this phase of the case you are instructed that if the evidence shows that the defendant Hotema believed in witches, and that it was the result of his investigation and belief as to what the Scriptures taught, and that he acted upon that belief, thinking that he had the right to kill the party he is charged with killing, because he thought she was a witch, but at the time he knew it was a violation of human law and that he would be punished therefor, in that event it would not be an insane delusion upon the part of Hotema, but would be an erroneous conclusion, and, being so, would not excuse him from the consequences of his act.

In approving the charge given by the trial court the Supreme Court said:[31]

> The court, by the portions of the charge above adverted to, directed the attention of the jury to the distinction between a mere erroneous opinion and an insane delusion, the product of a diseased mind or brain. The subject is somewhat difficult, and the line of distinction not always easily drawn, but it exists, and we think that in this case

[28] 55 Cal. Rptr. at 545.
[29] 186 U.S. 413 (1902).
[30] *Id.* at 419.
[31] *Id.* at 421.

> the condition of mind which would render the defendant irresponsible was sufficiently and properly indicated by the court in its charge.

The conclusion to be reached is that in 1901 the Supreme Court found no difficulty in labeling a religious belief erroneous. And it is highly doubtful that anyone would suggest that *sincerity* of religious conviction be made the constitutional standard for immunity from prosecution when violence is perpetrated in the name of religion. Yet, without an explicit finding that a socially disruptive religious belief is erroneous (or socially intolerable), it is difficult to see how a sane, but misguided, religious fanatic could be prosecuted for murder, manslaughter or other crimes of violence.[32]

One assumption underlying the Court's position in *Ballard* and in many other First Amendment cases, seems to be that the American public is an omniscient, enlightened people who will be ruled and persuaded by reason if only truth can have its say, unfettered by arbitrary limitations. And oldfashioned theologian would urge that this premise is based upon a utopian denial of what the theologians described as the effects of original sin—the darkening of the mind and the weakening of the will. Such an unfashionable approach today may command few formal adherents, yet the ugly reality of the world often seems to indicate that the old theologians were more accurate

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[32] Substantially the same charge and distinction was given in United States v. Guiteau, 10 Fed. 161 (1882). In this celebrated case, Guiteau was on trial for the assassination of President Garfield. In the course of the trial, Guiteau argued that God had inspired him to kill Garfield in order to save the Union and the Republican Party. In the course of the long, and sometimes discursive instruction of Judge Cox, the distinction between insane delusions and erroneous religious beliefs is repeatedly underscored. "Unquestionably a man may be insanely convinced that he is inspired by the Almighty to do an act, to a degree that will destroy his responsibility for the act. But, on the other hand, he cannot escape responsibility by baptizing his own spontaneous conceptions and reflection and deliberate resolves *with the name of inspiration.*" (Emphasis added.) U. S. v. Guiteau *supra,* at 181. However, in reference to the "right and wrong" standard of the M'Naghten rule, Judge Cox remarked, almost casually: "If a man insanely believes that he has a command from the Almighty to kill, it is difficult to understand how such a man can know that it is wrong for him to do it." U. S. v. Guiteau *supra,* at 182. *See also* Weihofen, INSANITY AS A DEFENSE IN CRIMINAL LAW 78 *et seq.* (1933).

Hotema has been rarely cited in subsequent opinions except to illustrate the principle of "burden of proof" in the defense of insanity in criminal proceedings. See e.g., Leland v. Oregon, 343 U.S. 797 (1951); Howard v. United States, 232 F.2d 274 (5th Cir. 1956); Sauer v. United States, 241 F.2d 643 (9th Cir. 1957). So far as can be ascertained, no one has attempted to assess the effect which the *Ballard* holding might have on the problem of "insane delusions" in the law of wills. Quaere: whether an argument can be made that *sincerely* held religious delusions must be enforced? In Irwin v. Lattin, 29 S.D. 8, 135 N.W. 759 (1912), a will dictated by "spirits" was set aside for want of testamentary capacity (insane delusion); and, in Ingersoll v. Gourley, 78 Wash. 406, 139 Pac. 207 (1914), a belief that a certain religious teacher was God was given as the reason for holding lack of testamentary capacity when the testator left everything to the religious teacher. The easier way out in the *Ingersoll* case would have been a finding of undue influence. However, when there is no existing person exercising an undue influence, the Court, when confronted with a bizarre will, cannot avoid the problem whether certain religious beliefs are insane delusions.

in their assessment of human nature than the optimistic moderns. And in this particular, the skeptical empiricism of Holmes brought him closer to the theologians. The point here is that it is impossible to build a second story over a vacant lot. And it is equally difficult to derive viable legal principles from logical categorizations founded on an unwarranted optimism about human behavior.

The majority in *Ballard*, and in many of these religious and free speech cases, create the impression that they benignly regard individual ministers as harmless, if somewhat misguided citizens, who should be let alone to out-talk themselves. For the highly educated, urbane agnostic, this approach may be adequate. Perhaps this is tautological, but it should be obvious that a religious leader does not become a civil problem until people begin to listen to him.[33]

Another example will serve to illustrate the complexity in this area. If John Doe advertises that he has concocted a new cure for cancer and his preparation turns out to be worthless, his advertising campaign can be severely curtailed by an FTC "cease and desist" order[34] and he could be prosecuted for mail fraud[35] or for fraud by wire (radio, television).[36] Yet if John Doe "sincerely believes" that the plain water which he blesses is "atomic" and will cure cancer, *Ballard* seems to say that he cannot be reached. Certainly the Ballards' preaching or advertising of their religious experiences are not substantially different from the religious experience or miracle which John Doe advertises for his product. And the inefficacy of the cure can be attributed to a whole host of "religious" causes: lack of faith, general sinfulness, etc. Consequently, John Doe would seem to be protected if he qualifies his advertising by promising cures only to those who are subjectively disposed.

In at least one case since *Ballard*, *Gottleib v. Schaffer*,[37] the lower court declined to follow the *Ballard* reasoning and found that although

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[33] For example, numerous "prophets" have foretold the end of the world at a specific day and hour. Most have been tolerated as harmless cranks. Yet, occasionally one catches the public eye. The New York newspapers for February 4, 1925, and days following contain vivid bulletins on the impending doom prophecied by an ascetic named Reid (for a full account of the prophecy see "D-Day for the Doom Prophet," 44 TRUE MAGAZINE 29 (Jan. 1963). The difficulty with Reid's prophecy was that people believed it and disposed of their property in preparation for the end. When the prophecy failed of fulfillment, these self-impoverished people became public charges. Quaere: whether this is a substantive evil which would justify an invasion of the prophet's free speech? The clear and present danger test is not of much help in this type of situation, unless we are prepared to say that the danger is always clear. How "present" does "present" have to be?

[34] 15 U.S.C. § 45 (1914).

[35] 18 U.S.C. §§ 1341-42 (1948).

[36] 18 U.S.C. § 1343 (1956).

[37] 141 F. Supp. 7 (S.D.N.Y. 1956).

sophisticated people might simply laugh at advertisements of a miracle cross which would allegedly solve all financial and marital difficulties, the fraud statutes were enacted to protect the ignorant and the credulous. And in finding that the allegedly miraculous effects of the items offered for sale were *false* claims, the court quoted a dictum from *Reilly v. Pinkus*,[38] to the effect that ". . . an intent to deceive might be inferred from the wholly unsupportable. . . ."[39]

A slightly different aspect of the problem of religious fraud was presented to the Court in *Hygrade Provision Co. v. Sherman*.[40] *This case* upheld the New York criminal statutes which forbade sales of meat products misrepresented as "kosher." The criminal provisions were attacked on the grounds that they violated the rights of the dealer under the due process and equal protection clauses of the Fourteenth Amendment. And the court held that the *scienter* requirement of the law adequately protected the merchants.

The First Amendment was not argued in *Hygrade*. However, it seems obvious that the Kosher-meat fraud statutes give a "special protection" to a number of sincere Jewish people. For these people, the dietary laws of their religion really matter. Yet, the "absolute separation principle," espoused by Mr. Justice Douglas,[41] would seem to require that Kosher-meat fraud statutes be declared unconstitutional because these criminal provisions do "aid" the practice of a particular religion. And it is precisely in this regard that the "absolute separation principle" breaks down as a viable constitutional tool, because it would put the full power of the state behind the suppression of all individual differences in religious practices.

Expressed in terms of political pluralism, the conscientious beliefs of the Orthodox Jew about what he eats are of extreme importance to him, although they may seem completely absurd to a Christian. But the function of a pluralistic, democratic state is to aid the Jew in the

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[38] 338 U.S. 269 (1949). *Reilly* involved a prosecution related to allegedly false advertising concerning the fat-reducing potential of the iodine from granulated kelp. The case was remanded to permit the Government experts to be cross-examined from medical dictionaries. However, the Court expressed no qualms about a judicial tribunal's competence to decide the scientific truth or falsity of the advertising claims. Quaere: whether the magic word "religious" would have prompted a different result? *See also* Reich v. United States, 239 F.2d 134 (1st Cir. 1956) *cert. denied*, 352 U.S. 1004 (1957). A prosecution injunction forbade Reich to continue advertising and selling his "orgone energy accumulators." Again, quaere: whether the magic word "religion" would have altered the outcome? For procedural aspects involving "doctors" who continued to use the machine after the original injunction was issued, see United States v. William Reich Foundation, 17 F.R.D. 96 (1954) *aff'd sub. nom.* Baker v. United States, 221 F.2d 957 (1st Cir. 1955).

[39] *Id.* at 276.

[40] 266 U.S. 497 (1924).

[41] See e.g., Engel v. Vitale, 370 U.S. 421, 443 (1962) (concurring).

free exercise of his religion by enactment of reasonable criminal laws, if this is necessary. Certainly, these laws do not interfere with the belief or practice of any other religious groups. Consequently, to deprive the sincere Jew of this protection seems to throw the full weight of the state behind an effort to get the Orthodox Jew to *change* his dietary rules—to reduce his religious practices to a "secularly acceptable" lowest common denominator along with other religious groups. Much more than subtle psychological pressure would be exerted by the repeal of these criminal provisions.

Civil Suits

Perhaps an innate dislike for criminal prosecutions motivated the majority in *Ballard*. Turning to the civil cases, where the conflict of "purely private" rights is involved, the New York case of *Brown v. Father Divine*,[42] will serve as an apt illustration. Mrs. Brown became a follower of Father Divine and moved into his Long Island "heaven." Before long she tingled with "excitement and religious fervor" and soon visioned a halo around Father Divine. Father Divine persuaded her that the only road to eternal life lay in surrendering all her earthly possessions to the "Heavenly Treasury." And heeding this advice the plaintiff handed over a substantial sum of cash and personal property.

However, these funds, instead of being deposited in the Heavenly Treasury, were in the greater part sequestered, misappropriated and diverted away. Mrs. Brown, alias "Rebecca Grace," brought this civil action to secure the appointment of a receiver for the profits from the Peace Mission so that her lost property might be restored to her.

In defense, Father Divine alleged that he had received the money but staunchly denied that he had received it "as a person." In other words, he argued that he, being divine, had received the money in a purely spiritual capacity and could do with it as he pleased. And no one questioned the *sincerity* of his belief. He really did think he was God. The court brushed aside these religious beliefs and held that when Father Divine entered a civil court he did so in human form and capacity—no differently from any other earthly being. Consequently, the court permitted Mrs. Brown to recover, after finding that the activities of Father Divine constituted fraudulent conversion of the plaintiff's funds.

Perhaps in a fictionalized world of superbly rational beings, dispassionate reason would prevent the harsh effects of victimization by

[42] 298 N.Y. Supp. 642, 163 Misc. 796 (1937).

fraud. However, we do not live in such a world. And while irrational emotional impulses continue to exercise a profound influence in human events, the political state must cope with these problems—or risk the danger that defrauded victims will resort to private vengeance. Although an argument may be made that criminal prosecutions are a less desirable method of solving this problem, it would seem that the legislature is the institution which is more properly competent to make a decision of this type. Consequently, if a court in a civil case can deny the validity of fanatical religious claims to prevent the anarchy of private vengeance, the same principles should govern the prosecution of criminal cases.

Fortune Telling and Faith Healing

With virtually unanimity, prosecutions under laws prescribing fortune telling and faith healing have been sustained over the objection of religious freedom, on the basis of the "belief" versus "practice" distinction from *Reynolds*.[43] Despite the difference between questioning sincerity of belief and questioning the belief itself brought out in *Ballard*, the courts rarely, if ever, have bothered about the *sincerity* of the defendant's belief or convictions. The fundamental reason seems to be that the court's until now, have given great weight to the legislature's "finding of fact" and these "religious practices" when engaged in for money, create serious social disruptions. The history of these two practices is replete with instances of fraud. There seems to be no valid reason why religious fraud should enjoy a preferred position different from religious polygamy or religious human sacrifice. It is recognized that the social need for regulating religious fraud may not be as compelling as the need for regulating human sacrifice, but the social need, if lesser in degree, is still present.

The establishment problem also hovers in the background of these religious frauds because of statutes prescribing fortune telling and faith healing—particularly if one subscribes to the principle of absolute separation of Church and State. The statutes generally exempt prophecy or faith healing when these practices are under legitimate religious auspices—which implies that the courts and the legislature can prescribe *some* standards of legitimacy. For example, a Los Angeles ordinance outlawing fortune telling, etc., exempts ministers "who are accredited ministers of a *bona fide* church."[44] In *Gladstone v.*

[43] See Rubenstein, Contemporary Religious Jurisprudence, Waldain Press, Chicago (1948) for a comprehensive compilation of the cases involving such prosecutions.

[44] Los Angeles Municipal Ordinance § 43.31.

Galton[45] the plaintiffs sought to enjoin the enforcement of this ordinance on the ground that it denies "equal protection" by granting a monopoly of fortune telling to religious organizations. The court held that if the exempted ministers engaged in the business of fortune telling they would come within the proscription of the ordinance. But the Court offered no discernible standards for distinguishing the "business" from the "religious practice" and perhaps theoretically it is impossible to do so. When confronted with a "totality of the facts situation"—in other words, a real case or controversy, a court will have to make close and arguable decisions, after hearing the totality of the evidence. But the contingent nature of the real world with which a court must deal belies every attempt to solve these problems with broad sweeping abstractions.[46]

In the same year *Gladstone* was decided, in *People v. Strong*,[47] the New York court found that a defendant minister was not acting in good faith in a sincere endeavor to administer the beliefs of his religion, but was engaged in the outlawed practice of fortune telling. The court based the conviction upon the finding that the "message service," consisting of a brief Bible passage, a fifty-cent charge and the presentation of questions and their answers, did not constitute a religious service because it was "almost entirely devoid of any religious presentation or exposition."[48] It is one thing to disagree with the court on the totality of the evidence in a close factual situation of this type. It is quite different, however, to assert that a court of law cannot constitutionally adjudicate such a question.

Such a view places the political state on the horns of a difficult dilemma. Either it must absolutely outlaw prophecy and faith healing —which it probably cannot do under the 'free exercise' clause, or else it must accept the magic word "religion" as an absolute defense to every prosecution—and thus frustrate the primary purpose of these criminal statutes. And the sincerity standard proposed in *Ballard* merely seems to obscure the second horn of the dilemma under more

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[45] 145 F.2d 742 (9th Cir. 1944).

[46] The final paragraph of the ordinance has a peculiarly Southern California flavor but seems to indicate a conscientious attempt to regulate abuses without infringing upon the "free exercise" of religion. ". . . [A]ny church or religious organization which is organized for the primary purpose of conferring certificates of commission, credit or ordination for a price and not primarily for the purpose of teaching and practicing a religious doctrine or belief, shall not be deemed to be a bona fide church." LOS ANGELES MUNICIPAL ORDINANCE § 43.31.

[47] 53 N.Y.S.2d 941 (1944).

[48] *Id.* at 945.

general phraseology.[49]

Fraudulently practicing medicine under the guise of religious belief, fraudulently stamping "kosher," and fraudulently describing religious beliefs or experiences in an effort to raise cash from the gullible should be governed by the same principles of law. The essential element in each case is the same: injuring others by asserting something which is not true. The *scienter* element from the general criminal law, which seems to be the element which *Ballard* chose to emphasize, is only *one* element in the crime. And it is not the *substantive* element of the offense. This misplacement of emphasis appears to be the inherent difficulty with the *Ballard* decision. The gist of the fraud action seems to be that the allegedly false statement is false. And an absolute principle which permits a court to convict while that same court is powerless to pass on the substantive element of the offense does seem anomalous.

Marriage Counseling

A 1963 article[50] appearing in the *Saturday Evening Post* presents an empirical parade of horribles very similar to the abuses which brought on the fortune-telling and medical-practice acts, and calls for legislative action to remedy the abuses. One proposal would allow the state to limit marriage counseling to specific professions, such as psychiatry and psychology, in which the applicant is previously qualified, licensed or certified. In addition, each applicant will have to take an examination to be licensed as a marriage counselor. Church groups which advertise as counselors will have to have a state-licensed marriage counselor on the staff.

There seems to be a major Church-State clash in the offing if this proposal is literally accepted. Clergymen have been in the "business" of marriage counseling for years, and they "advertise" this fact by their distinctive garb. Of course, many more churchmen have shown

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[49] In Los Angeles County v. Hollinger, 19 Cal. Rptr. 648 (1962), the court held that the Festival of Faith and Freedom Foundation was not a religious organization, and that the opera "Nabucco" was not a religious work, and that consequently the contract between Los Angeles County and the Foundation to procure production of the opera was not an aid or preferment of a religious organization, sect, church, or sectarian group. In People v. Estep, 345 Ill. App. 132, 104 N.E.2d 562 (1952), *cert. denied*, 345 U.S. 970 (1953), *reh. den.*, 346 U.S. 842 (1953), the Illinois court held that it is a question of fact whether a faith healer is exercising his religious freedom or using religious freedom as a subterfuge to practice medicine illegally, and thus use his religion as a shield for mercenary activity. A case of this type seems to point up Justice Jackson's reservations in *Ballard* about juries determining the sincerity of conviction of those who hold unpopular or "far out" religious beliefs.

[50] Davidson, *"Quack Marriage Counselors,"* Saturday Evening Post, Vol. 236, No. 1, January 5, 1963, pp. 17-25.

considerable reluctance to embrace the most *avant-garde* theories propounded by social scientists, including psychologists and psychiatrists. Consequently, any attempt to impregnate marriage counseling services with "modern" methods and approaches will receive a long, hard look from the major denominations. A quick way to avoid the problem might be to exempt ministers of religion from the act. This might work and apparently has in California.[51] However, according to a statement attributed to Irving R. Stone, then chairman of the San Diego Psychology Commission:[52]

> The only problems we have had go back to a provision in the original law which exempted certain professions, like doctors and ministers, from licensing. Occasionally we get some nut who ordains himself a minister in a church he creates himself and then opens up a pastoral counseling service. We go after them, usually on fraud charges, through the district attorney's office.

In *Carrieri v. Bush,* [53] the supreme court of Washington has opted for a "completely secular" resolution of this type of problem. In this case, the pastor and elders of an "unidentified religious sect"[54] were sued for alienation of affections. Plaintiff and his wife had a happy marriage before she became active in the affairs of the sect. In the presence of his wife, plaintiff husband was accused by the pastor of "being full of the devil,"[55] and that he, the pastor, had "the gift of discernment."[56] Plaintiff's wife, apparently believing these accusations, increased her participation in the sect's activities which led directly to the spouses' separation. After the divorce of the parties, the action for alienation of affections was instituted. The trial court dismissed the action, in effect, conferring upon the defendants "an absolute privilege to interfere in [plaintiff's] marriage upon religious grounds."[57] The supreme court reversed and held:[58]

> There is no question that our state constitution protects the free exercise of religious beliefs (Const. art. 1, 11, amendment 34), and neither a religious belief nor the lack of such belief is, of itself, grounds for divorce [citing case]. But one does not, under the guise of exercising religious beliefs, acquire a license to wrongfully interfere with familial relationships. Good faith and reasonable conduct are the necessary touchstones to any qualified privilege that may arise from any

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51 *Id.* at 24.
52 *Ibid.*
53 69 Wash. Dec.2d 536, 419 P.2d 132 (1966).
54 *Id.* at 539, 419 P.2d at 134.
55 *Id.* at 541, 419 P.2d at 135.
56 *Ibid.*
57 69 Wash. Dec.2d at 545, 419 P.2d at 137.
58 *Ibid.*

> invited and religiously directed family counseling, assistance, or advice. Ill will, intimidation, threats, or reckless recommendations of family separation directed toward alienating the spouses, where found to exist, nullify the privilege and project liability [citing cases].

Quaere: whether hellfire and damnation are any longer socially acceptable in Washington?

Licensing as an Answer

A more cumbersome alternative would involve the actual licensing of all ministers who wish to act as marriage counselors. Such a proposal presents certain very interesting problems. To assert that a state can set no licensing requirements for the performance of purely spiritual functions but can regulate other actions of a minister simply underscores the fallacious nature of these logical categories. The realities confronting each other—Church and State—are already commingled and refuse to abide in logically abstracted watertight compartments. Marriage ceremonies provide a good example. From the viewpoint of the minister they may be "purely spiritual"; yet they also have an undeniable secular aspect.

If we assume that the state could constitutionally require some regulation of ministers—as the District of Columbia does for the performance of marriage ceremonies—Coke's rules for interpreting statutes might assist in writing one. The major evil to be corrected seems to be the blind leading the blind, *i.e.*, men and women with little or no formal education posing as ministers or psychologists and dispensing advice to emotionally disturbed persons. Perhaps the answer to the problem would lie in licensing requirements which would stress educational qualifications similar to those required for military chaplains. It is possible that some of the larger denominations would go along with this proposal, provided that they were permitted to retain control over their own educational requirements. However, some of the smaller denominations which do not require substantial educational qualifications for their spokesmen would be hard hit by such a licensing requirement. And in addition, the "free speech" provisions of the federal constitution are also hovering in the background when the government undertakes to say who can and who cannot give advice. On the other hand, it is one thing to give advice—and another thing to charge money for it.

The vague standards set down for administrators have proved to be a handy reason for striking down "prior restraints" in the form of

municipally imposed licensing systems.[59]

A much more difficult problem is presented by the ramifications of certain state statutes. For example, a Delaware statute provides: "Every physician, midwife, undertaker, and clergyman shall without delay register his or her name, address, and occupation with the local registrar of the district in which he or she resides."[60] This registration provision, in the vital statistics section of the Delaware Code, seems to have been enacted in an area of legitimate state concern: information of births, deaths, etc. Relative to freedom of expression, in *Thomas v. Collins*,[61] the Court held that registration and a nondiscretionary permit could not constitutionally be required before delivering a political speech. Presumably, the same would apply to a religious minister. In *Cantwell v. Connecticut*,[62] the Court held invalid a permit system designed to prevent fraud in the solicitation of funds, on the grounds that the administrator had unbridled discretion to determine what causes were religious. And the implication in *Largent v. Texas*,[63] is that a certain limited amount of solicitation of funds for religious causes may be permissible without a permit, though the official in *Largent* had too much discretionary power.

Despite the fact that the solicitation of funds for religious and charitable causes involves a large element of free speech and freedom of access to private homes, there would seem to be no constitutional infirmity in an ordinance which requires a presentation of credentials, and even the issuance of a non-discretionary permit or identity card under appropriate criminal penalties, before soliciting for funds. Whether this is the best possible way to prevent a person disguised as a Salvation Army officer from fraudulently soliciting funds under false pretenses is relatively unimportant. The conclusion to be drawn is if such a system is enacted relative to ministers of religion soliciting funds to carry on their work, there would be no constitutional infirmities in a narrowly drawn statute. In fact, far from being a restraint on freedom of religion, such a system would aid freedom of religion by preventing such religious fund drives from falling into disrepute by reason of their abuse—if it is permissible to "aid" religion.

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[59] See Lovell v. City of Griffin, 303 U.S. 444 (1938); Largent v. Texas, 318 U.S. 418 (1943); Tucker v. Texas, 326 U.S. 517 (1946); Kunz v. New York, 340 U.S. 290 (1951). The "void for vagueness" doctrine has also been used to set aside a criminal conviction when a statute was so vague that it infringed constitutionally protected areas of free speech. Stromberg v. California, 283 U.S. 359 (1930) (display of red-flag case).

[60] DEL. CODE ANN. § 16-321 (a) (1953).

[61] 322 U.S. 516 (1945).

[62] 310 U.S. 296 (1939).

[63] 318 U.S. 418 (1943).

FAITH HEALING AND MANSLAUGHTER

A final word might be added about a related free speech problem which illuminates this area of free exercise and religious delusion from a slightly different viewpoint. The "*parens patriae*" approach, whereby children are given necessary medical attention as wards of the court, has, to a considerable extent, replaced criminal prosecutions of parents who refuse medical treatment for their children on the grounds of religious scruples.[64] However, faith healers, and other ministers of religion, can exhort parents to neglect or to refuse reasonable medical care for their children, apparently with complete impunity.[65]

Ballard may be thought to throw considerable doubt on whether *sincere* parents can be held guilty of involuntary manslaughter for "culpable negligence," "gross negligence," or "criminal negligence" in failing to summon readily procurable medical aid. However, assume that in the proper factual situation parents could be found guilty of criminal negligence (and, hence, of involuntary manslaughter) despite the sincerity or tenacity of their religious persuasions. Suppose an extreme factual situation in which a child cuts himself on a crib and the parents simply allow him to bleed to death although the simplest type of bandage would have saved the infant's life. Can the faith healer or other religious minister be held as an accomplice or accessory before the fact, because he counsels, exhorts or even persuades the parents to persist in their criminal negligence? At least two Canadian decisions seem to hold that he is able to do so. In *Rex v. Brooks*,[66] a friend of one parent was convicted for unlawfully counseling the parent to disregard his duty to provide his children with medical attention. By reason of the parent's neglect the two children needlessly died of diphtheria. And in *Rex v. Elder*,[67] a conviction of a Christian Scientist practitioner for aiding and abetting a parent to neglect his duty to care for his child (daughter died of diphtheria)

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[64] The landmark case invoking the *parens patriae* approach is People ex rel. Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 796, *cert. denied*, 344 U.S. 824 (1952), in which the Juvenile Court appointed the Chief Probation Officer as guardian of a child in order to consent to certain blood transfusions necessary to save the child's life. The child's parents, Jehova's Witnesses, vehemently objected to the transfusions and argued that the action of the Juvenile Court violated their constitutional right to freedom of religion. An earlier case in Texas, Mitchell v. Davis, 205 S.W.2d 812 (Tex.Civ.App. 1947), had followed the same procedure in ordering proper medical care for a child, but the *Mitchell* case did not attract the public attention of *Labrenz*. *Contra*, In re Hudson, 13 Wn.2d 673, 126 P.2d 765 (1942), holding that the state had no power to order medical treatment—over the religious objections of the child's parents—for amputation of an arm which was severely infected. *Cf.* Application of President & Directors of Georgetown Col., 331 F.2d 1000 (D.C. Cir. 1964).

[65] See Cawley, *Criminal Liability in Faith Healing*, 39 MINN. L. REV. 48 (1954).

[66] 22 Can. L. T. 105, 9 B.C.R. 13 (1902).

[67] 35 Man. Rep. 161 (1925).

was overturned because of a defect in the evidence. However, the court made it clear that the conviction for manslaughter would have been sustained had it not been for a technical defect in the trial (hearsay evidence admitted).

So far as can be ascertained, no American court has sustained a conviction of a minister of religion as an accessary to manslaughter. The *Los Angeles Times*,[68] contains the account of the successful prosecution of a parent for manslaughter because the death of a child from peritonitis. The religious advisor who had persuaded the parents to ignore the warnings of the family doctor when the child was stricken with appendicitis was also prosecuted but exonerated, apparently under the free exercise clause. However, the trial judge gave this particular defendant a tongue lashing, calling him a "religious racketeer."[69]

An uncritical appeal to libertarian generalities about preferred freedoms in cases of this type constitutes an enticing substitute for the hard work of carefully analyzing each factual situation. For example, if a religious leader is eloquent enough, he might induce one or more of his followers to hurl themselves from a high building in the firm belief that angels would bear them up. Quite apart from the counseling-of-suicide-problem (which might not be a crime where the common law crimes have been abolished), if the falling bodies of these religious votaries kill innocent passers-by, why could not the advisor be prosecuted for manslaughter?

Under a "reckless and wanton conduct" statute the charge against the religious counselor might even be first degree murder. And it is

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[68] September 3, November 18, 19, 22, 29 (1938).

[69] American courts have been reluctant to convict. See Craig v. Maryland, 155 A.2d 684 (1959), conviction reversed for insufficient evidence. However, the Maryland court at 690 dismissed the "free exercise" argument as follows:

> In prosecutions for the breach of a duty imposed by statute to furnish necessary medical aid to a minor child, the particular religious belief of the person charged with the offense constitutes no defense. He cannot, under the guise of religious conviction, disobey the laws of the land made for the protection of the health and safety of society. It has been said that statutes such as we just mentioned make it the duty of those charged with the care of a child to furnish medical aid to the child, regardless of their religious belief, as such statutes are directed at the acts and not the beliefs of individuals. Annotation, 12 A.L.R.2d 1050. People v. Pierson, 176 N.Y. 201, 68 N.E. 243, 63 L.R.A. 187, seems to be a leading case upon the subject. After a most interesting and enlightening discourse upon the origin of medical science, the growth of legends of miracles and the intertwining of religion into the treating of sickness, the court held that a statute making the failure to furnish medical attention to a child a misdemeanor as applied to a person believing that prayer was the proper cure for illness was not violative of a New York constitutional provision guaranteeing the freedom of religious worship, since the religious belief secured by the Constitution did not extend to practices inconsistent with the peace or safety of the State, which involved the protection of the lives and health of its children as well as obedience to its laws.

difficult to see why the sincerity of such a religious fanatic who has caused loss of innocent lives should excuse his conduct. Of course, it might be argued that jumping off a high building into a crowded street is misfeasance, whereas the parents relying on faith healing are guilty of nonfeasance. But this abstract categorization of misfeasance and nonfeasance breaks down into a distinction without a difference when the situation is sufficiently serious. "Trusting in God" and refusing to put an available lifesaver on a child or an unconscious stranger in a perilous situation at sea hardly differs in actuality from shooting at random in a crowd. And if *Reynolds* and *Davis v. Beason*[70] permit the prosecution of acts or the counseling of misfeasance, there seems to be no reason why the same principles would not permit the prosecution of counseling nonfeasance in an appropriate factual situation.

This returns us full circle to the starting point of uncritically accepting the distinction between "belief" and "practice" in *Reynolds*. A final illustration of this point may be seen in *First Church of Christ, Scientist*.[71] On the authority of the *Reynolds* distinction, the court denied incorporation for the First Church of Christ, Scientist, because the court felt that as a matter of public policy, it could not sanction the spread of faith healing.[72]

The conclusion to be reached is that the facile oversimplification which regards religious beliefs as absolutely immune from governmental control and religious practices as absolutely subject to regulation by the secular state belies the whole common law tradition of step-by-step, reasoned judicial adjudication. Despite innumerable dicta to the contrary, both the state and federal governments in the United States have some power, albeit indirect, to compel a change in religious belief. The classic example is the Mormon church cases, involving a whole complex of laws and regulations (including provisions for confiscation of property) which finally compelled the Mormons to announce in the 1890's that they did not preach polgamy nor permit any person to enter into its practice.[73]

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[70] 133 U.S. 333 (1890).

[71] 205 Penn. 543, 55 Atl. 536 (1903).

[72] *Accord*, In re St. Louis Institute of Christian Science, 27 Mo. App. 633 (1887).

[73] It often seems to be forgotten that Reynolds v. United States, 98 U.S. 145 (1879) was not the only case in this struggle which reached the Supreme Court. The property confiscation problem was decided in Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890) in which the Court upheld the constitutionality of the famous Edmunds-Tucker Act (1887). That Act dissolved the church corporation and provided for the seizure of the Church's property. Finally, Davis v. Beason, 133 U.S. 333 (1890) upheld the right of the Territory of Idaho to require a prospective voter or office holder to swear under oath that he was not a polygamist—nor a member of

Conversely, the federal and state governments in the United States do not have *absolute* power to regulate religious practices, and this is the inherent fallacy in the Christian Science cases just mentioned. In a realistic sense, both freedom to believe and freedom to practice are relative freedoms; and the power or right of the secular state to indirectly compel the adoption of certain beliefs or to proscribe certain religious practices is also relative. In this view the fundamental principle of constitutional adjudication is a "rule of reason." Admittedly, the rule is vague and uncertain. And admittedly there will be reasonable disagreement about its application in close factual situations.

CONCLUSION

A viable principle of constitutional adjudication must be flexible enough to respond to the endless gyrations of concrete factual situations. To say that "hard cases" make "bad law" is a confession that the principle or principles invoked have lost their flexibility and, consequently, their viability.

If only the real world would run in a precise, mathematical fashion, the clear and distinct concepts such as "belief" and "practice" would suffice to regulate the real. However, when confronted with the problems of religious fraud, these rigid categories prove to be completely inadequate.

Many an American court has stated that the "principle of separation" forbids any inquiry into the truth or falsity of religious belief, yet has had to ignore this absolute dictum when confronted with a problem of religious fraud. Absolutes generate absolutes. One harsh alternative to the incapacity of a court to pass on religious truth or falsity is to flatly prohibit the problematical practices: e.g., prophecy and faith healing. This illustrates the cruel paradox that overemphasis on "separation" as the unique principle of religious liberty will destroy the very freedom it supposedly bulwarks. On the other hand, absolute freedom to perpetrate fraud under the magic name of religion would restore a jungle atmosphere of private vengeance and convulse the state.

So long as human beings continue to be swayed by emotion, one must cope with religious fraud. And the absolute separation or "neutrality" principle is hopelessly inadequate to deal with this situation.[74]

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a church or other organization which "taught, advised, counseled or encouraged" polygamy. When the Court upheld the Idaho enactment, a similar provision was proposed in Congress for Utah, and this prospect finally caused the Mormons to capitulate.

[74] Abington School District v. Schempp, 374 U.S. 203 (1963). See the comments of Mr. Justice Brennan concurring at 244-45, favoring application of the strict neutrality principle:

> The mandate of judicial neutrality in theological controversies met its severest

Our constitutional history shows that our government has *some*—although a highly circumscribed—power to compel a change in religious belief—which implies a power to distinguish truth from falsehood. In other words, even in this supposedly intangible and untouchable realm of religious belief, separation is only relative.

Conversely, a rigid interpretation of government's broader power to regulate religious practices must be given a relative, not an absolute interpretation. To hold otherwise concedes to the secular state an omnipotence which belies the whole American emphasis upon the dignity of the individual and the inviolability of personal conscience.

Finally, a rigid application of the separation principle in such special areas as the Kosher-meat statutes and religious fund-raising drives would severely curtail if not completely destroy the "liberty" which "absolute separation" supposedly protects. Government compulsion can, of course, take many different and sometimes quite subtle forms. Governmental nonfeasance can as effectively compel a change in religious beliefs as the less subtle legal attack on the Mormons. Thus, the pernicious character of this "absolute separation" or "neutrality principle" is revealed in its surrender of religious freedom to a domain of exclusively secular competence in the regulation of the real world.

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test in United States v. Ballard, 322 U.S. 78. That decision put in sharp relief certain principles which bear directly upon the questions presented in these cases. Ballard was indicted for fraudulent use of the mails in the dissemination of religious literature. He requested that the trial court submit to the jury the question of the truthfulness of the religious views he championed. The requested charge was refused, and we upheld that refusal, reasoning that the First Amendment foreclosed any judicial inquiry into the truth or falsity of the defendant's religious beliefs. We said: 'Man's relation to his God was made no concern of the State. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views.' 'Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. . . . Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations.'

The dilemma presented by the case was severe. While the alleged truthfulness of nonreligious publications could ordinarily have been submitted to the jury, Ballard was deprived of that defense only because the First Amendment forbids governmental inquiry into the verity of religious beliefs. In dissent, Mr. Justice Jackson expressed the concern that under this construction of the First Amendment 'prosecutions of this character could easily degenerate into religious persecution.' The case shows how elusive is the line which enforces the Amendment's injunction of strict neutrality, while manifesting no official hostility toward religion—a line which must be considered in the cases now before us. Some might view the result of the Ballard case as a manifestation of hostility—in that the conviction stood because the defense could not be raised. To others it might represent merely strict adherence to the principle of neutrality already expounded in the cases involving doctrinal disputes. Inevitably, insistence upon neutrality, vital as it is for untrammeled religious liberty, may appear to border upon religious hostility. But in the long view the independence of both church and state in

APPENDIX

DIALOGUE

GODLY: What are the elements of fraudulent intent?

GODLESS: Suppose I come to you and say I have a piece of property out on the north side of town and that there is oil in the ground. We have tested it and found oil there. I am letting you in on the ground floor. You buy it and you find that there is no oil. What do you allege about me?

GODLY: That you made a false representation of a material fact and I relied upon it. I had a right to rely and was damaged.

GODLESS: Now I come to you and I have a roman collar on—and I say that there is oil in the ground and that you have to have faith. Can I be prosecuted for fraud?

GODLY: What do I have to prove?

GODLESS: That my religion is false, right?

GODLY: I don't think I could prove it.

GODLESS: How could a run-of-the-mill Catholic priest prove the Resurrection to a jury?

GODLY: Who is the attorney—what would be the economic value of such an issue?

GODLESS: Look at what the churches have going in simple terms of economic investment.

GODLY: All these cases illustrate that where the beliefs stay within a private realm there is no problem; but when they become detrimental to the public they must become subject to civil law.

GODLESS: That oversimplifies the issue. No crackpot idea is a problem until someone starts to take it seriously. You have absolute freedom of belief in the midst of a communist dungeon—or a dungeon operated by a religious order for that matter.

GODLY: I believe Ballard could be prosecuted because his beliefs have moved out of the private realm into the public domain and constitute a detriment which, if allowed to continue, would be subjecting the public to this man's beliefs.

GODLESS: Isn't the public always being subjected to someone's belief? Or are we going to outlaw only those religious beliefs which can't afford a Madison Avenue selling campaign?

GODLY: That is not what I meant.

GODLESS: Suppose I again let you in on the ground floor and sell you a few shares of stock on a gold mine in New Mexico. You go home and find a dividend check—to my utter astonishment. Can you prosecute me for fraud?

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their respective spheres will be better served by close adherence to the neutrality principle. If the choice is often difficult, the difficulty is endemic to issues implicating the religious guarantees of the First Amendment. Freedom of religion will be seriously jeopardized if we admit exceptions for no better reason than the difficulty of dilineating hostility from neutrality in the closest cases.

GODLY: Since I have suffered no damages, why would I want you to be imprisoned for fraud?

GODLESS: Why? What is the perfect defense to fraud?

GODLY: Truth.

GODLESS: So how can you convict anyone of religious fraud without deciding that their religion is false?

GODLY: You have to show that the people professing the religion did not sincerely believe what they were saying. When a person moves from the area of providing for spiritual welfare into providing for bodily welfare you can then show falsity.

GODLESS: OK? I tell you that if you give me a thousand dollars and have faith you will be cured of your sickness. (P.S. the Lord loves a cheerful giver.)

GODLY: I think what you are trying to point out is that in order to establish religious fraud you have to establish an untrue faith.

GODLESS: Exactly.

GODLY: Fraud can be shown in the area of bodily welfare because there are certain recognized scientific, medical facts which exist and which cannot be controverted. Untruth can be established the moment you move from the spiritual to the corporeal area.

GODLESS: Can you? Pick a disease.

GODLY: Cancer.

GODLESS: OK. If you pay the money and have faith you will be cured. Every faith healer says that. If you have faith in Saint Germain and are a generous giver you will be cured.

GODLY: Now you are asserting the fact that curing an incurable disease through faith is possible.

GODLESS: Exactly!

GODLY: What you are saying is if you *believe* what you are asserting you can't be prosecuted for fraud.

GODLESS: That is your position and the Court's position in *Ballard*. How are you going to find fraud without deciding that my representations are false?

GODLY: I can't. I can't find that his religion is false—but I can question his sincerity. Why can't a jury decide the question of his sincerity?

GODLESS: Suppose you make the contribution and you still have cancer.

GODLY: I could prosecute you . . .

GODLESS: . . . But I have a perfect defense: You don't have faith, brother.

GODLY: If I can show a jury that you knew when you told me to lay the cash on the table that you could not cure my cancer, then you defrauded me.

GODLESS: I don't cure your cancer—the spirit does—if you have faith. So now you want to inquire into the sincerity of my belief. You make a great pretext in this country of immunizing religious belief from public inquiry. Now you want the jury to tramp around in that sacrosanct area of man's deepest convictions—the most sacred, in-

violable part of a man's being. After all, that's all the Inquisition was supposed to do—find out if people really believed in the Catholic faith, or had lapsed back into Judaism or Mohammedanism.

GODLY: But if I can show that you don't believe what you are saying . . .

GODLESS: . . . How do you do that without putting my faith to the test?

GODLY: Just get twelve good men.

GODLESS: Poor Ballard—his statements are so bizarre that nobody could believe them. That is why everyone laughs when they read the statement of facts contained in the majority opinion.

GODLY: If that is the case why do superstitious people have the right to rely on such statements?

GODLESS: Why would I have a right to rely on an absurd statement and then bring an action for fraud?

GODLY: What is the difference between what the Ballards did and polygamy?

GODLESS: There is more money in fraud than in polygamy. I am only asking you to be consistent. If you are going to send Ballard to prison for hustling a few bucks via a few promises about this life and the next —why not imprison all these priests who collect substantial sums—far more substantial than Ballard for masses said for the dear departed. (You loved them in life . . .) These priests who live off the income of pious bequests (which were outlawed at common law by statutes against superstitious uses) obviously make more money than poor old Ballard or Saint Germain.

GODLY: You determine who to prosecute by the outrageousness of what they promise.

GODLESS: Spoken like a true bourgoise middle class moralist. Only "disreputable" religions are suppressed.

GODLY: But aren't you in the clear and present danger area when con artists run around bilking people?

GODLESS: How do you differentiate between a con artist and a simple country priest? All you are trying to do is distinguish between religions which are acceptable to the middle class and the more or less lunatic fringe which looks bizarre because the people involved are not in your "in group." All you are advocating is freedom of religion for those who are willing to conform to respectable middle class norms, but there is no freedom for those who dare to be different. To find them guilty of fraud, the simplest solution is to show that their religious beliefs are preposterous.

GODLY: What other test of sincerity is there?

GODLESS: In the good old days of Nero they had a simple solution: throw them to the lions, and if they don't beg for mercy they must be sincere. That was always the historical test of sincerity. Are people willing to die for their religious beliefs or at least suffer?

GODLY: What you are saying is that juries shouldn't be allowed to question anyone's religious integrity.

GODLESS: Precisely. As I read the First Amendment all religions are equal: be they good, bad, true, false or indifferent. This is the heart of the First Amendment.

GODLY: But what about the polygamists, the snake handlers and the peyote users?

GODLESS: What harm do they do? Snake handling could result in death. It probably has, despite the passage in Scripture about picking up poisonous serpents. But what harm does the polygamist do? He simply removes a few old maids from an already crowded market.

GODLY: What about the children?

GODLESS: We have child welfare laws to take care of the children if the children are abused. Can you prove "a priori" that a polygamus family is harder on children than the selective polygamy which is now fashionable in American culture?

GODLY: What about the peyote users?

GODLESS: What harm do they do? Or the pot smokers for that matter? Has anyone ever proved that marijuana is really harmful? Or is this a remnant of the general no smoking, card playing or dancing view of the Fundamentalists?

GODLY: Why can't we get out of the religious area and go to a contract theory in which a person promises to produce certain results and fails to do so? Why not bring an action for breach of contract?

GODLESS: OK. Let's go over and haul in Father X. He promised that if you had a Mass said for a soul in purgatory it would assist that soul or some other soul—now let him prove it.

GODLY: Although you can prove that the cancer was not healed, you can't prove that the soul was not assisted.

GODLESS: The cancer wasn't healed because you didn't have faith, baby.

GODLY: Well, you can prove a lot of people who go to Lourdes don't get healed, but some do.

GODLESS: Under the *Ballard* theory a jury of atheists could convict the whole Catholic Church of fraud per se because of their preposterous beliefs. Isn't that what Hallinan was trying to do in the *Supple* case? However, the California court ducked the embarrassment of the *Ballard* position by finding a technical defect in the pleadings.

GODLY: But looking at the allegations in the *Ballard* case, couldn't you say that public policy is against having three men religions going from town to town?

GODLESS: I don't know—Trinitarians have been running around for several centuries.

GODLY: If you go on a theory that a person's religious beliefs take precedence than Ballard would have absolute freedom to run rampant.

GODLESS: Not really. All I am asking is that the State show a convincing necessity before moving into the area of religious belief. I find that there is a slight difference between human sacrifice or the Hindu practice of sutee—and some bearded beatnik smoking pot.

GODLY: But what will happen to society?

GODLESS: Read the latest pronouncement on religious liberty from the supreme court of Washington. Here is a court which routinely rubberstamps divorces for a thousand different reasons yet solemnly

pronounces that if a religious minister *talks* a person into obtaining a divorce for religious reasons, the minister can be sued for tortious conduct.

GODLY: That is probably not their best reasoned opinion.

GODLESS: Why not take a good old fashioned Jeffersonian point of view and have a little faith in the common sense of the common man: can't you rely upon the good sense of the masses—that they won't go off the deep end and join one of these fringe groups?

GODLY: But what about public order?

GODLESS: If you mean by "public order" maintaining the status quo of the currently dominant middle class, then freedom of religion means protection for them and them alone. I would hope that religions would have a higher value and be suppressed only on a genuine showing of harm.

GODLY: But obtaining money by fraud is a genuine showing of harm.

GODLESS: If this is your value judgment then be consistent and prosecute *all* religious groups which procure money by reliance upon undemonstrable allegations.