EQUAL PROTECTION FOR UNPOPULAR SECTS

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This Colloquium is entitled "Alternative Religions" but that term has not been defined. I assume, and this paper is based upon that assumption, that "alternative religions" are associations that are popularly called cults. Cult, however, is not a legal term, and for a definition we therefore must look to other disciplines.

In their introduction to *Religious Movements in Contemporary America,*[1] sociologists Zaretsky and Leone suggest twenty-six indicia of cultism, including the following: "Most of the churches are offshoots of nineteenth-century American Protestantism. Some are imported religions and all of these are generically related to groups brought into the United States during the nineteenth century."[2] "Many of the groups have developed from each other through doctrinal and social schisms."[3] "Within recent history these groups have faced persecution from society and attempted to resolve their problems in court."[4] Other telltale indicia are that the groups are organized around charismatic individuals and that they often have rigid standards of membership and a clear set of rules which, if violated, lead to expulsion. They claim not to be just another competing religion and feel that they alone have constant contact with the Divine.[5]

These claims and doctrines, however, are hardly restricted to cults. They are much the same as those of established and respected faiths. Christianity and Islam developed from the Hebrew religion through "doctrinal and social schisms." And did not the Hebrews and the Christians assert that only through their respective priests could there be contact with the Divine?

Other sociologists have their own definitions of cults. Indeed, some avoid that term. Zaretsky and Leone speak rather of "marginal churches";[6] other sociologists, anthropologists, social psychologists, and, of course, religionists, have their own definitions of the term "cults." The noncommitted lay observer might, perhaps somewhat flippantly, suggest his own definition of cult: If you believe in it, it is a religion or perhaps *the* religion; and if you do not

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1. RELIGIOUS MOVEMENTS IN CONTEMPORARY AMERICA (I. Zaretsky & M. Leone eds. 1974).
2. *Id.* at xxiii.
3. *Id.*
4. *Id.* at xxiv.
5. *Id.* at xxiii-xxx.
6. *Id.*

care one way or another about it, it is a sect; but if you fear and hate it, it is a cult. Whatever the terminology may be in other disciplines, in law, I suggest, a cult is a religion for the purposes not only of the first amendment's ban on laws respecting an establishment or prohibiting the free exercise of religion,[7] but also of the Constitution's prohibition on religious tests for public office.[8]

In reality, every new faith group challenging existing faiths is condemned and fought by the established faiths. Hebrews, Christians, Protestants, Quakers, Mormons, Jehovah's Witnesses, Black Muslims, Hare Krishnas, the Unification Church, the Church of Scientology, Worldwide Church of God, and others, have all experienced such resistance. In most cases, cults rise, shine, and disappear.[9] A few survive, and in due time become accepted as good-standing members of the family of faiths. Thereafter they, too, often join in seeking to suppress new cultic challengers.

In 1906, 1916, 1926, and 1936, the United States Census Bureau undertook censuses of religious bodies,[10] but the practice was thereafter discontinued. An attempt to revive it (in large part at the urging of demographers and religious bodies) was made in 1960, but met with strong opposition from libertarians, with the result that the idea was dropped and has not been tried again.[11] The 1936 census (the last that we have) indicated that some 240 separate religious groups existed in the United States.[12] We have no way of knowing for sure whether the number has increased or decreased since that time, but it is a fair assumption that the number of sects or cults active in the United States today is in the many hundreds.

The reason for this multiplicity of sects or cults is to be found in the American tradition of tolerance in respect to religious differences. From time to time the number of far-out sects seems to surge. While most Americans accept this calmly and perhaps with some amusement, occasionally this surge brings fear to many parents, often parents who maintain few if any ties with their own nominal religion. Politically ambitious prosecutors sometimes take this as an opportunity to make hay, and we have instances of prosecutorial action such as those now experienced by the Unification Church, the Worldwide Church of God, and the Scientologists.

It has long been recognized that multiplicity of sects is an essential ingredient of religious freedom. Voltaire said, "If there were one religion in England, its despotism would be terrible; if there were only two, they would destroy each other; but there are thirty, and therefore they live in peace and

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7. U.S. CONST. amend. I.

8. U.S. CONST. art. VI, cl. 3.

9. A prominent example was the I Am movement, considered by the Supreme Court in United States v. Ballard, 322 U.S. 78 (1944).

10. 3 A.P. STOKES, CHURCH AND STATE IN THE UNITED STATES 611 (1950).

11. C. FOSTER, A QUESTION ON RELIGION (1961); L. Pfeffer, *Is It the Government's Business?*, 74 CHRISTIAN CENTURY 1281 (1957).

12. *See* STOKES, *supra* note 10.

happiness."[13] To this Madison added, "Security for civil rights must be the same as that for religious rights; it consists in the one case in the multiplicity of interests and in the other in the multiplicity of sects."[14] Madison, it should be remembered, was the principal draftsman of the Bill of Rights.

My view in respect to the subject of this conference can be simply put. The purpose of the first amendment's guarantee of freedom of religion was and is the protection of unpopular creeds and faiths. It needs no constitution to assure security for the Episcopalians, Methodists, Presbyterians, or other well-established and long-accepted religions. The heart of the first amendment would be mortally wounded if the religions we now call cults were excluded from the zone of its protection because of their disfavor in the eyes of government officials or of the majority of Americans.

Nor, in my opinion, is the free exercise clause the sole protection accorded by the first amendment to cults. The establishment clause of the first amendment likewise protects them against punitive action by government officials hostile to their religious beliefs and practices, and it likewise forbids preferential treatment of favored faiths.

Under present interpretations of the first amendment free exercise clause, government, state or federal, can restrict the expression or exercise of religion only by showing (1) that there is a countervailing governmental interest of such importance as to be deemed compelling, and (2) that there is no alternative for the implementation of this interest other than a limitation on the free exercise of religion. Thus, while the Supreme Court has upheld compulsory smallpox vaccinations over a claim of religious opposition,[15] in *Wisconsin v. Yoder*,[16] it has held that the free exercise clause gives parents acting on religious grounds the right to remove their children from schools at an age earlier than that sanctioned by the truancy laws, and in *Sherbert v. Verner*,[17] it has held that a state may not constitutionally deny unemployment compensation to a person who refuses to accept employment which would require him to work on his sabbath.

In interpreting the religion clauses of the first amendment, the courts have accorded a considerably broader mantle of protection to religion and churches in the exercise of their mission than that accorded to individuals and bodies, not only in the commercial or business area, but also in respect to first amendment rights as applied to nonreligious bodies. It is doubtful that the same results would have been reached in *Yoder* and *Sherbert* if the objections were based respectively on dissatisfaction with school teaching or with the capitalist system of workers and bosses.

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13. F. RUFFINI, RELIGIOUS LIBERTY 199 (1912).
14. Hunt, *James Madison and Religious Liberty*, 1 AMER. HISTORICAL ASS'N ANN'L REPT. 165, 170 (1901).
15. Jacobson v. Massachusetts, 197 U.S. 11 (1905).
16. 406 U.S. 205 (1972).
17. 374 U.S. 398 (1963).

The Supreme Court, for example, has forbidden governmental and even judicial intervention into the internal affairs of churches to a far greater extent than it has in nonreligious associations.[18] To take another example, the Supreme Court held in *NLRB v. Catholic Bishop of Chicago,*[19] that government may regulate labor relations in secular schools, public or private, but not in church-operated schools. This is so even though government may regulate labor relations where the press is concerned, notwithstanding a claim that freedom of the press would be infringed thereby.[20] Courts and legal scholars have often referred to the "preferred position" of first amendment rights in our constitutional scheme of things and of these rights, freedom of religion is, I suggest, the one most preferred.

Illustrative of the broad license accorded to persons to act in furtherance of their religious beliefs is the Supreme Court's decision in *United States v. Ballard.*[21] That case involved a prosecution for mail fraud against several individuals who had organized the "I Am" movement. Specifically, the defendants were charged with falsely representing their divine mission and divine powers to effect cures of physical ailments. In holding that the defendants could not constitutionally be prosecuted, the Supreme Court said:

> [W]e do not agree that the truth or verity of respondents' religious doctrines or beliefs should have been submitted to the jury. Whatever this particular indictment might require, the First Amendment precludes such a course, as the United States seems to concede. "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." . . . The First Amendment has a dual aspect. It not only "forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship" but also "safeguards the free exercise of the chosen form of religion." . . . The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with

18. *Compare* Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952) *and* Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969) *with* Steele v. Louisville and Nashville R.R. Co., 323 U.S. 192 (1944), *and* Smith v. Allwright, 321 U.S. 649 (1944).

19. 440 U.S. 490 (1979); *see also* Caulfield v. Hirsch, 95 L.R.R.M. 3164 (E.D. Pa. 1977), *cert. denied*, 436 U.S. 957 (1978).

20. Associated Press v. NLRB, 301 U.S. 103 (1937).

21. 322 U.S. 78 (1944).

> finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. The First Amendment does not select any one group or any one type of religion for preferred treatment.[22]

Of particular significance to the subject of this conference is the Supreme Court's decision in *United States v. Seeger*.[23] That case construed a provision in the Universal Military Training and Service Act limiting exemption from military service to persons possessing a belief in a "Supreme Being." Seeger, in applying for exemption, admitted his "skepticism or disbelief in the existence of God," but avowed a "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed," and cited Plato, Aristotle, and Spinoza in support of such a belief.[24] Jakobson, another applicant, stated a belief in Godness "horizontally, . . . through Mankind and the World," rather than "vertically, towards Godness directly."[25] A third applicant, Peter, avowed a commitment to religion which he defined as "the supreme expression of human nature; . . . man thinking his highest, feeling his deepest, and living his best."[26]

The Court held that all three applicants were entitled to exemption since all had the requisite "religious training and belief" in relation to a "Supreme Being."[27] By using the term "Supreme Being" rather than "God," the Court said, Congress intended something much broader than the traditional person-deity. As for the term "religious belief," the Court said that such a belief is one that "is sincere and meaningful [and] occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."[28]

It is true that both *Seeger* and *Welsh v. United States*[29] technically were decided as questions of statutory interpretation rather than as issues under the free exercise clause. It is clear, nevertheless, that the Court resorted to this interpretation in order to avoid declaring the challenged statute unconstitutional. This was candidly admitted by Justice Douglas, concurring in *Seeger*, who noted that "we have gone to extremes to construe an act of Congress to save it from demise on constitutional grounds."[30] Moreover, this is equally

22. *Id.* at 86-87 (citations omitted).
23. 380 U.S. 163 (1965).
24. *Id.* at 166.
25. *Id.* at 168.
26. *Id.* at 169.
27. *Id.* at 165-66.
28. *Id.* at 166. *See also* Welsh v. United States, 398 U.S. 333 (1970), involving an applicant for exemption who, in responding affirmatively to the question on his application form asking whether his objection to participation in war was based on "religious training and belief," first struck out the word "religious," and later stated that his beliefs had been formed "by readings in the fields of history and sociology." *Id.* at 341. The Supreme Court held that he was qualified for exemption.
29. 398 U.S. 333 (1970).
30. United States v. Seeger, 380 U.S. 163, 188 (1965).

true of the Court's basing its affirmance in *Catholic Bishop* on the ground that Congress did not intend to include parochial school teachers in the National Labor Relations Act.[31]

I have suggested that the free exercise clause is not the sole protection accorded to cults by the first amendment. The establishment clause likewise protects cultists against punitive action by government officials hostile to their religious beliefs and practices. The clause forbids preferential treatment of favored faiths and punitive treatment of those disfavored. In an oft-quoted paragraph in the case of *Everson v. Board of Education,*[32] the Supreme Court said:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. *Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church* against his will or force him to profess a belief . . . in any religion. *No person can be punished for entertaining or professing religious beliefs* . . . for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa.* In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."[33]

Later decisions of the Supreme Court have defined the establishment clause in somewhat different wording but not with different intent. In numerous cases within the past decade the Court has stated that in order to pass constitutional muster, a statute must have a secular legislative purpose, must have a principal or primary effect that neither advances nor inhibits religion, and must not foster excessive entanglement with religion.[34] (While these definitions speak in terms of legislation, they are of course equally applicable to executive action in enforcing facially neutral legislation.) Under these tests, laws that are enacted or government executive actions that are taken for the purpose of inhibiting cults, or that have a primary inhibitive effect upon them, or require for their enforcement entanglement with religion, violate the establishment clause no less than the free exercise clause.

There is one aspect of anti-cult action that concerns me deeply because, paradoxically, it is probably entirely constitutional. I am referring to the use against cults or their members of laws concededly valid but entirely unrelated

31. NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 504-07 (1979).
32. 330 U.S. 1 (1947).
33. *Id.* at 15-16 (emphasis added).
34. *E.g.*, Lemon v. Kurtzman, 403 U.S. 602 (1971); Meek v. Pittenger, 421 U.S. 349 (1975).

in their origin to cults or cult members. Invocation of tax laws is the most frequent example, but it is far from the only instance of such use. In California, for example, an attempt was made to invoke against the Worldwide Church of God an entirely valid and neutral statute relating to corporations.[35] Earlier, Jehovah's Witnesses were frequent targets of such devices,[36] but they, too, were not alone. The draft law was invoked against Cassius Clay when he became Muhammad Ali,[37] the Unification Church has been in the courts challenging a facially neutral zoning ordinance allegedly invoked against it,[38] and in this conference Professor Delgado proposes the invocation of the thirteenth amendment against cults,[39] although nothing could have been further from the minds of those who drafted and enacted that amendment.

I conclude with a caveat that almost need not be stated. No first amendment right, whether of religion, or nonestablishment, or speech, or press, or assembly, is completely immune from governmental restriction. The amendment does not forbid governmental action to prohibit child labor even where religion mandates it,[40] nor to compel innoculation[41] or blood transfusions,[42] nor to prevent Jonestown-type incidents or punish those responsible for them. In short, there are, and will continue to be, many instances of governmental interference with the activities of religious groups. All I suggest in this paper is that no greater interference is allowable with respect to cults than is permissible with respect to long-standing and respected religions.

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35. Worldwide Church of God v. Superior Court of State of California, L.A. No. 31091 (Cal. Sup. Ct. Mar. 22, 1979), *cert. denied*, 444 U.S. 883 (1979).

36. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296 (1940).

37. Clay v. United States, 397 F.2d 901 (5th Cir. 1968), *vacated sub. nom.* Giordano v. United States, 394 U.S. 310 (1969).

38. Corporation of Presiding Bishop v. City of Porterville, 90 Cal. App. 2d 656, 203 P.2d 823, *appeal dismissed*, 338 U.S. 805 (1949) (dismissed for want of a substantial federal question).

39. Delgado, *Religious Totalism as Slavery*, at 51 *infra*.

40. Prince v. Massachusetts, 321 U.S. 158 (1958).

41. Jacobson v. Massachusetts, 197 U.S. 11 (1905); State *ex rel.* Dunham v. Board of Educ., 154 Ohio St. 469, 96 N.E.2d 413, *cert. denied*, 344 U.S. 824 (1952).

42. People *ex rel.* Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769, *cert. denied*, 344 U.S. 824 (1952).