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RECENT DECISIONS AND DEVELOPMENTS

The Prisoner's Right to Hear Mass

In the recent case of *McBride v. McCorkle*,[1] a New Jersey court held, *inter alia*, that a prisoner being kept in a disciplinary segregation wing of the state prison because of bad conduct can be denied attendance at Mass celebrated in the prison chapel on Sundays and Holy Days of Obligation without violating his right of freedom of religion guaranteed by the state and Federal Constitutions.

This is the only reported case found in which a prisoner has brought suit for the deprivation of his religious rights under the United States Constitution. The court, quite properly, assumed that convicts are within the protection afforded by the guarantees of the first amendment to the Federal Constitution. The wording of the fourteenth amendment, which makes the first amendment's guarantees applicable to the states,[2] clearly would not allow any other construction: ". . . [N]or shall any state deprive *any person* of life, liberty, or property, without due process of law. . . ."[3] The Constitution of New Jersey is equally explicit: "*No person* shall be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience. . . ."[4]

In addition, courts have explicitly recognized that a prisoner does not lose all of his constitutional rights by virtue of his conviction. In *Coffin v. Reichard*[5] it was said: "A prisoner retains all the rights of an ordinary citizen, except those expressly, or by necessary implication, taken from him by law."[6]

It is apparent, however, that, even though a convict retains many of his constitutional rights, the state will be able to exert greater control over the exercise of those rights than it would over the rights of a free person. The very nature of imprisonment and the status of a convict force this conclusion. An analogous result was reached in *Prince v. Massachusetts*[7] where the Supreme Court held that children have a status different from adults and are therefore subject to a greater measure of state authority than are their parents.

The right of religious freedom has a two-fold nature, encompassing freedom to believe and freedom to exercise that belief.[8] The former may never be interfered with by the state.[9] The latter may be limited only when the limitation placed upon the exercise is necessary for the protection of a substantial[10] interest of society which society has a right to protect.[11] The sub-

[1] 44 N.J. Super. 468, 130 A.2d 881 (1957). The court carefully distinguishes segregation from solitary confinement, the former being a milder and less severe form of punishment than the latter. 130 A.2d at 882-83.

[2] Cantwell v. Connecticut, 310 U.S. 296 (1940).

[3] U.S. CONST. amend. XIV, §1 (emphasis added).

[4] N.J. CONST. art. I, §3 (emphasis added).

[5] 143 F.2d 443 (6th Cir. 1944), *cert. denied*, 325 U.S. 887 (1945).

[6] Coffin v. Reichard, *supra* note 5, at 445. See also White v. Hart, 80 U.S. (13 Wall.) 646, 651 (1872); Sigmon v. United States, 110 F. Supp. 906 (W.D. Va. 1953).

[7] 321 U.S. 158 (1944).

[8] Cantwell v. Connecticut, 310 U.S. 296 (1940).

[9] *Id.* at 303-04.

[10] See Dennis v. United States, 341 U.S. 494, 508-09 (1951).

[11] Cantwell v. Connecticut, *supra* note 8, at 303-04.

stantial interests of society defy any comprehensive listing, but generally fall into the areas of public health,[12] peace and safety,[13] and morals.[14] In the area of freedoms guaranteed by the first amendment, which sometimes have been said to enjoy a "preferred status"[15] under the Constitution, limitations placed on the exercise of constitutional rights in the name of public interest must be clearly justified or the limitation will be struck down.[16] As an example of the length to which courts will go to protect these freedoms, it has even been suggested that legislation which impinges upon first amendment freedoms is presumptively invalid.[17] The Court may be gradually retreating from this preferred status doctrine,[18] but it serves to illustrate the gravity with which infringements on first amendment freedoms have generally been viewed.

Various methods and tests have been devised by the courts to determine whether a given religious practice may be validly limited by governmental authority.[19] The most common method of delimiting the right of religious freedom involves the "clear and present danger" test. The practice of first amendment freedoms can be limited under this test only when the practice presents a grave and imminent danger to public health, safety, or morals.[20] "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion . . . as is necessary to avoid the danger."[21]

This is the test apparently adopted by the court in the instant case. The court recognizes as the paramount interest of society the necessity of maintaining discipline in penal institutions. There can be no quarrel with this if it is recognized that discipline is only a means of achieving prison security. Prison security, and not discipline as discipline, would seem to be the true substantial interest of society.

The court reasoned that to allow the prisoner to leave the segregation wing to attend Sunday Mass would present a clear and present danger to prison discipline. This conclusion was based solely upon the statements of prison authorities, parties with an interest in the proceedings. The court justified its acceptance of the prison authorities' conclusions as its own by saying that the courts cannot supervise prison discipline.

While it did not state *what* danger to

[12] See, *e.g.*, Prince v. Massachusetts, 321 U.S. 158 (1944); Jacobson v. Massachusetts, 197 U.S. 11 (1905); Sadlock v. Board of Educ., 137 N.J.L. 85, 58 A.2d 218 (1948).

[13] See, *e.g.*, Hamilton v. Regents, 293 U.S. 245 (1934); Lawson v. Commonwealth, 291 Ky. 437, 164 S.W.2d 972 (1942); Commonwealth v. Palms, 141 Pa. Super. 430, 15 A.2d 481 (1940).

[14] See, *e.g.*, Jacob Ruppert Corp. v. Coffey, 251 U.S. 264 (1920); Reynolds v. United States, 98 U.S. 145 (1878); Dill v. Hamilton, 137 Neb. 723, 291 N.W. 62 (1940).

[15] Saia v. New York, 334 U.S. 558, 562 (1948); Marsh v. Alabama, 326 U.S. 501, 509 (1946); United States v. Ballard, 322 U.S. 78, 87 (1944).

[16] See Board of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

[17] Prince v. Massachusetts, 321 U.S. 158, 167 (1944); United States v. CIO, 335 U.S. 106, 140 (1948) (concurring opinion).

[18] See Breard v. Alexandria, 341 U.S. 650 (1951); Kovacs v. Cooper, 336 U.S. 77, 90-97 (1949) (concurring opinion); Drinker, *Some Observations on the Four Freedoms of the First Amendment*, 37 B.U.L. REV. 1, 29 (1957).

[19] See Martin v. Struthers, 319 U.S. 141, 143 (1943); Reynolds v. United States, 98 U.S. 145 (1878); Hamilton v. Regents, 293 U.S. 245, 265 (1934) (concurring opinion). See also *In re* Summers, 325 U.S. 561 (1945); United States v. Ballard, 322 U.S. 78 (1944).

[20] Board of Educ. v. Barnette, 319 U.S. 624 (1943); Taylor v. Mississippi, 319 U.S. 583 (1943).

[21] Dennis v. United States, 341 U.S. 494, 510 (1951).

prison discipline or security would be threatened by the prisoner's release from the segregation area for attendance at Mass, it is obvious that the prison officials were of the opinion that the convict population might lose fear of segregation if a prisoner could leave the wing to attend Mass. Loss of this fear could in turn result in a general weakening of discipline with a consequent weakening of prison security.

Stated thusly, it is apparent that the "clearness" and "presentness" of the danger to the paramount interest of society leaves something to be desired.

The question posed by the instant case, what are the limits of a prisoner's right to freedom of religion, cannot be evaded by holding that he loses such right by necessary implication through the application of the doctrine of *Coffin v. Reichard*.[22] Such a holding would be tantamount to converting freedom of religion from a right into a privilege subject to the sufferance of prison authorities. Conviction for a crime would take the place of the due process required by the fourteenth amendment before religious freedom can be limited. To support such a view it would be necessary to maintain that the practice of religion by a convict necessarily presents a "clear and present danger" to prison security. This is patently not so, as is witnessed by statutes in many states which expressly require that chaplains be attached to prisons to minister to the religious needs of the inmates.[23] New York goes further and explicitly states that prisoners may not be denied the free practice of their religion.[24]

The true test must be that adopted by the court in the instant case. The determinative factor should be the particular facts of the case; the issue, whether the particular practice presents a "clear and present danger" to society by endangering prison security.

In the instant case the court may be criticized for accepting the opinions of prison authorities as conclusive of the matter without some investigation. It involved itself in a self-contradictory position when it said it cannot supervise prison discipline. Once the court took jurisdiction, the conclusion seems inescapable that it should have itself determined the "clearness" and "presentness" of the danger. A federal court has recognized the contradiction and dismissed a similar complaint.[25]

Sunday Laws

In upholding the constitutionality of Sunday legislation against due process, equal protection, and religious freedom objections, recent cases have pointed up various factors to be considered by legislatures in drafting this type of statute.

In *Gundaker Central Motors, Incorporated v. Gassert*,[1] the New Jersey Supreme Court determined that a statute prohibiting the sale of automobiles on Sunday was not violative of the "due process" clause of the fourteenth amendment since it was a valid exercise of the police power of the state. The United States Supreme Court dismissed an appeal for want of a substantial federal question. The New Jersey court said that the presumed purpose of the legislature in

[22] 143 F.2d 443 (6th Cir. 1944), *cert. denied*, 325 U.S. 887 (1945).

[23] See, *e.g.*, MASS. LAWS ANN. c. 125, §13 (Supp. 1956); N.Y. CORREC. LAW §18; PA. STAT. ANN. tit. 61, §§346, 378.

[24] N.Y. CORREC. LAW §610.

[25] See Dayton v. Hunter, 176 F.2d 108 (10th Cir.), *cert. denied*, 338 U.S. 888 (1949).

[1] 23 N.J. 71, 127 A.2d 566 (1956), *appeal dismissed*, 354 U.S. 933 (1957). Followed in Mosko v. Dunbar, – Colo. –, 309 P.2d 581 (1957).

enacting the law was to provide a day of rest for those employed in the automobile sales business; hence the statute bore a substantial relation to public health, safety, and welfare. Furthermore, the legislation was not violative of the "equal protection" clause of the fourteenth amendment, since it was not discriminatory or arbitrary in distinguishing one class of transaction from another. The fiercely competitive nature of the automobile sales business encourages a merchant to remain open seven days a week, thus tending to deprive employees of a day of rest. Moreover, a hazard to heavy Sunday traffic is created by customers entering and leaving the lots. Therefore, the state was justified in basing the distinction on the differences between this and other merchandising activities.

In a previous issue of THE CATHOLIC LAWYER,[2] it was pointed out that there are three types of Sunday laws: those which prohibit the opening of certain types of businesses, but permit all others to remain open; those which prohibit the operation of all businesses except certain types (which may, in many instances, sell the same products as do those which are prevented from opening); and the "commodity" Sunday laws, which prohibit business activity generally but permit the sale of certain commodities. The statutes dealt with in the *Gundaker* case and in *Mosko v. Dunbar*[3] seem to be representative of a "fourth" type, namely: one which prohibits the sale of certain commodities, but permits all other activities; this is the obverse of the third, "commodity" type.

The Court of Appeals of Ohio, in *State v. Ullner*,[4] considered possible constitutional objections to Sunday legislation under the religious guarantees of the first amendment. Since *Cantwell v. Connecticut*[5] had held the first amendment provisions applicable to the states in 1940, Ohio did not consider this federal issue, although other states had ruled such laws were not prohibited by the first amendment,[6] and Ohio's courts had previously ruled,[7] in accord with states generally,[8] that Sunday laws were not violative of religious provisions of the Constitution of Ohio.

In the *Ullner* case, the court used the same approach as in the previous determination concerning state limitations, pointing out that such a statute has no bearing on man's relationship with his God. It neither establishes a religion nor interferes with the free practice of religion: "It requires nothing. It imposes nothing. It dictates nothing. It leaves [man] completely free to choose his religion and practice it without let or hindrance."[9] The general business-closing law involved in the case was upheld as a mere provision for a day of rest, which constituted a valid exercise of the state's police power to legislate for the health and welfare of citizens.

It would appear, then, that a Sunday law is most likely to be upheld as constitutional if it is either the same type as the New Jersey and Colorado laws, or a general closing law exempting the sale of certain *commodi-*

[2] See 2 CATHOLIC LAWYER 260, 261 (July 1956).
[3] – Colo. –, 309 P.2d 581 (1957).
[4] – Ohio App. –, 143 N.E.2d 849 (1957).
[5] 310 U.S. 296 (1940).
[6] See, *e.g.*, People v. Friedman, 302 N.Y. 75, 96 N.E.2d 184 (1950) (per curiam); *cf.* McKaig v. Kansas City, 363 Mo. 1033, 256 S.W.2d 815 (1953).
[7] State v. Powell, 58 Ohio St. 324, 50 N.E. 900 (1898).
[8] *Ex parte Andrews*, 18 Cal. 679 (1861). See, *e.g.*, Silverberg Bros. v. Douglass, 62 Misc. 340, 114 N.Y. Supp. 824 (Sup. Ct. 1909).
[9] State v. Ullner, – Ohio App. –, 143 N.E.2d 849, 851 (1957).

ties, rather than a statute which distinguishes between *businesses.* As has been noted in this publication's previous discussion of Sunday laws,[10] commodity-type statutes are unlikely to be held violative of the "equal protection" clause. If a court once determines that the legislative purpose in enacting a Sunday law is to provide a day of rest, the statute cannot thereafter be successfully attacked as violative of the "due process" and "freedom of religion" clauses. However, there is always the danger that a court will not so determine. To obviate that problem, the legislature can expressly state the purpose of the law.

Religious Provision in Corporate Charter

In an application for a charter under Pennsylvania's Nonprofit Corporation Law,[1] the articles of incorporation stated that the purpose of the corporation would be to promote Christianity, and encourage good will among members of all religious faiths, ". . . with particular emphasis on the evangelization and conversion of adherents of the Roman Catholic faith. . . ."[2] In overruling the Court of Common Pleas,[3] the state Supreme Court held that the charter should have been granted since such particular emphasis toward members of a specific sect was "lawful and not injurious to the community."[4]

The first amendment declares that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."[5] The fourteenth amendment has, in like manner, limited state legislation.[6] This guarantee embraces two concepts – freedom to believe, and freedom to act.[7] The state can in no way force an individual to accept any religious code.[8] He may accept, or deny, whatever mode of worship he so desires. However, his right of free exercise of religion is not absolute.[9] One may only practice his religion – his right to worship his God and preach his tenets – to the extent that it is not "in violation of social duties or subversive of good order."[10] To this end, then, the state may, by general and non-discriminatory legislation, reasonably regulate the time, the place, and the manner of this religious activity.[11] While this regulation may not restrain unduly the communication of religious views, proselytization is, however, limited by the "clear and present danger" test.[12]

[10] See 2 CATHOLIC LAWYER 260, 262 (July 1956).

[1] PA. STAT. ANN. tit. 15, §§2851-1 to 1309 (Purdon 1938).

[2] Application of Conversion Center, Inc., 388 Pa. 239, 243, 130 A.2d 107, 109 (1957).

[3] The Pennsylvania Supreme Court will not review the Court of Common Pleas' decision in granting or refusing a charter unless there is a manifest abuse of discretion. *In re* Independent Garment Workers' Union, 335 Pa. 209, 6 A.2d 775 (1939).

[4] PA. STAT. ANN. tit. 15, §2851-201 (Purdon 1938). "Five or more natural persons . . . may form a nonprofit corporation . . . for *any purpose or purposes* which are lawful and not injurious to the community." *Ibid.* (emphasis added.) *But see* PA. STAT. ANN. tit. 15, §2851-4 (Purdon Supp. 1956) for those organizations which may not incorporate under these sections.

[5] U.S. CONST. amend. I.

[6] See Cantwell v. Connecticut, 310 U.S. 296 (1940).

[7] *Id.* at 303.

[8] See Jones v. Opelika, 316 U.S. 584, 593-94 (1942).

[9] *Id.* at 594.

[10] Reynolds v. United States, 98 U.S. 145, 164 (1878).

[11] See Cantwell v. Connecticut, 310 U.S. 296 (1940).

[12] *Cf.* Board of Educ. v. Barnette, 319 U.S. 624, 633 (1943). This test limiting freedom of speech first appeared in Schenck v. United States,

While the state must remain neutral in its dealings with religion,[13] it may offer religious associations the advantages of incorporation to assist in the orderly management of their temporalities[14] without interfering with their religious practices. The state cannot regulate ecclesiastical affairs,[15] but it may, through non-discriminatory legislation, aid all religions in attaining their spiritual end by regulating their material goods and temporal concerns.[16]

It should be noted that under Pennsylvania's Nonprofit Corporation Law, the court has not the authority to consider anything beyond the statutory requirements for incorporation.[17] Hence, when the state Supreme Court found that "nothing in the purpose clause . . . or in the evidence . . . indicates that the activities of the corporation would consist of . . . acts inimical to the peace, good order or morals of society . . .",[18] it concluded that the lower court's decision should be reversed and directed that the charter be granted. There was, however, a strong dissenting opinion. But if the application had been made in a jurisdiction which does grant the court the discretion to consider all the other circumstances concerning the request for incorporation,[19] a different result might have occurred. The sincerity of the applicants in their proposed attempt to encourage understanding and good will among members of all religious faiths could well have been doubted in light of the unnecessary mention of the Catholic faith. A religious organization, which is acting in good faith, does not have any reason to include such a provision in its charter.

249 U.S. 47 (1919). "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that . . . [the legislature] has a right to prevent." *Id.* at 52.

[13] Zorach v. Clauson, 343 U.S. 306, 314 (1952) (dictum).

[14] See Terrett v. Taylor, 13 U.S. (9 Cranch) 249, 253-54 (1815). This case was decided under a provision of the Virginia Bill of Rights which also guaranteed all men the right of free exercise of religion. *Ibid.* However, the state is not obliged to grant this privilege. Virginia and West Virginia deny religious associations the privilege of incorporation. VA. CONST. art. 4, §59; W. VA. CONST. art. 6, §47.

[15] See Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 107-08 (1952).

[16] See Terrett v. Taylor, note 14 *supra*.

[17] *In re* Deutsch-Amerikanischer Volksfest-Verein, 200 Pa. 143, 49 Atl. 949 (1901). ". . . [I]f the court shall find the articles to be in proper form and within the provisions of this act, and the purpose . . . to be lawful and not injurious to the community, the court *shall* so certify on the articles, and *shall* order and decree thereon that the articles are approved . . . ; otherwise, the court *shall* refuse the application for a charter." PA. STAT. ANN. tit. 15, §2851-207 (Purdon Supp. 1956) (emphasis added).

Religious Requirements for Tax Exemption

California's constitutional provision granting tax exemptions for property used for religious worship has been interpreted to include within its scope the property of a humanist group. In *Fellowship of Humanity v. County of Alameda*,[1] plaintiff, a non-profit corporation, brought an action for the recovery of property taxes and penalties paid under protest. The District Court of Appeal affirmed the trial court's judgment for plaintiff on the ground that, where activities of a non-profit corporation are

[18] Application of Conversion Center, Inc., 388 Pa. 239, 247, 130 A.2d 107, 111 (1957).

[19] See, *e.g.*, Application of United Winograder Medical Center, 125 N.Y.S.2d 279 (Sup. Ct. 1953); *In re* Boy Explorers of America, 67 N.Y.S.2d 108 (Sup. Ct. 1946).

[1] — Cal. App. 2d —, 315 P.2d 394 (1957).

similar in all respects to those of theistic religious groups, except for the members' "lack of belief" in a Supreme Being, the corporation's property is entitled to a tax exemption within the meaning of Section 1½ of the California Constitution which exempts property used for "religious worship."

Phrases similar to the one involved in the instant case, both in the area of exemption[2] and in other areas,[3] have been consistently given a traditional interpretation, one necessarily involving the concept of a being higher than man, a deity.

For example, the United States Supreme Court in construing the language of the first amendment has said: "The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."[4] Moreover, in the area of draft exemption, a humanist was denied an exemption under a provision of the Selective Training and Service Act of 1940[5] because ". . . no matter how pure and admirable his standard may be, and no matter how devotedly he adheres to it, his philosophy and morals and social policy without the concept of deity cannot be said to be religion in the sense of that term as it is used in the statute."[6] This definition was adopted by Congress in the Universal Military Training and Service Act of 1948.[7]

In the face of these interpretations the court, in the instant case, has granted an exemption to a group lacking any belief in the supernatural by using a test based on

[2] In St. Matthew's Lutheran Church v. Division of Tax Appeals, 18 N. J. Super. 552, 87 A.2d 732, 735 (1952), the phrase "officiating clergyman of any religious corporation" as contained in a state statute was interpreted in this manner: ". . . he must be serving the needs of a reasonably localized and established congregation. In this sense a congregation signifies an assemblage or union of persons in society to worship their God publicly in such manner as they deem most acceptable to Him, at some stated place and at regular intervals."

In Sunday School Bd. v. McCue, 179 Kan. 1, 293 P.2d 234, 236-37 (1956), the construction of a state constitutional provision was involved wherein the court said: "We do not believe it necessary to discuss extensively the meaning of the word 'religious.' It is the adjective form of the word 'religion' defined by the above dictionary [*Webster's New International Dictionary*] as being an apprehension, awareness or conviction of the existence of a supreme being controlling one's destiny."

The Internal Revenue Code of 1954 has made no attempt at defining the phrase "a church or a convention or association of churches" as used therein. INT. REV. CODE OF 1954, §170(b)(1)-(A)(i); *cf. id.* §511(a)(2)(A). However, a Regulation was proposed in 1956. See *Proposed Treasury Department Definition of* Church, 2 CATHOLIC LAWYER 86 (Jan. 1956).

[3] In Wiggins v. Young, 206 Ga. 440, 57 S.E.2d 486, 487 (1950), a restrictive covenant against the use of property "for any business purpose" was held not to apply to a church for "a church is a building consecrated to the honor of God and religion, with its members united in the profession of the same Christian faith."

In Lee v. Poston, 233 N. C. 546, 64 S.E.2d 835, 837 (1951), a change of venue was denied because the defendant was not a "municipal corporation" under the statute, but rather a religious corporation. The court said: "A religious corporation is a corporation whose purposes are directly ancillary to divine worship or religious teaching. . . ."

[4] Davis v. Beason, 133 U.S. 333, 342 (1890).

[5] Act of Sept. 16, 1940, c.720, §5(g), 54 STAT. 889.

[6] Berman v. United States, 156 F.2d 377, 381 (9th Cir.), *cert. denied,* 329 U.S. 795 (1946).

[7] 62 STAT. 613 (1948), 50 U.S.C. APP. §456(j) (1952). Special note should be given to the words of exclusion adopted by the statute: "Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, *but does not include* essentially political, sociological, or philosophical views or a merely personal moral code." *Ibid.* (emphasis added).

For treatment of a recent development in the case law of this area, see 32 ST. JOHN'S L. REV. 105 (1957).

activity rather than on belief.[8] It has accomplished this result by equating the validity of a belief with its content.[9] It is true that a court has no authority to decide the validity of a religious belief,[10] but it is also true that courts are continually occupied, at least implicitly, with the religious content of beliefs,[11] in areas other than that of community law and morals, which the court recognizes as an exception.[12]

There is certainly a grave difference between the truth or falsity of a religious belief and the characterization of a belief as religious. To say that "the content of the belief is of no moment"[13] is to render the word religious void of meaning by immersing within it all possible beliefs. Such an interpretation, admittedly given to sustain the constitutionality of the statute,[14] seems rather designed to destroy it on grounds of vagueness.

The Supreme Court of California, in deciding whether or not a particular piece of property came within a related exemption section of the state constitution,[15] used this test: Was the property ". . . incidental to and reasonably necessary for the accomplishment of religious or charitable purposes?"[16] Thus, where the ultimate proceeds of conducting a home for the aged, an activity authorized by the plaintiff's articles of incorporation, were exclusively used for religious or charitable purposes, its property was exempted.[17] Under this Section 1c, the activity alone is not enough; a reasonable connection with religious (or charitable) purposes must be shown before an exemption will be granted. Under the court's interpretation of the Section 1½ of the State constitution involved in the instant case, *activities alone are enough,* and no connection need be made with religion, for the court, as stated above, has ruled out any investigation into the religious content of belief. Recognizing the distinction that Section 1c is concerned primarily with purposes and that Section 1½ is concerned with use,[18] it is yet submitted that in both instances religion, given its ordinary and natural meaning, is the substratum of the exemption. If religion can be given no definite meaning except one based on activity, the activities or facilities possibly coming under Section 1c, which are very similar to the activities mentioned throughout the

[8] See Fellowship of Humanity v. County of Alameda, — Cal. App. 2d —, 315 P.2d 394, 409-10 (1957).

[9] *Id.* at 406. ". . . [T]he only valid test a state may apply in determining the tax exemption is a purely objective one. Once the validity *or content* of the belief is considered, the test becomes subjective and invalid." *Ibid.* (emphasis added).

[10] United States v. Ballard, 322 U.S. 78 (1944).

[11] See, *e.g.*, United States v. Ballard, note 10 *supra;* Serra Retreat v. Los Angeles County, 35 Cal. 2d 755, 221 P.2d 59 (1950); Lee v. Poston, 233 N. C. 546, 64 S.E.2d 835 (1951); Philadelphia v. Overbrook Park Congregation, 171 Pa. Super. 581, 91 A.2d 310 (1952).

[12] "Of course, the belief cannot violate the laws or morals of the community, but subject to this limitation, the content of the belief is not a matter of governmental concern." Fellowship of Humanity v. County of Alameda, — Cal. App. 2d —, 315 P.2d 394, 406 (1957). Davis v. Beason, 133 U.S. 333 (1890), for example, is concerned with bigamous and polygamous tenets of a religious sect.

[13] *Id.* at 406.

[14] "On the other hand, a definition which emphasizes the 'non-religious' facets of the conduct of respondent will serve to sustain the constitutionality of the section." *Id.* at 409.

[15] CAL. CONST., art. 13, §1c.

[16] Serra Retreat v. Los Angeles County, 35 Cal. 2d 755, 221 P.2d 59, 60 (1950). See also Harrison v. Guilford County, 218 N. C. 718, 12 S.E.2d 269 (1940).

[17] Solheim Lutheran Home v. County of Los Angeles, 152 A.C.A. 822, 313 P.2d 185 (1957). But see Sunday School Bd. v. McCue, 179 Kan. 1, 293 P.2d 234 (1956).

[18] See Serra Retreat v. Los Angeles County, *supra* note 16, at 61.

present opinion,[19] ought to be sufficient of themselves to establish an exemption without showing any connection with religious purpose. Thus, for example, at the present time a connection with a "religious purpose" would have to be shown before a lecture hall in which group discussions of politics, sociology and economics were carried on would be exempt under Section 1c; the activities or facilities would not suffice. However, the same lecture hall under the same conditions would be granted an exemption under Section 1½ simply by virtue of the activities or facilities and without showing any connection with "religious worship."[20] The position of the California courts under these two sections may become inconsistent, unless the courts are prepared to require a connection with a concept of religion, now meaningless, under Section 1c. However, if activities of a social, political and personal nature are what constitute religion, then the word "religious" in Section 1c would be as anomalous as is its continued use in Section 1½ under the court's interpretation.

Insofar as it frustrates the purpose of the exemption provisions concerned with religion, the reasoning of the instant case may lead to the repeal of such provisions. It is difficult to see how fraternal, social or political organizations have a pattern of action inspired by certain moral values developed by religion. The area of the first amendment and the area of draft exemption would be similarly affected, as well as many areas of state procedure. In fact, an adherence to this omnivorous interpretation of the word "religion" might be the downfall of all constitutional and statutory provisions in which it or similar phrases are employed. A multiplicity of examples is not necessary to see that such an interpretation is unreasonable and unnecessary.[21] The word "religion" should be restricted to its reasonable and natural meaning as developed by decades of case law.

[19] Fellowship of Humanity v. County of Alameda, — Cal. App. 2d —, 315 P.2d 394, 397-98 (1957).

[20] To give a further illustration of how complex and confused things may become under the court's interpretation in the instant case, one only has to refer to a portion of the decision where the court held that occasional dinners and dances which took place on the property did not take the property out of the exemption. *Id.* at 410. The court here relied on First Unitarian Soc'y v. Hartford, 66 Conn. 368, 34 Atl. 89 (1895) and quoted with approval this statement: "The policy on which the exemption of church buildings from taxation is granted is the encouragement of religion; and that policy is not hindered, but, rather, promoted, by permitting this building to be used for profit when not needed for those services distinctly called 'religious services'; for literary, scientific, or entertaining exercises, or for any other thing not inappropriate to be had in a church." *Id.* at 90. The court, however, does not go on to note what the cited case considers as "not inappropriate to be had in a church," such things as "lectures, concerts, readings . . . vocal and instrumental concerts, mesmeric performances, dramas by amateurs, and, at times, political conventions." *Ibid.* These activities bear a striking resemblance to the activities of the Fellowship of Humanity enumerated in the instant case. However, to the ordinary observer there would appear to be a great difference between activities "not inappropriate to be had in a church" (the language of the *First Unitarian Soc'y* case) and activities which are "analogous to the activities, serve the same place in the lives of its members, and occupy the same place in society, as the activities of the theistic churches" (the language of the instant case).

[21] See Ashwander v. TVA, 297 U.S. 288, 341 (1936) (concurring opinion of Justice Brandeis) in which the policy of the Supreme Court as to passing on constitutional questions is expressed, especially the principle that the Court will not ". . . formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Id.* at 347.

Furthermore, the principle of strict construction of tax exemption provisions has been grossly violated by the interpretation of the instant case. See, *e.g.*, State Tax Comm'n v. Whitehall Foundation, 135 A.2d 298 (Md. 1957); Church of the Holy Faith v. State Tax Comm'n, 48 P.2d 777 (1935).

Professional Disciplining of Attorneys

Section 7201 of the Internal Revenue Code provides that persons who willfully attempt to evade or defeat any tax shall be guilty of a felony.[1] The professional discipline problems that arise after the conviction of an attorney under this section are illustrated by two recent disbarment proceedings.

The Court of Appeals of Kentucky, in *Kentucky State Bar Association v. Brown*,[2] dismissed a proceeding which was based solely on the fact of conviction, holding that a violation of Section 7201 does not necessarily involve moral turpitude. In *State ex rel. Florida Bar v. Evans*,[3] the Supreme Court of Florida refused to act under a statute providing for disbarment of attorneys upon their conviction for an infamous crime, and instead suspended the attorney for a period of two years under another provision.

Attorneys are expected to maintain a standard of ethics, reputation and moral integrity higher than that demanded of other individuals in the community, concomitant with the status of attorneys as fiduciaries and as officers of the court. As a result, many states authorize or require summary disbarment or other disciplining of an attorney upon his conviction for certain crimes.

The prerequisite for such summary discipline differs among the states. For example, New York bases such action on conviction for any felony;[4] Georgia provides for the removal of an attorney upon his conviction for "any crime or misdemeanor involving moral turpitude,"[5] while North Carolina provides for suspension or disbarment of an attorney for commission of "a criminal offense showing professional unfitness."[6]

One theory advanced as the purpose for such summary proceedings is the expulsion from the profession of those who, by their conduct, have shown that they are unfit to practice law.[7]

A conviction of an attorney for murder, larceny, extortion, embezzlement, perjury or other similar crimes which require proof of criminal intent or proof of dishonesty, untrustworthiness or other conduct evidencing an unfitness for practice, would, under this "unfitness" theory, justify summary proceedings based solely on the fact of conviction.

However, if proof of such elements need not be established for conviction, the "unfitness" theory would not uphold disciplinary action based solely on the record of conviction. Among the crimes which lack such elements are involuntary manslaughter, which involves negligence rather than specific intent, and the *malum prohibitum* crimes. In these cases, before any disciplinary action is taken, a strict application of the "unfitness" theory would require that a full hearing be held to determine whether the acts or omissions upon which the conviction is based call for disciplining the attorney.

Another theory advanced as the purpose of this type of summary discipline is that the practice of law by convicted persons would cast a serious reflection upon the dignity and reputation of the entire legal profession, while summary expulsion or

[1] INT. REV. CODE of 1954, §7201.

[2] 302 S.W. 2d 834 (Ky. 1957).

[3] 94 So. 2d 730 (Fla. 1957).

[4] N. Y. JUDICIARY LAW §90(4).

[5] GA. CODE ANN. §9-501 (1935).

[6] N. C. GEN. STAT. §84-28 (1950).

[7] DRINKER, LEGAL ETHICS 42 (1953).

other punishment will serve to offset the adverse publicity of such convictions, and raise the standards of the profession's integrity and self-discipline in the eyes of the public.[8]

These motives and purposes merit serious consideration. However, the application of the "professional reputation" theory to justify summary *disbarment,* may result in the imposition of a harsh penalty. Where summary disbarment is based solely upon a conviction which does not require evidence of any act relatable to the competency or honesty of the attorney, it is submitted that it would be much more equitable and reasonable merely to suspend the attorney for the period of his sentence and possibly for the period of his parole or probation.

A conviction for the crime of willfully attempting to evade income taxes does not necessarily involve an intent to defraud[9] or moral turpitude.[10] The use of the net worth, gross expenditure and other analytical methods of establishing available funds has, for practical purposes, shifted the burden of proof from the prosecution to the defendant taxpayer.[11] Once the Government establishes an inference of unreported income by any of these methods, the defendant is compelled either to come forward with an explanation, or risk conviction.[12]

The Government, in establishing this inference of unreported net taxable income by analytical methods, makes no attempt to preclude the possibility that the increase in net worth or the expenditures of the taxpayer are the result of a past accumulation. A taxpayer, especially one faced with a trial several years after the tax year in question, may be unable to establish, in proper cases, a past accumulation of savings or a source of non-taxable income.

Although the Supreme Court has held that the prosecution must produce proof of some "evil intent" to warrant a conviction under Section 7201,[13] in many instances the jury is, in effect, permitted to infer the required intent from the inference that the defendant had unreported net income.[14] Therefore, since convictions can be had without proof of facts showing fraud, dishonesty or other acts reflecting on the integrity or professional ability of an attorney, summary disbarment should not be based solely on the fact of conviction under this section. While a conviction may be justified for tax purposes, disbarment should be imposed only after a full investigation into the facts and circumstances of each case and a finding of bad faith or fraudulent intent.

The courts in the instant cases, and of other states where disciplinary proceedings based on tax-evasion convictions have arisen,[15] appear to have followed this course of action. In *State ex rel. Florida Bar v. Evans,*[16] the court refused to act under a statute providing that "no . . . person . . .

[8] See DRINKER, *op. cit. supra* note 7, at 42; Note, 52 COLUM. L. REV. 1039, 1051 (1952).

[9] United States v. Scharton, 285 U.S. 518 (1932).

[10] *In re* Hallinan, 43 Cal.2d 243, 272 P.2d 768 (1954).

[11] See Holland v. United States, 348 U.S. 121, 124-29 (1954); Gordon, *Income Tax Penalties,* 5 TAX L. REV. 131, 187 (1950).

[12] See Schuermann v. United States, 174 F.2d 397 (8th Cir. 1949).

[13] United States v. Murdock, 290 U.S. 389 (1933) (prosecution under predecessor to §7201).

[14] Gordon, *supra* note 11, at 187.

[15] See People *ex rel.* Dunbar v. Fischer, 132 Colo. 131, 287 P.2d 973 (1955); Louisiana State Bar Ass'n v. Steiner, 204 La. 1073, 16 So.2d 843 (1944); Rheb v. Bar Ass'n, 186 Md. 200, 46 A.2d 289 (1946); *In re* Diesen, 173 Minn. 297, 217 N.W. 356 (1928); Matter of Crosby, 281 App. Div. 801, 119 N.Y.S.2d 478 (4th Dep't 1953) (mem. opinion).

[16] 94 So.2d 730 (Fla. 1957).

who has been convicted of an infamous crime shall be entitled to practice. . . ."[17] Only after an investigation into the merits and a finding of misconduct did the court proceed to suspend the attorney for two years under a general misconduct provision of the Code of Ethics of the Florida Bar.[18]

In *Kentucky State Bar Association v. Brown,*[19] the Court of Appeals of Kentucky refused to disbar the respondent under a rule which provided for disciplining upon presentation to the court of a certified copy of conviction for any felony;[20] the court held that a conviction under Section 7201 does not involve moral turpitude.

Both courts appear to have taken a just and reasonable course of action, insofar as they have refused to disbar solely on the basis of the record of conviction. However, in the *Brown* case, while the respondent was sentenced to imprisonment for a year and a day, the court did not consider any type of disciplinary action. As a result, an imprisoned convict was, in theory at least, entitled to hold himself out as licensed and capable of practicing law. In these circumstances, it would appear that discipline other than disbarment, perhaps suspension for the period of the attorney's sentence, should have been considered in order to preserve the dignity of the profession and to prevent possible scandal.

This approach, applying both the unfitness and the professional reputation theories of discipline to a limited extent, should be valid not only in tax evasion cases, but generally. In the case of a crime which per se indicates unfitness for practice, where a hearing as to the factual circumstances shows that the attorney is unfit, summary discipline, even disbarment, is not unjust. In cases that do not involve unfitness, courts should not feel without authority to impose discipline less than disbarment, if the reputation of the profession requires it in the specific case, and the discipline is such as not to inflict serious injury upon the attorney.

[17] FLA. STAT. ANN. §454.18 (1952).

[18] CODE OF ETHICS OF THE FLORIDA BAR, Canon 32, Rule B.

[19] 302 S.W.2d 834 (Ky. 1957).

[20] KY. CT. OF APP. RULE 3.335.

THE ELLIS CASE *(Continued)*

> tution of this Commonwealth. With this we cannot agree. All religions are treated alike. There is no "subordination" of one sect to another. No burden is placed upon anyone for maintenance of any religion. No exercise of religion is required, prevented, or hampered.[29]

It is to be fervently hoped that the *Ellis* case has not created any permanent cleavage or division in the community. It is not, and should not be made, a controversy between Catholic and Jew. It belongs in no such area. It is to be regretted that the case ever arose. It would be more regrettable, however, if one were to refrain from condemning what is patently a brazen defiance of law, lest offence be taken by the uninformed. The *Ellis* case with all of its consequent pain to the community has probably served one useful purpose. If it has done nothing else, it has virtually assured the citizens of Massachusetts that there will be no repetition of this unhappy case. We may be reasonably sure that in the future the adoption laws will be rigorously and speedily enforced because, in this area of the law as in others, justice delayed is justice denied.

[29] Petitions of Goldman, 121 N.E. 2d at 846.