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JUDICIAL RESOLUTION OF ISSUES ABOUT RELIGIOUS CONVICTION

KENT GREENAWALT*

I. INTRODUCTION

What can judges and lawyers learn about religion from those whose field is religious studies, and from others who can illuminate the phenomenon of religion? Using examples provided in Winnifred Fallers Sullivan's paper, I want to place this general question within the fabric of free exercise law.

What I say assumes that some legal issues she raises have reasonably clear answers. Given the cavalier way the Supreme Court turned free exercise law upside down in *Employment Division v. Smith*,¹ and given its harsh reception of the Religious Freedom Restoration Act (RFRA),² which had received overwhelming Congressional support, little in this area may be clear. Nonetheless, when Supreme Court resolutions are supported by powerful reasons, I take them as provisionally settled.

In legal terms, the issues that Professor Sullivan covers include sincerity, the borders of religion, substantial burden, and compelling governmental interest. Claims that a generally valid law imposes an unacceptable restriction on religious exercise have a typical structure.³ That structure is the same whether the claim is made under a state constitution generously interpreted to protect religious exercise,⁴ under the

* University Professor, Columbia University School of Law. A.B., Swarthmore College, 1958; B.Phil., Oxford University, 1960; L.L.B., Columbia Law School, 1963.

1. 494 U.S. 872 (1990).

2. See 42 U.S.C. 2000 bb (1993); *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997). The Court's opinion reads as if RFRA is invalid *in toto*, but the theory of the opinion is that Congress lacked power under the Fourteenth Amendment to create new rights of religious exercise against the states. The act also covers the federal government, and Congress needs no special constitutional authority to qualify *its own* past and future statutes. The opinion provides no reason why that aspect of RFRA should be viewed as invalid.

3. I am not including here arguments that a law discriminates against a religion or is aimed at a religion. See *Larson v. Valente*, 456 U.S. 228 (1982); *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

4. States that have distinctive free exercise language in their state constitutions may use a different verbal formula for some inquiries.

pockets of constitutional free exercise claims that remain after *Smith*⁵ or under RFRA. (The Supreme Court has not addressed whether RFRA itself or reenacted legislation with the same standards may validly apply to federal legislation.) The claim must be based on religion in some sense, it must assert a significant interference with religious exercise, and it must be sincere.⁶ Even when these conditions are met, a claim fails if application of the law serves a compelling government interest that cannot be satisfied by less restrictive means. What might lawyers learn from experts about religion that could help the resolutions of these kinds of claims?

II. SINCERITY

Is a claimant presenting his or her convictions honestly? The only reference in Professor Sullivan's paper to a serious question of this kind comes from Walter Dickey's deposition.⁷ Dickey was a prison administrator when he was confronted with the following situation:

[A] guy . . . who said he was Jewish . . . wanted to have a Jewish dinner . . . at Rosh Hashanah or whatever it was . . . I had to decide whether he was really Jewish, and I decided he was . . . I figured the guy had five life sentences, we could cut him a little slack, since he obviously wasn't Jewish or if he was, he was a very recent convert. He just wanted to have his own dinner.

One way to take this story is that Dickey thought the prisoner was probably not Jewish, but figured a Jewish dinner wouldn't hurt. We can also imagine an administrator not wanting to get tangled up in disputes about sincerity, especially if a court might review his decision. If the prisoner's assertion that he was Jewish was a matter of simple truth or simple falsity, Dickey's problem had nothing special to do with religion.⁸

But we might take the story differently. Although the prisoner may have had some sense of Jewish identity—perhaps his father was Jewish

5. These mainly consist of claims like the one sustained in *Sherbert v. Verner*, 374 U.S. 398 (1963).

6. The standard of inquiry need not necessarily be whether the individual is probably telling the truth. For certain matters, especially public representations about spiritual events that are claimed to be fraudulent, it may be that no inquiry into sincerity is appropriate. I discuss these matters in *Five Questions About Religion Judges Are Afraid to Ask*, 20-23 (Oct. 18, 1996) (unpublished manuscript, on file with the *DePaul Law Review*).

7. Winnifred Fallers Sullivan, *Judging Religion*, 81 MARQ. L. REV. 441 (1998).

8. However, one might think it is a good thing to encourage religious identification and practice, even if a person is not initially sincere. Assuming that is a proper attitude for a government official, the question the official faces is one of discretionary choice, not acceding to a valid claim of right.

but he was raised as a Christian by his mother and stepfather—it was arguable whether he deeply regarded himself as Jewish. In this event, ideas of religious and cultural indeterminacy, of the sort discussed by Larry Rosen,⁹ could be relevant. This apparently is how Professor Sullivan takes Dickey's story, for she speaks of "the occasional lifer who needs to have a Seder. This flexibility . . . comes out of a real respect for the individual and for cultural difference: an acknowledgment of an American cultural style in the case of cultural conflict."¹⁰ Lawyers may need to learn that people can have multiple and shifting religious identities, that "sincerity" need not lock them into one religious affiliation and set of doctrinal propositions.

There are two related points. One was made long ago by Justice Jackson in the *Ballard*¹¹ case, people may "believe" in a religion or religious ideas at the same time they entertain serious doubts. James Boyd White emphasized another in his keynote talk; people may be attached to rituals and other practices more than to doctrines.¹² Sincerity could mean attachment to practice rather than belief in propositions. Sincerity admits of doubt and stumbling; officials should not require certain conviction or unwavering practice.

III. RELIGIOUSNESS

I take it for granted that courts should entertain a broad approach to what counts as religious, an approach that is supported by relevant Supreme Court precedents.¹³ Issues of religiousness figure in at least three kinds of cases. The first kind is the most straightforward. Some set of beliefs, practices, and institutions is involved, and the question arises whether it is religious or not. In two notable cases, the Third Circuit had to decide whether Transcendental Meditation, taught in the New Jersey public schools,¹⁴ and M.O.V.E., a group to which prisoners be-

9. Lawrence Rosen, *The Integrity of Cultures*, 34 AM. BEHAVIORAL SCIENTIST, 594-617 (1991).

10. Sullivan, *supra* note 7, at 457.

11. *United States v. Ballard*, 322 U.S. 78, 93-95 (1944) (Jackson, J., dissenting).

12. See James Boyd White, *Talking About Religion in the Language of the Law: Impossible But Necessary*, 81 MARQ. L. REV. 177, 181-83 (1998).

13. See, e.g., *Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Seeger*, 380 U.S. 163 (1965); *Torcaso v. Watkins*, 367 U.S. 488 (1961). I have argued for an "analogical approach" to religion in *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753 (1984); and I defend that approach in *Five Questions About Religion Judges Are Afraid To Ask*, *supra* note 6.

14. *Malnak v. Yogi*, 592 F.2d 197 (3d Cir. 1979).

longed,¹⁵ were religious. However narrow or generous the approach to what counts as religious, inevitably certain cases will lie at the borderline. The more lawyers learn about how experts regard religion, the better they can discuss what approaches make sense, and how to apply those approaches in doubtful cases.

One particular question is how much an individual's own view of what is religious and what is nonreligious should matter. I am certain it should not always be controlling; a person should not receive more or less protection because of his or her idiosyncratic view of the boundaries of religion. But experts on religion might shed light on how much the concept of religion itself relates to variant ideas of the concept that people hold. In my defense of an "analogical" approach to defining religion, I have claimed that no particular factor, like belief in God or corporate worship, is necessary. An individual's own idea of religion may show which factors he or she takes as most important, and that may be relevant for a court. Nevertheless, judicial resolution of what counts as religious should not depend finally on what an individual claimant regards as religious.

A second kind of case about religiousness is one in which an individual's claims vary from those of any group to which he or she belongs. Courts occasionally have phrased a conclusion that a maverick individual should lose his case as a determination that his claim is not religious,¹⁶ but ordinarily this is a fallacy.¹⁷ Without doubt, individuals can have religious convictions and practices that vary from those of most, or all other, members of their groups. The question whether such idiosyncratic views should underlie a successful legal claim is not properly phrased as a question whether the claims are religious.

The third kind of case is the most elusive. A claim is made that has some connection to a religious outlook, but the connection is arguably weak. Imagine that a claimant says that her religion places a great value on family life, that nighttime work seriously interferes with her family life, and that an employer must therefore make a "reasonable accommodation" to her religious need not to work at night. A variation

15. *Africa v. Commonwealth*, 662 F.2d 1025 (3d Cir. 1981).

16. In *Thomas v. Review Bd.*, 450 U.S. 707 (1981), the state court had so characterized the beliefs of a member of the Jehovah's Witnesses who felt he could not work in a factory producing material for tanks; the court relied on the fact that some other members of the group did not take that view.

17. A possible exception might be when individual claims, regarded by themselves, do not appear to be religious, but might become so if attached to the practices of an atypical religious group with no theology, such as the Ethical Culture Society.

of this problem that resembles *Sherbert v. Verner* would be a claimant who says she cannot work on Saturday, because that is family time, on which her religion places great value. Is the claimant's desire to spend more time with her family religious or not? If the asserted connection to religion is bogus, then, of course, the claim is not religious. If the connection is sincere, perhaps the issue is best formulated not as whether the claim is religious but as whether the burden on religious exercise is serious enough to warrant relief. That brings us to the main topic of Sullivan's paper, insofar as it bears on approaches to free exercise claims that are cast in the broad legal formulations that now exist: what counts as a substantial burden on religious exercise.

IV. SUBSTANTIAL BURDEN

Professor Sullivan concentrates on RFRA and its specific language. That statute has now been held invalid in its application to state laws; but its language may continue to restrict the federal government. In any event, the basic issues she discusses about substantial burden arise in state and federal constitutional adjudication as well.

I want to begin by refining distinctions on which Professor Sullivan focuses. Judge Crabb, the trial judge in *Sasnett v. Sullivan*¹⁸, said that one possible approach to whether a person's religion was substantially burdened was to ask if the prohibited practices were required by their religion, meaning "the religion" as generally understood.¹⁹ A competing approach was to ask if the practices were central to and religiously motivated in terms of the individual's religious exercise.

A. Two Variables

My first point is that two distinct variables are involved. One concerns perspective; is that of the individual or the group to count? The other variable concerns stringency; must the behavior in which the claimant wants to engage, say wearing religious jewelry, be required from a religious point of view, be a central religious practice or closely related to a central religious belief, or be merely connected more weakly to religious belief or practice? Although Judge Crabb, drawing from positions of the parties, poses the options as if an individual approach will be more generous to the claimant than a group approach, that need not be the case. A court could adopt the individual's point of

18. 374 U.S. 398 (1963).

19. 908 F. Supp. 1429 (1996).

view but be very restrictive about what kinds of claims will succeed. To take an example, someone counts as a conscientious objector only if he feels that fighting in a war would be abhorrent. Conversely, a court might adopt a group perspective and require only a modest connection between the behavior at issue and the group's beliefs and practices. On such a test, an individual's claim to wear religious jewelry might succeed if the group to which he belonged regarded wearing such jewelry as one appropriate sign of devotion.

B. Individual Perspectives—For Most Cases

For most kinds of cases, there are powerful reasons to adopt an individual's perspective, not the group's. It is the individual who is seeking to engage in behavior; his or her convictions should matter the most. (One should not regard this conclusion as favoring individualist forms of religion over others; if an individual belongs to a religious group in which forms of understanding are closely similar, then the individual's rights will follow those of other members of the group.) Further, as the church property cases establish, courts are not well suited to determine the views of a "tradition," if there is any variety within the tradition.²⁰ The Supreme Court's decisions in conscientious objector cases²¹ and in unemployment compensation cases²² make clear that in those contexts individual conviction is crucial. In principle, most claims involving behavior within prisons should be similar. Perhaps looking at standard doctrines or practices may help officials understand an individual claimant's position or test its sincerity, but the individual's perceptions should be the final determinant.

A contrary argument is that prison officials (and other administrators) are not able to make such individual assessments. There is no doubt that assessments of a group's beliefs and practices may also be difficult, but at least officials would need to make many fewer assessments if they could apply standard approaches for Roman Catholics, Orthodox Jews etc. This argument has some force, but not enough to override the strong reasons for using the individual's perspective.²³

20. See, e.g., *Presbyterian Church v. Mary Elizabeth Blue Hull Mem. Presbyterian Church*, 393 U.S. 440 (1969).

21. See *United States v. Seeger*, 380 U.S. 163 (1965); *Welsh v. United States*, 398 U.S. 333 (1970).

22. See *Thomas v. Review Board*, 450 U.S. 707 (1981).

23. As a matter of administrative convenience, once it is established that some prisoners have a certain right, officials may not undertake to assess each otherwise similar claimant individual by individual.

Unfortunately, some kinds of cases cannot be resolved in this way. In *Lyng v. Northwest Indian Cemetery Protective Association*,²⁴ Native Americans wanted to stop the government from road building and logging that would destroy the quietness of sacred sites. In such a case,²⁵ we could not expect that the government would refrain from activity because of the sincere beliefs of one individual; claimants need to show that a substantial group has the attitude that they do. The same may be true when prisoners seek to engage in forms of group practice.

A similar approach is needed when courts decide whether a government action endorses or impermissibly aids a religion. The perceptions that matter are not those of particular individuals. It might be responded that courts need not then assess the perspectives of any actual persons because what counts is how a reasonable observer would see things. However, a reasonable observer's perceptions are connected to how most people would perceive something (at least if they have requisite information). If, for example, one asks whether enforcement of Orthodox Jewish standards of *kashrut* endorses or aids²⁶ Orthodox Judaism over the religion of Conservatives who observe somewhat different *kosher* standards, I do not see how that can be decided without some understanding of how Conservative Jews actually regard what the state is doing.²⁷

C. Stringency of the Standard

When we turn to the necessary connection between the act in which claimants want to engage—wearing religious jewelry—and religious conviction and practice, we can mark out three rough standards. The most stringent is that claimants cannot succeed unless the act is one the state forbids but their religious convictions demand (or the state demands and their religious convictions forbid, as with military service or jury duty). Of the two major decisions rendered by the Supreme Court sustaining free exercise claims, this condition may not have been met in either case. In *Wisconsin v. Yoder*²⁸ the law demanded that Amish children be educated in ordinary schools beyond the eighth grade; this was contrary to Amish practice, but it was not clear the Amish had a view

24. 485 U.S. 439 (1988).

25. I assume here that, contrary to what the majority decided in *Lyng*, the nature of the claim made in *Lyng* does not automatically preclude success.

26. Some aspects of aid might be determined independent of perceptions.

27. I discuss this problem in *Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance*, S. CAL. L. REV. (forthcoming 1998).

28. 406 U.S. 205 (1972).

that children *must* leave school after eighth grade.²⁹ The condition was definitely not satisfied in *Sherbert v. Verner*³⁰—Mrs. Sherbert was not compelled to work on Saturday, she merely stood to lose unemployment compensation if she refused. Since RFRA was designed—as the purposes section of the statute says³¹—to reinstate the law as reflected by *Sherbert* and *Yoder*, the statute did not require an absolute conflict of law and religious conviction. A contrary position could reasonably be defended *only on the basis* that any more generous standard is either not administrable by a court or is much too generous.

At the other end of the spectrum from absolute conflict is a standard that requires only sincere religious motivation for the act in which the claimant wants to engage. Sincere religious motivation, by itself, should not satisfy a substantial burden. If it did, any actual interference with religious exercise would constitute a substantial burden. The federal statute was meant to be more restrictive than that, and any analogous constitutional standard should be similarly understood. Professor Sullivan agrees.³²

Someone might make the following defense of a sincere motivation approach: “No one will bother suing unless they care a lot about something, so courts will not have to worry about slight, peripheral aspects of religious exercise.” One problem with this defense is that people may care considerably about some things, such as time with family, that they understand are peripheral aspects of *religious* practice. A more severe problem is that courts are not the frontline for most decisions about free exercise; administrative officials, such as prison wardens, are the frontline. If the courts announce that every sincere religious motivation satisfies the substantial burden standard, conscientious administrators will have to treat religious claims accordingly. Although few prisoners may litigate unless they have a substantial interest, many prisoners may be willing to make requests or demands of prison officials concerning matters of lesser importance.

29. Ira Lupu, *Where Rights Begin: The Problem of Burdens on The Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989).

30. 374 U.S. 398 (1963).

31. A purpose is “to restore the compelling interest test as set forth” in *Sherbert* and *Yoder*. See 42 U.S.C. 2000 bb (Supp. V 1993). I assume that the “compelling interest test” in *Sherbert* includes the basic premise that the government must produce a compelling interest to justify the impairment of religious exercise that the rule about Saturday work involves.

32. Professor Sullivan speaks of “the apparent absurdity of giving a legislative veto to any who claim a religious motive.” See Sullivan, *supra* note 7, at 458. Even if one grants that some test of sincerity will weed out a few claims, and that the veto is (just) an exemption from the law, still her basic point that this approach goes too far is correct.

If sincere religious motivation became the only standard for substantial burden, we could expect three offsetting developments. First, when the religious aspect of motivation was marginal or the subject seemed trivial, courts might conclude that motivation was not really religious. Second, courts might rely heavily on categorical analysis, saying that claims of a certain *kind* do not qualify for protection. This is what the Supreme Court did in *Lyng*. Failing to discover any direct or indirect coercion, it said no free exercise claim was raised, even if the effect of the government's actions on religious practices would be devastating. If sincere motivation were otherwise sufficient, courts would narrow the categories of claims that would receive recognition.

The third development would concern "compelling interest." In logical form, substantial burden and compelling interest are separate inquiries addressed in succession. However, a court determining substantial burden has an eye to compelling interest (and its least restrictive means component), and vice-versa. In practice, judges weigh whether the government's interest warrants the particular interference with religion. If a substantial burden test ceased to be significant, courts would often dispose of unappealing cases by deciding that the government was serving a compelling interest with the least restrictive means.

We are left with the following dilemma. Some intermediate standard for substantial burden that is between absolute conflict and mere religious motivation is appropriate. But can courts come up with reasonable formulations of such a standard that will allow them to be sensitive to individual perspectives and to decide cases in a nonarbitrary fashion? That is the underlying problem with which the courts have been struggling and on which Professor Sullivan concentrates.

Some courts that have not required an absolute conflict have used a formula that includes sincere religious motivation, the dimension of magnitude that the word "substantial" connotes, and some reference to a central belief or practice. In his dissent in *Lyng*, Justice Brennan had said there must be a "substantial and realistic threat" to "central" aspects of the religion of the claimants.³³ Some courts applying RFRA have spoken similarly. In *Mack v. O'Leary*,³⁴ for example, Chief Judge Posner said that a substantial burden "forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenet of a person's religious

33. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 475 (1988) (Brennan, J., dissenting).

34. 80 F.3d 1175 (7th Cir. 1996).

beliefs, or compels conduct or expression that is contrary to those beliefs.”³⁵ This language suggests that centrality of belief is a required aspect of a successful claim if conduct is inhibited or constrained, but that centrality is not required if a law forces restraint from conduct or compels conduct.³⁶

What can we say about the three components: religious motivation; central practice; and substantiality of burden? Without doubt some religious motivation is needed; that is a necessary requirement for a successful claim of religious exercise, although it should not be sufficient by itself.

I am skeptical about the usefulness of requiring a “central belief or practice.” If the central belief needs only to be weakly related to the behavior in which the claimant wants to engage, the requirement may do little work. For example, someone’s religious jewelry may represent something about his central beliefs—he wears a cross that represents the death and resurrection of Jesus, central aspects of his Christian belief. Should that be enough, even if the prisoner does not regard wearing religious jewelry as a central form of devotion? If this sort of connection suffices, it may be hard to imagine any sincere religious motivation that will not be tied to a central religious belief or practice. An alternative may be to say that the behavior itself has to be a central practice or directly follow from a central belief. That approach might be too restrictive. Some burdens may be substantial even though they do not interfere with someone’s central beliefs or practices. A prisoner might acknowledge that wearing jewelry is not *central*, but still regard it as a very important form of commitment, devotion, and witness. A final problem with centrality is difficulty saying how central something must be to be central. The courts that use centrality regard it as one critical test of magnitude, but it is doubtful how much it aids in that regard.

This leaves us with magnitude. A substantial burden is not just any burden; it must have a certain weight. In one formulation in *Mack v. O’Leary*, Judge Posner says that the practices must be important to vo-

35. *Id.* at 1179.

36. When I initially read this language, I thought it required centrality if the claim was to be exempt from compelled conduct. That is, I took “contrary to those beliefs” to include a requirement of a central tenet. I have altered my view for two reasons. As a matter of English usage, “those” in “those beliefs” more naturally refers to “religious,” not imparting the further phrase “a central tenet of.” Even more importantly, it would not make sense to require claimants to face a harsher standard when conduct is compelled than when conduct is forbidden. The formulation definitely has no centrality component when conduct is forbidden. In the subsequent case of *Sasnett v. Sullivan*, 80 F. 3d 1175, 1179 (1996), involving forbidden conduct, Chief Judge Posner’s opinion does not refer to centrality.

taries of the religion.³⁷ Once we are apprised of what an individual's belief and practices are, we may be able to say that some interferences with his or her religious exercise are trivial, others are very great. The "in between" circumstances are difficult. Any vague standard of magnitude is hard to apply, and opens itself up for inconsistent treatments. Of course, this problem is exacerbated if courts have little understanding of what they are doing.

An interesting aspect of Judge Posner's opinion in *Mack v. O'Leary* is his conclusion that courts can administer a test that asks about religious motivation and centrality of religious belief more easily than they can settle whether an absolute conflict is present.³⁸ His point is that it is too difficult for courts to determine whether, according to the religion to which the claimant belongs, a direct conflict is posed. If we focus on the individual's beliefs, however, I do not think we can reach any such straightforward conclusion about comparative administrability. In cases where it is reasonably arguable that a direct conflict may exist, a motivation-substantiality standard will be easier to apply, because it will almost certainly be satisfied. However, as one moves away from a tight connection between central religious beliefs or practices and a claimant's acts, an intermediate standard may become harder to apply than one that requires a direct conflict, under which a claimant would definitely lose.

For most of the prisoners to whom Sullivan refers, the direct conflict standard would be simpler, because the prisoners, even by their own words, do not meet it. No one quite claims that their religious convictions actually require that they wear religious jewelry. What Judge Posner says about the administrability of an intermediate standard is only modestly reassuring; many difficult cases will remain.

Judges can sometimes avoid determining substantiality by applying categorical limitations of the kind *Lyng* involves.³⁹ But even if they dispose of some cases in that manner, judges (and administrators) will often be left with some crucial questions about magnitude.

A richer understanding of people's religious lives, of the kind Professor Sullivan helps provide, may aid judges to resolve these questions; but we should not be too optimistic about how much that will do. If someone reflects on her own religious life, and understands it as well as

37. *Mack*, 80 F. 3d at 1180.

38. *Id.* at 1179.

39. See generally Lupu, *supra* note 29 (suggesting different, more defensible, kinds of limits).

one is capable of understanding that dimension of human experience, she may still be hard put to say which interferences with that religious life would be substantial. Sensitive understanding is only part of a judge's problem; the delicate exercise of line-drawing remains. Although it is troublesome for courts to be engaging in such an exercise, that engagement is preferable to each of the three main alternatives: no free exercise rights,⁴⁰ an absolute conflict requirement, and a simple religious motivation approach. This is one of those situations in which considerable messiness at the edges, and unevenness in application, are the regrettable costs of a legal standard that is warranted because it is responsive to the values that are at stake.

40. I mean here "no free exercise" rights other than rights against discrimination and against being targeted because of religious practices. This option is the one the Supreme Court established as the proper approach under the federal constitution in *Employment Division v. Smith*, 494 U.S. 872 (1990). *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), confirms that approach and indicates that Congress has no power to adjust it for the states.