

**LAW AND POLICY 1997:
RELIGION ON CAMPUS**

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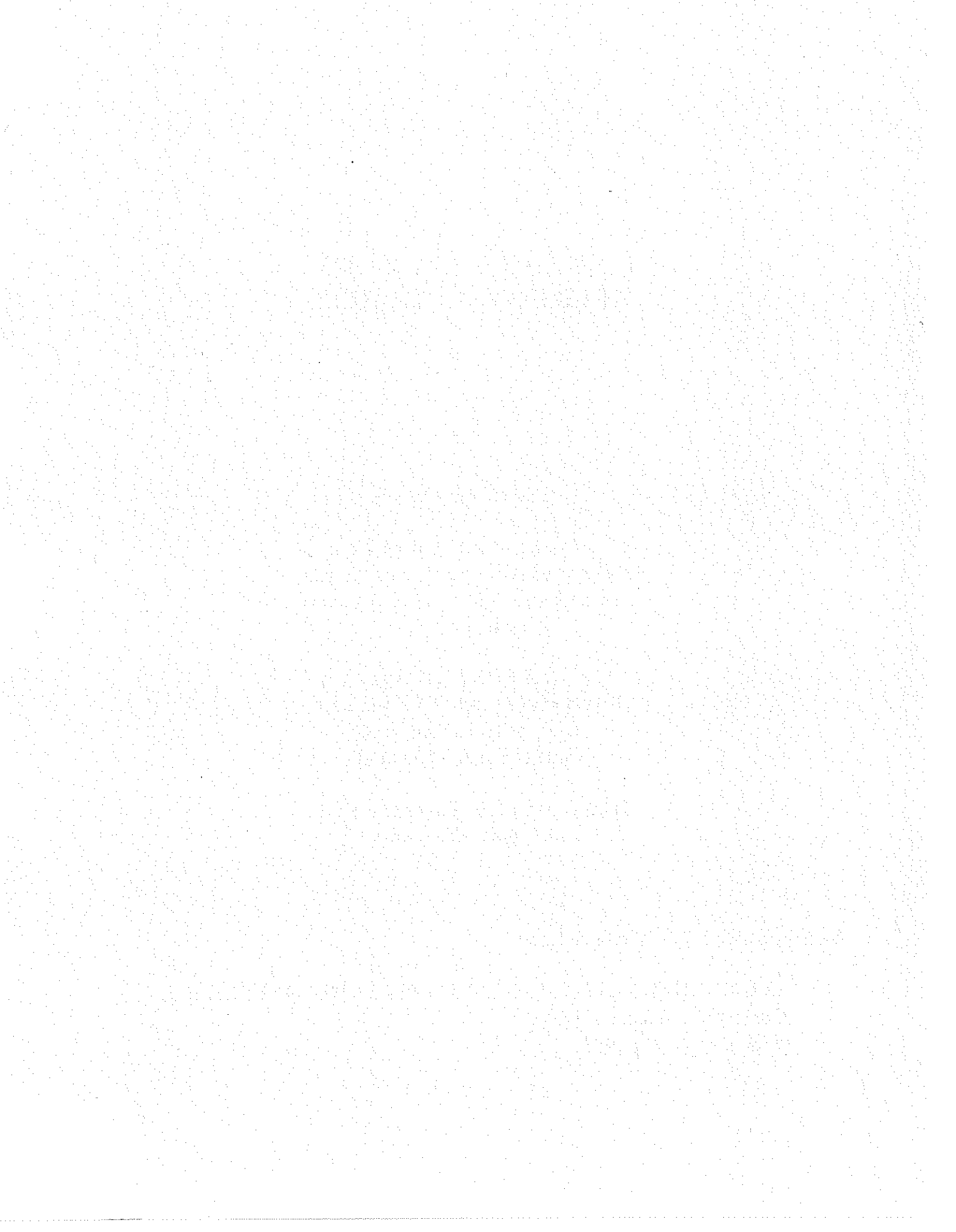
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LAW AND POLICY 1997:

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William A. Kaplin and Gary Pavela
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The Discussion Format

This presentation will be in a discussion format, comparable to interviews with Professor Kaplin conducted by Gary Pavela for *Synthesis: Law and Policy in Higher Education*.

The discussion is not rehearsed. Part of the presentation will also be in a case study format, using a case study originally developed for the Fall 1996 issue of *Synthesis* but revised and expanded for this presentation. We addressed the same topic at last year's conference, and we return to it in light of developments since then, focusing on some different issues and using the new case study format. For those who attended our presentation last year, this year's session will continue, update, and deepen the discussion; for those who did not attend last year's presentation, this session will provide an up-to-date introduction to and overview of the evolving law and policy issues pertinent to religious freedom on campus.

Audience participation is encouraged. Gary Pavela will stop at various points in the discussion to solicit relevant questions and comments from the audience. Please direct your questions or comments to the issue being addressed at the time.

Religious Freedom on Campus: A Case Study

Willard Penn Community College (a public institution) attracted a wide variety of students, including some with a heightened interest in either traditional or "New Age" religious perspectives. Controversy ensued when a coalition of student religious groups called the New Order Evangelical Alliance (New Order) received recognition as a campus student organization and sought a greater role in student life. New Order activities included:

- a. An aggressive effort to recruit new members, especially Jewish and Roman Catholic students, who were approached by small teams of New Order members in public areas of the campus, and questioned about their beliefs.
- b. Creation of a "web" site, using College computer facilities, to "preach the word" about New Order beliefs and values.
- c. A successful effort to encourage the Student Government Association (SGA) to use student fee monies to fund the painting of a mural depicting the building of Noah's Ark-- displayed along with other murals (all with secular themes) in the Student Union.
- d. Conducting worship services and bible study classes in rooms regularly used by student organizations on campus.
- e. Wearing a distinctive red arm band in classes.
- f. Writing the expression "In the Name of the Lord" on the top of all examinations and homework assignments.
- g. Planning to hold a public ceremony once a year at the "Discover Student Organizations at Penn" field day, during which a live mouse would be decapitated as a "sacrifice."

Complaints about the New Order have reached a critical mass within the college administration. Some staff members see the group as a "cult," which should be disciplined for "religious harassment" of other students. Many agree that the College ought to withdraw recognition of the New Order, deny it the use of campus computer facilities, remove the "religious" mural which the New Order encouraged the SGA to fund, forbid religious expression or symbolism in meeting rooms or classrooms, and ban any kind of animal sacrifice on campus.

Questions about how to respond to the New Order were referred to the County Attorney, who advises and represents the College. How should the attorney respond? Would the advice change if the college were private and being advised by a private law firm?

COMMENTARY

Religious harassment

1. It was prudent to consult with counsel about complaints against the New Order. Those complaints raise important legal issues, many of which have been addressed by the Supreme Court.

The Supreme Court held in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), that while "freedom of conscience" and religious belief are "absolute," the "freedom to act" is not. Public officials may establish reasonable time, place and manner restrictions for social, political, religious and other activities, including distribution of literature and solicitation of new members. See also *Heffron v. International Society for Krishna Consciousness* 452 U.S. 640 (1981); *International Society for Krishna Consciousness v. Lee*, 112 S. Ct. 2701 (1992). What cannot be done, however, is to create a system in which administrators try to distinguish between "valid" and "invalid" religious groups, perhaps as a way to regulate "cults." The Court in *Cantwell* observed that:

Without a doubt a State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent. The state is likewise free to regulate the time and manner of solicitation generally, in the interest of public safety, peace, comfort, or convenience. But to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state

authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.

See also *Aman v. Handler* 653 F. 2d 41, 44 (1st Cir., 1981), holding that the refusal of the University of New Hampshire to recognize a student group associated with the Reverend Sun Myung Moon violated the First Amendment. The court cited the U.S. Supreme Court decision in *Healy v. James*, 408 U.S. 169 (1972), and concluded that denial of recognition to a student group (including a religious group), in a context where other student groups are recognized on campus, would be proper only in three circumstances:

First, the state university might prove that the group has a "knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims". . . Second, it might prove that the particular group would be a "disruptive influence" in the sense that it poses a "substantial threat of material disruption." The threat must be one of "conduct," not "speech. . ." Third, the university might show that the group is unwilling "to be bound by reasonable rules governing conduct."

2. Simply asking provocative questions, or expressing "offensive" or "outrageous" views (religious or otherwise) in a public place, should not be considered a violation of reasonable rules of conduct, unless epithets or other forms of abuse directed at an individual or a small group could be regarded as face-to-face "fighting words" (*Chaplinsky v. New Hampshire* 315 U.S. 568 (1942)), or a threat (see *Watts v. United States*, 394 U.S. 705 (1969)), or harassment so severe or pervasive as to interfere with the victim's educational opportunities. The Court in *Cantwell*, supra, observed in this regard that:

In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tents of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false

statement. But the people of this nation have ordained in the light of history that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

3. Given the facts presented, the efforts by New Order to recruit new members appear to be protected by the First Amendment. Those listeners offended by the recruitment effort, however, need not be subject to repeated inquiries and comments directed toward them individually, or to being followed about on campus. Such behavior--once made known to New Order members as being unwelcome-- may constitute prohibited harassment, or disorderly or disruptive conduct, as defined by college disciplinary regulations. Those regulations should be fairly and consistently enforced, based on the repeated acts involved--not the content of the expression.
4. Had New Order's recruitment efforts taken place in private areas of the campus, such as residence hall private areas or study rooms or carrels in the library, or indeed in classrooms, other university interests would be implicated that could provide a legitimate basis for regulation (see *Frisby v. Schultz*, 487 U.S. 474 (1988)).

"Preaching the word" on the web

5. When asked why students are authorized to create "web" sites using campus computer facilities, campus officials may initially refer to academic purposes and assignments, but probably will also talk about fostering a "marketplace of ideas." This suggests such web sites are limited "public forums," requiring that any content-based prohibition be narrowly drawn, and justified by a "compelling state interest." *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983). Also, since the "web" sites connect with the Internet, and are designed to allow students to draw upon and participate in "the [Internet's] never-ending worldwide conversation," they may deserve "the highest protection from governmental intrusion" (opinion by Judge Dalzell in *ACLU v. Reno*, 1996 U.S. Dist. LEXIS 7919, E.D. Pa. June 12, 1996; see *Synfax Weekly Report* 96.27, "The end of computer decency?", Week of June 17, 1996, p. 497). For further

analysis, see Kaplin & Lee, *A Legal Guide for Student Affairs Professionals*, secs. 8.4 & 12.1.7 (1997; in press).

6. Having created or granted access to a public forum, the college cannot deny access to its facilities or equipment solely because of the religious viewpoints expressed by the New Order or students associated with it. Indeed, according to the U.S. Supreme Court's decision in *Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S. Ct. 2510 (1995), viewpoint discrimination in such a context would strike at the heart of the mission and history of higher education:

Vital First Amendment speech principles are at stake here. . . [The] danger is especially real in the University setting, where the State acts against a . . . tradition of thought . . . that is at the center of our intellectual and philosophic tradition. . . In ancient Athens, and, as Europe entered into a new period of intellectual awakening, in places like Bologna, Oxford, and Paris, universities began as voluntary and spontaneous assemblages or concourses for students to speak and to write and to learn. . . The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the nation's intellectual life, its college and university campuses.

7. The fact that New Order's viewpoints are expressed "in an open forum in a public university does not confer any imprimatur of state approval" upon New Order, or religious practices in general. *Widmar v. Vincent*, 454 U.S. 263 (1981). See also, *Capital Square Review Board v. Pinette*, 132 L. Ed. 2d 650 (1995); and *Keegan v. University of Delaware*, 349 A. 2d 14 (Del., 1975) (overturning the University of Delaware prohibition against religious services in residence hall common areas).

The use of the university computer system may be the

equivalent of using services such as the printing services provided to the student organization in the *Rosenberger* case (above). Thus, if these computer services are provided generally to other student organizations, their extension to New Order would not likely violate the Establishment Clause -- even if New Order uses these services to communicate from a religious perspective, as did the student organization in *Rosenberger*. See Kaplin & Lee, *A Legal Guide for Student Affairs Professionals*, secs. 9.1.4 and 8.2.2 (1997, in press). Also see the excerpt "9.1.4. Religious activities [of student organizations]," reproduced at the end of this commentary (Item A).

Use of student fee monies

8. Contrary to some interpretations of the Supreme Court decision in the *Rosenberger* case, it would almost certainly constitute an infringement of the First Amendment Establishment Clause for the SGA to provide direct student fee funding to a religious organization. See the interview with Catholic University Law School Professor William Kaplin in the Summer 1996 issue of *Synthesis: Law and Policy in Higher Education*, pp. 574-575. The SGA, however, may use student fee monies to fund a mural with a religious theme, if it does so for a secular purpose, in a way that would have no more than an incidental benefit to religion, and does not foster an excessive entanglement with religion.

In *Lynch v. Donnelly*, 465 U.S. 668 (1984) the Court held that the display of a religious symbol (a nativity scene) by a public institution could be justified as a historical depiction of the origins of a national and religious holiday. The Court observed that:

Art galleries supported by public revenues display religious paintings of the 15th and 16th centuries, predominantly inspired by one religious faith. The National Gallery in Washington, maintained with Government support, for example, has long exhibited masterpieces with religious messages, most notably the Last Supper, and paintings depicting the Birth of Christ, the Crucifixion, and the Resurrection, among many others with explicit Christian themes and messages. The very chamber in which oral arguments on this case were heard is decorated with a

notable and permanent--not seasonal--
symbol of religion: Moses with the Ten
Commandments.

The burden in this case is on the SGA to make a convincing case that the Noah's Ark mural has some secular purpose (e.g., saving the environment and protecting animals); that it does not have the principal or primary effect of advancing or inhibiting religion (e.g. that a reasonable person would not see it as an endorsement of religion or any particular sect, like the New Order); or that the decision to act upon a suggestion from a group like the New Order did not constitute an excessive entanglement with religion. See the *Synfax Weekly Report* excerpt "How are religious beliefs defined," reproduced at the end of this commentary (Item B).

Worship services and bible study classes in college facilities

9. The New Order should not be precluded from conducting worship services and bible study classes in spaces used by other types of student groups for expressive activities, so long as it complies with reasonable campus rules and space reservation policies.

In *Widmar v. Vincent*, 454 U.S. 263 (1981), the U.S. Supreme Court held that a University of Missouri at Kansas City decision to bar a student religious group from using university facilities "for purposes of religious worship or religious teaching" was an unjustifiable infringement upon the group's First Amendment rights of freedom of speech and freedom of association. The Court wrote that:

The basis for our decision is narrow. Having created a forum generally open to student groups, the University seeks to enforce a content-based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral, and the University is unable to justify this violation under applicable constitutional standards.

See generally Kaplin & Lee, *The Law of Higher Education* (3rd ed. 1995), pp. 526-530. (A federal statute, the Equal Access Act, 20 U.S.C. §§ 4071-4074, makes similar

principles applicable to public secondary schools.) Also see the excerpt "The Religious Freedom Restoration Act of 1993" at the conclusion of this commentary (Item C).

College administrators familiar with the *Widmar* case sometimes forget that First Amendment protections are applied to religious *worship*, as well as religious discussions or Bible readings. That issue was addressed in the *Widmar* opinion:

Here the University of Missouri has discriminated against student groups and speakers based on their desire to use a generally open forum to *engage in religious worship* and discussion. These are forms of speech and association protected by the First Amendment.

Religious freedom in the classroom

10. There are limits to student (or faculty) expression in the classroom. Students may be disciplined for disrupting classroom activities, or the work of other students--and may not insist on making irrelevant comments, or defining the nature or scope of their own papers or examinations.

In the present case, the simple wearing of a distinctive red arm band in classes is probably a form of "expressive activity" protected by the First Amendment. See *Tinker v. Des Moines School District*, 393 U.S. 503 (1969) (suspension of high school students for nondisruptive wearing of black arm bands in school to protest the Vietnam war violated the First Amendment; suppression of speech or opinion cannot be justified by an "undifferentiated fear or apprehension of disturbance" . . .).

Likewise, writing the expression "In the Name of the Lord" on the top of all examinations and homework assignments is probably protected by the First Amendment. The expression would not appear to substantially disrupt teaching or learning--including assignments to write on particular themes or topics. See, generally, *Settle v. Dickson County School Board*, 53 F. 3d 152 (6th Cir. 1995) (teacher not required to

accept student research paper titled "The Life of Jesus Christ . . ."). The Court wrote:

Ms. Ramsey [the teacher] assigned a research paper to her ninth-grade class at Dickson County Junior High School. In assigning the paper, the teacher stressed to the students that she wanted them to learn how to research a topic, synthesize the information they gathered, and write a paper using that information. . . [S]tudents could not merely expound on their own ideas. . .

So long as the teacher limits speech or grades speech in the classroom in the name of learning and not as a pretext for punishing the student for her race, gender, economic class, religion or political persuasion, the federal courts should not interfere.

Like judges, teachers should not punish or reward people on the basis of inadmissible factors -- race, religion, gender, political ideology -- but teachers, like judges, must daily decide which arguments are relevant, which computations are correct, which analogies are good or bad, and when it is time to stop writing or talking. Grades must be given by teachers in the classroom, just as cases are decided in the courtroom; and to this end teachers, like judges, must direct the content of speech. Teachers may frequently make mistakes in grading and otherwise, just as we do sometimes in deciding cases, but it is the essence of the teacher's responsibility in the classroom to draw lines and make distinctions -- in a word to encourage speech germane to the topic at hand and discourage speech unlikely to shed light on the subject . . .

The court in *Settle* did suggest, however, that Ms. Ramsey was on weak ground when she concluded that the law somehow prevented her from allowing a student to make a presentation about a religious topic. Circuit Judge Alice Batchelder, who concurred in the result, observed that:

Ms. Ramsey was dead wrong in her

view that [the student's] paper topic was impermissible because a paper of a religious nature is impermissible in the public schools. Had the assignment been to write a paper of opinion, and had Ms. Ramsey rejected the paper on the ground of its religious content alone, Brittney's freedom of speech truly would have been violated.

11. On the other hand, if the college had some important content-neutral and religion-neutral reason for prohibiting the wearing of symbols and signs in the classroom, or for prohibiting the writing of extraneous messages on exams and papers, such a rule may be valid. See *Guzick v. Drebus*, 431 F. 2d 594 (6th Cir. 1971).

Animal sacrifice

12. It will strike many observers as bizarre and offensive to allow a religious group to engage in a ritual like animal sacrifice. However, if the New Order is properly seen as subscribing to religious tenets (see the excerpt "How are religious beliefs defined", Item B) it will be protected by the Free Exercise Clause of the First Amendment, and the Religious Freedom Restoration Act, now pending review by the U.S. Supreme Court. To restrict an established religious practice, the college must have a secular purpose--not simply a distaste for an "offensive" religious ritual--and (under RFRA) can burden the exercise of religion only if it demonstrates that application of the burden--

- (1) furthers a compelling governmental interest; and
- (2) is the least restrictive means of furthering that compelling governmental interest.

For a relevant case involving a Free Exercise clause claim, see *Church of the Lukumi Babulu Aye v. City of Hialeah*, 113 S. Ct. 2217 (1993) (ordinances proscribing religious killing of animals, but allowing secular killing, are not neutral, and violate the Free Exercise clause).

Private institutions

13. Thus far in this commentary, the analysis is based primarily on First Amendment rights under the federal Constitution. These rights would normally not apply to the relationships between an institution and its students and faculty. See generally Kaplin & Lee, *The Law of Higher Education* § 1.5 (3d ed. 1995). Similarly, the Religious Freedom Restoration Act would protect students and faculty only from the actions of public institutions. If New Order were operating in a private institution, therefore, a different analysis, and perhaps some different results, would pertain. In particular, the issues would be addressed primarily with reference to the institution's own regulations and other internal policies applicable to students and student organizations. If the private institution had a student bill of rights or other policies protecting freedom of expression or religious freedom, or if New Order's activities (or some of them) fell within specific rules of the institution granting rights or privileges to student organizations, then the case study could be resolved similarly to the way it would be for a public institution. If the private institution had no such policies or rules, then the institution would likely prevail in any conflict with New Order. In a few states, however, New Order or its members might obtain some protection against the private institution's authority under state or local human rights laws (see *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*, 536 A. 2d 1 (D.C. 1987) or under provisions of the state constitution (see *State v. Schmid*, 423 A. 2d 615 (N.J. 1980)).

Excerpts:

**A. 9.1. Student Organizations
9.1.4. Religious Activities**

If a university funds student organizations, may it exclude religious activities or religiously affiliated organizations from eligibility for funding? This question was addressed in *Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S. Ct. 2510 (1995).

* * * *

The tension between the free speech and the establishment clause of the First Amendment is clearly illuminated by the sharply divergent majority and dissenting opinions in the U.S. Supreme Court. The majority opinion addresses *Rosenberger* from a free speech standpoint, and finds no establishment clause justification for infringing the rights of a student publication that reports the news from a religious perspective. On the other hand, the dissent characterizes the students' publication as an evangelical magazine directly financed by the state and regards such funding to be a clear example of an establishment clause violation. Justice O'Connor's narrow concurring opinion, tailored specifically to the facts of the case, serves to limit the majority's holding and reduce the gulf between the majority and the dissent.

* * * *

The majority's reasoning in *Rosenberger* generally parallels the Court's earlier reasoning in *Widmar v. Vincent* and generally affirms the free speech and establishment principles articulated in that case. More importantly, both Justice Kennedy's and Justice O'Connor's opinions extend student organizations' First Amendment rights beyond access to *facilities* (the issue in *Widmar*) to include access to *services*. Some critics of the majority (such as the four dissenting justices) and some religious interest groups advocating a broad reading of Justice Kennedy's opinion, argue in addition that the majority's reasoning may even extend to access to direct funding for religious activities or student organizations.

* * * *

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B. How are "religious" beliefs defined?

Recent articles in *USA TODAY* ("Officials balk at inmate 'religious lawsuits'", September 30, 1996, p. 1) and the *Washington Times* ("Religion used as a guise for Lorton sex, drug ring," September 27, 1996) have focused on the abusive use of the Religious Freedom Restoration Act (RFRA) by groups demanding accommodation for a broad range of unusual "religious" practices--including a claim by a Texas inmate that he was entitled to a weekly meal of chateaubriand as one of his "religious" rituals. (Our original analysis of RFRA appears in *SWR* "The Religious Freedom Restoration Act of 1993", Week of May 10, 1993, p. 89).

We monitor trends in the larger society that are likely to have a substantial impact on college campuses. The assertion of religious freedom and RFRA claims is likely to have such impact, especially after the *Rosenberger* decision at the University of Virginia (see *SWR* "Religious journal entitled to indirect subsidy," Week of July 3, 1995). Higher education administrators have to be prepared both for more religious freedom and RFRA claims, and opposition to those claims by individuals and groups who believe public institutions are being too accommodating of religious perspectives.

An initial issue college administrators have to face when religious claims are made or challenged is how "religion" should be defined. Useful guidance is offered in an August 23, 1996 decision of the United States Court of Appeals for the Ninth Circuit (*Raquel Alvarado v. City of San Jose*, No. 95-15519), called to our attention by Contributing Editor Raymond Goldstone. The facts of this case (in which public funding for a sculpture representing a figure of Aztec mythology was challenged on the ground that it constituted an unlawful establishment of religion) are especially relevant to the campus setting, given the complexities involved in affirming multicultural perspectives that may be associated with diverse religious traditions, including "New Age" perspectives. Excerpts follow:

[Facts of the case]

In 1991, an art committee ("the Committee") formed by the City of San Jose approached renowned Hispanic artist Robert Graham ("Graham") regarding the commission of a sculpture to commemorate Mexican and Spanish contributions to the City's culture. Graham proposed a sculpture representing Quetzalcoatl, or the "Plumed Serpent," of Aztec mythology . . . The City [eventually] agreed to pay the artist not more than \$400,000 and to pay for the transportation and installation of a bronze and concrete sculpture, in the form of a coiled serpent, projected to weigh about 10 tons . . .

In the fall of 1993, the City Council ("the Council") held meetings to discuss renaming [a local park] "Cesar Chavez Park." Around this time, controversy over the

sculpture was heating up in the community. According to an article in the San Jose Mercury News, submitted by plaintiffs, the piece was initially opposed by certain Christians who associated the statue with the serpent from the Garden of Eden and by persons of Mexican ancestry who associated Quetzalcoatl with human sacrifice . . . Contrary to some of its detractors, defenders of the sculpture maintain that Quetzalcoatl, or a priest by that name, was responsible for stopping the practice of human sacrifice . . .

In dispute here is the current religious significance, if any, of Quetzalcoatl or the Plumed Serpent. Plaintiffs submit "New Age" and Mormon writings to support their claim that worship of this ancient deity is a going concern.

On July 8, 1994, a private organization called the United States Justice Foundation wrote to the City Attorney demanding that it terminate the Plumed Serpent project as an unconstitutional promotion of religion . . . [N]ine days before the scheduled dedication and unveiling of the sculpture, plaintiffs filed suit to enjoin the installation, dedication, and maintenance of the artwork on the grounds that it promotes religion in violation of the federal and state constitutions. Following a hearing, the district court denied the motion for a preliminary injunction on the basis of its finding that "the Plumed Serpent is an artistic representation of an ancient civilization and is not a religious object."

The statue was unveiled and dedicated two days later in a ceremony which included speeches by local dignitaries and performances by traditional Aztec dance and drum groups . . . [S]ome observers laid offerings of flowers and food at the base of the statue, while others "ma[de] obeisance" to the statue and burnt incense . . .

[The statue was not "religious" in nature]

We must first consider whether the object in question can be defined as "religious" for establishment purposes. See *Fleischfresser v. Directors of Sch. Dist. 200*, 15 F.3d 680, 687 (7th Cir. 1994); *Malnak v. Yogi*, 440 F. Supp. 1284, 1312-13 (D.N.J. 1977) ("Malnak I"), *aff'd*, 592 F.2d 197 (3d Cir. 1979) ("Malnak II"). The district court found at the hearing that the statue had "some religious significance," but not enough to prove a constitutional violation. In its written order, the court stated that "[r]eligious significance [by

itself] is . . . insufficient to prove a constitutional violation . . ."

Attempting to define religion, in general and for the purposes of the Establishment Clause, is a notoriously difficult, if not impossible, task. See James M. Donovan, "God is as God Does: Law, Anthropology, and the Definition of 'Religion,'" 6 Seton Hall Const. L. J. 23 (1995) (reviewing courts' efforts to deal with the problem to date); and see *Africa v. Pennsylvania*, 662 F.2d 1025, 1031 (3d Cir. 1981), cert. denied, 456 U.S. 908 (1982) ("Few tasks that confront a court require more circumspection than that of determining whether a particular set of ideas constitutes a religion within the meaning of the first amendment.") . . .

The issue with which we are presented is whether Quetzalcoatl or the Plumed Serpent has current religious significance. Plaintiffs have submitted a collection of New Age and Mormon writings to support their contention that belief in the symbol is current and active among these groups . . .

In *Africa* [*Supra*], the court used the "three useful indicia" guideline proposed in the *Malnak II* concurrence [by judge Adams]. . . to decide that a prisoner claiming a Free Exercise exemption on the grounds that he was an adherent of MOVE had failed to show that his belief or practice was religious for First Amendment purposes The test devised by Judge Adams, which plaintiffs implored us at oral argument to consider, is as follows:

First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs . . .

The "formal and external signs" listed by the court include: "formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, observance of holidays and other similar manifestations associated with the traditional religions . . ."

Review of the materials submitted by the plaintiffs concerning New Age beliefs leads us to conclude that neither *Africa* nor *Malnak II* [*Supra*] supports the contention that there is a cognizable religious interest at issue here . . .

New Age [ideology] is a very flexible, amorphous, spontaneous movement. There is no national organization, no hierarchy, no clearinghouse for information. People become part of the movement by studying books, visiting small institutes, joining study groups, attending seminars, and working with the thousands of New Age therapists, teachers, healers, and gurus scattered around the country. A typical believer draws on these different interests to create his own, personal way of thinking about himself and the world around him . . .

The picture of the New Age that emerges is one of individual efforts to "find" or heal oneself, physically and spiritually, with the help of symbols drawn from an infinite store of texts, visual sources and "beliefs drawn from every religious tradition . . ." The New Age proponents cited by plaintiffs clearly indicate that there is no New Age organization, church-like or otherwise; no membership; no moral or behavioral obligations; no comprehensive creed; no particular text, rituals, or guidelines; no particular object or objects of worship; no requirement or suggestion that anyone give up the religious beliefs he or she already holds. In other words, anyone's in and "anything goes . . ."

We are hard put to imagine a more unworkable definition of religion or religious symbol or believer for purposes of the Establishment Clause or Free Exercise than that which is offered here. Few governmental activities could escape censure under a constitutional definition of "religion" which includes any symbol or belief to which an individual ascribes "serious or almost-serious" spiritual significance. "[I]f anything can be religion, then anything the government does can be construed as favoring one religion over another, and . . . the government is paralyzed. . . ." 6 Seton Hall Const. L. J. at 70. While the First Amendment must be held to protect unfamiliar and idiosyncratic as well as commonly recognized religions, it loses its sense and thus its ability to protect when carried to the extreme proposed by the plaintiffs . . .

Plaintiffs also argue that the Plumed Serpent invokes Mormon religious beliefs. While Mormons are clearly a recognized religious group, the evidence presented by the plaintiffs does not support a First Amendment argument. The writings suggest that, according to certain Mormons, ancient worshipers of Quetzalcoatl were in fact worshiping Christ. Historically, Mormon missionaries taught that Christ had revealed himself to

native Mesoamericans in the form of Quetzalcoatl or the Plumed Serpent long before he appeared to man in the human form known to Christians. This attribution of Christian or Christ-like qualities to ancient religious symbols and practices does not, however, create an inference that Mormons themselves worship Quetzalcoatl or the Plumed Serpent.

Plaintiffs also cite the speech given by Luis Valdez at the unveiling ceremony and to statements of Council member Blanca Alvarado, attesting to her own spiritual response to the piece and sharing her impressions of Aztec culture. Review of these statements reveals that they were made not in a religious spirit, but in homage to the City's Mexican heritage, and to the contribution of indigenous peoples to Mexican culture. It is commonplace that a work of art may affect someone on an emotional or spiritual level, or even "move [her] to tears." This does not imbue the work with religious content.

Practice Implications:

- [] In his *Systematic Theology* (Chicago: 1967) Paul Tillich wrote that the aim of religion and theology "is what concerns us ultimately" (p. 12). There are thoughtful reasons for this assertion, but the expansive scope of Tillich's language helps explain why the courts find it so difficult to develop an accepted definition of "religion." Public officials and the courts have no choice but to try to find formulations that differentiate between established religious beliefs and the idiosyncratic "ultimate concern" of each individual. For example, in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Supreme Court held that the state of Wisconsin could not require Amish children to attend public school after the eighth grade. The Amish challengers prevailed only after showing that their beliefs were:
 - [] shared by an organized group;
 - [] related to religious principles and an interpretation of religious literature;
 - [] regulated their daily lives; and
 - [] supported a lifestyle that had been in existence for a substantial period of time.
- [] Even if the statue in Alvarado had significant "religious" meaning to a number of observers, it could

have been funded and displayed by a public agency if it had a secular purpose; did not have the primary or principal effect of advancing or inhibiting religion; and did not create an excessive entanglement with religion. This formula is drawn from the frequently criticized (but not expressly overturned) Supreme Court decision in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

The "Lemon" test (along with Justice O'Connor's additional language that government may not endorse or disapprove of religion by sending a "message" to nonadherents or adherents that they are "outsiders") was followed by the Supreme Court in *Lynch v. Donnelly*, 465 U.S. 668 (1984). *Lynch* held that the display of a religious symbol (a Nativity scene) by a public institution could be justified as a historical depiction of the origins of a national and religious holiday. Using language that may prove especially important to college administrators, the Court observed that:

Art galleries supported by public revenues display religious paintings of the 15th and 16th centuries, predominantly inspired by one religious faith. The National Gallery in Washington, maintained with Government support, for example, has long exhibited masterpieces with religious messages, most notably the Last Supper, and paintings depicting the Birth of Christ, the Crucifixion, and the Resurrection, among many others with explicit Christian themes and messages. The very chamber in which oral arguments on this case were heard is decorated with a notable and permanent--not seasonal--symbol of religion: Moses with the Ten Commandments (pp. 676-677).

Religious ideas or expression, in other words, can be displayed or taught for secular historical, artistic, or symbolic purposes.

--From *Synfax Weekly Report* Week of September 30, 1996.

C. **The Religious Freedom Restoration Act** (now pending review by the Supreme Court).

A broad coalition of religious groups--from the American Jewish Congress to the United States Catholic Conference--successfully

pushed for adoption of the "Religious Freedom Restoration Act," designed to reverse a 1990 Supreme Court decision holding that Native Americans were not exempt from criminal laws banning the use of peyote (*Employment Division v. Smith*, 108 L.Ed.2d 876).

Before the *Smith* case, the courts used various versions of a two-part test to determine whether the "free exercise of religion" clause in the First Amendment could be used to exempt an individual or a group from the requirements of state or federal law.

Essentially, it had to be shown that the law had a "substantial burden" on the exercise of religion, and that it was not justified by a governmental interest of "sufficient magnitude" to override First Amendment protection. This was the test was used by the Supreme Court in 1972 when it held that the state of Wisconsin could not require Amish children to attend public schools after the eighth grade (*Wisconsin v. Yoder*, 32 L.Ed.2d 15).

The "Religious Freedom Restoration Act," likely to be reviewed by the Supreme Court in 1997, would overturn the *Smith* decision by returning to a standard that is even more stringent than that used in *Yoder*. Section 3 of the Act provides:

(a) IN GENERAL.--Government shall not burden a person's exercise of religion even if the burden results from a law of general applicability, except as provided in subsection (b).

(b) EXCEPTION.--Government may burden a person's exercise of religion only if it demonstrates that application of the burden to the person--

- (1) furthers a compelling governmental interest; and
- (2) is the least restrictive means of furthering that compelling governmental interest.

The Act, which "applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise," provides for a private cause of action and attorneys fees if the plaintiff prevails.

--From *Synfax Weekly Report*, Week of May 10, 1993.

D. Religion in the campus marketplace of ideas

One of the most important debates in higher education is the

role of religion in the campus marketplace of ideas. Good sources for different opinions on this subject can be found in the current issue of *Harvard Magazine* (Peter Gomes, "The New Liberation Theology," November-December, 1996, p. 34); the current issue of *Lingua Franca* (Charlotte Allen, "Is Nothing Sacred?" November, 1996, p. 31); the April 1996 issue of *Lingua Franca* (Alan Wolfe, "Higher Learning", p. 70); and the February, 1996 issue of the Journal *First Things* (Stanley Fish and Richard John Neuhaus, "Why we can/can't get along, p. 18). The latter contains the most fully developed statement of contending views, and is frequently cited by other writers.

In his *First Things* article, Duke University English professor Stanley Fish argued that religious perspectives should not be welcome in the secular marketplace of ideas because those perspectives are grounded in irrational "first premises" that threaten liberal institutions ("Why We Just Can't All Get Along," p. 18). Fish wrote that:

To put the matter baldly, a person of religious conviction should not want to enter the marketplace of ideas but to shut it down, at least insofar as it presumes to determine matters that he believes have been determined by God and faith. The religious person should not seek an accommodation with liberalism; he should seek to rout it from the field, to extirpate it, root and branch.

Richard John Neuhaus, Editor-in-Chief of *First Things*, argued in response that religion--especially Christianity as it evolved in the West--poses no threat to independent thinking:

The Christian is enjoined to exercise humility, forbearance, patience--in a word, love. But, for the purposes of this discussion, we can call it tolerance. This tolerance is made necessary by two factors: cognitive humility and love for neighbor. The Christian truth about God, man, and the world of which we are a part includes the truth that we are not the masters of all the truth there is. For starters, there is original sin, which distorts and disorders also our reason . . . Respect for the dignity of the other person created in the image of God [also] requires that we not try to silence or exclude him but try to persuade him . . .

Christians have a duty to make a free market of ideas freer still. Since God is one, truth is one, and we owe obedience to all that is true . . .

Our problem--not qua Christians but as reasonable people--is with an overweening liberalism that arbitrarily limits what counts as evidence and argument.

We think Neuhaus has won the debate with Fish, largely because Fish was so obviously fighting a battle of his own choosing against a religious sensibility of his own imagining. There's much more to the great religious traditions of the world than the fundamentalism Fish seems to have in mind. As Neuhaus suggested, there is a religious perspective--stated with equal conviction by Mahatma Gandhi--that God *is* truth.

The conception of God as truth--along with a sense of wonder at what Stephen Hawking calls the "remarkable numerical relations" we see throughout the universe (*Black Holes and Baby Universes*, 1994, p. 52) may help explain the insatiable search for knowledge demonstrated by some of the world's best scientists. At it's deepest level (e.g. whether the Universe is expanding or contracting), this search has no apparent "survival value;" it constitutes a waste of time in Darwinian terms. Yet it is often pursued with such intensity that Einstein was compelled to suggest that the "noblest driving force behind scientific research" is "the cosmic religious experience" (cited in Ronald W. Clark, *Einstein: The Life and Times*, New York: Avon 1971 p. 516).

College students (and some of their professors) may see little connection between scientific inquiry and religious sensibilities. Yet the experience of beauty and harmony is often common to both. Stephen Hawking wrote in this regard that:

In theoretical physics, the search for logical self-consistency has always been more important in making advances than experimental results. Otherwise elegant and beautiful theories have been rejected because they don't agree with observation, but I don't know of any major theory that has been advanced just on the basis of experiment. The theory always came first, put forward from the desire to have an elegant and consistent mathematical model (*Black Holes and Baby Universes*, supra, p. 42).

Science has an "advantage" over religion because it usually provides for some sort of observation. But there are important realms of knowledge and understanding--like the arts or (sometimes) athletics--where the qualitative experience of beauty and harmony cannot be proven or replicated. Music is good example--constituting a "mystery" few will try to explain solely as "the neurological consequence of the impact of air vibrations on the human eardrum" (John Polkinghorne "Heavy Meta", November 1996 *Scientific American* p. 122).

The arts are treasured--and institutions like M.I.T. foster them--because there seems to be a relationship between the arts, the sciences, and creativity. J. Bronowski wrote that:

A man becomes creative, whether he is an artist or a

scientist, when he finds a new unity in the variety of nature . . . The creative mind is the mind that looks for unexpected likenesses. This is not a mechanical procedure, and I believe it engages the whole personality in science as in the arts ("The Creative Process" *Scientific American*, September, 1958, p. 9).

Bronowski could have added that looking for "a new unity in the variety of nature" is an important part of the religious sensibility--a sensibility that has fostered some of the greatest art in the world.

However stimulating it may be, the "experience" of truth or beauty--*especially* in the name of religion--has to be grounded in an awareness of human fallibility, and the will-to-power. Once that foundation is laid, (something many religious traditions seem to have accomplished) there is no reason why religious perspectives should be excluded from campus marketplace of ideas, even if that were legally possible. Religion, like art, isn't inherently hostile to discourse or experimentation--it simply can't be fully explained by those processes.

