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## THE FORUM OF CONSCIENCE: APPLYING STANDARDS UNDER THE FREE EXERCISE CLAUSE

PAUL MARCUS\*

*The 1973 Supreme Court decision in Wisconsin v. Yoder reenforced and amplified the Court's earlier holding in Sherbert v. Verner that the free exercise clause of the first amendment requires the state to render substantial deference to religiously motivated behavior in the application of its laws and regulatory schemes. In this article, Mr. Marcus traces the evolving standards of free exercise doctrine and observes that the "balancing test" which has resulted from that evolution requires still further refinement to give religious freedom its full constitutional due. The author then illustrates how the new standards of free exercise might be applied in a variety of situations in which free exercise claims are most commonly asserted.*

[I]n the forum of conscience, duty to a moral power higher than the State has always been maintained.

*Chief Justice Charles Evans Hughes*<sup>1</sup>

When the state through its laws seeks to override reasonable moral commitments it makes a dangerously uncharacteristic choice. The law grows from the deposits of morality. Law and morality are, in turn, debtors and creditors of each other. The law cannot be adequately enforced by the courts alone, or by courts supported merely by the police and the military. The true secret of legal might lies in the habits of conscientious men disciplining themselves to obey the law they respect without the necessity of judicial and administrative orders. When the law treats a reasonable, conscientious act as a crime it subverts its own power. It invites civil disobedience. It impairs the very habits which nourish and preserve the law.

*Chief Judge Charles Wyzanski*<sup>2</sup>

Throughout the American experience, the right to believe in and worship one's own concept of the Supreme Deity has been said by judges and legislators alike to be a cherished and fundamental right

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1. *United States v. Macintosh*, 283 U.S. 605, 633 (1931) (Hughes, C.J., dissenting), *overruled by* *Girouard v. United States*, 328 U.S. 61 (1946).

2. *United States v. Sisson*, 297 F. Supp. 902, 910-11 (D. Mass. 1969) (Wyzanski, J.), *appeal dismissed*, 399 U.S. 267 (1970).

at the very heart of an individual's freedom.<sup>3</sup> This right to exercise one's religion is protected under the free exercise clause of the first amendment<sup>4</sup> and, along with the rights of free speech and press, occupies a "preferred position" in the constitutional hierarchy of protected rights.<sup>5</sup> While the free exercise clause was held, relatively early, to apply to the states as well as to the federal government,<sup>6</sup> individuals asserting free exercise claims have generally been successful in neither state nor federal courts.

In passing on these claims, the courts have indicated a sharp theoretical awareness of the fundamental nature of free exercise rights and, through much of this century, have said that a substantial free exercise claim would only be denied if the state could demonstrate that it had a compelling purpose for its statute.<sup>7</sup> Nevertheless, until very recently the courts consistently found such compelling purposes, no matter how strong the free exercise argument.<sup>8</sup>

The free exercise "losers" have been Mormons who served stiff sentences for practicing polygamy,<sup>9</sup> and independently lost the right

3. "One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

4. The first amendment provides in part that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

5. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Barnett v. Rodgers*, 410 F.2d 995 (D.C. Cir. 1969); *Sharp v. Sigler*, 408 F.2d 966 (8th Cir. 1969). The concept had its origin in Chief Justice Stone's famous footnote 4 in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938). But see Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 25 (1959) (footnotes omitted):

[I]t never has been really clear what is asserted or denied to have a preference and over what. Certainly the concept is pernicious if it implies that there is any simple, almost mechanistic basis for determining priorities of values having constitutional dimension, as when there is an inescapable conflict between claims to free press and a fair trial. It has a virtue, on the other hand, insofar as it recognizes that some ordering of social values is essential; that all cannot be given equal weight, if the Bill of Rights is to be maintained.

6. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

7. See generally Galanter, *Religious Freedom in the United States: A Turning Point?*, 1966 WIS. L. REV. 217, 236 & n.117.

8. Note, *Compulsory Medical Treatment: The State's Interest Reevaluated*, 51 MINN. L. REV. 293, 295 (1966).

9. *Reynolds v. United States*, 98 U.S. 145 (1878). See also *Cleveland v. United States*, 329 U.S. 14 (1946); *In re State in Interest of Black*, 3 Utah 2d 315, 283 P.2d 887, cert. denied, 350 U.S. 923 (1955). Although the polygamy issue in the free exercise context has been largely mooted by the Mormon faith's subsequent renunciation and prohibition of the practice, the precedents in this area are instructive—if for no other reason than their almost total failure to weigh the sincerity and importance of the outlawed religious practice against whatever deleterious effects condoning that practice in the case of the Mormons may have had on the community at large. For a more ex-

to vote;<sup>10</sup> conscientious objectors who could not attend state-run universities,<sup>11</sup> and could not, for a period, become naturalized citizens of the United States;<sup>12</sup> Jehovah's Witnesses who, for a time, could be required to pay flat license fees to sell their religious texts,<sup>13</sup> and still presumably can be prohibited from having their children sell or distribute religious literature in public;<sup>14</sup> and Black Muslims, who have had an uphill battle in asserting the right to discuss and practice their religion while in prison.<sup>15</sup>

These groups, as well as groups with more unusual views,<sup>16</sup> have historically failed miserably in their free exercise arguments. As recently as 1957 a commentator reviewing the case law could, with reasonable accuracy, make the following statement:

[G]enerally when Congress or a state legislature, in the exercise of some constitutional power, enacts a statute which requires or prohibits some action, and makes the violation a criminal offense, there is no requirement inherent in the First Amendment that religious beliefs shall constitute a sufficient excuse or justification for noncompliance with the terms of the statute.<sup>17</sup>

In short, Professor Kurland was probably correct when he stated that, while the courts had generally been tolerant toward religious minorities, "the caveat must be added that the minority must not be too small or too eccentric."<sup>18</sup>

Relief in the free exercise area, when granted, tended to be based on alternative constitutional provisions. Indeed, even in his famous religious freedom-flag salute opinion, Justice Jackson made it fairly clear

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tensive discussion of the current balancing approach in the free exercise area, see text accompanying notes 136-50 *infra*.

10. *Davis v. Beason*, 133 U.S. 333 (1890).

11. *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245 (1934).

12. *United States v. Macintosh*, 283 U.S. 605 (1931), *overruled by* *Girouard v. United States*, 328 U.S. 61 (1946).

13. *Jones v. City of Opelika*, 316 U.S. 584 (1942), *vacated & rev'd per curiam on rehearing*, 319 U.S. 103 (1943).

14. *Prince v. Massachusetts*, 321 U.S. 158 (1944).

15. *Childs v. Pegelow*, 321 F.2d 487 (4th Cir. 1963), *cert. denied*, 376 U.S. 932 (1964); *In re Ferguson*, 55 Cal. 2d 663, 674, 361 P.2d 417, 423, 12 Cal. Rptr. 753, 759, *cert. denied*, 368 U.S. 864 (1961) ("the Muslim Religious Group is not entitled as of right to be allowed to practice their religious beliefs in prison. . . .") See text accompanying notes 182-96 *infra*.

16. See, e.g., *United States v. Kuch*, 288 F. Supp. 439 (D.D.C. 1968). See text accompanying note 165 *infra*.

17. M. KONVITZ, *FUNDAMENTAL LIBERTIES OF A FREE PEOPLE: RELIGION, SPEECH, PRESS, ASSEMBLY* 46 (1957).

18. Kurland, *Expanding Concepts of Religious Freedom, Foreword—Church and State in the United States: A New Era of Bad Feelings*, 1966 WIS. L. REV. 215, 216.

that his primary ground of decision was the free speech clause rather than the free exercise clause.<sup>19</sup>

It would be safe, therefore, to say that most courts, and certainly the Supreme Court, had not expressly resolved a major free exercise claim in favor of the individual and against the state prior to 1963. Yet, in the short ten-year period since *Sherbert v. Verner*<sup>20</sup> the law of free exercise rights has changed remarkably, culminating in *Wisconsin v. Yoder*.<sup>21</sup> In light of these dramatic changes, and the failure of many courts to properly recognize them, the time is ripe for a reconsideration of the application of standards under the free exercise clause. Given this new judicial flexibility concerning free exercise arguments, workable standards must be enunciated to ensure whatever predictability and consistency is possible in this necessarily subjective area. It is the purpose of this Article to analyze those standards which have been adopted by the Supreme Court and to demonstrate how they should be applied in those situations, old and new, where free exercise claims are so important. The first step in this analysis is to look briefly at *Yoder*, *Sherbert*, and their important predecessor, *Braunfeld v. Brown*,<sup>22</sup> to see just how far we have come since 1961.

#### THE CHERISHED POSITION

##### *Braunfeld v. Brown*

Of the four Sunday closing cases decided in 1961, only in *Braunfeld v. Brown*,<sup>23</sup> was the "pure" free exercise argument made.<sup>24</sup> The Sunday-closing cases involved the prosecution of Orthodox Jews under state laws which prohibited engaging in retail sales on Sundays. Braunfeld's attorney argued that if Braunfeld were forced to close on Sunday it "[would] result in impairing [his] ability . . . to earn a livelihood and [would] render [him] unable to continue in his busi-

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19. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

20. 374 U.S. 398 (1963).

21. 406 U.S. 205 (1972). For a discussion of *Sherbert* and *Yoder* see text accompanying notes 39-74 *infra*.

22. 366 U.S. 599 (1961).

23. *Id.*

24. The other three cases were *Gallagher v. Crown Kasher Supermarket*, 366 U.S. 617 (1961); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961). In these cases, establishment clause contentions were primarily argued before the Court.

ness," thereby causing him to lose his capital investment, solely because Braunfeld was a Sabbatarian.<sup>25</sup> Simply stated, Braunfeld's position was that to compel him to choose between going out of business and giving up his Sabbath religious practices constituted an undue infringement of his free exercise rights.

Mr. Chief Justice Warren, joined by Justices Black, Clark and Whittaker, rejected this argument, finding that the burden on the plaintiff pursuing his religious views, while arguably severe, was nevertheless indirect.<sup>26</sup> Even though the statute would be invalid if "the State may accomplish its purpose by means which do not impose such a burden,"<sup>27</sup> the Chief Justice could find no such alternative means present. The state's interest was found to be a legitimate one, setting "one day of the week apart from the others as a day of rest, repose, recreation, and tranquility . . . ."<sup>28</sup> Thus, alternative means such as exempting religious individuals from the statute "might well undermine the State's goal of providing a day that, as best possible, eliminates the atmosphere of commercial noise and activity."<sup>29</sup> The Chief Justice was also concerned with other possible free exercise problems if such exemptions were granted to Sabbatharians:

To allow only people who rest on a day other than Sunday to keep their businesses open on that day might well provide these people with an economic advantage over their competitors who must remain closed on that day; this might cause the Sunday-observers to complain that their religions are being discriminated against.<sup>30</sup>

Additionally, such exemptions would require the state to make an inquiry into the sincerity of each individual's religious beliefs, "a practice which a State might believe would itself run afoul of the spirit of constitutionally protected religious guarantees."<sup>31</sup>

Justices Douglas, Brennan, and Stewart dissented. The principal free exercise dissent was written by Justice Brennan, who adopted the same basic test that had been utilized by the Chief Justice but reached a very different result.<sup>32</sup> Though Justice Brennan stressed that he

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25. 366 U.S. at 601.

26. *Id.* at 606. Justices Frankfurter and Harlan concurred in the result, in an opinion written by Justice Frankfurter. *Id.* at 610.

27. 366 U.S. 599, 607.

28. *Id.*

29. *Id.* at 608.

30. *Id.* at 608-09.

31. *Id.* at 609.

32. Justice Brennan queried:

What overbalancing need is so weighty in the constitutional scale that it justifies this substantial, though indirect, limitation of appellants' freedom?

would require the state's interest to be a compelling one even if the burden on the individual was indirect,<sup>33</sup> his chief departure concerned the question of whether the state might have accomplished its purposes by means which did not impose such an onerous, albeit indirect, burden on the plaintiff.<sup>34</sup>

Justice Brennan argued that requiring the state to grant an exemption to Orthodox Jews like Braunfeld would be appropriate, as 21 of the 34 states which had Sunday-closing regulations had such exemptions, without having defeated the purpose of their statutes. While such exemptions "would make Sundays a little noisier, and the task of police and prosecutor a little more difficult,"<sup>35</sup> other problems were "more fanciful than real."<sup>36</sup> He gave little attention to the claim that Sabbatarians would be receiving an unfair advantage over other merchants and concluded by pointing out that inquiries into the good faith of the plaintiffs would be perfectly constitutional, as the Court itself had held in *United States v. Ballard*.<sup>37</sup>

Justice Stewart, agreeing substantially with all that Brennan had written, stated the dissenting view succinctly but persuasively:

Pennsylvania has passed a law which compels an Orthodox Jew to choose between his religious faith and his economic survival. That is a cruel choice. It is a choice which I think no State can constitutionally demand. For me this is not something that can be swept under the rug and forgotten in the interest of enforced Sunday togetherness. I think the impact of this law upon these appellants grossly violates their constitutional rights of the free exercise of their religion.<sup>38</sup>

#### *Sherbert v. Verner*

Adell Sherbert was a member of the Seventh Day Adventist Church who had been fired because she would not work on Saturday, the Sabbath day of her faith. When she could not find other employ-

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It is not the desire to stamp out a practice deeply abhorred by society, such as polygamy, as in *Reynolds*, for the custom of resting one day a week is universally honored, as the Court has amply shown. Nor is it the State's traditional protection of children . . . for appellants are reasoning and fully autonomous adults. It is not even the interest in seeing that everyone rests one day a week, for appellants' religion requires that they take such a rest. It is the mere convenience of having everyone rest on the same day. It is to defend this interest that the Court holds that a State need not follow the alternative route of granting an exemption for those who in good faith observe a day of rest other than Sunday. *Id.* at 614.

33. *Id.* at 612.

34. *See id.* at 614-15.

35. *Id.* at 614.

36. *Id.* at 615.

37. 322 U.S. 78 (1944).

38. 366 U.S. at 616.

ment which did not require Saturday work, she filed a claim for unemployment compensation benefits. The state turned down her application finding that she refused, without good cause, to accept "suitable work when offered . . . by the employment office or the employer . . . ." <sup>39</sup> Though careful not to overrule *Braunfeld*, <sup>40</sup> Justice Brennan set a tone for the *Sherbert* opinion which differed drastically from that which had been set by the Chief Justice in *Braunfeld*. Recognizing once again that the burden on the petitioner was merely indirect—i.e., the conduct of the petitioner was not outlawed, it was simply made more difficult—Justice Brennan began with a premise not recognized in *Braunfeld*. The Chief Justice in *Braunfeld* had stated that the initial inquiry in an indirect burden case is to determine if "the purpose and effect of [the State regulation] is to advance the State's secular goals."<sup>41</sup> Justice Brennan made it quite clear that his threshold inquiry required a much stronger showing by the state:

It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation". . . .<sup>42</sup>

Finding that "[n]o such abuse or danger has been advanced in the present case,"<sup>43</sup> Justice Brennan never reached the question of whether there were alternative methods for promoting that state purpose or interest. The *only* state interest that had been raised in *Sherbert* was a possibility that "the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might not only dilute the unemployment compensation fund, but also hinder the scheduling by employers of necessary Saturday work."<sup>44</sup> Justice Brennan brushed the contention aside, both on the ground that the argument had not been made to the South Carolina Supreme Court and because the record did not appear to sustain such a contention. The opinion further suggested, without deciding, that the "consideration of such evidence [might be] foreclosed by the prohibition against judicial inquiry into the truth or falsity of religious beliefs."<sup>45</sup>

Holding that no compelling state interest had been shown, Justice Brennan added that even if such an interest *had* been shown, the

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39. 374 U.S. at 401.

40. See, e.g., *id.* at 403-04.

41. 366 U.S. at 607.

42. 374 U.S. at 406, citing *Thomas v. Collins*, 323 U.S. 516, 530 (1945) (a public assembly case).

43. 374 U.S. at 407.

44. *Id.*

45. *Id.*



state would still have to demonstrate that "no alternative forms of regulation would combat such abuses without infringing First Amendment rights."<sup>46</sup> Justice Brennan concluded his opinion by wholly dismissing the establishment clause argument against granting an exemption. He saw the exemption of Mrs. Sherbert from the usual unemployment compensation rules as "nothing more than the governmental obligation of neutrality in the face of religious differences, [which] does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall."<sup>47</sup>

Justices Douglas and Stewart filed separate concurrences, of which Justice Stewart's opinion is again more interesting. Justice Stewart agreed basically with Justice Brennan's free exercise notions, but thought that the exemption of Mrs. Sherbert might raise severe difficulties under the Court's "insensitive [and] positively wooden" approach<sup>48</sup> to the establishment clause. He proceeded to point out, however, that such difficulties would pose "no problem for me, because I think the Court's mechanistic concept of the Establishment Clause is historically unsound and constitutionally wrong."<sup>49</sup>

The less dramatic, but more important aspect of Justice Stewart's concurrence was his view that the holding in *Sherbert* could not consistently stand with *Braunfeld*. For one thing, *Braunfeld* involved a state criminal statute so "[t]he impact upon the appellant's religious freedom in the present case is considerably less onerous."<sup>50</sup> While agreeing with Justice Brennan that the possibility of denying Mrs. Sherbert twenty-two weeks of compensation payments solely because she could not find suitable employment which did not require work on Saturdays would be "enough to infringe upon the appellant's constitutional right to the free exercise of her religion,"<sup>51</sup> Justice Stewart felt that to justify such a conclusion "the Court must explicitly reject the reasoning of *Braunfeld v. Brown*."<sup>52</sup>

Justice Harlan, joined in dissent by Justice White, agreed with Justice Stewart on the latter point. He found, first of all, that the secular purpose of the South Carolina statute was, if anything, clearer than

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46. *Id.* (footnote omitted). This was wholly in conflict with the tone of the Chief Justice's *Braunfeld* opinion, which almost presumed the nonexistence of alternative forms that could combat those abuses. See, e.g., 366 U.S. at 608-09.

47. *Id.* at 409.

48. *Id.* at 414.

49. *Id.* at 415.

50. *Id.* at 417.

51. *Id.* at 417-18.

52. *Id.* at 418.

that involved in *Braunfeld*, and he too thought that the indirect burden on Mrs. Sherbert was less than that on Mr. Braunfeld. "Clearly, any differences between this case and *Braunfeld* cut against the present appellant."<sup>53</sup> Justice Harlan could consistently reach that conclusion, for he saw South Carolina's unemployment compensation law as simply allowing compensation for those available for work; because Mrs. Sherbert was unavailable for work she was, therefore, ineligible for benefits. "The fact that these personal considerations sprang from her religious convictions was wholly without relevance to the state court's application of the law."<sup>54</sup>

It seems clear now, ten years after the fact, that Justice Brennan was correct in both *Braunfeld* and *Sherbert*. Justice Harlan's contentions notwithstanding, the plaintiffs in both cases were severely disadvantaged, solely because of their religious beliefs. Had there been some compelling interest for that disadvantage or burden—an interest which would have been defeated by exempting the particular petitioners—then the states should have properly prevailed. In neither case, however, was such an interest present. In *Braunfeld*, even assuming that the state's interest in providing a uniform day of rest was compelling, there was no reason to defer to Pennsylvania's judgment that an exemption to that rule would have undermined the purpose of the statute, especially when two-thirds of the states which had the same laws had such exemptions. In *Sherbert*, the best argument that the state could muster concerned the potential for widespread fraudulent claims for religious exemptions which might result once such relief was granted in particular situations. The Court made it clear, however, that this mere possibility was insufficient to override a free exercise claim based on sincere religious conviction, especially when the state could not demonstrate the absence of alternative means to combat the potential fraud which would not impinge upon the exercise of religion.

#### *Wisconsin v. Yoder*

Old Order Amish communities believe "that salvation requires life in a church community separate and apart from the world and worldly influence."<sup>55</sup> "The single most prominent aspect of Amish faith is the belief that separation from the world, *i.e.*, from the worldliness of contemporary society, is the sine qua non of spiritual salva-

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53. *Id.* at 421.

54. *Id.* at 420.

55. *Wisconsin v. Yoder*, 406 U.S. 205, 210 (1972).

tion."<sup>56</sup> Formal public school education beyond the eighth grade is rejected by the Amish because it takes their children away from their community "during the crucial and formative adolescent period of life."<sup>57</sup> As stated by Chief Justice Burger,

Amish objection to formal education beyond the eighth grade is firmly grounded in these central religious concepts. They object to the high school and higher education generally because the values it teaches are in marked variance with Amish values and the Amish way of life; they view secondary school education as an impermissible exposure of their children to a "worldly" influence in conflict with their beliefs . . . . Amish society emphasizes informal learning-through-doing, a life of "goodness," rather than a life of intellect, wisdom, rather than technical knowledge, community welfare rather than competition, and separation, rather than integration with contemporary worldly society.<sup>58</sup>

Many Amish families have refused to send their children to school beyond the eighth grade and have risked criminal prosecution for violation of state compulsory school attendance statutes.<sup>59</sup> In light of the expansive language in *Sherbert* and the fact that being required to attend school against one's will appears to be far more of an infringement than being denied a relatively small sum of money, one would have thought that such a requirement would have been clearly unconstitutional after 1963.<sup>60</sup> Yet prior to *Yoder* the risk taken by the Amish was a great one, as many courts subsequent to *Sherbert* wholly avoided

56. Comment, *The Amish and Compulsory School Attendance: Recent Developments*, 1971 WIS. L. REV. 832.

57. 406 U.S. at 211.

58. *Id.* at 210-11. See also Casad, *Compulsory High School Attendance and the Old Order Amish: A Commentary on State v. Garber*, 16 KAN. L. REV. 423 (1968).

59. *State v. Garber*, 197 Kan. 567, 419 P.2d 896 (1966), cert. denied, 389 U.S. 51 (1967); *Commonwealth v. Beiler*, 168 Pa. Super. 462, 479 A.2d 134 (1951).

60. The Court made it clear that it did not intend *Sherbert* to be limited to the peculiar facts presented there, for soon after it decided *Sherbert*, the Court vacated the decision in *In re Jenison*, 265 Minn. 96, 120 N.W.2d 515 (1963), and remanded it for reconsideration in light of *Sherbert*, 375 U.S. 14 (1963). In *Jenison*, the defendant refused to serve on a jury for religious reasons. She was held in contempt on the ground that her refusal "offends the peace, safety, good order, or morals of the community." 265 Minn. at 99, 120 N.W.2d at 517. The Minnesota Supreme Court held that an exemption to this rule could only be created by the legislature, considering the importance of having a well functioning jury system. On reconsideration after the United States Supreme Court's action, the Minnesota Supreme Court took a different look at the situation. *In re Jenison*, 267 Minn. 136, 125 N.W.2d 588 (1963). The court held that an individual claiming an exemption from required jury duty for religious reasons would be exempt "until and unless further experience indicates that the indiscriminate invoking of the First Amendment poses a serious threat to the effective functioning of our jury system . . . ." 267 Minn. at 137, 125 N.W.2d at 589. Because no such indication existed, the conviction was reversed. See also *State v. Everly*, 150 W. Va. 423, 146 S.E.2d 705 (1966) (refusal to serve on grand jury).

or narrowly construed its holding in situations involving the Amish. For example, in *Kansas v. Garber*<sup>61</sup> an Amish farmer refused to send his fifteen-year old daughter to public school. He was found guilty of violating the state's compulsory education statute and his conviction was affirmed on appeal. While conceding the sincerity of the defendant's objections to exposing his daughter to secular high school education, the Kansas Supreme Court insisted that compulsory school attendance would not abridge either his or his daughter's freedom "to worship and believe" as they chose. Stating that "[t]he question of how long a child should attend school is not a religious one," the court emphatically denied an exemption on free exercise grounds.<sup>62</sup>

*Garber*, even prior to *Yoder*, had been severely criticized as wholly ignoring the teachings of *Sherbert* in focusing on the kinds of burdens that may be held to constitute infringements of one's rights under the free exercise clause.<sup>63</sup> Yet, as late as 1967 the Supreme Court refused to review the holding in *Garber*.<sup>64</sup>

Five years later, the Supreme Court considered these free exercise claims in a light wholly different from that in which the Kansas Supreme Court had considered them. Chief Justice Burger, for a six-justice majority, began his *Yoder* opinion by finding that the Amish object to secular education beyond the first eight grades because of deeply held religious beliefs and that requiring these parents to send their children to school beyond the first eight grades *would* severely interfere with the parent's freedom to act pursuant to such beliefs.

In striking down the compulsory attendance statute as applied to the Amish, the Court could not find any particular state interest "of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."<sup>65</sup> A number of arguments were put forth by the state in support of its statute, but the Court, in rejecting each one, was careful to point out that the alleged overriding interest of the state must be carefully and sensitively examined.

Where fundamental claims of religious freedom are at stake, however, we cannot accept such a sweeping claim; despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote by its requirement for compulsory

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61. 197 Kan. 567, 419 P.2d 896 (1966), *cert. denied*, 389 U.S. 51 (1967).

62. 197 Kan. at 574, 419 P.2d at 902. See generally Galanter, *supra* note 7, at 248.

63. Casad, *supra* note 58.

64. The Supreme Court denied a request for a grant of certiorari. 389 U.S. 51 (1967).

65. 406 U.S. at 214.

education to age 16, and the impediment to those objectives that would flow from recognizing the claimed Amish exemption.<sup>66</sup>

The Court recognized that the state has a substantial interest in providing some degree of education to prepare citizens to participate in society. The Chief Justice pointed out, however, that compulsory education beyond the eighth grade was not required to satisfy this interest in the case of the Amish; hence the regulation, as to the Amish, violated the free exercise clause. That is, the Amish children sufficiently acquired the educational fundamentals in the first eight grades, as could be seen by the fact the Amish were generally successful and lawful citizens. Moreover, the Amish themselves do provide education for their children beyond the eighth grade by teaching them agriculture techniques and methods, giving them religious training, and generally educating them as to moral and ethical values.

Justice White, with Justices Brennan and Stewart, concurred in the Chief Justice's opinion, but was careful to clarify the Court's precise holding. He noted that the state's interest in universal education might well be a sufficient justification for requiring all individuals, even the Amish, to attend school for a given number of years. He found, however, that "the State has [not] demonstrated that Amish children who leave school in the eighth grade will be intellectually stultified or unable to acquire new academic skills later."<sup>67</sup> Such a determination was certainly heavily influenced by the very nature of the Amish as people who function in a successful but very segregated society. Thus the result was necessary "because the sincerity of the Amish religious policy here is uncontested, because the potentially adverse impact of the state requirement is great and because the State's valid interest in education has already been largely satisfied by the eight years the children have already spent in school."<sup>68</sup>

Justice Stewart, joined by Justice Brennan, concurred in the majority opinion, noting that the record did not present the curious and interesting question raised by Justice Douglas. Justice Douglas agreed with the Court that the free exercise rights of the parents had been infringed. However, he disagreed "with the Court's conclusion that the matter is within the dispensation of the parents alone."<sup>69</sup> That is, Justice Douglas argued, the children themselves had substantial free exercise rights since they were the ones being forced to attend school. Be-

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66. *Id.* at 221.

67. *Id.* at 240.

68. *Id.* at 241.

69. *Id.*

cause only one of the children had affirmatively testified that her own religious views were the same as her parents on this matter, Douglas would have sent the case back to establish a record concerning the religious views of the other children.<sup>70</sup>

The answer to Justice Douglas' concern was hinted at by Justice Stewart in his reference to the fact that there was no indication in the record whatsoever that the questions presented by Justice Douglas were involved in the particular case before the Court. No showing had been made by any party that the interests and views of the children were anything but the same as those of the parents. Further, it is one thing for the Court to demand that the trial court question a child of fourteen or fifteen years concerning religious beliefs, and it is quite another to obtain intelligent, independent answers. In *In re Green*,<sup>71</sup> the state brought an action to have a guardian appointed on the basis that a fourteen-year-old child had been neglected because his parent, a Jehovah's Witness, would not allow him to have a blood transfusion in connection with a spinal fusion operation. The court ultimately held that there was no showing that the child's life was in immediate danger, hence the state's interest had been outweighed by the free exercise interest of the parent. Nevertheless, the court remanded the case to determine if the child agreed with his parents' decision concerning the blood transfusion. The dissenting judge, however, pointed out the dilemma which would then face the boy:

We are herein dealing with a young boy who has been crippled most of his life, consequently, he has been under the direct control and guidance of his parents for that time. To now presume that he could make an independent decision as to what is best for his welfare and health is not reasonable. [Citation omitted]. Moreover, the mandate of the Court presents this youth with a most painful choice between the wishes of his parents and their religious convictions on the one hand, and his chance for a normal, healthy life on the other hand. We should not confront him with this dilemma.<sup>72</sup>

Absent some indication in the record that the children's views did in fact differ from that expressed by the parents, this writer would have to agree with the dissenting judge in *Green* that allowing a young child, any young child, to be heard concerning the broad sorts of questions raised in *Yoder* would be a painful task which ought to be avoided. Of course, if there is some such indication in the record, the issue may

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70. *Id.* at 246.

71. 448 Pa. 338, 292 A.2d 367 (1972).

72. 448 Pa. at , 292 A.2d at 395.

not be so easily put aside. This writer concludes that to allow the child's views to prevail over the parent's would be troublesome indeed. If the child is reasonably mature and articulate, however, then a good argument could be made that the free exercise of the parents' religion should not necessarily control the child's life. Similarly, in the extreme situation in which a parent's religious predilections operate to foreclose a child's opportunities for even a minimum level of intellectual and physical development, it would seem clear that the state itself could intervene to assert both society's interest in the healthy development of its young and the child's own constitutional rights. But that issue raises questions beyond the scope of this Article.

It has been argued in some quarters<sup>73</sup> that *Yoder*, rather than striking a blow for individual religious liberties, extends broadened free exercise protection only to well-established churches. This approach to *Yoder* makes much of Chief Justice Burger's extensive discussion of the lengthy and consistent history of the Amish faith, and infers that a faith of more recent vintage may not have fared as well in the same circumstances. But *Yoder* need not be so narrowly construed. The recitation of Amish tradition was set forth in the opinion not because the existence of such a tradition was viewed as the *sine qua non* for a religious exemption. Rather, the historical discussion was utilized in the case of the Amish to demonstrate "the sincerity of their religious beliefs, the interrelationship of belief with their mode of life . . . and the hazards presented by the State's enforcement of a statute generally valid as to others."<sup>74</sup> It cannot convincingly be said that only a member of an established church will be able to demonstrate the factors of religious sincerity, actual practice, and incompatibility with a given state regulation which the Court found so persuasive in *Yoder*. Viewed in this context, and read in conjunction with *Sherbert*, *Yoder* may be said to have substantially expanded the area in which free exercise claims may viably be asserted.

#### FORMULATING STANDARDS UNDER THE FREE EXERCISE CLAUSE

It has never been seriously suggested that rights under the free exercise clause are any more absolute than rights under any other section of the Constitution. Just as one may not yell "fire" in a crowded theater when there is no fire, one may not kill an unsuspecting person in order to make a religious sacrifice. As with cases arising under the

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73. Kurland, *The Supreme Court, Compulsory Education, and the First Amendment's Religion Clauses*, 75 W. VA. L. REV. 213, 237-38 (1973).

74. 406 U.S. at 235.

free speech clause, the question here is one of determining when legitimate claims of the state or society must prevail over constitutional rights conferred on the individual.

There has been a remarkable number of simple cases in which free exercise claims have been raised where this question is not difficult at all, for it is clear in each such case that either the free exercise claim is nonsensical or that the state, on other grounds, must prevail: where a commercial performer argues that he is entitled to perform a copyrighted musical composition in pursuit of his alleged religious rights;<sup>75</sup> where a taxpayer refuses to disclose recipients of his reported charitable deductions when those donations constituted over 20% of his annual gross income, on the ground that a disclosure would unduly interfere with the practice of his religion;<sup>76</sup> where citizens move to block the public distribution of fluoridated water on alleged religious grounds, even though they are not compelled to purchase or use such water;<sup>77</sup> where an employee, on religious grounds, refuses treatment for injuries suffered in the scope of his employment, but still seeks compensation for injuries which were compounded or caused by the refusal of the treatment;<sup>78</sup> or where individuals, acting out of sincere religious beliefs, attempt to physically disrupt the administrative workings of the government.<sup>79</sup>

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75. *Robert Stigwood Group Ltd. v. O'Reilly*, 346 F. Supp. 376, 382-83 (D. Conn. 1972). There the copyright on the rock opera "Jesus Christ, Superstar" had been infringed, and the infringers claimed that because the substance of the rock opera had to do with religious beliefs the free exercise clause permitted the infringement.

76. *Hearde v. Commissioner*, 421 F.2d 846 (9th Cir. 1970).

77. *Baer v. City of Bend*, 206 Ore. 221, 292 P.2d 134 (1956); *Kraus v. City of Cleveland*, 55 Ohio Op. 6, 116 N.E.2d 779 (C.P. 1953), *aff'd* 163 Ohio St. 559, 127 N.E.2d 609, *cert. denied*, 351 U.S. 935 (1956).

78. *Walter Nashert & Sons v. McCann*, 460 P.2d 941 (Okla. 1969). *See also Powers v. State Dep't of Social Welfare*, 208 Kan. 605, 493 P.2d 590 (1972). In *Powers*, the plaintiff was denied disability benefits because she refused to submit to a medical examination. The court held that because it could not be properly determined if she was disabled without such a medical test, the state's interest in combatting fraudulent claims outweighed the individual's religious interest. The court's reliance on *State v. Garber*, 197 Kan. 567, 419 P.2d 896 (1966), *cert. denied*, 389 U.S. 51 (1967), makes its holding suspect particularly because many of the plaintiff's disabilities could have been verified without a medical examination. *Garber* was one of the Amish compulsory education cases decided after *Sherbert* which would appear to have been overruled by *Yoder*. See text accompanying notes 61-64 *supra*. But see *Montgomery v. Bd. of Retirement*, 33 Cal. App. 3d 447, 109 Cal. Rptr. 181 (1973).

79. *United States v. Kroncke*, 459 F.2d 697 (8th Cir. 1972). Of course, there are a number of cases where it is just as clear that the State should not prevail. *See, e.g., MacMillan v. Maryland*, 258 Md. 147, 265 A.2d 453 (1970) where the defendant was held in contempt for not removing his religious headgear in court. On appeal the contempt citation was dismissed, with the court noting that the re-



It is not in such cases as these that the formulation of standards to resolve the conflict between the state's interest and the individual religious interest is so crucial. Rather, it is the close cases, where reasonable men can and do differ, that bare all the competing interests and considerations concerning the rights of individuals and the needs of society. These cases range from situations where persons are held in contempt for refusing to testify before a grand jury,<sup>80</sup> to the Amish farmer who refuses to send his child to school beyond the eighth grade,<sup>81</sup> to the orthodox Jew who may be forced out of his business as a result of a Sunday Closing Law.<sup>82</sup>

With these tough cases one begins to hope, with Professor Wechsler, that the courts' resolutions will be based upon standards or principles which transcend the particular fact situation involved.<sup>83</sup> The Supreme Court has recently begun to formulate such standards,<sup>84</sup> although there remains considerable room for refinement. Before focusing on the application of these standards, it is important to consider briefly other standards used by the courts in deciding free exercise claims in order to note how inconsistent their disposition has been and to appreciate how truly dramatic is the Supreme Court's recent shift.

#### *Following the Founding Fathers' Wishes*

A few relatively early cases held that the courts could only determine the validity of a free exercise claim by looking to the historical setting of the enactment of the first amendment and deciding if the founding fathers would have wished that particular claim to be given free exercise protection.<sup>85</sup> While there has been a wealth of material written concerning the historical setting of the enactment of the free exercise clause,<sup>86</sup> there are severe and relatively obvious problems with such a standard.

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ligious headgear was worn for deeply held religious beliefs and that there was no compelling interest in requiring its removal.

80. *Smilow v. United States*, 465 F.2d 802 (2d Cir. 1972), *vacated*, 409 U.S. 944 (1973); *People v. Woodruff*, 26 A.D.2d 236, 272 N.Y.S.2d 786 (Sup. Ct. App. Div. 1966).

81. See text accompanying notes 55-74 *supra*.

82. See text accompanying notes 23-38 *supra*.

83. Wechsler, *supra* note 5.

84. See text accompanying notes 23-74 *supra*.

85. See, e.g., *United States v. Hillyard*, 52 F. Supp. 612 (E.D. Wash. 1943).

86. See, e.g., *Symposium—Constitutional Problems in Church-State Relations*, 61 NW. U.L. REV. 761 (1966); Freeman, *A Remonstrance for Conscience*, 106 U. PA. L. REV. 806 (1958). For a discussion of the historical setting of the birth of the establishment clause, see C. ANTIEAU, A. DOWNEY & E. ROBERTS, *FREEDOM FROM FEDERAL ESTABLISHMENT* (1964).

For one thing, the setting of the enactment of the first amendment is quite inconclusive as to what the founding fathers had in mind with regard to freedom of religion problems. Moreover, even if a particular problem might have been contemplated at the time, it is no doubt true that different individuals would have resolved it in very different ways.<sup>87</sup>

More importantly, it is quite likely that specific problems which now arise, almost 200 years after the enactment of the first amendment, could not even have been imagined by the founding fathers. Claims for unemployment compensation, or the claims of individuals who argue that they use drugs to practice their religion, are hardly eighteenth century difficulties. Yet, while the particular considerations of eighteenth century men are inconclusive and beyond reach, their purpose of preventing a tyranny by the majority and by the state is as clear and vital today as ever.

Thus, without losing sight of the fundamental purpose underlying the free exercise clause, the courts have properly rejected a wooden analysis of history and instead have sought to develop standards appropriate to twentieth century problems. To have done otherwise would have been to defeat a recognition of a vibrant first amendment.

[As to the founding fathers' views] concerning religious freedom and nonestablishment, we must inevitably find them encrusted with certain implicit assumptions which were products of prevailing social, political, and economic conditions. Doctrinal formulations designed to achieve certain ends may achieve indifferent or perverse results as the assumptions on which they rest change. As the social, political, and economic milieu evolves, so must the content given the first amendment.<sup>88</sup>

### *The Action-Belief Distinction*

The distinction between conduct taken pursuant to religious beliefs, and religious beliefs themselves, reached its high point about thirty years ago. Some courts denied free exercise claims holding that even though the state could never interfere with one's religious beliefs, it could, if its regulation were rationally based, interfere with one's actions even if such actions were taken pursuant to the individual's reli-

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87. Summers, *The Sources and Limits of Religious Freedom*, 41 ILL. L. REV. 53, 56-57 (1946).

88. Giannella, *Religious Liberty, Establishment, and Doctrinal Development: Part I. The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1383-84 (1967). See generally Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327 (1969)

gious beliefs.<sup>89</sup> It was never clear from where the authority for such a distinction came. The Supreme Court never expressly based a holding on the distinction, though there is dicta which would seem to approve of it: "[The free exercise clause] safeguards the free exercise of the chosen form of religion. Thus the amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."<sup>90</sup>

The distinction never received widespread approval and, though vestigial references to the doctrine still occasionally appear in free exercise cases,<sup>91</sup> it has been thoroughly discredited by *Sherbert* and *Yoder*. It appears to be somewhat incongruous to make such a distinction when the first amendment speaks in terms of protecting the *exercise* of the religion, not simply the beliefs held under the religion. While it is true that "[t]he language of the First Amendment is to be read not as barren words found in a dictionary but as symbols of historic experience illuminated by the presuppositions of those who employed them,"<sup>92</sup> it must also be true that Congress meant *something* when it chose to refer to the free *exercise* of the religion, not simply to the freedom to believe in one's chosen religion.<sup>93</sup> However narrowly defined the term "religion" may be, it must encompass action in addition to belief.<sup>94</sup>

Carried to its logical conclusion, the distinction would become ludicrous, as can be seen by a simple example. Inspired by a determination of the Food and Drug Administration that consumption of unleavened bread may result in stomach disorders, a state enacts a statute forbidding the manufacture or consumption of unleavened bread. A certain faith, however, requires its adherents, as a matter of dogma, to partake of limited quantities of unleavened bread on the annual occasion of that faith's most sacred holy day. The statute, as applied in this context, would be held to violate the free exercise clause. Even though the statute may be a rational exercise of the state's police power, and would only be limiting religious conduct and not religious beliefs,

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89. See, e.g., *United States v. Kissinger*, 250 F.2d 940 (3d Cir.), *cert. denied*, 356 U.S. 958 (1958).

90. *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940). See also *Davis v. Beason*, 133 U.S. 333 (1890); *Reynolds v. United States*, 98 U.S. 145 (1878).

91. See, e.g., *Biklen v. Board of Regents*, 333 F. Supp. 902, 909 (1971), *aff'd mem.*, 406 U.S. 951 (1972); *Kansas v. Garber*, 197 Kan. 567, 574, 419 P.2d 896, 902 (1966), *cert. denied*, 389 U.S. 51 (1967).

92. *Dennis v. United States*, 341 U.S. 494, 523 (1951) (Frankfurter, J., concurring).

93. See note 146 *infra* and accompanying text.

94. *Freeman*, *supra* note 86, at 825.

it is difficult indeed to imagine a court sanctioning such a flagrant infringement of religious freedom when a less sweeping prohibition could achieve the same statutory objective.

### *Neutral Standards*

Immediately after the Sunday closing cases, Professor Kurland wrote of his concern for the relationship of the free exercise clause to the establishment clause.<sup>95</sup> Since that time, a number of commentators have written in response to Professor Kurland's analysis of that relationship.<sup>96</sup> Still Professor Kurland's discussion of the relationship remains the most cogent and significant. Professor Kurland argued that the two religious clauses in the first amendment are inseparable and must be treated as such by the courts, so that the state may not lawfully use religion or religious belief as a standard either for governmental action or inaction.<sup>97</sup> Neither burdens nor benefits may flow from the existence of a particular religion or religious belief; religion must be a neutral factor in formulating and applying regulatory schemes.<sup>98</sup> The state has as little right to promote the religious rights of individuals as it has to infringe them. Thus, when a court invalidates a statute, it may not do so on free exercise grounds unless it is also invalidated as to nonreligious individuals—otherwise the result would be a violation of the establishment clause.<sup>99</sup>

The argument no doubt has a certain straight-forward appeal and persuasiveness. As noted in a different context, however, "[t]he problem with the argument is that all the authorities are against him."<sup>100</sup> Those few courts that have seriously considered the questions raised by Professor Kurland have uniformly rejected his contentions. For example, in *Commonwealth v. Arlan's Department Store of Louisville*,<sup>101</sup> the state had created an exception to its Sunday closing law for persons who observed a Sabbath day other than Sunday. The petitioner, a depart-

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95. P. KURLAND, *RELIGION AND LAW* (1962).

96. W. KATZ, *RELIGION AND AMERICAN CONSTITUTIONS* (1964); Giannella, *Religious Liberty Non-Establishment and Doctrinal Development: Part II, the Non-Establishment Principal*, 81 HARV. L. REV. 513 (1968); Stanmeyer, *Free Exercise and the Wall: The Obsolescence of the Metaphor*, 37 GEO. WASH. L. REV. 223 (1968); Note, *The Free Exercise and Establishment Clauses: Conflict or Coordination?*, 48 MINN. L. REV. 929 (1964); Comment, *Religious Accommodation Under Sherbert v. Verner: The Common Sense of the Matter*, 10 VILL. L. REV. 337 (1965).

97. P. KURLAND, *supra* note 95, at 68.

98. *Id.* at 18.

99. *Id.* at 40-41.

100. *United States v. Wolf*, 455 F.2d 984 (9th Cir. 1972).

101. 357 S.W.2d 708 (Ky.), *appeal dismissed for want of a substantial federal question*, 371 U.S. 218 (1962).

ment store seeking to stay open on Sunday, argued that such an exception violated the state's neutrality requirement under the establishment clause. The court's response was succinct: "[T]he exemption does not affirmatively prefer any religion nor amount to the establishment of a religion. Rather, it simply avoids penalizing economically the person who conscientiously observes a 'Sabbath other than Sunday.'"<sup>102</sup>

In essence, the answer in *Arlan's* is that which can be given generally to Professor Kurland: his broad conception of the establishment clause has never been accepted by the American judiciary, perhaps because to give it effect would be to largely emasculate the free exercise clause.<sup>103</sup> This problem is especially visible in the area of religious exemptions from statutes of otherwise general applicability, which the Kurland thesis would not allow on the theory that the exemption constitutes a state-conferred benefit for the religious group involved. Where these exemptions are necessary to prevent the infringement of sincerely held religious beliefs, and where it is determined that a limited exemption would not defeat an overriding state interest of compelling character, the courts have focused on free exercise and granted relief—despite the arguable "benefit" to the religious claimants. The response to the establishment clause objections to these results is that such exemptions merely tailor a statute, enacted without respect to the establishment of religion, so as to accommodate the imperatives of free exercise. Any incidental benefit to a particular religious group thus is attributable not to the statutory enactment or exemption, but to the free exercise limitations upon the legislative power. Only where the classification of "religion" for purposes of triggering the exemption is so narrowly drawn as to exclude those who assert other than traditionally recognized religious convictions do establishment clause considerations tangentially arise. It was this problem that various members of the Supreme Court addressed in *Welsh v. United States*.<sup>104</sup>

In *Welsh*, a case actually decided on statutory rather than free exercise grounds, a conscientious objector had refused to submit to military induction, but his refusal was not based on traditional religious grounds. Justice Black, for a plurality of the Court, held that section 6j of the Universal Military Training and Service Act<sup>105</sup> could

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102. 357 S.W.2d at 710. But see *State ex rel. Hughes v. Board of Educ.*, 174 S.E.2d 711 (W. Va. 1970), cert. denied, 403 U.S. 944 (1971), where the State was required by the court to provide bus transportation for private school children as well as for public school children.

103. See KATZ, *supra* note 96.

104. 398 U.S. 333 (1970). See text accompanying notes 200-04 *infra*.

105. 50 U.S.C. § 456(j) (1970).

properly be construed so as to include Welsh's moral and ethical beliefs so long as these beliefs were held with the strength of traditional religious convictions. Justice Harlan concurred in the result on the ground that a construction other than that put forth by Justice Black would be contrary to the establishment clause, as it would have benefited individuals solely because of their religious beliefs.

Justice White—in a dissent joined by the Chief Justice and Justice Stewart—spoke directly to the establishment contention raised by Harlan. Relying on the argument of Justice Frankfurter in the Sunday closing cases, he stated that to deny an exemption to Welsh because his views were not religious would not result in a breach of the neutrality requirement under the establishment clause. Justice Frankfurter had argued that a state action would lose its presumption of neutrality “only if the absence of any substantial legislative purpose other than a religious one is made to appear.”<sup>106</sup>

The three *Welsh* dissenters found at least one such legislative purpose—a practical judgment that religious objectors might be of no use in combat<sup>107</sup>—so that limiting the 6j exemptions to traditional religious views

would be no more an establishment of religion than the exemption required for Sabbatarians in *Sherbert v. Verner* or the exemption from the flat tax on booksellers held required for an evangelist, *Follett v. McCormick*. Surely a statutory exemption for religionists required by the Free Exercise Clause is not an invalid establishment because it fails to include non-religious believers as well; nor would it be less an establishment if camouflaged by granting additional exemptions for non-religious, but “moral” objections to war.<sup>108</sup>

Thus, two distinct approaches to the “neutrality” problem were advanced in the *Welsh* opinions. The first, embraced by Justice Harlan in his concurring opinion, averts collision with the establishment clause by adopting a sufficiently broad definition of “religion” for free exercise purposes as to negate any inference of favoritism.<sup>109</sup> The

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106. *McGowan v. Maryland*, 366 U.S. 420, 468 (1961) (separate opinion).

107. 398 U.S. at 369.

108. 398 U.S. at 370-71. See also *Gillette v. United States*, 401 U.S. 437, 454 (1971), where Justice Marshall, speaking for an eight justice majority in denying another establishment challenge to section 6j, stated that:

“Neutrality” in matters of religion is not inconsistent with “benevolence” by way of exemptions from onerous duties . . . so long as an exemption is tailored broadly enough that it reflects valid secular purposes. . . .

We conclude not only that the affirmative purposes underlying § 6(j) are neutral and secular, but also that valid neutral reasons exist for limiting the exemptions to objectors to all war and that the section therefore cannot be said to reflect the religious preference.

109. 398 U.S. at 344-67 (concurring opinion).

second, embodied in Justice White's dissent, insists that "the First Amendment itself contains a religious classification"— . . . a classification which need not be expanded to include nonreligious believers under the rubric of "neutrality."<sup>110</sup> Either approach seems to bely the necessity of strict neutrality. In the subsequent case of *Gillette v. United States*,<sup>111</sup> however, the Court clearly expressed its preference for Justice White's approach. By an eight to one vote, the Court denied that limiting the section 6j exemption to those opposed to all wars, as distinct from those merely opposed to "unjust" wars, violated the establishment clause.<sup>112</sup>

A final response to the Kurland theory is that exemptions limited to a particular religious group may be all that the free exercise clause *can* require in a particular situation. Free exercise, like free speech, is not an absolute, and thus its imperatives must be balanced against compelling state interests. Consequently, while an exemption limited to a small religious minority might not undermine a state policy advanced in a particular statute, the extension of the same exemption to a much broader array of claimants might well do so. Thus, in limiting an exemption to a particular religious group, the court or the legislature merely recognizes the limits of free exercise rather than advancing the particular religious cause.

Despite the failure of the neutrality theory to gain a toehold in the courts, it is not inconceivable that the expanding scope of free exercise relief might resurrect concern with the potential establishment clause problems. Whether the doctrinal responses to the Kurland theory discussed above would withstand such a renewed attack remains to be seen. If not, it is to be hoped that instances of apparent conflict between the two clauses will not result in automatic subordination of the libertarian objectives of free exercise to a scrupulous preoccupation with establishment problems.

### *Direct/Indirect Burdens*

In *Braunfeld*, Chief Justice Warren discussed for the first time the importance of the distinction between indirect burdens on free exercise rights and direct burdens.<sup>113</sup> A direct burden results when a religious practice itself is outlawed. A good example of a direct burden would be the criminal prosecution of a polygamist,<sup>114</sup> where it is

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110. *Id.* at 372 (dissenting opinion).

111. 401 U.S. 437 (1971).

112. See text accompanying notes 205-07 *infra*.

113. 366 U.S. at 605-07; see text accompanying notes 23-38 *supra*.

114. See, e.g., *Reynolds v. United States*, 98 U.S. 145 (1878).

the actual practice of the religion which subjects the individual to criminal sanctions. An indirect burden was involved in the Sunday closing cases.<sup>115</sup> There, Orthodox Jews were not restricted from practicing aspects of their religion, so long as their businesses were not open on Sundays. Since indirect burdens could be viewed as operating less restrictively on free exercise, it could be argued that the state carried a lesser burden of justification in cases where they were involved.

While it has been argued that this distinction is significant,<sup>116</sup> few cases were actually ever resolved in reliance on it. Indeed, the decisions in the Sunday closing cases themselves were not based on this distinction. The Chief Justice was careful to point out that even as to indirect burdens, the state would have to demonstrate that there was no alternative method of accomplishing its rational purpose which would not infringe on free exercise rights.<sup>117</sup>

Almost two years to a day later the distinction was eliminated for all practical purposes by the Court in *Sherbert*.<sup>118</sup> The burden<sup>119</sup> in *Sherbert* was once again indirect, yet Justice Brennan, for the majority, stated that the state would not only have to demonstrate that there were no alternative ways of accomplishing its purpose, but it would also have to show that its purpose was so compelling as to justify interference with the individual's religious rights.<sup>120</sup> While Justice Brennan avoided expressly overruling *Braunfeld*, certainly the direct/indirect burden distinction with regard to the nature of the showing required by the state was wholly rejected by the majority in *Sherbert*.<sup>121</sup>

### *Balancing of Interests*

There are two kinds of balancing formulations which have been used by the courts in the free speech and, from time to time, in the free exercise areas. The first is the ad hoc balancing of interests, so

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115. See text accompanying notes 23-54 *supra*.

116. See, e.g., Note, *A Braunfeld v. Brown Test for Indirect Burdens on the Free Exercise of Religion*, 48 MINN L. REV. 1165, 1166 (1964).

117. *Braunfeld v. Brown*, 366 U.S. 599, 607. See text accompanying notes 23-38 *supra*.

118. See text accompanying notes 39-54 *supra*; see also Galanter, *supra* note 7, at 217.

119. The burden in *Sherbert* was probably less severe than in *Braunfeld*, for Mrs. Sherbert would only have lost a few months of relatively low unemployment compensation benefits. Mr. Braunfeld, on the other hand, might have lost his entire business investment. 374 U.S. at 417-18 (Stewart, J., concurring).

120. 374 U.S. at 406.

121. *Id.* at 403-04. At least three justices in *Sherbert* believed *Sherbert* overruled *Braunfeld*, at least as to this distinction. See *id.* at 417-18 (Stewart, J., concurring); *id.* at 421 (Harlan & White, J.J., dissenting).



called because the court is asked to look to the particular facts involved in the case before it and to weigh the interests of the state therein against the interests of the individual. It then determines if the state's infringement of the individual's rights is justified under such facts.<sup>122</sup>

In balancing interests under the free exercise clause in this fashion, the individual has to make a threshold showing that the case does involve an infringement of his religious rights;<sup>123</sup> at that point the state is called upon to convince the court that its regulation is a rational one. Once both showings have been made, the court proceeds to balance the interest of the state in promulgating the regulation against the individual's interest in taking the restricted action and to determine which interest prevails.

The chief benefit of the ad hoc balancing method is its flexibility, as it enables a judge to consider the circumstances of the particular matter being contested. In this way it is hoped that the courts will be able to avoid rigid, unrealistic approaches to adjudicating sensitive first amendment questions.<sup>124</sup>

The major problem with the pure ad hoc balancing approach is that no matter what sort of guidelines the court utilizes to weigh the interests—and a number of incisive commentators have focused on the kinds of guidelines and interests that ought to be involved in the free exercise area<sup>125</sup>—the approach necessarily is based upon a consideration of factors in only the specific case. Hence, it is the antithesis of that which Professor Wechsler would hope for: neutral principles that transcend the particular fact situation.<sup>126</sup> That is, "ad hoc balancing by hypothesis means that there is no rule to be applied, but only interests to be weighed."<sup>127</sup> The fact that there is no rule of law to be applied means that a citizen "has no standard by which he can measure whether his interests . . . will be held of greater or lesser weight than the competing interest . . . ." <sup>128</sup> More important, perhaps, is that

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122. See, e.g., *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968).

123. For problems in defining religious rights for purposes of the free exercise clause, see notes 146-47 *infra* and accompanying text.

124. See generally DuVal, *Free Communication of Ideas and the Quest for Truth: Toward a Theological Approach to First Amendment Adjudication*, 41 GEO. WASH. L. REV. 161, 172-78 (1972).

125. See Clark, *supra* note 88; Gianella, *supra* note 88.

126. Wechsler, *supra* note 5.

127. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 939 (1968). See also T. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 54 (1963).

128. Nimmer, *supra* note 127, at 939.

when the courts balance the interests of an individual citizen against the interest of the state, "it is more than mere coincidence" that the state usually wins.<sup>129</sup> This is especially true in speech cases, for "in non-speech areas . . . public passions do not generally ride as high" as in speech areas;<sup>130</sup> yet, no doubt courts have been, and will continue to be, loathe to turn away the states generally on claims of security, health and welfare.

The second approach has been labeled the "definitional balance." As explained by Professor DuVal,

[D]efinitional balancing seeks to formulate rules for differentiating between protected and unprotected expression. In formulating this distinction, the interests in freedom of expression must be weighed against competing governmental interests in much the same manner as under the ad hoc balancing test. The outcome of the process, however, is a rule which governs not only the case before the court, but future cases as well . . . Moreover, the adoption of a rule will make it easier for the courts to resist popular pressures for suppression in particular cases.<sup>131</sup>

Probably the most famous definitional balance took place in *New York Times v. Sullivan*.<sup>132</sup> There, the Supreme Court determined that libel laws violated the first amendment when such laws were applied to render defendants liable for false statements concerning a public official and published without knowledge of falsehood or reckless disregard for the truth.<sup>133</sup>

Professor Nimmer, in referring to *New York Times*, succinctly explains the difference between the two balancing approaches:

[I]t should be made clear that there *was* balancing in *Times*, but that it was not ad hoc balancing. There was balancing in the sense that not all defamatory speech was held to be protected by the first amendment. The Court could not determine which segment of defamatory speech lies outside the umbrella of the first amendment purely on logical grounds, and no pretence of logical inexorability was made. By in effect holding that knowingly and recklessly false speech was not "speech" within the meaning of the first amendment, the Court must have implicitly (since no explicit explanation was offered) referred to certain competing policy considerations. This is surely a kind of bal-

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129. *Id.* at 939-40. See also Clark, *supra* note 88, at 330; Dodge, *The Free Exercise of Religion: A Sociological Approach*, 67 MICH. L. REV. 679 (1969).

130. Nimmer, *supra* note 127, at 947.

131. DuVal, *supra* note 124, at 179 (citations omitted).

132. 376 U.S. 254 (1964). See generally Nimmer, *supra* note 127.

133. 376 U.S. at 279-80.

ancing, but it is just as surely not ad hoc balancing.

If the Court had followed the ad hoc approach, it would have inquired whether "under the particular circumstances presented" the interest of the defendants in publishing their particular advertisement outweighed the interest of the plaintiff in the protection of his reputation. This in turn would have led to such imponderable issues as: How important was it to the defendants (or possibly to the public at large) that this particular advertisement be published? How "serious" was the injury to the plaintiff's reputation caused by the advertisement?<sup>134</sup>

Thus, for situations in which the law of libel (or invasion of privacy)<sup>135</sup> comes into conflict with the first amendment, the Court was able to define a fixed threshold which must be met by any plaintiff who would overcome the assertion of first amendment rights—that is, a showing of knowing falsehood or reckless disregard for the truth. In this fashion, the need for case-by-case situational balancing was substantially reduced: if the plaintiff cannot make the threshold showing, the Court need go no farther.

The Supreme Court in *Sherbert* and *Yoder* appears to have combined the two approaches in formulating a free exercise balance. The current free exercise test may be stated simply: if the individual demonstrates that his actions are sincerely religious and have been interfered with as a result of a state regulation, the state must demonstrate that it has a compelling interest in the regulation, an interest which could not be promoted by any less restrictive means.<sup>136</sup> If the state makes that demonstration, it prevails in the case; if not, it loses.

The test consists of ad hoc balancing because in each particular case a court must determine if a given state interest is substantial, if a person's rights are indeed religious, and if religious, whether they have been interfered with. It is not purely ad hoc in nature, however, for the Court has defined certain state interests—such as problems of administration and weeding out fraudulent claims—as not substantial in any case, and has further established that even an indirect burden may constitute an infringement of free exercise rights.<sup>137</sup>

The test, having been formulated relatively recently, has not yet experienced any variety of severe problems in reported opinions.<sup>138</sup> It

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134. Nimmer, *supra* note 127, at 943.

135. *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

136. See text accompanying notes 39-74 *supra*.

137. See text accompanying notes 113-21 *supra*.

138. *But cf.* *Bicklen v. Board of Educ.*, 333 F. Supp. 902, 909 (N.D. N.Y. 1971), *aff'd mem.*, 406 U.S. 951 (1972), where the State's "compelling interest in assuring the

would not be difficult, however, to conjecture criticisms that will be raised. For example, one criticism of the test will surely be that judges and perhaps juries are asked to make an inquiry into a particular individual's religious sincerity. The chief critic of such inquiries was Justice Jackson. In *United States v. Ballard*,<sup>139</sup> the defendant, a member of the "I am" movement, had been prosecuted for fraud. He was convicted of using the mails to solicit contributions, having represented himself to be a messenger of God.

The Court held that it would be violative of the first amendment to inquire into the objective truth or falsity of the defendant's representations, but it would be proper to examine the defendant's state of mind to determine if his representations were fraudulent.<sup>140</sup> Justice Jackson took exception to the latter point.

[A]s a matter of either practice or philosophy, I do not see how we can separate an issue as to what is believed from considerations as to what is believable . . . . If we try religious sincerity severed from religious verity, we isolate the dispute from the very considerations which in common experience provide its most reliable answer.<sup>141</sup>

While this writer is unable to discern why a court could not look to whether a defendant is sincerely religious when it can, for example, determine if a defendant's activities are ideologically motivated rather than commercially motivated,<sup>142</sup> some commentators have argued that Justice Jackson's position has at least limited validity. Professor Giannella, for instance, has suggested that the "no inquiry" theory may serve to limit the government's power to restrict arbitrarily the activities of fringe religions on the grounds that such religions are "spurious."<sup>143</sup>

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fitness and dedication of its teachers" was held sufficient to outweigh the religious convictions of a Quaker teacher who refused to take a required loyalty oath on the basis of those convictions. More careful analysis of the competing considerations might have revealed an alternative method through which the State could have assured itself of the teacher's loyalty and dedication without requiring her to compromise her religious beliefs.

139. 322 U.S. 78 (1944).

140. *Id.* at 84-88.

141. *Id.* at 92-93. Justice Jackson continued his analysis thusly:

In the second place, any inquiry into intellectual honesty in religion raises profound psychological problems . . . . [Religious] experiences, like some tones and colors, have existence for one, but none at all for another. They cannot be verified to the minds of those whose field of consciousness does not include religious insight. When one comes to trial which turns on any aspect of religious belief or representation, unbelievers among his judges are likely not to understand and almost certain not to believe him.

142. *Valentine v. Chrestensen*, 316 U.S. 52 (1942). The argument is particularly difficult to accept when it is noted that courts and administrative boards have traditionally (and presumably successfully) tested the sincerity of the religious belief in the Selective Service area. See text accompanying notes 197-209 *infra*.

143. Justice Jackson's arguments are especially persuasive in cases where gov-

Nonetheless, the Jackson position has never been adopted by the Supreme Court or by many lower courts, and most judges routinely permit evidence to be presented concerning the sincerity of the individual in free exercise actions.<sup>144</sup>

The second criticism of the evolving test concerns the necessity of determining whether particular actions or beliefs are religious for purposes of first amendment protection. Indeed, at least one court has stated, albeit in an indirect fashion, that it is beyond its power to say whether a belief or action is religious for purposes of the first amendment:

Defendants have not argued that the beliefs of Elijah Mohammed Muslims do not constitute a religion. A determination that they do not would be indistinguishable from a comparative evaluation of religions, and that process is beyond the power of a court.<sup>145</sup>

This kind of reasoning is wholly indefensible, for determining what is the exercise of religion for purposes of the first amendment does not differ, in substance, from determining what is speech for purposes of the first amendment—a demanding, but wholly necessary operation. Without any definitional threshold enormous problems would arise in trying to maintain a viable, but not unlimited, free exercise clause.

With regard to the practical problem of defining what is religious for the purposes of the first amendment, a number of commentators have tried, with varying degrees of success, to formulate definitions to assist the courts.<sup>146</sup> For the purposes of this article, we shall employ

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ernment would otherwise act to protect gullible citizens from spurious religious movements; a monitoring of the sincerity of religious leaders should be placed beyond the powers of the government. Giannella, *supra* note 88, at 1418.

144. See, e.g., *New v. United States*, 245 F. 710 (9th Cir. 1917), *cert. denied*, 246 U.S. 665 (1918); *United States v. Kuch*, 288 F. Supp. 439 (D.D.C. 1968); *People v. Crawford*, 69 Misc. 2d 500, 328 N.Y.S.2d 747 (Dist. Ct. 1972). But see *Banks v. Board of Public Instruction*, 314 F. Supp. 285, 295 (S.D. Fla. 1970), *vacated to allow appeal to 5th Cir.*, 401 U.S. 988, *aff'd per curiam*, 450 F.2d 1103 (1971).

145. *Cooper v. Pate*, 382 F.2d 518, 521 (7th Cir. 1967).

146. I submit that combining the sentiments and purposes which motivated the Founding Fathers, the numerous statements made by the judiciary, and the main thrust of contemporary thought, the following tentative definition can be given: Religion, for the purposes of the First Amendment, is a belief or system of beliefs founded on concepts of the supernatural usually expressed in terms of a personal god or gods, and inevitably concerned with the ends of man which purports to do more than relate each man to other men but also relates him to the universe or to the eternal. Supernatural does not necessarily mean that which is mysterious or irrational and incapable of human influence. Rather it encompasses all of that which is conceived to be beyond the natural order. Fernandez, *The Free Exercise of Religion*, 36 S. CAL. L. REV. 546, 561 (1963).

See also Galanter, *supra* note 7, at 217; Hollingsworth, *Constitutional Religious Protection: Antiquated Oddity or Vital Reality?*, 34 OHIO ST. L.J. 15 (1973); Weiss, *Priv-*

a short but broad definition. The term religion will be defined here, as in the statutory selective service cases, as any "sincere and meaningful belief, which occupies in the life of its possessor a place parallel to that filled by [commonly accepted notions] . . . of God. . . ."<sup>147</sup>

Although this definition could be susceptible to overly-expansive application, such broad contours may be necessary to forestall the resurrection of establishment clause objections to particularized free exercise exemptions. Moreover, any dubious claim which passes the definitional test only because of its pliancy would be unlikely to possess the substance needed to offset a compelling state interest under the balancing test.

The major inadequacy of the current balancing test, as applied by the Supreme Court, is its failure to encompass a necessary third step which would be essentially *ad hoc* in nature. The Court takes its first step in determining whether the individual's actions are sincere and religious, and whether they have been infringed by the state. It then takes the second step in deciding whether or not the state has a compelling interest for its action, an interest which could not be promoted by any less restrictive action. At this point some "definitional balancing" may occur, in that certain state interests, such as administrative convenience, may be dismissed as short of "compelling" as a matter of law. If, however, the state interest *is* compelling, the Court stops and the state automatically wins, even if the individual's interest is exceptionally compelling.

The third step proposed here would be to weigh, on an *ad hoc* basis, the importance of the state's interest against the importance of the individual's interest. Although this added step might render the

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*ilege, Posture and Protection "Religion" in the Law*, 73 YALE L.J. 593 (1964). The Supreme Court has also tried its hand at such definitional acrobatics:

The term "religion" has reference to one's views of his relation to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to this will. It is often confounded with the *cultus* or form of worship of a particular sect, but is distinguishable from the latter. The first amendment to the Constitution, in declaring that Congress shall make no law respecting the establishment of religion, or forbidding the free exercise thereof, was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets or the modes of worship of any sect. . . . It was never intended or supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. *Davis v. Beason*, 133 U.S. 333, 342 (1890).

147. *Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Seeger*, 380 U.S. 163, 176 (1965). For an extensive recent treatment of the problems involved in defining religion for free exercise purposes, see Hollingsworth, *supra* note 146.

free exercise standards less predictable in some cases, it is submitted that careful application of the "sincerity" test to the religious claim and the "compelling interest" test to the state's justification will assure maximum desirable predictability in this area by deciding most cases before they reach this third step. Those cases pitting a sincere religious belief against a compelling state interest, the "close" cases, do not lend themselves to the relatively unyielding contours of definitional balancing. Considerations such as whether the individual's practice of his religion would be effectively destroyed and whether the state's interest occupies a priority in its hierarchy of values, among others, would be appropriate in such an added balance.

While the necessity for such an added step cannot be shown from either *Sherbert* or *Yoder*—because in each case no compelling state interest was found—the problem is certainly by no means purely academic. Indeed, in a large number of situations, such as the drug use<sup>148</sup> and vaccination cases,<sup>149</sup> the problem is acute.

For example, in *People v. Woody*,<sup>150</sup> the California Supreme Court recognized the problem in resolving an especially difficult free exercise issue. There, a group of Navaho Indians were arrested for possessing peyote. The Navahos proved that the state's restriction on the use of peyote severely limited their ability to exercise their religion. Though the court found that the state had a substantial interest in controlling the use of drugs, even non-addictive drugs, the convictions were reversed on the ground that the Navahos' interest in practicing Peyotism outweighed the interest of the state in having them abstain from peyote. Under the Supreme Court's two-step approach in *Sherbert* and *Yoder*, the California court would never have reached this result in *Woody*, for as soon as the state demonstrated a compelling interest, the case would have been over. If the state's interest is compelling, the religious practice, regardless of its urgency, cannot prevail under the current test.

Such a result would have been improper in *Woody*, for while the state's interest may have been substantial as a general matter, this was a situation where the defendants' religion was wholly eliminated by a state regulation, a regulation which did not even arguably involve the restriction of unusually harmful drugs. Moreover, the defendants' action did not result in any interference with the rights or in-

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148. See text accompanying notes 151-66 *infra*.

149. See text accompanying notes 178-81 *infra*.

150. 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964). The case is discussed in greater detail in text accompanying notes 151-66 *infra*.

terests of others. Thus, on balance, the defendants' interest properly prevailed over the state's.

#### APPLYING THE STANDARDS

To recognize and recite the standards which have evolved in the free exercise area is hardly to appreciate the impact such standards have already had and will continue to have on the case law involving freedom of religion claims. It is only with the application of these standards to important fact situations that one can understand how far-reaching the opinions in *Yoder* and *Sherbert* truly are. Our attention, therefore, turns to these fact situations with a view toward analyzing previous applications of the standards set by the Supreme Court and analyzing such standards in other contexts.

#### *Drug Use*

As early as almost fifty years ago free exercise claims began to be made in the context of statutes that prohibited the possession and use of drugs.<sup>151</sup> Basically the free exercise argument against prosecutions for possession of drugs may be stated thusly: the use of drugs is either an essential or important aspect of the practice of certain religions; hence, to prohibit the use of these drugs would be to infringe the free exercise rights of the followers of such religions.

The *Woody* case, discussed briefly above,<sup>152</sup> represents the only reported decision which has recognized the validity of this rationale. The California Supreme Court began its opinion with the recognition that peyote was a hallucinogen which could properly be proscribed by the state. The court further found, however, that in the Native American Church peyote served as both a sacramental symbol and as an object of worship; its use for nonreligious purposes was deemed a sacrilege. Having so found, the court held that "[t]o forbid the use of peyote is to remove the theological heart of Peyotism."<sup>153</sup> The statutory prohibition against the possession and use of peyote thus "most seriously infringe[d] upon the observance of the religion."<sup>154</sup>

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151. *State v. Big Sheep*, 75 Mont. 219, 243 P. 1067 (1926).

152. See text accompanying note 150 *supra*.

153. 61 Cal. 2d at 722, 394 P.2d at 818, 40 Cal. Rptr. at 74.

154. *Id.* at 720, 394 P.2d at 816, 40 Cal. Rptr. at 72. The California Supreme Court apparently recognized the breadth of its ruling, for on the same day it decided *Woody* it also decided *In re Grady*, 61 Cal. 2d 887, 394 P.2d 728, 39 Cal. Rptr. 912 (1964). Grady was a "peyote preacher" and "way-shower" who used peyote, he claimed, for religious purposes such as to effect direct contact with God. Even though Grady was not a member of any recognized religious group, the court sent the case back for



The state contended that—notwithstanding the defendants' free exercise rights—it had a compelling reason for prohibiting peyote in that Peyotism generally had quite adverse effects upon the entire Indian community. Moreover, the argument proceeded, if these Indians were granted exemptions from the statute, there would be grave difficulties in detecting a great many fraudulent claims of asserted religious uses of peyote as well as other drugs. The court rejected these arguments, finding first that, as a matter of fact, Peyotism did not pose any danger to the Indian community; indeed some experts "regard the moral standards of the Native American Church as higher than those of Indians out of the church."<sup>155</sup> The court further held that the argument regarding fraudulent claims was simply not borne out by any evidence adduced by the state. The fact that some states, such as New Mexico and Montana, were able to allow for religious exemptions concerning the use of peyote for Indians without significantly impairing the efficacy of their narcotics laws gave the court additional cause to attribute less weight to the purported state interests.

The result in *Woody* appears sound, as does the court's application of the balancing standards. Nevertheless, while the defendant's interest in practicing his religion was paramount, it is difficult to see how the court was able to say that the state's interest was not sufficiently strong as to *Woody*. This difficulty was best pointed out by Judge Hufstedler in *Kennedy v. Bureau of Narcotics and Dangerous Drugs*.<sup>156</sup> Following the *Woody* decision, the Department of Justice listed exemptions in their rules concerning the definitions of dangerous drugs so as to adopt the holding in *Woody*. Each rule exempted from its application the use of peyote in bona fide religious ceremonies of the Native American Church.<sup>157</sup> The plaintiff in *Kennedy* was a member of the Church of the Awakening who claimed that he, like the Navajos, used peyote in bona fide religious ceremonies. He contended that the administrative exemptions created after *Woody* set an arbitrary classification distinguishing between members of the Native American Church and members of the Church of the Awakening, considering that the two uses of the drug were virtually identical. The relief sought in *Kennedy* was an order directing the government to include the Church of the Awakening in the two exemptions.

One very tough problem with this argument, one apparently not

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trial on the question of "whether the defendant actually engaged in good faith in the practice of the religion." 61 Cal. 2d at 888, 394 P.2d at 729, 39 Cal. Rptr. at 913.

155. 61 Cal. 2d at 723, 394 P.2d at 818, 40 Cal. Rptr. at 74.

156. 459 F.2d 415 (9th Cir. 1972), cert. denied, 409 U.S. 1115 (1973).

157. 21 C.F.R. § 320.3 (1971).

argued substantively in *Woody*, is that the legislature had initially made a determination that peyote was dangerous for individuals. If that legislative determination is correct, and if it is a proper subject for legislative determination, the state's interest may well be a compelling one.<sup>158</sup> At that point it becomes rather difficult to see how the government can legitimately distinguish between Navajo Indians and all other persons for purposes of enforcing its drug laws. The drug is just as dangerous to the individual no matter what his religious views,<sup>159</sup> so how can the defendant's free exercise argument possibly prevail?

The answer to this argument, with which the *Woody* and *Kennedy* courts did not specifically deal, is that the interest of the government in controlling the use of peyote simply may not be as great as the interest of the government in controlling the use of other more dangerous drugs. That is, the state's interest in curbing the use of highly addictive drugs, such as morphine or heroin, may be greater than its interest in curbing the use of peyote or marijuana, because of both the difference in effect on the individual and the more likely anti-social activities a morphine or heroin addict may engage in. That being the case, the government's interest in restricting the use of peyote, while perhaps strong generally, may still be outweighed by the interests of those persons who worship the use of the drug or need to use it to effectively practice their religion. On the other hand, if the drug is heroin rather than peyote, the result would almost surely be different.

This tension between the interests of the state and the individual effectively demonstrates the difficulty with leaving the balancing test as the Supreme Court formulated it in *Sherbert*. The state may be able to show that its interest in controlling the use of drugs, even non-addictive drugs, is strong and that no viable way of promoting that interest exists except to prohibit its use by every person. Once such

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158. Whether or not the state has the authority to make legislative determinations concerning the use of drugs is a particularly tough question when the drug is an hallucinogen rather than a narcotic. Without physically addictive drugs as the subject of the action, important issues exist (which have been raised by John Stuart Mill among others) concerning the appropriate functions of the state in involving itself in activities of the individual which are wholly private and are unlikely to manifest themselves in overtly anti-social conduct. See text accompanying notes 167-77 *infra*.

159. As the Court in *Kennedy* posed the issue:

We cannot say that the Government has a lesser or different interest in protecting the health of Indians than it has in protecting the health of non-Indians. We cannot say that the Government's interest in a church member's health increases or diminishes depending upon whether his ingestion of a dangerous drug is of greater or lesser importance in the religious ceremonies of his church. It follows that the exemption regulation creates an arbitrary classification that cannot withstand substantive due process attack. 459 F.2d at 417.

a showing is made, however, a court should not stop its inquiry. At that point the court should, as in *Woody*, weigh the allegedly compelling state interest against what may also be a compelling individual interest. If the use of a particular drug is of substantial importance to the effective practice of the defendant's religion, and if the drug is not addictive, then perhaps the individual's interest will outweigh the state's.

Notwithstanding the justifiable outcome in *Woody*, the court's analysis is imprecise with regard to this essential step. Nevertheless, it is difficult to be too critical of the California Supreme Court, for *Woody* is the only case that has actually weighed the free exercise interest of the individual against the state's interest and upset a drug possession conviction. Most courts refuse even to consider the free exercise claim, in spite of *Sherbert*. As the Oklahoma Court of Criminal Appeals remarked in *Lewellyn v. State*, "[T]here is no possible justification for the use of [drugs] in the name of religious freedom."<sup>160</sup>

While other courts have been willing to consider the free exercise claim, at least superficially, they have held either that the defendant did not make a showing that he used the drug in good faith pursuant to a deeply held religious belief,<sup>161</sup> or that the defendant cannot claim an infringement of his free exercise rights because the use of the drug was not "indispensable to the pursuit of his faith."<sup>162</sup> The latter distinction is hardly persuasive. Once the defendant has sustained his burden of proving that he used the drug sincerely as a result of a deeply held religious belief, the burden should, at that point, shift to the state to show that its interest is compelling and outweighs the defendant's. No doubt the courts may properly question a defendant's honesty, sincerity, and good faith;<sup>163</sup> it would seem, however, that once a practice is deemed to be religious, questions regarding what is "essential" as opposed to "important", what is "indispensable" as opposed to "desir-

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160. 489 P.2d 511, 516 (Okla. 1971). See also *Orlando Sports Stadium, Inc. v. State*, 262 So. 2d 881 (Fla. 1972); *State v. Big Sheep*, 75 Mont. 219, 243 P. 1067 (1926); *State v. Bullard*, 267 N.C. 599, 148 S.E.2d 565 (1966), cert. denied, 386 U.S. 917 (1967).

161. *United States v. Kuch*, 288 F. Supp. 439 (D.D.C. 1968); *People v. Crawford*, 328 N.Y.S.2d 747, 69 Misc. 2d 500 (1972).

162. *People v. Collins*, 273 Cal. App. 2d 486, 78 Cal. Rptr. 151, 152 (1969). See also *United States v. Spears*, 443 F.2d 895 (5th Cir. 1971), cert. denied, 404 U.S. 1020 (1972); *United States v. Hudson*, 431 F.2d 468 (5th Cir. 1970), cert. denied, 400 U.S. 1011 (1971); *Leary v. United States*, 383 F.2d 851 (5th Cir. 1967), rev'd on other grounds, 395 U.S. 6 (1968); *People v. Werber*, 19 Cal. App. 3d 598, 97 Cal. Rptr. 150 (1971); *People v. Wright*, 275 Cal. App. 2d 738, 80 Cal. Rptr. 335 (1969); *People v. Mitchell*, 244 Cal. App. 2d 176, 52 Cal. Rptr. 884 (1966).

163. See notes 140-44 *supra* and accompanying text.

able" in a religion, is better left to the theologians. As recently stated by one federal district judge: "The protection the Constitution extends to the exercise of religion does not turn on the theological importance of the disputed activity. Rather constitutional protection is triggered by the fact that it is religious."<sup>164</sup>

In short, it would be far better for the courts to begin to properly consider and apply the mandate of *Sherbert* and actually balance the two allegedly compelling interests. Such a balance, of course, would only occur when the defendant demonstrates both that his use of the drug is pursuant to a sincere religious dictate and that such religious dictate involves more than mere peripheral significance as to him. In most cases, the defendant will not be able to sustain the burden. Indeed, most defendants who have raised free exercise claims in this context have done so only as a last resort, with little apparent hope of prevailing. An atypical but rather amusing example is found in *United States v. Kuch*.<sup>165</sup> There the defendant claimed that she was a minister of the Neo-American Church and further stated that marijuana and LSD were true sacramental foods and that their use was essential to her religion. The District Court patiently listened to these arguments but ultimately rejected them,<sup>166</sup> thus demonstrating that the expanding scope of free exercise protection need not entail ridiculous results.

### *The Right to Die*

An individual voluntarily enters a hospital for treatment. She is advised that the treatment she seeks can only be successful if she is given a blood transfusion; she is further advised that if such treatment were attempted without a blood transfusion, she would die. She informs her doctor that due to her deeply held religious beliefs as a Jehovah's Witness, she cannot consent to the blood transfusion. At that point, can her doctor successfully petition a court to appoint a guardian for that individual who will order the blood transfusion to be given? This question has been a recurring and extremely difficult one for the courts, as it puts into clear conflict two widely divergent philosophical views of what a state's relationship to its citizens ought to be.

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164. *Unitarian Church West v. McConnell*, 337 F. Supp. 1252, 1257 (E.D. Wis. 1972).

165. 288 F. Supp. 439 (D.D.C. 1968).

166. The Court's discussion of defendant's religion provided additional insight into its rituals and theology:

Reading the so-called "Catechism and Handbook" of the Church containing the pronouncements of the chief boo hoo, one gains the inescapable impression

The conflict does not arise unless the individual is fully capable of making a rational choice. If the individual is either mentally incompetent<sup>167</sup> or a minor,<sup>168</sup> the courts will, as a matter of course, appoint the requested guardian. Absent some such showing by the state, however, the philosophical question becomes crucial: may the state protect a citizen against herself even if the individual seeks to avoid such treatment on the ground that she is following her religion?

Some courts which have attempted to expressly resolve this question have held that no relief could be granted the state or the doctor because the issue was "beyond the reach of judges."<sup>169</sup> These courts are careful to find that in such a situation—even though it involves life-or-death decisions—the state does not have any interest which outweighs the individual's religious dictates unless particular extenuating circumstances are present. Such circumstances might include the fact that the individual has a large family and without his support the state would have to provide care for the family; this may well be conclusive if the family includes small children.<sup>170</sup>

Other courts take the position that the state has an overriding

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that the membership is mocking established institutions, playing with words and totally irreverent in any sense of the term. Each member carries a "martyrdom record" to reflect his arrests. The church symbol is a three-eye toad. Its bulletin is the "Divine Toad Sweat." The church key is, of course, the bottle opener. The official songs are "Puff, the Magic Dragon" and "Row, Row, Row Your Boat." In short, the "Catechism and Handbook" is full of goofy nonsense, contradictions, and irreverent expressions. *Id.* at 444-45.

167. Application of the President and Director of Georgetown College, 331 F.2d 1000 (D.C. Cir. 1964), *cert. denied*, 377 U.S. 978 (1964); *Winters v. Miller*, 306 F. Supp. 1158 (E.D. N.Y. 1969), *cert. denied*, 404 U.S. 985 (1971).

168. Even John Stuart Mill, the champion of the primacy of individual decision over state paternalism, would agree that minors may not be asked to make these life and death decisions.

It is, perhaps, hardly necessary to say that this doctrine [sovereignty of the individual over his own body and mind] is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children, or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury. J.S. MILL, ON LIBERTY 10. (Crofts Classics ed.).

Compare with *In re Green*, 448 Pa. 338, 292 A.2d (1972), (discussed in text accompanying note 71 *supra*) and *In re Seiferth*, 309 N.Y. 80, 127 N.E.2d 280 (1955) (no guardian appointed where both the father and 14 year old child had religious convictions against surgical treatment of a cleft-palate because child's physical life not in peril).

169. Application of President and Director of Georgetown College, Inc., 331 F.2d 1010, 1015 (D.C. Cir. 1964), *on petition for rehearing en banc* (Burger, J., dissenting). See also *Holmes v. Silver Cross Hospital*, 340 F. Supp. 125 (N.D. Ill. E.D. 1972); *In re Brooks Estate*, 32 Ill. 2d 361, 205 N.E.2d 435 (1965); *Erickson v. Dilgard*, 252 N.Y.S.2d 705, 44 Misc. 2d 27 (1962).

170. See, e.g., *In re Osborne*, 294 A.2d 372 (D.C. Ct. of App. 1972) (dictum).

interest in protecting the lives of its citizens even if that protection is against the individual's wishes. These courts hold that the state's interest justifies the infringement of the free exercise rights<sup>171</sup> and will order the transfusion. In short, these courts agree with the dictum of Judge J. Skelly Wright, who directed that an emergency blood transfusion be given to a Jehovah's Witness because "I determined to act on the side of life."<sup>172</sup>

For the purposes of our analysis, this broad question does not encompass issues surrounding the sort of test that should be applied to determine if the state's interest outweighs the individual's. Rather, the question here is whether the interest claimed by the state is properly the subject of legislative or judicial consideration.<sup>173</sup> If John Stuart Mill's theory of the individual's autonomy over his own fate was wrong, and the state may legitimately move to protect a citizen against himself,<sup>174</sup> there can be little doubt that the state should and will prevail in the blood transfusion cases, no matter what test or balance is applied. Moreover, if the Mill view is not adopted, under any test, the state would also, for example, be able to order all motorcyclists to wear helmets while driving,<sup>175</sup> and to prohibit the taking of poisons or the

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171. *United States v. George*, 239 F. Supp. 752 (D. Conn. 1965); *Kennedy Memorial Hospital v. Heston*, 58 N.J. 576, 279 A.2d 670 (1971). For a harsh criticism of *Heston*, see 41 *FORD. L. REV.* 158, 166 (1972).

172. *Application of the President and Director of Georgetown College*, 331 F.2d 1000, 1010 (D.C. Cir. 1964). This statement was clearly dictum, however, because Judge Wright was careful to point out that it was clear that the woman needed a blood transfusion to survive and that "the woman was not in a mental condition to make a decision." *Id.* at 1007.

173. For two excellent discussions of the kinds of interests that the State may constitutionally base legislation on if free exercise questions are raised, and the weight that should be given to such interests, see Clark, *supra* note 88; Giannella, *supra* note 88.

174. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him, must be calculated to produce evil to some one else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign. J.S. MILL, *supra* note 168, at 9-10.

175. *Bogue v. Faircloth*, 316 F. Supp. 486 (S.D. Fla. 1970), *appeal dismissed*, 441 F.2d 623 (5th Cir. 1971); *State v. Eitel*, 227 So. 2d 489 (Fla. 1969). In numerous cases such as these, judges avoid the Mill argument by pointing out that the wearing of helmets may eliminate accidents. *But see People v. Fries*, 42 Ill. 2d 446, 250 N.E.2d 149 (1969), where an Illinois statute required the wearing of both headgear and goggles while driving a motorcycle. The court held that while it would be lawful to

use of snakes during a religious ceremony.<sup>176</sup>

The point is, if the state has the power to protect citizens against themselves, there are all kinds of imposing regulations which will be upheld by the courts, even if serious free exercise contentions are raised, unless less onerous ways of achieving that protection are available.<sup>177</sup> Whether the state has, or should have, such power has been debated without a satisfactory resolution by lawyers, politicians, and philosophers for centuries. Here the question is simply put into focus once again.

This writer is of the view that no infringement of free exercise rights should be validated by the courts in this context unless either the exercise of those rights infringe on the rights of others or narrow entenuating circumstances exist. Such circumstances, as indicated above, include a showing that the particular individual had support obligations which would have to be borne by the state, or the fact that the individual was somehow not competent to make a rational decision of this magnitude. The mere fact that the individual wishes to resolve a life-death decision in favor of death, however, should not *automatically* give rise to such a strong state interest as to be dispositive of the question.

### *Compulsory Vaccination*

No American court has ever held that a statute or regulation requiring that individuals be vaccinated, usually to attend public schools, was invalidly applied because of the adverse effect it would have on certain individuals' free exercise of religion. This has been so even when individuals have made showings that there has been no smallpox in the regulated county for over fifty years,<sup>178</sup> or that the vaccination itself posed a danger to the health of the individual.<sup>179</sup>

With regard to the first of these two situations, however, it is diffi-

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require goggles—because if a driver's vision is obstructed an accident could result—it would be unlawful to require headgear because there was no proof that the use of headgear would prevent injury to anyone other than the driver.

176. *Lawson v. Commonwealth*, 291 Ky. 437, 164 S.W.2d 972 (Ct. App. 1942); *State v. Massey*, 229 N.C. 734, 51 S.E.2d 179, *cert. denied*, 336 U.S. 942 (1949); *Kirk v. Commonwealth*, 186 Va. 839, 44 S.E.2d 409 (1947).

177. See notes 46-47 *supra* and accompanying text.

178. *Wright v. DeWitt School District*, 238 Ark. 906, 385 S.W.2d 644 (1965). See also *Vonnegut v. Baun*, 206 Ind. 172, 188 N.E. 677 (1934); *Mosier v. Barren County Bd. of Health*, 308 Ky. 829, 215 S.W.2d 967 (Ct. App. 1948). Compare with *State v. Miday*, 263 N.C. 747, 140 S.E.2d 325 (1965).

179. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). For the potential dangers to the public at large resulting from increased inoculation due to the existence of a large population of uninoculated persons, see Clark, *supra* note 88, n.101.

cult to see how these cases remain viable in light of *Sherbert* and *Yoder*. The state may take the position, which is probably easily proved; that it has a compelling interest in keeping all infectious diseases such as smallpox from becoming epidemics. The state could even validly argue that it has a compelling interest in precluding even the marginal probability of an epidemic. The difficulty with this argument, however, concerns whether compulsory vaccination is necessary to achieve that result. Presumably, if all but a small minority made up of devoutly religious individuals become vaccinated, there is no plausible danger of such a widespread epidemic, even though those few individuals who refused to be vaccinated themselves might become infected with the disease.

Without that danger to others, the central question becomes the same as is raised in those situations where persons refuse, on religious grounds, to have life-saving medical treatment: can a state protect an individual against himself?<sup>180</sup> The problem, however, is somewhat easier in this context; for virtually every case where the difficulty has arisen involves parents refusing to let their children be vaccinated before attending public schools. Even those staunchest supporters of Mill would take the position that the children themselves cannot make a rational choice concerning a possibly life-or-death situation and therefore the state may properly step in as *parens patriae* to insure that no harm comes to the children.

The focus of the courts in deciding such cases has, however, been imprecise, to say the least. To recite merely that a compelling state interest exists in having persons vaccinated gives an insufficient consideration to the religious interest; *Sherbert* and *Yoder* require more. Because these vaccination cases do involve children, though, the state will no doubt be able to make its compelling *parens patriae* interest prevail. Hence, a court's analysis may be nothing more than a purely academic exercise. While it is true that the *parens patriae* argument was basically the one made and rejected in *Yoder*, surely the vaccination cases are distinguishable from *Yoder* in that there is truly a clear "and ever present danger" of severe physical harm if a child is not inoculated against a disease such as smallpox.<sup>181</sup>

### *Prisoner Claims*

Since *Sherbert* was decided, complaints have been filed in virtually every jurisdiction by persons who are incarcerated alleging vio-

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180. See text accompanying notes 167-77 *supra*.

181. *Wright v. DeWitt School District*, 238 Ark. 906, 909, 385 S.W.2d 644, 646 (1965).



lations of free exercise rights. Most of these actions have been brought by members of the Black Muslim sect who contend that they, unlike other prisoners, are not allowed to hold religious meetings, cannot have their religious leaders attend to their needs, are not allowed to receive religious literature, and are prohibited from following their dietary laws.<sup>182</sup>

Until very recently, such actions have been disposed of with very little serious consideration. While recognizing that a prisoner's first amendment rights do not wholly disappear when he is incarcerated, most courts have approved the prison's restrictions of such rights on the ground that prison regulations were best left to the discretion of the authorities. In these actions, most often the complaints were summarily dismissed without an evidentiary hearing, even though the pleadings seemingly raised non-frivolous free exercise claims.<sup>183</sup>

Two concerns of the courts in this area may help to explain the singularly unsuccessful results of these prisoner actions in the past. The first is typified by *United States ex rel Goings v. Aaron*<sup>184</sup> where a Sioux Indian incarcerated in federal prison brought an action to prohibit prison officials from eliminating "good time" he had previously earned. A prison regulation stated that no prisoner could grow his hair over his collar, grow a beard, or grow sideburns below the ear lobe. When the petitioner grew his hair too long, he lost "good time" which had previously been credited even though he argued that his religion required that he keep his hair long. In upholding the prison officials' action, the court made it clear that it was concerned with the courts and prison officials being overwhelmed by masses of free exercise claims:

The consequences of a contrary decision than herein reached of course are that any prisoner who might claim a religious belief could claim exemption and the regulations might be rendered nugatory and pose an administrative disciplinary problem as to others. The court cannot believe that due process requires such a ruling.<sup>185</sup>

The other concern of the courts centers on the nature of the doc-

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182. See, e.g., *Hoggro v. Pontesso*, 456 F.2d 917 (10th Cir. 1972); *Barnett v. Rodgers*, 410 F.2d 995 (D.C. Cir. 1969); *Cooper v. Pate*, 382 F.2d 518 (7th Cir. 1967); *Clark v. Wolff*, 347 F. Supp. 887 (D. Neb. 1972); *Therault v. Carlson*, 339 F. Supp. 375 (N.D. Ga. 1972) (involving the Church of the New Song of Universal Life); *Rowland v. Sigler*, 327 F. Supp. 821 (D. Neb. 1971); *Williford v. California*, 217 F. Supp. 245 (N.D. Cal. N.D. 1963).

183. See, e.g., *Cooper v. Pate*, 324 F.2d 165 (7th Cir.), *rev'd* 378 U.S. 546 (1964); *Childs v. Pegelow*, 321 F.2d 487 (4th Cir. 1963), *cert. denied*, 376 U.S. 932 (1964).

184. 350 F. Supp. 1 (D. Minn. 1972).

185. *Id.* at 6.

trines put forth by the religious groups involved in these actions, particularly the Black Muslims. Many judges take the position that prison officials generally have a difficult enough time controlling and hopefully rehabilitating prisoners. They conclude that the government is justified in limiting free exercise rights for particularly obstreperous religious groups so that discipline, obedience, and control can be maintained.<sup>186</sup>

There is unquestionably much validity in these concerns, particularly the latter one, yet such summary decisions are difficult to justify in light of the Supreme Court's free exercise analysis in *Sherbert*.<sup>187</sup> The conclusion of the Court there was that courts cannot merely accept wholesale the state's rationale for actions which infringe free exercise rights; instead the courts must be satisfied that there is a compelling interest behind the action, an interest which could not be promoted by any less restrictive action.<sup>188</sup> While prison officials must be allowed to exercise considerable discretion in deciding how to discipline and control prisoners, the first amendment must nonetheless remain viable, within the limits necessitated by the exigencies of the prison situation, even as to incarcerated individuals.

The tension between these two considerations is a delicate one, but one which must be faced openly and carefully in every situation. Thus, it has been recognized that where prison inmates file petitions alleging infringement of their free exercise rights, an evidentiary hearing on the merits of such allegations is constitutionally required.<sup>189</sup> If the inmate can show at that proceeding that those rights have in fact been unduly restricted, then the burden shifts to the state to demonstrate that the restricted religious activity presents a clear and present danger to the maintenance of prison security.<sup>190</sup> Moreover, where such restrictive regulations fall more heavily upon adherents of a particular faith than

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186. See, e.g., *In re Ferguson*, 55 Cal. 2d 663, 674, 361 P.2d 417, 423, 12 Cal. Rptr. 753, 759 (1961) (the court stated that the "Muslim Religious Group is not entitled as of right to be allowed to practice their religious beliefs in prison . . ."); *Cooke v. Tramburg*, 43 N.J. 514, 205 A.2d 889 (1964).

187. See text accompanying notes 39-54 *supra*.

188. *Hoggro v. Pontesso*, 456 F.2d 917 (10th Cir. 1972); *State v. Cabbage*, 58 Del. 430, 210 A.2d 555 (Sup. Ct. 1965).

189. *Hoggro v. Pontesso*, 456 F.2d 917, 918 (10th Cir. 1972); *Brown v. Peyton*, 437 F.2d 1228, 1231-32 (4th Cir. 1971); *Long v. Parker*, 390 F.2d 816, 821 (3d Cir. 1968). But cf. *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971), *modifying* 312 F. Supp. 863 (S.D.N.Y. 1970), *cert. denied*, 404 U.S. 1049, 405 U.S. 978 (1972); *Therhault v. Carlson*, 339 F. Supp. 375, 387 (N.D. Ga. 1972).

190. *Hoggro v. Pontesso*, 456 F.2d 917, 918 (10th Cir. 1972); *Therhault v. Carlson*, 339 F. Supp. 375 (N.D. Ga. 1972); *Rowland v. Sigler*, 327 F. Supp. 821, 824 (D. Neb. 1971); *Northern v. Nelson*, 315 F. Supp. 687 (N.D. Cal. 1970).

they do on the general prison population, the courts will require a still stricter showing of necessity to justify their imposition.<sup>191</sup>

That the trend today is to require such a stringent showing by the state can hardly be disputed. Typical of the more recent cases in this area which have adopted thoughtful approaches to the free exercise issue is *State v. Cabbage*.<sup>192</sup> There the petitioner was a Black Muslim prisoner who claimed that he was not allowed to receive services and spiritual advice from clergymen, and that he and his fellow Black Muslims were forced to hold religious services in the prison yard. Prison officials responded by arguing that one of the clergymen invited to these services had a previous criminal record, and that "[t]he potential dangers inherent for many in the dissemination of their beliefs among the prison population warrant the restrictions imposed."<sup>193</sup>

The court's disposition of the case reflects a sound understanding of the Supreme Court's mandate.

It may be entirely possible that there are potential dangers in permitting [prisoners], in the case at bar, the right to practice their religious beliefs and to wear their religious insignia, but I do not believe that we should start with the assumption that trouble necessarily will result from [prisoners] being permitted to exercise their rights. If and when they do violate the discipline and applicable rules and regulations, they can be punished if the proven facts justify it. I know of no reason to deny the [prisoners] the equal protection of laws, even if it is feared that they might hereafter abuse the rights herein recognized.<sup>194</sup>

If the state is able to sustain its burden of demonstrating that the petitioner in a particular action is unmanageable or constitutes a direct threat to prison security as a result of attending religious meetings and reading religious literature, at that point the state may legitimately restrict such meetings and the receipt of such literature. Unless that burden is sustained and unless the state can also show that its interest could not feasibly be "pursued by means that [less] broadly stifle fundamental personal liberties,"<sup>195</sup> no valid reason exists for denying in-

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191. *Long v. Parker*, 390 F.2d 816 (3d Cir. 1968); *Cooper v. Pate*, 382 F.2d 518 (7th Cir. 1967).

192. 58 Del. 430, 210 A.2d 555 (1965).

193. *Id.* at 453, 210 A.2d at 568.

194. *Id.*

195. *Barnett v. Rodgers*, 410 F.2d 995, 1003 (D.C. Cir. 1969) quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). See also *Brown v. Peyton*, 437 F.2d 1228 (4th Cir. 1971); *Knuckles v. Prasse*, 302 F. Supp. 1036 (E.D. Pa. 1969), *aff'd*, 435 F.2d 1255 (3d Cir. 1970), *cert. denied*, 403 U.S. 936 (1971); *Brown v. McGinnis*, 10 N.Y.2d 531, 225 N.Y.S.2d 497, 180 N.E.2d 791 (1962).

dividuals their religious liberties, especially at a time when they may need them most.<sup>196</sup>

### *Conscientious Objection Claims*

*Under the Selective Service Act.* While the Supreme Court has never expressly held that a conscientious objector has no right, under the free exercise clause, to be exempt from military service, the lower courts are virtually unanimous in so holding.<sup>197</sup> The lower courts have also consistently held that the alternative service requirement for the religious conscientious objector is valid<sup>198</sup> and that there is no burden of proof on the government to demonstrate that there is a less restrictive alternative available other than alternative service.<sup>199</sup>

The only free exercise "in-road" that has occurred in the area of compulsory military service concerns the expanding definition of a conscientious objector eligible for exemption. Yet even here, the broadening scope of the exemption was based, at least ostensibly, on statutory construction rather than on constitutional compulsion. In *Welsh v. United States*,<sup>200</sup> the defendant objected to war in any form, but the basis of his objection was not religious in the traditional sense, as seemingly required by section 6j of the Universal Military Training and Service Act.<sup>201</sup> Justice Black's plurality opinion, relying on *United States v. Seeger*,<sup>202</sup> held that Welsh was entitled to his exemp-

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196. See generally A. HALEY, *THE AUTOBIOGRAPHY OF MALCOLM X* (1965).

197. This is the rule in every circuit that has considered the question. See *United States v. Koehn*, 457 F.2d 1332 (10th Cir. 1972); *United States v. Wolf*, 455 F.2d 984 (9th Cir. 1972); *United States v. Murray*, 452 F.2d 503 (8th Cir. 1971), cert. denied, 405 U.S. 935 (1972); *Clay v. United States*, 397 F.2d 901 (5th Cir. 1968), rev'd on other grounds, 403 U.S. 698 (1971); *Imboden v. United States*, 194 F.2d 508 (6th Cir.), cert. denied, 343 U.S. 957 (1952); *United States v. Kime*, 188 F.2d 677 (7th Cir.), cert. denied, 342 U.S. 823 (1951); *Brooks v. United States*, 147 F.2d 134 (2d Cir.), cert. denied, 324 U.S. 878 (1945).

198. *O'Conner v. United States*, 415 F.2d 1110 (9th Cir. 1969), cert. denied, 397 U.S. 968 (1970); *Wood v. United States*, 373 F.2d 894 (5th Cir.), vacated on other grounds, 389 U.S. 20 (1967); *United States v. Thorne*, 317 F. Supp. 389 (E.D. La. 1970).

199. *United States v. Milligan*, 457 F.2d 916 (8th Cir. 1972); *United States v. Boardman*, 419 F.2d 110 (1st Cir. 1969), cert. denied, 397 U.S. 991 (1970).

200. 398 U.S. 333 (1970). See text accompanying notes 104-12 *supra*.

201. Section 6j exempts an individual if "by reason of religious training and belief . . . [he is] conscientiously opposed to participation in war in any form." 50 U.S.C. § 456(j) (1970).

202. 380 U.S. 163 (1965). In *Seeger*, the Court suggested that "[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition." *Id.* at 176.

tion because Congress intended to exempt those, like Welsh, whose beliefs were deeply held and were based on a moral or ethical principle which was the equivalent of the religious principles referred to in the Act, so long as they were not based "upon considerations of policy, pragmatism, or expediency."<sup>203</sup>

*Welsh* is as close as the Court has come to facing squarely the major free exercise argument, yet each member of the Court, with the exception of Justice Harlan, was careful to rest his decision on purely statutory grounds.<sup>204</sup> Eight members of the Court have, however, expressly rejected a closely related free exercise argument. In *Gillette v. United States*,<sup>205</sup> the defendant challenged that portion of section 6j which exempts only those who are conscientiously opposed "to participation in war in any form." The defendant argued that such a restriction violated both religious clauses of the first amendment because it favored pacifistic religions over other religions and because it infringed the exercise of religions, such as Catholicism, whose adherents will fight only in "just" wars.

The Court, in an 8 to 1 decision, rejected both arguments. As to the establishment contention, the Court basically echoed Justice White's views in *Welsh*: The purposes of the exemption are neutral and secular; "the section therefore cannot be said to reflect a religious preference."<sup>206</sup> The Court, per Justice Marshall, gave just as little weight to the free exercise contention:

The conscription laws, applied to such persons as to others are not designed to interfere with any religious ritual or practice, and do not work a penalty against any theological position. The incidental burdens felt by persons in petitioners' position are strictly justified by substantial governmental interests that relate directly to the very impacts questioned. And more broadly, of course, there is the Government's interest in procuring the manpower necessary for military purposes, pursuant to the constitutional grant of power to Congress to raise and support armies.<sup>207</sup>

While it may be unfortunate that the Court has chosen to extend the section 6j exemption on strained statutory interpretation rather than on free exercise grounds, the result in *Welsh* is clearly the right one and may well be more than would have been granted on free exercise

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203. 398 U.S. at 342-43.

204. For a discussion of the various concurring and dissenting opinions in *Welsh*, see text accompanying note 104 *supra*.

205. 401 U.S. 437 (1971).

206. *Id.* at 454.

207. *Id.* at 462, citing U.S. CONST. art. I, § 8.

grounds. On the other hand, the result in *Gillette*, in light of *Sherbert* and *Yoder*, is troublesome indeed.

If an individual can show that his religious beliefs prevent him from participating in a certain war, there can be little question that his free exercise rights are being infringed if he is forced to choose between participation and a jail sentence. The argument is even more compelling if there is an alternative civilian employment program available.<sup>208</sup>

It is hard to see how the Supreme Court so easily rejects this claim. Justice Marshall's reference to "incidental burdens" does not nearly end the inquiry. The free exercise infringement is more severe than the incidental burdens in *Sherbert* or *Yoder*, as this individual is asked to either participate in what he deems an unjust war or go to jail. While the Court should properly weigh the government's interest in procuring manpower for military purposes, this is only the first step in the analysis, for there certainly are ways of procuring sufficient manpower without putting an individual in this unconscionable situation. Why could not the government be required, under the free exercise clause, to permit individuals such as *Gillette* to be either wholly exempt from military service or at least exempt from combat duty? The Army would no doubt be able to function; yet in any case the burden should be on the government to show that such an alternative would not work. Under the analysis set forth in *Sherbert*,<sup>209</sup> it is startling that the Court in *Gillette* could treat the free exercise argument in such a cavalier fashion. One can only hope that the result is an aberration, attributable to the Court's concern for the problems involved in raising an army.

*Naturalization Cases.* In *United States v. Macintosh*,<sup>210</sup> the Supreme Court was faced with the question of whether Congress in the Naturalization Act meant that a conscientious objector could not become a citizen. Section 4 of the Act then required that an applicant for citizenship take an oath to, *inter alia*, "defend the Constitution and

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208. There are many tasks, technologically or economically related to the prosecution of a war, to which a religious or conscientious objector might be constitutionally assigned. As Justice Cardozo wrote, "Never in our history has the notion been accepted, nor even it is believed, advanced, that acts thus indirectly related to service in the camp or field are so tied to the practice of religion as to be exempt, in law or in morals, from regulation by the state." *Hamilton v. Regents of the University of California*, 293 U.S. 245, 267 (1934).

*United States v. Sisson*, 297 F. Supp. 902, 910 (D. Mass. 1969), *appeal dismissed for want of jurisdiction*, 399 U.S. 267 (1970).

209. See text accompanying notes 39-54 *supra*.

210. 283 U.S. 605 (1931).

laws of the United States against all enemies . . . ."<sup>211</sup>

Macintosh was willing to take the oath required by the statute, but he admitted that he would bear arms only if he felt that the particular war was morally justified. A five-justice majority held that the Act required that a naturalization request be turned down if the individual would not swear that he would bear arms under all circumstances in defense of this country. Chief Justice Hughes, joined by Justices Holmes, Brandeis, and Stone, sharply disputed the majority's reading of the statute. Hughes argued that the Act did not mean that conscientious objectors could not become citizens, for Congress had previously exempted conscientious objectors from compulsory military service.<sup>212</sup>

*Macintosh* was overruled fifteen years later in *Girouard v. United States*.<sup>213</sup> The majority in *Girouard* followed Hughes' *Macintosh* dissent, and based its holding on purely statutory grounds.<sup>214</sup> The free exercise argument was not expressly considered in *Girouard*, as it had not been in *Macintosh*, except that in *Macintosh* Justice Sutherland gratuitously remarked that there was no free exercise right to be exempt as a conscientious objector from Selective Service requirements.<sup>215</sup>

While a first amendment scholar might have hoped that the Court would have carefully considered and approved the free exercise arguments inherent in the naturalization cases, it is no doubt true that to reach the result in *Girouard* the Court did not have to stretch the language and intent of Congress nearly as much as was subsequently done in *Welsh*. Moreover, unlike the situation in *Gillette*, the *Girouard* Court's construction of the statute caused the same result as would have been reached under a proper free exercise analysis.<sup>216</sup>

211. Act of June 29, 1906, ch. 3592, § 4, 34 Stat. 596.

212. 283 U.S. at 627-35.

213. 328 U.S. 61 (1946). Congress altered the Act in 1952, presumably to take into account the Court's holding in *Girouard*. Act of June 27, 1952, Pub. L. No. 82-414, § 337, 66 Stat. 258, codified at 8 U.S.C. § 1448 (1970).

214. 328 U.S. at 66-68.

215. 283 U.S. at 623-24.

216. The lower courts have, in the later naturalization cases, generally followed the Supreme Court's lead in the selective service cases. See, e.g., *In re Weitzman*, 426 F.2d 439 (8th Cir. 1970), where it was held that the meaning of the phrase "religious training and belief," 8 U.S.C. § 1448(a), shall be essentially that which was adopted by the Supreme Court in *Seeger* and *Welsh*. See also the cases interpreting 8 U.S.C. § 1427(a) which requires that an individual may only be naturalized if he or she "is a person of good moral character, attached to the principle of the Constitution . . . ." The more recent cases in this area have held that one could not be denied naturalization if, because of religious training, he or she refused to serve on a jury, vote, or engage in politics. See, e.g., *In re Pisciatano*, 308 F. Supp. 818 (D. Conn. 1970). *Contra In re Petition for Naturalization of Matz*, 296 F. Supp. 927, 932 (E.D. Cal. 1969) (the

*R.O.T.C. Cases.* In *Hamilton v. Regents of the University of California*,<sup>217</sup> the Court was faced with a University of California requirement that all physically fit male students participate in the school's R.O.T.C. program. Hamilton refused to participate in the program because he stated that it was contrary to his religious beliefs. He further argued that military training in the land grant colleges was not compulsory in time of peace. The Court rejected these arguments and upheld his suspension from the university. The majority's opinion is of little significance for it does not seriously consider the free exercise claims raised by Hamilton. Justice Cardozo's concurrence (joined in by Justices Brandeis and Stone), however, did consider them:

The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war, whether for attack or for defense, or in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government. One who is a martyr to a principle—which may turn out in the end to be a delusion or an error—does not prove by his martyrdom that he has kept within the law.<sup>218</sup>

After *Sherbert* and *Yoder*, Justice Cardozo's opinion appears suspect.<sup>219</sup> His striking fear that to allow an exemption for Hamilton would somehow result in citizens being able to refuse to contribute taxes in furtherance of a war is an unsupportable conclusion. The state has a very different interest in collecting taxes than it does in having university students participate in the R.O.T.C. program. Moreover, other states had exempted conscientious objectors from the requirement without crippling their programs, thus negating any claim

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state has a "paramount interest" in insuring selection of future citizens with political credos compatible with government "of the people, by the people and for the people").

217. 293 U.S. 245 (1934).

218. *Id.* at 268.

219. The Supreme Court in 1959 refused to reconsider its holding in *Hamilton* when the same basic fact situation arose once again. *Hanauer v. Elkins*, 217 Md. 213, 141 A.2d 903 (1958), *appeal dismissed*, citing *Hamilton*, 358 U.S. 643 (1959). The holding has not, however, been extended. See, for example, *Spence v. Bailey*, 465 F.2d 797 (6th Cir. 1972), where the Memphis public high schools required one year of either R.O.T.C. training or physical education. The student was a conscientious objector who was denied his high school diploma after he refused to participate in the R.O.T.C. program. His high school did not offer the alternative physical education program. The court in ordering the student's reinstatement was careful to distinguish *Hamilton* on the ground that here the student's attendance was required by law. Moreover, the court pointed out that the State could obviously not have any compelling state interest in having this student participate in the R.O.T.C. program because by its own statute it had made the R.O.T.C. training program optional to physical education.



that an all-inclusive program was necessary to achieve the government's purpose.<sup>220</sup>

The chief problem with *Hamilton*, as with other early free exercise cases,<sup>221</sup> is that the Court did not even begin to balance the individual's interest against the state's interest. Hamilton might have been able to show both that the University of California was the only public university in the state, and that he could not afford to attend a private school, so that to keep him out of that school might be to effectively bar him from receiving higher education. And what interest could the state balance against his showing? Possibly, as in the tax collection cases, the state would argue that a free exercise exemption, or any exemption, would render the system inoperable. It is inconceivable that a comparable showing could be made in this area. Thus, the state interest in a compulsory R.O.T.C. program would seem clearly insufficient to preclude religious exemptions under the current balancing test. One can only hope that the Cardozo opinion is the exception, attributable to a nation and a Supreme Court preoccupied with the approaching menace of Adolf Hitler.

#### *Mixed Speech-Religion Cases*

Beginning in the early 1940's a number of important cases were decided by the courts which involved issues arising under both the free speech and free exercise clauses. There are two basic kinds of cases which fall into this category. The first includes what may conveniently be referred to as the "student compulsion cases." In these cases the primary ground for decision was that the individual's "right to believe" was being interfered with by the state. The fact situations commonly involved the expulsion of public school students who would not participate in a compulsory flag salute,<sup>222</sup> would not stand while others participated in the flag salute,<sup>223</sup> would not leave the room while others participated in the flag salute,<sup>224</sup> or refused to participate in particular classroom assignments.<sup>225</sup> The refusal in each case was based on the student's religious beliefs.

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220. See *Braunfeld v. Brown*, 366 U.S. 599, 614-15 (Brennan, J., concurring and dissenting), discussed in text accompanying notes 23-38 *supra*.

221. See note 231 *infra* and accompanying text.

222. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), *overruling* *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940).

223. *Banks v. Board of Pub. Instruction*, 314 F. Supp. 285 (S.D. Fla. 1970), *vacated to allow appeal to the 5th Cir.*, 401 U.S. 988, *aff'd*, 450 F.2d 1103 (1971); *Sheldon v. Fannin*, 221 F. Supp. 766 (D. Ariz. 1963), *appeal dismissed*, 372 U.S. 228.

224. See *Frain v. Baron*, 307 F. Supp. 27 (E.D.N.Y. 1969).

225. See *Hardwick v. Board of School Trustees*, 54 Cal. App. 696, 205 P. 49 (1921).

The second kind of case involves persons who were arrested for engaging in overt speech activities arising out of their religious beliefs. The convictions in these cases were ultimately reversed, because they involved unusually restrictive and overly broad state regulations, such as: requirements of flat license fees to distribute religious materials;<sup>226</sup> city ordinances forbidding the ringing of door bells to circulate written materials<sup>227</sup> or granting city officials virtually absolute authority to determine whether individuals could engage in pure speech activities in particular areas;<sup>228</sup> and ordinances which wholly outlawed speech activities in certain sections of a city.<sup>229</sup>

While most of the cases in both areas could properly have been adjudicated under the free exercise clause because of the religious motivation of the individuals involved, they were decided on free speech grounds, as the courts and commentators have fairly uniformly noted.<sup>230</sup> However, most of them nonetheless reached the result which appears to be mandated by *Sherbert* and *Yoder*, with the first amendment claims prevailing over indiscriminate statutory restrictions.

In one important case in this area, however, the state did prevail. In *Prince v. Massachusetts*,<sup>231</sup> a woman was convicted under the state child labor statute for allowing her nine-year-old niece to sell written material on the public streets. Mrs. Prince and her niece Sarah were Jehovah's Witnesses and the materials they distributed were religious tracts. Mrs. Prince argued that both she and her niece believed devoutly in the distribution of the religious literature so that the state's interference with their actions was unconstitutional.<sup>232</sup> Over the vigorous dissent of Justice Murphy, the Court entirely rejected this contention:

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There, a number of children were expelled from school for refusing to dance "the 'waltz' step, the 'polka' step, the 'two-step,' and a dance that is 'equal' or similar to the 'fox-trot.'" *Id.* at 712, 205 P. at 55.

226. See *Murdock v. Pennsylvania*, 319 U.S. 105 (1942), *overruling Jones v. Opelika*, 316 U.S. 584 (1941).

227. *Martin v. Struthers*, 319 U.S. 141 (1943).

228. *Largent v. Texas*, 318 U.S. 418 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

229. *International Soc'y for Krishna Consciousness v. City of New Orleans*, 347 F. Supp. 945 (E.D. La. 1972).

230. See, e.g., *Freeman*, *supra* note 86, at 806; *Giannella*, *supra* note 88, at 1398; *Kurland*, *supra* note 95, at 51-54. Indeed, Professor Kurland would make quite sure that each of these cases was decided on free speech grounds so as to avoid any establishment problems. *Id.* at 60-64. See notes 96-99 *supra* and accompanying text.

231. 321 U.S. 158 (1944).

232. *Id.* at 167.

Parents may be free to become martyrs themselves. But it does not follow [that] they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.<sup>233</sup>

*Prince* today appears quite suspect. Indeed, even prior to *Yoder* a number of commentators had stated that the holding in *Prince* was erroneous.<sup>234</sup> The chief problem with *Prince* is the Court's failure to consider seriously the religious nature of the activity of Mrs. Prince and her niece. Thus, while the state has a legitimate interest in generally keeping young children from engaging in commercial activities it is difficult to see how this interest is served by prosecuting Mrs. Prince, who was concededly a devoutly religious individual. The situation in *Prince* is strikingly analogous to *Yoder*, but unlike *Yoder*, the Court in *Prince* did not examine the state's interest carefully to determine if this particular application of the regulation would promote that interest.

Young Sarah was distributing religious literature with her aunt because both she and her aunt believed that such distribution was an essential aspect of their religion. The usual evils of allowing children to work—improper environment, strenuous labor, and so on—were probably not present in *Prince*. Had the Court, as in *Yoder*, carefully examined the effect which an exemption would actually have on the child, the rationale of the state interest may have largely been negated. As with Wisconsin in *Yoder*, it can be said that Massachusetts had an otherwise valid statute whose purposes were either not carried out by the prosecution of the defendant or were outweighed by the defendant's interest in practicing her religion. As with Mr. Yoder, Mrs. Prince's conviction should have been reversed under the free exercise clause.

#### *Abortions and Military Service*

A female officer in the armed forces becomes pregnant. Pursuant to a service regulation<sup>235</sup> she is discharged. The woman is Catholic and her religion firmly prohibits her from getting an abortion, so she seeks reinstatement in her position, claiming that her free exercise rights have been violated. She argues that she is being discriminated against because her discharge results from her refusal to take action

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233. *Id.* at 170.

234. Giannella, *supra* note 88, at 1395; Comment, 10 VILL. L. REV. 337, 345-46 (1965).

235. The commission of any woman officer will be terminated with the least practical delay when it is determined that one of the conditions in a. or b. below exists . . . .

prohibited by her religion, while other pregnant females are not discharged because they can and do have abortions.

The officer's argument is not without merit. While the government certainly has a compelling interest in not having a pregnant woman in a combat zone—to argue the strongest case for the government—it would not appear to be too much to require the government either to transfer the officer to a non-combat zone during the later months of her pregnancy, or to give her a leave of absence for a number of months. If the government can show that such adjustments substantially disrupt the efficiency of the military units concerned, then the state interest in an efficient military should prevail. But the two courts which have considered this question in the context of free exercise claims made little<sup>236</sup> or no<sup>237</sup> attempt to analyze that interest or to balance it against the gravity of the particular free exercise claim.

Clearly there are a number of effective alternatives which could accomplish the government's goals without infringing on the free exercise rights of military personnel. In *Robinson v. Rand*,<sup>238</sup> a recent case involving the pregnancy discharge of an Air Force NCO who was not in proximity to a combat situation, a federal district court struck down the pregnancy regulation as applied, albeit on due process rather than free exercise grounds. The court carefully distinguished the considerations of personnel utilization and finance, which were held the sole justifications for applying the regulation to Airman Robinson, from the more compelling exigencies of the combat situation. The court further suggested that, had the petitioner been in a combat zone, a transfer "must be used as an alternative to discharge" if it is practically possible.<sup>239</sup>

The searching scrutiny of the government's interest in the preg-

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a. Pregnancy:

(1) General:

(a) A woman will be discharged from the service with the least practical delay when a determination is made by a medical officer that she is pregnant . . . .

b. Minor Children:

(1) General:

The commission of any woman officer will be terminated with the least practical delay when it is established that she:

(d) Has given birth to a living child while in a commissioned officer status. Air Force Regulation 36-12, 40.

236. *Struck v. Secretary of Defense*, 460 F.2d 1372 (9th Cir.), *vacated and rem'd* 409 U.S. 1071 (1972).

237. *Gutierrez v. Laird*, 346 F. Supp. 289 (D.D.C. 1972).

238. 340 F. Supp. 37 (D. Colo. 1972).

239. *Id.* at 41.

nancy regulation applied by the court in *Robinson* is likewise required when the challenge is grounded on free exercise. Thus, if a non-infringing alternative to a pregnancy discharge is practically available, judicial ratification of the regulation is unwarranted.<sup>240</sup>

### *Employment Relations Matters*

A number of important free exercise issues have arisen in the employment context. Perhaps the most dramatic situation involves the question of whether an employee can be required to associate with a union once his employer enters into a union shop agreement, even if such an association is contrary to that individual's religious views. A striking example of this situation is found in *Linscott v. Millers Fall Company*.<sup>241</sup> There the plaintiff, a devout Seventh Day Adventist, had been employed by the defendant for over eighteen years. At the end of this period the defendant entered into a collective bargaining agreement with a union providing for a union shop arrangement. When the plaintiff refused to pay dues to the union as required under that agreement, he was fired. Plaintiff raised as his sole argument the claim that his firing violated his free exercise rights in that his refusal to pay dues to the union was solely due to his religious beliefs.

The First Circuit rejected this argument, finding that the union did not require the plaintiff to become affiliated with it, only that he pay dues; and that, in any case, there was a strong governmental interest in preserving the union shop arrangement which would outweigh the plaintiff's religious interests.

The result in *Linscott* may well be correct,<sup>242</sup> yet the court's rather cavalier treatment of the free exercise claim is disturbing. Perhaps the interests of the state do outweigh the individual's interest in these situations, and that even applying a strict test, the state would still prevail. Nevertheless, it cannot be discounted that the individual's interest is quite strong. He is not simply required to tolerate working in a union shop; rather he is required to associate himself affirmatively with the union by paying dues to it.<sup>243</sup> Under *Sherbert* the state should not,

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240. Cf. Note, *Pregnancy Discharges in the Military: The Air Force Experience*, 86 HARV. L. REV. 568 (1973). Compare *Robinson v. Rand*, 340 F. Supp. 37, 40-41 (D. Colo. 1972) with *Sherbert v. Verner*, 374 U.S. 398, 407 (1962).

241. 440 F.2d 14 (1st Cir.), cert. denied, 404 U.S. 872 (1971).

242. *Linscott* adopted the rationale offered by the Fifth Circuit in *Grey v. Gulf, Mobile & Ohio R.R.*, 429 F.2d 1064 (5th Cir. 1970), cert. denied, 400 U.S. 1001 (1971), and was followed by the Sixth Circuit in *Hammond v. United Papermakers and Paperworkers*, 462 F.2d 174 (6th Cir.), cert. denied, 409 U.S. 1028 (1972). There have apparently been no reported cases reaching contrary results.

243. This fact distinguishes the case from *CAP Santa Vue, Inc. v. NLRB*, 424 F.2d

therefore, *automatically* prevail.<sup>244</sup>

Yet, what is the substantial state interest in these cases that prompts the courts to reject the individual's claim? While there certainly is a strong state interest in promoting labor harmony, particularly in key industries, would an exemption to the union shop arrangement for a devout Seventh Day Adventist really threaten that interest? While others might seek to fraudulently avoid paying their dues, the dispositive force of such an argument was expressly rejected by the Court in *Sherbert*.<sup>245</sup> The real issue is whether granting the exemption would as a practical matter result in labor strife. Would unions go out on strike because exemptions have been made for a relatively small group of religious individuals? If the court, upon reviewing the state's evidence in this regard, finds that a strike is a real possibility then perhaps the free exercise claim should be rejected. Absent some such strong showing, however, it is difficult to see why the courts so readily deny the individual's claim.

The failure of the courts to analyze adequately this kind of argument is also demonstrated by those cases involving the question of how accommodating the state, as employer, should be vis-à-vis the religious dictates of its employees. In *Dawson v. Mizell*,<sup>246</sup> the plaintiff was a Seventh Day Adventist who had been an employee of the United States Post Office. His assignment shifted and he was required to work

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883 (D.C. Cir. 1970), where the NLRB ordered the employer to bargain collectively with the union in good faith. The defense of the employer was that he could not, consistent with his religious scruples, bargain with the union "in good faith." The court upheld the NLRB, stating that the employer need not believe in the National Labor Relations Act, only that he comply with its legal requirements. Thus, the mandate of the NLRB went to controlling the employer's conduct, not his belief. The point was crucial when the plaintiff conceded that the bargaining as such was not violative of his religious views, only the requirement that his bargaining be in good faith.

244. While the Supreme Court declined to review *Linscott*, at least two members of the current Court have given some indication of how they might come out on this question. In *Russell v. Catherwood*, 33 A.D.2d 592, 304 N.Y.S.2d 415 (1969), *cert. denied*, 399 U.S. 936 (1970), the plaintiff was fired when he refused to join the union pursuant to the union shop provision of the collective bargaining agreement. The state court found that the plaintiff could not collect unemployment compensation because he had no "good cause" for refusing the job. Though plaintiff's refusal to join the union had nothing to do with free speech or free exercise claims—he refused because he had previously belonged to the union and had gotten into a dispute concerning payment of certain disability benefits—Chief Justice Burger and Justice Douglas dissented from the Supreme Court's denial of certiorari, remarking that the Court ought to consider whether the first amendment "requires the [state] to provide employment that does not conflict with the worker's freedom of association, as might be indicated under *Sherbert v. Verner*, 374 U.S. 398 (1963)." 399 U.S. at 936.

245. See text accompanying notes 39-54 *supra*.

246. 325 F. Supp. 511 (E.D. Va. 1971).

on Saturdays. He informed his supervisor that he could not work on Saturdays as he was a Sabbatarian; when he failed to show for his Saturday assignments he was fired for excessive absence. He brought an action against the Post Office claiming that its termination denied him his free exercise rights. The court noted that there was a union agreement in effect in the postal system covering 700,000 employees and that the union, stressing its need for a viable seniority system, strenuously opposed granting any special treatment to the plaintiff. Finding that the interest of the state in making sure that the postal workers did not go out on strike was compelling, the court held for the Post Office.

The court in *Dawson* properly analyzed the state's interest. In light of *Sherbert* and *Yoder*, however, the ultimate balancing question was reached too soon. Once the plaintiff demonstrated that his freedom of religion was adversely affected by the Post Office's action, the court should have then determined whether there was any alternative way of promoting the state's interest which would have had less impact on the individual. Certainly it is at least arguable that such an alternative existed. If the Post Office was concerned with the seniority system, it could well be that the plaintiff would have been willing to accept a drop in his employment status in order to be assigned to non-Saturday jobs. Moreover, it is not at all clear that labor strife would have resulted had plaintiff been granted such an exemption.

The *Dawson* opinion, however, is hardly unique in its holding that the state as employer need not go too far out of its way to accommodate its employees' religious beliefs. In *Stimple v. State Personnel Board*,<sup>247</sup> for example, the plaintiff state employee was assigned to a job which required him to work on Saturdays. Being a Seventh Day Adventist, he did not show for the Saturday assignments. He was then fired, and the court refused to reinstate him. The state never made a showing that the plaintiff could not have been shifted to a position which did not require Saturday work or that in fact union discord was likely to result from giving the plaintiff special treatment. Indeed, consideration of such factors would have been inconsistent with the court's manner of disposing of the action.

The proliferation of religions with an infinite variety of tenets would, if the state is required as an employer to accommodate each employee's particular scruples, place an intolerable burden upon the state. We conclude that if a person has religious scruples which conflict with the

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247. 6 Cal. App. 3d 206, 85 Cal. Rptr. 797 (2d Dist. 1970), cert. denied, 400 U.S. 952 (1970).

requirements of a particular job with the state, he should not accept employment or, having accepted, he should not be heard to complain if he is discharged for failing to fulfill his duties.<sup>248</sup>

The court's concern with the "proliferation of religions with an infinite variety of tenets" is understandable, yet its emphasis on this point is somewhat regrettable. The state may be able to show either that there would be labor strife or that—if this particular state employee was exempted—there would be chaos for its entire employment system. Absent some such showing in each particular case, however, such a position smacks of the fraudulent claims argument which was made to no avail in *Sherbert*.<sup>249</sup>

### CONCLUSION

The Supreme Court within the last ten years has expanded the scope and application of the previously dormant free exercise clause, as well as the scope of inquiry into the state interests set up in opposition to free exercise claims. It has been the goal of this Article to focus on the Supreme Court's formulation of standards for adjudicating free exercise questions, and to apply these standards to a wide assortment of important free exercise fact situations. It is hoped that the courts will continue to take a long look at the broad arguments raised by the state and federal governments in this area, for it is only in the context of such vigilant concern for free exercise rights that the statement of John Stuart Mill will become reality for religious minorities:

[T]he worth of a State, in the long run is the worth of the individuals composing it; and a State which postpones the interest of *their* mental expansion and elevation, to a little more of administrative skill, or that semblance of it which practice gives, in the details of business; a State which dwarfs its men, in order that they may be more docile instru-

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248. 6 Cal. App. 3d at 209-10, 85 Cal. Rptr. at 799. The *Stimpel* holding is difficult indeed to accept, especially since the Supreme Court has consistently held that, in the free speech area, waiver of constitutional rights may not be imposed as a condition to public employment. See, e.g., *Pickering v. Board of Education*, 391 U.S. 563 (1968).

249. See text accompanying notes 43-45 *supra*. But cf. *Dewey v. Reynolds Metal Co.*, 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971). Congress in 1972 amended Title VII of the 1964 Civil Rights Act to accommodate recent court decisions, and probably to overrule *Dewey*:

The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

86 Stat. 103, amending 42 U.S.C. § 2000e-2000e-15.



ments in its hands even for beneficial purposes—will find that with small men no great thing can really be accomplished; and that the perfection of machinery to which it has sacrificed everything, will in the end avail it nothing, for want of the vital power which, in order that the machine might work more smoothly, it has preferred to banish.<sup>250</sup>

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250. MILL, *supra* note 168, at 117-18.