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THE FREE EXERCISE OF RELIGION: A SOCIOLOGICAL APPROACH

Joseph M. Dodge, II*

THE first amendment to the Constitution begins with the words: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"¹ Although there is clearly some overlap between the establishment and free exercise clauses,² there is a fundamental distinction between the two: the establishment clause is applicable when government adopts a policy to aid religion generally or to confer benefits upon some religions in preference to others; the free exercise clause is invoked where state action has an inhibitory effect upon an individual's beliefs or a religious group's ritual practices.³ The former is thus a more specific prohibition against the promotion of religion or religions by the state, while the free exercise clause expresses basic American notions about the autonomy of the individual and the restriction of government to its proper sphere.⁴

No overriding theory has heretofore been proposed capable of allocating the various rules of decision in free exercise cases according to an appropriate classification of fact situations. This Article suggests an objective sociological approach to defining and weighing the governmental and religious interests inhering in a given free exercise claim in order to eliminate value preferences from the constitutional weighing process. Religious interests will be ranked according to functional criteria internal to all religious systems and not dependent upon the belief content of any given sect. State interests will be analyzed in terms of formalized modes of governmental action involving action generally and religion in particular,

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1. The first amendment has been made applicable to the states through the fourteenth amendment's due process clause. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

2. See *School Dist. v. Schempp*, 374 U.S. 203, 222 (1963). See generally *Sherbert v. Verner*, 374 U.S. 398, 413 (1963) (Justice Stewart, concurring); Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961); Note, *The Free Exercise and Establishment Clause: Conflict or Coordination?*, 48 MINN. L. REV. 929 (1964).

3. *School Dist. v. Schempp*, 374 U.S. 203, 222-23 (1963).

4. See *United States v. MacIntosh*, 283 U.S. 605, 633-34 (1930) (Chief Justice Hughes, dissenting), overruled by *Girouard v. United States*, 328 U.S. 61 (1946).

For general discussions of the free exercise clause, see Fernandez, *The Free Exercise of Religion*, 36 S. CAL. L. REV. 546 (1963); Freeman, *A Remonstrance for Conscience*, 106 U. PA. L. REV. 806 (1958); Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part I, The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381 (1967).

taking into consideration certain constitutional limitations on state power over the individual, over interpersonal relationships, and over intragroup behavior. The resulting method of adjusting competing governmental and religious interests may be characterized as value-neutral, and is capable not only of rationalizing past free exercise decisions, but also of resolving current controversies and of suggesting the direction of future development.

I. SCOPE OF THE FREE EXERCISE CLAUSE

A. *Basic Approach*

Before formulating rules of decision appropriate for particular fact situations, two extreme philosophies of adjudication under the free exercise clause must be dealt with. Some commentators contend that the free exercise clause, like the rest of the Bill of Rights, embodies personal rights which are entitled to absolute protection against state power.⁵ Without analyzing this proposition in detail, it should be noted that its rationale as usually presented is primarily political: speech of "governing importance . . . includes the vast range of forms of thought and expression by which the voter might equip himself to exercise a proper judgment in casting his ballot."⁶ Unfortunately, it is not at all clear how religious freedom relates to the political process. Although religion may have some public and instrumental aspects, its essence resides in its private and personal qualities; thus, courts have traditionally concluded that the core of the free exercise clause is freedom of conscience and belief. But if these freedoms are considered to be ends in themselves,⁷ nothing is to prevent the constitutional definition of the powers of government or the nature of the political process from being similarly exalted. If, on the other hand, all of the terms and provisions of the Constitution are equally means for attaining the goals set forth in the preamble, the free exercise clause is no higher in priority than, for example, the commerce clause. Either way, the fact that liberty appears to be of a different nature than governmental power does not controvert the fact that both are formally in the same position vis-à-vis the Constitution. Thus, the legitimate claims of neither religion

5. See Freeman, *supra* note 4.

6. Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 13 (1965). See, e.g., Meiklejohn, *The Balancing of Self-Preservation Against Political Freedom*, 49 CALIF. L. REV. 4 (1961); Barenblatt v. United States, 360 U.S. 109, 145 (1959) (Justice Black, dissenting).

7. See Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879-81 (1963); *id.* at 879: "[S]uppression of belief, opinion, and expression is an affront to the dignity of man, a negation of man's essential nature."

nor government assume an a priori precedence over those of the other.

At the other end of the philosophical spectrum is the restrictive theory of the free exercise clause, which gives conclusive deference to the legislative judgment for all but the most flagrant interferences with religious freedom. Given a legitimate governmental end, the function of courts is said to be merely to ascertain whether the legislature "could in reason have enacted such a law."⁸ A less sophisticated version of this theory is frequently encountered in state court decisions: once the statute or ordinance is found to curb religious "action" as opposed to "belief," the role of courts is reduced to upholding the law as a valid exercise of state police power to regulate safety, health, morals, and welfare.⁹ However, the Constitution is concerned with permissible legislative means as well as permissible ends.¹⁰

An analysis of the free exercise clause need not begin with any slogans or political philosophies. Rather, we must seek solutions in the realm of principles that are somewhat less abstract—principles capable both of accurately defining the various interests involved in a given free exercise claim and of weighing them properly. As the following discussion will show, such a goal has not yet been fully attained.

B. Current Free Exercise Doctrine

Courts and commentators have offered various tests and distinctions as rules of decision in free exercise cases, but these tests are either artificial, productive of inconsistent results, or incapable of explaining the true policies behind the free exercise clause. Worse, the tests offered to date involve blatantly subjective attempts to balance governmental and religious policies without defining the real interests in controversy.

1. Prohibitions and Compulsions

It would hardly be satisfactory to decide a free exercise case by simply characterizing the activity affected by state action as either

8. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 647 (1943) (compulsory flag-salute case) (Justice Frankfurter, dissenting); cf. *Kurland*, *supra* note 2, at 7.

9. *E.g.*, *Lawson v. Commonwealth*, 291 Ky. 437, 164 S.W.2d 972 (1942).

10. *See, e.g.*, *Schneider v. State*, 308 U.S. 147 (1939); Hammett, *The Homogenized Wall*, 53 A.B.A.J. 929, 932-33 (1967) (the establishment clause forbids the state from using religious means to achieve secular ends); cf. Meiklejohn, *supra* note 6. One of the main theses of this Article is that even with respect to secular means used to achieve secular goals, some means are more permissible than others. *Sherbert v. Verner*, 374 U.S. 398 (1963).

"religion," which is therefore protected, or "nonreligion," which is the proper subject of state power. Yet, the use of such simplistic categories has a long history in free exercise law. The first "pure" free exercise case, *Reynolds v. United States*,¹¹ upheld a bigamy conviction against a Mormon who practiced polygamy. Chief Justice Waite—referring to a statement by Thomas Jefferson that the legislative powers of government reach action alone and not opinions—concluded: "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."¹² Underlying this delimitation of religious liberty is the fear that to permit a criminal defendant to excuse his unlawful act because of his religious belief "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."¹³ That is good rhetoric, but it avoids the problem of examining the policies underlying the free exercise clause in order to determine what is lawful religion in the constitutional sense. The belief-action dichotomy does not necessarily follow either from the above reference to Jefferson or from another statement by him cited in *Reynolds*: "It is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order."¹⁴ At worst, this statement is ambiguous; at best, it appears to suggest something akin to a clear-and-present-danger test.¹⁵ Most important, the distinction between religious belief and action ignores the reality of a religion which is seriously practiced.¹⁶ Since almost every manifestation of religion that is cognizable by the state can be labelled "action," a literal application of the belief-action dichotomy would ef-

11. 98 U.S. 145 (1878).

12. 98 U.S. at 164.

13. 98 U.S. at 167.

14. 98 U.S. at 163.

15. Thus, the Court, speaking of *Reynolds* in 1963, could state: "The [religiously motivated] conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order. See, e.g., *Reynolds v. United States* . . ." *Sherbert v. Verner*, 374 U.S. 398, 403 (1963). The Supreme Court of 1878 had a rather culture-bound, not to say intolerant, conception of nonconforming religions. See Freeman, *supra* note 4, at 825; cf. the "modern" concept of religion expressed in *United States v. Seeger*, 380 U.S. 163 (1965).

16. *State ex rel. Holcomb v. Armstrong*, 39 Wash. 2d 860, 868-69, 239 P.2d 545, 550 (1952) (dissenting opinion):

There is rarely any need of court intervention to protect freedom to believe, since there are not many ways in which a state, even if it would, could impair that freedom. Appellant apparently has the idea, which should not be considered quaint, that religion is not something which need only be thought about between the hours of eleven and noon on Sunday morning, but must be expressed in daily living.

fectively write the free exercise clause out of the Constitution. Moreover, any method of analysis so dependent upon uncritical characterization cannot avoid the appearance of sometimes being arbitrary.¹⁷

Other distinctions have been offered as rules of decision in free exercise cases: activity versus passivity on the part of the religious believer, and harm to self versus harm to others.¹⁸ However, these dichotomies have not by themselves yielded wholly consistent results. Thus, it has been held that the state cannot compel an adult Jehovah's Witness to receive life-saving blood transfusions, but that the state can force a Christian Scientist to submit to a vaccination.¹⁹ The religious believers in both situations are equally passive. Perhaps the decisions can be reconciled on the ground that in the vaccination case a contagious disease poses a potential threat to the public, whereas one who allows himself to expire by natural causes is a danger to nobody. But the concept of harm to others only leads to further questions: Does harm include moral degradation, or does it refer only to physical injury? Does the category of "others" include the believer's fellow communicants, or does it denote only those outside of the sect? How much deference is owed to the legislature's lack of sensitivity to these distinctions?

Finally, some courts have spoken of a clear-and-present-danger test, but this approach is used almost exclusively in health regulation cases. Although the clear-and-present-danger formulation has been employed in a case concerning religious freedom, the decision in the case rested upon the political core of the first amendment.²⁰ This, coupled with the fact that the doctrine originated in a context of seditious libel,²¹ should warn against its relevance in areas where legislative objectives are more mundane: preventing fraud, controlling traffic in marijuana, and maintaining health and morals. Moreover, although courts may pretend to weigh probabilities of danger, they are more likely to follow the legislative assumption that some danger to society exists.²² Perhaps decisive is the fear of the

17. See *Harden v. State*, 188 Tenn. 17, 216 S.W.2d 708 (1949) (conviction for snake-handling affirmed, but with a statement that the law does not prevent anyone from believing that handling poisonous snakes is a necessary part of religious worship).

18. *In re Brooks' Estate*, 32 Ill. 2d 361, 368, 372, 205 N.E.2d 435, 439, 442 (1965).

19. *In re Brooks' Estate*, 32 Ill. 2d 361, 367, 372, 205 N.E.2d 435, 439, 442 (1965); *Moore v. Draper*, 57 S.2d 648 (Fla. 1952).

20. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634-35 (1943).

21. *Schenck v. United States*, 249 U.S. 47 (1919).

22. *Wright v. DeWitt*, 385 S.W.2d 644 (Ark. 1965); *Lawson v. Commonwealth*, 291 Ky. 437, 164 S.W.2d 972 (1942) (danger found to exist, even though no actual evidence thereof).

supposed practical and theoretical consequences if religious exemptions to criminal laws and health regulations were judicially granted.²³

2. Legislation for the Public Good: Of "Indirect" Burdens

Another class of cases considers the effect upon religious practices of general regulations promoting the public welfare. It has been suggested that where speech is involved, the result should be the same as in free speech cases; where speech is not the predominant element, courts should strive for equality of treatment with other religions. Thus, once a law of general applicability is found to be within the legislative power of the state, the courts must carve out no exceptions for religious believers so long as the purpose or primary effect of the statute is not to prohibit or discriminate against a particular religious practice.²⁴ Moreover, where the legislature itself has granted a religious exemption, it must be construed to apply equally to all religions.²⁵

Unfortunately, the no-discrimination principle has been unpredictably applied. In *Braunfeld v. Brown*, the Supreme Court upheld a statute which banned commercial activity on Sunday but made no exception in favor of those worshipping on other days.²⁶ Appellants contended that the law discriminated against their religion by compelling them to choose between observing a basic tenet of their faith and working on Saturday. On the other hand, in *Sherbert v. Verner*,²⁷ the Supreme Court held that South Carolina could not constitutionally withhold unemployment benefits from one who, for religious reasons, was unwilling to accept Saturday employment. As in *Braunfeld*, the effect of the state requirement was to force the individual to choose between the practice of his religion and his employment. Since both cases imposed equivalent de facto burdens upon minority religions, the distinction, if any, between the two certainly cannot be made according to a no-discrimination principle.

If discrimination is not the key to these cases, perhaps some sort of weighing of state interests is involved. The following passage from *Braunfeld* is suggestive:

23. *E.g.*, *Reynolds v. United States*, 98 U.S. 145, 167 (1878).

24. *Fernandez*, *supra* note 4, at 564-66; *Kurland*, *supra* note 2; *cf.* *Hamilton v. Regents of the University of California*, 293 U.S. 245 (1934).

25. *Washington Ethical Soc. v. District of Columbia*, 249 F.2d 127 (D.C. Cir. 1957); *Fellowship of Humanity v. County of Alameda*, 153 Cal. App. 2d 673, 315 P.2d 394 (1957). *See* *United States v. Seeger*, 380 U.S. 163 (1965).

26. 366 U.S. 599 (1961). Twenty-one of the thirty-four states having Sunday-closing laws do have exceptions for those wishing to worship on other days. *Id.* at 614 (Justice Brennan, dissenting).

27. 374 U.S. 398 (1963).

If the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite the indirect burden on religious observance unless the State may accommodate its purpose by means which do not impose such a burden.²⁸

One aspect of this test, contained in the "unless" clause, is the principle that a given statute may be invalid if the state has an alternative means, less burdensome on the religion, of accomplishing the desired end. It seems that such an alternative-means test would be an appropriately value-free—hence judicial—standard for review. However, it remains to be seen whether or not this test was actually applied in either *Braunfeld* or *Sherbert*. Although the *Braunfeld* Court did indeed mention the possibility of alternatives, it did so from the point of view of the legislature's rational judgment that a Sabbatarian exemption would seriously preclude the attainment of the secular goal.²⁹ Properly expressed, the Court's real concern was with the legislature's freedom to select and define such secular goals. The Court concluded that "to strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, *i.e.*, legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature."³⁰ Policy-weighting was clearly apparent in the decision: arrayed against the "indirect burden" of making the practice of Mr. Braunfeld's religion "more expensive" was a formidable congeries of state interests, including increased economic efficiency through greater physical and spiritual health, opportunity for families and friends to gather together, and the special Sunday atmosphere of peace and tranquility.³¹

Of course, the noncriminal burden upon appellant's religion in *Sherbert* was arguably even more indirect than it was in *Braunfeld*.³² Although the Court again referred to the alternative-means qualification, it did not rely on that test because the merely "colorable" state interest in preventing fraudulent claims was insubstantial: "In this highly sensitive constitutional area, 'only the gravest abuses, endangering paramount interests, give occasion for permissible limitation'"³³

It is submitted that, insofar as courts assume the attitude of a

28. 366 U.S. at 607.

29. 366 U.S. at 608-09. See Fernandez, *supra* note 4, at 584.

30. 366 U.S. at 605-06.

31. 366 U.S. at 607.

32. *Sherbert v. Verner*, 374 U.S. 398, 417 (1963) (Justice Stewart, concurring).

33. 374 U.S. at 406-07.

super-legislature, weighing tests of the kind used in these two cases are both confusing and susceptible to abuse. This remains true even when courts profess to defer to the legislature's balancing of means and ends. In *Braunfeld* the Court found the interests of the state to be those set forth in the companion case of *McGowan v. Maryland*,³⁴ there, however, the interests asserted were intended merely to demonstrate a secular purpose for Sunday-closing laws under the establishment clause. But, while it is one thing to show a secular purpose by means of ex post facto reasoning about state "interests," it is quite another to conclude that somehow such interests outweigh a claim premised upon the free exercise clause, or that a Sabbatarian exemption would not be a viable alternative to a Sunday-only-closing law. In sum, the Court in *Braunfeld* and *Sherbert* gave the unfortunate impression that it was rationalizing and speculating about policies without any standard to evaluate the strength of competing claims.

The folly of a policy-weighting approach is best illustrated by two recent cases in which religious adherents were required to participate in judicial proceedings contrary to their convictions. In *People v. Woodruff*,³⁵ a witness was compelled to testify before a grand jury investigating alleged use of narcotics, despite the witness' claim that her Hindu belief counseled against testifying because it was wrong to harm others. The New York intermediate court cited *Sherbert* and assumed that a balancing test was called for: "We balance, then, the interest of the individual right of religious worship against the interest of the state which is sought to be enforced."³⁶ Of course, the court concluded that the claim of the state was more compelling:

The community is entitled to the assistance and information of its members in seeking out and controlling the commission of crime. . . . If it were otherwise, the fabric of society might be pierced and fatally rent by a religious belief sincerely held by an individual in action or inaction damaging to the continued existence of peace and order in the community.³⁷

Whatever one may think about the result of *Woodruff*, it must be conceded that the New York court invoked general policy considerations to obscure the fact that the witness was not herself charged with

34. 366 U.S. 420 (1961). The Court quoted Blackstone (4 COMMENTARIES 63), at 434: "It humanizes, by the help of conversation and society, the manners of the lower classes; which would otherwise degenerate into a sordid ferocity and savage selfishness of spirit; it enables the industrious workman to pursue his occupation in the ensuing week with health and cheerfulness."

35. 26 App. Div. 2d 236, 272 N.Y.S.2d 786 (1966), *aff'd*, 21 N.Y.2d 848, 236 N.E.2d 159 (1968).

36. 26 App. Div. 2d at 238, 272 N.Y.S.2d at 789.

37. 26 App. Div. 2d at 238-39, 272 N.Y.S.2d at 789-90.

any crime and to ignore the alternative of making some accommodation to her religious claim. It might have been possible, for example, to compel her testimony only after it was concluded that no one else could be found to testify concerning the same matter. The Minnesota Supreme Court provided an even more unsatisfactory opinion in *In re Jenison*,³⁸ where the religious adherent was held in contempt of court for refusing to serve on a jury. After noting that the burden upon defendant's free exercise was slight, the court proceeded to give a dissertation about the overwhelming interest of society in the jury system.

Such experience with the balancing test tempts one to generalize that: (1) the state always wins; (2) courts scarcely notice the religious interest, much less attempt to analyze it; (3) courts do not really analyze the state's interest either; (4) neither courts nor attorneys accurately delineate the real issues; and, (5) judicial opinions proceed in terms of policy rather than more justiciable standards. Although accepting the necessity for some kind of "weighing" test, I categorically reject the "ad hoc balancing" approach as being arbitrary, useless, and too insensitive to the special competencies of legislatures and the judiciary. The appropriate role of the courts is not to balance policies—that, presumably, has already been done by the drafters of the Constitution, by basic social values, and by the legislatures—but rather to *define* interests of both religion and government in terms from which it is possible to generalize about future disputes.

It has not been the primary purpose of this brief survey to criticize the results of the decided cases—the outcome of the Sunday-closing-law cases, for instance, is certainly defensible.³⁹ Nor has the intention been to reject all of the tests and distinctions that have been offered by courts and commentators. Rather, this critique has been directed toward the point that there is neither a set of principles which allocates rules of decision to particular types of fact situations, nor objective criteria for assigning weights to religious and governmental interests in various contexts.

II. TOWARD A GENERAL THEORY OF THE FREE EXERCISE CLAUSE

We start with the notion that since religious freedom is not related to the governing process or (except perhaps indirectly) to a

38. 265 Minn. 96, 99-102, 120 N.W.2d 515, 518-19 (1963). The decision was soon reversed by the Supreme Court, 375 U.S. 14 (1963) (per curiam).

39. See Note, *State Sunday Laws and the Religious Guarantees of the Federal Constitution*, 73 HARV. L. REV. 729 (1960). For a general criticism of the result see Barron, *Sunday in North America*, 79 HARV. L. REV. 42, 52-53 (1965).

policy of unifying American society, the Brennan-Meiklejohn social-utility test⁴⁰—which focuses on the value to the political process of any form of expression—is inappropriate. Therefore, if one accepts the premise that under the free exercise clause the practice of religion is an end in itself, the search for values and policies underlying that clause should begin with an analysis of religion as such—specifically, how it satisfies the psychological, spiritual, and social needs of its adherents. Since viewing religious freedom as an end in itself means that it is unrelated to the structure and powers of government, a discussion of the scope of the free exercise clause must not stop with an analysis of religion alone. There must also be an examination of situations in which government can and should—and the areas in which it need not—accommodate religion. Although the two inquiries are analytically distinct, certain values and lines of argument are common to both.

A. *Interests of Religion*

Although religious “action” is susceptible to various forms of governmental intervention, it has been conceded that religious “belief” is absolutely protected.⁴¹ But since the belief-action distinction cannot be uncritically accepted,⁴² the present task is to determine what kinds of religious action should be protected, first of all, from the point of view of religion itself.

1. *Traditional Judicial Attitudes Toward Controversies Involving Religion*

Courts deciding free exercise cases have been reluctant to relate religious doctrine to the decision of particular disputes. In *Watson v. Jones*,⁴³ for instance, the Supreme Court faced the question of which party in a denominational schism was entitled to certain church property; it held that the dispute had to be resolved by the appropriate governing organ of the church itself, rather than by a judicial inquiry into the doctrinal purity of the competing parties. The Court, reading the free exercise and establishment clauses together, stated that “[t]he law knows no heresy, and is committed to

40. See authorities cited, note 6 *supra*. I do not, however, mean to imply that Justice Brennan himself would apply the social-utility test to the free exercise area. See *Sherbert v. Verner*, 374 U.S. 398 (1963).

41. *E.g.*, *Reynolds v. United States*, 98 U.S. 145, 164 (1878). See text accompanying notes 11-17 *supra*.

42. Freeman, *A Remonstrance for Conscience*, 106 U. PA. L. REV. 806, 826 (1958). See Fernandez, *The Free Exercise of Religion*, 36 S. CAL. L. REV. 546, 566-67, 587 (1963); Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 7 (1961); text accompanying notes 8-10 *supra*.

43. 80 U.S. (13 Wall.) 679, 727 (1871).

the support of no dogma, the establishment of no sect."⁴⁴ In contrast to the Chancellor in England, moreover, American judges have no competence in ecclesiastical law or theology; where the subject of the suit is ecclesiastical, the secular courts have no "jurisdiction."⁴⁵

As a matter of legal interpretation, however, the stricture against inquiry into religious doctrine and organization should be severely limited to situations like that at issue in *Watson v. Jones*—where both parties base their claims on religious factors. The typical free exercise case involves competing religious and governmental interests; since a court must accept jurisdiction and does in fact weigh the interest of the state, it seems that procedural fairness requires that equal attention be given to the interest of religion. An examination of theology in the usual free exercise case would not constitute an attempt to determine true doctrine or heresy, but would merely be a necessary first step in analyzing the religious claim.⁴⁶

One positive approach to an analysis of religious action looks to the place which a particular tenet has in the total scheme of the religion. A form of cultural anthropology, such a method claims to be value-neutral. In *Murdock v. Pennsylvania*,⁴⁷ Justice Douglas so analyzed the role of selling and distributing Watchtower Society literature in the religion of the Jehovah's Witnesses. He found these activities to be in reponse to a categorical commandment by God and to be as important to Jehovah's Witnesses as worship and preaching are to the religions with which most Americans are familiar. Although Justice Douglas correctly looked at the religion as a whole rather than the subjective zeal of its individual practitioners, he did

44. 80 U.S. (13 Wall.) at 728. This language was quoted in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 37 U.S.L.W. 4107 (Jan. 27, 1969), where the Court held that the first amendment, as applied to the states through the fourteenth amendment, prohibits a state court from reviewing a decision of a church tribunal and awarding title of disputed property to a local church on the ground that the actions of the general church amounted "to a fundamental or substantial abandonment of the original tenets and doctrines of the [general church], so that the new tenets and doctrines are utterly variant from the purposes for which the [general church] was founded," 37 U.S.L.W. at 4107.

45. 80 U.S. (13 Wall.) at 729, 733.

46. With *United States v. Seeger*, 380 U.S. 163 (1965), this stricture against inquiry into religious doctrine was finally put to rest, as was the notion that judges are incompetent by nature in the domain of theology. In only one area—fraud in advertising and selling religious therapy—has the heresy issue arisen. In *United States v. Ballard*, 322 U.S. 78 (1944), the Court attempted to side-step the question whether or not the religious claim was false by relying on a test of intent to defraud. Although it might seem that the truth or falsity of the religious claim could have been tested objectively, [see 322 U.S. at 89 (Chief Justice Stone, dissenting)], even that approach would be futile, since the victims might have viewed the "reality" differently. In that event, such an objective test would effectively declare the beliefs of the victims to be heresy. See 322 U.S. at 93-95 (Justice Jackson, dissenting).

47. 319 U.S. 105, 109 (1943).

not make clear how his method avoids the dilemma of either conceding that religion is what the sect says it is, or comparing the practice to some form of religious activity known to Judaeo-Christian tradition.⁴⁸

A more fruitful approach is present in those cases which recognize that some religious tenets may not be *compelled* by the religion, but instead are merely "believed in"; such tenets can be regulated by government without disrupting the core meaning of the religion itself.⁴⁹ Although this principle is not often explicitly set forth, it does appear to have influenced the results of some cases. To take but one example, the duty of a minister to castigate sin while preaching the Gospel to his congregation would not seem to require that he use obscenities offensive to the congregation's sensibilities.⁵⁰ Although the principle which attempts to distinguish between tenets that are beliefs and those that are compelled practices has frequently been passed over,⁵¹ it is a step in the right direction and will be elaborated upon in the analysis of religious action proposed below.

Finally, there is the question of the degree to which courts are willing to inquire into the sincerity with which a particular individual holds a belief. In religious fraud cases, the sincerity of the belief is the key issue—even the essence of the charge.⁵² There the expressed view is that "[i]n such an intensely personal area . . . the claim of the registrant that his belief is an essential part of a religious

48. Such a method merely succeeds in reintroducing elements of subjectivity. See *People v. Ashley*, 184 App. Div. 520, 172 N.Y.S. 282 (1918) (defendant, whether a "medium" or a "fortuneteller," held not to be like an Old Testament prophet); *McMasters v. State*, 21 Okla. Crim. 318, 207 P. 566 (1922) (based upon the judges' experience with religion, fortunetelling held not to fall within that category). Although cultural anthropology may have value in deciding what religion is in the first place, it cannot tell us what is lawful religion. See Note, *Right To Practice Black Muslim Tenets in State Prison*, 75 HARV. L. REV. 837, 838-39 (1962), in which the religious and political components of the Black Muslim faith are, with some difficulty, sorted out. See also *United States v. Seeger*, 380 U.S. 163 (Justice Clark for the majority), 188 (Justice Douglas, concurring) (1965). But see *Follett v. Town of McCormick*, 321 U.S. 573 (1944) (issue is whether or not practice is "protected religion").

49. *Reynolds v. United States*, 98 U.S. 145 (1878), is so interpreted by the California Supreme Court. *People v. Woody*, 40 Cal. Rptr. 69, 76, 394 P.2d 813, 821 (1964). For cases supporting the converse (that "essential" practices therefore have a higher status), see *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *People v. Woody*, *supra*; *State v. Delaney*, 1 N.J. Misc. 619, 122 A. 890 (1923).

50. See *Delk v. Commonwealth*, 166 Ky. 39, 178 S.W. 1129 (1918).

51. See *United States v. Hillyard*, 52 F. Supp. 612, 613 (E.D. Wash. 1943) (reversing contempt conviction for refusal to serve on a jury, even though the judge could see no connection between the refusal and defendant's religion). At the other extreme, statutes banning the handling of poisonous snakes have been upheld, despite the fact that the practice appeared to be central to the defendant's sect. E.g., *Lawson v. Commonwealth*, 291 Ky. 437, 164 S.W.2d 972 (1942).

52. *United States v. Ballard*, 322 U.S. 78, 86 (1944). See *People v. Ashley*, 184 App. Div. 520, 172 N.Y.S. 282 (1918).

faith must be given great weight."⁵³ Yet, in many instances, and sometimes without explaining why, courts are openly skeptical of a particular claimant's sincerity.⁵⁴ The trial court should be required to make a finding of the existence, but not the degree, of the claimant's sincerity; at a minimum, such an affirmative finding seems necessary in order to lay the basis for an individual's standing to challenge governmental action under the free exercise clause.⁵⁵ Once standing has been established, however, the question of sincerity need concern the court no longer; more formalistic and objective criteria should then be brought into play.

2. *An Analysis of Religious Action: The Theoretical Framework*

We turn now from a discussion of traditional judicial attitudes to a theoretical exposition of the nature of religious behavior—one that is derived from sociological principles governing action in general. Parenthetically, if these theoretical explanations seem to be confusing or difficult to grasp, the reader should be consoled by the thought that they are not so important as the results which follow; these results hopefully accord with common sense and experience. The various religious interests will be ranked according to criteria internal to religious systems as such, instead of according to American social and political values—although there is actually a striking correspondence between the two realms. In short, a frankly sociological approach to the religious interest is being urged in order to eliminate extrinsic value preferences from the constitutional weighing process. An analytical paradigm of such generality as to outline the essential functional imperatives of any system of behavior will be applied in order specifically to describe the major categories of religious action. Such an objective approach accords with the notion that the protection afforded by the free exercise clause should not vary according to the belief contents of various religions.⁵⁶

a. *Sociological principles governing action as such.*⁵⁷ The func-

53. *United States v. Seeger*, 380 U.S. 163, 184 (1965).

54. *Dobkin v. District of Columbia*, 194 A.2d 657 (D.C. App. 1963); *State v. Bullard*, 267 N.C. 599, 148 S.E.2d 565 (1966) (alternative holding); cf. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

55. See *School Dist. v. Schempp*, 374 U.S. 203, 224 n.9 (1963); *In re Grady*, 61 Cal. 2d 887, 394 P.2d 728, 39 Cal. Rptr. 912 (1964).

56. This point is constantly reiterated by Justice Douglas; see, e.g., *Sherbert v. Verner*, 374 U.S. 398, 411-12 (1963) (concurring opinion).

57. The main points in this subsection are taken from Talcott Parsons, *An Outline of the Social System*, in 1 THEORIES OF SOCIETY 30, 36-40 (1961). The following outline of the theory of action from a sociological perspective is extremely condensed, partly from necessity, but partly because it is also felt that the important point for the reader to grasp is not the mechanics of a particular sociological theory but rather

tional imperatives of any system of behavior are derived from responses to problems posed both by the internal environment and by the external environment. At the same time, a system can relate to these problems either in universalistic or particularistic terms. A universalistic mode is one which is founded upon some generalizable principle; for example, to adapt, one must be “efficient” or “flexible” or “powerful”—predicates which can be validly applied to any subject. The particularistic mode, on the other hand, focuses on the specific subject and its identity; particularistic qualities are “given” or are conceived of as being ends in themselves. The universalistic-particularistic dichotomy is somewhat like the distinction between the internal and external environment, except that the latter refers to *activities* of the system and its components, while the former refers to the way in which the system *conceives* of, and evaluates, itself. The combination of the internal-external and universalistic-particularistic dichotomies yields a fourfold paradigm (figure 1) containing four categories of action conceived of as functional imperatives for any system of behavior.

FIGURE 1

Universalism Particularism

External Environment (Performance)	Adaptation (A)	Goal Attainment (G-A)
Internal Environment (Quality)	Pattern Maintenance (P-M)	Integration (I)

The function of *pattern maintenance* involves maintaining the stability of the limits of the system itself by providing patterns which give it meaning. *Integration* relates to the mutual adjustment of sub-units within the system in order to organize the smooth functioning of the system as a whole. The function of *goal attainment* is defined in terms of the directional flexibility needed to lessen the tension between the needs of the system and the varying conditions

the fact that the categories of religious action do have a logical and analytical (as opposed to ad hoc empirical) derivation. The value of such a system lies in its capacity to “rank” its own “interests” according to its functional needs as a system.

in the environment that bear upon the satisfaction of such needs. The function of *adaptation* arises from the problem of allocating limited means to a multiplicity of goals and the resulting calculation of sacrifices and gains incidental to the attainment of those goals.

It should be evident that within the internal environment, the pattern maintenance function is universalistic while the integration function is particularistic. As the source of meaning for the system as a whole, the symbolic or rational contents of the pattern maintenance function, viewed as a subsystem, are by their form valid for all systems of a similar type. That is, statements about meaning are universalistic because they relate the unit (a sect) to some larger concept (such as goodness, truth, membership, unity) which is the source of meaning. This is done either by placing the unit into some larger frame of reference or by asserting that the unit is the only unit which possesses a certain desirable quality (the implication being that other units *could* have this quality, but, since they do not, they are inferior). For example, the doctrine, "Jesus Christ is the Son of God," is a universalistic source of meaning for a Christian sect. The word "Jesus Christ" is the particularistic reference related to the sect by the assumption that "I belong to a group which believes in Jesus"; the word "Son" is a lead-in to the concept of God, who has all the attributes of goodness and truth.

The four categories of the functional paradigm are neither static nor mutually exclusive; a given system by its nature may change, break down, or maintain its present boundaries. Also, among the various functional categories, each viewed as a subsystem in its own right, there are various inputs and outputs; some of those for the religious action system are illustrated in figure 2. Finally, the described system has an evolutionary component expressed in terms of the relative presence or absence of "functional differentiation" among the subsystems.

b. *A functional paradigm of the religious action system.*⁵⁸ The subsystems or categories of the religious system, which are derived from the functional paradigm governing action as such, are shown in figure 2.⁵⁹ It must be kept in mind that this is a theoretical scheme, and the categories are not derived from empirical generalization. Rather, they attempt to specify the elements of religious action in

58. Much of the following analysis is adapted from Bellah, *Some Suggestions for the Systematic Study of Religion* (mimeo) (permission kindly granted by the author) (1955). It would be very difficult to separate Bellah's analysis from my own modifications, but any deviations from theoretical consistency are attributable to me.

59. Adapted, with omissions and modifications, from Bellah, *supra* note 58, at 10, 13, 14.

terms of the functional imperatives described above. The religious system is defined briefly as that which relates values having to do with "ultimate meaning," as elaborated in a system of culture, to a given regime of social⁶⁰ behavior. Its four functional categories are stated below.

FIGURE 2

The pattern maintenance subsystem refers to the pattern of *belief* and symbols of ultimate meaning or concern. Theology, dogmatics, and the elaboration of symbols for liturgy are found here.

The integrative problem involves organizing a coherent system of religious practice and belief for the multitude of members within a given religious community who are confronted with varying social or psychological strains. This is called the religious *therapy* subsystem. Starting with notions of alienation or sin, the aim of this subsystem is to provide salvation—a restoration of spiritual wholeness or health—to the members of the sect by means of “saving” techniques such as sacrament, the power of faith, and acts of confession or charity.

60. This is a good place to emphasize that I am discussing religion as a *social* system. It might be objected that the first amendment has largely to do with *individual* liberty and personal conscience, and therefore that my analysis is irrelevant. But that is to assert the conclusion before the reasoning. All I am saying at this point is that religion should be analyzed from the point of view of a social system because of legally relevant considerations of objectivity, analytical consistency, ease of application, and efficiency. Moreover, a sociological analysis is not irrelevant even if one accepts an individualistic interpretation of the first amendment, because (1) the social system itself specifies “roles”—sets of expectations held by the social unit and other social actors concerning the individual's identity and performance; and (2) the social system interacts with the individual himself on the level of personal motivation and moral conscience.

The goal attainment subsystem is referred to as *worship*. The functional problem here arises from the need to reinforce commitment to the aims of the sect. Ceremony and ritual are the chief mechanisms by which the group defines itself in terms of action as opposed to pure doctrine; liturgy can be viewed as symbolic of the individual's identification with group values and needs. The ritual may relate both to the natural environment (in the form of sympathetic magic) or to the spiritual realm (in propitiation of the Divinity). The output from worship to the therapy subsystem is the facility for sacrament, and the output to the ethical action subsystem is sermon—the public commitment to ethical action.

Finally, the adaptive function concerns relating religion to everyday life by means of *ethical action*. On the most general level, this function regulates the balance of public versus in-group commitment. The aim of this subsystem is the achievement of moral acceptability in religious terms by means of the actual performance of ethical acts. The output from ethical action to the therapy subsystem is acts of confession or charity—"justification by works"—while the output to the worship subsystem is proselytization—the obtaining of new members for the religious group. Ethical action may range from the type of evangelism practiced by Jehovah's Witnesses, to various optional forms of charity, to actions like polygamy, the religious content of which is not immediately apparent to outsiders.

The above fourfold classification is inherent in mature religions. Conversely, "primitive" religion is defined sociologically not by the content of the belief system or by particular strange tenets, but rather by the absence of differentiation among the four functional subsystems. On a different level of analysis, a primitive religion is also characterized by the absence of differentiation between the religion itself and other social and cultural systems, particularly kinship, political organization, law, role-playing, science, and artistic expression. In analyzing a given free exercise claim, one should view the sect to which the claimant belongs in its entirety. If the religious subsystems cannot be distinguished, the religion should be characterized as primitive. If the tenet in question is only a relatively minor aspect of the religion—a residue of or regression to a prior stage of social evolution—it should, for purposes of this analysis, be considered in terms of whichever of the four functional subsystems it most closely resembles. To take some examples, polygamy may be indicative of a fusion of religion with social and kinship organization. Yet it is doubtful whether the practice of polygamy alone could

characterize the Mormon Church of the nineteenth century as being a primitive religion, especially since the ethical aspect of polygamy completely overshadowed whatever other religious functions could be attributable to it. On the other hand, such practices as snake handling, séance, and use of peyote for worship appear to be primitive in the sense that various religious phenomena—liturgy, sacrament, worship, and evangelism—are combined in various degrees and proportions in one practice. Nevertheless, of these examples only peyote worship, since it constitutes practically the entire religion for those American Indians who practice it, can be clearly said to be a primitive religion.

3. *Legal Consequences*

a. *Primitive religions.* A primitive religion in which the sub-systems are undifferentiated should be considered in a separate category for legal purposes in two circumstances: when the entire religion—not merely one of its tenets—can be characterized as primitive, and when the primitive sect is, from the point of view of social structure, isolated and self-contained. Given a legitimate governmental interest as well as a clear political commitment to advance “civilization,” a primitive sect should not be given any blanket exemption from secular law—even if that law is designed ultimately to erode the traditional religion. Unfortunately, the ability to recognize a primitive religion does not help us to determine whether it is entitled to more or less protection than that afforded to other religions. But while this theoretical issue is perplexing, the fact remains that today primitive religions in the sociological sense are found almost exclusively among the American Indians, who historically have stood in a special relationship with the federal government.⁶¹

61. Should the federal government decide to implement a policy of assimilation with regard to the Indian through the enactment of social legislation, then the Indians' free exercise rights should be accorded neither a greater nor a lesser status than the rights of other citizens. As to general regulations and criminal prohibitions bearing upon religious freedom, the appropriate rule should defer to the decision of the duly constituted tribal government in the case of on-reservation activity not of a physically violent nature. This approach corresponds with the sociological principle that the social-cohesion interest of the sect may be quite intense, and indeed the practice with respect to crimes or disputes on the reservations is very nearly the one proposed. See Note, *The Indian: The Forgotten American*, 81 HARV. L. REV. 1818 (1968); cf. *People v. Woody*, 61 Cal. 2d 716, 594 P.2d 813, 40 Cal. Rptr. 69 (1964). Such a principle need not be based on doubtful notions of sovereignty; rather it is merely an acknowledgment of the reality of a unique historical and social condition tolerated by both the polity and the Indians themselves. Eventually, however, it should suffer the fate of the separate-but-equal doctrine as (and if) a national policy of assimilation is adopted and implemented.

On the other hand, if the tribe itself suppresses the free exercise of religion, the protection offered by the Constitution should not be waived just because the state

b. *Mature religions.* The thesis of this Article is that the belief and therapy subsystems of a mature religion should be absolutely protected by the free exercise clause, that the worship subsystem should also be protected so long as there is no demonstrable harm outside of the worship group or severe physical injury within it, and that the ethical action subsystem should receive a much lesser degree of protection. The degree of protection afforded should depend upon what function the religious action performs rather than upon the content of the motivating belief. Moreover, functional analysis should take precedence even when a given religion places a high valuation upon a particular form of ethical action. Thus, in the *Murdock* case discussed above, it appears that Justice Douglas was seduced into finding that distribution of religious literature on the street "occupies the same high estate under the First Amendment as does worship in the churches and preaching from the pulpits"⁶² by the fact that the Jehovah's Witnesses themselves placed such high value on this form of evangelism. But according to the sociological analysis proposed here, the practice in question clearly falls within the category of ethical action, and the degree of legal immunity afforded should depend upon that functional characterization.

The belief and therapy subsystems should receive absolute protection because they relate by definition to the internal ordering of the religious system and to the individual's orientation and commitment thereto. As such, belief and communion are of maximum concern to the members of the sect and of minimal concern to everybody else.⁶³ Moreover, on a psychological level, to impinge upon an individual's conception of ultimate meaning, to interfere with his sacrament, or to compel him to adopt a permanent condition of sinfulness is to disrupt his most fundamental religious convictions.

On the other hand, worship and ethical action are both forms of performance which necessarily entail social consequences. However, the fact that worship is particularistic rather than universalistic performance explains why worship ought to receive greater protection than ethical action: the social conduct involved in worship relates, by definition, solely to members of the cult and is therefore less likely to harm outsiders. Moreover, worship is the primary outlet for expressing one's religious commitment publicly in collective

condones separatism; cf. *Colliflower v. Garland*, 342 F.2d 369 (9th Cir. 1965). *But see* *Native American Church v. Navajo Tribal Council*, 372 F.2d 131 (10th Cir. 1959).

62. *Murdock v. Pennsylvania*, 319 U.S. 105, 108-09 (1943).

63. Of course, the beliefs and sacraments of a religious group may well concern others very intensely, but only on the level of their own contrary beliefs and conscience. I do not think that this level of concern is a "social" interest requiring governmental protection. *See Cantwell v. Connecticut*, 310 U.S. 296 (1940).

ceremony and prayer; at the same time it provides the most conspicuous focus for the social identity of the religious group. Finally, worship provides a key facility for the therapy subsystem—the paraphernalia for sacrament. These characteristics are inherent in worship as an analytical concept, and exist independent of the value which the religion itself may place upon its goal attainment function. In sum, the worship function, in addition to being a primary means of expressing cult values and needs,⁶⁴ is the *sine qua non* of religion as a social organization.

Ethical action presents an entirely different situation. Although the norm that sanctions a given ethical practice may be of general applicability, the particular ethical practice itself may be only one of many possible derivations from such norm. This may explain why many ethical tenets appear to have no necessary logical relationship to the core of the underlying belief system, but merely seem to be derived from social, economic, or political origins.⁶⁵ Indeed, there is a feeling that many religiously motivated ethical practices are simply not “religious” within the common understanding of that word. Ethical acts are directed to man, not to God or some other core concept of a religion (except indirectly), while the emphasis of religion is the reverse.⁶⁶ These observations all accord with the concept that ethical action, the adaptive subsystem of religion, should be the lowest subsystem on the scale of priorities. Thus, since particular ethical practices have no necessary logical or ontological relationship to the rest of the system, it would seem that any sect frustrated by environmental hostility to one of its ethical practices could adapt to societal pressure by changing the offending practice. The change could occur without necessitating any fundamental alterations in the other more “religious” functional subsystems.⁶⁷ I do not suggest that a religion *must*, in any normative

64. See Fernandez, *supra* note 42, at 587. Giannella, in *The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1419-21 (1967), also points out the distinctions between types of religious action. However, his criterion seems to be merely the importance of a tenet to a particular religion on a sect-by-sect basis; therefore, the evangelism of the Jehovah's Witnesses would be as protected as is sacrament generally.

65. See Reynolds v. United States, 98 U.S. 145 (1878) (polygamy); United States v. Kissinger, 250 F.2d 940 (3d Cir. 1958) (refusal to limit production of grain); Newman v. Piggie Park Enterprises, 256 F. Supp. 941 (D.S. Car. 1966) (refusal to serve Negroes in restaurant).

66. This notion is expressed by the proposition that the essence of religion is “belief in a relation to God involving duties superior to those arising from any human relation.” United States v. MacIntosh, 283 U.S. 605, 633-34 (1930) (Chief Justice Hughes, dissenting).

67. For example, the Mormons changed their teachings in respect to polygamy in 1890, the same year that the Supreme Court, in Davis v. Beason, 133 U.S. 333, upheld a voting ban against advocates of polygamy; see Cleveland v. United States, 329 U.S. 14, 16 n.1 (1946); Bellah, *supra* note 58, at 11, 34.

sense, undergo such an evolutionary process; I merely emphasize that the standards for adaptation are "neutral." Therefore, a given religion need not, in view of the variety of options available for resolving conflicts with secular society, put all of its emphasis upon any particular moral tenet. Although it is true that a religious sect may so overcommit itself to a particular ethical practice in the face of social or political hostility that it ultimately ceases to be viable, no tears should be shed for such sociologically inflexible entities.

Nevertheless, in the short run, state interference with religiously derived moral tenets may acutely impinge upon religion, particularly when the result is to compel action or abstention which is defined as sinful by the therapy subsystem. When this occurs, religious ethical action merits *some* protection by the first amendment.⁶⁸ But where the therapy subsystem itself specifies that compulsion or an absence of intent to violate the moral norm is an excuse for the act or omission constituting "sin," the need for this protection is obviously lessened.

The practical advantages of using this functional paradigm in the legal analysis of a free exercise claim are numerous. First, this approach obviates the necessity of gauging the degree of emphasis that a particular religion attaches to a given practice and the relative strength of an individual's subjective beliefs. Second, such an analysis ranks religious interests and yet remains value-neutral; that is, the content of a belief is irrelevant and practices are not judged according to standards derived from Judaeo-Christian or American secular norms. At the same time, it should be relatively easy for a court to ascertain the formal distinctions among belief, sacrament, worship, and ethical action.⁶⁹ Where ethical action itself is under attack, a court can easily determine whether or not the state sanction results, as a matter of principle for the sect, in a condition of sinfulness for the believer, taking into account the doctrinal ability of the therapy subsystem to resolve the dilemma.

The fourfold classification outlined above accords with common sense and experience; therefore, judges need not master sociological theory. Not the least of the benefits of the proposed approach is that it is capable of rationalizing the mainstream of decided cases while clarifying elements that ought to be considered in future controversies.

68. Fernandez, *supra* note 42, at 564-66, seems to say that religious actions not involving worship or sacrament should receive no immunity, at least from the criminal law, except where another specific first amendment right can be invoked.

69. Courts should also be able to identify exotic tenets which fall into one of these categories and primitive religions as such. See note 61 *supra* and accompanying text.

B. *Interests of Government*

1. *Constitutional Limitations on Governmental Action*

Certain constitutional concepts that bear upon the relationship between government and individuals, interpersonal associations, and intragroup behavior serve to limit the governmental interest when dealing with religious groups in the same manner as when government seeks to affect other social units. The same jurisprudential, social, and practical considerations which tend to weaken the state interest may also reinforce the distinction between worship and ethical action and thus bear upon an evaluation of the religious claim itself.

a. *The individual—private thoughts and actions.* The heart of individual liberty is freedom from direct governmental coercion in the realm of ideas, beliefs, and opinions.⁷⁰ It matters not whether these ideas are religious, ethical, economic, philosophical, scientific, or political in nature. In other words, the "internal environment" of the individual is beyond the pale of direct governmental intervention. The obvious corollary of this proposition is that the individual has considerable liberty in respect to the consumption of ideas originating in his external environment;⁷¹ part of the penum-

70. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 635-36 (1943); Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879-81 (1963).

71. These statements underlie the basic evolutionary trend in the area of obscenity law. The Supreme Court in *Roth v. United States*, 354 U.S. 476 (1957), rejected an all-encompassing definition of protected speech in terms of personal belief and expression in favor of the "redeeming social value" test, which in turn is founded on the notion of the social utility of exchanging ideas of political consequence. The Court, however, implicitly admitted that immunity from state prohibition was available to advocacy of nonconforming moral values and for expressions of purely artistic value. These expressions, too, can be said to have social, if not political, value in the broad sense. *Kingsley Intl. Pictures Corp. v. Regents of New York*, 360 U.S. 684 (1959); Monaghan, *Obscenity 1966: The Marriage of Obscenity Per Se and Obscenity Per Quod*, 76 YALE L.J. 127 (1966); Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 16. See Emerson, *supra* note 70, at 880. Justice Brennan's discussion of *Garrison v. Louisiana*, 379 U.S. 64 (1964), in *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 18-19 (1965), suggests that his "general theory" of the first amendment revolves around a notion of social utility.

It would then seem that the proper theory on which to base the legislature's power to control obscenity should be "sociological" and should therefore refer to the mechanisms and manner of its communication instead of its expressive purposes. Since almost any material would pass muster under the "utterly without redeeming social value" test as laid down in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General*, 383 U.S. 413 (1966), the "pandering" analysis set forth in *Ginzburg v. United States*, 383 U.S. 463 (1966), which focuses upon the manner of distribution of the material, is now of dominant interest. See Supreme Court Note, *The Supreme Court 1965 Term*, 80 HARV. L. REV. 125, 186-94 (1966). I interpret the new test to be open invitation by the Court to legislatures to frame their obscenity laws according to the sociological theory proposed in the text. It has been strenuously urged that government has no power to ban pornography from those who desire to be

bra of the first amendment is the right of the individual to acquire knowledge or obtain exposure to ideology.⁷² Thus, a state cannot prevent a parochial school from teaching modern foreign languages,⁷³ nor can it force all children to attend only state schools.⁷⁴

The state has traditionally asserted its interest in the area of private conduct outside the realm of ideas only with respect to attempted suicide and consumption of alcohol or drugs. Yet the trend has clearly been away from attaching criminal sanctions to these actions.⁷⁵ Undoubtedly, one reason for this trend is a recog-

exposed to it. Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391 (1963), seems to say this without feeling any necessity to invoke the first amendment. Monaghan, *supra*, at 138, rejects the substantive due process implications of such a position, but agrees that the interest of the state here is weak and should yield to any asserted constitutional right. *Id.* at 139-40. Even Henkin, *supra*, at 413 n.68, admits that the state has the power to act against "public" obscenity. Of course, the state is said to have power to ban obscenity only because it has been decided that the latter is not "protected speech" under the first amendment. But as a test to be applied to printed matter or private behavior, this rule is suspect. This can be seen by a reading of the following passage from *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942), which Justice Brennan relied upon in *Roth v. United States*, 354 U.S. 476, 485 (1957):

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene [, the profane, the libelous, and the insulting or "fighting" words and those which by their very utterance inflict injury or tend to incite an immediate breach of the peace]. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. [Footnotes omitted.] [The bracketed words are those which Justice Brennan chose to omit.]

On its face, this dictum seems to refer to public utterances, as opposed to printed literature. *Accord*, *Delk v. Commonwealth*, 166 Ky. 39, 178 S.W. 1129 (1915). If so, the described type of behavior would be analogous to the inciting speech that was in fact the matter for decision in *Chaplinsky*. Thus, with the original context restored, "the lewd and obscene" reference probably means lewd or indecent conduct. To read the phrase as Justice Brennan did in *Roth* leads to the unique conclusion that obscene material is the only form of speech which can be banned as such by the state, in spite of the fact that there is no proved connection with unlawful conduct. Monaghan, *supra*, at 132, makes all of these points. Thus, if obscene matter were restored to its proper place within the first amendment, a mere untested assertion by the state that there was some connection with overt action would not have conclusive weight. *Roth*, *supra*, at 508 (Justice Douglas, dissenting); *cf.* *Sherbert v. Verner*, 374 U.S. 398 (1963); *People v. Woody*, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964); *Dennis v. United States*, 341 U.S. 494 (1951) ("gravity" of the evil).

Consistent with focusing upon the social communication of obscenity are the decisions of at least two courts which have construed their respective state obscenity laws so as not to cover material held solely for the personal use or enjoyment of the person who created it. *In re Klor*, 51 Cal. Rptr. 903, 415 P.2d 791 (1966); *State v. Wetzel*, 173 Ohio St. 16, 19, 179 N.E.2d 773, 775 (1962) (dictum).

72. *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (dictum); Emerson, *supra* note 70, at 880. See *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *cf.* *Martin v. City of Struthers*, 319 U.S. 141 (1943).

73. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

74. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

75. Thus, for example, under the Model Penal Code § 250.5 (Proposed Official

dition of the inherent futility of prohibition as a means of controlling such private conduct; another reason is the feeling that a person who attempts suicide or consumes harmful substances is more likely to possess some kind of psychological disorder than to have an evil intent.⁷⁶ And, most relevant to the religious problem, it has been argued with some force that suicide is simply none of the state's business insofar as there are no serious collateral effects on others.⁷⁷ These considerations may have implications for the way in which government should relate, as a matter of policy, to such religious practices as drug-taking, self-immolation, and snake-handling. Without religion, these practices would probably be considered to be symptoms of mental disturbance. Should the state act accordingly and "treat" these sociocultural "diseases" by education and social legislation rather than by criminal prosecution? Or can it be maintained that the state has no power at all to deal with these practices on the ground that they are "healthy" from a given sect's viewpoint? Perhaps the state has no more business saying what is healthy or unhealthy for a particular sect than it does in weeding out heresy or false opinions.

b. *Binary consensual relationships*. The leading case on the question of binary relationships between consenting adults is *Griswold v. Connecticut*,⁷⁸ which held that a state may not proscribe the use of artificial birth control devices by a married couple. At the same time, the Supreme Court conceded that the state may act constitutionally in the realm of sexual morality, presumably even where the regulation impinges upon the privacy of consenting adults. Apparently because the state itself sanctions the

Draft, 1962) the mere state of being under the influence of alcohol or drugs is not a crime, except where such status constitutes a public "nuisance." The Model Code also fails to list attempted suicide as a crime. In respect to suicide specifically, Grenville Williams, in *The Sanctity of Life and the Criminal Law* (1958), supports this trend.

76. Cf. *Robinson v. California*, 370 U.S. 660 (1962). In *Powell v. Texas*, 392 U.S. 514 (1968), the Court by a five-to-four decision refused to hold that public intoxication was beyond the pale of the criminal law. However, five Justices seem to have agreed that *Robinson* establishes a constitutional requirement of *mens rea* in regard to public crimes—or at least that the due process clause applying the eighth amendment prohibits the states from defining diseases or "conditions," and, by implication, acts which result therefrom, as substantive crimes, presumably because such diseases, conditions and acts are in some sense "involuntary." 392 U.S. at 548-49 (Justice White, concurring), 566-67 (four Justices dissenting).

77. "Society cannot stop a free man from committing suicide, nor should it try. What can be done is to make sure that the determination upon self-destruction is fixed and unalterable." G. WILLIAMS, *supra* note 75, at 262. Thus, it cannot be said that the state should cease to take an interest in these matters; nevertheless, governments are gradually discarding the old heavy-handed all-or-nothing methods in favor of more flexible and rehabilitative solutions.

78. 381 U.S. 479 (1965).

matrimonial status,⁷⁹ however, the line was drawn at the point at which state regulation interferes with marital intimacies.⁸⁰ If the policy of the state is decisive, can the relationship between the free exercise clause and the intragroup affairs of a religious sect be analogized to the relationship between state laws sanctioning marriage and the husband-wife social unit? Marriage and religious affiliation are similar in that they are both commonly described in terms of status rather than temporary unilateral or bilateral consent. Even if the penumbral right of privacy adds nothing of substance to the right of religious free exercise, it is certainly possible that it may help to define the interests implicit in the free exercise clause.

Outside the penumbra cast by the constitutional right of privacy and assuming that the state has power to legislate in the area of private sexual morality, the propriety of its exercise of this power invokes competing values. A representative distillation of Anglo-American jurisprudence holds that government should intervene in these delicate matters, especially with the criminal law, only when the conduct in question is openly offensive to others and only where state action would be effectual. The appropriate function for the state is not to prohibit conduct that is considered immoral but rather to limit its effect by preventing it from spilling over into society at large.⁸¹ In practice, morals legislation appears to be of decreasing repute. The Model Penal Code makes lewd behavior a crime only when it actually offends others or threatens to become a public nuisance; it even excuses "deviate sexual relations" between consenting adults.⁸² These considerations support the contention

79. 381 U.S. at 495 (Justice Goldberg, concurring).

80. This distinction admittedly does not resolve all problems in the area; for example, would it be any less an invasion of "fundamental liberty" to sterilize unmarried, as opposed to married, persons? Compare *Buck v. Bell*, 274 U.S. 200 (1927) with *Skinner v. Oklahoma*, 316 U.S. 535 (1942). And, if there is a substantive right to preserve one's capacity to sire natural children, what about the analogous limits upon freedom of choice imposed by various racial and religious classifications found in current adoption laws?

81. Rostow, *Enforcement of Morals*, 1960 *CAMB. L.J.* 174, 179-80 (summarizing and agreeing with the views of Lord Devlin). Considering alcoholism to be the subject of criminal sanctions at least partly because society finds it to be morally and aesthetically offensive, the various opinions set forth in *Powell v. Texas*, 392 U.S. 514 (1968), strongly imply that the state could not establish criminal sanctions to being drunk in the privacy of one's home.

82. Section 213.2, Comment (Proposed Official Draft, 1962). Section 251.1 of the Code defines lewdness as "[a]ny lewd act which [the actor] . . . knows is likely to be observed by others who would be affronted or alarmed." See *United States v. Klaw*, 250 F.2d 155, 164 (2d Cir. 1955). Cf. Model Penal Code § 2.11(1) (Proposed Official Draft, 1962), which holds consent to be a general defense to crime where it controverts an element of the offense or precludes the harm or evil sought to be prevented.

that acts of worship in which only the sect members participate should be afforded a high degree of immunity from government regulation.

c. *Voluntary associations.* Freedom of association, whether in connection with "political, economic, religious or cultural matters," is an "inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment."⁸³ This formulation implicitly recognizes that the right of association is not just an instrument to be used for goals of a political nature. Unfortunately, all of the leading Supreme Court cases on the subject have dealt with state regulation of associational relationships detrimental to the public good;⁸⁴ none of the cases has dealt with intraorganizational activity as such. Perhaps *DeJonge v. Oregon*⁸⁵ could be cited for the proposition that, when there is no incitement to action against society at large, the state has insubstantial reasons for interfering with an association's internal affairs; but there the intragroup activity involved only speech that was clearly protected in any event.

The interest of government with respect to immoral activity within a group would seem to be tenuous; the state should not interfere unless the practice in question arouses such deeply felt feelings of disgust in the public at large that it may be injurious to the society. Even then, if the state must act against immoral intra-group activity, it should quarantine rather than prohibit it.⁸⁶ Consistent with this theory, the Model Penal Code provides an affirmative defense to a defendant in an obscenity prosecution where the obscene material is held for noncommercial dissemination to personal friends.⁸⁷ Also, in *Roberts v. Clement*⁸⁸ a state law banning nudist colonies was struck down by a three-judge federal district

83. *NAACP v. Alabama*, 357 U.S. 449, 460 (1958).

84. See *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63 (1928); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947); *American Communications Association, C.I.O. v. Douds*, 339 U.S. 382 (1950); *NAACP v. Button*, 371 U.S. 415 (1963). But cf. *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America*, 344 U.S. 94 (1952).

85. 299 U.S. 353 (1937).

86. Paraphrasing E. Rostow's paraphrase of the view of Lord Devlin, *supra* note 81, at 181. In addition, the legislature should consider whether moral values may change in the foreseeable future in respect to the practice in question, and also whether the criminal law is an appropriate and effective means for bringing about the desired end. *Id.* at 180-81. See *Cleveland v. United States*, 329 U.S. 14 (1946).

87. Section 251.4(3) (Proposed Official Draft, 1962). Similar privileges are provided for educators, scientists, and government officials. It would also appear that the pandering analysis for obscenity cases promulgated in *Ginzburg v. United States*, 383 U.S. 463 (1966), lends support to this thesis insofar as commercial exploitation *ipso facto* precludes a concern with intragroup use.

88. 252 F. Supp. 835, 841-43 (E.D. Tenn. 1966). *Accord*, *Excelsior Pictures Corp. v. Regents of State University of N.Y.*, 3 N.Y.2d 237, 144 N.E.2d 31, 165 N.Y.S.2d 42 (1957).

court. Two judges thought that the law was unconstitutionally vague, but they also pointed to the common-law rule that indecent exposure or lewdness must be public in order to constitute a criminal offense. The third judge stated that the law was an unconstitutional abridgement of the right of association and the related right of privacy; since the nudist colony was isolated from public contact, the state had no interest in prohibiting it.⁸⁹ Similarly, religious intragroup activity should not be prohibited as long as its consequences can be effectively confined within the group.⁹⁰

2. Modes of State Action

Subject to the above limitations, the state may have an interest in accommodating religion by creating exemptions from secular laws, compelling action or submission when necessary to protect public health or welfare, prohibiting certain conduct defined as inherently evil, and enacting broad social legislation that indirectly impinges on religious interests.

a. *Accommodation.* Any effort by government to promote religion directly would collide head-on with the "wall" separating church and state embodied in the establishment clause of the first amendment.⁹¹ Nevertheless, there is a narrow area in which the free exercise clause allows the state to accommodate religion in spite of this strong prohibition against establishment: if the legislature creates a substantial burden upon a class of citizens, it may carve out religious exemptions where the burden relates directly to an important aspect of religion.⁹² Once such an exemption has been

89. 252 F. Supp. at 848-50.

90. Some religious activities, such as evangelizing, can appropriately be classified as speech. According to the free speech decisions of the Supreme Court, the first amendment posits an open society with respect to ideas and their advocacy. *Abrams v. United States*, 250 U.S. 616, 630-31 (1919) (Justice Holmes, dissenting); *Whitney v. California*, 274 U.S. 357, 375-77 (1927) (Justice Brandeis, concurring). There is no reason why the expression of emotions and feelings, particularly when occurring in circumscribed groups, should not enjoy the same protected status as political speech. See Emerson, *supra* note 70, at 879-81, 938.

91. Compare *Everson v. Board of Educ.*, 330 U.S. 1 (1947) with *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948).

92. *United States v. Jakobson*, 325 F.2d 409, 414-15 (2d Cir. 1963) (dictum), *aff'd*, 380 U.S. 163 (1965); *School Dist. v. Schempp*, 374 U.S. 203, 226 n.10 (1963) (dictum) (government subsidy of armed-forces chaplains); *State v. Grabinski*, 33 Wash. 2d 603, 206 P.2d 1022 (1949) (Sabbatarian exemption for Sunday closing law). Judicial exceptions resulting from the free exercise clause itself have also been made. See *Sherbert v. Verner*, 374 U.S. 398 (1963) (exception to availability-for-work requirement for state unemployment compensation scheme); *People v. Woody*, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (exception to state narcotics law for peyote worship). Cf. *Pierce v. LaVallee*, 293 F.2d 233 (2d Cir. 1961) (implied recognition of duty of state prison to accommodate religious worship). Giannella, in *The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1389 (1967), argues that the tension between the

created, however, it must be broadly construed so as to include all religions.⁹³

Professor Kurland⁹⁴ contends that government cannot legislatively or judicially confer religious exemptions to general laws which are within the power of the state to enact. The underlying postulate of his devaluation of the free exercise clause is the notion that any form of religious exemption would be a "special privilege" which would violate fundamental canons of equality and neutrality supposedly inherent in the establishment clause.⁹⁵ In my opinion, the Kurland thesis misconceives the reality of the interrelations between religion and the state. Why should religion in some situations merit exemption from state-imposed burdens? The answer, I think, is implicit in all of our previous discussion of religious interests and state power. Religion postulates loyalties to the divinity and to the sect which are, respectively, superordinate to, and competitive with, that owing to the state;⁹⁶ at the same time, religion has the capacity—as shown by the Mormons' abandonment of polygamy in the late nineteenth century—to adapt its ethical practices in response to notions about the proper sphere of secular government. But where the state interferes with the faith, therapy, and worship functions of religion, these built-in priorities cannot be so easily compromised. Yet it is in precisely these areas that government can offer to accommodate religion without having to sacrifice its own secular policies—where the

establishment and free exercise clauses must be resolved in favor of the latter as a matter of principle. See generally P. Kauper, *The Warren Court: Religious Liberty and Church-State Relations*, 67 MICH. L. REV. 269 (1968).

93. *United States v. Seeger*, 380 U.S. 163 (1965). Cf. *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Parker v. C.I.R.*, 365 F.2d 792 (8th Cir. 1966). For a discussion of the diverse theories, see *Seeger v. United States*, 326 F.2d 846 (2d Cir. 1964), *aff'd on other grounds*, 380 U.S. 163 (1965) (impermissible classification); *Pierce v. LaVallee*, 293 F.2d 233 (2d Cir. 1961) (violation of free exercise clause); *Fellowship of Humanity v. County of Alameda*, 153 Cal. App. 2d 673, 315 P.2d 394 (1957) (establishment of preferred sects).

94. *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 4-5, 96 (1961).

95. See *id.* at 26, 96.

If indeed the establishment clause is but the means of attaining the end specified by the free exercise clause, that would seem to cut in favor of a flexible reading of the former in deference to the latter. Actually, the two clauses cannot be so easily reconciled, especially in light of the altered character of federalism and the greater involvement of secular legislation in achieving positive social aims. Hence, it would seem more accurate to recognize the inherent tension between the two clauses, since that would force one to face frankly the question of which is to prevail in particular situations. See Giannella, *supra* note 92, at 1386-90. It is just this inherent conflict between the two clauses which, unhappily, precludes there being a unitary general theory of religion in the Constitution.

96. *United States v. MacIntosh*, 382 U.S. 605, 633-34 (1931) (Chief Justice Hughes, dissenting); *United States v. Kauten*, 133 F.2d 703, 808 (2d Cir. 1943).

religious practices in question are either intrinsically harmless to society or are confined within the sect. Moreover, the public generally does not feel that religious exemptions confer "special privileges"; a basic operative fact about religion—one that is widely understood—is that it imposes severe duties of its own which may more than compensate for any additional freedom granted by an exemption. Finally, religion properly conceived is not something that can be invoked at will, as can free speech; rather, it is a condition defined in terms of status as opposed to situation. Therefore, the free exercise clause need not be relegated to a subordinate role.

b. *Compulsion of action or submission.* In the public health field, the state has an interest in compelling universal action or submission (such as a required vaccination) when it is essential to preserve the life or health of its citizens. Nevertheless, since government compulsion of action or submission touches a sensitive nerve in the American conscience,⁹⁷ the state should be required to satisfy a particularly high burden of justification where the compulsion is contrary to religious tenets—especially when the religious system defines the compelled action as inherently sinful. Here the state's burden can be met only by showing a clear and present danger of some substantial harm to society which is within the state's power to control. Of course, adoption of such a test raises additional questions: What kind of deference is owed to the legislature's determination that danger exists? What are the relevant forms of danger against which the state may act through compulsion? How immediate must the danger be before the state can intervene by this method?⁹⁸

c. *Direct and secondary prohibitions.* The state has a legitimate interest in prohibiting unwanted conduct and in regulating certain other activity in order to encourage socially desirable results. Criminal law embodies society's notions of what would undermine its minimal moral cohesiveness and physical security. Conduct which is viewed as inherently evil (murder, rape, armed robbery, and kid-

97. *Sibbach v. Wilson*, 312 U.S. 1, 17-18 (1941) (Justice Frankfurter, dissenting). See *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Turner v. Turner*, 192 S.2d 787 (Fla. App. Ct.), cert. denied, 201 S.2d 233 (Fla. 1967); cf. *School Dist. v. Schempp*, 374 U.S. 203, 250 (1963) (Justice Brennan, concurring).

98. These last two questions tend to merge into one; the threat of contagious disease is a form of danger against which the state may act through compulsion, even where there is no recent relevant experience with the particular disease. *Wright v. DeWitt School Dist.*, 385 S.W.2d 644 (Ark. 1965). But, the danger must be to society at large. *In re Brooks' Estate*, 32 Ill. 2d 361, 205 N.E.2d 435 (1965). And the danger cannot be merely speculative. *In re Jenison*, 267 Minn. 136, 125 N.W.2d 589, enforcing 375 U.S. 14 (1963) (per curiam).

napping, for example) is directly prohibited. Where the evil is not so grossly offensive and dangerous (and assuming it can be isolated and effectively quarantined), the rationale underlying such prohibitions seems less compelling.

Direct prohibitions should not be confused with secondary prohibitions when criminal sanctions are attached for failure to conform to certain minimal standards of conduct. Cases involving the first amendment often involve such regulatory "crimes"; while the state-regulated activity is not inherently evil, it may cause general and perhaps severe inconvenience to the community because of the manner of its occurrence. For example, the ordinance challenged in *Schneider v. State (Town of Irvington)*⁹⁹ sought to prevent littering of the streets—a desirable social objective. Unfortunately, the state chose as its method of regulation a ban on the distribution of literature; since this amounted to prohibition of an activity protected by the Constitution, the ordinance was invalidated. The accepted rule of decision in controversies involving secondary prohibitions of this type is that the law must be narrowly drawn in respect to the specific evil.¹⁰⁰ It has been suggested that a weighing test be used in those instances where it is difficult to separate speech itself from its harmful incidents.¹⁰¹ But the only thing that is properly "weighed" in such cases is the appropriateness of the *form* of the activity in relation to its *own* inherent purposes.¹⁰² The essence of speech and assembly is that it takes place in public; yet regulation is proper when the speaker deliberately blocks traffic or invades the privacy of the home.¹⁰³ The same is true with religious action: while evangelism would be meaningless if it could not be pursued in public places, there is no compelling reason why a worship service must

99. 308 U.S. 147 (1939).

100. *Cantwell v. Connecticut*, 310 U.S. 296 (1940). Thus, in the situation presented in *Schneider*, the state could have attached sanctions directly to the littering itself, rather than to the distribution of handbills. 308 U.S. at 162.

101. *Kovacs v. Cooper*, 336 U.S. 77 (1949).

102. *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 160-61 (1939).

103. *Kovacs v. Cooper*, 336 U.S. 77 (1949); *Jamison v. Texas*, 318 U.S. 413 (1943); *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 160 (1939) (dictum).

Another way to make this point is to refer to the distinction between speech in its "natural" form and the mechanism of its dissemination. The more traditional the latter, the more it supposedly merges into speech itself. Perhaps this was what Justice Douglas meant in *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943), when he stated that "[t]he hand distribution of religious tracts is an age-old form of missionary evangelism—as old as the history of the printing presses." More "modern" mechanisms, which by their very nature may be more disturbing, are probably also more relevant to contemporary society. Such mechanisms may sometimes involve a captive audience. *Kovacs v. Cooper*, *supra*, at 83, 86-87. See *Trinity Methodist Church v. Federal Radio Commr.*, 62 F.2d 850 (D.C. Cir. 1932) (denial of license of defaming broadcaster).

take place anywhere that the religious group desires.¹⁰⁴ In short, if the public manifestation of religious conviction is logically and traditionally related to protected activity, mere public inconvenience is not a sufficient justification for prohibiting it altogether.

d. *Welfare legislation with indirect effects.* Perhaps the most complex mode of state action is economic or social legislation whose effect on religious freedom is only indirect. Two factors explain this complexity. First, the burden upon religion varies so widely from case to case that no rule of thumb, like those in cases prohibiting a particular practice, could be attempted which would be remotely accurate. Second, the burden does not always focus specifically upon any particular religious practice accurately classifiable as belief, worship, or ethical action, but may cut across all the functional components. Often this kind of legislation forces the religious practitioner to choose between his religion and some natural or state-created benefit that he could otherwise enjoy.¹⁰⁵ The state's concern here is not with any specific evil associated with a particular religious practice but instead with a "positive" good for society in general. Direct and secondary prohibition represents society's underlying consensus of the limits of socially permissible behavior, while social legislation having indirect effects reflects society's particularistic inclination to define the quality of life and to insure that all its members participate therein.

The proper role of the legislature in these cases is to formulate social policy and to balance the goods and evils which may result from its implementation. The exercise of legislative power in this realm should be accorded *prima facie* validity under whatever constitutional authority it is exercisable; it is not the proper function of courts to engage in a balancing process similar to, if not more limited than, that which the legislature has already undertaken. The appropriate judicial test is two-pronged. First, when the "hard choice" for the religious practitioner is the *necessary* consequence of the policy objective advanced by the statute itself, then the legislative scheme should be given a very heavy presumption of validity.¹⁰⁶

104. Compare *Matthews v. Board of Supervisors*, 203 Cal. App. 2d 800, 21 Cal. Rptr. 914 (1962), with *Diocese of Rochester v. Planning Bd.*, 1 N.Y.2d 508, 136 N.E.2d 827, 154 N.Y.S.2d 849 (1956). These and other zoning cases are collected in Fernandez, *Free Exercise of Religion*, 36 S. CAL. L. REV. 546, 586 n.242 (1963). Cf. *Poulos v. New Hampshire*, 345 U.S. 395 (1953).

105. See *Sherbert v. Verner*, 374 U.S. 398 (1963); *Braunfeld v. Brown*, 366 U.S. 599 (1961).

106. *Braunfeld v. Brown*, 366 U.S. 599, 608 (1961), provides, I submit, the perfect illustration of this proposition; one key passage answers petitioner's contention that the state is constitutionally required to provide a Sabbatarian exemption to its

Thus, the burden should be on the religious claimant to show that the preponderant purpose or effect of the legislation is to discriminate for or against some readily cognizable sect; in practice, this could be shown only where the statute explicitly or implicitly uses a religious test.¹⁰⁷ Second, where the claim is made that a scheme can be administered in two or more ways, the burden should be on the state to show that the substantive policy is incapable of implementation by any method of administration which does not impinge upon the religious practice.¹⁰⁸ Using this two-pronged approach, courts would be understandably reluctant to carve out religious exceptions to welfare legislation; since these laws are not drafted in terms of specific religious practices, to create an exception would be directly or indirectly to rewrite their substantive provisions.¹⁰⁹

3. *Physical Harm: Of What and to Whom*

Can physical harm within a religious group be tolerated? This question evokes basic attitudes toward the role of the state with respect to self-degradation, both physical and psychological. On the level of state power, it is said that the first amendment is never an excuse for harmful overt action.¹¹⁰ True as this may be in the political arena where the dissemination of ideas is the instrument

Sunday-closing law: "Thus, reason and experience teach that to permit the exemption might well undermine the State's goal of providing a day that, as best possible, eliminates the atmosphere of commercial noise and activity. Although not dispositive of the issue, enforcement problems would be more difficult [with a Sabbatarian exemption]" In other words, the legislative policy was not simply to provide a day of rest; rather, the objective of having a day of peace and tranquility required that there be *one common* day of rest. *McGowan v. Maryland*, 366 U.S. 420, 450-52 (1961).

Another example is presented by *State v. Garber*, 197 Kan. 567, 419 P.2d 896 (1966), where an Amish parent was convicted for refusing to send his son to a school that qualified under the state education law. Although superficially only the parent's "ethical practice" of sending his child to a nonqualifying Amish school was infringed, what was actually at stake, according to the Amish, was the preservation of their whole way of life. Nevertheless, it is within the power of a state to require a minimum level of education for all. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (dictum). Clearly the predominant intent or effect of the educational requirement was not to outlaw any Amish practice. *Cf. Zorach v. Clauson*, 343 U.S. 306 (1952). Although coercion was involved, that difficulty is resolved under the *parens patriae* doctrine. *State v. Perricone*, 37 N.J. 463, 181 A.2d 751 (1962).

107. See *Torasco v. Watkins*, 367 U.S. 488 (1961).

108. *Sherbert v. Verner*, 374 U.S. 398 (1963). The reason why the exigencies of administration of the government's program command such a low priority is, in brief, that administration is an "executive" and not a "legislative" function; it is merely the "adaptive" subsystem of the political structure in that its main concerns are relevancy, efficiency, and flexibility in respect to some substantive policy, and none of these qualities are necessarily related to the policy itself.

109. See *Board of Educ. v. Barnette*, 319 U.S. 624, 651 (1943) (Justice Frankfurter, dissenting).

110. Emerson, *supra* note 70, at 917.

for achieving desired ends, it is not self-evident in situations where the action itself may be a necessary religious expression of cult goals and values—the harm being confined within the group. It appears that the question of intragroup physical harm has never been squarely confronted in the free exercise area, but the weight of judicial authority, at least by analogy, supports the conclusion that the state can act in such situations.¹¹¹ The view is that physical activity does not cease to be the state's business merely because individuals happen to carry it out within the confines of a well-defined group. Such a view, however, assumes that people form groups for the *purpose* of carrying on harmful activity, while the reality for many religions is just the reverse: it is the religion itself which determines its own values and goals and specifies what action is appropriate to achieve them. To illustrate, suppose that some imaginary nonaddictive but potentially dangerous drug is used as the sacramental medium in a religious rite. Unlike a refusal to accept a life-saving blood transfusion, the consumption of the drug is not a passive act which could be described as simply letting nature take its course. And, although the drug taker wills the act, he does not necessarily will the resulting disability (assuming that it is medically uncertain whether it will occur).¹¹² It is the individual who acts, but it is the group acting collectively to apply social pressure which probably constitutes the dominant motivation to take the drug. Which way does this group pressure cut? It may be that the state should tolerate some room for individual freedom of choice, in which case the boundaries of the religious sect provide a ready-made mechanism for isolating and quarantining an undesirable practice within the group. If, however, the drug is particularly dangerous, the state may have a strong interest in entirely prohibiting group influence which encourages a destructive practice. State legislatures probably have the power to declare anything harmful, even if there is little or no scientific evidence to support such a conclusion.¹¹³ When, however, legislation impinges upon a constitutional area of privacy, mere assertions by the state unfounded in fact need not be

111. In *Lawson v. Commonwealth*, 291 Ky. 437, 164 S.W.2d 972 (1942), the handling of poisonous snakes was held to be within the state's police power, and hence there was no real constitutional issue. And in *People v. Woody*, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964), although peyote taking was upheld, it was found not to cause any physical or moral harm. Finally, in *Reynolds v. United States*, 98 U.S. 145, 163, 165-66 (1878), it was thought that polygamy was harmful not just to the Mormons but also to the general social and political order.

112. In short, assume that consumption of the drug is analogous to smoking cigarettes while knowing that some serious lung disease may result.

113. *People v. Glaser*, 238 Cal. App. 2d 819, 48 Cal. Rptr. 427 (1965).

taken at face value.¹¹⁴ In the public health field, the state need only show that a disease exists in North America and that it is communicable in order to justify compelled action or submission.¹¹⁵ But in the case of sacramental drugs, where the danger of the harm's spreading is a sociocultural rather than a physical phenomenon, the state should have the burden of proving that the likelihood of physiological injury is substantial.¹¹⁶ And if the issue is in doubt, expert scientific and medical testimony can be taken at the trial.

III. APPLICATIONS

As mentioned earlier, the sociological analysis outlined in this Article is capable both of resolving prior decisions in the free exercise area and of clarifying elements that ought to be considered in future cases. Because of the variety of factors involved, I shall not attempt to catalogue all of the abstract rules in all of their possible applications; instead, I will apply selected principles to familiar fact situations in an attempt to illustrate the analytical technique to be employed in all free exercise cases. Of course, the guiding principle is one of *defining interests* on *both* sides of the controversy.

A. Definition of Religion

The threshold question is what constitutes religion for purposes of invoking the free-exercise clause. The first significant judicial attempt to define religion in modern times was made by Chief Justice Hughes: religion is "belief in a relation to God involving duties superior to those arising from any human relation."¹¹⁷ The Second Circuit made the next definitional attempt in construing the phrase "religious training and belief" in the selective service law:

Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellowman and to his universe—a sense common to men in the most primitive and in the most highly civilized societies. It is a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets.¹¹⁸

Another federal court of appeals, however, defined the same phrase

114. See *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

115. *E.g.*, *Wright v. DeWitt*, 238 Ark. 906, 385 S.W.2d 644 (1965).

116. This assumes, of course, a bona fide constitutional claim. *People v. Woody*, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964). There, however, the court did not indicate how much the state must adduce in the way of proof.

117. *United States v. MacIntosh*, 283 U.S. 605, 633-34 (1930) (dissenting opinion).

118. *United States v. Kauten*, 133 F.2d 703, 708 (2d Cir. 1943).

in terms of a relationship with a "Supreme Being,"¹¹⁹ and this requirement was adopted by Congress in subsequent formulations of the selective service law.¹²⁰ Nevertheless, after the Supreme Court had said, in a different context, that it was a violation of the establishment clause for the state to favor religions based upon belief in God over religions founded upon different beliefs,¹²¹ it followed that this construction of the selective service law was unacceptable. A new judicial definition was offered, phrased in terms of the functional importance of the belief to the individual in question: "[T]he test . . . is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."¹²² Thus, many varieties of moral and philosophical tenets may now qualify one for exemption, despite the Court's disclaimer with respect to these as well as political, sociological, and economic beliefs.¹²³ Paradoxically, while the Court rejected a classification based upon the contents of belief, it referred to the latest trends in theology and provided such disparate statements of the core of religion as, "[m]eaning within meaninglessness, the power of Being," and "[d]evotion of man to the highest ideal he can achieve . . . [the] power that inspires moral purpose."¹²⁴

Welcome as this liberalization may be with respect to a legislative exemption from compulsory military service, it must not be adopted for free exercise cases generally. Theoretically, the definition focuses too exclusively upon the individual and the content of his belief and results in a form of cultural relativism in which every belief is its own standard.¹²⁵ Moreover, the definition tends to

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

120. 50 U.S.C. app. § 456(j) (1964). This definition was eliminated in the 1967 amendments to the selective service statute. 50 U.S.C. app. § 456(j) (Supp. III, 1965-1967).

121. *Torcaso v. Watkins*, 367 U.S. 488 (1961).

122. *United States v. Seeger*, 380 U.S. 163, 165-66 (1965).

123. See the facts of the three cases reviewed in *United States v. Seeger*, 380 U.S. 163, 165-69 (1965).

124. *United States v. Seeger*, 380 U.S. 163, 180, 183 (1965).

125. But see Giannella, *The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1423-31 (1967). Professor Giannella, although denying equal standing to practices advancing an individual's psychological or spiritual development, would open the door to those nontheistic manifestations of conscience that are intensely felt, selfless, and based upon humanitarian values. Not only does this position frankly depend on the author's evaluation of good morals and theology, but it also necessitates an inquiry into the claimant's subjective sincerity, and into the question of whether or not his specific nontheistic objection is founded upon "religious" belief. But since (apart from situations where the claimant is a member of a religion in the sociological sense) there is no frame of reference for saying whether or not a belief is founded upon a claimant's religion (except by means of a test of intensity or ultimate concern), the individual could, under such a theory, pretty well write his own ticket.

promote the factor of sincerity—admittedly useful for purposes of determining standing—into substantive doctrine; it is precisely this factor which provides the motivation for exaggerated claims and the mechanism for fraudulent ones. How is a court to decide whether a claimant is sincere in his beliefs, or sincere only in his desire to avoid some secular duty?¹²⁶ Furthermore, to measure the religious claim according to degrees of intensity of individual belief is to rely on a subjective factor which is both practically difficult for the trier of fact and theoretically lacking in the rationality needed to produce a stare decisis effect over time. Under this standard, a court would presumably have to have separate “rules” for individuals of the same religion who hold a particular tenet with varying degrees of intensity. Rather than adhere to such a subjective test, I would agree that, even where sincerity is present, “not . . . any conduct can be made a religious rite and by the zeal of its practitioners swept into the First Amendment.”¹²⁷

I am certainly willing to admit that considerations of personality (commitment, sincerity) and culture (tenets, theology) can be important. Moreover, presumptions favoring sincerity, as well as loose standards for ascertaining the “object” of belief, are useful and proper—although perhaps a requirement that there be a system or hierarchy of beliefs should be added.¹²⁸ But what is ultimately required is a sociological component to the definition of religion. Thus, at a minimum, a religion should have a social structure that extends beyond the individual and his kin.¹²⁹ Moreover, the religious group (and also the particular practice involved) should either have a history of, let us say, more than a generation,¹³⁰ or it should be characterized by a significant, persisting, and organized following of a charismatic leader. Such a leader is defined as one who has had a direct encounter with the divine and has thereafter preached the new power and structure of his faith through both explicit teachings and the force of his personality. Finally, a sect cannot be considered a religion unless some of its behavioral patterns can be characterized as worship or sacrament.

126. Sincerity is sometimes inferred from the claimant's willingness to face the consequences. *In re Jenison*, 265 Minn. 96, 120 N.W.2d 515 (1963). But this may obviously be the result of a utilitarian calculation of the lesser of two evils.

127. *Murdock v. Pennsylvania*, 319 U.S. 105, 109 (1943).

128. This would guard against the possibility of someone claiming that his religion consists of a single belief that just happens to conflict with the law under which he is being prosecuted. See *State v. Bullard*, 267 N.C. 599, 148 S.E.2d 565 (1966).

129. *Fellowship of Humanity v. County of Alameda*, 153 Cal. App. 2d 673, 693, 315 P.2d 395, 406 (1957).

130. See *Murdock v. Pennsylvania*, 319 U.S. 105, 109 (1943); *People v. Mitchell*, 244

This sociological definition of religion establishes the minimum requirements necessary to raise a constitutional issue under the free exercise clause. The definition does not undermine anyone's legitimate rights, and it serves to aid courts both in recognizing genuine interests and in disposing of fraudulent claims by those who seek to excuse unlawful conduct by invoking the free exercise clause. Even a so-called "religion" which turns out to consist entirely of moral tenets would not be significantly worse off than if it had been properly definable as a religion in the first place, since ethical action is the weakest of the religious interests in any event. Furthermore, adherents of a "religion" that does not qualify as such retain the rights of free expression¹³¹ and free association.¹³² Finally, in a very few instances, such persons may be able to argue that their practices are protected under the residual right of privacy.¹³³

B. *The Proof of the Pudding*

In applying the sociological analysis to various familiar fact situations, we shall begin with cases in which the conflict between religious and governmental interests is minimal and then discuss instances where the conflict is more acute. For example, evangelical activity by Jehovah's Witnesses involves religiously motivated ethical action directed toward society in general. Entirely apart from free exercise claims, execution of the divine command to preach in public is a form of activity protected by the free speech and press clauses of the first amendment.¹³⁴ The state may not legitimately prohibit protected religious activity, but may regulate its side effects; the controlling principle is that a regulation, to be valid, must be narrowly drawn to cover a specified social evil. If the objective is to prevent fraud, the state can require disclosure of information;¹³⁵ if the aim is to raise revenue, it can levy a tax on net income or on property;¹³⁶ if the purpose is to defray expenses of providing addi-

Cal. App. 2d 176, 52 Cal. Rptr. 884 (1966); *People v. Woody*, 40 Cal. Rptr. 69, 73, 394 P.2d 813, 817 (1964).

131. *E.g.*, *Schneider v. State (Town of Irvington)*, 308 U.S. 147 (1939).

132. *E.g.*, *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871).

133. *Cf.* *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roberts v. Clement*, 252 F. Supp. 835 (E.D. Tenn. 1966). *But cf.* *People v. Glaser*, 48 Cal. Rptr. 427, 432 (1965) (rejecting a *Griswold*-type argument in respect to private use of marijuana).

134. Fernandez, *The Free Exercise of Religion*, 36 S. CAL. L. REV. 546, 563-66, 581-82 (1963); Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 44-52 (1961).

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

136. *Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943).

tional services necessitated by the particular religious activity, it can scale its tax schedules accordingly.¹³⁷

*United States v. Kissinger*¹³⁸ presented an example of a general law that indirectly impinged upon a person's religious beliefs. There the federal government attempted to collect civil penalties from petitioner for exceeding his wheat quota; petitioner argued unsuccessfully that it was contrary to the Holy Scripture for him to limit his production. Unlike situations presented in the Sunday-closing law cases, Mr. Kissinger was forced to make a choice regarding only an ethical practice, and he made no allegation that submitting to the government regulation would constitute a sin for him. In fact, it is doubtful that the tenet which he invoked was derived from his religion at all; even if it was, his religion probably did not fall within the suggested sociological definition. In any event, it is to be recalled that deference to the legislature is the proper rule where the questioned regulation (wheat quotas) embodies the very policy (limiting wheat marketing) that is the object of the law.¹³⁹

At first glance, *Kissinger* would seem to be indistinguishable from *In re Jenison*¹⁴⁰ in which defendant's refusal to serve on a jury was also motivated by a moral tenet. In *Jenison*, the state employed the sanction of civil contempt in order to effectuate a policy of ensuring a universal supply of jurors. The Minnesota Supreme Court upheld the contempt conviction, but the United States Supreme Court reversed. The *Jenison* case is distinguishable from *Kissinger* on the ground that when the state attempts to *compel* someone to engage in activity—particularly continuing activity—contrary to religious precepts, it is subject to greater limitations than when it passes a general law forbidding certain activity.¹⁴¹ The argument could also be made that the real policy of the state was to achieve a representative, rather than a universal, selection of jurors; thus, the com-

137. *Murdock v. Pennsylvania*, 319 U.S. 105, 113-14 (1943).

138. 250 F.2d 940 (3d Cir. 1958).

139. See text accompanying note 106 *supra*. Incidentally, it was pointed out by the court in *Kissinger* that claimant was hardly prohibited from growing as much wheat as he wanted, but only from selling the excess over the quota. 250 F.2d at 942-43.

140. 265 Minn. 96, 120 N.W.2d 515, *reversed per curiam*, 375 U.S. 14, *enforcing* 267 Minn. 136, 125 N.W.2d 588 (1963). See text accompanying note 38 *supra*.

141. However, if the conscientious objection were solely moral or political, it would yield to the state requirement. In other words, the fact of compulsion is very likely to have severe repercussions in the therapy subsystem. See Supreme Court Note, 79 HARV. L. REV. 105, 115 (1965). Whether this is the case should be ascertained by the trial court. I cannot agree, therefore, with the proposition put forth by Fernandez, *supra* note 134, at 565-66, that the free exercise clause, outside of worship and sacrament, is merely an embodiment of the equal protection notion.

pulsory feature was merely one possible mechanism of judicial administration.

The state can demonstrate a more compelling interest in a case like *People v. Woodruff*.¹⁴² There a contempt conviction was upheld against a woman who refused to testify before a grand jury concerning an alleged violation of the state narcotics law on the ground that her Hindu belief prohibited her from doing anything which might harm others. Here, as in *Jenison*, an ethical tenet was set off against a penalty narrowly drawn to effectuate its goal. This time, however, the element of compulsion was legitimized by the integral part which grand jury evidence played in the state scheme for controlling crime; the appropriateness of the contempt conviction derived from the fact that the state needed *this* particular individual for her intimate acquaintance with the relevant facts. *In re Jenison*, on the other hand, parallels conscientious objection to military service:¹⁴³ in theory, the draft system needs everybody, but in reality it does not—as presently constituted—require those few individuals with religious objections.

*Sherbert v. Verner*¹⁴⁴ resembles *In re Jenison* in that a universal law relating to the execution of governmental policy was involved in both cases. But since *Sherbert* presented no problem of physical coercion, it might seem that the state interest should have prevailed. Of course, it can be argued that *Sherbert* involved an impingement upon worship as opposed to ethical tenets, but that was also true in the Sunday-closing law case.¹⁴⁵ In any event, the teaching of *Sherbert* is to be found in an analysis of the word "administration." In the *Jenison* case, the goal of the state was to provide a proper jury. In *Braunfeld v. Brown*,¹⁴⁶ the legislation to enforce Sunday closing aimed at ensuring *one* uniform day of rest. In the latter two cases, it would have been incorrect to characterize the regulations as merely administrative because the governmental policies were embodied in the very provisions that were violated by the religious claimants.¹⁴⁷ *Sherbert*, on the other hand, involved "administra-

142. 26 App. Div. 2d 236, 272 N.Y.S.2d 786 (1966). See text accompanying notes 35-37 *supra*.

143. The Minnesota Supreme Court thought so too, but in a different sense, *i.e.*, they compared jury duty with the duty to bear arms, and came to the opposite conclusion than the one proposed here. 265 Minn. at 99, 120 N.W.2d at 518-19. Incidentally, I do think there is a constitutional requirement of a religious-objector exemption to the draft. See note 141 *supra*.

144. 374 U.S. 398 (1963). See note 106 *supra* and text accompanying note 27 *supra*.

145. *McGowan v. Maryland*, 366 U.S. 420 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961).

146. 366 U.S. 599 (1961). See text accompanying note 26 *supra*.

147. This is a difficult notion to grasp, partly because such words as "policy,"

tion" in its stricter meaning: administration of a scheme to confer the specified benefits.

Functionally speaking, administration is the political system's analogue to ethical action in the religious system: the criteria for this form of "adaptation" are again such neutral norms as "suitability," "efficiency," and "flexibility." For example, in *Sherbert* the South Carolina Employment Security Commission decided that petitioner's unavailability for Saturday work on religious grounds triggered that provision of the unemployment compensation law which disqualified workers who failed to accept suitable jobs when offered. It is conceded that the state's policy can be defined in terms of a class eligible for the benefits it bestows,¹⁴⁸ but for that classification to prevail over a first amendment claim it must logically relate to the statute's goal in the narrow sense. It would be logical for South Carolina to withhold benefits from nonproductive members of society—those who are unwilling to work at all—since the purpose of an unemployment compensation scheme is to provide funds in lieu of wages when workers unexpectedly lose their jobs and must seek other employment. But on the facts of *Sherbert*, the state did not contend that petitioner failed to come within the scope and intent of the statute; rather, the claim was that if she were allowed to collect while remaining idle, the door would be open to fraudulent claims which would both deplete the state's funds and discourage employers from scheduling Saturday work. Yet the policy of providing unemployment benefits was neither to prevent fraud nor to influence businessmen to decide what days to remain open. Thus, the justification for depriving petitioner of her benefits was purely administrative: to conserve and allocate resources in order to achieve the policy of the statute. The state had no necessary commitment

"purpose," "goal," "object," and "aim" have a dual meaning. On the one hand, they refer to "ultimate ends" definable in terms of health, welfare, and so on (e.g., "to further the health and productivity of workers"); on the other hand, they refer to immediate goals *definable only by a tautological statement* incorporating the terms of the statute (e.g., "the 'goal' of unemployment compensation is to provide funds for workers who are unemployed"). We use these words only in the latter sense. To do otherwise would be to open the door to justification of requirements totally unrelated to the statute except by an upwards leap to superordinate ultimate goals. To wit, "Since the purpose of Sunday-closing laws is to help produce more efficient workers, a relevant way of administering this policy would be to require all laborers to attend trade school for four hours on Sunday morning." I do not imply an answer to the problem of whether or not the state has power to enact such provisions in general, but only that they would not be upheld under the *Braunfeld* principle against attack under the free exercise clause.

148. *Flemming v. Nestor*, 363 U.S. 603 (1960) (nonavailability of Social Security benefits).

to any particular means of coping with problems incidental to the achievement of its policy. This explains why it is reasonable in cases involving "administration" to require the state to "demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."¹⁴⁹ It is not enough for the state to show that the questioned regulation is the most efficient way of administering the statutory policy; it must prove that *no* other reasonable method is available that would be likely to effectuate that policy.

Turning to the criminal law, *prima facie* the state interest in prohibiting acts generally considered to be evil in themselves outweighs the religious interest in ethical action; this may not be the case, however, if the practice is worship or sacrament and clearly confined within an established and well-defined sect. Accordingly, *Reynolds v. United States*,¹⁵⁰ declaring polygamy unlawful, was rightly decided. "Polygamy, although a basic tenet of theology of Mormonism, is not essential to the practice of the religion."¹⁵¹ Rather, the moral tenet only motivated action toward other human beings, who—though they may have been conditioned to accept their fate—were relegated to such a status of inferiority that the state might well have anticipated harmful effects to the social and political spheres of the Mormon community.¹⁵² Moreover, since the state does not approve of polygamy as a status, an argument premised on *Griswold* is thereby undercut; the concern of bigamy laws is not with the acts within the family unit but rather with the legitimacy of the status itself.

Handling poisonous snakes is a primitive practice of a religion which, taken as a whole, probably cannot be considered to be primitive. While the practice appears to be ritualistic, the ethical aspect is equally prominent: it is a form of evangelism in which the believers' power of faith is demonstrated to an audience in order to induce them to become true believers. Although some precautions are taken to prevent the snakes from escaping into the crowd, these protections are often insufficient to preclude potential danger.¹⁵³ Therefore, the state is justified in prohibiting the ethical practice in order to eliminate the danger.

Fortunetelling must similarly be classified as an ethical practice

149. *Sherbert v. Verner*, 374 U.S. 398, 407, 410 (1962).

150. 98 U.S. 145 (1878).

151. *People v. Woody*, 40 Cal. Rptr. 69, 76, 394 P.2d 813, 820 (1964).

152. *See Reynolds v. United States*, 98 U.S. 145, 165-66 (1878).

153. *Harden v. State*, 188 Tenn. 17, 216 S.W.2d 708 (1948).

insofar as it relates to the external environment and is practiced upon people who are not cult members, even though they may believe in it. Moreover, to the extent that fortunetellers customarily ply their trade individually, they may not act in a religious capacity. In any case, the state interest is not to interdict actions causing physical injury, but merely to protect people from their own gullibility.¹⁵⁴ Thus, it is not necessary to prohibit fortunetelling under all circumstances, but only when it is done for a fee.¹⁵⁵ The Supreme Court has often supported efforts to isolate commercial exploitation conducted under the guise of some alleged first amendment right.¹⁵⁶ On the other hand, state statutes have consistently been construed not to ban séances, particularly if they take place in "church."¹⁵⁷ The location of the séance need not itself be decisive, however, since wherever conducted the practice can be characterized as worship with strong overtones of communion. Although pecuniary exaction may be involved here as well, it is not for the purpose of commercial gain.¹⁵⁸ Even if the state did consider séances to be morally harmful, it has a rather weak interest in preventing such intragroup activity.

Another contemporary problem arises when a court is called upon to direct a compulsory blood transfusion to an adult in order to save his life. In such situations, a court is neither invoking criminal law nor suppressing worship. If a policy approach to balancing is used, it is tempting to say that the strong state interest in preserving the life of its citizens should prevail. Under a closer analysis, however, the answer is not so simple. Jehovah's Witnesses regard themselves as under a divine command neither to give nor to receive blood transfusions. This is premised on the belief that "[t]he blood is the soul" (Deuteronomy 12:33) and that "[w]e cannot drain from our body part of that blood, which represents our life, and still love God with our whole soul, because we have taken away part of 'our soul—our blood—' and given it to someone else."¹⁵⁹ This prohibition is an

154. See *United States v. Ballard*, 322 U.S. 78, 93 (1944) (Justice Jackson, dissenting).

155. E.g., *State v. Neitzel*, 69 Wash. 567, 125 P. 939 (1912).

156. *Ginzburg v. United States*, 383 U.S. 463 (1966); *Valentine v. Chrestensen*, 316 U.S. 52 (1942). This line was also pursued briefly in respect to the Jehovah's Witness penchant of asking for money when distributing their religious tracts. *Jones v. City of Opelika*, 316 U.S. 584 (1942), *vacated*, 319 U.S. 103 (1943).

157. *Dill v. Hamilton*, 137 Neb. 723, 291 N.W. 62 (1940); *State v. Delaney*, 1 N.J. Misc. 619, 122 A. 890 (1923).

158. This can be compared with passing the collection plate, an analogy which was incorrectly applied to evangelism in *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943). The consent to pay should be pre-existing, not the result of an on-the-spot sales pitch.

159. From, BLOOD, MEDICINE, AND THE LAW OF GOD, quoted in *In re Brooks' Estate*, 32 Ill. 2d 361, 205 N.E.2d 435 (1965) (excerpted).

ethical tenet insofar as it is a universal norm prohibiting action in the external environment. That interpretation is supported by the seeming historical and sociological origins of the command: it appears to be directed against cannibalism and animal sacrifice, a crucial focus in the differentiation of ethical monotheism away from idolatry and primitive notions of magic. At the same time the quoted Biblical passages seem to have no bearing at all upon blood transfusion; in fact, the Jehovah's Witnesses' doctrine gives the appearance of being a tragic theological mistake. This illustrates an important point made earlier about ethical practice: it should not be difficult for a religion faced with current pressures from the external environment to reinterpret its ethical tenets without in any way altering the fundamental faith or mode of worship.

But our analysis of the religious interest does not end here. The moral tenet involved in refusing a blood transfusion is unique because of its necessary implications for the therapy function of religion. Most moral transgressions involve a sin against God, but the sinner may receive forgiveness if he is later truly penitent. No such mechanism is available to a Jehovah's Witness who receives a blood transfusion—even if his conscience has remained pure—because it is the very condition or status of having alien blood ("soul") in his body that creates a permanent alienation from God. This conclusion is not totally free from doubt; indeed, it may be only the act of exchanging blood that is sinful, rather than the resulting status. This was hinted at in *Application of the President and Directors of Georgetown College*,¹⁶⁰ where petitioner argued that, if responsibility for the transfusion would be accepted completely by the judge and the hospital, the matter would be so far out of her hands that she would not be accountable to God for her act. But that attitude may not have been representative of her faith; the judge himself was apprehensive that the mounting pressure of the situation in the hospital may have caused her convictions to waver.¹⁶¹ In the future, this issue should be explicitly decided with the aid of "expert" testimony by leading Jehovah's Witnesses learned in that sect's doctrine of sin.

If the religious interest in refusing a blood transfusion is greater than at first appeared, the interest of the state is somewhat less compelling. Where there are no public side effects, passive suicide

160. 331 F.2d 1000, 1007-09, *petition for rehearing en banc denied*, 331 F.2d 1010 (D.C. Cir.), *cert. denied sub nom*, Jones v. President & Directors of Georgetown College, 377 U.S. 978 (1964).

161. 331 F.2d at 1007. If this is so, her sin might have been even greater to have so ignored the prescription of her sect.

is of little concern to the state. The court in *In re Brooks' Estate*¹⁶² agreed with this proposition; not only does a patient's refusal to accept a blood transfusion involve no danger to other members of the community, but to hold otherwise would entail the conclusion that the individual has ultimate value only as a cog in the state machine. "In the final analysis, what has happened here involves a judicial attempt to decide what course of action is best for a particular individual, notwithstanding that individual's contrary views based upon religious convictions."¹⁶³ In a different context, Justice Brennan stated, "But we must not confuse the issue of governmental power to regulate or prohibit conduct motivated by religious beliefs with the quite different problem of governmental authority to compel behavior offensive to religious beliefs."¹⁶⁴ Accordingly, in order to justify a compelled blood transfusion, the state should show a clear and present danger of some substantive evil to society; it should not be able to meet this burden merely by pointing to a law against attempted suicide.¹⁶⁵ On the other hand, cases in which the believer directly or indirectly attempts to make the life or death decision for someone else—an infant or an unborn child—can be easily distinguished.¹⁶⁶ But should the fact that a dying parent has minor children also be sufficient to uphold state action compelling a transfusion? Following the principle that the state may compel action contrary to religious belief only when *substantial* harm to others is threatened, I would distinguish between the case of very young children for whom loss of the mother would be likely to result in severe emotional and psychological strain, and the case of older children for whom the father, school, and peer groups could provide an adequate substitute.¹⁶⁷ Expert testimony from psychologists would be helpful in drawing the line.

A particularly acute confrontation between strong interests of religion and the state would occur where drugs, whose possession or use is prohibited by the criminal law, are employed for worship and

162. 32 Ill. 2d 361, 205 N.E.2d 435 (1965).

163. 32 Ill. 2d at 373, 205 N.E.2d at 442.

164. *School Dist. v. Schempp*, 374 U.S. 203, 250 (1963) (concurring opinion).

165. *But see* Recent Development, *Authorization of Involuntary Blood Transfusion for Adult Jehovah's Witness Held Unconstitutional*, 64 MICH. L. REV. 554 (1966).

166. *See* *Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson*, 42 N.J. 421, 201 A.2d 537, *cert. denied*, 377 U.S. 985 (1964); *State v. Perricone*, 37 N.J. 463, 181 A.2d 751, *cert. denied*, 371 U.S. 890 (1962).

167. In *Application of Georgetown Hosp.*, 331 F.2d 1000 (1964), the mother, significantly, did have an infant only seven months old. *See also* Comment, *Unauthorized Rendition of Lifesaving Medical Treatment*, 53 CALIF. L. REV. 860 (1966).

sacramental purposes. Fortunately for judges, many possible claims can be disposed of prior to a test on the merits. First, the defendant in a drug prosecution may lack standing to make a free exercise claim either because he does not belong to a group qualifying as a religion under the comprehensive definition set forth above, or because of a lack of sincere commitment to the sect. It would not be sufficient for the claimant to assert that the group has some doctrinal connection with a traditional religion such as Buddhism; rather, the practice of using drugs itself must have historical antecedents or be instituted by a charismatic religious leader. Moreover, there should be direct personal contact at some point in time between the alleged sect member and the historical movement he claims to be part of. For example, one should not qualify as a member of the Native American Church (Indian peyote worship) just because he has read about it and has decided that some of its practices or ideas appeal to him; the situation would be different, however, should he enter a monastery or Indian reservation and undergo the total discipline of the church. Since the rationale for giving a preferred position to religion relates largely to its character as a status or obligation to which one is more or less permanently committed, it follows that if a person is able to turn his commitment on and off at will, he will be in a lesser position to claim special treatment. Thus, an isolated individual formally unrelated to any church or sect cannot achieve an exemption from narcotics laws just because he "believes in" taking drugs and can quote authority for his belief.¹⁶⁸

The second condition for weighing the religious interest against the state interest in controlling narcotics is that the use of the drug should be confined to worship—preferably as a sacramental medium. Even if a claimant belongs to a church that uses drugs in this manner, he is clearly not protected if he should be apprehended at home in possession of narcotics.¹⁶⁹ To hold otherwise would be to open up the possibility of using nominal religious affiliation to evade the narcotics laws.

Finally, where drug consumption is part of worship, the ceremony must be scrutinized closely to determine whether its predominant

168. *People v. Mitchell*, 244 Cal. App. 2d 176, 52 Cal. Rptr. 884 (1966).

169. *See State v. Bullard*, 267 N.C. 599, 148 S.E.2d 565 (1966). But, in *In re Grady*, 61 Cal. 2d 887, 394 P.2d 728, 39 Cal. Rptr. 912 (1964), a defendant convicted for possession of narcotics in his house was granted a new trial on the issue of whether or not he actually engaged in good faith in the practice of his religion. However, other people were seen going in and out of his house, so that an inference could be drawn that a religious meeting took place there.

purpose is ritual. If the emphasis is either upon heightened perception and awareness of the physical environment, or upon feelings of benevolence and good will toward one's friends, then the practice cannot qualify as worship. In the leading case in this area, *People v. Woody*,¹⁷⁰ these phenomena were present, but they were considered by members of the Native American Church to be secondary to the primary functions of peyote—an object of worship and a sacramental medium. The California Supreme Court held that the state narcotics law could not constitutionally be applied to penalize the use of peyote as a part of the Indians' religious ceremony.

It might be objected that this reliance upon sacrament and worship leaves in doubt the status of the mystic—one who communes directly with the Deity. Unfortunately, there is no way for a court to determine whether a given individual is capable of communicating directly with God; to accept assertions of this capacity at face value would again invite wide-ranging evasion of the law. If the mystic has a significant following, perhaps he could qualify as a charismatic religious leader. In any event, the narcotics laws do not prohibit mystical experiences as such, but only their inducement by artificial means.

When the drug-taking ceremony does qualify as worship or sacrament, application of the narcotics laws would destroy the substance of the religion; therefore, in order to override the strong religious interest, the policy and scientific foundations for application of the criminal law should be very compelling. Peyote has hallucinatory effects lasting about twelve hours and sometimes causes acute anxiety, but its symptoms are not permanent and it is non-addictive.¹⁷¹ Here, the state interest is probably not strong enough to prohibit use of the drug. If the state cannot ban the use of peyote in a religious service, a fortiori it cannot prohibit the use of marijuana for the same purpose; the effects of marijuana are of short duration, and it seldom results in aggressive or antisocial behavior. Moreover, the causal connection between taking marijuana and subsequently taking physiologically injurious drugs, such as heroin, has not been proved.¹⁷² LSD, although also nonaddictive, is much more potent in its "severe untoward psychological effects," with symptoms resem-

170. 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

171. Jarvik, *Drugs Used in Treatment of Psychiatric Disorders*, in L. GOODMAN & A. GILMAN, *THE PHARMACOLOGICAL BASIS OF THERAPEUTICS* 189, 205 (1965).

172. Jaffe, *Drug Addiction and Drug Abuse*, in L. GOODMAN & A. GILMAN, *supra* note 171, at 208.

bling schizophrenia which cannot be predicted in advance.¹⁷³ Arguably, an individual should be allowed to play this form of Russian roulette, particularly if consumption is part of a religious service. However, LSD not only has severe psychological and physiological effects long after it has left the blood stream, but it also may seriously impair the person's ability to make rational decisions many weeks after he has taken one dose.¹⁷⁴ There is also some evidence that the "religious experience" effect of LSD does not lead to genuine religion, since it fails to produce "a continuing pattern of discipline."¹⁷⁵ For these reasons, LSD can be constitutionally withheld from religious use.¹⁷⁶

IV. CONCLUSION

The main concern of this Article has been the formulation of a workable theory for assessing free exercise claims—a theory that depends upon the process of defining the interests involved in a given case in terms of formal categories of general applicability which posit their respective "weights" largely without reference to policy preferences. But why, one may ask, is it necessary to put so much weight upon sociological theory, particularly when the more "enlightened" trend in contemporary religious thought is toward reliance upon individual conscience and humanism rather than transcendentalism, superstition, and church-prescribed dogma? Should not some weight be given to conscientious objections to civil and criminal laws based upon personal natural theology intensely held, particularly if based upon unselfish and humanitarian universalistic values? Under such a test, the court would go beyond merely inquiring into sincerity as a means of assessing standing but rather would seek to determine if failure to sustain the conscientious

173. Jarvik, *supra* note 171, at 208.

174. Farnsworth & Prout, HARVARD UNIVERSITY HEALTH SERVICES REPORT ON DRUGS (1967).

In any event, it does not seem likely that cases involving LSD or other more harmful drugs will arise; not only will the "sect" probably fail to qualify as a "religion" under the definition proposed in this Article, but also few genuine religions founded upon such patently self-destructive practices will be able to maintain their identity as a group for extended periods of time.

175. Professor Huston Smith of M.I.T., *The Boston Globe*, April 20, 1967, at 12.

176. However, where marijuana is involved, the state interest is so weak that even a lesser religious interest might prevail. *See In re Grady*, 61 Cal. 2d 887, 394 P.2d 728, 39 Cal. Rptr. 912 (1964). In such a case, the state is in effect prohibiting the consumption of "evil" sensations. The analogy with developments in the law in respect to obscenity and morals is compelling.

objection would result in a fundamental sense of alienation—analogue to sin—from one's very being.¹⁷⁷

There are several theoretical and practical difficulties with such a construction of the free exercise clause. First, the fundamental sense of guilt or alienation referred to would probably arise only in those few cases where the individual was compelled to act or acquiesce over a considerable span of time in a way which would substantially affect his present and future life. But one in such a position can avail himself of a therapeutic remedy simply by being true to his conscience. A member of a religious group may, it is true, have available the same mechanism of therapy, but the source of the mechanism lies in an authority which *competes* with government at the visible level of structure and worldly action. In short, there is a certain logic in the thought that the Framers set aside an area for that which is, as practiced, on the *same* level as government and which is therefore necessarily competitive with it. To have based the exemption instead directly upon the source of religious authority, whether it be God or personal conscience, would have been to posit a superior-inferior relationship between the individual and government which could be invoked by anybody with sufficiently strong convictions. The result would be that governmental authority *would be potentially threatened at all points and at all times*. An exemption socially determined, on the other hand, would be limited, easy to ascertain, and designed to avoid random conflicts between the individual and authority which could ultimately result in political conflict.

Second, the psychological examination of the individual necessitated by the personal-conscience approach would be susceptible to attempts at deception. As a matter of practice, such an approach would entail reliance upon finders of fact in an area where "fact" is an illusory concept; the fact finders would undoubtedly be prejudiced by their feelings about the religious tenet invoked or the policy embodied in the law sought to be enforced.

Nevertheless, the criticism of a sociological approach to the free exercise clause based upon the notion that it embodies an outdated dependence upon organized and superstitious religions has a certain rhetorical point. I can only repeat that, given our philosophy that government has only those powers delegated to it by the people, it

177. Giannella, *The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1426, 1428-29 (1967).

was thought that in establishing the rules of the political process, a further disengagement had to be made respecting the one realm in man's experience which was competitive with government in its structure and in its claims to loyalty and obedience. Religion, like government, was usually practiced within social organizations which prescribed discipline and duty for their members. Moreover, the very multiplicity of sects and denominations in early America tended to make religious practices self-contained. Above all, the drafters may have thought a clause protecting religious free exercise would pose no danger to government because religion did not really have much to do with real life but only with speculation about the nature of the Universe and of God. To the extent that this assumption has proven unfounded in the light of new trends in theology and religious practice, it must be confessed that the free exercise clause is so much of an historical anomaly. Unfortunately, a resolution in favor of accommodating individuals who object to government regulation on the basis of their own consciences cannot properly be obtained under the free exercise clause itself; the adoption of that doctrine would have such a fundamental impact upon the structure of duly constituted governmental authority that a constitutional amendment would, I think, be required.

Nevertheless, some positive, if less radical, benefits have accrued from the analysis offered in this Article. For one, most of the past decisions are supported by the principles elaborated herein. Moreover, the ability to distinguish among ethical action, worship, or sacrament, or among the various modes of governmental action, does not require a great deal of expertise in sociology on the part of judges and lawyers. Indeed, simply uncovering such a multiplicity of factors and assumptions should promote more searching analyses of first amendment problems generally. Finally, in respect to the problem of religion specifically, I have intended this Article to go beyond mere attempts to formulate legal doctrine. When I have spoken of the interests of religion as being opposed to the interests of the state, I have actually been referring to an intertwined complexity—a process of interaction. However one may feel about whether religion or the state should triumph in a given case, he should take note of the dominant characteristic of the American system: that religion and the state, despite any conflict between their ultimate loyalties, have been able to adjust to each other. In those few situations where there is potential for a serious clash, both religion and government have shown the capacity to recognize priorities of interest and to make

concessions. Of course, the establishment clause also serves an important function by helping to keep potential controversies involving religion out of the political arena, where heated passions and demagoguery could only operate to obscure the nature of the interests at stake. All of these factors have combined to provide what has been a remarkably satisfactory mechanism for dealing with problems posed by the citizen's dual allegiance to religion and the state.