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Moral v. Immoral: Where Do Criminal Actions or Omissions Warrant a Free Exercise Exemption

Carver Martinez

INTRODUCTION

The First Amendment of the United States Constitution offers some of the most bedrock freedoms for today's society. The Religion Clauses prohibit Congress from enacting any laws that establish a religion or abridge the free exercise of religion; these are known as the "Establishment Clause" and the "Free Exercise Clause."[1] The Free Exercise Clause has been interpreted to apply in myriad contexts--including where religious actors have been criminally prosecuted.

Imagine for a second that an individual finds themselves in a predicament: they live along the southern border of the United States and as part of their way of helping out, they leave water and supplies out for migrant travelers. This individual also happens to assist migrant workers in a personal capacity by providing shelter and first aid amongst other things. Now picture that the individual is doing all this out of the kindness of their heart, and their humanitarian actions are rooted in and motivated by religious beliefs. Finally, envision that this person is arrested by border control and charged by the government for the assistance that they have been providing.

The above scenario is all too familiar to Scott Warren, a humanitarian aid worker based in southern Arizona, who was arrested in January of 2018 for the assistance he provided to migrant workers trying to cross into the United States.[2] Mr. Warren's situation is nothing new and embodies the issues that arise when one's free exercise rights come against the barrier that is government's criminal laws. Such a clash raises a host of issues, including whether an individual should be punished or exempted when their actions violate an applicable criminal

[1] U.S CONST. amend. I, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…"

[2] Jasmine Aguilera, *Humanitarian Scott Warren Found Not Guilty After Retrial for Helping Migrants at Mexican Border*, TIME, Nov. 20, 2019.

statute and what sort of standard should be used by courts when analyzing these types of free exercise cases.

Throughout the case law we have seen the Supreme Court approach the above issues with two differing approaches. In some instances a categorical rule is used in which actions are subject to general and applicable laws; on the other side a compelling interest test is used in which a court must balance a compelling government interest against the religious burden upon an individual.[3] This paper will take the reader through the history of free exercise claims that involve criminal acts by individuals or groups. There will be instances when it is clear, no matter the test applied, that a religious exemption should not be granted. In other instances the picture may be slightly murkier, and the ultimate outcome may be determined by a court's chosen approach. I believe that the prevailing test should be the compelling interest test because it offers the best chance for an individual to receive an exemption through the balancing process a court conducts.

Below I will discuss the case law and secondary materials, and what they have said when it comes to an individual attempting to use the free exercise rights as a defense. Additionally, a look at how the courts standard has evolved over the history of free exercise claims will be discussed. Section I will lay out the constitutional framework; Section II will discuss when a religious act is criminal; and finally, Section III will discuss when a religiously-motivated act in certain contexts is criminal.

I. CONSTITUTIONAL FRAMEWORK

When it comes to the free exercise rights, and its usage as a defense in criminal prosecution, the Supreme Court has dealt with a tension between two approaches. In the very

[3] Employment Division v. Smith, 494 U.S. 872 (1990) (A categorical rule should apply); Sherbert v. Verner, 374 U.S. 398 (1963) (A balancing test should apply).

early cases that the Supreme court addressed, it took a categorical approach that did not allow for exemptions if a criminal statute was general in its applicability.[4] Following these cases though, in the early to mid-twentieth century, the Court began to shift towards a compelling interest standard that set out a balancing test between religious burden and government interest to determine if there was a free exercise violation.[5] This standard continued to control Supreme Court analysis up until the *Employment Division v. Smith* decision, in which the Court reverted back to the categorical approach for any law that was facially neutral and generally applicable.[6] Following this landmark decision Congress enacted the Religious Freedom Restoration Act (RFRA) in 1993, re-establishing the compelling interest test that was originally set out in *Sherbert v. Verner* and *Wisconsin v. Yoder*.[7] Questions remain on which standard should apply, as *Smith* still controls when a law is facially neutral and generally applicable, but courts continue to apply strict scrutiny in many situations. Below I will address the early polygamy cases, the shift towards a compelling interest standard, and a shift back towards the categorical approach, along with a "reassertion" of the compelling interest test.

A. The Early Polygamy Cases

The Supreme Court initially addressed the issue of whether the free exercise rights can be used as a defense when violating a criminal statute in the case of *Reynolds v. United States* where the plaintiff was found in violation of the Territory of Utah's bigamy statute.[8] The plaintiff established during the trial that they were part of the Mormon Church and part of their religion

[4] Reynolds v. United States, 98 U.S. 145 (1878).
[5] Cantwell v. Connecticut, 310 U.S. 296 (1940); *Sherbert*, 374 U.S. at 398.
[6] *Smith*, 494 U.S. at 872 (Stating that there was no free exercise violation because the law in question was facially neutral and generally applicable).
[7] 42 U.S.C. §§2000bb-bb4 (Restoring the compelling interest standard of *Sherbert*, 374 U.S. at 398 and Wisconsin v. Yoder, 406 U.S. 205 (1972)).
[8] *Reynolds*, 98 U.S. at 145.

involved the active practice of polygamy.[9] They specifically cited doctrines of their religion allowing the practice of polygamy, and proved at trial that they had received approval from the necessary authority figure in their church to enter into a polygamous marriage.[10] After the plaintiff provided these pieces of evidence, they asked the lower court to instruct the jury that if found that the plaintiff entered into a polygamous marriage pursuant to their religiously held beliefs, then the verdict must be not guilty.[11] The instruction was not given, and the conviction was appealed to the Supreme Court; the Court ultimately determined that the federal statute against bigamy and polygamy did not violate the plaintiff's free exercise rights.[12] In its reasoning, the Court first noted that this statute was well within the legislative power of Congress to enact because the statute applied to everyone residing within the territory and any other place the United States had exclusive control over.[13] The Court then stated that if it were to exempt the plaintiff, and anyone who practiced polygamy as part of their religion from this statute, it would effectively introduce a new element into criminal law.[14] In making this point, the Supreme Court looked to the intent element in criminal law and pointed out that this statute was clear that plural marriages were not allowed, the plaintiff was aware that their second marriage was in violation of this law, and thus their intent was to break the law.[15] The plaintiff knowingly committed every element of the crime and thus their only defense was their religious belief; the Court stated that although this belief was part of the plaintiff's religion, it was still only a belief.[16]

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[9] *Id*. at 161.
[10] *Id*.
[11] *Id*. at 161-162.
[12] *Id*. at 166-167.
[13] *Id*. at 166.
[14] *Id*.
[15] *Id*. at 167.
[16] *Id*.

Similarly, the appellant in *Davis v. Beason* was also a member of the Mormon Church and practiced polygamy as part of their religion.[17] The appellant was found in violation of two Idaho statutes, one that barred the practice of bigamy and polygamy, and another which required voters within the state to swear that they did not belong to an organization or group that practiced bigamy or polygamy.[18] On appeal to the Supreme Court, the Court addressed the issue of whether the district court had jurisdiction in this case; in determining this issue, the Court once again visited whether the applicable criminal statutes violate the appellant's free exercise rights.[19] In its examination of the Idaho statutes, the Court determined that the statute preventing certain individuals from voting was not open to any constitutional or legal objections.[20] The Court reasoned that this statute prohibits voting for individuals who have been convicted of certain crimes and those who not only advocated for a resistance to laws of the territory, but who also approved of the commission of crimes forbidden by the territory.[21] Additionally, in its reasoning, the Court quoted *Reynolds*, reiterating the principles there that the laws in question were of general applicability, and to excuse a person's practices because of their religious belief would put religious doctrine above the law.[22]

As seen through these early cases, the Court determined the laws are generally applicable to the territories of the United States as a whole, and it did not matter that the actions were considered tenets of the Mormon belief as the practice of bigamy and polygamy was illegal conduct for anyone to commit.[23]

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[17] Davis v. Beason, 133 U.S. 333, 341 (1890).
[18] *Davis*, 133 U.S. at 346-347.
[19] *Id*. at 341.
[20] *Id*. at 347.
[21] *Id*.
[22] *Id*. at 344.
[23] *Reynolds*, 98 U.S. at 167.

B. A Shift Towards a Compelling Interest Test

Following the early polygamy cases, the Supreme Court continued addressing the issue of whether free exercise rights provided an applicable defense for violating a criminal statute. It specifically began to address public disturbance cases like *Cantwell v. Connecticut*, as well as child safety cases like *Prince v. Massachusetts*.[24]

Beginning in 1940, the Supreme Court addressed a free exercise claim made by the appellants in *Cantwell* in relation to their violation of a solicitation statute within Connecticut, as well a breach of peace charge. The appellant and his two sons were handing out religious pamphlets and playing recordings talking about each pamphlet in New Haven, Connecticut as this is how Jehovah's Witnesses practiced their religion; they were arrested, charged, and convicted under a Connecticut state statute prohibiting solicitation, as well as for the breach of peace.[25] The statute itself had specific language that noted that no one could solicit money or support for religious purposes, unless there was prior approval in the form of a certificate from the secretary of public welfare.[26] The Supreme Court held that the state statute did abridge the appellants' free exercise.[27] In first addressing the statute, the Court noted that the general regulation against solicitation which did not involve a religious test was not open for any constitutional challenge.[28] However, the Supreme Court pointed to the fact that a certificate is needed before solicitation can occur, with approval coming from the state secretary of the public

[24] *Cantwell*, 310 at 296; Prince v. Massachusetts, 321 U.S. 158 (1944).
[25] *Cantwell*, 310 U.S. at 300.
[26] *Id*. at 301-302 ("No person shall solicit money, services, subscriptions or any valuable thing for any alleged religious, charitable or philanthropic cause, from other than a member of the organization for whose benefit such person is soliciting or within the county in which such person or organization is located unless such cause shall have been approved by the secretary of the public welfare council…).
[27] *Id*. at 305.
[28] *Id*.

welfare council.[29] Particularly, the Court took issue with the fact that the secretary had the full power to determine if the solicitation was for a religious reason or not and had the full authorization to withhold a certificate if they deemed a cause to not be for religious purposes.[30] This was deemed by the Court to be the type of censorship of religion that is specifically prohibited by the First Amendment.[31] The Court additionally made the point that while it understood the state's interest behind wanting to prevent fraud and keep order in the community, that interest was outweighed by the fact that a state official was forming an opinion on what was a religious reason and what was not, which abridged the appellants' free exercise.[32] Here we see that the free exercise analysis is beginning to change, as the Court here relied on the belief/act distinction from *Reynolds*, but ultimately held that the statute violated the appellants' First Amendment rights.[33]

The major change comes in the Court's reasoning concerning the appellant's breach of peace conviction, in which the Court noted that two competing interests must be weighed against each other.[34] In addressing these conflicting interests, the Court stated that the appellant was upon the street legally, where they had every right to impart their beliefs in a peaceful manner; furthermore, the Court concluded that in this case, the appellant was only trying to persuade the listener to buy a pamphlet or donate money.[35] Finally, the Court noted that in the absence of a narrowly drawn statute to define and punish specific conduct that presented a clear and present

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[29] *Id*. at 307
[30] *Id*. at 305
[31] *Id*.
[32] *Id*. at 306-307.
[33] *Id*. at 303-304.
[34] *See Id*. at 307 (Stating that the lawfulness demands the weighing of two conflicting interests, the interest that the free exercise of religion not be prohibited and the state of Connecticut's interest in preservation and protection of peace).
[35] *Id*. at 310.

danger to a substantial state interest, the appellant's communications under constitutional guarantees did not amount to a breach of the peace.[36] It is here that we can see the first developments towards a compelling interest standard by the Court.

Another case that moved the Court toward strict scrutiny was *Prince v. Massachusetts*, coming shortly after *Cantwell*.[37] The appellant was a Jehovah's Witness, who along with a child under their legal guardianship, was distributing religious material along the highway and the sidewalk downtown in Brockton, Massachusetts.[38] This activity violated two state child labor statutes that prohibited any child, under the ages of twelve or eighteen depending on their sex, from selling any newspapers, pamphlets, etc. along the highway or within a public place.[39] The appellant was convicted in the lower courts and appealed, specifically claiming that these statutes violated their free exercise rights, as well as the child's free exercise rights.[40] Initially, the Supreme Court stated that while the realm of private family life is one in which the state may not enter, the family itself and welfare of children is not beyond the regulation of public interest.[41] It also recognized that a statute abridging and impinging upon a religious freedom cannot stand unless shown to be necessary and conducive to promote the safety of a child from some clear and present danger.[42] The Court ultimately concluded that the statutes against child labor and against children soliciting along the highway did not abridge the appellants' free exercise rights.[43] It noted that, while a statute like the one here but applicable only to adults would be invalid, a state's authority over children's activities is much broader; most importantly, the Court stated

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[36] *Id*. at 311.
[37] *Prince*, 321 U.S. at 158.
[38] *Id*. at 161-162.
[39] *Id* at 160.
[40] *Id*. at 163-164.
[41] *Id*. at 166.
[42] *Id*. at 167.
[43] *Id*.

that to come to the conclusion that because this type of adult regulation is not allowed, the regulation of a child for the same or similar activity is not allowed, would impose a huge limitation on child labor laws.[44] The Court then goes on to reason that the democratic society rests on the continuance of healthy, well-rounded children, and that the state may secure this interest against a broad range of impeding restraints and dangers, child labor being amongst those said evils.[45] Finally, the Supreme Court finished its reasoning by noting that parents are free and well to street preach and make martyrs out of themselves, but it does not follow that they are free to make martyrs of their children before the children have reached the age of full and legal discretion.[46] Massachusetts has the authority to regulate children's behavior is of broad range and thus is put into action here with an absolute prohibition of street solicitation and preaching, so as to accomplish the state's legitimate objective.[47]

As opposed to *Reynolds'* focus on complying with a criminal law, the Court in both *Cantwell* and *Prince* began to edge towards a balancing analysis in which a state's interest in having compliance with a criminal law is still taken into account, but now that interest is being weighed against the potential harm that may come from the abridgement of an individual's free exercise.[48] The following decades would see the Court grapple with what standard to apply for free exercise cases altogether, ultimately arriving at *Sherbert* and *Yoder* which formally established the compelling state interest test.[49] That test required a religious defendant to establish that the law as applied created a substantial burden to their religious exercise.[50] If such

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[44] *Id*. 168.
[45] *Id*.
[46] *Id*. at 170.
[47] *Id*.
[48] *Cantwell*, 310 U.S. at 296; *Prince*, 321 U.S. at 158.
[49] *Sherbert*, 374 U.S. at 398; *Yoder*, 406 U.S. at 205.
[50] *Yoder*, 406 U.S. at 205.

a burden was shown, the government was then required to justify that burden by showing a compelling interest and that there was no less restrictive way to advance said interest.[51]

C. Re-establishment of The *Reynolds*' Categorical Approach in *Smith* and RFRA

Following the establishment of the compelling interest test in *Sherbert* and *Yoder*, courts continued to apply that standard for almost thirty years whenever any free exercise issues arose,[52] most often in the unemployment context.[53] This would all change when the Supreme Court addressed yet another unemployment benefits case in *Smith*, but this time involving a criminal act that led to dismissal.

The respondents within *Smith* were fired from their jobs because as members of the Native American Church, they had ingested peyote for sacramental purposes during a ceremony.[54] When the respondents went to apply for unemployment benefits they were deemed ineligible due to their firing being because of work-related misconduct.[55] The Oregon Supreme Court, held in favor of the respondents free exercise claim which led to the Supreme Court granting certiorari again.[56] The Court first pointed out that the respondents within this case were attempting to carry the meaning of "free exercise" a step further by contending that their religious motivation for using peyote is beyond the reach of a generally applicable criminal law.[57] In response to this contention, the Court stated that they have never held before that a religious motivation to commit an otherwise criminal action should excuse the defendant from

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[51] *Id*.
[52] *See* People v. Woody, 394 P.2d 813, 821 (Cal. 1964) (Applying the compelling interest test by weighing the freedom of religion protected by the First Amendment on one side against the weight of the state's compelling interest).
[53] *See* Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707 (1981).
[54] *Smith*, 494 U.S. at 874.
[55] *Id*.
[56] *Id*. at 875-876.
[57] *Id*. at 878.

prosecution or from the reach of government regulation.[58] In determining this, the Court stated that the rule first promulgated in *Reynolds* should be controlling.[59]

The Supreme Court then moved to the contention pushed forth by the respondents, that even if there is not an automatic exemption to the Oregon law, a claim for exemption should be evaluated under a compelling interest test.[60] It then goes through previous case law in which the *Sherbert* analysis was either not applied or was applied but did not protect the religious claimant; the Court further explained that even if it were to breathe life into *Sherbert* analysis, it would never apply it to require exemptions from a generally applicable criminal law.[61] The Court finally concluded its decision by declaring that the compelling interest test is inapplicable to free exercise challenges to generally applicable and facially neutral criminal laws; it cited to *Reynolds* again noting that to make an individual's obligation to obey such laws contingent on the government establishing a compelling interest would allow one to become a law unto oneself.[62] This decision was groundbreaking in the realm of free exercise claims, as the Court reverted back to the categorical rule first stated in *Reynolds* when it comes to generally applicable and facially neutral rules; in short, the Court has stated that an individual's acts are subject to regulation by a facially neutral and generally applicable law.[63] It is also important to note though, that laws that were not general and neutral were still subject to strict scrutiny, as in cases where the law singled out a religious practice.[64]

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[58] *Id*. at 882.
[59] *Id*.
[60] *Id*. at 882-883.
[61] *Id*. at 884.
[62] *Id*. (Citing *Reynolds*, 98 U.S. at 167).
[63] *Id*.
[64] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

A few years after the *Smith* decision, Congress responded to the holding by passing the Religious Freedom Restoration Act of 1993 (RFRA).[65] The passage of RFRA reinstated the compelling interest test for free exercise claims.[66] RFRA also explicitly acknowledged how some "neutral" laws may burden a religious exercise and the government should not be permitted to apply such burdens without compelling justification.[67] Following the passage of RFRA, it was held unconstitutional as applied to states but continued to be constitutional as applied to federal law.[68] About thirty states now apply a compelling interest test through state RFRAs.[69]

The first case to interpret RFRA was a federal criminal prosecution of a religious group for its use of a prohibited drug. In *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, O Centro Espírita Beneficente União do Vegetal (UDV) is a Christian Spiritist sect based out of Brazil and as part of their faith, received communion through the consumption of a sacramental tea called hoasca.[70] One of the plants used in the making of this tea contains the hallucinogenic compound DMT, which is considered a Schedule I drug under the Controlled Substances Act (CSA).[71] In 1999, a shipment of hoasca intended for the American-based UDV was intercepted by United States Customs, and the UDV was threatened with prosecution.[72] In their complaint, the UDV alleged amongst other things that the application of the CSA to their sacramental use of hoasca violates RFRA.[73] This case goes all the way through the court system before finally

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[65] 42 U.S.C. §§2000bb

[66] 42 U.S.C. §§2000bb(b)(1)-(2) (Stating that one of the purposes of the act was to restore the compelling interest test as set forth in *Sherbert* and *Yoder* and to have it applied in any case where the free exercise of religion is substantially burdened; and to provide a claim or defense to an individual's whose religious exercise is substantially burdened by the government).

[67] 42 U.S.C. §§2000bb(a)(2)-(3).

[68] City of Boerne v. Flores, 521 U.S. 507 (1997).

[69] *Id*.

[70] Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 425 (2006).

[71] *Id*.

[72] *Id*.

[73] *Gonzales*, 546 U.S. at 426.

arriving at the Supreme Court for review of the district court's issuance of a preliminary injunction.[74] The Court ultimately affirmed the district court's decision, holding that the government failed to establish a compelling interest.[75] The government attempted to argue that the CSA should serve as a compelling purpose in itself, and there is no need to weigh UDV's particular claims or the weight of the impact an exemption may have; the Court quickly disposed of this, noting that the RFRA analysis is much more focused than the categorical approach the government attempts to put forth.[76] The Court then noted that under this more focused inquiry, the government's invocation of general characteristics under the CSA cannot carry the day.[77] In its reasoning on this point, the Court stated that although Congress determined that DMT should be on Schedule I, the government is not relieved of its burden under RFRA by simply providing this categorical answer.[78]

The Court also pointed to the language of the CSA as well as the fact that an exemption has existed under the CSA for thirty-five years for the religious use of peyote to further reinforce its conclusion.[79] In talking about this previously established exception, the Court also pointed out that it undermines the government's broader contention that CSA established a closed regulatory system because although the government puts forth a slippery slope argument in this context, the Court responded by noting that the peyote exemption impacted a large population of Native Americans, while the UDV group was much smaller; the Court in turn noted that given this size difference, extending an exemption to UDV would not have much impact on the general

[74] *Id*. at 428.
[75] *Id*. at 428-429.
[76] *Id*. at 430.
[77] *Id*. at 432.
[78] *Id*.
[79] *Id*. at 432-433.

enforceability of the CSA[80] It noted how Congress determined that the compelling interest standard was a workable test and how a case-by-case analysis is feasible when determining religious exemptions to generally applicable rules.[81] In concluding that the government's uniformity argument fails, the Court finally stated that it recognizes there may be instances for a need for uniformity; however, given that there was already a similar exemption in place for peyote and the reason for the passage of RFRA was in response to the *Smith* decision, the government failed to state a compelling interest that warranted the burdening of the UDV's religious exercise.[82]

The Court finally addressed the government's last interest which was stated as compliance with the 1971 United Nations Convention on Psychotropic Substances.[83] This interest was quickly disposed of, as the Court pointed out that the government failed to provide any evidence of the international consequences from the granting of an exemption to UDV.[84] Additionally, the Court recognized under this point that the interests of promoting public health and welfare are valid here, but such general interest cannot stand alone under the RFRA analysis.[85] Having rejected all of the interests put forth by the government, the Court affirmed the district court's original decision adding on that it was Congress's intention for the courts to strike a sensible balance between religious burden and government interest; in *Gonzales*, the government failed to state a compelling interest that allowed barring the UDV's sacramental use of hoasca.[86]

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[80] *Id*. at 434-436.
[81] *Id*. at 436.
[82] *Id*. at 436-437.
[83] *Id*. at 437.
[84] *Id*. at 438.
[85] *Id*.
[86] *Id*. at 439.

The decision in *Gonzales*, much like *Smith*, changed the landscape of free exercise claims. Does this mean that *Smith* and *Reynolds'* categorical approach still applies in the criminal context today, or should the compelling interest standard of *Yoder* and *Sherbert* apply to free exercise claims? Either way, it is easy to see the tension between these two standards, and how far the analysis as a whole has come since *Reynolds*.

II. WHEN A RELIGIOUS ACT IS A CRIME

Now that the two standards for free exercise analysis have been laid out, it is important to note that there are instances where exemptions should not be granted at all. These areas generally will include the individual attempting to invoke the free exercise defense for an overt bad act. Even in the application of the compelling interest test, courts are very hard-pressed to grant any exemptions when it comes to these cases. However, I still believe the compelling interest test is the best standard to apply here, as it provides the best opportunity for the courts to balance both the individual's freedom of religion rights against the state's interest. Below, the modern day polygamy cases will be discussed first, followed by drug usage cases, faith healing and child safety cases, and finally concluding with domestic abuse.

A. The Modern Day Polygamy Cases

While the Supreme Court settled the issue of polygamy and its place in free exercise jurisprudence, state courts long after the *Reynolds* decision continued to address the issue of whether a free exercise claim could act as a defense when in violation of a criminal bigamy statute. Although the Mormon Church as a whole no longer practices polygamy, there are still some fundamentalist sects within the religion that continue the practice.

In *State v. Green*, the defendant was a practicing polygamist who over the course of twenty-six years took many wives in either formal marriage services or unlicensed ceremonies.[87] While appearing on television, the defendant acknowledged that their conduct could be punished under Utah's criminal statutes, and in April of 2000, the State charged the defendant with, among other things, four counts of bigamy.[88] On appeal from the conviction to the Utah Supreme Court, the defendant alleged that the bigamy statutes violated their free exercise rights under the First Amendment.[89] The court upheld the conviction, and it was determined that the state's statutes did not violate the defendant's free exercise rights.[90] The court first began with a citation to *Reynolds* noting that although the understanding and purpose of free exercise rights has gradually changed since that decision, *Reynolds* was never formally overruled and thus still governed in this case.[91] Next, it moved to the point that even in extending beyond *Reynolds*, the statutes would still survive a free exercise claim under the standards set forth in *Smith* of neutrality and general applicability.[92] In applying this standard here, the court ultimately found that Utah's bigamy statutes were facially neutral because the statutes did not operate to punish only bigamy that results from the religious practice of polygamy.[93] The court finally addressed general applicability by relating back to its reasoning for neutrality, once again pointing to the fact that Utah's bigamy statutes did not attempt to target only religiously motivated bigamy.[94] Concluding this analysis, the court stated that the state only had to prove that the statutes were rationally

[87] State v. Green, 99 P.3d 820, 822 (Utah 2004).
[88] *Green*, 99 P.3d at 823.
[89] *Id*.
[90] *Id*. at 825.
[91] *Id*. at 826.
[92] *Id*.
[93] *Id*. at 827; *See also Lukumi*, 508 U.S. at 533-535 (Determining that facial neutrality is determined by reading the actual text of the statute, while operational neutrality is done so by examining the law in its real operation).
[94] *Id*. at 828; *Lukumi*, 508 U.S. at 534-535.

related to furthering state interests; the statute in question satisfied this requirement more than enough as the state put forth interests such as regulating marriage, preventing marriage fraud, and protecting vulnerable individuals.[95]

The above case harks back to the framework set forth originally in *Reynolds* and then continued further in *Smith* in its application of a categorical rule: an act committed whether it is a tenet of an individual's religion or not, is subject to regulation by a facially neutral and generally applicable law.[96] Like in *Green*, we see similar arguments advanced by the defendant in *State v. Holm*, in which the defendant was also convicted of violating Utah's bigamy statutes.[97] The court in *Holm* quickly disposed of the defendant's contention of free exercise infringement, citing to *Green*'s determination that Utah's bigamy statutes were constitutionally permissible and thus the defendant could not win an exemption from regulation.[98]

Both of the above cases involve defendants who are part of the Mormon church, with the latter being part of the Fundamentalist Church of Jesus Christ of Latter-day Saints (FLDS) which is a sect of the Mormon Church.[99] FLDS is particularly famous as being the group controlled by "Cult Leader" Warren Jeffs, until he was arrested in August 2006.[100] Amongst other things Jeffs was accused and convicted of child rape, and during the trial, similar to the defendants in *Holm* and *Green*, claimed religious persecution by the law.[101] The Warren Jeffs case highlights one of the key state interests that was expressed by the court in *Green*, that criminalizing polygamy

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[95] *Id*. at 830.
[96] *Smith*, 494 U.S. at 872.
[97] State v. Holm, 137 P.3d 726, 741 (Utah 2006).
[98] *Holm*, 137 P.3d at 742.
[99] *Id*. at 731.
[100] Nancy Perkins and Ben Winslow, *Fugitive Polygamist Leader Warren Jeffs Arrested Near Las Vegas*, DESERET NEWS, Aug. 29, 2006.
[101] *Polygamist Warren Jeffs Guilty of Child Rape*, ABC NEWS, Aug. 4, 2011. (In response to this claim by Jeffs, the Attorney General responded by stating the obvious, sexual assault or rape of 12 and 15 year olds has nothing to religion or religious persecution).

helped further the state's interest of protecting vulnerable individuals.[102] In particular it raises the question of whether in these instances, courts should stick to the categorical rational basis test that seems to persist in these cases, or apply the compelling interest test. Additionally, would the courts be better served conducting a more in-depth analysis under a compelling interest test, as it seems the court hints in *Green* that under such an analysis a religious exemption would still not be granted.[103]

B. People v. Woody and The Marijuana Cases

Following the Supreme Court's adoption of a compelling government interest test in *Sherbert* and *Yoder*, courts began applying the standard in free exercise claims that came across their dockets. During this time in particular, individuals and groups began claiming that state or federal drug laws were abridging their free exercise rights, and cases concerning this specific issue became quite prevalent.

Beginning with *People v. Woody*, the defendants are a group of Navajo Indians, who as part of their religious ceremonies would consume peyote.[104] In April of 1962, the defendants were arrested and found in violation of section 11500 of California's Health and Safety Code; when arrested, one of the defendants presented the police officers with the articles of incorporation for the Native American Church of California, which among other things stated that the sacramental use of peyote was a core part of the defendants' religion.[105] The Supreme Court of California addressed the first issue of whether the state statute put a burden upon the free exercise rights of the defendants, and concluded that the application of the statute most

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[102] *See Green*, 99 P.3d at 829 (Determining that Utah's bigamy statutes most importantly served the state's interest in protecting vulnerable individuals like women and children from exploitation).
[103] *Green*, 99 P.3d at 829-830.
[104] *Woody*, 394 P.2d at 814.
[105] *Id*. at 815.

definitely abridged the free exercise rights.[106] In its reasoning, the court determined that peyotism has a long historical use in Native American culture, and not only constitutes a sacramental symbol similar to bread and wine, but constitutes an object of worship in the defendants' religion.[107] After this determination, the court then addressed whether the state has a compelling interest in applying this statute.[108] The court concluded that the state did not meet its burden.[109]

The court first reasoned that the compelling interest of deterring the bad effects peyote has had on the Indian community fails because the state did not provide evidence to support its claim that peyote is used in place of medical treatment, there was no evidence that the use of peyote led individuals in the Indian community to harder drugs, and nowhere are there doctrines that tell the state that it must step in to free the Indian community from the supposed "primitive shackles" of peyote use.[110] Turning to the state's final interest, the court determined that the interest in the enforcement of narcotic laws and the possibility of fraudulent assertions of religious immunity are not supported because other states have made exemptions to their narcotic laws for the sacramental use of peyote.[111] Particularly on this point, the court distinguishes this case from *Reynolds* and *Braunfeld v. Brown*.[112] In *Reynolds*, the statute criminalizing polygamy was upheld as polygamy, while being a tenet in the theology of Mormonism, was not essential, while in this case, it was determined by the court that peyote was an essential part of the defendants' religion.[113] In distinguishing *Braunfeld*, the court noted that

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[106] *Id*. at 816.
[107] *Id*. at 817.
[108] *Id*. at 818
[109] *Id*.
[110] *Id*.
[111] *Id*. at 819.
[112] *Id*. at 819-820.
[113] *Id*. at 820.

in that case the infringement of religious freedom was only incidental, in that it only regulated a secular activity and did not make unlawful any religious practices of the appellants but here, the burden on a religious practice was direct.[114]

Woody helps to demonstrate how the application of the compelling interest test allows an individual or group the best chance at receiving an exemption because as we see a few decades later in *Smith*, the Supreme Court abandons the compelling interest test by reverting back to a categorical rule and ultimately rejecting the grant of a religious exemption.[115]

Following the *Smith* decision, the passage of RFRA and the *Gonzales* decision signaled a reestablishment of the compelling interest test, and seemed to signal a win for religious exemptions. However, when it came to individuals bringing RFRA claims for religious exemptions, especially concerning marijuana use, the courts generally rejected the granting of such exemptions, noting that the state had a compelling interest in preventing the diversion of sacramental drugs into the general public, as well as the enforcement of drug laws.[116] These cases offer up the question of, if a compelling interest standard granted the defendants' in *Woody* an exemption and the same test is applied under a RFRA claim, then why have the courts not granted more religious drug use exemptions? It appears that the courts draw an important distinction within these cases: if a drug has historically been utilized strictly for sacramental purposes, the likelihood of exemption is greater than compared to the usage of drugs that have a historical recreational use.

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[114] *Id*.

[115] *Smith*, 494 U.S. at 888-890.

[116] *See United States v. Christie*, 825 F.3d 1048, 1063 (9th Cir. 2016) (Holding that the government could not achieve its compelling interest in the prevention of sacramental marijuana being diverted to the general public, without enforcing the CSA); *See also United States v. Jefferson*, 175 F. Supp. 2d 1123, 1130 (N.D. Ind. 2001) (Determining that under RFRA, the government has proven it has a compelling interest in the enforcement of its drug laws enough to rationalize the burden applied to a religious practice).

C. Faith Healing & Child Safety Cases

Moving now to child safety cases, the Supreme Court addressed the issue of child safety and well-being originally in *Prince*.[117] In a broader scope, this was one of the first cases in which it appeared that the Court was starting to shift its approach from a categorical one, to a compelling interest balancing standard. Many of the child safety cases that followed this landmark case involved the Christian Science Church; one of this church's main practices is the practice of prayer for healing rather than traditional medical treatment.[118]

In *Walker v. Superior Court*, the defendant was a member of the Church of Christ, Scientist.[119] When the defendant's child began to feel ill and showed flu-like symptoms, consistent with the defendant's faith, they decided to utilize prayer as a treatment; the child's condition worsened and finally they succumbed to meningitis.[120] The defendant was charged and convicted of involuntary manslaughter and felony child endangerment, but on appeal, raised amongst other defenses, a free exercise defense.[121] While the defendant and the church in the case contended that the defendant's conduct was completely protected by their free exercise rights, the California Supreme Court disagreed.[122] In applying the compelling interest test, the court first noted, with no contention from the defendant, that the imposition of felony liability here furthered a government interest of unparalleled significance, the protection of children's health and safety.[123] Although the court recognized that the defendant's use of prayer for healing was a genuine part of their faith, the court stated that nowhere is it a sin for a Christian Scientist

[117] *Prince*, 321 U.S. at 158.
[118] Walker v. Superior Court, 763 P.2d 852 (Cal. 1988).
[119] *Walker*, 763 P.2d at 855.
[120] *Id*.
[121] *Id*. at 856.
[122] *Id*. at 869.
[123] *Id*.

to seek or resort to medicine; additionally, the court reiterated that regardless of the religious imposition, given the magnitude of the governmental interest, the applicable criminal statute was more than applicable.[124] In an attempt to avoid such an ultimate conclusion, the defendant's church attempted to make the argument that the religious conduct here was not a positive act, but an omission.[125] The court rejected this proposition on the grounds that parents should not be able to insulate themselves from state-compulsion so long as their religious claim was one of omission instead of action.[126] In so doing it cited *Jacobson v. Massachusetts*, in which the Supreme Court upheld a law compelling the vaccination of children for communicable diseases in the face of parental religious obligations.[127] It also cited *United States v. Lee*, where the Supreme Court upheld a law that required the Amish to violate their tenets by participating in the Social Security system.[128]

Upon the determination that imposition of the defendant's religious belief was justified by a compelling state interest, the court moved to the final prong on whether this was the least restrictive method of furthering this interest.[129] The defendant and church both make the argument that felony liability is not the least restrictive means, and that a civil dependency proceeding would be a least restrictive alternative.[130] The court rejects this argument on two grounds: first, the court notes that it has already observed the intrusive nature of such civil proceedings where it is not entirely clear that parents would rather lose custody of their children as opposed to the prospect of criminal liability; second, civil of proceedings only further the

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[124] *Id*. at 870.
[125] *Id*.
[126] *Id*.
[127] Jacobson v. Massachusetts, 197 U.S. 11, 39 (1905).
[128] United States v. Lee, 455 U.S. 252, 261 (1982).
[129] *Id*.
[130] *Id*.

government's interest when they have learned of the child's illness, which generally only occurs when an individual has died.[131]

Likewise, the court in *People v. Rippberger* addressed a similar issue by applying the compelling interest test in a case where the parents were practicing Christian Scientists.[132] The appellants were charged and convicted on a felony child endangerment charge, related to their child's ultimate death from bacterial meningitis.[133] After their child contracted the sickness, the appellants withheld traditional medical treatment in favor of prayer based on their beliefs as Christian Scientists.[134] The court in *Rippberger* ultimately adopted the same holding that the court determined in *Walker*, noting that religion is not an absolute right and must be balanced against rights of others, including one's children.[135]

Yet another Christian Science faith healing case was heard in *Commonwealth v. Barnhart*.[136] As in *Walker* and *Rippberger*, the parents' free exercise claim was rejected, but the court's reasoning differed.[137] The defendant's child became ill and instead of seeking traditional medical treatment, the defendant opted for prayer to cure their child's cancer.[138] The defendant was charged and convicted of involuntary manslaughter and endangering the welfare of a child; on appeal the defendant specifically argued that the applicable criminal statutes were unconstitutionally applied to conduct protected under the First Amendment.[139] The court cited *Yoder* when providing its analysis and applied somewhat of a balancing of interests, but does not

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[131] *Id*. at 871.
[132] People v. Rippberger, 283 Cal. Rptr. 111, 123 (Cal. Ct. App. 1991).
[133] *Id.*
[134] *Id*.
[135] *Id*.
[136] Commonwealth v. Barnhart, 497 A.2d 616 (Pa. Super Ct. 1985).
[137] *Id*.
[138] *Barnhart*, 497 A.2d at 620.
[139] *Id*.

clearly go through the compelling interest test.[140] In its holding though, the court noted that the defendants' child could not speak up and thus the defendants were charged with the affirmative duty of providing medical care to their child.[141] Finally, the court in *Barnhart* distinguished the decision here as not applying to the practices of the defendants in relation to themselves, but instead attached liability to the defendants' decision effectively forfeiting their child's life.[142]

D. Domestic Violence

The act of domestic violence could realistically be considered one of the most heinous acts an individual could commit. Much of the general public would also deem the act as not only being morally wrong, but criminal as well. How do courts address the action of domestic violence when an individual claims the action as being part of their religious beliefs?

In *S.D. v. M.J.R.*, both the defendant and their wife were citizens of Morocco and as such adhered to the Muslim faith.[143] Following a series of domestic incidents between the defendant and his wife, the wife filed a complaint against the defendant and obtained a temporary restraining order.[144] The trial court ultimately ended up accepting the husband's religious defense for his actions.[145]Following the trial in municipal court in which the court failed to issue a final restraining order and dismissed the domestic violence claims, the plaintiff appealed the decision.[146] On appeal, the court addressed first the dismissal of the plaintiff's domestic violence claim, and concluded that the lower judge was mistaken in their analysis.[147] In its analysis, the court cited much of the Supreme Court's free exercise jurisprudence, ultimately concluding that

[140] *Id*. at 624.
[141] *Id*.
[142] *Id*.
[143] S.D v. M.J.R., 2 A.3d 412, 413 (N.J. Super. Ct. App. Div. 2010).
[144] *S.D.*, 2 A.3d at 416.
[145] *Id*. at 417-418.
[146] *Id*. at 419.
[147] *Id*. at 422.

since New Jersey had not enacted a state RFRA statute, there was no reason not to apply the analysis developed in *Smith*.[148] Upon this conclusion, the court also determined that the lower court had erred in dismissing the plaintiff's claim because the defendant had knowingly engaged in the conduct that was forbidden by the law.[149] The court also pointed out that the applicable laws represented the Legislature's recognition of the serious nature of domestic violence and the responsibilities of the courts to protect victims of domestic incidents.[150]

As it can be seen in the above cases and all the cases within this section, there are just certain actions in which exemptions should be granted very sparingly by the courts, if at all. There is also the continued tension between the *Reynolds*/*Smith* categorical approach and the compelling interest standard of *Yoder* and *Sherbert*. The question still remains on which test should be applied, and I still believe the compelling interest test offers the best chance for the courts to properly balance government and religious interests in determining if a religious exemption is necessary. This belief rings true especially in the next section, which discusses the possibility of religiously motivated conduct being criminal in certain contexts; should the courts be more compelled to offer exemptions in this area of jurisprudence?

III. WHEN A RELIGIOUS ACT IN CERTAIN CONTEXTS IS CRIMINAL

While there are instances where a religious exemption should not be granted at all, or if granted, granted sparingly, there are certain circumstances that potentially offer more leniency when the courts examine whether an exemption is warranted. In the previous section, the action or omission committed by every defendant was in contrast with a state or federal criminal statute. Additionally, many would view the actions or omissions as generally evil, immoral, or unethical;

[148] *Id*. at 426.
[149] *Id*.
[150] *Id*.

whether it be the practice of polygamy, or the act of not seeking out medical attention for a sick child, these actions would likely rank near the bottom of a human morality meter. However, what happens when the act in itself is morally worthwhile in the eye of the general public? Finally, which standard of free exercise analysis should be applied: should the categorical approach be applied in which an individual's actions will have to give way to facially neutral and generally applicable statutes, or should the compelling interest standard be utilized in which interests of the state and individual are balanced. The compelling interest test is the exact standard to be applied in these situations because it offers the opportunity for an exemption to be granted, for actions that may only be bad in the context of statute violation. Below I will discuss the sanctuary movement and how free exercise jurisprudence has been applied in such situations; then I will conclude by making the case for an exemption when it concerns humanitarian aid.

A. The Sanctuary Movement and free exercise rights

The importance of churches, as well as other houses of worship to various communities cannot be numerically quantified; they serve as a beacon of hope for many whether an individual is seeking shelter from personal problems or if they wish to hide from legal problems. The question is what does the law do when a church or house of worship acts as a sanctuary to individuals. More specifically, how are churches treated if it is discovered that they are harboring undocumented immigrants or refugees. Within the following paragraphs the issue of the church sanctuary movement will be discussed, and whether churches are off-limits from prosecution due to religious freedoms; additionally, Fourth Amendment issues of surveillance will be discussed as well.

Sanctuary in churches, or for better terms any religious temple can be traced all the way back to the ancient Greeks; as Professor Munson of Southern Illinois University School of Law

states in their article on church sanctuary, the practice transferred all the way from the Greeks up and through to the colonists bringing it to America.[151] Professor Munson focuses on the 1980s sanctuary movement, in which religious organizations were trying to provide sanctuary to individuals from Central America fleeing civil conflict in their home nations.[152] Professor Munson points out how much of this sanctuary movement relies heavily upon the individuals claiming religious rights to offer sanctuary to the individuals in need.[153] Despite this, Munson notes that United States law does not currently recognize sanctuary for unauthorized immigrants.[154]

In the earliest case, *United States v. Merkt*, the defendants were part of a sanctuary movement, in which they assisted in the transportation and safety of five undocumented immigrants once they arrived in the United States.[155] Upon the arrest of the five undocumented immigrants, the defendants were arrested, charged, and convicted of violating 8 U.S.C § 1324(a)(1) and 8 U.S.C § 1324(a)(2).[156] On appeal though the defendants alleged that these convictions are barred by their religiously motivated activities and thus gave rise to free exercise immunity from punishment.[157] The appeals court ultimately decided against granting the

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[151] Valerie J. Munson, *On Holy Ground: Church Sanctuary In The Trump Era*, 47 Sw. L. Rev. 49, 50-53 (2017) (Professor Munson begins their article with background on the development of the sanctuary movement within religious temples, tracing it all the way back to the Greeks and Romans. They proceed to take it through history to show how it came to be in the United States where it not only played a huge role with the Underground Railroad, but also during the 1980s through to the present day giving sanctuary to undocumented immigrants from Central America).

[152] *Id*. at 53.

[153] *Id.*

[154] *Id*. at 54-57 (Professor Munson goes on to document how the United States Government does not recognize the offering of sanctuary to undocumented immigrants. Although the movement itself is deeply rooted within the country, the government has never recognized this help as being legal, and even has statutes and regulations in place holding individuals accountable for assisting in the sanctuary of unauthorized immigrants. A good majority of the article here, Professor Munson analyzes how different circuits have approached the applicable statutes, and specifically notes that many federal circuits deem an individual in violation of the anti-sanctuary regulations if the conduct engaged in is intended to help unauthorized immigrants avoid detection).

[155] United States v. Merkt, 794 F.2d 950, 953 (5th Cir. 1986).

[156] *Id*.

[157] *Id*.

defendants an exemption from their violation of the two criminal statutes.[158] In its decision, the court initially grappled with whether to apply the more stringent analysis of a compelling interest test put forth by the defendants, or the less stringent analysis proffered in *Reynolds* and *Smith*; the court goes on to state though that even under *Yoder*, the defendants still are not granted a religious exemption.[159] Nevertheless, the court applied the compelling interest test by first addressing whether the statutes unduly burdened the defendants' religious practices; the court is rather baffled at this point.[160] It sees in no way how the statutes burdened any religious practice, as they only relate to conduct that aids and shelters undocumented immigrants.[161] The court even points to the testimony that was offered by representatives from the Catholic and Methodist clergy, who testified to the fact that participation in the sanctuary movement was not mandated by the religion.[162] In the court's own words, this was a burden that the defendants voluntarily assumed and not one imposed by the government.[163] In addressing the second and third prongs of the analysis, the court first pointed to the fact that the government has a very real interest in the uniform enforcement of border control laws, and then goes on to reject the alternative put forth by the defendants of deportation, as this would effectively limit border control to a "catch-me-if-you-can" policy.[164]

Similarly, the defendants in *United States v. Aguilar* were convicted under the same statutes as the defendants in *Merkt* for running a modern-day underground railroad.[165] The

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[158] *Id*.
[159] *Merkt*, 794 F.2d at 955.
[160] *Id*. at 956.
[161] *Id*.
[162] *Id*.; It is important to note that the Supreme Court itself has never said to demonstrate a burden, a religious exercise must be mandated. *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981).
[163] *Id*.
[164] *Id*.
[165] United States v. Aguilar, 883 F.2d 662, 666 (9th Cir. 1989).

defendants here also contended that their convictions violated their free exercise rights.[166] While the government pushed for a much less stringent analysis to be applied, the court in citing *Merkt* noted that even under the strictest of standards, the defendants first amendment claim cannot survive.[167] The court noted how the *Merkt* court had already addressed the issue presented in the case here, and even if the statutes unduly burdened the defendants' religious beliefs, those beliefs were overridden by the government's interest in border policy.[168] The defendants in the face of this conclusion attempted to push for the court to treat the free exercise claim as focusing on three different aspects of the statute as all separate.[169] The court declined this argument because it had been determined that the compelling interest required the penalizing of smuggling, transporting, and harboring to discourage undocumented immigrants from crossing illegally.[170] The court concluded its reasoning by citing *United States v. Elder*, noting that the defendants could not seriously be considering a religious exemption from immigration laws as that would have resulted in no immigration laws at all.[171]

As demonstrated by the above cases of *Merkt* and *Aguilar*, the chance of a religious exemption being granted in the case of sanctuary is essentially zero; even the application of RFRA to federal immigration law would not have yielded a different outcome, as both courts conclude that the religious burden is outweighed by government's compelling interest of keeping an uniform border policy.[172] While the application of the compelling interest standard is giving

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[166] *Aguilar*, 883 F.2d at 694.
[167] *Id*.
[168] *Id*. at 695.
[169] *Id*. (The court states that the defendants wished for the court to address the First Amendment claim as focusing on smuggling, transporting, and harboring individually; by doing this, the defendants wished for the government to have to prove a compelling interest for each aspect separately).
[170] *Id*.
[171] *Id*. (Citing *United States v. Elder*, 601 F. Supp. 1574, 1579 (S.D. Tex. 1985) (Stating that if the government attempted to include within its immigration policy, the appellant's religious beliefs, it would ultimately result in no policy at all).
[172] *Merkt*, 794 F.2d at 953; *Aguilar*, 883 F.2d at 694 (Both *Merkt* and *Aguilar* were pre-RFRA cases).

these defendants the best chance to have their interest balanced against the government's interest, exemptions are non-existent here. Now we turn to the question whether there should be a different outcome for something like humanitarian aid being supplied to the undocumented immigrants.

B. The Case for a Humanitarian Aid Exemption

Turning now to humanitarian aid, it is important first to understand what the law defines as humanitarian aid; the United States Department of State's official website, under its policy issues section, lays out that the goal of providing this type of aid is to save lives and alleviate suffering.[173] Upon reading that, one thought comes to mind: what is the court's and government's stance on private citizens or groups providing this type of aid, especially if the aid violates state and federal border policy statutes? An even more intriguing question is what *should* be the court's and government's stance?

A perfect example of such a situation would be the instance of Dr. Scott Warren, who was arrested and indicted for his violation of federal laws prohibiting the aiding of undocumented persons.[174] Dr. Warren filed a motion to dismiss counts two and three, specifically citing RFRA as protecting his actions of offering assistance to migrants from prosecution.[175] In addressing the pre-trial motion, the court dismissed the motion because questions of fact still remained.[176] It first noted importantly that the federal criminal laws were of general nature that apply to all and did not single out Dr. Warren.[177] The court then

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[173] United States Dept. of State, *Refugee and Humanitarian Assistance*, (last visited Nov. 16, 2023) https://www.state.gov/policy-issues/refugee-and-humanitarian-assistance/.
[174] United States v. Warren, No. 18-00223-TUC-RCC, 2018 U.S. Dist. LEXIS 159000, at *1-2 (D. Ariz. May 30, 2018); 8 U.S.C. §§ 1324(a)(1)(A)(v)(1), (a)(1)(A)(ii) and (a)(1)(A)(iii); 8 U.S.C. § 1324(a)(1)(A)(iii).
[175] *Id*.
[176] *Warren*, No. 18-00223-TUC-RCC, 2018 U.S. Dist. LEXIS 159000, at *5.
[177] *Id*.

acknowledged that while they understood Dr. Warren's beliefs included the action of helping others in distress, violating the law to assist undocumented migrants was not an expressed objective of his beliefs.[178] It concluded its reasoning by stating that Dr. Warren's beliefs did not require him to assist individuals within this country illegally evade apprehension.[179] Upon these determinations, the court concluded that the statutes did not burden Dr. Warren's religious beliefs or their exercise of religion, and thus did not require the court to apply strict scrutiny.[180]

Why are exemptions so scarce in this area though; a court's decision almost seemed straightforward when it came to things like violating bigamy statutes or violating drug statutes; the acts were both immoral and criminal, and thus made the decision for courts that much easier. Why have individuals like Mr. Warren had difficulty receiving exemptions?

The case for an exemption in this situation is one the courts will have to continue to grapple with; there will be situations such as Mr. Warren's case, where his RFRA defense was rejected by the court, but was ultimately acquitted at trial. There will also be instances where individuals who are not granted a RFRA defense and fail to get acquitted by a jury. Mr. Warren's case in particular seems to suggest ongoing ambiguity over criminalizing aid. An application of a compelling interest standard though will provide the best avenue for individuals or groups in this area. There is potential for this standard to be the set test for these cases through the bringing of RFRA claims if the statutes in contention are federal. In terms of any state statutes, unless a state has enacted its own RFRA statute, then defendants are left with the standard from *Smith*.[181] The path is primed for a religious exemption to be granted, but based on the prevailing reasoning in most of the sanctuary cases, it is unlikely to occur anytime soon.

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[178] *Id*. at *6.
[179] *Id*.
[180] *Id*. at *7.
[181] *City of Boerne*, 521 U.S. at 507; *Smith*, 494 U.S. at 888-890.

CONCLUSION

Within the First Amendment, the free exercise of religion is a key freedom in society. The founders originally put it into place because they knew what religious persecution looked like and what happened when it was left to persist. What happens though when an individual or group attempts to use the free exercise rights as a defense for violating a criminal statue? Even more important is the standard a court should apply when trying to determine if a religious exemption is warranted in the case. Throughout the paper, we have explored the development of free exercise jurisprudence, starting all the way back with the categorical approach developed in *Reynolds*, then proceeding to examine the Court's change to a compelling interest test with *Sherbert* and *Yoder*, and finally the Court's reversion back to a categorical approach in *Smith*, followed by a "re-establishment" of the compelling interest test with the passage of RFRA.[182]

We then witnessed as lower courts, as well as the Supreme Court, continued to grapple with the tension that existed and still exists between these two standards. Questions still remain, like should the courts predominantly apply the compelling interest standard for all religious exemption cases, effectively overruling *Smith*, or should the courts retain the framework utilized in the present day? Additionally, should there be certain areas where exemptions should never be afforded, and to counter that point, are there circumstances that the courts should actually consider granting exemptions. The standard, I believe, should be a compelling interest test because it offers the best chance for a religious exemption to be granted and requires the government to clearly support its interests against the interests of the individual or group. Even if exemptions are sparingly handed out by the courts under this analysis, the compelling interest

[182] *City of Boerne*, 521 U.S. at 507.

at least requires the courts to balance interests and affords an individual or group the chance to contest a government's interest to its fullest.