GOVERNMENT ACCOMMODATION OF RELIGIOUS-BASED CONSCIENTIOUS OBJECTION

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Religious-based objections to participating in or conforming to a government program or requirement impacts upon many areas of law. Traditionally, the United States Supreme Court has applied the "compelling state interest" standard to determine whether the government must respect these objections. Recently, however, the Court abandoned this standard in favor of a new standard that will not permit religious-based objections whenever the government seeks to enforce a law of general applicability. The purpose of this paper is to survey government accommodation, or lack thereof, of a person's religious beliefs when such beliefs conflict with general government requirements or expectations. To begin with, however, a short history of the Supreme Court's analysis in such cases is warranted.

COMPELLING STATE INTEREST TEST

Because most conscientious objection claims are asserted pursuant to the guarantees of the Free Exercise Clause, it is important at the outset to review the major principles of free exercise jurisprudence. Since the United States Supreme Court decided *Sherbert v. Verner*[1] in 1963, courts have balanced the government's interest in regulation against the religious exercise interests of an objecting party. Rooted in this standard is the presumption that the religious interest would outweigh the government's interest unless the government could show that the regulation satisfied a compelling interest and that the government's interest could not be satisfied in a less restrictive way than by burdening an objector's religious behavior. As a result, religious activity could be restricted, but such restriction was the exception to the rule protecting religious freedom.

The "*Sherbert* test"[2] made clear that "[i]t is basic that no show-

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1 374 U.S. 398 (1963) (holding that the Free Exercise Clause prevented a Sabbatarian from having to choose between following her religion and receiving state unemployment compensation benefits).

2 The *Sherbert* test became the standard analytic tool for deciding free exercise

ing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'"[3] Nine years later, in *Wisconsin v. Yoder*,[4] the Court applied this compelling state interest test and stressed the difficulty the government must bear in overriding a free exercise claim. In *Yoder*, the Court emphasized that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[5]

The Court retreated from its earlier positions, however, when it decided *Employment Division, Department of Human Resources of Oregon v. Smith*.[6] In *Smith*, the Court rejected a claim that the Free Exercise Clause permitted the ingestion of a prohibited drug, peyote, in the context of the worship of the Native American Church.[7] In reaching its decision, the Court ruled that the Free Exercise Clause, standing alone, may not be used to adjudicate laws of general applicability. According to the Court, the Free Exercise Clause may be used to adjudicate laws of general applicability *only* when it is used *in tandem* with other constitutional principles such as freedom of speech, press, or the rights of parents to educate their children.[8]

The practical implication of the *Smith* ruling is that the "compelling state interest test" is essentially null and void. Writing for the Court, Justice Scalia explained that the Court had used the compelling state interest test only in cases involving the denial of unemployment compensation and that the Court would use this test only in the same types of cases in the future.[9]

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cases after 1963. *See* Mitchell A. Tyner, *Is Religious Liberty a 'Luxury' We Can No Longer Afford?*, LIBERTY: A MAGAZINE OF RELIGIOUS FREEDOM, Sept.-Oct. 1990, at 1, 4. Tyner pointed out that as of May 30, 1990, *Sherbert* had been cited in 546 federal court cases and 393 state court cases, for a total of 939 citations in 27 years. *Id.*

3 *Sherbert*, 374 U.S. at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

4 406 U.S. 205 (1972).

5 *Id.* at 215. In *Yoder*, the court declared that the Old Order Amish religious objection to formal education beyond the eighth grade outweighed the State's compulsory education law, which required formal school until age sixteen. *Id.* at 234.

6 494 U.S. 872 (1990).

7 Oregon denied plaintiff's unemployment compensation claim after discovering that he violated the terms of his employment by using peyote. *Id.* at 874.

8 *Id.* at 881.

9 *Id.* at 884-85. The *Smith* Court stated:

> The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." To make an individual's obligation to obey such a law contingent upon the

Justice Scalia did note, however, that legislatures *may* carve exceptions to laws of general applicability for the purpose of accommodating religious freedom. If religious groups with conscience-based needs can exercise some persuasion on legislatures, then the groups can potentially receive accommodation, although such accommodation would be a matter of legislative grace; legislatures are not constitutionally obligated to make exceptions.[10] Of course, small, obscure, or unpopular religious groups are unlikely to win legislative recognition for their special needs. For individuals, accommodation would be a virtual impossibility.

With this framework of the applicable law now securely in place, it will be useful at this point to examine some typical conscientious objector-First Amendment conflicts that have arisen in the past and how courts have responded to these controversies. Moreover, because *Smith*'s impact upon these previously resolved controversies cannot be ignored, it is appropriate to also examine *Smith*'s potential impact on future government accommodation of conscientious objection.

MILITARY SERVICE

Perhaps the most well known and obvious area of conflict between government and conscience is warfare. The government's

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> law's coincidence with his religious beliefs, except where the State's interest is "compelling"—permitting him, by virtue of his beliefs, "to become a law unto himself"—contradicts both constitutional tradition and common sense.

Id. at 885 (quoting Lyng v. Northwest Indian Cemetery Protective Assoc., 485 U.S. 439 (1988); Reynolds v. United States, 98 U.S. 145 (1879)). In *Lyng*, Indian free exercise-based claims to the use of traditional sacred lands in a federal national forest were rejected because such usage would impermissibly compel government to conform its procedures to plaintiffs' religious practice. Lyng v. Northwest Indian Cemetery Protective Assoc., 485 U.S. 439, 441-42, 450-51 (1988). Over one hundred years earlier, the *Reynolds* Court found that members of the Church of Jesus Christ of Latter-Day Saints (Mormons) could not practice polygamy, in spite of a Free Exercise Clause defense, because Congress had forbidden polygamy as being harmful to public morality and welfare. Reynolds v. United States, 98 U.S. 145, 166-67 (1879).

[10] *Smith*, 494 U.S. at 890.

The *Smith* decision elicited considerable criticism from all across the spectrum of church-state philosophies. For an excellent short summary and critique of *Smith*, see Tyner, *supra* note 2. For a much longer and analytical piece, see Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109-53 (1990). *See also* Dean M. Kelley, Implications for Churches of Oregon Employment Division v. Smith, 11 (unpublished paper on file with the author) (suggesting that the *Dred Scott v. Sandford* decision, which found blacks to be inferior to the majority, has a modern counterpart in *Smith*, which found that religious minorities have no rights to religious practice that majorities are bound to respect).

concern is national defense.[11] In contrast to this national purpose, some religious individuals and groups have held the belief that warfare is wrong. More often than not, this view is based on a concept of "higher law," or the will of God, which takes precedence over the humanly-constructed laws of government and teaches the sanctity of human life and the prohibition of violence. This perspective is well-summarized in a statement from the 1963 Confession of Faith of the Mennonite Church:

> We believe that it is the will of God for His children to follow Christian love in all human relationships. Such a life excludes retaliation and revenge . . . . As nonresistant Christians we cannot serve in any office which employs the use of force. Nor can we participate in military service, or in military training, or in the voluntary financial support of war.[12]

The conflict between conscience and government has taken three forms, two of which have been addressed by the U.S. Supreme Court. One of these categories involved the issue of the naturalization of aliens. The first case to address this issue was *United States v. Schwimmer*.[13] The oath of naturalization for aliens seeking citizenship included the phrase "I hereby declare . . . that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic . . . ."[14] Rosika Schwimmer, although an atheist, was a pacifist and declared that she could not take the oath if it meant that one would have to bear arms to defend the Constitution. Schwimmer could not understand how the oath could have such a meaning for a fifty-one year old female. In finding against Schwimmer, the Court reasoned that even if one were disqualified from military service by age or sex, a pacifist still might influence others from bearing arms in defense of the country and, thus, could not become a citizen. Congress specified the requirements for becoming a citizen, the Court explained, and courts should not modify these prerequisites

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11 Indeed, the Preamble of the Constitution states that one of the purposes for that charter of government is to "provide for the common defence." U.S. CONST. pmbl. Additionally, Article I, section 8 empowers Congress "[t]o declare war," "[t]o raise and support Armies," "[t]o provide and maintain a Navy," and "[t]o provide for calling forth the Militia to execute the Laws of the Union." *Id.* art. I, § 8.

12 J. C. WENGER, THE MENNONITE CHURCH IN AMERICA 341 (1966). For a brief introduction to the issues involved in conscientious objection to military service, see LEO PFEFFER, GOD, CAESAR, AND THE CONSTITUTION: THE COURT AS REFEREE OF CHURCH-STATE CONFRONTATION 138-67 (1975).

13 279 U.S. 644 (1929).

14 Naturalization Act of 1906, ch. 3592, § 4, 34 Stat. 596, 597-98 (1906) (current version at 8 U.S.C. § 1427(a) (1988)).

to citizenship.[15]

The Court subsequently applied the *Schwimmer* holding to deny the petitions for citizenship of an Episcopalian woman who was opposed to all wars in *United States v. Bland*,[16] and a Baptist theology professor who wanted to make judgments as to whether or not a war was moral before he would agree to bear arms in *United States v. Macintosh*.[17] In *Macintosh*, Macintosh wanted to judge the validity of a particular war based on whether or not it was consistent with the will of God. In rejecting his petition, the Court explained:

> We are a Christian people, according to one another the equal right of religious freedom, and acknowledging with reverence the duty of obedience to the will of God. But, also, we are a nation with the duty to survive; a nation whose Constitution contemplates war as well as peace; whose government must go forward upon the assumption, and safely can proceed upon no other, that *unqualified* allegiance to the nation and submission and obedience to the laws of the land, as well those made for war as those made for peace, are not inconsistent with the will of God.[18]

In both *Bland* and *Macintosh*, the Court relied on *Schwimmer*, which held that bearing arms was the accepted way, if not the only way, to protect and defend the Constitution, and that no alien could be naturalized without promising to bear arms.[19]

In 1946, however, in *Girouard v. United States*, the Court changed its position on the naturalization of conscientious objector (C.O.) aliens.[20] Girouard, a Seventh-day Adventist, expressed a willingness to serve in the military, but only in a noncombatant role. Writing for the

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15 *See generally* Ronald B. Flowers & Nadia M. Lahutsky, *The Naturalization of Rosika Schwimmer*, 32 J. CHURCH & ST. 343 (1990).

16 283 U.S. 636 (1931). For a detailed desription of the *Bland* case, see Ronald B. Flowers, *In Praise of Conscience: Marie Averil Bland*, 62 ANGLICAN & EPISCOPAL HIST. 37 (1993).

17 283 U.S. 605 (1931). For a brief summary of *Macintosh*, see Flowers & Lahutsky, *supra* note 15, at 360-61.

18 *Macintosh*, 283 U.S. at 625 (emphasis added).

19 United States v. Bland, 283 U.S. 636, 636-37 (1931); *Macintosh*, 283 U.S. at 626-27.

20 328 U.S. 61 (1946). Between *Macintosh* and *Bland*, however, and their reversal in *Girouard*, there were at least two lower court cases decided that may have influenced the Justices' opinion in *Girouard*. *See In re* Losey, 39 F. Supp. 37 (E.D. Wash. 1941) (taking explicit exception to precedent Supreme Court cases and endorsed the interpretation of law expressed in the dissents in those three cases); *In re* Kinloch, 53 F. Supp. 521 (W.D. Wash. 1944) (finding that Congress, after decisions in *Schwimmer*, *Macintosh*, and *Bland*, had passed legislation that explicitly permitted the naturalization of alien conscientious objectors who were serving in the military in non-combatant roles).

Court, Justice William O. Douglas found in Girouard's favor, noting specifically that the "[r]efusal to bear arms is not necessarily a sign of disloyalty or a lack of attachment to our institutions."[21] The Court further declared, contrary to its statement in *Macintosh*, that the will of the nation is not the same as the will of God:

> The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State.[22]

The Court explicitly stated that *Schwimmer*, *Bland*, and *Macintosh* were no longer valid law. Accordingly, aliens who held conscientious objections to war could be granted United States citizenship.

In 1950, probably as a result of *Girouard*, Congress amended the naturalization oath. Since then, aliens who were conscientious objectors have not had to promise to bear arms, but instead, they have the option to perform noncombatant service in the armed forces, or to do nonmilitary work of national significance when required by law. To qualify for these options, one has to show by "clear and convincing evidence" that he or she is opposed to bearing arms "by reason of religious training and belief."[23] In 1952, "religious training and belief" meant one's "belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [did] not include essentially political, sociological, or philosophical views or a merely personal moral code."[24] In *United States v. Seeger*,[25] however, the Court held that one's "relation to a Supreme Being" need not be a belief in a personal God. Courts have adopted the *Seeger* "parallelism

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21 *Girouard*, 328 U.S. at 64.

22 *Id.* at 68.

23 Section 29 of the Internal Security Act of 1950 provided:

> [A]ny such person shall be required to take the oath prescribed in subsection (b)(1) of this section unless by clear and convincing evidence he can show to the satisfaction of the naturalization court that he is opposed to the bearing of arms or the performance of noncombatant service in the Armed Forces of the United States by reason of religious training and belief . . . .

Internal Security Act of 1950, ch. 1024, § 29, 64 Stat. 987, 1017-18 (1950) (current version at 50 U.S.C. § 781 (1988)). *See also In re* Weitzman 426 F.2d 439, 444-48 (8th Cir. 1970) (per curiam) (Blackmun, J., dissenting) (summarizing the history of the evolution of accommodation for conscientious objectors in the naturalization laws).

24 Immigration and Nationality Act of 1952, ch. 477, § 337, 66 Stat. 163, 258-59 (1952) (codified as amended at 8 U.S.C. § 1448(a) (1982)). *See also* 50 U.S.C. app. § 456(j) (1958) (adopting identical language in 1948 for dealing with conscientious objectors to the military service).

25 380 U.S. 163 (1965).

test,"[26] and have held that an applicant for naturalization may take the modified oath even when he reserves the right to determine whether he would be willing to do a particular civilian alternative service the government requires him to do.[27]

An applicant for naturalization, however, may still be denied citizenship if he or she is not opposed to participation in all wars. The law requires that any candidate for naturalization must be "attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States."[28] Although the law allows applicants for naturalization who are conscientious objectors to be naturalized,[29] courts have held, as recently as 1992, that an applicant who wants to pick and choose the wars in which he will fight may not be naturalized. The rationale is that such a person is not "attached to the principles of the Constitution" because he or she is not able to swear to section (5)(A) of the Oath of naturalization[30] without mental reservation, i.e., he or she decides when he or she will or will not obey the law. Furthermore, in *Gillette v. United States*,[31] the Supreme Court held that one is not exempt from military service unless one is opposed to participation in war in any form. This reasoning has also been extended to naturalization, where an applicant for naturalization who was willing to fight in some wars, but not others, could be denied naturalization.[32]

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26 The parallelism test is "[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition." *Seeger*, 380 U.S. at 176. *See* 3A AM. JUR. 2d *Aliens and Citizens* § 1538 (1986); *see also Weitzman*, 426 F.2d at 440 (finding that an alien should be allowed to take oath of naturalization even though her pacifism was not based on "religious training and belief"); *In re* Thomsen, 324 F. Supp. 1205 (N.D. Ga. 1971) (holding that an alien should be allowed to take oath of naturalization even though her conscientious objection to military service was not specifically based on religion, but rather on experience and reading great writers); *In re* Ramadass, 284 A.2d 133 (Pa. 1971) (holding that an alien should be allowed to take oath of naturalization, with the proviso that he would do civilian work of national importance in the event of war, even though he could *conceive* of civilian work that his conscience would not allow him to do).

27 *In re* Del Olmo, 682 F. Supp. 489 (D. Ore. 1988).

28 8 U.S.C. § 1427(a) (1988).

29 See *supra* notes 23-24 and accompanying text for a discussion regarding aliens' ability to become naturalized despite conscientious objections to military service. *Cf.* H.R. REP. No. 1365, 82d Cong., 2d Sess. 82 (1952) (placing the naturalized citizen on an equal plane with the native-born citizen in the matter of conscientious objection).

30 Section 1448(a)(5)(A) of Title 8 requires that one must take an oath "to bear arms on behalf of the United States when required by the law." 8 U.S.C. § 1448(a)(5)(A) (1982) *amended by* 8 U.S.C. § 1448 (1988).

31 401 U.S. 437 (1971). See *infra* notes 43-44 and accompanying text for a discussion of the *Gillette* case.

32 *In re* Mahmoud Kassas, 788 F. Supp. 993 (M.D. Tenn. 1992) (denying a Muslim's

The second category of conflict between government and conscience in matters of defense is military service by those who are already citizens. Throughout our history the government has accommodated pacifists to some degree. During the Revolutionary War, for instance, some colonies made provisions for pacifists not to fight. Congress first exempted conscientious objectors during the Civil War, extending the exemption only to those who were members of "peace churches," (e.g., Mennonites, Quakers, and Brethren), those who could show that the articles of faith of their denominations prohibited them from fighting. The Confederacy did likewise.[33]

When the need for conscription arose again during the time of World War I, the Draft Act of 1917 repeated the earlier exemptions. Pacifists would be inducted into the military, but they would be allowed to perform noncombatant duties.[34] In response to this exception, the constitutionality of the draft laws, including the exemption for members of peace churches, was challenged on the ground that an exemption that applied only to "peace churches" discriminated against people of other religions and, therefore, violated the Establishment Clause. Dismissing the claim in a most cursory manner, the Court stated:

> We pass without anything but statement the proposition that an establishment of religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act to which we at the outset referred, because we think its unsoundness is too apparent to require us to do more.[35]

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application for naturalization because he would not agree to bear arms against other Muslims or a predominantly Islamic country).

[33] *See* United States v. Seeger, 380 U.S. 163, 171 (1964) (explaining that in 1864 the federal government "extended exemptions to those conscientious objectors who were members of religious denominations opposed to the bearing of arms and who were prohibited from doing so by the articles of faith of their denominations. In that same year the Confederacy exempted certain pacifist sects from military duty.") (citations omitted).

[34] Section 4 of the Selective Draft Act of 1917 provided:

> [A]nd nothing in this Act contained shall be construed to require or compel any person to serve in any of the forces herein provided for who is found to be a member of any well-recognized religious sect or organization at present organized and existing and whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war or participation therein in accordance with the creed or principles of said religious organizations, but no person so exempted shall be exempted from service in any capacity that the President shall declare to be noncombatant . . . .

Selective Draft Act, ch. 15, § 4, 40 Stat. 76, 78 (1917), *repealed by* Pub. L. No. 89-554, 80 Stat. 643 (1966).

[35] Selective Draft Law Cases, 245 U.S. 366, 389-90 (1918) (holding that the con-

Congress broadened the exemption beyond members of peace churches, however, with the 1940 Selective Training and Service Act. One would qualify for C.O. status if one's objection to war was based on "religious training and belief."[36] Furthermore, a C.O. did not have to serve in a noncombatant role within the military, but could do alternative nonmilitary service.

In *United States v. Seeger*, the Court addressed claims of "unconventional" conscientious objections to war, i.e., defendants who did not believe in a personal God.[37] The Court granted C.O. status for such beliefs, reasoning that a party's objection to war could be based on a "belief in goodness and virtue for their own sakes,"[38] or a moral code deriving from an "Ultimate Cause,"[39] rather than a belief in a personal

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cept of the draft is not contrary to individual liberty, the constitutional prohibition of involuntary servitude, or the religion clauses).

[36] Section 5(g) of the Selective Training and Service Act of 1940 provided:

> Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Any such person claiming such exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the land or naval forces under this Act, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be assigned to work national importance under civilian direction.

Selective Training and Service Act of 1940, ch. 625, § 5(g), 54 Stat. 885, 889 (1948) (codified as amended at 50 U.S.C. app. §§ 451-473 (1988)).

> Congress modified the law again in 1948, defining religious training and belief as an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.

Selective Service Act of 1944, ch. 625, § 6(j), 62 Stat. 604, 612-13 (1944) (codified as amended at 50 U.S.C. app. §§ 451-473 (1988)). A 1967 amendment to this statute struck out the phrase "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation." 50 U.S.C. app. § 456(j) (1988) (amended 1967).

[37] 380 U.S. 163 (1965). In describing Seeger's beliefs, the Court noted that his "'skepticism or disbelief in the existence of God' did 'not necessarily mean lack of faith in anything whatsoever'; that his was a 'belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed.'" *Id.* at 166.

[38] *Id.* at 166. The Court noted that Jakobson, an individual involved in a case the Court decided together with *Seeger*, claimed to be within the scope of § 6(j) because his objection to war was "based on belief in a Supreme Reality and is therefore an obligation superior to one resulting from man's relationship to his fellow man." *Id.* at 165. In his notes on religion, Jakobson declared that he "believed in 'Godness' which was 'the Ultimate Cause for the fact of the Being of the Universe . . . .'" *Id.* at 168.

[39] *Id.* at 168.

God. In *Seeger*, the Supreme Court suggested that because Congress used the phrase "Supreme Being" rather than the more restrictive word "God," the statute did not compel a belief in God that would appear "orthodox" to the majority.[40] The Court gave an even broader interpretation of the statute five years later in *Welsh v. United States*, when it found that the plaintiff's objections to war were based on religious training and belief even though plaintiff was not aware that he was religious.[41]

In the Selective Service Act of 1917, exemptions from military service were granted to those "peace church" members who opposed participation in war "in any form."[42] Although subsequent revisions of the law expanded the categories of people that qualified for C.O. status, the requirement persisted that the objection had to be to all wars. This requirement was finally challenged in the Supreme Court in 1971.

In *Gillette v. United States*, the plaintiffs contended that the law violated the Establishment Clause because it preferred those with religious views opposing all wars over those who were selective in their conscientious objection. The Court found against that claim on essentially two grounds. First, administering the law to accommodate selective objectors would create greater state involvement in ascertaining one's beliefs pertaining to particular wars, thereby entangling the government in sensitive religious questions. The Establishment Clause, the Court reasoned, prohibited such entanglement between

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40 In describing the requirements of the 1940 Act, the Court stated:

> Under the 1940 Act it was necessary only to have a conviction based upon religious training and belief; we believe that is all that is required here. Within that phrase would come all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent. The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition.

United States v. Seeger, 380 U.S. 163, 176 (1965). *See supra* note 26 and accompanying text (discussing the "parallelism test," which is also now applied to naturalization petitions by conscientious objectors).

41 Welsh v. United States, 398 U.S. 333 (1970). The *Welsh* Court noted that: "[V]ery few registrants are fully aware of the broad scope of the word 'religious' as used in § 6(j), and accordingly a registrant's statement that his beliefs are nonreligious is a highly unreliable guide for those charged with administering the exemption." *Id.* at 341. Of course, the "broad scope" of the word "religious" is that derived from *Seeger*.

42 Selective Draft Act, ch. 15, § 4, 40 Stat. 76, 78 (1917), *repealed by* Pub. L. No. 89-554, 80 Stat. 643 (1966).

religion and government.[43] Second, the language of the statute explicitly reserved the exemption from military service for those who object to war in any form. The Court found that the act was neutral and nondiscriminatory, and was not designed to prefer the beliefs of one sect over another or to single out any religious view for special treatment. Furthermore, the Court pointed out that the blanket principle of the statute facilitated fairness of administration. For all these reasons, the *Gillette* Court determined that selective conscientious objection could not be valid under the statute.[44]

The same kind of broad government accommodation is available to persons already in the military who *become* conscientious objectors. Based on the C.O. provisions of the Selective Service Act,[45] the Department of Defense issued procedures for allowing such a person to be assigned to a noncombatant role in the military or, if one's conscience will not allow that, to be discharged.[46] In order to receive C.O. status, a service person must be conscientiously opposed to war in any form, the opposition must be based on religious training and belief, and must be sincere and deeply held.[47] If, after the pursuit of regular military procedures, C.O. status is denied, there is an opportunity for judicial review through habeas corpus procedure when one is in military custody.[48]

Military personnel reassigned to overseas duty, however, may not receive a temporary restraining order and/or preliminary injunction prohibiting that reassignment while the objectors file a request for conscientious objector status.[49] When the denial of C.O. status is chal-

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43 Walz v. Tax Comm'n, 397 U.S. 664, 675-80 (1970) (finding that tax exemptions for religious property did not violate the Establishment Clause because such exemptions have long historical precedent, do not target such properties for preferential treatment, and prevent excessive entanglement between church and state).

44 Gillette v. United States, 401 U.S. 437, 462 (1971).

45 50 U.S.C. app. § 456(j) (1988).

46 32 C.F.R. § 75.1-11 (1993).

47 32 C.F.R. § 75.5(a)(1)-(3) (1991). *See also* Smith v. Laird, 486 F.2d 307, 309-10 (10th Cir. 1973) (holding that the government must show a basis in fact to deny an in-service request for discharge as a conscientious objector). The *Smith* court further found that mere disbelief of applicant's motivation was insufficient, and that an applicant's religious beliefs must be sincerely held. *Id.*

48 Singer v. Secretary of the Air Force, 385 F. Supp. 1369, 1372-73 (D. Col. 1974) (declaring that because the military held the Petitioner "in custody," the court had habeas corpus jurisdiction to review a denied application for conscientious objector status).

49 Pruner v. Department of the Army, 755 F. Supp. 362 (D. Kan. 1991). In *Pruner*, the court found that the temporary relief sought "would seriously interfere with the public interest in the efficient deployment of troops in connection with Operation Desert Shield." *Id.* at 364. In reaching this decision, the court reasoned that because Pruner's application for C.O. status would still be evaluated, and he would be as-

lenged, the court will try to determine if the plaintiff fits the first two criteria previously mentioned, but will focus on his or her sincerity.[50] Initially, the plaintiff has the burden of proof to show that he or she is a C.O. The burden then shifts to the government to justify the denial of C.O. status based on the record.[51] The military satisfies this burden only if there is a basis in fact for denying the status, rather than a mere disbelief.[52]

Moreover, the regulations governing eligibility for C.O. status specify, with certain exceptions, that in order to be considered a C.O., one must have arrived at one's views after induction or enlistment in the military.[53] In fact, the timing of one's application is not to be

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signed duties involving less exposure to conflict, he would not suffer irreparable harm. *Id.* at 365.

50 The pertinent regulation states: "A primary factor to be considered is the sincerity with which the belief is held." 32 C.F.R. § 75.5(c)(2) (1993).

51 Rautenstrauch v. Secretary of Defense, 313 F. Supp. 170 (W.D. Tex. 1970). The *Rautenstrauch* court added that the government's objections, which were based in part on the fact that the petitioner's Catholic upbringing did not prohibit him from serving in the armed services, did not necessitate a finding that his beliefs "are probably grounded in religious training and beliefs." *Id.* at 175.

52 Helwick v. Laird, 483 F.2d 959, 963 (5th Cir. 1971). The *Helwick* court noted that the military "is not at liberty merely to disbelieve the claimant. There must be some facts in his application—hard, provable, reliable facts—that provide a basis for disbelieving the claimant." *Id.* In *Helwick*, the court held that a service person may be granted a discharge from the military as a conscientious objector if his or her views were changed by the military experience. *Id.* This would be the case, the court stated, even if he or she entered on a noncombatant basis, and even if his or her religious views were not expressed with depth and maturity. *Id.* at 964. *See also* Lobis v. Secretary of the Air Force, 519 F.2d 304, 307 (1st Cir. 1975) (declaring that when one who has received a medical education at the government expense applies for conscientious objector status just prior to induction into active military duty, the timing of that application *alone* is not conclusive of insincerity); Reiser v. Stone, 791 F. Supp. 1072 (1992) (same).

53 32 C.F.R. § 75.4(a)(1) (1993). Section 75.4 (a)(2), however, permits exceptions when:

> (i) such beliefs crystalized after receipt of an induction notice; and (ii) he could not request classification as a conscientious objector because of Selective Service regulations prohibiting the submission of such requests after receipt of induction notice.

Id.; *see also* Bates v. Commander, First Coast Guard District, 413 F.2d 475, 478 (1st Cir. 1969). In *Bates*, the court found that because service personnel may apply for conscientious objector status after induction into the military, it was not proper to automatically conclude that such application is evidence of insincerity. *Id.* Under such a standard, no member of the military could ever qualify as a conscientious objector. *Id.*

The rationale for such a regulation is clearly stated by Robert L. Larsen, Jr. and Theodore G. Hess, both lawyers in the military:

> To be eligible for conscientious objector status, an applicant's beliefs must not have crystallized prior to the applicant's entry into military service. No one is forced to join the United States military, so it makes no sense for conscientious objectors to join the service in the first place.

interpreted as a sign of insincerity, even if one applies for C.O. status only shortly before the beginning of active duty. Neither will an inference of insincerity be drawn if an application is filed after one receives medical training at government expense in exchange for an obligation of military service.[54] Additionally, the fact that a petitioner for C.O. status failed to adopt a new life-style was insufficient as a basis-in-fact to reject the application.[55]

In evaluating an application, the regulations require that the applicant be interviewed by a chaplain, a psychiatrist, and an investigating officer. The combined reports are forwarded to the headquarters of the military service involved to make a final decision on the application.[56] When a court reviews a denial of an application, the views of the interviewing officers must be given greater weight than those of officers at the "decision level."[57] The regulations point out that even though C.O. status must be based on an applicant's religious training and belief, an applicant does not have to belong to a religious sect,[58] or, for that matter, a sect that teaches pacifism.[59] Furthermore, an application does not require intellectual sophistication,[60] and the military cannot question the truth or validity of an applicant's beliefs or reject them as incomprehensible.[61] Finally, the willingness of one to

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> If they do join despite their alleged beliefs, two inferences arise. First, they are trying to deceive the Government by joining the military with no intention to fight if called to do so. Second, their alleged beliefs are insincere, since they are willing to put them aside for the sake of military pay and benefits.

Captain Robert L. Larsen, Jr. & Colonel Theodore G. Hess, *Conscientious Objection In An All-Volunteer Military*, 66 ST. JOHN'S L. REV. 687, 692 (1992).

54 Daly v. Claytor, 472 F. Supp. 752, 754-55 (D. Mass. 1979) (declaring that while the timing of a request for conscientious objector status is not a sufficient basis in fact for a finding of insincerity, neither is an applicant's failure to adopt a new life style).

55 *Id.* at 755.

56 32 C.F.R. § 75.6(c)-(f) (1993).

57 Singer v. Secretary of the Air Force, 385 F. Supp. 1369, 1374 (D. Colo. 1974). Sometimes the "decision level," such as the Department of the Army Conscientious Objector Review Board, will overrule the investigating officers and chaplain.

58 *Id.* at 1374-75 (citations omitted). *See* 32 C.F.R. § 75.5(c)(2)(iii)(a)-(d) (1993).

59 Rautenstrauch v. Secretary of Defense, 313 F. Supp. 170, 175 (W.D. Tex. 1970).

60 Helwick v. Laird, 438 F.2d 959, 964 (5th Cir. 1971). *See also* Hager v. Secretary of the Air Force, 938 F.2d 1449 (1st Cir. 1991). In *Hager*, an officer who had received medical training at Air Force expense was entitled to conscientious objector status even though the military perceived his convictions to be shallow, simplistic, and recently acquired. *Id.* at 1459-60. The court found that these factors did not mitigate the sincerity of his views, which was the primary criterion used in evaluating requests for conscientious objector status. *Id.* at 1459.

61 Decker v. Wheeler, 331 F. Supp. 347, 349 (D. Minn. 1970). In *Decker*, the court noted that the Review Board impermissibly examined the validity of the plaintiff's beliefs, rather than asking the "critical question of whether the belief is in plaintiff's own scheme of things religious." *Id.* at 349-50.

fight in defense of one's immediate family or friends is not inconsistent with conscientious objection and cannot, by itself, be the basis for denying C.O. status to one in the military.[62]

This survey clearly suggests that, regardless of the importance of national defense, the government has become increasingly willing to accommodate conscientious objections to military service. This was also true during the Persian Gulf War, when the military had to mobilize on short notice and utilize a large number of reservists.[63] Although there was some decline in the rate of approval of such applications, the military's willingness to accommodate conscientious objectors did not disappear.[64] Because the accommodations have been made by specific military regulation, they presumably fall within the meager zone *Smith* allowed for legislative exceptions to laws of general applicability.[65]

SANCTUARY

The issue of sanctuary, which has antecedents in antiquity and medieval times,[66] as well as the "underground railroad" of nineteenth century American history,[67] has recently resurfaced as an

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62 *Id.* at 351. *But see* Rosenfeld v. Rumble, 386 F. Supp. 476 (D. Mass. 1974) (holding that a belief in fighting to protect all Jews in the event of hostile invasion of the country did not fall into the protected category of fighting for the defense of one's family). For a survey of the topic of conscientious objection within the military, see 6 C.J.S. *Armed Services* §§ 93-103 (1975). *See also* Brent D. Thomas, *The Impact Of The Gulf War On Conscientious Objectors*, 61 MO. L. REV., 67, 85-87 (1992) (providing a digest of the regulations at issue here, but no case law); Larsen & Hess, *supra* note 53, at 695-701 (same).

63 The number of applications for conscientious objector status increased, but not dramatically. Conscientious objector groups claimed that there were more such requests than the military acknowledged. *See* Thomas, *supra* note 62, at 69.

64 Larsen and Hess, in noting this trend, stated the armed forces "kept their doors open to conscientious objector applications, even though they had no guarantees that the war would be conducted swiftly, produce minimal casualties, or enjoy widespread popular support." Larsen & Hess, *supra* note 53, at 708. Additionally, the approval rate of these applications only dropped from sixty-five percent to about fifty-seven percent. *Id.*

65 On May 5, 1992, Representative Ronald V. Dellums of California introduced legislation that would have codified the regulations examined in this section of the paper. 138 CONG. REC. E1246 (daily ed. May 5, 1992). Although the bill did not become law, Congressman Dellums intends to reintroduce the bill during the current session of Congress.

66 William C. Ryan, *The Historical Case for the Right of Sanctuary*, 29 J. CHURCH & ST. 211-19 (1987).

67 *See generally* RENNY GOLDEN & MICHAEL MCCONNELL, SANCTUARY: THE NEW UNDERGROUND RAILROAD (1986); SANCTUARY: A RESOURCE GUIDE FOR UNDERSTANDING AND PARTICIPATING IN THE CENTRAL AMERICAN REFUGEES' STRUGGLE (Gary MacEoin ed., 1985).

issue of conscience.[68] The sanctuary issue has reemerged with the attempt to protect Central American refugees from deportation back to their country of origin by the United States Government. This is an issue of conscience for at least two reasons. First, sanctuary churches and sanctuary workers believe that the refugees are in danger of death if they are forcibly returned to their countries of origin. To protect these refugees, therefore, is an act of humanitarianism and an expression of Christian love. Secondly, because this activity is religiously motivated, sanctuary workers who have broken the immigration laws believe that the Free Exercise Clause of the First Amendment protects them from prosecution.

Section 1324(a) of the Refugee Act of 1980 prohibits importing or transporting illegal aliens.[69] There have been some criminal prosecutions of sanctuary workers for violating these laws. The workers have taken the position that because they are motivated in

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[68] Sanctuary became a "hot" issue when the Reagan Administration began, in 1981, to take a hard line against people fleeing from the repression of governments with which the U.S. was friendly and whose "freedom fighters" the Administration was supporting with arms and money. Troy Harris, *Toward a Universal Standard: Free Exercise and the Sanctuary Movement*, 21 J. L. REFORM 745, 746-49 (1988).

[69] This section provides, in pertinent part:

> (a) Any person, . . . of any means of transportation who—
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> (1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise;
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> (2) knowing that he is in the United States in violation of the law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;
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> (3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, house, or shield from detection in any place, including any building or any means of transportation; or
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> (4) willfully and knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of—
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> any alien . . . not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs: *Provided, however*, That for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.

8 U.S.C. § 1324(a)(1)-(4) (1982), *amended by* 8 U.S.C. § 1324 (1988 & Supp. IV 1992).

their humanitarian work by Christian compassion, the concept of religious freedom, guaranteed by the Free Exercise Clause, is a viable defense. The government, however, through the Immigration and Naturalization Service (INS) and the courts, has been unwilling to grant any accommodation. In every case, the courts applied the "compelling state interest" test to the detriment of the sanctuary workers. What is this weighty interest of the state? Protection of its borders. According to this rationale, a state that cannot determine who will cross its borders has lost its sovereignty and integrity. No matter how highly motivated the sanctuary workers or how precarious or pitiful the condition of the refugees, only Congress may determine who is eligible to cross this nation's borders and how this may be done.[70]

In a case involving a religious group, as opposed to an individual, a federal district court ruled that the group lacked standing to assert its First Amendment free exercise right to participate in the sanctuary movement.[71] Responding to charges of selective enforcement of the law and of religious harassment by the government, the court in *American Baptist Churches in the U.S.A. v. Meese*, found that the group was not subject to selective enforcement because many others had been prosecuted and convicted for violating § 1324(a). The court further found that the members were not being prosecuted or harassed for expressing their religious beliefs through sanctuary activities.[72]

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[70] United States v. Aguilar, 883 F.2d 662 (9th Cir. 1989). In *Aguilar*, the court declared that several sanctuary workers were subject to prosecution for harboring and protecting refugees, in spite of their religious motivations. *Id.* at 694-96. The court further found that the sanctuary workers were not victims of selective prosecution, and that the government could use the information it obtained through undercover operatives under the "invited informer doctrine." *Id. See also* United States v. Merkt 794 F.2d 950, 955, 957 (5th Cir. 1986) (holding that the Free Exercise Clause did not protect sanctuary workers from prosecution under 8 U.S.C. § 1324(a), even though they were religiously motivated in their attempted protection of Salvadoran and Guatemalan refugees); United States v. Elder, 601 F. Supp. 1574, 1578-79 (S.D. Tex. 1985) (denying a motion to prevent government prosecution of a sanctuary worker who claimed a free exercise right to help refugees to come to America and find safety).

[71] American Baptist Churches in the U.S.A. v. Meese, 712 F. Supp. 756, 766 (N.D. Cal. 1989). In *Meese*, plaintiff religious organizations limited their request for an exemption to acts allegedly in violation of § 1324 that were committed before November 6, 1986, which was the date of Congress's amendment. *Id.* at 759, 761. Because plaintiff's limited request would have no deterrent effect on the pursuit and prosecution of those participating in the sanctuary movement since that date, *i.e.*, under the new version of the law, there was no real possibility that the relief sought would redress or prevent the injury to those acting under the new version of the law. *Id.* at 761-62. The court concluded that the plaintiffs lacked standing to assert their [F]irst [A]mendment claims. *Id.* at 762.

[72] *Id.* at 764. The court added: "[T]he plaintiffs invoke the standard First Amend-

The immigration laws are laws of general applicability. Therefore, according to the *Smith* doctrine, courts have even less reason to accommodate the consciences of those who are trying to help imperiled Central Americans. This result is likely because the *Smith* decision has displaced the compelling state interest standard.[73]

TAXES

There are some who hold conscientious objections to the payment of taxes. A notable example is the Old Order Amish, a group that objects to the payment (and receipt) of Social Security taxes. The Social Security program provides for a series of old age and unemployment benefits.[74] The Amish, however, who have a strong belief in hard work and self-sufficiency, prefer to take care of their own sick and aged. For the Amish, providing such care is a religious obligation, based on the biblical admonition in I Timothy 5:8: "If any one does not provide for his relatives, and especially for his own family, he has disowned the faith and is worse than an

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ment protection applicable to symbolic conduct, and ask the court to apply it to that which is not symbolic conduct. . . and we decline to do so." *Id.*

[73] An additional dimension of the sanctuary issue, outside the scope of this paper, involves the government's methods in investigating the sanctuary movement. It is now well documented that the Immigration Naturalization Service, in trying to determine the scope and personnel of the sanctuary movement, infiltrated the movement with undercover operatives. As part of their work to inform the government, they attended planning meetings in churches and even religious services with hidden tape recorders. *Aguilar*, 883 F.2d at 696-705. The *Aguilar* court provided a lengthy and careful rationale for not allowing the free exercise defense that the government's activities were illegal because of their chilling effect on the churches involved. *Id.* at 705. The court also declared that the government did not need to obtain a search warrant to use undercover agents in church settings for the purpose of obtaining information about the sanctuary movement. *Id.* The court stated that "[a] search warrant requirement for undercover government agents to investigate an organization concededly engaging in protected [F]irst [A]mendment activities indeed would prohibit law enforcement officials from using an indispensable method of criminal investigation appropriate in any other circumstance." *Id.*

Recently, at least one court enunciated two limits on government behavior in this area: (1) the government must not engage in "unbridled and inappropriate covert activity *which has as its purpose or objective the abridgement of the [F]irst [A]mendment freedoms of those involved*"; and (2) the investigators must not go beyond the extent of the invitation to participate in the activities that are the subject of the investigation by those upon whom they are covertly spying. The Presbyterian Church (U.S.A.) v. United States, 752 F. Supp. 1505, 1516 (D. Ariz. 1990) (emphasis added). If these restraints are met, the investigators do not need to obtain a warrant from a court or prior approval by the authorities of the investigating agency. *Id.* The court also adopted the *Aguilar* declaration that religious organizations are not entitled to either Fourth or First Amendment (free exercise) protections from government agents infiltrating religious worship services and meetings to gather information about sanctuary workers or activities. *Id.* (citing *Aguilar*, 883 F.2d at 705 (9th Cir. 1989)).

[74] 26 U.S.C. § 3101 (1988).

unbeliever." (RSV) Believing that paying Social Security tax is an acknowledgement that the government has a responsibility to care for the aged and infirm, and that such an acknowledgment is a denial of their faith,[75] the Amish petitioned for an exemption.[76] Consequently, Congress exempted the self-employed among the Amish and any other religious groups with theological objections to Social Security from paying the taxes and receiving the benefits of the program.[77]

In 1982, however, the Supreme Court refused to allow a broadening of that accommodation in *United States v. Lee*.[78] In *Lee*, an Amish farmer employed other Amish and refused to withhold Social Security taxes from his employees or to pay the required employer's share of the taxes.[79] Writing for the majority, Chief Justice Burger held that the exemption Congress granted to the self-employed could not be extended further, regardless of the theological beliefs of the employer or employees. The Court reasoned that religious-based exemptions, beyond those expressly granted by Congress, would compromise the fiscal stability and the efficient administration of the program.[80]

One year after *Lee*, the Tax Court held that the exemption would apply only if one belonged to a sect that teaches both the self-sufficiency and rejection of government social insurance benefits. A similar belief held by one outside such a sect, according to the court, was not sufficient. The court pointed out that Congress could have exempted such persons, but chose to reduce opportunities for deception while also not burdening the program's administration.[81] In another decision by the Tax Court, a former Amish person, who still adhered to Amish beliefs regarding Social

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75 JOHN HOSTETLER, AMISH SOCIETY 20-21 (rev. ed. 1968).

76 *Id.* at 20. The Amish wanted Congress to recognize that "Old-age Survivors Insurance is abridging and infringing to our religious freedom. Our faith has always been sufficient to meet the needs as they come . . . ." *Id.*

77 26 U.S.C. § 1402(g) (1988).

78 455 U.S. 252 (1982).

79 *See supra* notes 74-77 and accompanying text, explaining the Amish beliefs against paying employment taxes.

80 *Id.* at 260. The Court declared that "[t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief." *Id.* (citations omitted). The Court found that the integrity of the tax system was an "overriding government interest" that outweighed Lee's religious liberty. *Id.* at 257, 260.

81 Hughes v. Commissioner, 81 T.C. 683 (1983) (holding that the plaintiff, who was seeking an exemption from paying and receiving social security, was not permitted to rely on the "parallelism test" enunciated in *United States v. Seeger* because he was not a member of a religious sect that provided its own social benefits).

Security, was not entitled to the exemption because he was no longer in the sect.[82]

In another area, the Supreme Court has declared that a person may not be exempted from the use of a Social Security number because of religious convictions that the number may somehow prevent one from advancing in spiritual power or endanger one's soul. The rationale for requiring a number, even over religious objections is, again, efficiency of administration and prevention of fraud. Additionally, as a test for interpreting the Free Exercise Clause, the Court ruled that a person may not compel the government to adapt its procedures to his or her religious beliefs.[83]

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82 Borntrager v. Commissioner, 58 T.C.M. (CCH) 1242, 1243 (1990) (holding that a person who was excommunicated from the Amish church was no longer a member of that sect for purposes of 26 U.S.C. § 1402(g)(1), and therefore was not exempt from paying and receiving social security because he was no longer cared for by the group).

83 Bowen v. Roy, 476 U.S. 693 (1986). In denying Roy's objection to the government's use of his daughter's Social Security number, the Court stated:

> Never to our knowledge has the Court interpreted the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family. The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens. Just as the Government may not insist that appellees engage in any set form of religious observance, so appellees may not demand that the Government join in their chosen religious practices by refraining from using a number to identify their daughter. "[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government."

Id. at 699-700 (quoting Sherbert v. Verner, 374 U.S. 398, at 412 (1963) (Douglas, J., concurring); *see also* Wolfrum v. Commissioner, 62 T.C.M. (CCH) 370 (1991) (finding that a taxpayer's belief that a Social Security number was a "universal numerical identifier" to be equated with the "mark of the beast" warned against in Revelation 13 and 14, this religious objection to the use of the Social Security number cannot exempt the taxpayer from paying self-employment tax). The *Wolfrum* court added that: "Generally, religious beliefs provide no basis for refusing to pay a tax." *Id.* at 393 (quoting United States v. Lee, 455 U.S. 262 (1982)).

In refering to the second beast, the Book of Revelation states:

> [16]Also it causes all, both small and great, both rich and poor, both free and slave, to be marked on the right hand or the forehead, [17]so that no one can buy or sell unless he has the mark, that is, the name of the beast or the number of its name. [18]This calls for wisdom: let him who has understanding reckon the number of the beast, for it is a human number, its number is six hundred and sixty-six.

Revelation 13:16-18. The attempt has also been made to avoid the use of a Social Security number as a requirement for obtaining a driver's license on the ground that the Social Security number is the "mark of the beast" referred to in Revelation 13 and 14. Leahy v. District of Columbia, 646 F. Supp. 1372 (D.C. 1986). In *Leahy*, plaintiff believed that there was a strong possibility that he would lose his life after death if he used the number. *Id.* at 1373. The court found that the requirement to supply Social

Another dimension of the relationship of taxation and conscience is war tax protest. Because government revenue finances the equipment and prosecution of war, some believe that by withholding tax payments, a protest against war can be made and, at the same time, one's conscience can be satisfied by nonparticipation. The principal forms of war tax protest are: refusing to file an income tax form, withholding the percentage of one's taxes equivalent to the percentage of the federal budget used for the military, or "W-4 resistance," *i.e.*, overstating the allowances the government permits for dependents and other reasons, so that no money is withheld from one's salary for tax purposes. This denies the government the use of that money and gives the salaried taxpayers the ability to refuse payment when they file their tax returns.[84] There are a variety of motivations for such action, but frequently the motivation is religious. War and killing are believed to be against God's law; one's faith in God and/or Jesus Christ demands that one protest war by affirmatively not supporting the financing of war.[85]

The government has not, however, accommodated war tax resistance. The principal reason for this is to maintain the viability of the tax system. The assumption is that the maintenance of the tax system is not only crucial for the government's constitutionally-mandated responsibility to "provide for the national defense," but is essential to the viability of the nation itself.[86] In *United States v. Lee*, for instance, the Court observed that there was no way to distinguish between war taxes and the government's general program of taxation. Using religiously-motivated war tax resisters as an example, the Court found that the soundness of the tax system out-

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Security number as a condition of obtaining a driver's license was not a violation of the free exercise of religion, given that it is neutral and uniform in its application and is a reasonable means of promoting a public interest, namely, public safety. *Id.* at 1378.

84 Rod Nippert & Bill Samuel, *Methods of War Tax Resistances, in* WAR TAX MANUAL FOR COUNSELORS AND LAWYERS II-8, II-9 (Kathy Levine & Vicki Metcalf eds., 1985 ed.) [hereinafter WAR TAX MANUAL].

85 *See* WAR TAX MANUAL, *supra* note 84, at II-1-6. For a helpful, brief, summary of both motivations for and methods of war tax resistance, see John C. & Zora L. Darrow, *Peacemaking and War Taxes: A Dilemma of Conscience*, LIBERTY: A MAGAZINE OF RELIGIOUS FREEDOM, Mar.-Apr. 1988, at 8, 8-9.

86 In the words of the Supreme Court:

> The power to tax is the one great power upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as is the air he breathes to the natural man. It is not only the power to destroy, but it is also the power to keep alive.

Nichol v. Ames, 173 U.S. 509, 515 (1899).

weighed a taxpayer's claims that the tax system violated religious beliefs.[87]

Moreover, the Tax Court rejected claims that the government's accommodation of conscientious objectors to military service should also apply to objectors of war taxes because payment of such taxes would be a denial of the free exercise of one's religion.[88] The Ninth Circuit came to the same conclusion, albeit for different reasons, in *Autenrieth v. Cullen*.[89] In *Autenrieth*, the court based its decision on the fact of the generality of the tax law, and that the tax law was not religion-specific. Quoting Justice Black's famous statement about the Establishment Clause in *Everson v. Board of Education*,[90] the court pointed out that the Income Tax Code taxed all citizens alike, and that allowing taxpayers to select those taxes they prefer to pay could destroy the government's ability to function.[91] Despite these sweeping rulings, however, some conscientious objectors have continued to try to make their point through the avoidance of taxes, and there has been an avalanche of litigation initiated by war tax protesters.[92]

As noted above, one war protest strategy has been to refuse to pay a percentage of one's income tax equivalent to the percentage of the government's budget used for war making. The tax protester frequently contributes that money to some charitable cause, often focused on the promotion of peace, both to show the government that the tax protest is not for personal gain and to make a contribution for the welfare of humanity. The tax code and the

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87 United States v. Lee, 455 U.S. 252, 260 (1982) (citations omitted). The Court added that "[b]ecause the broad public interest in maintaining a sound tax system is of such a high order, *religious belief in conflict with the payment of taxes affords no basis for resisting the tax.*" *Id.* (emphasis added).

88 Muste v. Commissioner, 35 T.C. 913, 918-19 (1961). In *Muste*, the court held that the requirement to pay income tax was not contrary to the Free Exercise Clause, even when taxpayer had religious objections to how the money is used. *Id.* The court also found that the failure to pay tax because of religious convictions was not *per se* fraudulent, but was willful neglect, and the Commissioner of Internal Revenue may collect the taxes with penalty. *Id.* at 920-21.

89 418 F.2d 586 (9th Cir. 1969).

90 330 U.S. 1, 15-16 (1947). In *Everson*, the Court held that public reimbursements for transportation to parents sending their children to parochial schools was not a violation of the Establishment Clause. *Id.* at 3, 18. The Court reasoned that because transportation was a public welfare program, such as police and fire protection, churches or religious people were not excluded from their benefits. *Id.* at 17-18.

91 *Autenrieth*, 418 F.2d at 588 (finding that although Congress exempted conscientious objectors from military service, Congress did not exempt people from paying income tax for a like reason, nor is Congress constitutionally required to do so). The *Autenrieth* holding becomes even more authoritative in light of *Smith*.

92 *See generally* WAR TAX MANUAL, *supra* note 84, at V-3-1 to V-10-16.

courts, however, have disallowed such a strategy.[93] Only Congress can provide a deduction in the taxing structure, and it has not done so for this purpose.[94] Furthermore, the taxpayer may not decide what cause should receive the withheld tax payment because Congress decides what can qualify as spending for the general welfare.[95]

Recently, however, the government took action against an employer, the Philadelphia Religious Society of Friends, for failing to withhold taxes from an employee's salary, in deference to the employee's conscientious objection to war and desire to be a war tax resister. In that case, it seems that the court wanted to find against the government and in favor of the tax resistance and would have, had it not been for the mandate of *Smith* that the Free Exercise Clause does not apply to laws of general applicability, which the tax code obviously is. Indeed, the judge's *dicta* in this case is often quoted by those who deplore *Smith*:

> It is ironic that here in Pennsylvania, the woods to which [William] Penn led the Religious Society of Friends to enjoy the blessings of religious liberty, neither the Constitution nor its Bill of Rights protects the policy of that Society not to coerce or violate the consciences of its employees and members with respect to their religious principles, or to act as an agent for our government in doing so. More than three hundred years after their founding of Philadelphia, and almost two hundred years after the adoption of the First Amendment, it would be a "constitutional anomaly" to the Supreme Court, *Smith*, if the Religious Society of Friends were allowed to respect decisions of its employee-members bearing witness to their faith.[96]

Some courts, however, have demonstrated a great deal of impatience with such religiously-based claims. In *DiCarlo v. Commissioner*,

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93 26 U.S.C. § 6651 (1988).

94 Lull v. Commissioner, 602 F.2d 1166, 1168 (4th Cir. 1979) (holding that religious objectors to war may not withhold from their tax payments a percentage equivalent to the percentage of the national budget spent for arms and war unless Congress specifically authorizes such a withholding, something Congress has not done).

95 Russell v. Commissioner, 60 T.C. 942, 947 (1973). In *Russell*, the court declared that the plaintiff could not substitute contributions to charity for payment of taxes because Congress decides what shall be supported by public spending, not individual taxpayers. *Id.* *See also* United States v. Malinowski, 472 F.2d 850, 856 (3d Cir. 1973) ("Thus posited, appellant's First Amendment argument . . . represents a feeble effort to emasculate basic principles of civil disobedience, and, simply stated, is invalid.") (quotation omitted).

96 United States v. Philadelphia Yearly Meeting Of the Religious Society of Friends, 753 F. Supp. 1300, 1306 (E.D. Penn. 1990).

for example, the plaintiff, a practicing Roman Catholic, professed not to be a tax protestor, but claimed that the requirement to pay income tax was a violation of his free exercise of religion because the government spent its money in ways that were contrary to teachings of the plaintiff's church. The Tax Court, denying the petition, asserted that:

> [N]othing in the Constitution prohibits the Congress from levying a tax upon all persons, regardless of religion, for support of the general government. The fact that some persons may object, on religious grounds, to some of the things that the government does is not a basis upon which they can claim a constitutional right not to pay a part of the tax.[97]

Citing the holding in *Smith*, the court further added that a generally applicable law does not burden the Free Exercise Clause:

> A statute does not violate the First Amendment unless it directly restricts an individual's free exercise of religion. . . . It is clear that the Internal Revenue Code, in imposing an income tax and requiring that returns be filed, does not restrict an individual's free exercise of religion. Courts have repeatedly and uniformly held that taxpayers' religious convictions do not entitle them to refuse to pay income taxes because of their disagreement with the way the Government spends their money.[98]

Finally, one last type of individual claim deserves mention: the claim that the war-making activities of the government are contrary to international law and, therefore, the conscientious objector is relieved from the obligation to pay war taxes. Courts have held, however, that such a claim is not even justiciable when the plaintiff uses it as a defense for failure to pay one's share of the general taxes.[99]

The clash between public policy and religious principles has also surfaced with tax-exempt organizations. For instance, Bob Jones University, an institution based on a fundamentalist interpretation of the Bible and Christian teachings, holds the belief that there should not be interracial marriage or dating, and imposed that view on its student body. The IRS denied the school its § 501(c)(3)[100] tax deduction because these racial policies were contrary to the public policy of racial integration, which Congress made law in the Civil Rights Act of 1964.

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97 DiCarlo v. Commissioner, 280 T.C.M. (CCH) 1383-84, *aff'd without published opinion*, 978 F.2d 716 (9th Cir. 1992) (quoting Autenreith v. Cullen, 418 F.2d. 586, 588 (9th Cir. 1969)).

98 *Id.* at 1384.

99 Russell v. Commissioner, 60 T.C. 942, 947 (1973); *see also* Muste v. Commissioner, 35 T.C. 913, 919-20 (1961).

100 Section 501(c)(3) of the Internal Revenue Code exempts from income taxation those "[c]orporations, . . . organized and operated exclusively for religious, charitable, . . . literary, or educational purposes . . . ." I.R.C. § 501(c)(3)(1988).

Challenging that ruling, the University claimed that it fell within the exempting statute because it was both religious and educational, and because the Free Exercise Clause guaranteed it the right to hold and implement those beliefs. The Supreme Court rejected the claim of the University, and declared that "an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy."[101] Consequently, the criterion of consistency with public policy can take precedence over the free exercise of religion in the area of taxation. Although the Court said that the evaluation that an institution is not "charitable" for tax purposes should be made only when "there is no doubt" that it is not consistent with public policy,[102] the principle has been established in the area of racial discrimination and the concept of accommodation has been narrowed.

JURIES AND OATHS

Required for criminal prosecutions pursuant to the Sixth Amendment, America's jury system is a crucial component of the country's judicial branch of government. Consequently, individual states have rights to expect jury duty from its citizens. If certain conditions are met, however, a trial judge, for any reason personal to the juror, may excuse a qualified juror before he or she is sworn. This rule applies to both petit and grand juries. Religious objection to serving as a juror qualifies as one of the reasons for excusing a juror from jury duty.[103]

One modern case that deals with this issue is *In re Jenison*.[104] In *Jenison*, Mrs. Jenison was selected to sit as a juror, but immediately prior to swearing, Mrs. Jenison declared that serving on a jury would violate her religious beliefs. Pointing out that the New Tes-

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101 Bob Jones Univ. v. United States, 461 U.S. 574, 586 (1983).

102 *Id.* at 592.

103 The question of religious objections to jury participation is a very narrow one, along with the use of oaths to qualify as a witness in the judicial setting. The larger question of religious disqualifications to jury service, to be determined on voir dire, is not specifically a conscientious objection issue and will not be covered here. *See* Joel E. Smith, Annnotation, *Religious Belief, Affiliation, or Prejudice of Prospective Juror as Proper Subject of Inquiry or Ground for Challenge on Voir Dire*, 95 A.L.R.3d 172 (1979); *see also* 50 C.J.S. *Juries* §§ 143, 243 (1947 & Supp. 1993). Nonetheless, an individual's religious objection to serving on a jury qualifies as a reason to excuse the potential juror from jury duty. *See* R. A. Vinluan, Annotation, *Religious Belief as Ground for Exemption or Excuse From Jury Service*, 2 A.L.R.3d 1392 (1965 & Supp. 1993).

104 120 N.W.2d 515 (Minn. 1963). Generally speaking, however, the case law on this issue is meager. In fact, as of 1963, there were no reported cases involving the interpretation of a statute that contained an exemption for jury service due to the status of religious belief. Vinluan, *supra* note 103, at 1393. The pocket part for this annotation suggests that this situation has not changed. *Id.*

tament asserts: "Judge not, that you be not judged[,]"[105] Jenison claimed that she could not sit in judgment of another. The Supreme Court of Minnesota, which disallowed her exemption, held that serving on a jury does not prohibit one's free exercise of religion, and that refusal to serve "is inconsistent with the peace and safety of the state."[106] Taking jury duty quite seriously, the court stated:

> No concept in our Anglo-Saxon tradition is more firmly entrenched or more an integral part of our democratic heritage than the right of every citizen to be tried by a jury of his peers. To sanction the disqualification of a juror because of a conviction which is at variance with such a basic institution is to invite the erosion of every other obligation a citizen owes his community and his country.[107]

In denying the exemption, the court reasoned that if a person were to be excused from jury duty for religious reasons, that exemption should be created by the legislature, as in the case of conscientious objections to war.[108]

Mrs. Jenison then petitioned the United States Supreme Court for a writ of certiorari. While the case was pending, however, the Court decided *Sherbert v. Verner*,[109] and remanded Mrs. Jenison's case back to state court for further consideration in light of *Sherbert*. On remand, the state court reversed itself and held that because there was no immediate serious threat to the jury system, the state's interest did not outweigh Jenison's free exercise rights.[110]

The only other case on this issue is *West Virginia v. Everly*. In *Everly*, a Jehovah's Witness was excused from jury duty because he believed that contributing to the mechanisms of a worldly government was inconsistent with his role as a representative of the Kingdom of God.[111] On the other hand, another court touched upon the juror oath - conscientious objection issue, at least tangentially, when the court excused jurors because the trial began on a holy day of their

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105 *Matthew* 7:1

106 *Jenison*, 120 N.W.2d at 517.

107 *Id.* at 518.

108 *Id.* at 519.

109 See *supra* note 1 and accompanying text for a description of *Sherbert*.

110 *In re Jenison*, 125 N.W.2d 588, 589 (Minn. 1963).

111 West Virginia v. Everly, 146 S.E.2d 705 (W. Va. 1966). The court noted the scarcity of cases on this subject. *Id.* at 707. "Shepherdizing" *Jenison* and *Everly* indicates that this is still entirely true. *See* R.A. Vinluan, Annotation, *Religious Belief as Ground for Exemption or Excuse from Jury Service*, 2 A.L.R.3d 1392 (1965 & Supp. 1993) (illustrating the point that there is a scarcity of cases dealing with the juror oath - conscientious objection issue).

religion.[112]

From the defendant's side, one can waive the right to a jury trial on free exercise grounds. In *United States v. Lewis*, the defendants requested a bench trial rather than a jury trial because their religion taught that one should be judged only by judges. The defendants argued that the Bible teaches that God has appointed judges from among the most learned of the community to settle disputes between people.[113] Although a defendant may want to waive a jury trial, how-

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112 Grech v. Wainwright, 492 F.2d 747 (5th Cir. 1974). In *Grech*, the trial judge's excusal of all Jewish veniremen who requested excusal because trial began on Yom Kippur [the Day of Atonement] was not a violation of the Constitution, nor did it invalidate a criminal trial jury. *Id.* at 749-50.

113 United States v. Lewis, 638 F. Supp. 573 (W.D. Mich. 1986). The *Lewis* court noted: "Accordingly, under defendants' version of God's will, [they] can only submit themselves to judgment by judges." *Id.* at 575. Although the biblical passages defendants relied upon are not specified in the text of the opinion, one passage is likely to have been found in Exodus:

> [13]On the morrow Moses sat to judge the people, and the people stood about Moses from morning till evening. [14]When Moses' father-in-law saw all that he was doing for the people, he said, "What is this that you are doing for the people? Why do you sit alone, and all the people stand about you from morning till evening?" [15]And Moses said to his father-in-law, "Because the people come to me to inquire of God; [16]when they have a dispute, they come to me and I decide between a man and his neighbors, and I make them know the statutes of God and his decisions." [17]Moses' father-in-law said to him, "What you are doing is not good. [18]You and the people with you will wear yourselves out, for the thing is too heavy for you; you are not able to perform it alone. [19]Listen now to my voice; I will give you counsel, and God be with you! You shall represent the people before God, and bring their cases to God; [20]and you shall teach them the statutes and the decisions, and make them know the way in which they must walk and what they must do. [21]Moreover choose able men from all the people, such as fear God, men who are trustworthy and who hate a bribe; and place such men over the people as rulers of thousands, of hundreds, of fifties, and of tens. [22]And let them judge the people at all times; every great matter they shall bring to you, but any small matter they shall decide themselves; so it will be easier for you, and they will bear the burden with you. [23]If you do this, and God so commands you, then you will be able to endure, and all this people also will go to their place in peace."
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> [24]So Moses gave heed to the voice of his father-in-law and did all that he had said. [25]Moses chose able men out of all Israel, and made them heads over the people, rulers of thousands, of hundreds, of fifties, and of tens. [26]And they judged the people at all times; hard cases they brought to Moses, but any small matter they decided themselves.

Exodus 18:13-26. The defendants probably pointed to Deuteronomy 16:18-20 as well. In this passage, God instructs the Hebrew people on how they are to live:

> [18]You shall appoint judges and officers in all your towns which the Lord your God gives you, according to your tribes; and they shall judge the people with righteous judgment. [19]You shall not pervert justice; you shall not show partiality; and you shall not take a bribe, for a bribe

ever, the Federal Rules of Criminal Procedure allow a waiver only if the government consents.[114] In *Lewis*, the defendants claimed that the Free Exercise Clause provided them the automatic right to waive a jury trial and that the requirement that the government must first consent was unconstitutional. Applying the compelling state interest test, the court agreed. The principal goals to be achieved in insisting on a jury trial in federal criminal cases, the court declared, are fairness and impartiality in reaching a verdict. The court then held that a bench trial is not inimical to those goals and the government can accommodate the defendants' beliefs without sacrificing the goals. Therefore, the defendants' religious beliefs outweighed the government's insistence on a jury trial as the *procedure* to obtain a fair trial.[115]

Because these kinds of accommodations to conscience rest implicitly and, in some cases, explicitly, on the compelling state interest test, it is probably safe to conclude that *Smith* impacts this area as well. Procedures about jury duty are of general applicability, and because *Smith* forbids the application of the compelling state interest test to such general laws, with very narrow exceptions, it is likely that courts

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blinds the eyes of the wise and subverts the cause of the righteous. [20]Justice, and only justice, you shall follow, that you may live and inherit the land which the Lord your God gives you.

Deuteronomy 16:18-20.

114 Rule 23(a) of the Federal Rules of Criminal Procedure provides: "Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government." FED. R. CRIM. P. 23(a).

115 The *Lewis* court declared that "[t]herefore, the [F]ree [E]xercise [C]lause . . . allows defendants to waive a jury trial, as their religious belief dictates, without the consent of the government as FED. R. CRIM. P. 23(a) prescribes." *Lewis*, 638 F. Supp. at 573. *But see* United States v. Turnbull, 888 F.2d 636 (9th Cir. 1989); Africa v. Anderson, 542 F. Supp. 224 (E.D. Pa. 1982). In *Turnbull*, a tax protester refused to employ counsel in his defense because he believed that the teachings of Jesus required him not to associate with lawyers. *Turnbull*, 888 F.2d at 637. Yet he would not waive his right to counsel while agreeing to the services of lay counsel. *Id.* The court ruled that "counsel" means "attorney," that there is no such thing as lay counsel other than pro se. *Id.* at 638 (citations omitted). The Ninth Circuit ruled that the district court did not err in appointing counsel for Turnbull. *Id.* The state's compelling interest in a fair and orderly trial outweighed Turnbull's religious objections to employing or associating with lawyers. *Id.* at 640.

In *Africa v. Anderson*, Ms. Africa was a member of the MOVE organization and rejected the legal system entirely. 542 F. Supp. at 225. In her trial over her alleged involvement in a confrontation between MOVE and the City of Philadelphia, she wanted to serve as counsel pro se. *Id.* The court determined that she was unable to represent herself adequately and appointed counsel for her. *Id.* at 226. Ms. Africa sued in federal court, claiming a violation of her religious freedom, based on the teachings of the leader of the movement of which she was a member. *Id.* at 228 & n.1. The court did not accommodate her religious beliefs on the grounds that the state's interest in the protection of the constitutional rights of the accused outweighed her religious objection to counsel and, indeed, to the legal system itself. *Id.* at 229-30.

in the future will not be able to accommodate religious objections in this area.

An integral and indispensable component to judicial process is the taking of oaths. An oath is the declaration of the truth of a statement, having the effect of binding the conscience of the affiant to tell the truth. The oath also puts the affiant on notice of the possibility of conviction for perjury if the oath is violated.[116] Historically and traditionally, the oath invokes the name of God. The source of the assumption that the oath binds the conscience of the affiant to tell the truth is the presumption that God is witness to the oath and that there will be some sort of divine punishment for the violation of the oath. Obviously, for such a religion-based oath to have the presumed effect, the affiant must believe in God.

But there are people who are not religious, or are religious in traditions other than the Judaeo-Christian-Islamic traditions. More to the point of this paper, there are people who have religious objections to the taking of an oath. The most well-known examples are the Quakers and Mennonites, both of which believe that Christians are obligated to tell the truth in any case and that oaths are contrary to Scripture. A Quaker statement is illustrative:

> Friends regard the custom of taking oaths as not only contrary to the teachings of Jesus but as implying the existence of a double standard of truth. Thus, on all occasions when special statements are required, it is recommended that Friends take the opportunity to make simple affirmations, thus emphasizing that their statements are only a part of their usual integrity of speech.[117]

Courts have tended to accommodate such people by allowing them to make "affirmations" rather than swear oaths.[118] The former, like the latter, is a declaration of the truth of a statement, but without

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116 Collins v. Florida, 465 So. 2d 1266, 1268 (Fla. Dist. Ct. App. 1985). In *Collins*, the court held that a police officer's failure to swear on oath to the truthfulness of an affidavit invalidated a search warrant, even though officer was known by the judge to be an honest man. *Id.*

117 FAITH AND PRACTICE: A BOOK OF CHRISTIAN DISCIPLINE 20 (reprint 1984). The statement of Jesus referred to is Matthew 5:33-37. In this passage, Jesus said:

> [33]Again you have heard that it was said to the men of old, 'You shall not swear falsely, but shall perform to the Lord what you have sworn.' [34]But I say to you, Do not swear at all, either by heaven, for it is the throne of God, [35] or by the earth, for it is his footstool, or by Jerusalem, for it is the city of the great King. [36]And do not swear by your head, for you cannot make one hair white or black. [37]Let what you say be simply 'Yes' or 'No'; anything more than this comes from evil.

Matthew 5:33-37.

118 For a helpful history of oaths and affirmations, see Jonathan Belcher, *Religion-*

the religious dimension, i.e., without invoking God's name. It is a solemn promise that is presumed to bind the conscience. It carries with it the possibility of prosecution for perjury. Indeed, some make no distinction between oaths and affirmations in terms of their effect in the judicial proceeding.[119]

The same is true with acts of Congress. The United States Code states, in pertinent part: "In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . 'oath' includes affirmation, and 'sworn' includes affirmed . . . ."[120] The accommodation is as old as the nation, in that the Constitution itself makes allowance for the affirmation rather than the oath in the assumption of public office.[121] Because of that constitutional recognition, and the fact that there are statutes that make the accommodation,[122] it is likely that the *Smith* principle cannot override the accommodation of those who object to oaths. Indeed, in *Society of Separationists v. Herman*, the Court of Appeals for the Fifth Circuit held that *Smith* did not prevent the use of affirmations or other promises to tell the truth in lieu of oaths. The court reached that conclusion, however, not because affirmations are allowed in the Constitution or because of statutory accommodations, but because the request for an affirmation involves speech as well as the free exercise of religion and is one of the "hybrid" cases in which *Smith* allows Free Exercise Clause protection.[123] In reaching this conclusion, however, the court went beyond the commonly-accepted principle mentioned earlier in this paragraph, i.e., that an af-

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Plus-Speech: The Constitutionality Of Juror Oaths And Affirmations Under The First Amendment, 34 WM. & MARY L. REV. 287, 290-99 (1992).

119 New Jersey v. Zamorsky, 159 N.J. Super. 273, 283, 387 A.2d 1227, 1232 (App. Div. 1978) In *Zamorsky*, the court rejected the state's contention that having a child "cross her heart and promise to tell the truth constituted substantial compliance" with the statutory requirement. *Id. See generally* 58 AM. JUR. 2D *Oath and Affirmation* §§ 1-9, 18-24 (1989).

120 1 U.S.C. § 1 (1988).

121 *See* U.S. CONST. art. I, § 3, cl. 6 (impeachment trials); U.S. CONST. art. II, § 1, cl. 8 (presidential oath of office); U.S. CONST. art. VI, cl. 3 (responsibilities of other office holders to support the Constitution); U.S. CONST. amend. IV (warrants issued on probable cause). This is probably no surprise, however, because the Constitution was written in Philadelphia, the bastion of Quakerism in the late colonial period. *See generally* JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1838, at 702-03 (New York, DaCapo Press 1970).

122 CHARLES E. TORCIA, 2 WHARTON'S CRIMINAL EVIDENCE §§ 372-373 (14th ed. 1972); SPENCER A. GARD, 3 JONES ON EVIDENCE: CIVIL AND CRIMINAL §§ 20:2-20:5 (6th ed. 1972).

123 Society of Separationists v. Herman, 939 F.2d 1207, 1215 (5th Cir. 1991). Upon rehearing this case en banc, the Fifth Circuit ruled that a prospective juror lacked standing to seek a declaratory judgment for a prospective remedy to avoid contempt for not making an affirmation for religious reasons. Society of Separationists v. Herman, 959 F.2d 1283 (5th Cir. 1992).

firmation is a promise to tell the truth without invoking the name of a deity. The *Herman* court found in favor of one who objected to an affirmation in qualifying for a jury because the affirmation was just as religious as an oath.[124]

One can argue, however, that the hybrid case rule of *Smith* leads to an opposite result. In other words, because the requirement to attest to the truth of one's statement by an oath or affirmation involves both freedom of religion and speech, objections are subject to strict scrutiny. Because the government has a compelling interest in guaranteeing truth-telling in judicial proceedings, the government does not have to accommodate the nonreligious objector beyond allowing him or her to use an affirmation rather than an oath, especially when the authors of the Constitution itself provided for the affirmation in that nonreligious sense. Therefore, the *Herman* court was wrong in the broad sweep of its ruling.[125]

PICTURES AND REFLECTORS

Another, although less significant, form of conscientious behavior needing accommodation from the government is the objection to having one's picture appear on a driver's license.[126] One of the Ten Commandments, which prohibits the making of "graven images,"[127] has been interpreted by some, most notably the Amish, to prohibit the taking of photographs. Consequently, the requirement to have a picture of oneself on a driver's license has been seen to be an infringement on one's religious freedom. In *Quaring v. Peterson*, a fundamentalist Christian woman, who was neither Amish nor the member of any other group that taught such beliefs, objected to the driver's license requirement because she believed the Second Commandment[128] prohibited creating the likeness of anything in God's creation. Finding her objection to be consistent with her other beliefs,[129] the court found that the driver's license

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124 The court reasoned that because the witness would neither "swear" nor "affirm," the witness should have been invited to suggest an alternative form, other than affirming, for guaranteeing the truth of testimony. *Herman*, 939 F.2d at 1216-17 (citations omitted).

125 *See id.* at 1220-25 (Garwood, J., dissenting); *see also* Belcher, *supra* note 118.

126 As of 1984, at least 47 states required such a picture. Quaring v. Peterson, 728 F.2d 1121, 1126 (8th Cir. 1984).

127 *See Exodus* 20:4 ("You shall not make yourself a graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth . . . ."); *Deuteronomy* 5:8 (same).

128 *Quaring*, 728 F.2d at 1123-24.

129 *Id.* at 1123. The court found that the woman was consistent with her beliefs: she had no pictures in her home, either of flowers or animals or of herself or her family,

requirement was a burden on her religious freedom.[130] The court rejected the state's contention that it had a compelling interest; namely, that the pictures aid in driver identification and that the state, for purposes of ease of administration, wanted to avoid selective exemptions.[131] The court, which did not agree that these interests were compelling enough to override plaintiff's religious freedom, went so far as to state that an administrative burden on the state becomes compelling only when it makes the statutory program inoperable. The court's decision, therefore, accommodated the conscientious objector.[132] In 1985, the United States Supreme Court affirmed this case by a divided vote.[133]

Since *Smith*, however, a court cannot reach this conclusion. Because a state's driver's license requirement is a law of general applicability and the "compelling state interest test" is no longer to apply to such laws, this accommodation to sincere religious belief could not now be made. A recent case involving Amish objections to being required to put a bright orange-red reflective triangle on their horse-drawn buggies illustrates this point.[134] A cardinal prin-

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she did not have a television, and she cut the labels off canned goods she purchased. *Id.*

130 *Id.* at 1125.

131 *Id.* at 1127.

132 *Id.* at 1127-28; *see also* Bureau of Motor Vehicles v. Pentecostal House of Prayer, 380 N.E.2d 1225, 1229 (Ind. 1978) (holding that the ease of driver identification by state law officers is not a compelling enough reason to force Amish and Pentecostals to have a picture on their drivers' license, contrary to their sincere religious beliefs). *But see* Dennis v. Charnes 571 F. Supp. 462, 464 (D. Col. 1983) (concluding that the ease of driver identification by state law officers is a state interest sufficient to override a religious objection against a photograph on a drivers' license); Johnson v. Motor Vehicle Div., 593 P.2d 1363, 1366 (Colo. 1979) (holding that photographic identification is a central purpose for issuing drivers' licenses; exceptions, even on religious grounds, would subvert that purpose). *Cf.* United States v. Slabaugh, 852 F.2d 1081, 1082-83 (8th Cir. 1988) (finding that the state has a compelling interest in photographing those charged with or convicted of crime for aid in identifying and apprehending fugitives, and that exempting individuals with religious objections to photographs would create a severe administrative burden for law enforcement officials and the courts).

133 Jensen v. Quaring, 472 U.S. 478 (1985) (per curiam). *Cf.* Wooley v. Maynard, 430 U.S. 705 (1977) (upholding the right of a person to refuse to display a state motto on his license plate). Although the *Wooley* Court appears to have decided the case on free speech grounds, the right to speak freely *and* the right not to speak at all, it is clear that plaintiff objected to displaying the motto because it was contrary to his moral and religious beliefs. Because *Wooley* is a "hybrid" case, involving speech and conduct, it will probably survive *Smith*.

134 MINN. STAT. ANN. § 169.522, subd. 1 (1988 & Supp. 1993). The statute states, in pertinent part:

> Subdivision 1. (a) All animal-drawn vehicles, . . . implements of husbandry and other machinery, . . . which are designed for operation at a speed of 25 miles per hour or less shall display a triangular slow-moving

ciple of Amish religion is difference from and separateness from the modern world.[135] On the basis of this aversion to modernity, the Amish objected to the requirement to put the slow moving vehicle emblem on their buggies. The "loud colors" and "worldly symbols" were a violation of these biblical admonitions.[136] The Amish recognized the safety interests of the state, however, and were willing to outline their buggies with silver reflective tape (silver is not "loud") and hang red lanterns on the backs of their buggies. Over the protests of the state, the Minnesota Supreme Court considered the Amish compromise a "less restrictive means" for the state to achieve its compelling interest and ruled that the Amish could not be forced to comply literally with the statute.[137]

The state disagreed with that opinion and petitioned the U.S. Supreme Court for certiorari. While that petition was pending, the Court handed down *Smith.* It then remanded the Amish case to the State Supreme Court for reconsideration in light of *Smith.* The state court recognized that *Smith* had changed the basis on which it had earlier decided the case. But it refused to apply *Smith* in its reconsideration, realizing that it would cause a different result, det-

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> vehicle emblem. . . . The emblem shall consist of a fluorescent yellow-orange triangle with a dark red reflective border and be mounted so as to be visible from a distance of not less than 600 feet to the rear. . . . After January 1, 1975, all slow-moving vehicle emblems sold in this state shall be so designed that when properly mounted they are visible from a distance of not less than 600 feet to the rear when directly in front of lawful lower beam of head lamps on a motor vehicle. . . .
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> (b) An alternate slow-moving vehicle emblem consisting of a dull black triangle with a white reflective border may be used after obtaining a permit from the commissioner under rules of the commissioner. A person with a permit to use an alternate slow-moving vehicle emblem must:
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> (1) carry in the vehicle a regular slow-moving vehicle emblem and display the emblem when operating a vehicle between sunset and sunrise, and at any other time when visibility is impaired by weather, smoke, fog, or other conditions; and
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> (2) permanently affix to the rear of the slow-moving vehicle at least 72 square inches of reflective tape that reflects the color red.

Id.

135 *See Romans* 12:2 ("Do not be conformed to this world . . . ."); II *Corinthians* 6:14 ("Do not be mismated with unbelievers. For what partnership have righteousness and iniquity? Or what fellowship has light with darkness?"). *See also* Minnesota v. Hershberger, 444 N.W.2d 282 (Minn. 1989); Hostetler, *supra* note 75 at 48-51.

136 Although Minnesota provided for an exception in section 169.522-1(b), which would permit the use of a dull black triangle with a white reflective border and at least 72 square inches of red reflective tape, the Amish found this to be unacceptable. *Hershberger,* 444 N.W.2d at 284-85. *See* MINN. STAT. ANN. § 169.522-1(b) (West Supp. 1993).

137 *Hershberger,* 444 N.W.2d at 289.

rimental to Amish religious freedom. Instead, the court considered the controversy under the Minnesota Constitution, which provides greater security for religious freedom than the First Amendment.[138] Because the state constitution also states that religious behavior may not be "inconsistent with the peace or safety of the [s]tate,"[139] the court found that it could apply the same balancing test as it had in the original case. As a result, the court accommodated Amish religious objections to state requirements.[140]

AUTOPSIES

Religious objections have also been asserted against autopsies performed on the bodies of dead relatives. Most states have statutes requiring medical examiners to perform autopsies on people when the cause of their death is unknown, when they die under unusual circumstances, or when there is reasonable suspicion that they died from some cause that might be communicable and thus a threat to public health and safety.[141] Controversies arise when the autopsy is performed without the prior knowledge or consent of relatives who have religious objections to autopsies, or even when relatives are notified in advance and try to prevent the required autopsy because of conscientious objection.

One religion prohibiting autopsies or anatomical dissections is Judaism. Such procedures are considered to be desecration of a corpse. According to Hebrew Scriptures, desecration is forbidden and there is to be a reverent disposal of the body, with all its parts, if possible.[142] The religious law against autopsies and dissection,

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138 Whereas the Free Exercise Clause mandates that the government may not "prohibit" religious freedom, § 16 of the Minnesota Constitution asserts: "The right of every man to worship God according to the dictates of his own conscience shall never be *infringed*. . . ." MINN. CONST. art. I, § 16 (1857) (emphasis added). The state court focused on "infringed." Minnesota v. Hershberger, 462 N.W.2d 393, 397 (1990).

139 MINN. CONST. art. I, § 16 (1857).

140 *Hershberger*, 462 N.W.2d at 399. Because many state constitutions are more specific and restrictive on the matter of religious freedom than the U.S. Constitution, it may be that other state courts will imitate the Minnesota Supreme Court and circumvent *Smith* by using their state constitution rather than the now-eviscerated Free Exercise Clause.

141 *See, e.g.*, Snyder v. Holy Cross Hosp., 352 A.2d 334, 337 (Md. Ct. Spec. App. 1976) (holding that a state statute requiring post-mortem examinations in a case where death occurred in an unexpected and mysterious way prevailed over the Free Exercise Clause-based objection of an Orthodox Jewish family because of the possibility of a threat to public safety and welfare).

142 Specifically, Deuteronomy states:

> [22]And if a man has committed a crime punishable by death and he is put death, and you hang him on a tree, [23]his body shall not remain all night upon the tree, but you shall bury him the same day, for a hanged

however, is not absolute. Most Jewish laws must give way to acts that would save or maintain life. Consequently, both medieval and modern rabbis have held that an autopsy may be performed if it is clear that such an act will save or preserve life, e.g., if it establishes the cause of the death of a person, contributes to medical research, or if dissection contributes to the medical education of future physicians. Therefore, the prohibition of autopsies is the rule, but an exception is allowed in the name of humanitarianism.[143]

Traditionally, various courts have balanced the religious objections to autopsies against the interests of the state. The law generally seems to be that the "next of kin" have a right to possess their relatives' bodies and may receive damages for injury to their religious sensibilities if the corpse has been dealt with wrongly.[144] Some states have statutes that require medical examiners to not perform autopsies when there are religious objections.[145] Many courts have held, however, that the interests of the state override these considerations.[146] Historically, however, the government

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> man is accursed by God; you shall not defile your land which the Lord your God gives you for an inheritance.

Deuteronomy 21: 22-23 (RSV).

143 Autopsies and Dissection, *in* 3 ENCYCLOPAEDIA JUDAICA cols. 931-33 (1971). Some Orthodox Jews believe that if the general prohibition against autopsy or dissection is violated in an unacceptable way, especially if parts of the body are destroyed or prevented from burial, "the soul of the deceased will find no rest until all parts of the body, or at least those parts which it is possible to find, have returned to the earth." Kohn v. United States, 591 F. Supp. 568, 573 (E.D.N.Y. 1984). In *Kohn*, the court found that an Orthodox Jewish family may bring tortious action for damages against the United States for performing an autopsy on their soldier son and for mishandling internal body parts. *Id.* at 574. Their claim against the United States may not prevail, however, in the case of the autopsy because there was an important government interest in knowing the cause of death, but the claim may nonetheless prevail in the case of the body parts. *Id. See also* Atkins v. Medical Examiner of Westchester County, 418 N.Y.S.2d 839, 841 (N.Y. Sup. Ct. 1979) (holding that the state's curiosity over the cause of death when there is no criminal activity, suspicion of foul play or of communicable disease may not prevail over religious objections to autopsies.).

144 *Kohn*, 591 F. Supp. at 573. The court added that "[t]he next of kin have an interest in the respectful treatment of the corpse, and in the case of those holding the views such as the plaintiffs [Orthodox Jews], an interest akin to that protected by the First Amendment." *Id.*

145 CAL. GOV'T CODE § 27491.43 (West 1989); N.J. STAT. ANN. § 52:17B-88.2 (West 1989); N.Y. PUB. HEALTH LAW § 4210-c (McKinney 1988); OHIO REV. CODE ANN. § 313.13.1 (Anderson 1989).

146 In the words of the Court of Special Appeals of Maryland:

> It is patent that the State has a compelling interest to safeguard the peace, health and good order of the community. To this end it needs to know when a death results from a criminal act or when the cause of death is such that the health and well-being of others may be adversely affected. That it may obtain this knowledge is the purpose and the underlying basis of the statutes pertaining to post-mortem examinations.

may not abuse its privilege in this area. For example, it is not enough reason to perform an autopsy over religious objections to determine whether the victim of an auto accident died of an injury to the head or an internal organ,[147] or merely to satisfy the curiosity of the Medical Examiner when there is no evidence of violence, foul play, or mysterious cause of death.[148]

Once again, however, the *Smith* decision changes the interests involved. As already noted, laws mandating autopsies are religiously-neutral, made in the interest of public health and safety. They are "laws of general applicability." As such, under the *Smith* doctrine, courts are not required to make any exceptions to the implementation of these laws, nor is the government required to show a compelling state interest. Therefore, in *Montgomery v. County of Clinton, Michigan*, the court held that a Jewish mother had no basis to receive damages from the state, despite the court's finding that the state had infringed on her free exercise rights when an autopsy was performed on her son without her permission. The court, citing *Smith*, declared: "As long as the burden imposed is not the object, but merely the incidental effect of a generally applicable and otherwise valid law, the First Amendment is not offended."[149]

> These statutes and the rules implementing them are general and nondiscriminatory. They are a valid exercise of sovereign power. When they are properly applied, . . . their purpose may not be defeated by invoking the constitutional guarantees of free exercise of religion with respect to the practice of religion. Practice in pursuit of the exercise of religion is not entirely free from government regulation.

Snyder v. Holy Cross Hosp., 352 A.2d 334, 341-42 (Md. Ct. Spec. App. 1976).

147 Weberman v. Zugibe, 394 N.Y.S.2d 371, 372 (N.Y. Sup. Ct. 1977). The *Weberman* court found that an autopsy performed to satisfy the curiosity of the Medical Examiner did not meet the "necessary to establish cause of death" requirement of the statute in the face of Orthodox Jewish free exercise objections. *Id.*

148 Atkins v. Medical Examiner, 418 N.Y.S.2d 839, 841 (N.Y. Sup. Ct. 1979). Noting the absence of foul play, the court emphasized the greater importance of the religious claim when it stated that: "[t]he sanctity of the right of free choice becomes accentuated when it entails the difference in the mind of the chooser between eternal life and terminal damnation." *Id.*

149 Montgomery v. County of Clinton, Mich., 743 F. Supp. 1253 (W.D. Mich. 1990). The court further explained that:

> There is no contention that the laws under which the autopsy was authorized are other than generally applicable and religion-neutral. Similarly, there is no contention that the authorization itself was other than religion-neutral. The religion of the decedent and of his next of kin played no role in the decision and actions of defendants. It follows then, by implication of *Employment Division*, that defendants' actions need only have been reasonably related to a legitimate governmental objective.

Id. at 1259.

In *You Vang Yang v. Sturner*,[150] another interesting autopsy case was decided. The case involved the Yang family, members of the Hmong community, whose son suffered a seizure while he was sleeping and was rushed to the hospital, where he died. Because the physicians did not know the cause of death, the Medical Examiner, pursuant to Rhode Island law, which requires an autopsy in those situations in which death occurs "in any suspicious or unusual manner," performed an autopsy on the young man without consulting his parents. The Yangs' religious beliefs prohibited any mutilation of a body, including autopsies and the removal of organs during autopsies.[151] Relying on the "compelling state interest test," the United States District Court for the District of Rhode Island found that the Yang family had a religion-based cause of damages against the Medical Examiner, but postponed the determination and awarding of damages until a hearing at a later date.[152] During the time the court was researching the case law in order to fix damages, the Supreme Court issued *Smith*. Subsequently the court took the highly unusual step of issuing a second decision in the case—rescinding the earlier decision. Expressing "deep regret" because of his profound sympathy for the Yang family, the judge noted that the *Smith* doctrine would not allow him to find for them because the state law concerning autopsies is a law of general applicability. The trial court was also critical of the Supreme Court, agreeing with Justice Blackmun and Justice O'Connor that the Court had effectively eviscerated the Free Exercise Clause.[153] The state, therefore, need not make any accommodation for religious objections to autopsies, so long as the law authorizing them is not aimed specifically at religious objections.

SUMMARY

In summary, the United States government has frequently expressed a willingness to accommodate conscientious objection to government policy. But not always. As Justice O'Connor pointed out in her separate concurring opinion in *Smith*, the compelling state interest test is a protection against the bizarre and the dangerous in the name of religion and against the erosion of important

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150 You Vang Yang v. Sturner, 728 F. Supp. 845, *withdrawn*, 750 F. Supp. 558 (D.R.I. 1990).

151 The Hmongs believe that the result of such mutilation was that the spirit of the dead was not free and thus would come back to take another person in the decedent's family. *You Vang Yang*, 750 F. Supp. at 558.

152 *You Vang Yang*, 728 F. Supp. at 857.

153 *You Vang Yang*, 750 F. Supp. at 559.

government policies such as taxation.[154] Accommodation has not meant license, but it has usually meant a consideration by the government as to whether a religious practice was somehow inimical to a government interest. Given the weight of the government interest, often religion could be accommodated, as this paper has shown. After *Smith*, however, the accommodation of religious-based conscientious objection has become problematical. *Smith* has hung like a cloud of Agent Orange over this entire issue.[155]

In November of 1993, however, the Religious Freedom Restoration Act became law. The Religious Freedom Restoration Act (RFRA) was a direct result of the opinion in *Smith* and its impact, examples of which are detailed in this Article. The bill was introduced on July 26, 1990, and was eventually supported by fifty-eight religious and secular interest groups that spanned the theological and political spectrum.[156] The purpose of the bill is to legislatively

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154 Employment Division, Department of Human Resources v. Smith, 494 U.S. 872, 899 (1990) (O'Connor, J., concurring in judgment).

155 In 1992, the United States Supreme Court decided Church of the Lukumi Babalu Aye v. City of Hialeah, 113 S. Ct. 2217 (1993), a case that many observers initially believed would provide the Court with an occasion to revisit, and perhaps reverse, the *Smith* ruling.

The Church of the Babalu Aye consists of those who practice the religion of Santeria, a combination of the traditional Yoruba religion of Africa and Roman Catholicism. Animal sacrifice is part of the the church's ritual. The City of Hialeah, Florida, became concerned about the animal sacrifice ritual within the city and in response, the city government passed ordinances forbidding such sacrifices. The Church of the Babalu Aye responded by filing suit, claiming that the ordinances denied the Church the right to free exercise of religion, as guaranteed by the First Amendment to the United States Constitution.

In *Smith*, the Court ruled that the compelling state interest test could not be used as a defense against a law of general applicability, no matter how much the law interfered with religious behavior. If a law were not of general applicability, however, but targeted religious behavior specifically, then the law would be subject to strict scrutiny. In *Babalu Aye*, the Court held that Hialeah's laws were of the latter sort, specifically targeting the church members' religious behavior. Under strict scrutiny analysis, the Court held that the city did not have a compelling enough reason to forbid animal sacrifice, given the fact that the killing of animals for a variety of nonreligious reasons was permitted within the city limits. Consequently, the Court found in favor of the church. In the process, the Court left the *Smith* doctrine undisturbed.

156 Groups supporting the bill were: Agudath Israel of America, American Civil Liberties Union, American Conference on Religious Movements, American Humanist Association, American Jewish Committee, American Jewish Congress, American Muslim Council, Americans for Religious Liberty, Americans United for Separation of Church and State, Anti-Defamation League, Association for American Indian Affairs, Central Conference of American Rabbis, Christian Church (Disciples of Christ), Christian Legal Society, Christian Life Commission of the Southern Baptist Convention, Christian Science Committee on Publication, Church of the Brethren, Church of Jesus Christ of Latter-day Saints, Church of Scientology International, Coalitions for America, Concerned Women for America, Episcopal Church, Evangelical Lu-

require the courts of the land to use strict scrutiny, the compelling state interest test, in adjudicating Free Exercise Clause cases. On the question of whether the Congress, through legislation, could mandate a procedure to be used by the judiciary, the sponsors of the bill clearly believed that Congress could do so. The authority to enact RFRA and apply it to the federal judiciary is said to derive from the Necessary and Proper Clause of Article I, Section 8 of the United States Constitution.[157] The authority to apply RFRA to the states derives from the Fourteenth Amendment, Section 5.[158] This is predicated, of course, on the premise that the Free Exercise Clause is made applicable to the states by means of its incorporation into the Due Process Clause of the Fourteenth Amendment.[159] In the words of the House Judiciary Committee:

> Pursuant to Section 5 of the Fourteenth Amendment and the Necessary and Proper Clause embodied in Article I, Section 8 of the Constitution, the legislative branch has been given the authority to provide statutory protection for a constitutional value when the Supreme Court has been unwilling to assert its authority.[160]

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theran Church in America, Federation of Reconstructionist Congregations and Havurot, First Liberty Institute, Friends Committee on National Legislation, General Conference of Seventh-day Adventists, Guru Gobind Singh Foundation, Hadassah, Home School Legal Defense Association, House of Bishops of the Episcopal Church, International Institute for Religious Freedom, Mennonite Central Committee Washington Office, NA'AMAT USA, National Association of Jewish Women, National Drug Strategy Network, National Federation of Temple Sisterhoods, National Jewish Commission on Law and Public Afairs, National Jewish Community Relations Advisory Council, National Sikh Center, Native American Church of North America, People for the American Way Action Fund, Presbyterian Church (USA) Social Justice and Peacemaking Unit, Rabbinical Council of America, Traditional Values Coalition, Union of American Hebrew Congregations, Union of Orthodox Jewish Congregations, United Church of Christ Office for Church in Society, United Methodist Church Board of Church and Society, United States Catholic Conference (did not support the bill until March 9, 1993). *The Religious Freedom Restoration Act*, (Coalition for the Free Exercise of Religion, Wash. D.C) n.d. at 3; *Fast Start: Early Action Good Sign for Religious Liberty Bill*, REPORT FROM THE CAPITAL (Baptist Joint Comm. on Pub. Affairs, Wash. D.C.), April, 1993, at 4-5.

157 *See* U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

158 *See* U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

159 *See* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]").

160 H.R. REP. No. 103-88, 103d Cong., 1st Sess. 9 (1993). On the issue of congressional authority to legislate judicial interpretive procedure, see D. ACKERMAN, CRS REPORT FOR CONGRESS—THE RELIGIOUS FREEDOM RESTORATION ACT AND THE RELIGIOUS FREEDOM ACT: A LEGAL ANALYSIS 30-31 (1992).

The result of RFRA is to reinstate the compelling state interest test as an interpretive principle in Free Exercise Clause adjudication.[161] Now, again, it will be necessary for the government to show

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161 The text of the bill states:

SECTION 1. SHORT TITLE

This Act may be cited as the "Religious Freedom Restoration Act of 1993."

SECTION 2. CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSES.

(a) FINDINGS.— The Congress finds that—

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) PURPOSES.—The purposes of this Act are—

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

SECTION 3. FREE EXERCISE OF RELIGION PROTECTED

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

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

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) JUDICIAL RELIEF.—A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under Article III of the Constitution.

SECTION 4. ATTORNEYS FEES.

(a) JUDICIAL PROCEEDINGS.—Section 722 of the Revised Statutes (42 U.S.C. 1988) is amended by inserting "the Religious Freedom Restoration Act of 1993," before "or title VI of the Civil Rights Act of 1964."

(b) ADMINISTRATIVE PROCEEDINGS.—Section 504(b)(1)(C) of title 5 United States Code, is amended—

that it has an interest of the highest importance and that it has no alternative means of obtaining that interest before it can interfere with religious freedom. Once again, as it was prior to *Smith*, religious freedom will be the rule and governmental interference in religious behavior will be the exception.

The effect of RFRA on this Article is to make the Article into something of a historical piece, to the degree that I have commented on the impact of *Smith* on the religious-based conscientious objections to government requirements. It is an important history, however, because it describes an aberration in the tradition of religious freedom in this country.

With the exception of the bad days when Americans lived under the *Smith* opinion, the country has a long tradition of accommodating

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(1) by striking "and" at the end of clause (ii);
(2) by striking the semicolon at the end of clause (iii) and inserting ", and "; and
(3) by inserting "(iv) the Religious Freedom Restoration Act of 1993"; after clause (iii).
SECTION 5. DEFINITIONS.
As used in this Act—
(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State;
(2) the term "State" includes the District of Colubia, the Commonwealth of Pureto Rico, and each territory and possession of the United States;
(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and
(4) the term "exercise of religion" means the exercise of religion under the First Amendment to the Constitution.
SECTION 6. APPLICABILITY.
(a) IN GENERAL.—This Act applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act.
(b) RULE OF CONSTRUCTION.—Federal statutory law adopted after the date of the enactment of this Act is subject to this Act unless such law explicitly excludes such application by reference to this Act.
(c) RELIGIOUS BELIEF UNAFFECTED.—Nothing in this Act shall be construed to authorize any government to burden any religious belief.
SECTION 7. ESTABLISHMENT CLAUSE UNAFFECTED
Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting an establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this Act. As used in this section, the term "granting," used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.
139 CONG. REC. H8713-14 (daily ed. Nov. 3, 1993).

conscience. Indeed, religious freedom, which has been the basis of accommodations, has been a major contributor to making this the unique country that it is. So, I close with the words of Justice O'Connor, in the belief that the Justice expressed the correct view of history and law, now restored by the Religious Freedom Restoration Act:

> As the language of the [Free Exercise] Clause itself makes clear, an individual's free exercise of religion is a preferred constitutional activity. . . . In my view, . . . the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility.[162]

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162 Employment Division, Department of Human Resources v. Smith, 494 U.S. 872, 901-02 (1990) (O'Connor, J., concurring in judgment).