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Exemptions and Privileges on Grounds of Religion and Conscience

Shimon Shetreet
Oklahoma City University

Exemptions and Privileges on Grounds of Religion and Conscience

By SHIMON SHETREET*

The main purpose of this article is to examine the kinds of exemptions and privileges which the law allows on grounds of religion and conscience.[1] The opening section will present examples of the types of exemption and privilege problems which arise, with particular attention paid to the nature of the relief sought. In the remaining parts of the article the doctrines utilized by the courts for resolving the issues in this area will be discussed in light of recent decisions. The general justifications for granting exemptions will also be examined. Finally, analysis will be made of the specific considerations which are weighed by the courts in determining whether to grant or deny exemptions.

I. EXEMPTIONS ON RELIGIOUS AND CONSCIENTIOUS GROUNDS: ILLUSTRATIONS CLASSIFIED

Legislatures and courts have created certain exemptions and privileges that allow individuals and institutions to pursue freely their religious activities. The nature of these exemptions and privileges fall into distinct categories, and the different categories raise different problems. The basic categories are:

(1) Privileges and exemptions which relieve *direct* conflicts between specific laws and religious tenets, wherein adherence to one requires disobedience to the other;

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* Assistant Professor of Law, Oklahoma City University, now Lecturer of Law, Hebrew University of Jerusalem. LL.B. 1968, LL.M. 1970, Hebrew University of Jerusalem; M.C.L. 1971, D.C.L. 1973, University of Chicago; member, Israeli Bar.

[1] The examination of the definition of "religious belief" and "conscientious belief" is beyond the scope of this work. Likewise, the question whether freedom of conscience is protected by the Constitution independently from freedom of religion is not within the scope of this work. The exemptions examined in this work are by no means comprehensive.

(2) Those which relieve *indirect* conflicts, wherein the law creates an economic loss or social hardship upon those who follow certain religious or conscientious principles;

(3) Relief from regulation of certain religiously or conscientiously motivated activities;

(4) Desirable exemptions from the discharge of legal duties, the performance of which would not necessarily create a conflict;

(5) Privileges conferred through affirmative action taken by government to allow satisfaction of religious and spiritual needs under circumstances that, without government action, would prevent religious fulfillment.

A. *Direct Conflict*

Exemption problems in this category are caused when the law requires an act or omission which "results in the choice to the individual of either abandoning his religious principles or facing criminal prosecution."[2] The legislatures "reveal a deep concern for the situation of the contravening imperatives of religion and conscience or suffering penalties,"[3] and to relieve the individual of this dilemma, a legal privilege or exemption may be granted. This "happy tradition" of "avoiding unnecessary clashes with the dictates of conscience"[4] may take the form of an exemption from a legal duty, the discharge of which is catagorically forbidden by the individual's religion or beliefs (such as the conscientious objector draft exemption[5]), or it may take the form of a privilege to disregard a law which prohibits an act commanded by one's religion (such as the privilege to use an otherwise prohibited drug in a religious ceremony[6]).

Conscientious objectors to war are granted varying exemptions depending on the nature of their beliefs. One who is opposed to any form of military service is granted a total exemption from serving in the armed forces. Opposition to service in a combatant unit which involves killing and carrying arms, but not to service in a non-combatant unit, gives rise to an exemption from the

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[2] Braunfeld v. Brown, 366 U.S. 599, 605 (1961).

[3] Gillette v. United States, 401 U.S. 437, 445 (1971).

[4] United States v. MacIntosh, 283 U.S. 605, 634 (1931) (Chief Justice Hughes dissenting).

[5] Section 6(j) of the Military Selection Service Act of 1967, 50 U.S.C. § 456(j) (1970).

[6] *E.g.*, People v. Woody, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

former only.[7] No exemption is granted to conscientious objectors who oppose participation in a particular war.[8]

In the area of education, direct conflict between law and religion may arise in numerous situations. For example, when mandatory attendance in school is contrary to a pupil's religion, the conflict is unavoidable. In *Wisconsin v. Yoder*,[9] defendants were members of the Amish religion who withdrew their children, aged 14 and 15, from school. The state's compulsory school attendance law required that all children attend school between the ages of 7 and 16 years.[10] The defendants showed that the children's attendance of any high school "was contrary to the Amish religion and way of life,"[11] and argued that the state statute encroached upon their right to free exercise of their religious beliefs. The Supreme Court held that the Amish parents, having met the "burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education,"[12] were exempt from the state's compulsion.

In *In re Jenison*[13] a woman was exempted from the duty to serve on a jury because her religious principles commanded that she not judge her fellow man.

Section I of the English Oaths Act of 1888[14] permits an exemption from taking oaths when they are forbidden by one's religion,[15] or when one is conscientiously opposed to taking an oath because of its religious nature.[16] The exemption applies in

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[7] For discussion of conscientious objector exemptions and alternative duty, *see* Redlich and Feinberg, *Individual Conscience and the Selective Conscientious Objector: The Right Not to Kill*, 44 N.Y.U.L. REV. 875, 898 (1969) [hereinafter cited as Redlich and Feinberg].

[8] Gillette v. United States, 401 U.S. 437 (1971).

[9] 406 U.S. 205 (1972).

[10] WISC. STAT. ANN. § 118.15(1)(a) (1973).

[11] 406 U.S. 205, 209 (1972).

[12] *Id.* at 235.

[13] 125 N.W.2d 588 (Minn. 1963). The Minnesota Supreme Court reversed its original decision, *In re* Jenison, 120 N.W.2d 515 (Minn. 1963), after the United States Supreme Court remanded the case in light of Sherbert v. Verner, 374 U.S. 398 (1963). *In re* Jenison, 375 U.S. 14 (1963).

[14] 51 & 52 Vict. c. 46.

[15] The Quakers' faith forbids oath taking. See their struggle in 1779 against oath taking in CONSCIENCE IN AMERICA 41-44 (L. Schlissel ed. 1968).

[16] "There is nothing in our legal procedure which so clearly shows the influence of religion as taking of an oath," Lord Denning, *The Influence of Religion on Law* 5, 33rd Earl Grey Memorial Lecture (1953). "[T]he oath tests so odious in history. For the oath was one of the instruments for suppressing heretical beliefs," West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 663 (1943) (Justice Frankfurter, dissenting). "The test oath is abhorent to our tradition." Girouard v. United States, 328 U.S. 61, 69 (1946).

all cases in which an oath is required (such as before testimony in court, upon entering a public office, or before receiving a license to practice a regulated profession), and the statute provides that an affirmation may be taken instead. This problem is avoided in the United States by provisions of the Constitution and laws that either "Oath or Affirmation"[17] is appropriate. Article VI of the Constitution of the United States provides that "no religious test shall ever be required as a qualification to any office or public trust under the United States." In *Torcaso v. Watkins*,[18] the Supreme Court dealt with a denial of a notary public commission to a person who refused to comply with a state constitutional provision requiring a declaration of belief in God. The Court held that such a "religious test for public office unconstitutionally invades the appellant's freedom of belief and religion and therefore cannot be enforced against him."[19] (The Court did not rule whether such a test violated the establishment clause,[20] nor did it reach the question whether the "no religious test" provision of article VI of the Constitution applies to the states, but seemed to rest its decision on the free exercise clause).

In another case, a petitioner in a naturalization process sought to substitute "I hereby declare . . . in honor and sincerity" for "I hereby declare on oath," and he wanted to omit the closing words "so help me God" from the required oath. Naturalization was denied by the district court,[21] but on appeal the decision was reversed on confession of error by the United States.[22]

Other exemptions from legal duties include that granted by the English Abortion Act to a doctor who conscientiously opposes taking part in, approving, or doing an abortion,[23] and the ex-

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[17] *See e.g.*, U.S. CONST., art. II (President's Oath or Affirmation); art. VI (Representatives, Senators and others' Oath or Affirmation). *See also* the fourth amendment which provides that warrants shall issue upon probable cause, supported by "Oath or affirmation." *But see* Rule 3 of the Federal Rules of Criminal Procedure which provides that a complaint "shall be made upon oath before a commissioner" omitting "or affirmation." Presumably under the Constitution the "or affirmation" is read into the rule.

[18] 367 U.S. 488 (1961).

[19] *Id.* at 496.

[20] *See* W. KATZ, RELIGION AND AMERICAN CONSTITUTIONS 6 (1964); Note, *Toward a Uniform Valuation of the Religious Guarantees*, 80 YALE L.J. 77, 85 (1970).

[21] Petition of Plywacki, 107 F. Supp. 593 (D. Hawaii 1952), *noted* in 1 KAN. L. REV. 343 (1953).

[22] 205 F.2d 423 (9th Cir. 1953).

[23] Sec. 4 of the Abortion Act 1967, c. 87. However, in emergency cases no doctor can claim such exemption.

emption from the duty to work on Sunday in times of emergency when workers of designated industries are required to work on Sundays.[24]

The above examples illustrate *exemptions* from legal duties; there are also *privileges* to perform affirmative acts which would otherwise be prohibited by law. For example, the members of the Native American Church have been granted the privilege of using peyote (a controlled drug) in religious ceremonies.[25] Similarly, an exemption for use of sacramental wine was upheld during the liquor prohibition period.[26] Exemptions from statutes prohibiting spiritualism[27] are other examples.

In many cases both exemptions from required acts and privileges to perform ordinarily prohibited acts have been denied by courts. The well-known Mormon polygamy cases are examples.[28] Statutes outlawing snake handling in religious rituals have been upheld.[29] Religious grounds were not sustained for exempting parents from liability for violation of child labor regulations,[30] and religion did not support a privilege in faith-healing cases.[31]

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[24] *See* S.C. CODE § 64-4.1 (1960 Supp.).

[25] Leary v. United States, 383 F.2d 851 (5th Cir. 1967), *rev'd on other grounds*, 385 U.S. 917 (1969). *But see* People v. Woody, 394 P.2d 813, 40 Cal. Rptr. 69 (1964); State v. Bullard, 148 S.E. 265 (N.C. 1966), *cert. denied*, 386 U.S. 917 (1967).

[26] People v. Marquis, 125 N.E. 757 (Ill. 1919). The exemption was limited to reasonable quantity *But see* State v. Kramer, 206 N.W. 468 (S.D. 1925), in which the court upheld a refusal of the state to exempt an unlimited quantity for sacramental purposes.

[27] State v. De Landy, 122 A. 890 (N.J. 1923) (freedom of religion upheld when charter of church permitted teaching of spiritualism); People v. Miller, 46 N.Y.S.2d 206 (1963) (statute expressly granted an exemption to spiritualist acting in good faith and without fee; defense upheld when a client made contribution).

[28] Davis v. Benson, 133 U.S. 333 (1890); Reynolds v. United States, 98 U.S. 145 (1878). The authority of the former case is questionable, Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 8-11 (1961). *Cf.* Torcaso v. Watkins, 367 U.S. 488 (1961).

[29] Hill v. State, 88 So.2d 880 (Ala. App. 1956), *cert. denied*, 88 So.2d 887 (Ala. 1956); Lawson v. Commonwealth, 164 S.W.2d 972 (Ky. 1942); State v. Massey, 51 S.E.2d 179 (N.C. 1949), *appeal dismissed sub. nom.* Bunn v. North Carolina, 336 U.S. 942 (1949); Harden v. State, 216 S.W.2d 708 (Tenn. 1948). *Cf.* Kirk v. Commonwealth, 44 S.E.2d 409 (Va. 1947), in which the court dismissed a defense of religious belief in a prosecution for death due to snake handling. *See also Comment*, 2 VAND. L. REV. 694 (1949), commenting on Harden v. State. For a discussion of snake handling *see* Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 364 (1969) [hereinafter cited as Clark]; Fernandez, *The Free Exercise of Religion*, 36 So. CAL. L. REV. 546, 568 (1963) [hereinafter cited as Fernandez].

[30] Prince v. Massachusetts, 321 U.S. 158 (1944).

[31] *See generally* Cawley, *Criminal Liability in Faith Healing*, 39 MINN. L. REV. 48 (1954) and the cases cited therein. *But see* Founding Church of Scientology

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Courts have not accepted the argument that a father should be exempted from his duty to maintain his children because his religion prohibits gainful employment,[32] and religious grounds were not sustained as a proper defense to a charge of counseling draftees to refuse to register.[33]

Direct conflict between law and religion might arise in many other situations. The taking of a suspect's blood sample for the purpose of obtaining evidence might raise a direct conflict if his religion forbids the blood sampling.[34] If a noise pollution regulation embraces church bells, it may raise a direct conflict between law and religion. Refusal to pay taxes that finance war falls into this category,[35] as does refusal to testify before a court or other tribunal on religious or conscientious grounds.[36]

Conflicts between law and religion might arise in the area of compulsory medical treatments and physical examinations. Such conflicts may be either direct or indirect and illustrations will serve to distinguish the two. If medical treatments and physical examinations are required as prerequisites to obtaining public licenses or services, such requirements create indirect conflicts because there is no irreconcilable dilemma: an individual is free to choose between following his religious obligations and obtaining the public service or license. Thus vaccinations[37] or X-ray examinations required of students prior to school admission,[38]

(Footnote continued from preceding page)
v. United States, 409 F.2d 1146 (D.C. Cir. 1969) in which the court, relying upon United States v. Ballard, 322 U.S. 78 (1944), sustained a religious defense in a prosecution for sale of faith healing medicines.

[32] *E.g.*, Pencoric v. Pencoric, 287 P.2d 501 (Cal. 1955).

[33] Warren v. United States, 177 F.2d 596 (10th Cir. 1949), *cert. denied*, 338 U.S. 947 (1950); Gara v. United States, 178 F.2d 38 (6th Cir. 1949), *aff'd. by equally divided court*, 340 U.S. 857 (1950).

[34] In Schmerber v. California, 384 U.S. 757 (1966), the Court left this question open. "Petitioner is not one of the few who on grounds of . . . religious scruple might prefer some other means of testing. . . . We need not decide whether such wishes would have to be respected." *Id.* at 771.

[35] For an early case *see Conscience in America* 34 (L. Schlissel ed. 1968). For cases at the present time, *see id.* at 398.

[36] *See* People v. Woodruff, 272 N.Y.S.2d 786 (1966), *aff'd*, 21 N.Y.2d 848, 236 N.E.2d 159 (1968).

[37] For an exemption from a vaccination requirement in a state university *see* Kolbeck v. Kramer, 202 A.2d 889 (N.J. Super. Ct. 1964) in which the court held that a state university which exempted Christian Scientists from vaccination requirements could not require membership in organized religious groups to qualify for religious exemption from vaccination.

[38] *See e.g.*, State ex rel. Holcomb v. Armstrong, 239 P.2d 545 (Wash. 1952) (religious objection dismissed). *Cf.* Moore v. Draper, 57 So.2d 648 (Fla. Sup. Ct. 1952).

and examinations for venereal disease prior to obtaining marriage licenses,[39] create indirect conflicts when required over objection on religious grounds. Medical examinations required for welfare benefits[40] also give rise to indirect conflicts if the examinations are contrary to religious beliefs. But if the law imposes a duty on parents to provide their children with medical care to which they are religiously opposed,[41] or where the requirement of vaccinating school children is coupled with compulsory education laws,[42] then there is a direct conflict between religion and law because the choice is between religion and criminal sanction, or perhaps between religion and custody of the child.[43]

B. *Indirect Conflict*

In this category problems arise when the law forces the individual to choose between following his religious or conscientious principles—thereby suffering an economic or other loss —and abandoning his religion or conscience to avoid such a loss.[44] Discussing a Sunday closing law in *Braunfeld v. Brown*,[45] the Supreme Court stated:

> Fully recognizing that the alternatives open to appellants and others similarly situated—retaining their present occupations and incurring economic disadvantage or engaging in some other commercial activity which does not call for either Saturday or Sunday labor—may well result in some financial sacrifice in order to observe their religious beliefs, still the

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[39] *E.g.*, Peterson v. Widule, 147 N.W. 966 (Wis. 1914) (religious objection dismissed).

[40] *E.g.*, Powers v. State Dep't of Social Welfare, 493 P.2d 490 (Kan. 1970).

[41] *E.g.*, State v. Chenoweth, 71 N.E. 197 (Ind. 1904); People v. Pierson, 176 N.Y. 201, 68 N.E. 243 (1903); Beck v. State, 233 Pac. 495 (Okla. Crim. 1925).

[42] *E.g.*, Sadlock v. Bd. of Educ., 58 A.2d 218 (N.J. 1948); City of New Braunfels v. Waldschmidt, 207 S.W. 303 (Tex. 1918).

[43] *E.g.*, Mitchell v. Davis, 205 S.W.2d 812 (Tex. Civ. App. 1947). For discussion of these and other medical treatment problems, *see generally* Note, *Compulsory Medical Treatment and the Free Exercise Clause*, 42 IND. L.J. 386 (1966).

[44] "Pennsylvania has passed a [Sunday] law which compels an orthodox Jew to choose between his religious faith and his economic survival," Braunfeld v. Brown, 366 U.S. 599, 616 (1961) (Justice Stewart dissenting). *See also* Justice Brennan's dissenting opinion taking the issue of that case to be "whether a state may put an individual to a choice between his business and his religion." *Id.* at 611. *See* Sherbert v. Verner, 374 U.S. 398, 404 (1963): "The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."

[45] 366 U.S. 599 (1961).

> option is wholly different than when the legislation attempts to make a religious practice itself unlawful.[46]

Legislatures and Courts generally recognize that although this option is wholly different from outlawing a religious practice, it is still a substantial interference with religious liberty. Hence, they have made "an effort to accommodate the demands of the state to the conscience of the individual."[47] Most of the states which have passed Sunday closing laws have provided for the exemption of those who rest on a different day because of religious conviction.[48] Whereas the dissenting opinion in *Braunfeld* found that such exemption was constitutionally required, the majority opinion was of the view that it was not, though it "may well be the wiser solution to the problem."[49]

Indirect conflict also arises in flouridation cases.[50] Where individuals are religiously opposed to the use of any drugs, the flouridation of water supplies forces them to choose between their religion and the expense and inconvenience of seeking a pure water supply.[51]

In *West Virginia State Board of Education v. Barnette*,[52] public school children of Jehovah's Witnesses challenged the validity of their duty to salute the flag in school since it was contrary to the command of their religion. The Supreme Court held that they could not be required to salute the flag.[53] The categorization of an exemption granted in a case like *Barnette* depends on the sanction imposed for violation of the flag salute duty. If a criminal

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[46] *Id.* at 605-06 (1961). Contrast Justice Brennan's dissenting opinion: "[T]he laws do not say that appellants must work on Saturday. But their effect is that appellants may not simultaneously practice their religion and their trade, without being hampered by a substantial competitive disadvantage." *Id.* at 613.

[47] Girouard v. United States, 328 U.S. 61, 68 (1946).

[48] *See* McGowan v. Maryland, 366 U.S. 420 (1961) (Appendix II to Opinion of Justice Frankfurter, at 551 *et seq.*).

[49] Braunfeld v. Brown, 366 U.S. 599, 608 (1961). *Accord,* McGowan v. Maryland, 366 U.S. 459, 520 (1960) (Justice Frankfurter): "However preferable, personally, one might deem such an exemption, I cannot find that the Constitution compels it."

[50] This conflict has generally been resolved in favor of the state. *See e.g.,* De Aryan v. Butler, 260 P.2d 98 (1953), *cert. denied,* 347 U.S. 1012 (1954); Kraus v. City of Cleveland, 121 N.E.2d 311 (Ohio Ct. App. 1959), *aff'd,* 127 N.E.2d 609 (1955), *appeal dismissed,* 351 U.S. 935 (1956); Baer v. City of Bend, 292 P.2d 134 (Ore. 1956).

[51] *See generally* Nichols, *Freedom of Religion and the Water Supply,* 32 So. CAL. L. REV. 158 (1959).

[52] 319 U.S. 624 (1943).

[53] Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) *rev'g* Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940).

sanction is imposed, then the exemption is clearly within the direct conflict category. If the sanction is expulsion from school, it can be argued that the problem is within the second category, since the child can go to a private school which does not require flag salute. The latter argument would hardly seem tenable, however, because of the established duty of the public government in this country to provide primary and high school education. If an institution of higher education were involved, the conflict would certainly be of an indirect nature.

An indirect conflict also faces the individual if "statutes . . . tax income and limit the amount which may be deducted for religious contributions [whereas one's] religion requires him to donate a greater amount to his church."[54]

If a statute compels workers of designated industries to work on Sunday in times of emergency, and grants an exemption to workers who are conscientiously opposed to Sunday work, but still leaves them unprotected from jeopardizing their seniority or other rights by their objection to Sunday work, the statute creates an indirect conflict. A South Carolina statute resolved the problem in favor of the individual by providing that "if any employee should refuse to work on Sunday on account of conscientious . . . objections, he or she shall not jeopardize his or her seniority by such refusal or be discriminated against in any other manner."[55]

In *In re Summers*,[56] the petitioner was refused admission to the practice of law in Illinois because he had refused to take an oath to support the Illinois Constitution on conscientious grounds. The Supreme Court ruled that such conflict should be resolved in favor of the state, but the authority of the case is now questionable since it does not seem consistent with Supreme Court cases regarding oaths of allegiance required from applicants for admission to the bar.[57] A conscientious objector to war who is forced to

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[54] Braunfeld v. Brown, 366 U.S. 599, 606 (1961).

[55] S.C. Code § 64-4.1 (1960 Supp.): "no employee shall be required to work on Sunday . . . who is conscientiously opposed to Sunday work" falls within the first category of exemptions; it resolves a direct conflict.

[56] 325 U.S. 561 (1945).

[57] *See e.g.*, Schware v. Bd. of Bar Examiners, 353 U.S. 252 (1957); Konigsberg v. State Bar, 353 U.S. 252 (1957). Nor is it consistent with Supreme Court decisions relating to freedom of religion. *See* Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595, 1597 (1955); Note, *A Braunfeld v. Brown Test for In-*

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choose between his religion and a certain profession which he cannot practice once he raises conscientious objection also faces an indirect conflict.

The English Slaughter of Animals Act[58] offers an example of a privilege to perform an act, otherwise prohibited, in order to resolve an indirect conflict between law and religion. The Act grants the privilege to slaughter animals, normally forbidden, to Jews and Moslems whose religions forbid the eating of meat unless the animal is slaughtered in accordance to certain rules. This privilege relieves them of the choice between the onerous economic burden of importing properly slaughtered meat, and abandoning their religion's dictates.

Other requirements which may create indirect conflicts include oaths to bear arms in a naturalization process,[59] military training at a state university,[60] mandatory disclosures of communications between a priest and his penitent where the disclosure is not expressly forbidden by religion,[61] and unemployment compensation to a Sabbatrian.[62]

C. *Relief from Regulation*

Zoning law offers an example of exemptions in this category in that houses of worship and other buildings used for religious purposes are generally relieved of zoning requirements.[63] In the absence of such a relief provision, it should be noted, there might

(Footnote continued from preceding page)
direct Burdens on the Free Exercise of Religion, 48 MINN. L. REV. 1165, 1176 (1964). However, it was referred to with approval in Gillette v. United States, 401 U.S. 437, 462 n.23 (1971). P. KURLAND, RELIGION AND THE LAW 47-49 (1962) suggests that *Summers* was wrongly decided.

[58] Section 1(3) of the Slaughter of Animals Act 1958, 6 & 7 Eliz. 2, c.8. In 1962 a bill was presented to abolish this privilege. *See* debates in the House of Lords on Oct. 3, 1962. See discussion of this privilege as to Jews, Dodd v. Venner, 127 L.T. 746 (1922).

[59] *E.g.*, Nationality Act of 1940, 8 U.S.C.A. §§ 307(a), 735(b), 707. Girouard v. United States, 328 U.S. 61 (1946); United States v. MacIntosh, 283 U.S. 605 (1931).

[60] Hamilton v. Regents of University of California, 293 U.S. 245 (1934).

[61] Most states limit the privilege in this way. 8 WIGMORE, EVIDENCE § 2395 n.1 (McNaughton rev. 1961); Reese, *Confidential Communications to the Clergy*, 24 OHIO ST. L.J. 55 (1965); Webb, *Priest-Penitent Privilege*, 46 CHI. KENT. L. REV. 48, 49 (1969).

[62] Sherbert v. Verner, 374 U.S. 398 (1963).

[63] *See generally* J. CURRY, PUBLIC REGULATION OF THE RELIGIOUS USE OF LAND 21-23 (1964); 1A L. RATHCLOPE, THE LAW OF ZONING AND PLANNING, ch. 19 § I (1956); Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development* (Part I), 80 HARV. L. REV. 1381, 1422 (1967); (Part II), 81 HARV. L. REV. 513, 538 (1968) [hereinafter cited as Giannella (Part I) or Giannella (Part II)]. *See also* M. KONVITZ, RELIGIOUS LIBERTY AND CONSCIENCE, A CONSTITUTIONAL INQUIRY 59 (1968).

arise an indirect conflict between law and religion. If, as is the case in the Orthodox Jews' belief, one may not drive or ride in a car on Saturday, the zoning of synagogues away from residential areas to places to which he cannot reasonably walk creates a conflict between the zoning laws and his religion. In such a case, the Orthodox Jew may avoid the conflict by staying home,[64] walking unreasonable distances, or moving to a place closer to the synagogue. All these alternatives are indirect burdens on his freedom of religion. A resolution of the conflict by exempting Orthodox synagogues from the zoning regulations would fall within the second category; the exemption of all houses of worship from zoning laws—without view toward a particular conflict—falls within the third category, as a mere exception to regulation. Exemptions from licensing and taxation requirements, when granted for the selling of religious literature,[65] also fall within this category.

D. *Desirable Exemptions*

In this category, exemptions are granted because, for various reasons, the legislatures deem it desirable to exempt the individual or institution from discharging a legal duty.

There are few exemptions which fall into this category. Tax exemptions of all kinds for churches are examples. These include income tax,[66] property tax,[67] estate and gift tax, inheritance tax,

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[64] To my best knowledge an Orthodox Jew is allowed to pray at home when under compelling circumstances he is unable to reach a synagogue. However, it is not considered the better form of worship.

[65] *E.g.*, Follet v. Town of McCormick, 321 U.S. 573 (1944); Murdock v. Pennsylvania, 319 U.S. 105 (1943), *rev'g* Jones v. Opelika, 316 U.S. 584 (1942). *But see* Cox v. New Hampshire, 312 U.S. 569 (1941) which upheld a state statute that required a license and a fee for holding a procession or parade on a public street even as applied to Jehovah's Witnesses engaging in a religious exercise. For other cases related to the problem discussed herein, *see* P. KURLAND, RELIGION AND THE LAW 50-74 (1962); Fernandez, *supra* note 29, at 574-82; Giannella (Part I), *supra* note 63, at 1397-98.

[66] Exemption is available to a "minister of the gospel" from the income tax which he would otherwise be liable to pay with respect to (1) the rental value of a house furnished to him as part of his compensation or (2) the rental allowance paid to him as part of his compensation to the extent used by him to rent or provide a home. INT. REV. CODE OF 1954, § 107. Exemption is also granted to the unrelated business income of churches or association of churches. INT. REV. CODE OF 1954, § 511 (a) (2)(a). *See also* INT. REV. CODE OF 1954, § 501(c)(3). Contributions to religious organizations are deductible from income, INT. REV. CODE OF 1954, § 170(a)(1), (c)(2). For discussion of these income tax exemptions, see Korbel, *Do the Federal Income Tax Laws Involve an "Establishment of Religion"?*, 53 A.B.A.J. 1018 (1967).

[67] *See* Walz v. Tax Comm'r of the City of New York, 397 U.S. 664 (1970).

and the like.[68] Other examples are the ministerial draft exemption[69] and the priest-penitent privilege if it is granted when the communication is not required by the penitent's religion and the disclosure by the priest is not forbidden by religion.[70]

The categorization of these exemptions might differ if it were argued that their abolition would result in interference with the free exercise of religion. Thus, the ministerial draft exemption is sometimes justified by invocation of the free exercise clause of the Constitution.[71] If this justification is correct, then the exemption falls within the third category as a relief from regulation. Likewise, if the justification for tax exemptions is the avoidance of governmental involvement in religious institutions, this exemption would be in the third category, since it relieves the church from monitoring its activities for ascertaining and collecting the amount of the taxes due. This view was advanced by the Supreme Court in *Walz v. Tax Commissioner of the City of New York.*[72] In that case a New York realty owner challenged the validity of a New York constitutional provision[73] which allowed tax exemption statutes for "religious, educational or charitable" organizations. It was alleged that the exemptions violated the establishment clause of the first amendment by requiring a contribution to religious institutions. The Court upheld the statute,

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[68] *See* R. ROBERTSON, SHOULD CHURCHES BE TAXED? (1968); Bittker, *Churches, Taxes and the Constitution,* 78 YALE L.J. 1285 (1969); Giannella (Part II), *supra* note 63, at 544; Kauper, *The Constitutionality of Tax Exempting for Religious Activities* in THE WALL BETWEEN CHURCH AND STATE 95 (Oaks ed. 1963); Paulsen, *Preferment of Religious Institutions in the Tax and Labor Legislation,* 14 LAW & CONTEMP. PROB. 144 (1949). Contrary to Paulsen and others who expressed the view that tax exemption for churches violates the first amendment, and in accordance with Kauper's and others' prediction, the Supreme Court upheld a property tax exemption in *Walz.*

[69] Selective Service Act of 1948, 50 U.S.C.A. § 456(g) (1964). Divinity students are also entitled under this section to draft exemption.

[70] *See e.g.,* MD. ANN. CODE art. 35, § 13 (1957): "No minister . . . shall be compelled to testify in relation to any confession or communication made to him in confidence by one seeking his spiritual advice or consolation."

[71] *See* Abington School Dist. v. Schempp, 374 U.S. 203, 298 (1963) (Justice Brennan concurring). For discussion of this point *see* Note, *The Ministerial Draft Exemption and the Establishment Clause,* 55 CORNELL L. REV. 992, 999 (1970). The constitutionality of this exemption was recently upheld in United States v. Branigan, 299 F. Supp. 225 (S.D.N.Y. 1969). As to this point *see also* Redlich and Feinberg, *supra* note 7, at 883. It is interesting to note that the *Branigan* case relied *inter alia* upon the free exercise of religion of the church members which would be interfered with if divinity students and ministers had been drafted. *But see* Note, *The Ministerial Draft Exemption and the Establishment Clause,* 55 CORNELL L. REV. 992, 1000 (1970).

[72] 397 U.S. 664 (1970).

[73] N.Y. CONST. art. 16, § 1 (1894).

saying "it is simply sparing the exercise of religion from the burden of property taxation levied on private profit institutions."[74] As to any conflict with the establishment clause, the Court concluded that "[t]he exemption creates only a minimal and remote involvement between church and state and far less than taxation of churches . . ."[75] because

> . . . Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes.[76]

Exemptions from anti-discrimination statutes[77] also come within this type of relief. These exemptions are warranted more by the nature of the regulations than by any Congressional purpose to resolve a conflict or to protect the free exercise of religion. It is quite natural that a statute prohibiting discrimination on grounds of religion would exempt religious institutions which naturally limit most of their activities to members of their religion, and which require as a qualification for employment, service or benefit a membership in the religion. Unlike the employment area, Congress expressly provided that the exemption from the fair housing law shall be granted only to religions which do not exclude persons from membership on grounds of color, race or national origin.[78] It remains unclear whether such a qualification impliedly applies to the equal employment statute since it is not expressly provided for.

E. *Accommodating Religion in Special Circumstances*

In this category, the government does not prohibit conduct or waive statutory requirements or duties. Rather it chooses to take some affirmative measures in order to insure that the religious needs of individuals are satisfied. Here, the government solves religious problems resulting from special circumstances under which the individual is unable to have his ordinary religious opportunities.

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[74] 397 U.S. 664, 673 (1970).
[75] *Id.* at 676.
[76] *Id.* at 674.
[77] In the employment area *see* Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(e) (1970); in the housing area *see* Civil Rights Act of 1968, 42 U.S.C. § 3607 (1970).
[78] 42 U.S.C. § 3607 (1970).

Providing for "chaplains and places of worship for prisoners and soldiers cut off by the state from all civilian opportunities for public communion"[79] is one example. Giving worship and pastoral care in state hospitals is another.[80] And allowing "the temporary use of an empty public building to a congregation whose place of worship has been destroyed by fire or flood"[81] is also within this category.

In a footnote by the Supreme Court in *Barnette*, it was stated that "those subject to military discipline are under many duties and may not claim many freedoms that we hold inviolable as to those in civilian life."[82] This does not refer to a right of having a chaplain and proper facilities for worship, but rather it refers to the types of "freedoms" which, because of the need for uniformity and strong discipline in the armed forces, might be denied to soldiers and granted to civilians.[83]

Providing for chaplains and houses of worship in prisons and in the armed forces might be coupled with another privilege: relief from ordinary duties while participating in the religious activity. The latter would be a first category privilege if the individual's religion compels him to participate in religious services or to meet with the chaplain.

It should be mentioned that, although a soldier is different from a prisoner and both are different from a patient in a state hospital, the differences do not warrant the application of different rules. It is true that a prisoner is behind bars for his crimes and thus should be deprived of many of his civil rights. But incarceration does not include the loss of all constitutional rights, even though certain rights may be more limited than those enjoyed by free citizens due to special circumstances.[84] For both prisoners

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[79] Abington School Dist. v. Schempp, 374 U.S. 203, 299 (1963) (Brennan, J., concurring). *See also* W. KATZ, RELIGION AND AMERICAN CONSTITUTIONS 21 (1964); Giannella (Part II), *supra* note 63, at 525; Katz, *Freedom of Religion and State Neutrality*, 20 U. CHI. L. REV. 426, 429-33.

[80] *See* W. KATZ, RELIGION AND AMERICAN CONSTITUTIONS 21 (1964).

[81] Abington School Dist. v. Schempp, 374 U.S. 203, 299 (1963) (Brennan, J., concurring).

[82] Bd. of Educ. v. Barnette, 319 U.S. 624, n.19 (1943).

[83] This suggestion finds support when reading the footnote in its context. *See id.*

[84] For discussion of the religious liberty of prisoners *see* King, *Religious Freedom in the Correctional Institutions*, 60 J. CRIM. L.C. & P.S. 259 (1969). *See also* Sostre v. MacGinnis, 334 F.2d 906 (2d Cir. 1964), *cert. denied*, 379 U.S. 892 (1964).

and soldiers, loss of religious privileges is not a restriction required by their station, and they can rightfully claim accommodation of the law and the disciplinary rules, as far as feasible under the circumstances, to religious demands. The case of patients in a state hospital is even easier. Bearing in mind the functions and duties of the modern state in welfare programs, it is submitted that if a patient wants religious services and spiritual guidance he should not have to go to a private hospital. In short, the soldier, the prisoner, and the patient in a state hospital are all in special circumstances (cut off from their ordinary community services) which justify governmental acts designed to solve their religious problems.

II. SOME DOCTRINAL PROBLEMS

A. *The Religion Clauses and Exemptions*

The first amendment commands that "Congress shall make no law respecting an establishment of religion." The first amendment also commands that "[Congress shall make no law] prohibiting the free exercise [of religion]." There is a tension between the establishment clause and the free exercise clause since protection of the free exercise of religion through legal accommodation of religious demands arguably violates the establishment clause. As Justice Brennan put it: "There are certain practices conceivably violative of the Establishment Clause, the striking down of which might seriously interfere with certain religious liberties also protected by the First Amendment."[85]

The exemptions and privileges granted to resolve direct and indirect conflicts between law and religion theoretically raise questions of both religion clauses. When the law which creates the conflict happens to be derived historically from or is parallel to a religious rule (e.g., Sunday closing), the argument can be raised that enforcement of the religiously colored law violates the establishment clause. Similarly, when a conflict resolving exemption is granted but limited to certain individuals, it can be

[85] Abington School Dist. v. Schempp, 374 U.S. 203, 299 (1963) (Brennan, J., concurring). As to the conflict between the free exercise clause and the establishment clause, *see also* Redlich and Feinberg, *supra* note 7, at 883 *et seq.*; Schwartz, *No Imposition of Religion: The Establishment Clause Value*, 77 YALE L.J. 692 (1968).

argued that the limitation constitutes an establishment of religion.[86] However, the tendency of the courts in the conflict cases is to focus on the free exercise clause while paying little or no attention to the establishment clause. Even in cases where relief from regulation is involved (the third category of exemptions), the courts apply concepts of the free exercise clause, since regulation is deemed to be an interference with the free exercise of religion.

However, the constitutionality of exemptions of the fourth category ordinarily rests upon the establishment clause. The approach seems to focus on establishment despite arguments based on the free exercise clause. In *Walz v. Tax Commissioner of the City of New York*,[87] the Court was confronted with the argument that elimination of tax exemptions would violate the free exercise clause. In a footnote, Justice Brennan stated that no question of free exercise need be answered in the case, but admitted that "state involvment with religion which would be occasioned by any cessation of exemptions might conflict with the demands of the Free Exercise Clause." However he added, "I do not say that government must provide [the exemptions]."[88]

Focusing on one of the religion clauses does not mean that the analysis will be confined to that clause. Thus in *Walz*, although the Court focused on the establishment clause, it relied heavily on the "entanglement" and "excessive involvement" arguments[89] which generally fall within the scope of the free exercise clause. The practice of using free exercise reasoning for sustaining fourth category exemptions under the establishment clause has been followed by lower courts.[90]

Within the fifth category, affirmative acts taken by the government in providing chaplains and facilities inevitably pose establishment problems. But note that the special circumstances of

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[86] *See e.g.*, Gillette v. United States, 401 U.S. 437 (1971). In other cases, though theoretically a claim for exemption on religious ground involves an establishment of religion, the court has focused, and presumably will continue to focus, on the free exercise clause. *See e.g., In re* Jenison, 375 U.S. 14 (1963); Sherbert v. Verner, 374 U.S. 398 (1963); Braunfeld v. Brown, 366 U.S. 599 (1961); Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[87] 397 U.S. 664 (1970).

[88] *Id.* at 692 n.12.

[89] *Id.* at 674-75.

[90] *See e.g.*, United States v. Branigan, 299 F. Supp. 225, 235 (S.D.N.Y. 1969) which sustained the ministerial draft exemption on the ground that it is necessary for the free exercise of the church members.

soldiers and prisoners are state created and raise free exercise problems which cannot be avoided.

B. *Exemptions and the Church-State Relationship*

Lord Denning once stated that only in a "religious state" like the United Kingdom, where there is no separation between church and state, is it possible to have complete freedom of religion. In other countries, he suggested, there always exists the danger that the individual will be forced to choose between loyalty to the state and loyalty to his religion.[91] But conflicts between law and religion exist in all countries, regardless of the status of the church-state relationship. Governments invariably impose duties and prohibitions which may affront individual religious tenets, and the law must resolve the conflicts.

If Lord Denning meant that only in countries with established religion will conflicts always be resolved in favor of individuals, then his proposition cannot be borne out. Many countries which separate church and state nevertheless grant exemptions from certain legal duties on grounds of religious beliefs,[92] and countries which have state-established religions deny such exemptions, and even expressly exclude them.[93] If Lord Denning meant that countries with established religion always resolve legal-moral conflicts in favor of the state, even that premise of religious freedom cannot withstand scrutiny. A better statement is that the relationship between church and state has no real effect on the free exercise of religion,[94] and the question whether freedom of religion

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[91] A. DENNING, FREEDOM UNDER THE LAW 48 (1949).

[92] The United States is a good example. Also, art. 463 of the Basic Law of the Federal Republic of Germany, 3 PEASLEE, CONSTITUTION OF NATIONS 362 (Rev. 3d ed. 1966) [hereinafter cited as 3 PEASLEE], grants draft exemption to conscientious objectors. There is no established religion in West Germany.

[93] Italy does not provide for conscientious objector exemptions. Several bills to establish such exemptions failed. Art. 2 of the Greek Constitution, 3 PEASLEE, *supra* note 92, at 404, expressly prohibits such exemptions, although there is an established church in Greece, art. 1 of the Greek Constitution. *See also* art. 70 of the Danish Constitution, 3 PEASLEE 263; art. 62, 64 of Iceland's Constitution, 3 PEASLEE 456. The opposite proposition is equally true: England—with an established church—grants exemptions, *see, e.g.*, National Service Act of 1948 § 17, 11 & 12 Geo. VI c. 64. On the other hand, Switzerland with state separate from church expressly excludes exemption on religious grounds, art. 49 of the Swiss Constitution, 3 PEASLEE 951. *See also* Czechoslovakia's Constitution, art. 32(2), 3 PEASLEE 233.

[94] *See* Weeramantry, *Digest of Judicial Decisions by Supreme Courts of Different Countries on Aspects of the Rule of Law*, 6 J. INT'L COMM. OF JURISTS 307, 312 (1965). *Cf.* art. I(d) of the International Draft Convention on the Elimination of

(Continued on next page)

in all its forms and aspects is adequately protected is to be answered by a careful examination of the law and practice within a given legal system.

C. *Commentators' Views and Judicial Doctrines*

There have been numerous attempts by commentators to lay down doctrines which govern the issues arising under the free exercise and establishment clauses. Professor Gianella has expressed the view that "political neutrality" and "voluntarism" are the values protected by the first amendment. The government, in his view, may not interfere with religious affairs by exerting political power to create social and ideological streams that have direct impact on religion. But governmental action, or inaction, that results in an indirect aid to religion is not violative of the establishment clause.[95]

Professor Schwartz has taken the view that the establishment clause commands that no imposition of religion should take place, and any governmental action or inaction which results in indirect interference with free choice of religion violates the establishment clause.[96]

Professor Kurland has advanced the strict neutrality test, suggesting that government may not use particular religions as a basis for classification in order to advance or inhibit religion.[97] When, however, religion comes under a broader classification, exemptions granted or limitations imposed should be sustained.[98]

(Footnote continued from preceding page)
All Forms of Religious Intolerance which provides that neither the establishment of a religion nor the separation of church from state, in and of itself, is an interference with the freedom of religion.

[95] *See generally* Gianella (Part II), *supra* note 63.

[96] Schwartz, *No Imposition of Religion: The Establishment Value*, 77 YALE L.J. 692 (1968); Schwartz, *The Nonestablishment Principle: A Reply to Professor Giannella*, 81 HARV. L. REV. 1465 (1968).

[97] Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 96 (1961). *See also* P. KURLAND, RELIGION AND THE LAW 18, 112 (1962). For discussion of Kurland's view, *see* Katz, *Radiation from Church Tax Exemption*, 1970 SUP. CT. REV. 93, 102; Kauper, Book Review, 41 TEX. L. REV. 467 (1963); Konvitz, *The Constitution or Neutral Principles* in RELIGION AND THE PUBLIC ORDER 99 (1963). For a more recent statement of Kurland's view, *see* Kurland, *Forward—Church and State in the United States: A New Era of Good Feelings*, 1966 WIS. L. REV. 215.

[98] Though Justice Harlan rejected Kurland's view in 1963, Sherbert v. Verner, 374 U.S. 398, 422 (1963) (Harlan, J., dissenting), he recently adopted it in *Walz*. Professor Kauper states that "it is evident that with [*Walz*], Justice Harlan has now adopted Professor Kurland's thesis," Kauper, *The Walz Decision: More on the Religion Clauses of the First Amendment*, 69 MICH. L. REV. 179, 198 (1970)

(Continued on next page)

Mr. Fernandez has suggested that the free exercise clause guarantees no more than "equal treatment" with special protection to "worship" under special circumstances.[99]

Mr. Weiss suggested that distinctions may be drawn between the "realm of pure belief," "the realm of religious action which may have public manifestations" and "the realm of action clearly public." While government can interfere with "public action," and, with justification, interfere with religious action having public manifestations, it cannot do so with individual belief.[100]

Professor Katz has advanced the thesis that when there is a tension between the establishment clause and the free exercise clause, the latter is to prevail. In his words: "in many situations . . . complete separation of church and state would operate to restrain religious freedom. Where this is the case there is no constitutional requirement of separation."[101]

Professor Howe, who has expressed a similar view,[102] argues that the first amendment should be read to afford churches special treatment or governmental aid so long as such treatment or aid does not interfere with complete freedom of religion. In other words, the prevailing force rests in the free exercise clause rather than in the establishment clause. In view of the *Walz* decision, it clearly appears that the majority of the Supreme Court follows this interpretation of the first amendment.[103]

Although one commentator has strongly advocated the application of a uniform test for both establishment issues and free exercise issues,[104] the Supreme Court has recently reiterated its long-established position of applying different tests for the establishment clause and the free exercise clause. In *Gillette v. United*

(Footnote continued from preceding page)
[hereinafter cited as Kauper]. By contrast, Professor Katz in an article discussing the same decision failed to make this point, quoting Harlan's passage in *Sherbert*, in which he had rejected Kurland's view, Katz, *Radiation from Church Tax Exemption*, 1970 SUP. CT. REV. 93, 103 [hereinafter cited as Katz-1970].

[99] *See* Fernandez, supra note 29. I find it difficult to see substantial differences between Kurland's view and Fernandez's, the latter being advanced later, other than different choice of words.

[100] Weiss, *Privilege, Posture and Protection, "Religion" in the Law*, 73 YALE L.J. 593 (1963).

[101] Katz, *Freedom of Religion and State Neutrality*, 20 U. CHI. L. REV. 426, 428 (1953).

[102] M. HOWE, THE GARDEN AND THE WILDERNESS (1965). For a recent discussion of Howe's view *see* Katz-1970, *supra* note 98 at 94-97.

[103] *See* Katz-1970, *supra* note 98; Kauper, *supra* note 98, at 198.

[104] Note, *Toward a Uniform Valuation of the Religion Guarantees*, 80 YALE L.J. 77 (1970).

States,[105] the Court discussed a claim for exemption by a conscientious objector to a particular war and stated: ". . . [O]ur holding that § 6(j) comports with the Establishment Clause does not automatically settle the present issue. For despite a general harmony of purpose between the two religious clauses of the First Amendment, the Free Exercise Clause no doubt has a reach of its own."[106]

The action-belief distinction established in *Reynolds v. United States*[107] and applied and elaborated in *Cantwell v. Connecticut*[108] and in *Barnette*[109] is sometimes used as a starting point for the Court's discussion of claims for exemptions on the ground of free exercise of religion.[110] This distinction does not define the nature of permissible restrictions on freedom of religion and it serves only as a starting point.

In *Braunfeld v. Brown* the Supreme Court advanced a distinction between direct burdens and indirect burdens on the exercise of religion.[111] In each case where an individual seeks exemption from a legal burden on his free exercise of religion, a proper balance must be found between the rights of the individual under the first amendment and the police power interest of the state. Where a direct burden is involved, the balancing process is unqualified and the result depends on the particular facts of the case. But where the burden is indirect, the Court has qualified the balancing process by laying down the following rule:

> If the state regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the state's secular goals, the statute is valid despite its indirect burden on religious observance unless the state may accomplish its purpose by means which do not impose such a burden.[112]

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[105] 401 U.S. 437 (1971).

[106] *Id.* at 461 (citing Abington School District v. Schempp, 374 U.S. 203, 222-23 (1967)).

[107] 98 U.S. 145 (1878).

[108] 310 U.S. 296 (1970).

[109] Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[110] *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 402 (1963); Braunfeld v. Brown, 366 U.S. 599 (1961).

[111] *See* Braunfeld v. Brown, 366 U.S. 599, 605-06 (1961); Direct conflict results in direct burden. Indirect conflict results in indirect burden.

[112] *Id.* at 607. *See generally* Note, *The Braunfeld v. Brown Test for Indirect Burdens on the Free Exercise of Religion*, 48 MINN. L. REV. 165 (1964) [hereinafter cited as Note, *Braunfeld v. Brown*].

As explained by the Court, different tests were needed for different problems: a direct burden forces the choice between "abandoning . . . religious practice or facing criminal prosecution,"[113] whereas an indirect burden at most causes incidental hardship, such as economic loss.

While the dilemmas may be different, there is no valid ground for utilizing different standards. Given that free exercise of religion necessitates accommodation of the law to religious demands, forcing a person to choose between his religion and his business[114] is not sufficiently distinct from forcing a choice between his religion and a criminal prosecution to warrant different legal treatment. It is true that in some cases "legislation [which] make[s] unlawful the religious practice itself"[115] poses a more immediate threat to religious freedom than legislation which incidentally results in economic loss. But in other cases where the expected economic loss is substantial while the penalty for violation of the criminal statute is trivial, the potential economic loss is a greater threat. In short, it is not the nature of the conflict—whether direct or indirect—which should be the determinative factor. Rather, in direct conflict cases and indirect conflict cases *all* the elements of a case should be considered. Even when dealing with indirect burdens the Court should consider whether an alternative means is available which would relieve the individual of the burden and achieve the state's goal, as well as considering all the other elements affecting state and individual interests.

That the just suggested approach is proper can be seen from a look at *Braunfeld v. Brown*[116] and *Sherbert v. Verner*[117] on the one hand, and at *Gillette v. United States*[118] on the other. Such considerations as administrative difficulties, economic advantage,

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[113] Braunfeld v. Brown, 366 U.S. 599, 605 (1961).

[114] For present purposes ignored is the inconsistency in application of the indirect burden rule itself which emerges from contrasting *Braunfeld* and *Sherbert*. The discussion here is confined to the distinction between direct and indirect burden which is unjustifiable. As to the difficulties in reconciling *Braunfeld* and *Sherbert*, *see* W. KATZ, RELIGION AND AMERICAN CONSTITUTIONS 99 (1964); Giannella (Part I), *supra* note 63, at 1400-02. *See also* the dissenting opinions in *Sherbert*. *But see* Note, *Braunfeld v. Brown*, *supra* note 112.

[115] Braunfeld v. Brown, 366 U.S. 599, 606 (1961).

[116] *Id.* (involving indirect conflict—exemption from Sunday closing law).

[117] 374 U.S. 398 (1963) (involving indirect conflict—the unemployment compensation case).

[118] 401 U.S. 437 (1971) (involving direct conflict—draft exemption to objection to a particular war).

nature and importance of religious principle, and substantiality of the state's interest are equally discussed in the first two cases (which involve indirect conflict) and in the latter (which involves a direct conflict).

One might ask why it was chosen in the categorization of the exemptions to distinguish between direct and indirect conflicts if no particular importance should be attached to the distinction. The answer is twofold. First, in the analysis and examination of exemptions it is certainly helpful to isolate the various elements involved in a problem, and it is more easily done if the distinction is drawn. Second, as has already been shown, the degree of interference with the free exercise of religion is usually higher in cases of direct conflict than in cases of indirect conflict, and this should be considered as a factor in the process of striking a balance between the state and individual interests.

The balancing test[119] applied by the Court has come under other criticisms. The most prevalent is the lack of specific rules governing the matters to which the balancing test is applicable. "The consequence of a lack of specific rules," said one commentator, "is not only to deprive individuals and prosecutors of an advance notion of their respective powers, but also to deprive the lower courts of guidance and the Supreme Court itself of the legitimacy normally conferred by reasoned decision."[120] Another commentator charged that "a balancing test tends to substitute subjective judgment for objective standards."[121]

It has been suggested that a constitutional presumption that the state can satisfy its interest by a less burdensome means should lie in favor of the individual claiming exemption from a duty or a prohibition.[122] Apart from shifting the burden of proof to the state, this suggestion does not change the basic problem. The Court still must evaluate, examine and resolve conflicting interests, and the criticism of lack of predictability is still valid. Moreover, although the Court has not established in so many words a presumption in favor of the individual, in practice it has required the state to prove that other less restrictive means are not available.

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[119] For discussion of the balancing test, *see* Clark, note 29; Giannella (Part I), *supra* note 63, at 1390-1423.

[120] Clark, *supra* note 29, at 330.

[121] Giannella (Part I), *supra* note 63, at 1384.

[122] Clark, *supra* note 29, at 345.

Thus, in *Sherbert v. Verner* the Court rejected an argument that the recognition of the claim at bar would result in spurious claims:

> Even if the possibility of spurious claims did threaten to dilute the fund and to disrupt the scheduling of work, it would plainly be incumbent upon the [state] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights.[123]

In the area of the establishment clause, the Court has moved from strict neutrality standards to a "benevolent" neutrality which leaves ample room for indirect aid to religion by granting exemptions. The concept of "the high and impregnable wall,"[124] the "no aid" test,[125] and the neutrality concept of "secular purpose and primary effect"[126] were discredited and rejected in the *Walz* decision,[127] and the concept of the "benevolent" neutrality was advanced. In *Walz,* the Court said:

> [W]e will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly prescribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.[128]

After *Walz,* the arguments advanced by commentators that

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[123] 374 U.S. 398, 407 (1963).

[124] "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach." Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947). *See also* McCollum v. Bd. of Educ., 333 U.S. 203, 231-32 (1948).

[125] "Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over the other." Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947). This "no-aid" test was later quoted with approval in numerous cases.

[126] "The test may be stated as follows: What are the purposes and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. . . . [T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." Abington School Dist. v. Schempp, 374 U.S. 203 at 222 (1963). *See also* Epperson v. Arkansas, 393 U.S. 97 (1968); Bd. of Educ. v. Allen, 392 U.S. 236 (1968).

[127] *See* Katz-1970, *supra* note 98, at 98. Kauper, *supra* note 98, at 196-208. However, unlike Professor Katz, Professor Kauper is of the view that "the secular-purpose test will continue to have vitality in cases involving nonpreferential government support of programs carried on by church-related agencies." Kauper, *supra* note 98, at 201.

[128] 397 U.S. 664, at 669 (1970).

the ministerial draft exemption[129] and the income tax exemption for ministers or churches[130] cannot be constitutionally upheld seem to have lost any hope of being accepted by the Supreme Court. The *Walz* decision seems particularly fatal to these arguments because the Court sustained a house of worship's exemption from a property tax. It would be difficult to draw any distinction between a property tax exemption granted to a house of worship and an income tax exemption or draft exemption granted to a minister. Moreover, although the Court expressed reservations about "too sweeping utterances" made in previous decisions,[131] they nevertheless indulged in making no less "sweeping utterances." It was unequivocally declared that "[t]he limits of permissible state accommodation to religion are by no means coextensive with the non-interference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself."[132] This would require the rejection of all arguments which rest on the idea that abolition of exemptions would not interfere with the free exercise of religion.[133]

Of course, *Walz* is not the last word and the picture is not clear. In a later decision, *Gillette v. United States*,[134] "old" tests were quoted with approval, but this time *Walz* was added to the list of cases supporting the Court's statement. In *Gillette*, the Court said: "The Establishment Clause stands at least for the proposition that when government activities touch on the religious sphere, they must be secular in purpose, evenhanded in operation and neutral in primary impact."[135] From this it clearly appears that Professor Katz was a little hasty in burying the prior doctrines of the courts.[136]

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[129] Note, *The Ministerial Draft Exemption and the Establishment Clause*, 55 CORNELL L. REV. 992 (1970) [hereinafter cited as Note, *Ministerial Draft*].

[130] Korbel, *Do the Federal Income Tax Laws Involve an "Establishment of Religion"?*, 53 A.B.A. J. 1018 (1967) [hereinafter cited as Korbel].

[131] The "considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles." Walz v. Tax Comm'r of the City of New York, 397 U.S. 664, 668 (1970).

[132] *Id.* at 673.

[133] *E.g.*, Note, *Ministerial Draft*, *supra* note 129, at 999-1000.

[134] 401 U.S. 437, 450 (1971).

[135] *Id.* at 451.

[136] *See* text at note 127 *supra*.

D. *Is Tax Exemption Different from Subsidy?*

It has been asserted that the exemption given to ministers from income taxation of their rental allowances[137] has the effect of "furnish[ing] the church with a state subsidy in the amount of the tax which would have been payable with respect to the receipt of such allowances but for the identity of the recipients."[138] By the same token, making contributions to religious institutions deductible from taxable income[139] and exempting a church from property tax[140] are state subsidies. Although these propositions cannot easily be denied, and Justice Harlan even admitted them,[141] he and a majority of the Court held in *Walz* that a tax exemption is not a subsidy.

More than one argument was advanced for sustaining this conclusion. The majority reasoned that the grant of a tax exemption did not amount to sponsorship of religious activity since "the government does not transfer part of its revenue to churches but simply abstains from demanding the church support the state."[142] He also argued that "direct money subsidy would be a relationship pregnant with involvement and, as with government grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards."[143] Mr. Justice Harlan found support for the difference between exemptions and subsidies in that subsidies, unlike exemptions, are passed periodically; therefore, they invite more political controversy than do exemptions. He also relied on the argument that "subsidies or direct aid, as a general rule, are granted on the basis of enumerated and more complicated qualifications and frequently involve the state in administration to a higher degree."[144] Mr. Justice Brennan, quoting Professor Giannella,[145] found support for distinguishing subsidies from exemptions on the basis that subsidies involve direct transfer of public money exacted from taxpayers as a whole, whereas exemptions

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137 INT. REV. CODE OF 1954, § 107.
138 Korbel, *supra* note 130, at 1019.
139 INT. REV. CODE OF 1954, § 170(a)(1), (c)(2). *See* Korbel, *id.*
140 *See* Walz v. Tax Comm'r of the City of New York, 397 U.S. 664 (1970).
141 *Id.* at 699.
142 *Id.* at 675.
143 *Id.*
144 *Id.* at 699.
145 Giannella (Part II), *supra* note 63, at 553.

are "mere passive state involvement with religion."[146] Mr. Justice Douglas could not agree that these arguments sustain the conclusion that exemption is distinguishable from a subsidy.[147]

It seems that after *Walz* little doubt remains as to this question. In terms of the establishment clause, an exemption is not a subsidy. Needless to say, this equally applies to property tax exemptions, income tax exemptions of ministers' rental allowances,[148] church income tax exemption, and to deductible contributions to religious institutions.[149]

E. *Mandatory and Permissible Exemptions*

The labels "mandatory" and "permissible" exemptions may come up in different contexts. When the constitutionality of an exemption is *challenged,* ordinarily the question is whether it is permissible for the legislature to establish the exemption. When an exemption is *claimed,* but not granted by the legislature, the question is whether it is mandatory for the legislature to grant the exemption or whether it is within the zone of legislative discretion. Both questions arise when an exemption is granted but is limited in scope. Those excluded may argue that the exemption thus limited is an establishment of religion, or that the free exercise clause affirmatively requires their inclusion in the exemption.[150]

The decision-making process for each question is different: the establishment issue is a problem of constitutional interpretation; the free exercise issue is a balancing of interests problem. However, the same argument is sometimes used both to reject exemptions claimed and to sustain exemptions challenged.

The involvement argument which, among others, the Court in *Walz* used for sustaining the property tax exemption,[151] was utilized by the Court in *Gillette* to deny an exemption for conscientious objection to a particular war:

> [I]t is true that "the more discriminating and complicated the basis of classification for an exemption—even a neutral one—the

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146 397 U.S. 664, 691 (1970).
147 *Id.* at 709.
148 INT. REV. CODE OF 1954, § 107.
149 INT. REV. CODE OF 1954, § 501(c)(3). *See* Korbel, *supra* note 130, at 1018-19.
150 *See, e.g.,* Gillette v. United States, 401 U.S. 437 (1971).
151 397 U.S. 664, 675 (1970) (Burger, C. J. for the Court) (Harlan, J., concurring at 698-99).

> greater the potential for state involvement" in determining character of persons' beliefs and affiliations, thus "entangl[ing] government in difficult classifications of what is or is not religious," or what is or is not conscientious.[152]

An argument similar in nature to this involvement argument was utilized before *Walz* and *Gillette* to justify the denial of Sunday law exemptions. In *Braunfeld v. Brown*, the Court said:

> This might make necessary a state-conducted inquiry into the sincerity of the individual's religious beliefs, a practice which a State might believe would itself run afoul of the spirit of consitutionally protected religious guarantees.[153]

With all respect, one finds it difficult to understand how the same argument can be utilized both for denying and sustaining exemptions. Moreover, utilizing the involvement argument for denying an exemption amounts to saying that "we deny your claim for complete freedom of religion because allowing your claim will result in excessive governmental involvement which will interfere with your complete freedom of religion."

The inherent deficiency of the involvement argument is that it takes you wherever you want depending on the preliminary assumption you make. If you assume that granting the exemption will result in more involvement, then you can utilize it for denying exemption. However, if you assume that granting the exemption will reduce the state involvement, then the exemption can be sustained. Clearly the underlying concern is whether the involvement is greater with exemption or without it, but that can be a very difficult factual question for the Court. In any event, the Court tends to make the "right" assumption according to the desirable result.

Coming back to the mandatory-permissible distinction, it is submitted that these labels do not carry with them any meaningful test which enables the Court to make a decision. Rather, as in other areas of the first amendment, after evaluating, examining and resolving the conflicting interests, the Court decides whether the Constitution compels the government to grant an exemption or whether it is only a matter of legislative discretion.

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[152] 401 U.S. 437, 457 (1971).
[153] 366 U.S. 599, 609 (1961).

In other words, the answer is not drawn from the Constitution; it is arrived at by examination of considerations relating to the state interest and the individual interest, together with other policy considerations.[154] After it has made the preliminary decision whether it is desirable to grant the exemption, the Court rules that the Constitution mandates the exemption.

Any statement made by the Court or any member thereof to the effect that an exemption is mandatory or only permissible carries with it a value judgment which dictates the conclusion. Statements of this type are not infrequent. Mr. Justice Brennan once stated that "hostility, not neutrality, would characterize the . . . withholding of draft exemptions for ministers and conscientious objectors . . . I do not say that government *must* provide . . . draft exemptions, or that the Court should intercede if it fails to do so."[155] Mr. Justice Brennan quoted this statement in his opinion in *Walz*.[156]

As to the eligibility for unemployment compensation of a Sabbatarian, Mr. Justice Stewart wrote "that the guarantee of religious liberty, embodied in the Free Exercise clause, affirmatively requires the government to create an atmosphere of hospitability and accommodation to individual belief or disbelief,"[157] thereby implying that the government was constitutionally compelled to grant an exemption to resolve the conflict between law and religion in that case. Justice Harlan "[could] not subscribe to the conclusion that the state [was] constitutionally *compelled* to carve an exception to its general rule of eligibility."[158]

As to exemption from Sunday closing laws, Chief Justice Warren, after having stated that "a number of states provide for such an exemption," said that "this may well be the wiser solution to the problem."[159] However, he was not prepared to say that the state was compelled to do so. The same view was expressed by Justice Frankfurter: "however preferable, personally, one

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154 The considerations which have an impact on the decision whether to grant or deny a claimed exemption are discussed *infra*.

155 Abington School Dist. v. Schempp, 374 U.S. 203, 299 (1963).

156 397 U.S. 664, 692 n.12 (1970).

157 Sherbert v. Verner, 374 U.S. 398, 415-16 (1961).

158 *Id.* at 423.

159 Braunfeld v. Brown, 366 U.S. 599, 608 (1961).

might deem such an exception, I cannot find that the Constitution compels it."[160]

The process of deciding whether an exception is constitutionally compelled was well described in *Gillette*: "Even as to neutral prohibitory or regulatory laws having secular aims [which means that Establishment issues are eliminated], the Free Exercise clause may condemn certain applications clashing with imperatives of religion and conscience, when the burden of First Amendment values is not justifiable in terms of the Government's valid aims. See [*Braunfeld, Sherbert*]."[161]

With the *Walz* expansion of legislative discretion as to accommodating law to religion,[162] little doubt, if any, remains as to the broad limits of permissible exemptions on religious and conscientious grounds.[163] Thus, the main issues in the area of exemptions shift to the problems of what is and what is not affirmatively required by the free exercise clause.

In considering the process of decision-making, it is difficult to make any valid prediction as to results. Thus in view of the very broad construction given by the Supreme Court to the conscientious objector exemption,[164] and in view of other cases sustaining broad conscientious objections as to draft,[165] it can be reasonably argued that should the question come before the Court, it will hold that the conscientious objector exemption is compelled by the Constitution and is not within the zone of legislative discretion, as has been held in a long line of cases.[166] Indeed, com-

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[160] McGowan v. Maryland, 366 U.S. 459, 520 (1961). Justice Frankfurter filed separate opinions for both *McGowan* and *Braunfeld*.

[161] 401 U.S. 437, 462 (1971).

[162] *See* text at note 132 *supra*. *See also* Welsh v. United States, 398 U.S. 333, 371 (1970) (dissenting opinion of Justice White, joined by Chief Justice Burger and Justice Stewart).

[163] *See* text at notes 130-37 *supra*.

[164] Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965).

[165] United States v. McFadden, 309 F. Supp. 502 (N.D. Cal. 1970), *remanded*, 401 U.S. 1006 (1971), *finally disposed of*, United States v. McFadden, 462 F.2d 4841 (1972); United States v. Sisson, 297 F. Supp. 902 (D. Mass. 1969), *appeal dismissed*, 399 U.S. 267 (1970). *See also* Girouard v. United States, 383 U.S. 61 (1946), *rev'g* United States v. MacIntosh, 283 U.S. 585 (1931).

[166] The Selective Draft Cases, 245 U.S. 366 (1948), where the Court in one sentence rejected the free exercise argument "because we think its unsoundness is too apparent to require us to do more." *Id.* at 390. *See also In re* Summers, 325 U.S. 561 (1945); Hamilton v. Regents, 293 U.S. 245 (1934); United States v. MacIntosh, 283 U.S. 605 (1931).

mentators have raised this argument.[167] However, from a footnote dropped by the Court in *Gillette,* it clearly appears that the Court has not abandoned the view that draft exemptions are a matter of legislative grace. In that footnote, *Hamilton, MacIntosh* and *In re Summers* were referred to with approval.[168]

III. CONSIDERATIONS FOR GRANTING OR DENYING EXEMPTIONS

A. *General Justifications for Granting Exemptions*

1. *Moral and Social Contributions to Society*

Perhaps the major justification for granting exemptions is the contribution that religion makes to the community. As the Supreme Court stated in *Gillette*:

> Congressional reluctance to impose [a choice between contravening imperatives of religion and conscience or suffering penalties] stems from a recognition of the value of conscientious action to the democratic community at large, and from respect for the general proposition that fundamental principles of conscience and religious duty may sometimes override the demands of the secular state.[169]

Forty years ago Chief Justice Stone made his oft-quoted statement that

> [a]ll our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep in its significance and vital indeed is it to the integrity of men's moral and spiritual nature that nothing short of the self preservation of the state should warrant its violation.[170]

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[167] *See* Note, *The Legal Relationship of Conscience to Religion: Refusal to Bear Arms,* 38 U. CHI. L. REV. 583 (1971).

[168] "We are not faced with the question whether the Free Exercise Clause itself would require exemption of any class other than objectors to particular wars. A free exercise claim on behalf of such objectors collides with the distinct governmental interests already discussed, and at any rate no other claim is presented. We note that the Court has previously suggested that relief for conscientious objectors is not mandated by the Constitution. See [*Hamilton* at 264; *MacIntosh* at 623-24; *cf. In re Summers* at 572-73]." 401 U.S. 437, 461 n.23 (1971).

[169] *Id.* at 445.

[170] United States v. MacIntosh, 283 U.S. 605, 623 (1931) (dissenting opinion). Courts and commentators frequently speak about the value of religion and conscience to society which justifies granting exemptions. *See* United States v. Seeger, 380 U.S. 163, 170-72 (1965); Lord Denning, *The Influence of Religion on Law* in 33rd EARL GREY MEMORIAL LECTURE 1953; Giannella (Part I), *supra* note 63, at 1412-13.

Obviously, the social value of religious and conscientious morality justifies exemptions when law and religion conflict, but it also justifies exemptions in the absence of any conflict. Thus in *Walz*, dealing with property tax exemptions for churches, the Court spoke of religious institutions "that exist in harmonious relationship to the community at large and foster its 'moral and mental improvement'."[171] The Court also stated that "[t]he state has an affirmative policy that considers these groups as beneficial and stabilizing influences in community life."[172]

In *School District v. Schempp*,[173] the Court refused to sustain Bible reading in classrooms as a means to accomplish "the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature."[174] Relying on this decision, one commentator argued that the ministerial draft exemption could not be justified on the ground that it "would enhance homefront morale in time of war and generally benefit the well-being of the people."[175] Although this argument is not without force, it cannot be sustained in light of *Walz*, which upheld property tax exemptions for a house of worship. The argument assumes that the same rules apply to Bible-reading and draft exemption or other exemptions of the fourth category which do not involve any conflict between law and religion. In the case of Bible-reading, the state takes affirmative action of a religious nature, while in the case of draft exemptions, the federal government does not. An exception from the draft simply leaves ministers free to choose whether to be exempt.

The combination of morality and inner duty which is found in religion makes it an effective means for promoting moral and social values.[176] It should be noted that the moral and social contributions of religion justify not only exemptions for orthodox religions holding the traditional principles of morality, but also exemptions for religious groups which hold wholly different

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[171] 397 U.S. 664, 672 (1970).

[172] *Id.* at 673. *See also* D. ROBERTSON, SHOULD CHURCHES BE TAXED? 191 (1968) [hereinafter cited as ROBERTSON].

[173] 374 U.S. 203 (1967).

[174] *Id.* at 223.

[175] Note, *The Ministerial Draft Exemption and the Establishment Clause*, 55 CORNELL L. REV. 992, 996 (1970).

[176] Note, *Defining Religion: Of God, The Constitution and the D.A.R.*, 32 U. CHI. L. REV. 533, 550 (1965).

principles from those held by the majority of society. The conflict between the traditional moral principles and those advanced by the dissenting groups results in a fertile confrontation that necessitates a beneficial re-examination of orthodox religions and society at large.[177]

Religious institutions also "uniquely contribute to the pluralism of American society by their religious activity."[178] According to this view "[G]overnment may properly include religious institutions among the variety of non-profit groups which receive tax exemptions, for each group contributes to a vigorous, pluralistic society."[179] Exemptions on conscientious and religious grounds are also justified by the fact that "religious or conscientious values frequently represent an idealism which serves a valuable function in society."[180] Thus draft exemptions to conscientious objectors may be justified "as a valuable reminder to the nation that war is undesirable and that evil should be returned with good."[181] This exemption "stands as a mark of the nation's continuing adherence to the ideal of peace."[182] In addition to advancing highly regarded social ideals, conscientious objection serves society by causing re-examination of controversial policies and keeping the issues alive.[183] The priest-penitent privilege may be justified on the ground that compelling the disclosure of religious confidence affronts human dignity and invades personal privacy.[184]

Exemptions granted to relieve the choice between conscience and the law find justification on the ground that the "moral condemnation implicit in the threat of criminal sanctions is likely to be very painful to one motivated by belief."[185] Also, a principled individual's failure to do a moral duty results in a loss of moral self-respect.[186] Hence, society's approach to the problem of an

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177 *Id.* at 551.

178 Walz v. Tax Comm'r of the City of New York, 397 U.S. 664, 689 (1970). For discussion of the pluralistic society idea *see* Katz and Southerland, *Rel'gious Pluralism and the Supreme Court*, 96 J. AM. ACAD. OF ARTS AND SCIENCES 180 (1967). *See also* ROBERTSON, *supra* note 172, at 220-34; Katz-1970, *supra* note 98, at 106-07.

179 Walz v. Tax Comm'r of the City of New York, 397 U.S. 664, 689 (1970).

180 Clark, *supra* note 29, at 337.

181 *Id. See also* Mansfield, *Conscientious Objection—1964 Term* in 1965 RELIGION AND THE PUBLIC ORDER 41.

182 Giannella (Part I), *supra* note 63, at 1415.

183 Redlich and Feinberg, *supra* note 7, at 899.

184 *See* 104 Cong. Rec. 2179 (1959) (remarks of Representative Mutler).

185 Clark, *supra* note 29, at 337.

186 *Id.*

individual who objects to obeying a law on conscientious grounds should be different from that of an individual who disobeys a law for a selfish and materialistic reason.

2. *Religious Institutions Serve Public Welfare*

Tax exemptions may be justified on the ground that churches and other religious institutions serve the public welfare by sponsoring welfare projects in various fields, such as health, education and charity, which would otherwise be paid for with public funds.[187]

Whereas Mr. Justice Brennan utilized this justification in his separate concurring opinion in *Walz*,[188] Chief Justice Burger speaking for the Court declined to do so. The Chief Justice argued that churches vary substantially in the scope of their social welfare and "good works". To give emphasis to such a variable aspect of the activities of religious institutions would mean that government would have to evaluate the scope of social welfare activities of religious institutions, thus ultimately resulting in undesirable governmental involvement.[189]

3. *Historical and Other Justifications*

Chief Justice Burger in Walz stated that

> [f]ew concepts are more deeply embodied in the fabric of our national life, beginning with pre-revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally, so long as none was favored over others and none suffered interference.[190]

While admitting that a right cannot be acquired in violation of the Constitution, the Chief Justice explained that "an unbroken practice of according the exemption to churches, openly and by affirmative

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[187] For discussion of this argument *see* ROBERTSON, *supra* note 172, at 192; Giannella (Part II), *supra* note 63, at 545 *et seq.*; Kauper, *The Constitutionality of Tax Exemptions for Religious Activities* in THE WALL BETWEEN CHURCH AND STATE 95 (Oaks ed. 1963); Korbel, *supra* note 130, at 1021 *et seq.* An argument has also been made that without the influence of religion on society, law and order would be much more precarious, and that police administration would be disrupted. ROBERTSON, *supra* note 172, at 194.

[188] 397 U.S. 664, 689 (1970).

[189] *Id.* at 673.

[190] *Id.* at 676-77.

state action, not covertly or by state inaction, is not something to be lightly cast aside."[191]

Economic justifications have been advanced to justify tax exemptions. It has been suggested that the property tax exemption granted to churches is justified if the presence of a church increases the value of lands surrounding it.[192] It has also been argued that church property is "unproductive with regard to the generation of income and therefore is not a fit subject for taxation."[193]

B. *The Elements of the Decision to Grant or Deny an Exemption*

1. *In General*

The considerations having impact on the decision-making process are essentially the same for the legislatures and the courts. Here an attempt will be made to delineate the various considerations as they emerge from the decisions of the courts. It is submitted that the about-to-be-examined factors determine the cases more than any doctrinal approach allegedly or seemingly utilized by the courts.

First, it is determined whether the prohibitory or regulatory law interferes with the religious liberty of the individual; and second, it is decided whether the religious claim is sincerely held.[194] A negative answer to either of these questions will doom a claim at the outset.

If a court concludes that the duty, prohibition, or requirement imposed by law interferes with a truly held religious belief, it proceeds to examine the degree of interference. This focuses on the individual's interest in the case. Then the public interest behind the law is analyzed. It is at this point, when the court is

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191 *Id.* at 678, 681.

192 *See* ROBERTSON, *supra* note 172, at 195-96.

193 *See* Giannella (Part II), *supra* note 63, at 552. For a penetrating examination of the economic aspects of tax exemptions *see* Bittker, *Churches, Taxes and the Constitution*, 78 YALE L.J. 1285 (1969).

194 The law is that, while the inquiry into the truth or falsity of religion is beyond the power of court or jury, the sincerity of the individual should be examined. United States v. Seeger, 380 U.S. 163, 185 (1965); United States v. Ballard, 322 U.S. 78 (1944). It has been suggested that sincerity should not be examined. *See* dissenting opinion of Justice Jackson in *Ballard;* Konvitz, *Religious Liberty and Conscience* 50-51 (1968); Note, *The Legal Relationship of Conscience to Religion: Refusal to Bear Arms*, 38 U. CHI. L. REV. 583 (1971). In Giannella (Part I), *supra* note 63, at 1418, it is suggested that sincerity should not be examined when a new religion is involved.

weighing the public interest against the interest of the individual, that a multiplicity of factors plays a role. The court must consider all the factors which tend to amplify or minimize the harm to the public interest if an exemption is granted, while at the same time evaluating the harm to the individual if an exemption is denied.

Generally, if a statutory scheme is designed to protect traditional police power interests of the state, a court is less inclined to grant an exception than it would be if mere pecuniary interests of the state are involved. But it can safely be said that most of decisions rest on the totality of the circumstances and a multiplicity of factors. Therefore, it should be kept in mind that the several considerations discussed below are not intended to imply that one factor can be conclusive of a case.

2. *Administrative Difficulties*

Administrative difficulties in enforcing a law can play an important role in the decision-making process.[195] Discussing the Sunday law exemption the Supreme Court stated that "[A]lthough not dispositive of the issue, enforcement problems would be more difficult since there would be two or more days to police rather than one and it would be more difficult to observe whether violations were occurring."[196] In response to a claim for religious exemption from the anti-marihuana laws, the Fifth Circuit asserted:

> It would be difficult to imagine the harm which would result if the criminal statutes against marijuana were nullified as to those who claim the right to possess and traffic in this drug for religious purposes. For all practical purposes the anti-marijuana laws would be meaningless and enforcement impossible.[197]

Certain exemptions raise enforcement problems as a result of the inherent difficulty in knowing whether a claimant's belief

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[195] *See generally* Clark, *supra* note 29, at 335; Giannella (Part I), *supra* note 63, at 1400.

[196] Braunfeld v. Brown, 366 U.S. 599, 608 (1961). *See also* McGowan v. Maryland, 366 U.S. 420, 451 (1961): "It seems plain that the problems involved in enforcing such a provision would be exceedingly more difficult than those in enforcing a common day-of-rest provision."

[197] United States v. Leary, 383 F.2d 851, 861 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969).

is "truly held."[198] But the possibility of spurious claims is not conclusive. Thus in *Sherbert* the Court said that "even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."[199]

When an exemption is claimed which "in its nature could not be administered fairly and uniformly over the run of relevant fact situations,"[200] then the chances are heavily against establishing the exemption. In the context of deciding an exemption for conscientious objection to a particular war, the Court said: "Should it be thought that those who go to war are chosen unfairly or capriciously, then a mood of bitterness and cynicism might corrode the spirit of public service and the values of willing performance of a citizen's duties that are the very heart of a free government."[201]

3. *Rights of Others*

Exemptions may not be granted if they result in interference with the rights of others. In *Barnette,* the Court said that "such conflicts [with rights asserted by any other individual] frequently require intervention of the State to determine where the rights of one end and another's begin."[202]

In *Prince v. Massachusetts,*[203] parents had their children sell religious literature in violation of child-labor regulations. The Court ruled that "parents may be free to become martyrs themselves. But it does not follow that they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice themselves."[204] Yet in *Wisconsin v. Yoder*[205] the Court

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[198] *See* Gillette v. United States, 401 U.S. 437, 457 (1971); Braunfeld v. Brown, 366 U.S. 599, 609 (1961). As to the distinction between the question of "truth" of the belief which is beyond the power of the court and the question whether the belief is "truly held," *see* United States v. Seeger, 380 U.S. 163, 185 (1965); United States v. Ballard, 322 U.S. 78 (1944).

[199] Sherbert v. Verner, 374 U.S. 398, 407 (1961).

[200] Gillette v. United States, 401 U.S. 437, 460 (1971). *See also id.* at 456.

[201] Gillette v. United States, 401 U.S. 437, 460 (1971).

[202] 319 U.S. 624, 630 (1942).

[203] 321 U.S. 158 (1944).

[204] *Id.* at 170.

[205] 405 U.S. 205 (1972).

made no mention of the Amish children's rights when they upheld the parents' right to withdraw the children from public school. It was held that "a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on other fundamental rights and interests."[206] The Court's decision was based in part on evidence that the Amish continued the educational process after withdrawal from the public schools and "that an additional one or two years of formal high school for Amish children in place of their long-established program of informal vocational education would do little to serve [the interests of the State.]"[207]

The possibility of causing harm to others is usually much greater when performing a positive act than when refraining from doing an act.[208] It is in the former case that the courts usually sustain the denial of an exemption on the grounds that it is in collision with rights of other individuals.[209] And, even though an exemption might cause harm only to the person claiming the exemption, the courts ordinarily deny the exemption if the harm is to life or limb.[210]

This factor takes us to the well known Hart-Devlin debate. Lord Devlin would justify enforcement of moral norms, under certain conditions, even if they are not aimed at protection of the rights of others and even if they are applied to consenting adults.[211] Professor Hart takes the position that the state can intervene only for the protection of the rights of others.[212] It

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[206] *Id.* at 211.

[207] *Id.* at 216.

[208] *Cf.* Clark, *supra* note 29, at 361.

[209] *See e.g.*, Harden v. State, 216 S.W.2d 708 (Tenn. 1948) (snake handling case). Refusal of parents to consent to medical treatment for their children has not been sustained by the courts. *See* cases in Note, *Compulsory Medical Treatment and the Free Exercise of Religion*, 42 IND. L.J. 386 n.4 (1966). *See also* Prince v. Massachusetts, 321 U.S. 158 (1944).

[210] Though the compulsory medical treatment for adults was not clearly decided, it seems that such medical treatment will be ordered over a religious objection. *See* Note, *Compulsory Medical Treatment and the Free Exercise of Religion*, 42 IND. L.J. 386 (1966). A clearer case in point is snake handling. *See* Harden v. State, 216 S.W.2d 708 (Tenn. 1948). *But see* Clark, *supra* note 29, at 361, who suggests that "where an individual's conscience demands of him as an inexcusable duty the performance of a positive act which can harm only himself and other fully consenting persons, that act cannot be prohibited by the state." Clark would apply this to snake handling.

[211] P. DEVLIN, THE ENFORCEMENT OF MORALS (1965).

[212] H. HART, LAW, LIBERTY AND MORALITY (1963). For discussion of the Hart-Devlin Debate *see generally* B. MITCHEL, LAW, MORALITY AND RELIGION IN A SECULAR SOCIETY (1967).

seems that the courts, reflecting, so to speak, the "sense of community," are following the Devlin theory.

4. *Hopelessness of Coercion*

The hopelessness of coercing a person to discharge a duty to which he is religiously or conscientiously opposed is an important consideration in two respects. First, such person, if coerced, will not discharge the duty properly. Thus "the hopelessness of converting a sincere conscientious objector into an effective fighting man"[213] justifies the granting of draft exemption. Likewise, an individual who is coerced to "judge" his fellow men against his religious belief is likely to return a verdict substantially colored by the emotional stress under which the coercion places him.[214] Second, sincere religious and conscientious objectors would rather go to jail than discharge the duty in violation of their religious and conscientious principles.[215]

5. *Number of Claimants of the Exemption*

The number of persons who can possibly lay claim to an exemption might have an impact on the decision to grant or deny an exemption. The greater the number, the greater the inclination of the court to deny the exemption, and vice versa. Thus, Professor Clark has suggested that "[a] religious privilege to smoke marijuana might be workable if only a handful of persons in the United States could establish the requisite religious interest, but absent assurance of this the right probably does not exist."[216] In *Sherbert v. Verner* the Court relied on the small number of possible claimants for sustaining an exemption.[217] Likewise, the number of conscientious objectors to war has been

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[213] Welsh v. United States, 398 U.S. 333, 369 (1970). *See also* Gillette v. United States, 401 U.S. 437, 456 (1971).

[214] *Cf.* Giannella (Part I), *supra* note 63, at 1410. This argument was not utilized by the court in *In re* Jenison, 125 N.W.2d 588 (Minn. 1963). There the court ruled that the state interest in maintaining an effective jury system would not be materially hindered by the exemption.

[215] *Cf.* Clark, *supra* note 29, at 335-36. Several thousand conscientious objectors to war have chosen jail rather than entry to the armed forces. *See* White, *Processing Conscientious Objector Claims: A Constitutional Inquiry*, 56 CALIF. L. REV. 652, 674 (1968).

[216] Clark, *supra* note 29, at 332.

[217] The Court pointed out that of 150 or more Adventists in the place where petitioner lived only she and another one had not found an employment which did not require Saturday work, 374 U.S. 398, 407 (1966).

regarded as an important factor for the decision to grant or deny a draft exemption.[218]

6. *Economic Advantage*

When an exemption would give its claimant an economic advantage over other persons, denial of the exemption or legislative imposition of an alternative duty is likely. In *Braunfeld v. Brown,* the Court supported the denial of Sunday laws exemption on the ground that "to allow only people who rest on a day other than Sunday to keep their business open on that day might well provide those people with an economic advantage over the competitors who must remain closed on that day."[219]

Speaking of the draft laws, Professor Giannella observed that "Unconditional exemption would confer a very substantial economic advantage on those who could continue to pursue their private interests while their fellow citizens were conscripted into military service."[220] Therefore, the scheme establishing the exemption imposes on conscientious objectors alternative duty in lieu of military service.[221]

7. *Legislative Judgment*

As in other areas of the first amendment, legislative judgment plays an important role in the decision-making process.[222] Thus in *Sherbert v. Verner* the Court sustained an exemption by relying on a general statutory scheme which granted exemption to Sunday worshippers.[223] Likewise, in *In re Jenison,*[224] the Court supported its conclusion that an exemption from jury service should be granted on the ground that the statutory scheme already granted the exemption to certain classes of people. Of course,

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[218] *See* MacGill, *Selective Conscientious Objection: Divine Will and Legislative Grace,* 54 VA. L. REV. 1355, 1381-82 (1968); Mansfield, *Conscientious Objection—1964 Term,* 1965 RELIGION AND THE PUBLIC ORDER 45-6; Note, *The Conscientious Objector and the First Amendment: There but for the Grace of God . . . ,* 34 U. CHI. L. REV. 79, 103-04 (1966).

[219] 366 U.S. 599, 609 (1961).

[220] Giannella (Part I), *supra* note 63, at 1411.

[221] For discussion of the alternative duty of conscientious objectors, *see* Redlich and Feinberg, *supra* note 7, at 898.

[222] I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 55 (1963).

[223] 374 U.S. 398, 406 (1963).

[224] 125 N.W.2d 588 (Minn. 1963) (on remand from the Supreme Court).

the courts also deny exemptions pursuant to legislative judgments.[225]

It seems, therefore, that when a general statutory scheme affords a basis for sustaining an exemption, the courts are inclined to grant the exemption. Bearing this in mind, it is an interesting question whether a court would exempt a priest from reporting a crime which he discovers through religious communications if a general statutory scheme provides for a priest-penitent privilege.

8. *Importance of Religious Principle*

When a conflict is between the law and fundamental principles of religion and conscience, courts are more inclined to grant an exemption than when the religious principle involved is not a central tenet of the religion.[226]

In *Sherbert v. Verner* the Court regarded the observance of the Sabbath as "a cardinal principle" of the faith of Seventh Day Adventists.[227] In *People v. Woody*,[228] sustaining an exemption from the drug laws, the court noted that peyote played "a central role in the ceremony and practice of the Native American Church" and that the "ceremony marked by the sacremental use of peyote composes the cornerstone of the peyote religion."[229] Distinguishing *Woody*, the Fifth Circuit pointed out in the *Leary* case[230] that the use of marijuana was not a central tenet of Hinduism and it was not used by Hindus universally.

Professor Konvitz[231] has criticized this approach, because it is very difficult to decide what is "a fundamental principle," "a central tenet," or a "cornerstone" of religion. He argues that sometimes there are disputes even within a given religion as to what are the central tenets of the religion. This being so, it seems

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225 *See e.g.*, Harden v. State, 216 S.W. 708, 710 (Tenn. 1948). *See also* Leary v. United States, 383 F.2d 851 (1967).

226 In *Gillette*, the Court used language which seems to reaffirm the approach of according more protection to fundamental principles: "*fundamental* principles of conscience and religious duty may sometime override the demands of a secular state." 401 U.S. 437, 445 (1971) (emphasis added). Worship is also accorded more protection, *see* Murdock v. Pennsylvania, 319 U.S. 105, 108-09 (1943).

227 374 U.S. 398, 406 (1963).

228 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

229 The court also said that "to forbid the use of peyote is to remove the theological heart of peyotism." *Id.* at 818, 40 Cal. Rptr. at 74 (1964).

230 Leary v. United States, 383 F.2d 851 (1967).

231 M. KONVITZ, RELIGIOUS LIBERTY AND CONSCIENCE 78-79 (1968).

difficult to understand how the courts can determine such questions.

The courts' inclination to grant an exemption when the law is in conflict with a central tenet of religion should not be read to mean that the state may not prohibit any activity which happens to be a central tenet of a particular religion. As always, the gravity and importance of the public interest must be considered.[232]

9. *The Religious Sect*

In discussing the difficulties of operating a draft system which would exempt conscientious objectors from "particular" wars, the Supreme Court referred to "a danger of unintended religious discrimination—a danger that a claim's chances of success would be greater the more familiar or salient the claim's connection with conventional religiousity could be made to appear."[233]

Commentators have charged that the courts have shown some reluctance to allow claims from unpopular, less familiar, non-orthodox religions. One commentator stated that "the Mormon polygamy cases and the cases upholding compulsory vaccination requirements stand as recurring testaments of the Court's preference for prevailing morality over religious liberty or radical dissenters."[234] Another commentator, discussing the ministerial draft exemption, charged that "ministers of the more orthodox sects generally have little trouble in obtaining draft exemptions, while those serving sects relying on a lay or volunteer ministry often encounter difficulty."[235] Not only have the courts shown the inclination to favor orthodox religions, commentators have done so too.[236]

Confining exemptions to religions which do not discriminate on grounds of color, race or national origin, as Congress has done

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[232] The snake handling statutes, for example, forbid the fundamental ceremony and form of worship of the Holiness Church. Nevertheless, they were upheld.

[233] Gillette v. United States, 401 U.S. 437, 457 (1971).

[234] Giannella (Part I), *supra* note 63, at 1385.

[235] Note, *Ministerial Draft, supra* note 129, at 998. For discussion of the role of prejudice *see* Comment, *Ministerial Exemption from Selective Service System,* 19 SYRACUSE L. REV. 996 (1968).

[236] The concept of natural theology suggested by Giannella (Part I), *supra* note 63, at 1430-31, does not seem to put on equal footing all religions. One commentator discussing this suggestion said: "It seems hard to formulate and harder still to defend." Clark, *supra* note 29, at 337.

in the Fair Housing Laws,[237] should not be taken as Congress' "preference for prevailing morality over religious liberty of radical dissenters."[238] Such discrimination is not "compatible with the political concepts and traditions embodied in our Constitution"[239] and should not be upheld or encouraged by a government charged with the duty to eliminate the improper discrimination.

In cases of unknown, non-orthodox or unpopular sects, the courts tend to stress the possibility of fraudulent claims.[240] Perhaps then, organized religions have less trouble in obtaining exemptions than unorganized ones.[241] Bearing in mind that fraudulant claims are more likely when the religion is unknown, it seems that it is reasonable to stress the possibility of fraudulent claims in cases of unknown or unorganized religions.[242] But the true question is whether the public interest in preventing fraudulent claims outweighs the damage to religious liberty which results from the emphasis on fraudulent claims in cases of unpopular religions. The answer to this question requires a difficult value judgment.

10. *Techniques Minimizing the Harm to Public Interest*

The existence of techniques for minimizing potential harm to the public interest may play an important role in the determination to grant an exemption. A prime technique is alternative duty, and it can eliminate several considerations militating against giving an exemption. If a substitute burden is imposed on an individual which is as onerous as the duty from which he seeks exemption, then it is unlikely that he will seek the exemption fraudulently. Alternative duty may indemnify the public, to some extent, for the loss resulting from an exemption, and it may eliminate an economic advantage which the exempted individual might have, absent alternative duty.

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[237] *See* note 78 *supra.*

[238] *See* text at note 235 *supra.*

[239] Walz v. Tax Comm'r of the City of New York, 397 U.S. 664, 669 n.2 (1970).

[240] Leary v. United States, 383 F.2d 851 (5th Cir. 1967); State v. Big Ship, 243 P. 1067 (Mont. 1926); State v. Bullard, 148 S.E.2d 565 (N.C. 1965).

[241] *Compare* People v. Woody, 61 Cal.2d 716, 394 P.2d 813 (1964) *with* Leary v. United States, 383 F.2d 851 (5th Cir. 1967); State v. Bullard, 148 S.E.2d 565 (N.C. 1965).

[242] *Cf.* Clark, *supra* note 29, at 335; Giannella (Part I), *supra* note 63, at 1408.

Alternative duty, however, is not feasible when the individual claims a privilege to perform an act otherwise prohibited. Nor is it feasible when the public interest can be served only by a particular individual, as, for example when the only witness available objects to testifying on religious grounds.

Another technique is the employment of alternative means to achieve the state's goals. The issue here is whether the alternative means are as effective and inexpensive as those which interfere with religious liberty. In *Wisconsin v. Yoder*,[243] the Court noted that "The Amish alternative to formal secondary school education has enabled them to function effectively in their day-to-day life . . . this is strong evidence that they are capable of fulfilling the social and political responsibilities of citizenship without compelled attendance beyond the eighth grade at the price of jeopardizing their free exercise of religious belief."[244]

11. *Action Versus Inaction*

The degree of government interference with religion is always a relevant consideration: the greater the interference, the better the chances for relief. When the law commands an individual to *perform* an act in violation of his religious belief, it is considered a greater interference with religious liberty than when the law *prohibits* an act required by religion.[245] The difference lies in the degree of compromise available: "inaction frequently represents an individual's compromise between violating his conscience and actively interfering with the right of others to act in ways which he disapproves."[246] When the law compels an act, this compromise is lost.

CONCLUSION

The categorization of exemptions suggested in the opening section can help in determining their constitutionality and in deciding whether an exemption should be granted. Recent decisions of the Supreme Court have broadened the zone of legislative discretion for accommodating law to religion,[247] but the decisions

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243 406 U.S. 205 (1972).
244 *Id.* at 225.
245 Giannella (Part I), *supra* note 63, at 1422.
246 Clark, *supra* note 29, at 346.
247 Walz v. Tax Comm'r of the City of New York, 397 U.S. 664 (1970).

at the same time indicate that the Court is narrowing the zone in which the legislature is affirmatively required to make accommodation.[248] The "benevolent neutrality" doctrine leaves ample room for legislatures to accommodate the free exercise values, if so desired. Yet the question whether an exemption claimed by an individual on religious or conscientious grounds should be granted remains dependent upon a balancing test, and it has been suggested that specific considerations in fact determine exemptions rather than doctrinal approaches.

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[248] Gillette v. United States, 401 U.S. 437, 461 n.23 (1971). *See* text at note 150 *supra*.