COMMENTS

THOMAS v. REVIEW BOARD OF INDIANA EMPLOYMENT SECURITY DIVISION: DENYING FREEDOM OF RELIGION IN UNEMPLOYMENT COMPENSATION CASES

I

INTRODUCTION

Since the 1963 United States Supreme Court decision in *Sherbert v. Verner*,[1] the free exercise clause of the first amendment[2] has been construed to limit the ability of the states to deny unemployment compensation to claimants whose religious practices or beliefs cause them to be disqualified from receiving benefits.[3] Unless the state can show a compelling interest which justifies the disqualification, it may not apply unemployment compensation disqualification provisions so as to cause claimants to abandon their religious practices.[4] In *Thomas v. Review Board of Indiana Employment Security Division*,[5] the Supreme Court of Indiana significantly narrowed the scope of *Sherbert* when it denied unemployment compensation to

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1. 374 U.S. 398 (1963).

2. The first amendment provides in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

The fourteenth amendment extends the protections of the first amendment to the states. Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943). *See also* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

3. Workers who voluntarily terminate their employment are generally not permitted to collect unemployment compensation. In all states, unless a worker who leaves his job voluntarily has "good cause" for quitting, he is disqualified. EMPLOYMENT AND TRAINING ADMINISTRATION, U.S. DEP'T OF LABOR, COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS 4-5, 4-7, 4-30 (1978). *See also* Sanders, *Disqualification for Unemployment Insurance*, 8 VAND. L. REV. 307, 317-23 (1955).

Many states define "good cause" so broadly as to authorize payment of unemployment benefits to workers who have left work for certain personal reasons. Most states, however, have interpreted the term "good cause" more restrictively. *See* 20 CLEV. ST. L. REV. 597, 598 (1971). In Indiana, "good cause" sufficient to justify voluntary termination must be job-related and must be objectively justifiable. *See, e.g.*, Geckler v. Review Bd. of Ind. Empl. Sec. Div., 244 Ind. 473, 477-78, 193 N.E.2d 357, 359 (1963); Wicker v. Review Bd. of Ind. Empl. Sec. Div., 173 Ind. App. 657, 658-59, 365 N.E.2d 787, 788 (1977); Gray v. Dobbs House, Inc., 171 Ind. App. 444, 446, 357 N.E.2d 900, 903 (1976).

4. Sherbert v. Verner, 374 U.S. 398, 409-10 (1963).

5. 391 N.E.2d 1127 (Ind. 1979), *rev'd*, 101 S. Ct. 1425 (1981).

a Jehovah's Witness whose religious convictions compelled him to quit his job at an armaments production plant.[6]

The Indiana Supreme Court thereby joined the growing ranks of state courts which have resisted the *Sherbert* holding by denying the claims to social welfare benefits brought by religious practitioners.[7] In *Sherbert,* the United States Supreme Court ruled that absent a compelling interest, states have a duty under the first amendment's free exercise clause to allow exceptions to unemployment benefit eligibility provisions when necessary to

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6. By contrast, the New York Insurance Appeals Board has concluded that religious aversion to war-related unemployment constitutes sufficient cause to grant a claimant unemployment compensation:

> A sincere objection against working on military implements of destruction because of religious beliefs, acceptance of such work being in fact an offense to claimant's religious and moral conscience, is not a proper basis for disqualification for voluntary [*sic*] leaving employment without good cause when claimant was transferred to such work from work which was not objectionable to him.

App. Bd. Dec. 24,048-52, [1980] UNEMPL. INS. REP. (CCH) ¶ 1965.12 (N.Y. 1952). *See also* Syrek v. California Unempl. Ins. Appeals Bd., 54 Cal. 2d 519, 354 P.2d 625, 7 Cal. Rptr. 97 (1960) (conscientious objector's refusal to accept employment because loyalty oath was required held to constitute good cause); Comm. Dec. No. 422-A-51, [1981] 3 UNEMPL. INS. REP. (CCH) ¶ 1975.13 (Conn. 1951) (when claimant realized that his assembly work was later used for military purposes, job became unsuitable for him, since no one is compelled to work in contravention of religious belief); App. Trib. Dec. No. AT-4572-57, [1981] 8 UNEMPL. INS. REP. (CCH) ¶ 1975.13 (N.D. 1957) (claimant, employed by a secret order whose tenets were unacceptable to her, had good cause for quitting job in lieu of joining order); Brewster v. Board of Review, [1976] 1B UNEMPL. INS. REP. (CCH) ¶ 1965.099 (Ohio C.P. Ashland County 1963) (due to degree of risk to claimant's moral beliefs and religious principles, she had right to refuse job which involved serving alcoholic beverages); Board of Review, Dec. No. 44-BR-60, [1981] 10 UNEMPL. INS. REP. (CCH) ¶ 1975.131 (Tenn. 1978) (mill worker who quit her job rather than join union because union membership conflicted with her religious beliefs held to have left voluntarily with good cause, since Tennessee Constitution provided that no human authority may control or interfere with rights of conscience).

7. *E.g.,* Hildebrand v. Unemployment Ins. Appeals Bd., 19 Cal. 3d 765, 566 P.2d 1297, 140 Cal. Rptr. 151, *cert. denied,* 434 U.S. 1068 (1977) (Sabbatarian denied unemployment compensation for refusal to work on Saturday, when she had taken job with knowledge of Saturday work requirement); Mullaney v. Woods, 97 Cal. App. 3d 710, 159 Cal. Rptr. 902 (1979) (state interest in maintaining fiscal integrity of its welfare system is sufficient to outweigh parent's religious conviction that her children should not receive social security numbers); Johnson v. Motor Vehicle Div., 197 Colo. 455, 593 P.2d 1363 (en banc), *cert. denied,* 444 U.S. 885 (1979) (statute requiring drivers' licenses to bear photograph not an infringement of plaintiffs' beliefs, which prohibit the taking of photographs); Marshall v. District Unempl. Comp. Bd., 377 A.2d 429 (D.C. 1977) (dismissal of police officer who took private religious vow not to shave upheld); Powers v. State Dep't of Social Welfare, 208 Kan. 605, 493 P.2d 590 (1972) (claimant who refused medical examination because of religious beliefs denied welfare benefits); Donnelly v. Unemployment Comp. Bd. of Review, 17 Pa. Commw. Ct. 39, 330 A.2d 544 (1975) (Sabbatarian denied unemployment compensation for refusal to accept suitable weekend work); Levold v. Employment Security Dep't., 24 Wash. App. 472, 604 P.2d 175 (1979) (postal service worker who refused to work occasional Sundays denied unemployment compensation, because he had only a personal preference, not a deeply held religious conviction).

safeguard religious liberty.[8] *Thomas* represents a significant state reinterpretation of the scope of the *Sherbert* doctrine.

A free exercise challenge to governmental action must meet two threshold requirements. First, the claim must be based upon bona fide "religious" beliefs within the constitutional meaning of the term.[9] Second, the beliefs must be sincerely held.[10] Once these prerequisites are satisfied, the question becomes whether the governmental requirement imposes any burden on the free exercise of the claimant's religion.[11] If the claimant demonstrates that a burden exists, the government must show that its action furthers a compelling state interest, and that this interest cannot be achieved by means less burdensome to the free exercise of the claimant's religion.[12]

This Comment will first evaluate the threshold issues: whether Thomas' refusal to aid in the production of armaments was based on a "religious" belief as defined by the first amendment, and whether he sincerely held such a belief. The Comment will then analyze the merits of Thomas' free exercise challenge. It will evaluate his claim that the Indiana disqualification provision burdened his religious faith and practice, and then examine both the substantiality of the government's interest in the provision and the effectiveness of the means chosen to serve that interest. This Comment will conclude that the Indiana Supreme Court departed from the free exercise analysis prescribed by the United States Supreme Court, and improperly denied Thomas' claim.

II

THE CASE

A. The Facts

Eddie C. Thomas, a Jehovah's Witness, worked at Blaw-Knox Foundry & Machinery, Inc., a plant engaged in the production of weapons.[13] He obtained his position as a chain hooker with the help of a fellow church

8. 374 U.S. 398, 406 (1963).

9. Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972); Stevens v. Berger, 428 F. Supp. 896, 901-02 (E.D.N.Y. 1977).

10. United States v. Seeger, 380 U.S. 163, 185 (1965).

11. Sherbert v. Verner, 374 U.S. 398, 403 (1963).

12. *Id.* at 406.

13. The record is unclear whether every division at Blaw-Knox was engaged in armaments production or whether the roll foundry where Thomas first worked was an exception. The Review Board of the Indiana Employment Security Division determined that the roll foundry "was not engaged in the manufacture of items used in the advancement of war." Rev. Bd. Case No. 76-R-468 (Nov. 29, 1976), *reprinted in* Petition for Certiorari at 5a, 101 S. Ct. 1425 (1981). The Indiana Supreme Court, however, found that "all of Blaw-Knox was involved in the production of armaments." 391 N.E.2d at 1933.

member who asked the general foreman to hire Thomas. Assigned initially to work in the roll foundry, Thomas did not investigate the nature of Blaw-Knox's business. After nearly a year of work, the roll foundry division closed permanently and Thomas was transferred to another part of the factory. Upon taking up his new position, he learned for the first time that Blaw-Knox was engaged in armaments production. Although his fellow Witness did not find the job "unscriptural," Thomas quit his new position within a month, stating that directly producing tank turrets violated his religious principles.[14]

A deputy examiner denied Thomas' initial claim for unemployment compensation. An appeals referee upheld the deputy's determination, and the decision was affirmed by the Employment Security Division Review Board.[15] Each tribunal applied the provision of the Indiana Employment Security Act which prohibited payment of benefits to any individual "who has voluntarily left his employment without good cause in connection with the work."[16] Although the hearing referee found that Thomas' religious beliefs specifically precluded him from producing armaments, the referee nevertheless concluded that Thomas had not established the requisite "good cause" for quitting.[17] Under the authority of *Sherbert,* the Indiana Court of Appeals reversed the Review Board's decision, holding that the denial of unemployment compensation infringed upon Thomas' first amendment right to the free exercise of his religion and that this infringement was not justified by a compelling state interest.[18]

B. The Indiana Supreme Court Decision

A divided Indiana Supreme Court vacated the decision of the Court of Appeals.[19] On the basis of the Review Board's determination that Thomas left his employment without good cause, the court concluded that the unemployment compensation disqualification provision did not violate the free exercise clause.[20]

The legal implications to be drawn from these conflicting characterizations of the facts are discussed in the text accompanying notes 108-19 *infra.* This Comment will present the facts as characterized by the Indiana Supreme Court.

14. The relationship of the roll foundry to armaments production had been unclear to Thomas because the foundry processed materials at an early stage of production. *See* Thomas, 391 N.E.2d at 1131.

15. Eddie C. Thomas, Rev. Bd. Case No. 76-R-468 (Nov. 29, 1976), *reprinted in* Petition for Certiorari at 4a-5a, 101 S. Ct. 1425 (1981).

16. IND. CODE § 22-4-15-1 (Supp. 1979). *See* note 3 *supra.*

17. Eddie C. Thomas, App. Referee Case No. 75-A-12221 (Feb. 24, 1976), *reprinted in* Petition for Certiorari at 3a, 101 S. Ct. 1425 (1981).

18. Thomas v. Review Bd. of Ind. Empl. Security Div., 381 N.E.2d 888 (Ind. Ct. App., 1978), *vacated,* 391 N.E.2d 1127 (Ind. 1979), *rev'd,* 101 S. Ct. 1425 (1981).

19. Thomas, 391 N.E.2d 1127. The court split three to two, with Justices Hunter and DeBruler vigorously dissenting. *See* text accompanying notes 35-37 *infra.*

20. Thomas, 391 N.E.2d at 1133-34. The court also indicated that permitting Thomas to recover unemployment compensation might violate the establishment clause of the first

The court observed that the purpose of the Indiana Employment Security Act was to "protect people from the menace of periods of unemployment and to encourage stable employment [and not] to facilitate changing employment or to provide relief for those who quit work voluntarily for personal reasons."[21] Indiana's social welfare system therefore required that individuals voluntarily terminating their employment meet certain objective standards in order to recover benefits. A claimant must demonstrate "that (a) his reasons for abandoning his employment were such as would impel a reasonable, prudent man to terminate under the same or similar circumstances; and (b), these reasons or causes are objectively related to the employment."[22] Thomas' reasons for leaving Blaw-Knox were not objectively related to his employment; rather, they were "unique, personal and subjective."[23] The Indiana Supreme Court upheld the Indiana Employment Security Act as applied to Thomas because its purpose was to encourage "people to maintain [their] present jobs rather than to quit them."[24] Such a general law, enacted within the state's power to advance its secular goals, was valid despite any indirect burden it may have placed upon Thomas' free exercise of his religion.[25]

Noting, moreover, that only a religious choice and not "a personal philosophical choice [will] rise to the level of a first amendment claim of religious expression,"[26] the court painstakingly inquired into the substance of Thomas' religious beliefs. Because he was unable to articulate these beliefs, the court concluded that both his beliefs and their religious bases were unclear. Consequently, the court determined that he had quit for personal reasons.[27]

The lower court, however, had found Thomas' religious claim valid under *Sherbert*.[28] The Indiana Supreme Court therefore attempted to dis-

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amendment. *Id. Thomas* thus highlights a potential conflict between the free exercise and the establishment clauses of the first amendment. Although *Sherbert* indicates that the free exercise clause requires the government affirmatively to exempt religious practitioners from regulations where necessary to avoid penalizing religious beliefs and practices, the establishment clause prohibits state "aid," or indeed preference, to any religious group. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 812-34 (1978). While a detailed discussion of this conflict between the first amendment religion clauses is outside the scope of this Comment, it is noteworthy that the Supreme Court has held that when such conflicts occur the protection of free exercise values is of paramount importance. Wisconsin v. Yoder, 406 U.S. 205 (1972). *See* L. TRIBE, *supra*; Pfeiffer, *The Supremacy of Free Exercise*, 61 GEO. L.J. 1115 (1973).

21. Thomas, 391 N.E.2d at 1129.

22. *Id.* at 1130.

23. *Id.*

24. *Id.*

25. *Id.* at 1130-31. For a criticism of this analysis, *see* text accompanying notes 120-50 *infra.*

26. Thomas, 391 N.E.2d at 1131 (citing Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1971)).

27. Thomas, 391 N.E.2d at 1130-33.

28. 381 N.E.2d at 895.

tinguish Thomas' situation from Sherbert's. Sherbert was a Seventh Day Adventist who had been discharged by her South Carolina employer for refusing to work on Saturday, her Sabbath. When her religious beliefs prevented her from obtaining other employment, she filed a claim for unemployment compensation benefits.[29] In filing her claim, Sherbert expressed a willingness to accept employment at other textile mills, or even in another industry, but only if Saturday work was not required. The state nonetheless denied her claim, determining that she had failed "without good cause to accept suitable work."[30] The United States Supreme Court held that the state had a duty to apply its disqualification provision so as not to penalize Sherbert in the free exercise of her religion.[31] The state violated Sherbert's free exercise rights, according to the Court, by forcing her to choose between practicing her religion without unemployment compensation, and forsaking her beliefs in order to accept work.[32]

According to the Indiana Supreme Court, Thomas' dilemma could not be equated with the choice forced upon Sherbert. Finding that Thomas was "struggling with" his position on participation in weapons production, and was unable to explain the precise bases of his beliefs, the court concluded that the record revealed neither pressure on him to quit nor obstruction of his religious practices.[33] The court determined that *Sherbert* did not require the extension of unemployment compensation to Thomas because he had voluntarily left his work for personal reasons which he merely described as religious beliefs.[34]

Justice Hunter strongly dissented. He argued that *Sherbert* controlled because the Review Board's findings of fact indicated that Thomas had indeed quit his job because of religious convictions.[35] The majority's inquiry into the nature of Thomas' beliefs was improper: "[T]his Court should not pick apart a religious adherent's beliefs because he is 'struggling'

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29. 374 U.S. 398, 399-400 (1963).

30. *Id.* at 401. The Indiana provision disqualified Thomas because he "voluntarily left his employment without good cause in connection with the work . . . ." IND. CODE § 22-4-15-1 (Supp. 1980). However, IND. CODE § 22-4-15-2 (Supp. 1980) contains a provision even closer to that at issue in *Sherbert,* and the Indiana courts have distinguished between the standards for disqualification in a voluntary resignation case and those in a work availability case. The standards are stricter in the former. *See* Thomas, 381 N.E.2d at 891; Gray v. Dobbs House, Inc., 171 Ind. App. 444, 357 N.E.2d 900 (1976).

This distinction does not affect the free exercise analysis. If Sherbert had quit when her employer altered her schedule to include Saturday work rather than waiting to be fired, and had been denied unemployment compensation under the state's voluntary termination provision, the *Sherbert* Court's reasoning should still have led to the invalidation of the statute.

31. 374 U.S. 398, 410 (1963).

32. *Id.* at 404.

33. Thomas, 391 N.E.2d at 1133.

34. *Id.* at 1134. Furthermore, the extension of such benefits would violate the establishment clause of the first amendment by granting Thomas compensation while other employees who voluntarily quit work for personal reasons were denied it. *Id.*

35. Thomas, 391 N.E.2d at 1134 (Hunter, J., dissenting).

with his position or because his beliefs are not eloquently stated."[36] In a separate dissenting opinion, Justice DeBruler similarly found no reason to distinguish *Sherbert* or to deny Thomas constitutional protection.[37]

The analysis of the majority hinged on its finding that Thomas' refusal to participate in the production of armaments was merely a personal belief. While recognizing that Thomas' belief might "somehow be described as religious,"[38] the court nonetheless did not consider it "religious" within the constitutional meaning of the term.

The Indiana Supreme Court's reasoning not only presupposes a narrow body of beliefs that are readily identifiable as "religious," but also assumes that it is within the power and competence of the judiciary to determine the precise scope of that body of beliefs. The *Sherbert* decision may encourage such questionable assumptions by requiring the judiciary to assess burdens on individual religious free exercise rights without providing a coherent definition of "religion." This Comment will examine the Indiana Supreme Court's conclusion that Thomas left Blaw-Knox for personal, non-religious reasons in light of general guidelines the United States Supreme Court has provided in defining "religion."

III

THRESHOLD ISSUES IN A FREE EXERCISE CHALLENGE

A. The Constitutional Definition of Religion

The Indiana Supreme Court's opinion recounted at great length the exchange between Thomas and the Review Board's hearing referee concerning the nature of Thomas' religious objections to participating in armaments work.[39] Because Thomas was unable to articulate his religious beliefs or their basis in Jehovah's Witness doctrine, the court deemed his termination of employment at Blaw-Knox a personal choice not warranting first amendment protection.[40] In concluding that Thomas' convictions had no religious basis, the court improperly interpreted the scope of "religion" protected by the free exercise clause.

1. The Broad Interpretation of "Religion"

Until the turn of the century, the Supreme Court narrowly construed "religion" to include only those theistic conceptions of divinity, morality,

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36. *Id.* at 1135 (Hunter, J., dissenting).
37. *Id.* at 1136-37 (DeBruler, J., dissenting).
38. *Id.* at 1134.
39. *Id.* at 1131-32.
40. *Id.* at 1134.

and worship acceptable according to "civilized" Western standards.[41] In 1890, for example, the Supreme Court in *Davis v. Beason*[42] stated: "The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."[43]

Since *Davis,* however, the Court has steadily expanded its definition of what constitutes a "religious" belief or practice.[44] By 1961, the Court had held that the government could not constitutionally force a person to "profess a belief or disbelief in any religion, . . . impose requirements which aid all religions as against non-believers," or aid theistic religions as against nontheistic faiths.[45]

The conscientious objector cases of the Vietnam War era also led to a broadening of the Court's definition of "religion."[46] In *United States v.*

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41. *See, e.g.,* Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 49-50 (1890) (charter of Mormon Church repealed because Church was not a religious or charitable corporation; the Mormons' religious adherence to polygamy was a "pretense" according to "the enlightened sentiments of mankind"); Davis v. Beason, 133 U.S. 333, 341-42 (1890) (Mormons' opinions respecting polygamy were not, according to "the common sense of mankind," religious tenets at all); Reynolds v. United States, 98 U.S. 145, 164-67 (1878) (polygamy practiced by Mormons not protected by religion clauses of first amendment); Note, *Toward a Constitutional Definition of Religion,* 91 HARV. L. REV. 1056, 1060-61 (1978) [hereinafter cited as Note, *Constitutional Definition*].

42. 133 U.S. 333 (1890) (state statute prohibiting bigamists and polygamists from voting upheld because free exercise clause does not protect religious conduct).

43. *Id.* at 342.

44. *But see* note 46 *infra,* for a discussion of how, in some contexts, courts have failed to apply an expansive definition of religious activity.

45. Torcaso v. Watkins, 367 U.S. 488, 495 (1961) (state constitutional provision denying an agnostic appointment as a notary public because he refused to declare his belief in God invalidated under the establishment clause).

46. There is much disagreement as to the scope of the definition of religion for purposes of the first amendment. Some courts have applied a much narrower definition than that applied in the conscientious objector cases. *See generally* Womens Servs., P.C. v. Thone, 483 F. Supp. 1022, 1035, 1040 (D. Neb. 1979) (court held that state criminal abortion statute violated neither the establishment clause nor the free exercise clause because the broad conscientious objector case definition did not apply to the first amendment and the statute did not burden a "fundamental tenet" of any religion); Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1189 (N.D. Ohio 1979) (city abortion ordinance did not violate the establishment clause since the belief that human life begins at conception is not "clearly and singularly" a religious belief, but one with foundations in science and philosophy as well); Callahan v. Woods, 479 F. Supp. 621, 624 (N.D. Cal. 1979) (federal regulation requiring welfare claimant to obtain social security number did not violate free exercise clause since claimant's belief that the number was a device of the Antichrist, although sincerely held, was not "rooted in religious belief"); Theriault v. Silber, 453 F. Supp. 254, 260-62 (W.D. Tex.), *appeal dismissed with prejudice,* 579 F.2d 302 (5th Cir. 1978), *cert. denied,* 440 U.S. 917 (1979) ("Church of the New Song" created by inmate was not a religion protected by the first amendment since its sole purpose was to disrupt prison discipline); Brown v. Pena, 441 F. Supp. 1382, 1385 (S.D. Fla. 1977), *aff'd,* 589 F.2d 1113 (5th Cir. 1979) (religious discrimination complaint dismissed because it was based upon plaintiff's "personal preference" for a certain cat food as beneficial to his state of well-being and work performance, rather than upon protected religious belief); State v. Brashear, 92

Seeger,[47] for example, the challenged statutory provision, which defined religious objections to war, granted selective service exemptions only to draftees whose objections arose out of their "belief in a relation to a Supreme Being."[48] The Supreme Court construed this language so as to include all objectors holding sincere, nontheistic beliefs as well as those possessing conventional religious beliefs: "[T]he test of belief 'in a relation to a Supreme Being' is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."[49]

The Supreme Court articulated its most expansive definition of religion in *Welsh v. United States*.[50] In *Welsh*, the Court excluded from the selective service all persons whose sincere conscientious objection did not rest "solely upon policy, pragmatism, or expediency."[51] The Court concluded that the conscientious objector provision of the Military Selective Service Act of 1967 "exempts from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war."[52]

N.M. 622, 625-28, 593 P.2d 63, 66-69 (1979) (court rejected defendant's subjective conclusion that his use and distribution of marijuana was mandated by religious beliefs finding that his practices arose from his personal views of the Bible not from those of religious organization of which he was a member); State v. Kasuboski, 87 Wis. 407, 417, 275 N.W.2d 101, 105-06 (1978) ("Life Science Church" ministers' aversion to compulsory education not protected by free exercise clause since church did not have tenet condemning education); Missouri Church of Scientology v. State Tax Comm'n, 560 S.W.2d 837, 842 (Mo. 1977) (property tax levied on nontheistic church upheld since minimum requirement of first amendment is belief in Supreme Being), *appeal dismissed*, 439 U.S. 803 (1978); Levold v. Employment Security Dep't, 24 Wash. App. 472, 604 P.2d 175 (1979) (plaintiff who was unaffiliated with religious organization and who desired to have some weekends off from work as a personal preference not covered by first amendment); *In re* McMillan, 30 N.C. App. 235, 238, 226 S.E.2d 693, 695 (1976) (father who refused to send his children to public school which did not teach their Indian heritage not protected by first amendment; deep-rooted attachment to Indian heritage not on equal constitutional plane with religious beliefs).

47. 380 U.S. 163 (1965).

48. Universal Military Training and Service Act § 6(j), 50 U.S.C. § 456(j) (1964). The provision requiring "belief in a relation to a Supreme Being" was deleted by the Military Selective Service Act of 1967, Pub. L. No. 90-40, § 1(7), 81 Stat. 104 (1967).

49. United States v. Seeger, 380 U.S. 163, 165-66. *See also* Womens Servs., P.C. v. Thone, 483 F. Supp. 1022, 1033 (D. Neb. 1979) (religion clauses of first amendment contemplate both theistic and nontheistic religious beliefs).

50. 398 U.S. 333 (1970).

51. *Id.* at 343. Like Seeger, Welsh had sought the exemption while explicitly qualifying the religious basis of his petition. Both asserted their deep and sincere opposition to killing in wars, and both were denied exemptions because they lacked the requisite religious belief. Each was granted an exemption by the Supreme Court because the strength of his purely moral or ethical beliefs occupied a place in his life parallel to those of traditionally religious persons.

52. *Id.* at 344. Justice Harlan, concurring, felt the statute's limited application of the exemption provision to "religious" beliefs violated the establishment clause, and he wished to salvage a long-standing congressional policy permitting conscientious objection to military service. *Id.* at 345.

This formulation expanded the statutory exemption for religious beliefs to include convictions based upon purely moral and ethical principles. By broadening the definition of religion, the Supreme Court avoided distinguishing between sincerely held religious beliefs and their moral or ethical counterparts.[53] In deciding whether the beliefs were religious, the Court in *Seeger* and *Welsh* focused on the conscientious objector's "attitude" rather than on a traditional characterization of the nature of his convictions. A sincere belief paralleling conventional theism exempted the claimant from the selective service. Indeed, even if the claimant himself did not characterize his convictions as religious, his characterization would not foreclose the possibility that he was entitled to the "religious" exemption:

> When a registrant states that his objections to war are "religious," that information is highly relevant to the question of the function his beliefs have in his life. But very few registrants are fully aware of the broad scope of the word "religious" as used in § 6(j), and accordingly a registrant's statement that his beliefs are non-religious is a highly unreliable guide for those charged with administering the exemption.[54]

Thus, the legal standard under *Seeger* and *Welsh* includes moral and ethical beliefs within the ambit of "religious" convictions. The *Welsh* court did not expand the definition of religion so as to include every belief subjectively characterized as "religious," however. The judiciary retains substantial discretion in determining whether a claimant's beliefs are religious.[55] While

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53. Note, *Constitutional Definition, supra* note 41, at 1066. According to some commentators, this definition applies under the free exercise clause but not the establishment clause. *See* L. TRIBE, *supra* note 20, at 819-25; Galanter, *Freedoms in the United States: A Turning Point?* 1966 WIS. L. REV. 217, 265-68. *But see* Womens Servs., P.C. v. Thone, 483 F. Supp. 1022, 1033 n.10 (D. Neb. 1979) (court rejected idea that definition of religion differs for purposes of free exercise clause and establishment clause because of Framers' intent and because the Constitution employs the word "religion" only once for both clauses).

54. Welsh v. United States, 398 U.S. 333, 341 (1970).

55. In Theriault v. Silber, 547 F.2d 1279 (5th Cir.) (per curiam), *cert. denied*, 434 U.S. 871 (1977), the Fifth Circuit recognized the applicability of the *Seeger* definition of religion where one possessed a "belief in a Supreme Being," but rejected the criterion to the extent that it excluded agnosticism or conscientious atheism. If anything, the definition was too narrow. *Id.* at 1281. Similarly, the district court in Loney v. Scurr, 474 F. Supp. 1186 (S.D. Iowa 1979), cited *Seeger* and *Welsh* in holding that the "Church of the New Song" organized by inmates was a religion since it possessed many of the characteristics associated with traditional religions: "[I]t is at least clear that if a group (or an individual) professes beliefs which are similar to and function like the beliefs of those groups which by societal consensus are recognized as religion, the First Amendment guarantee of freedom of religion applies." *Id.* at 1193. *See also* Malnak v. Yogi, 440 F. Supp. 1284 (D.N.J. 1977), *aff'd per curiam*, 592 F.2d 197 (3d Cir. 1979) (district court applied broad definition of religion to hold the teaching of a course called "Science of Creative Intelligence—Transcendental Meditation" in public schools violated the establishment clause); Fulwood v. Clemmer, 206 F. Supp. 370, 373 (D.D.C. 1962) (Muslim faith held to be a religion since it calls for "belief in the existence

a profession of belief which the claimant characterizes as religious is evidence of great weight, it is not determinative. Thus, although the Supreme Court has abandoned the historically narrow view of religion based on "civilized" Western concepts, it has also refrained from allowing a person to define her purely moral, ethical or philosophical beliefs as religious.[56]

2. *Current Parameters of the Broad Definition of Religion*

The Court delineated some of the parameters of constitutionally recognized religious beliefs in *Wisconsin v. Yoder*.[57] Because "the very concept

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of a supreme being controlling the destiny of man"); Note, *Constitutional Definition, supra* note 41, at 1064, 1072-75. This approach, however, has also been rejected by some courts. *E.g.*, Womens Servs., P.C. v. Thone, 483 F. Supp. 1022, 1035 (D. Neb. 1979); Missouri Church of Scientology v. State Tax Comm'n, 560 S.W.2d 837, 842 (Mo. 1977) (en banc), *appeal dismissed*, 439 U.S. 803 (1978).

The expansive interpretation of religion in the conscientious objector cases has been paralleled in the law prohibiting religious discrimination in employment. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (1976). Some commentators have argued that Title VII protects a person's individual beliefs rather than his religious beliefs. Note, *Title VII—Religious Discrimination in Employment—Is "Effect on Individual Religious Belief" Discrimination Based on Religion Under the Civil Rights Act of 1964?* 16 WAYNE L. REV. 327, 333 (1969). Although the Equal Employment Opportunity Commission, which was established to enforce the Act, adopted the Supreme Court's expansive definition of religion, *see* Note, *Religious Observance and Discrimination in Employment*, 22 SYRACUSE L. REV. 1019, 1043 (1970-71), courts have been reluctant to apply this reasoning. *See, e.g.*, Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971) (per curiam).

In 1972 Congress amended Title VII to include the following definition: "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. § 2000e(j) (1976)). The legislative history indicates that Congress intended the definition of religion for purposes of Title VII to be as broad as for the first amendment.

> The term "religion" as used in the Civil Rights Act of 1964 encompasses, as I understand it, the same concepts as are included in the first amendment—not merely belief, but also conduct; the freedom to believe, and also the freedom to act.
>
> I think in the Civil Rights Act we thus intended to protect the same rights in private employment as the Constitution protects in Federal, State, or local governments.

118 CONG. REC. 705 (1972) (remarks of Sen. Randolph).

It is important to remember, however, that considerations involved in free exercise litigation differ markedly from those involved in Title VII cases. While the first amendment places a heavy burden on government to justify an infringement of a person's free exercise of his religion, both employer and employee have legitimate interests under the federal statute. 44 N.Y.U. L. REV. 1147, 1150 (1969).

56. One commentator, however, argues that the Supreme Court has not retreated from the expansive definition of religion enunciated in *Seeger* and *Welsh*. Note, *Constitutional Definition, supra* note 41, at 1066 n.63.

57. 406 U.S. 205 (1972). *Yoder* has been explained upon nonreligious grounds. *See, e.g.*, Friedman, *The Motion Picture Rating System of 1968: A Constitutional Analysis of*

of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests,"[58] the Court rejected the approach of Justice Douglas who, in his dissent, argued for adherence to the broad definition of religion indicated in *Seeger* and *Welsh*.[59] To prevent the concept of religion from expanding to include all that is philosophical, however, the Court adopted an approach requiring careful examination of the particular belief at issue.

In *Yoder,* the Court overturned the conviction of Amish parents who, by refusing to send their children to high school, violated Wisconsin's compulsory school attendance law. The parents argued that the law exposed them to the censure of their church community, and endangered their salvation and that of their children.[60] The Court found that the law placed a heavy burden on the parents' religious free exercise rights by forcing them "to perform acts undeniably at odds with fundamental tenets of their religious beliefs."[61]

In applying the *Yoder* analysis in free exercise cases, it is important to distinguish between the question whether the Amish faith qualified as a "religion" under the first amendment, and the question whether the refusal of the Amish parents to send their children to high school was based on "religious" belief and practice in accordance with the tenets of the Amish faith. The former question was never at issue: the Court accepted the Amish faith as a bona fide religion.[62] The Court's extensive examination of Amish life and culture may be viewed primarily as an attempt to determine whether the Yoders' objection to compulsory high school education constituted a religious conviction entitled to constitutional protection.

The Court concluded that the parents' objection to compulsory education was one of the "basic religious tenets and practices of the Amish faith,

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Self-Regulation by the Film Industry, 73 COLUM. L. REV. 185, 215 (1973) (*Yoder* teaches that authority of state as parens patriae is superior to that of parens natural only when the former seeks to prevent harm to children).

58. *Id.* at 215-16.

59. *Id.* at 248-49 (Douglas, J., dissenting). *Accord,* Jones v. Bradley, 590 F.2d 294, 295 (9th Cir. 1979) (no prohibition against court ruling whether or not set of beliefs constitute a religion for purposes of first amendment). *But see* Womens Servs., P.C. v. Thone, 483 F. Supp. 1022, 1035 (D. Neb. 1979) (court refused to extend religious guarantees of first amendment to nontheistic beliefs that did not have tenets and organization for fear that any lesser standard would degenerate into a question of personal, albeit deeply-felt preference); Turner v. Unification Church, 473 F. Supp. 367, 371-72 (D.R.I. 1978), *aff'd per curiam*, 602 F.2d 458 (1st Cir. 1979) (district court could review only the "operational" or nonideological activities of a religion, not the validity of religious beliefs); Remmers v. Brewer, 361 F. Supp. 537, 540-42 (S.D. Iowa 1973), *aff'd per curiam*, 494 F.2d 1277 (8th Cir.), *cert. denied*, 419 U.S. 1012 (1974) (district court limited inquiry into whether "Church of the New Song" was a religion to the issue of sincerity and good faith belief in the creed).

60. 406 U.S. 205, 209 (1972).

61. *Id.* at 218.

62. *Id.* at 209-10 ("we must be careful to determine whether the Amish religious faith and their mode of life are, as they claim, inseparable and interdependent. . . . [T]he claims must be rooted in religious belief"). *Id.* at 215.

both as to the parent and the child."[63] Central to this determination were the following criteria: (1) the conviction was shared by members of an organized religion;[64] (2) the conviction related to certain theological principles derived from the interpretation of religious literature;[65] (3) the defendants' conviction about education derived from a faith that pervaded and determined virtually their entire way of life;[66] and (4) the conviction had existed for a substantial period of time.[67]

These criteria may be applied to determine whether the claim in *Thomas* is within the purview of the free exercise clause. The Indiana Supreme Court characterized Thomas' objection to participation in armament production as nonreligious, despite the evidence in the record that he was a member of the Jehovah's Witnesses, an organized religious group long opposed to the taking of life and to participation in secular warfare.[68] The first criterion requires that the belief or practice at issue be shared by an organized religious group. In early draft exemption cases this requirement was difficult to satisfy because the claimant's convictions had to be based on explicit religious doctrine: the right to a draft exemption was conditioned upon membership in a religious organization holding expressly pacifistic tenets.[69] Although this narrow statutory standard was replaced by one focusing more broadly on religious training and beliefs,[70] modern courts continue to inquire into the structure of the religious group with which the claimant is involved. Where a recognized religion is concerned,[71] it is generally much easier to satisfy a court that the belief is widely shared.[72]

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63. *Id.* at 218.

64. *Id.* at 216.

65. *Id.*

66. *Id.* This third criterion is arguably more relevant to the issue of whether the State has unduly burdened a claimant's protected belief. *See* L. TRIBE, *supra* note 20, at 862. The *Yoder* Court, however, apparently considered it relevant in assessing whether a professed belief falls within the constitutional definition of religion. *See* text accompanying notes 83-89 *infra.*

67. 406 U.S. 205, 216-17 (1972).

68. 391 N.E.2d at 1133-34.

69. The 1917 Draft Act exempted from combat service "members of any well-recognized religious sect or organization . . . whose existing creed or principles forbid its members to participate in war in any form." Act of May 18, 1917, ch. 15, § 4, 40 Stat. 76 (provision expired four months after end of World War I). The effect of the statute was to grant an exemption to members of churches historically opposed to war, *e.g.*, the Mennonites, Quakers, and Brethren in Christ. Note, *Freedom of Conscience and Compulsory Military Service*, 13 BUFFALO L. REV. 463, 464 n.7 (1964).

70. Selective Training and Service Act of 1940, ch. 720, § 5, 54 Stat. 885 (repealed 1948).

71. *See* Brown v. Dade Christian Schools, Inc., 556 F.2d 310, 313-14 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978); Moody v. Cronin, 484 F. Supp. 270, 274-75 (C.D. Ill. 1979); Womens Servs., P.C. v. Thone, 483 F. Supp. 1022, 1034, 1037 (D. Neb. 1979); Loney v. Scurr, 474 F. Supp. 1186, 1193 (S.D. Iowa 1979); McMurdie v. Doutt, 468 F. Supp. 766, 769-70 (N.D. Ohio 1979); Badoni v. Higginson, 455 F. Supp. 641, 645-46 (D. Utah 1977); Theriault v. Silber, 391 F. Supp. 578, 580 (W.D. Tex. 1975), *vacated and remanded*, 547 F.2d 1279 (5th Cir.), *cert. denied*, 434 U.S. 871 (1977).

72. Thus, the Alaska Supreme Court in Frank v. State, 604 P.2d 1068 (Alaska 1979),

The Indiana Supreme Court in *Thomas* failed to examine the "organized religion" criterion which *Yoder* suggests could be relevant in deciding whether a claimant's belief or practice is protected by the free exercise clause. Since the Jehovah's Witnesses refuse to serve in the armed forces or to register for the draft,[73] it is reasonable to conclude that Thomas shared a religious objection to all aspects of secular war, including participation in weapons production.[74]

Many courts place great weight upon the second criterion in holding that beliefs based upon scriptural exegesis are religious.[75] Indeed, in *Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc.*,[76] the Indiana Supreme Court found that the aversion to being photographed felt by members of a Pentecostal sect was religiously based because the sect interpreted the ban on idolatry in the Second Commandment of the Bible literally.[77] The scriptural grounds for Thomas' action are not as clear as

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held that an Athabascan funeral banquet was a religious ceremony because it was an integral part of "a distinct belief system recognizable in Athabascan villages many miles apart." *Id.* at 1071. Similarly, in Levold v. Employment Security Dep't, 24 Wash. App. 472, 604 P.2d 175 (1979), the fact that a claimant for unemployment benefits did not "belong to or regularly attend services of any religious organization," allowed the court to conclude that his beliefs were not religious but personal. *Id.* at 473, 604 P.2d at 176.

73. D. MANWARING, RENDER UNTO CAESAR: THE FLAG-SALUTE CONTROVERSY 29, 30 (1962). The Jehovah's Witnesses deny that they are pacifists because their doctrine requires them to take up arms in a holy war for Jehovah. W. WHALEN, ARMAGEDDON AROUND THE CORNER: A REPORT ON THE JEHOVAH'S WITNESSES 184 (1962). Since they claim only the rights of aliens in the countries in which they live, the Witnesses refuse to serve in the military. Such aid to secular authorities makes them instruments of Satan. During World War II thousands of Witnesses refused to register for the draft or to report for induction. D. MANWARING, *supra*, at 30.

This distinction between secular and holy wars does not affect the definition of "religion" developed in *Seeger* and *Welsh*. In Sicurella v. United States, 348 U.S. 385 (1955), the Supreme Court granted conscientious objector status to a Jehovah's Witness who opposed participation in secular wars but was not opposed to participation in a "theocratic war" commanded by Jehovah. The Court noted that the "theocratic war" reservation was highly abstract; no such war had occurred since biblical times. Sicurella's abstract reservations, therefore, did not undercut his conscientious objection to participating in "real shooting wars." *Id.* at 391. *But see* Rosenfeld v. Rumble, 515 F.2d 498 (1st Cir.), *cert. denied*, 423 U.S. 911 (1975) (Jewish naval reserve officer's application for conscientious objector status discharge denied because of his hypothetical position that he would personally bear arms, though not in a military unit, if foreign nation entered the United States to exterminate all Jews).

74. MANWARING, *supra* note 73, at 30.

75. In Stevens v. Berger, 428 F. Supp. 896 (E.D.N.Y. 1977), for example, a district court upheld the objection of welfare recipients to the requirement that they obtain social security numbers for their children because of their interpretation of the thirteenth chapter of the New Testament Book of Revelation. Plaintiffs believed that the use of social security numbers was a device of the Antichrist and feared that their children might be barred from heaven if forced to use them. *Accord*, Mullaney v. Woods, 97 Cal. App. 3d 710, 158 Cal. Rptr. 902 (1979). *Contra*, Callahan v. Woods, 479 F. Supp. 621 (N.D. Cal. 1979).

76. 269 Ind. 361, 380 N.E.2d 1225 (1978).

77. *Id.* at 367, 380 N.E.2d at 1228.

those found in *Pentecostal House* and other cases. Although the Jehovah's Witnesses generally oppose the taking of human life,[78] Thomas' fellow Jehovah's Witness at Blaw-Knox adopted a less strict interpretation of the sect's principles, permitting him to participate in armaments production. [79]

To focus on the interpretation of Thomas' co-worker, however, is to misapply the Supreme Court's analysis of "religious" belief in *Yoder*.[80] The issue is not whether every other Witness agreed with Thomas, but whether the refusal to participate in armaments production could be required by the general doctrines of his church.[81] Because the Jehovah's Witnesses view the secular state as an evil to be tolerated but not aided, they have consistently objected to military service in secular wars.[82] Thomas' refusal to contribute to warfare by constructing tanks could clearly fall within such a doctrine.

The third criterion suggested in *Yoder* focuses on whether the belief or the system of beliefs to which it belongs pervades the believer's daily life.[83] The holding in *Sherbert* rested in part on the undisputed fact that the person seeking an exemption from the Saturday work requirement considered the religious injunction against Saturday work "a cardinal principle of her religious faith . . . ."[84] This third factor has long been significant in free exercise cases,[85] and modern courts continue to rely heavily on the extent to which a claimant's religious practices derive from central beliefs in determining whether his free exercise rights have been impermissibly burdened.[86]

The Indiana Supreme Court failed to examine this third criterion in assessing the nature of Thomas' belief. The record notes that on his employment application to Blaw-Knox, Thomas listed his hobbies as Bible reading and Bible study.[87] The Jehovah's Witnesses are well-known for the importance religion plays in every aspect of their daily life:

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78. *See* note 73 *supra.*

79. Eddie C. Thomas, App. Referee Case No. 75-A-12221 (Feb. 24, 1976), *reprinted in* Petition for Certiorari at 3a, 101 S. Ct. 1425 (1981).

80. *See* text accompanying notes 62-67 *supra.*

81. Wisconsin v. Yoder, 406 U.S. 205, 209 (1972).

82. D. MANWARING, *supra* note 73, at 29.

83. This criterion may be most relevant to questions concerning the claimant's sincerity, *see* text accompanying notes 99-119 *infra,* and the centrality of the belief to the claimant's "religious" faith, *see* text accompanying notes 133-34 *infra.* The *Yoder* Court nonetheless considered this factor in discussing whether the asserted belief "was philosophical and personal rather than religious." 406 U.S. 205, 216 (1972).

84. 374 U.S. 398, 406 (1963).

85. *See* Galanter, *supra* note 53, at 274.

86. The Alaska Supreme Court in Frank v. Slate, 604 P.2d 1068 (Alaska 1979), for instance, held that the eating of moose in the Athabascan funeral banquet was a religious ceremony because the practice was deeply rooted in religious belief. *Id.* at 1073. The court in People v. Mullins, 50 Cal. App. 3d 61, 123 Cal. Rptr. 201 (1975), affirmed defendant's conviction for planting and cultivating marijuana because he had failed to offer any evidence that the use of marijuana was an indispensable part of his religion. *Id.* at 70-72, 123 Cal. Rptr. at 207-08.

87. Thomas, 391 N.E.2d at 1128.

> Jehovah's Witnesses, probably more than any other denomination, base *all* their actions on their religious beliefs. Their creed is an all-encompassing affair, purporting to explain all human history, to predict the certain course of the future, and to point out to the individual exactly how he must conduct his life to achieve salvation.[88]

An adherent could not, in conformity with such an all-encompassing creed, continue employment which would cause him to violate his religious conscience daily. To Thomas' understanding, his work on the turret line required just such a violation. Thomas' contention that his refusal to participate in munitions work was based on a religious belief and not simply on personal choice is further supported by the fourth *Yoder* criterion, the length of time the belief has existed.[89] The Jehovah's Witnesses have existed since 1870[90] and have consistently refused to take any human life except in accordance with God's rules. Modern secular wars violate God's laws.[91] Since World War I, the Jehovah's Witnesses have claimed conscientious objector status because of their refusal to aid in secular militarism.[92]

In light of the foregoing analysis, Thomas' interpretation of his religious precepts, the cause of his refusal to directly produce armaments at Blaw-Knox, is in accordance with Jehovah's Witness doctrine. His refusal derived from a shared belief in the sacredness of human life and the intrinsic evil of killing for secular purposes, a belief that qualified as "religious" in *Seeger* and *Welsh*.

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88. D. MANWARING, *supra* note 73, at 17.

89. 406 U.S. 205, 216-17 (1972).

The problem with this criterion is that it could create a constitutional preference for established creeds over new religions. *See* Stevens v. Berger, 428 F. Supp. 896, 900 (E.D.N.Y. 1977); State v. Brashear, 92 N.M. 622, 626, 593 P.2d 63, 67 (Ct. App. 1979). This tension is apparent when religious groups that use peyote, a hallucinogen, claim exemption from the application of state criminal drug statutes. In *People v. Woody* the California Supreme Court found that the sacramental use of peyote was "the *sine qua non* of defendants' faith." 61 Cal. 2d 716, 725, 394 P.2d 813, 820, 40 Cal. Rptr. 69, 76 (1964). Similarly, the Supreme Court emphasized the age-old character of the religious activity in Murdock v. Pennsylvania, 319 U.S. 105, 108-10 (1943). The California Supreme Court also extended *Murdock* to protect the ceremonies of religious groups of recent ancestry as well. *In re* Grady, 61 Cal. 2d 887, 394 P.2d 728, 39 Cal. Rptr. 912 (1964). Unlike *Woody,* the petitioner in *Grady* had not proven that his asserted belief was "an honest and bona fide one," and the court remanded the case for a factual determination of "whether defendant actually engaged in good faith in the practice of religion." *Id.* at 888, 394 P.2d at 729, 39 Cal. Rptr. at 913. *Accord,* Native American Church of New York v. United States, 468 F. Supp. 1247, 1251 (S.D.N.Y. 1979) (church founded in 1976 entitled to same religious exemption as that in *Woody* since it too regarded peyote as a deity). *Contra,* State v. Brashear, 92 N.M. 622, 593 P.2d 63 (Ct. App. 1979) (lack of evidence that religious tenet encompassed marijuana use).

90. D. MANWARING, *supra* note 73, at 17.

91. *Id.* at 29.

92. R. REGAN, PRIVATE CONSCIENCE AND PUBLIC LAW 23 (1972).

Thomas' willingness to work in the roll foundry instead of directly in tank turret production[93] did not make his belief any less religious. Judicial inquiry after *Yoder* and the conscientious objector cases must focus on the role a person's beliefs play in his life. Thus, a court should not characterize Thomas' belief as nonreligious merely because he could not clearly articulate his basis for distinguishing direct from indirect participation in weapons production or because his fellow Witnesses had a different interpretation of church doctrine. The analyses used in *Seeger, Welsh,* and *Yoder,* reveal that Thomas' refusal arose out of a religious conviction.

The power of a court to scrutinize religious beliefs is extremely limited,[94] and properly so: courts cannot assess the religious nature of a belief without, at best, becoming involved in fine theological distinctions[95] or, at worst, unconstitutionally inquiring into the truth or falsity of a belief.[96] In interpreting a religious claimant's statement of belief, a court may too easily permit its own sympathies to influence its determination as to the religious or nonreligious nature of the belief. Basing its decision to a large extent on Thomas' inarticulateness, the Indiana Supreme Court characterized Thomas' beliefs as personal, rather than religious.[97] The free exercise clause, however, should protect a claimant regardless of how inarticulate he or she may be. Religious rights should not depend on whether a court or state agency finds the beliefs familiar, clear, or comprehensible. A preferable approach, avoiding excessive judicial entanglement in interpreting a person's thought, would limit judicial inquiry to the criteria suggested in *Yoder,* and to an evaluation of a person's sincerity.[98]

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93. Thomas, 391 N.E.2d at 1133.

94. United States v. Ballard, 322 U.S. 78, 86-87 (1944).

95. *See* Clark, *Guidelines for the Free Exercise Clause,* 83 HARV. L. REV. 327, 343 (1967); Marcus, *The Forum of Conscience: Applying Standards Under the Free Exercise Clause,* 1973 DUKE L.J. 1217, 1250-51.

96. *See* text accompanying notes 99-101 *infra.*

97. Thomas, 391 N.E.2d at 1133-34.

98. For example, the court stated in *St. Claire v. Cuyler:*

> It is not the province of the court to determine what constitutes religious orthodoxy, and thus a court need not find a practice to be mandated by a religion to be protected. Further, individuals relate to their religious practices and their God in different ways. So long as no idiosyncratic religious claims are made, particular to the individual asserting the right to the practice, the court is bound only to assess the sincerity of the belief and not the significance of the belief.

481 F. Supp. 732, 736 (E.D. Pa. 1979), *modified,* 634 F.2d 109 (3rd Cir. 1980). *See also In re* Serna, 76 Cal. App. 3d 1010, 1020, 143 Cal. Rptr. 350, 356 (1978) (Stephens, J., dissenting). *Contra,* Womens Servs., P.C. v. Thone, 483 F. Supp. 1022, 1034 (D. Neb. 1979) (court rejected approach of evaluating a complainant's constitutional rights based on its impression of his sincerity or credibility for fear of dissimilarly treating similarly situated complainants and of protecting the constitutional rights of the articulate more than those of the inarticulate).

B. The Prerequisite of Sincerity

One who challenges governmental action under the free exercise clause must base her claim upon a sincerely held religious belief.[99] The constitutionality of such a requirement was established as early as *United States v. Ballard*,[100] a mail fraud prosecution of defendants who solicited money by claiming they were divine messengers. The Supreme Court held that the sincerity, and not the truth, of the defendants' religious beliefs could be submitted to the jury.[101] Since *Ballard*, courts have regularly inquired into the sincerity of those who assert that government regulations burden their religious beliefs.[102]

Scrutiny of the sincerity of a claimant's religious beliefs is necessary to prevent the free exercise clause from becoming a limitless excuse to avoid unwanted governmental obligations.[103] The difficulty, however, lies in

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99. United States v. Seeger, 380 U.S. 163, 185 (1965) ("while the 'truth' of a belief is not open to question, there remains the significant question of whether it is 'truly held'").

100. 322 U.S. 78 (1944).

101. The Court based its refusal to question the truth of religious beliefs on constitutional grounds:

> Freedom of thought, which includes Freedom of religious belief, is basic in a society of free men. It embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law . . . . The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position.

Id. at 86-87 (citations omitted).

102. *E.g.*, United States v. Seeger, 380 U.S. 163, 185-86 (1965); Teterud v. Burns, 522 F.2d 357, 360-61 (8th Cir. 1975); Theriault v. Carlson, 495 F.2d 390 (5th Cir.), *cert. denied*, 419 U.S. 1003 (1974); Founding Church of Scientology v. United States, 409 F.2d 1146 (D.C. Cir.), *cert. denied*, 396 U.S. 963 (1969); *In re* Grady, 61 Cal. 2d 887, 394 P.2d 728, 39 Cal. Rptr. 912 (1964).

103. As noted by one court, religious liberty is not served by exempting a merchant from appearing in court on Saturday because he claims to be a Sabbatarian when he regularly conducts business on that day. Dobkin v. District of Columbia, 194 A.2d 657 (D.C. 1963). *See also* United States v. Top Sky, 547 F.2d 486, 488 (9th Cir. 1976) (in prosecution of Indian for selling golden eagles and golden eagle feathers, defendant could not assert a free exercise defense since purely commercial sales were deplored by his religion); Youngkins v. Board of Review, [1976] 1B UNEMPL. INS. REP. (CCH) ¶ 1965.099 (Ohio C.P. Belmont County 1969) (claimant who refused a job on the ground that liquor was sold on the premises, in alleged violation of her religious convictions, was disqualified because record showed that she previously worked in a restaurant which sold beer).

achieving a means of evaluating sincerity without impermissibly probing into the reasonableness of the claimant's beliefs.

One approach frequently used to establish sincerity entails an examination of extrinsic evidence of the claimant's conduct. Many courts will consider extrinsic evidence to establish, for example, that religion is a fraudulent cloak for a claim of exemption from regulation.[104] The court in *United States v. Kuch*,[105] denied a claim for religious exemption from federal drug regulations, holding that only a pretense of religion was involved.[106] Where a person's actions repeatedly vary from his avowed religious duties, such actions may indicate that the individual does not sincerely hold those beliefs. Arguably, in such instances, no serious injury is likely to be inflicted upon the claimant's conscience by subjecting him to the challenged regulation. The extrinsic evidence test may thus properly limit judicial scrutiny to a neutral, factual inquiry not readily manipulated by religious prejudice.

Thomas' act of accepting work at Blaw-Knox, a factory engaged in producing armaments, directly raises a question as to the sincerity of his free exercise claim. As noted previously, the record is unclear whether his first job at the roll foundry directly entailed the production of weapons.[107] Notwithstanding the conflicting sets of facts, however, there is strong support for the sincerity of Thomas' claim under the extrinsic evidence approach.

If the Review Board correctly found that the roll foundry "was not engaged in the manufacture of items used in the advancement of war,"[108] Thomas' religious objection to working on the tank turret line, to which he was transferred, would clearly be sincere under the extrinsic evidence test. When Thomas was transferred to the turret line and became aware of the nature of his new work, he made every effort to find an alternative position

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104. *See, e.g.*, Ron v. Lennane, 445 F. Supp. 98, 100 (D. Conn. 1977); Remmers v. Brewer, 361 F. Supp. 537, 542 (S.D. Iowa 1973); State v. Brashear, 92 N.M. 622, 630, 593 P.2d 63, 71 (1979).

105. 288 F. Supp. 439 (D.D.C. 1968).

106. Members of the Neo-American Church were known as Boo Hoos, the seal of the church was a three-eyed toad, its bulletin was the "Divine Toad Sweat," and the church motto was "Victory over Horseshit!" *Id.* at 443, 444-45.

Similarly, in *In re* Marriage of Gove, 117 Ariz. 324, 572 P.2d 458 (Ct. App. 1977), the court held that no free exercise claim inhered in appellant's refusal to comply with a court order directing her to submit to a mental examination. Not only had appellant voiced no free exercise objection some years before in seeking psychiatric help for one of her children, but she herself had consulted a psychiatrist four months before she raised her free exercise claim. It could not "be overlooked that appellant's newly acquired convictions about mental examinations materialized at precisely the same time her mental condition became an issue . . ." *Id.* at 327, 572 P.2d at 461. Appellant's paucity of evidence and her failure to testify personally also indicated a lack of sincerity. *Id.*

107. *See* note 13 *supra*.

108. Eddie C. Thomas, Rev. Bd. Case No. 76-R-468 (Nov. 29, 1976), *reprinted in* Petition for Certiorari at 5a, 101 S. Ct. 1425 (1981).

consistent with his religious beliefs. On realizing that apart from the now defunct roll foundry, Blaw-Knox produced only military armaments, he requested a layoff and asked to be rehired should the roll foundry reopen. When this request was denied, Thomas felt compelled to quit because of his religious beliefs.[109] Thus, if his former roll foundry work did not involve weapons production, his attempt to leave the turret line soon after his transfer should provide sufficient extrinsic evidence of a sincere objection to participation in arms production.

If the Indiana Supreme Court correctly found that the roll foundry also produced weapons,[110] however, then the voluntary assumption of employment incompatible with his professed religious belief could suggest that Thomas' free exercise claim is insincere. Many courts have denied unemployment compensation to persons who voluntarily accepted work only to quit later because of professed religious beliefs. In *Hildebrand v. Unemployment Appeals Board*,[111] for example, the California Supreme Court upheld a denial of unemployment compensation where the claimant had accepted employment with full knowledge of a Saturday work requirement and had actually worked for one year. When she subsequently refused to work on her Sabbath, the court held that her claim was not protected by the free exercise clause,[112] and distinguished *Sherbert*:

> Under *Sherbert,* plaintiff would clearly have been permitted to refuse employment with [her employer] without risking any loss of unemployment benefits for she would not have rejected "available suitable work." However, plaintiff acceded to [her employer's] insistence upon Saturday work, served the entire 1972 season on that basis, and commenced the 1973 season knowing of [her employer's] continued policy requiring Saturday work. The conclusion is inescapable that, in doing so, plaintiff voluntarily assumed employment which she knew would conflict with her religious principles, and thereafter voluntarily quit her employment when the conflict proved unavoidable.[113]

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109. Eddie C. Thomas, App. Referee Case No. 75-A-12221 (Feb. 24, 1976), *reprinted in* Petition for Certiorari at 3a, 101 S. Ct. 1425 (1981).

110. Thomas, 391 N.E.2d at 1133. *See* note 13 *supra.*

111. 19 Cal. 3d 765, 566 P.2d 1297, 140 Cal. Rptr. 151 (1977).

112. *Id.* at 768, 566 P.2d at 1299, 140 Cal. Rptr. at 153.

113. *Id.* at 770, 566 P.2d at 1299, 140 Cal. Rptr. at 153. *Accord,* Stimpel v. State Personnel Bd., 6 Cal. App. 3d 206, 85 Cal. Rptr. 797, *cert. denied,* 400 U.S. 952 (1970). "We conclude that if a person has religious scruples which conflict with the requirements of a particular job with the state, he should not accept employment or, having accepted, he should not be heard to complain if he is discharged for failing to fulfill his duties." *Id.* at 209-10, 85 Cal. Rptr. at 799. *But see* Rankins v. Commission on Professional Competence, 24 Cal. 3d 167, 177, 593 P.2d 852, 858, 154 Cal. Rptr. 907, 913, *appeal dismissed,* 444 U.S. 986 (1979).

Levold v. Employment Security Department[114] echoed the *Hildebrand* rationale in denying unemployment benefits to another sabbatarian. The claimant in *Levold* "voluntarily accepted employment that conflicted with his religious beliefs. Any infringement of his religious freedom was self-imposed and therefore not violative of the First Amendment."[115]

In applying the extrinsic evidence test, the situations in *Hildebrand* and *Levold* should be distinguished from that in *Thomas.* The *Hildebrand* and *Levold* claimants knew that the requirements of their jobs conflicted with their religious beliefs and voluntarily accepted those conditions. The claimant in *Hildebrand* worked on Saturdays from 1966 until 1970 when she became a sabbatarian. Her employer excused her from Saturday work during the next two years, but informed her that he would no longer do so in 1972. She actually worked on Saturday for the next year before finally quitting.[116] The claimant in *Levold* worked on Sundays for two months before he informed his supervisors that this employment conflicted with his religious beliefs. He continued, despite his beliefs, to work occasional Sundays until his discharge.[117]

By contrast, even if the Indiana Supreme Court correctly found in *Thomas* that Blaw-Knox solely produced armaments, Thomas nevertheless had no actual knowledge of this situation until the roll foundry closed.[118] There is no evidence that he knowingly accepted incompatible work, as did the claimant in *Hildebrand,* or continued in such work despite his beliefs, as did the claimant in *Levold.* Even under the Indiana Supreme Court's reading of the facts,[119] Thomas did not voluntarily assume employment at Blaw-Knox which conflicted with his religious beliefs. Rather, he accepted the employment without knowledge of the nature of Blaw-Knox's business. Upon learning that his employer was an armaments manufacturer, he sought to accommodate his employment to his beliefs. When this attempt failed, he quit. Under the extrinsic evidence test, his religious convictions appear to have been sincerely held.

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114. 24 Wash. App. 472, 604 P.2d 175 (1979).
115. *Id.* at 475, 604 P.2d at 177.
116. 19 Cal. 3d 765, 768-69, 566 P.2d 1297, 1298, 140 Cal. Rptr. 151, 152 (1977).
117. 24 Wash. App. 472, 473, 604 P.2d 175, 176 (1979).
118. 391 N.E.2d at 1131. The Review Board stated in its "Findings and Conclusions":

> The evidence reveals that approximately two to three weeks prior to the claimant's date of leaving, the "Roll Foundry" was closed permanently and claimant was transferred to the terret [*sic*] line. Claimant, *at this time,* realized that all of the other functions at The Blaw Knox company were engaged in producing arms for the Armaments Industry.

381 N.E.2d 888, 889 (Ind. Ct. App. 1978) (emphasis added).
119. *See* note 13 *supra.*

IV

THE BURDEN ON THOMAS' RELIGIOUS FREEDOM

Once a claimant has proved that his is a bona fide and sincerely held religious belief, he must satisfy a two-pronged test in order to bring a successful free exercise challenge to the disqualification provision of an unemployment compensation statute. In *Sherbert*,[120] the Supreme Court formulated a free exercise analysis which inquires "whether the disqualification for benefits imposes any burden on the free exercise of appellant's religion."[121] If so, the court must then determine "whether some compelling state interest enforced in the . . . statute justifies the substantial infringement of appellant's First Amendment right."[122]

In *Thomas,* the Indiana Supreme Court held that disqualification from receiving unemployment compensation imposed "only an indirect burden, if any, on claimant's free exercise of his religion. It makes no religious practice unlawful."[123] According to the *Sherbert* Court, however, to state that the burden on a claimant has been indirect is merely to begin the inquiry.[124]

The first prong of the *Sherbert* balancing test focuses on whether the effect of a statute burdens, either directly or indirectly, an individual's religious freedom.[125] The claimant must prove that the effect of the statute is to coerce her to choose between her faith and her job. Without coercion, the free exercise of her religion is not burdened.[126] The *Sherbert* majority

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120. 374 U.S. 398 (1963).

121. *Id.* at 403.

122. *Id.* at 406.

123. 391 N.E.2d at 1131. Similarly, the Indiana Court of Appeals had conceded that "the burden imposed on Thomas' free exercise rights is less direct than that found in *Sherbert.*" 381 N.E.2d at 982.

124. 374 U.S. 398, 403-04 (1963).

125. "A regulation neutral on its face may, *in its application,* nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) (emphasis added). Traditionally, the analysis of the burden placed on an individual's free exercise of religion distinguished between religious belief and religious action. Although abstract beliefs might remain inviolate, actions based upon them might be subject to some governmental control. *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963); Braunfeld v. Brown, 366 U.S. 599, 603 (1961); Prince v. Massachusetts, 321 U.S. 158 (1944); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). This distinction, however, may be more apparent than real. A dichotomy based upon the distinction between thought and action affords little protection to an individual who acts upon his religious convictions.

126. *See, e.g.,* Wooley v. Maynard, 430 U.S. 705, 715 (1977); Board of Educ. v. Allen, 392 U.S. 236, 248-49 (1968); School Dist. v. Schemmp, 374 U.S. 203, 223 (1963); Robinson v. Price, 615 F.2d 1097, 1099 (5th Cir. 1980); Anderson v. Laird, 466 F.2d 283, 295 (D.C. Cir.), *cert. denied,* 409 U.S. 1076 (1972); Sequoyah v. Tennessee Valley Auth., 480 F. Supp. 608, 611 (E.D. Tenn. 1979); Valencia v. Blue Hen Conference, 476 F. Supp. 809, 820-22 (D. Del. 1979), *aff'd,* 615 F.2d 1355 (3d Cir. 1980); Lynch v. Indiana State Univ. Bd. of

found that a denial of unemployment compensation forced Sherbert to choose between following the precepts of her religion and forfeiting unemployment benefits on the one hand, and forsaking one of her religious convictions in order to accept work on the other.[127] The Court held that even though the burden imposed on Sherbert's religious beliefs was incidental and indirect, such economic pressure nevertheless infringed upon her religious free exercise rights.[128]

Critical to the Indiana Supreme Court's decision was its determination that the statute imposed no more than an indirect burden on Thomas' beliefs. The court found "no evidence that there was any pressure placed on Thomas, or on his fellow Jehovah's Witness, who continued to work at Blaw-Knox, to quit work. In Thomas' own words he was struggling to determine his position in this matter."[129] Because the Jehovah's Witnesses apparently did not forbid Thomas to continue at Blaw-Knox, the Indiana Supreme Court discounted the conflict Thomas nevertheless saw between his individual religious conscience and his participation in weapons production. Burdens on religion may be direct in the sense that an activity essential to the religious practice is prohibited.[130] They may also be indirect, however, if a governmental regulation makes the practice of religion more difficult.[131] In either case a claimant may be driven to violate his conscience.[132] It can hardly be said that the threat of exclusion from unem-

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Trustees, 378 N.E.2d 900, 903 (Ct. App. 1978), *cert. denied,* 441 U.S. 946 (1979). Justice Brennan, in his concurring opinion in McDaniel v. Paty, 435 U.S. 618, 633-35 (1978), however, argued that the state constitutional provision barring a minister from holding public office burdened the free exercise of his religion even though he was not compelled to seek office. *Accord,* Torcaso v. Watkins, 367 U.S. 488, 495-96 (1961). Under this more liberal standard, a claimant is burdened when a governmental action hampers the practice of his religion. *See* 49 IOWA L. REV. 952, 954 (1964).

127. Sherbert v. Verner, 374 U.S. 398, 404 (1963). *Accord,* McDaniel v. Paty, 435 U.S. 618, 626 (1978) (Tennessee statutory provision disqualifying ministers as candidates for delegates to state constitutional convention held unconstitutional since it effectively conditioned the right to seek elective office on the surrender of free exercise rights).

128. Sherbert v. Verner, 374 U.S. 398, 403 (1963).

129. Thomas, 391 N.E.2d at 1133.

130. *See, e.g.,* Wisconsin v. Yoder, 406 U.S. 205, 218 (1972) (criminal sanctions behind the state's compulsory school attendance law forced members of the Amish faith to act against the fundamental tenets of their religion).

131. *See, e.g.,* Sherbert v. Verner, 374 U.S. 398, 403 (1963) (economic detriment caused by disqualifying the claimant from unemployment compensation because of her religious practice constituted an indirect burden). *But see* Johnson v. Tobison, 415 U.S. 361, 385 (1974) (withheld educational benefits incidentally burdening conscientious objector's free exercise right is outweighed by state interest in providing benefits only to active servicemen); Valencia v. Blue Hen Conference, 476 F. Supp. 809, 820-23 (D. Del. 1979), (denying claim by parents of Catholic school children that refusal of athletic association of public schools to admit their Catholic school burdened their free exercise rights since parents could neither prove a direct burden nor show that the refusal rose to the level of compulsion to forego religious practices found in *Sherbert* and *Yoder*).

132. *See* Sherbert v. Verner, 374 U.S. 398, 404 (1963).

ployment benefits would not put pressure on an individual such as Thomas to compromise his religious beliefs. An employee who knows he will not receive unemployment compensation if he quits a job repugnant to his convictions is forced to choose between his conscience and his sole source of income.

Inherent in the Indiana Supreme Court's analysis is the danger that the severity of a burden on free exercise will be measured according to the factfinder's view of the reasonableness of the claimant's beliefs. In applying the first prong of the balancing test, the Indiana Supreme Court should have recognized the subjective nature of religious conviction, and should have sought to examine the coercive influence of the disqualification provision from the claimant's perspective. One commentator describes such an approach as an inquiry into how "essential to the religion is the practice affected by the prohibition or requirement."[133] The court should focus on the "core values" of the claimant's faith to determine if the practitioner's free exercise rights are burdened.[134]

The issue in *Thomas,* then, is whether the prohibition against engaging in the production of armaments was a core value of Thomas' faith. If it was, then disqualification from receiving unemployment compensation would burden his free exercise rights by forcing him to choose between his religious beliefs and his job. The appeals referee held that "[c]laimant's religious beliefs specifically exempts [*sic*] claimant from producing or aiding in the manufacture of items used in the advancement of war."[135] Thomas' fellow Jehovah's Witness continued to work at Blaw-Knox, however, because he interpreted the tenets of their faith differently.[136] For purposes of the free exercise clause, it should not matter what Thomas' companion believed. The *Sherbert* Court refrained from attempting any "objective" judicial determination of what constitutes a fundamental tenet of a religion.[137] To avoid an improper imposition of judicial values, the court should strictly limit its inquiry to a determination of the claimant's sincerity in asserting that the statute burdens his free exercise rights.[138]

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133. L. TRIBE, *supra* note 20, at 862. *See, e.g.,* Sherbert v. Verner, 374 U.S. 398, 406 (1963) (Saturday work requirement burdened "a cardinal principle of her religious faith . . . ."); Arizona v. Whittingham, 19 Ariz. App. 27, 504 P.2d 950 (1973), *cert. denied,* 417 U.S. 946 (1974); People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (unconstitutional application of penal laws to Native Americans using peyote in religious ritual).

134. *Id.* The Supreme Court in *Sherbert,* for example, considered the religious prohibition of Saturday work "a cardinal principle of [Sherbert's] religious faith . . . ." 374 U.S. 398, 406 (1963).

135. App. Referee Case No. 75-A-12221 (Feb. 24, 1976), *reprinted in* Petition for Certiorari at 2a, 101 S. Ct. 1425 (1981).

136. *Id;* Thomas, 391 N.E.2d at 1127.

137. L. TRIBE, *supra* note 20, at 863.

138. *Id.* at 864.

The court in *Lincoln v. True*,[139] found that the denial of unemployment compensation severely burdened the religious freedom of a Jehovah's Witness who left her employment in a tobacco factory. Her departure was brought about by "the compulsion which the church doctrine exerted on her conscience and on her beliefs as a member of the church."[140] It was immaterial that Lincoln had been a Jehovah's Witness for fifteen years and that she had worked in the tobacco factory for twenty-one years prior to quitting.[141] The church elders had declared that anyone using tobacco or working with tobacco products violated the Will of God and would be expelled from the fellowship of Jehovah's Witnesses. Evidence of her acceptance of this edict established that her religious beliefs conflicted with her employment.[142]

In Thomas' case, the elders did not unequivocally forbid his participation in armaments production. According to Thomas, his conscience was nevertheless constrained by his own strict interpretation of the teachings of the Jehovah's Witnesses with respect to warfare. As a core value of his own religious convictions, the prohibition on participation in weapons production was founded on long-standing principles of the sect. The Jehovah's Witnesses have long opposed the taking of life.[143] Their faith is renowned for the importance it plays in every aspect of their daily lives.[144] The fact that one member found his work at Blaw-Knox consistent with his own interpretation of Witness doctrine did not preclude Thomas, as a matter of personal religious conviction, from disagreeing. Many practitioners of the same religion differ in their interpretation of and devotion to their faith. Moreover, an individual's sincere religious beliefs, even if not shared by any other members of her sect, should still come within the protection of the first amendment.[145] It is reasonable to conclude, therefore, that Thomas' aversion to armaments production was a core value of his faith despite his fellow Witness's differing interpretation of Witness doctrine.

The first amendment precludes an examination of the truth of a person's religious beliefs.[146] Those aspects of a person's convictions left open to examination are extremely difficult to evaluate. Courts are ill-equipped "to assess and compare the psychic role played by orthodox and novel beliefs."[147] Yet, whenever an individual with unconventional religious be-

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139. 408 F. Supp. 22 (W.D. Ky. 1975).
140. *Id.* at 24.
141. *Id.* at 23.
142. *Id.*
143. *See* note 73 *supra.*
144. *See* text accompanying note 88 *supra.*
145. Lewis v. Califano, 616 F.2d 73, 79-81 (3d Cir. 1980).
146. United States v. Ballard, 322 U.S. 78, 86-88 (1944). *See* text accompanying notes 100-02 *supra.*
147. Galanter, *supra* note 53, at 263.

liefs seeks exemption from governmental restrictions based on those beliefs, judicial scrutiny is unavoidable.[148]

Thomas illustrates why courts should focus upon a practitioner's subjective perspective in claiming that the conflict involves a tenet central for him as an individual.[149] While the courts should use the extrinsic evidence approach to test the sincerity of the claimant's professed faith, they should rely heavily on the claimant's own characterization of his beliefs. By measuring the burden on the belief of a claimant such as Thomas according to his assessment of its central position in his faith, the judiciary could avoid the improper distinction made by the Indiana Supreme Court between direct and indirect effects on religious conscience.[150] Such an evaluation of the burden, combined with close scrutiny of the claimant's sincerity, would enable the judiciary to ensure constitutional protection of religion without relinquishing its duty to examine the validity of free exercise claims.

V

LEAST RESTRICTIVE MEANS FURTHERING A COMPELLING STATE INTEREST

The Supreme Court has long recognized that when an otherwise valid state regulation conflicts with the free exercise clause, the rights protected by the first amendment stand in a "preferred position."[151] As the Court has stated:

> The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to

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148. The difficulty of the investigation is compounded when the belief does not, on its face, fit into any generally recognizable religious framework. *See, e.g.*, Theriault v. Silber, 391 F. Supp. 578, 580 (W.D. Tex. 1975). For example, when two inmates who were pastors in the Church of the C.O.N.V.I.C.T. attempted to establish an outside bank account in contravention of their penitentiary's regulations, the majority in *In re* Serna, 76 Cal. App. 3d 1010, 143 Cal. Rptr. 350 (1978), tersely refused to hear their free exercise claim. The inmates had asserted that regulations forbidding the establishment of an outside account seriously curtailed their ability to hold and perform religious services. *Id.* The dissenting justice asserted that such a prohibition irreparably injured petitioners' religious freedom. The dissenter scrutinized only the Church's principles and refused to inquire into their validity, recognizing that the United States Constitution prohibits such an analysis. *Id.* at 1020-21, 143 Cal. Rptr. at 355-56 (Stephens, J., dissenting).

149. *See* Brown v. Dade Christian Schools, Inc., 556 F.2d 310, 315-16 (5th Cir. 1977) (Goldberg, J., concurring), *cert. denied*, 434 U.S. 1063 (1978). *Contra*, Malnak v. Yogi, 440 F. Supp. 1284, 1318 (D.N.J. 1977) (to rely on "the proponents' subjective characterizations of their activities . . . [as religious or nonreligious] would be to inject a variable into the first amendment which would preclude a fair and uniform standard").

150. *See* note 123 and accompanying text *supra*.

151. Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943). *See also* Note, *Title VII: An Employer's View of Religious Discrimination Since The 1972 Amendment*, 7 LOY. CHI. L.J. 97, 98-99 (1976).

> impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect.[152]

Accordingly, the Supreme Court in *Sherbert* laid out the second prong of free exercise analysis: a religiously burdensome statute is valid only if the court finds that it is the least restrictive method by which a compelling state interest may be served.[153]

The second prong of free exercise analysis thus has two components. First, the state has the burden of demonstrating a compelling interest of "sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."[154] However, "only the gravest abuses endangering paramount interests" are sufficient to sustain a burdensome statute.[155] The second prong further requires the state to show that the means chosen to pursue this interest is the least restrictive means available.[156] If an alternate means would also serve the state's interest, the burdensome statute is unconstitutional as applied to the claimant.

A. The Compelling State Interest

The court in *Thomas* should have required the government to demonstrate that the Indiana statute's disqualification provision served a compelling state interest. Although no legislative history exists to indicate the interest which the Indiana legislature sought to further through the disqualification provision, possible state interests may be identified from the statement of policy in the Indiana Employment Security Act:

> As a guide to the interpretation and application of this act, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is declared hereby to be a serious menace to the health, morale and welfare of the people of this state and to the maintenance of public order within this state. Protection against this great hazard of our economic life can be provided in some measure by the required and systematic accumulation of funds during periods of employment to provide benefits to the unemployed during periods of unemployment and by encouragement of desirable stable employment. The enactment of this mea-

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152. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).
153. 374 U.S. 398, 407 (1963).
154. Wisconsin v. Yoder, 406 U.S. 205, 214 (1972).
155. *Id.* (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).
156. Sherbert v. Verner, 374 U.S. 398, 407 (1963).

> sure *to provide for payment of benefits to persons unemployed through no fault of their own, to encourage stabilization in employment*, and to provide for a state employment service is, therefore, essential to public welfare; and the same is declared to be a proper exercise of the police powers of the state.[157]

Two purposes served by the Act generally, which may be identified from this policy statement, are conceivably also furthered by the disqualification provision challenged in *Thomas*. This provision prevents any individual from receiving benefits if he "has voluntarily left his employment without good cause in connection with the work."[158] Disqualification thus appears to encourage stabilization in employment by discouraging voluntary job changes, and by disqualifying persons who choose to leave "without good cause." Disqualification also helps preserve funds for those "unemployed through no fault of their own" by screening out the spurious claims of those who prefer not to work.

1. Indiana's Interest in Stabilizing Employment

The Indiana Employment Security Review Board conceded during oral argument before the lower court that it could offer no compelling state interest to justify the burden allegedly placed upon Thomas' free exercise rights by the disqualification provision.[159] On appeal, the Indiana Supreme Court failed to require the state to demonstrate that the disqualification provision served a compelling state interest or to identify the means by which the provision served such an interest. Instead, the court itself proposed that the disqualification provision[160] was designed to minimize unemployment by encouraging workers to remain at their jobs.[161] The majority suggested that workers who know they will be ineligible for unemployment compensation if they voluntarily leave their jobs without good cause will tend to remain there.[162]

Although the stabilization of employment is a conceivable purpose of the disqualification provision, there is evidence indicating that the Indiana Supreme Court was incorrect in its conclusion. One study of the Indiana Employment Security Act states unequivocally that the "experience rating provisions" of the Act[163] were designed to further the state interest in encouraging employment stability.

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157. IND. CODE § 22-4-1-1 (1976).
158. *Id.* § 22-4-15-1 (Supp. 1980).
159. Thomas, 381 N.E.2d at 892.
160. IND. CODE § 22-4-15-1 (Supp. 1980).
161. Thomas, 391 N.E.2d at 1130.
162. *Id.*
163. The experience rating provisions of the Indiana Employment Security Act are codified at IND. CODE § 22-4-11-1 (1976 & Supp. 1980).

> The chief instrument in the Indiana statute for the attainment of a greater degree of stability of employment is the experience rating provisions. These provisions, which adjust the unemployment tax rate of the individual employer in accord with a measurement of the employment experience of his own enterprise, are intended to stimulate employers, through the possibility of reductions in contribution rates, to adopt measures to stabilize employment in their own plants.[164]

Further, the study expressly states that the disqualification provision is not the mechanism by which unemployment compensation stabilizes employment.[165]

Even if Indiana intended the disqualification provision to stabilize employment, the provision would serve the state's interest in only limited circumstances. "Frictional" unemployment, one of several major classifications of unemployment, exists where the voluntary movement of workers from one position to another prevents them from finding immediate work.[166] The disqualification provision would clearly operate to minimize this type of unemployment by discouraging voluntary job changes among persons who have the choice of remaining in their positions. Those unemployed because of declining business conditions or because of inadequate skills would not be disqualified by the provision.

While the disqualification provision may thus discourage frictional unemployment, the state's interest in minimizing this type of unemployment should not be found sufficiently compelling to justify the burden on Thomas' free exercise of his religion.[167] Although Indiana has constitu-

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164. W. ANDREWS & T. MILLER, EMPLOYMENT SECURITY FINANCING IN INDIANA 154 (1956).

165. *Id.* at 164-65.

166. Frictional unemployment results from immediate matching of unemployed people and vacant jobs:

> More concrete definitions stress that frictional unemployment results from certain conditions which are characteristic of a private enterprise economy—voluntary quits, business failures or reorganizations, migration, new entrants into the labor market, etc.—and these conditions are temporary or short for the individual, although always present in the economy as a whole.
>
> It is fairly common, particularly in nontechnical writings, for this term to be used in the sense of "minimum" unemployment at full employment levels, embracing in addition to the causes mentioned seasonal unemployment and the short-term unemployment resulting from permanent shifts in the demand for labor.

SUBCOMM. ON ECONOMIC STATISTICS OF THE JOINT ECONOMIC COMM., 87TH CONG., 1ST SESS., UNEMPLOYMENT: TERMINOLOGY, MEASUREMENT, AND ANALYSIS 6 (Joint Comm. Print 1961).

167. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 221-29 (1972) (state's interest in compelling attendance for an additional one or two years of high school does not outweigh Amish parents' religiously-based refusal to send their children to school because the marginal value of those last years in preparing children for Amish community life is of "somewhat less substantial" value than requiring attendance for children entering modern society); Sherbert

tional authority to enact an unemployment compensation statute[168] and a legitimate interest in minimizing frictional unemployment, the state may not structure the disqualification provision so as to require people with religious objections to their work to violate their consciences unless the interest is "compelling." As the Supreme Court in *Sherbert* indicated, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation."[169] Frictional unemployment is of short duration.[170] A person out of work because of frictional unemployment generally does not remain jobless for long. Furthermore, a certain amount of frictional unemployment is normal in a complex economy. It is often viewed as an investment by the worker since it allows her time to accumulate knowledge about job opportunities and wage rates that will later help her find more satisfying work.[171] Indiana's desire to encourage stabilization of employment is therefore insufficient to override Thomas' religious objection to building tank turrets at Blaw-Knox.

2. *Indiana's Interest in Protecting Against Fraudulent Religious Claims*

The Review Board asserted, on appeal to the United States Supreme Court, that the disqualification provision served a compelling state interest by helping to provide for payment of benefits to persons unemployed through no fault of their own.[172] The Board argued that the state's interest in maintaining the integrity of the unemployment compensation fund against fraudulent claims by claimants feigning religious objections to their work was sufficiently compelling to withstand constitutional attack.[173]

One federal court has upheld a statutory scheme furthering the federal government's interest in assuring a source of funds for the social security

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v. Verner, 374 U.S. 398, 406-09 (1963) (state's interest in preventing fraudulent claims by unscrupulous claimants feigning religious objections does not outweigh appellant's interest in the free exercise of her religion because a religious exemption will not render unemployment compensation scheme unworkable); Moody v. Cronin, 484 F. Supp. 270, 276-77 (C.D. Ill. 1979) (court indicated in dictum that first amendment religious freedom of public school children is of "greater importance" than state's interest in developing the childrens' physical, social, and emotional development by compelling attendance in coeducational physical education classes); Stevens v. Berger, 428 F. Supp. 896, 905-07 (E.D.N.Y. 1977) (state's interest in preventing welfare fraud does not outweigh plaintiffs' religious objections to acquiring social security numbers because safeguard against fraud can be established by less drastic means).

168. Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 514-19 (1937).

169. 374 U.S. 398, 406 (1963) (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

170. E. GILPATRICK, STRUCTURAL UNEMPLOYMENT AND AGGREGATE DEMAND 34 (1966).

171. J. PALMER, INFLATION, UNEMPLOYMENT, AND POVERTY 37 (1973).

172. Brief for Respondent at 13, Thomas, 101 S. Ct. 1425 (1981).

173. *Id.*

system.[174] The federal courts have also sustained legislation designed to further interests such as preventing abuses which pose a substantial threat to the public welfare,[175] procuring the manpower necessary for military purposes,[176] and assuring collective bargaining and industrial peace.[177] Indiana's interest in preventing fraudulent claims on its unemployment compensation fund is arguably as compelling an interest as these.[178]

The Supreme Court's *Sherbert* decision, however, should cast doubt on the assertion that the state's interest in guarding against fraudulent claims is of sufficient magnitude to justify restrictions on constitutionally protected rights. The *Sherbert* Court questioned whether the prevention of fraudulent claims would necessarily amount to a sufficiently compelling interest.[179]

> The [state suggests] no more than a possibility that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might not only dilute the unemployment compensation fund but also hinder the scheduling by employers of necessary Saturday work . . . . Even if consideration of such evi-

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174. Varga v. United States, 467 F. Supp. 1113, 1118 (D. Md. 1979), *aff'd,* 618 F.2d 106 (4th Cir. 1980) (Seventh-Day Adventist denied statutory exemption from tax on self-employment).

175. *See* Prince v. Massachusetts, 321 U.S. 158 (1944) (statute proscribing child labor under which a Jehovah's Witness was convicted for allowing her nine-year old niece to sell religious literature on the street upheld since there existed a compelling state interest in protecting children from exploitative labor); Jacobson v. Massachusetts, 197 U.S. 11 (1905) (legislation providing for compulsory vaccinations against smallpox upheld over defendant's objections because of state's interest in protecting the public from contagious disease); Reynolds v. United States, 98 U.S. 145 (1878) (statute prohibiting polygamy upheld because of compelling state interest in preserving monogamous marriage and preventing the exploitation of women). *See also* Powers v. State Dep't of Social Welfare, 208 Kan. 605, 614-16, 493 P.2d 590, 598-99 (1972) (state can require but not compel medical examination as condition for receiving welfare disability benefits to insure fulfillment of public trust). Llewellyn v. State, 592 P.2d 538, 543 (Okla. Crim. App. 1979) (compelling state interest in prohibiting the distribution of dangerous controlled substance to that portion of the public which does not use it as part of their established religion). *Contra,* Montgomery v. Board of Retirement, 33 Cal. App. 3d 447, 452, 109 Cal. Rptr. 181, 185 (1973) (state cannot deny disability retirement benefits to employee whose incapacity to work was caused by her religious-based refusal to undergo surgery because it failed to show substantial threat to its interest in preserving life and health of its citizens).

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

177. Yott v. North Am. Rockwell Corp., 501 F.2d 398, 403-04 (9th Cir. 1974); Linscott v. Millers Falls Co., 440 F.2d 14, 18-20 (1st Cir.), *cert. denied,* 404 U.S. 872 (1971); Gray v. Gulf, Mobile & Ohio R.R. Co., 429 F.2d 1064, 1072 (5th Cir. 1970), *cert. denied,* 400 U.S. 1001 (1971); Cap Santa Vue, Inc. v. NLRB, 424 F.2d 883, 890-91 (D.C. Cir. 1970). *But see* Cooper v. General Dynamics, 533 F.2d 163 (5th Cir. 1976), *cert. denied,* 433 U.S. 908 (1977) (1972 amendment to Title VII of Civil Rights Act of 1964 extends religious protection to employees).

178. *But see* Montgomery v. Board of Retirement, 33 Cal. App. 3d 447, 109 Cal. Rptr. 181 (1973) (court required proof of threat to state's interest and concluded that the state's showing was insufficient to justify infringement of first amendment rights).

179. Sherbert v. Verner, 374 U.S. 398, 408-09 (1963).

> dence is not foreclosed by the prohibition against judicial inquiry into the truth or falsity of religious beliefs . . . —a question as to which we intimate no view since it is not before us—*it is highly doubtful whether such evidence would be sufficient to warrant a substantial infringement of religious liberties.*[180]

Similarly, the state in *Thomas* produced little substantial evidence showing that fraudulent religious claims would significantly dilute the Indiana unemployment compensation fund. This lack of evidence renders highly doubtful the state's asserted need to protect the fund by excluding claims of religious exemption.

B. The Least Restrictive Means

As the *Sherbert* Court further stated, moreover, even if the state's interest in preventing spurious claims were held to be a compelling interest, that determination would not end the free exercise inquiry.[181] Indiana must also demonstrate that "no alternative forms of regulation would combat such abuses without infringing First Amendment rights."[182]

If the state can further its compelling interests without burdening religious practices, the free exercise clause requires it to adopt that less restrictive alternative.[183] Thus, even a compelling state interest will not justify the limitation of a person's religious freedom unless an exemption for the exercise of religion would defeat the achievement of that vital secular goal.[184]

1. Achieving Indiana's Interest in Stabilizing Employment by the Least Restrictive Means

Even if the Indiana Supreme Court correctly suggested that the disqualification provision served Indiana's interest in stabilizing employment[185] and that Indiana had a compelling interest in such stabilization,[186] the court failed to consider whether Indiana could have achieved its objective by a less restrictive means. One less restrictive means of furthering Indiana's interest

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180. *Id.* at 407 (citation omitted) (emphasis added).
181. *Id.*
182. *Id.*
183. J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 872 (1978) [hereinafter cited as HANDBOOK ON CONSTITUTIONAL LAW]. In applying the requirement that the state achieve its compelling interest through the least restrictive means available, it is important to differentiate the state's interest in denying a religious exemption from its interest in maintaining a regulation for unexceptional cases. Only the first interest is constitutionally relevant when an exemption is sought under the free exercise clause. GALANTER, *supra* note 53, at 280.
184. HANDBOOK ON CONSTITUTIONAL LAW, *supra* note 183, at 879.
185. Thomas, 391 N.E.2d at 1129-30.
186. *See* text accompanying notes 159-71 *supra.*

in stabilizing employment would be simply to construe the present language of the disqualification provision to exempt religious objections to employment. "Good cause" for voluntary termination of employment could be extended to include voluntary resignation brought about by conflicts between work and sincerely held religious beliefs. Many states have expressly included religious objections within the scope of their disqualification provisions.[187] Indiana's interest in encouraging people to stay in their present jobs could thus be maintained without burdening workers like Thomas whose religious convictions prevent them from remaining at work.

Furthermore, effective means exist to stabilize employment by means other than a broad disqualification provision. Since the provision minimizes only frictional unemployment,[188] Indiana should enact more specific legislation to reduce that particular form of unemployment.[189] Among the less burdensome alternatives capable of minimizing frictional unemployment would be

> a more efficient employment service with intensified programs of vocational guidance, counselling and training, and extended placement activities including greater financial assistance in moving the unemployed from one region of the country to another. Another avenue would be to strive towards greater uniformity in trade certification regulations by the different government units, whether they be on a state, provincial or municipal level. In both the United States and Canada, for instance, certificated tradesmen may experience difficulty in working in their trade in another state, province or municipality because of differences in certification requirements.[190]

Programs and policies such as these would serve to reduce frictional unemployment directly by removing economic forms of dislocation which hinder a person from moving quickly from one job to the next. Indiana should seek to implement programs which would enhance an individual's technical skills and assist him in locating new work, and should remove legal barriers which prevent a tradesman from working at his craft in another locality. Because several less restrictive means exist to achieve Indiana's objective of stabilizing employment, the state cannot justify burdening Thomas' religious free exercise rights.

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187. *See* cases cited in note 6 *supra.*

188. *See* text accompanying note 166 *supra.*

189. Cantwell v. Connecticut, 310 U.S. 296, 311 (1940) (court required not only the choice of a less restrictive means but also the use of "a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State").

190. P. CASSELMAN, ECONOMICS OF EMPLOYMENT AND UNEMPLOYMENT 124 (1955).

2. *Achieving Indiana's Interest in Protecting Against Fraudulent Religious Claims by the Least Restrictive Means*

Even if considered compelling, Indiana's interest in maintaining an unemployment compensation fund against claims based on feigned religious beliefs must be served by the least restrictive means practicable. Indiana, therefore, must prove that it cannot exempt Thomas from the disqualification provision without significantly interfering with the preservation of the state's unemployment compensation fund.

Generally, states argue that creating a religious exemption is infeasible because of administrative inconvenience and expense.[191] Creating such an exemption for Thomas might force the Review Board to adopt costly and cumbersome procedures to protect against unscrupulous claimants feigning religious objections to their work. Some courts have used similar reasoning, for example, in denying free exercise claims for exemptions from federal social security taxes,[192] from state disability benefit programs,[193] and from state requirements that drivers' licenses bear photographs.[194] The court in *Mullaney v. Woods*,[195] denying welfare aid to a mother who refused on religious grounds to obtain social security numbers for her children, declared:

> It is no secret that welfare fraud consumes huge amounts of public funds annually . . . . [S]kyrocketing welfare costs in turn

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191. For example, the additional administrative problems of enforcement made granting a religious exemption infeasible in Braunfeld v. Brown, 366 U.S. 599, 608 (1961). The California Court of Appeals cited similar reasons for refusing to reinstate a government employee who had absented himself from his job because his religion did not permit Saturday work. Stimpel v. State Personnel Bd., 6 Cal. App. 3d 206, 85 Cal. Rptr. 797, *cert. denied,* 400 U.S. 952 (1970). Otherwise, the state would be saddled with the intolerable burden of tailoring its work schedule to meet its employees' religious scruples. *Id.* at 209, 85 Cal. Rptr. at 799. *Stimpel* no longer represents California law, however, since California later amended its constitution to provide: "A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, *creed,* color, or national or ethnic origin." (Italics added.) CAL. CONST. art. I, § 8. *See* Rankins v. Commission on Professional Competence, 24 Cal. 3d 167, 593 P.2d 852, 154 Cal. Rptr. 907, *appeal dismissed,* 444 U.S. 986 (1979) (California Supreme Court construed the prohibition of religious discrimination in article I, section 8 of the California Constitution as implying a duty of reasonable accommodation by the employer).

Finally, the Alaska Supreme Court in Frank v. State, 604 P.2d 1068, 1073-74 (Alaska 1979), considered and rejected the argument that the compelling state interest underlying hunting restrictions would suffer if an exemption were created for Athabascan funeral ceremonies.

192. Varga v. United States, 467 F. Supp. 1113, 1118 (D. Md. 1979), *aff'd,* 618 F.2d 106 (1980).

193. Powers v. State Dep't of Social Welfare, 208 Kan. 605, 493 P.2d 590 (1972). *Contra,* Montgomery v. Board of Retirement, 33 Cal. App. 3d 447, 109 Cal. Rptr. 181 (1973).

194. Johnson v. Motor Vehicle Div., 197 Colo. 455, 593 P.2d 1363, *cert. denied,* 444 U.S. 885 (1979) (compelling state interest in photograph to ensure driver competency).

195. 97 Cal. App. 3d 710, 158 Cal. Rptr. 902 (1979).

> impose financial hardship on all levels of government, beyond merely the welfare regime itself. The need to control such costs is a vital one.
>
> The use of a number to identify each recipient of aid was intended to facilitate the administration of these vast, constantly growing, welfare programs . . . . And the assignment of a number to a child prevents the making of multiple claims for the same child.[196]

The court held that the assignment of social security numbers was an effective means of maintaining the fiscal integrity of state welfare funds, and that the state's interest in preserving those funds was sufficiently compelling to outweigh the plaintiff's first amendment rights.[197]

As noted previously,[198] however, the *Sherbert* Court in dictum indicated that dollar-saving concerns may not necessarily constitute sufficient justification for Indiana to burden a claimant such as Thomas in the free exercise of his religion: "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 state] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."[199] For a burden on free exercise rights to be constitutionally permissible, Indiana must show that only the statutory exclusion of every claim by an employee who has voluntarily left his job because of religious beliefs will preserve the unemployment compensation system against the abuses of spurious claims. The Indiana Supreme Court failed to require the state to demonstrate that no alternative form of regulation could accommodate religious practitioners without substantially sacrificing fiscal integrity and administrative convenience.

Other courts have indicated, however, that religious exemptions may be appropriate if allegations of harm to the state interest are not adequately supported. The California Supreme Court in *People v. Woody*[200] held the state's interest in enforcing its narcotics statute insufficient to override a

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196. *Id.* at 726-27, 158 Cal. Rptr. at 910-11.

197. *Id.* at 727, 158 Cal. Rptr. at 911. Plaintiff was a mother of dependent children ineligible for state aid because she refused to allow them to receive social security numbers. She believed that the numbers were the "mark of the beast" which would preclude her children's access to heaven. *Contra,* Stevens v. Berger, 428 F. Supp. 896 (E.D.N.Y. 1977).

198. *See* text accompanying notes 179-80 *supra.*

199. 374 U.S. 398, 406-07 (1963) (citation omitted). *Accord,* Stevens v. Berger, 428 F. Supp. 896 (E.D.N.Y. 1977). Although the use of social security numbers was an important tool in combatting welfare fraud, exemption of a few people who believe that the use of the numbers violated their religious beliefs did not "present an administrative problem of such magnitude . . . that such a requirement would have rendered the entire . . . scheme unworkable." *Id.* at 907 (quoting Sherbert v. Verner, 374 U.S. 398, 408-09 (1963)).

200. 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

free exercise claim where the state made "untested assertions that recognition of the religious immunity will interfere with the enforcement of the state statute . . . ."[201] Finally, in *In re Jenison*,[202] on remand from the United States Supreme Court[203] to reconsider the conviction of a woman who had refused jury duty for religious reasons, the Minnesota Supreme Court held that a religious exemption must be permitted "until and unless further experience indicates that the indiscriminate invoking of the First Amendment poses a serious threat to the effective functioning of our jury system . . . ."[204]

In light of foregoing, courts should not permit bureaucratic and fiscal considerations alone to prevent them from requiring the state to devise alternative schemes which would relieve burdens on religious claimants. The degree of administrative inconvenience stemming from the use of an exemption provision often depends on the number of persons who claim the exemption.[205] Excessive deference to assertions of administrative inconvenience could lead the courts to condition a constitutional right on the number of people who claim it during a particular period. Moreover, the courts are ill-equipped to determine the number of claimants that would make an administrative scheme prohibitively inconvenient or expensive.[206]

The fiscal concerns expressed in the *Mullaney* opinion will deepen if the economy continues to stagnate in the 1980's. Yet the loss of religious liberty may pose a greater threat to society than the abuse of public coffers.

> The violation of a man's religion or conscience often works an exceptional harm to him which, unless justified by the most stringent social needs, constitutes a moral wrong in and of itself. . . . Furthermore, the cost to a principled individual of failing to do his moral duty is generally severe, in terms of supernatural sanction or the loss of moral self-respect.[207]

Given these important considerations, not only should the state in *Thomas* be required to prove that its coffers will be seriously depleted,[208] but that

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201. *Id.* at 724, 394 P.2d at 819, 40 Cal. Rptr. at 75.

202. 267 Minn. 136, 125 N.W.2d 588, *rev'g* 265 Minn. 96, 120 N.W.2d 515 (1963).

203. 375 U.S. 14 (1963).

204. 267 Minn. 136, 137, 125 N.W.2d 588, 589 (1963).

205. Clark, *Guidelines, supra* note 95, at 332.

206. *Cf.* United States v. Sisson, 297 F. Supp. 902 (D. Mass. 1969), *appeal dismissed,* 399 U.S. 267 (1970) (district court held that a conscientious objector had a constitutional right to a draft exemption but that this right might not exist during a war involving defense of the homeland).

207. Clark, *Guidelines, supra* note 95, at 337.

208. *See* Sherbert v. Verner, 374 U.S. 398, 407 (1963). The Supreme Court in Wisconsin v. Yoder, 406 U.S. 205 (1972), refused to hold that the state had a compelling interest in preparing Amish children for life in modern society. Absent "specific evidence" that Amish children were leaving their religious community unprepared for secular life, the Court

grave and immediate fiscal danger cannot be avoided by any means other than the denial of an exemption to individuals who, under the compulsion of religious conscience, leave their employment.[209]

VI

CONCLUSION

The efficient functioning of our unemployment compensation laws depends upon the delicate balance between the state's interest in encouraging stable employment by discouraging workers from quitting for personal reasons, and the individual's interest in pursuing employment consistent with his religious precepts. Too often the courts, for fear of undermining the social welfare system, have narrowly construed the first amendment guarantee of religious freedom in favor of the state interest.

The *Thomas* case demonstrates the constitutional ramifications of narrowly interpreting the scope of the free exercise clause. In rejecting Thomas' claim, the Indiana Supreme Court unjustly minimized the harmful effect that the denial of unemployment compensation benefits may have upon an individual's religious beliefs. To view an individual's refusal to work in a munitions factory as "personal" and therefore unworthy of the protection of the first amendment is to improperly impose a judicial assessment of religious values. This assessment has no place in a constitutional system incorporating the principle that the government may not inquire into the veracity or reasonableness of religious beliefs. To permit the government to withhold social welfare benefits in a case such as *Thomas* is to allow the government to pressure the individual to violate the integrity of his religious conscience. In a free exercise challenge, the government must be required to prove that vital state interests will be sacrificed if religious claimants are exempted from regulation. The state cannot be permitted to undervalue matters of individual conscience which the first amendment was designed to protect.

As this issue was going to press, the United States Supreme Court reversed the judgment of the Indiana Supreme Court in Thomas, *101 S. Ct. 1425 (1981). The Court held that Indiana's denial of Thomas' claim to*

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declined to uphold the state's requirement of compulsory education to age sixteen. *Id.* at 224-25.

209. Such action deserves the protection of the free exercise clause:

> [W]e hold it for a fundamental and undeniable truth, "that Religion or the duty which we owe to our Creator and the Manner of discharging it, can be directed only by reason and conviction, not by force or violence." The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.

THE WRITINGS OF JAMES MADISON 184 (G. Hunt ed. 1901).

unemployment compensation benefits violated his first amendment right to the free exercise of religion under Sherbert v. Verner. Id. *at 1430-33.*

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