Benevolent Neutrality Theory: Retesting and Redefining the Boundaries of the Free Exercise Clause

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I. INTRODUCTION

Religion is one of the central institutions of Philippine society.[1] Studies have shown that a large number of Filipinos believe in God or a Supreme Being.[2] This phenomenon remains true notwithstanding society's adherence to the value of secularism and the principle of the separation between Church and State.[3] Moreover, the vitality of religion in Philippine society is marked by the increasing number of New Religious Movements and fundamentalist religious groups. With this increasing differentiation and segmentation of society brought about by religious pluralization emerge different religious doctrines and beliefs that are expressed through the adherent's conduct.[4]

It may be said that free exercise of religion is one of the most important and widely recognized human rights. However, the scope and boundaries of this right have, historically, also been one of the most debated and

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1. CHESTER HUNT, ET AL., SOCIOLOGY IN THE PHILIPPINE SETTING 228 (5th ed. 1998).

2. *See* Virginia Miralao, *The Family, Traditional Values, and the Sociocultural Transformation of the Philippine Society*, *in* PHILIPPINE SOCIOLOGICAL REVIEW (1997). (It discusses the findings by the Social Weather Stations of its survey of 1,600 respondents, of which 99.6% believed in the concept of God or a Supreme Being.).

2. *See* Virginia Miralao, *The Family, Traditional Values, and the Sociocultural Transformation of the Philippine Society*, *in* PHILIPPINE SOCIOLOGICAL REVIEW (1997). (It discusses the findings by the Social Weather Stations of its survey of 1,600 respondents, of which 99.6% believed in the concept of God or a Supreme Being.).

3. PHIL. CONST. art. II, § 6. ("The separation of Church and State shall be inviolable.").

4. James Beattie Jr., *Taking Liberalism and Religious Liberty Seriously: Shifting Our Notion of Toleration From Locke to Mill*, 43 CATH. LAW 367, 371 (2004); JOAQUIN G. BERNAS, THE 1987 CONSTITUTION OF THE PHILIPPINES: A COMMENTARY 288 (1996 ed.). ("[m]odern society is faced with the phenomenon of expanding government reaching out its regulatory arm to an ever growing variety of areas of human action and the phenomenon of a growing articulation and acceptance of an expanding concept of religion.").

controversial. The controversy surrounding the free exercise clause largely lies in the possibility of conflict between religion and the law.[5] The main question that has generated this debate is "whether the freedom of religious exercise... require[s] the government, in the absence of a sufficiently compelling need, to grant exemption from duties that conflict with religious obligations."[6] This issue has generated conflicting decisions in the United States with some decisions invoking the free exercise clause while others, though involving similar circumstances, being decided on non-establishment grounds.[7]

Although not as acute, the same problem arises in the interpretation of the Philippine free exercise clause. The previously most celebrated cases tackling this question were the flag salute cases, namely: *Gerona v. Secretary of Education*[8] and *Ebralinag v. Division Superintendent of Schools*.[9] Recent jurisprudence touching on the free exercise clause, on the other hand, has largely concerned itself with questions of jurisdiction of administrative bodies and the regular courts in cases involving religious corporations[10] or employers.[11]

The prevailing doctrine in American jurisprudence on the conflict between law and religion was laid down in *Employment Division v. Smith*[12] where it was ruled that only laws which intentionally target conduct because of religious significance can be challenged on free exercise grounds.[13] On the other hand, the Philippine Supreme Court facing a situation with potentially far-reaching consequences in *Estrada v. Escritor*[14] deviated from the principles laid down in *Smith* and declared that Philippine courts adopt the benevolent neutrality position in dealing with free exercise cases. This approach fundamentally exhorts that government policies take religion into account so

5. *See* Michael McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1410 (1990) [hereinafter McConnell, *Origins*].

6. *Id.* at 1411.

7. *See* Michael McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 119-120 (1992) [hereinafter McConnell, *Crossroads*]. *See also* Christopher L. Eisgruber and Lawrence G. Sager, *Equal Regard in* LAW AND RELIGION: A CRITICAL ANTHOLOGY 200 (2000). Both of whom discuss the idea that jurisprudence regarding religious exemptions is in shambles.

8. Gerona v. Secretary of Education, 106 Phil. 2 (1959).

9. Ebralinag v. Division Superintendent of Schools, 219 SCRA 256 (1993).

10. *See* Long v. Basa, 366 SCRA 113 (2001).

11. *See* Austria v. National Labor Relations Commission, 312 SCRA 410 (1999).

12. Employment Division v. Smith, 494 U.S. 872 (1990).

13. *Id.* at 878-79.

14. Estrada v. Escritor, 408 SCRA 1 (2003).

as to allow individuals and groups to exercise their religion without hindrance or burden.[15] More specifically, *Estrada v. Escritor* introduced the possibility of exempting government employees from an administrative complaint for gross and immoral conduct under the Revised Administrative Code by requiring the government to show a compelling State interest that would override the invocation of the free exercise clause.[16] The majority thus held:

> We here lay down the doctrine that in Philippine jurisdiction, we adopt the benevolent neutrality approach not only because of its merits as discussed above, but more importantly, because our Constitutional history and interpretation indubitably show that benevolent neutrality is the launching pad from which the Court should take off in interpreting religious clause cases. The ideal towards which this approach is directed is the protection of religious liberty 'not only for a minority, however small—not only for a majority, however large—but for each of us to the greatest extent possible within flexible constitutional limits.[17]

Several justices, however, registered their dissents.[18] One of these was that of Justice Ynares-Santiago, who raised the fundamental legal issue of the general applicability of criminal laws, and bemoaned the fact that the employee in question would actually have been convicted as a co-principal in concubinage if so prosecuted.[19] Another was that of Justice Carpio, who stated that: "the wall of separation between Church and State is no defense against the State's police power over conduct constituting concubinage, bigamy or polygamy."[20]

The mere existence of the above dissenting opinions point to a pressing problem: the need to formulate a structural theory of the free exercise clause in relation to the benevolent neutrality theory. The failure to address this problem gives rise to an area rife with conflict between the rights of individual citizens to religion and the right of the State to properly protect society at large.

The challenge therefore, is upon the courts to adopt an integrative and consistent framework in navigating this area of the constitutional guaranty in a manner that effectively protects religious freedom, especially that of those

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15. Michael McConnell, *The Accommodation of Religion: An Update and Response to the Critics*, 60 GEO. WASH. L. REV. 685, 688 (1992) [hereinafter McConnell, *Accommodation of Religion*].

16. *Estrada*, 408 SCRA at 191.

17. *Id.* at 168.

18. Justice Ynares-Santiago dissented while Justice Carpio, joined by Justices Panganiban, Callejo, and Carpio-Morales filed a separate dissent.

19. *Id.* at 224.

20. *Id.* at 241.

coming from minority religious groups, and also, in a manner that upholds State interest in regulating conduct for the public good. By identifying the various state interests, the author seeks to develop a theory by which the boundary of religious freedom is clearly delineated to the extent that there are identifiable areas within the myriad of state interests by which religious freedom cannot be invoked. This approach seeks to address the fear that a liberal interpretation of the free exercise clause would result in "religious anarchy," by developing the analytical framework through which the courts can determine whether the proffered government interest is, in fact, compelling.

As such, the present undertaking will deal with six important issues. First, whether and to what extent has the benevolent neutrality approach expanded the protection of the free exercise clause vis-à-vis the State's power to regulate conduct? Second, has the benevolent neutrality theory altered the existing interplay between the free exercise clause and the non-establishment clause and how is this relationship to be thus articulated? Third, has the adoption of the benevolent neutrality theory redefined the boundaries of religious freedom and, if so, what are these new limits? Fourth, taking into consideration the particularities presented in *Estrada,* how can that ruling be reconciled with considerations of public policy? Fifth, is it possible to categorize free exercise claims in terms of their relationship with the interests the government seeks to protect? And finally, in establishing compelling state interest on the part of the State and substantial burden on the part of the individual, what relevant factors and proofs need be taken into account?

The culmination of the foregoing inquiry will result in a model for determining whether a challenged government action is justified by a compelling state interest, and a proposed framework of the free exercise clause under a benevolent neutrality approach.

A. Concepts

1. Definition and Function of Religion

Any free exercise inquiry must start with the determination of whether the conduct, belief, or expression is based on religion. The United States Supreme Court had the first opportunity to define religion in *Davis v. Beason*[21] as having "reference to one's views of his relations to his Creator, and the obligations they impose of reverence for his being and character, and of obedience to his will."[22] The understanding of the importance of protecting religious freedom should be made with regard to the social

21. Davis v. Beason, 133 U.S. 333 (1890).

22. *Id.* at 342.

function of religion. Religious freedom is protected not merely for the benefits it gives to the individual adherents but also because religion is viewed as a functional institution. Stephen Carter proposes two functions of religion in a democratic society. First, he views religion as an intermediary institution which serves as a "bulwark against majority tyranny." In this sense, religion offers a separate sphere of reality from the totalizing power of the State and can sometimes serve as agents of social change. Second, he views religion as having an important historical role as "vital transmitters of values and meanings" from one generation to the next.[23] In these two respects, religion serves both the function of preserving status quo and initiating change in society. Sociologically, Emile Durkheim viewed religion functionally. He believes that religion, being a product of human interaction, serves as a repository of what people believe as the "sacred" as opposed to the "secular" or "profane." Having a symbolic system divided between the sacred and the profane, religion serves to regulate the human needs and actions through beliefs about the sacred and to attach the people with one another through ritual activities.

2. The Free Exercise and the Non-Establishment Clause

The more important reason for protecting religious freedom is its recognition as a fundamental human right. Article III Section 5 of the 1987 Philippine Constitution states that "No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed. No religious test shall be required for the exercise of civil or political rights."[24] This provision consists of two principal parts, namely, the non-establishment clause and the free exercise clause.

Generally, these two provisions are perceived as having a "built in tension" vis-à-vis one another.[25] Thus, a set of circumstances would yield a different interpretation under a free exercise reading than when it is interpreted under the non-establishment clause. The conflict can be seen through an example where, if the government attempts to regulate a religious activity, it might be held to violate the free exercise clause. However, if it carves out a religious exemption, this might be held to violate the non-establishment clause.[26]

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23. Stephen Carter, *The Resurrection of Religious Freedom?*, 107 HARV. L. REV. 118, 136-37 (1993).

24. PHIL. CONST., art. III, § 5.

25. *See* BERNAS, *supra* note 4, at 319. *See also* McConnell, *Accommodation of Religion*, *supra* note 15, at 695.

26. McConnell, *Crossroads*, *supra* note 7, at 135.

This tension can be gleaned from the Supreme Court's decision in *Pamil v. Teloron*[27] where the constitutionality of a statute barring members of the ecclesiastic from being elected into public office was upheld by the Supreme Court.[28] The majority tackled the issue from the point of view of the non-establishment clause and principle of separation of church and state. In his dissenting opinion, however, Justice Teehankee expounded on the position that said provision was "inconsistent and violative of *religious freedom*" and the provision against the use of religious tests.[29]

Nevertheless, the free exercise and non-establishment clauses may also be seen as complementary. The ultimate purpose of constitutional provisions on religion is to protect and uphold religious freedom. In that sense then, the free exercise clause should be the controlling idea, whereas the non-establishment clause merely serves as its implementation.[30] Safeguarding against the establishment of a religion is needed in order to protect the rights of those who are inclined to dissent from whatever religion has been established.[31] Since the free exercise clause has primacy, the non-establishment clause should yield to it whenever possible.[32]

3. The Scope and Extent of the Free Exercise Clause

The free exercise clause is not an immobile concept. The ever growing reach of State regulation and the expanding notion of religion, with the consequent pluralization and diversification of religious beliefs, create conflict between the two and necessitates constant reexamination of the scope of the free exercise clause. Initially, in the landmark case of *Reynolds v. United States*,[33] the scope of the free exercise clause was viewed in terms of the distinction between religious belief and action. This was expanded in

27. Pamil v. Teloron, 86 SCRA 413 (1978).

28. Interestingly however, the reason why the constitutionality of said provision was upheld was the failure to reach the required eight votes, since only seven voted to invalidate it. Thus, the five votes upholding its constitutionality prevailed.

29. *Id.* at 440 (emphasis supplied).

30. Steven Tipton, *Republic and Liberal State: The Place of Religion in an Ambiguous Polity,* 39 EMORY L.J. 191, 192 (1990); Wisconsin v. Yoder, 406 U.S. 205 (1972).

31. Richard John Neuhaus, *A New Order of Religious Freedom,* 60 GEO. WASH. L. REV. 620, 627 (1992).

32. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-8, at 1201-205 (2d ed. 1988) [hereinafter TRIBE]. ("Such dominance is the natural result of tolerating religion as broadly as possible rather than thwarting at all costs even the faintest appearance of establishment.").

33. Reynolds v. United States, 98 U.S. 145 (1878).

Cantwell v. Connecticut,[34] wherein the freedom to believe was held to be absolute, while the freedom to act could not be so construed. This latter view, however, limited the scope of religious freedom to the realm of mere belief, since it underscored the conception that religiously motivated action could always be subjected to state regulation.[35]

A shift away from the *Cantwell* view began in the case of *Sherbert v. Verner*,[36] where it was held that the government could override religiously motivated action only if: a) the state interest was paramount and compelling enough to override the free exercise claim and b) the State could show that there were no other alternative means, free from the taint of impingement of religious liberty, of regulating such conduct. However, this perspective was subsequently undermined by the case of *Employment Division v. Smith* where the Court declared that, "[t]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on grounds of religious proscription."[37]

Nevertheless, *Smith* was criticized for emasculating religious freedom too much in favor of the government's interest. Brietta Clark offered several flaws of the *Smith* doctrine.[38] First, she argued that the claim of the *Smith* Court that only intentional burdens placed on religion by the State should be subject to strict scrutiny proceeded from an erroneous assumption that laws creating unintentional burdens have no effect on an individual's religious freedom.[39] And second, the statement of the Court that it was the legislature that could create exemptions to alleviate those burdens, also proceeded from an incorrect assumption—that exemptions would necessarily undermine the government's interest.[40] Michael McConnell, commenting also on *Smith,* added that the decision gave social policy, as determined by the State, primacy over the rights of religious communities to arrange their lives according to their own convictions. Thus, "[u]nder *Smith*, the state is more powerful, the homogenization is more powerful, and the ability of churches

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

35. *See* Ira Lupu, *Where the Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 938 (1992) [hereinafter Lupu, *Where the Rights Begin*]. *See also* McConnell, *The Accommodation of Religion*, *supra* note 15, at 719. (It argues that the very fact that the Constitution used the word "exercise" shows the intention not to limit religious freedom to speech and belief only.).

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

37. Employment Division v. Smith, 494 U.S. 872 (1990).

38. Brietta Clark, *When Free Exercise Exemptions Undermine Religious Liberty and the Liberty of Conscience: A Case Study of the Catholic Hospital Conflict*, 82 OREGON L. REV. 625 (2003).

39. *Id.* at 670-71.

40. *Id.* at 679.

to maintain their distinctive ways of life depends upon their skill at self-protection in the halls of Congress."[41] He also argued that non-mainstream religions were the ones most likely to need exceptions, considering that it is the values of the majority and median groups that were reflected in the laws of a democratic society. Thus, *Smith* not only increased the power of the State over religions, but also introduced a bias in favor of mainstream religions.[42]

4. Benevolent Neutrality Theory

Indeed, even our own Supreme Court, in *Estrada,* intimated its rejection of *Smith* when it described it as a "major setback,"[43] "highly unsatisfactory,"[44] and "exhibiting a shallow understanding"[45] of the free exercise clause. It then continued on to say that a survey both of its decisions and the various Constitutions of the Philippines would, instead, prove that a liberal interpretation of the free exercise clause is preferred—this stance was referred to as the benevolent neutrality theory or accommodation theory.[46]

The benevolent neutrality theory is, essentially, the policy of the government to take religion into account not for the purpose of promoting its own favored religion, but of allowing individuals and groups the exercise of their religion without hindrance.[47] Its basic proposition, as opposed to the strict neutrality theory, is that the government must "strive to uphold religious liberty to the greatest extent possible *within flexible constitutional limits.*"[48] According to the Court, the benevolent neutrality theory allowed for an accommodation of religion, *provided that the religion or its manifestations did not offend compelling state interests.*[49] As to its meaning, the Court had this to say:

> Although our constitutional history and interpretation mandate *benevolent neutrality,* [this] *does not mean that the Court ought to grant exemptions every time a free exercise claim comes before it. But it does mean that the Court will not look with hostility or act indifferently towards religious beliefs and practices and that it will strive to accommodate them when it can within flexible constitutional limits; it does mean that the Court will not simply dismiss a claim under the Free Exercise Clause*

41. McConnell, *Crossroads, supra* note 7, at 138-39.

42. *Id.* at 139.

43. Estrada v. Escritor, 408 SCRA 1, 100 (2003).

44. *Id.* at 102.

45. *Id.*

46. *Estrada,* 408 SCRA at 167-68.

47. McConnell, *Accommodation of Religion, supra* note 15, at 688.

48. Estrada v. Escritor, 408 SCRA 1, 182 (2003) (emphasis supplied).

49. *Id.* (emphasis supplied).

> *because the conduct in question offends a law or the orthodox view for this precisely is the protection afforded by the religion clauses of the Constitution, i.e., that in the absence of legislation granting exemption from a law of general applicability, the Court can carve out an exception when the religion clauses justify it.*[50]

Consequently, it should be used as the proper launching pad from which courts should take off in interpreting religious clause cases.[51]

What really drives the theory is, however, the test of compelling state interest. The compelling state interest is described as "the highest level of Constitutional scrutiny short of holding a *per se* violation."[52] This test was adopted in the case of *Victoriano v. Elizalde Rope Workers Inc.*,[53] where it was applied by the Court to determine whether the exemption, provided by law, from the operation of a closed shop agreement on the ground of religious beliefs was unconstitutional. The Court declared that "when general laws conflict with conscience, exemptions ought to be granted *unless some compelling state interest intervenes.*"[54] However, *Victoriano* merely used the test to justify the constitutionality of the law, and not to carve out a judicial exemption, as it did in *Ebralinag v. The Division Superintendent of Schools.*[55] In that case, the Supreme Court applied the compelling state interest test, in conjunction with the grave and imminent danger test, to exempt certain religious adherents from complying with governmental regulations.

This is not to say that the test is so cut and dry, so to speak. The problem in its application is the lack of a standard for determining what exactly should be considered as compelling. An analysis of Supreme Court decisions shows that this concept is undeveloped.[56]

II. PROBLEM OF CHARACTERIZATION

A. A Religious Rationale and its Importance

There is a need to establish a plausible rationale for the commitment to religious liberty in order to understand what that commitment entails. It is

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50. *Id.* at 167.

51. *Id.* at 182.

52. *Estrada*, 408 SCRA at 98.

53. Victoriano v. Elizalde Rope Workers Inc., 59 SCRA 54 (1974). The Supreme Court made a similar ruling in Basa v. Federacion Obrera, 61 SCRA 93 (1974) and Gonzales v. Central Azucarera de Tarlac Labor Union, 139 SCRA 30 (1985).

54. *Victoriano,* 59 SCRA at 75 (emphasis supplied).

55. Ebralinag v. Division Superintendent of Schools, 219 SCRA 256 (1993).

56. In *Victoriano*, for example, the compelling state interest test was applied unnecessarily. In *Ebralinag* the test was mentioned but not discussed.

not unusual that laws are to be interpreted in a manner as would effectuate their purposes. However, the purpose of a law arises out of, and is largely a projection of its justification. According to Steven Smith, "if we cannot articulate a convincing justification for the commitment to religious freedom then we cannot know its purpose, and we are accordingly paralyzed in our efforts to interpret the commitment."[57]

The interpretation of the free exercise clause and its application in actual cases must be based on a rationale that is consistent with the benevolent neutrality theory. Its basis rests on the inviolability of the human conscience.[58] As such, the guarantee of religious liberty has a dual aspect: first, it forestalls compulsion by law of the acceptance of any creed or the practice of any worship; and second, it also safeguards the free exercise of the chosen form of religion.[59]

B. The Public Policy Argument against Religious Freedom

The fear against a liberal interpretation of the free exercise clause is that religious freedom could be used to the detriment of public interest and public policy. Thus, like the other constitutional rights, religious freedom has been referred to as a qualified right.[60] Yet, this view presupposes that religious freedom is granted by the Constitution as a privilege; which the public policy dimension of legislative enactments may overturn. Thus, under the Civil Code, "[l]aws are repealed only by subsequent ones, and their violation or non-observance shall not be excused by disuse, or custom or practice to the contrary."[61] Also, "[c]ustoms which are contrary to law, public order or public policy shall not be countenanced."[62] However, these provisions do not mention the religion as not being excused from law. More important is that while custom, disuse, or practices are generally not constitutionally recognized, religion is afforded constitutional protection.

Consequently, the argument that religious freedom cannot be an excuse to actions that are contrary to public interest or public policy is easily put aside. For, it ignores the fact that protection of religious freedom is also part of public interest of the state. Since both religiously motivated actions and

57. Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PENN. L. REV. 149, 224 (1991).

58. BERNAS, *supra* note 4, at 290.

59. Cantwell v. Connecticut, 310 U.S. 296, 303-4 (1940).

60. JORGE COQUIA, CHURCH AND STATE RELATIONS 107 (1959).

61. An Act to Ordain and Institute the Civil Code of the Philippines, [CIVIL CODE], art. 7, ¶ 1.

62. CIVIL CODE, art. 11.

law cover a specific area of public interest, it follows that there is a need for balancing these two interests.

C. Problem with the Benevolent Neutrality—Compelling State Interest Approach

The author agrees that religious freedom is best guaranteed by applying the benevolent neutrality theory. However, it cannot be ignored that this theory also suffers from conceptual defects, as it fails to provide a judicially manageable standard in delineating the boundaries of the free exercise clause. According to Scott Idleman,[63] when the compelling state interest test is applied, the range of government interests that are deemed compelling become broader than in other constitutional contexts such as free speech and equal protection.[64] It also leads to a very subjective notion of what is compelling among the various interests of the State.[65] Furthermore, the argument has also been made that the benevolent neutrality position weakens the non-establishment clause. Allowing the possibility of creating exemptions from laws unless a compelling state interest is shown by the government also creates the danger of placing the courts in a position of scrutinizing possibly every enactment of the law-making body.[66]

An even more serious problem that has confronted the compelling state interest requirement is that, upon deeper analysis, *Smith* actually "represents not a departure from, but rather the culmination of modern free exercise jurisprudence."[67] In *Estrada*, the Supreme Court declared that between the two strains of free exercise jurisprudence in the United States, the Philippines follows the benevolent neutrality theory, which requires the government to establish that a challenged law is justified by a compelling state interest. However, observing American jurisprudence, since the 1972 case of *Wisconsin v. Yoder*,[68] which allowed exemption from a penal law, and the employment compensation cases starting with *Sherbert*, the Supreme Court has consistently rejected every free exercise claim. And, such rejection has either been effect without first resorting to the strict scrutiny approach in *Yoder,* or under the pretext that a balancing approach was not necessary

63. Scott Idleman, *Why the State Must Subordinate Religion, in* LAW AND RELIGION: A CRITICAL ANTHOLOGY 175 (2000).

64. *Id.* at 180.

65. *See* Donald A. Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development Part I: The Religious Liberty Guarantee*, 80 Harv. L. Rev. 1381, 1384 (1967) [hereinafter Gianella, *Religious Liberty*]. (It recognizes the hazard of subjectivity when a balancing approach is used in free exercise cases.).

66. Notes, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 YALE L. J. 350, 359 (1980).

67. Smith, *supra* note 57, at 235.

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

under several special contexts. Thus, "any active judicial commitment on the part of the Court to protect the free exercise of religion was virtually defunct even before *Smith* officially announced the demise of the free exercise exemption doctrine." For all intents and purposes, "*Smith* merely made explicit what was implicit in earlier rulings."[69]

This problem can be associated with the apprehension that granting exemptions would be tantamount to courting anarchy. The question that may be raised against a liberal interpretation of the free exercise clause is "to what extent should it be allowed?" In *Reynolds v. United States*, Chief Justice Waite expressed the fear of granting exemptions based on religious scruples:

> Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dear husband, would it be beyond the power of civil government to prevent her carrying her belief into practice?[70]

In order to develop a consistent framework protective of religious freedom to its fullest extent, it is necessary to address this fear of religious anarchy. The writer submits that this apprehension can be addressed by determining that there are government interests that are, by their nature, deemed so compelling that they cannot be overridden by any claim to free exercise.

D. Characterization of the State Interest

The object of this note is to formulate a conceptual framework that can address the weakness of the benevolent neutrality theory, specifically by exploring the boundaries of religious freedom with reference to the various state interests. It is submitted that the compelling state interest boundary is too general to be a workable framework of examining free exercise cases.

Under this proposed theory, what is deemed compelling is tested in relation to another set of standards. These standards are the various state interests that overlap with religious freedom. The present rule enunciated by the Philippine Supreme Court in *Estrada v. Escritor* involves a two-step process. The first step is the determination of whether there is a substantial burden on religious freedom, while the second step is the determination of whether the state-imposed burden is justified by a compelling state interest, *which the state has the burden to show*. This note will propose the insertion of an intermediate step—that is, the Court should characterize a specific free exercise claim in terms of the state interest involved.

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69. *Id.* at 235.

70. Reynolds v. United States, 98 U.S. 145, 164 (1878).

The determination of whether a given interest is compelling is largely determined by its characterization. This intermediate step of free exercise analysis may be compared to the conflict of laws process of characterization. Characterization can be defined as "the process by which a court at the beginning of the choice-of-law process assigns a disputed question to an area in substantive law, such as torts, contracts, family law or property."[71] The use of characterization for free exercise analysis is justifiable since analogies can be used to show the similarity between a free exercise case and a conflict of laws problem. For example, while a conflict of laws problem involves conflicting laws of two or more jurisdictions, a free exercise case may be said to involve a conflict between the law of the state and the law of a smaller group, the religious group.

A preliminary exploration of this characterization process will yield several major categories, with each category having its own set of rules. First, the government has the inherent police power interest to prohibit certain actions which may be contrary to public interest. Second, in order to finance its activities, the government also has its revenue-raising interest which is generally manifested in its inherent power to tax. Third, in order to conduct itself efficiently, the government also has its administrative interests. Fourth, the courts also have the judicial interest in resolving free exercise cases.

The purpose of the study is to discuss and analyze each category of state interest that may possibly conflict with religious scruples, especially that of the minority religious groups. The author proposes that under each area of interest, there is what may be referred to as non-negotiable areas wherein religious freedom cannot be invoked. This formulation seeks to develop an objective test where a given state interest is already deemed compelling.

III. POLICE POWER INTEREST

Police power is defined as the authority of the state to enact legislation that may interfere with personal liberty or property in order to promote the general welfare. It cannot be exactly defined but is considered comprehensive "to meet the exigencies of the times, even to anticipate the future where it could be done [to] provide enough room for an efficient and flexible response to conditions and circumstances thus assuring the greatest benefits."[72] Police power of the state generally concerns government enactments that interfere with *personal* liberty or property in order to promote the general welfare or the common good.

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71. COQUIA & AGUILING-PANGALANGAN, CONFLICT OF LAWS 83 (2000).

72. Sangalang v. Intermediate Appellate Court, 176 SCRA 719 (1989); ISAGANI CRUZ, CONSTITUTIONAL LAW 41 (1995).

While the police power of the state is considered as the least limitable power of government, it is not absolute. The free exercise clause exists as one form of limitation of police power.

A. Expression

A key area in free exercise cases which have not received enough attention is the distinction between religious expression and religious conduct. Decisions of the Philippine Supreme Court often rely on the distinction between belief and action, ignoring the possibility that there lies a conceptual difference as to the limits of expression and action. However, before this can be explored, it is necessary to determine what constitutes expression and conduct.

In the case of *Iglesia ni Cristo v. Court of Appeals*, religious expression, which the Court equated with the right to free expression, includes the right to criticize religious doctrines of other faiths and to persuade others to one's own point of view even by resorting to exaggeration.[73] Moreover, religious expression includes expressions to preach, proselyte, and to perform other similar functions.[74] It may also include the propagation of religious information which may include the sale of religious literature.[75]

The landmark case in religious expression in Philippine jurisprudence is *American Bible Society v. City of Manila*.[76] The acting treasurer of Manila informed American Bible Society, a missionary corporation engaged in distribution and sale of bibles, that it was conducting business without the necessary license and fee under various city ordinances. On the basis of the free exercise of religion clause of the 1935 Constitution, plaintiff argued that the ordinances are unconstitutional insofar as it was applied to them.

The Supreme Court held that the fact that plaintiff earned some profit for the sale of the bibles and religious literature does not remove the case from the protection of religious freedom. It declared that the constitutional guaranty of enjoyment and free exercise of religion *carries with it* the right to disseminate religious information. As such, "[a]ny restraint of such right can only be justified *like other restraints of freedom of expression* on the grounds that there is a clear and present danger of any substantive evil which the State has the right to prevent."[77] Noting that the license fee is being imposed upon the appellant for its distribution and sale of religious materials, the Court argued that the exercise of the power to impose a license tax as a condition

73. Iglesia ni Cristo v. Court of Appeals, 259 SCRA 529, 546 (1996).

74. *Id.* at 559.

75. *See* American Bible Society v. City of Manila, 101 Phil. 386 (1957).

76. American Bible Society v. City of Manila, 101 Phil. 386 (1957).

77. *Id.* at 398 (emphasis supplied).

to the exercise of a constitutional privilege amounts to the unwarranted exercise of the power of censorship.

More importantly however, this case has provided the basis for separating religious conduct from religious expression—already the norm in *Estrada*—when it stated that "[t]he constitutional guaranty of the free exercise and enjoyment of religious profession and worship *carries with it the right to disseminate religious information.*"[78] This implies that religious expression is a part of and within the field of religious conduct but is nonetheless a distinct part of the whole gamut of religiously motivated behavior.

American Bible Society was followed by what is popularly known as the flag salute cases.[79] The facts of these cases are substantially the same, differing only in the individuals involved and the time when the cases were decided. Petitioners who are members of the Jehova's Witnesses challenge the validity of the expulsion of their children from school for refusing to salute the flag pursuant to Republic Act No. 1265 or the Flag Salute Law, and Department Order No. 8 subjecting to administrative sanctions the educational institutions, teachers and students who refused to comply. Petitioners' refusal to salute the flag was based on their religious beliefs prohibiting them from venerating any symbols including the Philippine flag.

The first two cases of the flag salute trilogy are *Gerona v. Secretary of Education*[80] and *Balbuna v. Secretary of Education.*[81] In these two, the Supreme Court rejected the claim of petitioners that the dismissal of the children from school by reason of their religious beliefs violated their religious freedom. The decision was based mainly on the following propositions. First, while the freedom to believe is absolutely protected, the exercise of such belief is not, and the latter must give way if it clashes with the established institutions of society. Second, proceeding from the premise that "the determination of whether a certain ritual is or is not a religious ceremony must rest with the courts," the Court held that "the flag is not an image" in a religious sense but rather "a symbol of the Republic of the Philippines, [and] an emblem of national sovereignty and that the flag is devoid of any religious significance."[82] Last, the Court held that the rule is a valid, reasonable, and non-discriminatory regulation of religious conduct.

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78. *Id.* (emphasis supplied).

79. Gerona v. Secretary of Education, 196 Phil. 2 (1959); Balbuna v. Secretary of Education, 110 Phil. 150 (1960); Ebralinag v. Division Superintendent of Schools, 219 SCRA 256 (1993).

80. Gerona v. Secretary of Education, 196 Phil. 2 (1959).

81. Balbuna v. Secretary of Education, 110 Phil. 150 (1960).

82. *Gerona*, 106 Phil. at 11.

Gerona gave the free exercise clause a minimal protection. The decision, which was made years after *American Bible Society,* failed to apply the latter's precepts. Without defining "established institutions," the Court, in effect, expanded the area where the State cannot be required by the free exercise clause to grant exemptions since all that it has to do is to show that the challenged law or rule is made pursuant to an "established institution."

More than three decades after *Gerona* and *Balbuna*, the Court once again had an opportunity to change the path of free exercise jurisprudence in the case of *Ebralinag v. Division Superintendent of Schools.*[83] Reversing its previous rulings, the Court held that:

> The *sole* justification for a prior restraint or limitation on the exercise of religious freedom is the existence of a grave and present danger of a character both grave and imminent of a serious evil to public safety, public morals, public health or any other legitimate public interest that the State has a right (and duty) to prevent.[84]

Subjecting the case to the aforementioned test, the Court noted that the fear it had previously expressed in *Gerona*—that exempting petitioners from the flag raising ceremony would deprive the youth of a sense of patriotism—had not materialized.[85] Reversing the possible effect of the situation on the recognized interest of the state, Justice Grino-Aquino persuasively argued:

> After all, what the petitioners seek only is exemption from the flag ceremony, not exclusion from the public schools where they may study the Constitution, the democratic way of life and form of government... Philippine history and culture... and be taught the virtues of 'patriotism, respect for human rights, appreciation for national heroes, the rights and duties of citizenship... as part of the curricula. Expelling or banning petitioners from Philippine schools will bring about the very situation that this Court had feared in Gerona. Forcing a small religious group... to participate in a ceremony that violates their religious beliefs, will hardly be conducive to love of country or respect for duly constituted authorities.[86]

In exempting the petitioners from the operation of the Flag Salute Law and the corresponding implementing orders of the Department of Education, Culture and Sports, the Court did not have to resolve the

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83. Ebralinag v. Division Superintendent of Schools, 219 SCRA 256 (1993).

84. *Id.* at 271 (emphasis supplied).

85. This reasoning however, begs the question in the first place. If the question is whether the exemption from the flag ceremony will produce unpatriotic citizens, there is no answer until and unless an exemption is actually granted. For three decades after *Gerona* and *Balbuna*, no exemption has been granted. This comment thus, proceeded from an erroneous premise. Fortunately though, the decision did not rely on that line of reasoning.

86. *Ebralinag*, 219 SCRA at 271-72.

constitutionality of the law since it was not raised as an issue. It would be interesting however, had its constitutionality been raised as an issue considering the Court's pronouncement that:

> [t]he idea that one may be compelled to salute the flag, sing the national anthem, and recite the patriotic pledge, during a flag ceremony on pain of being dismissed from one's job or being expelled from school, is *alien to the conscience of the present generation of Filipinos who cut their teeth on the Bill of Rights which guarantees their rights to free speech* and the free exercise of religious profession and worship.[87]

Had the constitutionality of the Flag Salute Law been raised as an issue, the Court would have been forced to choose between giving religious expression a preferred status over other expressions and exempting petitioners from the operation of the law, or treating religious and non religious expression as the same and upholding the constitutionality or declaring the unconstitutionality of the Flag Salute Law. Fortunately enough, this opportunity arose in case of *Iglesia ni Cristo v. Court of Appeals.*[88]

In *Iglesia,* the MTRCB rated the program "Ang Iglesia ni Kristo" as an "X," which meant that the program was not for public viewing, containing, as it did, attacks offensive to other religions—which was prohibited by law. Petitioners went to court and raised two issues. The first issue was whether the television program, being protected by the free exercise of religion clause, was beyond the reach of the MTRCB. The second issue was whether the television program was subject to the police power of the state only in an extreme case sufficiently evidencing a clear and present danger.

Resolving the first issue, the Court rejected petitioner's contention that the free exercise clause immunizes their television program from the power of review of the MTRCB and said:

> We thus reject petitioner's postulate that its religious program is *per se* beyond review by the respondent Board. Its public broadcast on television of its religious program brings it out of the bosom of internal belief. Television is a medium that reaches the eyes and ears of children. The Court iterates the rule that the exercise of religious program can be regulated by the State when it will bring about the clear and present danger of some substantive evil which the State is duty bound to prevent, i.e. serious detriment to the more overriding interest of public health, public morals, or public welfare… For sure we shall continue to subject any act pinching the space for the free exercise of religion to a heightened scrutiny but we shall not leave its rational exercise to the irrationality of man. For

87. *Id.* at 270 (emphasis supplied).

88. Iglesia ni Cristo v. Court of Appeals, 259 SCRA 529 (1996).

> when religion divides and its exercise destroys, the State should not stand still.[89]

Iglesia illustrates the modern phenomenon which Karel Dobbelaere refers to as "pillarization."[90] According to Dobbelaere, while modern society is characterized by the proliferation of secularizing forces including mass media, the institution of religion has used these as countervailing forces against secularization. This partly explains the growth of religious programs in television and religious use of the internet and other forms of mass media. However, the limitations upon the secular use of these forms of communication may also be held applicable to its religious use. The Court thus noted as significant the peculiar nature of the television as a mode of communication that has a wide and virtually uncontrolled reach—a factor that is also taken into account by the Court in other free speech cases. Thus, following the principle laid down in *American Bible Society* which treats religious expression as the same as other forms of expression, the Court's decision in *Gonzales v. Kalaw Katigbak*[91] and *Eastern Broadcasting Corp. v. Dans, Jr.*[92] giving a different treatment of mass media due to its wide reach, will also apply to religious programs. This treatment was followed in the case of *Iglesia*, but the dissenting opinions of several justices introduced winds of change in the landscape of religious expression.

Justice Padilla dissented from the majority opinion on the first issue. Recognizing the function of the MTRCB as a form of prior restraint, he argued that, "[t]here can be no prior restraints on the exercise of free speech, expression, or religion, unless such exercise poses a clear and present danger of a substantive evil which the State has the right and even duty to prevent."[93] To him, the possibility of abuse of religious freedom is more acceptable than to arm an administrative agency of government with the authority to censor speech and expression. Justice Melo, on the other hand, took judicial notice of the fact that the Iglesia ni Cristo is an established religious organization in Philippine society with a significant number of members. He argued that the television programs of the Iglesia ni Cristo "should not be equated with ordinary movies and television shows which MTRCB is bound by law to monitor for possible abuse"[94] since these religious programs are entitled to the presumption that it will instill moral

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89. *Id.* at 544-45.

90. Karel Dobbelaere, *Towards an Integrated Perspective of the Processes Related to the Descriptive Concept of Secularization* in SOCIOLOGY OF RELIGION, *at* http://findarticles.com (last accessed Apr. 26, 2005).

91. Gonzales v. Kalaw Katigbak, 137 SCRA 717 (1985).

92. Eastern Broadcasting Corp. v. Dans, Jr., 137 SCRA 620 (1985).

93. *Iglesia ni Cristo*, 259 SCRA at 554.

94. *Id.* at 556 (1996).

values and not the contrary. Justice Kapunan[95] also dissented on the first issue on the ground that the television program is a form of dissemination of religious information which is protected by the free exercise clause. He eloquently discussed the protection of religious expression under the free exercise clause: "Free exercise encompasses all shades of expression of religious belief. It includes the right to preach, proselyte and to perform other similar functions."[96]

Justice Kapunan also gave religious expression a preferred position than other forms of expression when he argued that the government cannot interfere with the exercise of religious expression in film or television through prior restraint or review absent a showing of a compelling state interest enforced through the least intrusive means possible. He did not seek to invalidate the MTRCB law on the ground that it is a form of unwarranted prior restraint. Instead, he expressed the preference to religious expression when he argued that "[f]reedom of worship is such a precious commodity in our hierarchy of civil liberties that it cannot be derogated peremptorily by an administrative body or officer who determines, without judicial safeguards, whether or not to allow the exercise of such freedom."[97] What he sought in effect is to exempt the television program from the authority of review of the MTRCB since the least restrictive means in the case is subsequent punishment instead of inflicting prior restraint.

A close examination of the dissenting opinions in the case shows an attempt by several Justices to modify the landscape of religious expression. The prevailing trend from *American Bible Society* to *Ebralinag* is that religious expression is treated in the same way as other constitutionally protected speech. Following this proposition, the special circumstances of using mass media to disseminate religious expression was also subjected to greater amount of control. Non-religious expression made through broadcast media by their nature and scope, are subject to greater regulation than other forms of expression. Summing up the separate opinions of Justices Melo, Kapunan, and Mendoza, their argument is that religious expression occupies a preferred position over non-religious expression in the same way as religious conduct occupies a preferred position over non-religious conduct. This theory however, did not prevail over the trend originating from *American*

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95. While obviously assuming a libertarian position, Justice Kapunan nevertheless made a dangerous *obiter* when he said that "[b]ecause of its exalted position in our hierarchy of civil rights the realm of religious *belief* is generally insulated from state action and state interference with such *belief* is *allowed* only in extreme cases" *Id.* at 559 (emphasis supplied). This is a departure from the traditional distinction of the right to religious belief, which is absolute, and right to religious conduct, which may be subject to limitation.

96. *Id.* at 559-60 (emphasis supplied).

97. *Id.* at 570.

Bible Society that treated religious expression in the same manner as other forms of expression. *Iglesia* therefore, is an attempt, albeit unsuccessful, to liberalize and expand the boundaries of the freedom of religious expression.

The regulation of religious expression without doubt falls under the police power interest of the state. The number of decisions of the Philippine Supreme Court on religious expression shows that this area of free exercise jurisprudence is relatively more developed than free exercise cases involving religiously motivated conduct. The various cases which were discussed earlier followed a trend of treating religious expression in the same manner as other forms of expression. However, the unique circumstances of each case contributed to the development of this area of religious freedom. *American Bible Society* for instance, made the sale of religious literature, even if for a small profit, an act of religious dissemination which is protected by the free exercise and free expression clauses. On the other hand, the case of *Ebralinag* is an example that silence or non-expression, is also expressive conduct which is constitutionally protected as well. Moreover, it also emphasized the inclusion within the ambit of religious freedom the inability of government to classify what is religious and what is not when a genuine free exercise claim is raised. Moreover, *Iglesia* is an example of how the government can regulate religious expression which is shown through broadcast media.

What is important however is that religious expression is afforded the same constitutional protection as other forms of expression. Arguably it may be said that insofar as religious expression is concerned, the free exercise clause becomes a superfluity since the expression is constitutionally protected by the free expression clause of the Constitution.[98] Thus, analysis of free exercise cases involving religious expression may be done using established jurisprudence in free expression.

B. Conduct

When the free exercise clause uses the word "exercise," it means that what it seeks to protect are not limited to religious expression such as prayers and acts of worship, but rather the wide array of other actions that are either religiously motivated. Under this liberal interpretation of the free exercise clause, not only religious beliefs and expression, but also conduct, is protected.

Among belief, expression, and action, it is actions which are subjected to the greatest amount of regulation by the state. Regulation may come in many forms, which is the subject of this study.

1. Criminal Laws

98. PHIL. CONST. art. III, § 4.

There is perhaps no other characteristic of a well developed legal system than the presence of a system of public criminal law. This is primarily because the preservation of public order, which is an essential element in any modern society, largely depends upon the strong arm of criminal law.[99] The imposition of criminal liability, through the power of the state machinery is the strongest formal condemnation that society can inflict upon the person.[100] One of the main principles underlying the penal laws of the Philippines is the principle of generality. Statutorily, this principle is expressed in the Civil Code, which states that "[p]enal laws... shall be obligatory upon all who live or sojourn in Philippine territory..."[101]

Davis v. Beason[102] is the leading American case on religious freedom in relation to criminal law. This case involved a prosecution for violation of the state's anti-polygamy statute. The accused in both cases invoked their religious beliefs as a defense against incurring criminal liability. The United States Supreme Court rejected the invocation of religious freedom and declared that "[c]rime is not less odious, because sanctioned by what any particular sect may designate as religion."[103]

No challenge has been raised to the principle that religious freedom cannot be an excuse to commit acts that have been generally recognized as criminal such as murder, rape, physical injuries, robbery, and other similar acts. Of more interest is the question of whether religious freedom can serve as an excuse from acts considered as criminal by special laws. The case of *Centeno v. Villalon-Pornillos*[104] is illuminating to a certain extent. In this case, officers of a civic organization known as the *Samahang Katandaan ng Nayon ng Tikay*, the petitioners, were prosecuted for violating Presidential Decree No. 1564, or the Solicitation Permit Law. They launched a fund raising drive in order to renovate the chapel of their barrio by soliciting money from various persons, including the Judge Adoracion Angeles, who filed the complaint on the ground that solicitation was made without prior permit from the Department of Social Welfare and Development in violation of the Solicitation Permit Law. The majority opinion avoided ruling on religious freedom by construing "charitable purposes" as not contemplating religious purposes. Nevertheless, it delved upon the free exercise issue by ruling that:

> [E]ven the exercise of religion may be regulated, at some slight inconvenience, in order that the State may protect its citizens from injury.

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99. WILLIAM SEAGLE, THE QUEST FOR LAW 227-52 (1941).

100. ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 1 (2nd ed. 1995).

101. CIVIL CODE, art. 14.

102. Davis v. Beason, 133 U.S. 333 (1890).

103. *Id.* at 338.

104. Centeno v. Villalon-Pornillos, 236 SCRA 197 (1994).

> Without a doubt, a State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent. The State is likewise free to regulate the time and manner of solicitation generally, in the interest of public safety, peace, comfort, or convenience.
>
> It does not follow, therefore, from the constitutional guaranties of the free exercise of religion that everything which may be so can be tolerated. [It] has been said that a law advancing a legitimate governmental interest is not necessarily invalid as one interfering with the "free exercise" of religion merely because it also incidentally has a detrimental effect on the adherents of one or more religion. Thus, the general regulation, in the public interest, of solicitation, which does not involve any religious test and does not unreasonably obstruct or unreasonably delay the collection of funds, is not open to any constitutional objection, even though the collection be for a religious purpose. Such regulation would not constitute a prohibited previous restraint on the free exercise of religion or interpose an inadmissible obstacle to its exercise.[105]

The state interest in *Centeno* involves the police power of the state as expressed through criminal legislation. The decision itself impliedly recognized the law as an exercise of the government's police power when it said that "even the exercise of religion may be regulated, at some slight inconvenience, in order that the State may *protect its citizens from injury*."[106]

This statement of the Court that the Solicitation Permit Law does not infringe upon the religious freedom of the petitioners suggests the Supreme Court's position that, in its exercise of police power through criminal legislation, the State's interest overrides the interest of the religious adherent. *Centeno* was not really decided on the free exercise clause issue because the Court veered away from it by construing the law liberally in favor of the accused. However, the statement of the majority opinion shows how the Supreme Court could have decided the issue had the law included religious purposes within its terms.

The effect of the distinction between expression and conduct in terms of the scope of police power in *Centeno* can be ascertained when it is compared to the case of *Schneider v. State of New Jersey,*[107] dealing with a similar situation but reaching a different result. *Schneider* involved an ordinance which prohibited a person from canvassing, soliciting, or distributing circulars or other matters from house to house without first obtaining a written permit from the Chief of Police or officer-in-charge of the police headquarters and only from nine in the morning until five in the afternoon.

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105. *Id.* at 207.

106. *Id.* (emphasis supplied).

107. Schneider v. State of New Jersey, 308 U.S. 147 (1939).

The petitioner, a member of the Jehovah's Witnesses, was arrested, charged, and convicted under said ordinance for going from house to house all day and night without a permit. Petitioner showed the occupants a testimony and identification card stating that she would leave some booklets discussing problems affecting the person interviewed and that by contributing a small sum, that person would make possible the printing of more booklets. Petitioner claimed that she did not apply for or obtain a permit under the ordinance because she believed that doing so would be an act of disobedience to God's command.

The Supreme Court described the ordinance as giving the police officer the power of a censor who can determine what literature may be distributed and who may distribute it. The ordinance was also intrusive in the sense that the applicant must go through an "inquisitorial examination" before she may be allowed to disseminate religious information. While the Court recognized the interest of the town in prohibiting fraudulent appeals in the name of charity of religion, it held that this was not a sufficient justification to give the police officers the authority to determine which ideas could be disseminated and which could not. It added that this interest could be denounced through subsequent punishment.

The difference between *Centeno* and *Schneider* is readily apparent. *Centeno* involves religiously motivated conduct of soliciting contributions for religious purposes while *Schneider* which is similar to *American Bible Society*, involves religiously motivated expression of disseminating religious information. The effect of the difference is that unlike solicitation for contribution which can hardly be considered as religious expression, the dissemination of religious literature was afforded the protection given to other forms of expression. Moreover, while *Schneider* also involves solicitation, this activity was viewed by the Court in relation to the expressive activity of disseminating religious literature. It may then be said that while *Centeno* and *Schneider* have similar circumstances, the latter case more closely approximates *American Bible Society* in terms of delineating the protection afforded to religiously motivated activity as expressive conduct.

Following *Centeno*, when the police power interest of the State is expressed in terms of criminal legislation, the fact that the law is neutral and of general application is sufficient and there is no need on the part of the government to justify its applicability to religious objectors by showing a compelling state interest. This is a divergence from the Court's view in *Estrada* which makes a *carte blanche* reference to the compelling state interest test as the yard stick in free exercise cases. The question then is whether under this characterization, the *Smith* rule, contrary to the Supreme Court's ruling in *Estrada*, would then be applicable.

In the case of *Employment Division v. Smith*,[108] two employees were removed from work on the ground of misconduct for drug use. The plaintiffs were members of a Native American religion that exercised the ingestion of peyote, a hallucinogenic, for sacramental purposes. Their applications for employment compensation were denied on the ground that their dismissal was based on work-related misconduct. The Court held that the free exercise clause did not prohibit the State from prohibiting sacramental peyote use and from denying employment benefits to persons discharged for such use. In a sweeping, categorical fashion, the majority opinion declared that, "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability..."[109]

A subservience to *Smith* however, does not necessarily mean that a strict scrutiny of criminal laws will never be possible if it conflicts with religious freedom. The case of *Church of Lukumi Babalu Aye v. City of Hialeah*[110] is instructive. In this case, a city council, upon learning of the plans of the petitioner church, which practiced animal sacrifice as part of its ritual, to establish a house of worship and other facilities there, enacted an ordinance adopting the state animal cruelty laws and thus punishing whoever unnecessarily or cruelly killed an animal; this included the slaughter of animals for religious reasons. Another ordinance was passed defining "sacrifice" as to unnecessarily kill an animal in a ritual not for the primary purpose of food consumption. The city justified its position on the basis of the government's police power to protect public health and sanitation, and noted that the religious practices of the religion were inconsistent with public morals, peace, safety, and public health.

The United States Supreme Court declared the ordinances unconstitutional after subjecting them to strict scrutiny and finding that they failed to pass the *Smith* standard. Under *Smith*, while a law that burdens religious practice need not be justified by a compelling governmental interest if it is neutral and of general applicability, laws which are not neutral and not of general application are required to undergo the "most rigorous of scrutiny" by a showing that it is justified by a compelling governmental interest, and tailored to promote that interest.[111] The Court found that the ordinances pursued the interest of government only against conduct motivated by religious belief and that all were overbroad or underinclusive, since the objectives of the law, such as promotion of public health and prevention of cruelty to animals, were not being pursued with respect to

108. Employment Division v. Smith, 494 U.S. 872 (1990).

109. *Id.* at 879.

110. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

111. *Id.* at 533.

nonreligious conduct.[112] Finding that these analogous actions were not prohibited when the supposed interest to be promoted by the prohibition should have included such actions within the purview of the ordinances, the Court found no compelling state interest that would justify the validity of the ordinances.

It is difficult for the Court to declare that the Philippines has always adopted the benevolent neutrality theory because *Centeno* points rather to the direction of *Smith's* strict neutrality principle. The Supreme Court's decision in *Centeno* can be used as basis to argue that the Court's *ratio decidendi* in *Estrada* cannot be extended completely to criminal laws. To the extent that *Centeno* follows *Smith,* it is thus incompatible with *Estrada,* which is instead a departure from *Smith.* Indeed, while a *carte blanche* application of the compelling state interest test even in criminal laws will be inconsistent with *Centeno*, a similar application of the *Smith* standard of general and neutral laws is, however, inconsistent with the decision in *Wisconsin v. Yoder*[113]—which presented an instance wherein the free exercise clause was used as basis of exemption from a penal law.

Yoder involved Wisconsin's compulsory school attendance law which requires parents to cause their children to attend school until reaching the age of 16. The respondents in this case were prosecuted and convicted under this statute for refusing to send their children ages 14 and 15 to school after completing eighth grade. The respondents were members of the Old order Amish communities who believed that salvation depended in living a life in a church and community which is separate and apart from the world and other worldly influence. Their objection to formal education beyond the eighth grade was based on their view that secondary school education exposes their children to a worldly influence in conflict with their religious beliefs.

Acquitting the respondents, the Supreme Court argued that the State's interest in universal education was not immune from a balancing process when it impinges on other fundamental rights, such as the rights of the parents with respect to the religious upbringing of their children. While conceding that religiously grounded conduct could be subjected to the broad police power of the State, the Court added that this did not deny the fact that, "there are areas of conduct which are protected by the Free Exercise clause and beyond the power of the State to control, *even under regulations of general applicability*."[114] After scrutinizing the interest of the State in universal education and the interest of the parents in the religious upbringing of their children, the Court held that the State's interest cannot override the religious beliefs and practices of the Amish community. The law in effect subjected

112. *Id.* at 543-44.

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

114. *Id.* at 220 (emphasis supplied).

the respondents to choosing between their conscience, which violated the law, or the law, which violated their consciences: a choice which the Court found to be unjustified by a recognized State interest of universal education.

The cases discussed above create a dilemma. If an absolutist position with respect to penal laws in the tradition of *Smith* and *Centeno* is taken, then the Philippine free exercise clause, which adopts a benevolent neutrality policy, can never admit of the possibility of exemption in the fashion of *Yoder*. The test would then be reduced to whether the law is penal in nature or not. It is submitted that this justification is insufficient since under such an interpretation, the Court would have to surrender its power to decide free exercise claims to the determination of the legislature. As stated earlier, there are free exercise accommodations that are constitutionally compelled. However, since the legislature cannot account for all religious beliefs and practices, the courts can provide these accommodations by carving out exemptions from generally applicable laws. This power of the courts cannot be taken away by the legislature for if such is the case, then the guarantee of religious freedom can be easily nullified. It is submitted that the boundary of the free exercise clause must be sought elsewhere.

2. Morality

The third area under the police power interest of the State which conflicts with religious freedom is morality. In the case of *Reynolds v. United States*,[115] George Reynolds, a practicing Mormon, was prosecuted for violating the law against bigamy. Among the several defenses he raised was that, at the time of his second marriage, he was a member of the Mormon Church, which allegedly required every male member to practice polygamy. The Supreme Court argued that the free exercise clause deprived Congress the exercise of its legislative power only over mere opinion, "but was left free to reach actions which were in violation of social duties or subversive of good order."[116] It said:

> [The statute] is Constitutional and valid as prescribing a rule of action for... places over which the United States have exclusive control. This being so, the only question is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices.[117]

115. Reynolds v. United States, 98 U.S. 145 (1878).

116. *Id.* at 164.

117. *Id.* at 166.

The Court concluded that exemption from the law could not be possible, for, doing so amounted to making religious beliefs superior to the law of the land and making every citizen become a law unto himself.

This reasoning has delineated the boundary separating the free exercise clause and the political process. Religiously motivated actions, according to the *Reynolds* Court, can never be an excuse from committing acts which are prohibited by the legislature. Relating this to morality, it is within the power of the legislature to proscribe conduct which is immoral. This is referred to as public or secular morality.

In *Sulu Islamic Association of Masjid Lambayong v. Malik*,[118] the question raised was whether the respondent judge could be held administratively liable under the Civil Service Law for immorality, due to the fact that he was engaging in an adulterous relationship with another woman, with whom he had three children. Dismissing the accusation, our own Supreme Court reasoned:

> Since Art. 180 of P.D. No. 1083, otherwise known as the Code of Muslim Personal Laws of the Philippines, provides that penal laws relative to the crime of bigamy '*shall not apply to persons married*... under Muslim Law,' it is not 'immoral' by Muslim standard for Judge Malik to marry a second time while his first marriage exists.[119]

The above quote implies that the respondent would be exempted from the application of the law not because of his religious beliefs but rather because there is another law which exempts him from the coverage of the former. This means that had the legislature not made an accommodation of his religion, he would, of necessity, been held liable.

The implication of *Sulu Islamic* is found in *People v. Bitdu*,[120] which involved a prosecution for bigamy of a Muslim woman who raised the defense that under Muslim religious customs, she validly divorced her husband. Having been decided in 1933, there was at the time no law recognizing Muslim divorce. Rejecting this defense, the Court held:

> In the Philippine Islands we have a law (Act. No. 2710) enumerating the causes and conditions under which divorce may be secured and granted. Any divorce obtained in the Philippine Islands for causes and under conditions other than those enumerated in the said law, would have no legal effect. The habits and customs of a people, *the dogmas and doctrines of a religion cannot be superior to or have precedence over laws relating to public policy.*[121]

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118. Sulu Islamic Association of Masjid Lambayong v. Malik, 226 SCRA 193 (1993).

119. *Id.* at 199 (emphasis supplied).

120. People v. Bitdu, 58 Phil. 817 (1933).

121. *Id.* at 819 (emphasis supplied).

The principles stated earlier regarding morality were modified by *Estrada v. Escritor.*[122] In resolving the dispute, the Court made a distinction between public and secular morality on one hand, and *religious morality* on the other. While the circumstances presented in *Estrada* were similar to previous cases declaring adulterous affairs disgraceful and immoral, the Court noted that religious motivation should and does serve as a "distinguishing factor,"[123] thereby compelling it to subject the case to a free exercise inquiry instead.

In *Estrada*, the Court held that it could not be denied that the values which society defines as moral or immoral are usually the perception of the majority, while minority groups are left without political clout to express their own views on the matter. Morality, indeed, is not built upon the concurrence in the opinions of *all* as Justice Paras has said,[124] but rather upon the concurrence of the majority. In *Estrada,* however, the Court held that this prevalence of majority-imposed values should not be when religious freedom is implicated. Thus:

> In a democracy, this common agreement on political and moral ideas is distilled in the public square... Citizens are the bearers of opinion, including opinion shaped by, or espousing religious belief, and these citizens have equal access to the public square. In this representative democracy, the state is prohibited from determining which convictions and moral judgments may be proposed for public deliberation. Through a constitutionally designed process, the people deliberate and decide. Majority rule is a necessary principle in this democratic governance. Thus, when public deliberation on moral judgments is finally crystallized into law, the laws will largely reflect the beliefs and preferences of the majority... In the realm of religious exercise, benevolent neutrality that gives room for accommodation carries out this promise, provided the compelling interests of the state are not eroded for the preservation of the state is necessary to the preservation of religious liberty. That is why benevolent neutrality is necessary in a pluralistic society such... to accommodate those minority religions which are politically powerless.[125]

Estrada did to religious conduct what the Court failed to do to religious expression, which is to treat the religiously motivated actions as different from other actions.

C. Principle of Harm: What Constitutes Harm

As earlier shown, a blanket application of *Smith* to criminal laws would be inconsistent with the accommodationist position, thereby making *Yoder*

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122. Estrada v. Escritor, 408 SCRA 1 (2003).

123. *Id.* at 172 (2003). The act in question being the co-habitation of a widow with a married man, and their having borne a child together.

124. Magno v. Court of Appeals, 210 SCRA 471, 479 (1992).

125. *Id.* at 174-75.

impossible. A blanket application of the compelling state interest test, on the other hand, would ignore the fact that religion can never be used as a justification to injure another person. There is thus, a need to identify the proper standard in this case.

It is proposed that the principle of harm by John Stuart Mill may be used as a framework of delineating the boundary of the free exercise clause under the police power interest of the State. According to Mill, there are actions which should not be subject to regulation of the State since they do not cause harm to others; conversely, if those actions do cause harm, then that is precisely the reason why state regulation may be allowed. The sphere of outward individual conduct which is safeguarded by this principle includes those actions that primarily affect the agent alone and those actions that affect other people solely insofar as they believe such actions to be right or wrong. Under the second category, on the other hand, the "conceived" harm is the distress which a certain conduct causes to some people who believe such act to be immoral. Such distress however, is not the kind of harm which would warrant government intervention or regulation because the opinion of others concerning the wisdom and foolishness of an act is not harm and does not justify regulation of such act.

Mill then continues to outline the kinds of outward conduct which cause harm to others. The first is physical or material harm. Religious beliefs cannot be used as a justification to cause physical or material injury to another. He also conceives, as a form of harm, a violation of a distinct and assignable obligation to any other person. This obligation should also include the duty not to disturb the peace of the community.

Following the above mentioned principle, criminal laws, aside from its traditional classification, may be divided between those acts and omissions which are penalized because they cause harm to others, and those which do not cause harm to others, but are nevertheless penalized for violating some established notion of public policy, public interest, or morality. This view is more consistent with the theory of social contract and the nature of criminal laws. And, in the creation of society through the social contract, people waive their liberty to *harm* others so that others will not *harm* them. [126]

What is essential therefore in society is that people should not cause harm to one another. It generally happens that criminal laws are enacted to penalize acts that cause harm to other persons such as murder, robbery, estafa, kidnapping, and other similar crimes. However, as shown earlier, there are criminal laws that are enacted because of public interest or morals, which do not necessarily cause harm to others. At the same time, there are also acts which cause harm to others, not punished by penal laws, but are

126. Thomas Hobbes, *Leviathan in* 1 THE GREAT POLITICAL THEORIES 329-50 (Michael Curtis ed. 1981).

nevertheless covered by the law on human relations under the Civil Code.[127] Thus, equating criminal law as the absolute limit of religious freedom is overbroad and under inclusive at the same time.

First, to do so would result in over-breadth, since there will no longer be any chance of religious exemptions because the legislature says so, consequently nullifying the possibility of a Philippine free exercise jurisprudence similar to *Yoder*. Second, it would be under-inclusive because, while no exemption is allowed if a penal law is involved, a case should nevertheless be subjected to strict scrutiny because harm is caused to another person.[128] By using "harm" instead of the nature of the law as the boundary, these two problems may be addressed, and the courts are empowered to adjudicate free exercise claims without having to relinquish its power to the determination of the legislature.

In *Lawrence v. Texas*,[129] the United States Supreme Court invalidated a Texas statute making it a crime for two persons of the same sex to engage in sodomy. The Court recognized the purpose of anti-sodomy laws as a way of punishing that predatory sexual acts that did not constitute rape. However, it also recognized that the purpose of the law did not cover consensual acts unless the law declared it as immoral.[130] When the conduct is consensual however, "[l]iberty presumes an autonomy that includes freedom of thought, belief, expression, and certain intimate conduct."[131] The State cannot exert its power over certain intimate relationships absent an injury to a person or abuse of an institution which the law protects. One of the promises of the Constitution is to prohibit the government from entering the realm of personal liberty.

Lawrence recognizes the fact that matters involving the most intimate and personal choices a person may make in a lifetime are central to the liberty protected by the due process clause. It is submitted that just as physical intimacy between two persons is afforded constitutional protection, the spiritual intimacy between a person and his creator and among persons of the same religion should be afforded the same constitutional protection, absent a showing of harm. *Lawrence* thus exposes the weakness of the *Smith* Court's reasoning. The fact that a certain act is made criminal by the legislature does

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127. CIVIL CODE, arts. 19-21.

128. Velayo v. Shell Co. of the Phils., Inc., 100 Phil. 186 (1956).

129. Lawrence v. Texas, 539 U.S. 558 (2003).

130. *Id.* at 664 (citing Bowers v. Hardwick, 478 U.S. 186 (1986)). ("The Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family.").

131. *Id.* at 668.

not make an infringement upon recognized liberties unconstitutional, absent a showing of infringement upon the liberties of others.

The standard of "harm" however, is not very clear cut. There are situations when the existence of harm is an issue by itself. Several judicial pronouncements are important in this respect. For example, in the case of *Yoder*, the very question that may be raised is that given the judicial attitude of protecting children, does the refusal of the Amish parents to allow their children to attain secondary education, which the State has a high interest, constitute harm? The Court's resolution of the issue is that it does not. While the case was not resolved in a circumstance where the child was prevented from studying contrary to his/her own desire, the principle that may be abstracted from *Yoder* is that the courts should refuse to impute that not choosing the "best life possible" constituted harm. On the other hand, in *Ebralinag*, the Court suggested that a different conclusion would have been made if the students disrupt the flag raising ceremonies; and, in *Estrada*, the majority considered as an important factor the fact that the administrative case was not filed by the legal spouse of petitioner's husband.

In the case of *US v. Lee*[132] which was discussed under the revenue raising interest of the state, it may be inferred that the denial of statutorily granted rights of another person on the ground of religious scruples constitutes harm. This principle is also implied from the case of *Briones v. South Philippine Union.*[133] The question that was presented was whether a religious corporation could withhold retirement benefits of a retired member/minister who had previously been excommunicated and "disfellowed." The Court held that since the petitioner had already retired, he already had a *vested right* to receive retirement benefits and this right could not be divested from him by expulsion or excommunication. In addition, the Court also held that the petitioner's act of establishing a rival church was not an actionable wrong. It was, as held by the Court, "a perfectly legitimate exercise of one's freedom of religion enshrined in our Constitution."[134]

Thus, while Congress cannot prohibit religious freedom whether expressly or impliedly, unless a compelling state interest intervenes, it can create rights of persons through the enactment of laws. When a right is thus granted by law to another person, it is submitted that this cannot be taken away by reason of someone else's religious scruples, since that would amount to an unwarranted imposition of the religious beliefs of another.

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132. United States v. Lee, 455 U.S. 252 (1982).

133. Briones v. South Philippines Union Mission of the Seventh Day Adventist Church, 307 SCRA 497 (1999).

134. *Id.* at 508.

The question of harm may also be addressed by looking at the parties involved in a given transaction. For example, in the case of *Jehovah's Witnesses v. King County Hospital*,[135] the United States Supreme Court displayed a more sympathetic attitude to the state interest in looking after the welfare of children. It held that the state may protect children from physical harm at the hands of their religiously motivated parents or guardians who believe that a blood transfusion, although necessary to save the life of the child, is not allowed by the tenets of their faith. Similarly, in the case of *Prince v. Massachussets*,[136] the Court upheld the government's proffered interest in protecting children from burdensome and exploitative labor.

The most important test that may be employed to operationalize the principle of harm is the concept of damages. The Supreme Court defined damages in the case of *People v. Ballesteros*[137] as the "pecuniary compensation, recompense, or satisfaction for an injury sustained, or as otherwise expressed, the pecuniary consequences which the law imposes for the breach of some duty or violation of rights."[138] In order to be entitled to damages, the person claiming it must prove that his rights were violated by the defendant in violation of a legal duty which the defendant owes to him, whatever the source of obligation it may arise from. Thus, in legal terms, there is "harm" when the harm results in liability for damages.

This test effectively encompasses numerous situations involving the principle of harm since it covers both civil and criminal cases. In case of quasi-delicts, the liability of the author to the injured person is based on equity, in that a person cannot prejudice another by his own fault or negligence.[139] Thus, even in the exercise of one's rights to religious freedom, he/she must give due regard to the rights of others, failure of which can be a ground for liability for damages. Thus, the Civil Code provision on human relations provides that, "[e]very person must, *in the exercise of his rights* and the performance of his duties, act with justice, give everyone his due, and observe honesty and good faith."[140]

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135. Jehovah's Witnesses v. King County Hospital, 390 U.S. 598 (1968).

136. Prince v. Massachusetts, 321 U.S. 158 (1944).

137. People v. Ballesteros, 285 SCRA 438 (1998).

138. *Id.* at 448.

139. 4 ARTURO TOLENTINO, CIVIL CODE OF THE PHILIPPINES: OBLIGATIONS AND CONTRACTS 83 (1987 ed.).

140. CIVIL CODE, art. 19 (emphasis supplied).

More importantly, one of the main principles in criminal law is that every person criminally liable is also civilly liable.[141] Justice Mariano Albert explained the basis of civil liability arising from a crime, to wit:

> Oftentimes, the commission of a crime causes not only moral evil but also material damage. From this fact the rule has been established that every person criminally liable for a felony is also civilly liable. Not every crime, however, causes material injury... But whenever the criminal liability of the person is established, and as a result of the offense committed there is some harm to be indemnified or compensated, the Court must determine the civil liability incurred by him.
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> The declaration which this [Revised Penal] Code makes to the effect that every person criminally liable for felony is also civilly liable seems to convey the idea that civil liability arises precisely from the commission of the crime, when as a matter of fact, it arises from the duty everybody has of making good the damages he may occasion another by his acts, whenever these are contrary to law, whether or not he was aware of what he was doing. That is why, in contrast with penalty, which can only be imposed upon one who is conscious of his acts, civil liability may be exacted of an imbecile or a madman, or even an infant under nine, or other persons exempt from criminal liability, and is spread out until things are left as far as possible in the state which they were before the lawful act was performed.[142]

Thus, when a religious adherent violates a penal law by reason of his/her religious beliefs, the test to determine if it falls within the ambit of the principle of harm as herein contemplated is whether there is civil liability in the form of damages that will arise together with criminal liability. Damages presuppose the existence of injury in its real and material sense; that is, the situation of the person injured has been changed and he/she has become less of what he/she is before the act or omission causing the injury. As stated earlier, religious freedom cannot be defeated by reason of public policy alone, because it must be weighed with the public policy of protecting religious freedom as well. However, it is equally important to note that, religious freedom cannot be used as an excuse to cause harm to others, and the law rightly provides the standard of harm, which is the concept of damages.

For example, under the Revised Penal Code, one can be held civilly liable for damages for committing physical injuries or homicide because in these situations, there is an injury caused to another person, such as loss of earning capacity, expenses for hospitalization or burial, or moral damages. In this sense, the law recognizes that the act of committing these crimes caused

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141. An Act Revising the Penal Code and Other Penal Laws [REVISED PENAL CODE] art. 100.

142. MARIANO ALBERT, REVISED PENAL CODE 407-8 (1948 ed.).

damage to another person, and for which reason, such injured party is entitled to be indemnified. In these cases, religious freedom cannot be invoked for there is a compelling state interest in allowing the injured person recovery for losses sustained. Otherwise, it would be allowing the religious adherent to impose his beliefs upon the injured party. Moreover, public order also demands that recovery be allowed or it would be encouraging the injured party to take the law into his own hands in order to recover his loss.

On the other hand, there are also provisions under the Revised Penal Code and other special penal laws which declare certain acts as criminally punishable but do not involve the award of damages. For example, offenses against decency and good customs under the Revised Penal Code are penalized for violating the proper observance of social norms on modesty, good taste, and social conventions. However, these acts are not punished because it causes a direct and material harm to others. In these cases therefore, the principle of harm does not apply and the Court should apply the strict scrutiny approach.

IV. ADMINISTRATIVE INTEREST OF GOVERNMENT

While the police power interest of the government refers to the limitation of individual rights for the common good, the administrative interest of government refers to the interest in the performance by public officers of their duties and the conduct of carrying out the myriad activities of government through its various agencies and offices. The administrative interest of government is the "legitimate conduct by government of its own affairs."[143] The emphasis in this study of the administrative interest of government in relation to religious freedom is that the manner by which government conducts its affairs may possibly conflict with the religious scruples of some people.

A. Internal Affairs

The case of *Bowen v. Roy*[144] presented the question of whether the free exercise clause compelled the government to accommodate a religiously based objection to the requirement that a social security number be given by an applicant to a welfare program to be used by the State in administering the program. Appellees, parents of a two year old child named Little Bird of the Snow, applied for and received benefits under several government welfare programs. However, they refused to comply with the requirement that the participants in these programs should furnish the state welfare agencies with Social Security numbers as a condition for receiving the

143. Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988).

144. Bowen v. Roy, 476 U.S. 693 (1986).

benefits. The refusal was based on their religious beliefs, as Native Americans, that obtaining and using a number for their two year old daughter would rob her of her spirit. The welfare department terminated the appellees' benefits and filed a case to reduce the amount of food stamps given to appellees' household.

In resolving the issue, the majority distinguished between an instance where the government requires an individual to act in violation of his religious beliefs, and one where the government is required by an individual to act in accordance with his religious beliefs. In the latter situation, the Court declared that "[t]he Free Exercise Clause simply cannot be understood to require government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens."[145] Using a strange analogy, the Court said that "Roy may no more prevail on his religious objection to the government's use of a Social Security number for his daughter than he could on a sincere religious objection to the size or color of the government's filing cabinets."[146] The interest of the government in this instance is that of record-keeping to detect the filing of fraudulent claims.

In resolving the issue, Chief Justice Burger made a new standard of analysis in free exercise jurisprudence. According to him, the strict scrutiny test should not be applied under the setting presented in this case, which involved the enforcement of a facially neutral and uniformly applicable requirement for the administration of welfare programs reaching millions of people. This situation, according to him was less intrusive than the affirmative compulsion or prohibition presented in the cases of *Yoder* and *Sherbert*.

This opinion, however, was not free from scrutiny by the other justices of the Court. Justice O'Connor, joined by others, partly objected to the formulation of this new standard. What could be observed from the majority decision was the danger that its reach could become overbroad and possibly result in the denial of applying the strict scrutiny test in cases where it should have otherwise been required. The majority simply declared that the fact that the condition precedent for obtaining the benefits was general and uniformly applicable already removed it from the strict scrutiny test under which, the government must show that the requirement is justified by a compelling interest.

It had never been denied, however, that the government already had in its possession the social security number of the girl. The interest of the government in detecting welfare fraud could be satisfied without requiring

145. *Id.* at 699.

146. *Id.* at 700.

appellees from giving information which it already had. There should have been a distinction in this case between the interest of the government in *using* the social security numbers of welfare applicants for record keeping purposes and its interest in *requiring* the applicants to provide this information for administrative efficiency. Contrary to the *ratio* that the government cannot be compelled by the free exercise clause to conduct its *internal* affairs in accordance with the religious scruples of a person, the challenged law in this case required the parents to *act* contrary to their religious beliefs. The analysis of the majority opinion was incomplete since it neglected the fact that even the internal administrative interest of government can have outward implications that impinge upon the religious freedom of individuals. The burden in this case is evident, since the requirement of furnishing a social security number forced the parents to choose between their child's physical health and her spiritual well-being.

While the administrative interest of government mainly refers to the government's internal affairs, it cannot be said that this characteristic of this particular interest completely insulates it from the strict scrutiny approach mandated by the free exercise clause. The above case illustrates an instance where an administrative requirement of government can burden the religious convictions of individuals.

The danger created by the majority opinion in *Bowen* in creating a new standard was realized in the case of *Lyng v. Northwest Indian Cemetery Protective Association.*[147] In this case, the United States Forest Service initiated the construction of a six mile long connecting road through an area within a National Forest, which had been historically used by members of three Indian tribes for various religious rituals. A study commissioned by the Forest Service found that specific sites within the area were used for religious purposes and that the use of the area for such purposes depended on privacy, silence, and an undisturbed natural setting. The Forest Service nevertheless rejected said assessment and adopted its own version which supported its construction project.

A divided United States Supreme Court upheld the action of the Forest Service and rejected the contention that its action violated the free exercise clause of the Constitution; all the while relying heavily on *Bowen.* The Court held that the incidental effect of government programs which make it more difficult to practice certain religions but which have no tendency to coerce individuals to act contrary to their beliefs would not require the government to show a compelling justification. While admitting that the logging and road-building projects would have devastating effects on traditional Indian religious practices, the Court believed that such a

147. Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988).

contention would be immaterial considering that "the location of the line [between unconstitutional prohibitions on the free exercise of religion and legitimate conduct by government of its own affairs] cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development"[148] because if this is done, "government simply could not operate if it were required to satisfy every citizen's religious needs and desires."[149]

Describing the majority opinion as "unremarkable," Justice Brennan dissented on the ground that the Court's opinion that the free exercise clause bars only outright prohibitions, indirect coercion, and penalties on the free exercise of religion and not other incidental effects of government programs was not supported by jurisprudence implicating free exercise concerns whenever there is a restraint on religious conduct. He also rejected the argument that the present case falls squarely within the analysis of *Bowen.* According to him, the majority opinion ignored *Bowen's* emphasis on the internal nature of the government practice at issue in that case. Such a misreading created a very dangerous precedent, in that any governmental action that could virtually destroy a religion would, nevertheless, not trigger a constitutional free exercise inquiry.

Bowen and *Lyng*[150] therefore, yield the analysis that it is the form of government's restraint on religious practice, rather than its effects, which controls a constitutional analysis. The majority opinion thus created a form of injury to the free exercise of religion which is nevertheless non-constitutional. However, this ignores the fact that the government can commit a violation of human rights not only when it directly commits such violation but also when it fails to provide an environment by which these rights may be exercised fully. It is submitted that under a benevolent neutrality approach of the free exercise clause under this category, the key is not merely the nature of the action but more importantly its consequence on the exercise of religion.

In the Philippines, the administrative interest of government which purportedly created a burden on religious freedom was presented in *Tolentino v. Secretary of Finance.*[151] Petitioner Philippine Bible Society questioned the registration provision of R.A. No. 7716 on the ground that it amounted to prior restraint of religious expression. Rejecting this contention, the Court

148. *Id.* at 451.

149. *Id.* at 452.

150. Unlike in *Smith,* the Court in these cases did not argue that the compelling state interest test was applicable only to limited cases, such as unemployment compensation. On the contrary, the reasoning was that *Bowen* and *Lyng* were exceptions from the general rule in *Sherbert.*

151. Tolentino v. Secretary of Finance, 235 SCRA 630 (1994).

distinguished the case from *American Bible Society* by saying that the fee mentioned in the law was imposed, not for the exercise of a privilege in the nature of a license fee, but only for the purpose of defraying part of the cost of registration, which was a central part of the VAT system then being implemented. Unfortunately however, the Court did not discuss how the registration requirement comprised a central feature of such system. Moreover, the Court concentrated on the *purpose* of the registration requirement without even considering the probable *effect* of such requirement. Under R.A. No. 8424, the failure to register by a covered establishment could be a ground for the suspension of the business operation of a taxpayer by the Commissioner of Internal Revenue.[152] In effect therefore, the registration requirement amounted to a license to operate business operations.

B. Special Categories

Aside from formulating a new category of governmental interest in *Bowen* and *Lyng*, the United States Supreme Court also carved out exemptions to other areas of the government's administrative interest from a free exercise inquiry. Under this interest of government, the courts have often taken into account the specialized needs of particular government agencies. The case of *O'Lone v. Estate of Shabazz*[153] presented the question of whether a standard prison regulation was justified if it infringed upon the religious freedom of some of the Muslim inmates. The challenged policies adopted by the prison officials in this case prevented the inmates stationed outside the main prison building from participating in the *Jumu'ah*, a weekly Muslim congregational service commanded by the Koran. The prison officials justified the policy on the basis that allowing prisoners detailed to work outside to go in at anytime creates unacceptable security risks.

Writing for the majority, Justice Rehnquist emphasized, as an important factor in balancing the interest of government and religious freedom, the fact that the "evaluation of penological objectives is committed to the considered judgment of prison administrators, who are actually charged with and trained in the running of the particular institution under examination."[154] Refusing to apply strict scrutiny, the Court held that, "prison regulations alleged to infringe constitutional rights are judged under a *reasonableness test, less restrictive than ordinarily applied to alleged infringement of fundamental constitutional rights.*[155] Assessing the situation, the Court found the policy reasonable:

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152. National Internal Revenue Code of 1997 [NIRC], Presidential Decree No. 1158 as amended by Republic Act 8424, § 115(b).

153. O'Lone v. Estate of Shabazz, 482 US 342 (1987).

154. *Id.* at 349.

155. *Id.* (emphasis supplied).

> Prison officials testified that the returns from outside work details generated congestion and delays at the main gate, a high risk area in any event. Return requests have also placed pressure on guards supervising outside details, who previously were required to 'evaluate each reason possibly justifying a return to the facilities and either accept or reject that reason.' Rehabilitative concerns further supported the policy; corrections officials sought a simulation of working conditions and responsibilities in society... These legitimate goals were advanced by the prohibition on returns; it cannot seriously be maintained that 'the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational.[156]

The reasonableness standard is dangerous as it amounts to an abdication by the Court of its power of review to the determination by prison officials. This is even worse than the criticism, made earlier, of the Court's abdication of its power to determine free exercise cases to the legislature. Upon deeper analysis, the two justifications used by Justice Rehnquist to deny the free exercise claim, without first applying strict scrutiny, were misleading. First, the assertion that allowing entry into the main prison facility *at any time of the day* would pose unacceptable security risks ignores the fact that the *Jumu'ah* is held only at a specific point in time of the week.[157] Second, the argument that rehabilitative concerns compel the simulation of a working day carelessly assumes that the Muslim inmates will no longer practice the *Jumu'ah* after release from prison. Even more dangerous is the declaration of the Court that the religious freedom of the prisoners was not offended since they were allowed to practice the other rituals of their faith. It would in effect be saying that it is not wrong to infringe upon the religious beliefs of a person if he is nevertheless still allowed to practice other tenets and customs of his religion.

Virtually the same approach was used in the case of *Goldman v. Weinberger*.[158] The issue raised was whether an Orthodox Jew who was a member of the military could be prohibited, by military regulation, from wearing the headgear prescribed by his religion. Again, it was Justice Rehnquist, writing for the majority, who denied the free exercise claim of petitioner. Applying a similar approach as to that used in the prison setting, he argued that the Court's review of military regulations challenged on the ground of violation of First Amendment rights is far more deferential than constitutional review of similar laws or regulations designed for civilian society. He noted that within the context of the military setting, individual autonomy is not the same as that enjoyed in a larger civilian community and the military context demands the fostering of "instinctive obedience, unity,

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156. *Id.* at 350–51.

157. *Id.* at 345. ("Jumu'ah is commanded by the Koran and must be held *every Friday after the sun reaches its zenith* and before before the Asr, or afternoon prayer.").

158. Goldman v. Weinberger, 475 US 503 (1986).

commitment, and esprit de corps."[159] Similar to the requirement of reasonableness mentioned in *O'Lone*, the Court dismissed the petitioner's invocation of religious freedom amidst the interest of the "military's *perceived* need for uniformity."[160] Just as the Court submitted to penological interests, for which prison administrators are the best judges, the Court likewise submitted to the interest of uniformity in the judgment of military officials.

Justice Brennan dissented on the ground that the Court shunned away from its responsibility "by eliminating, in all but name only, judicial review of military regulations that interfere with the fundamental constitutional rights of service personnel."[161] This uncritical deference to the professional judgment of military authorities created a possibility that the Court would accept the conclusion of military authorities, no matter how absurd or unsupported. To him, a free exercise inquiry within the context of the military must have first passed the following test:

> A deferential standard of review, however, need not, and should not mean that the Court must credit arguments that defy common sense. *When a military service burdens the free exercise rights of its members in the name of necessity, it must provide, as an initial matter and at a minimum, a credible explanation of how the contested practice is likely to interfere with the proffered military interest. Unabashed ipse dixit cannot outweigh a constitutional right.*[162]

Examining the case, he argued:

> In the present case, the Air Force assets that its interest in discipline and uniformity would be undermined by an exception to the dress code permitting observant male Orthodox Jews to wear Yarmulkes. The Court simply restates these assertions without offering any explanation how the exception... could interfere with the Air Force's interests. Had the Court given *actual consideration* to Goldman's claim, it would have been compelled to decide in his favor.
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> The contention that the discipline of the Armed Forces will be subverted if Orthodox Jews are allowed to wear Yarmulkes with their uniforms surpasses belief. It lacks support in the record of this case, and the Air Force offers no basis for it as a general proposition. While the perilous slope permits the services arbitrarily to refuse exceptions requested to satisfy mere personal preferences, before the Air Force may burden free exercise rights, it must advance at the very least, a rational reason for doing so.[163]

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159. *Id.* at 507.

160. *Id.* at 510 (emphasis supplied).

161. *Id.* at 515.

162. *Id.* at 516 (emphasis supplied).

163. *Id.* at 517 (emphasis supplied).

What is notable in *O'Lone* and *Goldman* is that, even if the Court was divided as to whether an exemption ought to have been granted or not, it seems that even the justices who sought to adopt a more liberal approach also took the special context as an important consideration in deciding the case. The special circumstances of these cases made a great difference since the Court had to deal with these peculiarities: First, religious freedom was invoked in a context where deprivation of freedom in favor of specialized governmental interests is the norm. Second, the free exercise claimant was the very subject of the specialized governmental interest, which includes the deprivation of certain freedoms in order to achieve the very purpose for which the government agency exists for. Once again however, the Court in these cases became more concerned with the nature of the regulation rather than with the effect of the regulation to religion.

C. Morality

Another area of the administrative interest of government is the demand which the government imposes upon the integrity and morality of public officers. In a long line of jurisprudence, the Court has repeatedly held that government employees are expected to act with circumspect not only in their service but also in their private lives.[164] This requirement is even more stringent when court employees are involved, to whom the Supreme Court has exacted an even greater demand for moral righteousness and uprightness.

The case of *Estrada v. Escritor* serves as the landmark case under this category. In a sworn letter complaint, a letter was written to Judge Caoibes, requesting for an investigation of rumors that respondent Escritor, a court interpreter, was living with a man not her husband and had a child with him. The writer claimed that he filed the charge because he believed that she was committing an immoral act, thus tarnishing the image of the court and that the court should not allow her to remain in the service lest it appear that the court was condoning her actions. Respondent was charged for committing "gross and immoral conduct" under Book V, Title I, Chapter VI, Section 46(b)(5) of the Revised Administrative Code.[165] In her defense, respondent Escritor testified that when she entered the judiciary, she was already a

164. Acebedo v. Arquero, 399 SCRA 10 (2003); De Dios v. Alejo, 68 SCRA 354 (1975); Maguad v. De Guzman, 305 SCRA 469 (1999).

165. The law provides:

> Sec. 46. *Discipline: General Provisions.* – (a) No officer or employee in the Civil Service shall be suspended or dismissed except for causes as provided by law and after due process.
>
> (b) The following shall be grounds for disciplinary action:
>
> x x x
>
> (5) Disgraceful and Immoral Conduct;

widow. She admitted, however, that she had been living with Luciano Quilapio Jr. already separated-in-fact from his wife, for 20 years but without the benefit of marriage and that they had a son. However, she claimed that their conjugal arrangement was in conformity with their religious beliefs as members of the Jehovah's Witnesses and the Watch Tower and Bible Tract Society. In fact, after 10 years of living together, they executed a "Declaration of Pledging Faithfulness"[166] in accordance with the rules of their religious organization. Complainant on the other hand, contended that religious beliefs and practices could not override the norms of conduct which the law requires from government employees. Otherwise, a dangerous precedent would be created and others could simply join the Jehovah's Witness to escape punishment.

Justice Puno, writing for the majority, ordered the remand of the case to the Office of the Court Administrator and ordered the Solicitor General to intervene to examine the sincerity and centrality of respondent's religious beliefs and to demonstrate the state's compelling interest in the case and that the means adopted is the least restrictive way of enforcing the interest of the state. In so doing, the majority thus created a possibility of exempting respondent from liability under the Revised Administrative Code for "disgraceful and immoral conduct" by referring to respondent's religious beliefs as a "distinguishing factor"[167] which set the case aside from established jurisprudence.[168]

The case was by no means unanimous. Justice Ynares-Santiago dissented on the ground that since the Civil Service Law punishes public officers and

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166. Estrada v. Escritor, 408 SCRA 1, 51-52 (2003). The Declaration was worded in this manner:

> DECLARATION PLEDGING FAITHFULNESS
>
> I, Soledad S. Escritor, do hereby declare that I have accepted Luciano D. Quilapio Jr., as my mate in marital relationship; that I have done all within my ability to obtain legal recognition of this relationship by the proper public authorities and that it is because of having been unable to do so that I therefore make this public declaration pledging faithfulness in this marital relationship.
>
> I recognize this relationship as a binding tie before 'Jehovah' God and before all persons to be held to and honored in full accord with the principles of God's Word. I will continue to seek the means to obtain legal recognition of this relationship by the civil authorities and if at any future time a change in circumstances make this possible, I promise to legalize this union.
>
> Signed this 28th day of July 1991.

167. *Id.* at 172.

168. De Dios v. Alejo, 68 SCRA 354 (1975); Maguad v. De Guzman, 305 SCRA 469 (1999).

employees for disgraceful and immoral conduct, the question of whether an act is immoral or not within the meaning of the law cannot be determined by respondent's concept of morality. She argued that respondent could have been prosecuted as co-principal in the crime of concubinage and that the abandonment by her husband did not exempt her from liability but only served to mitigate the penalty. It was sufficient, in Justice Ynares-Santiago's opinion, that the act was punished by criminal laws in order to qualify it as disgraceful and immoral. Speaking for the administrative interest of government in terms of the moral attributes of its personnel, she argued that "[t]he degree of morality required of every employee or official in the public service has been consistently high [and] [t]he rules are particularly strict when the respondent is a Judge or a court employee."[169] Furthermore, she suggested that there was actually no genuine free exercise claim since respondent herself admitted the legal infirmities of her relationship with Quilapio. She contended that there was no conflict in the case between the tenets of the Catholic faith and those of the Jehovah's Witnesses' beliefs as to marriage since even in the "Declaration Pledging Faithfulness," Escritor even pledged to obtain all avenues to obtain legal recognition by civil authorities of her union with Quilapio.

Justice Carpio on the other hand, took a different route but reached the same result. According to him, Escritor's conduct was not disgraceful and immoral within the meaning of the law. Since the Court had previously recognized a Muslim standard in the case of *Sulu Islamic Association of Masjid Lambayong v. Malik*,[170] Justice Carpio believed that the Court could not reject a Jehovah's Witnesses' standard on the same matter without violating the equal protection clause, the free exercise clause, and the principle of separation of church and state. However, while implying that the free exercise clause protected respondent from the provision on disgraceful and immoral conduct, he contended that Escritor could be held administratively liable for conduct prejudicial to the best interest of the service since she could be held liable under Article 334 of the Revised Penal Code—absent, of course, a showing that Quilapio's wife consented to his cohabitation with Escritor. While protecting respondent's religious freedom from liability for disgraceful and immoral conduct, Justice Carpio refused to afford respondent the same protection from liability for conduct prejudicial to the best interest of the service. Purporting to subject the case to the compelling state interest test, he discussed:

> The Court cannot simply turn a blind eye to conduct of a court employee that, *by the employee's own admission*, violates our criminal statutes. Such conduct is prejudicial to the best interest of the administration of justice. Court employees, from the highest magistrate to the lowliest clerk, are

169. *Estrada*, 408 SCRA at 222.

170. Sulu Islamic Association of Masjid Lambayong v. Malik, 226 SCRA 193 (1993).

> expected to abide scrupulously with the law. They are held to a higher standard since they are part of the judicial machinery that dispenses justice. The courts of justice cannot harbor those who openly and knowingly commit a crime. Courts of justice would lose their moral authority and credibility if they condone violators of the law. They would be remiss in their solemn duty of upholding the law if they continue to employ those who admit running afoul with our criminal statutes. Thus, *there exists a compelling state interest to hold Escritor to the same standard required of every court employee*. If unsanctioned, Escritor's unlawful conduct would certainly impair the integrity and credibility of the judiciary.[171]

Justice Carpio's recognition of the equality between a Muslim standard which is legislatively affirmed and a Jehovah's Witnesses' standard which is not recognized by law is consistent with a benevolent neutrality stance. However, in finding that a compelling state interest existed in holding respondent liable for conduct prejudicial to the best interest of the service, he used the same standard as to that imposed upon other government employees committing the same acts, albeit for non-religious reasons.

The case of *Estrada* was, essentially, a jurisprudential balancing act.[172] It is important to note, however that only Justice Ynares-Santiago refused to interpret the free exercise clause as creating the possibility of exempting a free exercise claimant from administrative liability for disgraceful and immoral conduct by equating criminal liability with immorality. The other dissenters in fact recognized the equality between Muslim standards and Jehovah's Witnesses' standard, thereby supporting the majority's declaration that religious morality serves as a "distinguishing factor."

D. Element of Duty

Another area under the administrative interest of government which should be considered as compelling and therefore non-negotiable pertains to the performance of the duties of government officials. While there is no case which specifically points out to the interest that a public officer should act in accordance with law and not in accordance with their religious scruples, it is submitted that there is legal basis in establishing this proposition.

Under the Constitution, "[p]ublic office is a public trust" and that "[p]ublic officers and employees must at all times be accountable to the people."[173] The phrase that "public office is a public trust" was interpreted

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171. *Estrada*, 408 SCRA at 238 (emphasis supplied).

172. Only five justices concurred with the majority opinion. Justice Ynares-Santiago's dissent on the ground disgraceful conduct was hers alone. On the other hand, three justices joined the dissenting opinion of Justice Carpio. Two others registered their own separate opinions—in favor of the respondent.

173. PHIL. CONST. art. XI, § 1.

in *Cornejo v. Gabriel*[174] to mean that the basic idea of government in the Philippines:

> [I]s that of a representative government, the officers being mere agents and not rulers of the people, one where no one man or set of men has a proprietary or contractual right to an office, but where every officer accepts office pursuant to the provisions of law and holds the office as a trust for the people whom he represents.[175]

As a representative government therefore, every public officer must act in accordance with that representative capacity. As a representative of the people in general, he is not to use his own preferences or personal beliefs in performing his duty, for the public expects a public official to treat everyone equally.

One example that may be given is the case of judges who have the obligation to decide based on the law. Indeed, the objectivity of a judge is impressed with due process significance and he should thus "refrain from reaching hasty conclusions or prejudging matters [since it] would be deplorable if he lays himself open to the suspicion of reacting to feelings rather than to facts, of being imprisoned in the net of his own sympathies and predilections."[176] As such, regardless, whatever negative predilections a judge may have regarding the death penalty, it is nevertheless obligatory upon him to impose it when the accused so deserves.[177]

V. REVENUE RAISING INTEREST

A. Religious Freedom and Power of Taxation

The relationship between the State's revenue raising interest and religious freedom can be seen in various forms of accommodation that are found in the Constitution and in tax laws. Under the 1987 Constitution, "[c]haritable institutions, churches and parsonages or convents appurtenant thereto, mosques, non-profit cemeteries and all lands, buildings, and improvements actually, directly, and exclusively used for religious, charitable, or educational purposes shall be exempt from taxation."[178] Being a constitutional standard, this is beyond the broad taxing powers of the legislature. This provision was

174. Cornejo v. Gabriel, 41 Phil. 188 (1920).

175. *Id.* at 194.

176. Castillo v. Juan, 62 SCRA 124, 127 (1975).

177. People v. Limaco, 88 Phil. 35 (1951).

178. PHIL. CONST. art. VI, § 28 (3).

included in order to promote the separation of church and state, and to protect the church from the state.[179]

On the other hand, under the National Internal Revenue Code, contributions for religious purposes are deductible from gross income,[180] gifts in favor of religious corporations and institutions are exempt from the donor's tax,[181] and non-stock corporations or associations organized and operated exclusively for religious purposes are exempt from the tax on corporations.[182] These provisions are forms of establishment accommodation which are granted by the legislature in favor of religious entities or religiously motivated transfer of assets.

The principle on the relationship between religious freedom and the power of taxation was articulated in the case of *Follett v. McCormick*.[183] In this case, defendant, who sold religious literature, was convicted for violating a municipal ordinance requiring book agents to pay a license tax. Reversing the conviction, the Supreme Court declared:

> The exaction of a tax as a condition for the exercise of the great liberties guaranteed by the First Amendment is as obnoxious as the imposition of a censorship or a previous restraint. For, to repeat, 'the power to tax the exercise of a privilege is the power to control or suppress its enjoyment.'[184]

However, the Court was quick to qualify its declaration:

> This does not mean that religious undertakings must be subsidized. The exemption from a license tax of a preacher who preaches or a parishioner who listens *does not mean that either is free from all financial burdens of government*, including taxes on income or property. We said as much in the Murdock case. But to say that they like other citizens may be subject to general taxation does not mean that they can be required to pay a tax for the exercise of that which the First Amendment has made a high constitutional privilege.[185]

This principle was decisively followed up in the case of *Jimmy Swaggart Ministries v. Board of Equalization*.[186] Appellant, in this case, was a religious organization engaged in various religious activities. During its existence,

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179. JOAQUIN G. BERNAS, THE INTENT OF THE 1987 CONSTITUTION WRITERS 404-05 (1995).

180. NIRC, § 34 H (1).

181. NIRC, § 101 A (3); § 101 B (2).

182. NIRC, § 30 (E).

183. Follet v. McCormick, 321 U.S. 573 (1944).

184. *Id.* at 577.

185. *Id.* at 577-78 (emphasis supplied).

186. Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378 (1990).

appellant conducted several "evangelistic crusades" across the country and also sold religious and non-religious materials during the crusade. It also published a monthly magazine, which was sold nationwide by subscription. Eventually, the appellee Board of Equalization informed appellant that religious materials were not exempt from the sales tax and requested appellant to register as a seller to facilitate reporting and payment of the tax. Appellant filed a petition for redetermination and contended that the tax on religious materials violated their right to free exercise of religion. Appellant based its contention on *Murdock v. Pennsylvania*[187] where it was held that spreading one's religious beliefs or preaching is entitled to constitutional protection and on *Follett* where it was held that the power to tax the exercise of a privilege of disseminating religious information and preaching is the exercise of the power to suppress it. Rejecting the argument, Justice O'Connor distinguished the present case from the two and argued:

> Our decisions in these cases, however, resulted from the particular nature of the challenged taxes—flat license taxes that operated as a prior restraint on the exercise of religious liberty. In Murdock, for instance, we emphasized that the tax at issue was 'a license tax—a flat tax imposed on the exercise of a privilege granted by the Bill of Rights,' and cautioned that '[w]e do not mean to say that religious groups and the press are free from all financial burdens of government... We have here something quite different, for example, from a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities.' In Follett, we reiterated that a preacher is not 'free from all financial burdens of government, including taxes on income and property' and 'like other citizens, may be subject to general taxation.'[188]

Jimmy Swaggart found significance in the Philippine Supreme Court's decision in the landmark case of *Tolentino v. Secretary of Finance*.[189] Apart from the aspect of the case mentioned above, the Philippine Bible Society (PBS) questioned the amendment of Republic Act No. 7716 to the National Internal Revenue Code that deleted the previous exemption of print media to the Value Added Tax. More specifically, it removed the exemption for the printing, publication or importation of books and religious articles. One of the arguments that were raised was that the imposition of the VAT to such activities violated freedom of thought and conscience. Dismissing this claim, the Court simply cited *Jimmy Swaggart*—that the free exercise clause did not prohibit the imposition of generally applicable sales and use tax on the sale of religious materials by a religious organization.

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187. Murdock v. Pennsylvania, 319 U.S. 105 (1943).

188. *Jimmy Swaggart*, 493 U.S. at 386-87.

189. Tolentino v. Secretary of Finance, 235 SCRA 630 (1994).

The revenue raising interest of the government also includes within its terms the determination of whether deductions should be allowed.[190] In the case of *Hernandez v. Commissioner of Internal Revenue*,[191] the United States Supreme Court had the opportunity to delve into the issue of whether the disallowance from tax deductions of certain payments made to a Church violated the religious freedom of the taxpayers. The case involved claims for tax deductions by members of the Church of Scientology. The Church offered its members services known as "auditing"[192] and "training."[193] Pursuant to the Church's doctrine of exchange, which meant that at anytime one receives something, he had to give something in return, it charged fixed donations for auditing and training sessions. Some taxpayers then sought to deduct such payments from their income tax returns as charitable contributions. The Commissioner of Internal Revenue disallowed such deductions on the ground that such payments were not contributions or gifts within the meaning of the statute.

It was held that the denial of the deduction did not violate the free exercise of religion. The Court decreed that, "even a substantial burden would be justified by the 'broad public interest in maintaining a sound tax system,' free of 'myriad exceptions flowing from a variety of religious beliefs.'"[194] The principle upon which the *ratio* was based stems from the lifeblood theory of taxation—the reason why everyone must share the burden of contributing to finance the government through taxes. However, it so often happens that for public policy considerations, deductions are allowed. Nevertheless, being the exception, they should be strictly construed. In this case, allowing the deduction would give rise to a fear, engendered by the Court, that it "would expand the charitable deduction far beyond what Congress has provided."[195] The scope of such deductibility would then become virtually unlimited.[196]

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190. *See* Petro v. Pililla, 198 SCRA 82 (1991).

191. Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680 (1989).

192. Consisting of one-to-one encounter sessions between a participant and a Church official, or "auditor," during which, the participant's areas of spiritual difficulty were identified.

193. Wherein participants sought to attain the qualifications necessary to become an auditor.

194. *Id.* at 699.

195. *Id.* at 693.

196. "For example, some taxpayers might regard their tuition payments to parochial schools as generating a religious benefit or as securing access to a religious service; such payments, however, have long been held not to be charitable contributions... [they] might make similar claims about payments for church-

The danger posed to a sound tax system, where there are no clear standards as to what are deductible "religious contributions," is a compelling state interest to the Court. The interest of the government in maintaining the uniformity in the system of taxation is so compelling, that even a possibility of danger would suffice to meet the compelling state interest standard. Justice Marshall, in fact, made a substantial comparison of the case with *United States v. Lee* which will be discussed subsequently.[197] However, as will be shown, the analytical frame between the two cases should be distinguished, resulting in different conclusions.

B. Taxation as Revenue-Raising and Taxation as Police Power

There is a possibility that the government action which refers to the raising of funds to finance a specific government program could be classified under the police power interest rather than revenue raising interest of the State. *United States v. Lee*[198] presents an example of a situation where the interest of government could be classified under police power interest or revenue raising interest. Appellee, a self-employed farmer and carpenter who was a member of the Old Order Amish religion sued for a refund of social security taxes paid by him pursuant to law. He had several employees, also members of the same religion. He claimed that the imposition of said taxes violated his religious freedom and those of his employees, under his religion, there is a religiously based obligation to provide for their fellow members the kind of assistance contemplated by the social security system and that they were thus prohibited from accepting social security benefits and paying social security taxes.

The Supreme Court concluded that the social security taxes burdened appellee's religious beliefs but nevertheless rejected the free exercise objection on the ground that there is an essential overriding governmental interest. According to the Court, since the social security system was nationwide, the interest of government was thus readily apparent. It served the public interest by providing a comprehensive insurance system, the cost of which was shared by the employers and employees. The design of this system according to the Court required mandatory contributions from covered employers and employees since "mandatory participation is indispensable to the fiscal vitality of the social security system [and] widespread individual voluntary coverage under the social security... would undermine the soundness of the social security program."[199] Chief Justice Burger argued that the obligation to pay the social security tax was not

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sponsored counseling sessions or for medical care at church-affiliated hospitals that otherwise might not be deductible." [*Id.*] (citations omitted).

197. United States v. Lee, 455 U.S. 252 (1982).

198. *Id.*

199. *Id.* at 258.

fundamentally different from the obligation to pay income taxes since the only difference, in theory, was that social security taxes are segregated for the furtherance of a specific program. The danger which the Court recognized in allowing exemption from coverage in this case is the possibility of widespread demand for exemptions which could potentially destroy the program.

It is submitted that the Court's analysis in *Lee* is not wholly applicable in the Philippine context. First and foremost, the Philippine Supreme Court has never referred to social security contributions as "taxes." Second, Philippine law does not have the same exemption that is provided in U.S. law in case it is the employee who requests for an exemption from social security taxes based on religious beliefs. As stated earlier, a very important factor which led the *Lee* Court to deny the free exercise claim is the fact that the exemption was sought by an employer and not an employee, and that there was no proof showing that the former did not and would not employ those who belong to other religions. This analysis however, does not look into the revenue raising interest of the government to support its social security program. This speaks more of the police power interest of the State. The question in such a situation is not merely the right of the State to assess social security contributions, but rather a question of coverage.

The Court's analysis of the case under the revenue raising interest[200] of the state would be erroneous if applied to the Philippine setting. Social security contributions are assessed for a specific purpose—the use of employees. In effect, *Lee* will not therefore come within the contemplation of the "life blood theory" of the purpose of taxation. Social security contributions are not for the support of the government, but are merely in the nature of "forced savings." More importantly, upon further analysis, the interest which the *Lee* Court emphasized would not be really prejudiced by exempting an employee since the decrease in contributions would be offset by the corresponding decrease in the liability of the program.[201] This interpretation can accommodate the possibility of exempting an employee from the coverage of social security law while at the same time the employer cannot be allowed to invoke his religious beliefs to refuse from complying with the statutorily imposed obligation through the principle of harm.

Under this interest of government the necessity of taxation to the functioning of government renders this interest immune from the free exercise clause. It is unfair if a person, by reason of religious beliefs, can refuse to pay taxes while he receives the same protection from government

200. *Id.* at 260.

201. *Id.* at 262. ("[T]he non payment of these taxes... would be more than offset by the elimination of their right to collect benefits.") (Justice Stevens, concurring opinion).

as others. Refusal to pay taxes is tantamount to refusal to support the very structure which exists in order to protect the rights of its citizens, and this also includes the right to religious freedom.

VI. JUDICIAL INTEREST

A. Jurisdiction of the Religious versus Jurisdiction of the Court

Part of the judicial interest of the courts in free exercise analysis is the determination of whether a matter involved is within the jurisdiction of the civil courts or of the church. *Ebralinag* did more than just exempt the students from the flag salute law by reason of religious beliefs. In the concurring opinion of Justice Isagani Cruz, he contended that *Gerona's* assumption that it was the State which had the power to determine what was religious and what was not, was erroneous as it amounted to an unwarranted intrusion into religion—an intrusion that was, in itself, already a violation of the free exercise clause.[202] By allowing judicial determination of what is religious, the Court would consequently have to use its own standard and conception of religion—something that would be clearly offensive to the non-establishment clause. This proposition, while being consistent with religious freedom, however is triggered only when the issue raised involves a genuine free exercise claim.

The case of *Austria v. NLRC*[203] is a good example of this proposition. *Austria* involved an illegal dismissal case which was filed against a religious corporation. One of the issues raised in the case was whether or not the termination of the services of petitioner was an ecclesiastical affair, beyond the jurisdiction of the NLRC and the courts. In affirming the jurisdiction of the NLRC, the Court reasoned:

> The case at bar does not concern an ecclesiastical or purely religious affair as to bar the State from taking cognizance of the same. An ecclesiastical affair is 'one that concerns doctrine, creed, or form of worship of the church, or the adoption and enforcement within a religious association of needful laws and regulations for the government of the membership, and the power of excluding from such associations those deemed unworthy of membership.' Based on this definition, an ecclesiastical affair involves the relationship between the church and its members and relate to matters of faith, religious doctrines, worship and governance of the congregation... While the matter at hand, relates to the church and its religious minister it does not *ipso facto* give the case a religious significance. *Simply stated, what is involved here is the relationship of the church as an employer and the minister as an employee*. It is *purely secular* and has no relation whatsoever with the practice

202. *See* Ebralinag v. Division Superintendent of Schools, 219 SCRA 256 (1993). *See generally* United States v. Ballard, 322 U.S. 78 (1944).

203. Austria v. NLRC, 312 SCRA 410 (1999).

> of faith, worship, or doctrines of the church. In this case, petitioner was not excommunicated or expelled from the membership of the SDA but was terminated from employment. Indeed, the matter of terminating an employee, which is purely secular in nature, is different from the ecclesiastical act of expelling a member from the religious congregation.[204]

A closer examination shows that the respondent did not clearly raise a free exercise argument in justifying the termination of petitioner from employment. Religious freedom was merely used as a ground to buttress the religious association's contention that government tribunals were without jurisdiction to resolve the issue. It, however, failed to advance any fact showing that the Court's assumption of jurisdiction over the case would run contrary to their religious beliefs. More importantly, the reasoning in this case did not directly contradict Justice Cruz' stated fear in *Ebralinag*. The implication is therefore that while the courts cannot dictate what is comprehended with the term religion, the religious, on the other hand, may not similarly dictate what is within the jurisdiction of the courts.

B. Gate Keeper Doctrine

One of the concerns often raised against a liberal interpretation of the free exercise clause is the danger of significantly increased free exercised claims against laws of general and neutral application. This could result in the diminution of the power of government and would allow each person to "become law unto himself."[205] This fear of religious anarchy, according to Kathleen Sullivan, was an erroneous overstatement which began in *Reynolds*.[206] Part of this overstatement however can be addressed by enforcing, to its full extent, the judicial interest of the courts to resolve only *genuine* free exercise cases.

A benevolent neutrality interpretation of the free exercise clause burdens the judiciary by forcing it to create a delicate balance between the state and religion, and between the free exercise clause and the establishment clause. The importance of the judicial interest of the state is that before a free exercise inquiry is made, the courts are given the authority to sift through the claims by imposing a threshold requirement which a free exercise claimant must satisfy before his claim may be considered by the Court. Such power is quite important, for it is used to determine what religious claims should be resolved under a benevolent neutrality approach.

Unfortunately however, this area of governmental interests has often been the most neglected. One example of this neglect is shown in *Ang mga*

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204. *Id.* at 422.

205. Reynolds v. United States, 98 U.S. 145, 167 (1878).

206. Kathleen Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195 (1992) [hereinafter Sullivan, *Liberal Democracy*].

Kaanib v. Iglesia ng Dios,[207] wherein the Supreme Court dismissed a free exercise claim without having it first subjected to the burden test. This case involved a petition filed by the respondent before the Securities and Exchange Commission to compel the petitioner, a break away group, to change its corporate name to another name that was not similar or identical to that of the former. One of the issues raised by petitioner, after an adverse decision before the Commission and the Court of Appeals, was that the order compelling them to change their corporate name violated their right to free exercise of religion. In a unanimous decision, the Court rejected the free exercise claim.

The Court, however, ignored the possibility that the undertaking of a change of name was a condition which the petitioner was required to comply with in order to give its religious organization recognition as a person before the law. Petitioner was therefore confronted with a "take it or leave it" situation. This is similar to *Bowen* where the statutory requirement that a social security number be given was recognized as a burden on the applicant's religious beliefs. However, *Ang mga Kaanib* could still have been dismissed by arguing that the religious beliefs of the petitioner were not burdened—since it simply failed to establish that changing their name was contrary to their religious beliefs.

The main principle behind the judicial interest of the government is what has been referred to as the Gate Keeper Doctrine.[208] This doctrine locates itself at the *prima facie* stage of any potential free exercise inquiry, and serves to reduce the number of claims that must be afforded the searching inquiry demanded by the free exercise clause.[209] Before a free exercise analysis is triggered, the claimant must be able to persuade the Court that the government action has *burdened* the claimant's *sincerely held* religious beliefs.

1. The Burden Requirement

As it stands now, a prima facie case of a violation of the free exercise clause exists whenever a government policy creates a burden on a sincerely held religious conviction. If such a case is made, then the government must show that its interest in uniformly applying a certain law or regulation overrides the religious conviction of the adherent. The burden requirement is essential in establishing a free exercise claim since it triggers a free exercise inquiry and as a matter of evidence, it shifts to the government the burden of proving that the challenged law is justified by a compelling state interest. However, limited attention has been focused as to the character of

207. Ang mga Kaanib sa Iglesia ng Dios kay Kristo Hesus, H.S.K. sa Bansang Pilipinas, Inc. v. Iglesia ng Dios kay Cristo Hesus, 372 SCRA 171 (2001).

208. Lupu, *Where Rights Begin*, *supra* note 35, at 953-60.

209. *Id.* at 935.

government activity sufficient to create a "burden" that will trigger the application of the free exercise clause.[210]

The case of *Tony and Susan Alamo Foundation v. Secretary of Labor*[211] presents an instance where the burden requirement had been applied by the Court to avoid a free exercise analysis. In this case, the petitioner foundation was a non-profit religious organization that did not solicit contributions from the public to finance its activities. However, it derived its income mainly from the operation of a number of commercial businesses staffed by its "associates," most of whom were reformed drug addicts, derelicts or criminals. These workers were not given cash salaries but rather non-cash benefits. The Secretary of Labor filed an action against the foundation alleging violations of the Fair Labor Standards Act. The threshold issue raised was whether the minimum wage, overtime pay, and record keeping requirement of the Fair Labor Standards Act applied to workers engaged in the commercial activities of a religious foundation. The foundation objected to coverage, alleging that the application of the law to its activities violated their religious freedom. Some of the "associates" even testified that it would be offensive to their religious beliefs if they were forced to receive wages.

The Court dismissed the free exercise claim by declaring that the burden requirement was not satisfied in the present case since the program under the Act did not burden petitioner's religious exercise. To the Court, "[t]he Free Exercise Clause does not require an exemption from a governmental program unless at a minimum, inclusion in the program *actually* burdens the claimant's freedom to exercise religious rights."[212] The testimonies of the associates referred to the burden on their own religious freedom and not to the foundation's free exercise right. Moreover, the alleged burden upon the individual's religious beliefs against receiving wages was not given much merit since they still received wages, albeit in the form of non-monetary benefits.[213]

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210. *Id.* at 934. Professor Lupu contends that in the case of *Lyng*, the Supreme Court relied entirely upon the burden concept in holding that the free exercise clause did not bar government construction of a road upon public lands long used for purposes of religious ritual by several American Indian tribes. However, it is submitted that *Lyng* was not denied on the ground that no burden was proven. The Court's argument in *Lyng* was that the government did not violate the free exercise clause notwithstanding the burden that was imposed upon the adherents' religious practices.

211. Tony and Susan Alamo Foundation, et al. v. Secretary of Labor, 471 U.S. 290 (1985).

212. *Id.* at 303 (emphasis supplied).

213. *Id.* at 304.

What the Court was looking for was that the burden upon the religious beliefs of the associates should have been against receiving *any* kind of wages. In this case, the Court was able to avoid free exercise analysis by going into the religious tenets of the claimant's associates. The Court concluded that there was really no overlap between the religious beliefs of the associates and the Labor Standards law, since the associates were receiving benefits in the form of non-monetary wages.

The case of *Jimmy Swaggart* also falls under this interest since the Court, in that case, found that "[t]here is no evidence... that collection and payment of the tax violates appellant's sincere religious beliefs."[214] Analyzing the circumstances of the case and comparing it with established jurisprudence, the Court said that, "in no sense has the State conditioned receipt of an important benefit upon conduct proscribed by a religious faith, or... denied such benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs.'"[215] The case was different from the other cases invoked by the appellant where the exercise of the right to disseminate religious information was conditioned upon the payment of a license fee. In *Jimmy Swaggart,* where the tax imposed was based on the sales of religious materials, the Court citing *Hernandez* said that the "imposition of generally applicable tax merely decreases the amount of money appellant has to spend on its religious activities" and that "such burden is not constitutionally significant."[216] This emphasizes the point in the burden requirement that it is the effect rather than the nature of the law which is determinative of the presence of burden.

Jimmy Swaggart, and as will later be shown, *Hobbie v. Unemployment Appeals Commission*,[217] establish a minimum condition upon a finding of burden—that the challenged law or rule *actually* violates the claimants' religious beliefs. This requirement necessitates an examination of the religious tenets and doctrines of the religious association where the claimant belongs. This may be interpreted as amounting to intrusion upon religion and state-initiated entanglement with religion. However, since the burden requirement is imposed upon the religious adherent, the Court need not require the claimant to prove the religious doctrines of his church.[218] The Court may declare that no *prima facie* violation of the free exercise clause has

214. Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378, 391 (1990).

215. *Id.* at 391-92.

216. *Id.* at 391.

217. Hobbie v. Unemployment Appeals Commission, 107 S. Ct. 1046 (1987).

218. REVISED RULES OF EVIDENCE, Rule 131, § 1. ("[b]urden of proof is the duty of a party to present evidence on the facts in issue necessary to establish his claim or defense by the amount of evidence required by law.").

been shown by the claimant since the latter failed to show that the challenged law violates his religious beliefs or motivations. The Court can simply consider that the reason espoused by the claimant for exemption is secular, rather than religious.

a. Tests to Determine Burden

A textual examination of the free exercise clause exhibits the burden requirement in two ways. Thus, it states that, "[n]o law shall be made respecting an establishment of religion, or *prohibiting* the free exercise thereof. The free exercise and enjoyment of religious profession and worship... shall forever be *allowed.*"[219] A textual approach to defining the contours of the burden requirement is simple but leads to a very narrow interpretation of the free exercise clause. The first sentence bars the government from prohibiting religious freedom, while the second sentence obliges the government to allow religious freedom. Judicial interpretations of the burden requirement, however, have not used a purely textual interpretation in determining this threshold requirement. Rather, it is a more liberal approach that has been applied.

As stated earlier, a purely textual application of the burden requirement will leave much of free exercise jurisprudence unexplained. Established jurisprudential trend leads to a more liberal analysis of the burden requirement. The case of *Sherbert v. Verner*[220] provided an example of a situation where the Court found the presence of burden in a situation where the free exercise claimant was not *per se* punished for engaging in religiously motivated activities, but was, rather, denied government benefits. In this case, appellant, a member of the Seventh-Day Adventist Church, was discharged by her employer for refusing to work on Saturdays, her Sabbath Day. Failing to find other work for the same reason, she filed a claim for unemployment compensation under an unemployment compensation law, which was subsequently denied by the Employment Security Commission. The State Supreme Court affirmed the decision of the Commission on the ground that her ineligibility did not in any way prevent her from exercising her freedom to exercise her religious beliefs. Reversing the State Supreme Court, the United States Supreme Court through Justice Brennan held that the denial burdened appellant's religious beliefs. Thus:

> We turn first to the question whether the disqualification for benefits imposes any burden on the free exercise of appellant's religion. We think it is clear that it does. In a sense, the consequences of such a disqualification to religious principles and practices may be only an indirect result of welfare legislation within the State's general competence to enact: it is true

219. PHIL. CONST. art. III, § 5.

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

> that no criminal sanctions directly compel appellant to work a six-day week. But this is only the beginning, not the end of our inquiry. For "[i]f the purpose or effect of the law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being indirect."[221]

The theory advanced in *Sherbert*, similarly adhered to in later cases, is centrally important in the history of free exercise burden.[222] They point out the lack of direct compulsion by the State but nevertheless refrain from limiting its inquiry to that point. Instead, these cases continue on to describe the effects of "indirect" burdens on free exercise. This significantly widened the potential scope of the free exercise clause by including both direct and indirect harms to religion as constituting burden and therefore increasing the State's difficulty in satisfying prospective free exercise cases. The notion of indirect burdens recognizes one of the fundamental features of the modern state where the government can easily burden rights without having to resort to the direct use of force.[223] Under the principle of *Sherbert*, an "unconstitutional condition"[224] is created even though the coercion is not direct, since it is tantamount to coercion nonetheless.

What was clear in *Sherbert* is that direct burdens to religion in the form of direct prohibition, and indirect burdens in the form of denial of benefits, so placed by reason of religiously motivated action are considered in the same plane. This emphasizes a "rights-protective view"[225] of religious freedom that places emphasis upon the effect rather than the nature of governmental action.

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221. *Sherbert*, 374 U.S. at 403-04.

222. *See* TRIBE, *supra* note 32, § 14-13, at 1255 (2d ed. 1988).

223. Sullivan, *Liberal Democracy*, *supra* note 206, at 216.

224. *See* Kathleen Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989). ([t]he doctrine of *unconstitutional conditions* holds that "the government may not grant a benefit on the condition that the beneficiary should surrender first a constitutional right, even if the government may withhold the benefit altogether [and] [i]t is viewed as reflecting the triumph of the view that government may not do indirectly what it may not do directly over the view that the greater power to deny a benefit includes the lesser power to impose a condition upon its receipt.").

225. Lupu, *Where the Rights Begin*, *supra* note 35, at 942. He comments however, that *Sherbert* also failed to the extent of providing a clear guideline of identifying whether an indirect burden exists as it "teach[es] that 'indirect' burdens may suffice to cross the threshold, but do[es] not instruct on how to determine where indirect burdens begin."

Id.

The interpretation of the burden requirement in *Bowen* however deviates from this principle. In denying the claim, Justice Burger argued:

> We conclude then that government regulation that indirectly and incidentally calls for a choice between securing a governmental benefit and adherence to religious beliefs is wholly different from governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons. *Although the denial of government benefits over religious objection can raise serious Free Exercise problems, these two very different forms of government action are not governed by the same constitutional standard. A governmental burden on religious liberty is not insulated from review simply because it is indirect, but the nature of the burden is relevant to the standard the government must meet to justify the burden.*[226]

Another form of burden upon the exercise of religious freedom comes in the form of subsequent punishment. Conceptually, this type of burden is different from the burden as presented in the textual interpretation of the Constitution since technically, prohibition is a form of prior restraint while subsequent punishment is the consequence of an act which was otherwise done without any initial restraint, except, of course, for the deterrent effect of the punishment.

Instances of this type of burden can be seen in the cases of *Estrada, Ebralinag*, and *Yoder*. In *Estrada* for example, the respondent was held administratively liable for immoral and disgraceful conduct for living with a married man for twenty years. The burden was identified as the situation where the respondent has to choose between keeping her employment and abandoning her religious beliefs and family on one hand, and giving up her employment and keeping her religious belief and family on the other. Similarly, the refusal of the children to participate during the flag salute in *Ebralinag* resulted to their expulsion from school. In *Yoder* the parents who refused to send their children from school because of their religious beliefs and way of life were punished by a fine under the compulsory attendance law.

Notably however, unlike in *Yoder* and *Ebralinag*, the religious belief involved in *Estrada* has no "coercive effect" upon the free exercise claimant. In *Yoder*, the belief against attending school beyond eighth grade was associated with worldliness and ultimate salvation. In *Ebralinag* on the other hand, the prohibition against saluting the flag was based on the belief that such conduct constitutes idolatry. In *Estrada*, the conduct, that of executing the Declaration Pledging Faithfulness was not commanded by the religion of respondent, it was a voluntary act of respondent which was merely approved by her church. The religiously motivated conduct did not arise from any

226. Bowen v. Roy, 476 U.S. 693, 706-7 (1986) (emphasis supplied).

belief which has a "coercive effect" upon respondent like in *Yoder* and *Ebralinag*.

This can be explained by considering that the burden that may be suffered by the religious adherent is two-fold: the burden imposed by the government upon religious practice and the burden imposed by religion upon the adherent. For the purpose of free exercise analysis, what is important is the first type of burden. It is sufficient that what is burdened by government regulation is religiously *motivated* conduct, and it is not required that it be a religiously *required* conduct. Symbolically, this reinforces the rights-protective approach to religious freedom that was enunciated in *Sherbert*. Practically, this relieves the courts of having to complete the difficult task of determining the compulsive effect of religion upon a specific practice. Moreover, it avoids judicial intrusion upon religious beliefs and doctrine.

Another form of burden upon religious freedom is when the action of the government results in an environment which makes it substantially difficult for the individual to practice his faith. In *Lyng,* for example, the construction of a road through an area where various American-Indian tribes conducted their religious rituals was recognized as creating a burden upon the religious practices of those tribes.[227] Indeed, in the commissioned study to assess the effect of the construction, it was found that the construction "would cause serious and irreparable damage to the sacred areas which are integral and necessary part of the belief systems and lifeway of the Northwest California Indian peoples" since the successful use of the area for religious rituals is "dependent upon and facilitated by... privacy, silence, and an undisturbed natural setting."[228] The Court however denied the free exercise claim on the ground that the word used in the Constitution is "prohibit"[229] thus implying that it is the intent, and not the effect of the government action that creates a burden upon religious freedom. This interpretation however, overlooks the fact that the burden requirement looks into the *effect* of the government action, rather than the *intention* of the government. When the Court argued that the operative word in free exercise analysis is the constitutional text using the word "prohibit," it in effect ignores the lesson in *Sherbert* that even indirect burdens can trigger a free exercise analysis.

The courts must be vigilant in enforcing this requirement to make sure that only genuine free exercise claims will be considered. By fully enforcing this requirement, the Court will be able to avoid the clash of religion and the State, when it deems unnecessary to do so. The Court need not choose

227. Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988).

228. *Id.* at 442.

229. *Id.* at 451.

between the interest of religion and the interest of the State if it is able to show that the law caused no burden upon the religious adherent's beliefs.

Another question that may be raised is how the claimant can present evidence of his religious beliefs. The Court has generally been liberal as to how this can be demonstrated. Testimony of the claimant has often been accepted as a means of proving one's religious beliefs and how this conflicts with the challenged law or regulation. However, the cases of *Yoder* and *Estrada* show that a good aid in establishing the presence of religious burden is by presenting evidence of the religious doctrines of the church through an expert on the subject of religion or an official of the church. In *Yoder* for example, the claimants offered as evidence testimonies of experts and scholars on religion and education. These experts gave a detailed account of the history of the Amish religion, their way of life, attitude towards secondary education and the probable effect of the compulsory attendance law not only on the religious beliefs of the religious community but also on the existence of the community as a whole. In *Estrada* the religious motivation of respondent was established through the presentation of documentary evidence and testimonial evidence from a church minister. The minister testified as to the biblical basis of the allegedly religiously sanctioned beliefs of the respondent and the procedure of the church with respect to the requirements and execution of the "Declaration Pledging Faithfulness." In fact, this evidence became so persuasive to Justice Vitug that he sought to absolve respondent from the complaint for disgraceful and immoral conduct.[230]

Another aid in establishing the presence of burden is the demonstration of the centrality of the religious beliefs in the adherent's religion. The magnitude of the religious burden can thus be stated in terms of the centrality of the tenet to the believer's faith.[231] In *Yoder* for example, it was established through expert testimony that the religious beliefs of the Old Amish against "worldly" secondary education, which contravened their belief in simple life, weighed heavily in the Court's holding that an exemption ought to be granted to Amish parents who refused to enroll their children in high school after the eighth grade.

Conceptually speaking, it may be said that the burden requirement imposed upon the free exercise claimant reflects upon the centrality of belief, thus equating the burden requirement with centrality. This proposition however, is *non sequitur*. The *element* of centrality more appropriately looks at the importance of the belief to the adherent while on the other hand, the *requirement* of burden looks at the magnitude of the cost or inconvenience which the government regulation will affect the religious adherent. Thus,

230. Estrada v. Escritor, 408 SCRA 1, 209 (2003).

231. TRIBE, *supra* note 32, § 14-12 at 1247.

while it is true that "substantial burdens on the [religious] claimant will, almost by definition, impinge on central aspects of the claimant's belief, the opposite is not necessarily true: A burden might be minimal, and thus outside the protection of the free exercise clause, even though it relates to the central aspect of religion."[232] At the same time, a religiously motivated conduct may be burdened by government regulation but the religious motivation may be something which is not central to the religious beliefs of the adherent. In *Estrada* however, the Court gave the Solicitor General an opportunity to *question* the centrality of respondent's practice in her faith[233] thereby implying that if the questioned practice is not central to respondent's faith, then the free exercise claim may be dismissed.

The author submits however, that by allowing the centrality of practice to come under question, the Court thusly equated centrality with burden. It is submitted that giving the state the ability to question the centrality of a religious belief to bar a free exercise claim is not very different from allowing the state to determine what is religious and what is not—an ability already rejected in *Ebralinag*. Furthermore, this approach ignores the subjective element of religious beliefs. Religious adherents may have the same belief systems but the centrality of these beliefs to each individual differs. Religious freedom looks into the effect of the state regulation upon the *believer* and not only upon the religious beliefs. However, it cannot be denied that proof of the centrality of a religious belief can be helpful to the religious adherent.

b. Four Fold Test of Burden

An examination of the cases discussed earlier can be developed to formulate a four-fold test which can serve as an aid in determining the presence of burden. The first question is whether the religious adherent was *prohibited* from exercising his religion. For the purpose of this study, this may be referred to as the textual test since this is based on the text of the free exercise clause. The second question is whether the religious adherent was *subsequently punished* for engaging in religiously motivated conduct. The cases of *Estrada, Centeno*, and *Yoder* are the main examples under this test. Moreover, it is important to remember that the term "punished" as used in this test is not limited to criminal punishment, as *Yoder* and *Centeno* suggests, but rather also when other forms of punishment are imposed such as administrative liability in *Estrada*. The third question is whether the religious adherent was *denied any benefit or privilege* which he would otherwise receive if he did not engage in the religiously motivated conduct. This is the more liberal aspect of the burden requirement as established in the cases of *Braunfeld* and *Sherbert*. The fourth test is the question of whether the

232. *Id.* § 14-12 at 1247-1248.

233. *Estrada*, 408 SCRA at 190-91.

government has created, intentionally or unintentionally, an *environment* which makes it *substantially difficult* for the religious adherent to practice his faith. The best example under this test is the case of *Lyng*.

Under this fourfold test, an affirmative answer in a given case as to any of the four questions will indicate that the legal enactment has caused a burden upon the religious beliefs of the claimant.

2. The Test of Good Faith or Sincerity

After establishing the presence of burden, the Court may look into the sincerity of the adherent. This is the second requirement by which the fear of insincere free exercise claims can be suppressed. However, it may also be said that this requirement is an adjunct of the burden requisite, since the absence of a sincere religious belief shows that the religious adherent's beliefs are, in truth, not so burdened. The main case under this test is *United States v. Ballard*.[234] In this case, the respondents were convicted upon an indictment for use of mails to defraud, and conspiracy to defraud through the use of mails. The indictment charged a scheme to defraud through misrepresentations involving respondents' religious beliefs which were alleged to be false and known by respondents to be false. Respondents contested the indictment on the ground that it attacked their religious beliefs in violation of the free exercise clause. The Supreme Court denied the motions and instructed the jury to look only into the good faith of the respondents but not the merits of their religious beliefs.[235] The Court held that the jury could not rule as to the truth or falsity of the religious beliefs of an individual, since "[t]he law knows no heresy, and is committed to the establishment of no dogma"[236] and that men are not prohibited from believing what they cannot prove.

Ballard establishes a very important limit into the Court's ability to inquire into the religious beliefs of an individual—in assessing whether the free exercise claimant is sincere in his religious beliefs, the Court is without authority to judge sincerity from the truthfulness or falsity of the religious belief. Good faith should not be equated with the merits of the religious doctrine.

In examining whether the free exercise clause is being claimed in good faith or not, several indicators can be used by the courts. The courts may look into whether the claimant also follows the other tenets of the adherent's

234. United States v. Ballard, 322 U.S. 78, 82 (1944).

235. *Id.* at 82.

236. *Id.* at 86.

religion.[237] The tenets of the religious organization may also be used to see whether the religious adherent's beliefs are consistent with the doctrines of the church in which he is a member.[238] However, while the conversion from one religion to another may be used as an indicator of deliberate purpose, this should be balanced with the free exercise clause which includes the right to choose which faith to believe.

In *Hobbie v. Unemployment Appeals Commission*,[239] Hobbie informed her employer that she was *just joining* the Seventh Day Adventist Church and due to religious reasons, she could no longer work on scheduled shifts. She filed a claim for unemployment compensation but the same was denied on the ground that her discharge was due to misconduct in connection with her work. The Court accepted Hobbie's claim that the refusal to award unemployment compensation benefits in this context violated her religious freedom.

Similarly, in *Thomas v. Review Board*,[240] the Court applied the free exercise clause notwithstanding the admitted fact that the religious claimant was struggling with his beliefs and that other members of the same religious organization did not agree with his views on what actions are forbidden by their religious beliefs. The Court held that, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection"[241] and it would seem that this would be so even for members of the same church. And finally, in *Bowen*, the Court accepted the claimant's religious beliefs without cavil, despite his admission that they had been just recently "developed."[242] Thus, the threshold appears to be set relatively low. The examples mentioned above stress the fact that the free exercise clause looks not only upon the doctrine of a particular religion, but more importantly upon the religious beliefs of a particular individual.

In the Philippines, the case of *German v. Barangan*[243] is an example of how the requirement of sincerity can be used to dismiss a free exercise claim.

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237. *See* Estrada v. Escritor, 408 SCRA 1, 189 (2003). (The Court took into consideration the fact that respondent requested exemption from the flag ceremony, which was prohibited by her religion as evidence of sincerity.).

238. *See* TRIBE, *supra* note 32, § 14-2 at 1155.

239. Hobbie v. Unemployment Appeals Commission, 107 S. Ct. 1046 (1987).

240. Thomas v. Review Board, 450 U.S. 707 (1981).

241. *Id.* at 714.

242. Bowen v. Roy, 476 U.S. 693, 696 (1986). (It is important to note however, that as given in the facts of the case, the alleged religious belief was also based from appellant's conversations with the chief of their Abenaki tribe.).

243. German v. Barangan, 135 SCRA 514 (1985).

The case was filed by petitioners who converged near the Malacañang grounds for the ostensible purpose of hearing mass at a nearby chapel. They wore the color of the opposition, and started marching down the street with raised clenched fists, shouting anti-government invectives. They were, however, barred from entering the grounds by the respondent Major. Since he warned them that similar attempts in the future would likewise be prevented, petitioners filed a case to compel him to allow them to hear mass at the said chapel, which claim was, of course, grounded on a plea to free exercise of religion. Respondents raised the defense that petitioner's intention was not really to perform an act of religious worship, but to conduct anti-government demonstrations near the palace. Denying the invocation of religious freedom, the Court held that the exercise of all fundamental human rights, specifically religious freedom, must be done in good faith. The actions of the petitioners clearly evidenced that their intention was not merely to hear mass but to conduct anti-government demonstrations. Justice Teehankee, however, dissented from the Court's disposition of the case using the good faith requirement. According to him:

> Indeed, there is no precedent in this time and age where churchgoers ... have been physically prevented from entering their church on grounds of national security. On the other hand, it does not lie within the competence nor authority of such officials to demand of churchgoers that they show and establish their 'sincerity and good faith'... Nor is there any *burden* on the churchgoer to make a satisfactory showing of a claim deeply rooted in religious conviction before he may worship the church of his choice... *Good faith on both sides is and must be presumed. Thus, petitioner's manifestations of their sincere intentions as Christians to gather together in prayer should be taken in good faith.*[244]

The author agrees with Justice Teehankee's position that good faith is to be presumed from petitioners in invoking their constitutional right to religious freedom. He emphasized the fact that the majority's basis for imputing bad faith on the petitioners was based on mere conjectures, which were denied by petitioners and which remained unrebutted. Good faith consists on an intention to abstain from taking any unconscientious advantage of another. As the opposite of bad faith or fraud, its non-existence must be established by competent proof.[245] It is always presumed while bad faith must be proven by the party alleging it.[246] There is no reason why the same presumption should not be afforded in free exercise claims.

3. Sincerity and Burden Requirements

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244. *Id.* at 534-35 (emphasis supplied).

245. Abando v. Lozada, 178 SCRA 509 (1989).

246. Cardente v. IAC, 155 SCRA 685 (1987).

Comparing the sincerity requirement with the burden requirement, the former does not contribute much to the establishment of judicial precedent. A finding of the absence of sincerity operates only at "retail" level, since such findings apply only to a particular case. On the other hand, other screening mechanisms, such as the burden requirement, the definition of religion, and other generally applicable judicial principles can be considered at a "wholesale" level, one which "can operate systematically over time to eliminate entire classes of claims."[247]

As gate keepers of free exercise analysis, the burden and sincerity requirement may be viewed as indistinct tests. By viewing the burden requirement as the *effect* upon the religious adherent of government action, there is no point in saying that a specific government action has burdened an insincere individual's religious beliefs. It would be illogical for the Court to say that the government action has created a burden upon a religious belief, which it would, however, later on claim not to be sincerely held by the individual. In this respect, the presumption of good faith contributes in facilitating the application of these gate keeper doctrines because the Court can examine the presence of burden without having to concern itself with the question of whether the religious adherent carries such belief. However, once the government raises a serious question upon the sincerity of the religious adherent, the Court must not leave such issue for later resolution, since to do so would tear out the essence of the burden requirement.

C. Generally Applicable Judicial Principles

The analysis made earlier has shown that the free exercise clause creates, to a limited extent, the possibility of exempting a religious adherent from laws of general applicability on the basis of religious scruples. However, the free exercise clause has never been held to exempt a religious adherent from the application of established judicial principles particularly *stare decisis* and *res judicata.*

The flag salute cases illustrates the operation of these principles in a series of cases which substantially involve the same free exercise claim. One year after *Gerona v. Secretary of Education*,[248] *Balbuna v. Secretary of Education*[249] was decided, applying the principle of *stare decisis.* Had the case involved the same parties, it would have been dismissed on the ground of *res judicata* through a Motion to Dismiss.[250] This does not mean however, that the Supreme Court is forever bound by its previous decisions, as shown in the reversal three decades later, of *Gerona* by *Ebralinag.* Indeed, the latter was the

247. Lupu, *Where the Rights Begin, supra* note 35, at 956.

248. Gerona v. Secretary of Education, 196 Phil. 2 (1959).

249. Balbuna v. Secretary of Education, 110 Phil. 150 (1960).

250. REVISED RULES OF CIVIL PROCEDURE, Rule 16, § 1(f).

vehicle by which the Court reexamined the principle in the former. Presumptively, the Court noted that the fear in *Gerona,* that exempting the students from the flag ceremony would prevent them from learning the value of patriotism, had not come to pass.

What is important under this category is that courts have the authority, even the obligation, of applying judicial precedents even in free exercise cases. This finds basis under the equal protection clause. If one religious adherent is exempted from the operation of a general law, denying the same kind of protection to another religious adherent would be repugnant to equal protection.

VII. TESTING THE COMPELLING STATE INTEREST TEST

A. Compelling State Interest Test: Meaning and Problems

It is only after sifting through potential free exercise cases will there be the duty upon the Court to subject a given case to strict scrutiny. Unfortunately however, outside of cases involving religious expression, Philippine jurisprudence has no developed theory on the application of the compelling state interest test. American jurisprudence, on the other hand, has not been consistent. It is proposed that, having addressed the dangers of the benevolent neutrality approach in free exercise cases, strict scrutiny should be applied with full force.

In order to understand the concept of compelling state interest, it should be distinguished from the concept of clear and present danger which as shown earlier, is the test that is applied to religious expression. In *Cabansag v. Fernandez*,[251] the Court discussed the meaning of the clear and present danger test by distinguishing it from the dangerous tendency rule. According to the Court, the first means that "the *evil consequences* of the comment or utterance must be *extremely serious* and the degree of *imminence* extremely high before the utterance can be punished."[252] On the other hand, under the dangerous tendency rule, "it is not necessary that some definite or immediate acts of force, violence, or unlawfulness be advocated... [and] [i]t is sufficient if the natural and probable effect of the utterance be to bring about the substantive evil which the legislative body seeks to prevent."[253]

The question of the distinction between the compelling state interest and the clear and present danger has been settled in *Estrada* where the Court said:

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251. Cabansag v. Fernandez, 102 Phil. 151 (1957).

252. *Id.* at 158.

253. *Id.*

> The compelling state interest is proper where conduct is involved for the whole gamut of human conduct has different effects on the state's interests: some effects may be immediate and short-term while others may be delayed and far-reaching. A test that would protect the interests of the state in preventing a substantive evil, whether immediate or delayed, is therefore necessary. However, not any interest of the state would suffice to prevail over the right of religious freedom as this is a fundamental right that enjoys a preferred position in the hierarchy of rights—'the most inalienable and sacred of all human rights,' in the words of Jefferson.[254]

It is thus possible that conduct which can have long term, rather than immediate, effects will come within the purview of the compelling state interest. Thus, what would come under the dangerous tendency rule is considered a compelling state interest.

The requirement imposed upon the State to show that an unusually important goal can be achieved only through a uniform enforcement of the questioned regulation seeks to strike a balance between the individual's free exercise rights and the government's functional needs.[255] This duty upon the State arises only after the religious adherent has proven that the claimed belief arises from sincere religious motivation and that the government action has burdened the free exercise of his religion. Moreover, as shown in this study, the Court must also be satisfied that the action complained of does not come within the "immunized areas" of government interests. It is at this point then that the burden shifts upon the State to overcome the adherent's evidence by demonstrating two things: first, that the regulation pursues a particularly important governmental goal; and second, that an exemption would substantially hinder the fulfillment of that goal.[256] However, the determination of whether a given state interest is compelling cannot be determined by using one test alone; rather it is arrived at through a number of factors.

While the *real* application of this test is new in Philippine jurisprudence,[257] the compelling state interest test has been applied in several cases in the United States. However, even its application in that jurisdiction has displayed some inconsistencies in determining the nature of a compelling state interest.

Sherbert v. Verner made the doctrinal advancement that in free exercise cases, the government has the duty of showing that the burden, whether direct or indirect, caused upon the religious beliefs of a claimant, can be

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254. Estrada v. Escritor, 408 SCRA 1, 170-71 (2003) (emphasis in original).

255. TRIBE, *supra* note 32, § 14-13 at 1251.

256. *Id.*

257. *Estrada*, 408 SCRA at 191. (The Court described the case as one of first impression where the compelling state interest will be applied as the standard).

justified only by a compelling state interest and the means employed are the least restrictive means of achieving that interest.[258] The government, in *Sherbert,* suggested that granting an exception to the law would create the possibility of fraudulent claims by feigning religious objection to Saturday work, which could, in turn, dilute the unemployment compensation fund and prejudice work scheduling. This was, as noted, rejected by the Court on two grounds. First, the Court held that, "there is no proof whatever to warrant such fears of malingering or deceit as those which the respondents... advance [and] [e]ven... if consideration of such evidence is not foreclosed... it is highly doubtful whether such evidence would be sufficient to warrant a substantial infringement of religious liberties."[259] Second, it held that assuming that the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, "it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuse without infringing First Amendment rights."[260]

Sherbert teaches that the government cannot adopt a position of "religion blindness."[261] In this case, the only significant interest which the state raised for refusing to grant an exemption for religious objectors from Saturday work was its interest in treating religious objectors like anyone else, an argument which the Court was not willing to accept as sufficiently compelling. On the other hand, had the argument of the possibility of fraudulent claims been proved by the government, the Court would still require the government to show that the means of treating religious objectors like anyone else was the least restrictive means of achieving that interest.

Yoder reaffirmed the principle in *Sherbert,* but found another ground in rejecting the claim that the interest in compulsory education overrides the religious beliefs of the parents. The Court held that the State could not enforce its criminal statute against Amish families who refused to send their children to school beyond eighth grade. The recognized interest of the state in universal education in order to prepare the children to become effective, intelligent, and self-reliant was already ably served by the practices of the Amish communities' informal education for rural community life.

Sherbert and *Yoder*, as judicial precedents, were very protective of religious freedom. The Court in these two cases examined the purported governmental interest within the strictures of the circumstances of the case. In *Sherbert* for example, the possibility of fraudulent claims was deemed to be insufficient, and the Court dismissed the mere possibility without proof as a

258. Sherbert v. Verner, 374 U.S. 398, 407 (1963).

259. *Id.* at 407.

260. *Id.*

261. TRIBE, *supra* note 32, § 14-13 at 1257.

compelling interest.[262] On the other hand, in *Yoder*, the admittedly high interest of the state in compulsory education was matched with the equally compelling interest of the parents of raising their children in accordance with their beliefs and way of life.[263] The compelling interest requirement in *Sherbert* and *Yoder* were construed narrowly in the sense that hypothetical fears or dangers were perceived by the Court to be insufficient. What the Court required in these two cases was particularized evidence of precisely how the compelling interest of the state would be defeated by granting an exemption.

This protective principle was somewhat diminished in the more recent case of *United States v. Lee* where the Court rejected the claim of the Amish for exemption from the imposition of social security taxes.[264] First, the Court examined the importance of a universal security system and the indispensability of mandatory participation to its fiscal vitality. It then characterized the interest of the government in the mandatory and continuous participation of the people to the system as "very high."[265] Characterizing the interest of the government as "not [being] fundamentally different from the obligation to pay income taxes,"[266] the Court expressed its concern that exempting the Amish from payment of social security taxes would result to other claims for exemptions from general revenue taxes which would "radically restrict the operating latitude of the legislature."[267]

While the ratio of *Lee* applies within its specific context of religious objection to social security taxes, the manner by which it has altered the compelling state interest test may be applied to other cases. *Lee* has the effect of weakening the requirements that: a) the State show that its interest is compelling; and b) that the means of pursuing such interest is the least restrictive means of burdening religious freedom. It is important to note that while the Court in *Sherbert* and *Yoder* required a particular showing of how the exemption would defeat the compelling interest of the state, the Court in *Lee* was satisfied with the interest of the government in the social security

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262. *Sherbert*, 374 U.S. at 407.

263. Wisconsin v. Yoder, 406 U.S. 205, 226-27 (1972). ([i]n holding that because Amish communities had existed successfully decades before compulsory education became mandatory, there was strong evidence that enforcing an extra two years of education would, at best, be a "speculative gain." And thus, "[a]gainst this background it would require a more particularized showing from the State on this point to justify the severe interference with religious freedom such additional compulsory education would entail.").

264. United States v. Lee, 455 U.S. 252 (1982).

265. *Id.* at 258-59.

266. *Id.* at 260.

267. *Id.* at 259 (citing *Braunfeld v. Brown* at 606).

program as a whole. Moreover, while the Court required in *Sherbert* that the means employed by the government should be the least restrictive means of achieving that interest, the Court in *Lee* was satisfied that the accommodation to the religious objector will not unduly interfere with the fulfillment of the interest of the government. While the Court in *Lee* did not define the meaning of "unduly interfere," it has been considered as being a "looser" standard than the least restrictive means requirement of *Sherbert*.[268]

This inconsistency has been explained by commentators as having expanded the scope of the compelling governmental interests and substantially diminished the protection of the free exercise clause.[269] On the other hand, both modes of interpretation appear to be within the ambit of the benevolent neutrality theory. This can be further supported by considering the various factors which the government may take into account in establishing a compelling state interest in the general application of a specific law.

B. Developing a Model to Determine Compelling State Interest

The compelling state interest test may be viewed as a test of ends and means. The goal, or end, of this test is to protect religious freedom except from those interests of government that are of utmost importance. On the other hand, as a means, only the least restrictive means of infringement upon religious liberty will be allowed, which means that even if the interest of government is deemed to be of utmost importance, if there are less restrictive means of achieving that interest, then that should be employed.

As stated earlier, the use of the word "compelling" to modify the interest of the state under this test serves as proof that not all government interest may be upheld against the invocation of religious freedom. The bigger question considering the inconsistency with this principle is the determination of a general test. Gianella suggests the following balancing formula: first is the *importance* of the secular value underlying the governmental regulation; second, the degree of *proximity and necessity* that the chosen regulatory means bear to the underlying value; and third, the *impact* that an exemption for religious reasons would have on the over-all regulatory program. This would then be balanced against two factors: first, the sincerity and importance of the religious practice for which special protection is claimed; and second, the degree to which the governmental regulation interferes with the practice.[270] This test however can still face some pitfalls since it remains very subjective.

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268. TRIBE, *supra* note 32, § 14-13 at 1261-62.

269. *Id.* § 14-13 at 1261-63.

270. Gianella, *Religious Liberty*, *supra* note 65, at 1390.

It is possible to conceive of a model of determining whether a given interest is a compelling state interest by looking at various factors which, while generally not determinative, are nevertheless important indicators. The model which is proposed in here is not radically different from that which has been mentioned earlier. However, this model seeks to integrate the *wide* and *narrow* construction of the compelling state interest into a more consistent framework.

1. First Factor: Centrality of Government Interest

The first factor to consider is the *centrality* of the purported interest of the state in the over all regulatory scheme. While this may be considered as being the same with the first test of importance in the formula presented by Gianella, it is submitted that the *centrality* requirement is stricter than *importance*. This is a factor which the government is required to satisfy; similar to the element of *centrality* in assessing the burden imposed by the state upon religion. Thus, while the centrality element of religious beliefs asks the question of the importance of the beliefs to the believer, the centrality element of governmental interest looks at the importance of the purported interest in relation to the various government interests that are considered to be non-negotiable. As discussed earlier, an intermediate step is necessary because there should be several governmental interests that are by their nature already deemed compelling enough that the possibility of exemption should altogether be abandoned. Thus, under the police power interest, a person cannot seek exemption from liability if he has caused harm to another. Under the administrative interest of government, a religious claimant cannot force the government to adjust its *internal affairs* every time a religious claimant believes that it violates his beliefs. Moreover, a government official cannot use his religious beliefs in performing his *duty* to the public. Lastly, under the revenue raising interest of the state, a religious objection to the state's exercise of sovereign taxation as its source of income cannot be countenanced under the principle of *reciprocity*.

While not all forms of government action will fall under these immunized areas, it is possible that they can have an impact on those interests which are already deemed compelling. For example, under the law prohibiting the use of drugs, the use of banned substances is punished by imprisonment and fine. If banned substances are used in a religious ritual, the state can justify its interference by showing the deleterious effects of the prohibited drug to the health of its users. Furthermore, if a member of a particular religion is charged with violation of the law against *Mail to Order Brides* or *Trafficking in Women and Children*, while the transaction may involve consenting parties, the state can show that the transaction is characterized by

economic exploitation, which it then has the right to suppress.[271] Thus, it may be considered that the law could be justified by a compelling state interest as it seeks to prevent the possibility of harm.

2. Second Factor: Proximity

After assessing the centrality of the government interest, two factors may be considered in order to ascertain if the determination of the state interest is to be construed *broadly* or *narrowly*. The first factor is *proximity*. At the same time, though not determinative of the fact, proximity can also serve as a factor in assessing the character of the state's interest. This is reminiscent of the element of imminence in the clear and present danger test. For example, a suggestion may be inferred from the Court's decision in *Ebralinag* that had the case been filed at the time when the country was under foreign invasion, the interest of the state would have been deemed compelling.[272] However, it is submitted that the proximity factor necessarily presupposes that the danger is real and not merely apparent. Thus, the application of the proximity factor is, in the application of the compelling state interest, *narrowly* construed.

3. Third Factor: Magnitude

The second factor that may be considered is the *magnitude* of the effect which a religiously based exception would have upon the interest which the government seeks to promote. In *Hernandez* for example, the Court was ultimately concerned with the probable effect of allowing the claimed deduction. The fear was in the unwarranted expansion of tax deductions which could potentially destroy the government's compelling interest in maintaining a "sound and uniform tax system."[273] Discussing the magnitude of the probable effect of allowing the deduction, Justice Marshall argued:

> [P]etitioner's deductibility proposal would expand the charitable contribution deduction *far beyond what Congress has provided*... some taxpayers might regard their tuition payments to parochial schools as generating a religious benefit or as securing access to a religious service; such payments, however, have long been held not to be charitable contributions... [they] might make similar claims about payments for church-sponsored counseling sessions or for medical care at church-affiliated hospitals that otherwise might not be deductible. Given that, under the First Amendment, the IRS can reject otherwise valid claims of religious benefit only on the ground that a taxpayer's alleged beliefs are not sincerely held, but not on the ground that such beliefs are inherently

271. Joanna Divina Gracia, *The Marriage Practices of the Unification Church: A Constitutionally Protected Practice* (1997) (unpublished J.D. Thesis, Ateneo Professional Schools Library).

272. Ebralinag v. Division Superintendent of Schools, 219 SCRA 256, 273 (1993).

273. Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 689 (1989).

> irreligious, *the resulting tax deductions would likely expand the charitable contribution provision far beyond its present size.*[274]

The danger here is not with the proximity of such fact's occurrence, but rather, with the extent or magnitude of the effect of the deduction to the system of tax deduction. To an extent therefore, *Hernandez's* analysis is a construction of the compelling state interest *broadly* construed; similar to the analysis in *Lee*. However, the magnitude of such danger became a great consideration in the Court's resolution of the case. Thus, the *magnitude* factor looks at the compelling state interest *broadly* construed.

C. Least Restrictive Means Requirement

A finding that the governmental interest is indeed compelling does not, however, end the inquiry. For, under the terms of *Estrada*, the means employed by the state must be the least restrictive means of achieving such interest. This is the aspect of *means* of the compelling state interest requirement. It basically commands that government should always choose the least intrusive means possible of promoting a certain interest. Even if its action is justified by a compelling state interest, the government is not allowed to adopt an attitude of "religion blindness" by disregarding religious groups especially the minority.

Usually, the least restrictive means is viewed in terms of the point in time when government intrusion takes place. Thus, in the case of *Schneider* for example, the danger of possibility of fraud may be appropriately addressed by subsequent punishment rather than prior restraint in the form of an intrusive licensing procedure. On the other hand, this requirement does not mean that the Court can nullify the judgment of the legislature when it imposes penal sanctions for the commission of an offense. Thus, the Court cannot say that the imposition of imprisonment is not the least restrictive means of achieving a particular state interest since it may be achieved by imposing a fine only. Such an interpretation would be stretching the free exercise clause beyond the constitutionally permissible means for violating the principle of separation of powers.

VIII. TOWARDS A STRUCTURALLY CONSISTENT FRAMEWORK OF THE FREE EXERCISE CLAUSE

A. Boundary Retested

The above discussion of various cases emphasize one point: the benevolent neutrality theory has expanded the boundaries of religious freedom. This is especially so with religious conduct. In order to better appreciate the scope and extent of the free exercise clause and to be able to utilize fully judicial

274. *Id.* at 693.

precedents consistently with the benevolent neutrality theory, the only way to interpret the free exercise clause is through the proposition that *Estrada* did, indeed, expanded its scope. In recognizing this proposition, judicial precedents such as *Centeno v. Villalon-Pornillos*[275] and *Sulu Islamic v. Malik*[276] may be challenged once again.

B. Boundary Redefined

The study seeks to develop a structurally consistent framework which will aid the courts and other government bodies in dealing with free exercise claims in a manner that will allow religious freedom to the greatest extent possible within constitutional limits; while, at the same time, will safeguard those areas of state interest which cannot be penetrated by the free exercise clause. The insensitive treatment to religious motivation is the result of the judicial acquiescence to the "sometimes unpalatable fact that democratic government acts to reinforce the generally accepted values of a given society and not merely the fundamental ones which relates to its political structure."[277] More importantly, it is the fear of religious anarchy that has been used as a justification for turning a blind eye to a liberal construction of religious liberty. The study however, suggests that if this fear of religious anarchy can be addressed by formulating a structurally consistent framework wherein the fundamental values of society, or those interests which are non-negotiable, will be initially addressed before the action of government is scrutinized, then there will be no reason in refusing to maximize the potential protection of the free exercise clause to the greatest extent that is constitutionally permissible.

The following steps, culled from cases wherein the free exercise clause is implicated, are suggested:

First, the Court must determine whether a free exercise claim is being raised by a party in a case.

A free exercise claim is determined not because the claimant is a religious corporation or a member of the religious. What implicates the constitutional provision on the free exercise of religion is the allegation that the government has intruded upon the religious beliefs or motivations of the adherent.

In determining whether the free exercise clause is being invoked, the most practical recourse is to see whether the constitutional provision is being invoked by the adherent. However, it will be sufficient in substance that the religious adherent raises, for a defense, his religious beliefs as a motivation to

275. Centeno v. Villalon-Pornillos, 236 SCRA 197 (1994).

276. Sulu Islamic Association of Masjid Lambayong v. Malik, 226 SCRA 193 (1993).

277. Gianella, *Religious Liberty*, *supra* note 65, at 1385.

engage in conduct which happens to conflict with a particular government policy. To this extent however, that the defense of religious freedom is merely implied, the use of a legal definition of religion will help the Court in determining whether the free exercise clause is being invoked. This determination, however, does not include the right to determine whether a particular belief is religious or not. What it means is that if the argument is that the questioned action was made by reason of religious motivations, it should be held as conclusive upon the courts. However, when it was merely implied by the claimant that the action was made by reason of religious motivation, the Court must determine whether the defense being invoked is religious or secular.

Second, has the challenged government regulation or law burdened the claimant's religious beliefs?

This requirement flows from the liberal interpretation of the free exercise clause which mandates that no law shall be made "prohibiting" the free exercise of religion and that the freedom of religious profession and worship shall forever be "allowed."[278] In determining the presence of burden, the Court should be concerned with the effect upon the religious adherent, and not the form of government regulation.

In determining whether the challenged government regulation has burdened the religious freedom of an individual, the Court may employ a "four fold test." Under this test, a potential free exercise case will be subjected to four questions. The first question is whether the law has the effect of *prohibiting* the religious practices or behavior of the claimant. The second question is whether the religious adherent is *punished* for engaging in religiously motivated conduct. The third question is whether the religious adherent is *denied any privilege or benefit which he is entitled to had it not been for his religiously motivated activities*. Lastly, the question as to whether the government has created a condition which makes it *substantially difficult* for the religious adherent to practice his religion should also be considered. An affirmative answer in *any* of the four tests would establish that the government regulation has indeed burdened the adherent's practice of his religion.

If the Court finds that the challenged regulation has not burdened the religious beliefs of the adherent, judicial self-restraint dictates it should try to avoid making a free exercise inquiry. It would be best for the Court to emphasize that the *ratio decidendi* of the case is that the prospective free exercise claimant failed to meet the minimum requirement of burden. This would not only save the Court precious time but it would also strengthen judicial precedent which emphasizes the burden requirement.

278. PHIL. CONST., art. III, § 5.

Intimately connected with this is the question of whether the free exercise claimant is making the claim from sincerely held religious beliefs. Once the religious adherent has satisfactorily shown that the challenged government regulation has burdened his religious beliefs or motivations, it is not incumbent upon him to prove that he is in good faith, since it is presumed. On the contrary, it is upon the government to prove that the free exercise claimant is merely using religion as a subterfuge to claim exemption from regulation.

The steps mentioned earlier are what may be referred to as gate keeper doctrines. After a free exercise claim passes muster under the earlier steps may it only be said that there is a genuine free exercise claim. However, the analysis does not end there.

Third, after identifying whether a genuine free exercise claim is made, the Court must identify under what government interest the challenged regulation falls.

After identifying the interest, the Court must make a preliminary inquiry as to whether the government interest is already deemed so compelling that it is immunized from further strict scrutiny. This is the main proposition which this study aims to establish. Under the police power interest of the state, the area which religious freedom cannot penetrate is the principle of harm. Under this principle, religious freedom cannot be used as an excuse to cause injury to another. This finds support under Article 19 of the Civil Code which provides that "[e]very person must, in the exercise of his rights... act with justice, give everyone his due, and observe honesty and good faith." In its most essential form, society exists for mutual protection. Thus, any act which would tend to destroy this purpose must be properly dealt with.

Furthermore, under the administrative interest of government, the area which religious freedom cannot penetrate is the internal administration of government. The principle underlying this theory is that the free exercise clause cannot be used to justify an imposition upon the government as to how it should run its affairs. However, this should be limited to purely internal matters and a different analysis is warranted when a government policy causes external consequences that burden religious freedom. Lastly, under the revenue raising interest of the state, the lifeblood theory of taxes bars the application of the free exercise clause. Under the principle of reciprocity, the fact that persons in a given society, including religious associations, receive protection from government, whether direct or indirect, means that it is only just that each should contribute to the financing of the government.

This approach will enable the courts to more effectively police the boundaries of religious freedom. By admitting that notwithstanding the preferred position of religion, recognizing the existence of areas of government interest that cannot be overridden by religious freedom can strengthen religious freedom in other areas. This is mainly due to the fact

that, by determining a religious baseline more concrete than the compelling interest threshold and more dynamic than the generality and neutrality requirement, the rights protective viewpoint on religious freedom may be enforced by the Court rather than by the more majoritarian legislature.

Fourth, if the free exercise claim falls under these non-negotiable areas, the free exercise claim must be immediately dismissed by the Court.

The importance of this step is practical as well as symbolic. It is practical because similar to the burden requirement, it will help save judicial time. On the other hand, it is symbolic because it emphasizes that the legal enactment in question cannot be overridden by a simple free exercise challenge. At the outset, the courts will be able to inform the parties that there can be no possibility of exemption from the challenged law by reason of the invocation of religious freedom. As pointed out earlier, both the mere possibility of exemption and the presumption in favor of creating exemption from general laws are already considered as exemptions in and of themselves. It is also at this point that the free exercise clause and the non-establishment clause intersect, and the former must yield to the latter.

Fifth, if the challenged law does not fall under the non-negotiable interest, the Court must require the government to prove that the law is justified by a compelling state interest.

The fact that the challenged government policy does not fall under the interests of government which cannot be penetrated by the free exercise clause does not necessarily mean that an exemption is required. The government at this point is given the opportunity to show that the challenged policy is justified by a compelling state interest and that it is the least restrictive means of achieving that interest.

It is proposed that it is only at this point in time that the challenged government policy should be subjected to strict scrutiny. In determining whether the challenged law is justified by a compelling state interest, several factors may be considered by the courts. First, they may consider how the exemption impinges upon the non-negotiable government interest mentioned earlier. Second, they may consider the proximity and magnitude of the effect of the exemption to the interests of the government. Third, they may also see if the purported interest which the government seeks to promote by the challenged regulation is satisfied by other means. Additionally, an important consideration is whether the challenged regulation applies to both religiously and non-religiously motivated conduct.

The importance of the protective approach of this requirement is that it is the government which must show that its enactment is justified by a compelling state interest and that the means used is the least restrictive means of achieving that interest. By placing the burden upon the government, religious liberty becomes the rule rather than the exception.

C. Conclusion

Professor Ira Lupu, in one of his works, formulated alternative conceptions of the interplay between the free exercise clause and the non-establishment clause. [279] First, is a situation where there is a strong establishment clause and a weak free exercise clause. The second alternative comprises a situation wherein both the establishment and free exercise clauses are weak. The third alternative is one where the establishment clause is weak, while the free exercise clause is strong. Finally, and the one which Lupu prefers, is the alternative where both the establishment and free exercise clauses are strong. Under this last alternative, "[c]ourts would have maximum authority to police the boundaries of state-religion interaction, and would be expected to exercise that authority vigorously."[280]

In order that the courts may be able to police the boundary where the free exercise clause intersects with that of non-establishment, it is necessary to have a tool which can help the courts balance the right to religious liberty of the individual and the authority of the state to control the behavior of its people for the common good. The first tool is the law. The legislature, by making establishment accommodations, makes it easier for the courts to allow exemption by religious claimants. In such cases, the volatile free exercise clause need not be implicated and the only question that may be raised is the possibility of an objection under the non-establishment clause. The boundary can be identified conveniently since all that the courts must do is determine whether the legislature has allowed exemptions from generally applicable laws. This tool is very convenient, as it saves the judiciary the time and energy of scrutinizing laws which conflict with the religious scruples of people who generally belong to minority religious groups.

This convenience however becomes the very root of insensitivity. Going back to *Employment Division v. Smith*, the Court therein argued that "[v]alues protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process."[281] It then concluded:

> It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a

279. Ira Lupu, *The Trouble With Accommodation*, 60 GEO. WASH. L. REV. 743 (1992).

280. *Id.* at 780-81.

281. Employment Division v. Smith, 494 U.S. 872, 890 (1990).

> law unto himself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.[282]

Such reasoning is tantamount to turning a blind eye to minority religious groups who not only perform practices that are considered "deviant" by majoritarian standards, but also lack enough political power to represent themselves in the halls of Congress. Even the argument that criminal laws establish the minimum allowable conduct in society is not free from this criticism of "religious blindness."

This is the problem which the benevolent neutrality position seeks to address. Under such a situation, majority religions with enough political clout are able to make sure that their religious practices are not significantly infringed by any incidental legislation. Minority religions which do not have sufficient numbers to affect the political process shall remain controlled by incidental legislation made by the majority. There is a violation of the equal protection clause not only when the law makes an invalid distinction but also when the law fails, in the first place, to make a distinction.[283] Neither the Constitution nor the Supreme Court's interpretation of the free exercise clause, and the latter's commitment to equal treatment under a benevolent neutrality stance, supports such unequal disposition of minority religious liberties. Thus, to make the law the minimum standard which religious freedom cannot override by reason of public policy considerations would be tantamount to leaving everything to the political process, where power is unevenly distributed. This was amply demonstrated in *Smith*, which penalized what was otherwise a proper facet of a certain religious belief. The *ratio* of that case has often been characterized as the unavoidable consequence of democratic society, wherein the majority rules. However, as Justice O'Connor's concurring opinion had time to note, this should be far from the case. Thus:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[284]

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282. *Id.*

283. Villegas v. Hiu Chiong, 86 SCRA 270 (1978).

284. *Smith*, 494 U.S. at 903.

The above sentiment was repeated by our own Supreme Court in its resolution of the Motion for Reconsideration in *Ebralinag*.[285] Concerning the freedom of religion, the Court had this to say:

> [T]he freedom of religion enshrined in the Constitution should be seen as the rule, not the exception... As to the contention that the exemption accorded by our decision benefits a privileged few, it is enough to re-emphasize that 'the constitutional protection of religious freedom terminated disabilities, it did not create new privileges. It gave religious equality, not civil immunity.' *The essence of the free exercise clause is freedom from conformity to the law because of religious dogma.*[286]

In a pluralistic society such as the Philippines, the only conceivable way by which the government can go about its business without infringing upon the religious liberty of the people, especially the minority, is by allowing the courts to grant exemptions when to do so is constitutionally compelled. This recognizes the fact that the legislature cannot accommodate every religious belief when it enacts a law. Moreover, by creating the possibility of exempting a person from the application of a law by reason of his religious scruples, the Court is giving him an opportunity to follow an authority which he recognizes as higher than the state. Indeed, only those matters of interest which are of high importance can override religious liberty.

Neither would the interests of the State suffer should a sympathetic eye be turned to the inward manifestations of a person's central belief system. While the compelling state interest test may be viewed as the animating force behind the constitutional guarantee to religious liberty, it is the fear of a liberal construction placing at danger essential state interests that has, on the other hand, been the reason for severely crippling this test—a test which, in other constitutional contexts, has been otherwise seen as a very powerful safeguard. However, by identifying essential state interests and testing their applicability at the initial stage of a potential free exercise case, the danger has been considerably lessened. The benevolent neutrality approach thus, precisely seeks to maximize the potential protection which the free exercise clause can give to religious liberty.

Ultimately, if the free exercise clause is interpreted under a benevolent neutrality interpretation, perhaps the Court's promise in *Estrada* that, "the constitution commands the positive protection by government of religious freedom—not only for a minority, however small—not only for a majority, however large—but for each of us"[287] may become a reality.

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285. Ebralinag v. Division Superintendent of Schools of Cebu, 251 SCRA 569 (1995).

286. *Id.* at 580-81 (emphasis supplied).

287. Estrada v. Escritor, 408 SCRA 1, 50 (2003) (citing the concurring opinion of Justice Stewart in *Sherbert*, 374 U.S. at 416).