Police Power Absolutism and Nullifying the Free Exercise Clause: A Critique of *Oregon v. Smith*

John Delaney*

> *"A regulation neutral on its face may, in its application, nonetheless offend . . . the free exercise of religion."*
> *Chief Justice Warren Burger*[1]

Introduction

In the recent landmark decision of *Oregon v. Smith*,[2] the United States Supreme Court, in Justice O'Connor's words, "dramatically departs from well-settled First Amendment jurisprudence"[3] in a "paradigm free exercise"[4] case by reframing a core dimension of free exercise doctrine. Justice Blackmun calls this reframing "a wholesale overturning of settled law concerning the Religion Clauses of our Constitution."[5] A bare Court majority severely restricted the scope of the application of the traditional compelling interest balancing test for assessing claims of a burdening of religious practice and provided no real substitute test. What it sacrificed is elegantly captured by Justice O'Connor's description of the central significance of this balancing test in implementing the free exercise clause:

> The compelling interest test effectuates the First Amendment's command that religious liberty is an independent liberty, that it occupies a preferred position, and that the Court will not permit encroachments upon this liberty, whether direct or indirect, unless

---

* Associate Professor of Law, City University of New York Law School at Queens College; B.SS., 1954, Fordham University; J.D., 1959, New York Law School; LL.M., 1965, New York University School of Law; M.A., 1972, New School for Social Research. I wish to thank the following persons for their assistance with this Article: my colleagues at the City University Law School, Susan Carpenter, Steve Loffredo, and Peter Margulies; Ali Khan of the Washburn University Law School; Judge Luke Charde; Jesse Kasowitz, Esq.; my students, Shawn Boatright, Gilma Camargo, David Campbell, Marsha Edwards, and Robert Perry; my secretary, Betty Tabor; and my wife Lisa Blitman, Esq. I am also indebted to the CUNY Law School, its deans, and faculty for supporting this research and writing with a semester of paid leave.

1. Wisconsin v. Yoder, 406 U.S. 205, 220 (1972).
2. 110 S. Ct. 1595 (1990).
3. *Id.* at 1606 (O'Connor, J., concurring).
4. *Id.* at 1612 (O'Connor, J., concurring).
5. *Id.* at 1616 (Blackmun, J., dissenting).

> required by clear and compelling governmental interests "of the highest order." . . . The compelling interest test reflects the First Amendment's mandate of preserving religious liberty to the fullest extent possible in a pluralistic society.[6]

The immediate design of the Court majority is manifest — to foreclose free exercise analysis of any kind when a claim arises from the application of a typical facially neutral, generally applicable criminal statute. Yet, this drastic curtailing of free exercise claims may be part of a more resonant orchestration designed to refashion the role of the federal courts by leaving accommodation of claims that conflict with such statutes to the legislature with the likely result that recognition of minority religious claims will be held hostage to majoritarian politics.

Implicit in this startling dispatch to the legislature of free exercise claims is an alteration of our theory of democratic government which authorizes majoritarian decisionmaking within a framework of fundamental rights guaranteed by the Bill of Rights and protected by the courts. The Court is altering the proper relationship between individuals and government by enlarging state power through the curtailing of the occasions when individual constitutional rights may be considered by the courts. This is a "vision . . . bordering on the authoritarian . . . and insufficiently sensitive to human rights and needs."[7] It is not surprising, therefore, that the *Smith* Court's curtailing of free exercise claims, including its restricted role for the federal courts and its refashioned democratic theory, has provoked vehement criticism from within Congress and from a diverse coalition of religious groups throughout the country. In addition, it has provoked a congressional bill to "protect the free exercise of religion" through the restoration of the compelling interest test.[8]

---

6. *Id.* at 1609, 1613 (O'Connor, J., concurring).

7. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW ix (2d ed. 1988). Confirmation of this trend is proliferating. In McCleskey v. Zant, 111 S. Ct. 1454 (1991), the Court adopted new rules curtailing the number of times defendants sentenced to death can petition federal courts to consider new evidence or new arguments. In Arizona v. Fulminante, 111 S. Ct. 1246 (1991), the Court decided that a confession beaten out of a defendant may be only "harmless error" not warranting reversal of a conviction. In Rust v. Sullivan, 111 S. Ct. 1759 (1991), the Court, for the first time, approved executive agency censorship of what those who accept federal funds may say in carrying out their professional duties, in contrast to the traditional regulation of what they may do with those funds.

8. Numerous members of Congress have co-sponsored the Religious Freedom Restoration Act of 1990. H.R. 5377, 101st Cong., 2nd Sess. (1990). The authority for this bill is § 5 of the fourteenth amendment to the United States Constitution, which states that "[t]he Congress shall have power to enforce, by appropriate legislation, the

The claimants in *Smith* were denied unemployment insurance benefits after they were fired from their jobs as drug counselors for ingesting peyote in an annual sacramental rite of the Native American Church. They argued that the Court's rule and principle embedded in four prior unemployment cases controlled their unemployment case. More specifically, they argued that their dismissal fell within the free exercise exemption carved out by unemployment case precedents. Although the Oregon courts agreed, the *Smith* majority rejected this claim and reasoned that these cases did not apply to the claim because the denial of benefits resulted from behavior that fell within "an across-the-board criminal prohibition on a particular form of conduct."[9] In addition, the Court emphatically rejected the application of the *Sherbert* compelling interest balancing test[10] to the *Smith* facts and to *any* free exercise claim that

---

provisions of this article." U.S. CONST. amend. XIV, § 5.

The broad-based Coalition for the Free Exercise of Religion includes the American Jewish Congress, American Jewish Committee, Evangelical Lutheran Church in America, National Council of Churches, Baptist Joint Committee on Public Affairs, National Association of Evangelicals, Native American Church of North America, Union of American Hebrew Congregations, General Conference of Seventh Day Adventists, Agadeth Israel of America, American Civil Liberties Union, Church of the Brethren, and many other religious and secular groups. (Coalition for the Free Exercise of Religion, 200 Maryland Avenue, N.E., Washington, D.C.). Michael McConnell, a free exercise commentator, has expressed some of the concerns:

> [A] requirement that all witnesses must testify to facts within their knowledge bearing on a criminal prosecution . . . if applied without exception, could abrogate the confidentiality of the confessional. Similarly, a general prohibition of alcohol consumption could make the Christian sacrament of communion illegal, uniform regulation of meat preparation could put kosher slaughterhouses out of business, and prohibitions of discrimination on the basis of sex or marital status could end the male celibate priesthood.

McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410, 1419 (1990). The application of *Smith* has included the dismissal, "with deep regret," by a federal district court in Rhode Island of its prior holding that an autopsy should not have been performed on a son of Hmong parents over their religious objection. Yang v. Sturner, 750 F. Supp. 558, 558 (D.R.I. 1990). *See also* Salvation Army v. Department of Community Affairs, 919 F.2d 183, 196 (3d Cir. 1990) (state civil statute and regulations governing boarding homes "are not specifically addressed to religious practice and therefore, under . . . *Smith* are not susceptible to a free exercise clause challenge"); Montgomery v. County of Clinton, 743 F. Supp. 1253 (W.D. Mich. 1990) (autopsy performed on man over religious objection of Jewish mother did not violate her free exercise rights). An Ohio appellate court described the free exercise clause after *Smith* as "a puff of smoke." State v. Flesher, No. 89-P-2084, 1990 WL 73953, at 4 (Ohio Ct. App. June 1, 1990). For Jesse H. Choper, Dean and Professor of Law at the University of California at Berkely, *Smith* represents "the demise of the Free Exercise Clause." *See* 59 U.S.L.W. 2272, 2274 (Nov. 6, 1990) (synopsis of the Constitutional Law Conference held September 14-15, 1990).

9. Employment Div. v. Smith, 110 S. Ct. 1595, 1603 (1990).
10. Sherbert v. Verner, 374 U.S. 398 (1963).

arises from the application of "an across-the-board criminal prohibition."[11] The chief rationale for repudiating the validity of applying the *Sherbert* balancing test to the *Smith* claim was explicitly stated by the Court:

> The *Sherbert* test . . . was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct. . . . [A] distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment. . . . "The 'good cause' standard [in unemployment compensation statutes] created a mechanism for individualized exemptions. . . ." [O]ur decisions in the unemployment cases . . . have nothing to do with an across-the-board criminal prohibition on a particular form of conduct.[12]

The first thesis of this Article is that this rationale is mistaken and has led the Court to distinguish incorrectly between types of cases in which the Court must weigh the competing interests of the individual and the government. It is simply untrue that the rationale for balancing these interests in unemployment cases does not apply when a criminal statute prohibits the conduct. The historical and everyday reality is that both realms of law manifestly require "individualized governmental assessment of the reasons for the relevant conduct."[13] The core criminal law principles of *mens rea* and *actus reus* mandate, not simply invite, "consideration of the particular circumstances behind" a criminal defendant's external behavior.[14] These animating principles are detailed in an array of criminal law defenses which for centuries have indisputably comprised "a mechanism for individualized exemptions."[15]

The Court's error in *Smith* is fundamental and undermines the major premise that drives the majority's analysis: the attribution of "talismanic"[16]

---

11. *Smith*, 110 S. Ct. at 1603.

12. *Id.* (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)) (opinion of Burger, C.J., joined by Powell and Rehnquist, J.J.). The requirement of state authorized individualized exemptions is also embodied in *Bowen*: "If a state creates such a mechanism, its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent." *Bowen*, 476 U.S. at 708. *See also* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 142 n.7 (1987) (Florida's statutory unemployment scheme, "which labels and penalizes behavior dictated by religious beliefs as intentional misconduct, exhibits greater hostility toward religion than one deeming such resignations to be 'without good cause.'").

13. *Smith*, 110 S. Ct. at 1603.

14. *Id.*

15. Bowen v. Roy, 476 U.S. 693, 708 (1986).

16. In disagreeing with the Court's failure to apply the compelling interest test,

power to an ordinary across-the-board criminal statute, a power that bars a claim that the free exercise of religion has been burdened when the claim arises from the application of a criminal statute. The Court's majority relied on this flawed premise in rejecting "a settled and inviolate principle of [the] Court's First Amendment jurisprudence" in the criminal context.[17] This principle is that the test of the "constitutionality of a state statute that burdens the free exercise of religion" requires that both the "law in general, and the State's refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means."[18]

The second thesis of this Article is that the Court's major premise in *Smith* is wrong on two counts. The Court's premise violates core principles expressed in our theory of just punishment within a framework of constitutional criminal law and is also unjustified under our theory of crime control. The third and culminating thesis of this Article is that the Court's mistaken rationale and major premise result in a holding and principle that nullifies *de facto* the free exercise clause when a claim arises in the context of criminal law. The *Smith* Court's rejection of the command of the free exercise text is in favor of police power absolutism and is therefore antithetical to settled constitutional principles embedded in our jurisprudence.

After a detailed statement of the *Smith* facts and its complicated procedural history, Part I of this Article examines the Court's key rationale and major premise and explains that in order to understand this rationale and premise it is necessary to unfold the nature and scope of the governmental interest in across-the-board criminal statutes. In Part II, the Court's rationale and major premise are analyzed and critiqued from the standpoint of our theory of just punishment. In Part III, this rationale and premise are analyzed and critiqued from the perspective of our framework of constitutional criminal law. Lastly, in Part IV, the Court's rationale and premise are analyzed and critiqued from the standpoint of our theory of crime control.

This Article, however, does not systematically scrutinize other central contentions from *Smith* that are aptly analyzed and persuasively refuted in Justice O'Connor's concurring opinion, including the Court's "dis-

---

Justice O'Connor noted that there "is nothing talismanic about neutral laws of general applicability or general criminal prohibitions." Employment Div. v. Smith, 110 S. Ct. 1595, 1612 (O'Connor, J., concurring).

17. *Id.* at 1616 (Blackmun, J., dissenting).

18. *Id.* at 1615 (footnote omitted). In addition to compelling interest, the Court has utilized other language without specifying any difference in doctrinal meaning. *See, e.g.*, United States v. Lee, 455 U.S. 252, 257-58 (1982) ("overriding governmental interest"); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) ("interests of the highest order").

torted view"[19] of free exercise precedents in favor of "the single categorical rule that 'if prohibiting the exercise of religion . . . is . . . merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.'"[20] The Article also does not analyze the discussion in Justice Blackmun's eloquent dissent of the remarkably special facts regarding the religious interest presented by Smith's and Black's sacramental use of peyote in light of the precise nature of the state crime control interest at stake.[21] The *Smith* decision can, and should, be critiqued from a variety of perspectives. My primary interest is not in the Court's resolution of the facts, but rather in its sweeping principle, the drastic curtailing of the scope of the application of the compelling interest balancing test as a means to blunt the application of the free exercise clause and the impact of this principle at a time when America is becoming more religiously diverse as immigrants flow into the United States from Asia, Africa, the Middle East, and Latin America.[22]

The reframing of free exercise jurisprudence by the Supreme Court arises from the firing of respondents Alfred Smith and Galen Black from their jobs as counselors for a private drug rehabilitation organization in Oregon. Smith and Black were members of the Native American Church who ingested peyote as part of an annual sacramental rite. When they applied for unemployment compensation benefits, the state agency denied their applications on the basis that they were discharged for work-related "misconduct," a disqualifying test specified in the Oregon unemployment compensation statute. The Oregon Court of Appeals

---

19. *Smith*, 110 S. Ct. at 1616 (Blackmun, J., dissenting).

20. *Id.* at 1607 (O'Connor, J., concurring).

21. *See id.* at 1616-21.

22. [M]ore than two million immigrants [have arrived] across the Pacific Ocean in the past decade. . . . In 1965, Asian-Americans numbered barely one million; a quarter of a century later, the census counted 7.3 million Americans of Asian and Pacific Islander background. The Korean-American population has risen to nearly 800,000 and the East Indian population stands at 815,000. The Vietnamese population in the United States is about 615,000, Laotians number 149,000, Cambodians 147,411, Thais 91,000, Hmong 90,000 and Pakistanis 81,000.

N.Y. Times, June 12, 1991, at A1, col. 1. *See also* Pipes, *The Muslims Are Coming! The Muslims Are Coming!*, NAT'L REV., Nov. 10, 1990, at 28, 31 ("Muslims total two to three million in the United States. . . . Muslims will become the second largest religious community in about ten years."). Michael McConnell depicts the importance of the free exercise clause for "unfamiliar faiths": "One rarely sees laws that force mainstream Protestants to violate their consciences. Judicially enforceable exemptions under the free exercise clause are therefore needed to ensure that unpopular or unfamiliar faiths will receive the same consideration afforded mainstream or generally respected religions by the representative branches." McConnell, *supra* note 8, at 1419-20.

reversed the agency's determination and held that the denial of benefits violated their free exercise rights as guaranteed by the first amendment.[23]

On appeal to the Oregon Supreme Court, the agency argued that the denial of benefits was permissible because consumption of peyote is a crime under Oregon law. The Oregon Supreme Court rejected the relevance of this argument, affirmed the judgment of the Oregon Court of Appeals, and held that "the legality of ingesting peyote does not affect our analysis of the state's interest. The state's interest . . . must be found in the unemployment compensation statutes, not in the criminal statutes proscribing the use of peyote."[24] When the case was first reviewed by the United States Supreme Court in 1988 (*Smith I*), the Court determined that the alleged illegality of the respondents' peyote consumption was relevant to the constitutional analysis.[25] The Court remanded the case to the Oregon Supreme Court to resolve the question of the legality of the religious use of peyote in Oregon.

On remand, the Oregon Supreme Court, in a *per curiam* opinion, reaffirmed its prior decision as to the intent of the Oregon legislature: "[I]t was immaterial to Oregon's unemployment compensation law whether the use of peyote violated some other [criminal] law . . . [because] [t]he state's interest is simply the financial interest in the payment of benefits from the unemployment insurance fund to this claimant."[26] The Oregon Supreme Court also resolved the question posed on remand by the United States Supreme Court and stated that, "the Oregon statute against possession of controlled substances, which include peyote, makes no exception for the sacramental use of peyote."[27] The Oregon Supreme Court reaffirmed its prior holding that Smith and Black were entitled to unemployment compensation benefits because "outright prohibition of good faith religious use of peyote by adult members of the Native American Church would violate the First Amendment directly and as interpreted by Congress."[28]

The Supreme Court emphatically rejected this proposition as applied to Smith and Black in the second appearance of *Smith* in the United States Supreme Court.[29] The Court articulated a powerful new holding

---

23. Black v. Employment Div., 75 Or. App. 735, 707 P.2d 1274 (1985) (en banc), *aff'd*, 301 Or. 221, 721 P.2d 481 (1986), *vacated*, 485 U.S. 660 (1988).

24. Smith v. Employment Div., 301 Or. 209, 219, 721 P.2d 445, 450 (1986), *vacated*, 485 U.S. 660 (1988).

25. Employment Div. v. Smith, 485 U.S. 660, 662 (1988).

26. Smith v. Employment Div., 307 Or. 68, 71, 763 P.2d 146, 147 (1988), *rev'd*, 110 S. Ct. 2605 (1990).

27. *Id.* at 72-73, 763 P.2d at 148 (footnote omitted).

28. *Id.* at 73, 763 P.2d at 148.

29. Employment Div. v. Smith, 110 S. Ct. 1595, 1595 (1990).

and principle for the future. If the claim of a burdening of religious practice arises from the application of a facially neutral, generally applicable criminal statute, the burdening has an incidental effect and a first amendment violation does not exist.[30]

I. The *Smith* Principle Unfolded

A. The Court's Rationale and Major Premise Detailed

The key reason why the *Smith* Court rejected the application of the *Sherbert* balancing test is that the prior decisions of the Court that have embodied this balancing test "have nothing to do with an across-the-board criminal prohibition on a particular form of conduct."[31] The

---

30. *Id.* at 1602-03. In this Article, the description "typical criminal statute" means an otherwise valid, facially neutral, generally applicable criminal statute.

31. *Id.* at 1603 (referring to Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Thomas v. Review Bd., 450 U.S. 707 (1981); Sherbert v. Verner 374 U.S. 398 (1963)). The Court distinguished its other decisions in which the free exercise clause was applied in the context of facially neutral "across-the-board criminal prohibitions":

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, see *Cantwell v. Connecticut*, 310 U.S., at 304-307, 60 S. Ct., at 903-905 (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious); *Murdock v. Pennsylvania*, 319 U.S. 105, 63 S. Ct. 870, 87 L. Ed. 1292 (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); *Follett v. McCormick*, 321 U.S. 573, 64 S. Ct. 717, 88 L. Ed. 938 (1944) (same), or the right of parents, acknowledged in *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925), to direct the education of their children, see *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school). Some of our cases prohibiting compelled expression, decided exclusively upon free speech grounds, have also involved freedom of religion.

Id. at 1601 (footnote omitted). The Court majority concluded that the *Smith* facts are distinguishable because "[t]he present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right." *Id.* at 1602.

Justice O'Connor, in her concurring opinion, replied that "[t]he Court endeavors to escape from our decisions in *Cantwell* and *Yoder* by labeling them 'hybrid' decisions . . . but there is no denying that both cases expressly relied on the Free Exercise Clause . . . and that we have consistently regarded those cases as part of the mainstream of our free exercise jurisprudence." *Id.* at 1609 (O'Connor, J., concurring).

Let us assume, arguendo, that the *Smith* Court's description of these decisions is

Court stated that "the conduct at issue in those cases was not prohibited by law."[32] Justice Scalia distinguished these "balancing test" decisions from the *Smith* facts and dismissed the claim of a burdening of religious practice on the grounds that this test "was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct. . . . [The] eligibility criteria [of these statutes] invite consideration of the particular circumstances behind an applicant's unemployment."[33] The key unemployment compensation decisions, *Sherbert v. Verner*,[34] *Thomas v. Review Board*,[35] and *Hobbie v. Unemployment Appeals Commission*,[36] focused on the "good cause" standard for quitting a job, which "created a mechanism for individualized exemptions."[37]

Thus, in Scalia's words, "our decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[38] The Court, however, found that the balancing test and the proposition affirmed by these decisions "have nothing to do" with a claim of a burdening of religious practice arising from the application of an "across-the-board criminal prohibition."[39] The Court did not explicitly acknowledge the manifestly

---

correct (which it is not). How does the descriptive reality of these cases translate into a normative principle that a free exercise claim is not cognizable if it is unconnected with any communicative activity or parental right? How is fidelity to one's oath to support the Constitution satisfied by holding the free exercise text hostage to the existence of an additional constitutional text? More specifically, how is such fidelity satisfied by judicially adding to the first amendment a requirement that the free exercise claim must also be accompanied by a case-based principle which is derived from a different constitutional text (*e.g.*, the *Pierce*-based right of parents to direct the education of their children derived from the liberty interest protected by the fourteenth amendment)? How is all of this squared with a judicial conservative's commitment to the foundational text of the Constitution as the centerpiece of constitutional interpretation?

32. *Id.* at 1598.

33. *Id.* at 1603.

34. 374 U.S. 398 (1963).

35. 450 U.S. 707 (1981).

36. 480 U.S. 136 (1987). The *Smith* majority was mistaken in its statement that "[a]pplying [the *Sherbert*] test we have, on *three* occasions, invalidated state unemployment compensation rules that conditioned the availability of benefits upon an applicant's willingness to work under conditions forbidden by his religion." Employment Div. v. Smith, 110 S. Ct. 1595, 1602 (1990) (emphasis added). Actually, on four occasions, not three, the Court applied the *Sherbert* test in the unemployment insurance area. The fourth decision, by a unanimous Court, is Frazee v. Illinois Department of Employment Security, 489 U.S. 829 (1989). The Court overlooked the respondents' reliance on *Frazee* in stating that "[r]espondents' claim for relief rests on our decisions in *[Sherbert*, *Thomas*, and *Hobbie*]." *Smith*, 110 S. Ct. at 1598.

37. Bowen v. Roy, 476 U.S. 693, 708 (1986).

38. *Smith*, 110 S. Ct. at 1603 (citing Bowen v. Roy, 476 U.S. 693, 708 (1986)).

39. *Id.*

contrary implications of this conclusion: that across-the-board criminal statutes have no comparable standard and no comparable mechanism for individualized exemptions. Thus, because a "system of individual exemptions"[40] is not in place, the *Sherbert* compelling interest test is inapplicable to the *Smith* claim of religious hardship. The test is inapplicable because the reason for the test does not apply.

The Court's holding and principle flow from this rationale. If "a generally applicable and otherwise valid"[41] across-the-board criminal prohibition exists, any impact on a person's religious practice is "merely the incidental effect" of the application of the statute and "the first amendment has not been offended."[42] To trigger free exercise balancing analysis, the object of a criminal statute on its face must proscribe the exercise of religion.[43] Otherwise, any burdening of religious practice is automatically characterized as "merely the incidental effect" of the application of the statute, free exercise balancing is foreclosed and indeed, free exercise analysis is barred.[44]

Hence, in a criminal prosecution, a prosecutor may refute a claim that a criminal charge burdens the free exercise of religion by simply responding that the object of the criminal statute is not to burden religious exercise and thus, any burden actually imposed is "merely the incidental effect" of an otherwise valid provision. Applying *Smith*, the singular role of the trial court will be to determine that the object of the statute on its face is not to burden religious exercise.

Such a finding is virtually certain, even pro forma, because as Justice O'Connor noted, it would be an "extreme and hypothetical situation in which a State directly targets a religious practice"[45] on the face of a criminal statute. The reason underlying this conclusion is that such direct targeting by a legislature of religious practice violates the respect for the free exercise clause that is embedded in our political and civil culture. Once the trial court makes its virtually certain finding that the criminal statute does not facially burden religious exercise, any actual burdening of religious practice of any magnitude is automatically deemed to be "an incidental effect."

Hence, the Court's holding in *Smith* is a doctrinal test for suppressing free exercise analysis, not for performing it. Because "few States would be so naive as to enact a law directly prohibiting or burdening a religious

---

40. *Id.*
41. *Id.* at 1600.
42. *Id.*
43. *Id.*
44. *See id.* at 1600-03.
45. *Id.* at 1608 (O'Connor, J., concurring).

practice as such,"[46] and thus meet the standard of a statute which targets and therefore burdens religious practice, only in an extraordinary circumstance does *Smith* authorize any individual assessment by a court of the actual magnitude of the claimed burdening of free exercise.[47]

B. The Smith Direct/Indirect Dichotomy

Given the critical emphasis in the Court's holding and reasoning on the direct/indirect dichotomy,[48] there are two meanings that must be considered in decoding the Court's reference to "merely the incidental effect of a generally applicable and otherwise valid provision."[49] The first meaning is that if one looks from the vantage point of the legislative intent animating a facially neutral statute, then any impact in burdening free exercise may validly be called an "incidental effect" irrespective of the particular nature and magnitude of the burden. To illustrate, the primary legislative intent of the Oregon statute, or any statute criminalizing the possession of narcotics, is to discourage the use of drugs and to punish those who violate the statute. Thus, because an impact on free exercise is not intended by the legislature, any actual intrusion on free exercise may be characterized as an "incidental effect." In this first meaning, therefore, the words an "incidental effect" embrace free exercise claims from the most minor to the most egregious. All such

---

46. *Id.*

47. Justice O'Connor, in her concurring opinion, argued for the need for individual assessment of free exercise claims as a requirement of the judicial function:

> To me, the sounder approach—the approach more consistent with our role as judges to decide each case on its individual merits—is to apply [the *Sherbert* compelling interest] test in each case to determine whether the burden on the specific plaintiffs before us is constitutionally significant and whether the particular criminal interest asserted by the State before us is compelling. Even if, as an empirical matter, a government's criminal laws might usually serve a compelling interest in health, safety, or public order, the First Amendment at least requires a case-by-case determination of the question, sensitive to the facts of each particular claim. Given the range of conduct that a State might legitimately make criminal, we cannot assume, merely because a law carries criminal sanctions and is generally applicable, that the First Amendment *never* requires the State to grant a limited exemption for religiously motivated conduct.

Id. at 1611 (citation omitted) (emphasis in original).

48. The Court's emphasis on "merely the incidental effect" invokes the direct/indirect dichotomy and a comment about the dichotomy in a different context: "In thus making use of the expressions, 'direct' and 'indirect interference' with commerce, we are doing little more than using labels to describe a result rather than any trustworthy formula by which it is reached." Di Santo v. Pennsylvania, 273 U.S. 34, 44 (1927) (Stone, J., dissenting).

49. Employment Div. v. Smith, 110 S. Ct. 1595, 1600 (1990).

unintended intrusions are fairly characterized as adding up only to an "incidental effect" even if there is an egregious burden on religious exercise.

In the second meaning of an "incidental effect," however, there is a focus on the nature and magnitude of the actual burden inflicted. The Court's words in *Thomas*, which are quoted in *Hobbie*, incorporate this distinction: "While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial."[50] This meaning reflects the perspective of the person whose free exercise of religion is burdened and who surely will be concerned about the nature and magnitude of the intrusion. If the burdening of religious exercise is substantial, it is not "merely [an] incidental effect."[51] To collapse the two meanings into one obscures the second meaning. The *Smith* decision embraces only the first meaning. Because it bars any scrutiny of the specific facts, the *Smith* decision excludes any judicial assessment of the exact nature and magnitude of the intrusion on the free exercise of religion.

C. The Court's Passionate Language and Suppression of Free Exercise Analysis

The Court's emphatic intent to suppress free exercise analysis is further evidenced by its vivid and even passionate language. The Court explicitly rejected the compelling interest balancing test for performing free exercise analysis. It also repudiated the test in the strongest possible language: "[I]t is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice."[52] An across-the-board application of the compelling interest

---

50. Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141 (1987); Thomas v. Review Bd., 450 U.S. 707, 718 (1981).

51. *See Smith*, 110 S. Ct. at 1600.

52. *Id.* at 1606 n.5. Central to the justification for the *Smith* majority's categorical rule is the claim that application of the compelling interest test would require the courts to "*constantly* be in the business of determining whether the 'severe impact' of various laws on religious practice . . . suffices to permit us to confer an exemption." *Id.* (emphasis added). Justice Scalia makes perfectly clear that it is the frequency of the balancing of "the significance of religious practice" against "the importance of general laws" that is deeply objectionable. *Id.* The core significance of this argument is also apparent from the Court's emphatic language:

> Moreover, if "compelling interest" really means what it says . . . many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *pre-*

test would be "courting anarchy," a luxury our "cosmopolitan nation

---

> *sumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind — ranging from compulsory military service, to the payment of taxes, to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws, to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races. The First Amendment's protection of religious liberty does not require this.

Id. at 1605-06 (citations omitted) (emphasis in original).

In her concurring opinion, Justice O'Connor replied: "The Court's parade of horribles . . . not only fails as a reason for discarding the compelling interest test, it instead demonstrates just the opposite: that courts have been quite capable of applying our free exercise jurisprudence to strike sensible balances between religious liberty and competing state interests." *Id.* at 1612-13. Justice Scalia responded, in a footnote, to this criticism by arguing that:

> Justice O'Connor mistakes the purpose of our parade: it is not to suggest that courts would necessarily permit harmful exemptions from these laws (though they might), but to suggest that courts would *constantly* be in the business of determining whether the "severe impact" of various laws on religious practice . . . suffices to permit us to confer an exemption.

Id. at 1606 n.5 (emphasis added). The best guide for determining the frequency of free exercise claims is to look to the past. The *Sherbert* compelling interest test has existed since 1963. No floodgate was opened by *Sherbert* and its progeny. In Justice Blackmun's words:

> This Court, however, consistently has rejected similar arguments in past free exercise cases, and it should do so here as well. The State's apprehension of a flood of other religious claims is purely speculative. Almost half the States, and the Federal Government, have maintained an exemption for religious peyote use for many years, and apparently have not found themselves overwhelmed by claims to other religious exemptions. Allowing an exemption for religious peyote use would not necessarily oblige the State to grant a similar exemption to other religious groups. The unusual circumstances that make the religious use of peyote compatible with the State's interests in health and safety and in preventing drug trafficking would not apply to other religious claims. Some religions, for example, might not restrict drug use to a limited ceremonial context, as does the Native American Church. Some religious claims involve drugs such as marijuana and heroin, in which there is significant illegal traffic, with its attendant greed and violence, so that it would be difficult to grant a religious exemption without seriously compromising law enforcement efforts. . . . Though the State must treat all religions equally, and not favor one over another, this obligation is fulfilled by the uniform application of the "compelling interest" *test* to all free exercise claims, not by reaching uniform *results* as to all claims. A showing that religious peyote use does not unduly interfere with the State's interests is "one that probably few other religious groups or sects could make."

Id. at 1620-21 (Blackmun, J., dissenting) (citations omitted) (emphasis in original).

The wider specter of the floodgate argument ("many laws will not meet the test")

. . . cannot afford,"[53] creating "a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs"[54] and "produc[ing] . . . a private right to ignore generally applicable laws."[55]

---

is contradicted by the record of our modest free exercise case law. The challenged laws have already met the test in Justice Scalia's "parade of horribles," and the frequency of cases is not large. Indeed, the parade detailed in the *Smith* majority's specification of 12 cases in the highest state and federal courts from 1941 through 1989 does not support his floodgate argument. *See id.* at 1605-06. The parade is far too short, and it supports Justice O'Connor's argument that the courts can "strike sensible balances between religious liberty and competing state interests." *Id.* at 1613. Without a concrete basis, the floodgate argument is pure speculation and apprehension. Finally, this genre of instrumentalist argument should be considered in light of the status of the "First Amendment's command that religious liberty is an independent liberty, that it occupies a preferred position." *Id.* at 1609 (O'Connor, J., concurring). For those jurists committed to this cardinal principle, the floodgate argument does not come easily here.

53. *Id.* at 1605.

54. *Id.* at 1606.

55. *Id.* at 1604. This passionate, even fearful, language may be related to the *Smith* majority's repeated misstatement and dramatization of the rule urged upon the Court by Smith and Black: "Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation." *Id.* at 1602. "They assert . . . that 'prohibiting the free exercise [of religion]' includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires)." *Id.* at 1599. "The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind. . . ." *Id.* at 1605. In sum, the Court majority argues in classic either/or fashion that the only alternative to its sweeping categorical rule is "courting anarchy." *See id.*

Actually, the respondents' brief plainly indicated that their claim was utterly conventional in arguing in familiar positivist fashion that the *Sherbert* compelling interest balancing test, embedded in the Court's four prior unemployment insurance precedents, should be applied to their unemployment insurance case: "[T]here is nothing to distinguish the present case from this Court's prior unemployment decisions in *Sherbert*, *Thomas*, *Hobbie* and *Frazee*. Respondents urge the Court to affirm the decision of the Oregon Supreme Court . . . on this basis." Brief for Respondents at Point IIA, Employment Div. v. Smith, 110 S. Ct. 1595 (1990). The Brief for Respondents does not argue for a new test or for a reinterpretation of the embedded *Sherbert* test. Indeed, the Court itself explicitly acknowledges that "[r]espondents' claim for relief rests on our decisions in Sherbert v. Verner, Thomas v. Review Board . . . and Hobbie v. Unemployment Appeals Comm'n, in which we held that a State could not condition the availability of unemployment insurance on an individual's willingness to forgo conduct required by his religion." *Smith*, 110 S. Ct. at 1598.

The *Smith* Court's hostility to the application of the free exercise clause may also be manifested in the Court's reliance on the decision in Minersville School District v. Gobitis, 310 U.S. 586 (1940), without noting that *Gobitis* was explicitly overruled eight to one only three years later in West Virginia State Board of Education v. Barnette, 319

Given the Court's analysis in other first amendment areas,[56] the rejection of the compelling interest balancing test could easily have led to the Court's substitution of another, less challenging balancing test. In its prior free exercise cases, far less challenging tests are suggested, such as a "reasonable means" test and a weakened version of the compelling interest test.[57] Yet, the *Smith* Court's hostility to judicial enforcement of the free exercise clause is so consuming that even the "reasonable means" test, a veritable engine of justification that can validate almost any statute, is not authorized. The stark fact is that no test is substituted to assess a claimed burdening of religious practice. The reason is perfectly clear. The *Smith* holding and reasoning are patently designed to suppress, not authorize, free exercise analysis.

U.S. 624 (1943). Justice Scalia stated:

> We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition. As described succinctly by Justice Frankfurter in Minersville School Dist. Bd. of Educ. v. Gobitis, 310 U.S. 586, 594-95, 60 S. Ct. 1010, 1012-13, 84 L. Ed. 1375 (1940): "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities."

Smith, 110 S. Ct. at 1600 (footnote omitted). *Gobitis* is cited a second time on the same page, again without any indication that it was overruled three years later. *Id.* In addition, in concurring in a recent case, Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991), Justice Scalia again repeated the first sentence in the above quotation without any indication that *Gobitis* was overruled. In *Barnette*, Justice Jackson, speaking for the Court, upheld on general first amendment grounds the right of students who were Jehovah's Witnesses to refuse to salute the flag. The *Barnette* Court found it unnecessary "to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty." *Barnette*, 319 U.S. at 635. In often quoted language, the Court stated: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." *Id.* at 642. For broader insight into Justice Scalia's jurisprudence, including his use of inflammatory language, see Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297 (1990).

56. *See* Employment Div. v. Smith, 110 S. Ct. 1595, 1612 (1990) (O'Connor, J., concurring)..

57. In Bowen v. Roy, 476 U.S. 693, 707-08 (1986), three justices suggested that it is sufficient if a facially neutral, generally applicable rule providing benefits is a "reasonable means of promoting a legitimate public interest." In United States v. Lee, 455 U.S. 252, 259 (1982), the compelling interest test that must be demonstrated is that the free exercise claim not "unduly interfere with fulfillment of the governmental interest." For a detailed critique of reasonableness as a first amendment test, see C.E. BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 126-31 (1989).

D. The Jurisprudence of Generally Applicable Criminal Statutes

The *Smith* holding and principle, derived from a premise that attributes extraordinary power to an ordinary criminal statute as a bar to a free exercise claim, comprise the framework that the Court used to distinguish its prior case law, to reject the balancing test, and to justify its conclusions. Justice O'Connor called this attribution of power to the typical criminal statute "talismanic."[58] Yet, paradoxically, this decisive, even talismanic, importance of the typical criminal statute is postulated, never elaborated, and indeed never even directly argued.[59]

Any critique of the Court's major premise in *Smith* must begin by unfolding what the Court calls the importance of the governmental interest in across-the-board criminal statutes: the jurisprudence of facially neutral, generally applicable criminal statutes, including their precise nature, scope, and purpose in our system of constitutional criminal law. This affirmative exposition also leads to an understanding of their limitations and to a critique of the Court's simplistic and erroneous view of the governmental interest at stake.

In essence, these typical criminal statutes are designed to serve the overriding purposes of the criminal law within our constitutional system, including the protection of the fundamental interests embedded in the Bill of Rights and in the framework of divided, separated, and checked powers. This critique begins in Part II with an assessment of the importance of these statutes from the perspective of our theory of just punishment.

II. Criminal Statutes and Just Punishment

A. Across-the-Board Prohibitions

The *Smith* Court's attribution of talismanic power to an ordinary across-the-board criminal statute to defeat any claim of burdening of free exercise violates our traditional theory of just punishment. Just punishment presupposes just liability. Just liability requires that those

---

58. *Smith*, 110 S. Ct. at 1612 (O'Connor, J., concurring).

59. The Court does, of course, argue intensely that considering the judicial creation of free exercise exemptions to typical criminal statutes will be "courting anarchy," a luxury our "cosmopolitan nation . . . cannot afford." *Id.* at 1605. This vivid rhetoric assumes what is disproved in Part II of this Article: that the criminal law does not have an existing system of exemptions and that "an unbending application of a criminal prohibition" is the norm so that creating free exercise exemptions risks "anarchy." *See id.* at 1617 (Blackmun, J., dissenting). What is not argued, however, is why typical criminal statutes, within the history, theory, and practice of American criminal law, have the automatic and extraordinary power to bar a free exercise claim.

who demonstrate the same *mens rea* embodied in a criminal law act that causes a proscribed harm be treated equally in measuring liability. Thus, those who demonstrate an intent to kill embodied in a criminal act that causes death are liable for intentional murder.[60] Those who demonstrate an intent to rob and who take property by force or fear are liable for robbery.[61] Those who take the personal property of another with the intent to steal are liable for larceny.[62] Those who demonstrate an intent to cause physical injury to another person and who cause such injury are liable for assault.[63] And so on.

These facially neutral across-the-board criminal prohibitions serve to calibrate moral fault by providing for the channeling of like cases into categories for like treatment. They therefore serve the ideal of equal justice required for just liability. This channeling of like cases serves a closely related requirement for retributive justice. Different crime categories provide different legislative measures of moral fault. For example, robbery, a larceny with force or threat of force, exhibits more serious moral fault than simple larceny and therefore, a more severe penalty is authorized. In addition, the common degree structure that exists within each major crime category reflects legislative refinements of moral fault. Robbery with a dangerous weapon is typically robbery in the first degree with a more severe scope of penalties, yet robbery without such a weapon is robbery in the second or third degree with a lesser scope of penalties.[64]

B. Across-the-Board Defenses

Our theory of just liability also requires that those who demonstrate an intent to kill embodied in a criminal law act that causes death are not liable for intentional murder if they are insane.[65] In other words, they are liable only for manslaughter if they kill in response to legally recognized provocation.[66] Those who rob another are not liable for robbery if they are legally infants.[67] Those who steal personal property are not liable for larceny if they are the victim of duress or justification.[68] Those who strike another with the intent to cause physical injury are

---

60. *See, e.g.*, N.Y. PENAL LAW § 125.25 (McKinney 1987); MODEL PENAL CODE § 210.2 (1962).

61. *See, e.g.*, N.Y. PENAL LAW § 160.00; MODEL PENAL CODE § 222.

62. *See, e.g.*, N.Y. PENAL LAW § 155.05; MODEL PENAL CODE § 223.2.

63. *See, e.g.*, N.Y. PENAL LAW § 120.00; MODEL PENAL CODE § 211.1.

64. *See, e.g.*, N.Y. PENAL LAW §§ 160.05, 160.15; MODEL PENAL CODE § 222.1.

65. *See, e.g.*, N.Y. PENAL LAW § 40.15; MODEL PENAL CODE § 4.01.

66. *See, e.g.*, N.Y. PENAL LAW § 35.00; MODEL PENAL CODE § 210.3.

67. *See, e.g.*, N.Y. PENAL LAW § 30.00; MODEL PENAL CODE § 4.10.

68. *See, e.g.*, N.Y. PENAL CODE §§ 35.05(2), 40.00 (duress and justification); MODEL PENAL CODE §§ 2.09, 3.01 (duress and justification).

not liable for assault if they strike in self-defense or defense of another.[69] And so on, across the range of traditional defenses.

Just liability also means that these facially neutral across-the-board statutory defenses are equally essential in calibrating moral fault by the test of like treatment of like cases and by the test of retributive justice. Our theory of just liability, rooted in the principles of equal justice and retributive justice, does not authorize the grouping together of the sane and insane, adults and children, those who have the capacity for free choice and those who do not, and those who attack others without justification or excuse and those who strike others in self-defense or defense of another.

To have just liability there must be sufficient moral fault, and there is either no moral fault or diminished moral fault if a justification or excuse exists. For just liability, there must also be equal treatment of those who are similarly situated. Those whose behavior falls into a recognized category of justification or excuse are not similarly situated with those whose behavior must be categorized differently. To illustrate, if A shoots and kills B in a robbery and C shoots and kills D in self-defense or defense of another, the behavior of killing by shooting is identical, but A is morally culpable and liable for murder while C's behavior is justified. C is morally innocent and not legally blameworthy. Although the external behavior is identical, A and C fit into radically different moral and legal categories.[70] In determining whether fault exists,

---

69. *See, e.g.*, N.Y. PENAL LAW § 35.15; MODEL PENAL CODE §§ 3.04, 3.05 (self-protection and protection of others).

70. This moral calibration is demonstrated by the structure of our homicide law. The modern structure of homicide categories is an intricate web grounded in hundreds of years of common-law development. *See* G. FLETCHER, RETHINKING CRIMINAL LAW, 235-40 (1978). The homicide web of categories details subtle degrees of moral fault as measured by closely related but distinct forms of *mens rea*. Those who kill with an intent to kill (*i.e.*, a conscious design to kill, along with deliberation and premeditation) are grouped together in some states as liable for murder in the first degree, the most egregious category of murder. Those who kill with an intent to kill unaccompanied by premeditation and deliberation are categorized separately in some states as liable for murder in the second degree. The different degrees of moral fault are matched with different types of severe punishment, including life imprisonment and death. Those who have an intent to inflict serious bodily injury are grouped together as liable for a lesser form of murder or manslaughter. Those who kill with an intent to kill triggered by heat of passion or in response to certain types of recognized provocation or extreme emotional disturbance are grouped together in a manslaughter category. Those who kill without an intent to kill, but with a depraved indifference to human life are grouped together in a murder category and are distinguished from those who kill with a reckless form of moral fault (reckless manslaughter). Both groups are distinguished from those who kill due to criminal negligence, a killing with inherently less moral fault than one committed recklessly or with intent. *Id.*

the unit for analysis is the behavior of shooting and killing another and the *reason* for that behavior.

The ethos of equal treatment, as well as retributive justice, compel these distinctions, which are exemplified in the panorama of criminal law defenses rooted in our religious values, our culture, and hundreds of years of common-law tradition. The rules concerning justification and excuse were first systematically developed in the twelfth century by Abelard and the canonists.[71] In modern form, these distinctions are also generally codified in our penal laws and routinely applied every day in many thousands of cases.[72] In ancient times, Aristotle articulated the conflict between the need in law "to speak universally" and defined equity as the "correction of the law where it is defective by reason of its universality."[73]

C. The Need for Balancing

The calibration of moral fault sufficient to determine just liability compels a balancing of two interests: the interests protected by the criminal prohibitions such as murder, manslaughter, assault, robbery, and larceny and the interests protected by the defenses and partial defenses such as self-defense, defense of another, extreme emotional disturbance, entrapment, and insanity. The existence of facially neutral across-the-board criminal prohibitions does not bar defenses that are also facially neutral and across-the-board, nor do such prohibitions estop balancing or foreclose analysis of such claims.

This balancing is not simply at the level of facial analysis of statutes that define crimes and defenses. The finding of just liability by balancing

---

71. H. Berman, Law and Revolution, The Formation of the Western Legal Tradition 187-90 (1983).

72. The *Smith* case also illustrates this analysis. The criminal prohibition, which the *Smith* majority found decisive, is the facially neutral across-the-board Oregon criminal prohibition of the knowing or intentional possession of a controlled substance unless the substance has been prescribed by a medical practitioner. *See* Or. Rev. Stat. § 475.992(4) (1987). Yet, a person is patently not liable under this statute, even when there is proof of these elements beyond a reasonable doubt, *if* the person is a victim of duress, an infant, or is insane. *See* Or. Rev. Stat. §§ 161.270, 161.290, 161.295 (1990). A shorthand explanation for the lack of liability is that the person who can establish any one of these defenses lacks moral fault and thus lacks the *mens rea* required for just liability. In addition, even though moral guilt may exist, the person may not be liable if the proof of criminal guilt did not meet the constitutional proof standard of beyond a reasonable doubt or the drugs were seized in violation of the fourth amendment prohibition of unreasonable searches and seizures. *See In re* Winship, 397 U.S. 358 (1970); Mapp v. Ohio, 367 U.S. 643 (1961). Our theory of just punishment requires that across-the-board prohibitions against particular behaviors be viewed in light of underlying requirements of the individual's capacity, constitutional principles, and other relevant defenses.

73. *See* H. Berman, *supra* note 71, at 518.

competing interests also requires the application of the principles of equal and retributive justice in the individual case in light of its distinctive facts. In addition to justifying a statutory prohibition on its face, the application of a statute must also be justified in light of the distinctive facts of the case. Facial neutrality, in the sense of equal and retributive justice, does not automatically result in the vindication of these principles in application. The most pristine statute, from the standpoint of justice, may be enforced unjustly. Case-by-case scrutiny is essential to assure that the statute's promise of justice is made real in particular cases. Conscientious police, prosecutors, judges, and defense lawyers struggle in every case to make these principles real.

Hundreds of years of experience demonstrate that not everyone who initially appears to fit neatly into a generally applicable charge category deserves to be placed into that category upon scrutiny of the specific facts of a case. Indeed, it is precisely the role of the prosecutor and the defense lawyer to present evidence and arguments concerning which category should apply. In addition, it is the province of judge and jury to decide whether the behavior means that a particular defendant fits into the category created by a "generally applicable criminal prohibition" or is "exempted" from such a category because the facts mandate that the defendant be placed in the category created by a generally applicable defense.[74]

D. "Without Good Cause" and Mens Rea

In both unemployment compensation and criminal law, the blend of external behavior and the reason for the behavior comprises the micro cosmos that must be scrutinized for its legal meaning. The unemployment compensation tests of misconduct or "without good cause"[75] for quitting or refusing a job are matched by the criminal law test of *mens rea*, the measure of moral fault required for criminal liability. Like the "good cause" test in the unemployment compensation area, the *mens rea* requirement for just liability mandates a criminal law "system of in-

---

74. Trial language and procedure illustrate the balancing of interests required to realize individual justice. A judge, to make good on her oath to uphold the laws, must apply all the relevant laws pertaining to both the charges and defenses at the hearing or trial. Once the defense meets its burden of production for raising a defense, the defense is cognizable and must be adjudicated according to ordinary trial procedure. For example, the prosecutor has the burden of proving guilt by the difficult standard of proof beyond a reasonable doubt, so that usually a defense prevails if only a reasonable doubt as to guilt is raised. The judge must carefully define both the relevant charging statutes and defenses to guide the jury's deliberation, and the jury must then decide which category applies, charge or defense.

75. *See* Employment Div. v. Smith, 110 S. Ct. 1595, 1603 (1990).

dividual exemptions,"[76] which must be applied in each case as the particular facts require.

In deciding each case, behavior must be assessed. In unemployment compensation cases, this behavior includes quitting work or refusing to accept available work.[77] In criminal law, the behavior prohibited by the specific statute, the *actus reus*, must be assessed.[78] In each case, statutory tests are provided by which to assess the reasons offered for the behavior. In unemployment compensation, the "without good cause" or "misconduct" standard applies to assess the behavior of quitting work or refusing available work.[79] As the *Smith* Court emphasized, the application of this standard "invite[s] consideration of the particular circumstances behind an applicant's unemployment" and creates "a mechanism for individualized exemptions."[80]

In criminal law, the core principle of *mens rea*, as detailed in the range of related defenses, applies to test the external behavior prohibited by the statute. If the behavior prohibited was committed in self-defense or in the defense of another, that is, a "good cause" for the behavior, the person is not liable. In criminal law language, the act that harms another is justified because the defendant has a reason that we recognize as exculpatory. The defendant is not blameworthy because she lacked the required fault expressed in the *mens rea* element. This exemption from liability is many hundreds of years old. Indeed, by the twelfth century, "[i]t was accepted that a person who intentionally attacks another may be justified by self-defense or by defense of others."[81]

In addition, the independent principle of *actus reus* requires that the criminal law act itself be voluntary, "an exercise of free choice externalized into overt behavior."[82] If it is involuntary, as in a reflex or convulsion, no *actus reus*, as well as no *mens rea*, exists and hence,

---

76. *Id.*

77. *See* Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829, 830 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 137 (1987); Thomas v. Review Bd., 450 U.S. 707, 709 (1981); Sherbert v. Verner, 374 U.S. 398, 399 (1963).

78. *See, e.g.*, N.Y. PENAL CODE § 15.10 (McKinney 1987); MODEL PENAL CODE § 2.01 (1962).

79. *See Smith*, 110 S. Ct. at 1603.

80. *Id.* (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)). The definition of "without cause" or "misconduct" can incorporate the tone and even some of the traditional symbols of *mens rea*. For example, Florida's statute, which was reviewed in *Hobbie*, defines "misconduct" in part as: "(b) Carelessness or negligence of such a degree or recurrence as to *manifest culpability, wrongful intent, or evil design* or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer." *Hobbie*, 480 U.S. at 139 n.3 (quoting FLA. STAT. § 443.036(24) (1985)).

81. H. BERMAN, *supra* note 71, at 190.

82. J. DELANEY, CRIMINAL LAW: A PROBLEM SOLVING APPROACH 102 (1986).

no liability is present on either ground.[83] Even apart from *mens rea*, therefore, the finding of just liability mandates that the behavior itself be subject to scrutiny to verify that it is the expression of an incriminating reason and not simply an uncontrollable striking out which injures another person. In each criminal case, therefore, the foundational principles of *mens rea* and *actus reus* require, not simply invite, a "consideration of the particular circumstances behind" a person's behavior, and the resulting scope of defenses create a centuries-old "mechanism for individualized exemptions."[84] Indeed, "the canonists of the late eleventh and the twelfth centuries founded their doctrines of the subjective and objective aspects of crime . . . [on] 'the precise investigation in any given case of the intention . . . and of the external circumstances of the act.'"[85] Though initially created at common law, the modern scope of justification and excuse is refined and codified in penal codes in each state and also detailed in the Model Penal Code authored by the American Law Institute.[86]

Thus, it is plain that "a distinctive feature" of both our system of unemployment compensation and our system of criminal law is the requirement of "individualized governmental assessment of the reasons for the relevant conduct."[87] There are reasons for behavior that our culture and our civil and criminal laws validate and reasons that our culture and our laws invalidate. Each case must be scrutinized individually to determine which reasons underlie the behavior and which are valid and which are invalid. In both systems, a simplistic behavioristic preoccupation with the external conduct alone, a "snapshot" mirroring overt behavior, is insufficient. Such a preoccupation reduces what is at stake. Justice requires that those who make factual and legal findings, judge and jury alike, consider both the external behavior and the reasons for the behavior. It is precisely the role of judge and jury to determine this meaning by applying across-the-board charging and defense statutes in individual cases to determine whether a particular behavior fits into one legal category rather than the other. Thus, the principle that the Court extracts from the unemployment compensation cases, *Sherbert*, *Thomas*, *Hobbie*, and *Frazee*, is applicable to the criminal law arena. As the Court stated, "[O]ur . . . cases stand for the proposition that where the State has in place a system of individual exemptions, it may

---

83. *Id.* at 102-04.

84. *See* Employment Div. v. Smith, 110 S. Ct. 1595, 1603 (1990) (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)).

85. H. Berman, *supra* note 71, at 192 (quoting G. Le Bras, "Canon Law," The Legacy of the Middle Ages 357 (1926)).

86. Model Penal Code §§ 1.01-405.4 (1962).

87. *Smith*, 110 S. Ct. at 1603.

not refuse to extend that system to cases of 'religious hardship' without compelling reason.''[88]

Though the rationale expressed in the Court's unemployment cases easily applies, the *Smith* Court, nevertheless, emphatically rejected the application of the four decisions embodying the *Sherbert* compelling interest balancing test to the criminal context by stating, ''[these cases] have nothing to do with an across-the-board criminal prohibition on a particular form of conduct.''[89] Thus, under *Smith*, the classic role of the criminal court to do justice by applying general statutes in individual cases to find that a person's conduct fits into one category rather than another, has an ironic exception when the defendant's claim is a burdening of free exercise of religion. In an additional irony, the *Smith* majority held that the assertion of this fundamental claim, which usually triggers individualized ''as applied'' analysis and ''strict scrutiny'' through the compelling interest test, receives no scrutiny at all if it arises from the application of a typical criminal statute.

The rationale for the Court's refusal to apply the compelling interest test in *Smith* is rooted in its false polarity of unemployment compensation as creating a system of ''individualized governmental assessment'' of the reasons for quitting or refusing work, as compared to ''an across-the-board criminal prohibition of a particular form of conduct'' without such a system of individualized exemptions.[90] As the above analysis indicates, however, our theory of a just criminal law has for centuries included a system of individualized exemptions. The claimed polarity is clearly erroneous and is oblivious of our criminal law history and jurisprudence.

E. The Distinction Collapses

Once this underlying rationale falls, the Court's distinction collapses. Why should facially neutral unemployment compensation statutes be assessed regarding their application to the particular facts presented in each case while facially neutral criminal statutes require no such assessment? Criminal law jurisprudence, as applied to charging statutes, also supports this critique. Although such statutes appear to be complete definitions capable of discrete application (*e.g.*, robbery, arson, larceny), this atomistic conception is incorrect and misleading. To the contrary, they are, in Jerome Hall's words, ''neither autonomous nor complete.''[91]

---

88. *Id.*
89. *Id.*
90. *Id.*
91. J. Hall, General Principles of Criminal Law 19 (1960).

All such statutory definitions are incomplete and must be seen as part of a web of other statutes that define the across-the-board defenses relevant in a particular case. Hence, as Hall points out, "the [charging] rules do not completely define the specific crimes. . . [O]nly after the [defense] doctrines have been added to the rules has the penal law, i.e. the definitions of all the specific crimes, been fully stated."[92] To illustrate, when a person is charged with arson of a home, the charge explicitly and impliedly states, "one who sets fire to a dwelling-house, not being insane, intoxicated, an infant, coerced, etc., commits arson . . . [or] stated affirmatively: a sane, sober adult, acting freely . . . who sets fire."[93]

Hence, our criminal law jurisprudence mandates that the definitions specified in criminal law prohibitions require a system of individualized exemptions from liability for the behavior specified in across-the-board prohibitions. In addition, it is impossible to apply this system of individualized exemptions to particular cases without scrutinizing the specific facts posed in each case so that the relevant across-the-board defenses can be applied and adjudicated. The scrutiny of application is therefore a jurisprudential *sine qua non*. The *Smith* Court's prohibition of any scrutiny of application beyond facial analysis of the statute bars the pursuit of individualized justice when a free exercise claim is presented.

F. More Important in Criminal Law

There is an independent reason, grounded in the centuries-old struggle to forge the core policy of preservation of liberty into our criminal law jurisprudence, for more carefully scrutinizing free exercise claims that arise in a criminal law context than in a civil law context. The liberty interest at stake is more fundamental and thus, the array of individual exemptions that may be raised as defenses is infused with a different significance than the array of "good cause[s]" that may be raised in the unemployment compensation area.[94]

The *Smith* Court reaffirmed the *Sherbert* compelling interest balancing test to protect free exercise interests in the unemployment compensation realm when a significant monetary benefit is at stake, although it repudiated the applicability of this compelling interest test, or any real test at all, in the criminal law realm when liberty is at stake. Although monetary benefits are clearly important, in our tradition of constitutional criminal law, the free exercise liberty interest requires the most stringent

---

92. *Id.*
93. *Id.*
94. *See* Employment Div. v. Smith, 110 S. Ct. 1595, 1603 (1990).

protection. This difference was expressed by Justice O'Connor in her concurring opinion:

> A State that makes criminal an individual's religiously motivated conduct burdens that individual's free exercise of religion in the severest manner possible, for it "results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution." [A] neutral criminal law prohibiting conduct that a State may legitimately regulate is, if anything, *more* burdensome than a neutral civil statute placing legitimate conditions on the award of a state benefit.[95]

In our jurisprudence, the threat to liberty and autonomy inherent in a criminal charge triggers a heightened scrutiny both of the criminal statute at issue as well as the application of the statute to the specific facts detailed in the state's prosecution. In addition to the range of traditional defenses to criminal charges, the panoply of fundamental constitutional protections apply in scrutinizing the prosecutor's evidence, including the presumption of innocence, the probable cause standard, the test of proof beyond a reasonable doubt, and the guarantees of the fourth, fifth, sixth, and eighth amendments.[96]

In sharp contrast, these protections are inapplicable in an unemployment compensation case because liberty is not at stake. Yet, the *Smith* Court retains the *Sherbert* compelling interest test in assessing a free exercise claim to protect the applicant's interest in the monetary benefit provided by unemployment compensation, but rejects any real test to assess such a claim in the criminal law area when liberty is at stake and the "system of individualized exemptions" is even more important. The choice made by the *Smith* Court repudiates the foundational principle that a challenge to a liberty interest demands heightened protection, not lesser protection, or as in *Smith*, no real protection of a free exercise claim.

G. Smith and Police Power Myopia

This Article presupposes the validity of the Court's core framework that "our decisions . . . stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling

---

95. *Id.* at 1610-11 (O'Connor, J., concurring) (emphasis in original).

96. *See, e.g.*, United States v. Watson, 423 U.S. 411 (1976); *In re* Winship, 397 U.S. 358 (1970); Malloy v. Hogan, 378 U.S. 1 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963); Mapp v. Ohio, 367 U.S. 643 (1961); Weems v. United States, 217 U.S. 349 (1910).

reasons."[97] Thus, this critique has been addressed to the Court's failure to apply its principle to facially neutral criminal statutes. Yet, this central framework demonstrates that the *Smith* majority looked upon the free exercise clause with a telescope whose prism distorts the significance of the police power perspective and portrays a peculiar framework of separation of powers and federalism.

The *Smith* "proposition" renders enforcement of the free exercise clause hostage to the choice of a state legislature to create "a system of individual exemptions" whenever it enacts a generally applicable police power statute. If the legislature includes such a system in enacting statutes, the free exercise clause is operable, and a claim that free exercise is burdened will be cognizable by the courts. Yet, if the legislature rejects such a system in enacting its facially neutral statute, the free exercise claim is not operable, and any claim of burdening, however egregious, will not be cognizable by the courts. Enforcement of the first amendment "command that religious liberty is an independent liberty, that it occupies a preferred position,"[98] is contingent on the policies and political choices of state legislatures in enacting statutes. State legislatures definitively decide whether a free exercise claim arising from the application of a statute will be cognizable by the state and federal courts.[99]

The *Smith* Court's police power myopia also led to its use of the classical fallacy known as "denying the antecedent of a conditional statement."[100] Stated simply, "[t]he proposition that 'A implies B' is not the equivalent of 'non-A implies non-B,' and neither proposition follows logically from the other."[101] Initially, the *Smith* "proposition"

---

97. *Smith*, 110 S. Ct. at 1603.

98. *Id.* at 1609 (O'Connor, J., concurring).

99. The comments by Pastor Richard John Neuhaus, a conservative Lutheran theologian, about *Smith* are relevant in assessing the legislative hegemony over judicial cognizance of free exercise claims. He stated:

> But I would say that I am less alarmed about a parade of horribles, about the terrible things that are going to happen as a consequence of *Smith*, than I am — and I think other people involved in the churches and synagogues are — about what this says about whether in fact we believe that rights are established by nature and God as the Declaration says, whether we believe in the Pledge of Allegiance that this is a nation under God, or is this all just pious fluff?

Firing Line: *An Extraordinary Supreme Court Decision* (PBS television broadcast, July 24, 1990) (transcript available through Southern Educational Communication Association, P.O. Box 5966, Columbia, S.C. 29250). "The founding vision of the First Amendment religion clause, with its two parts, no establishment and free exercise, was . . . the founders' intention to say that the state is limited by a higher sovereignty, and that religion in society . . . is the carrier of that witness." *Id.*

100. French v. State, 266 Ind. 276, 291 n.1, 362 N.E.2d 834, 843 n.1 (1977) (DeBruler, J., dissenting).

101. *Id.*

is a valid hypothetical syllogism illustrating that "A implies A" or, as also formulated, if A then B. Its first part, "where the State has in place a system of individual exemptions,"[102] is called the antecedent A. The remainder of the proposition is the consequent B: "it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[103] This valid hypothetical syllogism uses familiar if-then reasoning and goes "to the heart of the Socratic method."[104]

Yet, the Court's immediate conclusion rejecting the existence of a system of exemptions in the criminal context (non-A) led it to conclude that the compelling interest test is inapplicable (non-B). This invalid leap from non-A to non-B illustrates the fallacy of "denying the antecedent of a conditional statement."[105] The Court's consequent statement that "[w]e . . . hold the [compelling interest] test inapplicable"[106] (non-B), simply does not follow from the denial of the antecedent (non-A), unless A is the *sole* possible antecedent for B. Viewing antecedents as causes, a causal relation exists between A and B (A causes B), but A is *not* the only possible cause of B (non-As can also cause B).[107] The Court's reasoning is a classic *non sequitur*, unless it posits the decision of state legislators as the *only* conceivable cause for the original consequent (*i.e.*, the application of the compelling interest test to cases of religious hardship to protect free exercise interests and values). This view, however, ignores that the command of the free exercise text itself is an independent cause.

If one adds the Court's holding to its proposition and conclusion, the Court is not only saying that non-A (the absence of a system of exemptions) equals non-B (no compelling interest test), but it is also saying that non-A equals what might be called non-T, no balancing test of any kind. Recall that the Court's rejection of the compelling interest test in the criminal context also means the rejection of any substitute test. Once the burdening of free exercise is found to arise from a typical criminal statute, it is deemed to be "merely the incidental effect" of the application of the statute and "the First Amendment has not been offended."[108] Thus, non-A equals non-B and non-T. The policy and

---

102. Employment Div. v. Smith, 110 S. Ct. 1595, 1603 (1990).

103. *Id.*

104. R. ALDISERT, LOGIC FOR LAWYERS 159 (1989).

105. *Id.* at 162.

106. *Smith*, 110 S. Ct. at 1603.

107. From a psychological perspective, "people tend to overassess [the] degree of correlation between conditions because they consider only instances in which condition A in fact occurs in tandem with condition B, while ignoring cases in which condition A is not associated with condition B." Margulies, *"Who Are You To Tell Me That?": Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Nonclients*, 68 N.C.L. REV. 213, 236 n.84 (1990).

108. Employment Div. v. Smith, 110 S. Ct. 1595, 1600 (1990).

political choices of state legislatures in including or omitting "a system of individual exemptions"[109] in enacting statues (A or non-A) is decisive in determining whether the compelling interest test will be applied and whether a balancing test of any kind will be applied.

Why should the interests and values codified in the ordinary criminal law defenses be routinely cognizable and adjudicable while the fundamental interests and values embodied in the free exercise clause of the Bill of Rights are not cognizable and adjudicable? Why should the interests and values protected by general criminal prohibitions be routinely balanced in thousands of hearings and criminal trials throughout the country against the traditional array of defenses never be balanced against a free exercise claim unless the statute directly targets religious practice? Why, in the unemployment compensation area, where money is at stake, should the "system of individual exemptions" implementing the test of "good cause" justify free exercise analysis under the compelling interest test while the centuries-old criminal law system of individual exemptions, mandated by the need for fault before liberty is deprived, never authorize any free exercise analysis unless the statute directly targets religious practice? Why should state legislative choice in omitting such a system of individual exemptions in enacting statutes have the power to bar permanently any consideration of a free exercise claim?

Our theory of just liability mandates that across-the-board criminal law prohibitions be viewed in light of a range of across-the-board criminal law defenses. It is unjust to single out the free exercise clause and bar this constitutional claim from consideration merely because it arises from the application of a facially neutral, generally applicable criminal statute. Although they are a prerequisite for equal and retributive justice, such statutes do not have the "talismanic" power to trump the quest for justice in individual cases by expunging the free exercise reason from our jurisprudential sensibility.

III. Criminal Statutes and Constitutional Criminal Law

A. Respecting the Majority Voice

The *Smith* Court's attribution of talismanic power to a typical criminal statute also finds no justification in our system of constitutional criminal law. Part III of this analysis begins with an affirmative presentation of the nature, scope, and purpose of criminal statutes within our constitutional tradition. This analysis leads to a constitutional critique of the *Smith* Court's attribution of extraordinary power to a typical

---

109. *Id.* at 1603.

criminal prohibition so that the free exercise clause is drained of meaning in the criminal context and indeed, even removed from analysis and decisionmaking.

Within our constitutional framework, criminal statutes implement the legislative form of sovereign power, commonly called police power, to enact laws for the public health, safety, and general welfare.[110] The exercise of the police power includes an expression of the political role of the criminal law in our democracy. To illustrate, the revival and imposition of capital punishment corresponds to a strong public consensus in many states in favor of capital punishment. In addition, the "white-heat conflict between pro-life and pro-choice advocates is [both a constitutional and] a political struggle over whether abortion should be criminalized once again."[111] The political character of the criminal law is also dramatically revealed in the heightening of penalties for drug, gun, and sex offenses and other violent crimes and in the "influential role of criminal-law issues in political campaigns ranging from the state legislature to the presidency."[112] In less dramatic form, the core prohibitions of murder, robbery, assault, rape, burglary, and larceny have the strongest possible support of the electorate, so that political controversy about such core crimes tends to be concentrated on the appropriateness of the punishment for their violation.[113]

In our democratic society, the majoritarian voice is rightly heard and respected by our legislative representatives in their decisions to criminalize and decriminalize, to define the elements of crimes and defenses, and to heighten or lower penalties. Therefore, an important governmental interest exists in typical facially neutral, across-the-board criminal statutes that embody the dominant political consciousness. These statutes serve to implement the legislative role in our governmental system which separates powers among the legislature, the executive, and the judiciary. The executive role is implemented by prosecutors who, unlike legislators, have the power to apply these statutes to individual cases by initiating criminal charges. The judicial role is carried out by judges and jurors who, unlike legislators and prosecutors, have the power to decide guilt or innocence in individual cases. Criminal prohibitions are also essential to fulfill the ideal of the rule of law. Legislatures enact facially neutral, across-the-board criminal statutes which guide and check the power of police, prosecutors, judges, and jurors.[114]

---

110. *See, e.g.*, Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2462 (1991); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952).

111. J. DELANEY, *supra* note 82, at 12.

112. *Id.*

113. *See id.*

114. *See, e.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156, 165-71 (1972); Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972).

The Oregon statute utilized by the *Smith* majority, which prohibits the knowing and intentional possession of a controlled substance, clearly falls within the legislative exercise of the police power (*i.e.*, within the authorization of legislation for the public health, safety, and general welfare).[115] Indeed, in *Robinson v. California*,[116] the Supreme Court, in dictum, specifically authorized the prohibition of the possession of narcotics to be within the police power and found a California statute penalizing the "status" of being a drug addict to be outside of the police power.[117] The Oregon possession statute illustrates, therefore, the importance in our democracy of what the Court in *Smith* calls facially neutral, across-the-board criminal prohibitions, because they implement both the rule of law and the democratic will of the majority.

B. Respecting the Bill of Rights

Although democratically determined police power embodies a basic and pervasive governmental interest, it is not unlimited. In our tradition of democratic criminal law, police power and the political struggle over its meaning is limited by federal and state constitutions. Indeed, the American contribution to political theory exemplified in our Constitution that protection of individual rights is central, not peripheral, to democracy reverberates throughout our criminal law.[118] "Since democratic theory stresses both majority rule and protection of individual rights, there is an inherent tension between the political role of the criminal law, which implements shifting majoritarian priorities, and the constitutional role of the criminal law, which safeguards personal freedom and autonomy against even majoritarian will."[119] In our system of divided, separated, and checked power, this political role is carried out by the legislature,[120] while the safeguarding of personal freedom and autonomy against even a majoritarian will is the special, but not exclusive, responsibility of the judiciary.[121]

---

115. *See* OR. REV. STAT. § 475.992(4) (1987).

116. 370 U.S. 660 (1962).

117. *Id.* at 666.

118. In Ronald Dworkin's words, "America's principal contribution to political theory is a conception of democracy according to which the protection of individual rights is a pre-condition, not a compromise, of that form of government." Dworkin, *The Reagan Revolution and the Supreme Court*, N.Y. Rev. of Books, July 18, 1991, at 23.

119. J. DELANEY, *supra* note 82, at 45.

120. L. TRIBE, *supra* note 7, at 19-22.

121. Thus, Madison, in presenting the proposed Bill of Rights to the Congress, stated:

> If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they

Thus, criminal statutes and their enforcement must not infringe upon the fundamental interests embodied in the Bill of Rights, our charter of liberties. Those preferred rights create a framework of fundamental principles, a fence within which the police power must be exercised. For example, the fourteenth amendment prohibits introduction of even crucial state prosecutorial evidence if the police violate the fourth amendment ban on unlawful searches and seizures,[122] the fifth amendment prohibition of testimonial compulsion,[123] or the sixth amendment guarantee of the right to counsel,[124] or if a statute violates the first amendment guarantees of freedom of expression.[125]

The police, prosecutors, judges, and jurors, who are sworn to apply the legislature's criminal statutes to specific cases, are also sworn to apply them within the framework of our Bill of Rights. Even overwhelming evidence proving beyond all doubt that the defendant violated a criminal statute may not result in criminal liability if the government violates one of the historic guarantees that distinguish our culture from authoritarian and totalitarian societies. Notwithstanding even overwhelming evidence against the defendant, such governmental intrusion beyond its power may be sufficient reason to pluck the defendant from the category of culpability created by the charging statute and classify her within one of the categories of constitutional defenses created by these guarantees.

C. Respecting the Twin Imperatives: Implementing Tests

The fundamental police power and the core interests protected by the Bill of Rights exist in both a theoretical and an existential tension.[126]

> will be an inpenetrable bulwark against every assumption of power in the Legislature or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.

Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1448 n.100 (1962) (quoting 1 ANNALS OF CONGRESS 139 (1789)). Yet, in emphasizing the role of the courts as a special guardian of the Bill of Rights, one must not overlook the obligation of all public officials, legislators, mayors, governors, and presidents to respect the Bill of Rights.

122. *See* Mapp v. Ohio, 367 U.S. 643 (1961).

123. *See, e.g.*, Malloy v. Hogan, 378 U.S. 1 (1964).

124. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

125. *See, e.g.*, Coates v. City of Cincinnati, 402 U.S. 611 (1971); Cohen v. California, 403 U.S. 15 (1971); Brandenburg v. Ohio, 395 U.S. 444 (1969); Cantwell v. Connecticut, 310 U.S. 296 (1940); De Jonge v. Oregon, 299 U.S. 353 (1937).

126. In philosophical language, the ontology of our constitutional criminal law is composed of this dual essence (*i.e.*, an embodiment of popular will and of the Bill of Rights). These two realities comprise its intrinsic nature. Thus, any test designed to reflect this essence must recognize and reflect that intrinsic tension in its full scope. Any test

Both embody critical democratic imperatives: respect for majority will and respect for those fundamental restrictions on state sovereign power that are also the glory of the American political experience. This intrinsic structural tension requires that determinations of guilt or innocence by the application of criminal statutes to individual cases respect and incorporate these twin imperatives. If, instead, the judicially-crafted implementing tests are centered exclusively on protection of the rights, interests, and values exemplified in the Bill of Rights, those tests slight or ignore the important governmental interests and values served by the legislature's exercise of the police power. Such one-sided tests do not authorize analysis and decisionmaking that is proportionate to the nature and scope of the twin legal realities at issue. They therefore fail what might be called a test for tests: they squeeze formulation and analysis so that an intrinsic two-sided reality is reduced to a one-sided reality.

Yet, the opposite premise is equally true. If judicially-crafted tests are centered exclusively on formulation and analysis designed to protect the police power interests and values served by criminal statutes, these tests fail to respect and implement the core rights, interests, and values protected by the Bill of Rights. These tests also fail the test for tests: they too squeeze formulation and analysis so that the intrinsic two-sided reality is reduced to a one-sided reality. In both instances, one-sided tests are reductive and distort analysis and decisionmaking.

The glaring *Smith* defect, therefore, is the Court's embracing of its one-sided test which focuses exclusively on the important governmental interests served by typical criminal statutes (unless the statute facially burdens religious practice). This one-sided test turns the constitutional framework of our democratic criminal law on its head by mandating a police power framework for assessing free exercise claims. In the Court's view, the importance of the governmental interest expressed in a routine criminal prohibition is automatically sufficient to overcome the fundamental interest expressed in the free exercise clause. In fact, the governmental interest in any typical criminal statute is sufficient, without any further analysis, to exclude the possibility of a violation of the free exercise clause. The Court's holding is perfectly clear: "[I]f prohibiting the exercise of religion . . . is not the object . . . but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[127] Thus, the *Smith* holding, because it focuses almost exclusively on the statute at stake, causes the text of

---

that overlooks part of that essence is reductive. The scientific norm of isomorphism also captures the identical requirement: the form or structure of a scientific analysis must be proportionate to the form or structure of that which is investigated.

127. Employment Div. v. Smith, 110 S. Ct. 1595, 1600 (1990).

the free exercise clause to fade away from our attention and lose its vitality.[128] The *Smith* holding also obliterates the policy underlying this Bill of Rights test: that the free exercise of religion, a preferred constitutional activity, is explicitly singled out by the text of the first amendment itself for special protection. The *Smith* test stands "in the place of the Constitution."[129]

The *Smith* holding transforms the traditional framework. The free exercise clause is plainly subordinated to the mere existence of an otherwise valid criminal statute. This first amendment guarantee is hostage to any ordinary criminal statute.

D. A Comparison of the Smith Rule With Other First Amendment Tests

A comparison of the *Smith* Court's prohibition of free exercise analysis contrasts strikingly with the multitude of tests that require first amendment freedom of expression analysis when an issue arises in the application of a criminal statute. The talismanic power attributed by the Court to such an ordinary criminal statute is starkly absolutist. It is not repeated in other first amendment areas. Nor is the requirement repeated that the state must intentionally intrude on protected first amendment interests before a claim can be considered.

Before comparing the *Smith* approach with the abundance of freedom of expression tests, it is necessary to appreciate the role of tests in respecting and implementing the ideals of the first amendment. The majestic words of the first amendment are not self-applying.[130] The plethora of tests in first amendment cases are rationalized as necessary to effectuate the deliberately imprecise language of the amendment itself.[131] These tests provide standards of review that enable lawyers and judges to enforce the guarantee of rights by applying the open-ended language of the text to diverse cases in a consistent and coherent manner. In principle, at least, the values, interests, and rights embodied in the first amendment are vindicated, and those who are similarly situated are treated equally. Judicially-crafted tests transform and illuminate the first amendment language from a statement of abstract ideals and goals, an inspiring democratic manifesto, to a repertoire of standards for lawyerly

---

128. *See id.* at 1608 (O'Connor, J., concurring).

129. *See* Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 187 (1985).

130. "[E]ven so stout a libertarian as Alexander Meiklejohn has chided those who insist that the words 'abridging the freedom of speech or of the press' are 'plain words, easily understood.'" Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CALIF. L. REV. 821, 821 (1962).

131. For a scholarly critique of the Court's utilization of proliferating and layered tests in constitutional analysis, see Nagel, *supra* note 129.

argument and judicial decisionmaking. In jurisprudential language, the first amendment articulates broad principles that have been implemented and defined by tests in a wide range of cases over an extensive period of time.

1. Criminal Statutes and Content-Based Regulation of Free Expression: Track One Categorical Analysis.—Governmental restrictions of expression fall within two general areas, content-based restrictions and content-neutral restrictions, and thus, there are two corresponding modes of analysis. We begin with content-based restrictions and the corresponding mode of analysis. In this track one realm, criminal statutes have no talismanic power to exclude analysis of the first amendment rights, values, and interests at stake in drawing the boundaries for the few traditional exceptions to the "principle that government may not prescribe the form or content of individual expression."[132] These exceptions include the prohibition of advocating violent overthrow of the government, of "fighting words," and of obscenity. The governing tests for these areas are expressed in categorical or per se rules that carefully define the behavior at issue: the *Brandenburg* clear and present danger test,[133] the *Chaplinsky* fighting words test,[134] and the *Miller* obscenity test.[135] These categorical tests shelter first amendment values, interests, and rights that arise in the application of criminal statutes while narrowly defining behavior that is beyond first amendment protection or behavior that may be criminally prohibited as a valid exercise of police power.

---

132. L. Tribe, *supra* note 7, at 832. Actually, there are a good many forms of expression that are outside the scope of the protection of the first amendment. These include verbal and other agreements spelling out conspiracy, solicitation of a crime, restraint of trade, perjury, larceny by false pretense and by trick, and intentional infliction of emotional distress. "Federal securities regulation, mail fraud statutes, and common-law actions for deceit and misrepresentation are only some examples of our understanding that the right to communicate information of public interest is not 'unconditional.'" Curtis Publishing Co. v. Butts, 388 U.S. 130, 150 (1967) (plurality opinion). Nevertheless, when one considers these forms of "expression" in light of the purposes of first amendment protection of free speech (that a free government, the quest for truth in the marketplace of ideas, and the needs of self-realization, all require the right of free speech), it is easy to understand that these crimes and torts are outside of the scope of protection of the first amendment guarantee.

The incontrovertible fact that certain forms of expression are not within the guarantee of free expression addresses the question of the scope of the guarantee, but not the question of the nature of the obligation for those forms of expression found to be within the guarantee. The failure to distinguish between "scope and obligation" is "sometimes astonishing." Frantz, *supra* note 121, at 1436. "The premise is that the first amendment cannot be 'absolute' in the sense of unlimited in scope. But, the conclusion is that it cannot be 'absolute' in the sense of unconditionally obligatory within its proper scope, whatever that may be." *Id.* Frantz aptly calls this conclusion a *non sequitur.*

133. Brandenburg v. Ohio, 395 U.S. 444 (1969).

134. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

135. Miller v. California, 413 U.S. 15 (1973).

a. The clear and present danger test

In first amendment challenges to criminal prosecutions for advocating the overthrow of the government, the *Brandenburg* clear and present danger test permits limitation of the content of free and robust expression only if the expression subject to the criminal statute and the actual expression at issue is: (a) "directed to inciting or producing imminent lawless action" and (b) "likely to incite or produce such action."[136] The *Brandenburg* test affirms the right of free expression even for advocacy directed at overthrowing our political, economic, and social institutions, except in the extreme and narrow situation in which both of its strict standards are met. Only then does the important governmental interest against imminent violent overthrow embodied in the criminal statute prevail over first amendment interests.

The narrowness of the *Brandenburg* test implicitly defines all other advocacy directed at transforming our institutions as protected free expression. Such hard core free expression trumps any police power argument that advocacy of hated and subversive ideas that threaten cherished premises of our political and civil society should be barred. Once advocacy is classified as protected under the central first amendment meaning of "no law . . . abridging the freedom of speech, or of the press," there is no balancing with a governmental police power interest. The interest is simply subordinated to the preferred interest inherent in the command of the first amendment.

b. The fighting words test

Second, criminal prohibitions of fighting words are limited by the strict first amendment test that such statutorily prohibited epithets must "by their very utterance inflict injury or tend to incite an immediate breach of the peace" and the actual words used must "have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed."[137] Again, this fighting words test affirms the right of robust, even insulting, free expression, unless the strict standards for fighting words are met. In this narrow instance, the important police power interest in public peace and security prevails. As in the *Brandenburg* test, the intentional narrowness of the fighting words test implicitly defines all other insulting speech that cannot be squeezed into its restricted terrain as protected, hard core free expression. Once so classified, the first amendment interest in such speech simply defeats outright the police power

136. *Brandenburg*, 395 U.S. at 447.

137. Houston v. Hill, 482 U.S. 451, 461-62 (quoting Gooding v. Wilson, 405 U.S. 518, 525 (1972)).

claim that such speech should be barred or, at a minimum, be subject to balancing analysis.

c. The obscenity test

Third, the *Miller* obscenity test, which is usually applied to assess state criminal prohibitions of obscenity, focuses on the police power interest: "whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest" and "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law."[138] The third element of the test captures the first amendment sheltering of free expression by also requiring that "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[139] The first and second elements of the test reflect the "legitimate [state] interest in prohibiting dissemination or exhibition of obscene material."[140] In contrast to these two elements for obscenity, the third part of the test captures the first amendment interest in free expression by negatively defining obscenity as "lack[ing] serious literary, artistic, political, or scientific value."[141]

The trifurcated *Miller* test, therefore, incorporates the free expression interest as an element of the test. While the first two elements reflect the police power interest in prohibiting obscenity, there can be no finding of obscenity unless the third element is also demonstrated (*i.e.*, unless the prosecution proves beyond a reasonable doubt that the allegedly obscene material "lacks serious literary, artistic, political, or scientific value").[142] If the third element is not proved, the prosecution fails and the police power interest is subordinated to the free expression interest. Though frequently criticized[143] and clearly no panacea for this perplexing area, the *Miller* test reflects the Court's intent to restrict the definition of obscenity so that free expression is also protected.

---

138. Miller v. California, 413 U.S. 15, 24 (1973) (citations omitted).

139. *Id.*

140. *Id.* at 18. For a specification of these interests, see T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 89 (1966) [hereinafter T. EMERSON, GENERAL THEORY].

141. *Miller*, 413 U.S. at 24.

142. *Id.*

143. *See, e.g.*, Paris Adult Theatre I v. Slaton, 413 U.S. 49, 84 (1973) (Brennan, J., dissenting) ("[N]one of the available formulas . . . can reduce the vagueness to a tolerable level. . . . [W]e are manifestly unable to describe [obscenity] in advance except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech.").

d. Trumping police power interests versus Smith absolutism

The important police power interests and values exemplified in the criminal statutes in prohibiting imminent violent overthrow, fighting words, and obscenity, although respected and promoted, do not automatically trump first amendment rights, interests, and values. In addition, these embodied police power interests do not foreclose formulation and consideration of relevant first amendment claims. These tests also do not require a discriminatory intention manifested on the face of the statute as a *sine qua non* for considering a first amendment claim. To the contrary, these three tests authorize free expression trumping of police power interests. They define and classify which expression falls within and without the protection of freedom of speech or of the press. They thereby specify the reach of hard core protected free expression. These tests, although characterized as categorical or per se rules rather than as balancing tests, incorporate what has been called "definitional balancing."[144] Each definition (clear and present danger, obscenity, or fighting words) and each application exemplifies the twin imperatives inherent in our system of constitutional criminal law.[145] Thus, these tests are two-sided categorical rules.

---

144. Tribe aptly describes definitional balancing:

> Although only the case-by-case approach of track two takes the form of an explicit evaluation of the importance of the governmental interests said to justify each challenged regulation, similar judgments underlie the categorical definitions on track one. Any exclusion of a class of activities from first amendment safeguards represents an implicit conclusion that the government interests in regulating those activities are such as to justify whatever limitation is thereby placed on the free expression of ideas. Thus, determinations of the reach of first amendment protections on either track presuppose some form of "balancing" whether or not they appear to do so. The question is whether the "balance" should be struck for all cases in the process of framing particular categorical definitions, or whether the "balance" should be calibrated anew on a case-by-case basis.

L. Tribe, *supra* note 7, at 792-93.

145. The power of the track one definitional approach to protected free expression can be summarized as:

> The definer - the judge who undertakes to assign some distinct meaning to the constitutional proposition - has now drawn a line. It may be a wavering and uncertain line at many points. He may come up against cases which compel him to conclude that he has drawn it in the wrong place and that it should be moved. . . . [B]orderline cases can still arise which could arguably be placed on either side. Yet, despite all these difficulties, something new emerges from the mere fact that a line has been drawn. There are now cases that are not borderline: cases that are well within the line, as well as others well outside it. The definer has therefore placed limits . . . on his own future freedom of decision. There are cases in which (unless he is willing to change the rule or evade it with sophistries) he *must* say that freedom of speech has been unconstitutionally abridged, as well as others in

The *Smith* holding is also a "categorical" or per se rule. It too defines the behavior it classifies as within or without the protection of the first amendment. Yet, in striking contrast to the traditional two-sided categorical rules that shelter free expression interests, the unilateral *Smith* test rejects first amendment analysis and mandates that any police power interest automatically trumps any free exercise interest whenever an ordinary criminal statute is applied. Thus, the one-sided categorical rule postulated in *Smith* is an absolutist police power rule. There is virtually no way the free exercise interest can prevail, and its rationale is the very antithesis of the driving rationale of track one analysis, an area in which free expression absolutists essentially prevail.[146]

2. Criminal Statutes and Content-Neutral Regulation of Free Expression: Track Two Balancing Analysis.

a. Track two governmental restriction

The second major way the government regulates free expression is through content-neutral restrictions that trigger the corresponding mode of track two analysis.[147] In this track two realm, the government does not seek directly to regulate the content of free expression by defining, as in track one, the scope of protected free expression. Instead, the government furthers a clearly valid and specific police power interest in public peace, safety, health, or order through criminal and civil statutes,

---

> which he must say it has not. The definer, in other words, must ultimately give the constitutional proposition a certain amount of content which he regards as being obligatory on the court. Consequently, in cases falling clearly within the defined area, the definer is largely relieved of responsibility for results in particular instances which he may find personally distasteful.

Frantz, *supra* note 121, at 1435. In effect, Frantz argues that the categorical approach serves the core legal model purposes in a constitutional framework of stare decisis, adjudication by an impartial judge, reasonable predictability and certainty, and equal justice for those who are similarly situated. Frantz contrasts the definitional approach with ad hoc balancing by a judge:

> For him, there can be no clearly protected area — all areas are subject to invasion whenever "competing interests" are sufficiently compelling. Furthermore, his initial assumption — without which he could never justify balancing — is that the constitutional proposition contained in the first amendment is incapable of being assigned any meaning which would not be too broad (or too narrow) for consistent application. Therefore, it must have been intended to be subject to unstated exceptions, which the court must make. . . . The *ad hoc* balancer's constitution is empty until the court decides what to put into it. It does not speak until the court speaks for it. It is inherently incapable of saying anything to the judge.

Id.

146. *See* L. TRIBE, *supra* note 7, at 792.

147. *Id.*

but limits the right to free expression in the application of such statutes, sometimes inadvertently and sometimes intentionally. In Justice O'Connor's words, "Our free speech cases similarly recognize that neutral regulations that affect free speech values are subject to a balancing, rather than categorical, approach."[148] Such clearly valid regulations include generally applicable, facially neutral criminal statutes and ordinances prohibiting trespass, breach of the peace, littering, conspiracy, and picketing near courthouses. Applications of statutes that raise free expression issues occur in cases involving reasonable time, place, and manner restrictions,[149] speech,[150] symbolic speech,[151] overbroad and vague statutes,[152] and associational rights.[153]

---

148. Employment Div. v. Smith, 110 S. Ct. 1595, 1612 (1990) (O'Connor, J., concurring).

149. *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104 (1972) (ordinance prohibiting picketing around elementary school buildings except for peaceful school labor disputes found unconstitutional because school grounds cannot be declared off limits); Adderley v. Florida, 385 U.S. 39 (1966) (a conviction pursuant to a facially neutral trespass statute for a demonstration on that part of the jail grounds reserved for jail uses against the explicit objection of the sheriff responsible for the jail upheld as applied as a valid neutral regulation of the location of the protest); Marsh v. Alabama, 326 U.S. 501 (1946) (facially neutral trespass statute held not enforceable against the distribution of religious literature on streets of company town).

150. *See, e.g.*, United States v. Spock, 416 F.2d 165 (1st Cir. 1969) (reversing convictions pursuant to a facially neutral conspiracy prohibition as applied to protected advocacy opposing the Vietnam War).

151. *See, e.g.*, United States v. Eichman, 110 S. Ct. 2404 (1990) (reversal of convictions upheld pursuant to a congressional statute prohibiting the destruction of an American flag as applied to persons who burned a flag as part of a protest against governmental policy); Texas v. Johnson, 491 U.S. 397 (1989) (application of a facially neutral Texas criminal statute prohibiting the desecration of venerated objects violated the first amendment as applied to Johnson who burned an American flag during a political demonstration); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) (application of a facially neutral federal park regulation prohibiting unauthorized camping in federal parks upheld as applied to demonstrators sleeping in Lafayette Park; the Court assumed, *arguendo*, that the overnight sleeping was "expressive conduct protected to some extent by the First Amendment").

152. The state interest and the free expression interest are balanced in these cases. If the state interest is compelling, the free expression interest is subordinated and less precision is mandated. *See, e.g.*, Parker v. Levy, 417 U.S. 733 (1974) (Captain Levy's free speech rights in urging enlisted men to disobey orders to go to Vietnam were subordinated to a compelling military wartime interest in order and discipline, and his conviction for "conduct unbecoming an officer and a gentleman" was upheld). If the free expression interest is weighed against a modest or dubious state interest, more precision is required. *See, e.g.*, Houston v. Hill, 482 U.S. 457 (1987) (ordinance prohibiting interrupting policeman in the execution of his duties invalidated as overbroad; however, "a properly tailored statute" could prohibit obstructing an investigation, creating a traffic hazard, and other behaviors typically prohibited by disorderly conduct statutes).

153. *See, e.g.*, Talley v. California, 362 U.S. 60 (1960) (conviction based on ordinance prohibiting the distribution of handbills which did not contain the name and address of the author, printer, and sponsor reversed as a restraint on freedom of association).

b. Track two, case-by-case balancing detailed

The central task of track two analysis is choosing between the state interest and the first amendment interest.[154] In Tribe's words, "[I]t is impossible to escape the task of weighing the competing considerations."[155] Indeed, it is impossible for the conscientious judge to blink at her oath to uphold the twin imperatives of "the Constitution and laws of the United States."[156] The choice "between competing interests" is "struck on a case-by-case basis."[157] There is case-by-case balancing by weighing the particularized governmental interest embodied in regulatory criminal and civil statutes on their face and as applied against the specific free expression interest raised by the facts and the individual's claim. This case-by-case balancing can be complex. Yet, although tests vary depending on the particularized interests in conflict, there is no abject deference to any police power interest incorporated in the ordinary criminal statute and no automatic subordination of free expression rights,

---

154. Aleinikoff specifies two distinct forms of balancing: "Sometimes the Court talks about one interest *outweighing* another. Under this view, the Court places the interests on a set of scales and rules the way the scales tip. . . . Constitutional standards requiring 'compelling' or 'important' state interests also exemplify this form of the balancing metaphor." Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 946 (1987) (emphasis in original). This first form of balancing is distinguished from "'striking a balance' between or among competing interests. The image is one of balanced scales with constitutional doctrine calibrated according to the relative weights of the interests. One interest does not override another; each survives and is given its due." *Id.* In addition, Aleinikoff distinguishes balancing from methods of adjudication that look at a variety of factors in reaching a decision:

> These would include some of the familiar multi-pronged tests and "totality of the circumstances" approaches. These standards ask questions about how one ought to characterize particular events. Was the confession voluntary or involuntary? . . . In answering . . . one starts with some conception of what constitutes voluntariness and involuntariness and then asks whether the particular situation shares more of the voluntary elements or the involuntary elements. . . . The reasoning is thus primarily analogical. Balancing represents a different kind of thinking. The focus is directly on the interests or factors themselves. Each interest seeks recognition on its own and forces a head-to-head comparison with competing interests.

Id. at 945.

Justice Black opposed balancing in principle and argued an absolutist approach that the literal first amendment language that Congress shall make "no law" abridging freedom of speech literally "means no law" without "any ifs, buts, or whereases." Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549, 553, 559 (1962). *See also* Barenblatt v. United States, 360 U.S. 109, 140-41 (1959) (Black J., dissenting); T. EMERSON, GENERAL THEORY, *supra* note 140, at 56-58.

155. L. TRIBE, *supra* note 7, at 792.

156. 28 U.S.C. § 453 (1988) (oaths of justices and judges).

157. L. TRIBE, *supra* note 7, at 792.

interests, and values. As in track one categorical analysis, the mere application of any typical criminal statute does not create talismanic power to exclude consideration of free expression when the government, directly or indirectly, intrudes on free expression.

c. The weaknesses of case-by-case balancing

Measured by the requirements of the positivist-dominated legal model for formulating, analyzing, and decisionmaking, the balancing approach to resolving competing interests, while not invalid, ranks low in the universe of modes of legal reasoning. The core legal model requirement that judges and jurors should be impartial decisionmakers, guided in their analysis by rules and principles that will govern the resolution of like cases in the future, is not well served by the ad hoc nature and elasticity of balancing. In a typical form of balancing, the judge in each case must initially identify the nature and weight of the particular police power interest at stake and then weigh that interest and determine whether the government used the least drastic means for attaining the specific police power interest.[158] This identification and weighing must be performed again to determine the precise first amendment interest at issue. The competing interests must then be weighed against each other with a determination that one interest outweighs the other in each case.[159]

The immediate analytical questions are: How is such identifying, weighing, comparing, and determining to be done? What are the criteria for these tasks? Are these tasks for judges or is the court asked "to assess after each incident a myriad of facts, to guess at the risks created by expressive conduct, and to assign specific value to the hard-to-measure worth of particular instances of free expression"?[160] The balancing approach itself does not supply adequate answers to these questions and forces judges to supply their own answers by looking to their predilections in ways which are quite different from their application of the element-centered rules characteristic of track one analysis.

Neither does the aggregation of prior ad hoc balancing decisions, what has been called a "quagmire of ad hoc judgment,"[161] aid such analysis and decisionmaking in new cases by providing a repertoire of explanations and justifications that has the authority of stare decisis and that therefore provides a framework for guidance. Nor does such an aggregation embody even a modest approximation of certainty and predictability, the absence of which could lead to chilling the exercise of

158. *See id.* at 977-86.
159. *Id.*
160. *Id.* at 793.
161. *Id.* at 794.

free expression because a person is never sure whether her free expression right will prevail over the governmental interest until an appellate court decides. In short, balancing is "a slippery slope . . . a matter of degree [and] first amendment protections become especially reliant on the sympathetic administration of the law."[162]

d. The justification of case-by-case balancing

First, in Tribe's words, in the track two realm, "the 'balancers' are right in concluding that it is impossible to escape the task of weighing the competing considerations,"[163] and ad hoc balancing is better than "a constitutional system in which . . . governmental behavior would automatically be upheld, however devastating its consequences for free-

---

162. *Id.* Nimmer, in arguing against the use of what he calls "ad hoc balancing," has three objections.

> First, ad hoc balancing by hypothesis means that there is no rule to be applied, but only interests to be weighed. In advance of a final adjudication by the highest court a given speaker has no standard by which he can measure whether his interest in speaking will be held of greater or lesser weight than the competing interest which opposes his speech. . . . [I]f there is no rule at all then there is no certainty at all. The absence of certainty in the law is . . . particularly pernicious where speech is concerned because it tends to deter all but the most courageous (not necessarily the most rational) from entering the market place of ideas.

Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 939 (1968). Nimmer's second objection to case-by-case balancing is that it leads to favoring "the side which opposes freedom of speech." *Id.* at 940. The reason is that free speech issues will arise from "those who espouse the most unpopular ideas, those against whom feelings run the highest . . . and only they are likely to be prosecuted." *Id.* When judges "engage in the 'delicate and difficult task' of weighing competing interests," they are likely to be influenced by "strong popular feelings." *Id.* His third reason is that "the ingrained judicial deference to the legislative branch can and has in ad hoc balancing tended toward judicial abdication in the weighing process." *Id.* at 941. For a detailed critique of ad hoc balancing, see Konigsberg v. State Bar of Cal., 366 U.S. 36, 60-61 (1961) (Black, J., dissenting); T. EMERSON, GENERAL THEORY, *supra* note 140, at 53-56; Frantz, *supra* note 121, at 1424.

Nimmer's critique of ad hoc balancing is a prelude to his argument that the balancing process should occur "on the definitional rather than the litigation or ad hoc level." Nimmer, *supra*, at 942. The level or place of balancing is changed so that the question is not "which litigant deserves to prevail in a particular case," but the broader question of "defining which forms of speech are to be regarded as 'speech' within the meaning of the first amendment." *Id.* Nimmer illustrates his argument with the Court's landmark decision in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), which determined that knowingly and recklessly false speech about public officials is not the type of speech protected by the first amendment. *See* Nimmer, *supra*, at 942-55. For a critique of Nimmer's argument that definitional balancing creates a rule which can be applied in the future without additional balancing, see Aleinikoff, *supra* note 154, at 979.

163. L. TRIBE, *supra* note 7, at 792.

dom of expression."[164] The essence of balancing requires that both the police power interest and the first amendment interest be considered in formulating and analyzing competing interests, even though that analysis can lead to subordinating one interest to the other in decisionmaking. Thus, balancing promotes fidelity to the judge's oath to uphold both the Constitution and the laws.[165]

Second, balancing has a potential over time to create definitional rules.[166] The *Brandenburg* definitional rule, for example, evolved in 1969 in common-law fashion after decades of federal and state sedition cases controlled by extremely elastic balancing approaches that strongly favored the police power interest and usually resulted in convictions and affir-

---

164. *Id.* at 978.

165. According to W. Mendelson:

> It is largely because of the absence of defining standards, I suggest, that the Court has resorted openly to balancing in free speech cases. We have had too many opinions that hide the inevitable weighing process by pretending that decisions spring full-blown from the Constitution — a document written generations ago by men who had not the slightest conception of the world in which *we* live. . . . Open balancing compels a judge to take full responsibility for his decisions, and promises a particularized, rational account of how he arrives at them — more particularized and more rational at least than the familiar parade of hollowed abstractions, elastic absolutes, and selective history. Moreover, this approach should make it more difficult for judges to rest on their predispositions without ever subjecting them to the test of reason. It should also make their accounts more rationally auditable.

Mendelson, *supra* note 130, at 825-26. Since this article was published in 1962, the Court has refined and increased the number of "defining standards," including the *Miller* obscenity test, the *Brandenburg* version of the "clear and present danger" test, and the *New York Times* "defamation" test for public officials. Thus, the characterization of the alternative to balancing as comprised of "hallowed abstractions, elastic absolutes, and selective history" now has, in my judgment, somewhat less validity. Compared to ad hoc balancing, the definitional approach is superior in protecting free expression for the reasons Nimmer, Mendelson, and others detail. Balancing is also superior to "hallowed abstractions, elastic absolutes, and selective history." For example, in Di Santo v. Pennsylvania, 273 U.S. 34 (1927), the Court decided that a state regulation was unconstitutional as a "direct burden" on interstate commerce without specifying "the decisive considerations that marked the burden in question as 'direct' rather than 'indirect.'" *See* Mendelson, *The First Amendment and the Judicial Process: A Reply to Mr. Frantz*, 17 VAND. L. REV. 479, 482 (1964). For a historical analysis of the development of balancing and a worthwhile critique, see Aleinikoff, *supra* note 154.

166. Balancing suggested a particularistic, case-by-case, common law approach that accommodated gradual change and rejected absolutes. The outcome of a case would turn on a careful analysis of the particular interests at stake. Today, the plaintiff might win because of the unjustified burden imposed by a governmental regulation; tomorrow, the government could demonstrate an adequate public interest to sustain its legislation. Balancing could keep everyone in the game. It thus provided flexibility without sacrificing legitimacy.

Aleinikoff, *supra* note 154, at 961.

mations of such convictions on appeal.[167] The emergence of the narrower, element-dominated *Brandenburg* rule is closely correlated with the fading of these sedition prosecutions in favor of tolerance of a much more robust and exuberant free expression, even of hated and disturbing ideas.[168]

Third, ad hoc judging with elasticity in formulating, analyzing, and deciding is for good as well as for ill. It allows a judge to seek and to capture more of the human complexity that is at stake without being fenced in by element-dominated rules. Positivism, in constitutional law as elsewhere, has limitations as well as advantages, and broad policy analysis can produce impressive examples of the legal imagination at work as well as personal and status quo myopia. Lastly, in many areas, balancing may simply be the best form of analysis that is possible at a particular time in deciding conflicts that cannot be anticipated precisely. This includes the array of conflicts that occur when the government, while aiming at the noncommunicative aspect of behavior, nevertheless significantly impacts free expression.[169] In these cases, balancing enables the judge to decide the controversy before her in as reasoned a manner as is possible at the time even though there is no guiding body of developed case law. The judge, who ordinarily must decide the instant case, does not have the luxury of the social philosopher who may defer resolution of issues until reflection has deepened her insight or until the available mode of reasoning has been refined in an evolving body of philosophical analysis.

e. Track two analysis versus Smith absolutism

The track two free expression cases referred to in this discussion unfold the precise police power interest posed and the precise first

---

167. *See* Scales v. United States, 367 U.S. 203 (1961); Dennis v. United States, 341 U.S. 494 (1951); Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1925); Abrams v. United States, 250 U.S. 616 (1919); Schenck v. United States, 249 U.S. 47 (1919).

168. *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982); Communist Party v. Whitcomb, 414 U.S. 441 (1974).

169. "Even first amendment absolutists accept something like a balancing or reasonableness standard in most time, place and manner contexts." C.E. BAKER, *supra* note 57, at 315 n.1. Justice Black, a leading advocate of the absolutist approach, saw no alternative to balancing in this context. *See, e.g.*, Konigsberg v. State Bar of Cal., 366 U.S. 36, 68-69 (1961) (Black, J., dissenting); Barenblatt v. United States, 360 U.S. 109, 141-42 (1959) (Black, J., dissenting); Martin v. City of Struthers, 319 U.S. 141, 143-44 (1943); Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 28. Professor Thomas Emerson, the preeminent scholarly proponent of first amendment absolutism, recognized that in allocating the use of physical facilities for the exercise of the right of free expression, "[t]he governing principle can only be a fair accommodation of opposing interests [that is] a kind of balancing test." T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 359 (1970).

amendment interest at stake by utilizing tests that focus analysis on these twin interests with some form of balancing to aid in resolving which interest shall prevail. In contrast, the one-sided *Smith* test mandates that any police power interest, no matter how modest, codified in an ordinary criminal statute *ipso facto*, trumps any free exercise interest, no matter how substantial, without any balancing at all. These free expression cases provide facial analysis of content neutrality and "as applied" analysis of whether neutrality has been demonstrated. *Smith* authorizes only facial analysis and emphatically rejects any case-by-case appraisal so that the entire terrain of intended and unintended harm to free exercise in application is not judicially cognizable.

The track two cases referred to in this discussion also have no *sine qua non* requirement that the government manifest its intent to intrude on protected free expression on the face of the statute before the first amendment claim can be adjudicated. In contrast, *Smith* imposes exactly this requirement as a *sine qua non*: that the government make plain on the face of the statute its intent to burden religious practice before the free exercise claim can be considered. In the wide array of track two cases, the variety of implementing tests applied sometimes results in protection of the governmental interest embodied in the criminal statute and other times results in protection of the first amendment interest.[170] The *Smith* test will almost always result in rejection of the free exercise interest in favor of the governmental interest. Lastly, in the track two cases previously discussed, there is a demonstration of respect and seriousness for the free expression claims, even when these claims are ultimately rejected after judicial scrutiny. This is in sharp contrast with *Smith*'s angry language in repudiating almost all free exercise claims that arise in a criminal context.[171]

---

170. *See, e.g.*, United States v. Eichman, 110 S. Ct. 2404 (1990) (flag burning on the steps of the United States Capitol was expressive conduct protected by the first amendment and could not support convictions under the Flag Protection Act of 1989); Texas v. Johnson, 491 U.S. 397, 400 (1989) (reversing a conviction for burning an American flag as part of a protest upheld as a vindication of the defendant's interest in freedom from content-based regulation of core free expression conduct); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 294 (1984) (prohibition of "expressive sleeping" as part of a protest in violation of a ban on camping upheld as a reasonable "time, place or manner restriction or as a regulation of symbolic conduct"); Spence v. Washington, 418 U.S. 405, 411 (1974) (conviction for displaying the American flag upside down from the window of an apartment reversed as a "prosecution for the expression of an idea through activity"); United States v. O'Brien, 391 U.S. 367, 382 (1968) (conviction for knowingly burning a draft card during the Vietnam War upheld as a vindication of "[t]he governmental interest . . . [in] preventing a harm to the smooth and efficient functioning of the Selective Service System").

171. *See supra* notes 52-55 and accompanying text.

E. Balancing and Free Exercise

1. The Reynolds Draining of the Free Exercise Clause.—In the nineteenth century landmark case of *Reynolds v. United States*,[172] the Supreme Court articulated a belief/action distinction, rather than a balancing test, in assessing the validity of free exercise claims.[173] Reynolds, a Mormon, violated a federal criminal prohibition against polygamy in what was then the Utah territory of the United States. The *Reynolds* test distinguished freedom of religious belief and expression of religious opinion, which received first amendment protection, from freedom of action based on religious motivation, which could be regulated by a secular, otherwise valid statute.[174] Thus, a person's action in marrying

---

172. 98 U.S. 145 (1879).

173. *Id.* at 166.

174. *Id.* at 166-67. Justice Scalia, in writing for the *Smith* majority, reflected the *Reynolds* holding and rationale. His initial explication of the history of free exercise doctrine emphasized that the clause "means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all 'governmental regulation of religious beliefs as such.'" Employment Div. v. Smith, 110 S. Ct. 1595, 1599 (1990). Justice Scalia also elaborated a second protected category: "performance of (or abstention from) physical acts: assembling with others for worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation." *Id.* Scalia, however, rejected a third category by excluding from free exercise protection all other behavior that has a "religious motivation." He wrote:

> Respondents . . . seek to carry the meaning of "prohibiting the free exercise [of religion]" one large step further. They contend that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons.

Id. Scalia cited *Reynolds* to refute the claim that "an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Id.* at 1600. Such laws, in the *Reynolds* language, "are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices." *Id.*

Justice O'Connor replied with a more expansive vision of what action is within the protection of "the express textual mandate" of the free exercise clause:

> A person who is barred from engaging in religiously motivated conduct is barred from freely exercising his religion. . . . It is difficult to deny that a law that prohibits religiously motivated conduct, even if the law is generally applicable, does not at least implicate First Amendment concerns. . . . The First Amendment . . . does not distinguish between laws that are generally applicable and laws that target particular religious practices. . . . Our free exercise cases have all concerned generally applicable laws that had the effect of significantly burdening a religious practice.

Id. at 1608 (O'Connor, J., concurring).

The majority's extremely narrow definition of the scope of religious activity that is cognizable within the free exercise of religion manifests an extremely narrow and aggressively

an additional wife, though religiously praiseworthy, could violate a valid criminal prohibition of polygamy.

The *Reynolds* belief/action distinction was driven by a deep-seated, ethnocentric repugnance for polygamy as an evil to be suppressed,[175] by a sweeping view of legislative police power embodied in generally applicable statutes,[176] and by an either/or mode of reasoning that excludes and expresses alarm about any exceptions to general laws.[177] In Professor Lupu's words:

---

secularist conception of religion. It emphasizes beliefs and includes religiously motivated conduct, but only in the sense of rituals and ceremonies such as congregate worship, use of sacramental wine, proselytizing, and abstaining from certain foods. What is excluded by this secularist definition is all other religiously laden conduct beyond belief and rituals.

Wisconsin v. Yoder, 406 U.S. 205 (1972), specifically captures this broader idea of religion. In *Yoder*, the refusal of Amish parents to send their children to a public high school was recognized by the Court as religious based action within the purview of free exercise protection. Chief Justice Burger, speaking for the *Yoder* Court, stated:

> [O]ur decisions have rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause. . . . [T]o agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability.

Id. at 219-20. The *Smith* Court's narrow view of the scope of conduct protected by the free exercise clause is also plainly inconsistent with the Court's validation of the religiously motivated refusal of a Jehovah's Witness to work on military tanks. *See* Thomas v. Review Bd., 450 U.S. 707 (1981).

It is hardly surprising that a broad array of religious groups have expressed dismay at the *Smith* Court's rejection of the compelling interest test which proposes a narrow secularist conception of the scope of religious practice to be recognized by federal and state courts for free exercise analysis and decisionmaking. *See supra* note 8. The Court has given a new meaning to the ancient imperative "[t]o render unto Caeser the things that are Caeser's." *Matthew* 22:15-21. Caeser has a new magnitude of power. The state has authoritatively defined religious exercise as essentially private (composed only of beliefs and rituals) and has explicitly defined other religious-laden conduct as beyond first amendment protection.

175. *Reynolds*, 98 U.S. at 164 ("Polygamy has always been odious among the Northern and Western Nations of Europe and . . . was almost exclusively a feature of the life of Asiatic and African people.").

176. *Id.* (man "has no natural right in opposition to his social duties") (quoting a letter written by Thomas Jefferson). Jefferson's views on the scope of free exercise appear to be an exception to the general belief. "[T]he freedom of religion was almost universally understood (with Jefferson being the preeminent exception) to include conduct as well as belief." McConnell, *supra* note 8, at 1451-55.

177. Reynolds v. United States, 98 U.S. 145, 167 (1979) ("To permit [exceptions] would . . . in effect . . . permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."). *Reynolds* illustrates the power of isolated legal formulation and analysis in narrowing the values and interests at stake in the existence of a religious people. In Tribe's words, "[f]ew decisions better illustrate how

> *Reynolds* drained the free exercise clause of its primary constitutional function. Those forms of religiously motivated action that are also speech are already protected by the constitutional clauses concerned with freedom of expression. . . . *Reynolds*' belief-action distinction thus reduced the free exercise clause to a primarily rhetorical commitment to protecting religious liberty.[178]

2. The Fading of the Reynolds Belief/Action Dichotomy.—Thus, for almost eighty years, the *Reynolds* belief/action dichotomy provided a thorny hurdle for most free exercise claims.[179] The reign of the *Reynolds* belief/action test came to an end, however, in *Braunfeld v. Brown*[180] in 1961 and in *Sherbert v. Verner*[181] in 1963. In *Braunfeld*, orthodox Jewish merchants raised a free exercise claim against laws that forced them to close on Sunday after fidelity to their orthodox religious beliefs required them to close on Saturday.[182] In a four week period, therefore, their stores would be open twenty days while their non-Sabbatarian competitors would be open twenty-four days, resulting in an economic burden on the Jewish merchants because of their adherence to their religious beliefs. Though deciding against the free exercise claim, the *Braunfeld* Court specifically rejected the contention that indirect governmental intrusions on the free exercise of religion do not violate the first amendment.[183] The Court stressed that intrusion into religious practice could flow from both governmental "purpose or effect":

---

amorphous goals may serve to mask religious persecution." L. TRIBE, *supra* note 7, at 1271. The history of the Mormons in the nineteenth century is filled with religious inspired persecution including violence, imprisonment, expulsion, and confiscation of property. *Id.* The *Reynolds* formulation and analysis is blind to this context. For Mormons, *Reynolds* is a footprint in a long trail of religious persecution. The *Smith* majority also formulated and analyzed in narrow fashion, as if its analysis and decision could be isolated from the historical trail of religious persecution of Native Americans referred to by Justice Blackmun in his dissent. *Smith*, 110 S. Ct. at 1622 n.10. For a detailing of this historical trail, see Barsh, *The Illusion of Religious Freedom for Indigenous Americans*, 65 OR. L. REV. 363, 369-74 (1986).

178. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 938 (1989).

179. The contradiction between the belief/action dichotomy and the text of the first amendment guarantee of the free exercise of religion is portrayed by Tribe. He states, "It is somewhat peculiar that the distinction between belief and action would persist in the free exercise context, for the guarantee refers explicitly to the *exercise* of religion, and thus seems to extend by its own terms beyond thought and talk." L. TRIBE, *supra* note 7, at 1183 n.33 (emphasis in original).

180. 366 U.S. 599 (1961).

181. 374 U.S. 398 (1963).

182. *Braunfeld*, 366 U.S. at 600-01.

183. *Id.* at 607 ("[T]o hold unassailable all legislation regulating conduct which

> If the purpose or effect of a 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 only indirect. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.[184]

In applying its least-drastic-means balancing test, the *Braunfeld* Court decided that anticipated difficulties for the police in enforcing the claimed exemption for Saturday Sabbatarians and a strong state interest in providing a uniform day of rest for all workers justified the denial of the exemption and the application of the closing laws to these merchants.[185] What is doctrinally significant in *Braunfeld*, however, is first, the implied rejection of the *Reynolds* belief/action dichotomy and the justification of its sweeping police power regulation of religious-based action by a generally applicable statute. Second, *Braunfeld* is also doctrinally significant in affirmatively legitimizing religious-based action as capable in principle of raising a free exercise claim that must be subjected to a balancing test. Even a valid "general law within its [police] power"[186] is scrutinized for direct and indirect burdens on religious practice that may raise such a claim.

3. The Rise of Free Exercise: The Emergence of the Sherbert Compelling Interest Test.—The *Sherbert* Court confirmed the overthrow of the *Reynolds* belief/action dichotomy and its justification of sweeping police power regulation of religious-based action. In place of the belief/action distinction, *Sherbert* clearly established the compelling interest balancing test.[187]

---

imposes solely an indirect burden on the observance of religion would be a gross oversimplification.").

184. *Id.*

185. *Id.* at 608-09.

186. Braunfeld v. Brown, 366 U.S. 599, 607 (1961).

187. In his opinion for the Court, Justice Brennan emphasized:

> In *Speiser v. Randall* we emphasized that conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms. . . . "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech." Likewise, to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.

Sherbert v. Verner, 374 U.S. 398, 405-06 (1963) (quoting Speiser v. Randall, 357 U.S. 513, 518 (1958)).

Sherbert involved a Seventh-Day Adventist in South Carolina who was fired because she would not work on Saturday, the Sabbath Day of her religion. The Court held that South Carolina could not constitutionally apply its facially neutral statutory test to force a worker to abandon his religious convictions respecting the day of rest.[188] The Court's holding followed its application of the compelling interest test: only a "compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right."[189] The Court affirmed that even if it found a compelling interest, the state must still "demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."[190] The Court reiterated that "[i]f the purpose or effect of a law is to impede the observance of one or all religions . . . that law is constitutionally invalid even though the burden may be characterized as being only indirect."[191]

Lupu, a free exercise commentator, describes the doctrinal shift inherent in *Braunfeld* and *Sherbert* as "creat[ing] sweeping potential for the free exercise clause to become a source of judicial power to protect religious liberty against insensitivity as well as direct government hostility."[192] *Sherbert* especially inaugurates the modern era of free exercise

---

188. *Id.* at 410.

189. *Id.* at 406.

190. *Id.* at 407. Michael W. McConnell, a historian of the free exercise clause, described the free exercise exemptions doctrine established in *Sherbert* in simple terms:

> If the plaintiff can show that a law or governmental practice inhibits the exercise of his religious beliefs, the burden shifts to the government to demonstrate that the law or practice is necessary to the accomplishment of some important (or "compelling") secular objective and that it is the least restrictive means of achieving that objective. If the plaintiff meets his burden and the government does not, the plaintiff is entitled to exemption from the law or practice at issue.

McConnell, *supra* note 8, at 1416-17.

191. Sherbert v. Verner, 374 U.S. 398, 404 (1963) (quoting Braunfeld v. Brown, 366 U.S. 599, 607 (1961)).

192. Lupu, *supra* note 178, at 942. Michael W. McConnell agrees: "The *Sherbert* decision . . . created the potential for challenges by religious groups and individual believers to a wide range of laws that conflict with the tenets of their faiths." McConnell, *supra* note 8, at 1412. The *Smith* Court appeared to react sharply against the potential of the *Sherbert* compelling interest test and rationale outside of the unemployment compensation area. In a scholarly decoding of free exercise history, McConnell concludes that "the historical evidence . . . does, on balance, support *Sherbert's* interpretation of the free exercise clause." *Id.* at 1415. In focusing on "exemptions from generally applicable laws," McConnell reaches three conclusions from his historical research:

> (1) that exemptions were seen as a constitutionally permissible means for protecting religious freedom, (2) that constitutionally compelled exemptions were within the contemplation of the framers and ratifiers as a possible interpretation of the free exercise clause, and (3) that exemptions were consonant with the

jurisprudence.[193]

4. The Sherbert Progeny in Unemployment Compensation.—What has become known as the *Sherbert* compelling interest test also controlled decisionmaking in *Thomas*, *Hobbie*, and *Frazee*. In all four unemployment compensation cases, the Court, in its formulation and analysis of the twin interests to be balanced, demonstrated respect for both the police power interest and the workers' claims. The Court particularized the government's administrative interests in uniform and efficient enforcement of the unemployment benefits statutes, and it described the free exercise claims of the minority religion members as both sincere and substantial. Indeed, there is no question raised in these cases as to the sincerity or substantiality of the claims that religious practice was burdened.[194]

In applying the requirement that the burdening of religious practice be substantial before free exercise rights are violated, the Court's analysis acknowledged what was at stake for the workers. In *Thomas*, a Jehovah's Witness and steel mill worker quit his job when he was reassigned to work on the production of military tanks. Writing for the Court majority, Chief Justice Burger vividly captured the substantial interest at stake for this Jehovah's Witness as posing "a choice between fidelity to religious belief or cessation of work."[195] Citing *Sherbert*, the Chief Justice applied the compelling interest test and reiterated what the Court had stressed elsewhere: a "regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."[196]

---

popular American understanding of the interrelation between the claims of a limited government and a sovereign God.

Id.

193. The absence of a detailed historical grounding of the *Sherbert* holding and rationale has been remedied by Michael McConnell's recent article. *See* McConnell, *supra* note 8.

194. Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829, 833 (1989) ("We do not face problems about sincerity or about the religious nature of Frazee's convictions, however. The courts below did not question his sincerity, and the State concedes it. . . . [T]he Board of Review characterized Frazee's views as 'religious convictions.'"); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 138 n.2 (1987) ("It is undisputed that appellant's conversion was bona fide and that her religious belief is sincerely held."); Thomas v. Review Bd., 450 U.S. 707, 716 (1981) ("On this record, it is clear that Thomas terminated his employment for religious reasons."); Sherbert v. Verner, 374 U.S. 398, 399 n.1 (1963) ("No question has been raised in this case concerning the sincerity of appellant's religious beliefs. Nor is there any doubt that the prohibition against Saturday labor is a basic tenet of the Seventh-day Adventist creed.").

195. *Thomas*, 450 U.S. at 717 (working on producing military tanks "would be against all of the . . . religious principles that . . . I have come to learn").

196. *Id.* (quoting Wisconsin v. Yoder, 406 U.S. 205, 220 (1972)). From the perspective

In *Hobbie*, a recent convert to the Seventh-Day Adventist faith was fired when she could no longer work on Saturday and was refused unemployment benefits because of this "misconduct."[197] The Court reaffirmed *Sherbert* and *Thomas* and applied the compelling interest test.[198] The Court also emphasized that an "indirect" infringement "upon free exercise is nonetheless substantial."[199] The Court found "no meaningful distinction" among the issues posed in *Sherbert*, *Thomas*, and *Hobbie*.[200]

In *Frazee*, in 1989, a unanimous Court, applying *Sherbert*, *Thomas*, and *Hobbie*, invalidated a denial of unemployment benefits to a Christian who was not affiliated with any Church and who declined a work offer because the job required that he work on Sunday. The unemployment agency grounded its rejection of his claim on the fact that his belief was "personal" and not rooted in the "tenants or dogma" of a church or sect and that the Illinois courts had distinguished the Supreme Court's precedents in *Sherbert*, *Thomas*, and *Hobbie* on this basis.[201] There was no question of Frazee's sincerity and, indeed, the state conceded it.[202] The Court summarily rejected the state's arguments.[203]

Sherbert, *Thomas*, *Hobbie*, and *Frazee* illustrate the power of the compelling interest balancing test to aid in promoting respect for and in scrutinizing the twin interests in conflict: the police power interest and the free exercise interest. They also illustrate the power of balancing analysis in a series of cases to create a narrow positivist rule that the statutory test of "without good cause" or "misconduct" may not be applied under the first amendment to deny benefits to a worker who quits or refuses work because her religion forbids work on the Sabbath Day of her faith, as well as a broader principle that a "choice between

---

of these Sabbatarians, there is, of course, nothing "neutral" about a requirement that mandates work on their Sabbath. The concept of neutrality is itself not neutral. It presupposes a perspective that defines and gives meaning to the word. For Sabbatarians, the claim is not simply individual. Its meaning arises from the duties they owe both to God and to Caesar.

197. Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 138 (1987).

198. *Id.* at 141. ("Both *Sherbert* and *Thomas* held that such infringements must be subjected to strict scrutiny and could be justified only by proof by the State of a compelling interest.").

199. *Id.* (quoting Thomas v. Review Bd., 450 U.S. 707, 718 (1987)).

200. *Id.*

201. Frazee v. Illinois Dep't of Employment Sec., 419 U.S. 829, 830 (1989).

202. *Id.* at 833. In *Frazee*, Justice White summarized *Sherbert*, *Thomas*, and *Hobbie* by stating, "each of the claimants had a sincere belief that religion required him or her to refrain from the work in question," and "[i]n each of these cases, the appellant was 'forced to choose between fidelity to religious belief and . . . employment.'" *Id.* at 832-33 (quoting Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144 (1987)).

203. *Id.*

fidelity to religious belief or cessation of work''[204] forces a worker to abandon her religious convictions. In contrast, the principle articulated by the *Smith* Court violates both the letter and spirit of these precedents. It is an example of what Justice Blackmun, in dissenting in *Smith*, calls a ''distorted view of our precedents.''[205] Notwithstanding the unmistakably dominant theme in these cases of preferring, even celebrating, the claimants' free exercise interests rather than the state's weak administrative interests, the *Smith* majority's begrudging reduction is that ''our decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason.''[206] Thus, the *Smith* Court viewed the free exercise interest through the distorting prism of its police power myopia.[207]

5. The Apogee of the Sherbert Test in Yoder.—Outside of the unemployment compensation cases, the promise of the *Sherbert* compelling interest balancing approach in the free exercise area was realized in *Wisconsin v. Yoder.*[208] In this landmark case, the Court applied the *Sherbert* balancing approach to a facially neutral, generally applicable criminal statute that required all children to attend public or private school until the age of sixteen.[209] Two sets of unrelated Amish parents refused to send their children, ages fourteen and fifteen, to public school after the eighth grade. The parents were convicted of violating the compulsory attendance law and a small fine was imposed. In assessing the nature of the general police power interest raised by these facts, the Court described the interest in promoting education as ''at the very apex of the function of a State.''[210]

Nevertheless, applying *Pierce v. Society of Sisters*,[211] Chief Justice Burger found that ''even this paramount responsibility was, in *Pierce*, made to yield to the right of parents to provide an equivalent education in a privately operated system.''[212] Burger affirmed that ''a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically guaranteed by the Free Exercise Clause

---

204. Thomas v. Review Bd., 450 U.S. 707, 717 (1981).

205. Employment Div. v. Smith, 110 S. Ct. 1595, 1616 (Blackmun, J., dissenting).

206. *Id.* at 1603.

207. *See supra* notes 97-99 and accompanying text.

208. 406 U.S. 205 (1972).

209. *Id.* at 207 n.2. From an Amish perspective this statute is, of course, not neutral.

210. *Id.* at 213.

211. 268 U.S. 510 (1925).

212. *Yoder*, 406 U.S. at 213.

of the First Amendment."[213] The Court specifically rejected the idea of an absolute police power interest in "universal compulsory education" and stated that "it is by no means absolute to the exclusion or subordination of all other interests."[214]

Although the Court found that Wisconsin's interest in enforcing a system of compulsory education would be compelling in the "generality of cases," its analysis rejected, on a variety of grounds, the application of this core police power interest to the claim.[215] The Court found the state's interest in compulsory school attendance to be "one thing . . . when its goal is the preparation of the child for life in modern society . . . but it is quite another if the goal of education be viewed as the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith."[216]

In effect, the Court found that the rationale for the state statute was served by the Amish parents' withdrawal of their children from school so that they could prepare for the Amish life through day-to-day participation in their family, communal, and farm existence, which was pervaded with religious meaning. In assessing the Amish free exercise interest, the Court meticulously detailed the impact of secular high school education on the Amish faith and upheld the trial court's finding that the Amish parents sincerely believed that a secular high school could "endanger their own salvation and that of their children."[217] The Court decided that enforcing the state's compulsory education statute to require these Amish children to attend a secular high school would "gravely endanger if not destroy the free exercise of respondents' religious beliefs."[218] In its reasoning, the Court explicitly rejected the state's argument that because the statute "applies uniformly to all citizens of the State and does not, on its face, discriminate against religions or a particular religion,"[219] it was constitutionally sound. Citing *Sherbert* and *Walz v. Tax Commission*,[220] the Court stated, "A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."[221]

Yoder illustrates the strength of ad hoc balancing when the facts and the nature of the conflict make the definitional approach both

---

213. *Id.* at 214.
214. *Id.* at 215.
215. *Id.* at 221-22.
216. *Id.* at 222.
217. *Id.* at 209.
218. *Id.* at 219.
219. *Id.* at 220.
220. 397 U.S. 664 (1970).
221. Wisconsin v. Yoder, 406 U.S. 205, 220 (1972).

inappropriate and unlikely. The Court's assessment of the state interest does not stop with the "paramount" police power interest in public education or with the neutrality of the state criminal statute, nor does the Court masquerade analysis with the confounding cloak of conclusory rhetoric about the direct or indirect impact of a statute. Chief Justice Burger impressively particularizes and unfolds this state interest and its impact on the Amish faith-laden rural life. The analysis also reveals a sensitive understanding and appreciation of the religious values inherent in the Amish faith and way of life, including the threat to free exercise of their religious beliefs.[222] In short, the application of the *Sherbert* compelling interest balancing test captures the heart and soul of what was at stake for the Amish (*i.e.*, the survival of their religion) and balances this core interest against the particular application of the general state interest in compulsory education. The scope of the *Sherbert* compelling interest balancing test permits and even promotes this in-depth analysis and is an impressive example of the legal imagination at work.

The *Yoder* Court's analysis is immune to criticism by advocates of the positivist form of the legal model. Given the extraordinary facts posed by the collision of a facially neutral state statute with the faith-driven Amish way of life, the possibility of a similar case and the possibility of extracting a positivist element-centered rule is modest. Because the facts in *Yoder* are *sui generis* or nearly so, the positivist need for a precedent, inspired by the needs of stare decisis in a constitutional context to meet the expectations of reasonable certainty and predictability, seems inapplicable. *Yoder* also illustrates that it is surely "impossible to escape the task of weighing the competing considerations,"[223] unless one favors a "constitutional system in which . . . governmental behavior would automatically be upheld, however devastating its consequences."[224] Surely balancing is better than this alternative. Though *Yoder* yields no simple positivist rule for the future, it exudes respect for the Amish free exercise interest, a respect that is an exemplar for the Court as it confronts other free exercise conflicts.

The contrast of *Yoder* with the *Smith* majority opinion is startling. *Yoder* exemplifies case-by-case individualization, the judicial function applied; *Smith* forbids case-by-case individualization. *Yoder* applies the compelling interest balancing test; *Smith* repudiates the compelling interest test and any balancing test at all. *Yoder* exhibits pervasive respect for

---

222. Chief Justice Burger eloquently summarized the vision permeating Amish culture: "Amish society emphasizes . . . a life of 'goodness,' rather than a life of intellect; wisdom, rather than technical knowledge; community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society." *Id.* at 211.

223. L. TRIBE, *supra* note 7, at 792.

224. *Id.* at 978.

the Amish free exercise claim which is detailed page after page;[225] *Smith* repudiates the Native American free exercise claim with passionate language, and there are no pages, no paragraphs, not even a sentence, that respectfully details Smith's and Black's religious interest in the annual sacramental rite of their Native American Church. In *Yoder*, the state interest in the criminal statute mandating compulsory school attendance, although at the apex of state function and a paramount responsibility, is balanced against and subordinated to the Amish parents' free exercise interest.[226] In *Smith*, the state interest in the application of the Oregon statute to the ingestion of peyote in a sacred rite of the Native American Church was so modest that Oregon never sought to prosecute Smith and Black and did not evince any concrete interest in enforcing its drug laws against religious users of peyote.[227] In sum, *Yoder* celebrates the values and interests symbolized by the free exercise clause, while the absolutist holding in *Smith* suppresses most free exercise analysis and celebrates as triumphant the state police power interest in any typical criminal statute.

6. The Decline of the Sherbert Test.—Although since 1972, the Court has rejected all of the claims for a free exercise exemption presented to it (except for the unemployment compensation cases), the analysis in these cases differs sharply from the *Smith* analysis. Three cases applied the *Sherbert* compelling interest balancing test,[228] two others rejected formal compelling interest balancing when special institutions are involved,[229] one denied, in a Native American land case, that any cognizable free exercise interest existed,[230] and one denied a free exercise interest in refusing to provide a child's social security number.[231] Yet, unlike *Smith*, no absolutist rule is applied in these cases that prohibits free exercise formulation and analysis. There is no *a priori* rejection of the validity of the free exercise claim as in *Smith* and no bar to the legitimacy of considering and adjudicating the free exercise interest. The subor-

---

225. *See Yoder*, 406 U.S. at 207-13.

226. *Id.* at 213.

227. Employment Div. v. Smith, 110 S. Ct. 1595, 1617 (1990) (Blackmun, J., dissenting).

228. Hernandez v. Commissioner, 490 U.S. 680 (1989); United States v. Lee, 455 U.S. 252 (1982); Gillette v. United States, 401 U.S. 437 (1971).

229. Justice O'Connor distinguished Goldman v. Weinberger, 475 U.S. 503 (1986) and O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987), because "they arose in the narrow, specialized contexts in which we have not traditionally required the government to justify a burden on religious conduct by articulating a compelling interest." *Smith*, 110 S. Ct. at 1612 (O'Connor, J., concurring).

230. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

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

dination of the free exercise interest in favor of the governmental interest *follows* the Court's scrutiny of the free exercise claim.[232]

Thus, in *Gillette v. United States*,[233] the Court upheld the governmental interest in military conscription against a religious objection to participation in the "unjust" Vietnam War.[234] Applying the *Sherbert* compelling interest balancing test, the Court, although affirming that Gillette was "guided by fundamental principles of conscience and deeply held views about the purpose and obligation of human existence,"[235] decided that the burdens resulting from the "impact of the conscription laws" were justified by the governmental interest at issue.[236] The Court again applied the *Sherbert* compelling interest test in *United States v. Lee*[237] and rejected the free exercise claim of an Amish employer who refused to collect and pay social security taxes for his employees.[238] The Court, while explicitly acknowledging both Lee's sincerity and the substantial burden on religion imposed in this situation, nevertheless justified the burden as "essential to accomplish an overriding governmental interest" in the uniform application of the social security system.[239] The Court feared that allowing a religious exception to the social security tax could lead to many "exceptions flowing from a wide variety of religious beliefs."[240]

In *Hernandez v. Commissioner*,[241] the Court again applied the *Sherbert* compelling interest balancing test.[242] In applying this test, the Court rejected the claim that payments by members of the Church of Scientology for auditing and training meetings were deductible charitable contributions or gifts to the church under Internal Revenue Code section 170(c). The Court reaffirmed the principle 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 wide variety of religious beliefs.'"[243] Unlike *Lee*, the religious interest in *Hernandez* did

---

232. In *Lyng*, however, the Court concluded that there is no free exercise interest at stake in the land claim of Native American plaintiffs. *Lyng*, 485 U.S. at 452.

233. 401 U.S. 437 (1971).

234. *Id.* at 439.

235. *Id.*

236. *Id.* at 461.

237. 445 U.S. 252 (1982).

238. *Id.* at 261.

239. *Id.* at 257-58.

240. *Id.* at 260.

241. 490 U.S. 680 (1989).

242. *Id.* at 699 ("The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden.").

243. *Id.* at 699-700 (quoting United States v. Lee, 455 U.S. 252, 260 (1982)).

not flow from a specific doctrinal obligation not to pay taxes, but from an argument that church members were forced to pay an incrementally larger tax burden because their payments for auditing were not classified as deductible contributions by the Internal Revenue Service.[244] Nevertheless, Justice Marshall, writing for the Court, detailed and analyzed at length the exact nature and role of the free exercise claim before subordinating it to the governmental interest.[245]

In *Goldman v. Weinberger*,[246] the Court rejected the free exercise claim of an Orthodox Jew who wore a small yarmulke while on duty in violation of an Air Force regulation mandating uniform dress.[247] The Government conceded that Goldman's claim was sincere,[248] and the Court did not dispute the importance of Goldman's religious interest in wearing his yarmulke.[249] Nonetheless, because "the military is, by necessity, a specialized society separate from civilian society," the Court rejected the application of the compelling interest test and decided that "great deference" should be shown to the "professional judgment of military authorities concerning the relative importance of a particular military interest."[250] Although the Court did not detail the free exercise claim and rejected formal balancing in this case, it considered both interests before deciding that the free exercise claim should clearly be subordinated to the military claim.[251]

In *Bowen v. Roy*,[252] the Court held, eight to one, that the free exercise clause did not give the claimants a right to refuse to furnish the social security number of their two-year-old daughter. The Court stressed that an individual does not have a free exercise right "to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens."[253] Yet, at least five Justices indicated that in a properly framed case, they would impose an exemption from the statutory mandate that applicants for benefits

---

244. *Id.* at 700.

245. *Id.* at 698-700.

246. 475 U.S. 503 (1986).

247. *Id.* at 504. The yarmulke was five and one-half inches in diameter and dark colored. That the wearing of a yarmulke, a constant silent prayer, could provoke the torrent of justifying rhetoric from the Court about the need for "great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest" is patently absurd, at least to anyone who has served in the military. *See id.* at 507.

248. *See id.* at 525 (Blackmun, J., dissenting).

249. *Id.* at 510 (Stevens, J., concurring).

250. *Id.* at 506-07.

251. *Id.* at 507-10.

252. 476 U.S. 693 (1986).

253. *Id.* at 699.

furnish their social security numbers.[254] In a three member plurality analysis, Chief Justice Burger suggested a reasonableness test for challenging a governmental benefit "neutral and uniform in its application" and distinguished *Sherbert* and *Thomas* because the statutory "good cause" standard present in the unemployment compensation statutes "created a mechanism for individualized exemptions,"[255] unlike the statutory requirement for furnishing a social security number which does not allow for exceptions.[256] The Chief Justice reiterated the *Sherbert* Court's reasoning that "[a] governmental burden on religious liberty is not insulated from review simply because it is indirect."[257]

In *O'Lone v. Estate of Shabazz*,[258] the Court, in a five-four decision, upheld the application of a prison regulation that barred Islamic prisoners from attending a Friday afternoon religious service.[259] The Court's analysis affirmed that prisoners retain limited free exercise protections[260] and detailed both the sincerity of the religious claim[261] and its substantiality.[262] In this special prison context, the Court applied a reasonableness test and stated that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[263]

In *Lyng v. Northwest Indian Cemetery Protective Association*,[264] the Court rejected the free exercise claim of a Native American who protested the building of a six mile segment of road to connect with two other completed portions of a road in the Chimney Rock section of the Six Rivers National Forest.[265] A study commissioned by the United States Forest Service recommended that the road not be completed because "constructing a road along any of the available routes 'would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples.'"[266] After detailing the free exercise claim and

---

254. *Id.* at 715, 731-33.
255. *Id.* at 708.
256. *Id.*
257. *Id.* at 706.
258. 482 U.S. 342 (1987).
259. *Id.* at 345.
260. *Id.* at 348.
261. *Id.* at 345 ("There is no question that respondents' sincerely held religious beliefs compelled attendance at Jumu'ah.").
262. *Id.* at 351 ("[w]hile we in no way minimize the central importance of Jumu'ah to respondents").
263. *Id.* at 349 (quoting Turner v. Safley, 482 U.S 78, 89 (1987)).
264. 485 U.S. 439 (1988).
265. *See id.* at 442.
266. *Id.*

finding that the claim was sincere and substantial,[267] the Court majority distinguished *Sherbert* and specifically rejected the application of the compelling interest test.[268]

Applying an unjustifiably broad analogical reading of *Bowen v. Roy*, the *Lyng* Court concluded that the instant "building of a road . . . cannot meaningfully be distinguished from the [governmental] use of a Social Security number in *Roy*,"[269] and stressed that in both cases the "affected individuals would not "be coerced by the Government's action into violating their religious beliefs; nor would either governmental action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens."[270] While first stressing that "this Court has repeatedly held that indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment,"[271] the *Lyng* Court concluded, paradoxically, that these holdings do "not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions."[272]

Although the Court explicitly acknowledged that the proposed road segment could have devastating effects on traditional Indian religious practices, Justice O'Connor, writing for the Court majority, found that "the Constitution simply does not provide a principle that could justify upholding respondents' legal claims."[273] This conclusion seems to be driven by the Court's apprehension that recognizing the Native American claim in *Lyng* could lead to other lawsuits in which Native Americans might "seek to exclude all human activity but their own from sacred areas of the public lands . . . [and] could easily require *de facto* beneficial ownership of some rather spacious tracts of public property."[274] The Court noted that the government cannot operate if it is required to satisfy every citizen's religious needs and desires, and therefore, indi-

---

267. *Id.* at 447 ("It is undisputed that the Indian respondents' beliefs are sincere and that the Government's proposed actions will have severe adverse effects on the practice of their religion.").

268. *Id.* at 450-52.

269. *Id.* at 449. The author, however, believes that this comparison is tortured on its face.

270. *Id.*

271. *Id.* at 450.

272. *Id.*

273. *Id.* at 452.

274. *Id.* at 452-53.

viduals should look to legislatures and other institutions to reconcile the various competing religious demands on government.[275] The *Lyng* Court explicitly rejected the "respondents' proposed extension of *Sherbert* and its progeny"[276] in favor of the *Roy* rationale because *Roy* "offers a sound reading of the Constitution."[277] The *Lyng* Court's conclusion may have been driven by the recognition that "the Government has taken numerous steps to minimize the very impact that construction of the road will have on the Indians' religious activities."[278]

The *Lyng* decision is similar to *Smith* in its readiness to drain the free exercise clause of meaning when a claim of burdening free exercise conflicts with a governmental regulation, in its dispatch to the legislatures of those seeking religious exemptions from governmental regulations,[279] and in its utilization of a direct/indirect test for recognizing free exercise claims. Nevertheless, the *Lyng* opinion differs from *Smith* in that the *Lyng* Court considered and even detailed at length the nature of the particular Native American claim of burdening, stressed both the sincerity and substantiality of the claim, and strongly urged governmental respect and accommodation of the religious needs of Native Americans and other citizens.[280]

7. The Redraining of the Free Exercise Clause: The Revival of Reynolds Belief/Action.—The *Smith* Court's evisceration of the free exercise clause creates a virtually impenetrable thicket for future free exercise claims. *Smith* revives the *Reynolds* police power absolutism approach by affirming a sweeping principle that any police power interest specified in an otherwise valid criminal statute defeats any free exercise claim and even bars consideration of free exercise claims by the courts. Like *Reynolds*, the *Smith* principle reduces this intrinsic two-sided reality to a one-sided reality. Despite decades of experience to the contrary, the *Smith* decision expresses an embedded fear that allowing courts to consider free exercise claims will precipitate a rush of claims and risk "courting anarchy."[281] *Smith* revives the aggressively secularist belief/action dichotomy of *Reynolds* and affirms that the free exercise clause protects religious beliefs and the performance of religious acts such as abstaining from foods and proselytizing, but not all other action based on "religious motivation"[282] except when statutes incorporate a system

---

275. *Id.* at 452.
276. *Id.*
277. *Id.*
278. *Id.* at 440.
279. *Id.* at 452.
280. *Id.* at 453-54.
281. Employment Div. v. Smith, 110 S. Ct. 1595, 1605 (1990).
282. *Id.* at 1599.

of individual exemptions or a hybrid free exercise/free expression or parental right claim is presented.

Like *Reynolds*, *Smith* resolves the "theoretical and existential tension" that is at the heart of our Constitution. The *Smith* decision embodies respect for the majority will and the Bill of Rights and favors a vision of an American people that calls upon us to subordinate ourselves to a majoritarian decisionmaking that is encoded into generally applicable laws and is hostile to any exemptions. Yet, what is sacrificed is the imperative that respect for the Bill of Rights calls for a vision of us as a polyglot American people willing to carve into police power statutes a system of individual exemptions that includes respect for the free exercise of religion as well as for the rest of the Bill of Rights.

Lastly, unlike all the other cases except *Reynolds*, there is not a single word of respect in the *Smith* majority opinion for the undisputed sincerity and central significance of the free exercise claim of Alfred Smith and Galen Black, two members of the old Native American Church.[283] Quoting *Lyng*, the majority dismissed the claimants' religious interest as an interest in "spiritual development."[284] Smith's and Black's participation in this annual and ancient religious rite, "the *sine qua non* of [their] faith,"[285] was reduced to a quest for "spiritual development."[286] This characterization was not inadvertent. Like the *Reynolds* rhetoric, the *Smith* majority decision is replete with angry words rejecting the Native American claim followed by an emphatic repudiation of any judicial role in considering such a claim.[287] The contrast with the respect

---

283. *See id.* at 1622 (Blackmun, J., dissenting).

284. *Id.* at 1603.

285. People v. Woody, 61 Cal. 2d 716, 725; 394 P.2d 813, 820 (1964). In *Woody*, the California Supreme Court characterized the application of a California criminal statute to a Native American religious ceremony as tearing out the "theological heart of Peyotism." *Id.* at 722, 394 P.2d at 818.

286. Employment Div. v. Smith, 110 S. Ct. 1595, 1603 (1990).

287. *Id.* at 1606 n.5. One of the cardinal justifications of the *Smith* Court's rejection of a judicial role in adjudicating such claims is detailed by the Court majority:

> Nor is it possible to limit the impact of respondents' proposal by requiring a "compelling state interest" only when the conduct prohibited is "central" to the individual's religion. It is no more appropriate for judges to determine the "centrality" of religious beliefs before applying a "compelling interest" test in the free exercise field, than it would be for them to determine the "importance" of ideas before applying the "compelling interest" test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is "central" to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable "business of evaluating the relative merits of differing religious claims." As we reaffirmed only last Term, "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants'

for the claims of the Seventh-Day Adventists in *Sherbert* and *Hobbie*, the Jehovah's Witness in *Thomas*, the unaffiliated Christian in *Frazee*, the Amish parents in *Yoder*, and the Native American in *Roy*, is especially

---

> interpretation of those creeds." Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.
>
> If the "compelling interest" test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded.

Id. at 1604-05 (citations omitted).

In commenting on Justice O'Connor's reference in her *Smith* concurrence to the instant free exercise burdening as "constitutionally significant" and to Justice Blackmun's reference in his dissent to "the severe impact of a State's restrictions on the adherents of minority religion" the *Smith* majority replied:

> In any case, dispensing with a "centrality" inquiry is utterly unworkable. It would require, for example, the same degree of "compelling state interest" to impede the practice of throwing rice at church weddings as to impede the practice of getting married in church. There is no way out of the difficulty that, if general laws are to be subjected to a "religious practice" exception, *both* the importance of the law at issue *and* the centrality of the practice at issue must reasonably be considered. . . . [I]nquiry into "severe impact" is no different from inquiry into centrality. He [Blackmun] has merely substituted for the question "How important is X to the religious adherent?" the question "How great will be the harm to the religious adherent if X is taken away?" There is no material difference.

Id. at 1605 n.4 (emphasis in original).

This abstract analysis by the Court majority omits the plain reason why neither O'Connor nor Blackmun discussed the issue of substantiality at any length. In O'Connor's words:

> There is *no dispute* that Oregon's criminal prohibition of peyote places a severe burden on the ability of respondents to freely exercise their religion. . . . As we noted in *Smith I*, the Oregon Supreme Court concluded that the Native American Church is a recognized religion, that peyote is a sacrament of that church, and that respondent's beliefs were sincerely held.

Id. at 1613 (O'Connor, J., concurring) (emphasis added). In Blackmun's words, "Respondents believe, and their sincerity has *never* been at issue, that the peyote plant embodies their deity, and eating it is an act of worship and communion. Without peyote, they could not enact the essential ritual of their religion." *Id.* at 1622 (Blackmun, J., dissenting) (emphasis in original).

The point is not that the Court majority's abstract analysis is without merit. Clearly, questions about substantiality of a free exercise claim could pose real difficulty, and the Court's arguments, though manifestly overdrawn and too sweeping, are important. Rather, the point is that these conceptual difficulties did not arise in *Smith* or in the array of landmark free exercise cases that are summarized by the Court. In Thomas v. Review Board, 450 U.S. 707, 714 (1981), for example, the Court accepted the claimant's explication of the burden from his perspective. The deeper point, however, is that conceptual acrobatics should be carried out in light of the facts and issues presented in such a body of case law. To engage in superficially impressive flights of abstraction emphasizing that there is invariably "no way out of the difficulty" in the face of numerous decisions that reveal *no dispute* about this issue is to engage in analysis that lacks proportionality and authenticity.

vivid. In these cases, the diverse claimants remained at the center of the Court's formulation and analysis. In *Smith*, the Court's formulation and analysis cause Alfred Smith, Galen Black, and the central religious rite of their faith, to fade away to the periphery. In our legal culture, informed by belief in the dignity and worth of all people, such reasoning should be suspect. It is especially unfortunate that after the "many years of religious persecution and intolerance"[288] of Native American religions by majoritarian institutions, the Court, which speaks for all of us, spoke so badly.

8. The Smith Assault on Our Democratic Theory and Practice.— The *Smith* repudiation of free exercise claims that arise within the criminal context is accompanied by an instruction that leaves accommodation to the political process in the legislature with explicit acknowledgment that this legislative "political process will place at a relative disadvantage those religious practices that are not widely engaged in."[289] This disadvantage is described as "that unavoidable consequence of democratic government."[290] Justice O'Connor aptly replied to this provocative reinterpretation of our theory and history of "democratic government" when she wrote that the "First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility," and the "history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups such as the Jehovah's Witnesses and the Amish."[291] She added the moving words of Justice Jackson in *West Virginia State Board of Education v. Barnette*:[292]

> 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

---

In addition, there is a diversion from the remaining conceptual problem, which deserves authentic analysis. For a discussion of centrality in free exercise claims, see L. TRIBE, *supra* note 7, at 1247-51.

288. *Smith*, 110 S. Ct. at 1622 (Blackmun, J., dissenting).

289. *Id.* at 1606.

290. *Id.* Pastor Richard John Neuhaus, a conservative Lutheran theologian, described this language as "one of the most callous statements in contemporary court language or in the recent history of court language." *Firing Line: An Extraordinary Supreme Court Decision* (PBS television broadcast, July 24, 1990) (transcript available through Southern Educational Communications Association, P.O. Box 5966, Columbia, S.C. 29250).

291. Employment Div. v. Smith, 110 S. Ct. 1595, 1613 (1990). As Michael McConnell points out, under one view of the threat that government poses to religious freedom, "[t]he evil includes not only active hostility, but also majoritarian presuppositions, ignorance and indifference." McConnell, *supra* note 8, at 1418.

292. 319 U.S. 624 (1943).

> 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.[293]

Lastly, the *Smith* Court's repudiation of any need to scrutinize the free exercise claim is contradicted by the oath to uphold the first amendment command that the legislature "shall make no law . . . prohibiting the free exercise [of religion]."[294] How can the Court decide whether a law prohibits the free exercise of religion without actually examining the specifics of the claim?

In contrast to other first amendment guarantees in both track one and track two realms and to most of the modest but important tradition of free exercise case law, the unmistakable nature and effect of the absolutist *Smith* holding and principle is to drain the meaning from the first amendment guarantee of free exercise of religion whenever the claim arises from the application of a typical criminal statute. It is an example of what Robert Cover calls judges "kill[ing] law."[295] As he stated, "Confronting the luxuriant growth of a hundred legal traditions, [judges] assert that *this one* is law and destroy or try to destroy the rest."[296] In

---

293. *Smith*, 110 S. Ct. at 1613 (O'Connor, J., concurring) (quoting *Barnette*, 319 U.S. at 638). "America's principal contribution to political theory is a conception of democracy according to which the protection of individual rights is a pre-condition, not a compromise, of that form of government." Dworkin, *The Reagan Revolution and the Supreme Court*, N.Y. Rev. of Books, July 18, 1991, at 23. "[T]he overriding virtue of and justification for vesting the Court with [the] awesome power [of judicial review] is to guard against governmental infringement of individual liberties secured by the Constitution." J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 64 (1980). In Michael McConnell's words:

> Locke's key assumption of legislative supremacy no longer holds under a written constitution with judicial review. The revolutionary American contribution to political theory was that the people themselves are sovereign and therefore possess inherent power to limit the power of the magistrate through a written constitution enforced by judges independent of the legislature and executive. . . . Once the courts are vested with the power to determine the proper boundary between individual conscience and the magistrate's authority . . . fuller protection for conscience becomes conceivable. . . . Once the people empowered the courts to enforce the boundary between individual rights and the magistrate's power, they entrusted the courts with a responsibility that prior to 1789 had been exercised only by the legislature.

McConnell, *supra* note 8, at 1444-45.

294. U.S. CONST. amend. I.

295. *See* Cover, *The Supreme Court 1982 Term, Foreward: Nomos and Narrative*, 97 HARV. L. REV. 4, 53 (1983).

296. *Id.* (emphasis in original).

Smith, the majority "kills" the potential for a more "luxuriant growth" from *Sherbert* and its progeny and asserts what is real: State police power is profoundly enlarged here to a new order of magnitude. Justice O'Connor's characterization of this startling power as "talismanic" is surely apt, for an ordinary criminal statute embodying a police power interest has the magical power to forge a new constitutional criminal jurisprudence. Where there is such a statute, *Smith*, in effect, rewrites and transforms the two-hundred-year-old free exercise text:

> Congress shall make no criminal law whose direct target is to prohibit the free exercise of religion.
>
> or
>
> Congress shall make no law prohibiting the free exercise of religion except where there is a typical, (*i.e.*, facially neutral, generally applicable, criminal statute).[297]

Smith transforms the state advocate armed with the weapon of an ordinary criminal statute into a legal Hercules with the power to hurl a free exercise claim from the legal arena.

IV. Criminal Statutes and Crime Control

The *Smith* attribution of "talismanic" power to an ordinary criminal statute also finds no justification under our theory of crime control. There is no crime control justification in concentrating on across-the-board criminal statutes which define crimes without a concurrent concentration on interrelated across-the-board statutes, including those which define legal capacity as well as all other relevant defenses. There is also no crime control justification in concentrating on such statutes without also considering constitutional claims raised by the facts.

In our jurisprudence, crime control justifications are not autonomous. They exist within the frameworks established by our federal and state constitutions and by the requirements of just liability.[298] To appreciate the Court's error in *Smith*, it is important first to understand the

---

297. *Smith* creates yet a third possible reformulation: Congress shall make no law prohibiting the free exercise of religion provided that the free exercise claim is a "hybrid" (*i.e.*, raised "in conjunction with other constitutional protections, such as freedom of speech and of the press . . . or the right of parents"). *See* Employment Div. v. Smith, 110 S. Ct. 1595, 1601 (1990).

298. In philosophical terms, utilitarian justifications of punishment and general and individual deterrence are limited by retributive justifications of just punishment rooted in ideas of what the offender deserves. *See, e.g.*, I. Kant, The Metaphysical Elements of Justice 99-102 (J. Ladd trans. 1965); W. LaFave & A. Scott, Criminal Law 62-190 (1986); P. Low, R. Bonnie, & J. Jeffries, Criminal Law: Cases and Materials 4 (1986).

important role and purpose of criminal statutes in serving crime control interests. This exposition also leads to understanding the limitation of such statutes in serving these interests.

A. General Deterrence

From the perspective of general deterrence, the across-the-board prohibitions set forth in penal law statutes embody threats to those who may be inclined to commit specific offenses.[299] If a person engages in behavior prohibited by the statute, that person is at risk for a finding of liability and for the specified punishment. In addition, the threats embodied in these statutes may exert a cumulative threat against violation of these norms.[300] The threats posed by the penal law are therefore both particular and cumulative in deterring prohibited behavior. The fact that many offenders are not actually deterred does not invalidate these threats. The validity of these threats and the validity of general deterrence as a crime control theory does not require that everyone, or even that most people, conform their behavior to the penal law norms.[301]

Institutional enforcement of the threats of penal law by police, prosecutors, courts, and prisons demonstrates that the threats are taken seriously in everyday life. Who will commit a crime with a police officer at his elbow? When the threats fail to deter, the theory of general deterrence provides a justification for punishment. The offender is punished as an example to others who may be tempted to violate these norms. The theory is that it is both just and useful to use the offender as an example. The theory is "just" because the offender was on notice that such punishment was threatened for failure to conform to the penal law norm and "useful" because others may be deterred.[302] The offender made a free choice to violate the norm and is responsible for that choice.[303] In addition to the general deterrent effect, such punishment also promotes crime control under the related theory of individual deterrence. For example, the imprisonment of the offender inhibits the possibility of threats to the general public during the term of impris-

---

299. *See, e.g.*, Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949 (1966); Bentham, *An Introduction to the Principles of Morals and Legislation*, in THE UTILITARIANS 170 (1961).

300. Andenaes, *supra* note 299, at 950-51.

301. *Id.* at 955.

302. *See, e.g.*, O.W. HOLMES, THE COMMON LAW 41 (1963); Brandt, *Rule Utilitarianism*, in PHILOSOPHICAL PERSPECTIVE ON PUNISHMENT 93, 93-94 (G. Ezorsky ed. 1972).

303. *See, e.g.*, O.W. HOLMES, *supra* note 302, at 41; Brandt, *supra* note 302, at 93-94.

onment, and the pain of imprisonment may also inspire law-abiding behavior in the future.[304]

In sophisticated articulations of general deterrence, these threats are also seen as reinforcing social norms inculcated by families, schools, churches, temples, and communities in the ordinary socialization process.[305] The penal law threats strengthen this socialization process with an influential impact. This influence may be of greater significance than the direct threat of punishment to would-be offenders or actual punishment of those found liable for offenses.[306] In our jurisprudence, these are the crime control purposes of across-the-board criminal prohibitions.[307]

Yet, there is no crime control justification in our tradition of criminal law jurisprudence for empowering a facially neutral, across-the-board charging statute to bar a constitutional claim. To articulate this notion is to expose its bankruptcy because all crime control efforts exist within a constitutional framework and are guided by it. More specifically, there is no crime control justification that flows from the principle that the mere existence of such a statute prevents a free exercise claim from being arguable and adjudicable. To the contrary, the values protected by these statutes are routinely balanced against the values protected by a range of constitutional guarantees and ordinary defenses.

B. Deterrence and Balancing

Indeed, general deterrence, when applied as a justification for individual punishment, compels case-by-case balancing of crime control values with a spectrum of competing values. These latter values are embodied in a system of individualized exemptions that require judges to determine that punishment is justified because the exemptions do not apply and liability is established. The deterrent justification of punishment is restricted to those who are adjudicated as offenders. It does not apply to those who, contrary to the initial charges and categorization, are

---

304. Delaney, *Towards a Human Rights Theory of Criminal Law: A Humanistic Perspective*, 6 HOFSTRA L. REV. 831, 878 (1978).

305. Andenaes, *supra* note 299, at 950, 956-57.

306. *Id.* at 978.

307. The utilitarian concept of crime control purposes is sometimes defined to include incapacitation, which can be viewed as part of individual deterrence, and rehabilitation, which is best viewed as a collateral objective of crime control and not itself an appropriate aim of punishment. *See* N. MORRIS & G. HAWKINS, LETTER TO THE PRESIDENT ON CRIME CONTROL 67-68 (1977); H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 50-51 (1968); A. VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976). General criminal statutes play a role in applying these additional "purposes" in varying degrees, depending on what is authorized by the penal code and the actual behavior of the sentencing judge.

found not to be punishable or who demonstrate a justification or excuse for their behavior rooted in self-defense, defense of another, mistake of fact, entrapment, duress, necessity, or other defense, which when established, exculpates the defendant from liability for the charge flowing from the across-the-board criminal prohibition.

In addition, the deterrent justification of punishment does not apply equally to those whose capacity to choose is diminished (*i.e.*, the mentally impaired,[308] the very young,[309] the intoxicated,[310] and the provoked[311]). It discriminates between the degree of punishment believed necessary to send a message to first offenders and the punishment believed necessary to send a message to repeat offenders.[312] Deterrence is simply subordinated to the vindication of competing constitutional interests when defendants who may have the required *mens rea* and *actus reus* are discharged from liability because their fourth, fifth, or sixth amendment rights were violated by governmental agents. We routinely subordinate the relevant crime control interest to the constitutional system of individualized exemptions. Crime control defers to the commanding interests embodied in the Bill of Rights.

C. Facial and Case-by-Case Analysis

Applying these basic jurisprudential principles, the crime control significance of the criminal statute injected by the *Smith* majority must be examined not only on its face, but also in light of its particularized application by the Court. Both "facial" and "as applied" analysis are necessary to determine the exact crime control interest at stake. As to facial analysis, the Oregon statute, which is aimed at users and prohibits the knowing or intentional possession of a controlled substance unless the substance was prescribed by a medical practitioner,[313] is on its face

---

308. Andenaes, *supra* note 299, at 958.

309. *Id.*

310. *See, e.g.*, People v. Hood, 1 Cal. 3d 444, 462 P.2d 370, 82 Cal. Rptr. 618 (1969).

311. *See, e.g.*, MODEL PENAL CODE § 4.01 (1962).

312. When utilized as a justification for sentencing, general deterrence provides a basis for individualizing the actual sentence imposed within the scope authorized by the across-the-board statute under which the defendant was found liable. Aggravating factors are balanced against ameliorating factors in determining the type of sentence that will serve to deter others. The rationale of general deterrence, as well as the rationale of just punishment, compels this crime control calibration. General deterrence will not be served by imposing an identical sentence on a first offender and an incorrigible offender. There is no sense in imposing an identical sentence on a person who stole $1,500 and a person who stole $15,000,000, although both may be liable for grand larceny. *See* Andenaes, *supra* note 299, at 960-70.

313. *See* OR. REV. STAT. §§ 475.992(4), 475.005(6), 475.992(4)(a), 475.035 (1987).

at the bottom of the specific hierarchy of crime control interests involved in controlling drugs. At the top are the statutes penalizing the sale or delivery of narcotics,[314] which are aimed at major drug suppliers and dealers. At an in-between level are the statutes prohibiting the possession of narcotics in sufficiently substantial amounts to create a statutory presumption of possession with the intent to sell or as classified in Oregon, attempted delivery.[315] Incidentally, this hierarchy of crime control interests manifestly reflects the political role of the criminal law in expressing the clear democratic will. Drug dealers, especially at higher echelons in the drug culture, bear a commonly accepted opprobrium in the community far greater than the street addict who buys small amounts to sustain his habit.

The *Smith* facts do not implicate a crime control interest in deterring the sale or delivery of narcotics or the possession of amounts sufficient to fall within the classification of attempted sale or delivery. The specific crime control interest raised by these remarkably special facts is limited to the use, and hence the possession, of apparently modest amounts of peyote by Smith and Black in the annual sacramental rite of their Native American Church. Thus, in Justice Blackmun's words, "[i]t is not the State's broad interest in fighting the critical 'war on drugs' that must be weighed against respondents' claim, but the State's narrow interest in refusing to make an exception for the religious, ceremonial use of peyote."[316] If the inquiry as to the state's interest is not appropriately narrowed, the result can be a loaded formulation of "the weighing process in the State's favor"[317] (*e.g.*, the individual's interest in justice as balanced against the core state or public interest in crime control in the "war on drugs"). To avoid this loaded formulation, which leads to a foreordained conclusion in favor of the government, the interests weighed must be, in Roscoe Pound's words, "on the same plane . . . [or] we may decide the question in advance in our very way of putting it."[318]

It is not possible to precisely identify the amount of peyote possessed by the two respondents in *Smith* for a reason that is revealing about the puny crime control interest inherent in these facts: "Oregon has

---

314. In Oregon, sales are included within a broader category of "delivery" of a controlled substance. *Id.* § 475.992(1).

315. In Oregon, these cases are captured within the prohibition of attempted delivery of a controlled substance. *See, e.g.*, Oregon v. Boyd, 92 Or. App. 51, 756 P.2d 1276 (1988).

316. Employment Div. v. Smith, 110 S. Ct. 1595, 1617 (1990) (Blackmun, J., dissenting).

317. *Id.*

318. Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 2 (1943).

never sought to prosecute respondents, and does not claim that it has made significant enforcement efforts against other religious users of peyote."[319] Although such a charge could have been brought,[320] this exercise of prosecutorial discretion reflects the extremely low crime control priority attached to the events in *Smith* by the local police and prosecutors who were charged with protection of crime control interests in the community. Possibly, the fact that there is no significant illicit traffic in peyote motivated this law enforcement response.[321] The drug menace confronting the country does not include peyote, especially not the sacramental use of peyote in an annual rite of a religion that is centuries old.[322] In Justice Blackmun's persuasive words: "The State cannot plausibly assert that unbending application of a criminal prohibition is essential to fulfill any compelling interest, if it does not, in fact, attempt to enforce that prohibition."[323]

D. Legislative Intent

Finally, the Oregon Supreme Court, in assessing the legislative intent underlying the Oregon unemployment compensation statute, clearly found that "the legality of ingesting peyote does not affect our analysis of the state's interest."[324] The court made this finding of legislative intent and rejected the contrary determination of the Oregon Unemployment Compensation Board. The court stated that the relevant state interest "in denying unemployment benefits to a claimant discharged for religiously motivated misconduct must be found in the unemployment compensation statutes, not in the criminal statutes proscribing the use of peyote."[325] The Oregon unemployment compensation statute, which provides monetary benefits to the unemployed, and the Oregon penal law, which seeks to control and punish crime, serve different purposes. The penal law purposes should not influence the unemployment statute.

Although he conceded that the United States Supreme Court is not bound by this judicial finding as to the intent of the Oregon legislature in enacting the unemployment statutes, Justice Brennan, in *Smith I*, commented, "we have never attributed to a state legislature a validating purpose that the State's highest court could find nowhere in the stat-

---

319. *Smith*, 110 S. Ct. at 1617 (Blackmun, J., dissenting).

320. *See id.* at 1597.

321. "In this case, the State actually has not evinced any concrete interest in enforcing its drug laws against religious users of peyote." *Id.* at 1617 (Blackmun, J., dissenting).

322. *See id.* at 1618-19.

323. *Id.* at 1617.

324. Smith v. Employment Div., 301 Or. 209, 218-19, 721 P.2d 445, 450 (1986), *vacated*, 485 U.S. 660 (1988).

325. *Id.* at 219, 721 P.2d at 450.

ute."[326] Nevertheless, the *Smith* Court foisted its own view of the legislative intent underlying the Oregon unemployment compensation statute without commenting on the emphatic rejection of such a view by the Oregon Supreme Court, both initially and on remand. Such disrespect, even contempt, for the finding of the Oregon Supreme Court concerning traditionally state-controlled crime control interests is inconsistent with federalism. The majority opinion in *Smith* reflects an unprincipled activism, an aggressive reaching out to foist an exaggerated view of the uncharged and untried crime control interest at stake upon the Oregon Supreme Court, which strongly rejected the relevance of this particular interest in the *Smith* unemployment compensation context.[327]

Even worse, the *Smith* Court's rejection of any balancing test forbids the calibration in case-by-case scrutiny of future cases of the exact crime control interest at stake which would then be balanced against the claimed burdening of religious practice. The general crime control interest in a criminal statute in any application is deemed to be automatically sufficient not only to override the claimed burdening, but also to bar consideration of the claim. The wide spectrum of crime control interests raised by various criminal statutes and their application to incredibly diverse facts are collapsed into one interest for this purpose. Any statute, any application, will do!

From the standpoint of crime control theory and practice, this is an extraordinary result because every day thousands of prosecutors throughout the country in hundreds of thousands of cases routinely balance the nature, scope, and magnitude of the crime control interest presented by actual cases and prospective investigations against scarce prosecutorial and judicial time and resources and then attach high, moderate, or low priority to a particular case or investigation on a spectrum of crime control significance.[328]

---

326. Employment Div. v. Smith, 485 U.S. 660, 677 (1988) (Brennan, J., dissenting).

327. Justice Blackmun, although reluctantly agreeing that the issue of the constitutionality of the Oregon statute criminalizing the use of peyote was "properly presented" in a technical sense in *Smith*, nevertheless was critical of the Court's adjudication of this issue.

> I have grave doubts, however, as to the wisdom or propriety of deciding the constitutionality of a criminal prohibition which the State has chosen not to enforce . . . and which the Oregon courts could, on remand, either invalidate on state constitutional grounds, or conclude that it remains irrelevant to Oregon's interest in administering its unemployment benefits program. It is surprising, to say the least, that this Court which so often prides itself about principles of judicial restraint and reduction of federal control over matters of state law would stretch its jurisdiction to the limit in order to reach, in this abstract setting, the constitutionality of Oregon's criminal prohibition of peyote use.

Employment Div. v. Smith, 110 S. Ct. 1595, 1616 n.2 (1990) (Blackmun, J., dissenting). The Court's unprincipled and aggressive activism in *Smith* is further demonstrated by the fact that neither side argued for the abolition of the compelling interest test.

328. Supervising judges also do such weighing in assigning especially skilled judges

Sworn to uphold the laws, the prosecutor attaches priorities which reflect penal law categorical priorities (robberies receive higher priority than larcenies and grand larcenies receive higher priority than petit larcenies) and degrees of harm within such categories (the more shocking intentional murder rivets attention and receives the highest priority compared to the less shocking murder or manslaughter). On the basis of this routine balancing, prosecutors and investigators are assigned or not assigned to particular cases, supervisory and preparation time is prioritized, and grand jury presentations and trials are planned. This everyday crime control balancing has an ironic exception. There is no need to do such balancing when there is a free exercise claim. Any police power interest, no matter how modest, defeats any free exercise claim, no matter how intrusive.

Other than *ipse dixit* magic, why should the mere existence of this statutory prohibition of possession, which was never applied to Smith or Black and was twice emphatically rejected by the Oregon Supreme Court, have the power automatically to bar a claim of a burdening of religious practice? As a matter of foundational crime control principle, why should any crime control interest, no matter how petty, prevail against any free exercise interest, no matter how intrusive? The attribution in *Smith* of this magical statutory power in the face of the puny, uncharged, and untried crime control threat injected by the *Smith* Court contradicts our crime control jurisprudence as well as core premises of our theory of just liability and of our constitutional criminal law.

V. Conclusion

In our political culture, the United States Supreme Court has on occasion the "prophetic" function[329] of summoning the nation to rally to its moral vision. It expounds "the best thinking" of what we "stand for as a people."[330] The Court should be "the voice of the spirit, reminding us of our better selves"[331] and calling the people to "provisional judgment—in the here and now."[332]

---

to high priority crime control cases, and trial and appellate judges often must weigh whether to frame a case in light of a crime control model or a "due process" model. *See* Packer, *Two Modes of the Criminal Process*, 113 U. Pa. L. Rev. 1 (1964).

329. M. Perry, The Constitution, The Courts, and Human Rights: An Inquiry Into the Legitimacy of Constitutional Policymaking By the Judiciary 98-99 (1982).

330. S. Barber, On What the Constitution Means 9 (1984).

331. A. Cox, The Role of the Supreme Court in American Government 117 (1976).

332. The secular "task of prophecy," in Perry's words, is to call "a people . . . to judgment—provisional judgment—in the here and now." M. Perry, *supra* note 329, at 98-99. Perry continues:

In the beginning . . . Americans have interpreted their history as having religious

By institutionalizing this prophetic function, the Court promotes the possibility of "moral education" and "moral evolution."[333] The Court does not simply reflect our shared constitutional understandings of the past. It also expounds them in light of the old text and the new issues posed in each historical era. To the ancient questions — how shall we live together as a people, and what is most important for us? — the Court's decisions bear witness to the Bill of Rights in the form of particularized moral and political responses. We should live together so that those who wield the state sovereign sword respect the free expression of our people, their right to be secure in their homes and persons, their right to be free of the establishment of religion, and their right to free exercise of their religious beliefs. In these matters, the Court's role is to help to define what it means to be a people, a polyglot American people, after two centuries of casting an American form of the human enterprise.

For free exercise, the Court, especially in *Braunfeld*, *Sherbert*, *Thomas*, *Hobbie*, *Frazee*, and *Yoder*, has erected the beginning of a sheltering canopy of respect for the minority religious voices in our midst "yearning to be free" and reminding us of our "better selves." Those voices long in our midst, including the Native American, the Amish, the Mormon, the Seventh-Day Adventist, and the Jehovah's Witness, as well as the less familiar voices of the Muslim, the Hindu, the Santabrian, the Shinto, the Buddhist, and the Confucian, can also summon our better selves.

> meaning. They saw themselves as being a "people" in the classical and biblical sense of the word. They hoped they were a people of God. They often found themselves to be a people of the devil. . . . Time and again there have arisen prophets to recall this people to its original task, its errand into the wilderness. Significant accomplishments in building a just society have alternated with corruption and despair in America, as in other lands, because the struggle to institutionalize humane values is endless on this earth.

Id. at 98 (quoting R. BELLAH, THE BROKEN COVENANT: AMERICAN CIVIL RELIGION IN A TIME OF TRIAL 2 (1975)).

333. *Id.* at 98-99, 111. "The Supreme Court is, among other things, an educational body, and the Justices are inevitable teachers in a vital national seminar." *Id.* at 112 (quoting Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952)). To illustrate, Brown v. Board of Education, 347 U.S. 483 (1954), has led to such moral education and moral evolution. Naturally, education works both ways: "[T]he *Plessy* edict led to the expansion of segregation; the *Japanese Exclusion Cases* were relied on to support the McCarran Act's detention camps; the *Gobitis* decision stimulated flag salute programs. . . ." M. PERRY, *supra* note 329, at 113 (quoting J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 168 (1980)). Closely related is the idea of the constitution and the decisions of the Court as creating a "'rhetorical community' by which aspects of our culture are defined and redefined." Nagel, *supra* note 129, at 172.

These heard and unheard voices could invoke shared memories of times past, reminding us that our nation has offered a refuge to prior dissenters who also yearned to be free, including the Pilgrims, the Quakers, the Jews, the Huguenots, and the Catholics, who fled discrimination, expulsion, and death in the old world. In seeking refuge in the new world, all these freedom-seekers yearned for what was refused them in the old world infernos — respect.[334] The first amendment promises respect for voices, old and new, that claim a burdening of free exercise. May the Court be true to its oath to respect this chorus of voices by considering free exercise claims rather than rejecting them *a priori*. In light of our history, may it beacon brightly for the Native American voice.

---

334. For the importance of what Joel Feinberg calls an attitude of respect "toward the humanity in each man's person," see J. FEINBERG, SOCIAL PHILOSOPHY 91-94 (1973).