

Preventing Non-Profit Profiteering: Regulating Religious Cult Employment Practices

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In 1974 the Peoples' Temple, under the direction of the Reverend Jim Jones, began building the community of Jonestown in the jungles of Guyana.¹ Facing adverse publicity in the United States, the Temple relocated its entire United States population to Jonestown in mid-1977.² On November 18, 1978, Congressman Leo J. Ryan and four others investigating rumors of mistreatment of cult members in Guyana were murdered in Jonestown.³ On that same day, over nine hundred members of the Jonestown community committed mass suicide.⁴

The events of Jonestown shocked many scholars who had been studying the new American religious cults.⁵ But, many did not find the events surprising.⁶ Rather, the Jonestown mass suicide was viewed as an almost predictable consequence of the practices many cults use to indoctrinate and control their members.⁷ As some have observed, the horror in Guyana lies "in the realization that more or less ordinary people had been so indoctrinated—and in the seed of fear that nearly anybody might be manipulated the same way."⁸

This Note first proposes that the employment relationship between cults and their members can contribute significantly to the indoctrination and manipulation exercised by a cult over its members. Second, a model state statute, designed to eliminate the harmful practices charac-

1. THE ASSASSINATION OF LEO J. RYAN AND THE JONESTOWN, GUYANA TRAGEDY, REPORT OF A STAFF INVESTIGATIVE GROUP TO THE COMM. ON FOREIGN AFFAIRS, H.R. REP., 96th Cong., 1st Sess., 16, 17 (1979) [hereinafter JONESTOWN REPORT].

2. *Id.* at 17.

3. *Id.* at 6.

4. *Id.*

5. *How They Bend Minds*, NEWSWEEK, Dec. 4, 1978, at 72.

6. *Id.*

7. *Id.* "Isolated from the real world and pressured by their peers, converts became wholly accepting of the leader's power—and his paranoia—and they put their welfare and their will totally in his hands." *Id.* As one ex-cult member said, "As a Moonie, I would have done exactly what they did . . . I was drilled and instructed to kill." *Id.*

8. *Id.*

teristic of this cult employment relationship, will be proposed. Third, the free exercise clause of the first amendment will be discussed. The extent to which a state may regulate the employment relationship between religious cults and their members will then be analyzed in light of the traditional indicia of constitutionality under the free exercise clause. Finally, the proposed statute will be examined pursuant to the excessive entanglement doctrine as it has recently been applied to free exercise issues.

Cult Employment

Arizona case law recognizes an employment status of "gratuitous employee."⁹ Under this doctrine, a person may have the status of an employee even though he performs services without compensation.¹⁰ This status is achieved when the employee submits himself to the direction and control of the person for whom service is performed¹¹ and when the employee's acts are done primarily for the purpose of serving the person exercising control.¹²

In *Vickers v. Gercke*,¹³ the doctrine of gratuitous employee was applied in a religious context. In *Vickers*, the plaintiff volunteered to work four or more days per week for a period of nine months in a church cafeteria.¹⁴ The plaintiff received no compensation, and her work was directed by a supervisor.¹⁵ The plaintiff brought suit when injured while performing services.¹⁶ The Arizona Supreme Court

9. *Bond v. Cartwright Little League, Inc.*, 112 Ariz. 9, 14, 536 P.2d 697, 702 (1975) (plaintiff, who volunteered to remove stadium floodlights for nonprofit corporation, was found to be a gratuitous employee and not a mere volunteer and, therefore, entitled to a reasonably safe place to work); *Vickers v. Gercke*, 86 Ariz. 75, 78, 340 P.2d 987, 990 (1959) (plaintiff, who volunteered to help in church cafeteria, was held to be a gratuitous employee, and, therefore, entitled to a reasonably safe place to work); *Maxwell v. Bell*, 121 Ariz. 475, 477, 591 P.2d 567, 569 (Ct. App. 1979) (son of employee of ranchworker was found to be a gratuitous employee, but shooting a third party was not within the scope of his employment duties); see *Edwards v. City of Chico*, 28 Cal. App. 3d 148, 152, 104 Cal. Rptr. 481, 484 (1972) (where plaintiff's actions were entirely controlled by employer, plaintiff was employee despite lack of compensation); RESTATEMENT (SECOND) OF AGENCY § 255 (1958) ("One who volunteers services without an agreement, may be a servant of the one accepting such services"); *Id.*, Comment (a) ("Consideration is not necessary to create the relation of principal and agent, and it is not necessary in the case of master and servant"). *But see* *Turner v. Unification Church*, 473 F. Supp. 367, 376-78 (D.R.I. 1978) (cult member found not to be an employee for purposes of the Federal Insurance Contributions Act, Fair Labor Standards Act, or quantum meruit suit for services performed under implied contract); *Markus v. Frankford Hospital*, 445 Pa. 206, 211-12, 283 A.2d 69, 73 (1971) (candy striper not employee of hospital for purposes of worker's compensation); *Camphill Village, U.S.A., Inc. v. Workmen's Compensation Bd.*, 23 N.Y.2d 202, 207-08, 243 N.E.2d 739, 742, 296 N.Y.S.2d 129, 133-34 (1968) (co-workers who lived in and supervised family-like establishments for non-profit corporation and cared for handicapped persons were not employees for purposes of worker's compensation).

10. *Bond v. Cartwright Little League, Inc.*, 112 Ariz. 9, 14, 536 P.2d 697, 702 (1975).

11. *Id.*

12. *Id.*

13. 86 Ariz. 75, 340 P.2d 987 (1959).

14. *Id.* at 77, 340 P.2d at 989.

15. *Id.*

16. *Id.*

found the plaintiff to be an employee of the church because she performed services for the church and was subject to the church's control.¹⁷ Consequently, the church was held liable for failing to provide a reasonably safe work area.¹⁸

In *Turner v. Unification Church*,¹⁹ an ex-cult member brought suit in Federal District Court alleging an employee relationship similar to that found in *Vickers*. Turner reported that she had worked long hours under the direction and control of the cult.²⁰ In addition, Turner stated that the services were performed to solicit money for the cult.²¹ Thus, had the question arisen, the relationship between the plaintiff and the cult could have been characterized as one of employer and employee under the gratuitous employee doctrine.²²

The reports of the plaintiff in *Turner* are characteristic of the findings many commentators have made concerning the relationship between cults and their members. An unvarying routine of proselytizing and fundraising for the cult is common practice for cult members.²³ Other forms of services performed for cults, such as farm work,²⁴ the selling of products,²⁵ or even prostitution²⁶ have been reported. Frequently, members perform services for cults for fourteen to eighteen hours each day.²⁷ Often, the long working hours are induced by the

17. *Id.* at 78, 340 P.2d at 990.

18. *Id.*

19. 473 F. Supp. 367 (D.R.I. 1978).

20. *Id.* at 370-71. The plaintiff claimed that her services were procured through forced penance. *Id.*

21. *Id.* at 371, 378. The plaintiff claimed that her services of soliciting money and selling candies, flowers, and tickets for Unification Church rallies amounted to being forced "to do the bidding" of the church. *Id.* at 378.

22. See text & notes 9-14 *supra*. The question whether the cult member was a gratuitous employee was not raised in *Turner*. Rather, in *Turner*, a cult member sued a cult for damages caused by involuntary servitude, 473 F. Supp. at 371, violation of the Fair Labor Standards Act (29 U.S.C. §§ 203, 206, 207 (1978)), *id.*, and various torts. *Id.* The complaint was dismissed for failure to state a claim. *Id.* at 378.

23. Delgado, *Religious Totalism: Gentle and Ungentle Persuasion under the First Amendment*, 51 S. CAL. L. REV. 1, 8-9 (1977).

24. JONESTOWN REPORT, *supra* note 1, at 313 (affidavit of Deborah Layton Blakey).

25. Thomas, *Practices of Cults Receiving New Scrutiny*, NEW YORK TIMES, Jan. 21, 1979, at 52, col. 2 (members solicit business for cult's carpet cleaning company).

26. Sheppard & Thomas, *Many Find Coercion in Cults' Hold on Members*, NEW YORK TIMES, Jan. 23, 1979, at A16, col. 5. (female members of the "Children of God" encouraged to engage in prostitution to raise funds for the cult).

27. See *Turner v. Unification Church*, 473 F. Supp. 367, 370-71 (D.R.I. 1978) (required to work more than 12 hours per day); JONESTOWN REPORT, *supra* note 1, at 313 (citing affidavit of Deborah Layton Blakey, which stated that members of the Jonestown Community were required to work 7 a.m. to 6 p.m., Monday through Saturday, and from 7 a.m. until 2 p.m. on Sundays); Delgado, *supra* note 23, at 45 n.253 (discussing NATIONAL AD. HOC. COMM., *The Unification Church: Its Activities and Practices, A Meeting of Concerned Parents, A Day of Affirmation and Protest*, pt. 1, at 24 (April 20, 1976) (members raised funds for 18 hours each day), pt. 2, at 11 (members begged on streets 14-16 hours per day), pt. 2, at 14 (members raised funds 14-16 hours each day), pt. 2, at 24, 36 (members raised funds for up to 18 hours each day)). See also Harrison, *The Struggle for Wendy Helander, McCall's*, at 88 (Oct., 1979). ("Fundraisers are required to fill a quota of \$100 a day, no matter how many hours of work this requires and no matter what ruses they use to sell their wares").

withholding of food or other necessities of life until work tasks are completed.²⁸

The infirmities associated with excessive working hours have long been recognized. Perhaps the classic formulation of these infirmities was presented in 1915 in the Frankfurter brief²⁹ for *Bunting v. Oregon*.³⁰ Frankfurter reported that excessive work may cause chronic fatigue, resulting in a general deterioration of health.³¹ This deterioration of health is a result of exerting the human organism beyond its capacities.³² Frankfurter found that the length of working hours is in itself a threat to health,³³ and that improvement of working conditions, without shortening hours, would not eliminate the health threat.³⁴ Thus, he concluded, the only effective remedy available was the shortening of maximum working hours to ten per day.³⁵

Modern science confirms Frankfurter's findings as to the serious consequences of prolonged physiological stress from excessive work.³⁶ Stress is recognized as a response to stimuli that strain the physiological organism to or beyond its capacity.³⁷ This response has been divided

28. Delgado, *supra* note 23, at 19 (discussing CAL. SEN. SELECT COMM. ON CHILDREN AND YOUTH, *IMPACT OF CULTS ON TODAY'S YOUTH* 97 (1975). An ex-member of the Children of God stated, "If you don't get your literature out and your money in then you're not allowed to eat"). *Id.*

29. F. FRANKFURTER, *THE CASE FOR THE SHORTER WORK DAY* (1915). Frankfurter presented over 1000 pages of scientific and medical data concerning the consequences of overwork. *See also* the Brandeis brief for *Muller v. Oregon*, 208 U.S. 412, 423 (1908) (state may constitutionally limit the maximum hours of employment for women).

30. 243 U.S. 426, 439 (1917) (state may constitutionally limit the maximum working hours of men and women).

31. F. FRANKFURTER, *supra* note 29, at 131.

32. *Id.* at 265.

33. *Id.* at 605.

34. *Id.*

35. *Id.* at 185. The statute Frankfurter supported provided:

Section 1. . . . It is hereby declared that the working of any person more than ten hours in one day . . . is injurious to the physical health and well being of such person. . . .

Section 2.—No person shall be employed in any mill, factory or manufacturing establishment in this State more than ten hours in any one day . . . except . . . in emergency. . . ; *provided, however*, employees may work overtime not to exceed three hours in any one day, . . . at the rate of time and one-half the regular wage. 1913 Or. Laws, ch. 102, at 169.

The modern Oregon statute is substantially similar to the statute considered by Frankfurter:

It hereby is declared that the working of any person more than 10 hours in one day in any mill, factory or manufacturing establishment or the working of any person more than eight hours, exclusive of one hour, more or less, in one day, or more than 48 hours in one calendar week in sawmills, planing mills, shingle mills and logging camps is injurious to the physical health and well-being of such person, and tends to prevent him from acquiring that degree of intelligence that is necessary to make him a useful and desirable citizen of the state.

OR. REV. STAT. § 652.010(2) (Supp. 1979-80).

36. J. STELLMAN & S. DAUM, *WORK IS DANGEROUS TO YOUR HEALTH* 81 (1973); UNIVERSITY OF MICHIGAN INSTITUTE FOR SOCIAL RESEARCH, *JOB DEMANDS AND WORKER HEALTH* (HEW Publication No. (NIOSH) 75-160) 85, 98 (1975).

37. Lazarus, *Cognitive and Personality Factors Underlying Threat and Coping*, *PSYCHOLOGICAL STRESS* 7 (1967). J. STELLMAN & S. DAUM, *supra* note 36, at 77.

into three stages.³⁸ The first stage is known as the alarm reaction.³⁹ Upon the initial encounter with a stressful situation (overwork, for example), the body reacts to protect itself, even at the expense of local bodily needs.⁴⁰ Thus, fatigue and minor physiological disorders may result.⁴¹ In addition, the response is proportionate to the stimulus—the amount of overwork—presented.⁴² When the stressful situation is prolonged, the second or “resistance” stage is reached.⁴³ At this stage, the individual appears to recover from the alarm reaction as the body adapts and attempts to cope with the stressful situation.⁴⁴ If exposure to the stressful situation is continued, however, the individual reaches the exhaustion stage.⁴⁵ Then, the ability to cope is lost and mental and physical disorganization result.⁴⁶ Normal brain functioning may be impaired and delusional and hallucinatory behavior may result.⁴⁷ Unless treatment and intervention measures are instituted, death becomes imminent in serious cases.⁴⁸

Long hours of work, then, can produce serious physical and mental harm. In the cult situation, these consequences may be exacerbated by the deprivation of food or other necessities until the stress-producing work is completed.⁴⁹ In addition, both deprivation and excessive work may be used as part of a psychological submission process.⁵⁰ During this process a cult member participates in an unvarying routine of long work hours,⁵¹ constant chanting or other repetitive worship practices,⁵² deprivation,⁵³ and other regimentation.⁵⁴ The result is

38. See generally H. SELYE, *THE STRESS OF LIFE* (1956) [hereinafter H. SELYE (1956)]. Although Selye published a revised edition of *THE STRESS OF LIFE* in 1976, the three stages of the stress reaction were not restated. Selye stated, however, that the original edition should remain as a summary of contemporary views on stress. H. SELYE, *THE STRESS OF LIFE* xi (1976) [hereinafter H. SELYE (1976)].

39. H. SELYE (1956), *supra* note 38, at 31; H. SELYE, *THE PHYSIOLOGICAL AND PATHOLOGICAL EXPOSURE TO STRESS* 774 (1950) [hereinafter H. SELYE (1950)].

40. H. SELYE (1950), *supra* note 39, at 46. See J. STELLMAN & S. DAUM, *supra* note 36, at 78.

41. H. SELYE (1950), *supra* note 39, at 46.

42. *Id.*; see J. STELLMAN & S. DAUM, *supra* note 36, at 77-79.

43. H. SELYE (1956), *supra* note 38, at 32; H. SELYE (1950), *supra* note 39, at 77.

44. See H. SELYE (1956), *supra* note 38, at 31, 32.

45. *Id.* at 31; H. SELYE (1950), *supra* note 39, at 774.

46. H. SELYE (1956), *supra* note 38, at 31. Diseases such as asthma, colitis, and heart disease may be caused by stress. J. STELLMAN & S. DAUM, *supra* note 36, at 79.

47. J. COLEMAN, *ABNORMAL PSYCHOLOGY AND MODERN LIFE* 109 (1976). For a summary of the physiological reactions to stress, see H. SELYE (1950), *supra* note 39, at 774-85.

48. H. SELYE (1956), *supra* note 38, at 31. See J. STELLMAN & S. DAUM, *supra* note 36, at 79. The proposition here is not that overwork will result in the death of all cult members, but that the stress to which cult members are exposed can have serious consequences.

49. See text & note 28 *supra*.

50. See *People v. Murphy*, 98 Misc. 2d 235, 243, 413 N.Y.S.2d 540, 545 (1977); Delgado, *supra* note 23, at 21-25.

51. Delgado, *supra* note 23, at 34.

52. *Id.* See *People v. Murphy*, 98 Misc. 2d 235, 243, 413 N.Y.S.2d 540, 545 (1977), where the New York Supreme Court stated,

The fact that indoctrination and constant chanting may be used as a defense mechanism to ward off what another person is saying or doing is devastating and it is equally

often a severe impairment of the cult member's autonomy.⁵⁵ Consequently, overwork not only directly causes physical harm to cult members, but also prevents a cult member from extracting himself from the situation that produces the harm.⁵⁶

A Proposed Statute

Except for child labor regulations,⁵⁷ federal laws do not impose absolute restrictions on the number of hours an employee may work.⁵⁸ Rather, federal laws discourage excessive work by requiring additional pay for hours worked in excess of established maximums.⁵⁹ In addition, federal hourly standards only apply to persons receiving formal compensation for services performed.⁶⁰ Consequently, federal statutes do not provide the remedy sought here—an absolute limit on the number of hours that may be worked by employees not receiving formal compensation.

Similarly, Arizona labor statutes⁶¹ do not provide the remedy sought. Hourly maximums are established only for children,⁶² underground mine workers,⁶³ laundry workers,⁶⁴ and railroad employees.⁶⁵ Consequently, this Note proposes an independent statute which would deal with the cult employer-employee relationship.

The purpose of the proposed statute, as presented in the appendix, is to prevent physical and mental harm caused by long working hours and other deprivations by regulating the relationship between employ-

devastating when used as a technique for brainwashing or mind control. It may even destroy healthy brain cells. It may also cause an inability to think, to be reasonable or logical.

Id.

53. See text & note 28 *supra*.

54. Delgado, *supra* note 23, at 24.

55. *People v. Murphy*, 98 Misc. 2d 235, 243, 413 N.Y.S.2d 540, 545 (1977); R. ENROUTH, *YOUTH, BRAINWASHING, AND THE EXTREMIST CULTS* 121 (1977); Delgado, *supra* note 23 at 21-22.

56. See text & notes 50-55 *supra*.

57. See 29 U.S.C. §§ 212, 213 (1976) (proscribing the interstate shipment of goods produced by oppressive child labor). A "child" is defined as a person under the age of fourteen. *Id.* § 213(c).

58. See *id.* § 207 (1965) (requiring special compensation for work in excess of 40 hours per week, but establishing no absolute maximum).

59. *Id.*

60. See *Walling v. Portland Terminal Co.*, 330 U.S. 148, 151 (1947) (trainees of railroad were not "employees" within the Fair Labor Standards Act); *Turner v. Unification Church*, 473 F. Supp. 367, 377 (D.R.I. 1978) (cult member was not an "employee" of cult within the Fair Labor Standards Act).

61. ARIZ. REV. STAT. ANN. §§ 23-281 to 287 (1971 & Supp. 1980-81). Cf. CAL. LAB. CODE §§ 510-856 (West 1971) (hourly maximum established only for specific categories of workers); N.Y. LAB. LAW §§ 160-169a (McKinney 1965) (hourly maximum established only for specific categories of workers).

62. ARIZ. REV. STAT. ANN. § 23-233 (Supp. 1980-81) (40 hours per week when not enrolled in school). The statute refers to children under the age of sixteen. *Id.*

63. *Id.* § 23-282 (8 hours per day).

64. *Id.* § 23-284 (8 hours per day).

65. *Id.* § 23-287 (16 consecutive hours).

ers and employees regardless of whether compensation is either anticipated or received by an employee.⁶⁶ To accomplish this purpose, "employee" is statutorily defined as any person who is subject to the direction and control of one for whom he performs services, including members of religious organizations and cults.⁶⁷ Furthermore, "employer" is defined as a person who exercises direction and control over a person from whom he receives services, including religious organizations and cults.⁶⁸

The relationship between employers and employees is subject to two statutory prohibitions. First, no employee may work for more than ten hours in any twenty-four hour period for an employer.⁶⁹ The ten hour period was chosen because it imposes a lesser restriction upon the rights of employees than the restrictions Arizona imposes upon some classes of workers,⁷⁰ yet is historically and currently recognized as necessary and sufficient to protect the health of a state's workers.⁷¹ Second, the statute proscribes the withholding of food or other necessities from employees until they complete work assignments.⁷² Employee services that directly relate to aiding those injured or threatened by certain emergencies, however, are exempted from the application of the ten hour maximum.⁷³ This exception recognizes the vital role uncompensated persons often play in such emergencies.

Four violations are identified under the statute.⁷⁴ A "serious violation" is a statutory violation that produces a substantial probability that serious physical harm will result to an employee. Whether an employer's conduct constitutes a serious violation is to be determined in the first instance by the Industrial Commission in a preliminary investigation.⁷⁵ The commission's determination shall include, but shall not be limited to, consideration of the age of the employee involved, the health condition of the employee, and the likelihood that the violation will be repeated.⁷⁶ A "non-serious violation"⁷⁷ is a violation other than

66. Appendix § 101.

67. *Id.* § 102(A).

68. *Id.* § 102(B).

69. *Id.* § 103(A).

70. See ARIZ. REV. STAT. ANN. § 23-282 (Supp. 1980-81) (miners limited to 8-hour days); *id.* § 23-284 (laundry workers limited to 8-hour days).

71. See text & notes 30-36 *supra*. Note specifically the repealed and modern Oregon statutes contained in note 35 *supra*.

72. Appendix § 103(B).

73. *Id.* § 103(C). The language of this provision was adapted from ARIZ. REV. STAT. ANN. § 23-292(C)(1) (Supp. 1980-81) (miners may work more than 8 hours per day in emergency).

74. The violations listed in the proposed statute were adapted from the Arizona Occupational Safety and Health statutes, ARIZ. REV. STAT. ANN. §§ 23-401 to 430 (Supp. 1980-81).

75. Appendix §§ 104(A), 105(C).

76. *Id.*

77. *Id.* § 104(A).

a serious violation.⁷⁸ A recurrence of a non-serious violation constitutes a "repeated non-serious violation."⁷⁹ A recurrence of a serious violation constitutes a "repeated serious violation."⁸⁰

The proposed statute is designed to function as a part of the Arizona labor statutes.⁸¹ Consequently, enforcement procedures are to be instituted pursuant to those statutes.⁸² These procedures are invoked through petition to the Arizona Industrial Commission by an employee, friend or relative of an employee, or any person concerned with the health or safety of an employee.⁸³ This provision recognizes that remedies may not always be sought by the employees themselves.⁸⁴ Consequently, standing to initiate enforcement proceedings is statutorily granted to third parties.⁸⁵ At the same time, however, standing under the statute is limited to persons concerned with the health or safety of an employee, so as not to foster harrassment of cult-employers.

To minimize intrusion upon the employer, three remedies have been developed: a "warning" notice sent to the employer, a fine, and an injunction. Upon petition to the Industrial Commission for any violation, a preliminary investigation shall be conducted by the commission.⁸⁶ If the allegations of the petition are determined to be groundless, the petition is dismissed.⁸⁷ If the investigation reveals that the petition contains correct allegations, the commission institutes enforcement procedures.⁸⁸

For a non-serious violation, enforcement consists only of notice sent to the employer and employee.⁸⁹ Enforcement for a repeated non-

78. *Id.* § 104(B).

79. *Id.* § 104(C).

80. *Id.* § 104(D).

81. See ARIZ. REV. STAT. ANN. §§ 23-101 to 1395 (Supp. 1980-81). These statutes authorize the Industrial Commission to adopt rules and regulations for effecting the purposes of the statutes. See *id.* § 23-107(1), and to enforce all laws for the protection of life, health, safety, and welfare of employees. See *id.* § 23-107(2). This Note proposes a statute, the enforcement of which includes these general powers of the Industrial Commission.

82. Appendix § 105(A).

83. *Id.* § 105(B).

84. The proposition here is that the employment practices of cults may function to indoctrinate cult members. See text & notes 50-55 *supra*. Consequently, members may be unlikely or incompetent to seek remedies.

85. Standing is statutorily granted to avoid the problems encountered in *Schupp* v. Unification Church, 435 F. Supp. 603, (D. Vt.), *aff'd*, 575 F.2d 1295 (2d Cir. 1977). In *Schupp*, parents of a cult member brought a suit against a religious cult on behalf of themselves and their daughter, a member of the cult. *Id.* at 604-05. The parents alleged alienation of the daughter's affections. *Id.* The *Schupp* court held that, in the absence of incompetence of the daughter, the parents had no standing to institute a suit on behalf of the daughter. *Id.* at 605. Cf. *Gilmore v. Utah*, 429 U.S. 1012, 1013 (1976) (United States Supreme Court terminated stay of execution which had been granted on application of friends of a convicted person).

86. Appendix § 105(C)(1).

87. *Id.* § 105(C)(2).

88. *Id.*

89. *Id.* § 105(D)(1).

serious violation, a serious violation, or a repeated serious violation, however, requires a hearing before the Industrial Commission.⁹⁰ If the hearing results in a determination that a serious or repeated non-serious violation has occurred, a fine, not to exceed \$300, may be imposed on the employer.⁹¹ A determination that a repeated serious violation has occurred provides the Industrial Commission the choice of imposing the \$300 fine or enjoining the conduct of the employer, or imposing both an injunction and a fine.⁹² The decision to enjoin the conduct of the employer may be based upon, but need not be limited to, the following factors: age and health of the employee involved; frequency of repetition of the violation; and the probability that harm will result to employees in the absence of injunction.⁹³ Any determination by the commission may be appealed to the superior court.⁹⁴

Free Exercise Background

The first amendment to the United States Constitution provides that Congress shall make no law prohibiting the free exercise of religion.⁹⁵ The first amendment is applicable to the states through the fourteenth amendment.⁹⁶ Consequently, when a state regulates a religion or an activity in which a religious group participates, the question arises whether the regulation imposes an impermissible burden on the free exercise of religion.⁹⁷

An early United States Supreme Court test to determine the permissible degree of state infringement upon the free exercise of religion was established in *Braunfeld v. Brown*.⁹⁸ *Braunfeld* involved a statute which proscribed Sunday retail sales.⁹⁹ The plaintiffs were members of the Orthodox Jewish faith which prohibits business activity on Saturdays.¹⁰⁰ The plaintiffs alleged that the statute violated the free exercise clause because it forced them to suffer an economic disadvantage if

90. *Id.* §§ 105(D)(1) and (2).

91. *Id.* The figure of \$300 was chosen because other Arizona statutes prescribing absolute limits on working hours provide that a violation constitutes a petty offense. *See* ARIZ. REV. STAT. ANN. §§ 23-284 to 287 (Supp. 1980-81) (8 hour per day limit on laundry workers). The penalty for a petty offense is a fine of up to \$300. *Id.* § 13-801 (1978).

92. Appendix § 105(D)(3)(a).

93. *Id.* § 105(D)(3)(b).

94. *Id.* § 105(G).

95. U.S. CONST. amend I.

96. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

97. *See, e.g.,* *McDaniel v. Paty*, 435 U.S. 618, 621 (1978) (plurality opinion) (whether statute barring ministers from serving as delegates to state constitutional convention impermissibly infringed upon the free exercise of religion); *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972) (whether compulsory education law impermissibly infringed upon free exercise of religion); *Sherbert v. Verner*, 374 U.S. 398, 400-01 (1963) (whether denial of unemployment compensation because of refusal to work on Saturday impermissibly infringed upon free exercise of religion).

98. 366 U.S. 599 (1961).

99. *Id.* at 600.

100. *Id.* at 601.

they practiced their religion.¹⁰¹ In upholding the statute, the Court stated that a statute burdening the free exercise of religion is valid if it has a secular purpose and a secular effect.¹⁰²

In 1963, in *Sherbert v. Verner*,¹⁰³ the Supreme Court again dealt with the test to determine whether a state has impermissibly infringed upon the free exercise of religion. In *Sherbert* the plaintiff was denied unemployment compensation under a South Carolina statute because she refused, on grounds of religious belief, to accept employment that would require her to work on Saturdays.¹⁰⁴ The Court held that the statute could not be constitutionally applied to deny the plaintiff her benefits.¹⁰⁵ In so doing, the Court carefully distinguished the *Sherbert* facts from the *Braunfeld* facts.¹⁰⁶ Justice Stewart, concurring, and Justices Harlan and White, dissenting, believed that the *Sherbert* result overruled *Braunfeld*.¹⁰⁷ Professor Tribe has agreed.¹⁰⁸

Regardless of whether *Braunfeld* survives *Sherbert*, *Sherbert* establishes the modern three-part test for free exercise clause cases.¹⁰⁹ First, the court must determine whether state action imposes a burden on the free exercise of religion.¹¹⁰ Second, the court must inquire whether a compelling state interest justifies state infringement.¹¹¹ Finally, if the court answers the first two questions affirmatively, it must then determine whether the state has implemented its purpose by use of the least restrictive alternative.¹¹²

101. *Id.* at 601-02.

102. *Id.* at 607.

103. 374 U.S. 398 (1963).

104. *Id.* at 400-01.

105. *Id.* at 407-09.

106. *Id.* at 408-09. The *Sherbert* Court stated that in *Braunfeld*, the Court found that the objective of a uniform day of rest could be achieved only by declaring Sunday to be that day of rest. *Id.* at 408. The *Sherbert* facts, according to the Court, presented no equally compelling reason for denying the plaintiff her benefits. *Id.* at 409.

107. *Id.* at 417 (Stewart, J., concurring), 421 (Harlan, J. & White, J., dissenting). Stewart contended that the issue faced by the court in both cases was the economic disadvantage caused the plaintiffs in the practice of their religion. *Id.* at 417.

108. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-10, at 855 (1978). Tribe contends that the argument that it would be inefficient not to have an absolute day of rest on Sunday would be insufficient to withstand the *Sherbert* test. *Id.* Consequently, he agrees with Justice Stewart that *Braunfeld* cannot stand consistently with *Sherbert*, and that *Braunfeld* should be overruled. *Id.*

109. For examples of application of the *Sherbert* test, see *Thomas v. Review Bd. Independent Employment Security Div.*, 49 U.S.L.W. 4341, 4344-45 (1981) (employee who refused work on religious grounds could not be denied unemployment benefits); *McDaniel v. Paty*, 435 U.S. 618, 628 (1978) (plurality opinion) (minister could not be prevented from serving as delegate to state constitutional convention); *People v. Woody*, 61 Cal. 2d 716, 727, 394 P.2d 813, 821, 40 Cal. Rptr. 69, 77 (1964) (no compelling state interest in prohibiting the use of peyote in religious ceremonies); *State ex rel. Swann v. Pack*, 527 S.W.2d 99, 111 (Tenn. 1975) (compelling state interest in prohibiting the use of poisonous snakes and poison in religious ceremonies).

110. 374 U.S. at 403; *accord*, *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (plurality opinion); *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972).

111. 374 U.S. at 406; *accord*, *McDaniel v. Paty*, 435 U.S. 618, 628 (1978) (plurality opinion); *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972).

112. 374 U.S. at 407; *accord*, *McDaniel v. Paty*, 435 U.S. 618, 629 (1978) (plurality opinion); *Wisconsin v. Yoder*, 406 U.S. 205, 228-29 (1972).

Free Exercise Analysis

a. Infringement upon the Free Exercise of Religion

The free exercise clause of the first amendment does not protect the exercise of *personal* beliefs.¹¹³ Rather, protection is invoked only to prevent impermissible infringement upon the exercise of *religious* beliefs.¹¹⁴ The threshold test under the free exercise clause, then, must be a determination of whether claims are rooted in religion.¹¹⁵

Initially, the United States Supreme Court employed a theistic definition of religion.¹¹⁶ A religion, according to the Court, entailed "reference to one's view of his relations to his creator, and to the obligations they may impose of reverence for his being and character, and obedience of his will."¹¹⁷

Many religions, however, do not recognize a God in the traditional sense.¹¹⁸ Realization of this has led many courts, especially those dealing with claims under the establishment clause of the first amendment, to attempt to formulate a modern definition.¹¹⁹ In *United States v. Bal-*

113. *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972); *Jones v. Bradley*, 590 F.2d 294, 295 (9th Cir. 1979); *Edwards v. School Bd.*, 483 F. Supp. 620, 624 (W.D. Va. 1980); *Brown v. Pena*, 441 F. Supp. 1382, 1385 (S.D. Fla. 1977). The court in *Jones* referred to a copy of the Universal Life newspaper as expressing a personal preference. 590 F.2d at 295 n.3. The newspaper provided, "The U.L.C. [Universal Life Church] has no traditional doctrine. We, the organization, only believe in that which is RIGHT. Each individual has the privilege and the responsibility to determine what is RIGHT for him—as long as it does not infringe on the RIGHTS of others." *Id.*

In *Brown*, the court stated that "[p]laintiff's 'personal religious creed' concerning the benefits of eating Kozy Kitten Cat Food can only be described as . . . a mere personal preference and, therefore, is beyond the parameters of the concept of religion as protected by the Constitution. . . ." 441 F. Supp. at 1385. Plaintiff's claims of employment discrimination on religious grounds were thus correctly denied. *Id.*

114. *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972); *Edwards v. School Bd.*, 483 F. Supp. 620, 624 (W.D. Va. 1980); *Brown v. Pena*, 441 F. Supp. 1382, 1385 (S.D. Fla. 1977).

115. See *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (plurality opinion); *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

116. See *United States v. Macintosh*, 283 U.S. 605, 633-34 (1931) (Hughes, C.J., dissenting) (denial of citizenship because of religious belief prohibiting the bearing of arms was valid); *Davis v. Beason*, 133 U.S. 333, 342 (1890) (statute proscribing polygamy upheld).

117. *Davis v. Beason*, 133 U.S. 333, 342 (1890).

118. "Among the religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others." *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961) (requirement of expression of a belief in God as a condition to holding public office violated the establishment clause).

119. See, e.g., *Malnak v. Yogi*, 592 F.2d 197, 207-10 (3rd Cir. 1979) (Adams, C.J., concurring) (the teaching of Transcendental Meditation in school violates the establishment clause); *Brown v. Dade Christian Sch., Inc.*, 556 F.2d 310, 324 (5th Cir. 1977) (exemption on religious grounds from desegregation laws denied); *Founding Church of Scientology v. United States*, 409 F.2d 1146, 1160 (D.C. Cir.) (theories of church, expounded in its literature, were not subject to the labelling requirements of the Food and Drug Administration), *cert. denied*, 396 U.S. 963 (1969).

The applicability of cases brought under the establishment clause to cases brought under the free exercise clause is questionable. Professor Tribe suggests that the definition of "religion" is different under each clause. L. TRIBE, *supra* note 108, at 826-33. Tribe argues that belief systems which are "arguably religious" should be considered religions under the free exercise clause. *Id.* at 828. On the other hand, belief systems which are "arguably non-religious" should not be considered to be religious under the establishment clause. *Id.* This distinction is necessary because if the same definition were implied in both free exercise and establishment situations, either "religi-

lard,¹²⁰ however, the Supreme Court indicated that a rigid definition of religion is of little use in modern free exercise cases. *Ballard* involved an allegation of mail fraud in connection with a group's faithhealing claims.¹²¹ The Court held that the truth of religious beliefs could not be considered by a judge or jury.¹²² Rather, only the sincerity of religious beliefs may be considered by a court.¹²³

As a result of *Ballard*, the threshold test under the free exercise clause—the determination that claims are rooted in religious belief—is easily satisfied. First, it must only be determined that the beliefs espoused are not merely personal beliefs.¹²⁴ A belief system which espouses a way of life or rejection of commonly held social values¹²⁵ or personal preferences,¹²⁶ for example, will not be recognized as a religion. But when the belief system occupies a more essential role in one's life, being raised to a level parallel to the orthodox beliefs in God, the basis for recognition of a religion exists.¹²⁷ The second inquiry is the

gion" would be construed too narrowly in free exercise cases, or government aid in almost all cases would be found to violate the establishment clause. *Id.* at 827-28.

120. 322 U.S. 78 (1944).

121. *Id.* at 79.

122. *Id.* at 86.

123. *Id.* Justice Jackson, however, argued in dissent that the Court could not even consider the sincerity of a person's religious beliefs. *Id.* at 92-95 (Jackson, J., dissenting). Justice Jackson found that the question of sincerity could not be separated from the question of truth. *Id.* at 92.

124. See text & note 113 *supra*.

125. See *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972). Chief Justice Burger, speaking for the majority, referred to the philosophy of Henry David Thoreau as a belief system that espouses a personal preference rather than a religious belief. *Id.* at 216. In so doing, he stated:

Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.

Id.

Thus, a set of values that is not based on religious belief is afforded no constitutional protection under the free exercise clause. For a discussion of what constitutes a religious belief, see notes 127, 129, & 130 *infra*.

126. See *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). See also *Jones v. Bradley*, 590 F.2d 294, 295 (9th Cir. 1979) (inmates not denied free exercise of religion when denied the use of the prison chapel for study groups); *Brown v. Pena*, 441 F. Supp. 1382, 1385 (S.D. Fla. 1977) (employee not denied free exercise of religion when fired because of eating cat food at work); note 125 *supra*.

127. See *United States v. Welsh*, 398 U.S. 333 (1970); *United States v. Seeger*, 380 U.S. 163 (1965). *Seeger* and *Welsh* are not constitutional cases, but involved interpretation of section 6(j) of the Universal Military Selective Service and Training Act. 50 U.S.C. § 456(j) (1976). The act provides conscientious objector status to those who are opposed to war "by reason of religious training and belief." *Id.* Religious belief is defined as "belief in relation to a Supreme Being." *Id.* The *Seeger* Court interpreted the phrase to include any belief that occupies "a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption." 380 U.S. at 166. While this interpretation was not made in light of a free exercise challenge to the statute, if the Court had interpreted the language "belief in relation to a Supreme Being" strictly, it may have been faced with a claim that the statute violated the free exercise clause. *Malnak v. Yogi*, 592 F.2d 197, 204-05 (1979) (Adams, C.J., concurring). Thus, the definition of religious belief offered by *Seeger* takes on constitutional significance as an emerging concept of religion. See *id.* See also L. TRIBE, *supra* note 108, at 831. Professor Tribe also suggests

sincerity requirement of *Ballard*. Orthodoxy cannot be demanded,¹²⁸ and consequently, the inquiry must be minimal. Insincerity is found only where the claim of religion appears fraudulent.¹²⁹

A showing of religion, then, is easily established. Consequently, most organizations claiming religious status will obtain such status. To assure the validity of the proposed statute, this Note will proceed upon the assumption that the cults to be regulated are religions.¹³⁰

The determination that an entity is a religious organization, however, does not end the inquiry. The Supreme Court has established that the free exercise clause embraces both belief and action.¹³¹ Belief is absolute and any attempt to regulate belief is per se invalid.¹³² Freedom of action, however, is not absolute.¹³³ Actions may be regulated, but care must still be taken to see that restrictions do not impermissibly infringe upon the free exercise of religion.¹³⁴ Infringement occurs when regulation restricts an action that constitutes an expression of the beliefs comprising a religion.¹³⁵ Once infringement is found, a determination as to whether the infringement is constitutionally permissible

that an even broader definition of religion should be used in cases brought under the free exercise clause. *Id.* Any belief system that is "arguably religious" should be recognized as a religion. *Id.*

128. *United States v. Ballard*, 322 U.S. 78, 86 (1942). The free exercise clause of the first amendment "embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of orthodox faiths." *Id.*; *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding that there is a first amendment right to refuse to salute the American Flag). 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 . . ." *Id.*

129. *See Theriault v. Carlson*, 495 F.2d 390, 395 (5th Cir. 1974) (remanded to determine whether "Church of the New Song" was entitled to protection under the first amendment); *United States v. Kuch*, 288 F. Supp. 439, 444-45 (D.D.C. 1968). The District Court in *Kuch* determined that the Neo-American Church's beliefs did not constitute religious beliefs. *Id.* The symbol of the church was the three-eyed toad. *Id.* The church key was the bottle opener. *Id.* The church songs were "Puff the Magic Dragon" and "Row, Row, Row Your Boat." *Id.* The church motto was "Victory over Horseshit!" *Id.*

130. For a general discussion of cult activities which may not constitute religious activities, see Comment, *Piercing the Religious Veil of the So-Called Cults*, 7 PEPPERDINE L. REV. 655 (1980). For a discussion of the definition of religion under the first amendment, see generally Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978). The author contends that, in a free exercise context, the Supreme Court should employ a functional definition of religion. *Id.* at 1072-75. Such a definition would define a religion as that set of beliefs which is the "ultimate concern" of those who espouse the beliefs. *Id.* at 1075.

131. *McDaniel v. Paty*, 435 U.S. 618, 629 (1978) (plurality opinion); *Wisconsin v. Yoder*, 406 U.S. 205, 219-20 (1972); *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940).

132. See cases cited in note 131 *supra*.

133. *Id.*

134. *Id.*

135. This proposition is analogous to the concept of "centrality," see text & notes 158-59 *infra*, used in determining whether infringement is permissible. The more central, or important, a belief is to a religion, the more infringement occurs when an act expressing that belief is limited. Text & notes 158-59 *infra*. However, an initial inquiry as to centrality must be made to determine whether there is any infringement, permissible or impermissible. See *Sherbert v. Verner*, 374 U.S. 398, 403-04 (1963); L. TRIBE, *supra* note 108, at 862-65. Centrality at this stage does not consider the importance of a belief to a religious system, but only whether the belief that an act expresses is part of the system of beliefs comprising a religion. See *id.*

must be made.¹³⁶

The statute proposed in this Note limits the number of daily hours that may be worked on behalf of a cult and the conditions under which the work may be performed.¹³⁷ Cult work often involves preaching,¹³⁸ proselytizing,¹³⁹ and the dissemination of information.¹⁴⁰ Such practices are recognized as comprising actions that are expressions of a religious belief system.¹⁴¹ Thus, the proposed statute infringes upon the exercise of religion.¹⁴² The question then becomes whether this infringement is permissible.

b. Compelling State Interest

State infringement upon any fundamental right implicitly or explicitly enumerated in the United States Constitution may be sustained only upon the state's demonstration of a compelling state interest.¹⁴³ The compelling state interest test includes a presumption that the infringement is unconstitutional.¹⁴⁴

The compelling state interest test may be contrasted with the mode of constitutional analysis applied to questions involving economic rights.¹⁴⁵ Statutes in this realm are presumed to be constitutional.¹⁴⁶

136. See text & notes 143-50 *infra*.

137. Text & notes 57-90 *supra*. See Appendix § 103.

138. *McDaniel v. Paty*, 435 U.S. 622, 626 (1978) (plurality opinion); *Turner v. Unification Church*, 473 F. Supp. 367, 370-71 (D.R.I. 1978).

139. See cases cited in note 124 *supra*.

140. See generally *Heffron v. International Soc'y for Krishna Consciousness*, 49 U.S.L.W. 4762, 4766 (1981); *Walker v. Wegner*, 477 F. Supp. 648, 652-53 (D.S.D. 1979), *aff'd*, 624 F.2d 60 (8th Cir. 1980); *Westfall v. Board of Comm'rs*, 477 F. Supp. 862, 870 (N.D. Ga. 1979).

141. See cases cited in notes 138-39 *supra*.

142. See *id.* In addition, regulation of employment has been recognized as infringing upon the free exercise of religion. See *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944); *Catholic Bishop v. NLRB*, 559 F.2d 1112, 1130 (7th Cir. 1977), *aff'd on statutory grounds*, 440 U.S. 490 (1979); *Mitchell v. Pilgrim Holiness Church*, 210 F.2d 879, 884-85 (7th Cir. 1954).

143. *Carey v. Population Services Int'l*, 431 U.S. 678, 685 (1977); *Roe v. Wade*, 410 U.S. 113, 155 (1973); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

144. *Harris v. McRae*, 448 U.S. 297, 312 (1980); *City of Mobile v. Bolden*, 446 U.S. 55, 76 (1980); *San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973).

145. It should be noted that from 1897 to 1937 the United States utilized a stringent form of review when reviewing state economic regulation. *L. TRIBE, supra* note 108, at 434-42. *Lochner v. New York*, 198 U.S. 45 (1905), is the principal case from this era. In *Lochner*, the Supreme Court invalidated a New York statute that limited the work week of bakery employees to a maximum of 60 hours. *Id.* at 64. The Court struck down the statute because the regulation did not relate "in any real and substantial degree" to its objective (the health of employees). *Id.* Compare the standard applied in *Lochner* with the standard applied to modern economic regulation, discussed at text & notes 146-47 *infra*. For a general comparison of the historical and modern standards of review applied to economic regulation, see *L. TRIBE, supra* note 108, at 427.

In addition, it should be noted that since *Lochner* the Supreme Court has accepted the proposition that excessive work may harm an employee's health. *Bunting v. Oregon*, 243 U.S. 426, 438 (1917) (upholding a ten hour maximum work day for manufacturing employees); *Muller v. Oregon*, 208 U.S. 412, 422 (1908) (upholding a ten hour work day for women). For a discussion of the necessity of a ten hour maximum work day, see text & notes 29-48 *supra*.

146. *City of Mobile v. Bolden*, 446 U.S. 55, 76 n.23 (1980); *Barnett v. West Va. Bd. of Educ.*, 319 U.S. 624, 639 (1943).

The burden is on the individual to demonstrate that there is no rational connection between the state's action and its interest.¹⁴⁷ When a fundamental right is infringed upon, however, the state must demonstrate that the individual's exercise of the right results in a grave and immediate danger to the state's interest.¹⁴⁸

The right to the free exercise of religion is a fundamental right.¹⁴⁹ The determination of a compelling state interest in the free exercise context involves a balancing of the state's interest against the individual's interest.¹⁵⁰ This balancing is best exemplified by the United States Supreme Court in *Wisconsin v. Yoder*.¹⁵¹

In *Yoder*, the Supreme Court considered the application of a state compulsory education statute to children of members of the Amish Church.¹⁵² The Wisconsin statute required a child to remain in school until the age of sixteen.¹⁵³ The Amish wished to withdraw their children from public school at the completion of the eighth grade.¹⁵⁴ They claimed that public education interfered with Amish religious teachings that de-emphasize intellectual training and teach the avoidance of materialistic goals.¹⁵⁵

The Court recognized that a state's interest in providing public education is of the highest order.¹⁵⁶ The Court also stated that, regardless of how highly a state's interest is ranked, the interest must be submitted to a balancing process to determine whether it is compelling when the free exercise of religion is impinged.¹⁵⁷

In applying the balancing process, the *Yoder* Court considered several factors in addition to the importance of the state's interest. First, the Court found the interest in avoiding public education central to the Amish faith.¹⁵⁸ Three hundred years of history demonstrated the

147. *Friedman v. Rogers*, 440 U.S. 1, 17-18 (1979); *Duke Power Co. v. Carolina Environmental Study*, 438 U.S. 59, 93 (1978); *West Va. Bd. of Educ. v. Barnett*, 319 U.S. 624, 639 (1943).

148. *Roe v. Wade*, 410 U.S. 113, 155 (1973); *West Va. Bd. of Educ. v. Barnett*, 319 U.S. 624, 639 (1943).

149. *McDaniel v. Paty*, 435 U.S. 618, 627-68 (1978) (plurality opinion); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963); *West Va. Bd. of Educ. v. Barnett*, 319 U.S. 624, 639 (1943).

150. *McDaniel v. Paty*, 435 U.S. 618, 628 n.8 (1978) (plurality opinion); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *Sherbert v. Verner*, 374 U.S. 398, 408-09 (1963). The *Yoder* Court explicitly stated that balancing is involved in determining whether a state has a compelling interest in infringing upon the free exercise of religion. "The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." 406 U.S. at 215.

151. 406 U.S. 205 (1972).

152. *Id.* at 207-09.

153. *Id.*

154. *Id.*

155. *Id.* at 204.

156. *Id.* at 213.

157. *Id.* at 214.

158. *Id.* at 215.

vital role that the belief occupied in the Amish religion.¹⁵⁹ Second, the Court found that enforcement of the statute would greatly infringe and perhaps destroy the free exercise of the Amish religion.¹⁶⁰ Third, the Court considered the extent to which enforcement of the statute would effectuate the state's interest.¹⁶¹ The Court found that one or two years of additional public education would do little to serve the state's interest.¹⁶² Finally, the Court considered the impact that an exemption would have upon the state's interest¹⁶³ and found that the Amish provided an adequate alternative to public education through continuing informal education.¹⁶⁴ In light of the minimal intrusion an exemption would cause to the state's interests, the state had no compelling interest in requiring public education for Amish children.¹⁶⁵

Two state court cases provide greater illustration of the balancing process in the free exercise context. In *People v. Woody*,¹⁶⁶ the California Supreme Court considered whether California could constitutionally prohibit Navajo Indians from using the drug peyote in their religious ceremonies.¹⁶⁷ In considering the possible infringement upon religion, the court found that the use of peyote was central to the Native American religion and that prohibition of its use would result in a "virtual inhibition" of the practice of the religion.¹⁶⁸ Furthermore, the *Woody* court found that the use of peyote represented only a slight danger to the state.¹⁶⁹ This conclusion was based on the finding that the drug caused no serious or permanent ill effects in its users.¹⁷⁰ The court, then, concluded that the scale of competing values tipped in

159. *Id.* at 235-36.

160. *Id.*

161. *Id.* at 221.

162. *Id.* at 222.

163. *Id.* at 222-27.

164. *Id.* at 228-29.

165. *Id.* at 235-36. The Court stated that few other religious groups could have successfully challenged the compulsory education statute. *Id.* This indicates the extent to which the balancing process is dependent upon the facts of each case.

166. 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964); *accord*, *State v. Whittingham*, 19 Ariz. App. 27, 28, 504 P.2d 950, 951 (1973), *cert. denied*, 417 U.S. 946 (1974) (use of peyote by the Native American Church is constitutionally protected). *But see* *Kennedy v. Bureau of Narcotics and Dangerous Drugs*, 459 F.2d 415, 416 (9th Cir.), *cert. denied*, 409 U.S. 1115 (1972) (no constitutional protection for the use of peyote by religious group); *State v. Soto*, 537 P.2d 142, 144 (Or. App. 1975) (use of peyote by member of Native American Church not protected).

167. *People v. Woody*, 61 Cal. 2d at 717-18, 394 P.2d at 814-15, 40 Cal. Rptr. at 70-71.

168. *Id.* at 720, 394 P.2d at 818, 40 Cal. Rptr. at 74.

169. *Id.* at 727, 394 P.2d at 821, 40 Cal. Rptr. at 77. The *Woody* court distinguished the use of peyote from the practice of polygamy at issue in *United States v. Reynolds*, 98 U.S. 145 (1876). 61 Cal. 2d at 725, 394 P.2d at 820, 40 Cal. Rptr. at 70. The *Woody* court stated that polygamy represents a threat to democratic institutions, while the use of peyote presents no similar threat. *Id.*

170. *Id.* at 722-23, 394 P.2d at 818, 40 Cal. Rptr. at 68. The court found that peyote was not used in place of medical care, that its use did not lead to the use of other drugs, that peyote was not used by children, and that its use produced no permanent deleterious effects. *Id.*

favor of constitutional protection.¹⁷¹

*State ex rel. Swann v. Pack*¹⁷² dealt with the use of poisonous snakes and strychnine in religious ceremonies by the Holiness Church of God in Jesus Name.¹⁷³ As in *Woody*, the practice was found to be central to the group's religious beliefs.¹⁷⁴ The distinction between *Swann* and *Woody*, however, lies in the nature of the state's interest. In *Swann*, the Tennessee Supreme Court found that the questioned practices produced serious health impairment in participants.¹⁷⁵ Such impairment, the court stated, endangers "paramount public interests."¹⁷⁶ Thus, any exemption for religious groups from the proscription of such practices would have seriously undercut the state's interest.¹⁷⁷ Consequently, the court found that, while the *Yoder* balance should be "weighted in favor of free exercise,"¹⁷⁸ the state had a compelling interest in proscribing the use of poisonous snakes and strychnine to maintain a "strong, healthy, robust" citizenry.¹⁷⁹

A comparison of the results obtained in *Yoder*, *Swann*, and *Woody* with the instant situation indicates that regulation under the proposed statute should be upheld. First, unlike the situation in *Woody*, cult employment practices present a serious health threat to cult members.¹⁸⁰ In addition, preventing the impairment of its citizens' health is at the apex of a state's interest.¹⁸¹ Second, while this threat is admittedly not as great as the threat presented in *Swann*, the state's interest need not tip the scale as heavily in favor of regulation. A religious organization's interest in excessive employment cannot be considered central to its tenets. Excessive employment is only incidental to the recognized religious interest in reasonable employment of a group's members in the distribution of literature, proselytizing, and other religious activ-

171. *Id.*

172. 527 S.W.2d 99 (Tenn. 1975).

173. *Id.* at 103.

174. *Id.*

175. *Id.*

176. *Id.* at 111.

177. *See id.*

178. *Id.*

179. *Id.* at 113.

180. See text & notes 23-56 *supra*.

181. *State ex rel. Swann v. Pack*, 527 S.W.2d 99, 111 (Tenn. 1975), *cert. denied*, 424 U.S. 954 (1976); see *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1964).

In *Prince*, the United States Supreme Court considered the permissible limitations of state infringement upon religious employment. The appellant had been convicted under Massachusetts child labor statutes for employing her niece in the distribution of religious literature. *Id.* at 159. She contended that the application of the statute violated her right to free exercise of religion. *Id.* The Court concluded that the state had a compelling interest in prohibiting the exposure of children to the infirmities involved in labor in the community. *Id.* at 166-67. The *Prince* decision, however, was limited in application to children. *Id.* at 169. The Court stated in dicta that the result would be different if the statute were applied to adults. *Id.* Nonetheless, *Prince* suggests that there are situations in which religious employment can be regulated.

ity.¹⁸² For the same reason, enforcement of the statute will not greatly infringe upon religious practice. While the state's interests in *Swann* and *Woody* could only be effectuated by complete prohibition of the practices in question,¹⁸³ employment practices need not be eliminated, but only reasonably restricted. Finally, an exemption under the proposed statute would greatly undercut the state's interest. The statute is proposed because neither a statutory nor a common law remedy currently limits the hours of employment of non-compensated employees.¹⁸⁴ Members of religious organizations comprise a large portion of non-compensated employees.¹⁸⁵ Thus, a statutory exemption for religious organizations would deny many cult members needed health protection.

In light of the preceding discussion, a state should have a compelling interest in regulating cult employment practices.¹⁸⁶ It must now be determined whether the proposed statute represents the least restrictive alternative for effectuating this compelling state interest.¹⁸⁷

c. Least Restrictive Alternative

Even when a state has a compelling interest in legislation that impinges on the free exercise of religion, the legislation is invalid if it imposes greater restriction on the exercise of religion than necessary to effectuate the state's interest.¹⁸⁸ Thus, legislation will be invalidated under the compelling state interest test if it is not the least restrictive

182. See text & notes 125-27 *supra*.

183. *People v. Woody*, 61 Cal. 2d 716, 717-18, 394 P.2d 813, 814-15, 40 Cal. Rptr. 69, 70-71 (1964); *State ex rel. Swann v. Pack*, 527 S.W.2d 99, 113 (Tenn. 1975), *cert. denied*, 424 U.S. 954 (1976).

184. See text & notes 57-62 *supra*.

185. Current estimates of the number of Americans who belong to religious cults range from 300,000 to 3 million. Thomas, *Practices of Cults Receiving New Scrutiny*, NEW YORK TIMES, Jan. 21, 1979, at 52, col. 1.

186. The *Yoder* balancing process has been utilized in other cases dealing with religious employment. For example, *Catholic Bishop v. NLRB*, 559 F.2d 1112, 1114 (7th Cir. 1971), *aff'd on statutory grounds*, 440 U.S. 490 (1979), concerned the unionization of a parochial school under the National Labor Relations Act. The court concluded that unionization would destroy the central role that the schools played in the church's mission. *Id.* at 1125. Nonenforcement, however, would not greatly injure the state. *See id.* Consequently, the court concluded that unionization would impermissibly impinge upon the free exercise of religion. *Id.* at 1126. See text & notes 240-61 *infra*.

Mitchell v. Pilgrim Holiness Church Corp., 210 F.2d 879 (7th Cir.), *cert. denied*, 374 U.S. 1013 (1954), a case from the same circuit, involved application of the Fair Labor Standards Act to a religious corporation. The *Mitchell* court found that maintenance of a minimum wage was necessary to the health and well-being of the state's citizens. *See id.* at 884. In addition, the court did not find that enforcement would jeopardize the central beliefs of the religion. *See id.* at 885. Consequently, application of the statute was held not to infringe upon the free exercise of religion. *Id.*

187. See text & note 112 *supra*.

188. *Wisconsin v. Yoder*, 406 U.S. 205, 235-36 (1972); *Sherbert v. Verner*, 374 U.S. 398, 407-09 (1963); *Cantwell v. Connecticut*, 310 U.S. 296, 306-07 (1940) (statute requiring religious groups to obtain a certificate prior to soliciting religious contributions was unconstitutional because it was not the least restrictive alternative available which would effectuate the state's interest).

alternative available to the state.¹⁸⁹ In determining whether an alternative is least restrictive, only those alternatives which are equally or substantially as effective should be considered.¹⁹⁰

Two types of remedial measures are available as alternatives to regulating the cult-member relationship.¹⁹¹ The first type is the pre-induction remedy.¹⁹² Pre-induction remedies are designed to provide better information to new cult initiates so as to reduce the number of unwary individuals who enter religious cults.¹⁹³ The practice sought to be regulated through the proposed statute, however, involves the employment relationship between cults and their members. Such a relationship assumes that the member employed has already been inducted into the cult. Thus, effective alternatives to the proposed statute are limited to the second type of remedy—the post-induction remedy.¹⁹⁴

The first alternative to be considered consists of existing labor regulations. As previously mentioned, existing statutes do not provide an effective remedy for preventing the employment abuses discussed in this Note.¹⁹⁵ First, federal statutes impose no absolute hourly limitations on employment.¹⁹⁶ Rather, the statutes merely specify the necessary compensation for work exceeding forty hours per week.¹⁹⁷ These statutes, therefore, impose no restrictions on cult employment since such employment is typically performed without compensation.¹⁹⁸ Second, state statutes provide no remedy. This is because state statutes

189. See cases cited note 188 *supra*. Only those alternatives which are the *least* restrictive, not simply *less* restrictive, will survive constitutional challenge. See *Dunn v. Blumstein*, 405 U.S. 330, 360 (1972) (30-day waiting period to establish residency for purposes of voting held invalid because it was not the least restrictive alternative available); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626-27 (1969) (statute requiring voters in school elections to own or lease property in the school district was invalid because not the least restrictive alternative available). *But see American Party v. White*, 415 U.S. 767, 781 (1974) (ballot requirement was valid because no significantly less burdensome alternative was available). See generally Spece, *Justifying Invigorated Scrutiny and the Least Restrictive Alternative as a Superior Form of Intermediate Review: Civil Commitment and the Right to Treatment as a Case Study*, 21 ARIZ. L. REV. 1049, 1055 (1980). Professor Spece suggests that the better rule requires the state to use the *least* restrictive alternative because any standard requiring the use of less effective alternatives would lead to abuse. *Id.* at 1055 n.31.

190. Spece, *supra* note 189, at 1055.

191. See Delgado, *supra* note 23, at 73-97.

192. *Id.* at 73-78.

193. *Id.* Professor Delgado lists several pre-induction remedies: required identification by proselytizers of their cult affiliation; required cooling-off periods between the decision to join and the actual joining; public education; prohibition of proselytizing by certain groups; and pre-induction statements by youths of a desire to be rescued should they join a cult. *Id.* These statements give the families and friends of cult members the authority to conduct post-induction remedies. *Id.*

194. See *id.* at 78-97. Professor Delgado lists as post-induction remedies: deprogramming; conservatorships; contract based remedies; and remedies against cults and cult leaders for torts and criminal violations. *Id.*

195. See text & notes 57-65 *supra*.

196. See text & note 58 *supra*.

197. See text & notes 59, 60 *supra*.

198. *Id.*

either provide no absolute hourly maximum¹⁹⁹ or because the hourly maximums prescribed do not apply to religious employment.²⁰⁰

A second possible alternative that warrants consideration is self-help employed by friends and relatives of cult members. Deprogramming is the primary method of self-help used.²⁰¹ Deprogramming first involves a forced extraction of a cult member from a cult.²⁰² The member is then "deprogrammed" through encounter therapy until he rejects the tenets of the cult and embraces life outside the cult.²⁰³ Many deprogrammings have been conducted,²⁰⁴ and most have been successful in permanently removing cult members from cult practices.²⁰⁵ Deprogramming, therefore, provides an effective alternative to the proposed statute.

Comparison of deprogramming with the proposed statute, however, reveals a problem with the deprogramming alternative. The statute only restricts cult employment. Enforcement of the statute does not preclude employment limited to a reasonable number of hours. In addition, enforcement of the statute does not prevent a cult member from engaging in the religious and social activities of a cult. Deprogramming, however, entails a physical removal of the member from the cult.²⁰⁶ Thus, during deprogramming, the cult member is precluded from engaging in any employment, social, or religious activity with other cult members.²⁰⁷

The drastic nature of deprogramming has led to constitutional

199. See text & notes 61-65 *supra*.

200. See text & notes 62-65 *supra* (Arizona statutes); CAL. LABOR CODE § 510 (1971) (8 hours per day is maximum employment unless otherwise agreed by the parties); N. Y. LAB. LAW art. 5 § 160(3) (McKinney 1965) (8 hours per day is maximum employment unless otherwise agreed by the parties).

Although the California and New York statutes mandate an eight hour maximum unless the employer and employee agree otherwise, cult members would often not be competent to exercise their interest in not executing such an agreement. See text & notes 50-55 *supra*. Thus, these statutes would not provide an effective alternative to the proposed statute.

201. See Delgado, *supra* note 23, at 78-88. For a general discussion of deprogramming methods and success rates, see T. PATRICK & T. DULACK, LET OUR CHILDREN GO! (1966).

202. Delgado, *supra* note 23, at 79-80.

203. *Id.*

204. T. PATRICK & T. DULACK, *supra* note 201, at 37. Patrick claims to have conducted over 1,000 deprogrammings. *Id.*

205. Delgado, *supra* note 23, at 85.

206. See text & notes 201-03 *supra*.

207. The drastic nature of deprogramming has led many to criticize it as an attack on religion, a promotion of violence, and nothing more than a "second brainwashing." See Delgado, *supra* note 23, at 81. Deprogramming has even led to prosecution of deprogrammers. *People v. Patrick*, 541 P.2d 320, 323 (Colo. App. 1975) (conviction of well-known deprogrammer Ted Patrick for false imprisonment upheld); see *Cooper v. Molko*, 512 F. Supp. 563, 565-66 (N.D. Cal. 1981) (jurisdiction sustained in suit against deprogrammer for violation of cult members civil rights). *But see United States v. Patrick*, 532 F.2d 142, 145 (9th Cir. 1976) (deprogrammer acquitted of violating federal kidnapping laws); *Weiss v. Patrick*, 453 F. Supp. 717, 721 (D.R.I. 1978) (complaint dismissed).

challenge. For example, in *Katz v. Superior Court*²⁰⁸ the parents of five cult members were appointed as the temporary conservators of their children for the purpose of deprogramming them.²⁰⁹ The cult members petitioned for prohibition of the deprogramming.²¹⁰ The California Court of Appeals held that, absent a demonstration of the incompetency of the cult members, the establishment of the conservatorship violated the cult members' right to the free exercise of religion.²¹¹

Deprogramming thus represents a serious infringement upon the activities of cult members. In addition, when aided by state-appointed conservatorship, deprogramming has been found to unconstitutionally restrict the free exercise of religion. Deprogramming as an alternative is thus not less restrictive than the proposed statute.

Finally, the cult member may seek a private remedy against the cult.²¹² A primary private remedy lies in tort.²¹³ Causes of action arising from the employment relationship might include intentional infliction of emotional distress,²¹⁴ alienation of parents' or friends' affection,²¹⁵ false imprisonment,²¹⁶ assault or battery,²¹⁷ fraud,²¹⁸ and actions under federal civil rights statutes.²¹⁹ There are, however, inherent limitations to any remedy that depends upon the assertion of a claim against a cult by one of its members. As discussed previously, the employment and other practices of a cult are often part of a psychological submission process.²²⁰ Individuals subjected to this process often suffer impairment of their ability to make decisions on their own behalf.²²¹ Thus, the individuals who suffer the harm are unlikely to bring actions on their own behalf, and private remedies will often only be effective when they can be asserted by third parties.²²²

208. 73 Cal. App. 3d 952, 141 Cal. Rptr. 234 (1977).

209. *Id.* at 956, 141 Cal. Rptr. at 235.

210. *Id.* at 956-57, 141 Cal. Rptr. at 235.

211. *Id.* at 988-89, 141 Cal. Rptr. at 256. *But see* Peterson v. Sorlien, 299 N.W.2d 123, 130 (Minn. 1980) (deprogramming did not violate cult members' right to the free exercise of religion where there was no testimony as to impingement of religious belief).

212. *See* Delgado, *supra* note 23, at 92-97 (discussion of the remedies available to a cult member).

213. *Id.* at 92.

214. *See* Schupp v. Unification Church, 435 F. Supp. 603, 604-05 (D. Vt. 1977) (cult member suffered emotional distress due to prosecution for failure to pay taxes).

215. *Id.*

216. Delgado, *supra* note 23, at 93 n.485. Professor Delgado cites an action filed on behalf of a 13-year-old girl by her parents. *Id.*

217. Schupp v. Unification Church, 435 F. Supp. 603, 604-05 (D. Vt. 1977) (member was "under constant threats and fear").

218. *See* United States v. Ballard, 322 U.S. 78, 84 (1944) (mail fraud).

219. Schupp v. Unification Church, 435 F. Supp. 603, 604 (1977) (18 U.S.C. § 1581 (1966) (peonage); *id.* § 1383 (slavery); *id.* § 2421 (1970) (white slavery)).

220. *See* text & note 50 *supra*.

221. *See* Delgado, *supra* note 23, at 21-25. Professor Delgado states that the common result of the cult indoctrination process is an impairment of autonomy. *Id.* at 21.

222. Parents may, however, in appropriate cases, sue for damages to the parent-child relation-

This limitation on the effectiveness of private remedies for cult members is demonstrated by *Schupp v. Unification Church*.²²³ In *Schupp*, the parents of a cult member sought to assert claims on her behalf.²²⁴ The California Court of Appeals stated that third parties have standing to assert the claims of an adult only when the adult is adjudged incompetent.²²⁵ The court held, however, that an adult, despite the suggestions of her parents, is presumed competent and may not be compelled to undergo an examination to determine competency, especially when she has disclaimed any interest in the proceedings.²²⁶ Consequently, the court dismissed the parents' claim.²²⁷

The proposed statute avoids the problems posed by *Schupp* because it contains a statutory grant of standing to third parties.²²⁸ Consequently, the statute constitutes an effective alternative to private tort actions.

Criminal remedies comprise the other private alternative available to cult members.²²⁹ Such remedies include actions for unlawful imprisonment,²³⁰ kidnapping,²³¹ and slavery.²³² Religion does not immunize one from prosecution under criminal statutes.²³³ Thus, criminal remedies should provide an effective alternative to the proposed statute. However, several factors limit the effectiveness of criminal remedies. First, punishment under the statutes may be severe. Thus, prosecution may be possible only in the most extreme cases.²³⁴ Second, prosecution of numerous cases could impose a severe burden on the criminal justice system.²³⁵ Thus, enforcement would not be practicable.

The proposed statute avoids the problems associated with private criminal remedies. The remedies provided in the statute can be quite

ship. See *Schupp v. Unification Church*, 435 F. Supp. 603, 604-05 (D. Vt. 1977); N.Y. TIMES, May 5, 1976, at 82, col. 2.

223. 435 F. Supp. 603 (D. Vt. 1977).

224. *Id.* at 604.

225. *Id.* at 605.

226. *Id.* Cf. *Gilmore v. Utah*, 429 U.S. 1012, 1014 (Burger, C.J., and Powell, J., concurring) (1976) (parent could not raise claim to stay execution of child absent demonstration that child was unable to assert claim on own behalf).

227. 435 F. Supp. at 610.

228. See Appendix § 105(B).

229. See generally Delgado, *supra* note 23, at 95-97.

230. ARIZ. REV. STAT. ANN. § 13-1303 (1978); MODEL PENAL CODE § 212.3 (Proposed Official Draft 1962).

231. ARIZ. REV. STAT. ANN. § 13-1304 (1978); MODEL PENAL CODE § 212.1 (Proposed Official Draft 1962).

232. 18 U.S.C. §§ 1581, 1583-85, 2421 (1970).

233. See *Chatwin v. United States*, 326 U.S. 455, 460 (1946) (religious beliefs do not prevent prosecution for kidnapping).

234. Delgado, *supra* note 23, at 97. Professor Delgado states that it is "likely that successful prosecution will only be feasible in cases where the abuse is extreme and the harm clear-cut." *Id.* See *People v. Murphy*, 98 Misc. 2d 235, 243, 413 N.Y.S.2d 540, 545-46 (1977) (insufficient evidence to sustain prosecution for unlawful imprisonment of cult member).

235. Delgado, *supra* note 23, at 97.

moderate.²³⁶ Thus, utilization of the statute need not be limited only to extreme cases. In addition, the statute is designed as part of an administrative system.²³⁷ Streamlined procedures will therefore allow the statute to be invoked when needed, without creating an unmanageable burden for the criminal justice system.²³⁸

The proposed statute, then, provides a more effective remedy than is available under present statutes or private remedies. Furthermore, the statute is a less restrictive alternative than deprogramming. The statute has been carefully drafted so as to impose the least restriction on religion possible and yet effectively achieve the state's interest. The grant of third party standing, for example, reduces the need for state surveillance of religious cult practices. The remedies under the statute are designed to allow infringement upon employment practices only to an extent proportionate to the state interest in restricting employment practices.²³⁹ The proposed statute is thus the least restrictive of the effective alternatives available to a state for preventing the injurious consequences of cult employment practices.

Excessive Entanglement

The preceding sections analyze the proposed statute pursuant to the traditional indicia of constitutionality under the free exercise clause. An additional test of constitutionality, however, is emerging from recent court decisions. This test is known as the "excessive entanglement" doctrine.²⁴⁰

The excessive entanglement doctrine requires that governmental intrusion upon the practice of religion be minimized.²⁴¹ The test was first formulated as an independent measure of the constitutionality of state action in cases arising under the establishment clause.²⁴² Recent United States Supreme Court decisions, however, have transplanted the doctrine to the free exercise context.²⁴³ In this context, the doctrine

236. See text & notes 86-94 *supra* (maximum penalty of a \$300 fine and/or injunction).

237. See text & notes 82, 83 *supra*.

238. See Delgado, *supra* note 23, at 97. Professor Delgado refers to conservatorship and guardianship proceedings as less onerous than criminal remedies because they "utilize streamlined procedures and nonjury trials, and . . . rely on private parties to supply much of the motivating power and energy." *Id.*

239. See Appendix § 105(D), (E); text & notes 86-99 *supra*.

240. *E.g.*, Hunt v. McNair, 413 U.S. 734 (1973); Lemon v. Kurtzman, 403 U.S. 602 (1971); Waltz v. Tax Comm'n, 397 U.S. 664 (1970). See generally L. TRIBE, *supra* note 108, § 14-12; Ripple, *The Entanglement Test of the Religion Clauses—A Ten Year Assessment*, 27 U.C.L.A. L. REV. 1195 (1980).

241. See cases cited in note 240 *supra*; L. TRIBE, *supra* note 108, at 865.

242. See cases cited in note 240 *supra*.

243. See NLRB v. Catholic Bishop, 440 U.S. 490, 502 (1979); *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (plurality opinion) (Brennan, J., concurring).

In *McDaniel*, although the Court did not directly address the excessive entanglement doctrine, Justice Brennan in a concurring opinion saw the importance of balancing establishment

requires that there be a "prophylactic separation of the religious and civil elements of society."²⁴⁴

The principal illustration of the excessive entanglement doctrine, as applied to free exercise issues arising in cases dealing with religious employment, is *NLRB v. Catholic Bishop*.²⁴⁵ In *Catholic Bishop*, the NLRB certified unions as bargaining agents for teachers.²⁴⁶ A group of schools operated by the Catholic Bishop of Chicago refused to bargain with the unions.²⁴⁷ The NLRB issued a cease-and-desist order against the schools.²⁴⁸ The schools appealed the order, alleging that the NLRB was without jurisdiction to regulate religious employees.²⁴⁹ Although the Supreme Court recognized the implication of the excessive entanglement doctrine,²⁵⁰ it avoided the constitutional issue and ruled that the statutory grant of jurisdiction to the NLRB did not encompass parochial schools.²⁵¹ The federal court of appeals, however, did reach the question whether the exercise of NLRB jurisdiction violated the requirement that government avoid excessive entanglement with religion.²⁵² Thus, the court of appeals opinion will be used for discussion purposes here.

clause interests against free exercise interests, thus minimizing government interference. *Id.*; see Ripple, *supra* note 240, at 1211-12.

In *Catholic Bishop* the Court more directly recognized the applicability of the excessive entanglement doctrine to free exercise issues, but avoided the constitutional questions presented and resolved the case pursuant to interpretation of the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976). 440 U.S. at 490.

244. Ripple, *supra* note 240, at 1214. While the entanglement test is postulated as an independent measure of constitutionality under the free exercise clause, *id.*, a close look reveals that the test may simply be an alternative formulation of the test presented in *Wisconsin v. Yoder*. See text & notes 151-65 *supra*. Under a *Yoder* analysis, the more closely the government becomes involved in the activities of a religious organization, the greater the infringement upon exercise of religion. See *id.* Further, the greater the infringement upon the exercise of religion, the greater the interest the government must demonstrate to justify its action. *Id.* The excessive entanglement doctrine utilizes the same analysis. See *Catholic Bishop v. NLRB*, 559 F.2d 1112 (7th Cir. 1977), *aff'd*, 440 U.S. 490 (1979); L. TRIBE, *supra* note 108, at 865-880; Ripple, *supra* note 240, at 1210-14.

245. 440 U.S. 490 (1979).

246. *Id.* at 493-94.

247. *Id.* at 494.

248. *Id.* at 494-95.

249. *Id.* at 495.

250. *Id.* at 502; see note 243 *supra*.

251. 440 U.S. at 506-07. The Court held that in the absence of a clear expression of congressional intent, the National Labor Relations Act (NLRA) would not be construed to extend NLRB jurisdiction to parochial schools. *Id.* The Court based this finding upon an amendment to the NLRA exempting employees of religious health care institutions. 29 U.S.C. § 169 (1976). Justices Brennan, White, Marshall, and Blackmun, however, stated in dissent that the majority had pressed "avoidance of a difficulty . . . to the point of disingenuous evasion." *Id.* at 517-18, *quoting* Moore Ice Cream Co. v. Rose, 289 U.S. 373, 379 (1933). The dissenters contended that the NLRB's statutory jurisdiction did encompass parochial schools. 440 U.S. at 518 (Brennan, J., dissenting). This conclusion was based on two findings. First, the NLRA contains eight exceptions from its application, and no exception applies to religious institutions. *Id.* at 511. Second, an attempt was made to except religious institutions from the NLRB's jurisdiction, but the bill containing the exception was defeated in the United States Senate. *Id.* at 512-14.

252. 559 F.2d at 1118-30.

In determining whether NLRB jurisdiction over parochial schools created excessive governmental entanglement with religion, the court of appeals considered several factors. First, the court found that certification of a union would interfere with the religious character of the affected schools.²⁵³ This would occur because unionization would, contrary to church doctrine, preclude the Bishop from exercising sole authority over church decisions.²⁵⁴ Rather, the Bishop would be required to defer employment matters to lay faculty representatives.²⁵⁵ Second, the court found that this limitation of the Bishop's authority would "chill" the religious mission of parochial schools.²⁵⁶ Finally, the court concluded that the imposition of collective bargaining would involve the Bishop in governmentally-defined tasks.²⁵⁷ Consequently, the court found the exercise of NLRB jurisdiction to violate the free exercise clause.²⁵⁸

The proposed statute poses problems similar to those faced by the federal court of appeals in *Catholic Bishop*. In limiting the number of hours to be worked by cult employees, the statute would place limitations on decisions of cult leaders. In addition, enforcement would involve at least minimal surveillance of cult activities. Enactment of the statute could consequently entangle state governments in religious matters.

There are several factors, however, which distinguish the proposed statute from the imposition of collective bargaining upon religious institutions. The first distinction concerns the degree of infringement upon religious decisionmaking. The court of appeals in *Catholic Bishop* expressed great concern regarding the possible inhibition of decisions based on religious doctrine.²⁵⁹ Collective bargaining would allow a federal board to invalidate dismissals of teachers whose employment was terminated because of the expression of views con-

253. *Id.* at 1123.

254. *Id.* The court stated:

Once a bargaining agent has the weight of statutory certification behind it, a familiar process comes into play. First, the matter of salaries is linked to the matter of workload; workload is then related directly to class size, class size to range of offerings, and range of offerings to curricular policy. Dispute over class size may also lead to bargaining over admissions policies. This transmutation of academic policy into employment terms is not inevitable, but it is quite likely to occur.

Id., quoting Brown, *Collective Bargaining in Higher Education*, 67 MICH. L. REV. 1067, 1075 (1969).

255. 559 F.2d at 1123.

256. *Id.* at 1124. As an example of such a "chill," the court cited a situation in which a teacher advocated a union and later advocated contraception. *Id.* The Bishop would be confronted with rightfully firing a heretical employee and risking an unfair labor practice suit, or forgoing his right to discharge the employee. *Id.*

257. *Id.* at 1128. The Bishop would be required to act according to NLRB guidelines. *Id.*

258. *Id.* at 1125.

259. *Id.* at 1130-31.

trary to church doctrine.²⁶⁰ There is no similar interference associated with the proposed statute. The statute would not affect decisions concerning the initiation or termination of employment or the views expressed during employment. Rather, the expression of such views in an employment setting would be reduced to a daily duration compatible with the health of employees. In addition, while the *Catholic Bishop* court felt decisions concerning employee bargaining were crucial to the religious nature of parochial schools,²⁶¹ there is little evidence that the work schedules of cult members are the result of crucial decisions concerning cult doctrines.²⁶²

Two other distinctions are derived from the *Catholic Bishop* opinion. First, the court recognized that there are inevitable areas in which the state will become involved with religious groups.²⁶³ Examples presented by the court are fire inspections, building and zoning regulations, and compulsory school attendance requirements.²⁶⁴ Such regulations are permissible, the court stated, because they have no clear inhibitory effect upon the relationships among members of religious groups.²⁶⁵ The proposed statute falls into this category of regulations. Limiting the amount of work to be performed by a cult employee should not affect member-member relationships. Although work hours will be shortened under the proposed statute, cult members remain free, during both working and non-working hours, to worship and socialize with other members as they choose.

The second distinction recognized by the *Catholic Bishop* court concerns whether the burdens imposed by regulation affect religious and secular institutions alike. For example, the court noted that public schools are exempt from NLRB regulation.²⁶⁶ Thus, the burdens of collective bargaining would be imposed only upon parochial schools.²⁶⁷ The court distinguished this type of regulation from regulation which affects all institutions equally.²⁶⁸ While the latter may be permissible, the former are not.²⁶⁹ The proposed statute avoids the disparate impact

260. *Id.* at 1124.

261. *Id.* at 1130. The court felt it essential that religious educational institutions be free from any external interference in selecting teachers.

262. Rather, long employment hours and poor working conditions appear to be motivated by a lack of concern for employees' welfare, the desire to accumulate wealth, and perhaps a desire to submit employees to a psychological submission process. See text & notes 23-28 *supra*.

263. 559 F.2d at 1124.

264. *Id.*

265. *Id.*

266. *Id.* at 1124-25; 29 U.S.C. § 152(2) (1976).

267. 559 F.2d at 1124. As examples of governmental action that affects parochial and secular institutions equally, the court cited *Tilton v. Richardson*, 403 U.S. 672, 688-89 (1971) (federal aid applied equally to all institutions of higher learning) and *Waltz v. Tax Comm'r*, 397 U.S. 664, 676 (1970) (tax exemptions applied to secular and parochial nonprofit institutions).

268. 559 F.2d at 1124-25.

269. *Id.*

of the imposition of collective bargaining. The statute expressly applies to all employers, regardless of any affiliation with religious institutions.²⁷⁰

The proposed statute thus avoids the problems discovered in *Catholic Bishop* that may be associated with labor legislation in a religious context. While the statute will foster some governmental entanglement with religious organizations, that association should be permissible.

Conclusion

The 1978 murder of five persons and the suicide of nine hundred others in Jonestown, Guyana, focused the attention of the world upon the dangers associated with religious cults. One aspect of cult practice—the employment of its members in solicitation and proselytizing—underlies many of these dangers. Cult employment is characterized by excessive working hours and deprivation of food, sleep, and other necessities. It is established that these practices cause severe psychological and physiological harm to cult members and function as part of a psychological submission process that prevents cult members from extracting themselves from this damaging environment. States have a compelling interest in regulating the practices that produce these results. The proposed statute is the least restrictive alternative for accomplishing this goal and does so without excessively entangling state governments with religious practices.

270. See text & notes 66-68 *supra*.

Appendix

PROPOSED STATUTE

§ 101. Purposes

This state recognizes that it has a compelling interest in preventing the physical and mental harm caused by long working hours and the deprivation of an employee's food, clothing, shelter, sleep, and health care during compensable and non-compensable employment. Pursuant to this interest, this statute regulates the relationship between employers and employees without regard to whether compensation is either anticipated or received by an employee.

§ 102. Definitions

- A. "Employee" means any person subject to the direction and control of one for whom the employee performs services, including members of religious organizations and cults.
- B. "Employer" means a person who exercises direction and control over another person from whom he receives services, including religious organizations and cults.

§ 103. Conditions of Employment

- A. No employee shall work more than 10 hours in any 24-hour period for an employer.
- B. No employer shall condition an employee's receipt of food, clothing, shelter, sleep, or necessary health care upon the completion of work assignments.
- C. Exception: § 103(A) shall not apply in the case of emergency, casualty, or natural disaster, where life or property are in imminent danger and the employee's services directly relate to the aid of those injured or threatened by such emergency.

§ 104. Violations

- A. "Serious violation" means a violation of § 103 that produces a substantial probability of serious physical harm to an employee. The determination whether an act produces a "substantial probability of serious physical harm" shall be made in the first instance by the Industrial Commission pursuant to § 105(C). Factors to be considered by the Industrial Commission shall include, but shall not be limited to: age of the employee involved, health status of the employee, and the likelihood of recurrence of the violation.

- B. "Non-serious violation" means a violation of § 103 other than a serious violation.
- C. "Repeated non-serious violation" means the recurrence, to be determined by the Industrial Commission pursuant to § 105(D)(4), of any non-serious violation.
- D. "Repeated serious violation" means the recurrence, to be determined by the Industrial Commission pursuant to § 105(D)(2), of any serious violation.

§ 105. Enforcement

- A. All enforcement procedures shall be instituted pursuant to the requirements of A.R.S. § 23-101 (1971 & Supp. 1980-81) and as subsequently amended by the Arizona legislature, except as provided within this section.
- B. Enforcement shall be invoked upon petition to the Arizona Industrial Commission by an employee, a friend or relative of an employee, or any person concerned with the health or safety of an employee. The petition need only state:
 - (1) that the petitioner has observed a violation of the standards established in § 103;
 - (2) the nature of the violation; and
 - (3) the petitioner's relationship to the affected employee (including, "person concerned with the health or safety of the employee").
- C. Preliminary Investigation:
 - (1) The Arizona Industrial Commission shall, after notice is given to the employee, make investigations concerning the subject matter of the petition that has been filed with the commission.
 - (2) If, upon this preliminary investigation, the Industrial Commission determines that the allegations in the petition are unfounded, the petition shall be dismissed. If the preliminary investigation confirms the allegations of the petition, the Industrial Commission shall proceed according to § 105(D).
- D. Sanctions:
 - (1) Upon a determination by the Industrial Commission pursuant to the procedures in § 105(C) that a non-serious violation has occurred, the Industrial Commission shall send notice of the determination to the employer and the employee. Each determination shall be recorded and retained in a file maintained by the Commission.
 - (2) Upon a determination by the Industrial Commission pursuant to the procedures in § 105(C) that a serious or repeated non-serious violation may have occurred, the Industrial Commission

shall send notice of the determination to the employer and the employee and a hearing shall be held. If it is determined that a serious or repeated non-serious violation has occurred, a fine not to exceed \$300 may be imposed on the employer.

(3)(a) Upon a determination by the Industrial Commission pursuant to the procedures in § 105(C) that a repeated serious violation may have occurred, the Industrial Commission shall send notice of the determination to the employer and employee and a hearing shall be held. If it is determined that a repeated serious violation has occurred, a fine not to exceed \$300 may be imposed on the employer, or the conduct of the employer may be enjoined, or both a fine and an injunction may be imposed.

(b) Factors to be considered by the Industrial Commission in determining the penalty to be imposed under § 105(D)(3)(a) shall include, but shall not be limited to: the age and health of the employee involved, the frequency of repetition of the violation, and the probability that harm will result to the employee in the event that an injunction is not issued.

- E. Any hearing held pursuant to §§ 105(D)(2) and 105(D)(3)(a) must be held within 60 days after the Industrial Commission has notified the employer of the potential violation. Failure to hold a hearing within the prescribed time period shall result in the dismissal of the petition.
- F. Any person dissatisfied with a determination of the commission may, within thirty days, commence an action in superior court in the county where the employment occurred to set aside, vacate, or amend the commission's determination.