

# THE CONSTITUTIONAL STATUS OF DISBELIEF\*

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## INTRODUCTION

The case of *Estrada v. Escritor*<sup>1</sup> should, by now, be famous.<sup>2</sup> In that case, the Supreme Court announced a new model for evaluating Free

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\* Cite as Florin Hilbay, *The Constitutional Status of Disbelief*, 84 PHIL. L.J. 579, (page cited) (2010).

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<sup>1</sup> The case appears in two separate volumes of reports, corresponding to the first decision remanding the administrative matter and the second dispensing with the merits. 408 SCRA 1, A.M. No. P-02-1651, Aug. 4, 2003. (hereinafter "Escritor I"); 492 SCRA 1, A.M. No. P-02-1651, June 22, 2006. (hereinafter "Escritor II").

<sup>2</sup> The basic facts as narrated in the opening paragraphs of Escritor I, at 50-52, are as follows:

In a sworn latter-complaint dated July 27, 2000, complainant Alejandro Estrada wrote to Judge Jose F. Caoibes, Jr., presiding judge of Branch 253, Regional Trial Court of Las Pinas City, requesting for an investigation of rumors that respondent Soledad Escritor, court interpreter in said court, is living with a man not her husband. They allegedly have a child of eighteen to twenty years old. Estrada is not personally related either to Escritor or her partner and is a resident not of Las Pinas City but of Bacoor, Cavite. Nevertheless, he filed the charge against Escritor as he believes that she is committing an immoral act that tarnishes the image of the court, thus she should not be allowed to remain employed therein as it might appear that the court condones her act.

Respondent Escritor testified that when she entered the judiciary in 1999, she was already a widow, her husband having died in 1998. She admitted that she has been living with Luciano Quilapio, Jr. without the benefit of marriage for twenty years and that they have a son. But as a member of the religious sect known as the Jehovah's Witnesses and the Watch Tower and Bible Tract Society, their conjugal arrangement is in conformity with their religious beliefs. In fact, after ten years of living together, she executed on July 28, 1991 a "Declaration of Pledging Faithfulness," *viz*:

### DECLARATION OF PLEDGING FAITHFULNESS

I, Soledad S. Escritor, do hereby declare that I have accepted Luciano D. Quilapio, Jr., as my mate in marital relationship; that I have done all within my ability to obtain legal recognition of this relationship by the proper public authorities and that this is because of having been unable to do so that I therefore make this public declaration pledging faithfulness in this marital relationship.

I recognize this relationship as a binding tie before 'Jehovah' God and before all persons to be held to and honored in full accord with the principles of God's Word. I will continue to seek the means to obtain legal recognition of this relationship by the civil authorities and if at any future time a change in circumstances make this possible, I promise to legalize this union.

Signed this 28<sup>th</sup> day of July 1991. (internal citations omitted).

Exercise and Non-Establishment Clause claims. Under the benevolent-neutrality/ accommodation paradigm, which the Court borrowed from American sources,<sup>3</sup> religion is recognized as having played an important role in public life. This descriptive account of the historical role of religion in the United States is then transformed into a normative theory of how constitutional law in the Philippines should relate to attempts to use religion and religious beliefs in the public sphere.<sup>4</sup> On the one hand, this should not be momentous in a country where religious practices in public institutions are allowed<sup>5</sup> and whose Constitution institutionalizes religious practices that are susceptible to constitutional attack in more secularized jurisdictions.<sup>6</sup> On the other hand, the legitimation of constitutionally suspect practices through the formal adoption of an overtly religion-friendly doctrine raises a warning flag for secularists who worry about the further entrenchment and continued privileging of non-rational belief systems.

One, and perhaps the most tempting, way of assessing the impact of benevolent-neutrality/accommodation is by looking at the consequences of *Escritor* in terms of the benefits to the religious and their favored institutions. The exemption from the application of the Civil Service Law on “disgraceful and immoral conduct”<sup>7</sup> of the kind of relationship Soledad Escritor had entered into is no minor pass, and surely even conservatives happy about benevolent-neutrality/accommodation would not be so excited about the

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<sup>3</sup> Escritor I, at 111-29.

<sup>4</sup> This, by itself, is a fascinating subject for comparative constitutional law scholars, but which shall be dealt with only in passing in this Article. In essence, the problem, as was pointed out by Justice Carpio in dissent, is the cherry picking of foreign sources by the majority. He pointed out in Escritor II, at 118:

It is true that a test needs to be applied by the Court in determining the validity of a free exercise claim of exemption as made here by Escritor. The compelling state interest test in *Sherbert* pushes the limits of religious liberty too far, and so too does the majority opinion insofar as it grants Escritor immunity to a law of general operation on the ground of religious liberty. Making a distinction between permissive accommodation and mandatory accommodation is more critically important in analyzing free exercise exemption claims. Such limitations force the Court to confront how far it can validly set the limits of religious liberty under the Free Exercise Clause, rather than presenting the separation theory and accommodation theory as opposite concepts, and then rejecting relevant and instructive American jurisprudence (such as the *Smith* cases) just because it does not espouse the theory selected.

<sup>5</sup> Florin T. Hilbay, *The Establishment Clause: An Anti-Establishment View*, 82 PHIL. L.J. 24 (2008).

<sup>6</sup> CONST. art. II, § 12 (recognizing the “sanctity” of family life and “equally protect[ing] the life of the mother and the life of the unborn from conception”); art. VI, § 28(3) (making tax-exempt churches and “all lands, buildings, and improvements, actually, directly, and exclusively used for religious” purposes); art. VI, § 29(2) (allowing the payment of public money to a “priest, preacher, minister, or dignitary [ ] assigned to the armed forces, or to any penal institution, or government orphanage or leprosarium); art. XIV, § 3(3) (allowing religion to be taught to children in public elementary and high schools, at the option expressed in writing by parents).

<sup>7</sup> REVISED ADMINISTRATIVE CODE, Book V, Title I, Ch. VI, § 46(b)(5).

doctrine being applied to exempt an otherwise adulterous relationship.<sup>8</sup> But if these kinds of relationships are excused from the punitive aspects of administrative law, one can only wonder about the effects of the new model on criminal, civil, and perhaps even commercial law. And what other categories of conduct can now be exempted from general laws because the actor/s declare what they are “doing”—as opposed to “saying”—as part of the exercise of their religious beliefs? One can imagine the lawyers of organized religions drafting memos for the elders of their various faiths enumerating atypical and/or presently-illegal practices that can now be argued as exempt from administrative or criminal scrutiny because they fall within the ambit of *Escritor*'s tolerant embrace. And while specific categories of religious conduct that could be claimed as exempt from state intervention or part of free exercise by a specific sect might not necessarily be agreeable to other sects, the global effect of the decision is to improve every sect's position against both the State and advocates of secularism.

In this Article, I would like to assess the consequences of *Escritor* by, first, developing some thoughts on the constitutional status and function of disbelief in a jurisdiction with a peculiar religious history such as the Philippines' and, second, situating religious belief and disbelief within a more comprehensive view of what free speech ought to be about from a secular constitutionalist's viewpoint. There is value to be gained in looking at the opposite side of the spectrum—the side of nonbelievers—as it should allow the observer to look at the whole strand of thought from which segments of the constitutional debate may be derived. This is most especially true in the light of the passing, though important, pronouncement of Chief Justice Puno about the theological status of disbelief or atheism, as he calls it. There are also practical aspects to the discussion such as the question of what constitutes a religion for purposes of taking advantage of the Free Exercise Clause and the exemptions and privileges provided by the Constitution and related jurisprudence. The other question of interest is whether atheism is itself a religion both as a constitutional and philosophical matter.

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<sup>8</sup> This is perhaps the great paradox of *Estrada v. Escritor*. The religious themselves, specifically those fixated with morals legislation, would not be excited with a jurisprudence that allows adulterers a constitutionalized exemption from the application of administrative, civil, and criminal law. The only exception here would be the members of the Jehovah's Witnesses themselves. At the same time, the heads of these religious denominations themselves would be very excited with the prospect of having a constitutional principle that essentially marks every legislation that incidentally burdens their free exercise as presumptively invalid.

**BELIEVING**

In the rather long discourse leading to the Court's justifying the adoption of benevolent-neutrality/accommodation (by, among other things, pointing to certain public practices in the United States that favor religion), Chief Justice Puno declares: These practices clearly show the preference for one theological viewpoint—the existence of and potential for intervention by a god—over the contrary theological viewpoint of atheism.<sup>9</sup>

This statement, whether or not it betrays a pastor's prejudice,<sup>10</sup> is what one might characterize as pregnant with implications, of the type that gets cases decided and constructs constitutional policy. What does it mean to say that atheism is a theological viewpoint? So far as constitutional law is concerned, what are its doctrinal implications? What Puno most likely means can be derived from his description of what constitutes theological (or, to be more precise, theistic) viewpoint, "the existence of and potential for intervention by a god." Belief in a god who dabbles in human affairs and cares enough to participate (broadly defined) is the hallmark of theology of the type Puno envisions. This coincides of course with Christianity which asserts the historical existence of a deity who lived as a human being—some say without losing his divine character—for the purpose of teaching and saving human beings (more specifically, his Chosen People) from the curse of the original sin. By this account, atheism would be the lack of belief or, to use the stronger version, the denial of the existence of a god and, by implication, his/her/its capacity to interfere in human affairs. How then can atheism be a theological viewpoint? How can the denial of the existence of a god be a form of god-belief? Is this but a semantic play or can logic serve to clarify the basic claims here? For instance, how can disbelief be a form of belief? Is negation itself an assertion of something other than what is being negated?

a) *Belief*.—To subscribe to theism, as distinguished from deism,<sup>11</sup> is to assert a menu of beliefs about the attributes of a god that are canonically taken in constitutional law as protected form of expression under the Free Exercise Clause. This set of attributes in turn is actually ontological and

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<sup>9</sup> Escritor I, at 120.

<sup>10</sup> The Supreme Court biography of Chief Justice Puno, *available at* <http://sc.judiciary.gov.ph/justices/cj.puno.php> (last visited Feb. 15, 2010). The Chief Justice is actively involved in civic and church activities. He is a lay preacher of the United Methodist Church and the incumbent Chairman of the Administrative Council of the Puno Memorial United Methodist Church.

<sup>11</sup> W.R. Inge, *Theism*, in 23 PHIL. 38 (1948); Terence Penelhum, *Natural Belief and Religious Belief in Hume's Philosophy*, 33 PHIL. Q. 166 (1983). See also <http://www.theism.info/> and <http://www.deism.com/>.

epistemological claims usually embedded in the narrative articulated in such holy texts as the Bible and the Koran. They therefore tell us a lot of important things about the nature of reality and how we are able to specify its status as such—whether human beings evolved or were intelligently designed; whether the universe was created in seven days and is static or is expanding as a consequence of the big bang; whether there is free will. They are important in the sense that, once believed, they form the basis of the core set of assumptions about human action (agency and, therefore, morality) and the world (physics and, therefore, “objective” reality). From the standpoint of constitutional policy, they assume greater importance because the canonical status of accounts in holy books means that many, and some would even say *all*, of the statements written in them are universal imperatives to leading the good life and a rewarding eternal afterlife. Precisely, narratives embed imperatives; stories communicate, directly or otherwise, standards of action. That they are considered divine or divinely inspired serves to signal the claim that they are extraordinary in a way that immunizes them from the critical bite of traditional forms of human inquiry such as logic, history, or today, science. Thus, accepted as facts of the religious aspects of one’s life would be the existence of the soul or the spirit world, karma, angels and devils, heaven and hell, the creation story, the reality of miracles, and the effectiveness of prayers. These are just some of those religious beliefs that, as such, are broadly protected by the Free Exercise Clause.

But what does it mean to say that a particular belief is religious and therefore covered by the Free Exercise Clause? The doctrinal understanding of free exercise is that which is similar to the negative conception of free speech, that is, that the government should leave the speaker or, in this case, the believer, by herself, and let her believe or say what she wishes to express. Thus, the constitutional norm is respected or guaranteed when the government does nothing to interfere with the expression. Consistent with the liberal tradition, the right is recognized when its holder is able to deploy, as pure speech, what she believes in regardless of cost and the majority’s opposition. This is well and good, but only if religious beliefs were exercised in the solitude of one’s bedroom and, one might hasten to add given today’s technology, without any internet connection. Many forms of religious belief, just like political or artistic speech, must be exercised or expressed. In the ordinary course of things, they are exercised in an environment where either people are affected (roused or riled, convinced or disgusted) or government policies (need for neutrality, decision to promote certain symbols, desire to protect children) are implicated. This is when constitutional policy is made and battle lines are drawn.

This comparison of the negative aspects of free speech and free exercise should highlight an important question that starts with a textual analysis. Are the Free Speech and Free Exercise Clauses constitutionally identical? If they are, then why does the constitution separately guarantee either of these rights? Is there anything to the fact of separate guarantees that signals to the constitutional interpreter that somehow Free Speech and Free Exercise cases ought to be treated differently? And how?

One way of resolving these questions is by simply declaring that, to the extent these clauses have been imposed by the United States during the colonial regime and therefore only part of those bits of transplanted doctrinal terms,<sup>12</sup> they are non-issues. This point of view becomes more relevant when we consider that this imposition was done repeatedly<sup>13</sup> over a

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<sup>12</sup> William McKinley's famous Instructions to the Second Philippine Commission, dated Apr. 7, 1900, reads in part:

At the same time the commission should bear in mind, and the people of the islands should be made plainly to understand, that there are certain great principles of government which have been made the basis of our governmental system which we deem essential to the rule of law and the maintenance of individual freedom, and of which they have, unfortunately, been denied the experience possessed by us; that there are also certain practical rules of government which we have found to be essential to the preservation of these great principles of liberty and law, and that these principles and these rules of government must be established and maintained in their islands for the sake of their liberty and happiness, however much they may conflict with the customs or laws of procedure with which they are familiar.

It is evident that the most enlightened thought of the Philippine Islands fully appreciates the importance of these principles and rules, and they will inevitably within a short time command universal assent. Upon every division and branch of the [Government of the Philippines](#), therefore, must be imposed these inviolable rules:

That no person shall be deprived of life, liberty, or property without due process of law; that private property shall not be taken for public use without just compensation; that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense; that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted; that no person shall be put twice in jeopardy for the same offense, or be compelled in any criminal case to be a witness against himself; that the right to be secure against unreasonable searches and seizures shall not be violated; that neither slavery nor involuntary servitude shall exist except as a punishment for crime; that no [bill of attainder](#), or [ex-post-facto](#) law shall be passed; that no law shall be passed abridging the freedom of speech or of the press, or the rights of the people to peaceably assemble and petition the Government for a redress of grievances; that no law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof, and that the free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed.

<sup>13</sup> The Philippine Bill of 1916, § 3(k) (That no law shall be made respecting an establishment of religion or prohibiting the free exercise thereof, and that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed; and no religious test shall be required for the exercise of civil or political rights. No public money or property shall ever be appropriated, applied, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, sectarian

period of almost half a century and in the name of promoting constitutional rights, so much so that by the time Filipinos were in a position to draft their own constitution they could have devised novel doctrinal terms for themselves. But this might be ascribing too much emphasis on the capacity or willingness of the framers of the various constitutions to depart from settled understandings. They could have been focused on other things or just happy with the way things were doctrinally.<sup>14</sup> The second alternative is to assign to the framers of the various constitutions a certain level of responsibility in the way these clauses have retained their form, despite the initial imposition by the United States.

Such way of resolving these issues also dichotomizes one's view of the extent to which interpreters can manipulate the variance between the clauses. If we subscribe to the former view that the clauses are identical simply because they were imposed, interpreters may take this as a cue to read the clauses separately and impose separate policies into the clauses with abandon. This could result in a regime where the Free Speech clause is interpreted in the classic liberal tradition providing the highest level of freedom to communicate, while the free exercise clause is read in a utilitarian way, that is, deployed to maximize welfare or promote specifically-identified causes. On the other hand, we could take the latter view and say that the identical forms of the two clauses have interpretive implications, that is, insofar as the drafters of the various constitutions have consciously maintained the formal identity of these clauses, we can derive the specific intention to also maintain their substantive identity. This means that those committed to some notion of fidelity to the framers' intentions have a smaller interpretive space and are thus constrained by both text and history.

b) *Exercising Belief*.—The previous discussion focused on the textual similarity between Free Speech and Free Exercise clauses. The pure speech aspect of the clauses is easy enough to deal with, given today's understanding of freedom of speech. Unless the speech—political, religious

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institution, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary as such); CONST. (1935), art. III, § 7 (No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof, and the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed. No religious test shall be required for the exercise of civil or political rights.); CONST. (1973), art. IV, § 8 (No law shall be made respecting the establishment of religion, or prohibiting the free exercise thereof. The free exercise and enjoyment of religious profession and worship, without discrimination or preference shall forever be allowed. No religious test shall be required for the exercise of civil or political rights).

<sup>14</sup> If this were the case, then it represents a significant departure from the menu of debatable items during the Philippine Revolution against Spain. At the center of the revolutionary struggle was not just a demand for democracy, broadly defined, especially at a time when even western societies were decidedly non-democratic, but a fight towards a more secular (and thus less theistic) state.

or otherwise—amounts to a direct incitement to violence or poses a clear and present danger,<sup>15</sup> either of which is a very high standard for allowing the suppression of content, the government is bound to keep its hands off what is being said. That the speech is protected means that the constitution acts as a shield between the information and men of zeal.<sup>16</sup> This, of course, is limited to the traditional case of distributing leaflets, delivering spiels in public places, and the like. While it may be true that the information is carried by some medium such as paper, the human voice box, or a megaphone, the government's interest in regulating leafleting or public speaking can hardly be justified as implicating some policy directed at papers or voice boxes. History also shows that State intrusion into these "activities" is primarily focused on the information itself and not on something else.

The rules are different when the information or speech sought to be disseminated is intertwined with action that affects other people in a way that is different from the effects of pure speech or when a separately justifiable government policy is implicated. The paradigmatic example of the former is hate speech, which is considered in other jurisdictions as resting on an entirely separate category as political or artistic speech.<sup>17</sup> Regardless of whether one agrees with it, the theory is that such form of speech is proscribable because it is no different from (or perhaps even worse than) a physical attack or is at least equivalent to direct incitement to violence. On the other hand, the government is held to a lower standard of justification when its regulation is aimed at a concern justifiably separate from speech itself. This is the case with so-called content-neutral regulation,<sup>18</sup> such as in the case of a permit system for the use of public streets for demonstrations where, at least theoretically, the government's desire to regulate the streets is considered sufficient to justify an incidental burden on the right of speakers to express their grievances if they decide to use the streets as a venue for communicating. Needless to state, no person

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<sup>15</sup> *Brandenburg v. Ohio*, 295 U.S. 444 (1969); *Reyes v. Bagatsing*, 210 Phil. 457 (1983).

<sup>16</sup> Justice Brandeis famously remarked in *Olmstead v. U.S.*, 277 U.S. 438 (1928)—The greatest dangers to liberty lurk in the insidious encroachment by men of zeal, well meaning but without understanding.

<sup>17</sup> The theory is that certain forms of speech are simply untrue (denying the Holocaust), undermine the state's attempt at developing a community (homophobic slander), and susceptible to producing violence (racist or anti-religious speech) that society is better off proscribing them.

<sup>18</sup> The paradigmatic example is the case of *U.S. v. O'Brien*, 391 U.S. 367 (1968), adopting the test named after the private petitioner. The Court held, at 377, that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. See also *Social Weather Stations, Inc. v. Commission on Elections*, G.R. No. 147571, May 5, 2001.

can inflict physical harm on another person as a form of “symbolic speech” and then seek constitutional protection for the criminal consequences of his act.

Cases involving the exercise of one’s religion, when argued to be constitutionally “free,” are qualitatively different from speech complicated by action. The peculiar nature of free exercise claims is precisely that they are aimed to act as a specific immunity or exemption from regulation on the simple ground that the act sought to be immunized or exempted is intertwined with the exercise of one’s religious beliefs. The practical consequence of the claim, if sustained, is to create a double standard whereby the entire population minus the successful free exercise claimants is subjected to the effects of a (presumably rational) statute. The irony should be quite evident: statutes that undergo a tedious process of rationalization and articulation end up not holding ground against non-rational beliefs.

This situation is a major departure from free speech jurisprudence which makes a bright line distinction between pure speech and speech coupled with action. The general rule, as may be gathered from the so-called red scare cases<sup>19</sup> is this: you can talk all you want, but once your advocacy of ideas turn into advocacy to action, when you (literally) start walking your talk, the government can step in and use its resources to stop and punish people. This ensures that the marketplace of ideas is, given certain other conditions, free from the hands of government, while the marketplace of actions is a state-policed environment. This is a rational compromise that maximizes speakers’ liberty and listeners’ autonomy, essentially allowing buyers and sellers of ideas the right to define the rational and the good.

Free exercise claims, on the other hand, are different because the immunity or exemption sought raises equality concerns of the rather bizarre type. In the case of a citizen seeking exemption from the application of a statute, disagreement with the law, however rational or well-grounded, is rarely a good argument for non-compliance. Here the basic rule is *dura lex, sed lex* or, in the language of constitutional law, unless the constitution constrains the majority, it can impose its will on minorities, marginal speakers, and dissenters through the normal processes of democracy. But in the case of the free exercise claimant, her exemption need not be grounded on disagreement with the statute, as she may even, at least in principle, be

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<sup>19</sup> Schenk v. U.S., 249 U.S. 47 (1919); Abrams v. U.S., 250 U.S. 616 (1919); Whitney v. California, 274 U.S. 357 (1927).

unopposed or morally neutral to it. Her argument for exemption is either that her religion stands in the way of her complying with the statute or that compliance with her religion makes her believe that the law is incompatible with the tenets of her faith which, incidentally, is further claimed to assume primacy over law and pretty much everything else. In the case of *Escritor*, the constitutional exemption is even more potent because even when one's religion simply "allows" the believer to engage in some otherwise illegal activity (as opposed to "requires" her to act in one way and not the other) the Court has in effect sanctioned the use of religion as a trump card for permissible acts that conflict with general statutes. The analysis of general statements can be sharpened by the major cases the *Escritor* majority used as fodder for discussion.

#### SHERBERT V. VERNER<sup>20</sup>

Adell Sherbert was a member of the Seventh-day Adventist Church. Discharged by her employer because she would not work on Saturdays, the Sabbath Day of her faith, and unable to obtain other employment, she decided to file a claim for unemployment compensation which was denied on the ground that she had failed, without good cause, to accept available suitable work. She then brought suit on First Amendment grounds, arguing that the denial of unemployment compensation was a violation of her right to freely exercise her religion.

The U.S. Supreme Court agreed with her. The Court introduced its analysis by adopting a test which essentially rejected a rational basis standard and instead placed a high burden of justification for the State to overcome. It held that "if the decision of the [lower court] is to withstand [ ] constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of the subject within the State's constitutional power to regulate.'"<sup>21</sup> According to the Court, the impediment to Sherbert's free exercise is apparent: the decision of the unemployment commission "forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."<sup>22</sup> The Court declared

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<sup>20</sup> 374 U.S. 398 (1963).

<sup>21</sup> *Id.* at 403.

<sup>22</sup> *Id.* at 404.

the burden as no different from a fine imposed on the believer for her Saturday worship.<sup>23</sup> It then held insufficient for purposes of complying with the compelling interest standard the mere possibility of fraudulent claims by those feigning conscientious objection.<sup>24</sup> The Court's analysis was then followed by a set of disclaimers: (a) the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences; (b) the recognition of the right to unemployment benefits in this case does not serve to abridge any other person's religious liberties; (c) the decision does not declare the existence of a constitutional right to unemployment benefits on the part of all persons whose religious convictions are the cause of their unemployment; and (d) nothing in the judgment constrains the States from adopting any particular form or scheme of unemployment compensation.<sup>25</sup> As correctly pointed out in *Escritor*, this decision signaled a transition from the view that inadvertent or incidental interferences with religion raised no problem under the Free Exercise Clause to one where such interferences violated it in the absence of a compelling state interest—the highest level of constitutional scrutiny short of a holding of a *per se* violation.<sup>26</sup>

The *Sherbert* decision is a classic example of the policy of accommodation of the type the *Escritor* court would approve. On the surface, it is also apparently progressive, given that the facts of Adell Sherbert's case seem to call only for a mild form of exemption that will cost the State a non-significant amount. Just as important, there is an undercurrent of equality argument against the overwhelming (non-Sabbatarian) Christian population of the State who can be said to be systemically accommodated by the economy that generally slows down on Sundays.

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.* The appellees suggest no more than a possibility that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might not only dilute the unemployment compensation fund but also hinder the scheduling by employers of necessary Saturday work. But that possibility is not apposite here because no such objection appears to have been made before the South Carolina Supreme Court, and we are unwilling to assess the importance of an asserted state interest without the views of the state court. Nor, if the contention had been made below, would the record appear to sustain it; there is no proof whatever to warrant such fears of malingering or deceit as those which the respondents now advance. Even if consideration of such evidence is not foreclosed by the prohibition against judicial inquiry into the truth or falsity of religious beliefs—a question as to which we intimate no view since it is not before us—it is highly doubtful whether such evidence would be sufficient to warrant a substantial infringement of religious liberties. For even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights. (citation omitted).

<sup>25</sup> *Id.* at 409.

<sup>26</sup> *Escritor I*, at 98.

Nonetheless, the peculiarity of having a system of precedents is precisely that principles crafted for a particular set of facts become policy for future cases of similar nature. And even if judges and lawyers can make fine distinctions based on factual disparities or parse the language of doctrine to distinguish one set of facts from another, the court's adoption of a doctrine becomes a default rule or principle departure from which requires a justification. The important questions, therefore, are: (a) could the *Sherbert* majority have crafted a narrower doctrine that does not make statutes of general applicability presumptively invalid when faced with a claim for exemption? And (b) were there other ways of justifying the decision without adopting the compelling interest standard? Finally, is any form of accommodation for *Sherbert* bound to create larger expectations?

Keep in mind that what *Sherbert* refused was work on Saturdays.<sup>27</sup> This is crucial because refusal to work on Saturdays does not make *Sherbert* unavailable for many of the jobs available in the labor market which presumably requires a Monday through Friday engagement. One can say therefore that the consequence of refusing Saturday work is not so much that *Sherbert* becomes technically incapacitated for a larger menu of possible employment, constricting her choices to such a point where she literally becomes invisible to the labor market, but only that she doesn't get certain jobs that require her to work on Saturdays. One may go so far as to say that *Sherbert* stands no differently from the position of a person who wants to visit his parents on Saturdays (the only day when the entire family is available for get-togethers) or regularly plays basketball with high school classmates, and thus would not accept Saturday jobs. It is quite doubtful whether, in these cases, the unemployed could make a claim that they have the right of privacy to make these kinds of life choices without any cost or with the government bearing the cost of such choices.

Ultimately, the question in *Sherbert* is one of cost—who is to bear the financial burden of making a religiously-informed choice not to work on Saturdays? This approach takes the constitutional question from a different angle than the *Sherbert* court took and which focused more on the question of whether the Free Exercise Clause *allows* the State to place what it called an “incidental burden” on the free exercise rights of the believer. Preliminarily, one should not lose sight of the Court's strategy of collapsing the belief-action distinction. *Sherbert*'s claim is not that the State is getting in the way

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<sup>27</sup> *Sherbert*, 374 U.S. at 399. “Appellant became a member of Seventh-day Adventist Church in 1957, at a time when her employer, a textile-mill operator, permitted her to work a five-day week. It was not until 1959 that the work week was changed to six days, including Saturday, for all three shifts in the employer's mill.”

of her subscribing to the doctrines of her faith; it is that the State is unwilling to pay for the cost of her acting upon her belief that Saturday cannot be a day of work. And because the Court considered Sherbert's not being able to obtain unemployment compensation a burden equivalent to a fine, it became (at least for the Court) rhetorically easier to unburden Sherbert. Notice, however, that the act of unburdening Sherbert is not without cost. Put plainly, the effect of the decision is to shift the burden from the believer to the State. This is the policy choice. Why should the State bear the burden for Seventh-day Adventists not working on Saturdays and let other private citizens shoulder the costs of a work-free Saturday?

The Sherbert Court wrongly casts the issue when it speaks of an "obligation of neutrality in the face of religious differences" and decides the case as if it were an affirmative action in favor of Sabbatarians in order to somewhat equalize their position with other Christians who are able to rest on Sundays. It may be true that most Christians get a free pass because the market is generally favorable to work-free Sundays, but their belief does not require total refusal to engage in secular activities. The practices of these Christians, therefore, do not result in conflict with the aims of a secular society. The conflict arises precisely because Sabbatarians claim that their decision to rest on Saturdays should be cost-free on their part and a financial burden for the government. The Sherbert Court's assertion of "neutrality" can in fact be easily flipped: instead of looking at the unemployment commission's decision to deny Sherbert benefits as a form of a fine for believing in a particular form of god-belief, we could very well look at the Sherbert Court's decision as a form of endorsement, that is, a financial reward that makes it more convenient for Sherbert to believe what she believes in, however irrational it may be. The concept of a reward is in fact quite apt in the case of Adell Sherbert precisely because it is not as if the labor market does not provide for jobs that would allow her to work anywhere between Sunday and Friday.

Problems of operationalization arose when the Sherbert court rejected the existence of a constitutional right to unemployment benefits on the part of all persons whose religious convictions are the cause of their employment. Given that the Court did recognize exactly a species of that right with respect to Adell Sherbert, one is at a loss as to how other claimants may successfully prove a claim for exemption and how the government can justify a compelling state interest. Suppose Seventh-day Adventists had Wednesdays for their day of rest? If this had been the case, would the constitutional claim for exemption be weaker or stronger? Would it be weaker because Wednesdays, unlike Saturdays, fall right smack in the

middle of work week and thus the prospect of Sabbatarians earning unemployment compensation for refusing to work on Wednesdays, when almost everyone else is working, is very difficult to justify? Or is it stronger because believers who demand unemployment compensation for not working on Saturdays are even rarer, which means that their minority status is even more highlighted and their impact on unemployment compensation funds is less than other marginal believers?

#### EMPLOYMENT DIVISION V. SMITH<sup>28</sup>

It is possible to say that the claim for exemption argued for by members of the Native American Church in *Smith* is simply the logical consequence of the successful claim for exemption in *Sherbert*. After all, once the Supreme Court opened the door to exemptions such as the one successfully made in *Sherbert*, it was not very difficult to foresee a slippery slope in which only the Court is able to dictate the steepness of the slide. Considering further the nature of religious claims for exemptions, one could very well say goodbye to any rational standard for determining which claims for exemption stand on better footing than the others. *Smith* is a shining exemplar of the difficulties in navigating a rational compromise in irrational waters.

Alfred Smith and Galen Black were fired from their jobs with a private drug rehabilitation organization because they ingested peyote for sacramental purposes at a ceremony of the Native American Church, of which both were members.<sup>29</sup> They sought unemployment compensation from the Employment Division, Department of Human Resources of Oregon, but their claims were denied on the ground that they were discharged for work-related “misconduct.”<sup>30</sup> Citing the court’s prior decisions<sup>31</sup> Smith and Black argued that the State could not condition the availability of unemployment insurance on an individual’s willingness to forego conduct required by his religion.

It is interesting that the Court opened its analysis by mildly adverting to the belief-action distinction the *Sherbert* court dropped by implication, noting that the “exercise of religion” often involves not only belief and profession but the performance of (or abstention from) physical acts such as

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<sup>28</sup> 494 U.S. 872 (1990).

<sup>29</sup> *Id.* at 874.

<sup>30</sup> *Id.*

<sup>31</sup> *Sherbert*, 374 U.S. at 403; *Thomas v. Review Board of Indiana Employment Security Division*; *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136 (1987).

assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation.<sup>32</sup> The purpose of the Court, however, was not to reintroduce a bright line distinction between operations of the mind and of the body, but subtly introduce an *animus* requirement that focuses on the intention of the legislature in passing a law that incidentally burdens religious freedom.<sup>33</sup> This is why the Court saw the claim for exemption by Smith and Black as a contention “that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons.”<sup>34</sup>

The larger purpose of the reframing the argument for exemption allowed the Court to reject the claim on grounds of “neutrality.” A law, to be considered neutral, must be of general applicability and it should suffice that it does not suffer from the vice of having been passed specifically to prejudice a religious group. This definition permitted the Court to declare it had never held that an individual’s religious beliefs excused him from compliance with an otherwise valid law prohibiting conduct that the State was free to regulate.<sup>35</sup> Because the commands of religions are not “superior to the law of the land,”<sup>36</sup> “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”<sup>37</sup>

The reality is that *Smith* is a bad case to win for those who reject the existence of the right to an exemption from general laws on religious grounds. For one, it is very easy to see this case within the context of the long history of discrimination and marginalization of native Americans—just an extension of Western arrogance or a form of legalized violence against native cultures. For another, the wisdom of criminalizing peyote (instead of, say, just regulating its use) is even more suspect than the criminalization of marijuana. The argument can be made that it is not inconsistent with secularism to distinguish between religious and non-religious use of peyote

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<sup>32</sup> *Smith*, 494 U.S. 872.

<sup>33</sup> And so the Court declares: “It would be true, we think (though no case of ours has involved the point), that a State would be ‘prohibiting the free exercise [or religion]’ if it sought to ban such acts or abstentions only when they are engaged in [it] for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of ‘statues that are to be used for worship purposes,’ or to prohibit bowing down before a golden calf.” *Id.* at 877-78.

<sup>34</sup> *Id.* at 878.

<sup>35</sup> *Id.* at 878-79.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

because its psychoactive effects are required to attain certain chemical states essential to the claimed spiritual experience of the believer. This experience, especially because it is part of a tradition, can have an independent cultural value that a secular society might wish to tolerate. Non-religious users of peyote and all marijuana smokers, on the other hand, are only interested in getting a fix. While this may not in itself furnish a justification for criminalization in a liberal society, it might furnish a rational distinction for treating religious users differently from pleasure seekers, even if only because those who use prohibited substances purely for pleasure might be more susceptible to committing other acts that the legislature might wish to protect the general population from. One can therefore conclude that the problem in *Smith* should have been handled at the level of statutes, instead of the Constitution.

Notwithstanding the problematic factual situation in *Smith*, certain abstract principles may be derived which should prove essential to building a secular rule of law: *first*, the primacy of human law over non-human law. It is central to a regime of law to recognize the important assumption that in a modern constitutional liberal democracy, the law of human beings takes precedence over any supposed natural and/or divine law. Privileging human law should of course not be treated as an endorsement of dogmatic positivism. What is meant simply is that when it comes to legal discourse, the items on the menu should be limited to rules, processes, and principles that rational human beings can access, as opposed to unadulterated reference to one's holy book or the command of some high priest.

*Second*, the rejection of the use of "compelling government interest" in religious exemption cases on the ground that its application in the context of claims for exemption produces a constitutional anomaly.<sup>38</sup> The court made a crucial distinction between, on the one hand, free speech and equal protection cases, and, on the other, religious exemption cases. While it did not provide any reason why, one can assume it had something to do with ensuring the primacy of human law or non-human law. Why should society justify *post-facto* the existence of a general secular law that happens to incidentally burden one's practice of religion? Regulations that target the content of one's speech or focus on a special class must comply with a higher standard of justification because modern societies have come to understand the transcendent value of promoting the marketplace of ideas and laws that create suspect classifications undermine the principle of equal citizenship. But in societies that adopt the separation of Church and State as

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<sup>38</sup> *Smith*, 494 U.S. at 1604.

an organizing principle, it is hard to justify why the State should bend over backwards and is made to adopt a high burden of justification to accommodate (in this case, fund) religious practices.<sup>39</sup>

c) *The Escritor Paradigm*.—Because the *Escritor* majority focused on the two preceding cases, endorsing *Sherbert*<sup>40</sup> (for providing significantly increased degree of protection to religiously motivated conduct)<sup>41</sup> and criticizing *Smith*<sup>42</sup> (as a perversion of precedent),<sup>43</sup> it is very important to distinguish the factual scenarios in the three cases from the perspective of *Escritor*.

Both *Smith* and *Sherbert* were decided along the line of claims for exemption from general statutes in order for the claimants to obtain unemployment compensation which, in their nature, is a temporary welfare grant from the State. *Escritor*, on the other hand, involved a claim for immunity from the morality provisions of the civil service law which constitute a continuing qualification for holding public office in the Philippines. At some level, all three cases involved assertions of immunity of a permanent character for all those similarly situated—those who cannot work on Saturdays for religious reasons and unable to find a job because of it; those who smoke peyote for religious reasons even if they work in drug rehabilitation centers; and those who enter into adulterous relationships. *Escritor*'s claim, however, is qualitatively different because, whereas *Smith*

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<sup>39</sup> As pointed out by the majority, it is even more difficult to operationalize: [Society] cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind—ranging from compulsory military service, to the payment of taxes; to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws; to social welfare legislation such as minimum wage laws, child labor laws, environmental protection laws, and laws providing for equality of opportunity for the races. *Id.* at 1605-1606 (citations omitted).

<sup>40</sup> The pinnacle of free exercise protection and the theory of accommodation in the U.S. blossomed in the case of *Sherbert v. Verner*, which ruled the state regulation that indirectly restrains or punishes religious belief or conduct must be subjected to strict scrutiny under the Free Exercise Clause. (citation omitted) *Escritor* II, at 43.

<sup>41</sup> *Escritor* II, at 48.

<sup>42</sup> The *Smith doctrine* is highly unsatisfactory in several respects and has been criticized a exhibiting a shallow understanding of free exercise jurisprudence. *First*, the First amendment was intended to protect minority religions from the tyranny of the religious and political majority. Critics of *Smith* have worried about religious minorities, who can suffer disproportionately from laws that enact majoritarian mores.... *Second*, *Smith* leaves too much leeway for pervasive welfare-state regulation to burden religion while satisfying neutrality. After all, laws aimed at religion can hinder observance just as effectively as those that target religion.... *Third*, the *Reynolds-Gobitis-Smith* doctrine simply defies common sense. The state should not be allowed to interfere with the most deeply held fundamental religious convictions of an individual in order to pursue some trivial state economic or bureaucratic objective. This is especially true when there are alternative approaches for the state to effectively pursue its objective without serious inadvertent impact on religion. (citation omitted) *Id.* 53-54.

<sup>43</sup> *Id.* at 56.

and *Sherbert* involved acts that are performed under religious compulsion, *Escritor* was about a non-optional relationship or an engagement that was, pursuant to the beliefs of *Escritor*'s faith, simply permitted or allowed.

This distinction matters a lot for doctrine because there is a very wide disparity between acts of god-believers that are only permissive or allowed by the doctrines of their faith and those that are mandatory or required in order to become a compliant believer. To further help the analysis, we can create a box composed of zones of convergence and divergence between the secular and the sectarian. The first (upper left) is the zone of convergence between the secular and sectarian in the sense that here we can find the universe of acts that are allowed both by secular and sectarian laws. Usual examples of these acts are getting married, having children, acquiring property, etc. This poses no problem for either community. The second (upper right) is another zone of convergence, where we find the universe of acts that are mandatory under both secular and sectarian regimes. General examples of these would be the prohibitions against committing murder and theft. This also poses no problem. The third (lower left) is a zone of divergence, where we find the universe of acts that are allowed by sectarian laws but are prohibited by the secular regime. This is the *Escritor* zone of divergence. In the fourth (lower right) is another zone of divergence, where we find the universe of acts that are prohibited by sectarian laws but allowed by the secular regime. This is the *Sherbert* zone of divergence. In the fifth (lowest left) is another zone of divergence, where we find the universe of acts required by the secular regime but prohibited by sectarian law. This is the *Minersville School District v. Gobitis*,<sup>44</sup> *West Virginia v. Barnette*,<sup>45</sup> *Ebralinag v. The Division Superintendent of Schools*<sup>46</sup> and *Victoriano v. Elizalde Rope Workers Union*<sup>47</sup> zone of divergence. In the sixth (lowest right) is another zone of divergence, where we find the universe of acts prohibited by secular law, but required by sectarian law. This is the *Wisconsin v. Yoder*<sup>48</sup> zone of divergence.

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<sup>44</sup> 310 U.S. 586 (1940). (Involving compulsory flag salute and recitation of the pledge of allegiance in American public schools).

<sup>45</sup> 319 U.S. 624 (1943). (Reversing *Minersville*).

<sup>46</sup> 219 SCRA 256 (1993). (Exempting the Jehovah's Witnesses from compulsory flag salute in Philippine public schools.)

<sup>47</sup> 59 SCRA 54 (1974). (Exempting members of the Iglesia Ni Kristo from the application of the closed shop agreement).

<sup>48</sup> 406 U.S. 205 (1972). (Exempting children of Amish parents from compulsory education beyond the 8<sup>th</sup> grade).

Allowed by Law, Allowed by Religion = Zone of Convergence	Prohibited/Required Law, Prohibited/Required by Religion = Zone of Convergence
Allowed by Religion, Prohibited by Law = Escritor Zone of Divergence	Prohibited by Religion, Allowed by Law = Sherbert Zone of Divergence
Prohibited by Religion, Required by Law = Ebralinag Zone of Divergence	Prohibited by Law, Required by Religion = Yoder Zone of Divergence

Here we see that the decision in *Escritor* furnishes the strongest possible form of immunity for religious practices, even if only because in the *Escritor* zone of divergence will be found the universe of activities that are not doctrinally required for maintaining or qualifying for a particular faith but nonetheless a source of exemption from general, and even criminal, statutes. In cases where a particular act is simultaneously prohibited by religion and required by law, as in the flag salute cases, the incommensurability between religious belief and secular demands is very high given that acts prohibited by religion usually constitute a ticket to hell and those required by law are generally backed by a powerful sanction that could land the violator a trip to prison. In the flag salute cases, for example, the choice given to the believer is between saluting an idol and being expelled from school. These are very difficult choices to make, especially if the fight is actually one between parents and the State, with children in the middle. The same thing is true in those instances involving acts that are, at once, prohibited by law and required by religion. Just as in the flag salute cases, the believer is pinned to a zero-sum game between the State and the Church.

The *Yoder* case is also a battle for the life choices of the child. In fact, the only difference between the *Ebralinag* zone of divergence and the *Yoder* zone of divergence is the position of the State and the Church in either case. Because the demands of religion and law in either zone are very high, there is very little room for compromise on the part of the Court deciding the issue, in which case the choice made becomes even more susceptible than the normal case to the charge of having been politicized.

In contrast, factual situations covered by the *Escritor* and *Sherbert* zones of divergence should not, at least in theory, present a situation as dire as in the *Ebralinag* and *Yoder* zones of divergence. This is because in either case, religion or law plays only the part of an enabler, which in turn allows

the prohibitor to take the upper hand and be followed by the citizen/believer. In the normal course of things, *Escritor* would have chosen not to enter into an adulterous relationship given the reality that while it is permitted by her religion, it is nevertheless a violation of a criminal statute. In this case, the citizen/believer is subjected to a test of incentives or disincentives. Thus, the rational decision is for her to follow the command of the prohibitor. With respect to *Sherbert*, the rational decision—to follow the dictates of her faith where the law has given her the option—is also dictated by the fact that her religion has claimed greater stake to meaning than the State in the matter involving the decision to work on Saturdays. Why is it then that cases of the *Escritor* and *Sherbert* type are just as, if not even more, controversial than those falling within the other zones of divergence?

The answer lies in the fact that, in reality, every zone of divergence is a highly contested space where both Free Speech and Non-establishment clauses are in operation, with highly mobile demarcation of doctrinal lines. For instance, in *Sherbert*, we should not have anticipated any problem because the State has no problem with Sabbatarians refusing to work on Saturdays. To be sure, this is a zone of minimal divergence considering that the interests of the State and of the religious denomination involved are not really in direct conflict—the citizen/believer is not pressed against the wall. The situation becomes highly charged when Sabbatarians argue that they not only have the right to freely exercise their religion by not working on Saturdays but also, and more important, that the cost of their choice be shouldered by the State. This creates a situation of conflict because the citizen/believer not only wants a pass but a free lunch as well. Those who agree with the decision argue that exercise of religion is “free” when the economic burden is shifted to the State, while those who disagree argue that the transfer of burden to the State would amount to an establishment as the constitution does not mandate that religious choices be cost-free—much less, cost-beneficial—on the part of the god-believer. Viewed this way, *Sherbert* is a free exercise case not from the standpoint of a negative right but from the standpoint of a positive right in which the government, in addition to being required to respect the exercise of the right by not standing in the way, is also made to perform an affirmative act to support its exercise.

But let us assume that the *Sherbert* decision was defensible because the choice of the god-believer to not work on Saturdays is religiously compelled and thus a matter over which the follower has very little discretion. How do we now justify the decision in *Escritor*? For one, that the Jehovah’s Witnesses allow Soledad to engage in an otherwise adulterous

relationship doesn't really help. Sure, the elders' certification might mean her god would tolerate her relationship with Quilapio, but the only effect of that certification is the congregation's assurance that she won't be punished by god even if the Department of Justice of the Republic of the Philippines would. More important, that her conduct is excused by the leaders of her faith only means she is free to do as she pleases without having to worry about any form of punishment in the here and now or in any supposed afterlife. That is it and nothing more. The doctrine of her faith is thus "neutral" with respect to human laws against adultery. Furthermore, this certification is in the form of an immunity which means, in Hohfeldian fashion, that the choice is lodged in her. This effectively eliminates a Sherbert-type of a defense.

A further implication of the fact that Soledad's choice on this matter is not religiously compelled has something to do with the "centrality argument" that has become a part of debates for exemption which the U.S. Supreme Court has veered away from,<sup>49</sup> but which, surprisingly, the *Escritor* majority has embraced.<sup>50</sup> With this dangerous venture into the question of whether a particular belief claimed to be exempt from regulation is central to the believer's faith, the Supreme Court has included the element of proportionality into its decision-making in the area of religious freedom. In general, the rule is that beliefs that are central to a particular faith are, at least in comparison with those that are not, entitled to a higher degree of consideration (not necessarily respect) given that the sensitivity of the issue is directly related to the importance of a specific practice to the belief system. While it does make sense to measure the value of the practice from the perspective of the belief system in question, it also entangles the courts in the rather messy affair of weighing the value of the affairs of the faithful.<sup>51</sup> In the case of *Escritor*, the Court could have safely engaged in this affair of considering the nature of the act involved—adultery. It is really a testament to the astounding lack of imagination of the Solicitor General in

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<sup>49</sup> Smith, 494 U.S. at 886-887. "Nor is it possible to limit the impact of respondents' proposal by requiring a 'compelling state interest' only when the conduct prohibited is 'central' to the individual's religion. It is no more appropriate for judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test in the free exercise field, than it would be for them to determine the 'importance' of ideas before applying the 'compelling interest' test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith?"

<sup>50</sup> The dispositive of *Escritor* I, at 191 stated: IN VIEW WHEREOF, the case is REMANDED to the Office of the Court Administrator. The Solicitor General is ordered to intervene in the case where it will be given the opportunity (a) to examine the sincerity and centrality of respondent's claimed religious belief and practice...."

<sup>51</sup> One can imagine that even among the various sub-sects of the many religions that thrive today, religious leaders—and even their practitioners—would find it difficult to fully agree on a set of central claims of their belief system. It also goes without saying that these sects cannot simply argue that all matters related to their faith are central and thus protected.

this case when it simply conceded the centrality of the practice as “beyond serious doubt.”<sup>52</sup>

What precisely is the relationship between committing adultery and becoming a good and compliant Jehovah’s Witness? It is not a matter of debate that being an adulterer is not a requirement of the Jehovah’s Witnesses. Nor it is required, as a ticket to heaven, that all the faithful execute a Declaration Pledging Faithfulness; the document is but an evidence that a member who is disqualified from entering into a specific form of relationship under the laws of a legal jurisdiction has done her best to comply and that this best effort attempt is good enough in the eyes of their deity. The purpose, as stated in Soledad’s affidavit itself, is merely to seek “God’s approval”—it is to establish as a fact of the Witnesses’ religious life that certain types of adulterous relationships may be permitted. To be more precise, the best that can be said about the issue of centrality is that a marriage that is valid in the eyes of the Witnesses’ deity is what is central or important to the life of a Witness. But this can be said of most other Christians as well, as marriage is an important sacrament. To be unified “in the eyes of god” is so central to Christian dogma that those who live together without the benefit of marriage are considered living in sin. But this only means that those who wish to live together in a committed relationship must get married, not that marriage is mandatory for everyone. In the case of the Witnesses, that adulterous marriages are in some cases allowed by their faith is certainly not equivalent to the claim that entering into adulterous marriages is central to their religious dogma.

The *Escritor* paradigm allows exemptions from laws of general application in such a comprehensive manner one wonders whether the majority was able to foresee the consequences of what it was doing, as the new model empowers religious outfits to potentially claim exemption from a vast swath of legislation of general application. Considering that *Escritor* establishes an exemption from the effects of adultery as a threshold, it is really not farfetched to imagine that in the future, assuming the Supreme Court can remain true to the bar it has set, multiple challenges will be made to civil and criminal legislation in the form of a constitutionalized demand for immunity purely on religious grounds.

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<sup>52</sup> *Escritor II*, at 81.

**SPEAKING AND (DIS)-BELIEVING**

The previous section mapped out the discourse that constitutes the jurisprudence related to the concept of believing, which platform we can use for reflecting on the constitutional status of disbelief. What we can gather from this rhetorical environment is that the courts, especially the Philippine Supreme Court, have distinctly separated the concept of speaking embodied in the Free Speech Clause and of believing contained in the Free Exercise Clause. This separation has essentially allowed the Supreme Court to somewhat create a hierarchy among rights with preferred status. The constitutional status of believing, as per *Escritor's* momentous implication, is “specially preferred,” which means that the right to believe not only involves the negative freedom to be left alone in the way a person subscribes to her faith but also the positive freedom to act pursuant to one’s beliefs and either be immune from regulation or entitled to support from the State to ensure that the exercise of one’s faith is cost-free. With benevolent-neutrality, believing in the irrational, the fantastic, and the mythical has become even more protected than speaking, whether rationally or otherwise.

What about disbelief? If, as Puno declares, atheism is a contrary theological viewpoint, should atheists celebrate and take advantage of the Chief Justice’s conceptual misapprehension? To be sure, to embrace atheism as a religion has its benefits, not the least of which would be the possibility of freeriding on *Escritor*-esque exemptions. There are a host of criminal and anti-social practices an astute builder of the Church of Atheism could concoct with this strategy. One particular freethinker thought it wise to use such strategy—for benign reasons—to set up an inmate study group focusing on humanism, atheism, and free speaking.<sup>53</sup> Such particular instrumentalism, however, has its larger implications. Atheism, following this view, and consistent with Puno’s remarks about the subject, is a theology. Given that it is a form of god-belief, it is entitled to all those constitutionalized perks the paradigm of benevolent-neutrality/accommodation has since created. This is, of course, beneficial—but at what level and cost?

Nonbelievers should take a second look at the benign instrumentalism of the freethinker who wishes to learn in the restricted halls of the prison library. True, obtaining the books would help him advance his knowledge, a matter truly central (if there ever was one) to the concerns of nonbelievers. But the constitutional principle is erroneous and not cost-free.

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<sup>53</sup> Kaufman v. McCaughtry, 419 F3d 678, Aug. 19, 2005.

For starters, atheism—or more precisely, disbelief or post-theism or non-theism—is not a religion to the extent that it does not involve the belief in a theos or a deity, whether of the type that interferes in human affairs or not.<sup>54</sup> Those who do not (but should) know better equate disbelief with “scientism” or the deification of science as a replacement for a god. Whether this is only propaganda or a sincerely held opinion is difficult to ascertain. But one does not need to have a scientific mindset to not believe, even if it immensely helps in debating god-believers. For some philosophers and those given to critical thinking, religious dogma is for the most part already self-contradictory, if not downright false. The scientific evidence for evolution and other matters sensitive to the religious are just a bonus. Most certainly as well, the “god” of science is incapable of unleashing the plague or ordering physicists to sacrifice their children in the tradition of Moses’ blind commitment.

For another, taking advantage of the constitutional exemptions of religions for the benefit of nonbelievers amounts to a rather distasteful recognition. To accord religious practices that are today constitutionally exempt the status of equality with non-theistic views is nothing less than cynical pragmatism. Worse, it grants recognition and legitimacy to the very practices secularists worry about. To say that atheism should embrace the Chief Justice’s inappropriate tag is to accept as unproblematic the very concept of constitutionalized exemptions for religious practices. From the point of constitutional principle, it is the very idea of exemption from general statutes of practices that are religiously motivated that is worrisome. Finally, insofar as non-theistic practices are concerned, it is really impossible to identify any set of practices that might conceivably be thought of as central to non-theistic beliefs which require any special protection beyond the same protections accorded to the freedom to speak, to inquire, and to criticize.

#### **TOWARDS CONCEPTUAL SYMMETRY BETWEEN BELIEF AND DISBELIEF**

How then should we evaluate the constitutional status of belief and disbelief? And what tests should be used to weigh claims of incidental burdens to belief or non/dis-belief? Are there any existing laws that can serve as examples to stress test the model? What are the justifications for adopting this new model? What are its advantages over benevolent neutrality/accommodation paradigm?

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<sup>54</sup> Richard Dawkins, *THE GOD DELUSION* (2006).

As a preliminary matter, the principle of separation of Church and State in the Constitution requires that the Supreme Court adopt principles of interpretation and doctrines that are rationally sustainable and defensible given the concern over sectarianism in Philippine history and the enmeshed problem of a shrinking space for public reason coupled with the difficulty of promoting secular policies. Without a doubt, the Supreme Court's attitude towards religion is a powerful signal for legitimizing religious practices that go against either the demands of communitarianism (certain religious practices make use of rights precisely to reject majoritarian norms) or of equal citizenship (exemption is, by nature, selective). At the same time, it creates an incentive mechanism that drives the action of religious institutions and serves as a standard for individual activities that implicates rules at the level of the public.

The model proposed here does not require sophisticated justification or a strained reading of constitutional principles. Indeed, all that is needed is to simplify the paradigm that has been obscured by theories which only serve to justify counter-secularist principles. The goal of the model is to rationalize the way Free Speech and Free Exercise clauses are used in relation to the activities of believing and disbelieving. The practical effect of the model is to create some symmetry between belief and disbelief in such a way that these activities become equivalent in the eyes of the Constitution. The general features of this model are as follows—

*First*, the negative guaranty of symmetry between the right to speak and the right to believe or not believe. The right to believe or not believe should be seen as constitutionally coextensive with the right to speak. This means that any attempt to regulate the content of belief should be subjected to the same tests available for content-based regulation.

*Second*, the guarantee of free exercise of religion (or of disbelief) is an assurance against government regulation targeting religious practices on the sole ground that they are emanations of the right to believe (or not believe). In those instances where regulation is directed not at the content of speech but at a justifiably secular concern, the fact of incidental burden to free exercise should not result in the presumptive invalidity of the statute. Instead, such regulation should be scrutinized following the O'Brien standard for content-neutral regulation.

Applying this symmetrical model for Free Speech and Free Exercise to the case against Soledad Escritor, a court can view the Declaration Pledging Faithfulness as a form of pure speech or even a private matter

between her and her congregation (or even her god). But the declaration carries no weight insofar as the administrative case against her is concerned. It should not immunize her from the criminal or administrative effects of the act of committing adultery. Obviously, regardless of whether one agrees with the wisdom of criminalizing adultery, a reasonable secular and rational justification is available for the existence of the crime of adultery in the statute books. Soledad, therefore, cannot hide behind her religion alone to avoid the administrative charge.<sup>55</sup>

Another sample application of this model, this time implicating the right of nonbelievers, involves two old provisions of the Penal Code. Under Title Two of the Penal Code on “crimes against the fundamental laws of the state” are the crimes of “interruption of religious worship” and “offending the religious feelings.”<sup>56</sup>

Suppose a nonbeliever decided to do a silent protest five meters away from the entrance to the Church of Holy Sacrifice in the Diliman Campus of the University of the Philippines on a Sunday. His silent protest is communicated in the form of a placard that says “No Religion = Peace” in front and “Grow Up! Stop Believing!” at the back. Assuming his protest falls within the doctrinal interpretation of Art. 133, can he raise the defense of free speech or exercise of his right not to believe? In such a case, just as free speech doctrine protects offensive speakers, so should the Free Exercise Clause protect offensive nonbelievers. It is only when anti-religious speech amounts to incitement that the government should be allowed to step in and protect public peace. By these standards, Art. 133, if solely directed against speech, should be subjected to the highest level of scrutiny and, if not, should be scrutinized under the O’Brien standard.

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<sup>55</sup> This, however, does not mean she should be, as the dissenters in *Escritor* would have it, subjected to administrative sanction. As I have pointed out somewhere else, the respondent could have raised plausible procedural concerns to avoid the sanction. See Florin T. Hilbay, *Undoing Marriage*, 42 SILLIMAN J. 141 (2006).

<sup>56</sup> Art. 132. *Interruption of religious worship*. — The penalty of prision correccional in its minimum period shall be imposed upon any public officer or employee who shall prevent or disturb the ceremonies or manifestations of any religion.

If the crime shall have been committed with violence or threats, the penalty shall be prision correccional in its medium and maximum periods.

Art. 133. *Offending the religious feelings*. — The penalty of arresto mayor in its maximum period to prision correccional in its minimum period shall be imposed upon anyone who, in a place devoted to religious worship or during the celebration of any religious ceremony shall perform acts notoriously offensive to the feelings of the faithful.

### CONCLUSION

The understanding of doctrine is, in many cases, shaped by the normative implications of interpretations of historical fact. In this Article I have presented a secularist viewpoint for reading the Free Exercise Clause which, given the consequences of the model, rationalizes our embrace of the irrational. There is no society in the world today that is so rational it has thoroughly rejected superstition and its foremost but barely acknowledged manifestation—religion. We do not know whether such a society will ever exist or whether, given the present structural injustices modern life has engendered, it is even possible or desirable. And so we accept as a reality of life the almost inexplicable embrace by many of the transcendent, the spiritual, and the mystical. We wear items of luck, have special numbers, murmur incantations, and sometimes believe our actions are specially guided or, to paraphrase an author, that the universe conspires to get certain things done. But we should exercise caution with the way we deal with the irrational, especially when it is presented otherwise or as a worldview that conflicts with our present-day understanding of physical reality, social ethics, and, most importantly, democracy.

The case of *Estrada v. Escritor* is an unfortunate instance of the failure to recognize the deeply problematic association between Church and State in Philippine history.<sup>57</sup> To the extent that this is so, the decision is but a logical continuation of Philippine society's failure to re-direct its ship towards secular destinations and a journey into even more dangerous sectarian waters. The model I have proposed here is not only different from the benevolent- neutrality/accommodation model embraced by the *Escritor* majority in terms of the way the Free Exercise Clause should be interpreted; it is also different in a more fundamental sense—in the way it constructs assumptions about our shared history and points to a future less dependent on a tortured past. Whether the courts will listen is a matter of faith.

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<sup>57</sup> As I have pointed out somewhere else: "The atheist is in a position to reply to the hypothetical answer, given at the start of this essay, that hers is a nation that presupposes Christian values, whose institutions assume the existence of a monotheistic god, and that this is not incompatible with secular civil government. The straightforward reply is that this is the mark of false consciousness, of the inability to historicize the reason why the Philippines has become dominantly religious in the first place. To say that this form of god-belief is an essential part of what we now call Philippine culture is no different from saying that the Philippines is a wonderful name for this country, for monotheism and the national label are both powerful symbols of three centuries of slavery. They are not badges of honor, only marks of continued colonial status, now on autopilot, that consign the unmindful to a future of colonial culture capture. It is a clear instance of the reach of colonialism, of the haunting presence of three hundred years of inability to narrate one's history, and of the ability of the past to justify its astounding currency." See Hilbay, *supra* note 6, at 41.