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Winter 2003

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Rebecca Redwood French  
*University at Buffalo School of Law*

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#### Recommended Citation

Rebecca R. French, *Shopping for Religion: The Change in Everyday Religious Practice and Its Importance to the Law*, 51 Buff. L. Rev. 127 (2003).

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**Shopping for Religion:  
The Change in Everyday Religious Practice  
and its Importance to the Law**

REBECCA FRENCH†

INTRODUCTION

Americans in the new century are in the midst of a sea-change in the way religion is practiced and understood. Scholars in a variety of disciplines—history of religion, sociology and anthropology of religion, religious studies—who write on the current state of religion in the United States all agree on this point. Evidence of it is everywhere from bookstores to temples, televisions shows to "Whole Life Expo" T-shirts.<sup>1</sup> The last thirty-five years have seen an exponential increase in American pluralism, and in the number and *diversity* of religions. There has been an explosion of New Religions, break-away churches from

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† Professor, SUNY Buffalo School of Law. I would like to thank Scott Crane, Kate Houghton, Laura Myers, and Amy Herstek of the University at Buffalo and Sarah Faville, Sean Rutledge, and Jennifer Moore Joy of Colorado University for their excellent research assistance. K. K. DuVivier, David Engel, Jim Gardner, Fred Konefsky, Murray Levine, Shubba Ghosh, Betty Mensch, and Jack Schlegel have provided needed analysis and warm support. Marcia Zubrow has been instrumental in her methodological and technical suggestions. Leslie Occhiuto and Terri Morgan helped by supplying a desk and much laughter at the Park Library. This paper was read at its beginning stages at the Baldy Center, State University of New York at Buffalo, to a thoughtful and responsive audience. Finally, Diane Stahl of Colorado University and Lois Stutzman of the University at Buffalo have improved and made legible too many drafts. Thanks to all. This piece is dedicated to a dear friend, Michelle Nimrod.

1. For more information on these expositions, see: Whole Health Expo Website, at <http://www.wholehealthexpo.com> (last visited Nov. 26, 2002); Whole Life Expo Website, at <http://www.wholelifecanada.com> (last visited Nov. 26, 2002); Equinox Astrology Website, at <http://www.equinoxastrology.com> (last visited Jan. 20, 2003).

traditional denominations and immigrant religions from Asia. At the same time, religions have moved into conservative and liberal camps, most denominations have changed their ritual practices, and fundamentalism has grown significantly.

A second type of change has taken place in the *practice* of religion as individual practitioners now emphasize spiritual identity and personal choice. They routinely shop for a new religion when relocating to a different part of the country or create their own personal practice, picking and choosing from a wide variety of possibilities. A third change concerns the *nature* of religion itself. Scholars have discovered that many of the basic functions of religion such as a connection to the divine, counseling, and ritual ceremonies are being comfortably displaced by other activities. And consumer culture is now applied, not opposed or juxtaposed, to religion itself as competitive religions have increasingly entered the marketplace. While historians argue about whether this is an increase of an already present trend, part of a long-term cycle, or a disjunctive rupture, the seismic shift itself is not questioned.

Surprisingly, law review articles, law casebooks on religion<sup>2</sup> and sociolegal journals have not highlighted these changes. While there is the occasional article on brainwashing,<sup>3</sup> the position of Scientology<sup>4</sup> and Hare Krishna proselitizing,<sup>5</sup> law review articles in general have continued on their traditional tracks of discussing the

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2. See, e.g., MICHAEL S. ARIENS & ROBERT A. DESTRO, *RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY* (1996).

3. See, e.g., Howard O. Hunter & Polly J. Price, *Regulation of Religious Proselytism in the United States*, 2001 *BYU L. REV.* 537 (2001); Catherine Wong, *St. Thomas on Deprogramming: Is it Justifiable?*, 39 *CATH. LAW.* 81 (1999); Shawn McAllister, *Holy Wars: Involuntary Deprogramming as a Weapon Against Cults*, 24 *T. MARSHALL L. REV.* 359 (1999).

4. A good review of Scientology in the legal world and its relationship to new religions and church and state relations is Paul Horwitz, *Scientology in Court: A Comparative Analysis and Some Thoughts on Selected Issues in Law and Religion*, 47 *DEPAUL L. REV.* 85 (1997).

5. See Marianne Elizabeth Dixon, *International Society for Krishna Consciousness, Inc. v. Lee: One Failure of the Public Forum Doctrine to Protect Free Speech*, 37 *ST. LOUIS U. L.J.* 437 (1993); Jennifer A. Gianno & Stacy Plotz Maza, *International Society for Krishna Consciousness, Inc. v. Lee: Public Forum Analysis of Airport Restrictions on Speech*, 6 *ST. JOHN'S J. LEGAL COMMENT.* 333 (1991); Paul Hayden, *Religiously Motivated 'Outrageous' Conduct: Intentional Infliction of Emotional Distress Against 'Other People's Faiths'*, 34 *WM. & MARY L. REV.* 579 (1993); Hunter & Price, *supra* note 3.

private school funding issue, reviewing doctrinal stances such as religious neutrality with a philosophical bent, and researching the history of the Constitution or constitutional era figures. A recent, interesting addition has been symposium discussions of the faith aspects of legal actors or institutions. Sociolegal journals avoid articles on religion in general perhaps because of the presumed illiberal nature of the arguments or the strict confines of First Amendment doctrine although, after several years of effort, a symposium on non-American religions recently appeared in *Law and Social Inquiry*.<sup>6</sup> The most highly regarded and prolific writers in the field of religion and law are legal academics who write pieces that could be categorized as lamentations such as Stephen Carter's *Culture of Disbelief* and his latest work, *God's Name in Vain*.<sup>7</sup> This generally conservative school of thought worries and mourns the fall of Jerusalem. That is, it decries the lack of religion and religious discourse in the public secular square, it worries about secularism, and it points out that legal liberalism generally misunderstands serious religious devotion.<sup>8</sup> Liberal democratic scholars occasionally respond to these pieces by warning about intolerance: the "All Against the Many."<sup>9</sup>

This shift in religious practice has gone largely unnoticed in the legal and sociolegal academic world, an omission that is hard to justify. In part, this article is an attempt to understand that omission and to see how it can be contextualized. For example, there are two prominent

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6. See Symposium, *Law, Religion and Identity*, 26 LAW & SOC. INQUIRY 95 (2001). The work of Jim Richardson on cults is an exception to this generalization. See, e.g., James T. Richardson, *Cult/Brainwashing Cases and Freedom of Religion*, 33 J. CHURCH & ST. 55 (1991). Two excellent recent law review volumes that have begun a discussion of these changes. See Symposium: *Religious Liberty at the Dawn of a New Millennium*, 75 IND. L.J. 1 (2000); *International Law and Religion Symposium*, 2001 B.Y.U. L. REV. 619 (2001).

7. See STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* xiii-xx (1993); STEPHEN L. CARTER, *GOD'S NAME IN VAIN: THE WRONGS AND RIGHTS OF RELIGION IN POLITICS* 1-8 (2000). Carter's latest work is fiction, STEPHEN L. CARTER, *THE EMPEROR OF OCEAN PARK* (2002).

8. On the issue of the misunderstanding of serious religious devotion by the legal academy, see Rebecca R. French, *A Conversation with Tibetans? Reconsidering the Relationship between Religious Beliefs and Secular Legal Discourse*, 26 LAW & SOC. INQUIRY 95 (2001).

9. See Kathleen M. Sullivan, *Exchange; Religious Participation in Public Programs: Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195 (1992).

arguments that could explain why legal academics don't examine these issues: a time-lag argument and an argument based on dearth of case law material argument. The time-lag argument states that the religion cases showing diversity, practice, and nature changes are not reaching the courts yet, especially the upper courts. In short, the changes have been too recent. The second argument for why these cases go unnoticed in academia is more cogent. Commentators are not discussing the changes in religion because they are not "legal issues," that is, they are social issues that have not shown up in the state supreme court and appellate court level decisions. Understandably, lawyers, legal academics and sociolegal scholars can not be expected to report on every popular culture change in the United States but instead are expected to focus on those that are dramatically influencing the case law and practice of law.

#### *A. Methodology Employed in This Study*

To answer these questions, this article considers the extent to which these dramatic social and cultural changes in the area of religion have appeared in the case law by 2001. The method used was to compare sets of cases before and after this shift. That is, to first read a collection of cases from the year 1963 and then to read pertinent cases handed down in the year 2001. Two different sets of cases were developed from the two time periods<sup>10</sup> for a total of four data sets: (1) a computer search for religion cases for the year 1963; (2) a similar computer search for year 2001;<sup>11</sup> (3) the

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10. We wanted to cover the changes over the last forty years. Knowing that we needed both computer case sets and a more in-depth digest, we looked for the earliest year a religion case reporter was in circulation: 1963. At the other end of the spectrum, the most recent year for which complete reporter and computer case series were available was 2001. The 2002 data sets are not yet complete. This provides us with a thirty-eight year, 1963 to 2001, contrast set.

11. For the computer searches, the head reference librarian at the University at Buffalo, Marcia Zubrow, helped us to conduct a <Sy, Di (Religi!) & DA (1963)> search on Westlaw for both years 1963 and 2001 resulting in 176 and 567 cases respectively. She then contacted Gary Pollard, Senior Vice President in charge of Editorial Operations, at LexisNexis (July 25, 2002 conversation) to find out if the Westlaw and Lexis case sets would vary significantly. Lexis "core terms" are somewhat similar to the synopsis and digest fields written by the West editors.

The result of a Lexis search using the core term (religio!) and date 1963 was

cases listed in a volume of a digest reporter for the year 1963; and (4) a similar digest reporter for the year 2001.<sup>12</sup>

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124 cases compared to 176 in the Westlaw search. The result of a Lexis search for 2001 was 548 cases compared to 567 cases for Westlaw in 2001. As Westlaw appeared to be catching more cites, we decided to use the Westlaw computer sets for 1963 and 2001. The data yields were: Westlaw in 1963, 176 cases; Reporter in 1963, 107 cases; Westlaw in 2001, 578 cases; Reporter in 2001, 300 cases. The total number of cases reviewed was 1, 159.

After receiving the case names and cites, all of the cases in each data set were photocopied and reviewed and a chart with information on the court level, religions of the participants, and subject matter, an abstract and disposition of the case was constructed and filled in for each of the four groups. The statistics given in the following sections of this article are based on these data sets.

12. To provide a more academic view, context, and extra background, we turned to digests and case reporter series. The only religious digest series available for the 1960s decade, the Ecclesiastical Court Digest, began in 1963 and was compiled by Emanuel Bund, the former Assistant Attorney General of the State of New York. His compilation of 107 cases for that year is the basis of this data set. It should be noted that the cases in this collection cover the years 1961 (rarely), 1962 and 1963 because they are cases reported in Volume 1 during the 1963 year.

For the year 2001, we chose the Religion Case Reporter edited by Paradigm Press with Martin Fisch as Editor after looking at the available options. The Religion Case Reporter had 300 cases for Volume 4 published in the year 2001. It should be noted that these cases cover 1999 (rarely), 2000 and 2001 because they are the cases reported during the 2001 calendar year.

Overlap statistics, with regard to these sets, were lower than expected due to three factors. First, there is a time lag problem for the digest reporters. Close to half of the cases in the reporter and digest set are not from the year 1963 or 2001. Second, there is a wide net cast by the computer search editors to present any case even remotely connected to the topic. The reporter and digest editors only write on cases that are central. Third, the reporter and digest series have a much greater jurisdictional range and report several interesting cases from court levels too low to be picked up by the computer. For the year 1963, there is a 16% overlap between the digest cases and the computer case set. For the year 2001, there is a 6% overlap between the reporter cases and the computer case set.

It should be noted that, due to the broad inclusion of cases in the Westlaw 2001 religion data search, approximately 22% (or 126 cases) of the cases that Westlaw cites are not relevant to a religion and law discussion. (These include criminal offenses, discrimination statutes that include the term "religion," INS cases that concerned ethnicity but not religion and my personal favorite, *Benedict v. State*, on the status of a sex offender allegedly lying to his probation officer. 774 So.2d 940 (D.C. Fla 2001) (the Headnote stating that "he worked religiously" to fulfill the conditions of his probation). The percentages cited for 2001 do not include these irrelevant 126 Westlaw cases. Please note also that all counts and percentages are my own provisional counts derived from a subjective view of the content of cases.

Sometimes one 2001 database will be used in the text and not the other, or a combination of the two. This is due to the differences in the nature of these data sets, one derived from scattershot computer fishing, the other from detailed

The cases range from the U.S. Supreme Court, State Supreme Courts, magistrate and district courts down to barely reported local decisions. This article will review each of the major changes as described in the social science literature on religion and then present the legal cases of 1963 in contrast to cases of 2001 to see what the cases show us about these changes.

This method of analysis is more qualitative than the quantitative studies of the Supreme Court and State Supreme Court by political scientists. Instead, it is a detailed look at the case subject matters and content to determine, as Paul Brace and Melinda Hall have recently put it, whether "the types of issues composing courts' dockets are connected to the social, economic and political forces surrounding these courts."<sup>13</sup> It is similar in nature to a 1977 study by Bob Kagan *et al.*, that looked at the types of changes in issues before sixteen state supreme courts from 1870 to 1970. That study found a shift from debt collection and property cases to torts and criminal law over a 100-year period.<sup>14</sup> The question being asked here reverses the question of how law is represented in popular culture and asks if popular cultural shifts appear in the case law.

The results of this survey of over 1000 cases viewed in light of this question elucidate the presence of most of these religious changes in case law at all levels by 2001. In some surprising twists, the changes are already apparent in the 1963 cases. All of the basic changes are chronicled and documented in the cases: diversity; the influx of Asian and Mid-Eastern immigrant religions; the growth of New Religions; political divisions between liberal and conservative religions; and commodification of religion. The results of this article raise several interesting questions about the ways in which law acts as a forum for social issues. If religious studies scholars have long trumpeted these monumental shifts, and the religion and law cases reflect them, why aren't legal scholars talking about them? What

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human investigation based on experience in the field.

13. See Paul Brace & Melinda Gann Hall, *'Haves' versus 'Have Nots' in State Supreme Courts: Allocating Docket Space and Wins in Power Assymmetric Cases*, 35 LAW & SOC'Y REV. 393, 397 (2001).

14. See Robert A. Kagan, et al., *Do the 'Haves' Come Out Ahead? Winning and Losing in State Supreme Courts, 1870-1970*, 21 LAW & SOC'Y REV. 403-45 (1987).

then is the role of legal and sociolegal academics in reporting, monitoring and commenting on the law?

### B. *Some Theories of Change in Religion Reviewed*

Before outlining the organization and major ideas presented in this article, it is important to briefly present the historical and theoretical backdrop against which these changes are measured. Three different theoretical approaches have been used to explain the enormous proliferation and change in religion over the last thirty-five years. Each is a response to a "sacred canopy" ideology, prevalent in the 1950s, which was "an effort to achieve religious unity by emphasizing America's bland and vague 'shared values'."<sup>15</sup> Called the old paradigm, it depicted a "society suffused with religion" as in Will Herberg tripartate presentation of religion in America, *Protestant, Catholic, Jew*.<sup>16</sup> Religion, in this model, was a cohesive force that tied post-World War II American society together with three major religious threads, supported the status quo, and was consensual in appeal.

The first of the new models used to explain this change over the last thirty-five years is the cyclical pattern theory in which social upheaval leads to new religions and eventually to a stabilized pattern. In the cyclical pattern, periods of social upheaval, such as the Reformation in Europe, destabilize the society and cause the creation of new religions. This is followed by the institutionalization of these religions, ossification, and an eventual reoccurrence of the cycle. According to this interpretation, American religion is now in a period of ferment.<sup>17</sup>

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15. ELIZABETH MENSCH & ALAN FREEMAN, *THE POLITICS OF VIRTUE: IS ABORTION DEBATABLE?* (1993). See also, PETER L. BERGER, *SACRED CANOPY: ELEMENTS OF A SOCIOLOGICAL THEORY OF RELIGION*, 25-28 (1967); *TO EMPOWER PEOPLE: FROM STATE TO CIVIL SOCIETY* (Peter L. Berger & Richard John Neuhaus eds., 1996).

16. WILL HERBERG, *PROTESTANT, CATHOLIC, JEW: AN ESSAY IN AMERICAN RELIGIOUS SOCIOLOGY* (1960). These ideas were also very much promoted by the consensus school of historians, very prominent in the 1950s—Daniel Boorstin, Louis Hartz, and Richard Hofstadter. For an interesting description of this period, see JOHN HIGHAM, *HANGING TOGETHER; UNITY AND DIVERSITY IN AMERICAN CULTURE* (2001).

17. Historians commonly present religious change as having a cyclical pattern with a particular causal factor creating the momentum. For example, periods of social upheaval and severe economic shifts are thought to lead to new



Several New Religious Movements scholars, such as James Lewis, David Bromley, and Robert Wuthnow, contend that the era since the early 1960s does not follow this pattern. Their model is one of real change, one without a new synthesis and eventual ossification.<sup>18</sup> They posit the past as based in a particular American traditional model, the sacred canopy theory of Protestant-Catholic-Jew dominance, and state that the last thirty-five years is a complete break with that model.

The third approach eliminates the idea of change on its head and declares that the traditional model never existed. Stephen Warner and others using this third theoretical perspective state that the old Durkheimian paradigm of the sacred canopy has simply never existed in America, nor did it adequately address many key aspects of modern religion.<sup>19</sup> Announcing that American religions have always

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approaches to religion. The examples given are the late Classical Period, the Protestant Reformation, and the Great Awakening of the 1740s when multiple innovative forms of the majoritarian traditional religion sprung up all over the European landscape. According to the cyclical theory, as these innovations eventually coalesce and are institutionalized, they become part of a new general cultural and religious synthesis. The new synthesis then ossifies into a traditionalist pattern. This religious cycle—disruption, religious innovation, coalescence and institutionalization—is presented by scholars as successively repeating itself throughout history. This is the theoretical approach of many of the older scholars of religion and also of historians of religion.

18. See JAMES R. LEWIS, *ODD GODS: NEW RELIGIONS AND THE CULT CONTROVERSY* (2001); DAVID G. BROMLEY, *RELIGION AND THE SOCIAL ORDER: NEW DEVELOPMENTS IN THEORY AND RESEARCH* (1991). PHILLIP E. HAMMOND, *THE FUTURE OF NEW RELIGIOUS MOVEMENTS* (1987); ROBERT WUTHNOW, *THE RESTRUCTURING OF AMERICAN RELIGION: SOCIETY AND FAITH SINCE WORLD WAR II*, 14-17, 33, 314-17 (1988). While a period of social problems and disruption did occur, particularly in the United States, Canada, and Europe, followed by a search for new visions and new approaches to religion in the 1960s and 1970s, Wuthnow argues that the social changes were far reaching and the stage of coalescence and institutionalization has not resulted.

19. See R. Stephen Warner, *Work in Progress, Toward a New Paradigm for the Sociological Study of Religion in the United States*, 98 *AM. J. SOC.* 1044, 1055 (1993). The sacred canopy model, according to this school, did not describe the lack of secularity in modern society and had to typify New Age religions as deviant and degenerate. It relegated all supernaturalism and mysticism to the periphery of modern society, to the backward regions and lower classes, which does not fit the facts. By requiring religion to be the property of the whole society, the old paradigm lost its value as a theoretical tool. Thus, these scholars argue that the older paradigms of Talcott Parsons, Peter Berger, Lechner and Hunter, although still cited extensively particularly in the legal literature, are not useful for interpreting American religion. See also, ROGER FINKE & RODNEY STARK, *THE CHURCHING OF AMERICA, 1776—1990: WINNERS*

been multifarious and innovative by citing the First and Second Great Awakening periods, this model rejects both the cyclical theory and the recent permanent change model. Instead, New Paradigm theorists point to the periods of religious ferment as the baseline against which all periods of American religion, including the present one, should be measured.<sup>20</sup> They maintain that religion in America has always been the property of subcultures, has always been a form of assertive and positive particularism, and has been a means of creative innovation and mobilization. Furthermore, they state that religion is an absolutely fundamental category of identity and a fundamental means of association in America.<sup>21</sup>

The New Paradigmists also employ economic and marketplace vocabulary and imagery to discuss religion but, as Warner notes, even "those who use economic imagery do not agree on the full logic of market analysis as applied to religion in all of its empirical corollaries."<sup>22</sup>

AND LOSERS IN OUR RELIGIOUS ECONOMY (1992).

20. New Paradigm theorists suggest that the Second Great Awakening in the early 19th century in the United States was the actual American norm. This is a very interesting period in American religious history, a time when new and entrepreneurial religious interests were constantly forming and reforming. During this century, from 1800 to 1900, the original thirty denominations of colonial times increased to well over two hundred in number. Between 1820 and 1840, the Congregationalists split with the Unitarians, the Presbyterians split into Old and New Schools, scores of new denominations were formed and immigration brought different religious groups from Europe. Familiar religious groups such as the Mormons, the Seventh Day Adventists, Jehovah's Witnesses, The Christian Scientists, and the Pentecostal Churches were all formed by charismatic leaders in this period. The westward expansion, the Civil War and Reconstruction period caused further differentiation and the voluntary formation of new congregations through the end of the century. An excellent book on this topic and its relationship to democracy and egalitarianism is NATHAN O. HATCH, *THE DEMOCRATIZATION OF AMERICAN CHRISTIANITY* (1989).

21. They point to the role of the black church during the Civil Rights movement or the formation of the Metropolitan Community Church, a central organization for legitimating gay culture in America. Religious pluralism and structural adaptability are the norms in America not deviations from a standard model. Steve Warner points out four properties of American religion that highlight this role: (1) religion is constitutive for many American subcultures, (2) it has always been used by a mobile population as a way of associating in new places, (3) it provides a safe social space for unusual cultural elements inside the United States, and (4) religion remains the most common voluntary associational form in our society. See R. Stephen Warner, *Work in Progress: Toward A New Paradigm for the Sociological Study of Religion in the United States*, 98 AM. J. OF SOC., 5, 1044 (1993).

22. *Id.* at 1055.

Concepts like "rational consumer," and a market open to all "energetic entrants,"<sup>23</sup> are prevalent in this new theoretical discourse. This is an application of the methodology and theory of economics to the institutions and practice of religion, in which the choice of various participants occurs in a marketplace of religious offerings. Thus, several of the new churches and religions actually do view the process from this perspective. This article will look at whether or not these theories are discernible in the religion cases as well.

*C. The Organization and Major Ideas Set Out in This Article*

The central part of this article is structured into three separate sections each highlighting an important religious change. At the end of each section is a case law analysis in which cases from 1963 and 2001 are reviewed to see if they reflect the changes.

1. *Section One.* In the beginning section, the first of the three major shifts will be discussed: the change in *diversity* and *politicization* of the religious landscape in the United States over the last fifty years. The thesis of a historian of religion, Robert Wuthnow, is that the post-WWII population was very different from their parents. Influenced by the Civil Rights and the feminist movements, a better educated and more tolerant post-WWII generation began to lose affiliation with their natal religious denominations. This tolerance smoothed the way for a vast increase in types of religions in the United States—small independent congregations, thousands of break-off churches, growing African-American churches, and new fundamentalist groups. According to Wuthnow, the distinguishing feature of the pre-WWII period was denominationalism, while the distinguishing feature of the post-WWII period is a split between liberal and conservative religious groups.

An important part of this story is the *Immigration and Naturalization Act of 1965*, which is described in Part I.A. New religions came streaming into the United States and were added to the growing diversity. Part I.B describes the

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23. *Id.* at 1067, 1079.

*spiritual revitalization* of this period and the changes in New Religions and New Age Spirituality that added to the mix. New Religions like Scientology combine therapy, new theology, technological innovation, economic enterprise and global marketing to evolve effective new hybrids. Though they often receive negative press, New Religions rarely experience public events such as the burning at Waco of the Branch Davidians.

New Age Spirituality is another new phenomenon based on an old American tradition of spiritualism and transcendentalism from the 1800s. Americans now seek help and information through crystal power, astrology, palm-reading, psychics, and the hundreds of other spirituality counselors that are quite common working both as individuals and in large expositions like the Whole Life Expos. Further, the internet is another new religious frontier.

Part I.C, *Case Law Analysis*, considers whether these described changes in the religious landscape appear in the case law and, if so, how they are represented. After reviewing the 1963 and 2001 case law, this article examines five areas in which these changes appear. First, the political liberal/conservative religious split that Wuthnow predicts as a major change in the religious landscape from denominationalism is apparent. Second, the diversity predicted for the 2001 period in comparison to 1963 is evidenced by the many small Protestant independent churches and the profusion of Asian and other immigrant religions represented. Third, prison cases show a strong difference between the two periods. In 1963, the only new denomination was the Black Muslims. Case law from 2001 has a large profusion of new denominations, including: Rastafarians, Muslims, Orthodox Jews, Wiccans, Hare Krishnas, and Buddhists. Fourth, there is little evidence in the case law to support the anti-immigrant religion response that Diana Eck chronicles. Fifth, there are many New Religions and New Age Spirituality cases in the 2001 case law.

2. *Section Two*. The next section describes the second major shift, the change in religious *practice* to issues of identity, choice and expressivism. While social theorists have predicted a loss of religion and secularization, statistics show that this loss has not occurred. Instead, the

way individuals practice religion has changed. Announced as the "Me Generation" by Christopher Lasch, American culture in the 1960s entered a phase of increased individual autonomy, greater mobility, increased self-expression and experimentalism which directly affected the practice of religion. Spiritual seekers began to shop around for different religions or to combine aspects of religions into their own personalized practice.

Many of the different authors who have chronicled this shift to individualism, identity, and expressivism in religion are presented in Part II.A. This type of spiritual seeking includes Luckman's invisible personal religion, Wuthnow's fluid and negotiable religious practice, and Bellah's "Sheilaism." This section provides a general understanding of the religious shift in practice in the words of the religion scholars. Part II.B investigates a less understood phenomenon, the process of choosing or creating one's own religion. Shopping for a religion, switching to a new denomination and creating one's own "grocery cart" religion filled with the pieces of various practices that appeal, have become very common approaches. There are even aggregate syncretic institutional forms such as the Techno Cosmic Mass in San Francisco.

The case law analysis in Part II.C presents three areas in which the shift to individualism and identity issues in American religious practice is clear. First, cases on sex and particularly on gay and transgendered identity demonstrate that issues of identity and individual orientation have permeated the religion case law. Over 11% of the case law by 2001 concerns sexual topics and one third of those cases are on gay issues. The two types of gay cases are individual pro-gay plaintiffs and individual anti-gay plaintiffs, usually conservative Christians who oppose tolerance of homosexuality. These Christians object to the sexual orientation and identity of others on religious grounds.

Next, the sexual harassment and abuse cases are reviewed. While there were only two in 1963, there are at least twenty cases by 2001. Harassed and abused plaintiffs do not win the majority of the time. The Roman Catholic Church was particularly successful in avoiding suits which partially explains the current politicization of that issue. Third, the issue of personal choice, so much a part of the turn to identity, is strongest in 1963 case law with the anti-draft effort and theological shifts of the period of the 1960s.

Shopping for religion and creating one's own religion is not present in either the 1963 or the 2001 case law. "Personal choice" language is used in the aid-to-school cases in what Laura Underkuffler has called "the theory of the individual as causative agent." This section concludes with a discussion of the 2003 Supreme Court decision on school-funding. In this interesting case, private, individual choices by Cleveland parents are presented as a way of neutralizing aid from the government to sectarian schools. The conservative majority of the Court is pro-personal choice under these circumstances.

3. *Section Three.* This section describes perhaps the least known change, a shift in the *nature* of religion as evidenced in a move toward the displacement and consumer commodification of religion. At the turn of the century, the pursuit of wealth and the pursuit of morality became coupled, and American consumer capitalism was forged in the aisles of the department stores that were first developed by John Wanamaker. By the end of the century, the United States had moved into a much more flexible and individually-based form of consumer capitalism, a process that has deeply affected the nature of religion. The consumerization of religious holidays is just one arena in which to view this change.

Part III.A begins with the story of Susan, the long distance runner who has replaced religion with running. Running fulfills all the aspects and functions—community, catharsis, ritual, therapeutic counseling, connection to the divine, meaning—that religion would in another individual's life. This is the process of displacement, replacing religion with another activity or process. Susan states that her running community is her religious community. Bicycling, fitness, weight-lifting, shopping, obsessive dieting, technology—almost any activity can have this displacement effect.

A discussion of the consumer and commodification effects of religion constitutes Part III.B. Many of the functions of religion, such as therapeutic counseling, have been separated from religion and turned into commodities that are now for sale in the form of books, nighttime courses at universities, seminars, counseling sessions, and programs. At Borders bookstore for example, there are now several aisles of books on Christian inspiration, crystal

power, astrology, and the internal sacred warrior in each of us. Also, commercialization has moved into several spheres connected to religion such as holiday celebrations. Finally, religion itself has become a commodity for sale both in juxtaposition to other religions and also to other cultural commodities. One author suggests mapping the ways in which this has happened and some of the confusion that has resulted. A good place to start might be the attractions of the megachurch movement: vast church complexes that incorporate malls, water parks, housing, restaurants, gyms, sports facilities, and auditoriums that seat nine thousand people in front of a stage with several huge screens.

The case law analysis for the third section, Part III.C, tries to uncover indications of the displacement and consumer commodification of religion in the cases for 1963 and 2001. What about cases about money—estate taxes, exemptions, or charitable bequests? These cases, which are very common in 1963, do not concern consumer commodification but institutional exemption from government taxes. Only 4% of the cases from the 2001 database address these issues.

The cases on therapy as religion better illustrate the process of displacement. Alcoholics Anonymous (AA), a therapeutic mutual assistance program, was declared a "religion" in at least six cases in 2001, usually under circumstances in which prisoners or parolees were forced into the treatment program and not provided a secular alternative. In another case, an individual sued and lost after arguing that the state was supporting a religion (AA) for Establishment Clause purposes. However, that court still held that AA was a religion. Finally, when a member of AA claimed confidential communication privileges in a criminal case, the lower court agreed, but the Second Circuit held that AA is not a "traditional religion." These cases indicate how far the court has gone in displacing religion with other entities.

How have religion and consumerism intersected? In the middle of the last century, a presumed, general Christian morality dictated commercial interactions and religion. Thus, in 1963 there are cases on Sunday closing laws, convictions for the possession and sale of obscene materials, and anti-gaming suits. In contrast, by 2001, most of the cases involve conservative Christians suing to bring religion back into public schools. By 2001, the courts state that

commercial messages are appropriate at holidays such as Christmas, because they send messages of inclusion and freedom to listeners. The last arena in which the cases show the intersection of religion and consumerism is in intellectual property. Perhaps the perceived general Christian morality of the 1950s has shrunk in effect and scope by 2001 and the liberal/political split that Wuthnow depicts is a result of this contraction.

Finally, the wide variety of cases filed in 2001 when compared with 1963, show that plaintiffs now perceive the category of "religion" as highly flexible, malleable, and perhaps even consumerist. A case based on a religious objection to genetically modified foods (which the court accepted as a valid belief), a case involving resistance to DNA testing on religious grounds (although the prisoner made no claims whatsoever as to his religion), and a case in which the valid religious beliefs of the plaintiff were based on what the court decided was not a religion, indicate the confusion that arisen as to the nature of religion itself.

The Conclusion reviews the initial changes in religion described by religion scholars and concludes that case law for these changes is definitely available. It then discusses a few reasons why these changes might not be covered by the academic community. It also raises seven important avenues for approaching and addressing the changes in religion as they appear in the law.

#### I. THE FIRST OF THREE MAJOR SHIFTS IN RELIGION IN THE UNITED STATES: DIVERSITY AND POLITICIZATION

In an influential book, *The Restructuring of American Religion*,<sup>24</sup> Robert Wuthnow of Princeton attributes the change in religion in the last fifty years to several factors, the most important of which is the enormous population increase after World War II. With returning soldiers pouring back into schools and jobs and the concomitant expansion of higher education for their baby boomer children, American society was transformed through increased literacy into a more liberal and tolerant population. The post-war period saw several influential technological developments such as the satellite, the computer, and an expanded role for government that

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24. WUTHNOW, *supra* note 18, at 153-54.



altered the political and legal landscape. As social requirements loosened, the general intolerance for other ethnic groups and religions began to abate. Gradually, a loss of denominationalization occurred, and it was possible to conceive of marrying outside of one's religion. The Civil Rights struggle, the growth of feminism,<sup>25</sup> the Vietnam War, and finally, the internal changes of traditional religions such as Vatican II in 1962 to 1965,<sup>26</sup> were all markers of a shift during this period. The salient long-term change that resulted from this period was a move away from denominationalism to a new split between conservative and liberal religious groups.<sup>27</sup>

Scholars have chronicled an exponential increase in diversity during this period. This diversity was demonstrated in (1) an increase in new mainstream denominations, break-off denominations, and a turn to evangelicalism;<sup>28</sup> (2) a growth in Christian alternative

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25. See ENLING JORSTAD, *HOLDING FAST/PRESSING ON: RELIGION IN AMERICA IN THE 1980S*, 1-11 (1990). The author attributes the permanent changes in religion to the emancipation of female sexuality and the resultant sexual revolution. *Id.*

26. The Second Vatican Council was opened under Pope John XXIII in 1962 and closed by Pope Paul VI in 1965. One of the fruits of Vatican II is the *Nostra Aetate, Declaration of the Relation of the Church to Non-Christian Religions*. In this document, The Holy See recognized non-Christian religions and acknowledged it must develop a new sensitivity towards non-Christian religions. The *Nostra Aetate* also chartered a path for inter-religious dialogue and collaboration between the Pope and other religious leaders, and recognized the contributions of non-Christian faiths to society. For a discussion of the effect of Vatican II, see RICHARD J. REGAN, *CONFLICT AND CONSENSUS; RELIGIOUS FREEDOM AND THE SECOND VATICAN COUNCIL* (1967); THADDEUS D. HORGAN, *WALKING TOGETHER: ROMAN CATHOLICS AND ECUMENISM TWENTY-FIVE YEARS AFTER VATICAN II* (1990). See also *Nostra Aetate*, available at [www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/index.htm](http://www.vatican.va/archive/hist_councils/ii_vatican_council/index.htm) (last visited Mar. 3, 2003).

27. Wuthnow rejects discussions of the secularization of America as not particularly insightful, but does agree that government growth and the "Supreme Court's espousal of a strong policy of 'strict neutrality' toward religion" have had very important consequences for American religion. WUTHNOW, *supra* note 18, at 322. For reasons behind the split, see Mark A. Shibley, *Contemporary Evangelicals: Born-Again and World Affirming*, 558 *ANNALS AM. ACAD. POL. & SCI.* 67 (1998).

28. A good study of the turn to evangelicalism in the United States is R. STEPHEN WARNER, *NEW WINE IN OLD WINESKINS: EVANGELICALS AND LIBERALS IN A SMALL-TOWN CHURCH* (1988), which chronicles in detail the change in a Mendocino church from Protestant social club to evangelical insurgents. See also GEORGE MARSDEN, *UNDERSTANDING FUNDAMENTALISM AND EVANGELICALISM* (1991).

churches such as the Christian Scientists and Jehovah's Witnesses; (3) the enormous growth of the African-American Church Movement including the African-American Freedom Movement with religions such as Santeria, Rastafarians and Voudou; (4) an influx of immigrant religions such as Islam, Buddhism, Bahai, Sikhs and Hinduism; (5) the proliferation of New Religions like Scientology and Eckankar; (6) a revitalization of traditional American spiritualism in the form of New Age Spirituality; and (7) the growth of fundamentalist movements and break-offs.<sup>29</sup> This article can only highlight a few of these significant changes.

While it has always been pluralistic, American religion is now divided in a thousand more ways than it was initially, and it is changing more rapidly and taking different forms. New African American megachurches have grown into three of the largest denominations in the United States. Cheryl Gilkes points out that, "[a]lthough African Americans compose only 12% of the U.S. population, they constitute 25% of its megachurch movement."<sup>30</sup> Another well-known religious studies scholar, J. Gordon Melton has used the term "exploding" to describe the changes. "Today, over half of all the 2000-plus primary religious groups operating in the United States were formed after 1960."<sup>31</sup> The compiled statistics of the *American Religious Identification Survey* support this claim.<sup>32</sup>

As September 11th, 2001 demonstrated, the role of fundamentalism in what has been called a global

29. This is my own list of types of diversity. While there are other forms in the American religious landscape, I will not go into them here. See generally, Wade Clark Roof, *Americans and Religions in the Twenty-First Century*, 558 ANNALS AM. ACAD. POL. & SOC. SCI. 9 (1998).

30. Cheryl Townsend Gilkes, *Plenty Good Room: Adaption in a Changing Black Church*, 558 ANNALS AM. ACAD. POL. & SOC. SCI. 101, 102 (1998).

31. J. Gordon Melton, *Religious Pluralism: Problems and Prospects*, 2001 B.Y.U. L. REV. 619, 621 (2001).

32. *The American Religions Identification Survey*, The Graduate Center of the City University of New York (2001) available at [http://www.gc.cuny.edu/studies/key\\_findings.htm](http://www.gc.cuny.edu/studies/key_findings.htm) (last visited, Mar. 3, 2003). Supporting Melton's assertion that participation in New Religions is growing exponentially, the survey found that 7.7 million Americans practice some form of New Religion. *Id.* When asked to name their religion, respondents gave one hundred different categories of responses including Santeria, Ethical Culture, Wiccan, Deity, Druid, Eckankar, Rastafarian, New Age, Pagan and Sikh. *Id.*

resacralization movement should not be underestimated.<sup>33</sup> Some of the most demanding religions in terms of commitment are the most successful in recruiting new practitioners within the United States. Studies among fundamentalist women in New England and orthodox Jewish female converts have found that "religious commitments helped people set and maintain priorities in a time of perceived bewildering choice."<sup>34</sup> Martin Marty and Scott Appleby's Fundamentalism Project, which surveyed fundamentalist movements throughout the world, surprisingly found that although these religions are categorized as traditionalist, most fundamentalism is essentially modern in its instrumentality, function, and core teachings.<sup>35</sup>

This section will present in more detail two of these changes: immigrant religions and the spiritual revival of New Religions and New Age spirituality.<sup>36</sup> It will then turn to the case law to review if, how and where these changes might be illuminated in the actual cases being brought to courts.

#### A. *The Immigration and Naturalization Act of 1965 and the Changes it has brought to American Religion*

Standing at the foot of the Statue of Liberty on an October day in 1965, President Lyndon Baines Johnson signed into law a bill that reversed forty-five years of restrictive immigration quotas for most countries outside of Europe.<sup>37</sup> Prior to that day, immigration into the United

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33. See ANDREW GREELEY, *RELIGIOUS CHANGE IN AMERICA* 19-20 (1989); DAVID MARTIN, *THE RELIGIOUS AND THE SECULAR* (1969); RICHARD JOHN NEUHAUS, *UNSECCULAR AMERICA* (1986).

34. Warner, *supra* note 19, at 1078.

35. Martin Marty and Scott Appleby have collected essays that meticulously describe individual cases of religious fundamentalism around the world. See *THE FUNDAMENTALISM PROJECT: FUNDAMENTALISMS OBSERVED* 817-27 (Martin Marty & R. Scott Appleby eds., 1991). See also *FUNDAMENTALISMS AND SOCIETY; RECLAIMING THE SCIENCES, THE FAMILY AND EDUCATION* (Martin Marty & R. Scott Appleby eds., 1993); *FUNDAMENTALISMS AND THE STATE: REMAKING POLITICS, ECONOMICS AND MILITANCE* (Martin Marty & R. Scott Appleby eds., 1993).

36. For a good review of both the immigrant religions and new spiritualities categorized under the heading, alternative religions, see *AMERICA'S ALTERNATIVE RELIGIONS* (Timothy Miller ed., 1995).

37. See Immigration Nationality Act Amendments of 1965, Pub. L. No. 89-

States from Asia and other non-European areas had been severely restricted by the Johnson-Reed Act of 1924. As a result of his signature, the number of Asians and Africans entering the country in the last thirty-five years has risen exponentially.<sup>38</sup>

With these new populations came immigrant religions. From Sikhs and Jains to Sufiis and Baha'i, many new religions, each with its own array of sects and subdivisions, have joined the American population. There are well over one million Hindus practicing in centers throughout the country and estimates of Buddhist—from a variety of sects in Thailand, Vietnam, Japan, Cambodia, Tibet, Mongolia, Korea and China—vary from half a million to three million.<sup>39</sup> Thousands of non-immigrant Americans have converted to these immigrant religions. In Buddhism for example, there are now thousands of members of these sects, independent American Buddhist congregations and hundreds of centers, retreat centers, meditation facilities and classes.<sup>40</sup> Off-shoots of groups from Asia are equally plentiful, such as the Aum Shinrikyo sect, the Unification Church (Moonies), the International Society for Krishna Consciousness Peoples Temple, Soka Gakkai, Osho (formerly known as followers of Bhagwan Ragnesh or sunyasin), and Maharishi's Transcental Meditation.<sup>41</sup> And

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236, 79 Stat. 911 (1966).

38. Data compiled by the U.S. Census Bureau and the INS shows that in 1964, the immigration quota for Asians was 3,690; the quota for Africans was 4,074. U.S. Census Bureau, *Statistical Abstract of the United States: 1965*, at 92 (1965). In 1998, the latest year for which figures are available, those numbers grew to 219,700 and 40,700 respectively. U.S. Census Bureau, *Statistical Abstract of the United States: 2000*, at 10 (2000).

39. A collection of essays that chronicles these changes is *GATHERINGS IN DIASPORA: RELIGIOUS COMMUNITIES AND THE NEW IMMIGRATION* (R. Stephen Warner & Judith G. Wittner eds., 1998). Included are essays on Hindus, Iranian Jews, practitioners of the Mayan religion, Vodou and Hatian Catholicism, Rastafarians, Muslims, Indian Christians, Korean Protestants, and Chinese Christians. *See also* HO-YOUN KWON, ET AL., *KOREAN AMERICANS AND THEIR RELIGIONS: PILGRIMS AND MISSIONARIES FROM A DIFFERENT SHORE* (2001) (discussing the ethnic roles of Korean immigrant churches in the U.S. and the growth of Korean Buddhism in America); E. BURKE ROCHFORD, JR., *HARE KRISHNA IN AMERICA* (1991).

40. For an accurate but off-beat compendium, see ANDREW RAWLINSON, *THE BOOK OF ENLIGHTENED MASTERS; WESTERN TEACHERS IN EASTERN TRADITIONS*, 3-13 (1997).

41. A description of the Aum Shinrikyo sect is available on the internet at [http://www.stelling.nl/simpos/aum\\_shinrikyo.htm](http://www.stelling.nl/simpos/aum_shinrikyo.htm) (last visited, Mar. 3, 2003).

these immigrant religions have significant populations when compared to non-immigrant religions. For example, in the United States in the year 2001, there were more Muslim Americans than Episcopalians, more Muslims than members of the Presbyterian Church USA, and as many Muslims as Jews.<sup>42</sup>

In *A New Religious America*, Diana Eck describes these changes as creating a new pluralism: "the new American dilemma is real religious pluralism and it poses challenges to America's Christian churches that are as difficult and divisive as those of race."<sup>43</sup> Her descriptive and celebratory response to the change is in sharp contrast to a long tradition of negative conservative responses to these immigrants such as Peter Brimelow's *Alien Nation*, Arthur Schlesinger Jr.'s *The Disuniting of America* and a recent addition by Patrick Buchanan, *The Death of the West: How Dying Populations and Immigrant Invasions Imperil Our Country*.<sup>44</sup> In varying degrees, this genre blames the loss of American-ness and American morality on the influx of alien populations and their foreign religions. Eck warns of the violence directed at these religious groups by non-immigrant Americans. She recounts many incidents of hatred and bigotry—temples burned down, windows

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For a brief history of the Unification Church (Moonies), see a discussion of the Unification Church at <http://www.rapidnet.com/~jbeard/bdm/Cults/unificat.htm> (last visited, Mar. 3, 2003). See also International Society for Krishna Consciousness Peoples Temple Website at <http://www.krishnadenver.com/index.html?body=pg-intro-about-01.html> (last visited, Mar. 3 2003); for more information on the Soka Gakkai, Osho see Trance Cult Website at <http://www.trancenet.org/links/cults.shtml> (last visited Mar. 3, 2003); for more information on Maharishi's Transcental Meditation see Maharishi Website at <http://www.alltm.org/Maharishi.html> (last visited, Mar. 3, 2003).

42. See DIANA ECK, *THE NEW RELIGIOUS AMERICA; HOW A "CHRISTIAN COUNTRY" HAS NOW BECOME THE WORLD'S MOST RELIGIOUSLY DIVERSE NATION* 2-3 (2001).

43. *Id.* at 46, 69-77. Eck also presents three possible responses to this challenge: *exclusion*, *assimilation* into the melting pot, and real *pluralism*, which she defines as active engagement, constructive understanding, an encounter of commitments rather than just tolerance and on-going work for each generation. *Id.*

44. See PETER BRIMELOW, *ALIEN NATION* (1995); ARTHUR M. SCHLESINGER, JR., *THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY* (1998); PATRICK J. BUCHANAN, *THE DEATH OF THE WEST; HOW DYING POPULATIONS AND IMMIGRANT INVASIONS IMPERIL OUR COUNTRY AND CIVILIZATION* (2002).

smashed, and members of immigrant churches beaten up and shot—most of which the media does not report. In particular, violence against Muslims, Sikhs, and Hindus is on the rise. The events of September 11th have only increased the invectives and underlined these animosities.

B. *The Spiritual Revitalization in the Second Half of the Twentieth Century*

Scientology is the classic example of a new religious movement in the second half of the twentieth century.<sup>45</sup> Initially, the Church of Scientology was strongly criticized and members were prosecuted for fraud and tax evasion.<sup>46</sup> More recently, the Internal Revenue Service has come to an agreement with the church, and law review articles by practitioners advocating Scientology positions have appeared.<sup>47</sup> While ex-members dispute their figures, the Church of Scientology has listed its membership at six

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45. In 1950, L. Ron Hubbard published *DIANETICS: THE MODERN SCIENCE OF MENTAL HEALTH* which became an international best-seller. He then used his success to found a new religion, the Church of Scientology in Los Angeles. Scientology is individualistic: each person has a life energy made up of matter, energy, space, and time. Painful experiences are purged from your subconscious mind to achieve good mental health. Long-term therapy is done one-on-one with a therapist called an auditor using a machine called an auditoron. For a book on Scientology, see BENT CORYDON AND L. RON HUBBARD, JR., *L. RON HUBBARD, MESSIAH OR MADMAN* (1987). For a recent law review article on Scientology presenting its history in court, see Horwitz, *supra* note 4.

46. See, e.g., *Hernandez v. C.I.R.*, 490 U.S. 680 (1989). The Supreme Court held that the fixed payments for Scientology members' auditing and training services were not tax deductible charitable contributions. *Id.*

47. The IRS settled their years-long battle with the Church of Scientology in October 1993. See *Church of Scientology of Calif. v. C.I.R.*, 823 F.2d 1310 (9th Cir. 1987); IRS Rev.Rul. 93-73, 1993-2 C.B. 75. A significant part of the change was the recruitment of several famous Hollywood stars such as Tom Cruise, Nicole Kidman and John Travolta. See Stephen M. Silverman, *Tom Cruise Speaks Up for His Beliefs*, *PEOPLE WEEKLY*, January 30, 2002, available at [http://people.aol.com/people/news/now/\(1\)1\(11\)958,198271,00.html](http://people.aol.com/people/news/now/(1)1(11)958,198271,00.html). Scientology has been humorously caricatured in recent films such as Steve Martin's *BOWFINGER* (Universal Pictures 1999). For a law review article on Scientology, see Michael Browne, *Should Germany Stop Worrying and Love the Octopus? Freedom of Religion and the Church of Scientology in the United States*, 9 *IND. INT'L. & COMP. L. REV.* 155 (1998). The religion often receives negative press, see Richard Behar, *The Thriving Cult of Greed and Power*, *TIME*, May 6, 1991, at 47. To counteract this article, the church started a long costly legal suit to object to its treatment. See *Church of Scientology Int'l v. Behar*, 238 F.3d 168 (2d Cir. 2001).

million, with satellite centers in every major city in the United States and many foreign countries.

Scientology, the Children of God, the Forums Network (formerly known as *est*), the Branch Davidians, the members of the Solar Temple, ECKANKAR, UFO religious movements, and Heaven's Gate are just a few examples of newly formed spiritual groups that show the particular mix of therapy, new theology, technological innovation, economic enterprise and global organization which typify new religious movements since the 1960s.<sup>48</sup> Old spiritual traditions such as Wicca, Satanism, and Paganism have experienced a huge resurgence.<sup>49</sup> Eileen Barker states that there are over "2,600 different groups on INFORM's [the Information Network Focus on Religious Movement] computer, the majority (but not all) of which might be called [New Religious Movements]."<sup>50</sup> While they have received a great deal of negative media attention, with depictions on the television of cult brainwashing, the mass suicide in Jonestown,<sup>51</sup> or the incineration of the Branch Davidians in Waco,<sup>52</sup> these extreme incidents are rare in

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48. There are many good books on this topic. See JAMES A BECKFORD, *CULT CONTROVERSIES: THE SOCIETAL RESPONSE TO THE NEW RELIGIOUS MOVEMENTS* (1985); SHIRLEY HARRISON & SALLY EVELY, *CULTS: THE BATTLE FOR GOD* (1990); *NEW RELIGIONS AND NEW RELIGIOSITY* (Eileen Barker and Margit Warburg eds., 1998).

49. See Eileen Barker, *New Religious Movements: Their Incidence and Significance*, in *NEW RELIGIOUS MOVEMENTS, CHALLENGE AND RESPONSE* 20, 22 (Bryan Wilson & Jamie Craswell eds., 1999).

50. *Id.* at 16. On the whole, the members of these groups are first generation converts who come from higher status economic and educational backgrounds. These movements offer converts new theologies with answers to the ultimate questions in life and the nature of the supernatural, as well as an emphasis on personal spiritual enlightenment and development. While reluctant to further characterize this large and amorphous group of new religions, Barker gives other generally agreed upon points of similarity including "unambiguous clarity and certainty in the belief systems, the urgency of the message, the commitment of life-style, perhaps a charismatic leadership, and possibly, strong Them/Us, and/or, Before/After, distinctions—all of which are, of course, liable to undergo significant change within a single generation." *Id.* at 20.

51. For information on the twentieth anniversary of the massacre at Jonestown, see Larry D. Hatfield, *It's Been 20 Years Since Massacre at Jonestown*, *ORANGE COUNTY REGISTER*, Nov. 15, 1998 at A5; Stephanie Salter, *Recognizing the Humanity of Jonestown's Victims*, *S. F. EXAMINER*, Nov. 17, 1998, at A19; Andrew Quinn, *Jonestown Remembered*, *BALT. SUN*, Nov. 15, 1998, at C6. For a more academic inquiry, see JONATHAN Z. SMITH, *IMAGINING RELIGION: FROM BABYLON TO JONESTOWN* (1982).

52. The Branch Davidians who believed they were chosen by God for

New Religions.<sup>53</sup> And each of these movements is watched by a strong, web-based Christian anti-cult movement aimed specifically at tracking, monitoring and discouraging the new religiosity through information and public opinion.<sup>54</sup>

Another aspect of this turn to alternative religions in the United States over the past thirty-five years is New Age Spirituality. A good place to see the proliferation of new age spiritualities are the Whole Life Expositions, enormous trade show fairs that book convention centers around the country and offer hundreds of stalls on every variety of crystal therapy, blue green algae treatments, feng shui, psychic tours with Sylvia Brown, and ritual celebration experts. With the availability of these spiritualities, the average American now seeks advice from a wide array of casual and serious counselors such as therapists, marriage counselors, pastoral counselors, and massage therapists. The Expo also offers less mainstream practitioners such as astrologers, spiritual nutritionists, psychics, reflexologists, Aruvedic and Chinese herbal medicine experts, angel specialists, and miracle workers. With leading publications like *Conversations with God* and the *Celestine Prophecies* on bestseller lists for the past several years, local bookstores are now filled with books on self-help, inspiration, meditation, Eastern religions, New Age Spirituality, simplicity, and Witchcraft.<sup>55</sup>

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salvation were a splinter group of the Seventh Day Adventists. The incineration of the Branch Davidians at Waco, Texas, occurred April 19, 1993. For a specific discussion of the Branch Davidians at Waco, see JAMES D. TABOR & EUGENE GALLAGHER, *WHY WACO? CULTS AND THE BATTLE FOR RELIGIOUS FREEDOM IN AMERICA* (1995). For a more general account of the Branch Davidian Movement, see *ARMAGEDDON IN WACO* (Stuart A. Wright ed., 1995).

53. See Bryan Wilson's Introduction, in *NEW RELIGIOUS MOVEMENTS: CHALLENGE AND RESPONSE 8* (Bryan Wilson & Jamie Cresswell, eds., 1999).

54. See Apologetics Index: Research, Resources on Religious Cults, Sects, Movements, Doctrines, available at <http://www.gospelcom.net/apologetics/index/etc>. (last visited Nov. 11, 2002). See also Watchman Fellowship, Inc.: A Ministry of Christian Discernment Focusing on Cults and New Religious Movements, available at <http://www.watchman.org/> (last visited Jan. 20, 2003). See also, J. Gordon Melton, *Anti-Cultists in the United States: an Historical Perspective*, in *NEW RELIGIOUS MOVEMENTS* (Bryan Wilson & Jamie Cresswell eds., 1999).

55. See NEALE DONALD WALSCH, *I CONVERSATIONS WITH GOD: AN UNCOMMON DIALOGUE, BOOK I* (1995). See also NEALE DONALD WALSCH, *II CONVERSATIONS WITH GOD: AN UNCOMMON DIALOGUE* (2000). JAMES REDFIELD, *THE CELESTINE PROPHECY: AN ADVENTURE* (1993); MARIANNE WILLIAMSON, *A RETURN TO LOVE: REFLECTIONS ON THE PRINCIPLES OF A COURSE IN MIRACLES* (1975); ROBERT



Connected historically to the mystic aspects of traditional religions and to the spiritualist movements of the last century, this form of spirituality has a long history in America.<sup>56</sup> Members of spiritualist groups in the nineteenth century were responsible for starting many contemporary reform movements and communal living arrangements, for advocating universal temperance, suffrage for women, and a radically modified diet and dress. In general, 21st century New Age practitioners are interested in approaches to the supernatural that are anti-institutional, therapeutic, organized as a quest for knowledge, occult, and not mutually exclusive in their approaches.<sup>57</sup> Unlike their transcendental forerunners who were excited about the eventual union of religion and science, these postmodern practitioners are generally anti-science and their religious practices blend easily with

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THURMAN, *INNER REVOLUTION: LIFE, LIBERTY AND THE PURSUIT OF REAL HAPPINESS* (1998); KEN WILBER, *EYE TO EYE: THE QUEST FOR THE NEW PARADIGM* (1996). For more general New Age treatises see ELIZABETH LESSER, *THE NEW AMERICAN SPIRITUALITY: A SEEKER'S GUIDE* (1999); CECILE ANDREWS, *THE CIRCLE OF SIMPLICITY: RETURN TO THE GOOD LIFE* (1997). Note also that several bookshelves are now devoted to these topics in national chains such as Borders or Barnes and Noble.

56. During the peak of spiritualism in the late nineteenth century, ideas of reincarnation and the raising of the dead became very popular. Henry Thoreau, Ralph Emerson, and Margaret Fuller were allied with the spiritualist movement. As a group, the Transcendentalists began by reviewing aspects of Unitarianism and ultimately rejected all established church denominations and most political theories.

57. One interesting question is how Christians make room for New Age spirituality. Many have found that it is complementary and not mutually exclusive. Certainly, New Age professionals see their approach as integrated with other religions.

God and spirit give us many tools to help us understand our journey in this world and I think that astrology is just one wonderful way to do that. This is not a fatalistic, causal form of religion. This is not taking people's power away. I remind people that the birth of Christ was known by at least three astrologers and that helps to allay their fears.

A quote from Paul Nunn, 51, one of the foremost astrologers of Washington, D.C. with a client base of over 5,000, including many famous movie stars and well-known government figures. Trained as an electrical engineer who worked on top-secret inverter controller systems for the Navy, he began doing astrological calculations as a hobby. He has been a full-time astrologer for over 25 years, having read 40,000 charts, and is connected with the Omega Institute and several other major New Age groups. He has appeared on television, done numerous radio talk shows, and is considering doing a show for NPR. The quotes in this article are based on several interviews in his home. Interview with Paul Nunn, Alexandria, Va. (Jun. 23, 25 1999).

commodity consumerism.<sup>58</sup> A 1992 University of California at Santa Barbara study shows twelve million Americans very actively participating in New Age practices with over thirty million others believing in some forms of it.<sup>59</sup>

Another recent movement of interest is the move to Internet religion by the current generation. Some Christian churches have sensed that the Internet is an excellent forum for proselytizing and recruiting, a move that is being both promoted and studied.<sup>60</sup> In conclusion, New Religious Movements like Scientology and New Age Spirituality such as astrology and crystal power, are only two of a wide proliferation of religious currents that run through the end of the twentieth and into the twenty-first century.

### C. Case Law Analysis

What, if any, of these changes in religious practice and institutions appear in the case law for the year 2001?

1. *Liberal/Conservative Split.* Wuthnow predicted that the most important aspect of religion at the turn of the century would be a general shift from denominationalism to a conservative/liberal divide. From the perspective of the case law, this shift was clearly developing by the 1960s with the Civil Rights movement, and an early liberal/conservative divide that extended to church

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58. Several scholars, such as J. Gordon Melton, see a strong continuity between the spiritualist, New Thought, and Transcendental movements of the late 1800s and the more recent florescence of spiritualism in the United Kingdom and then the United States in the 1960s when interest in the occult and other spiritual practices blossomed. Like the Transcendentalist movement, the current New Age wave is concerned less with theology and more with the supernatural. Practitioners want to reconnect the mind and the body to seek personal situational truths. Women are very important in both spiritualist periods. Both groups share ideas that are out of the mainstream, usually believe in some form of reincarnation and seek divine unity through multiple routes. See J. Gordon Milton, *New Thought and the New Age*, in PERSPECTIVES ON THE NEW AGE (James R. Lewis & J. Gordon Melton eds., 1992). See also, MICHAEL F. BROWN, THE CHANNELING ZONE: AMERICAN SPIRITUALITY IN AN ANXIOUS AGE (1997).

59. See MICHAEL F. BROWN, THE CHANNELING ZONE, AMERICAN SPIRITUALITY IN AN ANXIOUS AGE 7 (1997). See also WADE CLARK ROOF, A GENERATION OF SEEKERS: THE SPIRITUAL JOURNEYS OF THE BABY BOOM GENERATION (1993) (discussing New Age practices and their allure).

60. See ANDREW CAREAGA, eMINISTRY: CONNECTING WITH THE NET GENERATION (2001); BRENDA BRASHER, GIVE ME THAT ONLINE RELIGION (2001).

populations. Martin Luther King Jr., a Baptist minister, gave his "I Have a Dream" speech to over 200,000 Americans marching for civil rights in Washington D.C. on August 28th, 1963. With congressional Civil Rights Acts in 1957, 1960 and 1964 pushing to create a more equal society, it is not surprising that in 1963 there were twenty religion cases relating to segregation, discrimination, and breach of peace.<sup>61</sup>

In 2001, these Civil Rights cases continue, but they are primarily discrimination cases. Of the seventy-three work-related cases in the 2001 Westlaw search, for example, only 6 or 8% were not religious discrimination cases. Perhaps the most interesting one is *Veitch v. Danzig*,<sup>62</sup> in which a "theologically conservative evangelical" Navy chaplain complained about religious discrimination by the other two chaplains who served with him, a Roman Catholic and an Episcopalian. Philip Veitch claimed that these two men created "a culture of religious oppression" in which he was forced to preach "religious pluralism," and to "refrain in his sermons from disparaging other religions."<sup>63</sup> This claim of

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61. See *City of Rock Hill v. Henry*, 128 S.E.2d 775 (S.C. 1962), *State v. Levitt*, 176 A.2d 465 (N.J. 1961), *Terry v. City of Toledo*, 194 N.E.2d 877 (Ohio App. Ct. 1963), *Johnson v. Crumlish*, 224 F. Supp. 22 (E.D. Pa. 1963), *Stanton Land Co. v. City of Pittsburgh*, 33 Pa. D.&C.2d 756 (April Term 1963), *Cooper v. Pate*, 324 F.2d 165 (N.D. Ill. 1963), *Todd v. Joint Apprenticeship Comm. of Steel Workers of Chicago*, 223 F. Supp. 12 (N.D. Ill. 1963), *Don Wilson Builders v. Sup. Ct. for L.A. County*, 220 Cal.App.2d 77 (M.D. Ca. 1963), *Chance v. U.S.*, 322 F.2d 201 (S.D. Fl. 1963), *Anderson v. City of Albany*, 321 F.2d 649 (M.D. Ga. 1963), *Jackson v. Pasadena City Sch. Dist.*, 59 Cal.2d 876 (S.D.M.S. 1963), *Mitchell v. Delaware Alcoholic Beverages Control Comm'n*, 193 A.2d 294 (Del. Super. 1963), *Congress of Racial Equity v. Douglas*, 318 F.2d 95 (S.D.M.S. 1963), *State v. Cade*, 153 So.2d 382 (La. 1963), *Wood v. Hogan*, 215 F.Supp. 53 (W.D. Va. 1963), *Anderson v. Kelly*, 32 F.R.D. 355 (M.D.Ga. 1963), *McKibbin v. Michigan Corp. and Sec. Comm'n*, 119 N.W.2d 557 (Mich. 1963), *Holliday v. McGinnis*, 237 N.Y.S.2d 652 (App. Div. 1963), *Dall v. Pearson*, 246 F. Supp. 812 (D.C.D.C. 1963), *Application of Lombardo*, 18 A.D.2d 444 (N.Y.App.Div. 1963). It should be noted that the Keynote for Westlaw here may have been too large in scope, but it does demonstrate the perceived connection between Civil Rights and religion in this period.

The case law during 1963 also has the classic cases concerning reading the Bible in school. See *School District of Abington Tp., Pa. v. Schempp*, 83 S. Ct. 1560 (1963); *Sills v. Board of Ed. of Hawthorne*, 200 A.2d 817 (N.J. Super. Ct. 1963). See also *Stein v. Oshinsky*, 224 F.Supp. 757 (D.C.N.Y. 1963) (student initiated prayer); *Sheldon v. Fannin*, 221 F. Supp. 766 (D.C. Ariz. 1963) (not standing for the national anthem).

62. *Veitch v. Danzig*, 135 F.Supp.2d 32 (D.C.D.C. 2001).

63. *Id.* at 33, 34.

oppression is clearly based on a conservative/liberal split, and on the premise that liberal secularists are oppressing and defeating practitioners of conservative Christianity. And there is now clear case law initiated by inter-denominational religious groups organized to achieve politically conservative ends. Self-described conservative action groups, such as the Positively Pro-life Anti-Abortion group,<sup>64</sup> the Christian Coalition,<sup>65</sup> and Keyword Ministries.<sup>66</sup>

There are also several cases that could be the result of conservative religious action groups based on objections to homosexuality or lesbianism,<sup>67</sup> anti-abortion cases,<sup>68</sup> and objections to a sex change operation.<sup>69</sup> Rudy Guiliani, the former mayor of New York filed a politically-oriented case against the Brooklyn Museum over paintings he thought were sacreligious.<sup>70</sup> There is a lawsuit involving the use of a town hall for the National Day of Prayer,<sup>71</sup> and a suit involving a kindergartener and his parents who were angry about a school's refusal to display a poster with a big cross and picture of Jesus.<sup>72</sup> The usual array of cases about Saturday work rules,<sup>73</sup> or the right to preach in a public place<sup>74</sup> appear as they did in 1963.<sup>75</sup>

Liberal political action groups, particularly the ACLU and the Freedom from Religion Foundation, contested the

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64. See *Orin v. Barclay*, 272 F.3d 1207 (9th Cir. 2001).

65. See *Richey v. Tyson*, 2001 WL 530700 (S.D. Ala. 2001).

66. See *Okwedy v. Molinari*, 150 F.Supp.2d 508 (E.D.N.Y. 2001).

67. See, e.g., *Hyman v. City of Louisville*, 132 F.Supp.2d 528 (W.D. Ken. 2001) A physician, Dr. Barrett Hyman, sued the city and county stating that their gender-orientation ordinances prevented him from advertising for a Christian heterosexual employee. *Id.* Hyman said that he "believes that acts of homosexuality, bixsexuality, transgenderism and other departures from monogamous heterosexual relations are sinful and greivously offensive to God." *Id.* at 532. The gay and lesbian cases are discussed more fully *infra* at notes 140-59.

68. See *Nat'l Abortion Fed'n v. Metro. Atlanta Rapid Transit Auth.*, 112 F.Supp.2d 1320 (N.D. Ga. 2000); *Tarsney v. O'Keefe*, 225 F.3d 929 (8th Cir. 2000); *Orin*, 272 F.3d at 1207.

69. See, e.g., *Cruzan v. Minneapolic Pub. Sch. Sys.*, 165 F.Supp.2d 964 (D.Minn. 2001).

70. See *Brooklyn Inst. of Arts and Sciences v. City of New York*, 64 F.Supp.2d 184 (E.D.N.Y. 1999).

71. See *Deboer v. Vill. of Oak Park*, 267 F.3d 558 (7th Cir. 2001).

72. See *Peck v. Baldwinsville Cent. Sch. Dist.*, 7 Fed.Appx. 74 (2d Cir. 2001).

73. See *Thomas v. Nat'l Ass'n of Letter Carriers*, 225 F.2d 1149 (10th Cir. 2000).

74. See *Lansing v. City of Memphis*, 202 F.3d 821 (6th Cir. 2000).

75. See, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963).

role of religion in general public life in at least eleven cases in 2001.<sup>76</sup> Also, most of the plaintiffs in the anti-aid to religious schools cases,<sup>77</sup> a separate category and an issue that appears only twice in 1963,<sup>78</sup> assume what Wuthnow would consider liberal political postures.

A final interesting point to note is that politically-oriented case law, which seems strong at both the beginning and the end of this approximately forty year period, has shifted from a religious concern about minority and disadvantaged members of the society to a concern about the power of conservative Christianity's influence on the general population. This may differ from Wuthnow's view of these changes.

2. *Diversity and Immigrant Religions.* Groups mentioned specifically in both the 1963 and the 2001 religion cases demonstrate the wide variety of types of religious practitioners in the United States throughout this forty-year period: Roman Catholics; Reformers, Orthodox and Hassidic Jews; Evangelicals; Episcopalians; Methodists; Jehovah's Witnesses; Presbyterians; Baptists; Russian, Greek, Armenian, and Bulgarian Orthodox;

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76. See *ACLU of Kentucky v. McCreary Co.*, 145 F.Supp.2d 845 (2001); *Am. Civil Liberties Union of Ohio v. Capitol Square Review and Advisory Bd.*, 243 F.3d 289 (6th Cir. 2001); *ACLU of New Jersey v. Township of Wall*, 246 F.3d 258 (3rd Cir. 2001); *Books v. City of Elkhart*, 239 F.3d 826 (7th Cir. 2001); *Daughtery v. Vanguard Charter Sch. Acad.*, 116 F. Supp.2d 897 (W.D. Mich., 2000); *Schmidt v. Cline*, 127 F. Supp.2d 1169 (D. Kan., 2000); *Wells v. City and County of Denver*, 257 F.3d 1132 (10th Cir. 2001); *Paulson v. City of San Diego*, 262 F.3d 885 (9th Cir. 2001); *Brown v. Gilmore*, 258 F.3d 265 (4th Cir. 2001); *Doe v. Sch. Bd. of Ouachita Parish*, 274 F.3d 289 (5th Cir. 2001); *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766 (7th Cir. 2001).

77. *Columbia Union Coll. v. Oliver*, 254 F.3d 496 (4th Cir. 2001); *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000); *Virginia Coll. Bldg. Auth. v. Lynn*, 538 S.E.2d 682 (Va. 2000); *Hooks v. Clark County Sch. Dist.*, 228 F.3d 1036 (9th Cir. 2000); *Johnson v. Econ. Dev. Corp. of the County of Oakland*, 241 F.3d 501 (6th Cir. 2001); *Toney v. Bower*, 744 N.E.2d 351 (Ill. App. Ct. 2001); *Moore v. Metro. Sch. Dist. of Perry Township*, 2001 WL 243292 (S.D. Ind. 2001) (a time-release program case), *Freedom from Religion Found., Inc. v. Bugher*, 249 F.3d 606 (7th Cir. 2001); *Steele v. Indus. Dev. Bd. of the Metro. Gov't of Nashville and Davidson County*, 117 F. Supp.2d 693 (M.D. Tenn 2000); *Griffith v. Bower*, 747 N.E.2d 423 (2001).

78. See *Bd. of Educ. for Indep. Sch. Dist. No. 52 v. Antone*, 384 P.2d 911 (Okla. 1963); *Stern v. Stern*, 188 N.E.2d 97 (Ill. App.Ct. 1963). See also *Lewis v. Lefkowitz*, 223 N.Y.S.2d 221 (N.Y.Sup.Ct. 1963) (a 1963 case contesting the presence of chapels in airports).

Lutherans; Christian Scientists; and the Native American Church. New in 2001 case law (although not necessarily new to religious case law in the United States) are the 7th Day Adventists, the African Methodist Church, the Liberal Catholic Church, the "Hebrew Religion" (not Judaism), "Fundamental Protestants," Mormons, and Lebanese and Assyrian Christians. The 1963 case law included a few New Age religions such as the Ancient Divine Order of Melchisadech,<sup>79</sup> and the "I AM" religion,<sup>80</sup> to which the 2001 suits added Rastafarians, Wiccans, Moonies, HEART, Scientology followers, Pagans, Agnostics and members of a "cult." Another grab-bag category, which could only be designated "Protestant Unknown" constituted approximately one-sixth of the Religion Case Reporter 2001 data set. Many of these were small independent particularist Protestant congregations which could have been predicted given the changes in the religious landscape over this period.

While immigrant religions are not apparent in the 1963 cases, forty years later there is a profusion of them. There are at least seventy-one cases *directly* mentioning the religion of a party as being Hindu, Sikh, Muslim or Buddhist.<sup>81</sup> There is a Muslim suing over employment,<sup>82</sup> zoning ordinances for Hindu or Buddhist temples,<sup>83</sup> and a Muslim's slaughterhouse in Mississippi being enjoined for not meeting sanitation requirements.<sup>84</sup> New Christian immigrants—the Protestant from Costa Rico, the Korean Presbyterian, or the ethnically Chinese Catholic who has immigrated from Indonesia—are harder to discern and

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79. See *In re Currence*, 42 Misc.2d 418 (N.Y. Fam. Ct. 1963).

80. *Saint Germain Found. v. Siskiyou County*, 28 Cal.Rptr. 393 (Cal.Ct.App. 1963).

81. It should be noted that this section could be understood as overcounting for immigrant religions by presuming that these religions were not available in the United States prior to 1960. I am willing to accept that possible error and state that this number is an approximation because that information is not available in the law cases. This number does not include Black Muslim, "Islamism," Moorish Science Islamic Temple, Moorish Science Temple or Baha'i groups.

These cases constitute approximately 9% of the Religion Case Reporter 2001 data set and 7% of the Westlaw which are substantial figures.

82. See *Hussein v. Waldorf-Astoria*, 134 F.Supp.2d 591 (S.D.N.Y. 2001).

83. See *Colella v. Bd. of Assessors of the Cty. of Nassau*, 95 N.Y.2d 401, 2000 NY Slip Op. 10598 (2000).

84. See *Spell v. Muhammad*, 756 So.2d 748 (Miss. 2000).

therefore seriously underrepresented in this count. Not surprisingly, many of these cases indicate the marginality of the new immigrants because suits against the Immigration and Naturalization Service (INS) or prisoner petitions requesting a change in personal conditions. In contrast, the only INS case in 1963 concerned a Yugoslavian.<sup>85</sup>

The underrepresented immigrant Christian churches appear in a Korean Presbyterian case, an Armenian Mormon case, a Belarus Baptist case, and a case about an evangelical Spanish-speaking church in Michigan that was broadcasting illegally. Also, there are eleven INS hearings for practitioners of Christianity from other countries.<sup>86</sup> In all, twenty-six cases on immigrant religions appear in the Religion Case Reporter and the 2001 Westlaw materials have many more, including Jordanian Catholics<sup>87</sup> and Ukrainian Baptists.<sup>88</sup> The under-represented Christians and the INS cases involving immigrant religious practitioners constitute 13% of the entire dataset.

3. *Prisoner Cases.* As might be expected, prisoners<sup>89</sup> suing over religious issues occupied a substantial number of the cases in both 1963 and 2001, and they deal with the usual range of issues: proscribed diet; hair grooming; access to religious personnel; rituals; and paraphernalia. The difference between the two time periods is that in the earlier set, almost every case was instituted by a Black

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85. See *Zupicich v. Esperdy*, 319 F.2d 773 (2d Cir. 1963).

86. See e.g., *Tecun-Florian v. INS*, 207 F.3d 1107 (9th Cir. 2000) (a Catholic who was pursued by guerillas in Guatemala); *Ambati v. Reno*, 2 Fed. Appx. 500 (7th Cir. 2001) (a Catholic in India); *Bandari v. INS*, 227 F.3d 1160 (9th Cir. 2000) (an Armenian Christian who fled from Muslims); *Avetova-Elisseva v. INS*, 213 F.3d 1192 (9th Cir. 2000) (an Armenian Mormon); *Rostomian v. INS*, 210 F.3d 1088 (9th Cir. 2000) (a Lebanese Christian); *Galina v. INS*, 213 F.3d 955 (7th Cir. 2000) (a Russian Jewish Latvian); *Mansour v. INS*, 230 F.3d 902 (7th Cir. 2000) (an Iraqi Assyrian Christian); *Akhtar v. Reno*, 123 F.Supp.2d 191 (S.D.N.Y. 2000) (a Pakistani Christian); *Park v. INS*, 241 F.3d 1186 (9th Cir. 2001), (a Korean Christian); and *Valioukevitch v. INS*, 251 F.3d 747 (8th Cir. 2001) (a Belarus Baptist). Note that cases concerning an Armenian Christian in the United States that are not INS cases can not be counted as an immigrant religion cases because it is almost impossible to determine if the parties are new to the United States.

87. See *Waklich v. INS*, 24 Fed.Appx. 769 (9th Cir. 2001).

88. See *Turina v. INS*, 21 Fed.Appx. 618 (9th Cir. 2001).

89. This category of prisoner suits includes one parolee case that is very similar.

Muslim—an African American prisoner following an American syncretic form of Islam.<sup>90</sup> In 2001, many different prisoner religions are represented: Rastafarians; "Black Jews;" Native Americans; Wiccan practitioners; Baptists; Methodists; Sunni and Shi'a Muslims; Orthodox Jews; members of "the Hebrew Religion" and New Covenant Hebrew (both not Judaic); Humanists; Jehovah's Witnesses; members of "Heritage Examined Around Redman's Tradition;" Buddhists; Hare Krishna followers; members of the "Liberal Catholic Church;" and many others. In 2001, few cases involve Black Muslims.<sup>91</sup>

4. *Anti-Immigrant Response*. A few of the cases in the 2001 series demonstrate harrassment or antagonism towards immigrant religions and religious diversity. *Colella v. Board of Assessors of the County of Nassau* involves a neighborhood that sued the city over the zoning of a local Buddhist temple.<sup>92</sup> Multiculturalism in school was the subject of a different suit by a Roman Catholic family, the Altmans, who claimed that their fifth grader was being exposed to satanism and pagan religions.<sup>93</sup> The local public

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90. See *Brown v. McGinnis*, 225 N.Y.S.2d 497 (N.Y. 1962); *U.S. ex rel. Washington v. Fay*, 217 F.Supp. 931 (D.C.N.Y. 1963); *Childs v. Pegelow*, 321 F.2d 487 (Va. Ct.App. 1963); *Cooper v. Pate*, 324 F.2d 165 (N.D. Ill. 1963); *Shaw v. McGinnis*, 244 N.Y.S.2d 681 (App. Div. 1963); *Pierce v. LaVallee*, 319 F.2d 844 (N.Y. 1963); *Williford v. People of Cal.*, 217 F.Supp. 245 (D.C. Cal. 1963); *Holliday v. McGinnis*, 237 N.Y.S.2d 652 (App.Div. 1963); *Roberts v. Pegelow*, 313 F.2d 548 (4th Cir. 1963); *State v. Moczygemba*, 379 P.2d 557 (Or. 1963) (concerns an assault by prisoners who took a religious leader hostage).

Nineteen sixty-three marked the height of the most militant form of the Black Muslim Movement. It began with Wallace D. Fard who founded the Temple of Islam No. 1 in Detroit in 1930 accepting only blacks as members and calling for the complete separation of the races, black nationalism and Muslim teachings. Economic independence and a separate black identity were also precepts of the original group which grew quickly in strength.

From 1952 to his death in 1965, Malcom X was the most famous member of the Black Muslims. In the 1970s the group rejected separatism, changed into the American Muslim Mission and began integrating into the Sunni branch of Islam. In 1977, Louis Farrakhan and a small band of followers broke off from the Mission to resurrect the Nation of Islam with the nationalist and separatist teachings of the original leaders.

91. It is difficult, by 2001, to count Black Muslims both because the movement has waned, and because many case opinions do not designate nor do parties self-identify as *Black Muslim*. *But see* *Triplett v. Wilkinson*, 23 Fed.Appx. 231 (6th Cir. 2001).

92. See *Colella*, 95 N.Y.2d 401.

93. See *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49 (2d Cir. 2001).



school had incorporated yoga classes by a Sikh athletic director, class projects for international enrichment week on the Hindu God Shiva, Earth Day, Taos Indian songs, a wizard card game, stories about the Buddha, Aztec stories, a project about Quetzalcoatl, the Drug Abuse Resistance Program, exercises in creativity by a known psychic, moral decision-making classes, and several other activities. Although the Second Circuit Court of Appeals ultimately rejected the claims of the plaintiffs, this case shows community resistance to New Age religions. The Altman case also qualifies as a politically motivated suit with a more conservative Christian agenda.

The violence described by Diana Eck is not present in these data sets, but it might be found in local criminal records. Although difficult to compile, they would be very interesting to study. Another issue is how long it takes before immigrants begin suing on religious grounds in a new culture or, stated differently, when after the 1965 Immigration Act did the case law start to demonstrate the profusion of types of immigrant religions seen by 2001?

5. *New Religions and New Age Spirituality.* There are approximately thirty-five New Religion/New Age Spirituality cases in the 2001 data set.<sup>94</sup> It is unclear whether some of the new 2001 groups are New Age, radically conservative versions of older religions, African-American New Age, or simply a new type of postmodern, post New Religion amalgam. These groups include: Egyptian Freemasonry Voodoo,<sup>95</sup> Black Hebrew,<sup>96</sup> Universal Life Church (affiliated with the Wicca religion);<sup>97</sup> Temple of the Healing Spirit,<sup>98</sup> Asatru,<sup>99</sup> Summum,<sup>100</sup> and the Church

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94. In the last few years, there have been several constitutional invalidations of local ordinances or statutes which ban clairvoyancy, palmistry, phrenology, mind-reading, or fortune telling from public places that arguably had an effect on the number of these cases by 2001. *See, e.g.,* McDermott v. Montana Dept. of Corrs., 29 P.3d 992 (8th Cir. 2001).

95. *See* Young v. Saunders, 169 F.Supp.2d 553 (W.D. Va., 2001).

96. *See* Yahweh v. U.S. Parole Comm'n, 158 F.Supp.2d 1332 (S.D. Fla. 2001).

97. *Fender v. Kansas Soc. and Rehab. Serv.*, 168 F.Supp.2d 1216 (D.C. Kan 2001) (a witch objected to ugly and demeaning pictures posted at Halloween and wore a T-shirt with the slogan "Born Again Pagan. And again!").

98. *See* Bowden v. Iona Grammar Sch., 726 N.Y.S.2d 685 (N.Y.A.D. 2001).

99. *See* Lenz v. Virginia, 544 S.E.2d 299 (Sup.Ct. Va. 2001).

100. *See* Summum v. City of Ogden, 152 F.Supp.2d 1286 (D.C. Utah 2001).

of Jesus Christ Christian (described in the text as "a white-supremacist, neo-Nazi religious group").<sup>101</sup> There is little information available on these groups.

In a more typical New Age case, the parents lost a suit to prevent immunization of their daughter at a school despite their religious belief that the natural immune systems of children should not be defiled through vaccination.<sup>102</sup>

The New Religion cases in 2001 are following on the heels of a famous Supreme Court decision, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.<sup>103</sup> In this case, Justice Kennedy found unconstitutional the local city laws targeting the ritual sacrifice of animals required by the syncretic Santeria religion. The court's acceptance of this religion has arguably relaxed the pressure on new religions throughout the United States. Other interesting New Religion cases included: a case involving the Unification Church or Moonies;<sup>104</sup> at least nine Rastafarian cases;<sup>105</sup> a libel case by the Church of Scientology against the author of a negative Time Magazine article;<sup>106</sup> and five Wiccan cases.<sup>107</sup> In one of the Wiccan cases, *In re Huff*, the court indicated that it will look intensely at New Religion practices in custody suits, especially when the husband states that the wife was a witch and could cast spells.<sup>108</sup>

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101. *Marquart v. McGinnis*, 22 Fed.Appx. 383 (6th Cir. 2001). Another paramilitary white supremacist organization is the World Church. See *Scatena v. Rowland*, 785 A.2d 1232 (2001).

102. See *Galinsky v. Bd. of Educ. of New York*, 2000 WL 562423 (2d Cir. 2000).

103. 508 U.S. 520 (1993).

104. See *Tsirpanlis v. Unification Theological Seminary*, 2001 WL 64739 (S.D.N.Y. 2001).

105. See *Lawson v. Liburdi*, 114 F.Supp.2d 31 (D.R.I. 2000); *Ghana v. Holland*, 226 F.3d 175 (3rd Cir. 2000); *Reynolds v. Goord*, 2001 WL 118564 (S.D.N.Y. 2001); *Jackson v. District of Columbia*, 89 F.Supp.2d 48 (D.D.C. 2000); *Shepherd v. Sanchez*, 2000 WL 1010829 (S.D.N.Y., 2000); *Rossi v. Portuondo*, 748 N.E.2d 1073 (N.Y. 2001); *U.S. v. Jefferson*, 175 F.Supp.2d 1123 (N.D. Ind. 2001); *People v. Foote*, 110 Cal.Rptr.2d 260 (Cal. Super. 2001); *Williams v. Norris*, 11 Fed.Appx. 656 (8th Cir. 2001).

106. See *Behar*, 238 F.3d at 168.

107. See *Legg v. Gomez*, 238 F.3d 429 (Table) (9th Cir. 2000); *In re Huff*, 547 S.E.2d 9 (N.C. 2001); *In re Frederick P.*, 779 A.2d 957 (Me. 2001); *Fender*, 168 F.Supp.2d at 1216; *State v. Leitner*, 34 P.3d 42 (Kan. 2001).

108. See *In re Huff*, 547 S.E.2d at 9.

## II. THE SECOND MAJOR SHIFT IN AMERICAN RELIGION: PRACTICE

The predictions of secularization and declining numbers of religious adherents in the twentieth century have not turned out to be accurate.<sup>109</sup> Indeed, religious studies scholars have rejected the eventual secularization component of the theories of Victorian Era scholars such as Max Weber, Sigmund Freud, Emile Durkheim and Karl Marx.<sup>110</sup> A Pew Research Center report in late 1997 found that 71% of Americans believe strongly in God (which is ten points higher than 1987),<sup>111</sup> and other polls have found 95% attest to a belief in God or a universal life spirit.<sup>112</sup> Similarly, overall attendance rates at religious gatherings

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109. Secularization has been a constant thesis in modern social science. See BERNARD E. MELAND, *THE SECULARIZATION OF MODERN CULTURES* (1966). Jeffrey Hadden commented about secularization theory that was "a marginally useful heuristic pedagogical device" that was going to have to be "significantly refined." *SECULARIZATION AND FUNDAMENTALISM RECONSIDERED* 23 (Jeffrey K. Hadden & Anson Shupe eds., 1996).

In a recent article, I review these ideas and the pertinent works associated with them. Three aspects of secularization are often separated out: (1) the transition from the sacred to the secular worldview through the process of modernity; (2) the process of privatization which is the gradual move from the external to the internal private sphere; and finally, (3) the decline of religion in general in terms of influence, practice and belief. The last of these is the least cogent argument. See Rebecca R. French, *Lamas, Oracles, Channels and the Law: Reconsidering Religion and Social Theory*, 10 *YALE J.L. & HUMAN.* 505 (1998). There are several books which address this issue. See, e.g., JOSE CASANOVA, *PUBLIC RELIGIONS IN THE MODERN WORLD* (1994); JAMES A. BECKFORD AND THOMAS LUCKMANN, *THE CHANGING FACE OF RELIGION* 2-9 (1989).

110. For a fuller description of this move by religion scholars, see THEODORE CAPLOW ET AL., *ALL FAITHFUL PEOPLE: CHANGE AND CONTINUITY IN MIDDLETOWN'S RELIGION* 37-38 (1983). This work demonstrates the lack of change in denomination numbers in Muncie, Indiana between 1924 and 1980. Spearheading this move to reconsider secularity is Andrew Greeley who wrote *UNSECCULAR MAN: THE PERSISTENCE OF RELIGION* (1972) and *RELIGIOUS CHANGE IN AMERICA* (1989) as well as David Martin who sets out to demolish the theory of secularization in *THE RELIGIOUS AND THE SECULAR: STUDIES IN SECULARIZATION* (1969) and *A GENERAL THEORY OF SECULARIZATION* (1978). For a discussion of all of these ideas and their impact on the law, see French, *supra* note 109, at 509-16.

111. See Pew Research Center for the People and the Press, *High Personal Contentment, Low News Interest*, available at <http://people-press.org/reports/display.php3?ReportID=99> (last visited Dec. 22, 2002).

112. Richard Morin, *Do Americans Believe in God?* WASH. POST, April 24, 2000, at A5. The article states "more than nine in ten Americans—95 percent—told ABC News polltakers that they believe in God." *Id.*

and institutions have actually increased<sup>113</sup> and books on religion and spirituality have been areas of growth for publishers. What *has* changed is how Americans *practice* religion. And those changes have taken both institutional and individual forms.

Most local Catholic churches have dropped the Latin mass and the requirement of eating fish on Friday. Instead, a priest asks parishioners to turn and shake the hand of the person behind them in the middle of the mass, and he mentions the Dieting with Angels course starting next week. Clergy now commonly borrow rituals and ideology from one another and discuss plans for increasing their share of the local population. Many of the new non-denominational churches have business organizational forms, unusual buildings, and large pop culture rituals. The Crystal Palace church in Irvine, California, for example, has built an enormous church entirely out of glass and steel and holds elaborate nativity shows every Christmas.<sup>114</sup> Breakoff groups use religious language and presentations to create client bases and hold services. For example, the PromiseKeepers, a large organization for Christian men which was started by the football coach, Bill McCartney, holds its revivalists weekend meetings in stadiums.<sup>115</sup> In

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113. There are many studies of this phenomenon; none of which find a trend toward loss of numbers. For example, Martin Marty states that from 1920 to 1956, membership in several American Protestant churches increased fifty percent. See MARTIN E. MARTY, *RIGHTEOUS EMPIRE; THE PROTESTANT EXPERIENCE IN AMERICA* (1970).

114. Megachurch complexes, also called 24/7 churches, now exist in Louisville, Kentucky (Southeast Christian Church), Glendale, Arizona (Community Church of Joy), Houston, Texas (Brentwood Baptist Church), Grapevine, Texas (Fellowship Church), and Plano, Texas (Prestonwood Baptist Church). Many include housing, movie theatres and every other possible civic and social function. Southeast Christian Church of Louisville received more than \$20 million in donations last year and has 22,000 members. While Wade Roof and others have criticized this movement as isolating, Disneyesque, and "the religious version of the gated community," there is little doubt that it is enormously successful. See Patricia Leigh Brown, *Megachurches as Minitowns: Full-service havens from family stress compete with communities*, N. Y. TIMES, May 9, 2002, at D1. For a great introduction, see Scott Thumma, *Exploring the Megachurch Phenomena: Their Characteristics and Cultural Context*, at [http://hrr.hartsem.edu/bookshelf/thumma\\_article2.html](http://hrr.hartsem.edu/bookshelf/thumma_article2.html) (last visited, Mar. 3, 2003). See also Center for Megachurch Research Website, at <http://www.megachurches.net> (last visited, Mar. 3, 2003).

115. See Promisekeepers Website at <http://www.promisekeepers.org> (last visited, Mar. 3 2003).

the Bay Area Fellowship of Corpus Christi, Texas, parishioners file into an entirely black auditorium while movies are projected on every wall surface and the minister speaks through the sounds of rock music.<sup>116</sup> Televangelism is a very popular mediated form of religious practice for many Christian homeviewers; it allows them to pray together on Sunday morning at different television sets throughout the country. Even more interesting is the recent turn to the Internet cyber-church, which one Christian sociologist has predicted will be the spiritual connection for millions of people in the next several years.<sup>117</sup> Clearly, the practice of religion through group institutions has changed dramatically.

Individually, there has been a move to more personal, internal-expressive forms of religion. Most theorists in the area of religion consider this move towards a personalized spirituality as important, or perhaps more important than the change in diversity. It is also possible to see this as simply another form of diversity, the basis for the fracturing of the original denominations.

#### *A. Individualism, Identity and Expressivism*

In 1979, Christopher Lasch became famous for labelling the period after 1965 the "me generation."<sup>118</sup> He noted that American culture had entered a period of individual narcissism, and of an obsession with self identity. Over the intervening years, the self and sexual identity have become central issues in the social sciences. Tony Giddens talks of the turn to the self and the resulting rise of narrative expression, the individual viewpoint, and a skepticism of metanarrative universal truths. Individuals are forced "to negotiate lifestyle choices among a diversity of options [and] . . . [r]eflexively organized life-planning . . . becomes a central feature of the structuring of self-identity."<sup>119</sup> As part of this movement, he has also chronicled the sexual revolution and its results.<sup>120</sup>

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116. See Bay Area Fellowship Website at <http://www.bayarea-fellowship.org> (last visited, Mar. 3, 2003).

117. See CAREAGA, *supra* note 60.

118. See CHRISTOPHER LASCH, *THE CULTURE OF NARCISSISM* (1979).

119. See ANTHONY GIDDENS, *MODERNITY AND SELF-IDENTITY: SELF AND SOCIETY IN THE LATE MODERN AGE* 1, 5 (1991).

120. ANTHONY GIDDENS, *THE TRANSFORMATION OF INTIMACY: SEXUALITY,*

The sphere of religion has been equally affected by this trend. With the individual at the center, scholars have noted that a particular identity, including a religious identity, must be constructed. Thomas Luckmann has described this change as a marginalization of institutions and a focus on the individual search for private meaning and self-realization through religion.<sup>121</sup> Luckmann sees a new social form of religion with a modern sacred cosmos comprised of "individual 'autonomy,' self-expression, self-realization, the mobility ethos, sexuality and familism."<sup>122</sup> This religion is invisible because it is personal.

Robert Wuthnow's thesis on the religion of the babyboomer generation is reworked in a new book ten years later, *After Heaven: Spirituality in America Since the 1950s*.<sup>123</sup> First, he defines spirituality as an individual's personal relationship to the sacred. Then, Wuthnow outlines a move in the last thirty years from a two-hundred year old "spirituality of dwelling," that is, geographically based, community-based, denominational, and organized, to a free choice "spirituality of seeking," largely based in a personal belief system. This is a very significant shift. Religion is now fluid, portable, flexible and negotiable, a change he is not entirely comfortable with. Charles Taylor also discusses the move to personal religion in *Varieties of Religious Experience Today*. In his assessment of William James' thesis that religion should be understood as expressive and personal, Taylor notes that James' thesis is more relevant today than it was at the beginning of the twentieth century.<sup>124</sup> He cautions us not to see these

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LOVE AND EROTICISM IN MODERN SOCIETIES (1992).

121. See THOMAS LUCKMANN, *THE INVISIBLE RELIGION: THE PROBLEM OF RELIGION IN MODERN SOCIETY* (1967).

122. *Id.* at 113-14. See also French, *supra* note 109, at 510-11; Ulrich Beck & Elizabeth Beck-Gernsheim, *Individualization and Controversies of a Subject-oriented Sociology*, in ANTHONY ELLIOTT, *CONTEMPORARY SOCIAL THEORY* 127-38 (1999); ULRICH BECK, *RISK SOCIETY: TOWARDS A NEW MODERNITY* (Mark Ritter trans., 1992); ULRICH BECK ET AL., *REFLEXIVE MODERNIZATION: POLITICS, TRADITION AND AESTHETICS IN THE MODERN SOCIAL ORDER* (1994).

123. ROBERT WUTHNOW, *AFTER HEAVEN: SPIRITUALITY IN AMERICA SINCE THE 1950S* (1998).

124. See CHARLES TAYLOR, *VARIETIES OF RELIGION TODAY: WILLIAM JAMES REVISITED* (2002). But Taylor also points out that the turn to an individual relationship with God is also a very old part of Christian thinking, with roots in the early mystics, the Protestant Reformation, and Catholic Counter-Reformation.

personal missions as only "self-indulgent seekers," who are "unhooked from . . . a sacralized society," but as individuals who may choose a devout personal life or join one of the new, "extremely powerful religious communities."<sup>125</sup>

Critics of individualized religion have depicted it as producing a protean personality,<sup>126</sup> or as a negative turn away from the unifying sacred canopy.<sup>127</sup> Robert Bellah and his coauthors enshrined these ideas of religious choice, spiritualism, and individuality in their book, *Habits of the Heart*, through their description of "Sheilaism," the self-described private faith of a woman named Sheila Larsen. Sheila believed in God but stated that one's goal is to "love yourself and be gentle with yourself" and to listen to your own little voice.<sup>128</sup> The coauthors contend that putting the individual gendered self at the center of religion requires no submission to an ethical code of behavior of right and wrong. God simply becomes "the self magnified."<sup>129</sup>

### B. *Shopping for Religion and the Grocery Cart*

Shopping for a new church, temple, or religious affiliation is now commonplace. In the United States, a family that moves to a new town commonly shops around for the church or other religious institution that suits them best. A person might be raised Catholic, not participate in any organized religion for several years, spend a few months in a Zen monastery, and then join the local Baptist church when she settles down and marries. After ten years, when her family is relocated to another part of the country, it is by no means unusual for the family to join a different religious group once they have visited various institutions in the new town. Wade Roof and William McKinney call this process the "new voluntarism" or the eclecticism of the new spirituality in America. Their polls indicate that one half of those responding have changed their religious denominations at least once during their lifetimes.<sup>130</sup>

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125. *Id.* at 112-13

126. See ROBERT JAY LIFTON, *THE PROTEAN SELF* (1993).

127. See PETER BERGER, *THE SACRED CANOPY* (1967).

128. See ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 221, 235 (1996).

129. *Id.* at 235.

130. See WADE CLARK ROOF & WILLIAM MCKINNEY, *AMERICAN MAINLINE RELIGION* (1987).

How can it be explained that people are "working on God" by shopping around for a religion that fits?<sup>131</sup> One scholar, Hammond, explained this as a shift from "collective-expressive" church affiliation to "individual-expressive" religious ties.<sup>132</sup> Another set of authors, in describing this phenomenon through the story of one couple, Steve and Julie, state "[t]hey shopped for a church like they would shop for a car, looking for something comfortable and practical."<sup>133</sup>

Wade Roof has followed these changes and described it in *The Spiritual Marketplace, Baby Boomers and the Remaking of American Religion*. His central thesis is that "the boundaries of popular religious communities are now being redrawn encouraged by the quests of large, post-World War II generations and facilitated by the rise of an expanded spiritual marketplace."<sup>134</sup> According to Roof, religion is being reshaped by individual seekers who take their religious interests, these quests for meaning, and their community, very seriously.

A related approach that is equally popular but not as well-documented is what this article will call "grocery cart religion," a personal brand of religion not based in the self

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Individual improvisations on a traditional theme are often disparaged by clergy and scholars as syncretism or mix-and-match religion. To equate the new heterodoxy with lack of seriousness or value is a tremendous, if very common, misapprehension that blinds many, from traditional purists to preacher-politicians to secular commentators, to the millennial revolution going on quietly around them. Those in one ivory tower or another may not like this new 'layered' or 'blended' spirituality but huge numbers of people in the trenches do.

WINIFRED GALLAGHER, *WORKING ON GOD*, at xxi (1999).

132. *Id.*

133. RICHARD CIMINO & DON LATTIN, *SHOPPING FOR FAITH: AMERICAN RELIGION IN THE NEW MILLENNIUM* 10 (1998). There may also be hints of a form of this shopping earlier in American history. Historians have noted that American religious practitioners in the 1800s wrote about attending or mimicking churches of different denominations at holidays—Presbyterian usually, Episcopal at Christmas, Good Friday at the Moravian church—because they were more "appropriate." See LEIGH ERIC SCHMIDT, *CONSUMER RITES: THE BUYING AND SELLING OF AMERICAN HOLIDAYS* 180 (1995). He states: "In an article in 1857, even the New England-based *North American Review* advised outright imitation of 'the Romanist and Episcopalians' in their religious observance of Christmas and lamented the residue of 'puritan zeal' that still impeded the holiday's full acceptance among 'all Christian denominations'." *Id.*

134. WADE CLARK ROOF, *SPIRITUAL MARKETPLACE: BABY BOOMERS AND THE REMAKING OF AMERICAN RELIGION* (1999).



as in Sheilaism, but in personal choice. An individual assembles her own bricolage religion after filling a grocery cart with pieces from several different types of religious practice. Examples of these polyglot practitioners include: a woman who was raised Jewish, attends the Telluride folk festival every year declaring that it is the central spiritual experience of her life, and intermittently attends lesbian-only Wiccan ceremonies; a well-paid executive from New York City who was raised in the Unitarian church, was a self-professed atheist for ten years and then began a private Buddhist practice at home, first Tibetan Buddhist and now Zen Buddhist; and an individual who takes Yoga classes for stress reduction and breathing control and reads avidly on Christian Orthodox religions and art.

A grocery cart religious practice has only the rituals and ethical boundaries that the practitioner explicitly agrees to take on. Instead of following a revealed canon, the individual fits the interesting parts of different religions together into a structured personal spiritual practice. Richard Cimino and Don Lattin have written extensively on this phenomenon and call this "tendency to mix elements of different traditions into new hybrid forms," a type of "syncretistic spirituality."<sup>135</sup> They also describe it as "the pick and choose approach to faith, the desire to 'take from it what is wonderful and good,'" and they predict that "the same consumeristic and experiential approach popularized via Eastern mysticism will be brought to the traditional spiritual teachings of the West" in the coming years.<sup>136</sup>

Grocery cart spirituality has also been described in its institutional form by Cimino and Lattin. They give the example of the Reverend Matthew Fox's Creation Spirituality and the Sunday night Techno Cosmic Masses which he had held since the late nineties in a warehouse in San Francisco. They describe a worship service that includes "African drumming, strobe lights, candles, video monitors, t'ai chi, gospel music, aboriginal prayers and Celtic blessings [and other elements] to create a multicultural, intergenerational and ecumenical form of worship."<sup>137</sup> A former Dominican, Reverend Fox determined

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135. CIMINO & LATTIN, *supra* note 133, at 26.

136. *Id.* at 23.

137. *Id.* at 25.

that a rave mass was a better way to create post-denominational community.

While it is difficult to determine how large the movement is to institutional and personal grocery cart religion, Cimino and Lattin predict that "designer Gods" are only going to increase in the next millenium. Naysayers like Peter Van Ness have predicted that it is simply a "large-scale generational psychodrama" that will fade with the baby boom generation.<sup>138</sup> However Cimino and Lattin find little evidence of a decrease in these switching, syncretic and gendered customizing tendencies, and they note that the age range for attendance is varied.

### C. Case Law Analysis

What, if any, of these changes in religious *practice* are indicated in the case law for the years 1963 and 2001?

1. *Gay and Transgendered Identity.* Consciousness of individual identity, of the body, and of gendered relationships are at the center of what Tony Giddens calls the structuring of self-identity in the last thirty-five years.<sup>139</sup> And these themes show up in the religion material in the twenty first century in the form of cases on gay issues, sexual harassment, sex-change operations, AIDS, sex offenders, contraception, and abortion issues. Indeed, of the three hundred cases collected from the Religion Case Reporter series in 2001, forty, or 13%, dealt with these themes, a substantial increase over the year 1963. Of the four hundred fifty distinct Westlaw 2001 cases, forty-eight cases, or 11%, were on sex-related themes.

A third of the sex-related 2001 religion cases specifically concerned the issues of gay and transgendered sexual identity. In gay plaintiff cases, a homosexual or lesbian claimant was attempting to acquire or retain social rights such as the right to cohabit in Medical School housing,<sup>140</sup> or to retain a job after a lesbian commitment ceremony.<sup>141</sup> In most of the other cases, an anti-gay plaintiff,

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138. See PETER H. VAN NESS, *SPIRITUALITY; THE SECULAR QUEST* 220 (1996).

139. See GIDDENS, *supra* note 120.

140. See *Levin v. Yeshiva Univ.*, 754 N.E.2d 1099 (N.Y. 2001).

141. See *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648 (10th Cir. 2002).

claiming violation of religious rights, sues a governmental institution that has imposed a tolerant anti-discrimination ordinance. These plaintiffs are usually self-described as Biblically-oriented Christians who do not want pro-gay tolerance posters,<sup>142</sup> plays,<sup>143</sup> or policies in schools;<sup>144</sup> or employees who do not want to attend gay and lesbian tolerance training,<sup>145</sup> or to be forced to work with homosexuals.<sup>146</sup> The more conservative anti-gay plaintiffs are generally unsuccessful unless the regulation is obviously overbroad,<sup>147</sup> or the employer was specifically targeting the religious anti-homosexual employee.<sup>148</sup> Two of the more unusual cases involved a female employee who objected to using a common bathroom with a colleague who had recently changed genders (male to female) and a plaintiff mother who unsuccessfully tried to limit the child's interactions with her former spouse's gay lover and a gay church.<sup>149</sup> Adding the odd Boy Scout case<sup>150</sup> into the mixture, this area is a very fruitful example of the conjunction of current social identity theory and the religion and law cases.

But *Wolfe v. Horne*<sup>151</sup> demonstrates just how complex and difficult gender identity issues have become in the religion and law area. Jessica Wolfe is described as a "male-to-female pre-operative transsexual" state prisoner who "[w]hile retaining male genitalia, suffers from a gender identity disorder that causes her to identify as a woman."<sup>152</sup> She was denied her hormonal therapy and the right to long hair by the state prison for men in which she resides causing severe emotional and physical withdrawal

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142. See *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003 (9th Cir. 2000).

143. See *Linnemeier v. Ind. Univ.-Purdue Univ. Fort Wayne*, 155 F. Supp.2d 1044 (N.D. Ind. 2001).

144. See *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200 (3rd Cir. 2001).

145. See *Altman v. Minn. Dep't of Corr.*, 251 F.3d 1199 (8th Cir. 2001).

146. See *Bruff v. North Miss. Health Servs., Inc.*, 244 F.3d 495 (5th Cir. 2001).

147. See *Saxe*, 240 F.3d at 200.

148. See *Phillips v. Collings* 256 F.3d 843 (8th Cir. 2001)

149. See *In re Marriage of Dorworth*, 33 P.3d 1260 (Colo. Ct. App. 2001); *Cruzan v. Minn. Pub. Sch. Sys.*, 165 F.Supp.2d 964 (D.Minn 2001).

150. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 120 S.Ct. 2446 (2000). (holding that Boy Scouts did not have to readmit a former assistant Scoutmaster who was expelled for being homosexual.)

151. See *Wolfe v. Horn*, 130 F.Supp.2d 648 (E.D. Pa. 2001).

152. *Id.* at 650.

symptoms. While applying the equal protection standard to the question of Jessica's hair length, the court investigated the difference between religious and gendered opposition to prison grooming regulations.<sup>153</sup>

In comparison, these issues were only addressed in one case in 1963. In the *Faulkner* case homosexuality was treated as a crime against nature.<sup>154</sup> The nonviolent sexual issues in the earlier cases are (1) the legality of vending machines with condoms;<sup>155</sup> (2) the possession and sale of pornography;<sup>156</sup> (3) mistaken circumcision of Jewish male babies;<sup>157</sup> and (4) one abortion case.<sup>158</sup> Given this backdrop, the 2001 case law is a substantial and clear change.

2. *Sexual Harassment, Exploitation and Abuse.* There were only two cases of assault and rape of a parishioner by a church official in 1963, and both involved more marginal religions: the Gospel Tabernacle<sup>159</sup> and the Elijah Ministry.<sup>160</sup> Mainstream religions figure more prominently by 2001 with over twenty cases involving issues of sexual harassment, sexual exploitation or sexual/physical abuse<sup>161</sup>

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153. See *id.* at 645-55.

154. See *Faulkner v. State of Fla.*, 151 So.2d 17 (Fla. Dist. Ct. App. 1963).

155. See *Sanitary Vendors, Inc. v. Byrne*, 190 A.2d 876 (N.J. 1963).

156. See *Olsen v. Doerfler*, 225 F.Supp. 540 (E.D. Mich. 1963). See also *State v. Hudson County News Co.*, 196 A.2d 225 (N.J. 1963).

157. See *Kalina v. Gen. Hosp. of City of Syracuse*, 220 N.Y.S.2d 733 (1961); *Kalina v. Gen. Hosp. of City of Syracuse*, 235 N.Y.S.2d 808 (1962); *Kalina v. Gen. Hosp. of City of Syracuse*, 245 N.Y.S.2d 599 (1963).

158. See *Planned Parenthood Comm. v. Maricopa County*, 375 P.2d 719 (1962).

159. See *State v. Gammons*, 128 S.E.2d 860 (N.C. 1963).

160. See *State v. Scalf*, 119 N.W.2d 868 (Iowa 1963).

161. See *Rivers v. Poisson*, 761 A.2d 232 (R.I. 2000); *Hawkins v. Trinity Baptist Church, Tyler*, 30 S.W.3d 446 (Tex.App. 2000); *Carnesi v. Ferry Pass United Methodist Church*, 826 So.2d 954 (Fla. 2002). See also *Carnesi v. Ferry Pass United Methodist Church*, 770 So.2d 1286 (Fla. Dist. Ct. App. 2000); *Appeal of Morrill*, 765 A.2d 699 (N.H. 2001); *Bilquin v. Roman Catholic Church, Diocese of Rockville Centre*, 729 N.Y.S.2d 519 (2001); *Clay v. Kuhl*, 727 N.E.2d 217 (Ill. 2000); *Parks v. Kownacki*, 737 N.E.2d 287 (Ill. 2000); *Moriarty v. Garden Sanctuary Church of God*, 534 S.E.2d 672 (S.C. 2000); *Sandoval v. Archdiocese of Denver*, 8 P.3d 598 (Colo. Ct. App. 2000); *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, 2002 WL 1837910 (Conn. Super. Ct. 2002); *Franco v. Church of Jesus Christ of Latter-Day Saints*, 21 P.3d 198 (Utah, 2001); *Leary v. Geoghan*, 2001 WL 1902391, slip op., (Mass.App.Ct. 2001); *McKelvey v. Pierce*, 800 A.2d 840 (N.J. 2002); *Hiles v. Episcopal Diocese of Mass.*, 773 N.E.2d 929 (Mass. 2002); *Osborne v. Payne*, 31 S.W.3d 911 (Ky. 2000); *Doe v. New London Ass'n of the United Church of Christ*, 2001 WL 83883

and particularly in the Roman Catholic church. Many concerned sexual harassment or abuse of a parishioner by staff of a religious institution. For example, in *Rivers v. Poisson*,<sup>162</sup> a church janitor made harassing telephone calls from a Roman Catholic parish building to a church member who then sued for negligent supervision and emotional distress. In *House of God Which is the Church of the Living God, the Pillar and the Ground of the Truth Without Controversy, Inc. v. White*, the pastor of a small, independent Christian congregation called the plaintiff parishioner a slut from the pulpit.<sup>163</sup> In another case, two brothers in Minnesota who claimed that they were sexually abused as minors by clergymen attempted to sue under a delayed discovery statute.<sup>164</sup> A third kind of case is the claim of a sexual affair. In *Osborne v. Payne*,<sup>165</sup> for example, a Catholic priest in Kentucky conducting marital counseling with a couple was accused by the plaintiff husband of having an affair with his wife.

Suits by victims were surprisingly unsuccessful which may be why, by 2003, there is a politicization of these issues. Indeed, of the claims by victims of abuse in the 2001 Religion Case Reporter data—whether based on respondent superior doctrine, labor law, intentional affliction of emotional distress, negligent supervision, agency law, delayed statutes of limitation, or civil rights—45% of the abusers were successful in avoiding repercussions. The Roman Catholic church was particularly successful in avoiding responsibility. Reluctant to interfere in church

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(Conn. Super. Ct.); *Checkley v. Boyd*, 14 P.3d 81 (Or. App. 2000); *Martin v. Howard*, 784 A.2d 291 (R.I. 2001); *State v. Fortier*, 780 A.2d 1243 (N.H. 2001); *Sands v. Living Word Fellowship*, 34 P.3d 955 (Alaska 2001); *Odentha v. Minnesota Conf. of Seventh-Day Adventists*, 632 N.W.2d 783 (Minn. Ct. App. 2001); *Maldonato v. Texas*, 59 S.W.3d 251 (Ct. App. 2001); *Lunn v. Davis*, 793 So.2d 463 (La. Ct. App. 2001); *Smith v. Estate of Kelly*, 778 A.2d 1162 (N.J. Super. Ct. App. Div. 2001); *State v. Hopkins*, 772 A.2d 657 (Conn. App. Ct. 2001); *Paz v. Weir*, 137 F.Supp.2d 782 (Tex. 2001); *Weaver v. African Methodist Episcopal Church, Inc.*, 54 S.W.3d 575 (Mo. Ct. App. 2001); *Hargrave v. Brown*, 783 So.2d 497 (La. Ct. App. 2001); *House of God v. White*, 792 So.2d 491 (Fla. 4 Dist. Ct. App. 2001); *A.M.P. v. Hubbard Broad., Inc.*, 216 F.Supp.2d 933 (Minn. 2001).

162. See *Rivers*, 761 A.2d at 232.

163. See *House of God*, 792 So.2d at 491.

164. See *John Doe 28B v. Archdioceses of St. Paul and Minn.*, 2000 Minn. LEXIS 540 (Minn. 2000).

165. See *Osborne*, 31 S.W.3d at 911.

affairs, the courts often claimed, under the ecclesiastical abstention doctrine, that such an interference would violate the First Amendment church-state separation.<sup>166</sup>

3. *Personal Choice*. Interestingly, 1963 was a banner year for strong evidence of personal choice and individually constructed religion. This is because the 1960s were the central years for several important political movements including the anti-war push and the movements for theological innovation. In a rush to avoid military service in the Vietnam War, hundreds of young men contested their draft status by putting forward their own personally chosen religious views. As a result, in the 1963 data set there are eleven conscientious objector cases including a very famous case, *Seeger v. United States*, which eventually reached the Supreme Court.<sup>167</sup> In both *Seeger* and *Welsh*,<sup>168</sup> the Supreme Court supported a personally constructed set of beliefs that function as an equivalent to religion.

Shopping for religion is hard to detect in the cases for either 1963 or 2001. It appears to be a social phenomenon that has not yet been challenged in the courts.<sup>169</sup> A variant

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166. See *Carnesi*, 826 So.2d at 954; *McKelvey*, 800 A.2d at 840. The more successful cases in this area included: *Hiles v. Episcopal Diocese of Mass.*, 773 N.E.2d 929 (Mass, 2002) (an action for libel and slander which was allowed to go forward); *Rosado*, 2002 WL 1837910 (a claim by priests to protect their personnel records in an abuse case); *Hawkins*, 30 S.W.3d at 446 (a claim against a pastor and church where the court found the pastor liable but not the church).

An interesting line of reasoning was exhibited in *Appeal of Morrill*, in which a pastor claimed to have been giving a thirteen year old girl only "holy kisses" on the mouth and "holy hugs." 765 A.2d 699 (N.H. 2001).

167. See *United States v. Grizzard*, 223 F.Supp. 890 (S.D. Cal. 1963); *United States v. Jakobson*, 325 F.2d 409 (2d Cir. 1963); *Peter v. United States*, 324 F.2d 173 (9th Cir. 1963); *Badger v. United States*, 322 F.2d 902 (9th Cir. 1963); *United States v. Stewart*, 322 F.2d 592 (4th Cir. 1963); *Etcheverry v. United States*, 320 F.2d 873 (9th Cir. 1963); *Osborn v. United States*, 319 F.2d 915 (4th Cir. 1963); *United States v. Seeger*, 216 F.Supp. 516 (S.D.N.Y. 1963); *U.S. v. Cole*, 315 F.2d 466 (4th Cir. 1963); *Keefer v. United States*, 313 F.2d 773 (9th Cir. 1963); *United States v. Willard*, 312 F.2d 605 (6th Cir. 1963). The Supreme Court decided the *Seeger* case in 1965. *United States v. Seeger*, 380 U.S. 163 (1965).

168. See *id.*; *Welsh v. United States*, 398 U.S. 333 (1970).

169. It is possible to imagine such a case however. What if a defendant discovers that the plaintiff, a member of religion X, has only been a member of that religious group for two weeks? What if a father sues for custody of the children citing the fact that the mother has switched religious affiliation three times in the past year? Or a family member states that there must be a trustee

of personal choice reasoning, termed "private choice," does come up in the 2001 cases due to the influence of theories of individualism, self-identity, and market choice in the general culture. Laura Underkuffler has spoken about this in a law review article on school vouchers, stating that while the

'theory of the individual as causative agent' has long been one of the strains of the Supreme Court's Establishment Clause jurisprudence . . . [I]t is now championed by many as the critical theoretical key to properly and easily dispose of what would otherwise be very difficult Establishment Clause challenges to state-aid programs.<sup>170</sup>

The rise of identity and choice in the public consciousness arguably underlies much of the cogency of these "personal choice" arguments.<sup>171</sup>

There are ten cases which involve some aspect of government funding for non-public schooling in the 2001 cases (vouchers, conduit funds, tax-exempt bonds, funded special education classes, state revenue bonds, tax-credit and time-release school funding cases).<sup>172</sup> Of these, only one, *Simmons-Harris v. Zelman*,<sup>173</sup> a Sixth Circuit case in the 2001 data that went to the Supreme Court in 2002, is factually similar to the cases which involve the "theory of the individual as causative agent." The Sixth Circuit found the voucher statute unconstitutional in 2001 by

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for a bequest to her brother because he has changed religions several times and is therefore mentally unstable? Standing to sue, stability to care for a child or to inherit and other legal issues might give rise to such a claim. Note also that these claims would perhaps not show up in these databases.

170. Laura Underkuffler, *Vouchers and Beyond: The Individual as Causative Agent in Establishment Clause Jurisprudence*, 75 IND. L.J. 167, 168 (2000).

171. I understand that these cases involve state action, which is an important difference, but I still stand by this point.

172. See *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000); *Indus. Dev. Auth. of Albemarle County v. Mohler*, 51 Va. Cir. 449 (Va. Cir. Ct. 2000); *Virginia Coll. Bldg. Auth. v. Lynn*, 538 S.E.2d 682 (Va. 2000); *Hooks v. Clark County Sch. Dist.*, 228 F.3d 1036 (9th Cir. 2000); *Columbia Union Coll. v. Oliver*, 254 F.3d 496 (4th Cir. 2001); *Johnson v. Econ. Dev. Corp. of the County of Oakland*, 241 F.3d 501 (6th Cir. 2001); *Toney v. Bower*, 744 N.E.2d 351 (Ill. App. Ct. 2001); *Veschi v. Northwestern Lehigh Sch. Dist.*, 788 A.2d 382 (Pa. 2001); *Griffith v. Bower*, 747 N.E. 2d 423 (Ill. App. Ct. 2001); *Freedom From Religion Found., Inc. v. Bugher*, 249 F.3d 606 (7th Cir. 2001).

173. *Simmons-Harris*, 234 F.3d at 945.

distinguishing previous Supreme Court cases in which money had been funneled to private religious schools as a result of the private choices of individuals.<sup>174</sup>

In the many amicus curiae briefs for the 2002 Supreme Court decision of *Zelman*, the various sides made interesting arguments given their purported political stances. Arguing for sectarian schools and individual private choice were the religious schools, the United States, the state—which was interested in minimal-cost alternative options for an abysmal school system in Cleveland—and a phalanx of religion and law scholars.<sup>175</sup> Anti-voucher parties included both liberal organizations and some conservative religious schools.<sup>176</sup>

What is apparent is that parties from conservative, religious positions promote choice and self-identity in these cases thinking that it will increase the presence of religion

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174. A previous case was *Agostini v. Felton*. 521 U.S. 223 (1997) (citing *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993)). One example of such a case is Justice Thomas's plurality opinion in *Mitchell v. Helms* where he stated that the key factor was the nexus between neutrality and private choice; he found private choice occurred "only as a result of the genuinely independent and private choices of individuals." 530 U.S. 793, 810-12 (2000).

175. The amicus briefs are available for viewing on Westlaw under the case cite. See Brief of Amici Curiae Christian Legal Society, Ethics and Religious Liberty Commission of the Southern Baptist Convention, Family Research Council, Inc., and the National Association of Evangelicals, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (No. 00-1751, 00-1777, 00-1779); Brief of Amici Curiae United States, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (No. 00-1751, 00-1777, 00-1779); Brief of Amici Curiae State Petitioners, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (No. 00-1751, 00-1777, 00-1779); Brief of Amici Curiae Jesse H. Choper, et al., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (No. 00-1751, 00-1777, 00-1779) (signers included Jesse Choper, John Coons, Allen Ferrell, Frederick Gedicks, Mary Ann Glendon, Rick Hills, Scott Idleman, Michael Perry, Steve Smith, Eugene Volokh, Richard Wilkins, and John Witte. See also brief of John E. Coons and Stephen D. Sugarman)

176. See Brief of Amici Curiae Anti-Defamation League, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (No. 00-1751, 00-1777, 00-1779); Brief of Amici Curiae NAACP Legal Defense and Educational Fund Inc., and the National Association for the Advancement of Colored People, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (No. 00-1751, 00-1777, 00-1779); Brief of Amici Curiae Council on Religious Freedom, Northwest Religious Liberty Association, the Seventh Day Adventist Church State Council, and the Interfaith Religious Liberty Foundation, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (No. 00-1751, 00-1777, 00-1779) (arguing that the religious atmosphere at sectarian schools is pervasive, and showing that "since 1989, conservative Christian schools have seen an astonishing increase of 46% in enrollment . . . account[ing] for 75% of the total rise in private school enrollment during the past decade." *Id.* at 2.).



in the social and political sphere. Although they are not generally advocates of other aspects of this cultural phenomenon—such as the gay and transgendered identity movement or the open treatment of the sexual abuse cases—conservative religious groups use pro-personal choice reasoning in this area.

Reflecting the current dissension and confusion on the topic of religion, the Supreme Court presented six separate opinions on this case in June of 2002. Writing the bare majority decision, Justice Rehnquist followed the conservative amicus briefs and approved funding "programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals,"<sup>177</sup> that is, "as a result of the numerous independent decisions of private individuals."<sup>178</sup> This language both reiterates the private choice language of previous cases and reverberates with the theme of consumerist choice. If the parents can choose and the market is deciding through hundreds of private consumer choices, then the government is not involved.

This case clearly shows the liberal/conservative split in religion discussed in section I.C.1 and the propensity for the various sides to use reasoning that is merely convenient. For example, personal choice would not be a line of reasoning appealing to the conservative religious action groups in the areas of abortion, gay rights, or individual identity. Injecting personal choice can be a treacherous decision as authors such as Underkuffler and Betty Mensch have pointed out.<sup>179</sup> Perhaps more significant is the fact that some social science studies show that the "private choice" rhetoric hides social inequalities. In a case study of eight public and eight private schools in California, researchers found that the arguments of the private choice voucher advocates were not sustained. What shapes a school's culture almost entirely is the economic level of the community around it. Private schools, both religious and

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177. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), 2002 WL 1378554 at 6.

178. *Id.* at 9.

179. See Underkuffler, *supra* note 170. See also MENSCH & FREEMAN, *supra* note 15. Mensch has described the abortion movement and the many problems with using "pro-choice" rhetoric to label the pro-abortion side. *Id.*

secular, were not any more flexible, innovative, competent, or responsive than public schools in poor communities.<sup>180</sup>

### III. THE THIRD MAJOR SHIFT IN RELIGION: NATURE

The *nature* of religion has also changed in the new millennium. It has been displaced, commodified, and strongly linked to consumerist values, as the United States has become a highly commodified, consumerist capitalist society.<sup>181</sup> The effects of this process on religion are perhaps the most interesting area of change in the field of religion and it is the least written about, and certainly the least recognized in the legal sphere.<sup>182</sup> There are two parts to this process which will be discussed in this section, the displacement of aspects of religion by consumer activities

180. See LUIS BENVENISTE, MARTIN CARNOY, & RICHARD ROTHSTEIN, *ALL ELSE EQUAL: ARE PUBLIC AND PRIVATE SCHOOLS DIFFERENT?* (2002).

181. This truism is noted in DANIEL BELL'S 1996 Afterword to the twentieth anniversary edition of his famous book, *THE CULTURAL CONTRADICTIONS OF CAPITALISM* (1976, 1996). One anthropologist has described the growth in consumerism in this way:

The consumer revolution is a strange chapter in the ethnographic history of the species. For what may have been the first time in its history, a human community willingly harbored a nonreligious agent of social change and permitted it to transform on a continual and systematic basis virtually every feature of social life.

GRANT MCCrackEN, *CULTURE AND CONSUMPTION: NEW APPROACHES TO THE SYMBOLIC CHARACTER OF CONSUMER GOODS AND ACTIVITIES* 29-30 (1988). For one of the best accounts of commodification and its cultural transmission, see PIERRE BOURDIEU, *DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGMENT OF TASTE* (Richard Nice Trans., 1984). See also *THE SOCIAL LIFE AND THINGS: COMMODITIES IN CULTURAL PERSPECTIVE* (Arjun Appadurai ed., 1986). There are many studies of the effects of consumerism and shopping in different areas of life. One author has chronicled the relationship between shopping and community from a city planner's perspective. She argues that shopping, which used to be connected to other aspects of life and took place in community centers, is now practiced on the Internet and in mall wastelands with people we do not know. See ANN SATTERTHWAITTE, *GOING SHOPPING: CONSUMER CHOICES AND COMMUNITY CONSEQUENCES* (2001). For a biting social critique of this phenomenon, see THOMAS FRANK, *ONE MARKET UNDER GOD: EXTREME CAPITALISM, MARKET POPULISM AND THE END OF ECONOMIC DEMOCRACY* (2000); *COMMODIFY YOUR DISSENT: THE BUSINESS OF CULTURE IN THE NEW GILDED AGE* (Thomas Frank & Matt Weiland eds., 1997).

182. Legal reviews of the problems with this all-encompassing economic process include MARGARET JANE RADIN'S *CONTESTED COMMODITIES: THE TROUBLE WITH SEX, CHILDREN, BODY PARTS AND OTHER THINGS* (1996). Radin calls the reduction of everything to a commodity and all transaction to a market model, "privatizing." *Id.*

and the consumer commodification of functional parts of religion. This section is closest to the model of religious change of Stephen Warner and other New Paradigm theorists who use the marketplace and economic vocabulary and imagery. However, in this section, the economic analysis of religion is joined with a recent approach by cultural historians trying to explain the growth of ties between the consumer marketplace and religious practice.

At the turn of the last century, Max Weber began building a model of the origins of capital accumulation within a religious ethos. At the end of his masterwork, *The Protestant Ethic and the Spirit of Capitalism*, he commented disparagingly on the eventual success of capital accumulation as unlinking society from religion entirely:

In its field of highest development, in the United States, the pursuit of wealth, stripped of its religious and ethical meaning, tends to become associated with purely mundane passion, which often actually give it the character of sport.<sup>183</sup>

The thesis of the loss of religion through secularization has not manifested in the United States. According to several intellectual historians, the pursuit and the consumption of wealth became moral pursuits of their own.

One of these scholars, William Leach, stitches together the pieces that created this historical shift to consumerism. He describes the formative years of the development of American consumer capitalism as producing "a culture almost violently hostile to the past and to tradition, a future-oriented culture of desire that confused the good life with goods."<sup>184</sup> Central to his argument is the role of John Wanamaker, one of the major forces in the creation of the department store, who sought to gradually make shopping a valued and moral activity. Leach also presents William James' description of the "mind-cure movement" born out of the religious turmoil of the 1870s and 1880s, with its emphasis on affirmation, the creative power of positive thinking, and personal connection to the divine. These ideas were linked to the powerful economic theories of a scholar

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183. MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 181-82 (1904).

184. WILLIAM LEACH, *LAND OF DESIRE: MERCHANTS, POWER, AND THE RISE OF A NEW AMERICAN CULTURE* at xiii (1993) (citing 1880 to 1930 as the years in which this developed).

named Simon Patten, a well-known academic entrepreneur who built the Wharton School of Economics in Philadelphia. As Leach describes it, Patten argued in his articles and in his 1901 book, *The Consumption of Wealth*, that the new business culture needed new values and proposed "the steady pursuit of private wealth and the expansion of market relations led inexorably to peace, human betterment, stability, 'gentleness,' and civility," (in the sense that it was in everybody's self-interest to be honest, dependable and kindly).<sup>185</sup> Modern corporate capitalism was moral, Patten concluded because it "has increased the stability of industry and reduced the suffering coming from famine, contagious disease and the lack of employment."<sup>186</sup>

Robert Wuthnow believes that the consumerist changes in the larger social context *caused* the changes in religion.<sup>187</sup> Leigh Eric Schmidt agrees, having studied this shift from the perspective of a particularly appropriate medium, the commercial commodification of religious holidays such as Christmas and Easter.<sup>188</sup> He sees the connection as one that was forged between the commercial marketplace and religious celebrations throughout the last century. From the perspective of these authors, the underlying structural changes in the economic system and the social fabric account best for the intense move to the personal position and the current customer aspects of religion described in the next two parts. Whether the Protestant ethic allows capital accumulation to grow or capital accumulation and consumerism affectively commercialize Protestantism and other religions, or the relationship has been one of mutual

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185. *Id.* at 269.

186. *Id.* at 270.

187. See WUTHNOW, *supra* note 18. Also, several well-known theorists of postmodernism, or as Anthony Giddens calls it, the period of late modernity, have described profound economic (flexible commodity capitalism) and social changes which would directly impact religious movements and their contexts. Manuel Castells has pointed to the enormous fractal influences and the undermining of key social institutions in the last thirty-five years to explain the pull to polar oppositions of the global Net and the Self as the new centers of our environment. In this new world, both fundamentalism and New Age spirituality create meaning and have an enormous appeal. See MANUEL CASTELLS, *THE RISE OF THE NETWORK SOCIETY* (1996); MANUEL CASTELLS, *THE POWER OF IDENTITY* (1997); MANUEL CASTELLS, *END OF MILLENIUM* (1998).

188. See SCHMIDT, *CONSUMER RITES: THE BUYING AND SELLING OF AMERICAN HOLIDAYS* (1995). His work will be described later in Part III.B.

engagement, these processes are important ones to watch for in the case law.

A. *The Displacement of Religion or Aspects of Religion*

The easiest way to introduce the idea of the displacement of religion is with a short narrative derived from an interview in 1999:

Susan wakes up every morning to run five miles with her local running club in Colorado Springs. She states that she felt very lost and depressed before she met this group and they provide her with a community and a real sense of meaning in life. Recently, she had a bout of breast cancer and the result was a realization that her connection with the divine was a naturalistic one, that she finds Spirituality in the natural environment around her. When she runs outdoors for over five miles at top speed, she enters what she describes as an ecstatic, cathartic, mystic state due to the endorphin output. She has bonded so closely to her running group that they have become her primary social unit and she often travels with them for races to other parts of the country. She refers to them as "her congregation" and thinks that the bonds she feels to the outdoors and her running are stronger than those of any religion she has been associated with; they are in fact, her religion.<sup>189</sup>

In the second half of the twentieth century, Susan's story is not uncommon. For many individuals the chief characteristics of religion have been replaced or partially displaced by other, market-driven or competitive activities. All of these practices have commonly been lumped together by legal scholars as "secularization" or less commonly as "privatization," but the process is best separated out and called *displacement*. The area of pastoral religious counseling to congregants is a growth area for non-religious marketing that has been filled with psychological and therapeutic counseling of every kind. A wide range of individuals with various types of training, as well as free-standing seminars, night classes, and books, offer advice and help with every sort of problem. Alcoholics Anonymous's Twelve Step Program and many similar mutual help associations operate as religion replacements.<sup>190</sup>

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189. Based on an interview conducted by the Author. Interview with Susan X., Colorado Springs, Co. (October, 1999).

190. See Murray Levine, *An Analysis of Mutual Assistance*, AM. J. COMTY.

Thus, counseling, previously the prerogative of a religious leader or community, has been displaced, replaced, and supplemented with other activities or practices, many of which must be purchased to be enjoyed.

There is also the new metaphorical ideology of the *replacement* of religion entirely. Commentators commonly speak of environmental pursuits as a religion, sports as a religion, bicycling, exercise or weightlifting as a religion, shopping as a religion, technology as religion, obsessive dieting or anorexia nervosa as a religion. There is an entire academic field based on Robert Bellah's ideas about American civil religion, a religious-like attachment to the American polity, which results in deification of the Constitution, salvation through monetary and political success and the myth of the chosen people. Bellah describes it as "the religious dimension" through which a people interpret their "historical experience in the light of transcendent reality."<sup>191</sup> Applying this metaphor, Sanford Levinson has given us *Constitutional Faith*, Tom Grey, the *Constitution as Scripture*, and John Brigham, *The Cult of the Court*.<sup>192</sup> Gary Snyder is one of several ecologists advocating environmentalism as American spiritual religion in the tradition of Thoreau and Muir.<sup>193</sup> A recent book in this vein is Tom Hayden's *The Last Gospel of the Earth*.<sup>194</sup> There are many other examples. Ray Kybartas and Kenneth Ross wrote *Fitness is a Religion; Keep the Faith* which is endorsed by Madonna. James Twitchell wrote *Adcult*.<sup>195</sup> While authors are using these religious terms metaphorically, the interesting point is that in terms of time commitment, attachment, catharsis, sense of community, emotions, and most of the other social attributes which

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PSYCHOL., Vol. 16, No. 2, 1988, at 167.

191. See ROBERT BELLAH, *BROKEN COVENANT: AMERICAN CIVIL RELIGION IN TIME OF TRIAL* (1975).

192. SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988); Tom Grey, *The Constitution as Scripture*, 37 *STAN.L.REV.* 1 (1984); JOHN BRIGHAM, *THE CULT OF THE COURT* (1987).

193. See, e.g., GARY SNYDER, *TURTLE ISLAND* (1974).

194. See TOM HAYDEN, *THE LAST GOSPEL OF THE EARTH* (1996).

195. See RAY KYBARTAS, *FITNESS IS A RELIGION—KEEP THE FAITH* (1997); JAMES B. TWITCHELL, *ADULT USA: THE TRIUMPH OF ADVERTISING IN AMERICAN CULTURE* (1995). For the sports as religion replacement metaphor, see *THE GOSPEL ACCORDING TO ESPN: SAINTS, SAVIOR AND SINNER* (Jay Lovinger ED., 2002). For the idea of technology as religion, see DAVID F. NOBLE, *THE RELIGION OF TECHNOLOGY: THE DIVINITY OF MAN AND THE SPIRIT OF INVENTION* (1997).

are associated with religion, these other activities are substituting for aspects of religion. Many of these group activities are even scheduled specifically on Sunday morning when Christian services are often held.

### *B. Consumerism and the Commodification of Aspects of Religion*

North America and England are now awash in the Whole Life Exposition movement: spiritually oriented consumer fairs that present health, environmental, religious services, goods, and experiences to customers in giant convention centers.<sup>196</sup> These expositions with their hundreds of stalls and speakers such as Deepak Chopra and Barry Sears, are an example of the commodification and consumerism of religion. This process can be understood in three different ways.

First, aspects of religion such as therapeutic counseling or explaining the relationship of the universe to an individual, have moved from the religious sphere (advice from a rabbi or paster or minister) to the commercial sphere. For example, a person attending the Expo or going to Borders bookstore might ask for a book on meaning and spirituality. At Borders, a patron who approaches a clerk

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196. One Sunday afternoon last year, my family and I took a fieldtrip to attend a "Whole Life Expo" offered in a local convention center. Under the bannered portal entrance were advertisements for many speakers including Deepak Chopra, John Gray (author of *MEN ARE FROM MARS, WOMEN ARE FROM VENUS* (1993)), Doreen Virtue (author of *MESSAGES FROM YOUR ANGELS: WHAT YOUR ANGELS WANT YOU TO KNOW* (2002)), and Barry Sears (author of *A WEEK IN THE ZONE* (2002)). Upon entering the enormous hall filled with stalls, the kids went immediately to the free New Age cuisine section, with samples of health bars and chocolate soy milk, Vitamix demonstrations, pure water filters, and herbal coffee substitutes. My husband wandered over to look at the massage chairs, free acupuncture demonstrations, and trips to Egypt with Sylvia Browne, the Psychic. I turned the corner past the stalls filled with jewelry, incense, crystals, meditation beads, and yoga paraphernalia for, went down the aisle with the Ritual Celebration Expert and the Feng Shui consultant, to the aisle where I could speak with the representatives of the Falun Gong, Mahareshi Mahesh Yogi, various Hindu and Sikh sects, and the Book of Urantia followers. All the while, Tall Tree, an Ojibwe flutist in full dress, played his songs on the corner stage in front of a table with a display of his CDs. Much later, as we left, we were all offered strong, long hugs accompanied by a hearty laugh by Eric Brodsky at the Booth of Hugs of The Universal One Foundation. See Wholelife Exposition Website at <http://www.wholelife.com> (last visited, Mar. 3, 2003).

with this question will probably be answered with another question: Do you mean Christian books or spirituality? If the patron responds spirituality,<sup>197</sup> she might be pointed to Carolyn Myss' book, *Sacred Contracts: Awakening Your Divine Potential* as a good option.<sup>198</sup> In this book, the author combines sacred figures such as Abraham, Jesus, Muhammed, and Buddha with astrology, myths, and individual archetypes like Goddess, Warrior, King, Slave, and Networker, into a personalized health and spiritual wisdom profile for each person.<sup>199</sup> Myss re-explains, for a price, the core substantive functions of religion such as counseling, self-help, ceremonies, divinities, connection to the divine, and a re-definition of identity. But Carolyn Myss's perspective is not the only idea people are buying. The process of commercialization has fostered the dissemination of many religious ideologies through books, as well as through hundreds of religious presses, newspapers, and paraphernalia shops. There are

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197. In May 2002, I went to Borders and also Barnes & Noble Bookstores in Buffalo, N.Y., and asked for books on meaning and spirituality. This discussion comes from my notes on this experience.

198. See CAROLINE MYSS, *SACRED CONTRACTS: AWAKENING YOUR DIVINE POTENTIAL* (2001). This is what was recommended to me in July, 2002.

199. In January, 2002, I interviewed Tracy X., supervisor at Borders in Buffalo, with her permission. She explained their cataloguing and bookshelf system. The first big division in the religion bookshelves is between Christian and non-Christian. Christianity is listed as Religion and divided up into Bibles, History, Theology, and several other divisions including Inspirational which is a very large section of many shelves going almost to the ceiling including "novels about Christianity," as Tracy put it. The novels of Tim LaHaye and Jerry Jenkins about the actual return of Jesus Christ are in this area. See, e.g., TIM LAHAYE & JERRY B. JENKINS, *LEFT BEHIND: A NOVEL OF THE EARTH'S LAST DAYS*, (1996) (This bestselling series has sold over forty million copies but is listed not on the New York Times Book List, but on a separate Christian best-selling books list.). Next to this area is the large non-Christian area including Eastern Thought, which contains Taoism, Confucianism, Meditation, Yoga, Hinduism, Islam, Sufism, Voodoo, and others.

Tracy then took me over to Metaphysical Studies which includes all of the more New Age materials such as Tarot Cards and books on tarot card reading, astrology, dreams, magical studies, werewolves, vampires, sacred sciences, and UFOs. This section included books on Psychic powers including: H. REED, *AWAKENING YOUR PSYCHIC POWERS* (1996); KEN TAYLOR, *CLAIRVOYANCE* (2001) LINDA GOODMAN, *LOVE SIGNS* (1992); and KONSTANTINOS, *VAMPIRES: THE OCCULT TRUTH* (1996). There are almost three times as many titles in the psychic powers section as in the section on Buddhism. Also in this section are books on reincarnation in general, out of body experiences, ghosts, paranormal experiences, energy channeling, and several other categories.



specialized Buddhist publication houses in the United States, such as Snowlion and Wisdom Press, and there are also hundreds of Christian bookstores and publishers.<sup>200</sup>

Second, commercialization has moved into spheres that are connected to religion such as the celebration of religious holidays. The best example of this is the consumerist extravaganza, Christmas. Schmidt and others have demonstrated that the relationship between commerce and holidays is very old. There is little question that the holiday has become a medium for accumulation, self-gratification and consumption through the marketplace promotion of a religious day.<sup>201</sup> What is perhaps different today is the style and degree of commercialization. Modern national consumer markets tend to homogenize and standardize the forms of these celebrations, to de-ethnicize them, and to bring them within the carefully controlled confines of huge department stores and purchase-centered malls. The commercial pressure is toward uniformity, nationalism and mass-appeal. And commercialization tends to emphasize *Christian* holidays, a form of consumer promotion that has profited American Christian churches at the expense of other denominations.<sup>202</sup>

Finally, religion itself can become a commodity for sale on the market. R. Laurence Moore has described this in his book, *Selling God: American Religion in the Marketplace of Culture*.<sup>203</sup> He argues that "much of what we usually mean by speaking of secularization has to do not with the disappearance of religion but its commodification, . . . its

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200. See, e.g., Faith Centered Resources, which sells Christian books, tapes, videos and CDs, at [www.faithcenteredresources.com](http://www.faithcenteredresources.com) (last visited, Mar. 3, 2003); Christian Books, at [www.christianbook.com](http://www.christianbook.com) (last visited, Mar. 3, 2003); Christian Booksellers Association, at [www.cbaonline.org](http://www.cbaonline.org) (last visited, Mar. 3, 2003).

201. See SCHMIDT, *supra* note 133. However, the story is a bit more complex than just the consumer usurpation of religious authority. As Schmidt points out, these festivities are multi-functional; while they are commonly times of family-centric overindulging, they also serve to get families together to attend religious ceremonies, and allow for cultural creation and renewal. *Id.*

202. The relationship has also often been reciprocal with Sunday Schools promoting consumer purchases and church bazaars. By denouncing and not participating in consumer Christmas, several denominations aided in the secular domestication of the holiday as a social event rather than a religious festival. See SCHMIDT, *supra* note 133, at 6-11, 156-159, 175-191 and the Epilogue.

203. See R. LAURENCE MOORE, *SELLING GOD: AMERICAN RELIGION IN THE MARKETPLACE OF CULTURE* (1994).

cooperation in making itself a competitive item for sale."<sup>204</sup> To Moore, arguments of the privatization of religion, based on a Weberian presumption of secularization, also miss the point. Instead, religion has become another entrant into two separate but related markets: the competitive marketplace of religions and also the general market of all cultural commodities.<sup>205</sup> Instead of lamenting, he suggests attempting to "map the ways in which religion has aggressively pursued strategies to shape culture and social practices within both marketplaces."<sup>206</sup> Consider the new megachurch movement in which certain religions compete both with other churches for members and with commerce itself by incorporating mall functions—health spas, movie theaters, shops, restaurants, boutiques—into one immense facility connected to a nine thousand seat religious assembly hall equipped with a stage, sound system and giant TV screens.<sup>207</sup>

As Scott Thumma, an academic expert in the field has stated, megachurches "adjust to a changing context in order to address the needs of their clientele. To do this, megachurch pastors simply asked people what they wanted in a religion and then sought to create that product."<sup>208</sup>

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204. *Id.* at 5.

205. An interesting related study of this idea in Japan is IAN READER & GEORGE J. TANABE, JR., *PRACTICALLY RELIGIOUS; WORLDLY BENEFITS AND THE COMMON RELIGION OF JAPAN* (1998) in which the offering of new religious products in the Japanese religious marketplace is detailed.

206. *Id.* at 5-6. Peter Berger agrees that disestablishment plus consumer culture has resulted in a market logic for religious institutions. See BERGER, *supra* note 15, at 137.

207. Megachurches have even been the subject of a New York Times article. Brown, *supra* note 114. Touted as a method for comforting and consoling the entire family, megachurches are competing for marketshare of the local church-going population.

The town within a town being fashioned by the Community Church of Joy in suburban Phoenix will let members live on church grounds and even be buried there, venturing outside perhaps only to work and buy groceries. Even the water park which will be part of an Olympic-size aquatic center, will have a Christian theme, with laser shows depicting Jonah and the whale and David and Goliath. The housing development which will not be limited to church members, will have a full-time chaplain. Though not meant to replicate Disneyland, it is a Disneyesque utopian vision with a Christian Spin.

*Id.*

208. See Thumma, *supra* note 114.

### C. Case Law Analysis

What, if any, of these changes in consumer commodification and displacement of religion can be uncovered in the case law for the years 1963 or 2001?

1. *Estate Taxes, Exemptions and Charitable Bequests.* In the 1963 case law, over 20% of the total data set deals with monetary tax-related issues, certainly the highest percentage of cases for that year. What this indicates is that the largest percentage of petitioners in religious suits in that year were concerned with attaining or contesting a religious tax exemption for their real estate, charitable bequest, or bequest for religious schooling. Religion was understood as a well-defined category in terms of *institutional* structure. This understanding also related very strongly to the highly prized and protected tax exemption it allowed.

By 2001, only four percent of the cases involved these issues. In the 2001 Westlaw relevant cases database,<sup>209</sup> the four largest case categories, excluding the irrelevant cases, are: prisoner suits at approximately eighteen percent, jury and death penalty issues at seventeen percent, religious discrimination in the workplace at sixteen percent, and sex and sexual orientation issues at eleven percent. Of the sex and religion law cases, 31% are on gay issues. This is an extraordinary change from an emphasis on tax and property issues to an individual identity focus.

2. *Therapy as Religion.* Perhaps one of the most telling changes in this entire database is the displacement of religion by therapeutic self-help programs such as AA. Unlike Scientology or other new groups in the United States that have sought the status of a religion for the benefits and protections it confers, Alcoholics Anonymous, a therapeutic mutual assistance program,<sup>210</sup> has *not* sought to

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209. This is the total Westlaw 2001 database: 576 cases, minus the 126 which are not relevant to a religion and law discussion, for a total of 450 relevant cases. See *supra* note 12. The 4% figure in the previous sentence also refers to the Westlaw database.

210. Alcoholics Anonymous is designated a mutual assistance group in the psychology literature. Levine has outlined two different types of groups: the first is the AA model "to assist the deviant individual to cope with a specific problem" and the second is "to change the public definition of a condition" such

be defined within that category. Instead, the courts applied the label "religion" to AA in at least 6 suits in the year 2001.<sup>211</sup> How do these suits arise? How did AA become "a religion"?

In *Alexander v. Schenk*, the court describes "the Alcoholics Anonymous Twelve Step manifesto, the dominant theme of which 'is unequivocally religious'. 'Followers are urged to accept the existence of God as a Supreme Being, Creator, Father of Light and Spirit of the Universe.'<sup>212</sup> Many of the AA cases are brought by prisoners or parolees who have sued, on religious grounds to avoid being part of its therapeutic environment. In these cases, the inmate/parolee must fulfill a treatment requirement in preparation for or to stay on parole. Not having fulfilled the requirement or gained parole, the inmate sues over the issue of whether he was offered a non-religious therapeutic equivalent other than AA.<sup>213</sup> *DeStefano v. Emergency Housing Group, Inc.*, exemplifies a more typical Establishment Clause suit with the AA twist: a state taxpayer brought an action under Title 1983 claiming that state funding of AA is a violation of the First Amendment establishment of religion. The court describes the activities of the AA-based treatment program and concludes, "the district court in the case before us rightly considered the AA program . . . to be a 'religion' for Establishment Clause purposes. It is too late in the day for the defendant to argue otherwise."<sup>214</sup>

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as the women's movement or gay liberation groups. Levine, *supra* note 190, at 167.

211. See *Alexander v. Schenk*, 118 F.Supp.2d 298 (N.D.N.Y., 2000); *Rausser v. Horn*, 43 Fed.Appx. 523 (Table) (3rd Cir. 2002); *In re Garcia*, 108 Wash.App. 1053, 2001 WL 1338424 (2001); *DeStefano v. Emergency Hous. Group, Inc.*, 247 F.3d 397 (2d Cir. 2001); *Bausch v. Sumiec*, 139 F.Supp.2d 1029 (E.D. Wis., 2001); *Cox v. Miller*, 154 F.Supp.2d 787 (S.D.N.Y. 2001).

212. *Alexander*, 118 F.Supp.2d at 300, n. 1 (*quoting* *Griffin v. Coughlin*, 88 N.Y.2d 674, at 681, 683). See, e.g., *Bausch v. Sumiec*, 139 F.Supp.2d 1029 (the court states that Narcotics Anonymous, an AA-based treatment program "could not be considered secular," following the 1996 Seventh Circuit decision); *Kerr v. Farrey*, 95 F.3d 472, 474 (7th Cir. 1996) (in which "all nine justices thus agreed that unconstitutional religious coercion arises when the state exerts the force of law and the threat of penalty to induce an individual to participate in religious activity," here AA treatment).

213. See *Alexander*, 118 F.Supp.2d at 298; *Rausser*, 43 Fed.Appx. at 523 (Table); *In re Garcia*, 108 Wash.App. at 1053; *DeStefano*, 247 F.3d at 397; *Bausch*, 139 F.Supp.2d at 1029; *Cox*, 154 F.Supp.2d at 787.

214. *DeStefano*, 247 F.3d at 397, 407 (citing *Griffin*, 88 N.Y. 2d at 674, 683).

As these opinions indicate, the idea of AA as a religion is both court supported and attested to by individuals who undergo the treatment process and then become full-time, daily AA attenders. Instead of secularization or privatization, the process here is often the displacement of standard denominational religion by a therapeutic program with a spiritual aspect to it that is supported by the state as a religion.

But another case has added a new dimension. In *Cox v. Miller*, the petitioner admitted to "at least eight fellow AA members that he 'believed' he had committed the two murders in his former residence while he was blacked out from alcohol" and was later convicted.<sup>215</sup> His argument to the court was that his AA disclosures were privileged because they were confidential communications to clergy to gain spiritual guidance. Citing *Griffin*, the District Court judge held that AA is a religion, that therefore the statutory privilege applies and habeas corpus was granted, a result that certainly did catch the eye of the media and commentators.<sup>216</sup>

At the next appellate level, the Second Circuit stated that New York's clergy confidentiality privilege did not extend to members of AA, and that AA is not a "traditional religion."<sup>217</sup> The case is currently awaiting certiorari at the United States Supreme Court.<sup>218</sup>

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215. *Cox*, 154 Supp.2d at 789-90.

216. For published popular reports of the 2001 decision see: John Lehmann & Leonard Greene, *Juries Can Hear AA Confessions*, N.Y. POST, July 18, 2002; *Behind Closed Doors: Paul Cox's murder of Drs. Rao and Shanta Chervu*, NBC NEWS: DATELINE NBC, Feb. 26, 2002 (a TV special that recreates the original case, the courtroom drama and the jurors' reactions); Daniel Wise, *Verdict Overturned in Doctors' Slaying; Statements at Alcoholics Anonymous Shielded*, N.Y. L.J., Vol. 226, No. 23, Aug. 2, 2001. See also, Thomas J. Reed, *The Futile Fifth Step: Compulsory Disclosure of Confidential Communications among AA Members*, 70 ST. JOHN'S L. REV. 693 (1996); Jessica G. Weiner, Comment, *And the Wisdom to Know the Difference*, 144 U. PENN. L. REV. 243 (1995); and George Barry, Comment: *Confidentiality in the Church of the Twelve Steps*, 10 J.L. & POL'Y 433 (2002).

There are other notes in law reviews on this case arguing for or against an evidentiary privilege to protect speech within AA. My concern, however, is with how these decisions and discussions on AA relate to our current confused understanding of the nature of religion.

217. In footnote 12 of the opinion, Justice Sack states, of the previous decisions on AA, "[n]either *Warner* nor *DesStefano* nor *Griffin* held that AA is a 'religion.'" *Cox*, 296 F.3d at 108. Perhaps he should reread *DeStefano*. He continues by pointing out that while "therapeutic recovery programs for alcohol

Another surprising case is *People v. Hardacre* in which a committed sexually violent predator "presented evidence that he had been participating in Bible studies and a parole recidivism program based on Christian values" rather than the psychology-based counseling program.<sup>219</sup> While the court focussed on the issue of whether or not Hardacre received a full hearing, it did comment that his lack of participation in the secular treatment program meant that he could not be assessed for mental condition and therefore could not be released. Here then, a religious treatment program is not equivalent to a therapeutic treatment program.

These court cases and the scholarly commentary on them indicate the ferment and the interest in the relationship between therapy and religion. However, the academic discussion of these cases presents arguments on either side and does not address the changes in the religious landscape that have brought us to the question of whether therapy is religion.

3. *Religion and Consumerism.* Arguably, cases on the consumer commodification of religion would not appear in a typical religion reporter series because they often concern commercial issues. Thus, publishing contracts, agreements to rent space for a Whole Life Exposition, Uniform Commercial Code cases involving shipped goods, and copyright infringement cases are the areas of law where one should look. To the extent that law promotes the expansion and process of commercial enterprises, it will do so for religious commodification as well. And the time when the Court objected to payments and therapy as a part of the rituals in a religion has long since passed.<sup>220</sup> But, given

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or drug addiction may involve 'substantial religious component[s]', [they] do not, for that reason, become or consider themselves to be 'religions' in the ordinary sense of the word." People do not "convert" to the AA religion, as they would to a "traditional religion," like "Catholicism, Judaism, Islam and Christian Science." *Id.* at 107, 110.

218. See U.S.S.C. pending docket No. 02-937, *Cox v. Miller* at <http://www.supremecourt.us.gov/docket/02-937.htm>.

219. *People v. Hardacre*, 90 Cal. App.4th 1392, 1397 (2001).

220. In 1989, in the Supreme Court case *Hernandez v. Comm'r of Internal Revenue*, Justice Marshall indicated that the Court did not associate the activities of a religion with commerce. 490 U.S. 680 (1989). He used commercial terminology such as "franchises," "charges," "fixed donations," "prices," "training sessions," and "discounts" to describe activities which the Scientologists engaged in that were not religious in nature. *Id.* By the mid-

these caveats, is there evidence of a relationship between religion and commerce that can be discerned in these cases?

In the 1963 case law, an understood premise underlying each of the decisions is the common agreement to the basics of Christian morality, a kind of Christian sacred canopy over commerce. For example, 1963 Sunday closing law cases presented the question whether individuals should be permitted to shop on the Christian Sabbath? And the answer was no. Even when the operator of a small grocery store was Jewish, could not open on his Sabbath, and needed the Sunday business to survive, the Court held that he violated the Penal Code by opening on Sunday.<sup>221</sup> Eighteen Sunday closing law cases in the 1963 sample discussed this issue in various ways.<sup>222</sup>

Anti-gaming suits,<sup>223</sup> convictions for the possession and sale of obscene materials,<sup>224</sup> and the illegality of vending machines that dispensed condoms,<sup>225</sup> demonstrated that Christian values were socially and legally enforced upon the general population. Commerce was understood to be under the general umbrella of the Christian faith which determined its boundaries.

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1990s, the Church of Scientology had achieved the status of a "religion" for taxation purposes even though it continued to require payments for individual therapeutic treatment and to advertise and promote the religion.

221. See *People on Complaint of Follar v. Finkelstein*, 239 N.Y.S.2d 835 (1963).

222. See *State v. Karmil Merch. Corp.*, 186 A.2d 352 (Me. 1962); *State v. Katz Drug Co.*, 362 S.W.2d 80 (Mo. Ct. App. 1962); *Marks Furs Inc. v. Detroit*, 112 N.W.2d 66 (Mich. 1961); *City of Euclid v. MacGillis*, 179 N.E.2d 131 (Ohio Ct. App. 1962); *Highland Sales Corp. v. Vance*, 186 N.E.2d 682 (Ind. 1962); *State v. Schottenstein*, 188 N.E.2d 217 (Ohio Mun. 1963), *Kearns v. Barney's Clothes, Inc.*, 239 N.Y.S.2d 319 (1963); *People v. Pam*, 238 N.Y.S.2d 363 (1963); *Opinion of the Justices*, 191 A.2d 637 (Me. 1963); *Arlan's Dept. Store v. Commonwealth*, 369 S.W.2d 9 (Ky. 1963); *People v. The Paine Drug Co.*, 241 N.Y.S.2d 946 (Ky. 1963); *Fass et al. v. Roos, etc.*, 221 F.Supp. 448 (D. N.J. 1963); *City of South Euclid v. Bondy*, 192 N.E.2d 139 (Ohio Mun. 1963); *State v. Grimes*, 190 N.E.2d 588 (Ohio, 1961); *Moss v. Horning*, 314 F.2d 89 (2d Cir. 1963); *Cardinal Sporting Goods Co. v. Eagleton*, 213 F.Supp. 207 (E.D. Mo. 1963); *People v. Rogers*, 241 N.Y.S.2d 996 (1963); *Finkelstein*, 239 N.Y.S.2d at 835; For a relevant Sunday closing case and a discussion of Christian morality in 2001, see *State v. King*, 40 S.W.3d 442 (S.C. Tenn 2001).

223. See *Cooley's Found. v. Legalized Games of Chance Control Comm.*, 187 A.2d 731 (N.J. Super. A.D. 1963).

224. See *Olsen v. Doerfler*, 225 F.Supp. 540 (1963); *State v. Hudson County News Co.*, 196 A.2d 225 (1963).

225. See *Sanitary Vendors, Inc.* 190 A.2d 876 (vending machine containing condoms banned based on statute making extramarital intercourse illegal).

By the 2001 case law, this relationship has changed remarkably, and the influence of generalized Christian morality has faded. One case stands out in particular as questioning the relationship between religion and consumerism. In *Sechler v. State College Area School District*, a Christian "youth pastor" filed a complaint alleging that the local school superintendent had violated his First Amendment rights because no "Christian symbols" were displayed at the winter holiday school program. Instead, he stated that the program was filled with commercial expressions of Christmas, symbols for Kwanzaa, Chanukah, and the Swedish festival of St. Lucia.<sup>226</sup> In particular, the plaintiff alleged that a song called "Bruno's Christmas at the Mall"<sup>227</sup> was an example of secular commercial songs of the Christmas season. The court held that the plaintiff's "claim is that the table display and song program violated the First Amendment because they were not Christian enough."<sup>228</sup> The court cited *Lynch v. Donnelly* writing, "[w]e fail to see how this song demonstrates hostility toward Christianity . . . [w]e recognize that Christmas is a time of serious commemoration . . . [but] this song is about nothing more than children having fun during the Christmas season."<sup>229</sup> Instead, the court found that commercial enterprises and songs "send a message of inclusion and celebrate freedom to choose one's own beliefs . . . a legitimate, secular message."<sup>230</sup> Consumer messages, then, encourage freedom of religion and are to be equated with religious ceremonies in this display. Sunday is no longer a day of commercial quiet because of religion, but a day of commercial celebration.

There are nine cases in the area of intellectual property, trademark and copyright in 2001.<sup>231</sup> In general,

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226. See *Sechler v. State Coll. Area Sch. Dist.*, 121 F. Supp.2d 439 (M.D. Pa. 2000).

227. *Id.* at 444.

228. *Id.* at 446.

229. *Id.* at 452.

230. *Id.* at 453.

231. Review of the 1963 case law did not turn up any cases in trademarks or copyrights. The 2001 cases are: *Gen. Conference Corp. of 7th Day Adventists v. Perez*, 97 F.Supp.2d 1154 (S.D.Fla. 2000); *Gen. Conference Corp. of 7th Day Adventists v. 7th Day Adventist Kinship Int'l, Inc.*, 1991 WL 11000345 (D.Cal. 1991); *Gideons Int'l, Inc. v. Gideon*, 94 F.Supp.2d 566 (E.D. Pa. 1999); *Christian Science Bd. of Dirs. of the First Church of Christ Scientist v. Robinson*, 259 F.3d



these are cases in which denominations such as the Christian Scientists, Seventh Day Adventists, and the Gideon Society, sought to protect all of their associated names and often an e-mail domain name. Control over the actual words of a charismatic leader<sup>232</sup> or over a break-off group issuing pamphlets<sup>233</sup> tested the relationship between religion and commercial restraints.

A related media case, *A.M.P. v. Hubbard Broadcasting, Inc.*,<sup>234</sup> demonstrates the degree to which religion has become comfortable in a world of MTV, televangelism, sensationalist talk shows, and news reports. KSTP News had prepared and was about to air a television news story about a cult-like religious group that practiced "atrocities" including forced incest.<sup>235</sup> A member of the group whose father had sexually assaulted her as a minor requested a temporary restraining order to "prohibit any broadcast or advertising of the KSTP news story about the group" which included segments with her father asserting that the group had caused him to become insane and coerced him into attacking her. Although she was unsuccessful in her plea for a prior restraint on expression, this case exhibits the vast change from the 1963 concern with younger people seeing condoms in a public place.<sup>236</sup> The nature of Wuthnow's liberal/conservative split may be, rather, a slow shrinking of the image (true or untrue) of a sacred canopy. The legal world was definitely influenced by a generalized Christian morality in 1963 which has, arguably, been reduced to only encompass the conservative religious right by 2001.

4. *Varied Nature Of Religion.* Another way in which the newly expanded and commercialized category of religion shows up in the 2001 case law is through the variety of

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209 (4th Cir. 2001); *Torah Soft, Ltd. v. Drosnin*, 2001 WL 1506013 (S.D.N.Y. 2001); *Merkos L'Inyonei Chinuch, Inc. v. John Doe No. 1-25*, 172 F.Supp.2d 383 (E.D.N.Y. 2001); *Yahoo!, Inc. v. LaLigue Contre LeRacisme et L'Antisemitisme*, 169 F.Supp.2d 1181 (N.D. Cal. 2001); *Cummins v. Mold-In Graphic Systems*, 26 P.3d 518 (Ariz. App. 2001); *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110 (9th Cir. 2000).

232. See *Gideon*, 94 F.Supp.2d at 566

233. See *Worldwide Church of God*, 227 F.3d at 1110.

234. 216 F. Supp.2d 933 (Minn. 2001).

235. *Id.* at 934.

236. See *Sanitary Vendors, Inc.*, 190 A.2d at 876.

cases now thought of as vehicles for First Amendment claims. The plaintiffs in the new century obviously perceive the category of religion as highly flexible, malleable, and even consumerist.

For instance, in *Alliance for Bio-Integrity v. Shalala*,<sup>237</sup> a group of scientists, religious leaders and citizens objected to the Food and Drug Administration's policy on genetically modified foods. Although the plaintiffs averred that "their beliefs are sincerely held and can demonstrate an 'honest conviction' desiring to avoid genetically engineered food,"<sup>238</sup> and that these views were equivalent to a religious belief, the court found that food labeling did not "'substantially' burden Plaintiffs' religious beliefs" or "force them to abandon any of their religious beliefs or practices."<sup>239</sup> This is an interesting holding indeed. Here, objections to the commercial production of genetically altered food are treated as a religious belief akin to Roman Catholicism, Lutheranism, and AA.

*Yusov v. Martinez* appears on first glance to be a typical prisoners' rights case in which an inmate refused to comply with prison regulations. In fact, the case involved the DNA ID Index Law of New York State, which provides a complete genetic map of each offender. In this suit, the offender presented *no* specific religion, *no* specific religious beliefs and *no* religious practices as the basis for his objection. The court accepted his statement that obtaining a sample would violate his religious beliefs as a solid basis for a First Amendment claim without any explanation of his religion. This is a very broad reading of the scope of religious belief.<sup>240</sup>

In another case, a prisoner who was not Native American by birth or adoption joined Heritage Examined Around Redman Traditions (HEART) while in prison. Stating specifically that "HEART is not a religion," the court held that the inmate practiced a kind of "Native

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237. 116 F. Supp.2d 166 (D.D.C. 2000).

238. *Id.* at 180.

239. *Id.* at 181.

240. See *Yusov v. Martinez*, 2000 WL 1S93387 (S.D.N.Y. 2000). This remarkable stretching of the understanding of religion also emerges in a custody case in which a mother states that removing her children violates her religious freedom. See *In the Matter of B.P. and A.P.*, 306 Mont. 430, 437 (S.Ct. Mon. 2001).

American Spirituality" as his "professed religious beliefs."<sup>241</sup> In two other cases, joining the "Hebrew religion" meant that the inmate followed a religion,<sup>242</sup> but "Humanism" was not a religion entitled to First Amendment protection.<sup>243</sup> These cases demonstrate both serious confusion in the understanding of what constitutes a religion and a much wider and more malleable concept than in the 1960s.

#### IV. REPERCUSSIONS IN LAW FROM THE CHANGES IN AMERICAN RELIGION

Contrary to popular understandings of the general loss of faith in the United States, the "secularization thesis," academic religion scholars have presented the following evidence on the stability of the American attachment to religion: Church membership is up over the past century, attendance and belief in God have remained stable, religious contributions have stayed at their 1955 level and the rate of belief and activity has generally increased with education. Smaller sects and cults are not filled with aberrant personalities, and college professors are only slightly less religious than their non-academic peers. These studies have also noted that "throughout the world, [the] fastest growing religions tend to be strict, sectarian and theologically conservative."<sup>244</sup>

What has changed is the *diversity, practice and nature* of the religions and religious viewpoints now available. And, a brief review of the 2001 religion case law clearly reveals the effects of the changes that religion scholars have been writing about. The seachange in American religion that has occurred over the past thirty-five years is evidenced in the case law as well as the social science

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241. *Morrison v. Garraghty*, 239 F.3d 648, 652 (4th Cir. 2001).

242. *See Love v. Reed*, 216 F.3d 682 (8th Cir. 2000).

243. *See Kalka v. Hawk*, 215 F.3d 90 (D.C. Cir. 2000).

244. The points in this paragraph are paraphrased from an excellent article reviewing all of the literature on the subject by Laurence R. Iannoccone, *Introduction to the Economics of Religion*, 36 J. ECON. LIT. 1465, 1468-72 (Sept. 1998) (outlining the incorrect assumptions of the secularization thesis: that religion must inevitably decline as science and technology advance; that individuals become less religious and more skeptical of faith-based claims as they acquire more education, particularly more familiarity with science; and that membership in deviant religious groups . . . is usually the consequence of indoctrination leading to aberrant values . . . All of these assumptions are false. *Id.*).

literature. While the *diversity of religion* is often attributed to the 1965 Immigration and Naturalization Act and the explosion of New Age Spirituality and New Religions, these phenomena are more than popular cultural events, they are also legal phenomena. The case law for the year 2001 clearly demonstrates these changes, including the heightened liberal/conservative split outlined by Robert Wuthnow, the wide diversity of religions, and even the anti-immigrant response outlined by Diana Eck.

In terms of *practice*, the move has been to emphasize individualism, self-identity, and expressivism in a wide variety of areas including sexual expression, personal choice, and individual rights. Thus religion scholars have found individuals shopping for religions that fit their lifestyles, creating self-described private faiths or fashioning different parts of several religions into a syncretistic personal spirituality. Again, the case law in the area of religion reveals several of these issues in practical form. Gay and transgendered identity issues are prevalent in the 2001 religion case law with gay plaintiffs requesting equal treatment for their non-traditional identities and more conservative plaintiffs objecting to pro-gay policies, posters, tolerance training or plays. The assertion of individual rights against hierarchical authorities shows up in the gay, sexual harassment, exploitation and abuse cases which are approximately 11% to 13% of the 2001 cases. And a pop culture, market-oriented conceptualization of personal choice has become even more prevalent in the case law as a rationale to wash away the state action component of government aid to religious institutions.

In the third major shift in the *nature* of religion, displacement and consumer commodification, the results of the changes, though visible, are harder to discern in the case law. Arguably, many of the lawsuits in this area will be handled under commercial law and not appear in any religion database. Alcoholics Anonymous, however, is an important example of a self-help therapy program that has displaced religion for its participants. The courts clearly define AA as a religion. Consumerism, on the other hand, is seen as not antithetical to religion and as a normal part of any liberal secular agenda. In cases concerning holiday displays, the courts are very positive about consumer displays as inclusive and secular, even equating them with religious displays. Similarly, the nature of religion is now

perceived as very broad including genetically altered food, claims of infringement when no religious basis is ever mentioned and non-religions as the basis for religious beliefs. This malleability is fully visible in the 2001 case law. Religion has been personalized, spiritualized, downsized, decentralized, and widely diversified.

Of the three historical theories for the change in religion presented in the Introduction, none of the case law provides any hints as to which might be the most cogent. If the case law had not reflected the changes, one could argue that the changes were not important or that they were not coming into the legal systems. As to whether these changes represent a cyclical pattern with periods of social upheaval, whether they represent a complete break with the 1950s sacred canopy model or, finally, whether these changes proclaim American religious innovation and the use of economic and marketplace vocabulary, the 2001 case law is silent. Neither judges nor parties seem to find such analysis or historical reasoning useful for presenting their claims.

However, the fact that these shifts in religious practice have gone largely unnoticed in the legal academic and the sociolegal academic world are harder to justify or explain. It can not be justified by either a time-lag or a dearth of case law material argument. The time-lag argument does not apply because, in thirty-eight years, cases reflecting the new religious awakening in the United States have had ample time to appear in the courts and to work up through the legal system. And there is no dearth of material to consider. The changes in religion appear in large enough percentages in the case law that one cannot argue that these are purely social and not legal issues.

If the time lag and the lack of cases' justifications are not pertinent, what other reasons are keeping legal academics and sociolegal scholars from assessing these changes? One argument concerns the personal position of most legal academics. Arguably, legal academics are from more mainstream denominations than the New Religions or spiritual movements. To talk about how you recently "shopped around for a religion" is perhaps a form of disclosure that law professors would find antithetical to their authoritative position, even in these times of narrative and self-revelation in the law. Another possibility is that legal academics tend to look up, rather than down. That is, they are interested in examining and commenting on

Supreme Court cases more than cases from the lower courts. With the reduced review schedule of the Supreme Court, ever fewer cases on religion come up on certiorari every year, and generational issues make it unlikely that the current Court members are experiencing these changes. A third issue could be the hardened subject matter categories into which academics slot cases—free exercise *versus* establishment claims, school vouchers *versus* religion in the workplace—that do not include the category of "religious change." Another possible reason involves pressure to stick closely to doctrinal lines of argument that avoid cultural shifts. Each of these reasons would partially explain the lack of examination.

However, the most compelling argument is that the law review literature of the current legal academy is itself stuck in the 1950's discourse of the sacred canopy. A standoff has developed between the more conservative pro-religion group, called the New Religionists, and the more liberal democratic secularists. This drawing of battle lines mirrors the political liberal/conservative split that Wuthnow described in detail. Moreover, the conversation has become limited to one kind of argument endlessly repeated and debated.

The secularists defend pluralist values and democracy, fail to see the enormous shifts in pluralism, and mistake tolerance for a real understanding of the variety of devotional worldviews. Their rationalist perspective does not enable them to understand shopping for religion (although they may actually practice it themselves) or the religious patriarchy of a fundamentalist sect. Standing on one side of the battlelines, the secularists ignore the proliferation of otherness that they state they are defending, while they put forward philosophical liberal values and an image of the secular public square that is hardly based on current realities.

On the other side, the conservative pro-religion group equally avoids the new pluralism and changes in belief. Its conferences and articles bemoan the position of religion in the law, bemoan the problems with doctrine, or assert the importance of the Founding Fathers.<sup>245</sup> Remaining locked in

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245. In a recent speech, Justice Antonin Scalia presented a purely originalist position. Justice Antonin Scalia, Address for the Erie County Bar Association, (Mar. 13, 2002). When asked if he then was willing to take on the sacred

a battle over these topics with the liberal secularists keeps the arguments focused directly on these limited issues. Traditional denominations continue to dominate these arguments: Herberg's Protestant-Catholic-Jew. Sociological scholars completely avoid all of these issues. They are certain that the discussion of the relationship between law and religion is an illiberal one in which the First Amendment doctrine trumps every argument. Their avoidance insures that there is no easy entry into the relevant social science material.

What could be considered in these debates? First of all, the new religious diversity, practice, and nature challenge this locked discussion. The new diversity, including Shi'a Muslims and Bengali Hindus, changes the basis for the discussions in natural law and religious ethics because a purely Christian theology can no longer be assumed. The secular public square that is so often trumpeted needs a legal membership drive. Second, harassments and abuse of these new populations revisit the problems with immigrant religions throughout American history. Legal historians and immigrant specialists have been compiling information on this which could be mined.

Third, the tremendous fear in both liberal and conservative camps of the increasing religious pluralism reflects an ignorance about the nature of religious affiliation, moral values, and democratic principles. Empirical studies have shown a strong correlation between religious activity and the social, mental, and physical health of populations in the United States.<sup>246</sup> And the rates of religious attendance and concern are higher in areas with higher rates of religious diversity.<sup>247</sup> Religious pluralism has never been "a secularizing threat to faith and fervor" in the United States.<sup>248</sup> Indeed, an authority no less than Adam Smith once suggested that religious competition did not

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religious framework of that period as his own, a framework which was dominantly Christian and included the idea of the Providential Plan, he responded: "No, I don't. You can favor religiousness, but they believed in natural law and they didn't want a theocracy. They wanted freedom of religion." *Id.*

246. See Ianncone, *supra* note 244, at 1476.

247. See *id.* at 1486.

248. See *id.* at 1488.

pull a population apart, but rather it improved the civil welfare and prosperity of societies.<sup>249</sup>

Fourth, a different sort of understanding of fundamentalist sects and churches must be developed. Fundamentalist and conservative religious groups are by far the fastest growing religions in the United States and throughout the world. As Iannaccone has pointed out, Mormons and Jehovah's Witnesses, long-regarded as highly deviant groups, continue to double their membership every fifteen to twenty years and now outnumber all but the largest five or six Protestant denominations in America.<sup>250</sup> This switch is reflected in a linguistic shift in the 2001 legal cases in which the term "Christian church" has come to mean a Protestant, conservative, non-denominational church while other religions are given as their denomination, whether it be "Episcopal" or "Wiccan." As the growing group of conservatives and fundamentalists are also largely drawn from among the poorer, less educated, and minority members of society,<sup>251</sup> this exclusion creates race and class issues as well. Wuthnow's split between the liberals and conservatives is not a split in the legal academy, as much as it is a race, class, and education split in the country that is mirrored in religion, and then ultimately, in the religion case law.

Fifth, the new emphasis on individualism, self-identity and expressivism in religion changes the ways in which the term religion can be defined, raises issues such as standing and sincerity with respect to belief systems, and forces scholars to look at their own normative assumptions about syncretistic personal spirituality. Gay and transgendered identities are front and center in the religion case law but are largely ignored in the legal literature. The religious sexual abuse cases in 2001 are a harbinger of the current religious upsurge against the Roman Catholic Church that has resulted in hundreds of legal suits all over the country.

And, sixth, as the cases point out, the facile way in which the terms "personal" and "private choice" are used demonstrates that the same terms can be a market metaphor when used by the conservative pro-religionists or

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249. See ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776; 1985) at 742-43.

250. See Iannaccone, *supra* note 244 at 1471-72.

251. See Iannaccone, *supra* note 244.



an icon of democratic theory when employed by the liberal secularists. This situation demands thorough discussion and thought.

Seventh, the shift in religion to displacement and consumer commodification shows the staleness of the current conversation in high relief. With bicycling and Alcoholics Anonymous being equated to religion, with church members decrying the consumerist world in lawsuits at the same time that they work for their own churches' market share, the actual positions of the parties, the nature of the debate and the purposes that it serves, need serious rethinking. What kind of moral discourse can take place in this new atmosphere of diversity? What is the real influence/control of consumerism in dictating "moral choices" and the new spirituality? A further problem is that courts veer from one understanding of "religion" to another in these cases. Although no one likes definitions, the current incoherency will not be relieved without some stronger definitional guidelines.

And what of the position of the Supreme Court? If the Constitutional arguments in the area of religion are based on classical liberalism as legal commentators would have it, and most of these arguments are objective rather than subjective, then several very interesting questions arise. What does it mean to have a society in which subjectivist religious concerns—shopping around, creating your own, customizing a religion, rejecting aspects of religion that don't work for you, skipping from one to another, highlighting your personal choice—have become paramount? If the Court understands historically rooted traditional denominations best and relies on them as a standard for protection, what of the fact that most persons in the United States are now switching their religion at least once in their lifetime or do not follow a traditional religion? Is the Supreme Court really "neutral" when it talks about religions that get protection under the First Amendment if they have an objectivist view of religion such as the Protestant-Catholic-Jew on view in most of their decisions?

If this is a calculated withdrawal to the 1955 Protestant-Catholic-Jew sacred canopy by both the Supreme Court and the entire legal academy, both liberal and conservative, I would argue that remaining awash in a quiet traditionalism actually creates more problems than it

solves. Like the Internet and dot-com revolution, ignoring an enormous shift in the American cultural landscape leads to a kind of intellectual incoherency that is already very evident in the religion case law.

I hope that legal scholars and sociologists will begin to ask different questions and do different investigations. This article has provided one method for looking at the dramatic social and cultural changes in religion as they appear in the case law, and given these changes,<sup>252</sup> a series of important issues that need to be addressed.

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252. Please see my discussion of incoherency in *From Yoder to Yoga: Models of Traditional, Modern and Postmodern Religion in U.S Constitutional Law*, 41 ARIZ. L. REV. 49, 54, 55 (1999); See also Phillip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CAL. L. REV. 817, 819 (1984); Kent Greenawalt, *Religious Liberty and Democratic Politics*, 23 N. KY. L. REV. 629 (1996).

