UNDERGRADUATE ARTICLE

Spirituality and the Law

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In 1968 a Harvard graduate by the name of John Sisson refused to accept induction into the U.S. Armed Forces for the war effort in Vietnam. He considered his "moral development" a preclusion from service. However, he did not submit a "conscientious objector" form, because his cited ethical compass did not meet the qualifications of the document. These required qualifications were "reason[s] of religious training and belief, [which are] conscientiously opposed to participation in war in any form," where "[r]eligious training and belief" "does not include essentially political, sociological, or philosophical views or a merely personal moral code" (*Military Selective Service Act of 1967*, 81 Stat. 100 §7; P.L. 90-40 [30 June 1967]; see also 50 App. U.S.C. §456[j]).[1] When the time came for him to step forward and formally accept service, he refused. His deviation prompted extensive legal review and, in 1969, a District Court ruled in *United States v. Sisson* (297 F.Supp. 902 [D-MA, 1969]) that he could not be ordered into the military.

Sisson's ethical situation reflects a predicament in the American postmodern moment, where individuals are opting for moralities alternative to traditional religious blueprints. They are turning toward paths of greater dynamism. They deny establishment, but claim ethics. They are "spiritual, but not religious." However, even as they dismiss religiosity, they are entirely reliant upon it—their namesake depends on the phrase "… but not religious." This is epitomized in Chief Justice Wyanski's legal opinion; he concludes

> Sisson's table of ultimate values… reflects quite as real, pervasive, durable, and commendable a marshaling of priorities as a formal religion… What another derives from the discipline of a church, Sisson derives from the discipline of conscience… He was as genuinely and profoundly governed by his conscience as would have been a martyr obedient to an orthodox religion. (905)

Thus, his approval of Sisson's morality is only justified to the extent that it corresponds to religious content and function. In this paper, I will hold that this is the legal

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[1] This version of the Act replaced earlier versions containing references to "God" and a "Supreme Being."

state of spirituality in the contemporary American courtroom. Spirituality, even as it is liberally perused and pursued, can only be legally understood to the extent that it corresponds to religiosity. I will evidence this argument in three arenas: in military service, the public labor space, and the public education sector. Through these investigations, a spectrum of spirituality will emerge, which will hint toward the drastic implications inherent to spirituality's malleability. Such mobility will be shown to be both advantageous—and dangerous. And, to these effects, the legal potentiality of the "spiritual, but not religious" status will be unveiled.

At the outset, the various definitions and typologies of spirituality demonstrate an explicit relation to religiosity. Religion in America scholar Catherine Albanese distinguishes four typologies specific to spirituality: that of the body, of the heart, of the will, and of the mind (2001:10). These emphasize the central individualism of spirituality—it is an individual's body, an individual's heart, an individual's will, and an individual's mind. The individual is the medium for experience, as well as the sole director. To this extent, he or she is a seeker on a personalized quest (see Roof 1999). On that journey, he or she develops along an axis of gradualism, maturing and developing through adopted and adapted practices. Such continual change often appears as random eclecticism—and this may be an appropriate appearance. Spiritual quests often tour many diverse landscapes, unharnessed by any regimented regions of religion. Thus, spirituality may be primarily characterized by its emphasis on individualism and fluidity. These characteristics are not inadvertent; rather they are artifacts of the history of American spirituality. This history—from its nineteenth century movements of Spiritualism, Theosophy, and New Thought to its postmodern revival as New Age inspiration—has pivoted to the ideal of innovation and retreated from the inhibition of institution. This motion is emblematic of spirituality's relation to religion: spirituality aims to shed the constraints of religious dogma and doctrine and, oppositely, flow freely into experiential curiosity and liberty.

However, while spirituality aims to shed religion's traditionalism, it remains embedded in its American secularism. To begin, the religion clauses of First Amendment to the Constitution state that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Through countless Supreme Court decisions, a clearer—and more nuanced—definition of religion has emerged. One highly influential case was *United States v. Ballard*, (322 U.S. 78 [1944]). The Ballards were the leaders of the "I AM" belief movement. They were sued for fraudulently amassing over $3,000,000 in donations on the basis of deceitful ontological claims. However, the Supreme Court refused to evaluate these charges, stating that "if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect… The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position" (87). In this opinion, religion is understood as a belief of any sect or any one group, comprised of any sincerely held axioms. Thus, importantly, the I AM movement was categorized as a religion not on its content, but on its collectivity. In *Religion on Trial*, scholars Hammond, Machacek, and Mazur identify this "habit of thinking about religion in terms of institution-based collective identities," stating that "the High Court understands religious identity not only as static but also as determined by the community, whether that

community is numeric or historic" (2004:70-72). The authors note that this trend declines after 1965, when David Seeger, an individual with a non-institutional "faith in a purely ethical creed" is granted "conscientious objector" status in *United States v. Seeger* (380 U.S. 163 [1965]). Concurring with this analysis, Richard John Neuhaus remarks, "the court's references to religion have less and less to do with what is usually meant by religion… That is, religion no longer referred to those communal traditions" (1984:80). I reject these conclusions. While Neuhaus heralds an eve of legal individualism, such acknowledgement is only substantiated by parallelism to "what is usually meant by religion… those communal traditions." However, to the extent that it diverges, spirituality will not be comprehended—and therefore, not prosecuted or protected—by the law.

The legal topic of military exemption is emblematic of this phenomenon. In the majority opinion, Seeger's petition was a question of parallelism, "namely, does the claimed belief occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption?" (184). Ronald Flowers calls this framework the "double sincerity test," where "[i]n evaluating the application of a conscientious objector with unconventional 'religious' beliefs, the officials at the draft board have to think of some conscientious objector with conventional religious beliefs they have known… They are to think about the sincerity of religious belief of that person… Then they are to think about the unconventional applicant and try to determine if that person's unconventional beliefs are held as sincerely" (2005:64-65). This same test was later applied to *Welsh v. United States* (398 U.S. 333 [1970]), where religiosity was retained in Welsh's evaluation even after he had crossed out the word "religious" on the "conscientious objector" form. And, again, the same methodology was applied in *United States v. Kauten* (133 F.2d 703 [1943]), when Kauten, a proclaimed atheist, was exempted as he demonstrated "the equivalent of what has always been thought a religious impulse" (708).

Kauten's case also hinted toward an area of discord in the spiritual-religious equation. This was the "distinction between a course of reasoning resulting in a conviction [about] particular war and a conscientious objection to participation in any war under any circumstances" (708). This was brought forward in *Gillette v. United States* (401 U.S. 437 [1971]). Guy Gillette was opposed to serving in the Vietnam War, but conceded that he could conceivably be willing to engage in others. His petition for conscientious objector status was rejected by the Supreme Court. They reasoned, "Conscience is often the echo of religious faith. But, as this case illustrates, it may also be the product of travail, meditation, or sudden revelation related to a moral comprehension of the dimensions of a problem, not to a religion in the ordinary sense" (466). This decision points toward an inherent shortcoming of the parallelism equation: spirituality's gradualism cannot be legally comprehended. Spirituality is characterized by its dynamism, it oscillates and evolves on an experiential basis. This could absolutely entail "transformative travail, meditation, and revelation." In fact, it is spirituality's faculty for such particularized and idiosyncratic deliberation that makes it so attractive in the postmodern setting. Thus, to the extent that the function of spirituality diverges from religiosity, it eludes legal protection in regards to U.S. military compulsion.

Such evasion can be perilous, as evidenced in the American public workspace.

Initially, the invocation of peril may seem dramatic, as religious protection in the labor realm is very extensively enforced by the contemporary legal canon. This is through the Constitution (in the First and Fourteenth Amendments) and in federal acts (namely, the *Civil Rights Act of 1964* and the *Religious Freedom Restoration Act*). In many cases, this robustness has extended to instances of personal spirituality. For example, in *Frazee v. Illinois Department of Employment Security* (489 U.S. 829 [1989]), when appellant William Frazee refused to be employed on Sundays, but was not associated with any establishment, the Supreme Court ruled that he was due unemployment benefits. Many legal scholars have highlighted this as a monumental success. In *That Godless Court*, scholar Ronald Flowers declares that this case marks the moment when "purely personal religious belief receives as much protection… as that tied to the theological propositions of an organized religious group" (2005: 35). However, I think Flowers goes too far. In the Court's opinion, the Justices rely upon strict parallelism to the rites practiced by communal religiosity, and connect Frazee's claims to "claims by Christians that their religion forbids Sunday work" (*Frazee*, 834n2). Further, when evaluating undue burden under the Federal Civil Rights Act of 1964, the Supreme Court only denies the reasoning of the lower Illinois Appellate Court that there is "great significance to America's weekend way of life… Sunday is not only a day for religion, but for recreation and labor… if all Americans were to abstain from working on Sunday, chaos would result" (*Frazee*, 835). This was no great maneuver; consequently, their denial does not establish a very high threshold for what may not be considered undue burden for beliefs distinct from traditional religiosity. Thus, even in an arena of substantial legal literature, the divergences of spirituality remain vulnerably unprotected.

The full extent of such vulnerability was revealed in another unemployment compensation case in 1990, in *Employment Division, Department of Human Resources of Oregon v. Smith* (494 U.S. 872 [1990]). In this case, the Supreme Court decided whether the "Free Exercise" clause permitted Oregon citizens to use peyote in religious rites even though the drug was criminalized. Justice Scalia held that the law was foremost, even to the dismantlement of religious exercise. To reach this decision, his reasoning transforms many standing legal rules. To begin, he confirms the unconstitutionality of limiting the free exercise of "acts or abstentions only when they are engaged in for religious reasons," that is, singularly religious acts (877). He defines religious acts as "the casting of statues" and "bowing down before a golden calf" (877-878). In this way, he categorizes Oregon's state drug law as "a neutral law of general applicability," which lies beyond the scope of religious contention; he states, "The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities… professed doctrines of religious belief [are not] superior to the law of the land, and [would] in effect to permit every citizen to become a law unto himself" (879). Next, Justice Scalia creates a new legal rule, the requirement of hybridity: petitioners must now invoke not only the "Free Exercise" clause alone, "but the Free Exercise Clause in conjunction with other constitutional protections." Finally, the majority opinion explicitly overturns the requirement of undue burden; "To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling'—permitting him, by virtue of his

beliefs, to become a law unto himself" (885).

This landmark decision provoked deep anxiety for legal scholars and citizens in its significant restriction of religious liberty. Many have argued that it essentially nullifies the "Free Exercise" clause. However, beyond these characteristically "religious" consequences, the ruling resulted in even more detrimental legal predicaments for the "spiritual, but not religious. " To begin, the opinion completely neglects spirituality in its understanding of singularly religious acts when it narrowly defines "religious beliefs as such" to be rites such as "the casting of statues" and "bowing down before a golden calves." This blatantly excludes postmodern modes of spirituality, which are intentionally less creedal and ceremonial. Moreover, this narrow understanding is used to support Justice Scalia's theory of "neutral laws of general applicability." This theory is in itself hugely alarming. Its reasoning wholly rests on precedent from *Minersville School District Board of Education v. Gobitis* (310 U.S. 586 [1940]), but the Supreme Court had already overruled this decision. Crucially, their overruling responded to severe discrimination of Jehovah's Witnesses. This is an equally pertinent factor for those who are "spiritual, but not religious." Regardless of its increasing popularity, this phenomenon remains a minority one in the United States, and is therefore entirely vulnerable to the devastating effects of cultural oppression. Justice Scalia even notes this reality in his opinion, and suggests that "the government's ability to enforce generally applicable prohibitions… cannot depend on measuring the effects of a governmental action… [this] will place at a relative disadvantage those religious practices that are not widely engaged in; but that [is an] unavoidable consequence of democratic government" (*Smith*, 885, 890). In this way, the Court is enabled to be selective about constitutional protection and/or persecution of religion. This could be highly manipulative, endangering the fate of spirituality. Such selectivity is especially dangerous in a postmodern realm, whereby public labor policy and practice is deeply embedded in consumerism and neo-capitalism. Suppose the newly popular consumerist and neo-capitalist appeals of workplace spirituality influence public policy to invalidate secularist laws. Apparently, now consideration of such potential consequences is free to permeate into the legal arena and persuade decisions.

Beyond these overwhelming issues inherent to the "neutral law of general applicability," the decision poses further challenges to spirituality. One such challenge is the nullification of the test for undue burden in assessment of the necessity of accommodation; "To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling' [permits] him, by virtue of his beliefs, to become a law unto himself" (*Smith*, 885). This declaration completely deletes even the low bar of burden set in *Frazee* noted above. Thus, in the realm of public labor—as explored through two denials of unemployment compensation—the Supreme Court not only continues to rely on a rigid parallelism, but endangers the legal protection of spirituality to the extent that it diverges from such alignment.

These concerns plague the legal understanding of spirituality in the public labor setting, but the public education sector may provide a more robust comprehension, as it has been an extremely prolific setting for secular delineations in America. This began in 1947, in *Everson v. Board of Education* (330 U.S. 1 [1947]), when Justice Hugo Black

historically articulated a "high and impregnable" wall of separation between church and state. This declaration was substantiated in subsequent cases, beginning with *Engel v. Vitale* (370 U.S. 421 [1962]). In this case, prayer in school as encouraged by public education officials was ruled unconstitutional. Importantly, "neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary [could] serve to free it from the limitations of the Establishment Clause" (430). This supplication of the "No Establishment" clause was to be the instrument for restricting religion in education henceforth. In 1985, *Wallace v. Jaffree* (472 U.S. 38 [1985]) again raised the issue of prayer in schools, specifically concerning time for "meditation or voluntary prayer" allocated to the beginning of each school day. Notably, the legislation did not endorse any particular religious denomination or doctrine. Regardless, it was held unconstitutional due its "impermissible purpose" of establishing religion, this time with cited litany from the first part of the "*Lemon* Test" (from the Supreme Court's 1971 decision in *Lemon v. Kurtzman*, 403 U.S. 602). This "impermissible purpose" thesis coheres with Justice Black's opinion in *Engel* that "the nature of such a pious activity [prayer] has always been religious" (424-425). Thus, it has been held that it cannot be in any way propagated or serviced by public education employees. This strict "high and impregnable" demarcation of "church and state" has endured through many cases in the Supreme Court.

However, thus far such delineation has been based largely on straightforwardly religious cases. To what extent are more characteristically spiritual practices understood within the legal literature? One example is found in *Malnak v. Yogi* (592 F.2d 197 [1979]), when Transcendental Meditation (TM) was evaluated. TM is a spiritual practice for therapy and self-development followed by millions of people globally. Founded by an Indian guru named Maharishi Mahesh Yogi, the program rose to popularity in the 1970s by appealing to "secular spirituality," and propagating TM as a technical training. To this end, TM incorporated educational programs, health products, and corporate presentations. However, in *Malnak* such secular characterization was challenged when a New Jersey public high school course titled "Science of Creative Intelligence – Transcendental Meditation" was determined to be a violation of the "No Establishment" clause. In Justice Adams's concurrence, he addressed the novelty of the case's decision, writing that "this is the first appellate court decision… that has concluded that a set of ideas constitutes a religion over the objection and protestations of secularity by those espousing those ideas" (200). He went on to note that *Malnak* relied on what "would appear to be properly described as definition by analogy… look[ing] to the familiar religions as models in order to ascertain, by comparison, whether the new set of ideas or beliefs is confronting the same concerns, or serving the same purposes, as unquestioned and accepted 'religions'" (207). He extrapolated on those concerns and purposes of religiosity; he identified a concern with "ultimate" questions which "lay claim to comprehensive 'truth.'" Thus, Judge Adams not only resounded a theory of parallelism, but expanded the extent to which divergences were comprehended by the court by acknowledging endeavors pursued by the "spiritual but not religious" (seeking responses to ultimate questions regarding truth). His opinion is surely cause for celebration, but this, still, must be tempered. First, his rule only applies to the jurisdiction of the Third Circuit Court of Appeals; it did not extend to the entirety of the U.S. Second, following his broad definition of religion as "a concern with ultimate

questions of comprehensive truth," he adds that, furthermore, "any formal, external, or surface signs that may be analogized to accepted religions" such as "formal services, ceremonial functions, the existence of… structure and organization, efforts at propagation, observation of holidays and other similar manifestations" are helpful characteristics (209). Thus, even with efforts toward spiritual encompassment under the "No Establishment" clause, he disregards the highly individualistic character of spirituality. Divergences, it seems, are still incomprehensible.

This conclusion, however, only pertains to the sole application of the "No Establishment" clause in the public education sector—the freedom of individualized fluidity is guaranteed by the other clause of the First Amendment. This was historically declared in 1969, in *Tinker v. Des Moines Independent Community School District* (393 U.S. 503 [1969]): "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" (506). While the particularities of *Tinker* (students wearing armbands in protest of the Vietnam War) were protected by free speech liberties granted in the First Amendment, the decision's legal rule has been recognized as extending to the protection of the "Free Exercise" clause inside the schoolhouse. As such, individual proclamations, practices, and positions of "spiritual, but not religious" character are fully legally comprehended and protected. Moreover, they are undoubtedly protected as themselves, not only as analogies to religiosity. This reality places a constraint upon the theory of parallelism; nonetheless, in this instance, whereby "spirituality" is seemingly granted, it is granted as a tenet of individual agency, in the same way that individual opinions are granted, and in the same way that individual perspectives are honored. It is affirmed as an option or an orientation. This thus becomes a pole on the spectrum of spirituality, opposite to the position of traditional "communal religiosity," yet equally socially and legally relevant to the postmodern arena.

The spectrum incorporates the conclusions from analyses of American military exemption, public labor laws, and public education policy. Initially, spirituality could only be legally understood to the extent that it paralleled religiosity. This is seen at one pole of the spectrum, whereby the collectivity (*Ballard*), continuity (*Gillette*), and sincerity (*Sherbert v. Verner*, 374 U.S. 398 [1963]) of traditional religious identity are absolutely equated to spirituality. At this end, the terms even become interchangeable, as seen in Justice Douglas's language in the majority opinion of *Zorach v Clauson* (343 U.S. 306 [1952]): "it then respects the religious nature of our people and accommodates the public service to their spiritual needs" (314). From this pole, the variance moves away in degrees of innovation. One or two grades to the right could be a New Religious Movement, a communal denomination which adopts greater elasticity than fundamentalist traditions. A few more grades, and the community may diverge further from Judge Adams's "formal, external, or surface signs analogized to accepted religions"; to this end, they may formalize less, make fewer hierarchies, and worship less. As one moves farther away from the left pole, the appreciation of dynamism increases, against the dogma of "religion." Similarly, the sources of authority become increasingly internal, against religion's institutionalism. And it is on this opposite pole of the spectrum that absolute individualism is located. At its most extreme, this becomes human consciousness and positionality itself. As Judge August Hand noted, "Recognition of this obligation moved the Greek poet Menander to write

almost twenty-four hundred years ago: 'Conscience is a God to all mortals'; impelled Socrates to obey the voice of his 'Daimon' and led Wordsworth to characterize 'Duty' as the 'Stern Daughter of the Voice of God'" (*Kauten*, 708); Hannah Arendt differentiated it from mindlessness emergent from being a cog in some subsuming machinery (1963). The imperative question thus becomes: which grade achieves legality? Which are comprehended under the Constitution—and, resultantly, persecuted and/or protected? These questions illuminate the tensions between legal jurisprudence and sociological scholarship regarding spirituality. The law depends on black-and-white definitional structures and identification frameworks. However, academia remains committed to nuanced, textured grayscale. This is evident in Kerry Mitchell's work on spirituality in the public space, *Spirituality and the State*. Mitchell holds that spirituality "operates in large part through avoidance of definition… Spirituality, in this sense, is not treated as an identifiable object" (2016:6). Hence, we arrive at a pivotal moment in American religious and legal history, where determinations of livelihoods across all arenas are to be sentenced and settled in an obscure, orphic grey-zone.

Such a conclusion affects two realities: the legal and the spiritual. In the legal realm, a need for further flexibility emerges as a requirement not only in order to capture spirituality, but also to comprehend the postmodern paradigms which it embodies and accompanies. Judge Adams noted this in *Malnak*: "Defining religion is a sensitive and important legal duty. Flexibility and careful consideration of each belief system are needed" (210). Such sensitivity stems from the judiciary's power to leverage economic privileges (such as the tax-exempt status), enact socio-cultural understandings (such as in implications of authenticity), and transform the human lives and livelihoods of which they judge. These measures have and will continue to have immense and enduring impact for the American landscape. Moreover, in the spiritual arena, this analysis demonstrates that the relation to, from, and against religiosity will continue to be a defining factor for spiritual identity. And though the strength of postmodern, neo-capitalistic individualism will motivate accelerated movement towards the "spiritual, but not religious" status, individualism will continue to be a social ethos, and, to the extent that the legal realm expands to include it, will be judged as such, in company with the whole social pluralism of the United States.

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