Chapter 21

Harry Potter and the Curse of the First Amendment: The Role of Esoteric Religions in the Public Schools[1]

I have a confession to make: I love the Harry Potter books, and patiently waited in several midnight lines for them, even before my daughter was old enough to read (or understand) them. Like several million fifth graders, I was excited to hear that J.K. Rowling is writing a new movie set in the Harry Potter Universe. But back in the early 2000's, my personal feelings were put to the test when a client school district called and wanted me to talk to a reporter about the school's decision to ban the Harry Potter books (actually they planned to place them on a reserved shelf for students to check out with parent permission). I had to explain to my client that I was happy to talk to the reporter about the law governing the removal of books, but I thought he needed to know that I personally liked the Harry Potter books and did not see anything wrong with school libraries carrying them. I could tell he was not happy with me (and luckily for my law firm partners, the whole matter went away on its own a couple days later), but it brought home for me the emotional controversy that can develop around books that some people feel feature unconventional religions.

The seven Harry Potter books were published between 1997 and 2007, and each new book seemed to engender complaints from parents who believed the books were promoting some form of non- (or anti-) Christian religion. For example, a group called "Family Friendly Libraries" once maintained a website that stated that the danger of the Harry Potter books is that they promote "witchcraft and wizardry" and that:

> [W]itchcraft is a bona fide, tax-exempt "religion" in this country with an agenda contrary to every moral Judeo-Christian fiber that built this nation and should not be OK'd reading in our schools.[2]

A school district in Zeeland, Michigan placed restrictions on both the reading and the displaying of the Harry Potter books in grades five through eight. After the American Booksellers Foundation

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[1] Writing about religion and the law is difficult because, no matter how hard you try, you are bound to insult someone in the process. In fact, if you can get through a paper or a speech about religion in the schools and not insult someone in the audience, you probably have not said much of any substance. I originally saw the phrase "esoteric religions" in in *Alvarado v. City of San Jose*, 94 F.3d 1223 (9th Cir. 1996) and thought that it was a good way to collectively describe the multitudes of non-mainstream religions with which schools are faced today. By using the phrase "esoteric religions" to describe numerous religions, I do not intend to imply that those religions have anything in common other than their status as non-mainstream religions. To those who are upset because their religion is lumped in with some other religion that they personally find distasteful, I apologize.

[2] http://www.fflibraries.org/Book_Reports/HarryPotter/WHATS_WRONG_WITH_HARRY_POTTER.htm. (visited Nov. 2001). *See also* http://www.fflibraries.org/Book_Reports/HarryPotter/HPRNo3.htm ("Although these Potter books are not religious instruction manuals, they celebrate Witchcraft through entertainment. As a result the books can prove to be a powerful advertisement for the occult religions.") This website is no longer activie.

for Free Expression weighed in with a letter to the superintendent, the school district lifted most of the restrictions. Mr. Potter even had himself an organized defense committee with a website on the Internet called "Muggles for Harry Potter",[3] although that website has now morphed into a more generic Harry Potter site.

Since the series ended in 2007, challenges against it appeared to have died down. One of the last great gasps occurred down in Gwinnett County, Georgia, where a mother named Laura Mallory led a multi-year campaign between 2005 and 2009 to force her local public school district to take the Harry Potter books off the shelves of the school libraries. Mallory claimed that the books were an "evil" attempt to "indoctrinate children in pagan religion," as they were full of "evil themes, witchcraft, demonic activity, murder, evil blood sacrifice, [and] spells."[4] Mallory had numerous hearings at the school level, before they were consolidated and heard by a hearing officer appointed by the school board to conduct a public hearing. Mallory argued that the books contained "favorable" descriptions of murders, witchcraft, disrespect for authority, lying, and intolerance, which did not reflect socially acceptable values and were too likely to improperly influence small children. Mallory also claimed that the books promoted the Wicca religion to the students contrary to the First Amendment. Apparently her main evidence were two articles she read on the Internet, one of which featured a teenager who claimed that she had gotten involved with witchcraft after reading the Harry Potter books, and another in which a marriage counselor said that witchcraft and paganism "instilled a fear response in children."

The hearing officer, however, agreed with the school that the Harry Potter books promoted reading, and that Rowling's use of wizards and witches did not promote or encourage the religion of Wicca. The hearing officer found that the books were fantasy, and that any student able to read them would understand that they were fantasy. The hearing officer rejected the Internet articles as "cause-and-effect assumptions," finding that there was no real evidence that the behavior in the articles would not still have occurred but for the Harry Potter books. Mallory appealed the school board's decision to the Georgia State Board of Education, which in December 2006 upheld the school board and found that the board did not abuse its discretion in deciding not to remove the books.[5] Mallory then filed suit in state court, but in September 2009 a state court judge upheld the State Board of Education and dismissed her lawsuit.[6]

I don't intend this article to become a plug for the Harry Potter books. But the dispute over the Harry Potter books[7] illustrates a growing phenomenon in the public schools: the extent to which the public schools are having to deal with so-called esoteric religions, religions that are outside of

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[3] See http://www.mugglesforharrypotter.org (visited Nov. 2001).

[4] *See* http://www.d.umn.edu/~csigler/PDF%20files/PotterChallengeList.pdf (visited September 21, 2013).

[5] *See Laura Mallory v. Gwinnett County Board of Education*, Case No. 2006-84 (State Bd. of Educ. 2006).

[6] *See* http://disinfo.com/2009/09/georgia-mom-cant-stop-harry-potter/ (visited September 21, 2013).

[7] For an excellent overview of the dispute over the use of the Harry Potter books in the public schools, *see* Todd A. DeMitchell and John J. Carney, "Harry Potter, Wizards, and Muggles: The First Amendment and the Reading Curriculum," 173 Educ. Law Rep. 363 (2003).

the mainstream religions of the United States. I do not intend to cast judgment on these esoteric religions and say that they are "bad" or "wrong." They are simply different, and different in such a way that many public schools are unprepared for how to deal with someone who claims to be a Wiccan, or requests permission to start a Satanist book discussion group.

Take, for example, a small town in central Texas. Forty years ago the big religious division in such a town would have been between the Baptist Church and the Church of Christ. Both were Protestant sects, and although their disputes were no doubt real and important to the people involved, the theological differences between the two churches were objectively minor. With a little effort both groups could understand the other. Over the last thirty years people living in such a small town would have encountered Catholics, Jews, and Muslims. Although there have been clashes between these groups--and I do not wish to denigrate in any way the struggles of those who pursued "minority religions" during that time--by the year 2000 in most areas Christians, Jews, and Muslims have reached at a minimum tolerant co-existence, and in some cases understanding and acceptance.[8] It helps that Christianity, Judaism, and Islam have common roots and--in a very generic sense--are religions organized in a similar fashion.

But now many of those same towns are encountering esoteric religions; religions that are <u>not</u> similar to Christianity, Judaism, and Islam and seem too "different" and unknowable to allow them to exist side-by-side with the established religions. Christians are being asked to deal on a more regular basis with a religion that seems diametrically opposed to their own--Satanism--on an equal basis. Learning to accommodate such esoteric religions will be quantitatively more difficult than, say, the attempts of Christians and Jews to get along. And many school officials will tell you that the rise of esoteric religions is only just beginning.

As Catholicism, Judaism, and Islam all came to our small Texas town, schools (and other townfolk) struggled to learn to understand and, if possible, accommodate each religion. And each time people no doubt thought to themselves, "this is never going to work." So the question now is this: have we reached the point where the legal framework the courts have created for enforcing the First Amendment will no longer work? Can we accommodate religions as diverse as the esoteric religions? Is it even possible to accommodate religions like Christianity and Satanism, where (at least in the eyes of some) by accommodating one religion you automatically "disfavor" the other?

Our Continuing Saga:

> *Shortly after the May Day celebration is held, Mary M. Delaine shows up in Principal Wilderd's office. "Principal Wilderd, did you approve Eddie Feelingood's little ceremony the other day?"*

[8] When I first wrote this chapter as a speech in early 2001, it did appear that the acceptance of Muslims in the United States was on the upswing. The events of September 11, 2001 and the more recent events in Iraq and Syria involving ISIS, have probably set that acceptance back, sometimes significantly. However, I would argue that current tensions between Muslims and non-Muslims have more to do with current events, and not a lack of understanding of Islam.

"Um, yes," relies Principal Wilderd, belatedly thinking that she probably should have attended, to keep an eye on what Eddie was up to.

"Did you know that he had a pole that he made everyone dance around, and two fires after school that he had everyone walk between?

"I knew about the May Pole and the bonfire," Wilderd replies cautiously.

"Well, I've heard that Wicca is really just a form of Satanism, and we all know that the Satanists want to sacrifice Christian virgins," Mary says. "I think the pole and the fire were supposed to symbolize the Wiccans' desire to burn us good Christians at the stake, like as revenge for burning the witches in the Middle Ages. I think Eddie's Wiccan stunts are a direct attack on my Christian religion. You can't let Eddie do his Wiccan things, because it deprives me of my free exercises rights in my religion. After all, there are a whole lot more of us than of him."

What should Principal Wilderd do (other than pray for graduation and summer)?

The Esoteric Religion Cases

Cases Challenging Government Endorsement of Esoteric Religions[9]

So far, most of the lawsuits involving schools and esoteric religions have been challenges brought against the schools by those who wish to stop or remove what they perceive to be esoteric religious practices. One of the more interesting cases in recent years is *Altman v. Bedford Central School District*.[10] In *Altman*, a group of Roman Catholics challenged the curriculum used at their local public schools, claiming that it promoted "Satanism and occultism, pagan religions and a New Age Spirituality."[11] The court adopted a definition of religion proposed by the Third Circuit in *Malnak v. Yogi*[12]:

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[9] The discussions of *Altman* and *Guyer* here are very similar to those in Chapters 16 and 20. Feel free to skim, if you want.

[10] *Altman v. Bedford Central School District*, 45 F.Supp.2d 368 (S.D. N.Y. 1999), *rev'd in part*, 245 F.3d 49 (2d Cir. 2001). I am going to focus on the lower court decision, because for the most part, the Court of Appeals reversed the lower court's rulings against the school district on procedural grounds; most of the plaintiffs had moved out of the school district by the time of the lower court's ruling, and the Court of Appeals found that a majority of the challenges were therefore moot. The Court upheld most of the rulings in favor of the school district for the same reason, and noted in passing that to the extent any issues on which the school district had prevailed survived the mootness challenge, the Court agreed with the lower court's substantive rulings on those issues. The only substantive issue that the Court of Appeals addressed was the Earth Day issue, as will be noted below. Although the tone of the Second Circuit's opinion casts doubt on the lower courts' analysis, I still believes that the lower court's opinion is instructional as to how courts should – and should not – resolve religious curriculum challenges.

[11] *Id.* at 372.

[12] *Malnak v. Yogi* , 592 F.2d 197 (3d Cir. 1979) (Adams, J., concurring).

> First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs.[13]

The "formal and external signs" were considered to include "formal services, ceremonial functions, the existence of clergy, structure and organization; efforts at propagation, observance of holidays and other similar manifestations associated with the traditional religions."[14]

The *Altman* plaintiffs claimed that their school had promoted Satanism and the occult by allowing students to play the game *Magic: The Gathering*. *Magic: The Gathering* is a fantasy-based card game, where players "duel" each other by playing cards that represent various fantastical creatures, spells, and devices. Although the game's rules are complex and the cards colorful (to say the least), at heart *Magic* is a math-based card game that is not very different from hearts, spades, and bridge. Students at the elementary and middle schools were allowed to play the game after and before school, with parental permission and school supervision. Although the court had serious doubts that the game could even be considered religious, it ruled that under the endorsement test, "no reasonable observer or participant could believe that the school district's actions communicated a message of endorsement of the beliefs, if any, contained within the game."[15]

The court took more seriously the allegations that a unit on India had violated the Establishment Clause. During what the court called "an elaborate lesson plan and classroom environment [designed] to foster the learning of the Indian culture, not the Hindu religion,"[16] one teacher decided to read a story called "How Ganesha got his Elephant Head," and planned to have her third-grade students make models of Ganesha out of clay (the project never occurred, as the class ran out of time). Unfortunately for the teacher, Ganesha is a fairly prominent Hindu deity. The court did not entirely disapprove of the cultural unit:

> Although Lord Ganesha is a deity of the modern Hindu religion worshiped by hundreds of millions of people, reading a story common to the Indian culture, as part of an innovative, structured lesson plan about a foreign country and its culture, does not have the purpose or effect of advancing or inhibiting religion. Hinduism has religious, social, economic, literary and artistic aspects that combined form an intricate part of the Indian culture, knowledge of which is beneficial to the students and consistent with a diverse educational experience.[17]

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[13] *Altman*, 45 F.Supp.2d at 378 (citing Malnak, 592 F.2d at 207-210).

[14] *Id.*

[15] *Id.* at 381.

[16] *id.* at 382.

[17] *Id.* at 383.

The court ruled that reading the Ganesha story did not advance or promote Hinduism, but simply educated students about the Indian culture.

However, the court went on to find that making the Ganesha models (even though it never happened) created "subtle coercive pressure" to engage in the Hindu religion. The Court could find no educational justification for making the clay models of "a known religious god," especially one other than the gods of the students. Finding that the exercise violated the First Amendment, the court summed up its holding:

> Permitting a school teacher to read a religious based story to students as part of a secular program is far removed from directing the same students to create a likeness or graven image of a god.[18]

Why? Despite the fact that the court began its opinion by noting that "[w]ith due respect to the witness, the issue in this case is not one of offensiveness to Catholic parents, but rather whether the conduct violates the Constitution,"[19] it was with the Ganesha issue that the court began to stray from its own pronounced legal standard of "whether the conduct violated the Constitution," to the more subjective "whether the conduct offended the Catholic faith." The mere use of the phase "graven image," which appears in at least some translations of the Second Commandment,[20] shows that the court was using Christianity as a standard for determining the appropriateness of the school activity, since other religions might not have the same problem with creating "graven images." The court also seemed to place undue reliance on the testimony of a Catholic priest that "it is a violation of the First Commandment and Catholic teaching, for Catholics to fashion images of false gods.[21] If reading stories about Hindu gods did not promote the Hindu religion, then how was making a clay model of an elephant head any more of a promotion? Did the court truly believe that a reasonable observer would believe that making clay models of an elephant man would promote the Hindu religion? The court had no problem with making paper images of Babar or Dumbo. The court had begun to stray into considering whether the challenged conduct was offensive to the majority religion–an improper test.[22]

The Worry Doll issue shows how difficult it can be for even a federal judge to keep his personal views from interfering with a dispassionate analysis of the legal issues. The school sold 1 1/4" tall "Worry Dolls" made out of toothpicks. When one of the student plaintiffs made a Worry

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[18] *Id.* at 384.

[19] *id.* at 373.

[20] *See* Exodus 20:4 (King James) ("Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth.")

[21] *Id.* at 384.

[22] It is unfortunate that the Court of Appeals reversed this issue on mootness grounds, because its treatment of the Earth Day issue – specifically, its treatment of statements made during the Earth Day ceremonies that the priest testified were contrary to the Catholic faith – hint that the Court of Appeals would have reversed this issue on the merits as well.

Doll, someone at the school told him that if he put the doll under his pillow at night, "[i]t would chase away your bad dreams." The Court called the Worry Dolls "a rank example of teaching superstition to children of a young and impressionable age,"[23] and found that their creation and sale violated the First Amendment.

The court's resolution of the Worry Doll issue appears to be have been made more out of emotion than out of reason or law. First, it is certainly not clear that "superstition" is a religion. Second, the court made no effort to apply the *Lemon* test or any other test to the Worry Dolls. As silly as they may have been, it is doubtful that a reasonable observer would have perceived the creation and sale of Worry Dolls to promote or endorse any religions. And again, the court's main "evidence" against the Worry Dolls was the testimony of a Catholic priest that "the use of charms is forbidden by scriptures and is an offense against the First Commandment."[24] Reviewing the short analysis of the Worry Dolls leads to the conclusion that the court's holding was based on its disapproval of the practice, not on whether the practice violated the First Amendment.

Earth Day originally failed to escape the wraith of either the plaintiffs or the district court – but was eventually vindicated by the Second Circuit Court of Appeals. New York state law required some observance of "Conservation Day," which over the years had become known as Earth Day. The district court noted that "[t]he worship of the Earth is a recognized religion (Gaia), which has been and is now current throughout the world."[25] It is somewhat hard to tell precisely what the students were doing to celebrate Earth Day, because by the end of its opinion the district court's descriptions had taken a turn for the conclusory:

> The ceremony included the erection of 'symbolic structures,' equal to an altar, and a chorus of drums playing throughout the presentations. The Earth was deified and students were urged to 'do something that would make Mother Earth smile.'[26]

How the court concluded that the undefined "symbolic structures" were "equal to an altar," or what the students did to "deify" the Earth, is never spelled out.[27] It does appear that Native American prayers were offered at the various ceremonies. The district court appeared most concerned that the Earth Day celebrations "involved the school district in teaching a doctrine directly contrary to the views of Roman Catholic students and many others."[28] After reviewing the Earth Day celebrations as a whole, the Court of Appeals reversed the district court, holding that a reasonable observer would not view the Earth Day celebrations as promoting the religion of

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[23] *id.* at 385.

[24] *Id.* at 385.

[25] *Id.* at 393.

[26] *Id.* at 393-94.

[27] In fact, the Court of Appeals later decided that the "symbolic structures" were tepees, not alters. It is clear from the Second Circuit's opinion that it too had trouble with the district court's description of the evidence of what actually occurred at the Earth Day celebrations.

[28] *Id.* at 394.

Gaia. The Court of Appeals specifically found that the fact that statements were made that might have been contrary to the Catholic faith was insufficient to violate the Establishment Clause.

Altman shows how a court might handle--not always successfully--esoteric practices claimed to advance esoteric religions. But what about our favorite American pagan holiday? At least one court has directly considered the issue of whether an elementary school's celebration of Halloween violated the Establishment Clause. In *Guyer v. School Board of Alchua County*,[29] Robert Guyer challenged the Halloween festivities at his children's elementary school, claiming that they violated the Establishment Clause by promoting the religion of "Wicca." A state court in Florida found that the schools hung Halloween decorations, teachers dressed in costumes, a carnival poster was hung showing a witch stirring a pot, and stories with a Halloween theme were read. The court concluded that the Halloween celebration did not violate the Establishment Clause. Using the *Lemon* test, the court found that the Halloween celebration served a secular purpose:

> [T]here is no doubt that the Halloween festivities and decorations serve a secular purpose. According to the school principal, the costumes and decorations serve to make Halloween a fun day for students and serve an educational purpose by enriching their educational background and cultural awareness. The record also reflects that this cultural celebration enhances a sense of community.[30]

The court also found that there was no excessive entanglement between the school and the Wicca religion, in large part because there was no evidence of such a religion or religious body.[31]

The court concluded that the Halloween celebration did not have a principal or primary effect of promoting or endorsing religion. Analogizing to the Christmas nativity cases, the court noted that any symbols that might be associated with Wicca (such as witches) were displayed side-by-side with pumpkins and "other typical symbols of Halloween that today signify nothing more than the secular celebration of a traditional cultural event."[32] The court rejected comparisons to cases in which crosses displayed in public parks had been found to violate the Constitution, noting that while the Latin cross is a "singularly" and "distinctively" religious symbol, pumpkins and witches are not.[33] The court found that "[g]iven the overall physical and cultural setting of the Halloween festivities, it is not sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval of their religious choices."[34] The court concluded by noting that a government practice "does not violate the

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[29] *Guyer v. School Board of Alchua County* , 634 So.2d 806 (Fla. App. 1994), *rev'w denied*, 641 So.2d 1345 (Fla. 1994), *cert. denied*, 513 U.S. 1044, 115 S. Ct. 638 (1994).

[30] *Id*. at 808.

[31] *See*, *e.g.*, *Lynch v. Donnelly*, 465 U.S. 668, 684, 104 S. Ct. 1355, 1365 (1984) ("There is no evidence of contact with church authorities concerning the content or design of the exhibit....").

[32] *Guyer*, 634 So.2d at 808-809.

[33] *Id*. at 808.

[34] *Id*. at 809.

establishment clause because it happens to coincide or harmonize with the tenants of some or all religions."[35]

It is interesting to note that the *Guyer* court appeared to assume that Satanism, Witchcraft, Neo-Paganism, or Wicca were "religions." Not all courts are so accommodating; in *Fleischfresser v. Directors of School District 200*,[36] a case involving religious challenges to an elementary school reading series (see below), the court was clearly troubled over whether these practices actually constitute coherent religions.[37]

Mythological deities have also not escaped challenge under the First Amendment. In *Alvarado v. City of San Jose*,[38] plaintiffs challenged the installation and maintenance of twenty-foot tall statue of Quetzalcoatl, or the "Plumed Serpent," an ancient deity from Aztec and Mayan cultures, on the grounds that the statue violated the Establishment Clause. This raised a rather unique problem: Quetzalcoatl has not been worshiped for roughly five hundred years, and the court seriously questioned whether promoting a defunct religion would really implicate the Establishment Clause. Although the court noted that there are no cases considering whether a religion must be current to be protected by the First Amendment, both the courts and the parties appeared willing to assume that a symbol must have current religious adherents to merit First Amendment protection.[39]

In the absence of any Aztecs or Mayans who worshiped Quetzalcoatl, the plaintiffs claimed that various "New Age" and Mormon writings showed that the worship of Quetzalcoatl was current within those religions. This immediately raised the question of whether "New Age" was a religion. After a lengthy analysis of the caselaw defining religion, the court ruled that "New Age" was not a religion: "the New Age concepts presented by the plaintiffs, while they invoke 'ultimate concerns,' fail to demonstrate any shared or comprehensive doctrine or to display any of the structural characteristics or formal signs associated with traditional religions."[40] The court also rejected the contention that vague references in certain Mormon texts that the ancient worshipers of Quetzalcoatl were in fact worshiping Jesus Christ meant that Mormons themselves worshiped Quetzalcoatl.

After its lengthy analysis of defunct religions, the court revealed that maybe Quetzalcoatl actually was being worshiped by modern adherents; an expert witness testified that "the worship and cult of Quetzalcoatl is making a resurgence among the Zapatistas, who are Mayan and revolutionaries in

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[35] *Id*. at 809 (quoting McGowan v. Maryland, 366 U.S. 420, 422, 81 S. Ct. 1101, 1113 (1961)).

[36] *Fleischfresser v. Directors of School District 200,* 15 F.3d 680 (7th Cir. 1994).

[37] *Fleischfresser,* 15 F.3d at 687-88. *See also* DeMitchell & Carney, "Harry Potter, Wizards, and Muggles," 173 Ed. Law Rep. at 371-72.

[38] *Alvarado v. City of San Jose*, 94 F.3d 1223 (9th Cir. 1996).

[39] *See also Altman*, 45 F.Supp.2d at 387 ("Unlike Lord Ganesha, Quetzalcoatl is not currently worshiped in the world and hanging the Quetzal Bird in class should not be regarded as the adoption of a religious symbol.")

[40] *Alvarado*, 94 F.3d at 1230.

southern Mexico."[41] Therefore, the court turned to the *Lemon* test to determine whether the statue of Quetzalcoatl violated the Establishment Clause. The plaintiff conceded the secular purpose of the statute and did not raise the issue of entanglement, so the court turned to the effect prong. Utilizing Justice O'Connor's endorsement test, the court ruled that a reasonable observer would not see the statue as endorsing religion: "a reasonable observer cannot be expected to infer an endorsement of the religion practiced by a revolutionary group in southern Mexico."[42]

Although the *Guyer* court did not address whether a Halloween celebration in the public schools would violate the free exercise rights of those who oppose such celebrations, it is unlikely that it would. The test for whether a specific government practice violates the Free Exercise Clause is "whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden."[43] It is not enough, however, that the student be exposed to the Halloween celebration; a violation of the Free Exercise Clause requires a distinct element of coercion:

> [The Free Exercise Clause's] purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. The distinction between the two clauses is apparent--a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended.[44]

The courts have consistently noted that mere exposure to ideas that offend a person, on religious or other grounds, does not violate that person's right to religious freedom.[45] As Justice Jackson has noted, attempts to tailor a public school curriculum so as to satisfy everyone's religious sensibilities would result in "[n]othing but educational confusion and a discrediting of the public school system...."[46]

Would requiring students to read stories about goblins or witches provide the coercion necessary to make out a free exercise claim? Again, probably not. In *Mozert v. Hawkins County Board of Education*,[47] one of the leading cases on religious challenges to the use of various textbooks, a

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[41] *Id*. at 1231.

[42] *Id*. at 1232.

[43] *Hernandez v. Commissioner*, 490 U.S. 680, 699, 109 S. Ct. 2136, 2148 (1989); *Wisconsin v. Yoder*, 406 U.S. 205, 215, 92 S. Ct. 1526, 1533 (1972).

[44] *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 223, 83 S. Ct. 1560, 1572 (1963). *See also Mozert v. Hawkins County Bd. of Educ*., 827 F.2d 1058, 1066 (6th Cir. 1987).

[45] *Mozert*, 827 F.2d at 1068 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 106 S. Ct. 3159, 3164 (1986)).

[46] *McCollum v. Bd. of Educ*., 333 U.S. 203, 235, 68 S. Ct. 461, 477 (1048) (Jackson, J., concurring). In fact, attempts to do so might violate the Establishment Clause. *See*, *e.g.*, *Epperson v. Arkansas*, 393 U.S. 97, 106, 89 S. Ct. 266, 271 (1968); *Mozert*, 827 F.2d at 1065.

[47] *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058, 1066 (6th Cir. 1987).

group of parents claimed the Holt, Rinehart, and Winston reading series violated the free exercise rights of a group of students and parents because of its use of themes ranging from secular humanism to the occult and supernaturalism. After finding that mere exposure to the ideas expressed in the series did not violate the students' free exercise rights,[48] the court went on to find that requiring a student to read the books was not the sort of coercion prohibited by the Free Exercise Clause; while students were required to read the books, they were not required to profess or deny a belief in what they were reading. Moreover, reading the stories did not require a student to engage or refrain from engaging in a practice contrary to their religious beliefs. Likewise, in *Fleischfresser v. Director of School District 200*, the Court found that requiring students to read Halloween-related stories did not violate their parents' free exercise rights, because the students were not required to do or refrain from doing anything of a religious nature.[49] Even if the parents' religious rights were substantially burdened by the use of the reading series, the *Fleischfresser* court found that the parent' rights were outweighed by the compelling government interests of providing a well-rounded education and teaching tolerance of divergent political and religious viewpoints.[50]

If requiring students to read stories would not be the sort of coercion prohibited by the Free Exercise clause, what about requiring the students to play-act portions from the stories? The *Mozert* court hinted that requiring students to participate in such activities might violate their free exercise rights, although it held that there was not enough evidence before it to reach the question.[51] *Mozert* did note that merely being exposed to other students performing such acts would not violate a student's rights.[52] This issue was raised, however, in *Brown v. Woodland Joint Unified School District.*[53] The reading series at issue in *Brown* contained stories that involved witches and magic, and the teacher's edition had suggested learning activities where students would role-play the characters of witches and sorcerers and create and cast "spells." However, the court ruled that the purpose of such activities was to encourage reading, creativity and imagination, and the mere fact that these activities coincided with religious rituals that would presumably be practiced by real witches did not have the primary effect of advancing the religion of witchcraft.[54]

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[48] *Id*. at 1068-69.

[49] *Fleischfresser*, 15 F.3d at 690.

[50] *Id*. at 690 & n.10. The court noted that any other result would lead to Justice Jackson's educational confusion.

[51] *Mozert*, 827 F.2d at 1066.

[52] *Id*. Therefore, allowing students to opt out of the play-acting would apparently satisfy *Mozert*'s concerns, even if the students were required to remain in the room while their fellow students play-acted.

[53] *Brown v. Woodland Joint Unified School District*, 27 F.3d 1373 (9th Cir. 1994). The same claims were raised on appeal in *Fleischfresser*, which involved the same reading series. However, the parents' pleadings in *Fleischfresser* were apparently inartfully drafted, and the court found that their claims were limited to the series itself, and not any outside practices. *Fleischfresser*, 15 F.3d at 685.

[54] *Id*. at 1380.

While "New Age" religions such as Wicca are involved in a disproportionate number of esoteric religion disputes in the public schools, some plaintiffs have accused their schools of promoting Satanism. In *Kunselman v. Western Reserve Local School District*,[55] the court rejected a religious challenge to the use of the "Blue Devil" as a school mascot. The plaintiff students and parents claimed that it advanced and promoted the religion of Satanism, and that it therefore violated the Establishment Clause. The court defined the issue as whether a *reasonable* observer would perceive the use of the Blue Devil as an endorsement of the religion of Satanism or a disapproval of that person's own religious beliefs. Although the court found that the plaintiffs were sincerely offended by the use of the Blue Devil, it also found that no reasonable person would think that the school authorities were either advocating Satanism or showing disapproval of any other religion by the use of the mascot, and that the use of the Blue Devil was therefore constitutional.

Cases Challenging the Denial of the Right to Practice Esoteric Religions

Several years ago, a special education diagnostician was telling me about a new student who had moved into her school district. The school had convened a special education committee to consider the student's placement and programs. The little girl's grandmother announced that she wanted to get one issue out of the way before they started the meeting: her granddaughter could not go outside for gym class.

"Why?" asked the diagnostician, thinking that the little girl might have some sort of skin condition that would need to be accommodated.

"Because my granddaughter and I are practicing witches," announced the grandmother, "and one of the tenets of our religion is to maintain a healthy pallor for our skin." The old woman went on to explain that if her granddaughter went outside for gym in the Texas sun, she would get a tan, and that would violate their religious beliefs.

"What did you do?" I asked, thrilled that I had actually stumbled across a real-life conflict between the First Amendment and an esoteric religion.

"What do you think we did? We let her stay inside," the diagnostician told me. "Do you think we wanted to mess with the witches?"

I hesitate to finish what really is a true story, since the next thing the diagnostician told me looks like the punch line to a bad joke: the grandmother and the little girl had moved to Texas from, of all places, Salem, Massachusetts.

Although it is more common for schools to be accused of promoting esoteric religions, a growing number of adherents to various esoteric religions have begun to insist on accommodations in the public school system for their beliefs and practices. The dearth of reported lawsuits in the past

[55] *Kunselman v. Western Reserve Local School District*, 70 F.3d 931 (6th Cir. 1995).

brought by persons wanting to assert their right to practice esoteric religions is not that surprising; it is safe to assume that there are far fewer adherents of esoteric religions than the major religions practiced in the United States and--from a very practical standpoint--who wants to be the first person to stand up in a small town and declare himself/herself to be a witch?

The leading case involving the right to practice an esoteric religion, which happens to take place in a non-educational setting, is *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*[56] ("*Lukumi Babalu*"). *Lukumi Babalu* involved the Santeria religion, a fusion of Roman Catholicism with traditional African religious elements brought by the Yoruba people from Africa to Cuba. Santeria devotees seek to foster a close personal relationship with spirits, or *orishas*, and the main method for doing so is ritual animal sacrifice. Although the religion had been practiced mainly in secret in Cuba, the Church announced its intent to establish a church in Hialeah, Florida and practice in the open. This announcement sparked a minor panic in Hialeah, which eventually passed a number of resolutions and ordinances, the net effect of which was to ban the Santeria church's animal sacrifices, while allowing other citizens to kill animals in virtually every other setting. Although the District Court noted that the ordinances were not religiously neutral, it ruled that the ban was constitutionally justified on the grounds of public health and welfare. The Court of Appeals affirmed in a single paragraph.

The Supreme Court struck down the ban as a violation of the Establishment Clause. The Court noted that Santeria was undoubtedly a "religion" within the meaning of the First Amendment, and that while animal sacrifice might be abhorrent to some, "religious beliefs need not be acceptable, logical, consistent, or comprehensive to others in order to merit First Amendment protection."[57] The Court then ruled that while neutral laws of general applicability are constitutional even where they have the incidental effect of burdening a particular religious practice under its *Smith* decision, the ordinances at issue were not "neutral" and therefore violated the First Amendment. The Court went beyond the arguably facial neutrality of the text of the ordinances to find that the entire record "compels the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinance."[58] Although the Court acknowledged that protecting the public health and preventing cruelty to animals were legitimate governmental interests, it felt that these goals could be met without resorting to an all-out ban on the Santeria sacrificial practice.[59] The Court also ruled that the ordinances were not "generally applicable," because they had been carefully drafted to exempt most "normal" animal killings while banning only the Santeria practice.[60]

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[56] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 113 S. Ct. 2217 (1993).

[57] *Id*. at 531, 113 S. Ct. at 2225 (quoting Thomas, 450 U.S. at 714, 101 S. Ct. at 1430 (1981)). The Court also noted that animal sacrifice has ancient roots as a religious practice, including numerous mentions in the Old Testament of the Bible.

[58] *Id*. at 534, 113 S. Ct. at 2227.

[59] *Id*. at 538, 113 S. Ct. at 2229.

[60] *Id*. at 545, 113 S. Ct. at 2233.

With respect to cases involving a right to practice esoteric religions in the public schools, one of the closest reported opinions to date appears to involve none other than Mr. Potter himself! In *Counts v. Cedarville School District*,[61] a school received complaints from a parent and a minister (who also happened to be a member of the school board) about the first Harry Potter book (*Harry Potter and the Sorcerer's Stone)* being in general circulation in the school libraries. The school librarian convened a Library Committee, which reviewed the book and voted unanimously to keep it in general circulation with no restrictions. The school board then voted 3-2 to restrict access not only to the *Sorcerer's Stone*, but to the other books in the Harry Potter series as well. The three board members voting to restrict access to the books agreed that they were motivated by a shared belief that the books might promote disobedience and disrespect for authority, and by the fact that the books dealt with "witchcraft" and "the occult." As a result of the vote, the books were to be placed in a place where they were highly visible, but not available to be checked out without parental permission. Suit was brought on behalf of Dakota Counts, a student who desired to read the Harry Potter books, and her father, a member of the Library Committee that had approved the books. It was undisputed that Dakota had already read the first three books, owned the fourth, and had written permission from her parents to check out any of the books.

The court first had to determine whether the restrictions actually impacted Dakota's First Amendment rights, given that she had both outside access to the books and parental permission to check them out of the library. The court found that the restrictions on the Harry Potter books resulted in a "stigmatization of those who choose to read them," and noted that locating them in a reserved section meant that Dakota was not free to simply walk into the library and peruse the books whenever she wanted.[62] Even though it found these burdens "relatively small," the court determined that they impermissibly impacted Dakota's First Amendment rights.[63] The court also rejected the argument that Dakota's rights were not violated because she had access to the books at home, noting that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."[64]

Having determined that the restrictions on access to the Harry Potter books burdened Dakota's rights under the First Amendment, the court then turned to the question of whether those restrictions were constitutionally justified. With respect to the allegation that the books promoted disobedience and disrespect for authority, the court found under *Tinker* that there was no evidence of past disruptions, and nothing more than mere speculation that the books would cause such disruption in the future.[65] With respect to the objection that the books were about "witchcraft" and "the occult," the court had little trouble finding under *Pico* that the school board could not restrict access to the books simply because they disliked and disagreed with the ideas expressed in

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[61] *Counts v. Cedarville Sch. Dist.*, 295 F.Supp.2d 996 (W.D. Ark. 2003).

[62] *Id.* at 999, 1002.

[63] *Id.*

[64] *Id.* at 1000 (quoting *Reno v. ACLU*, 521 U.S. 844, 117 S. Ct. 2329 (1997)).

[65] *Id.* at 1003-04.

the books.[66] It certainly did not help matters that one of the board members testified that he objected to the books because they "teach witchcraft" – but that had they "promoted Christianity," he would not have objected to them.[67] The court therefore ruled that requiring parental permission violated the First Amendment.

Based on a review of First Amendment caselaw and websites, the two most common "esoteric religions" that have appeared in the public school system in recent years are Wicca and Satanism. Whether the Church of Wicca could be considered a religion was litigated in Virginia in the early 1980's.[68] Herbert Dettmer, a prisoner, had been studying the Wiccan faith through a correspondence course for a year when he requested a number of items that he claimed he needed to aid and protect him during meditation. The prison rejected his request, arguing that the Church of Wicca was not a religion protected by the Free Exercise Clause of the First Amendment. Both the district court and the Fourth Circuit disagreed, finding that Wicca is a religion.

Turning first to an old Supreme Court case, the court determined that Wicca occupies a place in the lives of its adherents "parallel to that filled by the orthodox belief in God" in more widely known religions.[69] Using factors similar to those proposed by the *Meyers* court (see Chapter 10), the court found that i) Wiccans "adhere to a fairly complex set of doctrines relating to the spiritual aspect of their lives"; ii) Wiccan doctrines concern "ultimate questions of human life"; iii) Wiccans believe in another world and a supreme being; iv) members worship both individually and corporately and follow religious leaders; v) witchcraft enjoys a long history as a pagan faith.[70] The court rejected the government's argument that Wicca was really a conglomerate of nonreligious occult practices that were illogical and internally inconsistent, ruling that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[71] The court also rejected the government's claim that Dettmer had offered no proof that the items he requested were required by the Wiccan faith, ruling that "differing beliefs and practices are not uncommon among followers of a particular creed."[72]

Although there appear to be no reported decisions as yet regarding Wiccans asserting their rights in the public schools, that does not mean that there have not been lawsuits. Since the turn of the century, several high-profile lawsuits have been filed against schools by students who claimed that their schools discriminated against them on the basis of their religious beliefs by not allowing them to wear pentagrams, a symbol of the Wiccan faith. Crystal Seifferly sued Lincoln Park High School in Michigan after it enforced a dress code policy against her that prohibited the wearing of

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[66] *Id.* at 1004-05 (citing *Board of Education v. Pico*, 457 U.S. 853, 102 S. Ct. 2799 (1982)).

[67] *Id.* at 1004.

[68] *See Dettmer v. Landon*, 799 F.2d 929 (4th Cir. 1986).

[69] *See United States v. Seeger*, 380 U.S. 163, 166, 85 S. Ct. 850, 854 (1964).

[70] *Dettmer*, 799 F.2d at 931-32.

[71] *Id*. at 932 (quoting Thomas v. Review Board, 450 U.S. 707, 714, 101 S. Ct. 1425, 1430 (1981)).

[72] *Id*. (citing Thomas, 450 U.S. at 715, 101 S. Ct. at 1430-31).

five-point stars. The ban on pentagrams was part of an overall effort to curb gangs, drug use and disruptive behavior by enforcing the code of student conduct against the Ku Klux Klan, skinheads, pagans, satanists, cults, street gangs, white supremistists, vampires and witches. The school district eventually settled with Ms. Seifferly and agreed not to enforce the policy against witches and pagans, claiming that they had not intended to interfere with anyone's religious practice.[73]

In Indiana, two high school students were dismissed from a junior-teaching program for wearing pentagrams while teaching third-graders. Brandi Lehman and Shauntee Chaffin wore the pentagrams as outward signs of their Wiccan faith. They sued their school, and on April 27, 2000 United States District Judge S. Hugh Dillin ruled that the girls could return to work wearing their pentagrams. Judge Dillin said that there had been no evidence of any disruption caused by the wearing of the pentagrams.[74]

Gang symbols and the symbols of esoteric religions frequently become intertwined, leading to difficult decisions in school districts. In Hammond, Indiana, Irma Patton was sent home for refusing to cover up two pentagrams that she wore to express her Wiccan faith. She returned to school with the symbols covered, but claimed that her religious rights had been violated. School officials argued that the pentagram was an identification symbol for the Latin Kings gang, and that enforcing the ban against the Latin Kings, but not against Ms. Patton, would be unfair. Savvy street gangs that deliberately adopt religious symbols--crosses or pentagrams--as their gang signs are only likely to complicate this issue in years to come.

While school districts may only just be starting to deal with religions such as Wicca and Satanism in the schools, Satanism at least is no stranger to the prison system, where pro se prisoner plaintiffs have regularly sued various prisons for years claiming the denial of their right to practice Satanism.[75] Could the practice of Satanism be prohibited in the public schools without running afoul of the First Amendment? As with many of the esoteric religions, it would depend on what the practitioner means when he claims to be a practicing Satanist. Take, for example, the prisoner-plaintiff in *McCorkle v. Johnson*,[76] who sued the prison system after it refused to provide him with *The Satanic Bible*, *The Satanic Book of Rituals*, and a Satanic medallion. Skipping over the issues of whether Satanism is a religion and whether the plaintiff was a sincere believer in Satanism, the court considered whether the denial was "reasonably related to legitimate penological interests," the test for whether a prison policy impinges on a prisoner's constitutional rights. The court felt that the defendants' concerns for institutional security and order were legitimate, in light of some of the rituals described by the plaintiff as including the sacrifice of a female virgin (preferably Christian); an initiation ceremony involving wrist-slashing,

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[73] *See generally* "Michigan student wins right to wear pentagram in high school," at http://www.freedomforum.org/religion/1999/3/23michwicca.asp (visited July 5, 2000).

[74] *See generally* "Federal judge upholds Indiana students' right to wear Wiccan symbols," at http://www.freedomforum.org/news/2000/05/2000-05-01-01.asp (visited July 5, 2000).

[75] *See*, *e.g.*, *Doty v. Lewis*, 995 F.Supp. 1081 (D. Az. 1998); *Ramirez v. Coughlin*, 919 F.Supp. 617 (N.D. N.Y. 1996); *Howard v. United States*, 864 F.Supp. 1019 (D. Colo. 1994).

[76] *McCorkle v. Johnson*, 881 F.2d 993 (11th Cir. 1989).

blood-drinking, and the consumption of human flesh (preferably fingers); and the use of candles made out of the fat of unbaptized infants. Passages from *The Satanic Bible* encouraged readers to rebel against the laws of man and God and to live life according to individual desires without regard for conscience or consequence.[77] The court upheld the denial of the various requested items. While analogizing to prison cases in the school setting is risky, considering the paramount safety issues in prisons, it seems fairly safe to assume that schools can at least prohibit the above practices without running afoul of the First Amendment.

At least one prisoner has sued over what he claimed to be restrictions placed on his right to practice the Thelemic religion.[78] Thelema, founded in 1904 by Aleister Crowley, employs numerous practices grouped under the generalized term "Magick." Some Thelemic practices have traditionally been associated with occultism. The plaintiff claimed that the prison had failed to accommodate him by denying him access to numerous objects needed for his rituals. The court ruled that the denial of such items as incense, robes, a cauldron, a dagger, and a sword were reasonably related to the legitimate penological interests of safety and security.[79]

I have had several clients call in the past couple years with students who claimed that their school's dress code rules prohibiting multiple ear-piercings violated their religious rights as members of the "Church of Body Modification" ("CBM") – an Internet-based "church"[80] which encouraged its members to "grow as individuals through body modification and its teachings," to "promote growth in mind, body and spirit," and to be "confident role models in learning, teaching, and displaying body modification."[81] While I have never seen any cases addressing the Church of Body Modification in the school setting, there is one federal Court of Appeals decision dealing with the CBM: *Cloutier v. Costco Wholesale Corp*.[82]

In *Cloutier*, an employee who was told that she could no longer wear her facial piercings (eyebrows, not ears) claimed that Costco's dress code conflicted with her religious beliefs as a member of the CBM. Although the district court appeared somewhat skeptical as to whether the CBM was a true religion for the purposes of Title VII,[83] or whether Cloutier's refusal to remove her facial piercings was motivated by a religious belief – as opposed to a purely personal preference – because its review of the CBM website convinced it that adherents were not required to display their facial piercings at all times, it ruled that Costco had reasonably accommodated

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[77] *Id.* at 995-96.

[78] *Maberry v. McKune*, 24 F.Supp.2d 1222 (D. Kan. 1998).

[79] *Id*. at 1226-27.

[80] *See* http://uscobm.com/ (visited October 30, 2013).

[81] *Id.* at 129.

[82] *Cloutier v. Costco Wholesale Corp*., 390 F.3d 126 (1st Cir. 2004).

[83] However, even the district court declared that "[t]his decision is not intended in any way to offer an opinion on the substance or validity of the belief system of the Church of Body Modification." *Cloutier v. Costco Wholesale*, 311 F.Supp.2d 190, 191 (D. Mass. 2004).

Cloutier's religious practices by offering to allow her to wear a clear plastic retainer or to cover her piercings with a flesh-colored band-aid.[84] The Court of Appeals refused to consider the reasonable accommodation issue[85], but upheld judgment for Costco on an alternative ground: that because Cloutier insisted that the only possible accommodation would be for Costco to completely exempt her from its "no facial piercing" rule, Cloutier's religious beliefs created an undue hardship for Costco, eliminating its need to accommodate those beliefs.[86]

Cloutier is an interesting employment case for several reasons. First, it shows how even common and fairly-accepted employment practices (such as a dress code prohibiting "extreme" types of "dress," such as excessive facial piercings) can run afoul of the beliefs of an esoteric religion that the employer (and the courts) had probably never even heard of before the present dispute arose. Second, it echoes the warning of the *Meyers* court (see Chapter 10) that the anti-discrimination laws "could easily become the first refuge of scoundrels if defendants could justify [otherwise impermissible] conduct simply by crying 'religion'."[87] Costco presented evidence that Cloutier first joined the CBM two days *after* first being told to remove her facial piercings, and the record also suggested that the accommodations offered by Costco and rejected by Cloutier during the EEOC mediation process had first been suggested by Cloutier herself prior to her termination.[88] Third, *Cloutier* demonstrates how uncomfortable courts are answering the question of whether a given set of beliefs – which in this case appeared to consist mainly of sticking small pieces of metal through one's eyebrows and being proud of it – really constitute a "religion." Perhaps to make up for that reluctance, however, the fourth lesson of *Cloutier* is that courts still appear willing to side with an employer when practices required by an esoteric religion conflict with neutral, generally-applied standards of conduct for employees, including their dress codes.

Sometimes the government is asked to deal with "religions" that do not even appear to have a name. Take, for example, Mr. Brown, a prisoner who argued in *Brown v. Pena*,[89] that the state had discriminated against him on the grounds of religion by denying him certain types of food: his "personal religious creed" that "Kozy Kitten People/Cat Food ... is contributing significantly to [his] state of well being ... [and therefore] to [his] overall work performance" by increasing his energy.[90] After reviewing several statutory and judicial definitions of "religion," the court noted that virtually all of the definitions excluded "unique personal moral preferences" from the realm of

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[84] *Cloutier*, 311 F.Supp.2d at 199-200.

[85] The summary judgment evidence most favorable to Cloutier showed that Costco had first made its suggested accommodations during the EEOC mediation process, one month after Cloutier had been terminated. The First Circuit noted a split in authorities as to whether post-termination offers of accommodations could insulate an employer from liability under Title VII, but avoided joining the debate by relying on its undue hardship finding. *Cloutier*, 390 F.3d at 133-34.

[86] *Id.* at 137.

[87] *Meyers*, 906 F.Supp. at 1498.

[88] *Cloutier*, 390 F.3d at 129 n.2 & 130.

[89] *Brown v. Pena*, 441 F.Supp. 1382 (S.D.Fla.1977).

[90] *Id.* at 1384.

religion.[91] Because the plaintiff's desire to eat cat food could only be described as a "mere personal preference," the court ruled that it was not protected by the First Amendment.

But just because you cannot name your religion does not mean the First Amendment will always deny you your culinary desires (at least in prison). In *Love v. Reed*,[92] a prisoner challenged the prison's refusal to provide him with bread and peanut butter for his consumption on Sunday, his claimed Sabbath. Although Kelvin Love did not formally subscribe to any organized religion, he considered himself to be an adherent of the "Hebrew religion," which apparently was based on his own interpretations of the Old Testament of the Christian Bible. One of his beliefs was that not only should he rest on the Sabbath, he could not allow others to work on his behalf. The practical result of this belief was that Love would not allow others to make him food on Sundays; hence, the request for the peanut butter and bread, which would have allowed him to make his own sandwiches on Saturdays, for consumption on Sundays. The prison challenged whether Love's belief system could be considered a "religion." The court determined that while Love was not always articulate in explaining the details of the "Hebrew religion," it was clearly an offshoot of Christianity or Judaism, with strong roots in the Old Testament. Although Love could not yet place his individual beliefs within a broader philosophical context:

> Courts should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.

The court therefore found that Love's beliefs were religious in nature, and ordered the prison to give Love his peanut butter.

Unnamed religions have also appeared in the educational setting. In *Seshadri v. Kasraian*,[93] a professor accused his graduate student of academic misconduct regarding a paper that they had jointly authored. After a hearing cleared the student of the charge, the professor was found guilty of academic misconduct for making a groundless complaint against the student. The professor was suspended without pay for one year and forbidden to advise graduate students in the future. The professor brought a religious discrimination claim against the university under Title VII, claiming that he had been sanctioned for his adherence to a "creed [that] requires scrupulous honesty ... in the scholarly pursuit of scientific knowledge."[94] The Seventh Circuit noted that there would be cases where the courts could find that no matter how deeply-seated a belief might be, it was not religious, citing as an example the Kozy Kitten People/Cat Food case. In the *Seshadri* case, however, the court could not even get that far, since the professor absolutely refused to tell anyone what his religion was. While the court acknowledged that the government does not have the power to force a citizen to state his religious beliefs or preferences, "a person who seeks to obtain a privileged legal status by virtue of his religion cannot preclude inquiry designed to

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[91] *Id.* at 1385.

[92] *Love v. Reed*, 216 F.3d 682 (8th Cir. 2000).

[93] *Seshadri v. Kasraian*, 130 F.3d 798 (7th Cir. 1997).

[94] *Id.* at 800.

determine whether he had in fact a religion."[95] The Court therefore dismissed the Title VII religious discrimination claim.

As can been seen from the above cases, the incursion of esoteric religions into the public school system is slow but seemingly inevitable. To date, adherents of the majority religions – mainly Christianity – have been active in seeking to exclude from the public schools what they perceive to be the teaching of esoteric religions, but have been largely unsuccessful in court. This is not to say that they have not been successful in school boardrooms and behind closed doors. In *Cole v. Maine School Administrative District No. 1*,[96] a teacher claimed that his school had violated his First Amendment rights by restricting his ability to teach about non-Christian religions. The dispute began when a parent visiting Cole's classroom took issue with his statement that Cro Magnon man is at least 40,000 years old, arguing that based on her strict interpretation of the Bible, the Earth could be no older than 8,000 to 10,000 years. The parent, who complained to the principal and ultimately withdrew her child from school, was the granddaughter of a prominent local Christian minister and a member of another influential church, which two school officials allegedly admitted was trying to "run" the local schools. Despite the fact that Cole was using the same curriculum and lesson plans that he had used for several years, and for which he had received good evaluations and commendations, after the incident with the parent he was abruptly given strict limitations on which periods of history he could and could not teach, which effectively prevented him from teaching about non-Christian religions. The school district moved for summary judgment, but the district court rejected the motion, finding that Cole's version of events presented a valid First Amendment case that would need to go to trial.[97]

Adherents of esoteric religions have been slower to publicly assert their rights (except in the prison system, where being a Wiccan or a Satanist appears to be a *de facto* requirement in some prisons), but such challenges have been gaining steam and, for the most part, have been successful. This is especially true in dress code cases, where students such as Crystal Seifferly, Brandi Lehman and Shauntee Chaffin have successfully challenged anti-gang dress codes when those codes conflicted with their own esoteric religious beliefs. The courts have also been extremely reluctant to find that a given set of beliefs would not qualify as a "religion," except (apparently) where those beliefs merely amount to eating cat food or smoking pot.

So if the scorecard shows that the majority religions have been largely unsuccessful (in the courts, at least) in keeping the esoteric religions out of the schools, but esoteric religions have been increasingly successful at gaining a foothold in the schools, what does that mean? Are the esoteric religions simply being accorded the protection that Christianity has always had, or is something more going on? Several recent lawsuits have indicated a growing feeling among

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[95] *Id.*

[96] *Cole v. Maine School Administrative District No. 1*, 350 F.Supp.2d 143 (D. Me. 2004).

[97] To be fair to the school district, the judge noted that he was not ruling that Cole's version of events was correct, but just that taking Cole's version as true, summary judgment was not proper. The school district argued that the reason limits were placed on what Cole (a middle school teacher) could teach is that he was teaching subjects covered by the high school history teacher, and that the limits were intended to prevent the students from receiving the same instruction twice.

adherents of majority religions – Christianity, specifically – that esoteric religions are being accorded special protection at the expense of Christianity. The following section will examine this perception.

The Accommodation of Esoteric Religions: A Backlash Against Christianity?

As can be seen from the above discussion, in the last ten years there have been a large number of lawsuits brought against school districts seeking to stop what practitioners of Christianity perceive to be esoteric religious practices. As an attorney representing a large number of public school districts in east and south Texas, I have noticed a growing feeling among Christians that the courts, by seeming to bend over backwards to accommodate minority and esoteric religions, are somehow discriminating against Christianity. In the Supreme Court decision involving prayer at high school football games, where the Court ruled that student-initiated, student-led invocations violated the Establishment Clause, Chief Justice William Rehnquist writing for the dissent accused the majority opinion of "bristl[ing] with hostility to all things religious in public life."[98]

Nowhere is the perception of a backlash against Christianity more apparent than in *Altman v. Bedford Central School District*,[99] the case discussed above in which a group of Roman Catholics challenged the curriculum used at their local public schools, claiming that it promoted "Satanism and occultism, pagan religions and a New Age Spirituality."[100] The plaintiffs were very clear as to the "theme" of their litigation:

> It has been the Plaintiffs' position all along that what this case is really about is applying the same draconian limitations imposed by the federal courts on Judeo-Christian religious practice in the public schools to Eastern religions and religious-type practices.[101]

The plaintiffs complained that one teacher had read an account of the life of Buddha to her students, arguing that "[i]f public school children cannot be shown a video of the life of Christ they cannot be read the life of Buddha by their own teacher."[102]

The district court formally rejected the Plaintiffs' position, noting that "[w]ith due respect to the witness, the issue in this case is not one of offensiveness to Catholic parents, but rather whether the conduct violates the Constitution."[103] With regards to the Buddha story, after noting that the

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[98] *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 318, 120 S. Ct. 2266, 2283 (2000) (Rehnquist, C.J., dissenting).

[99] *Altman v. Bedford Central School District*, 45 F.Supp.2d 368 (S.D. N.Y. 1999).

[100] *Id.* at 372.

[101] *Id.* at 372-73.

[102] *Id.* at 387.

[103] *Id.* at 373.

school could probably show a video of the life of Christ if done properly, the court ruled that there was no evidence that the teacher had sponsored or promoted Buddhism, and that therefore reading about Buddha's life did not violate the First Amendment. However, as discussed above, the *Altman* district court regularly justified its rulings that various other practices did violate the Establishment Clause by finding that the practices at issue were repugnant to the beliefs of Christians and/or Roman Catholics.

Likewise, in *Brown v. Woodland Joint Unified School District,*[104] the plaintiffs argued that the court's conclusion that having students role-play the characters of witches and sorcerers did not have the primary effect of advancing the religion of witchcraft or discriminating against Christianity, because the court would "obviously" find an Establishment Clause violation if the stories required students to take communion or perform a baptism. Like in *Guyer*, the court rejected this argument, finding that while communion and baptism were "overt religious exercises," casting spells was a "fantasy" activity that only happened to coincide with a religious practice.[105]

It could be (and has been) argued that Christianity is already well-entrenched in many public school districts, and that all we are seeing now is that same protection being accorded to the newcomer esoteric religions. It is also possible in some areas that the reason that Christians feel overly persecuted by the courts today is that for years the schools were violating the Constitution regularly by promoting Christianity in some form or fashion, and what we are really seeing now is the enforcement of the Establishment Clause against those practices.

At heart, Christianity in the United States suffers from "the Curse of the Majoritarian Religion" (surely an excellent title for a new Harry Potter novel!). For example, the likelihood that a reasonable observer, seeing a statute of a winged serpent in a park, would think that the city is trying to endorse the worship of Quetzalcoatl is remote at best. It is far more likely that the same reasonable observer, seeing a portrait of Jesus Christ hanging in the hall outside the principal's office,[106] or a permanent mural of the crucifixion outside a school auditorium a mural of the last supper,[107] will believe that the school is trying to endorse Christianity. Reading a story about the life of Buddha will only cause some eyebrows to rise; reading a story about the life of Christ would be perceived as a much more significant issue under the Establishment Clause.

I believe that this is true for two reasons: first, to the extent that a school district has any history of promoting religion, it will almost certainly have been some form of Christianity, thereby leading a reasonable observer, who is presumed to know that history and who sees current Christian references or items in a school, to assume that "they are at it again." Courts have increasingly looked at a school district's history in analyzing the intent prong of the *Lemon* test; as discussed at

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[104] *Brown v. Woodland Joint Unified School District* , 27 F.3d 1373 (9th Cir. 1994).

[105] *Id.* at 1382.

[106] *Washegesic v. Bloomingdale Public Sch*., 33 F.3d 679 (6th Cir. 1994), *cert. denied*, 514 U.S. 1095, 115 S. Ct. 1882 (1995).

[107] *Joki v. Bd. of Educ. of the Schuylerville Cent. Sch. Dist*., 745 F. Supp. 823 (N.D. N.Y. 1990).

length in Chapter 12, the Supreme Court in *Santa Fe Independent School District v. Doe*,[108] considered the school district's past history of having a "student chaplain" deliver the football prayers in ruling that the current (arguably) facially-neutral policy was unconstitutional. Likewise, as also discussed in Chapter 12, the only real difference between the moment of silence statutes allowed by the courts and those struck down as unconstitutional was the history of the state passing the statutes; Alabama[109] and New Jersey[110] were seen as "trying again" to return prayer to school through the passage of their moment of silence statutes, while Texas,[111] Illinois,[112] Virginia113 and Georgia[114] were all found to have clean (or reasonably clean) histories on the issue. It simply is unclear how much of a temporal gap must exist between historical potentially-unconstitutional religious practices and current facially-neutral practices for the current practice to avoid being saddled with the sins of the past.

Second, most people tend to view things through their own subjective personal perspectives, meaning that people who have grown up in a Judeo-Christian tradition will view things through that religious lens. A Christian parent who sees a Christmas tree in the lobby of her local elementary school will in all likelihood automatically think that the tree represents "Christmas" – both the religious and non-religious aspects of the holiday – even if the courts have acknowledged that there are essentially two holidays called "Christmas," and the tree falls under the non-religious version of Christmas. A Jewish student who sees the same Christmas tree, and who has dealt all her life with the predominance of Christianity in American society, will probably think the same thing. But if the school takes down the Christmas tree and in February puts up a statute of Quetzalcoatl, neither the Christian parent nor the Jewish student are likely to think that the school is promoting an ancient Aztec or Mayan religion, especially if, as discussed above, the school lacks a history of doing so. The parent's and student's minds simply aren't wired that way. Christianity suffers because many people, through their own personal histories, are predisposed to think that Christian symbols are there for a religious reason.

From a curriculum viewpoint, Christianity also suffers from the separation of church and state that exists in the Unites States and (arguably) in most other Western European nations where Christianity is the dominant religion. By this I mean that it is possible to teach about the current governments and economies of most "Western" nations without having to discuss religion, because religion is (again, arguably) "separated" from the state. By contrast, as the *Altman* court noted, in countries such as India religion is much more intertwined with politics, and you cannot teach one without the other. For a more current example of this phenomenon, one need look no further than the recent elections in Iraq. A good civics teacher could not effectively explain

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[108] *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 302, 120 S. Ct. 2266, 2275 (2000).

[109] *Wallace v. Jaffree*, 472 U.S. 30, 105 S. Ct. 2479 (1985).

[110] *May v. Cooperman,* 780 F.2d 240, 241 (3d Cir. 1985).

[111] *Croft v. Governor of the State of Texas*, 562 F.3d 735 (5th Cir. 2009).

[112] *Sherman v. Koch*, 623 F.3d 501 (7th Cir. 2010).

[113] *Brown v. Gilmore,* 258 F.3d 265 (4th Cir. 2001).

[114] *Bown v. Gwinnett County School District*, 112 F.3d 1464 (11th Cir. 1997).

elections in Iraq (and, indeed, pretty much everything else going on there) without discussing religion in general, and, specifically, the differences between the Shiites and Sunnis. A discussion of the last round of elections in, say, Great Britain, would not require much if any mention of religion.

Whether Christianity or other majoritarian religions truly are being discriminated against is a sensitive subject, because it requires a determination of how much religion of any sort belongs in the public schools in the first place – and that subject, as any superintendent can tell you, is far from being decided. Part of the problem is that the rise of the esoteric religions and their desire to be included in the schools has upset the delicate balance that the courts, schools, and majoritarian churches had established in individual communities. To return to the discussion at the beginning of this paper, at the root of the current conflict between majoritarian and esoteric religions is the fact that the esoteric religions are sometime too different for adherents of the majoritarian religions to stomach – especially in the case of Satanism, which frequently contradicts and challenges the teachings and beliefs of Christianity. All of which leads to the question discussed in the next section: can the esoteric religions be accommodated under the Supreme Court's current First Amendment jurisprudence?

Can Esoteric Religions be Accommodated?

As discussed above, current Supreme Court Establishment Clause/Free Exercise jurisprudence requires school districts to avoid promoting religion in general, specific religions, or "non-religion," while at the same time accommodating all religions and being hostile to none. Sound like a tall order? While the courts have always had difficulty walking the thin line between Establishment, Accommodation, and Hostility, with the coming of the esoteric religions that line may have virtually disappeared.

Most bright-line rules work best when they are i) addressing a fairly "mainstream" situation; and ii) that situation arises in a vacuum, *i.e.* only the rights of one party need be considered. Such rules tend to break down -- or lead to unpredictable results -- when they are applied to "fringe" situations, or when the competing rights of multiple parties must be reconciled. Take, for example, our prisoner plaintiff in *McCorkle v. Johnson*[115] who testified that his belief in Satanism required the sacrifice of a female virgin, preferably Christian, and that his religion's holy book, *The Satanic Bible*, encouraged adherents to rebel against "the laws of man and God." I would hope that even a moderately creative school attorney could come up with an argument against allowing virgin sacrifices in school that would withstand First Amendment challenge. But what if McCorkle wished to hand out pamphlets that discussed his religion, including his belief that Christian virgins should be sacrificed? For the sake of argument, assume that the school has established an open forum that allows outside groups of all viewpoints to pass out literature on all manners of subjects. If the school accommodates McCorkle's religion by allowing him to pass out his pamphlets, is it not at the same time being hostile to the Christian religion, by allowing very anti-Christian literature to be circulated in the schools? Can two religions that are diametrically opposed to each other be accommodated at the same time? Or is the only way to accommodate both religions to accommodate neither, by prohibiting the distribution of all religious literature?

[115] *McCorkle v. Johnson*, 881 F.2d 993 (11th Cir. 1989).

This is the Interacting Religions Dilemma: the proposition that when two religions that conflict to some degree interact with each other in a public setting, the government cannot accommodate one without in some form being hostile to the other. The Interacting Religions Dilemma is not limited to conflicts between esoteric and established religions. In fact, the most common and well-publicized example of this dilemma is the issue of prayer in school. To a large degree, the current debate about prayer in school is not about whether a student has a right to pray in school. As discussed in Chapter 12, students have always had the right to pray in school, at least so long as it is done silently and to oneself. Nor is the issue about whether students of like mind can gather together at school to pray and/or discuss religion. As discussed in Chapter 14, for the vast majority of schools that allow at least one noncurricular student group to use school facilities, the schools have obligated themselves under the Equal Access Act to allow religious groups to meet on school property as well. The real issue is the ability to pray publicly to people who have not affirmatively indicated that they want to hear the prayer; in other words, to proselytize.

To date, the courts have for the most part ruled in favor of those who do not want to hear the prayers, at least under the Establishment Clause and in the school setting.[116] So, to the extent that those who want to pray have a sincere religious belief that they must proselytize their faith, the courts have shown hostility to them by accommodating the wishes of those who oppose such public prayers. In other words, the courts cannot accommodate both religious desires and have had to choose one over the other. When faced with conflicting religions or religious beliefs, current Establishment Clause jurisprudence breaks down.

An excellent example of this breakdown appears in *Linnemier v. Board of Trustees of Purdue University*.[117] John Gilbert, a theater major, was required to direct a play as part of his course requirements. He chose to direct *Corpus Christi*, a somewhat infamous play by Terrence McNally that depicts Jesus Christ as a homosexual who has sexual relations with his disciples and contains a significant amount of profanity and vulgarity. The play was scheduled to be performed in a campus theater that was open to any group that wished to use it, so long as the use comported with the university's educational mission -- although, as the dissent goes to great lengths to point out, the only evidence of the "openness" of the theater was the testimony of two administrators, and not any written policies or handbooks. The University required the playbill to carry a typical disclaimer. Not surprisingly, a group of citizens challenged what they called a blatant attack on Christianity, arguing that allowing Gilbert to present his play constituted an endorsement of its anti-Christian views. An extremely divided court allowed the production of the play to proceed.

While not exactly an example of two religions hostile to each other in conflict -- there is no suggestion in the opinion that either Gilbert or McNally belonged to any anti-Christian religions -- the *Linnemier* decision dramatically highlights the difficulties that two respected federal judges had in coping with a practice that directly attacked a "majority" religion. Although Judge Posner,

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[116] *See*, *e.g.*, *Lee v. Weisman*, 505 U.S. 577, 112 S. Ct. 2649, 2661 (1992); *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 120 S. Ct. 2266 (2000). *But see Town of Greece, New York v. Galloway*, 134 S. Ct. 1811 (2014).

[117] *Linnemier v. Board of Trustees of Purdue Univ.*, 260 F.3d 757 (7th Cir. 2001).

writing for the majority, clearly disapproved of the play itself (noting that it has been called "a typical product of the lunatic cultural Left"), he adopted the "neutrality" approach favored by recent Supreme Court decisions, stating bluntly that "[t]he contention that the First Amendment forbids a state university to provide a venue for the expression of views antagonistic to conventional Christian beliefs is absurd."[118] Judge Posner appears to conclude that the production of *Corpus Christi* was private speech protected by the First Amendment (his opinion is somewhat cursory on this point), as he specifically notes that a public university that had a policy of promoting atheism or Satanism would violate the First Amendment. Following the tenants of the "neutrality" test, Judge Posner concluded that the University had as little business protecting Christianity as it would promoting Christianity.[119] Analogizing to the esoteric religion cases discussed above (*Fleischfresser* and *Brown*, among others), Posner noted that efforts to ensure that a school's curriculum comported with each student's individual religious views would reduce the curriculum to a "lowest common denominator."[120] Whether the forum was open or closed was somewhat irrelevant, concluded Judge Posner, because although "[c]lassrooms are not public forums...the school authorities and the teachers, not the courts, decide whether classroom instruction shall include works by blasphemers. It is the same with a university theater."[121]

Judge Coffey, writing in dissent, strongly disagreed with virtually every premise and conclusion of the majority:

> [S]hould this court allow the Ft. Wayne campus of Indiana University/Purdue University (IPFW) to stage a performance of *Corpus Christi*, it states a clear message that we will, with a wink and a nod, tolerate government-sponsored attacks on religion. Allowing the university to stage the play would open the flood gates for anti-religious speech where any religion (be it Roman Catholicism, Protestantism, Judaism, Islam, Buddhism, etc.) could be the target of the vile and hateful speech that is from this date forward sanctioned by the government.[122]

I believe that Judge Coffey is ultimately wrong in his overall analysis,[123] but he raises some very interesting points. Coffey took great exception to the state of the record on the issue of whether

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[118] *Id*. at 759.

[119] *Id*. at 759 ("It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine.") (quoting *Epperson v. Arkansas*, 393 U.S. 97, 106-07 (1968)).

[120] *Id*. (quoting *Brown*, 27 F.3d at 1379).

[121] *Id*. at 760 (internal citations omitted).

[122] *Id*. at 760 (Coffey, J., dissenting).

[123] Judge Coffey's opinion tends to swing back and forth between addressing the actual issue before the Court -- a request for a stay pending the plaintiffs' appeal from the lower court's denial of their request for a preliminary injunction that would have stopped the play -- and addressing the merits of the First Amendment claims. This is not surprising; Judge Posner spends virtually all of his opinion addressing the merits. To the extent that Coffey is arguing that the stay should be granted to better develop what he clearly believed to be an insufficient record on the forum issue, he may have a point -- although, as any ex-drama wannabe could tell you, postponing a play for the months, if not years, that it could take to litigate the issues below would kill the play altogether.

the campus theater actually was a public forum, noting the lack of any written policies or procedures on the issue, the lack of evidence of a history of the use of the theater by non-University groups, and the lack of any guidelines as to how to determine whether a proposed use "comported with the university's educational mission."[124]

The real conflict between Posner and Coffey, however, came down to how they characterized the play under the First Amendment. In Posner's view, the play represented private speech consisting of a viewpoint that was distasteful or antagonistic to Christianity, and he relied on *Epperson v. Arkansas* to rule that "the state has no legitimate interest in protecting any or all religions from views distasteful to them."[125] Coffey, who considered the play to be government-sponsored speech, distinguished between speech that contained views that were incompatible with a religion and speech that constituted an outright attack on a specific religion, and relied on various cases such as *Lynch v. Donnelly*, for the proposition that the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any...."[126]

Can these views be reconciled? *Linnemier* represents an interesting departure from the normal practice of claiming that the acts of government violate the Establishment Clause by promoting or favoring an esoteric religion; the plaintiffs in *Linnemier* simply argued that allowing the play *Corpus Christi* to be produced was anti-Christian – thereby avoiding having to prove that the playwright or director belonged to or believed in an esoteric religion, which was a problem plaintiffs have had in textbook cases such as *Fleischfresser* and *Brown*. But if we were to change the facts of *Linnemier* a bit, and the director were to admit that he wanted to produce the anti-Christian play because of Satanic beliefs, we would have a direct conflict between two religions. To accommodate the director's Satanic beliefs by allowing him to go forward with the play would arguably constitute hostility towards Christianity; to prohibit the play would discriminate against the director's beliefs. Can these competing and diametrically-opposed positions be accommodated?

In the above hypothetical, probably. If you combine Judge Posner's view that the speech was private speech in an open forum with the fact that under the Free Exercise Clause, while freedom to believe is absolute, freedom to act is not,[127] a result can probably be reached that would technically meet the requirements of the First Amendment as it is currently interpreted by the courts. But what is absolutely clear is that whatever result is reached, someone is going to be mighty unhappy. The reality that in religion cases, someone is always unhappy with the court's decision no matter how legally correct it may be is certainly nothing new, but the esoteric religion cases highlight this problem with growing frequency.

The esoteric religion cases also illustrate a problem of practical, if not legal, nature with the so-called "endorsement test." First suggested by Justice O'Connor in her concurring opinion in

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[124] *Id*. at 761-62.

[125] *Id*. at 759 (citing Epperson v. Arkansas, 393 U.S. 97, 106-07, 89 S. Ct. 266 (1968)).

[126] *Id*. at 765 (Coffey, J., dissenting) (citing Lynn v. Donnelly, 465 U.S. 668, 688, 104 S. Ct. 1355 (1984)).

[127] *See Cantwell v. Connecticut*, 310 U.S. 296, 303-04, 60 S. Ct. 900, 903 (1940).

Lynch v. Donnelly,[128] and later approved of by a majority of the Supreme Court in *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, [129] under the endorsement test, the government may not engage in a practice that suggests to the reasonable, informed observer that it is endorsing religion.[130] In the esoteric religion cases where the courts have found that the government is not endorsing an esoteric religion, what the courts are saying to the plaintiffs is that they are not being reasonable – which can be a harsh message. But what if the vast majority of the local community believes that celebrating Halloween promotes the religions of Satanism or Wicca? In that case, the endorsement test would presumably require a court to tell a whole community that it is not being reasonable – a tacit rejection of local community standards. And if those community standards are based on the Christian Bible, then we are right back where we started: the apparent "discrimination" against Christianity in favor of an esoteric religion, which in the example above may not even have any actual adherents in the local community.

The End of the Beginning:

OK – I admit I had to force this hypothetical a bit. I want to make it clear: Wicca is not the same thing as Satanism. Most Wiccans are actually quite tolerant of other religions, including Christianity, although they tend not to be fond of organized churches. However, throughout history, both in modern times with respect to Wicca and in past centuries with regards to the various pagan religions that served as the spiritual forebears of modern Wicca, various religions have accused Wiccans of being Satanists. So Mary's assumption that Eddie's Wiccan practices are somehow Satanic in origin is not far off the mark.

But my hypothetical serves to illustrate my main point, which is that there are some people who see "esoteric religions" as so diametrically different than, and in some way opposed to, their own religions, that they will assume that anything a school does that appears to favor an esoteric religion must be an attack on their religion. Like this chapter, with which I am constantly tinkering and which I never seem to be able to finish conclusively,[131] the search for a workable test for dealing with the rise of esoteric religions and their interaction with the more established religions is an on-going process. Those who think they can proclaim an easy test would do well to remember that one of the main reasons why the *Lemon* test is still viable after nearly thirty years is

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[128] *Lynch v. Donnelly*, 465 U.S. 668, 104 S.Ct. 1355 (1984).

[129] *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 592-94, 109 S.Ct. 3086, 3134 (1989).

[130] *Lynch*, 465 U.S. at 690, 104 S.Ct. 1355 (O'Connor, J., concurring).

[131] This chapter was originally a speech called "The Coming of the Witches: Schools, Esoteric Religions and the Christian Backlash," presented at the 2001 National Conference of the Education Law Association in Albuquerque, New Mexico. It was later published as a note of the same name in the March 2002 edition of the *Texas School Administrators' Legal Digest,* and then three years later again as an article entitled "Harry Potter and the Curse of the First Amendment: Esoteric Religion, the Public Schools and the Christian Backlash," in *West's Education Law Reporter*. *See 198 Ed.Law Rep.* [399], July 28, 2005. If you actually went back and compared those three versions with this chapter, you would see I still haven't reached much of a conclusion.

that the combined federal judiciary cannot come up with a more reliable test upon which they can all agree.

The main lesson to learn from this chapter, then, is that oddly-named faiths like Wicca, Santeria, and Zoroastrianism are as much religions as Catholicism and Judaism, and must be treated as such. At the same time, school officials must be careful about a backlash, however unintended, against Christianity in the rush to accommodate newer religions. Only the future will tell whether our current First Amendment jurisprudence will be enough to cope with new religions as they are encountered in the schools. For who knows what our children may be reading at the end of the next decade; we may look back wistfully for the days of Harry Potter and a little witchcraft.