Opening the Broom Closet: Recognizing the Religious Rights of Wiccans, Witches, and Other Neo-Pagans

I. INTRODUCTION

Religious freedom is a core component of our nation and one of the most widely known and accepted constitutional guarantees provided by the First Amendment. No prior civilization had adopted a national policy that tolerated various religious beliefs while simultaneously refusing to endorse or promote a national religion. Justice Douglas, in the majority opinion of *United States v. Ballard*, summarized that the founders were well aware of the potential for religious divisiveness when "[t]hey fashioned a charter of government which envisaged the widest possible toleration of conflicting [religious] views. Man's relation to his God was made no concern of the state."[1] Considering the fundamental backdrop of religious tolerance, it might seem unimaginable that a skilled medical technician could be fired from her job, an alleged victim of sexual abuse could have her credibility undermined in a court of law, or a mother could lose custody of her child, under the color of legality, because of their religious beliefs. Yet, the startling reality is that many courts have allowed for the disparate and discriminatory treatment of earth-based religious beliefs broadly labeled as Neo-Paganism.[2]

Courts have vastly inconsistent views in their recognition and treatment of emergent earth-based religions.[3] While many courts fully and accurately recognize the religious rights and freedoms of proclaimed Neo-Pagans, others explicitly or implicitly utilize mechanisms of law to engender hostility and perpetuate centuries-old stereotypes against such practitioners.[4] The focus of this Comment is to identify the ways that some courts effectuate the disparate treatment of Wiccans, Witches, and similar faiths under the Neo-Pagan umbrella, so that Neo-Paganism can receive the same constitutional protections it is entitled to, along with all other valid religions.

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1. United States v. Ballard, 322 U.S. 78, 87 (1944).

2. *See, e.g.*, Saeemodarae v. Mercy Health Servs., 456 F. Supp. 2d 1021 (N.D. Iowa 2006); State v. Plaskett, 27 P.3d 890 (Kan. 2001); Hicks v. Cook, 288 S.W.3d 244 (Ark. Ct. App. 2008).

3. *Compare* Roberts v. Ravenwood Church of Wicca, 292 S.E.2d 657 (Ga. 1982) (holding by a slight majority that Wicca was a recognized religion according to Supreme Court criterion), *with Plaskett*, 27 P.3d at 913-14 (allowing impeachment of a victim-witness's credibility due to her Wiccan beliefs).

4. *See* Gelford v. Franks, No. 07-C-258-5, 2007 WL 5582586, at *2 (W.D. Wis. Sept. 29, 2007) (noting that Wisconsin law "allow[s] Wicca[n] inmates to possess one emblem . . . for religious purposes"). *But see* Raper v. Adams, No. 5:06-CT-41-D, 2007 WL 3532344, at *2 (E.D.N.C. Mar. 28, 2007) (concluding that a prison must be allowed great deference in forbidding a Wiccan from using tarot cards with other inmates, because tarot readings pose a security risk).

The basic tenets of the Neo-Pagan belief system are first summarized to show how its beliefs are congruent with many aspects of "orthodox faiths."[5] Some distinctions are also discussed, but perhaps most importantly, common misconceptions that have inaccurately portrayed Wicca and Neo-Paganism as malevolent and/or anti-establishment belief systems are addressed.

Next, the history and definition of American religious rights are summarized to show how Neo-Paganism comports with the Supreme Court's definition of a valid religion protected by the United States Constitution.[6] Such recognition demonstrates that judicial and legislative discrimination against Neo-Pagans at any level is impermissible and in violation of the Constitution.[7]

Applying this legal conclusion, multiple courts have violated constitutional protections by continuing to discriminate against Neo-Pagans.[8] Specific cases involving parental rights,[9] employment discrimination law under Title VII's religious entity exemption,[10] and rules of evidence[11] are analyzed to demonstrate how courts are enabled to unconstitutionally admit and/or use prejudicial religious information against Neo-Pagan practitioners.

While treatment of Neo-Pagans in the context of parental rights, evidentiary impeachment of character, and employment discrimination (specific to Title VII's religious entity exemption) are the detailed areas explored in this article, there are almost as many potential areas of law impacted by discrimination against Neo-Paganism as there are legal causes of action.[12] The reason such an expansive range of cases exists is that any

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5. *Ballard*, 322 U.S. at 86 ("[Freedom of religious belief] embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the *orthodox* faiths.") (emphasis added). The use of the word "orthodox*"* will be used to describe the five largest world religions: Buddhism, Christianity, Hinduism, Islam, and Judaism; the word "unorthodox*"* will be used to describe all other religious beliefs. These words are admittedly imperfect, because unorthodox has a negative connotation. However, the Supreme Court has relied on these words in this general context. *See, e.g.*, United States v. Seeger, 380 U.S. 163, 165 (1965).

6. *See Ballard*, 322 U.S. at 86.

7. *E.g.*, Jones v. Jones, 832 N.E.2d 1057 (Ind. Ct. App. 2005).

8. *See, e.g.*, Saeemodarae v. Mercy Health Servs., 456 F. Supp. 2d 1021 (N.D. Iowa 2006); *In re* Hilton, Nos. 06CA106, 06CA107, 2007 WL 2298129 (Ohio Ct. App. Aug. 7, 2007); Hicks v. Cook, 288 S.W.3d 244 (Ark. Ct. App. 2008).

9. *E.g.*, *Jones*, 832 N.E.2d 1057; *Hicks*, 288 S.W.3d 244.

10. *E.g.*, *Saeemodarae*, 456 F. Supp. 2d 1021; Dodge v. Salvation Army, No. S88-0353, 1989 WL 53857 (S.D. Miss. Jan. 9, 1989).

11. *E.g.*, State v. Plaskett, 27 P.3d 890, 913-14 (Kan. 2001); *In re Hilton*, 2007 WL 2298129.

12. *E.g.*, Doe v. Tangipahoa Parish Sch. Bd., 631 F. Supp. 2d 823 (E.D. La. 2009) (reviewing conduct of school board in the context of a potential Establishment Clause viola-

criminal or civil case that improperly considers a party or witness's Neo-Pagan faith may compromise the court's decision by an irrelevant prejudice. The pocket areas selected will serve as a microcosm of the ways in which unconstitutional discrimination continues to occur against Neo-Pagans. Whether the discrimination is a product of ignorance, complacency, or complicity, the hope is that heightened legal awareness will eradicate what has become a recurring, if not systemic, atrocity in our judicial system.

II. BACKGROUND ON NEO-PAGANISM

A. WICCA AND NEO-PAGANISM: WHAT IS IT AND WHICH IS WITCH?

The term Neo-Paganism is used here as the broadest term to encompass a seemingly wide array of spiritual practices that include various forms of Wicca,[13] Witchcraft,[14] Druidism and Indo-European Shamanism,[15] and Asatru and pantheistic deity worship.[16] While most of these subdivisions contain practices distinct from the other labeled groups,[17] they all fall under the penumbra of Neo-Paganism, so "[a]ll Wiccans are pagans, but not all pagans are Wiccans."[18] While practitioners of the various forms of Neo-Paganism may be very particular about how they define themselves, such as Wiccan or Witch or Pagan, Neo-Paganism will be used as the most expedient word to convey all branches of Pagan religion.[19]

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tion against non-Christian beliefs); McCollum v. California, 610 F. Supp. 2d 1053 (N.D. Cal. 2009) (regarding rights of prison inmates to practice Wicca); Fender v. Kansas Soc. & Rehab. Servs., 168 F. Supp. 2d 1216 (D. Kan. 2001) (concerning a Wiccan employee's Title VII religious discrimination claim alleging a hostile work environment).

13. Generally, Wicca emphasizes magic and divination through use of candles, knots, herbs, and harnessing energy through lunar and other natural cycles. Wiccans also commonly observe and invoke earth spirits or fairies. *See generally* ANN MOURA, GREEN WITCHCRAFT (2002).

14. The terms Witch and Witchcraft are largely synonymous with Wiccan and Wicca, although practitioners may attribute specific meaning to the terms. *Id.* at 13.

15. Generally, Druidism and Shamanism emphasize transformative spiritual journeys through meditative and ecstatic practices. *See generally* ROSALYN GREENE, THE MAGIC OF SHAPESHIFTING (2000).

16. Some Neo-Pagans invoke the energy of polytheistic deities, commonly including deities from ancient Babylonian, Egyptian, Greek, and Sumerian pantheons. Asatru is the specific observance of European-based deities most commonly associated with the Norse pantheon. *See generally* IVO DOMINGUEZ, JR., OF SPIRITS: THE BOOK OF ROWAN (2001).

17. *See generally* MOURA, GREEN WITCHCRAFT, *supra* note 13; GREENE, *supra* note 15; DOMINGUEZ, *supra* note 16.

18. IRIS FIREMOON, FIREFLY: WICCAN ADVANCEMENT 13 (2008).

19. Native American religion is highly similar and interchangeable with the above-mentioned forms of Neo-Paganism. However, the American legal treatment of Native American religions has a storied history stemming from the colonial era. It would be disin-

The core of Neo-Paganism is the central belief that humans are connected to and should strive to live in harmony with the Earth, elements of nature, and the universe by extension.[20] While the Neo-Pagan belief system embraces a multitude of ways to invoke the divine, most Neo-Pagans observe a complex central deity, typically referred to as the Goddess, Mother Earth, or Gaia.[21] The names of this fundamental deity reflect the Neo-Pagan belief that humans are part of the Earth and part of the Goddess, although Neo-Pagans extend this central belief to the entire cosmos.[22]

The Goddess, while usually personified as feminine, is dualistically "female and male, transcendent yet the center of all," revealing that She is both the progenitor of all creation and simultaneously part of all creation.[23] While the Neo-Pagan movement is commonly considered to have cognizably emerged in the late twentieth century,[24] Neo-Pagans consider observance of the Mother Goddess to reflect the purest and most ancient form of spirituality.[25] The Goddess is commonly revered as a tripartite deity of the feminine: Mother, Maiden, and Crone[26] with a dualistic tripartite deity[27] of

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genuous to group the unique treatment of indigenous religions with the treatment of the modern Neo-Pagan movement. *See* CAROL BARNER-BARRY, CONTEMPORARY PAGANISM: MINORITY RELIGIONS IN A MAJORITARIAN AMERICA 13-19 (2005) (recounting the history of Native American religious rights, notably the Rule of Discovery that Chief Justice John Marshall used to undermine the Native American's claim to land rights due to their non-Christian beliefs and being "fierce savages." Johnson v. McIntosh, 21 U.S. 543, 590-91 (1823)).

20. *See* FIREMOON, *supra* note 18, at 13 ("The earth. She vibrates as the universe dances in spirals within itself. . . . There is a single driving force behind these things, just as we somehow feel inherently connected with them.").

21. *Id.* at 15.

22. *Id.* at 15-16 (stating that a Wiccan strives "to become more aware of the earth, the universe, and the self").

23. JOSEPH CAMPBELL, THE MYTHIC IMAGE 157 (1974).

24. *See* FIREMOON, *supra* note 18, at 157-58 (recalling Gerald Gardner's seminal work establishing the "Gardnerian Wicca" tradition in the 1950s in England, and Raymond Buckland's effort that brought his "Seax Wiccan" tradition from England to the United States). *But see* MOURA, GREEN WITCHCRAFT, *supra* note 13 at 13 (critiquing the overemphasis on late twentieth century initiatory traditions of Gardner and others. Moura contends the modern initiatory traditions are just one aspect of a much richer and older tradition); *see also* BARNER-BARRY, *supra* note 19, at 33 (affirming that there is a group of practitioners, hereditary witches, who trace their religious lineage back generations, even centuries).

25. *See* PHYLLIS CUROTT, BOOK OF SHADOWS 57 (1998) (stating the origin of "Goddess worship dates back to the Upper Paleolithic Age, about 25,000 to 30,000 B.C.E."). *See also* Ambreen Ali, *Statue of Busty Woman May Be World's Oldest*, NEWSER, (May 13, 2009), http://www.newser.com/story/58907/statue-of-busty-woman-may-be-worlds-oldest.html (recounting the discovery of a 35,000 year old ivory statue depicting a full-figured female); MOURA, GREEN WITCHCRAFT, *supra* note 13, at 26 (stating a large body and exaggerated sexual features are "the earliest images of the Divine as female").

26. *See* FIREMOON, *supra* note 18, at 15 (explaining the three forms of the Triple Goddess are "the Maiden, the Mother, and the Crone").

the masculine: Father/Creator, Son/Preserver, and a third sage-like and/or warlike male deity.[28] The triple aspects of a dualistic deity are representative of the cycle of life, death, and rebirth, the changing seasons, and the dynamic universe.[29] Similar triple aspects of a central deity are found in Eastern and Western orthodox religions.[30]

Neo-Paganism's central tenet of harmony with nature inherently promotes peaceful behavior and benevolent use of powers derived from the faith.[31] A basic observance in Neo-Paganism is The Law of Return or The Threefold Rule: "[W]hatever magical power is sent out returns threefold . . . . You do not want to harm others because what is sent comes back," and the Witches' Rede: "If it harms none, do what you will . . . ."[32] The underlying principle is that each person is connected to and able to access the energy of the entire universe.[33] Magic is how a Neo-Pagan practitioner acts as a conduit of this energy to manifest his or her intent to a specific focal point, a

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27. ANN MOURA, ORIGINS OF MODERN WITCHCRAFT 41 (2002) ("The idea of Deity as dualistic had entered into human consciousness by at least 28,000 B.C.E. . . . . People honored a 'Great He/She' deity . . . .").

28. *See* MOURA, ORIGINS OF MODERN WITCHCRAFT, *supra* note 27, at 47-48 (explaining that Shiva "as the Holy Spirit" in the current Hindu Trinity "with God the Father as Brahma, Vishnu as God the Son (that aspect of Deity which becomes incarnate from time to time)," supplanted "Indra, the Great Warrior" as the third Deity. Similarly, the Norse Male Trinity includes "Odin, King of the Gods; Tyr, the Lawgiver; and Thor, the Great Warrior").

29. Neo-Pagans view divinity alternately as one, two, three, or more interconnected and balanced aspects:

> The more we "cut apart" the divine, the more we understand it, although the further we may be from the whole picture. If we cut the deity into two parts, we visualize the God and the Goddess. This duality is seen in many forms: light/dark powers . . . [and] yin/yang . . . . When the deity is cut into three parts, we expose the secrets of . . . (The Triple Goddess), which represents the phases of the moon, and rites of passage. If the deity is cut into four parts, we see the four elements (earth, air, fire, and water), with spirit being the glue that connects them.

FIREMOON, *supra* note 18, at 15.

30. *See, e.g.*, MOURA, ORIGINS OF MODERN WITCHCRAFT, *supra* note 27, at 119 (explaining that in Hinduism, "[t]he Triple Goddes is still Shakti, and the Horned God is still Shiva, who is specifically named in India as Shiva Tryambaka—*wed to the Triple Goddess*") (emphasis in original); Lewis Loflin, *Overview of Gnosticism*, http://www.sullivan-county.com/id2/gnosticism.htm (last visited Nov. 19, 2010) (stating that Christianity observes the Holy Trinity: father, son, and holy spirit and "in Gnosticism the Holy Spirit was the 'feminine' or female aspect of God. Thus the Holy Spirit was the true 'mother' of Jesus").

31. Most books containing applicable practices of Neo-Paganism include an admonishment to use the powers of the faith for beneficial purposes only, such as: "*magick should not intentionally be used to harm others.* Spells which interfere with a person's choice and free will, are considered . . . out of bounds . . . . What a person does to others . . . that person does to himself or herself as well." FIREMOON, *supra* note 18, at 19 (emphasis in original).

32. *See* MOURA, GREEN WITCRAFT, *supra* note 13, at 11.

33. *See* FIREMOON, *supra* note 18, at 18, 22.

process by which he becomes more intensely subject to the energy than the recipient of the magic.[34]

To illustrate this process with a basic metaphor, imagine the process of jumping a car battery. There are three things needed: a power source—either a generator or another car's battery, a jumper cable, and the dead battery. While the purpose of jumping the car is to transfer energy into the dead battery, the jumper cable is exposed to more of the energy from the power source than the actual dead battery, because the cables must be connected to the power source before and after the energy is transferred. Metaphorically, the practitioner of Neo-Paganism is the jumper cable who ritualistically connects and disconnects from the power source in order to imbue an entity with power.[35] It would be counterintuitive and self-destructive for a Neo-Pagan to expose himself to anything but positive energy.[36] Positive energy not only means benevolent, but it also means that the target must be receptive to the magic, because it would be impermissible to manipulate another person with magic against their will even if it was for a seemingly good cause.[37]

The core principles of Neo-Paganism reveal that the religion is fundamentally gentle and emphasizes harmony with all external forces, whether they are natural, human, or spiritual. A closer examination reveals that Neo-Paganism is more similar than dissimilar to many aspects of orthodox religions.

B. SIMILARITIES AND DIFFERENCES BETWEEN NEO-PAGANISM AND ORTHODOX RELIGIONS

The similarities between Neo-Paganism and orthodox religions are more striking than the differences. A few areas of significant overlap are how and when the holy days are observed, and fundamental beliefs about the practitioner's place in the universe.

Neo-Pagans celebrate the lunar cycles, typically on Esbats when the moon is full,[38] as well as eight major annual holidays, called Sabbats.[39] Each phase of the lunar cycle and the Sabbats correspond to a cycle or

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34. *See id.* at 19, 22.
35. *See id.* at 22.
36. *See id.* at 19-23.
37. *See id.*
38. *See* FIREMOON, *supra* note 18, at 45.
39. *See id.* at 43-44. "The word 'Sabbat' comes from the old Greek word 'sabatu,' meaning 'to rest'" and shares the same derivative history as the similar word used by orthodox religions, "Sabbath." EDAIN MCCOY, SABBATS, A WITCH'S APPROACH TO LIVING THE OLD WAYS 4 (2002).

phase of life.[40] The Sabbats each last approximately six-and-a-half-weeks, beginning with Yule on the winter solstice on December 21 or 22 (birth), which also marks the ending point of the Samhain period (death).[41]

Each Sabbat represents a stage of life, so Yule symbolizes the sun returning "after the darkest night of the year to again bring warmth and fertility,"[42] and its diametric opposite, Sabbat of Midsummer on June 22 marking "the height of the sun's power" before declining for the next six months.[43] The observance of major Neo-Pagan Sabbats is intriguingly similar, in timing and substance, to the major holy days of orthodox religions, particularly Roman Catholicism.[44] Consider the following chart:[45]

40. *See* CUROTT, *supra* note 25, at 184 (describing the significance of magic connected to each lunar phase); MCCOY, *supra* note 39, at 4 (stating "[t]he eight solar Sabbats . . . each honor[ ] a stage in the eternal life cycle of the Goddess and the God. Many pagans see time as one eternal whole which is forever turning . . . .").

41. MOURA, GREEN WITCHCRAFT, *supra* note 13, at 183 (marking "the departure of the Holly King (known today as the Dark Lord, old Saint Nick, and Father Time) and arrival of the Oak King (known today as the Sun King, Jesus, and the New Year's Baby) . . . .").

42. *See* MCCOY, *supra* note 39, at 53.

43. *Id.* at 149.

44. *See* CUROTT, *supra* note 25, at 293-94.

45. *See* MCCOY, *supra* note 39, at 23-189; CUROTT, *supra* note 25, at 293-94; INTERFAITH CALENDAR, http://interfaithcalendar.org/index.htm (last visited Oct. 5, 2010); *Hanukkah*, HISTORY.COM, http://www.history.com/topics/hanukkah (last visited Oct. 5, 2010); *Hinduism*, BBC, http://www.bbc.co.uk/religion/religions/hinduism (last visited Oct. 5, 2010); Ajaan Lee Dhammadharo, *Visakha Puja*, METTA FOREST MONASTERY (last visited Aug. 23, 2010), http://www.accesstoinsight.org/lib/thai/lee/visakha.html; THE UPPER ROOM, http://www.upperroom.org/askjulian/default.asp?act=answer&itemid=39734 (last visited Oct. 5, 2010); *Pentecost*, NEW ADVENT, http://www.newadvent.org/cathen/15614b.htm (last visited Oct. 5, 2010); *What is Isra and Lailat al Miraj?*, IMUSLIMZ NETWORK, http://www.imuslimz.com/what-is-isra-and-lailat-al-miraj (last visited Oct. 5, 2010); SOJOURNEY, http://www.sojourney.co.za (last visited Oct. 5, 2010); Ariela Pelaia, *Judiasim*, ABOUT.COM, http://judaism.about.com/od/holidays/a/roshhashanah.htm (last visited Oct. 5, 2010).

Religion:	Roman Catholicism:	Date:	Neo-Paganism:	Date:	Other Religions' Notable Days:	Date:
Holiday:	All Saints Day	1-Nov	Samhain	31-Oct	Diwali/Divali (Hinduism)	Oct-Nov
Significance:	Honoring Saints		Honoring Deceased Ancestors, final harvest		Celebrate triumph of good with lit candles	
Holiday:	Christmas	25-Dec	Yule/Saturnalia/Winter Solstice	22-Dec	Hannukah (Judaism)	Dec
Significance:	Birth of Jesus Christ in Bethlehem		(Re-)Birth of Sun God		Rededication of Holy Temple of Jerusalem	
Holiday:	St. Bridget's Day	2-Feb	Imbolc	2-Feb	Mahashivrati (Hinduism)	Jan-Feb
Significance:	Honor Virgin Saint/Purification		Honor Fertility Goddess (Brigid)/Purification		Union of God and Goddess/Purification	
Holiday:	Ash Wednesday/Lent starts	Feb-Mar	Ostara/Eostre	22-Mar	Ramayana/New Year (Hinduism)	Mar-Apr
Significance:	Ashes from prior year used to atone sins		Re-emergence of Fertility Goddess from darkness		Incarnation of Vishnu reclaims bride from darkness	
Holiday:	Easter/Lent ends	Mar-Apr	Beltane	1-May	Visakha Puja (Buddhism)	May
Significance:	Resurrection of Jesus Christ, eternal life		Fertility in bloom, primal joy		Buddha's death and full transcendence	
Holiday:	Pentecost/Whitsunday	May-Jun	Lithe/Litha (Midsummer)	22-Jun	Lailat al Miraj (Islam)	May-Jul
Significance:	Descent of Holy Spirit onto Disciples		Sun God's zenith, nurturing, fullness		Prophet Muhammed visits with Allah and Moses	
Holiday:	Assumption of Virgin Mary	1-Aug	Lughnasadh/Lammas	1-Aug	Lammas (Traditional Christianity)	1-Aug
Significance:	Honoring mother of Christ to Heaven		Celebrating first harvest and God(dess) for the gift		Celebrating first harvest	
Holiday:	All Angels' Day	29-Sep	Mabon	22-Sep	Rosh HaShanah/New Year (Judaism)	Sep-Oct
Significance:	Honor Archangel of fire who fights evil		Second harvest, waning Sun God, thanksgiving		Casting away sins, community	

Without detailing the nuanced similarities between certain Neo-Pagan and orthodox holidays, a cursory review indicates that the general timing and significance of many orthodox religious observances are intriguingly similar to Neo-Paganism. Even the Neo-Pagan observance of lunar holy days is a concept similarly engrained in orthodox religions, as most belief systems have cosmologically reconciled the cyclical differences between the sun and the moon.[46]

Also similar, the aforementioned Neo-Pagan Law of Return and the Witches' Rede[47] that emphasize benevolent behavior and a karmic sensibility are reminiscent of the Golden Rule of Confucianism[48] and the teachings of Jesus Christ.[49] The Neo-Pagan belief in the impermanence of life and the interconnectivity of the universe strikes a transcendental chord very akin to Zen Buddhism: "[I]mpermanence itself is preaching impermanence . . . and this, as it is, is preaching, practising, and realizing the Buddha-nature."[50]

It is significant that many Neo-Pagan practitioners observe beliefs from multiple subdivisions therein, so Neo-Pagans may practice Wiccan candle magic, Druidic shamanism, and meditate through ecstatic magic and refer to their beliefs by one or more of these labels.[51] Interestingly, it is not uncommon for Neo-Pagans to incorporate aspects of orthodox religion into their beliefs, such as Judaism or Hinduism.[52]

At first blush this seeming hodgepodge of beliefs gives rise to some critics' assertion that Neo-Paganism is too unstructured to be classified as a religion.[53] This argument is negated by two major arguments. First, Neo-Paganism is a dynamic belief system that anticipates adaptations and em-

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46. *See* CAMPBELL, THE MYTHIC IMAGE, *supra* note 23, at 141-62 (stating that numerous belief systems have a duodecimal (based on the number twelve) or sexagesimal (based on the number sixty) calendar at odds with the number thirteen that must compensate for the variance between the imperfect number of lunar cycles in the approximately 365.25 day solar year. Many systems measure longer periods or ages of time in accordance with a complete cycle in which the disparity resets itself).

47. *See supra* Part II.A.

48. *World Scripture*, UNIFICATION, http://www.unification.net/ws/theme015.htm (last visited Nov. 8, 2010) ("Tsekung asked, 'Is there one word that can serve as a principle of conduct for life?' Confucius replied, 'It is the word shu--reciprocity: Do not do to others what you do not want them to do to you.'").

49. *Mark* 12:31(New Oxford) ("You shall love your neighbor as yourself.").

50. MASAO ABE, ZEN AND WESTERN THOUGHT 52 (1985).

51. *See* MCCOY, *supra* note 39, at 3 ("Modern paganism is a rich tapestry of interwoven traditions, ideas, and orientation.").

52. *E.g.*, MOURA, ORIGINS OF MODERN WITCHCRAFT, *supra* note 27, at 174 (explaining that many Neo-Pagans observe Kabballah which "despite allegations of [its] ancient origins . . . the historic [origin] is in the Jewish community of medieval Europe"); FIREMOON, *supra* note 18, at 45 (noting that deities associated with the New Moon in Neo-Paganism include two Hindu gods, Kali and Shiva).

53. *See* Roberts v. Ravenwood Church of Wicca**,** 292 S.E.2d 657, 660-61 (Ga. 1982) (Jordan, J., dissenting).

braces any knowledge—scientific[54] or religious—that heightens awareness of the workings and interconnections of the universe.[55] Therefore, it is natural for Neo-Pagans to incorporate any pertinent observance or practice that better enables them to connect to the divine without necessarily subscribing to all surrounding dogma.[56]

A related belief in Neo-Paganism is that many modern orthodox beliefs are static adoptions of more ancient and universal Neo-Pagan beliefs;[57] so orthodox versions of creation,[58] a great deluge,[59] and the virgin birth of the solar or redemptive god,[60] for example, are implicitly Neo-Pagan and therefore welcome variations of the same principal symbolism.[61]

Second, every major orthodox religion has notable diversity in the specific beliefs of the various subsets of the larger religion, so differences between Neo-Pagan practitioners are not aberrant from differences within other accepted belief systems. For example, the Sunni and Shiite branches of Islamic faith are divided as to whether Allah is corporeal, and the Sunnis deviate from the Shiites belief in the "House of Ali who is believed to have

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54. *See* MOURA, ORIGINS OF MODERN WITCHCRAFT, *supra* note 27, at 1 ("Awareness of universal bodies . . . and the possibility of life on other planets . . . force[s] us to realize that we can no longer consider ourselves isolated from the rest of the universe.").

55. *See id.* (elaborating that "[o]ver time, [Neo-Paganism] evolved to reflect, and deflect, changes in society, economy, politics, and the new religions that supported these innovations . . . . [T]he Old Religion never lost its deeper awareness of the interrelationship of all life on Earth and our place among the stars"); KEN WILBER, QUANTUM QUESTIONS 113 (2000) ("[T]hose individuals to whom we owe the great creative achievements of science were all of them imbued with the truly religious conviction that this universe of ours is something perfect and susceptible to the rational striving of knowledge.").

56. *See* MOURA, ORIGINS OF MODERN WITCHCRAFT, *supra* note 27, at 1-3.

57. *See id.*

58. *Compare id.* at 29 (explaining the 7000 year old Dravidian mythology "that addressed the creation of the world in seven days . . . the Tree of Life . . . and the snake . . . ."), *with Genesis* 1:1-3:13 (New Oxford) (recounting a Western Orthodox Creation belief that "on the seventh day God finished the work" of creating the universe before "the serpent" compelled the first humans to consume from "the tree of knowledge").

59. Stories of a great flood exist in the indigenous mythologies of several continents, as well as some island nations. *See* JOSEPH CAMPBELL, MYTHS TO LIVE BY 74-76 (1972).

60. *See* MOURA, ORIGINS OF MODERN WITCHCRAFT, *supra* note 27, at 99-105; CAMPBELL, THE MYTHIC IMAGE, *supra* note 23, at 32-66 (showing similarities in Christian, Egyptian, Greek, Hindu, Persian, Phrygian, and Roman deities).

> The recurrence of many of the best-loved themes of the older, pagan mythologies in legends of the Christian Savior was a recognized feature intentionally stressed in the earliest Christian centuries. . . . [T]he birth, death, and resurrection of the new [Christian] savior . . . prefigured in the *mere* myths of the pagan gods . . . .

CAMPBELL, THE MYTHIC IMAGE, *supra* note 23, at 32-33 (emphasis added).

61. *See* CAMPBELL, THE MYTHIC IMAGE, *supra* note 23, at 32-33; MOURA, ORIGINS OF MODERN WITCHCRAFT, *supra* note 27, at 1.

been [Allah]'s designated repository of the spiritual authority inherent in that line."[62] Sunnis do not recognize Ali and his descendants to have been the only chosen leadership of Allah, which was the cause of the initial split in the groups, stemming to around 680 CE.[63]

Similarly, subsets of Christianity differ vastly about many beliefs, including: the existence of Purgatory; whether the *Apocrypha* is a sacred text; the status of Mary, mother of Jesus; and whether the actual flesh and blood of Jesus Christ is transmogrified through the communion ritual.[64] The fact that Neo-Pagans may connect to the divine by meditating for guidance, tying knots to manifest intention, conduct rituals to summon natural elements, and/or invoke an anthropomorphic deity(ies) and possibly earth spirits is not dissimilar to Christians who may pray for guidance, use a cross or rosary beads, partake in communion to symbolically or actually consume their deity, and/or invoke a tripartite deity and a vast array of saints.[65]

A true distinction of Neo-Paganism from Western orthodox religions does exist, however. Neo-Pagans practice magic, which is manipulating aspects of reality by manifesting personal intent through various magical media.[66] Unlike Western orthodox religions that seek results from appealing to the external power of a supreme being, many Neo-Pagans believe the power to attain results is internal and the use of outside media enables them to hone and intensify their innate power:[67]

> Magic[ ] has been compared to the concept of praying, but this is a false statement. Praying is passive, in which practitioners ask an outside consciousness to make changes for them. Utilizing magic[ ] is an active task, requiring practi-

62. Bethany Mason, *Following the Prophet: A Comparison of Sunni and Shiite Muslims*, EAST TENN. STATE UNIV. (Apr. 2006), http://www.etsu.edu/writing/teaching &theory_s06/sunnis.htm.

63. *Id.*

64. *See Comparison of Christian Denominations' Beliefs*, RELIGION FACTS, (March 5, 2005), http://www.religionfacts.com/christianity/charts/denominations_beliefs.htm (explaining that Catholics alone believe in Purgatory, only Catholics and Greek Orthodox believe the *Apocrypha* to be sacred text, and Greek Orthodox do not believe in the immaculate conception of Jesus, while Catholics believe Mary was sinless and was assumed into heaven instead of dying); *see also* PRUDENCE JONES & NIGEL PENNICK, A HISTORY OF PAGAN EUROPE 75 (1995).

65. *See* JONES & PENNICK *supra* note 64, at 103-05, 160-62 (noting that many Christian saints are synonymous with traditional pagan deities and earth-spirits).

66. "Magick runs through all of us. It is the cosmic energy that is within everything." FIREMOON, *supra* note 18, at 18 (explaining further that Neo-Pagans use magic to "'stir up the energy a little bit' for a specific purpose").

67. *Id.*

> tioners to use their connection to the universe to make changes for themselves.[68]

So where a Jew might pray to God for a sick person to convalesce, a Neo-Pagan might conduct a healing ritual with candles and invoke elements of nature to raise and channel healing energy to the ill person.[69]

Courts occasionally use this self-powered and seemingly non-deistic belief in magic to discredit Neo-Paganism as a religion: "'The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation.' In my opinion the Wiccan faith does not meet this test."[70] This statement of Georgia's Chief Justice Jordan suggests that only a belief system revolving around an omnipotent, monotheistic deity can be considered a religion.[71] However, the self-powered aspect of Neo-Pagan practice does not justify its removal from the penumbra of recognized religion. Even Neo-Pagan practitioners that do not invoke an actual deity in their magic still consider themselves part of the Goddess, thus, the Goddess is implicit in any magical act a Neo-Pagan performs.[72] Thus, there is a belief in a relation to a superior, albeit androgynous, deity, which may suffice to meet the Chief Justice's interpretation.[73]

Furthermore, even if Chief Justice Jordan's interpretation of religion is most narrowly construed and would be considered valid, *arguendo*, the literal application of his standard could discount most forms of orthodox religion: Buddhism, Christianity, and Hinduism. The latter two religions could be viewed as similarly polytheistic because they centrally believe in a three-part deity; therefore they do not adhere to a "relation to God" in the singular.[74] Buddhism espouses the quest to achieve Nirvana, which means that the practitioner in herself possesses the self-powered ability to be one and co-equal with the highest level of divinity, thereby failing to meet Jordan's requirement that deity be superior to humans.[75] Therefore, similar arguments could be made to discredit the recognition of orthodox religions by the same standards the Chief Justice leverages to discredit Neo-Paganism.[76]

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68. *Id.* at 18-19.
69. *Id.*
70. *E.g.*, Roberts v. Ravenwood Church of Wicca, 292 S.E.2d 657, 661 (Ga. 1982) (Jordan, J., dissenting) (quoting United States v. Macintosh, 283 U.S. 605, 633-34 (1931) (Hughes, J., dissenting)).
71. *Id.*
72. *See supra* Part II.A.
73. *Roberts*, 292 S.E.2d at 661 (Jordan, J., dissenting).
74. *See supra* Part II.A.
75. *See supra* Part II.A.
76. *Roberts*, 292 S.E.2d at 661 (Jordan, J., dissenting).

As is evidenced by Chief Justice Jordan's short-sighted dissent, any attempt to differentiate characteristics of Neo-Paganism from orthodox religions is difficult, because the common threads between orthodox religions and Neo-Paganism weave an intricate web that cannot be pulled apart by a clear-cut definition of what constitutes a religion.[77] Inspired by similar difficulties, the United States Supreme Court has rejected narrow interpretations of religion and moved away from court-defined qualities of theism and focused on the individual's belief, as will be discussed in finer detail in Part II.D.[78]

C. THE NEO-PAGAN STRUGGLE TO OVERCOME MILLENIA OF ERRONEOUS AND DEMEANING STEREOTYPES

Neo-Pagans do not observe or even recognize Satan,[79] because Satan is a figure originating from the Jewish-Christian-Islamic belief system.[80] Western orthodox religions emphasize a strict dichotomy of good and evil, therefore, the existence of the supremely good God requires a vying inappositely evil being like Satan.[81] Neo-Paganism is about harmony and balance, so while the Goddess has a creative and a destructive aspect, destruction is viewed as a necessary phase of existence and is not viewed as malevolent.[82] For example, crops must be harvested, which is a destructive act even though the food is then used to sustain life.[83] Furthermore, it would be counter-intuitive to suggest that practitioners of a faith that believes in The Threefold Rule would intentionally bring harm to others, because they would cause greater harm to themselves.[84]

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77. *Id.*; *see also supra* Part II.A.

78. *See* Torcaso v. Watkins, 367 U.S. 488 (1961); United States v. Seeger, 380 U.S. 163 (1965); Welsh v. United States, 398 U.S. 333 (1970) (overturning traditional attempts by the Court to define religion in terms of belief in a monotheistic deity, as had been done in *Davis v. Beason*, 133 U.S. 333 (1890)).

79. *See* MOURA, GREEN WITCHCRAFT, *supra* note 13, at 27 ("The Christian deity of evil is not part of the Witch's pantheon. Instead, the dark and the light are seen as a balance of positive and negative energies—every yin has its yang.").

80. *See Genesis* 3:1-22 (describing Satan as the serpent in the Garden of Eden); *Job* 1:6-12 (attributing divine capabilities to Satan); *Isaiah* 14:12-14 (describing Satan's hubris and fall from grace, antithetical to the followers of God).

81. *Isaiah 14:12-14*.

82. *See* MOURA, GREEN WITCHCRAFT, *supra* note 13, at 242 (reciting part of the Mabon (second harvest) ritual: "The wheel of the year is ever turning, through sun tides and mood tides, through seasons and harvests, for plants and for people; for all life moves within the wheel of the year from life to death to life again").

83. *See generally* MCCOY, *supra* note 39, at 173-77 (recounting the symbolism of the first harvest Sabbat, Lughnasadh).

84. *See supra* Part II.A.

Despite the gentle and non-dichotomous nature of Neo-Pagan beliefs, the Western orthodoxy's sense of conflicting forces is often projected onto Neo-Paganism in popular media, creating and perpetuating misconceptions about Neo-Pagan practices.[85] The concept of white magic versus black magic is not grounded in Neo-Paganism but in the entertainment world:

> With fairytales of bad witches, spiders, and hexes, it is easy to come to the conclusion that dark forces are evil. Although disappointing to the average Hollywood director, dark magick does not refer to black magick. While dark magick refers to the balance of natural cycles of life, black magick is done at the cost of life and liberty. Black magick is any magickal working that has the intent to harm, manipulate, or force others against their will. Black magick has no place in Wicca and those who claim otherwise are imposters.[86]

The movie *The Wizard of Oz*[87] seminally featured a good witch and a bad witch. More recently, the Harry Potter books[88] and movie franchise[89] and popular television series, such as *Charmed*[90] and *Supernatural*,[91] depict benevolent magic, but also depict co-equal malevolent magic. Worse still

85. *See* FIREMOON, *supra* note 18, at 117.

86. *Id.*

87. THE WIZARD OF OZ (Twentieth Century Fox 1939).

88. J. K. ROWLING, HARRY POTTER AND THE SORCERER'S STONE (Arthur A. Levine Books 1998); J. K. ROWLING, HARRY POTTER AND THE CHAMBER OF SECRETS (Arthur A. Levine Books 1999); J. K. ROWLING, HARRY POTTER AND THE PRISONER OF AZKABAN (Arthur A. Levine Books 1999); J. K. ROWLING, HARRY POTTER AND THE GOBLET OF FIRE (Arthur A. Levine Books 2000); J. K. ROWLING, HARRY POTTER AND THE ORDER OF THE PHOENIX (Arthur A. Levine Books 2003); J. K. ROWLING, HARRY POTTER AND THE HALF BLOOD PRINCE (Arthur A. Levine Books 2005); J. K. ROWLING, HARRY POTTER AND THE DEATHLY HALLOWS (Arthur A. Levine Books 2007).

89. HARRY POTTER AND THE SORCERER'S STONE (Warner Brothers Pictures 2001); HARRY POTTER AND THE CHAMBER OF SECRETS (Warner Brothers Pictures 2002); HARRY POTTER AND THE PRISONER OF AZKABAN (Warner Brothers Pictures 2004); HARRY POTTER AND THE GOBLET OF FIRE (Warner Brothers Pictures 2005); HARRY POTTER AND THE ORDER OF THE PHOENIX (Warner Brothers Pictures 2007); HARRY POTTER AND THE HALF BLOOD PRINCE (Warner Brothers Pictures 2009); HARRY POTTER AND THE DEATHLY HALLOWS, PART 1 (Warner Brothers Pictures 2010); HARRY POTTER AND THE DEATHLY HALLOWS, PART 2 (Warner Brothers Pictures 2011).

90. *Charmed* (WB Television Network television series broadcast 1998-2006).

91. *Supernatural* (WB Network television series broadcast 2005-06; CW Network television series broadcast 2006-present).

are depictions of Neo-Pagans as purely barbaric or evil, such as the cult classics, *The Wicker Man*[92] and *The Blair Witch Project*.[93]

A rough analogy to demonstrate the nonsensicality of these popular images would be if every media depiction of a devout Christian included a struggle against a co-equal satanic force. Imagine *The Flying Nun*[94] pitted in an epic battle against an aeronautical worshipper of Satan. Imagine the family from *7th Heaven*[95] using the power of Jesus Christ in every episode to engage in mortal combat with the forces of evil that are equally represented and powerful amongst the population. The degree of ridiculousness that a Christian would perceive from such ubiquitously extreme and inaccurate depictions of Christianity is equivalent to what Wiccans perceive from popular media depictions of their faith. Yet the entertainment world has little use for depicting a Neo-Pagan living an ordinary existence, dealing with realistic ordeals.[96]

Vampirism, the practice of drinking human blood, is also a distorted byproduct of Western orthodox religion with no basis in Neo-Paganism.[97] The folklore surrounding vampires makes them a bizarre version of the Antichrist:[98] shunning the Christian cross, rising corporeally from the dead, and ritualistically drinking the blood of others. [99] A vampire's sanguineous partaking in which it damns the soul of the human victim[100] is conspicuously converse to Jesus Christ who offered his blood to redeem the souls of humans.[101] The concept of a corpse returning to life is anathema to Neo-

92. THE WICKER MAN (British Lion Films 1973) (remade by Warner Brothers Pictures 2006).

93. THE BLAIR WITCH PROJECT (Haxan Films 1999).

94. *The Flying Nun* (ABC television series broadcast 1967-1970).

95. *7th Heaven* (WB Network television series broadcast 1996-2006, CW Network television series broadcast 2006-2007).

96. *See* FIREMOON, *supra* note 18, at 117.

97. The basis for the modern vampire image derives from southeastern Europe in the eighteenth century. The quintessential vampire, Dracula, is based on the fifteenth century military governor of Walachia (present day Romania), Vlad III (the Impaler), a Christian despot who sought to terrify his foes with graphic acts of mutilation to slain enemies, which included drinking their blood. *See* ENCYCLOPEDIA BRITANNICA, *Vampire* (2010), *available at* http://www.britannica.com/bps/search?query=vampire; ENCYCLOPEDIA BRITANNICA, *Vlad III* (2010), *available at* http://www.britannica.com/bps/search?query=vlad+the+impaler.

98. Kristofer Widholm & Bernard McGinn*, Antichrist: An Interview with Bernard McGinn*, CABINET MAGAZINE, 5 Winter 2001-02, *available at* http://www.cabinetmagazine.org/issues/5/widholm.php (describing the Antichrist as Satan incarnate "within the context of Christian belief, where Jesus is not only the messiah, but also God come to earth, that the Antichrist figure emerges as the flip side of the coin, so to speak").

99. *See* Widholm & McGinn, *supra* note 98.

100. *See id.*

101. *See Ephesians* 1:7 (New Oxford) ("In [Jesus Christ] we have redemption through his blood."); *Revelation* 5:9 (New Oxford) (singing to Jesus Christ, "for though was

Pagan beliefs, because it unnaturally refutes the cycle of life and death.[102] Therefore, vampirism has no correlation to Neo-Paganism.

Another common misconception about Neo-Paganism, the practice of human and animal sacrifice, derives from Rome before it was an Empire.[103] The Romans, under General Julius Caesar and his military and imperial successors, led a notorious smear campaign against the indigenous beliefs of the Celts, primarily the druids because they were the academic, legal, spiritual, and medical core of Celtic society.[104] To accuse the elite minds of Celtic society of human sacrifice was a way to rationalize the conquest and Romanization of these uncivilized savages.[105]

The pre-Christian Romans made similar accusations against the early Christians, claiming they sacrificed babies to obtain blood for communion.[106] Ironically, when Christianity became the state religion of Rome, the Christians took up the persecution of the druids, because Christians then "had a vested interest in blackening the picture they painted of the druids and in denouncing practices they deemed contrary to their own."[107] Another irony is that the Romans advocated the mortal confrontation of thousands of humans and animals for the sake of entertainment in the Colosseum,[108] yet maligned the alleged religious killing of humans and animals in Celtic society.

While early pagans certainly practiced animal sacrifice as a symbolic offering for the good graces of their deity(ies),[109] this is akin to early Western orthodox practices.[110] Similarly, while it is debatable whether the ancient druids or other early pagans ever practiced human sacrifice or whether sacrifice was symbolic only,[111] the dogma of human sacrifice is also deeply

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slain and by thy blood didst ransom men for God from every tribe and tongue and people and nation").

102. *See* FIREMOON, *supra* note 18, at 155 ("[T]he pagan way is not a path of grieving about death. [Neo-Pagans] embrace death as a part of the never-ending cycle of life.").

103. JEAN MARKALE, THE DRUIDS: CELTIC PRIESTS OF NATURE 159-63 (1999).

104. *Id.* at 4-10, 160-61.

105. *Id.* at 159-63.

106. *Id.* at 161.

107. *Id.* at 160.

108. *See Colosseum*, HISTORY.COM, http://www.history.com/topics/colosseum (last visited Oct. 11, 2010).

109. *See* MARKALE, *supra* note 103, at 159.

110. *E.g.*, *Exodus* 12:5-6 (New Oxford) (proclaiming the Passover ritual: "Your lamb shall be without blemish . . . you shall keep it until the fourteenth day of this month; when the whole assembly of the congregation of Israel shall kill their lambs in the evening.").

111. *See* MARKALE, *supra* note 103, at 159 (suggesting Druidic sacrifice was symbolic only and similar to how "the Catholic Mass is a memorization of a bloody ritual by which humanity, in the person of Jesus, surpassed its original mortal state and transcended itself to the divine plane through death and rebirth.").

ingrained in orthodox religions.[112] Therefore, it is difficult to discern that the sacrifices of ancient pagans were any more real or vicious than those of other ancient religions still extant.

Yet, the inaccurate associations of paganism with reprehensible behavior extended beyond the Roman Empire, and reached into medieval Europe with misconceptions that lingered into the Colonial era,[113] eventually bleeding into the new world.[114] "The Great Witch Hunt" occurred from the late fifteenth to mid seventeenth centuries in Europe,[115] continuing for another half century in colonial America.[116] Yet again, an undeniable irony exists in that an estimated 40,000-100,000 people were brutally killed in the name of Christendom, typically by burning, and many were not even accused of harming anyone.[117] The Salem Witch Trials of the late seventeenth-century epitomize what can best be described as the religiocentric pandemonium of a fearfully puritanical society.[118] Rationality yielded to paranoia, and in some cases, opportunism, as the plurality of Salem's community persecuted its own people with ridiculous accusations of hexing pregnant mothers and flying on broomsticks at night to expedite their voyage to meet with Satan in orgiastic rituals.[119]

Regardless of ancient practices and historical accusations, contemporary Neo-Pagans do not dignify live sacrifice in their practice.[120] While ritualistic tools of Neo-Paganism may include a knife, referred to as an athame, this device "is not used for any physical tasks," such as cutting, because it

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112. *See Genesis* 22:2 (New Oxford) ("Take your son, your only son Isaac, whom you love, and . . . offer him there as a burnt offering upon one of the mountains that I shall tell you"); *see also* MARKALE, *supra* note 103, at 159.

113. *See* JONES & PENNICK, *supra* note 64, at 196-207.

114. *See* BARNER-BARRY, *supra* note 19, at 48.

115. JONES & PENNICK, *supra* note 64, at 204.

116. *See* BARNER-BARRY, *supra* note 19, at 48-49.

117. *See* JONES & PENNICK, *supra* note 64, at 204-07; BARNER-BARRY, *supra* note 19, at 48 (referring to a sixteenth century demonologist who advocated death to any witch, even if the witch had done nothing but good things for others).

118. *See* GEORGE H. MOORE, SUPPLEMENTARY NOTES ON WITCHCRAFT IN MASSACHUSETTS: A CRITICAL EXAMINATION OF THE ALLEGED LAW OF 1711 FOR REVERSING THE ATTAINDERS OF THE WITCHES OF 1692 (University Press 1884) (detailing Massachusetts's legal efforts to pardon and recompense the families of individuals who were wrongly accused of statutory witchcraft); Tim Sutter, *Salem Witchcraft: The Events and Causes of the Salem Witch Trials*, http://www.salemwitchtrials.com/salemwitchcraft.html (last visited Oct. 11, 2010).

119. *See* JONES & PENNICK, *supra* note 64, at 207; Sutter, *supra* note 118 (recounting how 20 people in a community of approximately 600 were put to death for witchcraft, and how 200 or 33% were imprisoned for accusations of witchcraft).

120. *See* FIREMOON, *supra* note 18, at 35 (invoking these words in ritual: "Nor do I demand sacrifice, for behold, I am the Mother of all things, and My love is poured out upon the Earth.").

could compromise its positive energy.[121] The concept of taking the life of a living being for anything less than physical necessity is antithetical to Neo-Pagans:

> [A]ny attempt to modify the natural world should be undertaken . . . with a sense of reverence for the subject of [the] change . . . . Often cited is a Native American practice of explaining to a freshly killed animal the necessity to take its meat and skin for food and clothing . . . . It cannot be done thoughtlessly or frivolously.[122]

Because Neo-Paganism pays such reverence to living beings, Neo-Pagans frequently opt to be vegetarians or choose diets low in meat intake.[123]

An unjustified paradox exists in that Neo-Pagans strongly oppose the sadistic beliefs underlying Satanism, vampirism, devil-worship, and live sacrifice, yet Neo-Paganism is prevalently associated with these unrelated forms of practice. Such misconceptions fuel an array of tribulations for Neo-Pagans in the legal system, most evidently the judge and jury's possible prejudice against a Neo-Pagan who may serve as a plaintiff, a defendant, a victim, or a witness. The potential prejudicial impact is only controllable if the court properly recognizes Neo-Paganism as a valid religion at the onset of the case.

D. THE RISE OF NEO-PAGANISM IN AMERICA

While it is impossible to say with precision the number of Neo-Pagans in the United States today, most credible sources estimate that Neo-Paganism numerically rivals some notable religions, and that Neo-Paganism has a faster growing base than all orthodox religions.[124] There are three main reasons for the difficulty in precisely measuring Neo-Pagan

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121. FIREMOON, *supra* note 18, at 67.

122. BARNER-BARRY, *supra* note 19, at 34.

123. *See* Sarah White, *Faith-Based Diet, Wiccan-Style*, CALORIELAB (Oct. 30, 2006), http://calorielab.com/news/2006/10/30/faith-based-diet-wiccan-style ("In a way eating is a spiritual practice and it's likely there are more vegetarians and vegans (or even just people who eat organic foods) among pagans than are in the general population, though a special diet is far from required."); *See also* Goodman v. Snyder, No. 00-C-0948, 2003 WL 22765047, at *1-3 (N.D. Ill. Nov. 20, 2003) (holding a Wiccan prisoner asserted a valid claim against Illinois Department of Corrections because the plaintiff was not provided a vegetarian diet in accordance with his beliefs).

124. *See*, *e.g.*, *American Religious Identification Survey* (ARIS 2001), GRAD. CENTER OF THE CITY UNIV. OF NEW YORK, *available at* http://www.gc.cuny.edu/Faculty/GC-Faculty-Activities/ARIS--American-Religious-Identification-Survey/Key-findings; *Pagans Go Mainstream: Wiccans and Druids and Goddesses—Oh, My!*, RELIGION LINK, http://www.religionlink.com/tip_091020.php (last visited Nov. 8, 2010).

practitioners. First, our country does not obtain religious information in its census data, so there is no truly centralized or all-encompassing method to obtain religious information.[125] Second, the specific mainstream stigma of being labeled a "witch" or "pagan" has caused many practitioners to remain in the broom closet; therefore any survey may be under-inclusive of actual Neo-Pagan practitioners.[126] There is also a contrasting problem that those who label themselves as one subset, such as "Wiccan," may also label themselves as "Neo-Pagan," thereby overinflating the numbers.[127]

Despite these challenges, a number of groups such as the American Religious Identification Survey (ARIS) gather and analyze religious information through surveys, and have created estimates of Neo-Paganism based on the raw statistics and projected variances for the known potential discrepancies.[128] Perhaps the most striking statistic is the precipitous increase in Wiccan and Neo-Pagan adult practitioners, rising from 8000 in 1990, to 274,000 in 2001, to 682,000 in 2008.[129] ReligiousTolerance.org adjusts these numbers down by 25% to account for the number of Wiccans who also label themselves as Neo-Pagan, and then increases by 200% to account for those who do not "feel sufficiently safe and secure to tell their real religion."[130] Following the ReligiousTolerance.org formula, there would be just over 1,000,000 adult practitioners based on the raw ARIS survey numbers in 2008.[131] This estimate is also roughly corroborated by Circle Sanctuary's range of Neo-Pagan practitioners in 2006.[132]

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125. *See American Religious Identification Survey* (ARIS 2001), *supra* note 124.

126. *See supra* Part II.B.

127. RELIGIOUS TOLERANCE, http://www.religioustolerance.org/wic_nbr3.htm (last visited Nov. 8, 2010).

128. *See, e.g.*, *American Religious Identification Survey* (ARIS 2001), *supra* note 124; *"Boo" Who? Pagans and Christians Celebrate Halloween, but Differently*, RELIGION LINK, http://www.religionlink.com/topic_101028.php (last visited Nov. 8, 2010); RELIGIOUS TOLERANCE, http://www.religioustolerance.org/wic_nbr3.htm (last visited Nov. 8, 2010).

129. *See* the *American Religious Identification Survey* (ARIS 2001), *supra* note 124; *Pagans Go Mainstream: Wiccans and Druids and Goddesses—Oh, My!*, RELIGION LINK, http://www.religionlink.com/tip_091020.php (last visited Nov. 8, 2010).

130. *How Many Wiccans Are There?: Estimates for the U.S. and Canada*, RELIGIOUS TOLERANCE, http://www.religioustolerance.org/wic_nbr3.htm (last visited Nov. 8, 2010).

131. *See American Religious Identification Survey* (ARIS 2001), *supra* note 124; RELIGIOUS TOLERANCE, http://www.religioustolerance.org/wic_nbr3.htm (last visited Nov. 8, 2010). There was also an American Religious Identification Survey done in 2008, however this ARIS study did not provide the same level of detailed information concerning Neo-Pagan religions and instead lumped them together with other minority religious groups. *See American Religious Identification Survey* (ARIS 2008), TRINITY COLLEGE, *available at* http://b27.cc.trincoll.edu/weblogs/AmericanReligionSurvey-ARIS/reports/p1a_belong.html.

132. *Wiccans Battle VA Over Veteran Grave Marker Symbol*, CIRCLE SANCTUARY, http://www.circlesanctuary.org/liberty/veteranpentacle/aldagarticle.htm (last visited Nov. 8, 2010) ("Sociologists and other scholars have estimated that between 250,000 and one million Americans [in 2006] are members of the Wiccan religion and other forms of contempo-

If there are indeed 1,000,000 adult Neo-Pagan practitioners, Neo-Paganism has become as comparably widespread as Hinduism in the United States, but with a much faster growth rate.[133] If Neo-Paganism continues at a similar growth rate for the next decade, Neo-Paganism could outnumber any orthodox religion, except Christianity,[134] and become one of the most prevalent religions in the United States. Neo-Paganism may already have more followers than many recognizable denominations of Christianity, such as Seventh Day Adventist, Eastern Orthodox, Mennonite, and Christian Science.[135]

Religious views are ultimately unique to each individual, and as such, the number of practitioners should not matter as applied to each person's liberty interest in religious freedom. However, the number is significant in two ways. First, the number of legal actions involving Neo-Paganism will likely increase with the increased number of Neo-Pagan practitioners. As such, the uniform acceptance and treatment of Neo-Paganism as a valid religion by courts will ensure consistency and judicial efficiency. Second, the United States' reluctance to embrace the incorrectly stigmatized Neo-Pagan religion is a lingering and increasingly visible eyesore in our nation's promise to provide religious liberty.[136]

III. NEO-PAGANISM IS A VALID RELIGIOUS BELIEF

This section will first summarize the history of religious freedom in the United States, focusing on the First Amendment's Establishment and Free Exercise Clauses.[137] Next, the definition of religion is explored, pri-

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rary Paganism.") (This number is within the same rough range estimated by the other organizations before factoring in variable adjustments); *See*, *e.g.*, *American Religious Identification Survey* (ARIS 2001), *supra* note 124; *"Boo" Who? Pagans and Christians Celebrate Halloween, but Differently*, RELIGION LINK, http://www.religionlink.com/topic_101028.php (last visited Nov. 8, 2010); RELIGIOUS TOLERANCE, http://www.religioustolerance.org/wic_nbr3.htm (last visited Nov. 8, 2010).

133. *See Hinduism: The World's Third Largest Religion*, RELIGIOUS TOLERANCE, http://www.religioustolerance.org/hinduism.htm (last visited Nov. 8, 2010).

134. *See generally American Religious Identification Survey* (ARIS 2001), *supra* note 124 (following the growth trend from 1990-2001 for these denominations indicates that they had less than one million followers in 2010).

135. *See generally American Religious Identification Survey* (ARIS 2001), *supra* note 124 (showing that Christianity is the majority religion in the United States with 76.5% of the American population claiming Christian beliefs in 2001. Interestingly, it is the group with no religious belief that comprises 14.1% of the population—the second most adherents in the survey).

136. *See* Trans World Airline, Inc. v. Hardison, 432 U.S. 63, 97 (1977) (Marshall, J. dissenting) ("[O]ne of this Nation's pillars of strength [is]—our hospitality to religious diversity . . . .").

137. U.S. CONST. amend. I.

marily by extrapolating the Supreme Court's interpretation.[138] Using the Court's definition of religion, Neo-Paganism is then evaluated to demonstrate that it is a valid religious belief system and is thus protected by the First Amendment's guarantees of religious freedom.[139] A few cases are examined to show correct and incorrect acceptance of Neo-Pagan beliefs by different courts.[140]

A. HISTORY OF RELIGIOUS RIGHTS IN AMERICA

Religious freedom is a broad term that encompasses the two divergent and sometimes competing clauses contained in the First Amendment: "Congress shall make no law respecting an *establishment* of religion, or prohibiting the *free exercise* thereof . . . ."[141] The impetus for the inclusion of the Establishment Clause and the Free Exercise Clause into the Bill of Rights was to prevent the repetition of "persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy . . . ."[142] In other words, the framers perceived a political threat in religious majoritarianism.[143] Therefore, the intention was to create a nation that was not religiously homogenous or nonreligious, but one that welcomed and embraced diverse religions coextensively.[144]

The two Clauses provide a delicate balance point between tolerance for individuals to practice their religious beliefs and separation of church and state.[145] Extensive legal history and academic research has debated the nuanced scope of each Clause and how to resolve issues when the Clauses

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138. *See* United States v. Ballard, 322 U.S. 78 (1944); United States v. Seeger, 380 U.S. 163 (1965).

139. *See Ballard*, 322 U.S. at 87; *Seeger*, 380 U.S. at 167.

140. *E.g.*, Cutter v. Wilkinson, 544 U.S. 709 (2005); Roberts v. Ravenwood Church of Wicca, 292 S.E.2d 657 (Ga. 1982).

141. U.S. CONST. amend. I (emphases added).

142. Everson v. Bd. of Educ., 330 U.S. 1 (1947). *Everson* is also considered to be the case in which the Supreme Court incorporated the religious clauses as fundamental rights applicable to the states by way of the "Liberty" Clause of the 14th Amendment. Arguments have been made that the Establishment Clause was never intended to apply to the States. *See* SULLIVAN, CONSTITUTIONAL LAW 1251-52 (Foundation Press 16th ed. (2007)).

143. *See Everson*, 330 U.S. 1.

144. Cnty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburg Chapter, 492 U.S. 573, 627 (1989) ("We live in a pluralistic society. Our citizens come from diverse religious traditions or adhere to no particular religious beliefs at all. If government is to be neutral in matters of religion, rather than showing either favoritism or disapproval towards citizens based on their personal religious choices, government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community.").

145. *Id.*

overlap.[146] The Supreme Court's decision in *Cantwell v. Connecticut*, however, summarized the interplay between the Establishment Clause's "freedom to believe" and the Free Exercise Clause's "freedom to act" astutely:[147] "The first is absolute but . . . the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection."[148] Understanding that religious based conduct could possibly cause injury to other citizens or the government, the Court sagaciously reserved some power to regulate acts of religion when necessary and in such a way that does not "unduly . . . infringe the protected freedom."[149]

So while religious freedom, like most fundamental rights, is not absolute, any intentional government interference with religious practices must be narrowly tailored to meet a compelling government interest.[150]

Even though the First Amendment's religious protections might seem to put a true wall between church and state, the tendrils stemming from religion have had an undeniable impact on many aspects of our nation's history. Rhode Island, for example, was settled and eventually became a sovereign state because Quakers and other religious minorities wanted their own community away from an overwhelmingly Catholic Massachusetts.[151] American's westward expansion during the nineteenth century was predicated in part on Manifest Destiny, a concept that is inextricably linked to religion: "There was a widely held underlying belief that Americans, the 'chosen people,' had a divinely inspired mission to spread the fruits of their democracy to the less fortunate (usually meaning Native Americans and other non-Europeans)."[152]

Significantly, the nineteenth-century also ushered in many additions of "ceremonial deism" that the Court has consistently held do not violate the

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146. *See, e.g.*, *id.*; Reuben Quick Bear v. Leupp, 210 U.S. 50 (1908); William Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on* Lynch v. Donnelly, 1984 DUKE L.J. 770.

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

148. *Id.* at 303-04.

149. *Id.* at 304.

150. *See, e.g.*, Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) (striking down a city ordinance prohibiting animal sacrifice because it was designed to single out Santerian religious practices and was not narrowly tailored to pass strict scrutiny). *But see* Prince v. Massachusetts, 321 U.S. 158 (1944) (upholding state law prohibiting minors from publicly selling written materials even though it conflicted with proscribed duty of Jehovah's Witness faith, because child welfare and not religious practice was the target of the legislation).

151. Rickie Lazzerini, *The History of Rhode Island*, KINDRED TRAILS (2006), http://www.kindredtrails.com/Rhode_Island_History-1.html.

152. Dawn Taylor, *Manifest Destiny*, TIMETOAST (2011), http://www.timetoast.com/timelines/70344; *accord Manifest Destiny*, U.S. HISTORY, http://www.u-s-history.com/pages/h337.html (last visited Oct. 1, 2011).

Establishment Clause.[153] Prominently, "In God We Trust" began being placed on U.S. currency in 1864. [154] The Court traced its own session opening remark, "God save the United States and this honorable Court," to 1827.[155] Ceremonial deism expanded further in the twentieth century.[156] Congress made "In God We Trust"[157] the national motto while adding "under God" to the Pledge of Allegiance.[158] These references to a deity have been tolerated by the Court, because they are viewed as not pervasive and do not promote a particular religion.[159]

Dissenting Supreme Court Justices have argued in various ways that symbols and references specific to Christianity by government actors may be constitutional.[160] Justice Kennedy has argued that the Christian roots of our nation are inextricably tied to our national history.[161] Justice Kennedy, joined by Chief Justice Rehnquist, White, and Scalia referenced numerous examples of historical state actions and legislation that would justify a much narrower application of the Establishment Clause and more broadly allow for the observance of Christian or even Jewish religious holidays by governmental entities.[162]

The *Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter* holding, however, was that a government body may not have holiday displays endorsing particular religions, such as a Catholic crèche.[163] Justice Blackmun's lead opinion rejected the notion that any religion receives preference because of the nation's history:

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153. *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 36-37 (2004) (O'Connor, J., concurring).

154. *Id.* at 29.

155. *Id.* at 37 (O'Connor, J., concurring).

156. *Id.*

157. Act of July 30, 1956, ch. 795, 70 Stat. 732 (codified as amended at 36 U.S.C. § 302 (2006)).

158. Act of June 14, 1954, ch. 297, 68 Stat. 349 (codified as amended at 4 U.S.C. § 4 (2006)).

159. *See Elk Grove*, 542 U.S. at 36-38 (O'Connor, J., concurring).

160. *See, e.g.*, Cnty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburg Chapter, 492 U.S. 573 (1989) (holding despite four dissents that display of a religious symbol by a city government is an Establishment Clause violation).

161. *Id.* at 671-75 (Kennedy, J., dissenting in part).

162. *Id.* at 655-75 (including statements made by presidents going back to George Washington that reference "God" and the almost ubiquitous belief in Christianity or Judaism).

163. *Compare id.* at 601-02, *and* Stone v. Graham, 449 U.S. 39 (1980) (holding that display of the Ten Commandments in public schools was an Establishment Clause violation), *with* Lynch v. Donnelly, 465 U.S. 668 (1984) (holding that displaying a Christmas tree and Santa Claus was not an Establishment Clause violation because displays were non-religious).

> Perhaps in the early days of the Republic these words were understood to protect only the diversity within Christianity, but today they are recognized as guaranteeing religious liberty and equality to "the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism." It is settled law that no government official in this Nation may violate these fundamental constitutional rights regarding matters of conscience.[164]

Having determined that the Court views all religions as equal under the Constitution, Neo-Paganism is entitled to constitutional protection so long as it is a valid religion. The next question, therefore, is whether Neo-Paganism constitutes a valid religious belief system.

B. NEO-PAGANISM COMPORTS WITH LEGAL DEFINITION OF A VALID RELIGIOUS BELIEF

Two twentieth century Supreme Court cases provide much of the foundation for analyzing what is a constitutionally recognized religious belief: *United States v. Ballard*[165] and *United States v. Seeger*.[166] Applying these principles to Neo-Pagan belief systems demonstrates how Neo-Paganism is a valid religion which must be given the same constitutional protections as orthodox religious beliefs.

Ballard contains some of the Court's richest language defining religious beliefs and explains why a court must examine the sincerity of an individual's belief to be dispositive instead of examining "the truth or verity of [an individual's] religious doctrines or beliefs."[167] The Court in *Ballard* dictated that religious beliefs may not be discounted simply because an onlooker finds the religion unbelievable.[168] As Justice Douglas explained, "religious views espoused . . . might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect."[169] Justice Douglas's opinion established that fact-finder determinations of the validity of a religion would destroy our coun-

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164. *Cnty. of Allegheny*, 492 U.S. at 590 (quoting Wallace v. Jaffree, 472 U.S. 38, 52 (1985)).

165. United States v. Ballard, 322 U.S. 78 (1944).

166. United States v. Seeger, 380 U.S. 163 (1965).

167. *See Ballard*, 322 U.S. at 85-88.

168. *Id.*

169. *Id.* at 87 (explaining that Christian doctrine, including "[t]he miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer" could be discounted by a jury).

try's notion of religious freedom.[170] Perhaps most poignantly Douglas specified that "[t]he First Amendment does not select any one group . . . for preferred treatment" because an individual's "relation to . . . God was made no concern of the state."[171]

Building off of the *Ballard* holding that the veracity of an individual's religious belief "cannot be questioned,"[172] *Seeger* explicated a broad interpretation of religion not exclusive to belief in an orthodox God: "the test of belief 'in a relation to a Supreme Being' is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God."[173] Thus, all honest beliefs in matters of divinity and spirituality are accepted as valid religious beliefs,[174] and the Court has only exempted beliefs that are "essentially political, sociological, or philosophical views or a merely personal moral code"[175] while still liberally including nonreligious but strongly held ethical and moral beliefs that "function as a religion."[176]

Neo-Paganism comports with the Supreme Court's definition of religious belief primarily because practitioners hold a sincere belief in the mechanisms of a higher power—a Mother Goddess, elements of nature, and an interconnected universe.[177] Furthermore, while the Supreme Court has never explicitly evaluated Neo-Paganism under its definition of religion, it did implicitly accept Neo-Paganism as a valid belief system in *Cutter v. Wilkinson*.[178] In *Cutter*, the Court reviewed a cause of action of prison inmates of various religious beliefs, including Wicca and Asatru,[179] under the Religious Land Use and Institutionalized Persons Act.[180] At no point did the Court reject the listed religious beliefs as invalid.[181]

Considering the Court's openness to unorthodox religious beliefs, specifically beliefs that "are rank heresy to followers of the orthodox faiths,"[182]

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170. *Id.*
171. *Id.* at 87-88.
172. *See* United States v. Seeger, 380 U.S. 163, 184 (1965).
173. *Id.* at 165-66.
174. *See id.*
175. *See id.*
176. *See* Welsh v. United States, 398 U.S. 333, 340 (1970) (including "deeply and sincerely [held] beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience . . ."); James H. Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CAL. L. REV. 847, 851 (1984) (analyzing in further detail the inclusion and exclusion of non-religious philosophies).
177. *See supra* Part II.A.
178. *See* Cutter v. Wilkinson, 544 U.S. 709, 712-13 (2005).
179. *Id.* at 712.
180. 42 U.S.C. §§ 2000cc-1(a)(1)-(2) (2006).
181. *See Cutter*, 544 U.S. at 712-13.
182. United States v. Ballard, 322 U.S. 78, 86 (1944).

it is interesting that some members of the judiciary have continued to assert objections to Neo-Paganism as a valid religion. Georgia's Chief Justice Jordan dissented in *Roberts v. Ravenwood Church of Wicca* from the majority's holding that Wicca was a religion, stating "the Wiccan faith does not meet [the *Seeger*] test."[183] Jordan's rationale attacked Wiccan belief on the basis that it has no belief in an "anthropomorphic God."[184] Such a narrow definition of religion flies in the face of *Seeger's* holding that unequivocally stated that religious beliefs are not to be limited to traditional orthodox beliefs in God.[185]

Other examples of judicial reluctance to accept Neo-Paganism as a valid religious belief include Arkansas appellate court's holding in *Hicks v. Cook* that denigrated Wicca by stating, "One final concern is her testimony regarding the WICCA religion, movement, cult or whatever that may be . . . . That is no joking matter."[186] Also, the North Carolina Supreme Court's holding in *State v. Theer* allowed the defendant's "alleged practice of Wicca[]" as acceptable character evidence while never explaining how Wicca was relevant to the charged crime.[187] *Hicks* and *Theer* will be examined in detail, along with other cases, to demonstrate how courts continue to unconstitutionally apply impermissible prejudices against Neo-Paganism in various contexts.[188]

IV. DENIAL OF PARENTAL RIGHTS BASED ON NEO-PAGAN BELIEFS

An Indiana trial court decision emerged in 2004 which actualized the greatest fear of many Neo-Pagan parents—that their parental rights to raise a child in accordance with their personal beliefs could not coexist with their Neo-Pagan faith.[189] The trial court in *Jones v. Jones* specifically decreed that both parents were not to expose their child to their "non-mainstream [Neo-Pagan] religious beliefs."[190] In 2005, the Indiana Court of Appeals quelled the panic by striking down the lower court's decree.[191] However,

183. Roberts v. Ravenwood Church of Wicca, 292 S.E.2d 657, 660 (Ga. 1982).

184. *Id.*

185. *See* United States v. Seeger, 380 U.S. 163, 165-66 (1965).

186. Hicks v. Cook, 288 S.W.3d 244, 247 (Ark. Ct. App. 2008).

187. State v. Theer, 639 S.E.2d 655, 663-64 (N.C. Ct. App. 2007) (including other character evidence, the court accepted to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake[,] . . . her sexual promiscuity and affairs[,] . . . her 'alternative' lifestyle[,] . . . 'swinging[,]' . . . and her ability to manipulate others, particularly men") (referencing N.C. Gen. Stat. § 8C-1, Rule 404(b) (equivalent to the Federal Rules of Evidence 404(b) standard)).

188. *See infra* Parts IV, VI.

189. *See* Jones v. Jones, 832 N.E.2d 1057, 1060-61 (Ind. Ct. App. 2005).

190. *Id.*

191. *Id.*

for Neo-Pagan religious practitioners, the trial court's animosity towards Neo-Paganism found in *Jones*[192] recurs in various state courts and similar custodial contexts, although typically in a more clandestine fashion.[193]

Explicit animosity to Neo-Paganism is in some ways preferable, because it is more easily recognized and corrected by a higher court, as in *Jones*.[194] A more insidious problem occurs when the prejudice against Neo-Paganism is shrouded in the pretext of legitimacy, because the burden shifts to the party who was discriminated against to show there was clear judicial error—a standard which is very difficult to meet.[195]

The first subsection will examine the legal history of parental rights from foundational Supreme Court decisions, as well as how the state court framed the *Jones* decision.[196] Next, the *Hicks v. Cook*[197] decision is analyzed at length to extract the prejudice against Neo-Paganism which was tolerated by an Arkansas appellate court, despite strong dissenting opinions. Finally, other contemporary decisions that involve Neo-Pagan custodial rights are analyzed to suggest how courts continue to apply prejudice against Neo-Pagans in parental custody cases.

A. LEGAL PRECEDENT AND THE *JONES V. JONES* BACKDROP

The fundamental right of parents to raise their children in accordance with their own beliefs has been supported by the Supreme Court as a substantive liberty guarantee under the Fourteenth Amendment since as early as 1923 in *Meyer v. Nebraska*[198] and in later decisions.[199] Indiana explicitly echoed *Meyer* in *Swartz v. Swartz* when it asserted that "[p]arents have a constitutionally recognized fundamental right to control the upbringing, education, and religious training of their children."[200] If any doubt remained about the fundamental right of parents to instill their own religious beliefs in their children, the Indiana Code also unequivocally expressed in its di-

192. *Id.*

193. *See generally* Hicks v. Cook, 288 S.W.3d 244 (Ark. Ct. App. 2008).

194. *See Jones*, 832 N.E.2d at 1060-61.

195. *See, e.g.*, State v. Plaskett, 27 P.3d 890 (Kan. 2001).

196. Cantwell v. Connecticut, 310 U.S. 296 (1940); Meyer v. Nebraska, 262 U.S. 390, 399-402 (1923); *Jones*, 832 N.E.2d at 1060-61.

197. *Hicks*, 288 S.W.3d 244.

198. *See Meyer*, 262 U.S. at 399-402 (holding that due process includes an individual's "freedom . . . to acquire useful knowledge, to marry, establish a home and bring up children, [and] to worship God according to the dictates of his own conscience . . ."); *see also Cantwell*, 310 U.S. 296 (incorporating the First Amendment's "free exercise" clause as a fundamental right of all citizens of all states).

199. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 210-11, 216-17 (1972) (allowing Amish parents to not send their children to public school after the eighth grade because the parents' religious beliefs were implicated).

200. Swartz v. Swartz, 720 N.E.2d 1219, 1222 (Ind. Ct. App. 1999).

vorce statute: "the custodian may determine the child's upbringing, including the child's education, health care, and religious training."[201]

Despite the statutory language and mandatory precedents, the Indiana trial court in *Jones v. Jones* erroneously decreed that both divorcing parents must desist from exposing their child to their mutually shared Wiccan beliefs: "The following specific term [] shall [] apply to both parties: . . . That the parents are directed to take such steps as are needed to shelter [the child] from involvement and observation of these non-mainstream [Wiccan] religious beliefs and rituals . . . ."[202]

The trial court not only refused to dignify Neo-Paganism as a valid religion—in fact the court refused to dignify Wicca by name—but the court further denigrated it by framing the child's exposure to a religion that "people might think [involves] Satan" as an impairment to the well-being of the child.[203] In other words the trial court trumped the well-established and fundamental right of the parents to raise their children with their religious beliefs under the guise of a significant concern for the child's physical or emotional health.[204]

By the court's misguided logic, a judge could presumably restrict a parent from raising their children Jewish if they lived in an area prone to anti-Semitism or conceivably restrict the Protestant upbringing of a child in a predominately Catholic neighborhood, because the child might be ridiculed or accosted due to her religious beliefs.[205] Taken to the extreme, such restrictions on religious beliefs could result in courts in every state refusing to allow the upbringing of a child in any religion other than the state, county, or municipality's majority religion or denomination, based on how the court subjectively applies its discretion.[206]

The appellate court did correctly identify the trial court's error and struck down the religious limitation in the decree, although the reversal was predicated on statutory, not constitutional, grounds.[207] The appellate court found that the trial court abused its discretion and failed to specify a valid health concern of the child that could justify the decree's religious limitation.[208] While the appellate court corrected what was an egregious misap-

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201. IND. CODE § 31-17-2-17(a)(2) (2005) (excepting only situations that would impair the physical or emotional well-being of the child).

202. Jones v. Jones, 832 N.E.2d 1057, 1060-61 (Ind. Ct. App. 2005).

203. *Id.* at 1060.

204. *See id.* at 1060-61.

205. *See id.*

206. *Id.*

207. *Jones*, 832 N.E.2d at 1059-61 (holding that a constitutional issue will not be addressed if the issue can be resolved statutorily).

208. *Id.* at 1061 ("Although the trial court does not specify what is meant by 'these non-mainstream religious beliefs and rituals,' we can infer that this refers to the Wiccan beliefs and rituals discussed by both parents in their testimony. The trial court's inclusion of

plication of judicial authority by the trial court based on prejudice against Neo-Paganism,[209] religious prejudice, like most forms of discrimination, rarely appears in such a facially recognizable form.

A curious series of questions arises in the wake of *Jones*: What if only one of the parents, both seeking custody, was Wiccan? The trial court delved into the religious beliefs and practices of each parent before ultimately awarding the father custody with the religious limitation.[210] Might the trial court have awarded the mother custody had she been a Christian or even an atheist? What would this court have done if a non-custodial parent who is not Neo-Pagan sought custody from a custodial parent who is a Neo-Pagan but may require medication for emotional stability? These questions will be explored next.

B. PARENTAL FITNESS OR RELIGIOUS PREJUDICE? THE IMPLICATIONS OF *HICKS V. COOK*

Hicks v. Cook reveals how a court's prejudice against Neo-Paganism can result in a parent losing custody of a child under the color of law.[211] In 2008, a divided Arkansas appellate court upheld the granting of a father's petition to take custody away from a mother, prompted by an isolated incident of the illegitimate child being dirty and allegedly having minor dog bites.[212] Evidence considered in the trial also included the mother's mental health and her involvement in "the Wicca[n] religion," which the mother actually denied even though she displayed considerable knowledge about Wicca.[213]

A close examination of the facts and a comparison to similar custodial decisions involving parents who were not Neo-Pagans demonstrates that the *Hicks* decision was impermissibly based on religious prejudice and not on the best interest of the child or parental fitness.[214] Each of the nonreligious factors the court considered in *Hicks*: the physical condition of the child, the mental health of the mother, and the fitness of the father, are not sufficient, individually or in the aggregate, to warrant the mother losing custody of her child.[215]

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this term in the Decree would appear to reflect the judge's personal opinion of the parties' Wiccan beliefs and rituals.").

209. *See id.*

210. *Id.* at 1059-61.

211. *See* Hicks v. Cook, 288 S.W.3d 244 (Ark. Ct. App. 2008).

212. *Id.*

213. *Id.* at 246, 253 (explaining to the judge that "she only *told* the father she was practicing Wicca, but that she was really a Baptist." The mother further explained, "Wicca was an earth based religion that had gods and goddesses and believed in doing good").

214. *See id.* at 244-49.

215. *See id.*

The Arkansas Code presumes custody for the mother of a child born out of wedlock.[216] The biological father may seek custody if: (1) he is considered a fit parent, (2) who has substantively provided for the child, and (3) it is deemed in the best interest of the child.[217] The best interest of the child is considered the primary consideration.[218] In *Hicks*, both parties agreed that the father met the first two elements, and so the best interest of the child was the critical issue.[219] A look at other Arkansas custody cases establishes that the best interest element oftentimes, as here, pivots on a determination of the mother's fitness as a parent because the father's fitness is already recognized.[220] Yet the *Hicks* court deviated from established standards set forth in precedents to rule the mother unfit to provide for the best interest of the child, belying its prejudice against Neo-Paganism.[221]

1. The Pretextual Foundations Used to Strip the Mother of Custody

Examining the best interest of the child in *Hicks*, the trial court expressed a concern with "the mother's ability to raise the child in a safe and nurturing manner."[222] The specific concerns the father reported based on the single incident were that the child had diaper rash, dirty nails, earwax, something dirty or fungal on his face, and possibly minimal dog bite wounds on his shoulder.[223] At first blush, this accumulation of sanitary breakdowns might suggest neglectful parenting by the mother.

However, as one dissent pointed out: the fingernails, diaper rash, and earwax are "not unusual with a toddler;" and a child being dirty and having

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216. ARK. CODE ANN. § 9-10-113(a) (2007).

217. ARK. CODE ANN. § 9-10-113(c) (2007).

218. Taylor v. Taylor, 110 S.W.3d 731 (Ark. 2003); *see also* Sheppard v. Speir, 157 S.W.3d 583, 590 (Ark. Ct. App. 2004) (stating six factors for determining the best interest of the child: "(1) the child's preference; (2) the effect of the change of the child's surname on the preservation and development of the child's relationship with each parent; (3) the length of time the child has borne a given name; (4) the degree of community respect associated with the present and proposed surnames; (5) the difficulties, harassment, or embarrassment that the child may experience from bearing the present or proposed surname; (6) the existence of any parental misconduct or neglect") (citing Huffman v. Fisher, 987 S.W.2d 269 (Ark. 1999)).

219. *See Hicks*, 288 S.W.3d at 246-47.

220. *See* Sykes v. Warren, 258 S.W.3d 788, 793 (Ark. Ct. App. 2007) (clarifying that "the trial court d[oes] not have to find [the mother] unfit in order to grant custody . . . to [the] father. Once [the father] show[s] to the satisfaction of the trial court that he [is] a fit parent and [has] taken responsibility for his child, the trial court [is] left solely to make a best-interest determination").

221. *See Hicks*, 288 S.W.3d at 246-47.

222. *See id.* at 246.

223. *Id.* at 245-46.

a dog bite is not in itself proof of neglect.[224] Considering that none of the child's conditions required medical attention or were medically evaluated, it becomes difficult to reconcile the majority's willingness to change custody in *Hicks* based on physical well-being with the same court's unwillingness to alter custody in *Carver v. May* when some evidence suggested a father was molesting his daughters but the court deferred to a lack of medical substantiation.[225]

A mother had lost custody in *Carver* for "extreme animosity" towards her ex-husband which made his continued visitation with the children almost impossible, and so the court determined the father-child relationships could only be sustained by granting him custody.[226] Despite the mother's proclivity to incorrectly accuse the father of various misdeeds, there was compelling evidence that the daughters had been subjected to sexual abuse by the father, which the mother also claimed.[227] A child therapist's examination revealed that one daughter claimed that "daddy touched me and my sister," pointing to her genitals.[228] An educational assistant stated that the younger daughter seemed upset after spending time with her father and started "shaking and crying when her diaper was being changed."[229] However, the Arkansas appellate court refused to disturb the father's custody for this reason, because a medical examination could not substantiate sexual abuse.[230]

Part of the duplicity of the Arkansas Appellate Court is that in *Carver*, the court accepted the medical exam as dispositive that the father was not an unfit parent while disregarding evidence from other relevant testimony, but in *Hicks* the court accepted a lay opinion of the father regarding scant accusations of filth and non-medical diagnoses as dispositive of the mother's unfitness.[231] As a dissenter elucidated, there were disputed facts as to the alleged conditions the child suffered in *Hicks* to suggest the mother was very fit.[232] For example, the mother "was treating the rash with a topical ointment [and] . . . the so-called [dog] 'wound' on [the child] was likely just a bug bite, as [the mother] hypothesized."[233] Why did the court in *Carver* only appear willing to upend existing custody if the parent's unfit-

224. *Id.* at 254-55 (Heffley, J., dissenting).

225. Carver v. May, 101 S.W.3d 256, 260-61 (Ark. Ct. App. 2003).

226. *Id.* at 258-59 (detailing an incident where the mother called the police to arrest the father for drug possession as he was trying to exercise his visitation rights—the father was not found to have drugs on him).

227. *Id.* at 260-61.

228. *Id.*

229. *Id.*

230. *Carver*, 101 S.W.3d at 260-61.

231. *Id.*; Hicks v. Cook, 288 S.W.3d 244, 246-49 (Ark. Ct. App. 2008).

232. *Hicks*, 288 S.W.3d at 254 (Hart, J., dissenting).

233. *Id.*

ness could be medically substantiated,[234] whereas in *Hicks* the court appeared complicit to strip a mother of custody at least partially based on disputed medical diagnoses from the father?[235]

Another irreconcilable inconsistency in the court's decision in *Hicks* is the relatively minor nature and degree of the alleged physical harm to the child when compared to more extreme and evidenced harm to children by parents who do not suffer as drastic of legal consequences.[236] Logic and Arkansas case law dictate that the frequency and severity of adverse physical conditions must be considered when determining parental fitness. For example, in *Henry ex rel. Phillips v. Henry*, the court only took temporary custody away from a child's parents despite medical testimony that the infant was anemic and overweight due to an improper diet, and despite several witnesses testifying that the father "frequently left the baby dirty," including a doctor's testimony that the child's skin was sticky because he not been bathed.[237]

Unlike the father's report against the mother in *Hicks* that was based on one incident out of numerous visitations he had with the child, the father in *Henry* exhibited a pattern of not attending to basic health and sanitary needs of the child.[238] However, despite the more frequent and extreme disregard of the parent in *Henry* the court anticipated that the father could regain custody by only awarding temporary custody to the mother's parents, whereas in *Hicks* the mother lost permanent custody rights of her child.[239] Following Arkansas case law, the rationale for removing the mother's custody in *Hicks* based on the best interest of the child must have been for a reason other than the alleged physical condition of the child.

Next, the *Hicks* court's erroneous reasoning about the mother's mental health will be examined to expose how the majority exceeded its judicial limitations, once again honing in on the discriminatory reason underpinning the decision.[240] The court made two errors on the mental health subject that are irreconcilable with proper jurisprudence. First, there was no allegation that the mother was prone to improper behavior due to her "depression and anxiety" that would render her unfit as a parent.[241] Second, no medical expert correlated her mental health with the need to take prescriptive medi-

234. *Carver*, 101 S.W.3d at 260-61.

235. *Hicks*, 288 S.W.3d at 244-46.

236. *Id.*, *compare with* Henry *ex rel.* Phillips v. Henry, No. CA 85-470, 1986 WL 3694, at *1 (Ark. Ct. App. 1986).

237. *Phillips*, No. CA 85-470, 1986 WL 3694, at *1.

238. *Compare Hicks*, 288 S.W.3d at 244-46, *with Henry*, No. CA 85-470, 1986 WL 3694, at *1-2.

239. *Compare Henry*, No. CA 85-470, 1986 WL 3694 at *1-2, *with Hicks*, 288 S.W. 3d at 244-46.

240. *See Hicks*, 288 S.W.3d at 244-46.

241. *Id.* at 244-46, 253.

cine.[242] In so finding the mother was unfit based in part on her failure to medicate her alleged mental ailments, the court impermissibly assumed the roles of doctor and opposing counsel.[243]

The undisputed facts of the mother's mental health in *Hicks* are as follows: she had previously been diagnosed and treated for anxiety and depression.[244] At the time of the trial the father introduced evidence of the mother's recent prescriptions that she did not feel she needed to take.[245] Aside from the existence of the prescriptions, no evidence was presented and no specific allegation was made that her mental condition, with or without medication, made her prone to "behavior inconsistent with the best interest of the child."[246] The court nevertheless concluded that "the child would be much better off if the mother took medications."[247]

On the same day that *Hicks* was decided, the Arkansas appellate court—with three of the same majority/concurring judges of the six on panel from the *Hicks* decision—decided a mother's custody appeal of her child born out of wedlock in *Sharp v. Keeler*.[248] In *Sharp*, the mother appealed the granting of her four year old son's custody to his father, stemming from an appellate decision of the same name, the prior year.[249] The mother lost custody of her son for a litany of acts primarily rooted in her severely inimical relationship with the child's father.[250] The court correctly affirmed that the mother's actions were detrimental to the child's best interest and that the father should have custody.[251] Yet, the court also reversed the requirement for supervised visitation due to the mother's mental state, despite an inconclusive psychological evaluation that suggested that she might have "significant and pervasive emotional problems."[252] Therefore, even in a case where the mother was vindictively pawning her child's

242. *Id.*
243. *See id.*
244. *Id.* at 244.
245. *Hicks*, 288 S.W.3d at 244.
246. *Id.* at 253.
247. *Id.* at 249.
248. Sharp v. Keeler (*Sharp II*), 288 S.W.3d 256 (Ark. Ct. App. 2008).
249. Sharp v. Keeler (*Sharp I*), 256 S.W.3d 528 (Ark. Ct. App. 2007).
250. *Id.* at 537-38 (including: not sharing medical information with the father when the child was undergoing chemotherapy; giving the father false information about medical procedures their son needed; refusing to let medical staff provide the father information about the child's medical condition; rushing the child to the emergency room and contemplating a stomach pump in response to the father giving the sick child half the recommended dose of Tylenol; cursing the father in front of the child; and failing to cooperate with the father's visitation schedule).
251. *Id.* at 538.
252. *Id.* at 539.

health, the court required a more definitive psychological evaluation to deem her mentally unfit for unsupervised visitation.[253]

While the circumstances in *Hicks* and *Sharp* are notably different, the court's disparity in handling similar concerns about the mental fitness of the mothers is striking. In *Sharp*, the court erred to leniency in the absence of a definitive medical diagnosis even though the mother had committed prior acts that were detrimental to the child,[254] but in *Hicks* the court did not require medical expert testimony to support its inference that the mother's untreated past mental issues would negatively impact the child.[255] Furthermore, there were no past acts in *Hicks* in which the mother's mental health or failure to take medication indicated that her ability to take care of the child had been or ever would be compromised,[256] unlike in *Sharp* where the mother lost custody of her child for specific acts that negatively impacted the child.[257] Both dissents in *Hicks* noted how the trial court was "practicing medicine without a license"[258] and "without the benefit of expert testimony."[259]

Judge Heffley's dissent in *Hicks* also took specific issue with how the trial court further incorrectly correlated the mother's mental health with the need for medication: "Far be it for someone to stop taking medication that one does not need."[260] Judge Linker Hart's dissent asserted that the evidence of the mother's mental health was "at best, circumstantial," and the court did not and could not have taken judicial notice of such a reasonably disputed fact.[261] Therefore, the court projected two facts and treated them as undisputed even though the father failed to sufficiently establish them—that the mother had mental conditions that impaired her ability to raise her child, and that the mother needed to continue taking medication.[262]

Such projection of speculated facts is inconsistent with the Arkansas Supreme Court that has specifically held that where "no harm has been shown to the children . . . a decision based on perceptions and appearances" is not sufficient to overturn custody.[263] Thus, it was improper for the *Hicks* court to consider the mother's perceived mental health barring substantive

253. *Id.*
254. *Sharp I*, 288 S.W.3d 537-39.
255. Hicks v. Cook, 288 S.W.3d 244, 249 (Ark. Ct. App. 2008).
256. *Id.*
257. *Sharp I*, 288 S.W.3d at 537-38.
258. *Hicks*, 288 S.W.3d at 253-54 (Hart, J., dissenting).
259. *Id.* at 255 (Heffley, J., dissenting).
260. *Id.*
261. *Id.* at 253 (Hart, J., dissenting).
262. *See id.* at 253-55 (Hart, J. and Heffley, J., dissenting).
263. *See* Taylor v. Taylor, 110 S.W.3d 731, 739 (Ark. 2003).

evidence that her mental health was problematic to the child's best interest.[264]

An inability to reconcile the *Hicks*' mental health analysis emerges once the lack of evidence the court still utilized is considered, especially when combined with the precedent that courts will defer to presume mental fitness barring an affirmative medical diagnosis to the contrary.[265] Interestingly, neither the father nor the court in *Hicks* attested to any specific inability of the mother to continue properly caring for the well-being of the child aside from the physical dirt and bites noted in the isolated instance discussed, *supra*.[266] The court's stated reasons about physical and mental concerns have been discredited, leaving the only remaining non-discriminatory reason the court could have used—the best interest of the child as measured by the home environment each parent could provide.[267]

The trial court in *Hicks* was reticent about why it specifically found the father in a superior position to raise the child, stating generally, "the father has met the requirements of assuming his responsibilities toward the child by providing care, supervision, protection, and financial support."[268] While the father testified that he had access to family, parks, and a preschool, there was no evidence to indicate the mother did not have access to family, parks, or a preschool, so these resources alone do not indicate a superior environment for the child.[269] Similarly, the court unilaterally referenced that the mother "is a nursing assistant, and that she wants to be a social worker" without detailing the father's occupation or whether he has financial means to raise the child.[270]

The appellate court provided no specific elucidation beyond these statements and cited only the trial court's concern with the child's safety, the mother's mental health, and the mother's "Wiccan religion" to affirm the trial court's decision.[271] Therefore, it is difficult to pinpoint how the father was better able to provide for the child, but the implication is that the father somehow would provide better for the child.[272] A concise analysis of the governing law will demonstrate that the trial and appellate court erred in putting any weight into the home environment based on such undeveloped facts.[273]

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264. *Hicks*, 288 S.W.3d at 249.
265. Sharp v. Keeler (*Sharp I*), 256 S.W.3d 528, 537-39.
266. *See Hicks*, 288 S.W.3d at 246.
267. *Id.*
268. *Id.*
269. *Id.* at 245.
270. *Id.* at 246.
271. *Hicks*, 288 S.W.3d at 246.
272. *Id.* at 245-46.
273. *Id.* at 245. A shadow of gender discrimination may appear here as well, because the court in no ways shuns the father for having children with multiple women, including the

Taylor v. Taylor reinforced that a custody change may not be justified simply because one parent has more income or resources in general.[274] The Arkansas Supreme Court went so far as to say that "it was aware of no cases where custody was changed merely because one parent had more resources or income than the other."[275] The larger concern with the child's best interest is health and education.[276]

In *Sykes v. Warren*, the Arkansas Appellate Court overturned an initial custody ruling in favor of the father of a child born out of wedlock.[277] One of the primary reasons the trial court awarded the father custody was because of his financial stability compared to the mother who received government aid.[278] The appellate court justified the reversal on the reasoning that financial status is only relevant to provide a stable environment, and that the mother "lived within her means . . . and managed to run an independent household where she could be a full-time parent."[279] Both *Taylor* and *Sykes* establish that financial resources cannot be dispositive of the best interest of the child, barring an affirmative showing that one parent's financial situation is insufficient to provide for the child's well-being.[280]

Applying the precedent that custody must only be changed where one parent's environment provides for the well-being of the child where the other parent's environment is deficient, the *Hicks* court failed to recognize the mother's undisputed ability to provide for her child.[281] The court may have properly found that the father was able to provide for the best interests of the child, but because the court failed to detail in any way that the mother was not able to provide for the best interests of the child, the father's financial and environmental factors the court alluded to could not have been the reason the mother lost custody of her child.[282]

Now that the child's physical condition, the mother's mental health, and the financial situation have been individually eliminated by binding

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mother in this case. However, this court references a case that makes a point that a mother having four children from different fathers supported its removal of one child's custody in favor of the father. *See* Sheppard v. Spier, 157 S.W.3d 583, 585 (Ark. Ct. App. 2004).

274. Taylor v. Taylor, 110 S.W.3d 731, 736 (Ark. 2003).

275. *Id.*

276. *Id.*, referring to 1 JEFF ATKINSON, MODERN CHILD CUSTODY PRACTICE § 4-18, at 4-44, 4-20, at 4-47 (2d ed. 2002) ("Financial resources of the parties are normally irrelevant to a custody determination," and "financial resources of the parents have been found to be relevant to the extent that they reflect a parent's ability to provide a stable home," specifically, "the ability of one parent to meet the educational or health needs of the child better than the other parent.").

277. Sykes v. Warren, 258 S.W.3d 788 (Ark. Ct. App. 2007).

278. *Id.* at 793.

279. *Id.*

280. *Taylor*, 110 S.W.3d at 736; *Sykes*, 258 S.W.3d at 793.

281. *See* Hicks v. Cook, 288 S.W.3d 244, 245-46 (Ark. Ct. App. 2008).

282. *See id.*

precedent in other Arkansas custody decisions, the only remaining non-discriminatory explanation for the court's decision in *Hicks* is the aggregate effect of the three factors.[283] These factors, however, cannot be reasonably compounded in *Hicks* to justify removal of the child from the mother's custody, because the factors do not represent degrees of probative value that can be stacked to prove underlying parental unfitness by the mother.[284] Instead, each factor is a matter of relevant applicability that does not and should not compound with the others.[285]

The unsubstantiated concern for the physical condition of the child in the one alleged incident cannot be rationally correlated to the mother's mental health, nor can the mental health concern be correlated to the financial and environmental well-being of the child.[286] If there were several instances of physical neglect instead of the one alleged,[287] for example, each instance could be compounded to establish a greater pattern of parental unfitness. Or, if the father alleged with some evidence that the mother's mental condition caused her to neglect the physical well-being of the child, those factors could possibly be aggregated.[288] However, neither the father nor either court argued that any of the factors correlated to another, so they could only be properly considered in isolation and applied if found by a preponderance of evidence.[289] For the reasons already stated, each factor was judicially insufficient to be proved in *Hicks* because the court violated proper and precedential jurisprudence when it rationalized and upheld any of those factors from the trial court's decision.[290]

2. Revealing the Discriminatory Application of Judicial Power

With every non-discriminatory reason for the *Hicks* decision discredited individually and collectively, the trial judge's personal bias against Wicca was the true reason the court stripped the mother of custody over her only child.[291] The appellate court's majority opinion erred when it concluded that "there is no basis to hold that the trial court resolved this initial custody determination on appellant's interest or involvement with Wicca, but simply pointed out appellant's lack of credibility on the issue."[292] The

283. *See id.*
284. *See id.*
285. *See id.*
286. *See Hicks*, 288 S.W.3d at 245-46.
287. *Id.* at 246.
288. *Id.* at 245-46.
289. *Id.* at 246.
290. *See id.*
291. *See Hicks*, 288 S.W.3d at 245, 249.
292. *See id.* at 248.

trial court explicitly voiced its concern, not about the mother's credibility, but about Wicca: "One final concern is her testimony regarding the WICCA religion, movement, cult or whatever that may be. She testified that . . . she was involved, but was only joking. That is no joking matter. The Court believes she is much more involved than she would now lead us to believe."[293]

First, note that the trial court capitalized Wicca to draw emphasis in a way that immediately suggests the court's non-acceptance of Wicca as a valid religion.[294] Justice Gladwin who wrote the *Hicks* lead opinion never used all capital letters when referring to the "Christian" religion in his opinions, therefore, it is strange he would not have detected prejudice in the trial court's anomalous spelling choice of the "WICCA religion."[295]

The trial court then referred to Wicca as a "cult," which can only be reasonably described as "pejorative" language, as the mother contended on appeal.[296] The trial court's derogatory employment of the word "cult" is further evidenced by the context of the case.[297] The father argued at trial that "not all religions are worthy of constitutional protection," that "Wicca is a cult, not a religious belief," and asserting that the "court is committing a grievous error if it allows cult activities to be protected."[298] How could the judge have reasonably meant for the word "cult" in his opinion to mean anything less than the denigration and/or disparagement of Wicca in light of the "vile and slanderous" arguments made by the father?[299]

The reference to "no joking matter" further reveals that the court was undoubtedly concerned about the mother's beliefs in such an unconventional belief system, whether she validly practiced Wicca or not.[300] Yet the appellate majority found that "the trial judge did not impermissibly base his decision on his perception of appellant's religious preferences,"[301] and a concurring justice stated that "the trial judge made no disparaging or otherwise unfavorable comments about Wicca."[302]

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293. *Id.* at 247.

294. *Id.*

295. *Compare id.*, *with* Bullock v. Steed, No. CA 08-394, 2008 WL 4735961, at *4 (Ark. Ct. App. Oct. 29, 2008) (referring to a child's beliefs that her mother "is not a Christian"), *and* Sykes v. Warren, 258 S.W.3d 788, 790 (Ark. Ct. App. 2007) (referring to a living environment as a "Christian home").

296. *Hicks*, 288 S.W.3d at 247.

297. *Id.*

298. *Id.* at 255 (Hart, J., dissenting opinion on the denial of rehearing) (quoting the father's inflammatory arguments which included that Mormons, as a whole, "practice incest and child marriages").

299. *Id.* at 255.

300. *Id.* at 247.

301. *Hicks*, 288 S.W.3d at 248.

302. *Id.* at 249 (Griffen, J., concurring).

The notion that these comments were simply made to impeach her credibility is a gross misreading of non-clandestine language that is charged with anti-Wiccan prejudice.[303] Even assuming, *arguendo*, that the concern was about the mother's credibility, what possible relevance did the mother's religious beliefs have to do with her ability to look after the best interest of her child—the central issue in the case?[304] No evidence supports that the mother's credibility was ever at issue or that any of her other testimony was disputed by the father.[305] By contrast, the mother was abundantly cooperative with the proceedings and never contradicted the father's general fitness as a parent, so it is unclear how her credibility became a material issue sufficient to eclipse noticeably prejudicial language.[306]

The dissenting justices correctly pointed out the glaring misapplication of the majority and concurrence's treatment of the trial court's language, poignantly surmising that "they [the majority] twist the words in the finding regarding Hicks's alleged practice of Wicca to be a finding regarding Hicks's credibility, notwithstanding the fact that this case does not turn on the credibility of any witness!"[307] "The trial court's mention of Wicca cannot be dismissed as a simple credibility determination . . . . Obviously, the judge held her interest in Wicca against her."[308] Knowing that the asserted reasons for taking the child away from the mother were pretextual and not enough to support a mixed-motive assertion, the erroneous decision's effect was that "[t]he child was removed from a home, which the record reflects was otherwise appropriate in every way."[309]

Further evidence of the court's prejudice and misapplication of judicial authority exists in the fact that religious beliefs are in no way relevant to the child custody determination, other than to possibly accommodate the custodial parent's desires for the child to participate in religious services while the child is with the non-custodial parent.[310] Why was the mother's religion at issue, if not for the father's successful attempt to create a prejudicial effect?[311] Even the majority held that "no party explored the connections between religious belief and [the child's best interest]."[312] There was no rele-

303. *See id.* at 247.

304. *Id.*

305. *See generally id.*

306. *See Hicks*, 288 S.W.3d at 248 ("[The father] proved he was a fit parent to raise the child. [This was] not denied by appellant.").

307. *Id.* at 253 (Hart, J., dissenting).

308. *Id.* at 254 (Heffley, J., dissenting).

309. *Id.* at 255 (Heffley, J., dissenting).

310. *See, e.g.*, Johns v. Johns, 918 S.W.2d 728, 731-32 (Ark. Ct. App. 1996) (ordering the non-custodial father to "see that his children did [attend religious services] to maintain consistency in the religious regimen that their mother has set for them").

311. *See generally Hicks*, 288 S.W.3d 244.

312. *Id.* at 248.

vancy connecting religion to the child's best interest, so why would the trial court have incorporated provocative anti-Wiccan statements into the decision unless it improperly factored that evidence into the custody determination?[313] And how could the appellate court have refused to recognize the erroneous inclusion of a topic whose prejudicial effect is only outweighed by its irrelevance?[314]

Another intriguing fact that strongly suggests improper use of religious prejudice by the trial court is that the judge questioned the mother directly about her religious beliefs once the father had initiated questions about the mother's Wiccan beliefs.[315] A dissenting justice described it as "the trial judge interjected himself into the proceedings and began interrogating the appellant about [Wicca]."[316]

If the inflammatory comments and arguments made by the father regarding Wicca were the only evidence of inappropriate use of religion in the trial, a stronger case could be made that the judge did not improperly factor the mother's religion into his decision.[317] The judge, however, not only tolerated the line of irrelevant religious questioning, but he pursued it on his own.[318] The judge's direct involvement in the questioning about Wicca, combined with the vituperative comments made about the Wiccan "cult,"[319] demonstrate that the "trial court's mention of Wicca cannot be dismissed as a simple credibility determination,"[320] but that the overwhelming indication is that the judge actively used impermissible prejudice against Wicca to influence the custody determination.

Significantly, an appellate court has good reason to give "special deference to the trial judge's ability to evaluate and judge the credibility of the witnesses,"[321] and not overturn a decision barring evidence of clear error.[322] However, the majority's affirmation of the *Hicks'* determination revealed, at a minimum, impermissible complicity with a clearly erroneous trial court

313. *Id.*
314. *Id.* at 247-49.
315. *Id.* at 253 (Hart, J., dissenting).
316. *Hicks*, 288 S.W.3d at 255 (Hart, J., dissenting).
317. *Id.*
318. *Id.* at 253 (Hart, J., dissenting).
319. *Id.* at 247.
320. *Id.* at 254 (Heffley, J., dissenting).
321. *Hicks*, 288 S.W.3d at 245; Hamilton v. Barrett, 989 S.W.2d 520 (Ark. Ct. App. 1999).
322. Harris v. Grice, 244 S.W.3d 9, 11 (Ark. Ct. App. 2006) (stating that clear error is reviewed *de novo* and, "[a] finding is clearly against the preponderance of the evidence when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made") (citing Dunham v. Doyle, 129 S.W.3d 304 (Ark. Ct. App. 2003)).

proceeding.[323] If the trial judge's tolerance, interrogation, and inclusion of charged facts regarding the mother's religious practices—irrelevant and immaterial to a custody determination—throughout the trial and opinion do not constitute clear error, then it "betray[s] the belief by the majority that this deference is somehow the way to resolve every case."[324] The precedent suggested by this opinion is that anything short of the trial court stating to cease and desist any exposure of the child to Neo-Paganism, as in *Jones*,[325] is not clear error.[326]

However, the Arkansas Appellate Court is not always reticent to find clear error in custody cases that do not involve Neo-Pagan parents,[327] suggesting that the prejudice in *Hicks* is more a product of systemic prejudice than of universal deference.[328] The Arkansas Appellate Court in *Harris v. Grice*, including two of the same justices in the majority holding in *Hicks*,[329] found clear error in the trial judge's moralistic comments about custody battles.[330] The judge commented that "'custody fights were just as bad for the children' and that he wanted 'to discourage these custody cases.'"[331] The appellate court reasoned that the trial judge's disdain for custody battles resulted in an improper upholding of the current custody determination.[332] So the appellate court was quick to infer an ulterior motive on the judge, based on a few isolated comments in *Harris*,[333] whereas the appellate court in *Hicks* had to, "twist the words in the [trial judge's] finding" to construe them to be valid and non-discriminatory.[334]

Perhaps the most revealing contradiction is that the *Hicks* majority went through contortions to uphold the trial court's decision while denying religion was at play, but the Arkansas Appellate Court, including the justice that wrote the *Hicks* lead opinion as well as an agreeing justice,[335] later referenced *Hicks* as standing for the proposition that "in child custody disputes . . . a parent's religiously motivated choices and actions are material if they

323. *See Hicks*, 288 S.W.3d at 245, 249.
324. *Id.* at 253 (Hart, J., dissenting).
325. Jones v. Jones, 832 N.E.2d 1057, 1060-61 (Ind. Ct. App. 2005).
326. *Hicks*, 288 S.W.3d at 248-49.
327. *See, e.g.*, *Harris*, 244 S.W.3d at 13-14.
328. *See Hicks*, 288 S.W.3d at 249.
329. *Id.* at 49 (agreeing Justice Glover and concurring Justice Griffen); *Harris*, 244 S.W.3d at 14 (agreeing Justice Glove and Justice Griffen).
330. Harris v. Grice, 244 S.W.3d 9, 13-14 (Ark. Ct. App. 2006).
331. *Id.* at 13.
332. *Id.*
333. *Id.*
334. *Hicks*, 288 S.W.3d at 253 (Hart, J., dissenting).
335. *Id.* at 245 (leading opinion of Justice Gladwin, agreeing opinion of Justice Glover).

affect a child's well-being."[336] If the *Hicks* decision truly did not "turn[] on the trial court's acceptance or rejection of a specific religion," and religion was only used to "judge the credibility of the witness[]," then how can *Hicks* later mean that a parent's religious beliefs are material to a custody determination?[337] The court contradicted itself and exposed that the appellate court in *Hicks* knowingly allowed and perpetuated the blatant misuse of religious prejudice to strip a mother of the custody of her two year old child.[338]

C. THE CONTINUING STRUGGLE OF COURTS TO NOT DISCRIMINATE AGAINST NEO-PAGAN PARENTS

In fairness to the *Hicks* court, no other appellate case in Arkansas, before or after, ever implicated Neo-Paganism in a parental custody case.[339] The traditional American reaction is disdain for anything hinting at witchcraft, and even the learned judiciary is not always immune to this deep-seeded prejudice.[340] The shroud of misunderstanding is not exclusive to Arkansas, but is endemic to most states that have no more than a handful of appellate level cases that implicate Neo-Paganism in any way, much less cases that directly involve parental custody.[341]

Other state courts that have dealt with Neo-Paganism in the context of parental custody have commonly invoked similar prejudices to the *Jones* and *Hicks* courts. The Tennessee appellate case of *In re R.D.H.* involves a mother's petition to regain custody of her child after she and the father had voluntarily given custody to the child's grandparent.[342] In recounting the mother's hardships at the time she relinquished custody, the court makes the incorrect conflation that the parents "were involved with 'wiccan' or Satanism practices."[343] While the mother was granted custody, the court still took note of the fact that the mother's involvement with Wicca was in the past and made sure to list it as one of the many disturbing activities that had gone on in the mother's life, along with drug abuse and domestic vio-

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336. Thorne v. Arkansas Dep't of Human Serv., 2010 Ark. App. 443, 17 (Ct. App. May 19, 2010), http://opinions.aoc.arkansas.gov/WebLink8/ElectronicFile.aspx?docid=45241&dbid=0.

337. *Hicks*, 288 S.W.3d at 248.

338. *See id.*

339. *See generally id.*

340. *See supra* Part II.C.

341. *See, e.g.*, *In re* R.D.H., No. M2006-00837-COA-R3-JV, 2007 WL 2403352 (Tenn. Ct. App. Aug. 22, 2007).

342. *Id.* at *1.

343. *Id.*

lence.[344] Might the outcome of the custody determination have been different if evidence was presented that the mother was still practicing Wicca?[345]

The California appellate case *In re Marriage of Deuel* echoed the *Jones* court's[346] restrictions on a parent's right to expose a child to various topics, including "abortion, Wicca, [and] abuse between [the parents]."[347] The *Deuel* court upheld the restraint on these topics and treated Wicca as something nefarious and less than a valid religious belief.[348] *Deuel* is no longer good law, but it serves as another recent example of judicial prejudice against Neo-Paganism.[349]

The Minnesota appellate case of *Froberg v. Froberg* did not invoke outward prejudices against Neo-Paganism, but the father sought sole custody partly on the basis that the mother was involving, "at least one of the children in the Wicca religion."[350] What is compelling is that the parents initially had joint legal custody of the children, which means both were equally able to control the religious upbringing of the children.[351] The father was Catholic; the mother became Wiccan after the divorce.[352] Yet the court admonished the mother for failing "to support the children's Catholic upbringing," as if she had no right whatsoever to expose the children to her own religious beliefs.[353]

The mother undeniably acted in many ways for the trial court to have reasonably granted custody to the father, but the court still employed language that disparately treated Wicca from the more accepted Catholic faith of the father.[354] For example, "[a]ppellant *claims to be* a member of the Wicca religion whereas respondent *is* Catholic."[355] Why does the court have to qualify a "claim[] to be" Wiccan, whereas the father is just simply Catholic?[356] The decision itself does not suggest anything erroneous, but the opinion cannot hold the mother's Wiccan beliefs at the same level it holds the

344. *Id.*

345. *See generally R.D.H.*, 2007 WL 2403352.

346. Jones v. Jones, 832 N.E.2d 1057 (Ind. Ct. App. 2005).

347. *In re* Marriage of Deuel, No. F050088, 2007 WL 2318744, at *34 (Cal. Ct. App. Aug. 15, 2007).

348. *Id.*

349. *Id.*

350. Froberg v. Froberg, No. A04-2511, 2006 WL 330086, at *8-9 (Minn. Ct. App. Feb. 14, 2006) (elaborating further, the court's specific concern was that the mother had to notify the father of any changes in the children's religious exposure, which she did not do).

351. MINN. STAT. § 518.17 (2002).

352. *Froberg*, 2006 WL 330086, at *8.

353. *Id.*

354. *Id.* at *6-8 (finding that the mother had neglected one child's diabetes to the point that it caused possible kidney damage and also attempted to get a restraining order against the father so he could not visit the children).

355. *Id.* at *8 (emphases added).

356. *Froberg*, 2006 WL 330086.

father's Catholic beliefs, hinting at a prejudice that may be so deep-seeded that it is subconscious.[357]

In the wake of this litany of recent custody decisions that unfavorably treat Neo-Paganism, it is important to note that there are examples of courts objectively handling custody decisions predicated in part on a parent's Neo-Pagan beliefs.[358] The majority of court opinions in custody decisions, however, mistreat Neo-Paganism as an invalid belief or as a lesser quasi-religion.[359] For the reasons previously stated,[360] any treatment of Neo-Paganism as less than a valid religion is constitutionally impermissible, yet many courts continue to perpetuate the societal prejudice against Neo-Paganism.[361]

V. TITLE VII'S OVER-ALLOWANCE FOR RELIGIOUS DISCRIMINATION BY RELIGIOUS ENTITIES AND ITS IMPACT ON NEO-PAGANS

Another way Neo-Pagans face legal discrimination is ironically through an act of Congress that seemingly aimed to protect religious practitioners from discrimination. Title VII of the Civil Rights Act of 1964 contains religious entity exemptions that are, unfortunately, an overbroad loophole in what is an otherwise well-crafted and high-quality body of legislation.[362] This section will explore the background of the legislation, specifically as it pertains to religious discrimination, and demonstrate how a more narrowly tailored approach to accommodate religious entities would achieve the necessary safeguards to protect religious organizations, while minimizing the unwanted religious discrimination that Title VII aimed to eliminate.[363] A strong argument can be made that because the exemptions are not the least restrictive means to further a compelling government inter-

357. *Id.*

358. *E.g.*, Luminella v. Marcocci, 814 A.2d 711, 717-18 (Pa. Super. Ct. 2002) (rejecting the petitioning mother's claim that the custodial father's Neo-Pagan beliefs were harmful to the children); V.F.O. v. J.J.O, No. CS92-3627, 2001 WL 1773676, at *8 (Del. Fam. Ct. Feb. 14, 2001) (holding that the joint custodial mother's right to expose the children to Wiccan beliefs must be honored along with the father's right to expose the children to Methodist beliefs).

359. *E.g.*, Hicks v. Cook, 288 S.W.3d 244 (Ark. Ct. App. 2008); *Froberg*, 2006 WL 330086.

360. *See supra* Part III.

361. *E.g., Hicks*, 288 S.W.3d 244; *Froberg*, 2006 WL 330086.

362. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 252. (codified at 42 U.S.C. § 2000e-1-2000e-3).

363. *Id.*

est,[364] they are constitutionally invalid as an undue burden on the free exercise of religion.[365]

A. THE BACKGROUND OF TITLE VII'S RELIGIOUS ENTITY EXEMPTIONS

Title VII's inclusion of religion as a protected status of public and private employment stands out from the other protected characteristics: race, color, sex, national origin, and age, because religious beliefs are based on choice and not immutable characteristics.[366] The reason to protect religion "is clearly consistent with the basic concept of religious freedom that is embodied in the First Amendment to the Constitution."[367] Tolerance for religious beliefs is implicit in the freedom to exercise religion and is necessary for individuals to seek and maintain employment.[368] The failure to protect religion in employment may result in the exclusion of certain religious practitioners from large sectors of private employment and undermine the entire notion of religious freedom.[369] If such exclusion were permitted, taken to the extreme, a religious majority in America could relegate minority religious practitioners to the point of economic distress and the most menial forms of employment.[370]

Yet the protection of religion in employment, like almost all rights, is not absolute or limitless because there is a competing interest, stemming from the Establishment Clause, which must protect religious organizations from undue interference by the government to dictate the manner in which a religious organization pursues its objectives.[371] For example, it would be unreasonable for a Presbyterian church to keep a minister employed who recently converted to Hinduism, just as it would be unreasonable for a Hindu temple to keep a pandit employed who recently converted to Presbyterian Christianity.[372] Such restrictions would frustrate the organization's purpose to perform work in the advancement of its religion.[373]

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364. *See* Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal, 546 U.S. 418 (2006).

365. U.S. CONST. amend. I.

366. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 252 (codified at 42 U.S.C. § 200e-1-2000e-3).

367. DIANNE AVERY ET AL., EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE 629 (8th ed. 2010).

368. *See id.* at 629-32.

369. *Id.*

370. *See id.*

371. Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).

372. *See* Duane E. Okamoto, *Religious Discrimination and the Title VII Exemption for Religious Organizations: A Basic Values Analysis for the Proper Allocation of Conflicting Rights*, 60 S. CAL. L. REV. 1375, 1381-82 (1987).

373. *Id.*

To prevent unreasonable hardships on religious organizations, Congress included two exemptions for religious entities in Title VII. The pertinent exemption for this analysis states that Title VII "shall not apply to . . . a religious corporation, association, educational institution or society."[374] The other exemption pertains specifically to religious educational institutions.[375] Significantly, the first exemption originally applied "to the employment of individuals of a particular religion to perform work connected with the carrying on . . . of its *religious* activities."[376] The 1972 amendment revised the end of the statement to apply to "its activities" and removed "religious."[377]

The legislative intent behind the amendment may be partially gleaned from its Senate sponsors, one of whom stated: "Our amendment would strike out the word 'religious' and remove religious institutions in all respects from the subjugation to the EEOC [(Equal Employment Opportunity Commission)],"[378] and "take the political hands of Caesar off of the institutions of God, where they have no place to be."[379] The other Senate sponsor was concerned that without the amendment, "there would be nothing to prevent an atheist being forced upon a religious school to teach some subject other than theology."[380] The shared concern of the co-sponsors was specifically to not require a religious entity to hire outside of its religious beliefs, because it could interfere with the advancement of the entity's religious objectives.[381] Unfortunately, however, the legislative history is not clear as to whether the amendment was passed to broadly exempt religious institutions from all possible liability for religious discrimination.[382]

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374. The Civil Rights Act of 1964, Pub. L. No. 88-352, § 702(a), 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e-1(a) (1972)).

375. § 703(e)(2), 42 U.S.C. § 2000e-2(e)(2).

376. § 702(a), 42 U.S.C. § 2000e-1(a) (1970) (emphasis added).

377. § 702(a), 42 U.S.C. § 2000e-1(a) (1972).

378. King's Garden, Inc. v. FCC, 498 F.2d 51, 55 (D.C. Cir. 1974) (paraphrasing Sen. Allen's comments).

379. *The Equal Opportunity Act of 1972: Hearing on Amend. 809 to S. 2515*, 92nd Cong., 1st Sess. (1972) (statement of Sen. Ervin).

380. *King's Garden*, 498 F.2d at 55 (paraphrasing Sen. Allen's comments).

381. *See The Equal Opportunity Act of 1972 Hearing on Amend. 809 to S. 2515*, 92nd Cong. 1st Sess. (1972).

382. *See* Okamoto, *supra* note 372, at 1384-87.

> [The] changes in the exemption coupled with the sponsors' intent via the legislative history left the extent or breadth of the amendment's exemption unclear and subject to two possible interpretations—one favoring religious group autonomy rights and the other limiting such rights in favor of the individual employee.

Id. at 1384.

The original language intentionally narrowed the exemption to employees directly performing religious activities,[383] but the Supreme Court interpreted the amendment as creating the broadest possible loophole that now allows religious entities to patently discriminate against any employee performing any job function at any time before or during employment.[384] In theory a thirty-year employee who has served satisfactorily as a religious community center's groundskeeper could be fired just because he observes a particular religion or none at all, even if the employee never introduced his religious beliefs in the workplace.[385] Furthermore, the exemption may not be waived generally, even if the employer boasts being an equal opportunity employer and derives benefit from holding itself out as such.[386]

Granting such unfettered discretion to religious entities upheaves the necessary and delicate balance between the free exercise of religion and permissible protection of religious entities' objectives.[387] As will be demonstrated, what was enacted to be a shield to protect religious entities from undue governmental interference[388] has oftentimes been employed as a sword to castigate certain religious practitioners in an appalling way that frustrates Title VII's purpose.[389] Not surprisingly, the victims of the over-inclusive religious entity exemption are oftentimes religious minorities.[390] While the theme of this analysis continues to be the disparate impact on Neo-Pagans, the discrimination through the exemption may be based on any religious difference, even slight and sometimes regarding issues invoking other forms of discrimination.[391]

The Supreme Court fielded an Establishment Clause challenge to the religious entity exemptions in *Corporation of the Presiding Bishop v.*

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383. § 702(a), 42 U.S.C. § 2000e-1(a) (1970).

384. *See* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 329-31 (1987).

385. *See Amos*, 483 U.S. 327 (upholding the firing of a janitor who was not qualified for membership in the Mormon church of his employer).

386. Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618, 625 (6th Cir. 2000) (citing Little v. Wuerl, 929 F.2d 944, 951 (3d Cir. 1991)). *But see, e.g.*, Siegel v. Truett-McConnell College, Inc., 73 F.3d 1108 (11th Cir. 1995) (acknowledging waiver may exist, but only if the entity states that it will not discriminate on religious grounds).

387. *See* Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).

388. *The Equal Opportunity Act of 1972 Hearing on Amend. 809 to S. 2515*, 92nd Cong. 1st Sess. (1972) (statement of Sen. Ervin).

389. *See, e.g.*, Saeemodarae v. Mercy Health Servs., 456 F. Supp. 2d 1021 (N.D. Iowa 2006).

390. *E.g.*, *id.*

391. *E.g.*, *Hall*, 215 F.3d at 624-27 (upholding the exemption for defendant terminating employee who was a lesbian, because her orientation was against the Baptist Christian beliefs of her employer, even though employee was non-denominational Christian).

Amos.[392] Specifically, the plaintiffs argued that religious institutions should not be permitted to discriminate on the basis of religion for non-religious positions, because religious institutions are being favored or promoted by the government.[393]

The Court rejected this argument, holding that "[t]here is ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.'"[394] The Court recognized that religious exemptions could constitute over-interference by the government, but that the religious entity exemption was neutral and benign.[395] The Court in *Amos* also rejected an Equal Protection argument under low level scrutiny, finding the exemption's small accommodation to religious entities to be "rationally related to the legitimate purpose of alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions."[396]

Two arguments can be made to trigger a heightened level of scrutiny to invalidate the religious entity exemption that the Court has not addressed. First, an alternative Establishment Clause claim could be made that specifically challenges the intent and impact of the religious entity exemption as overly promoting a particular religion, Christianity.[397] Second, that under the Free Exercise Clause, the religious entity exemptions are overbroad and fail to comply with the heightened scrutiny required under the Religious Freedom Restoration Act of 1993 (RFRA).[398]

B. THE RELIGIOUS ENTITY EXEMPTION V. THE ESTABLISHMENT CLAUSE: ROUND 2

In light of the *Amos* decision that rejected the general Establishment Clause challenge to the religious entity exemption on the basis that the exemption is benevolent and neutral,[399] statistics suggest that the exemption is

392. Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) (applying the three prong *Lemon* Test to determine if legislation violates Establishment Clause). The *Lemon* Test requires a law's primary effect to not promote or deter religion, and it must not create an entanglement of government and religion. A law is not unconstitutional simply because it allows the advancement of religion. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

393. *Amos*, 483 U.S. at 327.

394. *Id.* at 334 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 673 (1970)).

395. *Id.* at 334-35.

396. *Id.* at 339.

397. *Id.* at 334-35 (acknowledging that a religious exemption could violate the Establishment Clause).

398. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1489 (codified as amended at 42 U.S.C. §§ 2000bb-2000bb-4 (2006)).

399. *Amos*, 483 U.S. at 334-35.

far from neutral.[400] It is true that a minority religious entity could use the religious entity exemption to just as easily discriminate against a religious practitioner in the majority.[401] However, the overwhelming majority of religious organizations in the United States are Christian-based, therefore, the natural consequence is that even if all religious entities discriminated by the same percentage, the disparate impact would be exceedingly felt by religious minorities.[402]

All seventy-four of the listed religious organizations with 1000 or more employees are Christian-based, and 129 out of 130 of religious organizations with 500 or more employees are Christian-based.[403] Also consider that over 600 of the 628 religious organizations that generate $2.5 million or more in revenue annually are Christian-based, a list that includes numerous large hospital groups, national retailers, auto dealerships, and even a National Football League franchise.[404] Religious entities are not confined to traditional images of churches and ministry outreach services, but have tendrils reaching into industries that most people consider secular.[405] In many markets a religious organization may be the area's largest employer.[406] Any notion that the diversity in major religious employers mirrors the nation's religious diversity is erroneous based on the following statistical breakdown of religious beliefs in the United States:

Religious Beliefs Held by Americans	ARIS 1990 Survey[407]	ARIS 2008 Survey[408]
Christian	86.2%	76.0%
Agnostic/Atheistic	8.2%	15.0%
All Others	5.6%	9.0%

The Court in *Amos* specifically left open the door for a constitutional challenge to the impact of the religious entity exemption when it stated, "At

400. *Religious Organizations of the United States*, MANTA.COM, http://www.manta.com/mb_34_F0295_000/religious_organizations (last visited Dec. 16, 2010).

401. 42 U.S.C. § 2000e-1(a) (2006).

402. *Religious Organizations of the United States*, *supra* note 400.

403. *Id.*

404. *Religious Organizations in the United States*, MANTA, http://www.manta.com/mb_34_F0295_000/religious_organizations (last visited Dec. 16, 2010) (including Tennessee Titans Baptist Sports).

405. *Id.*

406. *See, e.g.*, Saeemodarae v. Mercy Health Servs., 456 F. Supp. 2d 1021 (N.D. Iowa 2006). The defendant boasts being the largest employer in the area. MERCY MEDICAL CENTER, http://www.mercyclinton.com/AboutUs/index.htm (last visited Dec. 16, 2010).

407. *American Religious Identification Survey* (ARIS 2001), *supra* note 124.

408. *American Religious Identification Survey* (ARIS 2008), *supra* note 131.

some point, accommodation may devolve into 'an unlawful fostering of religion.'"[409] With no suggestion that any scheme or intent existed to promote a particular religion by the exemption, the reality—more than two decades removed from *Amos*—is that large religious employers are overwhelmingly represented by one particular religion, disproportionate to the population.[410] The practical effect of the exemption is that it allows almost all of the largest religious organizations to minimally exclude 24% of the population from employment *carte blanche*.[411]

Disregarding the obvious Equal Protection claim that previously failed in *Amos*,[412] could the Supreme Court find "an unlawful fostering of religion"[413] when viewing the exemption in light of the enormous statistical disparity favoring one religion?[414] And if not, what statistical disparity between religious employers and the representative population would constitute a fostering of religion?

C. THE RELIGIOUS ENTITY EXEMPTION V. THE FREE EXERCISE CLAUSE

The Supreme Court limited the scope and application of strict scrutiny to a series of Free Exercise cases subsequent to *Sherbert v. Verner*.[415] Congress responded by passing the Religious Freedom Restoration Act of 1993 (RFRA) to restore a semblance of the prior *Sherbert* test's heightened scrutiny, requiring the government to use the least restrictive means to further a compelling government interest when religious rights are infringed.[416] The Court, however, invalidated the RFRA finding that Congress overreached its granted authority as applied to the states.[417] Yet the Court held that the

409. *See* Corp. of Presiding Bishop of Church of Latter-Day Saints v. Amos, 483 U.S. 327, 334-35 (1987) (quoting Hobbie v. Unemp't Appeals Comm'n of Fla., 480 U.S. 136, 145 (1987)).

410. *Religious Organizations of the United States*, MANTA.COM, http://www.manta.com/mb_34_F0295_000/religious_organizations (last visited Dec. 16, 2010).

411. *Id.*

412. *See Amos*, 483 U.S. at 339.

413. *See id.* at 335.

414. *See id.*

415. *Compare* Sherbert v. Verner, 374 U.S. 398, 405-10 (1963) (establishing the *Sherbert* Test, most pertinently holding: "whether some compelling state interest . . . justifies substantial infringement" of an individual's freedom to exercise religious beliefs, whether direct or indirect), *with e.g.*, Lyng v. Nw. Indian Cemetery Prot. Assoc., 485 U.S. 439 (1988) (disregarding strict scrutiny analysis because government actions were neutral and not intended to have detrimental impact religious practices).

416. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1489 (codified as amended at 42 U.S.C. §§ 2000bb-2000bb-4 (2006)).

417. Boerne v. Flores, 521 U.S. 507 (1997) (holding that Congress overreached its power under the Fourteenth Amendment by applying the RFRA to the states); U.S. CONST. amend. XIV, § 5.

RFRA is applicable to the Federal Government, thus the RFRA is valid for claims based on federal law, presumably including Title VII challenges.[418]

Because *Amos* preceded the RFRA, the plaintiff did not assert a Free Exercise claim.[419] Subsequently, the Court never addressed whether the religious entity exemption violated the least restrictive means under the RFRA standard of review to the Free Exercise Clause.[420] The basic argument, however, is that while the religious entity exemption serves a compelling state interest, the statute is overbroad because there are ample alternatives that would minimize unnecessary religious discrimination.[421] Therefore, the exemption is invalid unless it is narrowed in application.[422]

1. Discriminatory Application of the Religious Entity Exemption to Neo-Pagans

Dodge v. Salvation Army was the seminal case addressing a large religious organization using the religious entity exemption to terminate a victims' assistance coordinator due to her Neo-Pagan beliefs.[423] In *Dodge*, the plaintiff was terminated after she used the office copy machine to reproduce pages with Wiccan rituals on them, and she filed suit for religious discrimination.[424] The plaintiff had subsequently renounced her Wiccan faith and re-converted to Christianity,[425] but the court upheld her motion for summary judgment because her position with the Salvation Army was substantially funded by the federal and state government.[426] Due to the government funding the court found "excessive government entanglement" under the Establishment Clause to allow the defendant to discriminate on the basis of religion.[427] Yet the court acknowledged that the religious entity exemption would otherwise be fully applicable to a similar situation in which the employer was not substantially funded by the government.[428]

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418. *See* Gonzales v. O Centro Espirita Beneficento Uniano do Vegetal, 546 U.S. 418 (2006).

419. *See generally* Corp. of Presiding Bishop of Church of Latter-Day Saints v. Amos, 483 U.S. 327, 334-35 (1987).

420. *Id.* (holding that the religious entity exemption did not constitute the government promoting any religion under an Establishment Clause challenge).

421. *See* Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-2000bb-4.

422. *Id.*

423. Dodge v. Salvation Army, No. 588-0351, 1989 WL 53857, at *1 (S.D. Miss. Jan. 9, 1989).

424. *Id.* The court also found that the unauthorized use of office equipment could not have been sufficient grounds for termination by itself. *Id.*

425. *Id.* at *4.

426. *Id.*

427. *Id.*

428. *Dodge*, 1989 WL 53857, at *2-3.

In addition to the court's mistaken acceptance that Wicca and Satanism are interchangeable terms and beliefs,[429] what is interesting about the *Dodge* opinion is that it exemplifies how courts have not recognized a distinction point between a religious organization promoting its own religion versus a religious organization selectively discriminating against certain other religions.[430] If the true purpose of the religious entity exemption was to allow religious organizations enough latitude to pursue their religious objectives,[431] why is it tolerable for religious entities to discriminate against some but not all differing beliefs?[432]

To illustrate this thought further, imagine a Christian-based hospital that has 70% Christian employees, 15% agnostic or atheistic employees, 5% Jewish employees, 3% Hindu employees, 3% Buddhist employees, 2% Islamic employees, and 2% Neo-Pagan employees. Under the current application of the exemption, the hospital could fire the Jewish employees for purely religious differences, even though the same religious difference exists with the Hindu, Buddhist, Islamic, and Neo-Pagan employees.[433] Or the employer could fire the atheist, Hindu, Buddhist, Islamic, and Neo-Pagan employees but not the agnostic employees.[434] As it frequently happens, however, it is the Neo-Pagan employee who is singled out in these situations.[435]

An example of this selective discrimination is found in the case *Saeemodarae v. Mercy Health Services*.[436] Mercy is a Catholic-based religious hospital in Clinton, Iowa, that has "nearly 1,000 employees" and boasts being "the areas [sic] largest employer."[437] The plaintiff was a medical telemetry technologist whose job performance was never asserted to be less than satisfactory. [438] She was never asked to perform non-secular job duties, nor was she ever told during her employment that her job was contingent upon her religious beliefs.[439] When she was fired, she filed a religious discrimination claim under Title VII[440] and the corresponding Iowa statute,[441]

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429. *Id.* at *4 (referring to "the proliferation of Satanic/Wiccan" material).

430. *See id.* at *2-3.

431. *See The Equal Opportunity Act of 1972: Hearing on Amend. 809 to S. 2515*, 92nd Cong., 1st Sess. (1972).

432. *E.g.*, *Dodge*, 1989 WL 53857, at *2-3.

433. *Id.*

434. *Id.*

435. *E.g.*, Saeemodarae v. Mercy Health Servs., 456 F. Supp. 2d 1021 (N.D. Iowa 2006).

436. *Id.*

437. MERCY MEDICAL CENTER, http://www.mercyclinton.com/about-us (last visited Dec. 16, 2010).

438. *Saeemodarae*, 456 F. Supp. 2d at 1023.

439. *See id.* at 1037-39.

440. 42 U.S.C. § 2000e-1 et seq. (1964).

alleging that she was terminated "because of her Wiccan religious beliefs . . . including reading Wiccan literature at work."[442] No facts were asserted that the plaintiff proselytized in the workplace, exposed her reading material to patients, broadcast her religious beliefs to coworkers, or in any way offended anyone based on her religion.[443]

The defendant never denied the religious claim and simply asserted the religious entity exemption.[444] The plaintiff argued that the hospital was primarily secular, thus negating the exemption, and alternately, that it waived its exemption by holding itself out as an equal opportunity employer with its policy stating that "Mercy is further committed to going beyond the legal requirements of equal employment opportunity to take action to achieve diversity in our working environment."[445] The appellate court affirmed the trial court's granting of a motion for summary judgment in favor of the hospital after concluding that "there is no genuine issue of material fact that Mercy is a 'religious organization' entitled to assert the 'religious organization' exemption to Title VII."[446]

The appellate court also accepted an unnecessarily narrow interpretation of the potential waiver claim based on its dicta regarding the possibility of a waiver exception when a religious organization takes an explicit "undertaking not to discriminate against its personnel on the basis of religion."[447] Established case law does generally state that a religious entity cannot waive its exemption.[448] Mercy's policy, however, stated that it would "not discriminate for any reason prohibited by law," which the court correctly held to not be a waiver, because a religious entity's practice of religious discrimination is not prohibited by law.[449] The policy further stated that it would go "beyond the legal requirements of equal employment . . . to achieve diversity in [its] working environment."[450] The only area of discriminatory protection under Title VII,[451] the Americans with Disabilities Act of 1990,[452] and the Age Discrimination in Employment Act of 1967[453]

441. Iowa Civil Rights Act (ICRA), IOWA CODE § 216.6 (2006).
442. *Saeemodarae*, 456 F. Supp. 2d at 1040.
443. *See generally Saeemodarae*, 456 F. Supp. 2d 1021.
444. *Id.* at 1023.
445. *Id.* at 1029-31.
446. *Id.* at 1043.
447. *Saeemodarae*, 456 F. Supp. 2d at 1038-39.
448. *E.g.*, Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618, 625 (6th Cir. 2000).
449. *Saeemodarae*, 456 F. Supp. 2d at 1038-39.
450. *Id.* at 1029.
451. 42 U.S.C. § 2000e-1 et seq. (1964).
452. 42 U.S.C. §§ 12111-12118 (1990).
453. 29 U.S.C. §§ 621-34 (1967).

not available to Mercy's employees was religious discrimination.[454] Therefore, the areas of race, color, sex, national origin, age, and disability discrimination still applied in full force to the defendant.[455] So what equal employment diversity could Mercy have possibly meant beyond "legal requirements" if not religion?[456]

Sexual orientation would be the only other commonly recognized area of discrimination, other than religion, that was not already protected. Yet, Mercy is based on Catholicism, a Christian denomination that holds non-heterosexuality to be a sin.[457] Therefore, it is unlikely that a significant portion of potential employees would be non-heterosexual Catholics. So if Mercy truly never intended to waive its religious discrimination exemption, the additional language in the policy would have little applicable meaning if the intention was to only further protect homosexual, bisexual, and transgendered Catholics because any other non-heterosexuals could still be fired because of their religion.[458]

The court correctly referenced that waiver of the religious entity exemption would require an express "undertaking" by the religious employer to not discriminate based on religion.[459] However, does an employer not conduct such an undertaking when it holds itself out as an equal opportunity employer "beyond the legal requirements" and fails to disclose that it still intends to discriminate against certain but not all religious beliefs?[460]

Another interesting wrinkle in the *Saeemodarae* decision is that the plaintiff also alleged a Title VII retaliatory claim against the hospital which the court rejected because the statutory language of the religious entity exemption "necessarily includes an exemption from the anti-retaliation provision in 42 U.S.C. § 2000e-3(a)."[461] Applying the exemption to retaliatory claims is particularly problematic, because the court must apply a complex examination to determine if a defendant qualifies as a religious entity.[462]

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454. *See generally Saeemodarae*, 456 F. Supp. 2d 1021.

455. *Id.*

456. *Id.* at 1038-39.

457. CATHOLIC ENCYCLOPEDIA 272 (Robert C. Broderick ed. 1987) ("Homosexuality: Sexual activity between persons of the same sex. It is not a normal condition, the acts being against nature are objectively wrong.").

458. *E.g.*, Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618, 624-25 (6th Cir. 2000) (upholding firing of lesbian employee, because of conflict with employer's religious beliefs).

459. *Saeemodarae*, 456 F. Supp. 2d at 1039 (referencing Siegel v. Truett-McConnell College, Inc., 13 F. Supp. 2d 1335, 1344 (N.D. Ga. 1994)).

460. *Id.* at 1029.

461. *Id.* at 1041.

462. *Id.* at 1025 (requiring "the court 'to look at all the facts to decide if the [defendant] is a religious corporation,' and in making this inquiry, '[i]t is appropriate to consider and weigh the religious and secular characteristics of the institution'") (citing *Hall*, 215 F.3d at 624).

This leaves a plaintiff like Ms. Saeemodarae in an intolerably precarious position. Assuming that she is being discriminated against (notably the Equal Employment Opportunity Commission did find probable cause of religious discrimination), by pursuing a Title VII claim which requires administrative exhaustion, the defendant can then legally terminate the employee because she made the discrimination claim if the court finds the defendant is a religious organization.[463] The alternatives are to do nothing and endure what may be religious hostility or to voluntarily leave the employment.[464]

The *Saeemodorae* case epitomizes many of the problems with the overbreadth of the religious entity exemption.[465] Why should a good employee whose job function has nothing to do with religion be terminated because she innocuously read a religious book during her break?[466] Why is it permissible for an employee to be terminated because of her beliefs when she was never informed that her religion was a condition of employment?[467] Why is it alright, assuming the organization does have a Christian purpose, to terminate a Neo-Pagan employee while not terminating the other employees with various religious beliefs?[468] What legal recourse does an employee who is subjected to religious discrimination by a quasi-religious organization have if the retaliatory provisions of Title VII may not be available to her? Reiterating the fact that this hospital was the largest employer in the area, what equivalent career options does a skilled medical professional have without relocating or commuting a great distance? The quandaries raised by *Saeemodarae* demonstrate how the religious entity exemption is not narrowly tailored.

The *Saeemodarae* opinion even acknowledged the seemingly harsh paradox that the religious entity exemption created, as the court proverbially washed its hands in deference to the overly broad statutory language and application.[469] The court sagaciously stated, "Just because Congress has broadly enabled religious organizations to discriminate against employees on the basis of their religion does not mean that they must or should do so . . . . Was it fear of a perceived odd or strange religion like the Wicca[n] religion?"[470] This admonition in dicta underscores how the religious entity

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463. *Id.* at 1032.
464. *See* Okamoto, *supra* note 372, at 1387.
465. *Saeemodarae*, 456 F. Supp. 2d 1021.
466. *Id.*
467. *Id.*
468. *See Saeemodarae*, 456 F. Supp. 2d at 1030-31.
469. *Id.* at 1043-44.
470. *Id.* at 1044 (elaborating further, "this opinion does not address whether Mercy's actions were fair, just, or moral . . . . Was it religious intolerance or bigotry? Was the discharge 'a Christian thing to do'?").

exemption is a potently offensive weapon that legitimizes discrimination against an otherwise protected minority, and how its use by the court goes well beyond the scope of religious requirement.[471]

2. Less Restrictive Alternatives to the Religious Entity Exemption

One simple alternative to the overbreadth problem of the religious entity exemption is to discard the exemptions entirely, leaving religious institutions to assert a Bona Fide Occupational Qualification (BFOQ) defense under Title VII to any religious discrimination claims that arise.[472] A BFOQ is an affirmative defense that, if proven successfully, enables an employer to avoid Title VII liability.[473] The underlying logic to the BFOQ solution is that the religious entity exemption is theoretically duplicative, because if the exemption is used by organizations to further their religious purpose then that objective would be "reasonably necessary" to qualify as a BFOQ.[474]

There is a critical difference in application, however, between the BFOQ and the religious entity exemption.[475] The exemption bars the cause of action, whereas a BFOQ is an affirmative defense generally requiring additional judicial advancement; therefore, the religious entity exemption provides judicial efficiency that a BFOQ cannot provide.[476]

Another solution to the overbreadth of the religious entity exemption is direct, effective, and preserves the exemption's efficiency. A legal presumption could be created that if an employee is not informed when hired that their employment is conditioned on their religious beliefs, then the religious entity has waived its right to assert the exemption. This solution would protect the reasonable expectations of employees performing secular work for religious entities[477] while still allowing a safety valve for religious entities to overcome the presumption in situations involving convincingly non-secular positions.[478] Of course, the entity could prevent any problems by simply disclosing the religious requirement at the time of hiring. Ultimately, religious organizations would not lose their exemption; they would

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471. *See id.* at 1043-44.

472. 42 U.S.C. § 2000e-2(e)(1) (1975) ("[I]t shall not be an unlawful . . . for an employer to hire and employ employees . . . on the basis of religion, sex, or national origin in those certain instances where religion, sex, or national origin is . . . reasonably necessary to the normal operation of that particular business or enterprise.").

473. *Id.*

474. *Id.*

475. *Id.*

476. *Id.*

477. *See, e.g.*, Saeemodarae v. Mercy Health Serv., 456 F. Supp. 2d 1021, 1030-31 (N.D. Iowa 2006).

478. *See* Okamoto, *supra* note 372, at 1380-81.

just have legal incentive to communicate their intention to utilize the exemption.

Such a solution may have some detrimental impact on larger religious employers who engage a primarily secular workforce, such as Mercy, because qualified individuals in the pool of potential employees may resent a religious requirement looming over their employment.[479] It is more unreasonable, however, for companies like Mercy to advertise that they are equal opportunity employers when they can still patently discriminate on the basis of religion, than it is for an adequately performing employee to get blindsided by a largely unknown exemption within a widely known body of legislation that prohibits such discrimination.[480] Under this alternative, the religious organization would ultimately control whether to disclose the requirement to some or all of its employees, so any hardship that results from its decision would be self-inflicted.

The existence of a less discriminatory alternative solution minimally indicates that the religious entity exemption is invalid under the RFRA standard that requires the least restrictive means be used.[481]

VI. THE CAULDRON IN THE COURTROOM: EVIDENTIARY DISCRIMINATION AGAINST NEO-PAGANS

Impeaching witnesses' credibility because of their religious beliefs is seemingly barred by the Federal Rules of Evidence, which simply state: "Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness'[s] credibility is impaired or enhanced."[482] Despite the plain language of Federal Rule of Evidence 610 that is echoed by most states' evidentiary rules,[483] the introduction of Neo-Pagan beliefs has been impermissibly tolerated by many courts to impair a witness's credibility.[484]

The rationale to exclude religious beliefs is to ensure that fact-finders do not apply a prejudice in favor of a believer of their religion, and perhaps more importantly, that fact-finders do not apply a prejudice against a believer of a different religion, because "disclosure of unconventional beliefs has the greatest potential to incite the prejudice [Rule] 610 exists to pre-

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479. *See, e.g.*, *Saeemodarae*, 456 F. Supp. 2d at 1040-41.

480. *See id.*

481. The Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb et seq. (1993).

482. FED. R. EVID. 610.

483. *Id.*; *e.g.*, ARIZ. R. EVID. 610; LSA. C. EVID. 610; ILL. EVID. MAN. § 18:11; N.J. R. EVID. 610.

484. *See, e.g.*, State v. Plaskett, 27 P.3d 890 (Kan. 2001); State v. Theer, 639 S.E.2d 655 (N.C. Ct. App. 2007).

vent."[485] Underlying this principle is the First Amendment's Free Exercise Clause, because the use of legal mechanisms to attack a witness on the basis of her religion is a form of religious persecution that is constitutionally prohibited.[486]

One way courts may run afoul of this constitutional protection is by erroneously excluding Neo-Paganism from the definition of religion: "[I]mposition by a judge of a narrow personal notion of religion may, in and of itself, violate the notions of religious liberty inherent in both [Rule] 610 and the Free Exercise Clause of the U.S. Constitution."[487] As previously stated, Neo-Paganism comports with the Supreme Court's definition of religion and must be accepted as such at all judicial levels for all judicial purposes.[488] Yet another problem is that some states, such as Kansas, do not have a corollary rule of evidence to expressly prohibit religious questioning for credibility impeachment, leaving non-majority religious practitioners vulnerable to baseless character attacks.[489]

An example of a court failing to protect a Neo-Pagan witness from religious credibility impeachment is the Kansas case of *State v. Plaskett*.[490] The defendant in *Plaskett* was convicted by a jury for sexually abusing his adopted daughter and stepdaughter. [491] Both victims were minors during the time of the alleged crimes; the stepdaughter's sexual abuse began at the age of nine.[492]

Amongst the defendant's challenges on appeal was the trial court's refusal to admit a series of exhibits into evidence.[493] The exhibits included a letter that the stepdaughter wrote to a friend describing how she wanted "to become a REAL *witch*," although the defense was still able to cross-examine her about "whether she ever told anyone she wanted to become a witch and wanted to use powers."[494] The reason the defendant sought to introduce the letter was to show that the victim "had a vivid imagination and that she did not restrict her thinking to verifiable facts."[495] Kansas, instead of following a rigid rule of evidence equivalent to Federal Rule 610,

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485. DAVID P. LEONARD & VICTOR J. GOLD, EVIDENCE: A STRUCTURED APPROACH 466 (2010).

486. *See id.*

487. *Id.*

488. *See supra* Part III.B.

489. *E.g.*, *Plaskett*, 27 P.3d at 894.

490. *Id.*

491. *Id.* at 893-94.

492. *Id.* at 894, 897.

493. *Id.* at 913.

494. *Plaskett*, 27 P.3d at 910 (testifying that she was "'referring to a religion called [W]icca . . . . [a]nd to be able to tell fortunes and stuff like that'").

495. *Id.*

conducts a balancing test similar to Federal Rule 403[496] to determine if the evidence's "probative value is substantially outweighed by the risk of unfair prejudice . . . ."[497]

Even though the trial court correctly barred the evidence about Wiccan beliefs as irrelevant, the Kansas Supreme Court reversed and found "the prejudicial effect of not allowing evidence impeaching [the stepdaughter]" to be part of "the cumulative effect of the trial errors [that] would require that we reverse the conviction."[498] Based on the court's finding of error regarding the alleged abuse against the stepdaughter, the court also reversed and remanded the convictions against the adopted daughter because the claims were joined.[499]

In fairness to the *Plaskett* court, there were other evidentiary issues and police testimony that were found to be "trial errors."[500] Yet, the court still failed to recognize the victim's Wiccan religious beliefs as sacrosanct and outside the scope of permissible character impeachment.[501] The defense explicitly sought to introduce the victim's Neo-Pagan beliefs to impeach her credibility on the reasoning that somebody who believes in witchcraft "has a vivid imagination," and is therefore not trustworthy.[502] How could the court have sustained the challenge of not including the victim's religious beliefs when such beliefs were completely irrelevant to the underlying crime?[503]

What is most disturbing about the Kansas Supreme Court's complicity in tolerating a credibility attack on the basis of Neo-Pagan beliefs is the precedential effect that all lower Kansas courts follow.[504] Arguments can now be supported by precedent that Neo-Pagan beliefs are not protected from credibility impeachment, or minimally that the Kansas Rules of Evidence have some tolerance for Neo-Pagan character attacks.[505] A closer examination of Kansas court decisions reveals that such a discriminatory pattern exists when Neo-Paganism is brought to trial.[506]

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496. *Compare* KAN. STAT. ANN. § 60-445, *with* Fed. R. Evid. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . .").

497. State v. Leitner, 34 P.3d 42, 55 (Kan. 2001) (citing Curry v. Klein, 840 P.2d 443 (Kan. 1992), which explained an expanded role of KAN. STAT. ANN. 60-445 beyond the "element of surprise" that the statute explicitly addresses).

498. *Plaskett*, 27 P.3d at 913.

499. *Id.* at 914.

500. *Id.*

501. *See id.*

502. *Id.* at 910.

503. *See Plaskett*, 27 P.3d at 914.

504. *Id.*

505. *See* KAN. STAT. ANN. § 60-445; *Plaskett*, 27 P.3d at 914.

506. *See, e.g.*, State v. Leitner, 34 P.3d 42, 47-48 (Kan. 2001).

Subsequent to the *Plaskett* decision,[507] a spousal murder conviction was upheld by the Kansas Supreme Court in *State v. Leitner* despite prosecutorial questioning of the defendant's involvement with Wicca.[508] A Kansas appellate court had already found the admission of the defendant's religious beliefs to be in error, and the supreme court agreed that Wicca bore "no relevance to the crimes charged against [defendant] . . . . The record contain[ed] no hint or innuendo that [defendant's] abstract beliefs had any connection" to killing her husband.[509]

The court specifically recognized the highly prejudicial effect stemming from Wicca stating that "[i]t seems evident that our culture associates witchcraft with Satanic worship and other evil practices."[510] Considering the court's supposed disdain for unnecessary inclusion of unorthodox religious beliefs into a criminal prosecution, the Kansas Supreme Court's choice to utilize the harmless error analysis instead of a more stringent standard[511] gives additional form to the specter that attacks on the basis of Neo-Pagan beliefs are tolerated, even if they are admonished.[512]

Having found error, the Kansas Supreme Court in *Leitner* had to choose whether "to apply the harmless error rule[513] . . . [or] the federal constitutional error rule to the erroneous admission of that [religious] evidence."[514] A harmless error review in application creates a very high standard to disturb a trial court's outcome, because it disregards any error that is not "inconsistent with substantial justice."[515] Cases that are reversed under this standard require egregious evidentiary misapplication, such as failure to allow a defendant to present exculpatory evidence[516] or failure to allow defendant to show compelling bias evidence against an adverse witness.[517]

A federal constitutional error review (FCER) provides a much lower standard for reversal because the court "must be able to declare beyond a reasonable doubt that the error had little, if any, likelihood of having

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507. *Plaskett*, 27 P.3d at 914.

508. *Leitner*, 34 P.3d at 47-48 (defendant asserted self-defense after shooting estranged husband, stemming from years of alleged physical abuse).

509. *Id.* at 55.

510. *Id.* at 56.

511. *See id.* at 55-56.

512. *Id.*

513. KAN. STAT. ANN. § 60-261 (Supp. 2010).

514. *Leitner*, 34 P.3d at 56.

515. State v. Morris, 880 P.2d 1244, 1257 (Kan. 1994).

516. *See, e.g.*, State v. Getz, 830 P.2d 5 (Kan. 1992) (finding reversible error when defendant could not present evidence that she reasonably believed property was entrusted to her for sale by the true owner).

517. *See, e.g.*, State v. Mays, 866 P.2d 1037, 1042 (Kan. 1994) (finding reversible error when defendant in sexual assault case could not present evidence that victim's boyfriend previously threatened to "get even" with defendant).

changed the result of the trial."[518] Examples of FCERs include the Fifth Amendment's Double Jeopardy Clause,[519] or here the First Amendment's Free Exercise Clause.[520] Whereas the harmless error review requires a showing by the challenging party that substantial justice was missed in light of the entire trial outcome,[521] the FCER only requires that any reasonable alternative outcome may have resulted if not for the erroneous evidentiary ruling.[522]

Interestingly, the court in *Leitner* does not explicitly state which standard it applied, although much of the language suggests the court applied the harmless error rule in finding that reversible error did not occur, stating that "[i]t is *clear* in this case that the jury heard *ample evidence* to show [the defendant] murdered her husband with premeditation."[523] "Clear" and "ample evidence" suggest a lesser standard of review than "beyond a reasonable doubt," as FCER requires.[524]

An argument could be made that the court did apply FCER to *Leitner*, because it frequently referenced "overwhelming evidence" against the defendant, language consistent with other Kansas cases applying FCER.[525] FCER, however, focuses on any reasonable impact the error may have had on the result of the trial, not solely on the sufficiency of other evidence presented, which is what the *Leitner* decision did.[526] Therefore, the court misapplied the federal constitutional error rule and reduced the defendant's constitutional interest by failing to address the specific impact that the "inflammatory evidence" about Wicca may have had on the jury.[527]

No argument is made that the defendant in *Leitner* would not have been found guilty beyond a reasonable doubt without the prejudicial Wiccan evidence.[528] The concern is that the court side-stepped the constitutional protection of a defendant's religious rights by minimizing the trial violation

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518. State v. McClanahan, 910 P.2d 193, 204 (Kan. 1996).

519. *E.g.*, Oregon v. Kennedy, 456 U.S. 667 (1982); *see generally* U.S. CONST. amend. V.

520. State v. Leitner, 34 P.3d 42 (Kan. 2001); *see generally* U.S. CONST. amend. I.

521. KAN. STAT. ANN. § 60-261 (Supp. 2010).

522. *See generally Kennedy*, 456 U.S. 667 (holding that a plausible alternative outcome would be sufficient to meet the FCER standard).

523. *Leitner*, 34 P.3d at 57 (emphasis added).

524. *Id.*

525. State v. Pham, 10 P.3d 780, 788 (Kan. App. Ct. 2000) (reversing aggravated assault conviction for "cumulative trial errors" including admissions of highly prejudicial gang affiliation evidence).

526. *Leitner*, 34 P.3d at 55-56.

527. *Id.* at 56-57.

528. *Id.* (finding self-defense not reasonable in light of defendant's previous attempts to murder husband, planned obtainment and concealment of the murder weapon, and multiple shots to the back of the victim's head).

under a plain error analysis, instead of the more rigorous FCER.[529] Like in *Plaskett*, the Kansas Supreme Court perpetuated the classification of Neo-Pagan rights as something less than constitutionally protected.[530] *Leitner* and *Plaskett* show how Kansas' failure to have a rule equivalent to Federal Rule 610 opens the door for the disparate treatment of Neo-Paganism in the court room.[531]

North Carolina has similarly failed to provide a corollary rule of evidence to Federal Rule 610 and has also undermined the importance of Neo-Pagan religious recognition in evidentiary matters.[532] The case of *State v. Theer*[533] is highly similar to *Leitner*[534] in that a wife was found guilty of first degree murder of the shooting death of her husband. The prosecution in *Theer* introduced a litany of character evidence, including the defendant's "alleged practice of Wicca" without any supporting inferences as to how Wicca was relevant to the charged crime.[535]

While the court in *Leitner* set a dangerous precedent even though the legitimate evidence against the defendant was seemingly more than sufficient to meet the burden of proof,[536] the court in *Theer* failed to even dignify the religious rights of the defendant despite what was otherwise more than sufficient evidence.[537] The primary problem in *Theer* is that the court accepted that Wicca had some relevance to the case.[538] Acceptance of the defendant's religious beliefs to prove her guilty of murder is in direct violation of the First Amendment barring an exceptional circumstance where religion is a central issue in the case.[539] The court should have upheld the verdict on the sufficiency of the proper evidence and used the opportunity to admonish the prosecution for having sought to use religious beliefs as character evidence against the defendant.[540] Instead the court established a

529. *Id.* at 56-57.

530. *Id.* at 56-57; State v. Plaskett, 27 P.3d 890, 914 (Kan. 2001).

531. *Leitner*, 34 P.3d at 56-57; *Plaskett*, 27 P.3d at 914.

532. State v. Theer, 639 S.E.2d 655 (N.C. Ct. App. 2007).

533. *Id.*

534. *Leitner*, 34 P.3d 42.

535. *Theer*, 639 S.E.2d at 663 (including other character evidence the court accepted to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake "under N.C. Gen. Stat. § 8C-1, Rule 404(b)" (equivalent to Fed. R. Evid. 404(b) standard): "her sexual promiscuity and affairs . . . her 'alternative' lifestyle . . . and 'swinging' . . . and her ability to manipulate men").

536. *Leitner*, 34 P.3d at 56-57.

537. *Theer*, 639 S.E.2d at 663.

538. *Id.* ("[W]e acknowledge that this evidence had a tenuous, at best, relevance to the Defendant's guilt.").

539. *Id.*

540. *Id.*

precedent that it is not a serious violation to attack a defendant or witness on the basis of their Neo-Pagan beliefs.[541]

North Carolina's reticence to accept Neo-Paganism as a protected religious belief is further evidenced by the custody determination made *In re Huff*; a case that also implicates parental rights discussed in Part IV.[542] In *Huff*, the appellate court approved the guardian *ad litem*'s questioning of the father about the parent's belief in Wicca.[543] The court acknowledged that only "a limited inquiry into the religious practices of the parties is permissible, if such practices may adversely affect the physical or mental health or safety of the child, and if the inquiry is limited to the impact such practices have upon the child."[544] However, the court found "remarks by three witnesses, and six pages of inquiry" during the father's examination to be brief and necessary to determine the best interests of the child.[545]

The most dubious line of questioning involved how the parents used Wicca in ways an orthodox religious practitioner would pray to their deity: for help finding a job and to help their child sleep well while in the hospital.[546] The court referenced no similar inquiry of a mainstream orthodox belief that involved three witnesses and several pages of questioning, thus suggesting that Wicca was not given its proper recognition as a religion for purposes of the custody determination.[547] In other words, because no clear precedent clearly stated the extended inquiry into the parent's Neo-Pagan beliefs was erroneous, the court was able to set the bar of error around the lower court's determination and almost indelibly allow similar inquiries in the future about Neo-Paganism that would likely be viewed as unnecessary and ridiculous to a mainstream religious practice.[548]

Looking at the evidentiary scenarios affecting Neo-Pagans detailed in this section, the common denominator is the absence of statutory safeguards, such as Federal Rule 610, in some states' court systems.[549] Often when courts are left to their own discretion, judges attach the societal

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541. *Id.*

542. *In re* Huff, 536 S.E.2d 838, 842-845 (N.C. Ct. App. 2000).

543. *Id.*

544. *Id.* at 843 (quoting Petersen v. Rogers, 433 S.E.2d 770 (N.C. Ct. App. 1993), *rev'd on other grounds,* 445 S.E.2d 901 (1994)).

545. *Id.* at 843-44.

546. *Id.* at 842.

547. *Huff*, 536 S.E.2d at 843-45 (citing Petersen v. Rogers, 433 S.E.2d 770 (N.C. Ct. App. 1993), *rev'd on other grounds*, 445 S.E.2d 901 (1994)) (contrasting only a case that was overturned for excessive religious inquiry involving parents who followed a non-mainstream belief, The Way).

548. *See id.* at 843-45.

549. *See, e.g.*, State v. Plaskett, 27 P.3d 890 (Kan. 2001); State v. Theer, 639 S.E.2d 655, 663 (N.C. Ct. App. 2007).

prejudices of Neo-Paganism to an evidentiary ruling,[550] if for no reason other than ignorance.[551] Once judicial discretion is applied, properly or improperly, the burden of proving judicial error is more often an insurmountable task, even when the judge improperly admitted prejudicial religious evidence.[552] While statutory safeguards are not an absolute solution because a judge may still refuse to properly recognize Neo-Paganism as a religion, the prevalence of improperly admitted religious evidence in courts that do not have such safeguards strongly suggests that religious prejudice can be minimized with them.[553]

VII. THE BROADER IMPLICATIONS OF RELIGIOUS INTOLERANCE

The religious composition of America has been changing over the past few decades in a faster and more diverse way than our nation has ever previously experienced.[554] Different theories exist as to the exact cause(s) of this phenomenon: whether it is a broader gyration of a recurring cycle; whether it is culturally or generationally inspired; and/or whether the accessibility to global information has accelerated an inevitable shift.[555] Regardless of the cause or causes, a fissure has developed between those at the core of what has been a predominantly Christian (particularly Protestant) society, and those who are breaking off and exploring new and/or different ways of understanding their existence.[556]

Contemporary issues—such as the events surrounding 9/11 and the unprecedented period of war our nation has subsequently faced—have been wrapped into a series of indelible images that many perceive to be rooted in the malfeasance of a religion that "propagate[s] terrorism."[557] Consequently, some within the traditional Christian majority have latched onto a notion that our national heritage is Christian more strongly than ever.[558]

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550. *See, e.g.*, *Plaskett*, 27 P.3d 890; *Theer*, 639 S.E.2d 655.

551. *See supra* Part II.C.

552. *E.g.*, State v. Leitner, 34 P.3d 42, 56 (Kan. 2001).

553. *See, e.g.*, *Plaskett*, 27 P.3d 890; *Theer*, 639 S.E.2d 655.

554. *See American Religious Identification Survey* (ARIS 2008), *supra* note 131; Rebecca French, *Shopping for Religion: The Change in Everyday Religious Practice and Its Importance to the Law*, 51 BUFF. L. REV. 127, 128 (2003) ("[A]n exponential increase in American [religious] pluralism, and in the number and diversity of religions . . . . [C]onsumer culture is now applied . . . to religion itself as competitive religions have increasingly entered the marketplace.").

555. *See* French, *supra* note 554, at 128, 133-34.

556. *Id.* at 141.

557. Avigael N. Cymrot, *Reading, Writing, and Radicalism: The Limits on Government Control Over Private Schooling in an Age of Terrorism*, 37 ST. MARY'S L.J. 607, 608.

558. *See* BARNER-BARRY, *supra* note 19, at 9-10 (explaining the engrained belief by some Americans that the United States is a "Christian Nation," a belief that has been periodically engrained legislatively); *e.g.*, TEX. CONST. art. I, § 4 (stating that a person may be

Those at the core of these beliefs dig their heels in deeper and deem that a common Christian doctrine is more essential than ever for our nation's long-term identity and survival.[559] Others, including many Christians and various other religious believers and non-believers, oppose the projection of majoritarian religion into our government and military as an egregious violation of one of our most fundamental liberty guarantees.[560] With both sides advocating from conflicting stances that each views as more patriotic and constitutional than the other, every indication is that the fissure will grow before the differences are mended:

> [F]etishizing of the Constitution is unsettling. It's not that it isn't worthy of veneration or study. It's that too often, the Constitution is wielded as a political cudgel, even if . . . the cudgelers fail to grasp the document's finer points. Both parties are desperate to claim themselves as the true descendants of the framers, and they drape themselves in the [C]onstitution like a political safety blanket, since it's one of the only unassailable quantities in contemporary politics.[561]

In just the past year, controversial topics implicating religion included: the proposed building of an Islamic building near the World Trade Center site;[562] the military's implementation of a spirituality test as part of the "Comprehensive Soldier Fitness" program;[563] the perception that President Obama is a Muslim;[564] and the constitutionality of religious symbols on

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excluded from holding public office if he does not "acknowledge the existence of a Supreme Being").

559. *Id.* at 173-204.

560. *See* BARNER-BARRY, *supra* note 19, at ix (explaining that most Christians have not asserted a belief of dominance and that "[w]hen bad things happen to minority religious groups and individuals . . . Christians have often been in the forefront of efforts to try to ameliorate or remedy the situation").

561. Alex Altman, *The Cult of the Constitution*, TIME (Jan. 6, 2011), http://swampland.blogs.time.com/2011/01/06/the-cult-of-the-constitution/.

562. *See, e.g.*, Associated Press, *Imam to Tour Nation Promoting Islamic Center Proposed Near Ground Zero in NYC*, FOX NEWS (Dec. 24, 2010), *available at* http://www.foxnews.com/us/2010/12/24/imam-ny-islamic-center-tour-nation/.

563. *Countdown with Keith Olbermann* (MSNBC television broadcast Jan. 6, 2011) (describing a mandatory test that asks military personnel to respond to questions, such as "I am a spiritual person" and then provides recommendations, such as "You lack a sense of meaning and purpose in your life").

564. *See Glenn Beck* (Fox News television broadcast Aug. 24, 2010). The eponymous host tried to explain the confusion about Pres. Obama's religion: "[W]here your father is a Muslim, an atheist, your mother at least is not practicing any religion . . . . [I]s there any wonder why so many Americans are confused by him? They don't recognize him as a Chris-

government property.[565] Even though much of the current friction may be rooted in animosity towards Islam, any issue that implicates a non-majority Protestant belief is vulnerable to scorn on the national stage.[566]

Neo-Paganism specifically received bad press in 2010 when U.S. Senate hopeful Christine O'Donnell first maligned and then made a mockery of witchcraft in her failed campaign.[567] In recent years, other notable public figures have made disparaging remarks about the validity of Neo-Paganism as a religion, such as then Governor George W. Bush's comment that, "I don't think that witchcraft is a religion."[568]

Ironically, the fate of religious freedoms for Neo-Pagan beliefs is held overwhelmingly by Christian politicians and justices, and the rights of minority religions have historically been left to representatives of the majority religion.[569] The Supreme Court operated into the twentieth century with only Christian justices, until the appointment of Justice Brandeis in 1916.[570] Even subsequent to the appointment of "the Jewish seat," all justices have been of Judeo-Christian faith.[571]

Congress is also predominantly composed of Judeo-Christian believers.[572] Despite the precipitous rise in beliefs other than Judeo-Christian, the 112th Congress is statistically overrepresented by Judeo-Christian adherents and underrepresented by all other beliefs:

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tian . . . . [T]here are more people . . . who don't know what religion he is, than there are people who believe he's a Christian." *Id.*

565. *E.g.*, Am. Atheists v. Duncan, 616 F.3d 1145 (10th Cir. 2010) (finding an Establishment Clause violation for government to erect memorial crosses on roadsides for traffic victims).

566. *See* BARNER-BARRY, *supra* note 19, at 3-6.

567. *See* AOL News, *Christine O'Donnell, Not-a-Witch Senate Candidate: Where Is She Now?* (Dec. 17, 2010) (recounting the candidate's prior statements that she "dabbled in witchcraft" and how she ran a media campaign asserting "I'm not a witch"). O'Donnell's description of her dabbling did not resemble a cognizable Neo-Pagan practice. *See supra* Part II.A-B.

568. Interview with Governor George W. Bush, *Good Morning America*, ABC News (June 1999) (criticizing the military's recognition of Neo-Paganism).

569. *See* BARNER-BARRY, *supra* note 19, at ix.

570. *Religion & the Supreme Court*, MOMENT MAGAZINE (Sep./Oct. 2008), *available at* http://www.momentmag.com/moment/issues/2008/10/SupremeCourt.html.

571. *Id.*

572. Jamelle Bouie, *Where Are the Atheists in Congress?*, THE ATLANTIC (Jan. 6, 2011), http://www.theatlantic.com/politics/archive/2011/01/where-are-the-atheists-in-congress/69010/.

	ARIS 1990 Survey[573]	ARIS 2008 Survey[574]	112th Congress (2011)[575]
Christian	86.2%	76.0%	88.8%
No Religious Belief	8.2%	15.0%	0.0%
Jewish	1.8%	1.2%	7.3%
All Other Beliefs	3.8%	7.8%	3.9%

There is nothing inherently problematic about these statistical disparities. The congressional underrepresentation of non-Judeo-Christian groups, however, when combined with a religiously charged political environment, is understandably cause for concern amongst religious minorities.[576]

The future of religious freedom can go one of two ways: either our country shifts towards becoming a nation under a majoritarian Judeo-Christian God, or it embraces the religious pluralism that is central to our heritage and national success.[577] Every case in which a minority practitioner's religion is not recognized and given the full rights that all religious beliefs are entitled to receive is a shift to the former.[578]

Perhaps a longer-term concern for those advocating for expanded recognition of Judeo-Christian beliefs in government is that our nation may not be that far from becoming a people primarily without a majoritarian religious belief, or possibly a people primarily without any religious belief.[579] If the current majority became the future minority, would the same advocates want majoritarian decision-making to use legal mechanisms to undermine the rights of those with faith?

While Neo-Paganism has been the specific focus of this Comment, any oppression to any religious belief or non-belief creates a dangerous precedent to the future rights of all, with possible repercussions rippling to those in the present majority.

Our representatives and jurists in the present religious and political majority are entrusted with guiding the future of religious freedom in our country. May they recognize Neo-Pagan rights, along with the religious rights of any valid belief, and continue to adhere to the understanding laid

573. *American Religious Identification Survey* (ARIS 2001), *supra* note 124.

574. *American Religious Identification Survey* (ARIS 2008), *supra* note 131.

575. Jamelle Bouie, *Where Are the Atheists in Congress?*, THE ATLANTIC (Jan. 6, 2011), http://www.theatlantic.com/politics/archive/2011/01/where-are-the-atheists-in-congress/69010/.

576. *Id.*

577. *See* BARNER-BARRY, *supra* note 19, at 6-7.

578. *E.g.*, Hicks v. Cook, 288 S.W.3d 244 (Ark. Ct. App. 2008).

579. *See* French, *supra* note 554, at 195-99.

out by Justice O'Connor, honoring religious pluralism and opposing thinking that would oppress religious minorities: "[T]he First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility. The history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups . . . ."[580]

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580. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 902 (1990) (O'Connor, J., concurring) (distinguishing her opinion from that of J. Scalia's lead opinion that sanctioned the "unavoidable consequence[s]" that befell minority religions).

* Juris Doctor Candidate, 2012, at Northern Illinois University College of Law; Notes and Comments Editor for the NORTHERN ILLINOIS UNIVERSITY LAW REVIEW. I extend special thanks to Iris Firemoon and Selena Fox for providing background information, and my wife, Emily Fornwall, for tolerating the time and energy that went into researching, writing, and revising this Comment.