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Ware v. Valley Stream High School District: At What Expense Should Religious Freedoms Be Preserved?

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WARE v. VALLEY STREAM HIGH SCHOOL DISTRICT: AT WHAT EXPENSE SHOULD RELIGIOUS FREEDOMS BE PRESERVED?

The religion clause of the first amendment,[1] which states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[,]"[2] was enacted in response to widespread persecution[3] and the fear of a national religion.[4] The clause was intended to "state an objective, not to write

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[1] U.S. CONST. amend. I. The original version of the religion clause of the first amendment was introduced by James Madison on June 8, 1789 and read: "The civil rights of none shall be abridged on account of religious belief, nor shall any national religion be established, nor shall the full and equal rights of conscience in any matter or on any pretext be infringed." 1 ANNALS OF CONG. 434 (J. Gales ed. 1789), *reprinted in* W. PARSONS, THE FIRST FREEDOM 30 (1948). There were six versions of the amendment. *Id.* at 30-40. The sixth and final one was approved by the House of Representatives on September 24, 1789, and by the Senate on September 25, 1789. *Id.* at 40.

[2] U.S. CONST. amend. I.

[3] *See* Everson v. Board of Educ., 330 U.S. 1, 9 (1946). The persecutions which caused the colonists to flee from England were practiced in America. *See id.*

> Catholics found themselves hounded and proscribed because of their faith; Quakers who followed their conscience went to jail; Baptists were peculiarly obnoxious to certain dominant Protestant sects; men and women of varied faiths who happened to be in a minority in a particular locality were persecuted because they steadfastly persisted in worshipping God only as their own consciences dictated.

Id. at 10.

In 1659, Virginia enacted a Quaker banishment statute. *See* F. SWANCARA, THOMAS JEFFERSON VS. RELIGIOUS OPPRESSION 54 (1969). James Madison was referring to the persecution of Baptists in Virginia when he wrote, "there are at this time . . . not less than five or six well meaning men in close jail for publishing their religious sentiments." *Id.* at 51.

In addition, a tax for church support was imposed on the citizens of Virginia, North Carolina, Massachusetts, Connecticut, New York, Maryland, and New Hampshire. *Everson*, 330 U.S. at 10 n.8. Religious persecution was condemned by James Madison as a threat to a free society in general, not just to religious freedom. *See* C. JAMES, DOCUMENTARY HISTORY OF THE STRUGGLE FOR RELIGIOUS LIBERTY IN VIRGINIA 256 (1971).

[4] *See* I. BRANT, JAMES MADISON: THE NATIONALISTS 1780-1787 344 (1948) ("religion is corrupted when established by law"). The framers of the Constitution recognized that "one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular [religion]." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1170 n.9 (2d ed. 1988); *see* Engel v. Vitale, 370 U.S. 421, 427-28 (1962) (at time of Revolutionary War, established churches and religions existed in former colonies); Zorach v. Clauson, 303 N.Y. 161, 180, 100 N.E.2d 463, 472 (1951) (Desmond, J., concurring) (there were established churches in five states at time of adoption of Constitution), *aff'd*, 343 U.S. 306 (1952).

a statute."[5] The religion clause contains two separate prohibitions; the first, known as the establishment clause, forbids the creation of a national religion or the favoring of one religion over another;[6] the second, the free exercise clause, protects an individual's right to practice the religion of his choice.[7] There is an inherent tension in the dual restrictions embodied in this sixteen-word clause,[8] which is evidenced by the abundance of litigation involving public schools and religion clause issues.[9] The public school arena is fertile

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[5] Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970). The objective of the religion clause of the first amendment was to leave the choice of religion to "the conviction and conscience of every man" and to protect the inalienable "right of every man to exercise it as these may dictate." *See* C. JAMES, *supra* note 3, at 256. The development of rules and principles to implement this objective has been left to the judiciary. *See* L. TRIBE, *supra* note 4, at 1155-56.

[6] *See Engel*, 370 U.S. at 430-31; Note, *Freedom of Religion vs. Public School Reading Curriculum*, 12 U. PUGET SOUND L. REV. 405, 406-07 (1989). To avoid violating the establishment clause, government action must have a secular purpose, a primary effect that neither advances nor inhibits religion, and must not foster excessive entanglement between government and religion. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

[7] *See* Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 967-68 (1989) (free exercise clause was modeled after Statute of Virginia for Religious Freedom enacted in 1786). The free exercise clause protects the right of every individual to choose and practice his own religion. *See* C. JAMES, *supra* note 3, at 256; Note, *supra* note 6, at 407; *see also* Bob Jones Univ. v. United States, 461 U.S. 574, 603 (1983) (outlining two-step analysis of free exercise claims).

[8] *See* M. MCCARTHY, A DELICATE BALANCE: CHURCH, STATE AND THE SCHOOLS 14 (1983); Note, *supra* note 6, at 410. The difficulty of finding neutral ground between the two prohibitions is heightened by their "absolute terms" which "tend to clash with [one another]." *See* L. TRIBE, *supra* note 4, at 1157 (quoting *Walz*, 397 U.S. at 668-69). The Supreme Court and legal scholars are cognizant of this tension. *See* Sherbert v. Verner, 374 U.S. 398, 416-17 (1963) (Stewart, J., concurring) ("dilemma posed by the conflict between the Free Exercise Clause of the Constitution and the Establishment Clause"); L. TRIBE, *supra* note 4, at 1158-59 (views of Roger Williams, Thomas Jefferson, and James Madison explored). There is some authority for the proposition that the framers did not intend or foresee any tension, *see* L. TRIBE, *supra* note 4, at 1156, and that the clauses merely complement one another. *See, e.g*, Buchanan, *Accommodation of Religion in the Public Schools: A Plea for Careful Balancing of Competing Constitutional Values*, 28 UCLA L. REV. 1000, 1023 n.135 (1981) (striking down law prescribing certain form of worship for all would promote both clauses).

Since the two provisions protect different interests, the Supreme Court has treated them separately and has developed different tests for each of them. *See* Note, *supra* note 6, at 406; *see also supra* note 6 and accompanying text (establishment clause test).

[9] *See* Comment, *Fundamentalist Christians, The Public Schools and the Religion Clauses*, 66 DEN. U.L. REV. 289, 291 (1989). Conflicts between school curriculum and religion have occurred since the inception of the public school system in the eighteenth century. *Id.* The first American schools were affiliated with churches and incorporated the values of Protestant Christianity into their curricula. *Id.* at 308. However, throughout the nineteenth century the influence of religion in public schools was decreased or completely removed. *Id.* at 309. Today, controversy surrounding religion generally focuses on alleged violations of the right to free exercise rather than the inculcation of a particular religion. *Id.* at 289-91.

ground for religion clause debate since any incorporation of religion or religious activities into public school curricula creates the danger of an establishment clause violation.[10] On the other hand, the free exercise clause is implicated whenever an individual requests an exemption from a facially neutral curriculum requirement because of an alleged conflict with a sincerely held religious belief.[11] Recently, in *Ware v. Valley Stream High School District*,[12] the New York Court of Appeals highlighted this controversial area by addressing a free exercise clause challenge to a state-mandated acquired immune deficiency syndrome ("AIDS")[13] education program.[14]

In *Ware*, the plaintiffs were members of the Plymouth Brethren,[15] a devoutly religious group which requires its members to

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[10] *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 61 (1985) (moment of silence for prayer or meditation); Stone v. Graham, 449 U.S. 39, 42-43 (1980) (posting of Ten Commandments in classroom); Abington School Dist. v. Schempp, 374 U.S. 203, 223 (1963) (Bible readings); *Engel*, 370 U.S. at 433 (school prayer); McCollum v. Board of Educ., 333 U.S. 203, 211-12 (1948) (religious instruction given in public schools). When an establishment clause violation is found, exempting the complainant from the activity would not be a sufficient remedy, because the government action must be prohibited. *See* Note, *supra* note 6, at 408.

[11] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) (compulsory school attendance); Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1063 (6th Cir. 1987) (compulsory reading program), *cert. denied*, 484 U.S. 1066 (1988); Spence v. Bailey, 465 F.2d 797, 800 (6th Cir. 1972) (ROTC classes). For unsuccessful free exercise challenges, *see, e.g.*, Blackwelder v. Safnauer, 689 F. Supp. 106, 130 (N.D.N.Y. 1988) (minimum standards of instruction for home education), *appeal dismissed*, 866 F.2d 548 (2d Cir. 1989); Keller v. Gardner, 552 F. Supp. 512, 516 (N.D. Ill. 1982) (attendance at basketball practice conflicting with scheduled religious classes). It has been suggested that since a violation of the free exercise clause makes the government action invalid only as to a particular individual, the appropriate remedy is an exemption. *See* Note, *supra* note 6, at 409.

[12] 75 N.Y.2d 114, 550 N.E.2d 420, 551 N.Y.S.2d 167 (1989).

[13] *See* Burris, *A Little Law for Non-Lawyers*, AIDS AND THE LAW 1 (1987). Discovered in 1981, AIDS is caused by the human immunodeficiency virus (HIV) and destroys the immune defense system. *See* Green, *The Transmission of AIDS*, AIDS AND THE LAW 28 (1987); *see also* I. SLOAN, AIDS LAW: IMPLICATIONS FOR THE INDIVIDUAL AND SOCIETY 1 (1988) (general background and medical history of AIDS).

[14] [1987] 8 N.Y.C.R.R. § 135.3. The regulation requires that all elementary and secondary schools provide instruction about AIDS as part of the health education program. *Id.* §§ 135.3(b)(2), (c)(2). Upon written request of the parent, and assurance that such instruction will be received at home, an exemption is permitted from that portion of the program which deals with prevention. *Id.*

[15] *Ware*, 75 N.Y.2d at 116-17, 550 N.E.2d at 422, 551 N.Y.S.2d at 169; *see* B. WILSON, "THE BRETHREN" A RECENT SOCIOLOGICAL STUDY 3 (1981). The Brethren were first established in Dublin, Ireland, in the late 1820s. *Id.* Disenchanted with established religions, the original members of the Brethren sought to return to the Christian life described in the New Testament. *Id.* This was accomplished by the separation of members from existing churches and the world. *Id.* at 3-4.

As of 1989, there are approximately 35,000 members worldwide, approximately 2,000 of

"distance themselves from all things they consider evil."[16] Such moral standards created a conflict for Brethren children, approximately thirty-five of whom were students at New York's Valley Stream High School.[17] In accordance with a regulation issued by the New York State Commissioner of Education,[18] the Valley Stream High School District incorporated AIDS education into its health education program.[19] However, when confronted with the Brethren's request that their children be exempted from the compulsory AIDS education requirement, because it conflicted with their religious beliefs, the School District refused to honor their request.[20] In response, the Brethren brought suit against the School District, the New York State Commissioner of Education, and New York State, seeking a declaration that the relevant regulation violated their constitutional right to the free exercise of religion,[21] because the tenets of their religion[22] forbid exposure to the

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whom live in the United States. *See* Brief For Plaintiff-Appellants at 4, *Ware*, 75 N.Y.2d at 116-17, 550 N.E.2d at 422, 551 N.Y.S.2d at 169 (No. 89-3126) [hereinafter Brief for Plaintiff-Appellants]. This action was brought on behalf of the local gatherings in Valley Stream, New York, which consists of 140 members, and Rochester, New York, which has approximately 120 members. *Id.*

[16] *See Ware*, 75 N.Y.2d at 117, 550 N.E.2d at 422, 551 N.Y.S.2d at 169; *see also* B. WILSON, *supra* note 15, at 4 (separation from evil as primary duty of Christians emphasized as early as 1836).

[17] *Ware*, 75 N.Y.2d at 117, 550 N.E.2d at 422, 551 N.Y.S.2d at 169.

[18] *See supra* note 14 (discussion of regulations).

[19] *Ware*, 75 N.Y.2d at 117-18, 550 N.E.2d at 422, 551 N.Y.S.2d at 169. Valley Stream High School includes 22 lessons concerning AIDS in its health education program. *Id.* These lessons include topics such as, "Practice skills in saying no," "Know ways the AIDS virus can and cannot be transmitted," and "Recognize and evaluate media messages regarding sexuality." *Id.* at 118, 550 N.E.2d at 422-23, 551 N.Y.S.2d at 169-70. These lessons were added to the curriculum in the second semester of the 1988-89 school year. *Id.* at 117-18, 550 N.E.2d at 422, 551 N.Y.S.2d at 169.

[20] *Id.* The request was denied because the school district did not have the authority to grant a complete exemption. *Id.* A subsequent petition to the New York State Commissioner of Education was also denied. *Id.* at 119, 550 N.E.2d at 423, 551 N.Y.S.2d at 170. The Brethren children were, however, granted an exemption from five lessons dealing with methods of prevention. *Id.* at 118, 550 N.E.2d at 422, 551 N.Y.S.2d at 169. These lessons included classes on abstinence from illegal drug use, abstinence from sexual activity, and prevention of the transmission of AIDS. *See id.* In denying a total exemption, the Commissioner stressed the need to educate all children about AIDS, *id.* at 119, 550 N.E.2d at 423, 551 N.Y.S.2d at 170, and noted that there was no coercion to affirm a belief or engage in conduct forbidden by the tenets of the Brethren's religious beliefs. *See* Brief for Plaintiff-Appellants, *supra* note 15, at 9 (quoting decision of Commissioner of Education).

[21] *See Ware*, 75 N.Y.2d at 118, 550 N.E.2d at 423, 551 N.Y.S.2d at 170.

[22] *See* Brief for Plaintiff-Appellants, *supra* note 15, at 4. Brethren members are required "to abjure all sexual conduct and relations outside of marriage, to maintain personal purity, to observe strictly ethical modes of conduct, [and] to obtain moral guidance in accor-

materials presented under the AIDS educational program.[23]

At the trial level, both plaintiffs and defendants moved for summary judgment.[24] Upon finding that the members of the Brethren were integrated into the mainstream of society and that the AIDS educational program would not conflict with their religious beliefs, and stressing that the state's interest in curbing the AIDS epidemic was compelling,[25] the trial court granted the defendant's motion. Emphasizing the state's compelling interest, the Appellate Division of the Supreme Court of New York affirmed, despite finding a possible burden on the plaintiffs' religious freedom.[26]

Upon review by the New York Court of Appeals, Judge Kaye, in reliance on well-established precedent, held that the Brethren initially must bear the burden of proof demonstrating that the AIDS curriculum unconstitutionally infringed upon a sincerely held religious belief.[27] If met, the burden would then shift to the

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dance with scriptural commands solely within their carefully insulated religious gathering." *Id.* The Brethren's relationships outside of the community are kept to the absolute minimum. *Id.* at 5. The religious and social associations of Brethren members are limited to the Brethren community. *Id.* at 14. Brethren children are not permitted to associate with other children either during or after school. *Id.* In addition, members do not use televisions or radios, see movies, or read magazines. *Id.* at 31.

[23] *See* Brief for Plaintiff-Appellants, *supra* note 15, at 24. The Brethren objected to the fact that the information in the AIDS program is taught in a manner which does not comport with their moral values. *See id.* at 22. Their primary objection is that the program is devoid of any connection between immoral conduct and the "fear of God" or the "fear of eternal penalty," an essential component of their religious beliefs. *See* Reply Brief for Plaintiff-Appellants at 2, *Ware*, 75 N.Y.2d at 114, 550 N.E.2d at 420, 551 N.Y.S.2d at 167 (No. 89-3126).

The gravamen of the Brethren's suit was that requiring their children to attend classes under New York's AIDS program infringed on their first amendment right to the free exercise of religion. *See Ware*, 75 N.Y.2d at 120-21, 550 N.E.2d at 423-24, 551 N.Y.S.2d at 170-71; Brief for Plaintiff-Appellant, *supra* note 15, at 24. No claim was asserted under the free exercise clause of the New York State Constitution, despite the fact that the New York State Constitution provides, in pertinent part, that "[t]he free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind." N.Y. CONST. art. I, § 3; *see Ware*, 75 N.Y.2d at 123 n.3, 550 N.E.2d at 426 n.3, 551 N.Y.S.2d at 173 n.3.

[24] *See Ware*, 75 N.Y.2d at 121, 550 N.E.2d at 424, 551 N.Y.S.2d at 171.

[25] *See id.* at 121, 550 N.E.2d at 425, 551 N.Y.S.2d at 172.

[26] *See id.* at 122, 550 N.E.2d at 425, 551 N.Y.S.2d at 172.

[27] *See id.* at 124, 550 N.E.2d at 426, 551 N.Y.S.2d at 173. In free exercise clause cases, the Supreme Court has employed a two-step analysis. *See* Sherbert v. Verner, 374 U.S. 398 402-03 (1963); Lupu, *supra* note 7, at 934; Note, Mozert v. Hawkins County Bd. of Educ.: *The Struggle to Balance Competing Constitutional Interests in the Public School Curricular*, 42 ARK. L. REV. 519, 525 (1989) [hereinafter Note, *School Curricular*]; Comment, *supra* note 9, at 299. The threshold inquiry is whether or not a sincerely held religious belief is

state to show that the AIDS curriculum served a compelling state interest which would be "substantially impede[d]" by granting an exemption to the Brethren children.[28] Applying this two-part analysis, the *Ware* court determined that there were disputed issues of material fact, and thus a trial on the merits was required to determine whether: (1) the Brethren were "thoroughly integrated into the larger society—and its evils"; (2) "the AIDS curriculum pose[d] any threat to the continued existence of the Brethren as a church community" and thus constitutes an "extreme injury";[29] (3) "the education [the Brethren] provide their children [has left] them ill equipped to cope with the dangers of AIDS";[30] and (4) the state's compelling interest in the AIDS epidemic overrides any burden which the Brethren might establish.[31] Dissenting, Judge Titone argued that the *Ware* court had before it all the relevant facts and that, therefore, the plaintiffs' motion for summary judgment should have been granted.[32] In contrast, Judge Bellacosa's

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burdened by the government action. *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 447 (1988); Lupu, *supra* note 7, at 934; Note, *Native American First Amendment Sacred Land Defense: An Exercise in Judicial Abandonment*, 54 Mo. L. Rev. 777, 780 (1989); Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 Yale L.J. 350, 355 (1980) [hereinafter Note, *Competing Authorities*]. Notably, however, this religious belief need not be based on membership in a particular sect or community. *See* Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829, 109 S. Ct. 1514, 1517 (1989).

In *Ware*, the school district conceded the sincerity of the Brethren's religious beliefs. *See Ware*, 75 N.Y.2d at 127, 550 N.E.2d at 428, 551 N.Y.S.2d at 175.

[28] *Ware*, 75 N.Y.2d at 124, 550 N.E.2d at 426, 551 N.Y.S.2d at 173. Once a *prima facie* case has been established by meeting the threshold inquiry, the state must demonstrate that the regulation or government action is the least restrictive means of achieving the compelling state interest at issue. *See* Wisconsin v. Yoder, 406 U.S. 205, 214 (1972); Fosmire v. Nicoleau, 75 N.Y.2d 218, 221, 551 N.E.2d 77, 78, 551 N.Y.S.2d 876, 877 (1990); Note, *The Interests of the Child in the Home Education Question*: Wisconsin v. Yoder *Re-examined*, 18 Ind. L. Rev. 711, 712 (1985) [hereinafter Note, *Home Education*]; Note, *supra* note 6, at 409.

[29] *Ware*, 75 N.Y.2d at 127-28, 550 N.E.2d at 428-29, 551 N.Y.S.2d at 175-76.

[30] *Id.* at 129, 550 N.E.2d at 430, 551 N.Y.S.2d at 177; *see also Yoder*, 406 U.S. at 235 (Amish demonstrated adequacy of their alternative to compulsory education).

[31] *Ware*, 75 N.Y.2d at 128, 550 N.E.2d at 429, 551 N.Y.S.2d at 176.

[32] *Id.* at 131, 550 N.E.2d at 431, 551 N.Y.S.2d at 178 (Titone, J., dissenting). Judge Titone also contended that the defendants had not met their burden of "[producing] evidentiary proof in admissible form sufficient to require a trial." *Id.* (Titone, J., dissenting). Judge Titone relied on prior New York Court of Appeals cases stating that mere conclusory statements or unsupported allegations are insufficient to prevent summary judgment. *Id.* (Titone, J., dissenting) (citations omitted).

Under New York law, the party opposing a summary judgment motion will be unsuccessful if "in his opposing papers [he] cannot convince the court of the existence of [disputed material issues]." N.Y. Civ. Prac. L. & R. § 3212, commentary at 424 (McKinney

dissent contended that the decision of the lower courts should have been upheld,[33] and contended that the "pervasive, voluntary integration of the Brethren . . . [into] their chosen communit[ies]" and the compelling state interest in curtailing the spread of AIDS forestalled any right of the Brethren to obtain an exemption on religious grounds.[34] For a free exercise violation to exist, a court must find that a government practice burdens the free exercise of religion and is not outweighed by a compelling state interest.[35] This Comment will submit that the court in *Ware* failed to recognize that, as a matter of law, no burden was created on the Brethren's free exercise of religion due to New York's compulsory AIDS education program. It will further assert that, assuming *arguendo*, a burden did exist, the *Ware* court was incorrect in finding that such a burden was not outweighed by a compelling state interest as a matter of law. Finally, this Comment will suggest that, by granting the Brethren a trial on the merits, the court in *Ware* created a potential establishment clause violation.

I. BURDEN ON RELIGIOUS BELIEFS

To establish a *prima facie* violation of the free exercise clause of the first amendment, a plaintiff must show that a sincerely held religious belief is burdened by government action.[36] The United States Supreme Court consistently has required government coercion before finding such a burden.[37] It is submitted that this kind of unconstitutional coercion only exists where government action

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1970). A motion for summary judgment may be denied if it appears that facts sufficient to defeat it may exist, and the court is shown the sources through which the opposing party believes the needed evidence can be secured. *Id.* at § 3212, commentary at 450 (referring to N.Y. CIV. PRAC. L & R. § 3211, commentary at 53).

[33] *Ware*, 75 N.Y.2d at 138, 550 N.E.2d at 435, 551 N.Y.S.2d at 182 (Bellacosa, J., dissenting).

[34] *Id.* at 139, 550 N.E.2d at 436, 551 N.Y.S.2d at 183 (Bellacosa, J., dissenting). The "plaintiffs have not advanced sufficient proof . . . to withstand defendant['s] . . . record presentations of a dominant, compelling State interest." *Id.*

[35] *See* Yoder v. Wisconsin, 406 U.S. 205, 214 (1972). "[A] State's interest in universal education . . . is not totally free from a balancing process when it impinges on fundamental rights and interests . . . ." *Id.*

[36] *See supra* note 27 and accompanying text.

[37] *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 450 (1988) ("Indirect coercion or penalties on free exercise of religion . . . are subject to scrutiny under the First Amendment"); *see also* Board of Educ. v. Allen, 392 U.S. 236, 248-49 (1968) (no violation of free exercise clause where no coercion shown); Abington School Dist. v. Schempp, 374 U.S. 203, 223 (1963) (free exercise claim predicated on coercion).

either compels an affirmation or denial of a religious belief, or requires conduct which is proscribed by a religious belief.[38] Under this test, it is asserted that the *Ware* court should have found that the Brethren failed, as a matter of law, to establish a burden of constitutional magnitude because the Brethren children attending public schools were not coerced to act in a manner forbidden by their religious beliefs. The Brethren argued that "instruction by school personnel concerning moral conduct in terms of sexual practices and drug use is violative of Brethren precepts."[39] New York's AIDS program, however, did not threaten the Brethren's religious requirements since it did not seek to teach moral conduct, but was designed to teach good health practices aimed at assisting an individual to avoid contracting or spreading a deadly disease.[40] Also, it is important to note that Brethren dogma forbids members to engage in "sexual conduct outside of marriage."[41] Thus, since the New York AIDS education program "stress[es] abstinence as the most appropriate and effective . . . protection against AIDS,"[42] it is submitted that the program, in effect, supports and reinforces the beliefs of the Brethren and accordingly cannot be interpreted to burden or threaten the survival of those beliefs.

Further, the first amendment protection of the free exercise of religion is not meant to prohibit mere exposure to ideas offensive

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[38] *See Lyng*, 485 U.S. at 450. The government is not required to show compelling justification for programs "which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs." *Id.* The government cannot force a person "to profess a belief or disbelief in any religion." Torcaso v. Watkins, 367 U.S. 488, 495 (1961); Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1066 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988). "It is clear that governmental compulsion either to do or refrain from doing an act forbidden or required by one's religion, or to affirm or disavow a belief required by one's religion, is the evil prohibited by the Free Exercise Clause." *Id.*

[39] Brief for Plaintiff-Appellants, *supra* note 15, at 4.

[40] *See Ware*, 75 N.Y.2d at 116, 550 N.E.2d at 422, 551 N.Y.S.2d at 169. The regulations require that students receive extensive instruction about AIDS. *Id.* "Each curriculum must include instruction concerning the nature of the disease, methods of transmission and methods of prevention." *Id.* at 117, 550 N.E.2d at 422, 551 N.Y.S.2d at 169 (citation omitted). "Recognizing the delicacy of some of the subject matter, the regulations further provide that: '[n]o pupil shall be required to receive instruction concerning the methods of prevention of AIDS if the parent or legal guardian of the pupil . . . request[s] that the pupil not participate in such instruction, with an assurance that the pupil will receive such instruction at home.'" *Id.* (quoting [1987] 8 N.Y.C.R.R. §§ 135.3(b)(2), (c)(2)); *see also Mozert*, 827 F.2d at 1064 (students not required to believe ideas in books).

[41] *Ware*, 75 N.Y.2d at 120, 550 N.E.2d at 424, 551 N.Y.S.2d at 171.

[42] *Id.* at 138, 550 N.E.2d at 435, 551 N.Y.S.2d at 182 (Bellacosa, J., dissenting).

to certain religious beliefs.[43] The first amendment guarantees that "state schools will be neutral . . .[,] neither advocating a particular religious belief nor expressing hostility to any or all religions."[44]

The Brethren in *Ware* argued, and it is asserted that the *Ware* court mistakenly agreed, that the United States Supreme Court's decision in *Wisconsin v. Yoder*,[45] created a "mere exception" to the traditional free exercise analysis.[46] The Brethren contended that they fell within this "mere exposure exception" and therefore their children were entitled to an exemption from state-mandated AIDS education.[47] In *Yoder*, the Court held that the Amish could not be compelled to send their children to school beyond the eighth grade, reasoning that this would place an impermissible burden on their constitutional right to their free exercise of religion.[48] The Brethren maintained that by granting such an exemption to the Amish, the Court was declaring that exposure to ideas antithetical to one's religion could constitute the requisite burden in a free exercise claim.[49]

It is submitted that the court in *Ware* misinterpreted *Yoder* in that *Yoder* did not create a "mere exposure exception" and that *Yoder* is factually distinguishable. In *Yoder*, Wisconsin's policy of compulsory education until age sixteen was deemed to be coercive government action which burdened the beliefs of the Amish by requiring them to act in a manner forbidden by their religious beliefs.[50] Even if a "mere exposure exception" did exist, it is sug-

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[43] *See* Mozert v. Hawkins County Pub. Schools, 579 F. Supp. 1051, 1053 (E.D. Tenn. 1984) ("[t]he First Amendment does not protect the plaintiffs from exposure to . . . antithetical religious ideas"), *rev'd*, 765 F.2d 75 (6th Cir. 1985); *see also* Comment, *supra* note 9, at 299 (quoting *Mozert* court).

[44] Mozert v. Hawkins County Pub. Schools, 582 F. Supp. 201, 203 (E.D. Tenn. 1984). In *Mozert*, the United States Court of Appeals for the Sixth Circuit held that a mandatory reading program did not constitute the requisite government coercion. Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1070 (6th Cir. 1987), *cert. denied.*, 484 U.S. 1066 (1988). The *Mozert* court stated that the coercion must consist of "governmental compulsion either to do or refrain from doing an act forbidden or required by one's religion, or to affirm or disavow a belief forbidden or required by one's religion." *Id.* at 1066. The court also indicated that a violation might have existed had students been required to participate beyond reading and discussing the material, or if a student had been disciplined for disputing the ideas contained in the reading. *Id.* at 1064.

[45] 406 U.S. 205 (1972).

[46] *Ware*, 75 N.Y.2d at 125, 550 N.E.2d at 427, 551 N.Y.S.2d at 174.

[47] *Id.*

[48] *Yoder*, 406 U.S. at 219.

[49] *See* Brief for Plaintiff-Appellants, *supra* note 15, at 24-32.

[50] *See Yoder*, 406 U.S. at 218-19.

gested that the Brethren would not fall within it due to significant differences from the Amish in *Yoder*. The Amish live in separate communities, wholly apart from the mainstream of society.[51] In contrast, the Brethren live and work within the mainstream of society[52] and do not even reside within the same communities.[53] It is asserted that the *Ware* court should have recognized this distinction, and as a matter of law, held that the behavior of the Brethren constituted "integration within the larger society," and therefore that *Yoder* was inapplicable.[54]

II. Compelling State Interest

A compelling state interest which cannot be achieved through less restrictive means may justify an infringement on the right to the free exercise of religion even where a *prima facie* case of a free exercise clause violation has been established.[55] In determining whether an infringement exists, courts must balance the relevant government interest and the burden which would be placed on the government to accommodate the religious beliefs in question, and the burden placed on the religious group's first amendment rights.[56]

The court in *Ware* conceded that the "[s]tate has a compelling interest in controlling AIDS" and "in educating its youth about AIDS."[57] It is submitted that the *Ware* court erred in failing to

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[51] *See id.* at 217.

[52] *Ware*, 75 N.Y.2d at 120, 550 N.E.2d at 424, 551 N.Y.S.2d at 171; *see* Brief for Plaintiff-Appellants, *supra* note 15, at 4. In this respect, the Brethren are more analogous to the Apolistic Lutherans in Davis v. Page, 385 F. Supp. 395, 396 (D.N.H. 1974), because their children, in their adulthood, will live and work within the mainstream of society. *See id.* at 400.

[53] *See Ware*, 75 N.Y.2d at 128, 550 N.E.2d at 428, 551 N.Y.S.2d at 175. The defendants urged that the plaintiffs were not the "isolated religious community that was the subject of *Yoder*." *Id.*

[54] *See* Blackwelder v. Safnauer, 689 F. Supp. 106, 135 (N.D.N.Y. 1988), *appeal dismissed*, 866 F.2d 548 (2d Cir. 1989). The rule of *Yoder* is limited to religious communities living "separate and apart from American society in general." *Id.*

[55] Sherbert v. Verner, 374 U.S. 398, 403 (1963); *see also* Note, *Native American First Amendment Sacred Land Defense: An Exercise in Judicial Abandonment*, 54 Mo. L. Rev. 777, 780 (1989) (state has burden of showing compelling interest and that means used are least restrictive).

[56] *See* Menora v. Illinois High School Ass'n, 683 F.2d 1030, 1033 (7th Cir. 1982), *cert. denied*, 459 U.S. 1156 (1983).

[57] *Ware*, 75 N.Y.2d at 128, 550 N.E.2d at 429, 551 N.Y.S.2d at 176. Halting the spread of AIDS is the government's top health priority. *See* Gostin, *Traditional Public Health Strategies*, AIDS and the Law 47 (1987).

recognize that, as a matter of law, this compelling state interest outweighed any infringement on the free exercise rights asserted by the Brethren. This position garners support from the fact that although the Supreme Court has held that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion,"[58] it has also recognized that "a community has the right to protect itself against an epidemic."[59] In light of these pronouncements by the Court, it can be inferred that a state can, when necessary, compel action inimical to a citizen's religious beliefs.[60]

AIDS has been characterized as the modern-day black plague.[61] Since its discovery in 1981, the number of cases has increased from 316 to over 60,000.[62] It is estimated that 1 million to 1.5 million people have been exposed to the AIDS virus within the United States and that by the end of 1991, 179,000 to 270,000 Americans will have died from AIDS or AIDS-related complications.[63] It is submitted that even if the Brethren had established the required burden on the free exercise of their religion, the court in *Ware* should have taken judicial notice of these tragic statistics

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[58] *Yoder*, 406 U.S. at 215.

[59] Jacobson v. Massachusetts, 197 U.S. 11, 27 (1905); *see also* Brown, *AIDS Discrimination in the Workplace: The Legal Dilemma*, 94 No. 6 CASE & COMMENT 44, 44 (1989) ("estimated 1.5 million Americans are afflicted with the virus that causes AIDS, with a large percentage of them expected to develop the full symptoms of the disease"). The Court's decision in *Jacobson* has been interpreted as meaning that "for some purposes the good of the whole is more important than the freedom of the part." W. PETERSON, THY LIBERTY IN LAW 92 (1978).

Providing for the health, safety, and welfare of its citizens is the primary responsibility of the state. *See* Davis v. Page, 385 F. Supp. 395, 404 (D.N.H. 1974). The state need not present uncontroverted proof of a health hazard before legislating to control it. *See* Marcicopa County Health Dep't v. Harmon, 156 Ariz. 161, 166, 750 P.2d 1364, 1369 (1987).

[60] *See* W. PETERSON, *supra* note 59, at 93. Since "no person lives unto himself alone," the state may regulate action or inaction which threatens the health of others. *Id.*

[61] *See* Orlando & Wise, *The AIDS Epidemic: A Constitutional Conundrum*, 14 HOFSTRA L. REV. 137, 137 (1985).

[62] *See* M. QUACKENBUSH & S. VILLAREAL, DOES AIDS HURT: EDUCATING YOUNG CHILDREN ABOUT AIDS 108 (1988); Orlando & Wise, *supra* note 61, at 144. An average of 11 new cases of AIDS are reported daily. *Id.* After 1981, the number of reported cases doubled every six months. *See* Osborne, *The AIDS Epidemic: Discovery of a New Disease*, AIDS AND THE LAW 19 (1987). By 1987, the cases were doubling every 13 months. *Id.* In 1986, more new cases were diagnosed than had been in the prior five years. *Id.* The mortality rate (proportion of deaths to the total number of reported cases) is 47%, but the fatality rate (the chance that a specific patient will die) is 100%. *See* Orlando & Wise, *supra* note 61, at 144.

[63] *See* I. SLOAN, *supra* note 13, at 2. The enormity of the AIDS statistics is obvious "when compared with the approximately 292,000 Americans killed in World War II and the 58,000 Americans who lost their lives in Vietnam." *See* Brown, *supra* note 59.

and found that, as a matter of law, such information would justify any possible burden the compulsory AIDS education program would place on the free exercise of the Brethren's religious beliefs.

In *Yoder*, the Amish succeeded in their free exercise challenge because no overriding state interest justified the burden that state compulsory education placed on the Amish religion.[64] It is submitted that, in contrast, a sufficiently compelling state interest did exist in *Ware* that would differentiate *Ware* from *Yoder*, and justify the position that no constitutional violation existed despite the limited burden found to exist by the appellate court. In fact, the *Yoder* court seemed to indicate that there is such a distinction when it included the caveat that *Yoder* was not a case "in which any harm to the physical or mental health of the child or to the public safety . . . has been demonstrated or may be properly inferred."[65] It is asserted that the *Ware* court failed to recognize that the AIDS epidemic falls squarely within this caveat.

Support for the view that Brethren children should not be exempted from New York's AIDS program regardless of any limited burden on their religious beliefs can be gleaned from the Supreme Court's upholding of government coercion where the coerced conduct was the only effective method of preventing a life-threatening disease.[66] Currently, AIDS would qualify as such a disease as there is no available vaccine against AIDS[67] and no known cure.[68] It is presently believed that education is the best method of prevention available.[69] In fact, the *Ware* court conceded that education is "a powerful weapon . . . and an essential component" in the fight against AIDS.[70] It is asserted that the *Ware* court should have recognized that education is the least restrictive means available to

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[64] *See Yoder*, 406 U.S. at 213.

[65] *Id.* at 230.

[66] *See, e.g.*, Jacobson v. Massachusetts, 197 U.S. 11, 39 (1905) (plaintiff compelled to be vaccinated against smallpox despite objections).

[67] *See* N.Y. Times, March 13, 1990, at C8, col. 4. Dr. Jonas Salk has recently tested a vaccine which he developed. *Id.* Clergy members in Los Angeles have taken the vaccine experimentally. *See* N.Y. Times, March 12, 1990, at B8.

[68] *See* Orlando & Wise, *supra* note 61, at 144-45 (no effective AIDS treatment yet available).

[69] *See* Ware v. Valley Stream High School Dist., 150 App. Div. 2d 14, 20, 545 N.Y.S.2d 316, 320 (2d Dep't) (quoting Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic, June 1988, at 83), *aff'd as modified*, 75 N.Y.2d 114, 550 N.E.2d 420, 551 N.Y.S.2d 167 (1989); *see also* Aiken, *Education as Prevention*, AIDS AND THE LAW 90 (1987) (education is most effective way to stop spread of AIDS).

[70] *Ware*, 75 N.Y.2d at 128, 550 N.E.2d at 429, 551 N.Y.S.2d at 176.

prevent the spread of AIDS, and thus would justify any burden placed on the Brethren's free exercise of religion by compulsory AIDS education.

III. ESTABLISHMENT CLAUSE

The first amendment right to the free exercise of religion is not absolute.[71] The establishment clause limits how far the government can go in accommodating the free exercise rights of an individual.[72] The establishment clause also prohibits the government from "placing its official stamp of approval upon one particular kind of [religion]."[73] It is submitted that, by granting a trial on the merits, the *Ware* court created the potential for a violation of the establishment clause.

Allowing an exemption from a religiously neutral portion of a school curriculum may conflict with the establishment clause by giving the appearance of advancing religion or of favoring a particular religious sect.[74] It is submitted, therefore, that to allow the Brethren a total exemption from the New York AIDS program

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[71] Keller v. Gardner Community Consol. Grade School Dist., 552 F. Supp. 512, 514 (N.D. Ill. 1982); *see also* Note, *Competing Authorities*, *supra* note 27, at 360-61 (courts have held that under certain circumstances "government may impose indirect burdens on the exercise of religion").

[72] Note, *supra* note 6, at 407 n.20. In the school setting, establishment clause values must be weighed against the value of the free exercise of religion in determining whether to accommodate one religion. *See* Buchanan, *supra* note 8, at 1031. Since the state must accommodate itself to "external norms of conduct" when granting a religion-influenced exemption, there is a risk of violating the establishment clause. *See* Note, *Competing Authorities*, *supra* note 27, at 356.

[73] Engel v. Vitale, 370 U.S. 421, 429 (1962). The establishment clause stemmed from "an awareness of the historical fact that governmentally established religions and religious persecution go hand in hand." *See id.* at 432. The primary purpose of the establishment clause was to prevent the degradation of religion, which our Founders felt was "too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate." *Id.* at 432 (quoting MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, II WRITINGS OF MADISON 187).

The government must remain neutral in regard to religion. *See Engel*, 370 U.S. at 443 (Douglas, J., concurring). This neutrality protects and serves all religious sects. *Id.* (Douglas, J., concurring). The government may not favor one religion over another, or religion over nonreligion. *See* Zorach v. Clauson, 343 U.S. 306, 313 (1952); Comment, *supra* note 9, at 290 n.8 (Supreme Court cases indicate government can neither favor nor oppose religion or nonreligion).

[74] *See* Note, *supra* note 6, at 407, 410 (exemption from apparently neutral program may appear to favor or advance religion). The establishment clause would be violated by a religion-based exemption from a curriculum requirement if "other students *might* perceive the school to be favoring, endorsing, or simply manifesting approval of the plaintiffs' religion." *Id.* at 447 (emphasis added).

would violate the establishment clause, and that this violation would supersede any incidental burden on the free exercise of religion.[75] The situation in *Ware* is distinguishable from others where students have been permitted to opt out of certain classes on religious ground, because in other instances the classes in question were noncore or noneducational in nature and thus the risk of a perceived state endorsement was significantly diminished.[76] In *Ware*, the parents of Brethren children were seeking exemption from a portion of a core subject, and it is therefore submitted that the *Ware* court should have recognized that a trial on the merits could lead to the granting of an exemption which fosters one religion over another—a direct violation of the establishment clause.

CONCLUSION

In *Ware*, the lack of impermissible government coercion makes it apparent that the Brethren's right to the free exercise of religion is not unconstitutionally burdened by the New York State statute mandating AIDS education. However, even assuming, *arguendo*, that exposure to such ideas did constitute a burden, this burden is clearly outweighed by the state's compelling interest in curtailing the spread of AIDS. In addition, granting the Brethren's request for an exemption would violate the establishment clause because the state would be providing preferential treatment to one specific religious sect. Granted, freedom of religion is one of our most precious rights. However, where there is only an incidental burden on that freedom, and that burden is necessitated by a com-

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[75] *See* Buchanan, *supra* note 8, at 1016 (school authorities permitted to honor establishment clause values over those of free exercise clause). *But see* Note, *supra* note 6, at 447 n.299 (free exercise principles should dominate establishment clause principles).

The primary objective of the framers of the first amendment was to prevent government domination of religion. *See* Board of Educ. v. Allen, 20 N.Y.2d 109, 121, 228 N.E.2d 791, 797, 281 N.Y.S.2d 799, 808 (1967) (Van Voorhis, J., dissenting), *aff'd*, 392 U.S. 236 (1968); *see also* Zorach v. Clauson, 303 N.Y. 161, 180, 100 N.E.2d 463, 473 (1951) (Desmond, J., concurring) (first amendment was necessary to prevent Congress from making laws to "infringe the rights of conscience, and establish a national religion." (quoting 1 ANNALS OF CONG. 758 (1789)), *aff'd*, 343 U.S. 306 (1952).

The intention of the framers as to the scope of the free exercise clause is far from clear. *See* Note, *Competing Authorities*, *supra* note 27, at 352. It has been suggested that the framers themselves may have had conflicting intentions. *See id.* at 352 n.16. Thus, while Madison may have endorsed religion-based exemptions, his view may not have been shared by his co-authors. *See id.*

[76] *See* Davis v. Page, 385 F. Supp. 395, 402 (D.N.H. 1974) (students could be excused when audio-visual equipment was used for noneducational reasons).

pelling state interest which cannot be achieved by less restrictive means, courts must not blindly adhere to the ideal of freedom of religion at the expense of potentially grave injury to the whole of society.

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