COMMENT

Religious Torts: Applying the Consent Doctrine as Definitional Balancing

Tort actions based on religiously motivated conduct necessitate delicate balancing between the governmental interest in providing redress to injured plaintiffs and the Constitution's guarantee of religious free exercise. This Comment argues that when plaintiffs were members of defendant churches at the time of the alleged tort, a definitional balancing standard is the most appropriate means of measuring the competing interests. The proposed standard is based on the traditional tort law consent doctrine. The standard's definitional element shifts the burden of proving lack of consent to member/plaintiffs.

INTRODUCTION

According to the book of Genesis, one of the first questions man asked God was "Am I my brother's keeper?"[1] By their nature, religious groups answer in the affirmative.[2] Yet in recent years, lawsuits filed by church members against their churches and church leaders have tested the legal boundaries of the relationship between churches and their members. Beginning in 1984, two cases alleging religiously motivated torts by church leaders received national media attention.[3]

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[1] *Genesis* 4:9 (King James).

[2] *See, e.g.*, W. SELBIE, THE PSYCHOLOGY OF RELIGION 148-65 (1924); G. SPINKS, PSYCHOLOGY AND RELIGION 174-76 (1963); H. WIEMAN, NORMATIVE PSYCHOLOGY OF RELIGION 193 (1935).

[3] Perhaps the best-publicized religious tort cases in recent years have been Nally v. Grace Community Church, 157 Cal. App. 3d 912, 204 Cal. Rptr. 303 (1984), *decertified & hg. denied*, Aug. 30, 1984, and Guinn v. Collinsville Church of Christ, No. CT-81-929 (Dist. Ct. Tulsa County, Okla. Mar. 15, 1984), *appeal docketed*, No. 62,154 (Okla. Apr. 16, 1984). Both cases received national media attention. *See, e.g.*, *Marian and the Elders*, TIME, Mar. 26, 1984, at 70; *A Premium Price on Casting Stones*, NEWSWEEK, Mar. 26, 1984, at 58; Starr & Shapiro, *Suing Over a Scarlet*

Following this publicity, disgruntled church members, former church members, and others[4] filed several similar suits.[5] They named as defendants not only individuals, but also religious organizations.[6] If much of the litigation proves successful, the number of lawsuits seems likely to increase further.[7]

This Comment argues that courts should apply the traditional consent doctrine of intentional tort law to religious tort lawsuits brought by church members against their church or its leaders. Because of the constitutional and policy considerations such lawsuits present, courts should shift to member/plaintiffs the burden of proving lack of consent to religiously motivated conduct. Part I discusses types of tort actions most commonly litigated by member/plaintiffs. Part II examines the threat these lawsuits pose to the first amendment free exercise and establishment clauses. It identifies the individual and governmental inter-

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Letter, NEWSWEEK, Feb. 27, 1984, at 46; Woodward & Huck, *Next, Clerical Malpractice?*, NEWSWEEK, May 20, 1985, at 90. While appearing on *The Phil Donahue Show*, the plaintiff in *Guinn* said she sold the movie rights to her life story and the events that led to her lawsuit against the church. The Phil Donahue Show (May 7, 1985).

[4] The "others" are often relatives of church members. *See, e.g.*, Orlando v. Alamo, 646 F.2d 1288 (8th Cir. 1981) (parents of religious sect convert sue for intentional infliction of emotional distress); *Nally*, 204 Cal. Rptr. at 303 (parents of alleged victim of clergy malpractice bring wrongful death action); Radecki v. Schuchardt, 50 Ohio App. 2d 92, 361 N.E.2d 543 (1978) (estranged spouse of religious convert sues church for alienation of affection).

[5] *See, e.g.*, Edwards v. Saint Stevens Episcopal Church, No. 844020 (Cal. Super. Ct. filed Aug. 5, 1985) (church treasurer who embezzled $28,000 from church alleges clergy malpractice when, after she confessed the crime to her priest in a confessional booth, the priest turned her over to police); Kelly v. Christian Community Church, No. 545117 (Cal. Super. Ct. filed Mar. 22, 1984) (alleging clergy malpractice in religious counselor's passing on to church's elders plaintiff's private confession that he visited a prostitute; elders excommunicated the plaintiff based on the information). Although the media's focus on religious tort lawsuits is a recent phenomenon, civil litigation over religious conduct has a long history in America. *See infra* note 34.

[6] In both *Nally* and *Guinn*, the plaintiffs named as defendants the individuals accused of committing the torts and their churches. *See Nally*, 204 Cal. Rptr. at 304; Appellee's Opening Brief at 1, *Guinn* No. 62,154 (Okla.); *see also* Alexander v. Unification Church of America, 634 F.2d 673 (5th Cir. 1980) (deprogrammer sues Unification Church for intentional infliction of emotional distress); Christofferson v. Church of Scientology, 57 Or. App. 203, 644 P.2d 577 (1982), *cert. denied*, 459 U.S. 1206, 1227 (1983) (suit against Church of Scientology for fraud); Bear v. Reformed Mennonite Church, 462 Pa. 330, 341 A.2d 105 (1978) (excommunicated businessman sues church for interference with business relations).

[7] McGolderick, Marian Guinn v. Collinsville Church of Christ 8-9 (1985) (unfiled brief on file with *U.C. Davis Law Review*).

ests implicated by religious tort lawsuits and criticizes balancing these interests solely on a case-by-case (ad hoc) basis.

Part III proposes the broad-scale or definitional balancing of interests in intentional religious tort lawsuits. By analogy to defamation law's actual malice standard, it argues that definitional balancing can, if well tailored to the competing interests, protect first amendment interests more effectively and fairly than pure ad hoc balancing. Part III presents the consent doctrine, modified to presume consent rather than lack of consent, as a definitional balancing standard well fitted to religious tort lawsuits brought by member/plaintiffs. Finally, the Comment discusses elements of the consent doctrine available to member/plaintiffs to negate the presumption of consent.

I. Religiously Motivated Conduct Susceptible to Tort Liability

Lawsuits against churches and church leaders merit constitutional analysis only if the offensive conduct is religiously motivated. The Supreme Court recognizes that the intensely personal nature of religious belief makes determining whether an act is religiously motivated "a difficult and delicate task."[8] To avoid an overly subjective inquiry, the Court defines religious motivation broadly in free exercise analyses.[9] It presumes the validity of any religious motivation claim unless patently frivolous.[10] Professor Tribe suggests viewing the approach as a dichotomy "between things arguably religious and things not even arguably having a religious character."[11] Anything arguably religious should receive first amendment protection.[12]

The possible scenarios for tort lawsuits based on at least arguably religious conduct are countless. However, in recent years lawsuits arising from clergy counseling, excommunication proceedings, and the practices of religious sects appear most common.

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[8] Thomas v. Review Bd., 450 U.S. 707, 714 (1981). The Court added that "the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Id.*

[9] *Id.* at 715; Sciarrino, *Free Exercise Footsteps in the Defamation Forest: Are "New Religions" Lost?* (pts. 1 & 2), 7 Am. J. Trial Advoc. 57, 307 (1983-1984).

[10] *Thomas*, 450 U.S. at 715.

[11] L. Tribe, American Constitutional Law 828 (1978).

[12] *Id.*

A. "Clergy Malpractice" by Religious Leaders and Counselors

Perhaps the most publicized religious tort cases involve "clergy malpractice" in counseling.[13] The first lawsuit in the United States to allege clergy malpractice was *Nally v. Grace Community Church.*[14] In *Nally*, a suicide victim's parents brought a wrongful death action against the Grace Community Church and its leaders.[15] The parents alleged that church leaders tortiously counseled their son that suicide is acceptable under some circumstances.[16] They also alleged that church leaders discouraged their son from receiving professional psychiatric treatment.[17] A California court of appeal held that the plaintiffs stated a cause of action for wrongful death arising out of intentional infliction of emotional distress.[18] The California Supreme Court refused to grant a hearing, but decertified the appellate court's decision.[19] On remand the trial court dismissed the case. The plaintiffs plan to appeal again.[20]

Although *Nally* is the only clergy malpractice case to reach the appellate level, several other religious counselees have filed similar suits.[21]

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[13] One author accuses the insurance industry of fraudulently generating publicity about supposed clergy malpractice liability. While insurance carriers distributed brochures purporting to document clergy malpractice cases, the author claims that the cases never existed. Breecher, *Ministerial Malpractice*, LIBERTY, Mar.-Apr. 1980, at 15; Breecher, *Ministerial Malpractice: Is It a Reasonable Fear?*, TRIAL, July 1980, at 11. Sixty-two percent of the members of the American Association of Pastoral Counselors who responded to a 1980 survey said they were covered by some form of malpractice insurance. *See* Augspurger, *Legal Concerns of the Pastoral Counselor*, 29 PASTORAL PSYCHOLOGY 109 (1980).

[14] 157 Cal. App. 3d 912, 204 Cal. Rptr. 303 (1984), *decertified & hg. denied*, Aug. 30, 1984; *see* Ericsson, *Clergy Malpractice: Ramifications of a New Theory*, 16 VAL. U.L. REV. 163, 163-64 (1981).

[15] *Nally*, 204 Cal. Rptr. at 304.

[16] *Id.* at 306.

[17] *Id.* at 304.

[18] *Id.* at 309.

[19] *Id.* at 303.

[20] Telephone interview with Samuel Ericsson, Attorney for Grace Community Church and President of the Christian Legal Society (Apr. 7, 1986).

[21] *See, e.g.*, Edwards v. Saint Stevens Episcopal Church, No. 844020 (Cal. Super. Ct. filed Aug. 5, 1985) (church treasurer who embezzled $28,000 from church alleges clergy malpractice when, after she confessed the crime to her priest in a confessional booth, the priest turned her over to the police); Kelly v. Christian Community Church, No. 545117 (Cal. Super. Ct. filed Mar. 22, 1984) (alleging clergy malpractice by religious counselor who told church elders of plaintiff's private confession that he visited a prostitute; elders excommunicated the plaintiff based on the information); Neufang v. Cahn, No. 79-8143 (Fla. Cir. Ct. filed May 2, 1979) (alleging clergy malpractice by religious counselor who released dangerous counselee from his care, even though the

Many allege that a religious leader or counselor gave bad advice,[22] or breached a duty of confidence.[23] Although the theories pleaded vary widely, these plaintiffs often argue for adoption of a negligence standard analogous to that used for secular professional counselors.[24] As plaintiffs continue to litigate, scholars continue to question the validity of clergy malpractice lawsuits.[25] Judicial acceptance of the cause of action remains uncertain.[26] In California, legislators recently introduced bills unsucessfully attempting to limit recovery for clergy malpractice.[27]

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counselor allegedly knew of the counselee's dangerous propensities). One expert asserts that the media and the insurance industry focus on the clergy malpractice "crisis" overstates the problem. He claims that plaintiffs have filed only 12 lawsuits pleading clergy malpractice in the past six years, and that only six of these involved church discipline or counseling. Telephone interview with Samuel Ericsson, President of the Christian Legal Society (Apr. 7, 1986); *see also supra* note 13.

[22] *See, e.g.*, *Nally*, 204 Cal. Rptr. at 304. Ironically, plaintiffs almost never file lawsuits alleging bad advice by psychiatrists. By 1983 one author found only two psychiatric malpractice cases in which the alleged malpractice was related to the therapist's counsel. All other cases involved prescribing the wrong drugs or electroshock therapy. *See* Comment, *Made Out of Whole Cloth: A Constitutional Analysis of the Clergy Malpractice Concept*, 19 CAL. W.L. REV. 507, 519 (1983) [hereafter Comment, *Whole Cloth*].

[23] *See, e.g.*, *Edwards*, No. 844020 (Cal. Super. Ct.); *Kelly*, No. 545117 (Cal. Super. Ct.).

[24] *See* Comment, *Whole Cloth*, *supra* note 22, at 510-11. The author notes that plaintiffs in clergy malpractice cases often employ a "shotgun" approach in pleading, blurring the outlines of the emerging theory. *Id.* at 511.

[25] Commentators raise several arguments against the clergy malpractice theory. First, it is difficult to define a valid standard of care for clergy behavior. *See* Ericsson, *supra* note 14, at 166, 168; Comment, *Whole Cloth*, *supra* note 22, at 520; Note, *Religious Counseling — Parents Allowed to Pursue Suit Against Church and Clergy for Son's Suicide*, 1985 ARIZ. ST. L.J. 213, 235. Second, the theory challenges the free exercise clause. *See* Ericsson, *supra*, at 182; Comment, *Whole Cloth*, *supra*, at 534-42. Finally, it challenges the establishment clause. *See* Bergman, *Is the Cloth Unraveling? A First Look at Clergy Malpractice*, 9 SAN FERN. V.L. REV. 47, 51 (1981); Ericsson, *supra*, at 169-70; Comment, *Whole Cloth*, *supra*, at 529-34.

[26] Although the court of appeals denied defendants' motion for summary judgment in *Nally*, 204 Cal. Rptr. at 303, it did not decide the validity of clergy malpractice as a negligence action. Rather, it sustained the lawsuit based on the plaintiffs' allegation of intentional infliction of emotional distress. *Id.* at 309. The California Supreme Court's decertification of the *Nally* decision underscores the tort theory's dubious future.

[27] *See* S. 2247, 1985-86 Calif. Leg., Reg. Sess. (defeated in Jud. Comm. Apr. 29, 1986) (proposing limitations on punitive damage awards against religious organizations); A. 2247, 1985-86 Calif. Leg., Reg. Sess. (defeated in Jud. Comm. Apr. 29, 1986) (proposing that damage awards related to clergy counseling and church discipline be denied unless church acted criminally or fraudulently). State Senator John Doolittle plans to reintroduce S. 2247 next year. Telephone conversation with Lynn Whitley, aide to Senator Doolittle (May 14, 1986).

B. Excommunication, Disfellowship, and Shunning

Many religious groups in the United States practice some form of excommunication,[28] shunning, or disfellowship of wayward members.[29] Typically, church leaders inform the congregation of a member's violation of the religion's moral code.[30] The leaders then instruct the congregation to "withdraw fellowship" from the member.[31] Excommunication generally requires that members of the church avoid all contact with the wayward member.[32]

Over the past century, defamation was the principal theory used in actions stemming from excommunication. A substantial body of case law developed to govern these lawsuits.[33] Many jurisdictions extend a

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[28] Disciplinary actions removing a member from fellowship vary widely from church to church. However, this Comment refers to all disciplinary actions in which the church expels a member as excommunication.

[29] Some of the religious groups sued for excommunicating members include Baptist groups, *e.g.*, Crosby v. Lee, 88 Ga. App. 589, 76 S.E.2d 856 (1953); Creekmore v. Runnels, 359 Mo. 1020, 224 S.W.2d 1007 (1949), the Churches of Christ, *e.g.*, Brown v. Fairview Church of Christ, No. 427764 (Cal. Super. Ct. filed Apr. 20, 1984); Guinn v. Collinsville Church of Christ, No. CT-81-929 (Dist. Ct. Tulsa County, Okla. Mar. 15, 1984), *appeal docketed*, No. 62,154 (Okla. Apr. 16, 1984); Lide v. Miller, 573 S.W.2d 614 (Tex. Civ. App. 1978), Jewish congregations, *e.g.*, Leob v. Geronemus, 66 So. 2d 241 (Fla. 1953), the Reformed Mennonite Church, *e.g.*, Bear v. Reformed Mennonite Church, 462 Pa. 330, 341 A.2d 105 (1978), the Roman Catholic Church, *e.g.*, Carter v. Papineau, 222 Mass. 404, 111 N.E. 358 (1916); Morasse v. Brochu, 151 Mass. 567, 25 N.E. 74 (1890), and the Seventh-Day Adventist Church, *e.g.*, Call v. Larabee, 60 Iowa 212, 14 N.W. 237 (1882). Many Christian groups claim a biblical directive regarding excommunication:

> If your brother sins against you, go and show him his fault, just between the two of you. If he listens to you, you have won your brother over. But if he will not listen, take one or two others along, so that "every matter may be established by the testimony of two or three witnesses." If he refuses to listen to them, tell it to the church; and if he refuses to listen even to the church, treat him as you would a pagan or a tax collector.

Matthew 18:15-17 (New International Version).

[30] *See, e.g.*, *Guinn*, No. 62,154 (Okla.).

[31] *Id.* However, not all religious groups announce excommunication to the lay members of the church. *See, e.g.*, Carter v. Papineau, 222 Mass. 404, 111 N.E. 358 (1916) (Roman Catholic priest not liable for defamation because excommunication not publicly announced). *But see* Servatius v. Pichel, 34 Wis. 292 (1874) (Roman Catholic priest liable for defamation because excommunication injured plaintiff's reputation even though not publicly announced).

[32] In the *Guinn* case, the church elders instructed their congregation to avoid all contact with the plaintiff following her excommunication. Appellee's Opening Brief at 6, *Guinn* No. 62,154 (Okla.).

[33] *See* cases cited *infra* note 35; Sciarinno, *supra* note 9, at 90-104.

qualified privilege to church leaders and members while they are discussing church disciplinary matters.[34] Courts confer this privilege under a "common interest" theory, provided that the communication is made only to other church members.[35]

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[34] Sciarinno, *supra* note 9, at 99-102; Annot., 87 A.L.R. 2d 453, 464-67 (1963) (discussing expulsion or suspension from religious organizations or activities); *see also* cases cited *infra* note 35.

[35] *See, e.g.*, Slocinski v. Radwan, 83 N.H. 501, 504, 144 A. 787, 789 (1929); Sciarrino, *supra* note 9, at 102-03. The Supreme Court has never specifically addressed the constitutional issues presented in religious speech defamation cases. *Id.* at 99. State courts have long permitted church-related defamation cases. *See* Annot., 20 A.L.R. 2d 476 (1951). But their ability to inquire into religious proceedings was sharply curtailed by the fourteenth amendment's application of the Constitution to the states. *See* Sciarrino, *supra*, at 99. As stated in Annot., 87 A.L.R. 2d 453, 455 (1963):

> The mere statement that a member of a religious organization has been or should be expelled . . . has generally been held not defamatory, although in a number of cases the action . . . has been sustained where the publication also contained a charge in extravagant words of irreligious or immoral conduct, or a charge tending to injure the plaintiff in his profession or occupation.

See also Morasse v. Brochu, 151 Mass. 567, 25 N.E. 74 (1890) (holding actionable conduct of Roman Catholic priest in not only excommunicating plaintiff but also asserting that excommunicaton should bar him from employment as a physician); M'Corkle v. Binns, 5 Binn. 34 (Pa. 1812) (holding libelous a newspaper article alleging that plaintiff was denied communion because of his religious nonconformity); Servatius v. Pichel, 34 Wis. 292 (1874) (holding actionable Roman Catholic priest's use of extravagant language in announcing plaintiff's excommunication).

The "common interest" privilege applies in many jurisdictions to religious disciplinary acts conducted in accordance with the religion's bylaws or doctrine. *See, e.g.*, *Slocinski*, 83 N.H. at 504, 144 A. at 789:

> [I]t is to the general interest of society that correct information shall be obtained as to the character of persons in whom others have a common interest, and hence the law grants to all the privilege of giving information concerning private individuals when given *bona fide* and to a person having a corresponding interest in the subject . . . it is hard to imagine a more classic example of common interest than that which is shared by the members of a church in the character and conduct of its minister, since these factors determine his capacity for spiritual leadership.

See also Chavis v. Rowe, 93 N.J. 103, 459 A.2d 674 (1983). The privilege applies not only to communications regarding those in leadership positions, but to all members. *See* Farnsworth v. Storrs, 59 Mass. (5 Cush) 412 (1850) (dismissing defamation action by publicly excommunicated church lay member on grounds of privilege); Landis v. Campbell, 79 Mo. 33 (1883) (dismissing defamation action by suspended and expelled lay member on grounds of privilege). The Restatement (Second) of Torts specifically addresses the common interest privilege:

> The common interest of members of religious . . . associations is recognized as sufficient to support a privilege for communications among them-

In recent years, however, plaintiffs increasingly have asserted other tort theories in excommunication lawsuits. Courts have approved causes of action based on alienation of affection,[36] interference with business relations,[37] and the relatively new torts of invasion of privacy and intentional infliction of emotional distress.[38]

The best known of these lawsuits resulted in a large damage award against a church. In *Guinn v. Collinsville Church of Christ*,[39] a jury awarded Marion Guinn $390,000 in actual and punitive damages.[40] Guinn, a church member, became involved in a nonmarital sexual relationship with the former mayor of Collinsville, Oklahoma.[41] When her church's elders learned of the relationship and she refused to end it, the elders announced her excommunication before their congregation.[42] Guinn's lawsuit alleged invasion of privacy and intentional infliction of

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selves concerning the qualifications of the officers and members and their participation in the activities of the society. This is whether the defamatory matter relates to alleged misconduct of some other member that makes himself undesirable for continued membership, or the conduct of a prospective member.

RESTATEMENT (SECOND) OF TORTS § 593 comment e (1977).

The religious defendant loses the qualified privilege if it acts maliciously. *See, e.g.*, Brewer v. Second Baptist Church of Los Angeles, 32 Cal. 2d 791, 795, 197 P.2d 713, 716 (1948) (church leaders maliciously accused plaintiffs of "downright falsehood" which was "totally unworthy of the continued confidence, respect, and fellowship of a great church which they have so grievously wronged"); Leob v. Geronemus, 66 So. 2d 241 (Fla. 1953) (leaders of Jewish organization acted maliciously in charging that plaintiff was not a Jew, and was a disgrace to any Jewish organization).

Defendants also lose the qualified privilege if they make the defamatory communication outside the regular course of church discipline. *See, e.g.*, Flanders v. Daley, 124 Ga. 714, 52 S.E. 687 (1904) (defamatory communication not privileged because not made in defendant's official capacity as a church leader).

For a full discussion of the qualified defamation privilege given religious groups during the excommunication process, see Sciarrino, *supra*; Annot., 87 A.L.R. 2d 453 (1963).

[36] *See, e.g.* Washington v. Hill, No. 80-423 (Ark. Ct. App. filed Mar. 4, 1981); *Bear*, 462 Pa. at 330, 341 A.2d at 105; Bacaum v. Rajneesh Found. Int'l, No. 638013 (Wis. Cir. Ct. filed Nov. 1, 1983). Some alienation of affection lawsuits brought against religious groups do not involve church members as plaintiffs. *See, e.g.*, Radecki v. Schuchardt, 50 Ohio App. 2d 92, 361 N.E.2d 543 (1978) (estranged spouse of religious convert unsuccessfully sues church).

[37] *See, e.g.*, *Bear*, 462 Pa. at 330, 341 A.2d at 105; *Lide*, 573 S.W.2d at 614.

[38] *See, e.g.*, Shire v. Adkisson, No. 84CU8646 (Colo. Dist. Ct. filed Sept. 6, 1984); *Guinn*, No. 62,154 (Okla.).

[39] No. 62,154 (Okla.).

[40] Appellant's Opening Brief at 12-13, *Guinn*, No. 62,154 (Okla.).

[41] *Id.* at 8-10.

[42] Appellee's Opening Brief at 6-7, *Guinn*, No. 62,154 (Okla.).

emotional distress.[43] The case is now on appeal to the Oklahoma Supreme Court.[44]

C. Tort Claims Against Nontraditional[45] Religions

Religious sects that engage in practices and conversion techniques repulsive to societal norms are particularly susceptible to intentional tort lawsuits. Intentional tort theories pled against new or nontraditional religions include false imprisonment,[46] "brainwashing,"[47] fraud,[48] intentional infliction of emotional distress,[49] and malicious prosecution.[50] These lawsuits show mixed results in successfully stating causes of action and recovering damages for religiously motivated conduct.[51]

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[43] *Id.* at 1.

[44] *Guinn*, No. 62,154 (Okla.).

[45] Nontraditional religions are those groups outside the "mainstream" of American religions. Although sometimes referred to generically as "cults," they defy ready definition. *See* Comment, *Piercing the Religious Veil of the So-Called Cults*, 7 PEPPERDINE L. REV. 655, 655 n.1 (1980) [hereafter Comment, *Religious Veil*].

[46] *See, e.g.*, O'Moore v. Driscoll, 135 Cal. App. 770, 28 P.2d 438 (1933) (priest unsuccessfully sues superiors for false imprisonment as part of effort to obtain confession of sins).

[47] *See, e.g.*, Orlando v. Alamo, 646 F.2d 1288 (8th Cir. 1981); Turner v. Unification Church, 602 F.2d 458 (1st Cir. 1978); Lewis v. The Holy Spirit Ass'n, 589 F. Supp. 10 (D. Mass. 1983); Schuppin v. Unification Church, 435 F. Supp. 603 (D. Vt. 1977).

[48] *See, e.g.*, Christofferson v. Church of Scientology, 57 Or. App. 203, 644 P.2d 577 (1982), *cert. denied*, 459 U.S. 1206, 1227 (1983) (plaintiff denied recovery from religious leader and organization that allegedly fraudulently attempted to take her money and control her mind); Nelson v. Dodge, 76 R.I. 1, 68 A.2d 51 (1949) (plaintiff granted recovery from religious leader for using undue influence and fraud to procure member's money).

[49] *See, e.g.*, *Lewis*, 589 F. Supp. at 10; *Christofferson*, 57 Or. App. at 203, 644 P.2d at 577.

[50] *See, e.g.*, Allard v. Church of Scientology of Cal., 58 Cal. App. 3d 439, 129 Cal. Rptr. 797 (1976) (religious organization held liable for $100,000 in actual and punitive damages for maliciously instigating prosecution of former member for embezzling church funds). Two writers discuss in some detail the constitutional implications of tort actions against nontraditional religions. *See* Delgado, *Religious Totalism: Gentle and Ungentle Persuasion Under the First Amendment*, 51 S. CAL. L. REV. 1, 92-94 (1977); Note, *People v. Religious Cults: Legal Guidelines For Criminal Activities, Tort Liability, and Parental Remedies*, 11 SUFFOLK U.L. REV. 1025, 1037-45 (1977) [hereafter Note, *Legal Guidelines*].

[51] *See supra* notes 46-50.

II. The Challenge to the Religion Clauses

The Supreme Court recognizes judicial sanctioning of tort recovery as state action subject to constitutional scrutiny.[52] Although the Supreme Court has yet to rule on a religious tort lawsuit, lower courts often acknowledge that such lawsuits carry constitutional implications.[53]

Religious tort damage awards, although often justifiable,[54] impinge on important first amendment interests. The first amendment protects the free exercise of religion and instruct that no laws shall establish religion.[55] The guarantee of free religious exercise was considered a

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[52] *See* New York Times v. Sullivan, 376 U.S. 254 (1964); L. Tribe, *supra* note 11, at 1167-69; Sciarrino, *supra* note 9, at 224-25; *see also* Comment, *Whole Cloth*, *supra* note 22, at 525-29 (describing all judicial action as state action in religion clause cases).

[53] *See, e.g.*, Chavis v. Rowe, 93 N.J. 103, 107-09, 459 A.2d 674, 677-79 (1983); Christofferson v. Church of Scientology, 57 Or. App. 203, 235-48, 644 P.2d 577, 597-605 (1982), *cert. denied*, 459 U.S. 1206, 1227 (1983); Bear v. Reformed Mennonite Church, 462 Pa. 330, 341 A.2d 105 (1978).

[54] Although religious tort lawsuits impinge on first amendment interests, legitimate government interests often favor allowing them. Truly injured citizens deserve compensation and justice. Unfairly denying them legal recourse may threaten "safety, peace, or order." Wisconsin v. Yoder, 406 U.S. 205, 239 n.1 (1972) (White, J., concurring); Sherbert v. Verner, 374 U.S. 398, 403 (1963). Also, permitting tort recovery for religious conduct would effectively discourage dangerously fanatical or antisocial religious behavior. *See* Delgado, *supra* note 50, at 93 (arguing that tort recovery against cults helps control their proliferation). The activities of many new and nontraditional religions are often portrayed as a menace to society. *See, e.g.*, Delgado, *When Religious Exercise is Not Free: Deprogramming and the Constitutional Status of Coercively Induced Beliefs*, 37 Vand. L. Rev. 1071, 1073 (1984); Thomas, *Preventing Non-Profit Profiteering: Regulating Religious Cult Employment Practices*, 23 Ariz. L. Rev. 1003, 1003 (1981); Comment, *Religious Veil*, *supra* note 45, at 656; Note, *High Demand Sects: Disclosure Legislation and the Free Exercise Clause*, 15 New Eng. L. Rev. 128, 158 (1979-80). Courts could check antisocial religious behavior by making religious actors accountable for the injuries they inflict. For example, allowing a cause of action against religious "brainwashing" might encourage some religious sects to alter their treatment of converts. Allowing tort recovery counters even the isolated incidents of extremist behavior by mainstream religious groups. *See, e.g.*, Nally v. Grace Community Church, 157 Cal. App. 3d 912, 204 Cal. Rptr. 303 (1984), *decertified & hg. denied*, Aug. 30, 1984. The defendant church, whose pastors allegedly encouraged the plaintiffs' son to commit suicide, constitutes the largest Protestant congregation in Los Angeles County. *See* Ericsson, *supra* note 14, at 164.

The government interest in allowing religious tort recovery seems compelling when the plaintiff is not a member of the church; the religious defendant cannot claim that the plaintiff impliedly consented to its religious conduct by affirming the church's doctrines. *See infra* notes 121-34 and accompanying text.

[55] U.S. Const. amend. I.

central tenet of individual liberty by the nation's founders.[56] Although difficult to apply,[57] the judicial trend over the past twenty-five years

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[56] *See* L. TRIBE, *supra* note 11, at 818: "The free exercise clause was at the very least designed to guarantee freedom of conscience by preventing any degree of compulsion in matters of belief . . . So viewed, the free exercise clause is a mandate of religious voluntarism." Tribe also cites a quotation from James Madison offered in Walz v. Tax Comm'n, 397 U.S. 664, 719 (1970) (Douglas, J., dissenting): "[W]e hold it for a fundamental and undeniable truth, 'that Religion and the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force and violence.' "

The roots of religious voluntarism run deep in the American experience, influenced by numerous cultural and philosophical forces. These influences include the English doctrine of natural rights; the humanistic ideals of the French *Philosophies*; the emergence of the naturalistic school of science; the absence of a theocracy or a single established religion; the American experience with English domination; the motivation of many of America's early settlers to come to the colonies to escape religious persecution; and the American experience with wilderness living. *See* Reynolds v. United States, 98 U.S. 145, 162-64 (1878); Smith, *Getting Off on the Wrong Foot and Back on Again: A Reexamination of the History of the Framing of the Religion Clauses of the First Amendment and a Critique of the* Reynolds *and* Everson *Decisions*, 20 WAKE FOREST L. REV. 569, 569-634 (1984); Note, *Conservatorships and Religious Cults: Divining a Theory of Free Exercise*, 53 N.Y.U. L. REV. 1247, 1256-58 (1978) [hereafter Note, *Religious Cults*].

[57] Carried to its logical extreme, the free exercise clause would prevent the government from regulating *any* religious activity — even outrageous activity such as human sacrifice or ritualistic suicide. The Supreme Court confronted this problem in *Reynolds*, the Court's first free exercise case:

> Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pyre of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

Reynolds, 98 U.S. at 166.

The facts of the *Reynolds* case, while not so extreme as human sacrifice, illustrate the impracticability of literally interpreting the free exercise clause. In *Reynolds*, a United States district court convicted a Mormon of bigamy. He challenged the verdict, arguing that the plain language of the free exercise clause allowed bigamy if religiously motivated. The Court rejected his argument and declared an ill-fated controlling distinction between religious beliefs and religious action. "Laws are made for the government of actions, and while they cannot interfere with religious beliefs and opinions, they may with practices." *Id.* Thus, the free exercise clause permitted the *Reynolds* defendant to believe that bigamy was acceptable or even God-ordained. However, because of bigamy's threat to society, he was denied the right to *act* on his belief. If religiously motivated actions were beyond regulation, every citizen could "become a law unto himself," a situation in which "government can exist only in name." *Id.* at 167. The Court concluded that "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or

has been increasingly to accommodate free exercise interests.[58]

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subversive of good order." *Id.* at 164.

The belief/action distinction established in *Reynolds* prevailed as the standard for free exercise decisions until the 1960's. *See* Pfeffer, *The Supremacy of Free Exercise*, 61 GEO. L.J. 1115, 1121-30 (1973). Justice Roberts worded the most-quoted 20th century affirmation of the distinction in Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940): "[T]he Amendment embraces two concepts — freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."

Following the 1963 case of Sherbert v. Verner, 374 U.S. 398 (1963), the belief/action distinction fell into disfavor. *See* Note, *Religious Cults*, *supra* note 56, at 1260; Comment, *Amish Parents Not Required to Enroll Children in Secondary School*, 48 NOTRE DAME LAW. 741, 742 (1973). Although it remains true that courts are more likely to allow restriction of actions than beliefs, the distinction is no longer controlling. L. TRIBE, *supra* note 11, at 826, 837-39.

Further examples of the lesser protection once provided by the Supreme Court for religious free exercise abound. *See, e.g.*, Braunfeld v. Brown, 366 U.S. 599 (1961) (rejecting a free exercise challenge to Sunday closing laws that did not exempt persons who for religious reasons kept their businesses closed on a day other than Sunday); Heisler v. Board of Review, 343 U.S. 939 (1952) (per curiam) (finding no substantial federal question in state's refusal to allow unemployment compensation benefits to Sabbatarian who refused to accept referred employment requiring her to work on Saturdays); Bunn v. North Carolina, 336 U.S. 942 (1949) (per curiam) (dismissing for lack of a substantial federal question an appeal from a decision rejecting a free exercise challenge to a statute prohibiting snake-handling).

[58] *See* Marcus, *The Forum of Conscience: Applying Standards Under the Free Exercise Clause*, 1973 DUKE L.J. 1217 (1973); Pfeffer, *supra* note 57, at 1121-30; Note, *Religious Cults*, *supra* note 56, at 1261. Following *Sherbert* and other victories, one writer labeled free exercise the "favored child" of the first amendment. Pfeffer, *supra*, at 1142. The Supreme Court has sometimes cited a "Preferred Rights Doctrine," which holds freedom of speech and religion above other fundamental rights. *See* L. TRIBE, *supra* note 11, at 564-75; Saladin, *Relative Ranking of the Preferred Freedoms: Religion and Speech*, RELIGION & PUB. ORD. 149 (1964). The Burger Court neither repudiates nor wholeheartedly embraces the Preferred Rights Doctrine, opting rather to apply consistently ad hoc balancing between legitimate state interests and an individual's right to exercise her religion freely. *See* Sciarrino, *supra* note 9, at 522, (citing Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 441 (1980)).

Some scholars argue that free exercise currently surpasses even free speech as the fundamental right protected most vigorously by the Supreme Court. "[I]t is religious freedom that has been singled out with the greatest frequency. It enjoys a 'particularly preferred' position." Sciarrino, *supra*, at 520 (quoting Saladin, *supra*, at 149). However, Sciarrino concedes that his proposition is "hotly debated." *Id.* at 520 n.3.

Wisconsin v. Yoder, 406 U.S. 205, 215 (1972), was probably the most notable post-*Sherbert* decision continuing the extension of free exercise. In *Yoder* the state of Wisconsin appealed the reversal of a decision convicting Amish parents of violating a state compulsory school attendance statute. *Id.* at 207. The Amish parents refused to send their children to public schools beyond the eighth grade. *Id.* Their religious beliefs mandate that salvation requires life in a church community separate from the world

A. The Religious Interests Burdened

The state action of sanctioning religious tort lawsuits implicates free exercise rights by monetarily punishing religious conduct. Courts disfavor government action that in effect financially punishes free exercise.[59] The financial punishment imposed by religious tort lawsuits can be severe.[60] In *Guinn v. Collinsville Church of Christ*, for example, the

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and worldly influence. *Id.* at 210. Applying the three-part balancing test developed in *Sherbert*, the Court found that the Amish parents were sincere in their religious beliefs, *id.* at 216, that the state's action in compelling high school attendance interfered with their religious interest, *id.* at 218, and that the state's interest was not sufficiently compelling to override the religious interest, *id.* at 225. Although conceding that the state's interest in an educated citizenry is strong, the Court found the Amish' religious interest even stronger. *Id.* at 213-15. The Court invalidated the Wisconsin statute. *Id.* at 236. Thus, *Yoder* is nearly universally viewed as a powerful extension of the protection of free exercise. *See, e.g.*, L. TRIBE, *supra*, at 856; Marcus, *supra*, at 1230; Note, *An Expansion of the Free Exercise Clause:* Wisconsin v. Yoder, 37 ALB. L. REV. 329, 341 (1973); Note, *Religious Cults*, *supra* note 56, at 1261. *But see* Kurland, *The Supreme Court, Compulsory Education, and the First Amendment's Religion Clauses*, 75 W. VA. L. REV. 213, 237-38 (1973) (arguing that *Yoder* extends broadened free exercise protection only to well-established churches).

Cases following *Sherbert* and *Yoder* continue the trend demanding strong government interests before regulating free exercise. *See, e.g.*, Thomas v. Review Bd., 450 U.S. 707 (1981) (requiring state to pay unemployment compensation to worker who voluntarily quit his job at an armaments factory because of religious beliefs); McDaniel v. Paty, 435 U.S. 618 (1978) (holding unconstitutional on free exercise grounds a Tennessee statute prohibiting clergy from participating in state legislature).

However, the protection afforded free exercise remains far from absolute. Indeed, recent cases may sound a subtle retreat from the advances of *Sherbert* and *Yoder*. Sciarrino, *supra*, at 341. *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (government interest in preventing racial discrimination sufficiently powerful to justify withdrawing tax exemption from school practicing religiously motivated racial discrimination); United States v. Lee, 455 U.S. 252 (1982) (government interest in perpetuating social security system overrides Amish employer's religious prohibition against paying social security taxes).

[59] *See, e.g.*, *Thomas*, 450 U.S. 707 (state must pay unemployment compensation to worker who voluntarily quit his job at an armaments factory because of religious beliefs); *Sherbert*, 374 U.S. 398 (requiring state to pay unemployment compensation to woman fired because she refused to work on religiously significant day). New York Times v. Sullivan, 376 U.S. 254 (1964), presents an analogy by criticizing government action that financially punishes free expression. The Court's rationale for restricting defamation lawsuits was their potential for financially draining those practicing their right of expression. *Id.* at 277; *see also infra* notes 103-16 and accompanying text.

[60] Religious tort actions pose an even greater threat to free exercise than the unemployment compensation cases (*see supra* note 59) because of the large damage awards available in tort actions. *Cf.* PROSSER AND KEETON ON THE LAW OF TORTS 665 (W. Keeton 5th ed. 1984).

damages awarded were five times the entire annual income of the defendant church.[61] Other recent religious tort lawsuits have generated large jury verdicts, including one for thirty-nine million dollars.[62] Because religious tort actions are particularly susceptible to large damage awards from inflamed juries,[63] churches and individuals easily could be punished to the point of bankruptcy for exercising their religious beliefs. The fear induced by such punishment chills not only tortious conduct, but also nontortious religious exercise.[64]

Sanctioning religious tort lawsuits also implicates the first amendment's establishment clause. The establishment clause[65] prohibits exces-

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[61] *See* McGolderick, *supra* note 7, at 8. The plaintiff sued for $1,300,000 in compensatory and punitive damages. *Id.* The jury awarded $205,000 in compensatory and $185,000 in punitive damages. *Id.*

[62] *See, e.g.*, Allard v. Church of Scientology of Cal., 58 Cal. App. 3d 439, 129 Cal. Rptr. 797 (1976) (jury verdict of $100,000); Christofferson v. Church of Scientology, 57 Or. App. 203, 644 P.2d 577 (1982), *cert. denied*, 459 U.S. 1206, 1227 (1983) (jury verdict of $39 million).

[63] *Cf.* PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 60, at 665. For a discussion of why juries are easily inflamed in cases involving religious issues, see *infra* notes 82-86 and accompanying text.

[64] An analogous chilling effect results from civil lawsuits implicating free expression. For a discussion of the chilling effect these lawsuits have on free expression, and some proposed solutions, see Comment, *The Use of Summary Judgments in Defamation Cases*, 14 U.S.F.L. REV. 77 (1979); Comment, *The Propriety of Granting Summary Judgment for Defendants in Defamation Suits Involving Actual Malice*, 26 VILL. L. REV. 470 (1981); Note, *The High Cost of Free Speech: Proposed Relief for Defendants in Political Defamation Cases*, 2 COOLEY L. REV. 361 (1985); Note, *The Role of Summary Judgment in Political Libel Cases*, 53 S. CAL. L. REV. 1783 (1979-80).

Courts consider government action overbroad when it restricts both constitutionally protected conduct and prohibited conduct. Overbreadth is a central factor in chilling first amendment freedoms. *See infra* note 92; Bogen, *First Amendment Ancillary Doctrines*, 37 MD. L. REV. 679, 706 (1978): "The particular problem with the overbroad law is that there is no way in a single case to sustain the law for its legitimate applications, while at the same time preventing it from unconstitutionally restricting expression."

[65] The establishment clause represents the oft-quoted but ill-defined "wall" between church and state. Thomas Jefferson coined the term, and the Supreme Court employed it in Everson v. Board of Educ., 330 U.S. 1 (1947):

> The establishment of religion clause of the First Amendment means at least this: neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to

sive government interference with religion.[66] Religious tort lawsuits interfere with religion not only by deterring it,[67] but also by evaluating its "correctness."[68] By making some religious conduct actionable, courts unavoidably suggest that the beliefs inspiring the conduct are untrue.[69]

> support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice-versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and state."

The framers of the Constitution considered this "wall" vital to the nation's well-being for at least three reasons. Roger Williams worried that churches might be consumed by "worldly corruptions" if not kept separate from the influence of the state. Thomas Jefferson's concern was the opposite: that separation was needed to protect the state from "ecclesiastical depredations and incursions." James Madison took the middle, and perhaps most reasonable, position that both religious and secular interests would best be advanced by separation. L. TRIBE, *supra* note 11, at 816.

[66] *See infra* notes 77-79 and accompanying text.

[67] *See supra* notes 59-64 and accompanying text.

[68] "[N]o official, high or petty, can prescribe what shall be orthodox in . . . religion." West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943). The government cannot "approve, disapprove, classify, regulate, or in any manner control" the content of religious sermons. Fowler v. Rhode Island, 345 U.S. 67, 70 (1952). James Madison warned that believing a civil magistrate can competently judge religious truth is "an arrogant pretension falsified by the contradictory opinion of Rulers in all ages, and throughout the world." II THE WRITINGS OF JAMES MADISON 183-91 (G. Hunt ed. 1901) (cited by L. TRIBE, *supra* note 11, at 871). The Supreme Court has often declined jurisdiction over religious questions. "[T]he First Amendment prohibits civil courts from resolving . . . disputes on the basis of religious doctrine and practice." Jones v. Wolf, 443 U.S. 595, 602 (1979) (referring to a dispute by two rival factions over which was the "true" church); *see also* Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1979) (refusing to determine whether a particular person is a duly constituted church official); Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1968) (refusing to determine in a church property dispute whether one faction had departed from the church's original faith and practice). *But see* Baugh v. Thomas, 56 N.J. 203, 265 A.2d 675 (1970) (claiming jurisdiction when a church violated its own written constitution or bylaws).

[69] *See* Ericsson, *supra* note 14, at 176-80. The *Nally* case provides a useful example of the government entanglement required to adjudicate religious tort lawsuits. In *Nally* the plaintiffs alleged that the defendant ministers advised their emotionally disturbed son that suicide can be an acceptable or even desirable act; a way for God to say "come on home." *Nally*, 204 Cal. Rptr. at 306. To impose liability for this advice, the court would in effect determine the advice's spiritual validity. The ministers can be liable only if their beliefs and doctrine were wrong — a question secular courts have no jurisdiction to decide. *See* United States v. Ballard, 322 U.S. 78, 86-87 (1944):

> Men may believe what they cannot prove. They may not be put to the

Thus, religious tort lawsuits require courts to consider first amendment implications when determining whether to allow recovery.

B. The Ad Hoc Balancing Tests

Courts apply ad hoc balancing tests to determine whether government action burdening religion is justified. Ad hoc balancing weighs competing government and individual interests on a case-by-case basis.[70] Courts allow government action that burdens religion only if, after balancing the interests in each case, they determine that government interests outweigh individual interests.[71]

> proof of their religious doctrine or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law . . . . If one could be sent to jail because a jury in a hostile environment found . . . [his] teachings false, little indeed would be left of religious freedom. The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views.

Even if the *Nally* court claimed it was not determining religious truth, but rather was enforcing social policy against encouraging suicide, the effect is to disapprove the communication of a religious idea. Whether justifiable or not, by adjudicating the controversy the court becomes entangled in religion.

The plaintiffs in *Nally* also alleged that although the defendant ministers undertook to counsel their son, they failed to make themselves sufficiently available to him. *Nally*, 204 Cal. Rptr. at 309. One of the church ministers responded to the decedent's request for "discipleship time," but within six months determined that the decedent would not follow his advice. *Id.* at 314. Some Christian groups interpret the Bible as commanding not to waste time on those who refuse to accept its message. *See* 2 *Thessalonians* 3:14-15. To decide the validity of this allegation, the court would become further entangled by determining how much time religious counselors should make available for counselees. *See* Ericsson, *supra*, at 170. Ericsson suggests that judicial second-guessing of clergy time allocation would also require determining whether the standard should be the same for all religious counselors, or should vary according to the size of the congregation and other factors. *Id.*

[70] *See* M. NIMMER, NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT § 2, at 16 (1984); L. TRIBE, *supra* note 11, at 582; Sciarrino, *supra* note 9, at 320. Most of Professor Nimmer's arguments are also presented in Nimmer, *The Right to Speak from* Times *to* Time: *First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935 (1968).

[71] *See infra* notes 72-79 and accompanying text.

Present free exercise analysis, developed in the 1963 case of *Sherbert v. Verner*,[72] requires a compelling state interest to justify any restriction.[73] The test first analyzes whether the government action implicates a sincere religious belief.[74] If so, the test weighs the government interest to determine whether, in the case's particular circumstances, those interests compel the religious interference.[75] Government interference is

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[72] 374 U.S. 398 (1963). In *Sherbert*, a South Carolina employer discharged an employee because she refused to work on Saturday, the Sabbath Day of her faith. *Id.* at 399. The state rejected her claim for unemployment compensation. *Id.* at 401. It argued that her personal religious conviction was not "good cause" (within the meaning of its unemployment compensation statute) for refusing to accept employment that included Saturday working hours. *Id.* The Supreme Court held the application of the statute unconstitutional under the free exercise clause. *Id.* at 410.

[73] *Id.* at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945) (a public assembly case)): "[N]o showing merely of a rational relationship to some colorable state interest would suffice, in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.' "

Typical cases demonstrating the weighing of interests are People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964); and State *ex rel.* Swann v. Pack, 527 S.W.2d 99 (Tenn. 1975). In *Woody*, the California Supreme Court ruled that the state could not prohibit a group of Navajo Indians from possessing and smoking peyote as a religious practice. The court recognized that peyote was a hallucinogen which the state had a valid interest in proscribing, but held that proscription so severely limited the Navajos' ability to exercise religion that it was unconstitutional. "To forbid the use of peyote is to remove the theological heart of Peyotism." *Woody*, 61 Cal. 2d at 716, 394 P.2d at 813, 40 Cal. Rptr. at 69. Additionally, the use of peyote did not substantially endanger the Navajo community. Thus, the balancing scale tipped in favor of the Navajos' religious interest. *Id.* For an overview of the religious drug use defense, see Brown, *Religion: the Psychedelic Perspective: the Freedom of Religion Defense*, 11 AM. INDIAN L. REV. 125 (1985).

In *Pack*, the Tennessee Supreme Court confronted whether the religious handling of poisonous snakes and drinking of strychnine are a public nuisance. The court found these activities sufficiently dangerous to justify prohibiting them, notwithstanding their religious character. However, the court acknowledged the powerful free exercise right mandated by *Sherbert* and *Yoder*. To assure due deference to the free exercise clause, the court researched the issues "with meticulous care" and announced its decision "through an unusually extensive opinion." *Pack*, 527 S.W.2d at 112. It found that in balancing state and religious interests, "the scales are always weighted in favor of free exercise and the state's interest must be compelling; it must be substantial; the danger must be clear and present and so grave as to endanger paramount public interests." *Id.* at 111.

[74] The sincerity of religious belief "is the threshold question . . . which must be resolved in every case." United States v. Seeger, 380 U.S. 163, 185 (1965) (allowing a conscientious objector to avoid military duty); *see also* United States v. Ballard, 322 U.S. 78 (1944) (holding that religious beliefs of defendant claiming free exercise protection were insincere, and thus undeserving of constitutional protection).

[75] *See Sherbert*, 374 U.S. at 407.

acceptable only if the government interests outweigh the religious interests and if no less restrictive alternative is available.[76]

The establishment clause test also calls for primarily ad hoc balancing.[77] Under the test, courts require that government action be religiously neutral, that its primary impact neither advance nor inhibit religion, and that it avoid excessive government entanglement with religion.[78] Whether government entanglement is excessive and whether its primary impact advances or inhibits religion depends on a judge's discretionary weighing of interests in each case.[79]

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[76] *See* Thomas v. Review Bd., 450 U.S. at 707 (holding that state must pay unemployment compensation to worker who voluntarily quit his job at an armaments factory because of his religious beliefs); *Sherbert*, 374 U.S. at 407; Sciarrino, *supra* note 9, at 340.

[77] *See infra* notes 78-79 and accompanying text.

[78] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). Until recently, relatively few cases even addressed the establishment clause. *See Sherbert*, 374 U.S. at 413 (Stewart, J., concurring); M. SHAPIRO & R. TRESOLINI, AMERICAN CONSTITUTIONAL LAW 453 (1975). The flurry of cases in the 1960's which eventually led to *Lemon*'s no excessive entanglement principle were perhaps inspired by Engle v. Vitale, 370 U.S. 421 (1962) (banning prayer in public schools), and School Dist. of Abington v. Schempp, 374 U.S. 203 (1963) (banning Bible reading in public schools). These two cases ignited a nationwide controversy regarding the relationship between religion and public education. *See* M. SHAPIRO & R. TRESOLINI, *supra*, at 62-63.

The establishment clause often collides with the free exercise clause; they are in "natural antagonism." J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 1029 (1983). For example, the government's stationing of an armed forces draftee in a remote region devoid of churches may impinge on his religious free exercise. However, by providing an army chaplain to remedy the free exercise incursion, the government challenges the establishment clause. *See School Dist. of Abington*, 374 U.S. at 309 (Stewart, J., dissenting). Another example is the government's supplying of free secular textbooks to children in religious schools. Under a literal interpretation, courts could view this as violative of the establishment clause because the government is "supporting" a religious group. However, if the government did not provide the free textbooks to children at religious schools, but did provide them at public schools, the free exercise clause would be implicated. The government would be denying a benefit solely on the basis of religion. In effect it would punish citizens for exercising their religious beliefs. Thus, the attempt at separation of church and state would implicate the free exercise clause. *See* Board of Educ. v. Allen, 392 U.S. 236 (1968).

Professor Kurland suggests that the only way to reconcile the two clauses is to read them together as a prohibition against using religion as a basis of classification for purposes of governmental action. P. KURLAND, RELIGION AND LAW 17-18 (1962).

[79] *See, e.g.*, *Lemon*, 403 U.S. at 614-15 ("judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct, and invisible barrier depending on all the circumstances of a particular relationship"); *see also* Stone v. Graham, 449 U.S. 39 (1980) (holding unconstitutional a statute requiring that schools post the Ten Commandments on classroom walls); Committee for

The primary advantage of ad hoc balancing in religion clause cases is its precision in measuring varying government and individual interests. It provides judges flexibility in applying the first amendment to varying circumstances.[80] For example, ad hoc balancing allows the court to recognize the heightened government interest in discouraging particularly egregious religious torts by permitting recovery. Proponents argue that such flexibility enables courts to avoid rigid decisions insensitive to the unique setting of each case.[81]

D. The Undesirability of Pure Ad Hoc Balancing in Religious Tort Lawsuits

1. Susceptibility to Popular Sentiment

Despite the flexibility allowed by ad hoc balancing, many scholars argue that its harms outweigh its benefits in first amendment cases.[82]

Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1972) (holding unconstitutional New York's aid program for religious schools); Tilton v. Richardson, 403 U.S. 672 (1971) (allowing church-related schools to receive federal funds). That these three cases involve schools is not surprising. Many, if not most, establishment clause cases of the past 25 years deal with aspects of religion in education. *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (holding that government may deny tax benefits to racially discriminatory religious school); Widmar v. Vincent, 454 U.S. 263 (1981) (holding that state university cannot distinguish between students' religious speech and other kinds of speech); Epperson v. Arkansas, 393 U.S. 97 (1968) (holding that state cannot ban teaching of evolution in public schools); Board of Educ. v. Allen, 392 U.S. 236 (1968) (holding that state can issue free textbooks to religious schools).

[80] *See* M. NIMMER, *supra* note 70, § 2, at 18; Marcus, *supra* note 58, at 1240. As an example, the government's interest in military conscription would seemingly weigh more heavily on a balancing scale in wartime than in peacetime.

[81] *See* M. NIMMER, *supra* note 70, § 2, at 18; Mendelson, *The First Amendment and the Judicial Process: A Reply to Mr. Frantz*, 17 VAND. L. REV. 479, 483 (1964) ("The essence of balancing is realism — a repudiation of the modern activists' rhetorical, or magic phrase, technique."); *see also* Konigsberg v. State Bar, 366 U.S. 36, 51 (1961) (arguing that ad hoc balancing is necessary in free speech cases to weigh the relevant interests properly).

[82] *See, e.g.*, M. NIMMER, *supra* note 70, § 2, at 9-14; DuVal, *Free Communication of Ideas and the Quest for Truth: Toward a Teleogical Approach to First Amendment Adjudication*, 41 GEO. WASH. L. REV. 161, 172-78 (1972); Frantz, *The First Amendment in the Balance*, 71 YALE L. J. 1424, 1424-50 (1962). Modernly, the courts employ a two-tracked approach to cases involving traditional speech. In the first track, speakers receive absolute protection from government actions *aimed* at restricting communicative impact. The second track applies to most speech restricted by government action directed toward other, legitimate goals. Courts apply ad hoc balancing to the second track cases. *See* L. TRIBE, *supra* note 11, at 580-88; Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analy-*

Public passions ride especially high in first amendment cases, because the liberties protected — religion, speech, and association — naturally generate controversy.[83] Allowing judges the broad discretion of ad hoc balancing makes them vulnerable to prevailing public emotions.[84] For example, imagine that while Bhagwan Shree Rajneesh still presided over his Oregon commune, a convert sued him for sexually molesting her in a bizarre religious initiation procedure — a practice of which she claims she was unaware upon joining the religion. Suppose further that the case was tried in a nearby town, where the long-time residents hated and feared Rajneesh and his religion. If Rajneesh claimed implied consent and free exercise protection because the sexual ritual was religiously motivated, "unusual judicial courage"[85] would be required to give his claims fully impartial consideration under ad hoc balancing.[86]

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sis, 88 HARV. L. REV. 1482 (1975).

[83] *See* M. NIMMER, *supra* note 70, § 2, at 20 (arguing that the public sentiment problem overrides whatever advantages ad hoc balancing offers in first amendment cases); Marcus, *supra* note 58, at 1241. The nationwide controversy that erupted following School Dist. of Abington v. Schempp, 374 U.S. 203 (1963) (banning Bible reading in public schools), and Engel v. Vitale, 370 U.S. 421 (1962) (banning prayer in public schools), demonstrates that public passions ride high in religion cases as well as speech cases. *See* M. SHAPIRO & R. TRESOLINI, *supra* note 78, at 62-63; *see also* Cantwell v. Connecticut, 310 U.S. 296, 310 (1940) ("In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor."). Indeed, nearly all of the constitutional considerations inherent in freedom of expression issues apply with equal force to the free exercise clause. *See generally* Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545 (1983) (arguing that constitutional protections afforded free expression should also apply to free exercise).

[84] *See* M. NIMMER, *supra* note 70, § 2, at 20.

[85] *See* Nimmer, *supra* note 70, at 944 (citing the "unusual judicial courage" that would be required to preside fairly over a case involving an equally emotional free speech fact pattern).

[86] Another example arises from the Jonestown, Guyana, massacre of 1979. Suppose that Jim Jones, the group's leader, survived the mass suicide and killings, and returned to the United States. His victims' relatives would doubtless file numerous wrongful death lawsuits against him (in addition to the government's criminal charges). Any defense he might make that his followers consented to their deaths would certainly arouse great animosity. In the face of such powerful public sentiment, a judge would be hard-pressed to handle Jones' defense fairly.

The *Guinn* case's damage award may provide a third, and perhaps most real, example of the public passion factor's influence. Even though the plaintiff admitted that the defendants treated her kindly, Appellant's Opening Brief at 12, *Guinn*, No. 62,154 (Okla.), the trial judge upheld the jury's verdict of $120,000 in punitive damages, and its finding that the defendants committed intentional infliction of emotional distress.

2. Compounding of Chilling Effect

A second and perhaps more serious objection to ad hoc balancing in religious tort lawsuits is that it significantly compounds tort liability's chilling effect on religious exercise.[87] As discussed above, the financial impact of tort recovery has some chilling effect on religious exercise.[88] The uncertainty caused by ad hoc balancing greatly promotes this chilling.[89] Since ad hoc balancing relies heavily on judicial discretion and the factual circumstances of each case, an individual has no way of knowing whether her religious conduct is tortious until a plaintiff sues.[90]

The uncertainty created by ad hoc balancing restrains an overbroad class of religious conduct.[91] It encourages potential defendants to curtail

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Appellee's Opening Brief at 10, *Guinn*, No. 62,154 (Okla.).

Not only public sentiment, but also judicial discretion plague ad hoc balancing. "Because the Constitution affords no guidelines, absent statutory standards, hundreds of judges would . . . be at large to fashion ad hoc standards, in individual cases, according to their own ideas of what seems 'desirable' or 'expedient.' " Houchins v. KQED, Inc., 438 U.S. 1, 14 (1978).

[87] For cases and articles discussing the chilling effect in first amendment cases, see *supra* note 64.

[88] *See supra* notes 59-64 and accompanying text.

[89] *See* M. NIMMER, *supra* note 70, § 2, at 10; DuVal, *supra* note 82, at 179; Frantz, *supra* note 82, at 1443; Marcus, *supra* note 58, at 1240. Because courts weigh interests solely on the facts of each particular case in pure ad hoc balancing, they create no general rule. *See* T. EMERSON, D. HABER, N. DORSEN, P. BENDER & B. NEUBORNE, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 58 (4th ed. 1976); M. NIMMER, *supra*, § 2, at 10; Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 330 (1969); *see also* DuVal, *supra*, at 175:

> The most important criticism of the balancing test has received but scant attention. It is not that the test protects too little speech. Nor is it that it gives insufficient protection to the speech which it does protect. Nor is it that the test is fatally inconsistent with the language of the first amendment. Rather, it is that the ad hoc balancing test is not a test at all.

In United States v. Robel, 389 U.S. 258 (1967), the Supreme Court declared that ad hoc balancing was inappropriate in a case involving individual rights verses the national interest. However, the Court has not followed this dictum. *See* T. EMERSON, D. HABER, N. DORSEN, P. BENDER & B. NEUBORNE, *supra*, at 58. Professor Tribe views ad hoc balancing as an inescapable "quagmire;" "a slippery slope; once an issue is seen as a matter of degree, first amendment protections become especially reliant on the sympathetic administration of the law." L. TRIBE, *supra* note 11, at 584. But definitional balancing rules "tend to protect the system of free expression better because they are more likely to work in spite of the defects in the human machinery on which we must rely to preserve fundamental liberties." *Id.*

[90] *See* M. NIMMER, *supra* note 70, § 2, at 10.

[91] In Walker v. City of Birmingham, 388 U.S. 307, 344-45 (1967), Justice

not only tortious conduct, but also conduct that might ultimately prove nontortious.[92] For example, because ad hoc balancing does not define actionable clergy counseling, a clergyperson can be safe only by not giving any advice.[93] Such uncertainty is especially pernicious in first amendment cases;[94] it chills the entire nation's use of the liberties it values most highly.[95]

Brennan's dissenting opinion explained that a chilling effect can result from vagueness, overbreadth, or unbridled discretion.

[92] Even if the tort action is unsuccessful, the price it exacts in trauma and legal fees chill free exercise. *See* Baggett v. Bullitt, 377 U.S. 360, 372 (1964); NAACP v. Button, 371 U.S. 415, 433, 435-36 (1963); *see also* Dombrowski v. Pfister, 380 U.S. 479, 487 (1965) ("The chilling effect upon the exercise of First Amendment rights may derive from the fact of prosecution unaffected by the prospects of its success or failure."). The Supreme Court has given much attention to the chilling effect of government action on constitutionally protected conduct. *See, e.g.* Secretary of State v. Joseph H. Munson Co., 104 S. Ct. 2839, 2853 (1984) (chilling effect of banning fundraising by charitable groups); Calder v. Jones, 465 U.S. 783, 786 (1984) (chilling effect on reporters of defamation actions in physically distant venues); Bill Johnson's Restaurants v. National Labor Relations Bd., 461 U.S. 731, 741 (1983) (chilling effect on company employees' free speech); United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 596 (1973) (Douglas, J., dissenting) (chilling effect of overbroad government regulation). Usually courts employ the chilling effect doctrine in first amendment cases — specifically, free expression cases. *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 168 (1972); Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808, 809 (1969). Although the Supreme Court has never specifically discussed the effect of chilling in a religion case, the impact is similar to that in free expression cases. The Court has also discussed chilling in non-first amendment contexts. *See, e.g.*, Pulliam v. Allen, 466 U.S. 522 (1984) (discussing potential chilling effect of government action on judicial independence).

The three evils that cause first amendment chilling are unbridled discretion, *e.g.*, Walker v. City of Birmingham, 388 U.S. 307, 344-45 (1967) (Brennan, J., dissenting), vagueness, *e.g., id.* at 344-45; *see also* Bogen, *supra* note 64, at 714-26; Shauer, *Fear, Risk, and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U.L. REV. 685, 685 (1978); Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 67-116 (1960), and overbreadth, *e.g.*, *Walker*, 388 U.S. at 344-45; *see also* Alexander, *Is There An Overbreadth Doctrine?*, 22 SAN DIEGO L. REV. 541, 541-54 (1985); Shauer, *supra*, at 685; Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 860-61 (1970).

[93] For example, John MacArthur, Jr., one of the pastors named as a defendant in *Nally*, told television interviewers, "What will happen if we can get sued for this kind of thing is that we'll have to stop counseling." 20/20 (April 10, 1986).

[94] *See* M. NIMMER, *supra* note 70, § 2, at 10.

[95] *See supra* note 58.

III. A Definitional Balancing Alternative

A. Advantages of Definitional Balancing Over Pure Ad Hoc Balancing

Applying definitional balancing[96] to religious tort lawsuits would lessen the difficulties inherent in the present ad hoc approach.[97] In definitional balancing, courts create explicit rules to differentiate between constitutionally protected and unprotected conduct.[98] In effect, the rules define as a matter of law activity that is constitutionally protected.[99] Unlike ad hoc balancing, definitional balancing does not justify a holding solely on the particular circumstances of each case.[100] Rather, it balances[101] the relevant interests on a broader scale and produces a

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[96] Several commentators employ the term definitional balancing. *See, e.g.*, M. Nimmer, *supra* note 70, § 2, at 17-25; DuVal, *supra* note 82, at 172-82; Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877, 912-15 (1963); Lasson, *Group Libel Versus Free Speech: When Big Brother Should Butt In*, 23 Duq. L. Rev. 77, 104 (1984); Marcus, *supra* note 58, at 1239-47; Redish, *The Content Distinction in First Amendment Analysis*, 34 Stan L. Rev. 113, 119 (1981); Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 30 UCLA L. Rev. 671, 673 (1983). *Cf.* L. Tribe, *supra* note 11, at 584 (discussing "categorical rule" approaches). DuVal points out uncertainties as to the exact nature of definitional balancing in particular applications. DuVal, *supra*, at 179 n.78.

[97] For a detailed illustration of the benefits of definitional balancing in the mythical state of Utopia, see M. Nimmer, *supra* note 70, § 2, at 19-20. Although definitional balancing is arguably best suited to first amendment cases, writers have used the theory in other contexts. *See, e.g.*, Chamallas, *Evolving Concepts of Equality Under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Theory*, 31 UCLA L. Rev. 304, 334 (1983) (discussing definitional balancing in the context of employment discrimination).

[98] *See* DuVal, *supra* note 82, at 179.

[99] *See* M. Nimmer, *supra* note 70, § 2, at 17.

[100] *See supra* note 75 and accompanying text.

[101] First amendment scholars differentiate between definitional balancing and the absolutist approach championed by Justice Hugo Black. Definitional balancing actively weighs government and individual interests to formulate a rule of law. *See* M. Nimmer, *supra* note 70, § 2, at 15-16; Schlag, *supra* note 96, at 673. But absolutism considers all balancing incompatible with the language of the first amendment, which endows *absolute* protection from government interference. *See* Black, *The Bill of Rights*, 35 N.Y.U. L. Rev. 865, 874-75 (1960); DuVal, *supra* note 82, at 174. Justice Black would have extended a form of absolute protection even to the free exercise clause. Black & Cahn, *Justice Black and the First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. Rev. 543, 549 (1963). But such an extension is untenable because it would protect extreme antisocial behavior — even murder — as long as the behavior was motivated by religious beliefs. *See* United States v. Reynolds, 98 U.S. 145, 166 (1878); *supra* note 57. The theory's potential for chaos has led its benefactors to focus on freedom of expression. *See* J. Nowak, R. Rotunda & J. Young, *supra* note

general standard governing not only the present case, but future cases.[102]

Defamation law's actual malice standard illustrates how definitional balancing reduces the impact of popular sentiment and the chilling of first amendment freedoms. The actual malice standard, established by the Supreme Court in *New York Times v. Sullivan*[103] and *Gertz v. Welch*,[104] is the best example of definitional balancing.[105] Its sweeping rule forces public officials and public figures to prove actual malice — knowing falsity or reckless disregard for the truth — before recovering for defamation.[106]

In creating the standard, the Court recognized the threat to freedom of expression presented by the vague and complex law of defamation.[107] This lack of clarity[108] chilled free expression.[109] Uncertainty over liability led speakers to make only statements that "steer far wider of the unlawful zone"[110] and denied free expression the "breathing space" it

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78, at 866; *see also* Schlag, *supra* note 96, at 673-74 (adding a third distinction — between definitional balancing and "non-absolutist categorical approaches").

[102] *See* M. NIMMER, *supra* note 70, § 2, at 17; DuVal, *supra* note 82, at 179.

[103] 376 U.S. 254 (1964). In *New York Times*, the police commissioner of Montgomery, Alabama, sued the newspaper and four black religious leaders for printing an allegedly defamatory advertisement. *Id.* at 256. The advertisement's allegation of suppression of the black civil rights movement by white leaders in Montgomery contained inaccuracies. *Id.* at 258. The plaintiff claimed that the untrue statements were directed at him as police commissioner. *Id.* The Alabama Supreme Court affirmed his jury award of $500,000, leading to the reversal by the United States Supreme Court. *Id.* at 256.

[104] 418 U.S. 323 (1974).

[105] *See* Marcus, *supra* note 58, at 1241.

[106] *See, e.g.*, Street v. National Broadcasting Co., 645 F.2d 1227 (6th Cir. 1981) (applying actual malice standard to witness in famous trial); McCoy v. Hearst Corp., 174 Cal. App. 3d 892, 220 Cal. Rptr. 848 (1985) (applying actual malice standard to police officers and former deputy district attorney); Burnett v. National Enquirer, 144 Cal App. 3d 991, 193 Cal. Rptr. 206 (1983) (applying actual malice standard to famous entertainer).

[107] *See* Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc., *and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1350 (1975). Prior to *New York Times*, the law of defamation was a "forest" of complexities. *Id.* Even today areas of the defamation forest not "bulldozed" by the actual malice standard continue to provide complexity. *Id.* at 1349-51. Although some of the tort's perplexing rules may have originated as concessions to free speech and freedom of the press, first amendment considerations had little effect on the law's development prior to *New York Times*. *Id.* at 1350, 1359-64.

[108] *See New York Times*, 376 U.S. at 285-86.

[109] *Id.* at 279.

[110] *Id.*

needs to survive.[111]

The Supreme Court also found the definitional standard necessary to prevent the suppression of unpopular ideas and beliefs.[112] Prior to the *New York Times* standard, judges performing discretionary ad hoc balancing were more susceptible to community pressure to suppress unpopular speech.[113]

The sweeping definitional rule alleviated both of these problems. It lessened the impact of popular sentiment by reducing judicial discretion[114] and lessened the chilling effect on expression by increasing certainty over what was actionable. It also eased defamation law's burden on free expression by making recovery more difficult.[115] Applying a definitional balancing standard would similarly protect first amendment interests in religious tort cases because they present comparable problems of public influence and chilling.[116]

B. A Consent Based Standard

Although definitional balancing offers these advantages, it will improve on ad hoc balancing only if it is well fitted to the interests implicated. In the raging debate[117] over the approaches, the most serious objection to definitional balancing is its lack of precision in weighing sensitive and complex interests.[118] Because it is not based on the facts of

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[111] *Id.* at 271-72.

[112] *Id.* at 271.

[113] *See* M. NIMMER, *supra* note 70, § 2, at 18. Professor Nimmer provides a useful example of how objective definitional rules lessen societal pressure ("How much easier it would be for a conscientious judge to explain to the members of the Lion's Club that he found as he did because that was 'the rule,' rather than because upon a weighing of the interests involved he found weightier the side that public opinion opposed.").

[114] *See id.* § 2, at 19-20.

[115] Consider the chilling effect had the Court decided *New York Times* on a purely ad hoc basis. Had the Court reached the same results through ad hoc balancing, future potential defendants and public figures would have little or no increased knowledge of what future conduct would be actionable. Worse, the uncertainty might have deterred future criticism of public officials, since speakers cannot predict which way the scales will tip in the particular circumstances of a new case. *See id.* § 2, at 17-18. However, definitional balancing allows speakers certainty. They know that they are liable if they speak with actual malice, and otherwise are not liable. *See New York Times*, 376 U.S. at 279-80.

[116] *See supra* notes 87-95 and accompanying text.

[117] *See* Sciarinno, *supra* note 9, at 321 n.78.

[118] *See, e.g.*, P. FREUND, THE SUPREME COURT OF THE UNITED STATES 74 (1961). Professor Nimmer concedes that ad hoc balancing is more precise, and points out that in the same year two jurisprudentially polar Justices — Brennan and Rehnquist — emphasized precision as ad hoc balancing's advantage. M. NIMMER, *supra*

each case, it can be a blunt knife compared to the sharp scalpel of ad hoc balancing.[119] Unless a definitional balancing standard accounts for most or all of the competing interests in a class of lawsuits, its sweeping rule may often produce unjust results.[120]

Applying the consent doctrine would create a partially definitional balancing standard well fitted to government and individual interests in religious tort lawsuits. The consent doctrine bars recovery by plaintiffs

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note 70, § 2, at 18 n.13 (citing Smith v. Daily Mail Publishing Co., 442 U.S. 97, 106 (1979) (Rehnquist, J., concurring); and Herbert v. Lando, 441 U.S. 153, 196 (1979) (Brennan, J., dissenting)).

Disparagers have numerous criticisms of categorical or definitional rules. First, they are too rigid for courts to apply effectively. *See, e.g.*, Schlag, *supra* note 96, at 674-75. Second, they are a front behind which judges engage in "intuitive" balancing. *See, e.g.*, Mendelson, *supra* note 81, at 481-82. Third, they allow the Supreme Court to make policy decisions better left to legislatures. *See, e.g.*, Dennis v. United States, 341 U.S. 494, 539-40 (1951) (Frankfurter, J., concurring) ("we are not legislators . . . direct policy making is not our province. How best to reconcile competing interests is the business of legislatures, and the balance they strike is a judgment not to be displaced by ours, but to be respected unless outside the pale of fair judgment."); Mendelson, *On The Meaning of the First Amendment: Absolutes in the Balance*, 50 CALIF. L. REV. 821, 825-28 (1962). Fourth, the Court has no constitutional guidelines on how to make definitional rules, thus leaving it susceptible to the same criticism leveled against ad hoc balancing. *See, e.g.*, A. BICKEL, THE LEAST DANGEROUS BRANCH 96 (1962); Black, *Mr. Justice Black, the Supreme Court, and the Bill of Rights,* in THE OCCASIONS OF JUSTICE 89, 94-97 (1963); DuVal, *supra* note 82, at 180. Fifth, categorical definitions of constitutionally protected conduct include too little or too much. *See, e.g.*, Schlag, *supra*, at 674.

[119] *See* M. NIMMER, *supra* note 70, § 2, at 18.

[120] In Gertz v. Welch, 418 U.S. 323 (1974), the Supreme Court recognized that the definitional actual malice rule might not always produce fair results. *Gertz* extended the actual malice standard to public figures. It divided public figures into two groups: those who are public figures for all purposes, and those who became limited public figures by thrusting themselves to the forefront of a controversy. *Id.* at 344-45. In both instances the public figures voluntarily subjected themselves to public scrutiny, *id.* at 345, and thus lessened the government's interest in protecting them from unflattering speech, *id.* at 342-43. The Court conceded that this voluntary exposure to increased risk might not apply to all public figures. *Id.* at 345. Nevertheless, the Court held that the relevant free expression interests entitled the media to assume that the exposure was voluntary. *Id.* Subsequently, courts have not applied the actual malice standard to limited public figures who attained their status accidentally. *See* PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 60, at 806.

The *Gertz* Court also conceded that the actual malice standard exacts a "high price from the victims of defamatory falsehood. Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test." *Gertz*, 418 U.S. at 342. The Court concluded that this unfairness is justified by the "limited state interest" present in libel actions brought by public persons. *Id.* at 343.

who willingly engage in dangerous conduct.[121] Courts often imply consent even if the plaintiff hopes to avoid the injury.[122] For example, a boxer, by participating in the sport, impliedly consents to an opponent's blows even though hoping to avoid them.[123] Similarly, when an individual joins a religious group she impliedly consents[124] to its religious practices.[125] If the group practices excommunication, she impliedly consents to her own excommunication, even though she hopes to avoid it.

Voluntary membership in a religious group should create a rebuttable presumption that an individual consents to the group's religious conduct. Shifting the burden of proof to the member/plaintiff would reduce ad hoc considerations, and make recovery more difficult. Thus, it would ease the challenge religious tort lawsuits pose to the religion clauses.[126] Equally important, the presumption would recognize that the plaintiff's voluntariness greatly reduces the government interest in allowing tort recovery.[127] Courts refrain from paternalism when individuals voluntarily expose themselves to tortious conduct.[128] Thus, the standard is well fitted to the government and individual interests implicated.

Again, consider an analogy to the actual malice standard. In *Gertz*[129]

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[121] *See* PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 60, at 113.

[122] *Id.*

[123] *Id.*

[124] For possible exceptions to this general statement, see *infra* notes 135-81 and accompanying text.

[125] In a nontort setting, the Supreme Court has flatly stated that membership in a church indicates consent to its practices. *See* Watson v. Jones, 80 U.S. (13 Wall.) 679 (1872) (denying dissident church members use of church property); *see also* Brady v. Reiner, 198 S.E.2d. 812, 844 (W. Va. 1973); Delgado, *Cults and Conversion: the Case for Informed Consent*, 16 GA. L. REV. 533 (1982). Delgado proposes that courts apply an informed consent standard to cult indoctrination procedures. However, he concedes that courts show diminished concern for "insider-insider" relations in religious groups, "perhaps because members are deemed to have impliedly consented to normal transactions within the group." *Id.* at 542.

[126] *See supra* notes 82-95 and accompanying text.

[127] *See infra* notes 129-34 and accompanying text.

[128] *See* PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 60, at 112 ("The attitude of the courts has not, in general, been one of paternalism. Where no public interest is contravened, they have left the individual to work out his own destiny, and are not concerned with protecting him from his own folly in permitting others to do him harm.").

[129] 418 U.S. at 323. In *Gertz* a John Birch Society magazine reported falsely that Elmer Gertz, a Chicago attorney, was a "Leninist" and a "Communist-fronter." *Id.* at 326. The Court found that Gertz was not a public figure, and thus was not required to prove actual malice to prevail in his defamation action. *Id.* at 351-52.

the Supreme Court explained that the actual malice standard reflects the "limited state interest" in protecting public persons from defamation.[130] Public persons usually become well known by willingly thrusting themselves to the forefront of public controversies.[131] The voluntary assumption of an increased risk of defamation justifies a higher standard of recovery.[132] This voluntariness tips the scale against the government's interest in protection.[133] Cases following *Gertz* strongly reaffirmed the voluntariness component of the actual malice rule.[134] Voluntariness should play an equally important role in the balancing of government and individual interests in religious tort lawsuits.

C. Applying the Consent-Based Standard

Rather than completely eliminating lawsuits by member/plaintiffs for religiously motivated conduct, the proposed standard would create a preliminary barrier to recovery: proof that membership did not constitute consent. To erect this barrier, the religious defendant must first show that its conduct was religiously motivated and that the plaintiff was a church member when the tort occurred.[135] Once the defendant establishes these facts, the burden would shift to the member/plaintiff

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[130] *Id.* at 343.

[131] *Id.* at 345.

[132] *Id.*

[133] *Id.* at 343-44. A "compelling normative consideration" distinguishes a public person from a private defamation plaintiff. *Id.* at 344. "An individual who decides to seek government office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case." *Id.* By contrast, a private plaintiff "has relinquished no part of the interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood." *Id.* at 345.

[134] *See, e.g.*, Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979); Time, Inc. v. Firestone, 424 U.S. 448 (1976). In *Time*, the former wife of the heir to the Firestone tire fortune sued the magazine for publishing allegedly defamatory information about her divorce. *Id.* at 452. The Court refused to consider her a public figure because she did not voluntarily seek public attention. "Respondent did not assume any role of especial prominence in the affairs of society . . . and she did not thrust herself to the forefront of any public controversy in order to influence the resolution of the issues involved in it." *Id.* at 453.

In *Wolston* the issue of voluntariness took on "even greater importance." Sciarinno, *supra* note 9, at 114. The Supreme Court found that a man falsely identified as a Soviet agent by *Reader's Digest* did not willfully enter the public eye. *Wolston*, 443 U.S. at 166. He did not "voluntarily thrust" or inject himself into public view. "It would be more accurate to say that petitioner was dragged unwillingly into the controversy." *Id.* Therefore, the Court refused to apply the actual malice standard. *Id.*

[135] *See infra* notes 139-49 and accompanying text.

to prove lack of consent. Traditional consent doctrine recognizes several factors that negate consent.[136] Under the proposed standard, if a member/plaintiff proves one of these negating factors, the court proceeds to the merits of the case. If not, the case fails.[137] Defamation law's actual malice standard serves as an example of a definitional rule creating a preliminary barrier to recovery. There the plaintiff's preliminary barrier to recovery is proving knowing falsity or reckless disregard for the truth.[138]

1. Membership and Religious Motivation

Before shifting the burden of proving lack of consent, courts should require the religious defendant to show that the plaintiff was a member of the church, and that the tort was religiously motivated. Unless the plaintiff is a church member — or was a member when the tort occurred — no justification for presuming voluntariness arises. And unless the tort is religiously motivated, constitutional protection is unwarranted.

The standard should not apply to nonmembers unless their cause of action is derivative. Nonmember parents, for example, probably do not consent to the alienation of their child's affection by a religious group.[139] However, the standard might bar parents' recovery in a case like *Nally v. Grace Community Church*,[140] if the son validly consented to his pastors' counseling practices. There the parents sued for the intentional infliction of emotional distress on their decedent son.[141] They should not recover for their son's injuries if his membership implied consent to the injurious conduct.

The consent-based standard also should not apply to tortious acts committed by a religious group after a member withdraws from the group. Courts routinely hold that members of religious groups may terminate their membership.[142] Termination is the logical point at which

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[136] *See infra* notes 150-81 and accompanying text.

[137] *Id.*

[138] *See* Marcus, *supra* note 58, at 1242.

[139] *See supra* note 36 and accompanying text. But if the alienation resulted from the child's independent choice rather than the church's untoward influence, parents should not recover.

[140] 157 Cal. App. 3d 912, 204 Cal. Rptr. 303 (1984), *decertified & hg. denied*, Aug. 30, 1984.

[141] 204 Cal. Rptr. at 304-05.

[142] *See, e.g.*, Katz v. Singerman, 241 La. 103, 134, 127 So. 2d 515, 526 (1961) (stating that dissident members of Jewish synagogue may change membership); Fuchs v. Meisel, 102 Mich. 357, 373, 60 N.W. 773, 778 (1894) (stating that dissident mem-

individuals withdraw consent to religious activity.[143]

However, equivocal membership should not, absent some consent-negating factor,[144] excuse a plaintiff from meeting the proposed standard. A football player cannot threaten legal action if she is tackled, and at the same time refuse to quit playing football. Not recognizing the difference between equivocal and wholehearted membership may lead to harsh results, particularly in a society in which religious membership is often halfhearted or traditional. But large, traditional churches that tolerate equivocal membership arguably are less likely to engage in tortious religious conduct than churches which demand total commitment from their members.[145] More importantly, courts have always assumed that religious membership is an affirmative act of self-determination.[146]

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bers of Methodist Episcopal Church may withdraw membership); Saint John's Greek Catholic Church v. Fedak, 89 N.J. Super. 65, 75, 213 A.2d 651, 656 (1965) (stating that the right to secede from a parish is unquestionable); Brady v. Reiner, 198 S.E.2d 812, 845 (W. Va. 1973) (holding that dissident members of United Methodist Church can withdraw membership).

[143] Allard v. Church of Scientology of Cal., 58 Cal. App. 3d 439, 129 Cal. Rptr. 797 (1976), vividly illustrates the necessity of using termination of membership as a cutoff point for consent. The defendant Church of Scientology employed a tactic it termed "fair game" to discourage membership withdrawal. *Id.* at 444, 129 Cal. Rptr. at 800. This tactic allowed Scientologists "to trick, sue, lie to, or destroy 'enemies.' " *Id.* at 447, 129 Cal. Rptr. at 802. By quitting the church, the plaintiff became an "enemy" and was subjected to the fair game tactic. *Id.* Had his consent to church practices not ended with his withdrawal of membership, he would have been unable to recover for his damages which resulted from the fair game tactic.

The belief of some religious groups that a person can never quit her membership further supports this rule. The defendants in Guinn v. Collinsville Church of Christ, No. CT-81-929 (Dist. Ct. Tulsa County, Okla. Mar. 15, 1984), *appeal docketed*, No. 62,154 (Okla. Apr. 16, 1984), apparently hold this belief. The plaintiff claims that prior to excommunication she attempted to withdraw from the church. The defendants allegedly informed her that she could not quit, but could only be separated from the church by excommunication. *See* Appellee's Opening Brief at 6-7, *Guinn*, No. 62,154 (Okla.).

For an argument that the defendants' right to freedom of association permitted them to excommunicate Guinn even though she earlier attempted to quit her membership, see McGolderick, *supra* note 7, at 17-21 (analogizing the church's right to excommunicate Guinn even after she attempted to quit to the California Bar Association's right to disbar Richard Nixon even if he attempted to quit).

[144] For a discussion of consent negating factors, see *infra* notes 150-81 and accompanying text.

[145] *See supra* notes 45-54 and accompanying text.

[146] *See* Delgado, *supra* note 125, at 541 ("Values of self-determination are deeply rooted in our societal views and legal treatment of religion. Although some religions stress passive values . . . the legal system has always required that religions treat each person *as though* commitment to membership is an affirmative act that is his or hers

Considering the delicate constitutional interests at stake, courts can ill afford to ponder whether a church member, when she joined a church, made a wholehearted commitment.[147]

Courts must also force religious defendants to prove religious motivation before applying the proposed standard. As discussed above, courts consider conduct religiously motivated if it is arguably religious.[148] Suppose, for example, that a clergyperson acting as a counselor preys upon a counselee's emotional vulnerability to initiate a sexual relationship.[149] In most cases, a court would likely find that seduction is not even arguably religious and that a reasonable person would not believe that membership in a church indicates consent to such conduct.

2. Incapacity to Consent

Although equivocal members should not evade the standard, the consent doctrine recognizes that some plaintiffs are incapable of consent.[150] For example, a child's membership in a church may not indicate true consent to religious conduct.[151] Often children are baptized or otherwise inducted into a religious group at birth.[152] Many children grow up as

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alone to make." (emphasis in original)).

[147] *Id.* Although necessary, avoiding paternalism will often lead to hard cases. Membership in a religious group is primarily a subjective decision. Although the decision involves objective elements — such as the logical consistency of a religious group's doctrine — the decision to adopt a set of beliefs is ultimately a matter of faith. Because of religion's subjectivity, converts may understandably have difficulty rationally considering the possible consequences of their submission to a group's doctrine. The need to assign a meaningful order in one's world may make individuals feel *compelled* to adopt a religious faith — especially in the formative period of adolescence. *See* G. SCOBIE, PSYCHOLOGY OF RELIGION 51 (1975).

[148] *See supra* notes 8-12 and accompanying text.

[149] *See, e.g.*, Milla v. Tamago, No. C485488 (Cal. Super. Ct. filed Sept. 20, 1984) (woman accuses seven Catholic priests of violating fiduciary duty by initiating sexual relations with her).

[150] An individual may be incapable of consenting because of age, mental condition, or other reasons. *See* PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 60, at 114-15.

[151] *Id.* Whether minors are capable of consent is a factual question determinable on a case-by-case basis. *Id.* They are considered capable of consent when they subjectively attain the ability of the average person to weigh the risks and benefits involved. *Id.* At varying stages in their development, they are capable of consenting to some kinds of activity, but incapable of consenting to others. *Id.*; *see also* Comment, *"Mind Control" or Intensity of Faith: The Constitutional Protection of Religious Beliefs*, 13 HARV. C.R.-C.L. L. REV. 751, 778-83 (1978) [hereafter Comment, *Mind Control*].

[152] *See, e.g.*, Martin, *Minors in Canon Law*, 49 MARQ. L. REV. 87, 91 (1965). The Roman Catholic Church allows minors relatively liberal freedom to participate in reli-

members of the group without affirmatively committing themselves to the group's religious principles and practices.[153] Even when children voluntarily undergo an act of confirmation, or independently join a religious group, they may be incapable of appreciating the risks and benefits involved.[154] Under the traditional consent doctrine, the ability of children or mentally-impaired persons to consent is a question of fact.[155] This ability varies depending on a child's intelligence, training, maturity, and other factors.[156]

Courts consider all adults capable of consenting to any activity unless the defendant knows or should know of some abnormality that makes true consent impossible.[157] If the abnormality substantially impairs the plaintiff's capacity to understand and weigh the benefits and risks, consent is ineffective.[158] In the religious tort context, the most common challenge to capacity would likely involve alleged brainwashing by non-traditional religions.[159] If plaintiffs can prove incapacity due to brainwashing, courts should allow recovery. However, the plaintiff's burden of proof is difficult to overcome in such cases.[160]

Difficult factual questions may arise when the injured person is an adult who joined the church as a child. Even if an individual's religious membership was not originally voluntary, she is usually capable of affirming the church's beliefs as an adult.[161] Courts use the objective reasonable person standard, rather than the plaintiff's subjective state of mind, to determine consent.[162] Unfortunately, this necessary ad hoc element of the consent doctrine fails to insulate religious defendants com-

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gious affairs. At age 14 a Catholic youth may sponsor a baby's baptism. *Id.* at 95. At age 16 minors may join religious communities. *Id.* At age 17 they may take temporary vows in a religious community. *Id.*

[153] *See* Comment, *Mind Control*, *supra* note 151, at 781-82.

[154] *See supra* note 150.

[155] *See* PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 60, at 113-15.

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] *See* Delgado, *supra* note 125, at 550-52; *see also* Delgado, *Ascription of Criminal States of Mind: Toward a Defense Theory for the Coercively Persuaded ("Brainwashed") Defendant*, 63 MINN. L. REV. 1 (1978) (discussing brainwashing as a defense to criminal liability for religious sect members because of incapacity to form culpable *mens rea*).

[160] Several plaintiffs have filed tort actions alleging brainwashing. All of them have failed. *See, e.g.*, cases cited *supra* note 47.

[161] *See* Comment, *Mind Control*, *supra* note 151, at 780-81.

[162] *See* PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 60, at 113. "The defendant is entitled to rely upon what any reasonable man would understand from the plaintiff's conduct." *Id.*

pletely from public sentiment, since juries usually determine what is reasonable.[163] But because of its definitional element — shifting the burden to prove lack of consent to member/plaintiffs — the standard still provides significantly greater protection than pure ad hoc balancing.[164] Thus, an injured adult who joined a church as a child would have to prove that a reasonable person would not believe she affirmed her membership.[165]

3. Exceeding Consent

A member/plaintiff could also overcome the presumption of consent by proving that the tortious conduct was outside the scope of the consent implied by her membership. A boxer impliedly consents to the possibility of being hit, but not by brass knuckles.[166] Likewise, an individual who joins a church practicing excommunication does not consent to excommunication in a manner violating the church's written constitution.[167] The problem may also arise when a church changes its doctrine after a member joins,[168] or acts in any other unexpected way. Again, under the consent doctrine, courts must determine whether a reasonable person in the defendant's position would believe the plaintiff consented.[169] If the conduct differs drastically from conduct a church member would normally expect, and the member/plaintiff did not affirm the conduct, she probably could prove that it exceeded her consent.[170]

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[163] *Id.* at 173.

[164] For a discussion of some of the weaknesses of pure ad hoc balancing, see *supra* notes 82-95 and accompanying text.

[165] On a practical level, this problem probably would not often arise. If an adult can believably argue that she never affirmed her childhood membership, she likely would have little interaction with the church which could lead to tortious injury.

[166] *See* PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 60, at 118-19.

[167] In Baugh v. Thomas, 56 N.J. 203, 208, 265 A.2d 675, 677 (1970), the church's written constitution detailed a rigid procedure for excommunication. The plaintiff alleged that the church excommunicated him in a manner violating its constitution. *Id.* at 206, 265 A.2d at 676. The court claimed jurisdiction and held that Baugh stated a valid cause of action. *Id.* at 210, 265 A.2d at 678.

[168] For example, imagine that a traditional church, after experiencing a charismatic revival, reinstated a traumatic and sometimes violent exorcism ritual abandoned a century earlier. Based on the injured plaintiff's conduct, a jury would determine whether she consented to the church's revived practice.

[169] *See* PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 60, at 113.

[170] A plaintiff might implicitly affirm a changed church doctrine by continued membership. Suppose that after an individual joined a church, the church adopted an excommunication procedure. If the individual remained a member, a reasonable person might well believe she affirmed the procedure.

4. Fraud in Obtaining Consent

A church's fraudulent concealment of potentially tortious conduct during the conversion process should negate the presumption of consent. Traditional consent doctrine invalidates fraudulently obtained consent.[171] Courts should hold that members' consent extends only to acts they knew or readily could have learned were church practices. Otherwise, the proposed standard would protect and even encourage deception. For example, a religious sect could conceal its practice of restricting new converts' liberty and later claim that the converts "consented" to the deprivation.[172]

Indeed, the problem of fraud in obtaining membership and consent to religious practices likely arises most frequently in cases involving new or nontraditional religions. Critics claim that some nontraditional religious groups intentionally conceal their religious identity until after a convert joins the group.[173] Several fringe groups allegedly employ other consent-negating conversion practices, including coercion and wearing down potential converts mentally and physically.[174] In such cases the convert's "consent" is nominal and should not protect the religion from tort liability.[175]

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[171] *See* PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 60, at 120. The use of fraud in obtaining consent arises most frequently in cases involving sexual contact obtained through false pretenses. *Id.* Thus, a man who fraudulently induces a woman to engage in sexual intercourse through a mock marriage, or by impersonating her husband, or by concealing a sexual disease, cannot successfully claim that she consented to his sexual contact. *See, e.g.*, Kathleen K. v. Robert B., 150 Cal. App. 3d 992, 198 Cal. Rptr. 273 (1984) (male conceals sexually transmittable disease from sex partner); Barbara A. v. John G., 145 Cal. App. 3d 369, 193 Cal. Rptr. 422 (1983) (man induces woman to engage in sexual intercourse by falsely claiming to be sterile); *cf.* Stephen K. v. Roni L., 105 Cal. App. 3d. 640, 164 Cal. Rptr. 618 (1980) (woman induces man to engage in sexual intercourse by falsely representing that she was taking birth control pills). Indeed, such concealment may itself give rise to a cause of action for fraud. *See* Delgado, *supra* note 125, at 557.

Mistake can also nullify consent if the defendant is aware, or should be aware, of the mistake, and takes advantage of it. *See* PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 60, at 114.

[172] *See* Delgado, *supra* note 125, at 552 (asserting that some religious sects fraudulently conceal during the conversion process their intention to subject new converts to activity designed to brainwash them).

[173] *Id.*

[174] *Id.* at 550-51. Duress also negates consent. *See* PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 60, at 121.

[175] *See* Delgado, *supra* note 125, at 550-52. Delgado argues that the cult conversion process "deprive[s] the convert of the chance to exercise a fully autonomous decision to join or not to join." *Id.*

If the plaintiff claims ignorance of the tortious church practice, again the reasonable person standard should apply. To prevail, the member/plaintiff should be required to prove that a reasonable person in the defendant's position would not believe that the plaintiff knew of the church's tortious conduct. Requiring "informed consent" — that churches warn converts of all of their potentially tortious activities[176] — seems unnecessary for two reasons. First, most churches already volunteer as much information as possible without legal admonishment.[177] Second, if religious groups conceal information, they obtain consent fraudulently and thus invalidly.[178]

Forcing churches to provide consent forms to disclaim liability for faulty spiritual counseling[179] or to volunteer any other information is not only largely unnecessary; it also threatens the religion clauses. The government would intrude into religious affairs by prescribing religious conversion practices.[180] Such an intrusion is not justified by the possibility that a small minority of religious groups use fraudulent conversion tactics to conceal information.[181]

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[176] Delgado proposes that courts require religious groups to obtain informed consent to their practices. *Id.* at 533-74.

[177] *See id.* at 573. However, even "mainstream" religious groups may often through oversight fail to disseminate information about religious practices. The plaintiff in Collinsville Church of Christ v. Guinn claimed she was unaware that the Church of Christ practiced excommunication until it was threatened against her. Collinsville Church of Christ v. Guinn, No. CT-81-929 (Dist. Ct. Tulsa County, Okla. Mar. 15, 1984), *appeal docketed*, No. 62,154 (Okla. Apr. 16, 1985).

[178] *See supra* note 171 and accompanying text.

[179] Professor Bergman provides a facetious example of how a warning might read:

> ATTENTION COUNSELEE (PENITENT)
>
> Due to potential lawsuits for spiritual malpractice, this counselling room (confessional booth) is no longer available to deal with anything other than clearly superficial problems. We suggest (but do not counsel) for your possible consideration the use of prayer and Scripture, but you should do so at your own risk. If government-sponsored counseling services are unavailable due to lack of mental health funds, and you cannot afford private psychiatric care, a list of possible churches in this state who may be insured is available on request at the front office upon signing a Release from Referral Liability. If your problem is urgent and real serious, please be assured that our prayers are with you. We wish you 'Godspeed' and hope that you will visit when you are better.

Bergman, *supra* note 25, at 65 n.58.

[180] For a statement of the establishment clause test for excessive government intrusion on religious affairs, see *supra* notes 77-79 and accompanying text.

[181] Attorneys should nevertheless encourage religious groups to obtain specific, perhaps even written, consent to religious practices from new converts. Such formalized consent would assure that converts understand the group's religious practices. Also, it

CONCLUSION

The strength of the proposed standard is that it increases protection for the religion clauses without unfairly burdening deserving plaintiffs. Presuming consent by church members merely acknowledges that religious membership is an affirmative decision, a choice that must, because of its consensual nature and the respect demanded by the Constitution, carry important implications.[182] By impressing potential converts with the significance of religious membership, the standard may lead to more thoughtful choices and fewer tragic incidences of religious disillusionment and injury.[183] Even if it does not, providing finan-

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would help protect the group from future allegations that it acted in bad faith to conceal its religious practices from new converts.

[182] Although it appears ironic that a plaintiff must forfeit a right (recovery for injury) partially to protect a larger constitutional right (religious exercise), the Supreme Court recognizes that such exchanges are sometimes necessary. For example, the actual malice standard necessarily exacts a "high price" making "many deserving plaintiffs, including some intentionally subjected to injury . . . unable to surmount the barrier," in order to protect free expression. Gertz v. Welch, 418 U.S. 323, 342 (1974).

[183] The injury can obviously be much more than religious disillusionment. The conduct of some fanatical religious elements may even include physical assault. Whether to apply the proposed standard to civil recovery for serious criminal conduct presents difficult issues. The Restatement of Torts, supported by legal scholars and a minority of jurisdictions, argues that consent should bar civil recovery even in cases of criminal assault. *See* PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 60, at 122-24; RESTATEMENT (SECOND) OF TORTS § 892 c(1) (1977). Allowing recovery discourages religious groups from engaging in dangerous criminal activity; especially any groups that might cynically employ the shield of the religion clauses solely or primarily to gain protection for their illicit activities. For a discussion some of the illicit activities allegedly committed by many nontraditional religions, see Delgado, *Religious Totalism as Slavery*, 9 N.Y.U. REV. L. & SOC. CHANGE 51, 56-67 (1979) (accusing the groups of subjecting their converts to peonage); Delgado, *supra* note 50, at 41-42 (discussing deceptive "cult" practices); Note, *Legal Guidelines*, *supra* note 50, at 1030-45 (outlining criminal and civil causes of action against cults).

However, other considerations argue against making an exception to the consent rule when the activity is illegal. A criminal prosecution arguably fulfills the government's interests. *See* PROSSER AND KEETON ON THE LAW OF TORTS, *supra*, at 122; Bohlen, *Consent As Affecting Civil Liability for Breaches of the Peace*, 24 COLUM. L. REV. 819, 835 (1924). Government has little social interest in permitting recovery to a person capable of protecting herself but declining to do so. *See* PROSSER AND KEETON ON THE LAW OF TORTS, *supra*, at 122. She would financially gain from a criminal act she participated in or willingly allowed. *Id.* Potential victims might feel *more* willing to consent to criminal religious conduct than they otherwise would, because they would know that if injured, they could at least recover money. *Id.* Allowing recovery would also unfairly allow them to change their minds about consent after the fact. Added to these considerations is the great protection the Constitution requires for the sincere exercise of religion. *See supra* notes 55-58 and accompanying text. The need to protect

cial recovery to protect individuals who wilfully fail to protect themselves is hardly a compelling government interest "of the highest order,"[184] as is required to impinge on religious freedom. The Bible requires believers to carefully "count the cost" of discipleship.[185] This admonition makes sense not only for the religious, but for the caretakers of the Constitution as well.

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religious free exercise does not excuse criminal offenses, but it should be an important factor in determining whether to allow tort recovery for consenting victims to add to the burden on religion the criminal law necessarily imposes.

[184] Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

[185] *Luke* 15: 25-33.