Religiously Motivated "Outrageous" Conduct: Intentional Infliction of Emotional Distress as a Weapon Against "Other People's Faiths"

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RELIERICALLY MOTIVATED “OUTRAGEOUS” CONDUCT: INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AS A WEAPON AGAINST “OTHER PEOPLE’S FAITHS”

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[T]he price of freedom of religion or of speech or of the press is that we must put up with, and even pay for, a good deal of rubbish... I would... have done with this business of judicially examining other people's faiths.

—Justice Jackson, dissenting in United States v. Ballard

I. INTRODUCTION

The law both represents and sets the limits of our tolerance. Conduct that is legally wrong is, by definition, that which we as a society will not tolerate. The law of torts is a powerful weapon in society's suppression of intolerable activities; its doctrines are flexible and open-ended and the contours of those doctrines often are filled in by juries rather than by legal elites. Tort law is thus extraordinarily responsive to and reflective of societal mores, and serves a useful function in allowing persons who are harmed by another's actions to sue to recover damages for their injuries, judged by a common-sense standard of social tolerance.

Tort law governing intentional infliction of emotional distress allows a plaintiff to recover for intangible harm to emotional well-being caused by the defendant’s intentional conduct, if that conduct is “extreme and outrageous” and “utterly intolerable in a civilized society.” Its substantive standards are ill defined, requiring the trier of fact in each case to render an ad hoc judgment about the outrageousness of the particular defendant’s particular conduct. The limits on damages available to one who proves such a case are also ill defined; general damages are available, ostensibly as compensation, yet not measured by actual pecuniary loss.
tive damages are also available virtually any time the tort itself is established, because by definition a liable defendant's conduct is "extreme and outrageous." Because of these characteristics, the tort of intentional infliction of emotional distress is a powerful weapon against socially intolerable conduct. Indeed, it is one of the most sweeping causes of action in all of tort law.

This Article explores this tort in a single factual context; namely, when the allegedly outrageous and intolerable conduct is religiously motivated. In such situations, any positive abstract characteristics of the tort as a flexible tool against bad conduct take a decidedly negative, and even bigoted, turn. Through its remedial and substantive aspects, the tort threatens both defendants' right of religious freedom and society's important interest in tolerating differing religious views. More pointedly, adjudication of such claims invariably tends to involve the trier of fact in an inquiry into the verity of the religious belief that motivates the allegedly outrageous conduct. Such inquiry is prohibited because, at a minimum, it requires the trier of fact to decide whether the motivating belief is "fundamentally flawed."

Factually, the vast majority of reported cases falls into one or more of three categories: 1) suits attacking religious indoctrination methods; 2) suits attacking religious discipline methods; and 3) suits alleging "outrageous" spiritual counseling. An example of the first category is a case in which a defendant believes that his religion justifies lying to a potential convert about the nature of the religion, getting the plaintiff into an isolated, cloistered environment, and converting him to the religion; the convert later

5. Id. § 7.3, at 530.
8. See infra part IV.B.1.
9. See infra part IV.B.2.
10. See infra part IV.B.3.
leaves the religion and sues the defendant who has acted on this belief. An example of the second category is a case in which defendants, based on their interpretation of the Bible, "shun" a former member of their religious group, refusing to have any dealings with that person and perhaps actively denouncing her to others; the former member then sues. Finally, an example of the third group is a case in which a minister engages in counseling a parishioner who later commits suicide; the family of the decedent then sues the minister on the ground that the spiritual counseling actually encouraged the suicide by portraying suicide as a religiously acceptable alternative for someone unhappy in this life.

In calling for a restriction of the sweep of this tort, I do not maintain that the juries in the reported cases were necessarily wrong in determining that some of the conduct at issue was outrageous. Rather, the courts were wrong in allowing the claims to reach the jury. Many of us rightly may detest the practices described in the cases and indeed might conclude that most of the religious beliefs involved in these cases are wholly bogus. Such reactions may be appropriate outside, but not inside, the courtroom. The key question is whether the law, via the tort of intentional infliction of emotional distress, should declare such conduct outrageous and utterly intolerable in civilized society and award substantial general and punitive damages against a defendant whose tortious actions are religiously motivated. For the reasons developed in this Article, I conclude that our courts have no business adjudicating such claims.

The power of courts to modify this tort springs from the nature of the common law itself. Judges make and administer the legal standards governing the tort of intentional infliction of emotional distress; they can and should change these standards when they

12. Id. at 46-47.
14. Id.
16. Id. at 305.
appear to work unjustly.\textsuperscript{17} This Article exposes one set of particularly baneful effects of this tort relating to important religious rights and interests and argues that some judicial revisions are necessary simply because this tort is not working justly. I therefore do not argue for a constitutionally required religious exemption from a generally applicable law.\textsuperscript{18} Rather, I suggest the need for courts, utilizing traditional common law powers, to restrict the scope of this particular common law tort in a manner that would result in greater protection of religious freedom, broadly defined, and in the accordance of greater weight to the societal interest in tolerating various religious beliefs.\textsuperscript{19} Such a restriction, perhaps a radical one,

\begin{quote}
17. As Justice Benjamin Cardozo, quoting Munroe Smith, wrote:
Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered. It may not be modified at once, . . . but if a rule continues to work injustice, it will eventually be reformulated. The principles themselves are continually retested; for if the rules derived from a principle do not work well, the principle itself must ultimately be re-examined.

\textit{Benjamin N. Cardozo, The Nature of the Judicial Process} 23 (1921).


19. My analysis thus does not stand or fall on the argument that courts must hold unconstitutional, on free exercise grounds, the application of this tort against any person whose conduct is religiously motivated. As a general matter, the United States Supreme Court's opinion in Employment Division v. Smith, 494 U.S. 872 (1990), in which the majority said that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability,'" \textit{id.} at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)), makes any such argument more
is fully justified because the adjudication of these intentional infliction claims embroils courts in forbidden inquiries. These inquiries have few boundaries or even guidelines and concern the verity, social value, and acceptability of particular religious beliefs. This is a major, not a minor, flaw in the tort and calls for major, not minor, change.

Following this Introduction, Part II describes generally society's intolerance of antisocial conduct, as embodied in tort law, and then describes the tort of intentional infliction of emotional distress. Part III discusses society's strong interest in religious tolerance and the well-established tenet that secular courts should not inquire into the verity of religious beliefs. Part IV then discusses many of the reported cases of intentional infliction of emotional distress that have involved religiously motivated conduct. Finally, Part V discusses some of the ways that the tort could be revised to deal with the problems identified in the Article, ultimately suggesting that the tort itself may be flawed in its conception.

II. TORT LAW'S INTOLERANCE OF SOCIALLY UNDESIRABLE CONDUCT

A. General Principles

No area of law is as flexible and responsive to changing social mores as is torts. This can be seen in the development of new causes of action, such as unfair competition and products liability, to accommodate majoritarian notions of right and wrong;\(^\text{20}\) in the problematic. The scope and practical impact of Smith is not yet clear. If limited to its facts—that the Free Exercise Clause does not prohibit applying criminal drug laws against the religious use of peyote—then it does not apply to tort law at all. One important scholar, however, has suggested that Smith might apply to the very kind of case discussed in this Article, because tort laws are "generally applicable laws." See Douglas Laycock, The Remnants of Free Exercise, 1990 Sup. Ct. Rev. 1, 45-46. My analysis begins where Laycock's ends, however; I am arguing that whatever the impact of Smith on tort law adjudication, courts can and should revise this particular common law tort even if the Free Exercise Clause does not compel such revision.


\(^{20}\) "In a very vague general way, the law of torts reflects current ideas of morality,
open-endedness of the elements that comprise a number of tort causes of action, via the use of deliberately flexible words such as "reasonableness" or "outrageousness," and in the recoverability of substantial damages for intangible affronts to dignity, even in the absence of the plaintiff's ability to prove actual economic harm. Responsiveness to social mores of behavior is accomplished not only in the formation of the law itself, either by a court or by a legislature, but also by the process of adjudication, which relies strongly on civil juries to fill in the open-ended terms in the "black letter law" and to determine the amount of money that should be shifted from the defendant to the plaintiff.

"So far as there is one central idea" to the law of torts, a leading treatise notes, "it would seem that it is that liability must be based upon conduct which is socially unreasonable." The same scholars assert that "it is not easy to discover any general principle upon which [all torts] may be based, unless it is the obvious one that injuries are to be compensated, and anti-social behavior is to be discouraged." Tort law, then, is concerned with deterring socially intolerable conduct and with compensating persons whom it harms. Even where the antisocial conduct does not fit into a predetermined legal box—that is, an existing tort cause of action—the conduct may still give rise to a successful tort action by an injured plaintiff; indeed, this is how tort law evolves.

This flexibility of substantive tort law is coupled with flexibility in providing remedies for violations of it. As Leon Green eloquently put it, "Tort law is general law for the adjustment of the hurts that result from everyday activities of people. It has no

24. Prosser & Keeton, supra note 20, § 1, at 6.
25. Id. at 3 (emphasis added).
26. Id. at 3-4 ("The law of torts is anything but static, and the limits of its development are never set.").
bounds except for their desires for protection and the imagination of their institutions for giving remedies."27 These remedies include possibly substantial damages for emotional injuries, the amount of which is inherently difficult or impossible to measure with anything approaching precision.28 Fixing the amount of such damages is left largely to the discretion of the jury, which awards damages on the basis of its sense of the degree of social undesirability of the defendant's conduct and of the severity of the harm to the particular plaintiff. As Dan Dobbs explains in his treatise on remedies, "the courts tend to presume some harm of more than nominal nature in the dignitary tort cases," in part "to preserve rights of the public generally to be free from oppressive conduct."29

Tort law's open texture, its ability to respond to and reflect changing social mores and allow for the ad hoc condemnation of conduct that strikes a jury as socially undesirable, is both boon and danger in a democracy. It is a boon because it prevents doctrinal moribundity and stagnation and forestalls the widening of any gap between communitarian notions of right and wrong and the legal standards that both enforce and influence those notions. Yet it is a danger because it may extend too ready an invitation for law to intrude into places where it should not go, and may allow majoritarianism to ride roughshod over unpopular or minority rights and beliefs, the protection of which is an important societal value.30

There is no better example of the danger come to fruition than when a person sues another alleging that religiously motivated conduct forms the basis of a claim for intentional infliction of emotional distress. In such a case, the plaintiff urges the court to find that the particular religiously motivated conduct is extreme and outrageous, utterly intolerable in a civilized society, and that it has caused some intangible harm for which the defendant should pay.

29. Id. at 531.
30. See generally Guido Calabresi, Ideals, Beliefs, Attitudes and the Law 53-68 (1985) (arguing that tort law treats the beliefs of mainstream religions as presumptively "reasonable" but requires members of more idiosyncratic religions to prove the reasonableness of their actions and beliefs).
B. The Intentional Infliction of Emotional Distress

The independent tort of intentional infliction of emotional distress is a recent arrival, as causes of action go. Most scholars trace its origins to the 1897 English case of Wilkinson v. Downton, in which a plaintiff recovered against a defendant for the emotional shock—and resulting physical consequences—of being told, as a practical joke, that her husband had been seriously injured in an accident. The tort, however, was created not so much by the courts as by scholars during the heyday of Legal Realism. William Prosser, in a 1939 law review article, boldly proclaimed the “new tort” of intentional infliction of emotional distress, although a survey three years earlier showed that twenty-one states had already allowed recovery for purely emotional distress. As legal historian G. Edward White has pointed out, Prosser and his academic colleagues did not so much “invent the principle of compensation for emotional distress” as simply “expand the locus of that principle from isolated ‘exceptional’ cases to an established doctrine of tort law.” This maneuver was fully in accord with “the emergent theoretical framework of tort law in the 1930s, which suggested that tort liability be assessed through a ‘common sense’ balancing of social interests,” and was more broadly based upon “three familiar tenets of [Legal] Realism: a heightened interest in the insights of the behavioral sciences; an impatience with

31. 2 Q.B. 57 (1897).
32. Id. at 58, 61. Wilkinson is characterized as “[t]he leading case which first broke through the shackles of the older law.” Prosser & Keeton, supra note 20, § 12, at 60.
35. White, supra note 33, at 104 (citing Rosenthal, Liability for Injuries Resulting from Fright or Shock, Report of the N.Y. State Law Revision Comm’n, 18 N.Y. Leg. Doc. 65(E) (1936)).
36. Id.
37. Id. at 102.
judicial ‘fictions’ . . .; and a developing conception of tort law as an exercise in social policymaking.\textsuperscript{38}

In 1948, bowing to the arguments of these Realist scholars, the American Law Institute (ALI) first recognized the cause of action in its \textit{Restatement of Torts}.\textsuperscript{39} The \textit{Restatement (Second) of Torts} now provides in section 46: “One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.”\textsuperscript{40} The Official Comment to this section notes that “[t]he law is still in a stage of development, and the ultimate limits of this tort are not yet determined.”\textsuperscript{41} While this caveat is certainly still true, courts generally agree on the three basic elements that a plaintiff must prove to prevail in a suit alleging intentional infliction of emotional distress: first, that the defendant intended to inflict severe emotional distress; second, that the defendant’s conduct was “extreme and outrageous”; and third, that the plaintiff did in fact suffer severe emotional distress as a result.\textsuperscript{42}

\textsuperscript{38} \textit{Id.} at 104. White further explains:

\begin{quote}
Several features common to the climate of educated opinion in which Realism came to prominence had interacted in the “discovery” that tort law could compensate persons for emotional discomfort inflicted by others. The “speculative” nature of emotional injuries had been purportedly eliminated by the insights of the behavioral sciences. The seriousness of the “interests” at stake in emotional distress cases had gradually been recognized, and the possibilities for using tort law as a means of protecting various social interests had emerged as a source of intellectual excitement. Finally, scholars of the 1920s and 1930s had shown a willingness, uncommon in their earlier scientist counterparts, to concede that the doctrinal state of an area of tort law was indeterminate and capable of dramatic change. \\
\textit{Id.} at 105.
\end{quote}

\textsuperscript{39} As it first appeared in the \textit{Restatement}, liability for both “emotional distress” and “bodily harm” attached where “one . . . without a privilege to do so, intentionally cause[d] severe emotional distress to another.” \textit{Restatement of Torts} § 46 (Supp. 1948). The drafters from the ALI had earlier rejected the idea that intentional infliction of emotional distress was an independent tort. \textit{See Restatement of Torts} § 46 (1934). Consequently, damages for mental distress were recoverable only on a parasitic or “peg” theory, that is, only if caused by some other recognized tort. \textit{See Prosser, Insult and Outrage, supra} note 34, at 41-43.

\textsuperscript{40} \textit{Restatement (Second) of Torts} § 46(1) (1965).

\textsuperscript{41} \textit{Id.} § 46 cmt. c.

\textsuperscript{42} \textit{Id.} § 46(1). Prosser’s hornbook puts it thus:
The second of these elements is most troubling, especially when the conduct at issue is religiously motivated. This is so both because of the indeterminacy of the element of “outrageousness” itself and because of the means used to establish it. As to the showing needed to establish the “outrageousness” prong of the tort, the Restatement contains this colorful explanation:

Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, “Outrageous!”

Courts adjudicating intentional infliction cases generally have followed the Restatement formulation of outrageousness, both in tone and in letter. One could scarcely imagine a tort element more tied to ill-defined communitarian norms of conduct than this.

So far as it is possible to generalize from the cases, the rule which seems to have emerged is that there is liability for conduct exceeding all bounds usually tolerated by decent society, of a nature which is especially calculated to cause, and does cause, mental distress of a very serious kind.

Prosse & Keeton, supra note 20, § 12, at 60.

43. Restatement (Second) of Torts § 46 cmt. d.

44. For a state-by-state compilation of intentional infliction cases decided since 1970, showing that the vast majority of jurisdictions have recognized the cause of action and have adopted the Restatement formulation of it, see Annotation, Modern Status of Intentional Infliction of Mental Distress as Independent Tort; “Outrage,” 38 A.L.R.4th 998 (1985).


Oregon has expressly rejected the Restatement formulation but has adopted a similar one: the defendant's conduct must be "beyond the limits of social toleration" to fall within the term "outrageous." Christofferson v. Church of Scientology, 644 P.2d 577, 583-84 (Or. Ct.
The "civilized community" must regard the defendant's conduct as "utterly intolerable" and "atrocious"; the average member of the community must get positively red faced with resentment, to the point of shouting.

The Restatement provides, as the Pennsylvania Supreme Court recently noted, "only the most nebulous definition of 'outrageous' conduct," a situation that "in turn renders the cause of action one which tends to defy principled adjudication." As one scholar puts it, the Restatement's description of "outrageous" as found in comment d is

> a strange description of a rule of law. Those situations in which "average members of the community" are up in arms over the outrageous conduct of individuals are situations in which the evenhanded application of law is threatened. To suggest, as the Restatement does, that civil liability should turn on the resentments of the average member of the community appears to turn the passions of the moment into law.

As this same scholar pejoratively observes, this appears to be "adjudication unencumbered by doctrine."

The problem of the lack of a clear definition of "outrageousness" is further exacerbated by the fact that intentional infliction cases often seem to boil down to that single element. As the Restatement itself says, "Severe distress must be proved; but in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed."
The cases demonstrate that "when the defendant behaves outrageously, the plaintiff will not usually be required to show either intention to cause distress or even a deliberate disregard of a high

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46. Givelber, supra note 33, at 52.
47. Id. at 45.
degree of probability that it will result."49 The "outrageousness" element becomes, in short, "the entire tort."50

Further, determining whether the defendant's conduct is "outrageous" is the jury's job, unless reasonable people could not differ on the issue.51 This has led one scholar to conclude that the Restatement definition of "outrageous" conduct "tells us very little except that the defendant's fate hangs upon the emotional reaction of the twelve jurors who hear his case."52 Utilization of the jury to determine this issue may allow what torts scholar John Fleming calls "prevalent street values" to determine the outcome of a case.53 As a general matter, using juries to fill in the contours of open-ended tort concepts may be a procedure worth defending, because it allows a large degree of input by a nonelite "community" into lawmaking.64 However, tort law is so varied and so broad in its sweep that to generalize one's approval of the jury's function in one area to other distinct areas may be both simplistic and misguided. Recognizing that intentional infliction of emotional distress differs in significant respects from all other torts is critical on this point. As Daniel Givelber has argued persuasively, it is a true hybrid.55 It is unlike other intentional torts such as battery, assault, and false imprisonment, which all provide clearer definitions of prohibited conduct;56 it is also unlike negligence, which by contrast implies a low degree of moral condemnation of the defendant's conduct, focuses primarily on compensation for accidental physical injury, is widely insured against, and, at trial, tends to involve


50. Givelber, supra note 33, at 46.

51. See Restatement (Second) of Torts § 46 cmt. h.


54. Indeed, I have made this argument, focusing on negligence law. See Hayden, supra note 23, at 51-54.

55. Givelber, supra note 33, at 56.

56. Id. at 51.
much more specific inquiries.\textsuperscript{57} In summary, the intentional infliction of emotional distress

resembles intentional torts in that the distinction between behavior and injury is blurred, and it resembles negligence in that the defendant's conduct is evaluated in terms of a vague standard. The resemblance to either form of tort ends, however, when we look for the definitional elements that limit the dangers inherent in these features: there is neither the precise definition of the prohibited behavior that is characteristic of intentional torts nor the requirement of a palpable, physical injury characteristic of the unintentional ones.\textsuperscript{58}

Finally, one cannot describe the open-endedness of the tort of intentional infliction of emotional distress without stressing that the damages assessed against the defendant are usually inextricably connected to the degree to which the jury feels the conduct is "outrageous." This is, after all, a tort that seeks on its face to compensate a plaintiff for emotional distress\textsuperscript{59}—a type of intangible harm. As Prosser's hornbook reports, in most cases allowing recovery for intentional infliction, severe emotional distress has been "evidenced by resulting physical illness of a serious character, and both the mental and the physical elements have been compensated."\textsuperscript{60} The Restatement formulation, however, does not require proof of physical manifestation of mental distress for recovery.\textsuperscript{61}

From the many cases without such proof, Prosser concludes that "where physical harm is lacking the courts will properly tend to look for more in the way of extreme outrage as an assurance that the mental disturbance claimed is not fictitious."\textsuperscript{62} This scheme of awarding damages based on the jury's collective judgment of the degree of "outrageousness" or social intolerability of the defendant's action clearly has little to do with compensation. Rather,

\textsuperscript{57} Id. at 56 (stating that in a negligence suit "a jury is rarely presented a story and asked to decide whether the defendant behaved reasonably simply by referring to its own sense of appropriate behavior") (emphasis added); see Theis, supra note 52, at 289-91.

\textsuperscript{58} Givelber, supra note 33, at 56-57.

\textsuperscript{59} See Restatement (Second) of Torts § 46(1) (1965).

\textsuperscript{60} Prosser & Keeton, supra note 20, § 12, at 64.

\textsuperscript{61} Restatement (Second) of Torts § 46 cmt. k.

\textsuperscript{62} Prosser & Keeton, supra note 20, § 12, at 64.
damages in an intentional infliction of emotional distress case are designed primarily to punish the defendant.\textsuperscript{63}

Thus something of a multiplier effect is inherent in any intentional infliction case: the more outrageous the defendant’s conduct, the higher the plaintiff’s damages may go, even without proof of the severity of the distress. This effect is further multiplied when punitive damages are awarded on top of the already-punitive general damages.\textsuperscript{64} The Restatement provides that punitive damages are available to punish “conduct that is outrageous,”\textsuperscript{65} which means that a plaintiff who can establish a “case of intentional infliction of emotional distress by outrageous conduct should also be entitled to punitive damages; if the defendant deserves to be punished at all, then in some jurisdictions, at least, he deserves to be doubly punished.”\textsuperscript{66} The degree of this punishment is not clearly delineated because “the standards for imposing and assessing punitive damages remain frustratingly vague.”\textsuperscript{67}

At bottom, then, the tort of intentional infliction of emotional distress opens the door to uniquely freewheeling and unfettered condemnation of antisocial conduct. Its breadth and vagueness, both as to the kind of conduct that is actionable and to the amount and kind of damages that may be recovered, have never been limited significantly, as many courts\textsuperscript{68} and commentators\textsuperscript{69} have recognized. This is hardly mysterious. The major difficulty

\textsuperscript{63} Givelber, supra note 33, at 54 (“[T]he outrageousness requirement gives this tort an unusual focus—punishment rather than compensation.”); Stanley Ingber, Rethinking Intangible Injuries: A Focus on Remedy, 73 CAL. L. REV. 772, 788 n.78 (1985) (“Clearly the Restatement’s focus is on situational justice and punishment rather than on the preservation of emotional tranquility and compensation.”).

\textsuperscript{64} See Dan B. Dobbs, Ending Punishment in “Punitive” Damages: Deterrence-Measured Remedies, 40 ALA. L. REV. 831, 848 (1989) (“The use of ‘punitive’ damages to provide for intangible, unprovable, or unmeasurable harms adds confusion to the administration of punitive damages law.”).

\textsuperscript{65} Restatement (Second) of Torts § 908(2).

\textsuperscript{66} Givelber, supra note 33, at 54.


\textsuperscript{68} See, e.g., Orlando v. Alamo, 646 F.2d 1288, 1290-91 (8th Cir. 1981) (avoiding saying that particular religiously motivated conduct was “outrageous” and noting that the court was dealing with “a recently established area of state law”); Christofferson v. Church of Scientology, 644 P.2d 577, 583 (Or. Ct. App.) (“The type of conduct for which liability may be imposed for infliction of emotional distress, absent physical injury, is not well defined.”), petition denied, 650 P.2d 928 (Or. 1982), cert. denied, 459 U.S. 1206 (1983).
with this tort is not that limitations will evolve slowly, but that the tort itself resists such an evolutionary process. It was created as an open tort with indeterminate contours, and this very indeterminacy has "free[d] courts of the necessity of rationalizing results in terms of rules of universal applicability." As a result, the tort may be overly prone to allowing juries to return large verdicts against defendants "because of who they are rather than what they have done" by failing to prevent the jury's equating "outrageous with unpopular." The danger is particularly serious when the conduct at issue is religiously motivated because invariably the religious beliefs motivating the conduct are, in the eyes of the jury, "other people's faiths." Courts should recognize this danger and draw some definite limitations on the sweep of this tort to prevent it.

II. THE IMPORTANCE OF RELIGIOUS FREEDOM AND TOLERANCE IN AMERICAN LAW

A. General Contours of the Interest in Religious Tolerance

That tolerance of different religious practices and beliefs is an important societal value hardly can be considered a new idea in

69. See, e.g., Prosser & Keeton, supra note 20, § 12, at 55 ("[T]he law is clearly in a process of growth, the ultimate limits of which cannot as yet be determined."); Givelber, supra note 33, at 45-56 (noting the inherent vagueness of the tort); Theis, supra note 52, at 288-91 (pointing to the residual nature of the outrageousness requirement).
70. Givelber, supra note 33, at 43.
71. Id. at 52.
72. Id.
73. See infra part IV.
74. The United States Supreme Court has recognized similar problems with the indeterminacy of this tort in the context of another clause of the First Amendment. In Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988), the Court reversed a large jury verdict for the plaintiff in an intentional infliction of emotional distress case on the ground that a magazine parody alleged to be "outrageous" was protected by the the right of free speech. The Court explained,

"Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An "outrageousness" standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.

this country, although it properly may be considered radical. The First Amendment to the United States Constitution begins, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Religious freedom was important to the Founders of this country, as demonstrated tangibly by the existence of this constitutional guarantee.

Furthermore, the United States today is an intensely religious country, a point historian Garry Wills makes in his recent book, *Under God*. Wills reports that internationally Americans rank near the top in rating the importance of God in their lives; on a one-to-ten scale, Americans average just over eight, behind only Malta. Fifty percent of Americans believe in angels; 37% in a personal devil. Nine of ten say they have never doubted the existence of God; eight in ten believe God still works miracles; the same percentage believe they will be called before God on Judgment Day to answer for their sins; over 90% of Americans say they pray some time in the week; and 40% of Americans go to church in a typical week. Our citizens "give more money and donate more time to religious bodies and religiously associated organizations than to all other voluntary associations put together."

Despite this religiosity, the United States is not a theocracy; it was expressly not founded as one. There is no single state religion


78. Id. at 16 (quoting data from GEORGE GALLUP, JR. & JIM CASTELLI, *THE PEOPLE'S RELIGION: AMERICAN FAITH IN THE 90s* (1989)).

79. Id.

80. Id. Lest that sound low, just 14% of the British and 12% of the French have a similar attendance record. Id.


82. Steven Smith has suggested recently that survey evidence such as that presented by Wills "measures religiosity at a relatively superficial level," but agrees that "large majorities of Americans, including more educated Americans, at least give intellectual assent to tradi-
and there can never be one without violation of the Religion Clauses. Rather, the government position is one of "benign neutrality" towards religion. By not interfering with or favoring one religion over another, the government refrains from both interference with the flowering of religious freedom and the establishment of a state religion. As Michael McConnell reminds us, "[R]eligious liberty is the central value and animating purpose of the Religion Clauses of the First Amendment." Yet to preserve the public order, secular government requires at least some degree of obedience from all its citizens without regard to their particular religious beliefs. The challenge—an incredibly difficult one, if one tries to

83. See Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970) (asserting that the basic purpose of the Religion Clauses "is to insure that no religion be sponsored or favored, none commanded, and none inhibited," and to create "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference").

84. Two noted scholars recently pointed out that

[t]wo very different propositions emerge from the [United States Supreme] Court's definition of neutrality under the establishment clause: government must be neutral between religions, and it must be neutral between religion and nonreligion. The first proposition, that government may not prefer one religion over any other, receives overwhelming support in the American tradition of church and state . . . . The Court's second proposition . . . is problematic from the standpoint of history and semantics.


86. Many of the early state constitutions that predated the enactment of the Bill of Rights guaranteed religious freedom with express caveats. For example, Delaware added to its free exercise guarantee, "unless, under Colour of Religion, any Man disturb the Peace, the Happiness or Safety of Society." Delaware Declaration of Rights and Fundamental Rules (1776), reprinted in 5 The Founders' Constitution 70, 70 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter Founders' Constitution]. Maryland added, "unless, under colour of religion, any man shall disturb the good order, peace or safety of the State, or shall infringe the laws or morality, or injure others, in their natural, civil or religious rights." Md. Const. of 1776, Declaration of Rights 33, reprinted in Founders' Constitution, supra, at 70, 70. New York added this proviso: "Provided, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State." N.Y. Const. of 1777, art. 38, reprinted in Founders' Constitution, supra, at 75, 75. Massachusetts added, "provided he doth not disturb the public peace or obstruct others in their religious worship." Mass. Const. of 1780, pt. 1, art. II, reprinted in Founders' Constitution, supra, at 77, 77.

The federal Constitution does not contain such a proviso, although arguably a similar condition was understood from the beginning. James Madison, who along with Thomas
protect religious freedom instead of merely ignoring it—is to strike a balance that preserves both the public order and the fundamental right to religious freedom.

Tort law presents an especially volatile setting for adjudicating such issues, because tort law and freedom of religion are in a significant way diametrically opposed. The former represents the enforcement of communitarian intolerance of antisocial acts; the lat-

Jefferson was the primary author of the Religion Clauses, appeared to express this understanding in a letter written decades after the ratification of the amendment:

I must admit moreover that it may not be easy, in every possible case, to trace the line of separation between the rights of religion and the Civil authority with such distinctness as to avoid collisions & doubts on unessential points. The tendency to a usurpation on one side or the other, or to a corrupting coalition or alliance between them, will be best guarded [against] by an entire abstinence of the Govt. from interference in any way whatever, beyond the necessity of preserving public order, & protecting each sect [against] trespasses on its legal rights by others.

James Madison, Letter to Rev. Adams (1832), reprinted in FOUNDERS' CONSTITUTION, supra, at 107, 107-08 (emphasis added). Certainly, courts consistently have read a proviso of this sort into the federal Free Exercise Clause. See, e.g., United States v. Ballard, 322 U.S. 78, 87 (1944) (stating that the State cannot interfere with “the manner in which an expression” of religious beliefs is made, “provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with”) (quoting Davis v. Beason, 133 U.S. 333, 342 (1890)).

A number of state constitutions today contain similar express provisos. See, e.g., CAL. CONST. art. 1, § 4 (“This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State.”); FLA. CONST. art. 1, § 3 (“Religious freedom shall not justify practices inconsistent with public morals, peace or safety.”); ILL. CONST. art. 1, § 3 (“The liberty of conscience hereby secured shall not be construed to . . . excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the State.”); MO. CONST. art. 1, § 5 (“This section shall not be construed to excuse acts of licentiousness, nor to justify practices inconsistent with the good order, peace or safety of the state, or with the rights of others.”).

On this point, compare Justice Scalia’s majority opinion in Employment Division v. Smith, 494 U.S. 872 (1990), with Justice O’Connor’s concurrence. The majority held that “generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest.” Id. at 886 n.3. Scalia noted that such a decision “will place at a relative disadvantage those religious practices that are not widely engaged in,” id. at 890, but he regarded this disadvantage as an “unavoidable consequence of democratic government.” Id. Although Justice O’Connor concurred in the judgment, she disagreed with the reasoning of the majority.

A person who is barred from engaging in religiously motivated conduct is barred from freely exercising his religion. . . . It is difficult to deny that a law that prohibits religiously motivated conduct, even if the law is generally applicable, does not at least implicate First Amendment concerns.

Id. at 893-94 (O’Connor, J., concurring in part and dissenting in part).
ter represents the protection of unpopular, even antisocial, views and practices from the majority's tendency to want to squelch them. "Respect for the religious beliefs of others is particularly difficult when one does not share those beliefs," wrote Judge Noonan in dissent in EEOC v. Townley Engineering & Manufacturing Co. 88 "The First Amendment," he continued, "is an effort, not entirely forlorn, to interpose a bulwark between the prejudices of any official, legislator or judge and the stirrings of the spirit." 89

Judge Noonan could have added "any jury" to his list. At its core, the First Amendment is antimajoritarian; that is, it serves to protect minority rights against the popular will—against the intolerance of the majority. 90 As Justice Jackson so aptly put it a half-century ago, "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials . . . ." 91 In the context of religious freedom, this means that minority religions, whether well established over time, such as the Old Order Amish, or newly developed, such as the Church of Scientology or the International Society of Krishna Consciousness, should be legally protected against oppression by those who find "other people's faiths"—and the exercise of those faiths—outrageous and utterly intolerable. 92

Justice O'Connor, concurring in the Court's judgment in Smith, asserted that

the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority

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89. Id.
92. A former Solicitor General of the United States has written that "[m]ost religious and non-religious people will agree that a tolerance by both groups for the views of the other is one of the surest signs of a civilized society." Rex E. Lee, The Religion Clauses, 1986 B.Y.U. L. REV. 337, 337.
and may be viewed with hostility. The history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups such as the Jehovah's Witnesses and the Amish.93

As David A.J. Richards has argued, "[T]he religion clauses [of the United States Constitution] rest on a radical understanding of the primacy of religious toleration."94 Indeed, this religious toleration principle was perhaps more clearly expressed in the Virginia Declaration of Rights of 1776, which served as a model for the Bill of Rights. That document listed freedom of exercise as one of the rights that form "the basis and foundation for government."95

That Religion, or 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 or violence; and, therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity, towards each other.96

Of course, it would be questionable at best to assert that persons who migrated to the Colonies did so with the expectation of setting up a civilization where all religions would be tolerated;97 it is perhaps more accurate to say that many of the new Americans wanted to establish their own religion as the official state religion.98 Indeed, the Body of Liberties of the Massachusetts Collonie in New England 1641 made it a capital offense to worship "any other god,  

94. Richards, supra note 90, at 133.
95. Virginia Declaration of Rights para. 16 (1776), reprinted in Founders' Constitution, supra note 86, at 3, 3-4.
96. Id.
97. Even the use of the word "toleration" causes some historical difficulties. In the colonial period, official government "toleration" of religion usually involved the development of a list of religions to be "tolerated," and is thus distinct from freedom of religion as we discuss it today. See Robert S. Alley, The Despotism of Toleration, in James Madison on Religious Liberty 142-49 (Robert S. Alley ed., 1985).
98. For a good, succinct discussion of this historical view, see Bellah et al., supra note 81, at 219-25.
but the lord god,\textsuperscript{99} or to commit blasphemy,\textsuperscript{100} and guaranteed “religious freedom” only to those “orthodox in Judgement, and not scandalous in life,” provided that they conduct themselves “in a Christian way, with due observation of the rules of Christ revealed in his word.”\textsuperscript{101} There were always dissenters from this form of government, of course, ranging from theologian/politicians\textsuperscript{102} and political philosophers\textsuperscript{103} to revolutionary patriots,\textsuperscript{104} and gradually

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  \item \textsuperscript{99} The Body of Liberties of the Massachusetts Collonie in New England para. 94, no. 1 (citing in the margin Deuteronomy 13:6, :10, 17:2, :6; Exodus 22:20), reprinted in Founders’ Constitution, supra note 86, at 46, 47.
  \item \textsuperscript{100} Id. para. 94, no. 3 (citing in the margin Leviticus 24:15, :16), reprinted in Founders’ Constitution, supra note 86, at 47.
  \item \textsuperscript{101} Id. para. 95, no. 1, reprinted in Founders’ Constitution, supra note 86, at 47.
  \item \textsuperscript{102} For a noteworthy example, Roger Williams wrote in 1644 that “[a]n enforced uniformity of religion throughout a nation or civil state confounds the civil and religious,” and that “[t]he permission of other consciences and worships then a state professeth, only can (according to God) procure a firme and lasting peace.” Roger Williams, The Bloody Tenent, of Persecution for Cause of Conscience (1644), reprinted in Founders’ Constitution, supra note 86, at 48, 48-49.
  \item \textsuperscript{103} John Locke, for instance, wrote in 1689 that

  the care of souls is not committed to the civil magistrate, any more than to other men. It is not committed unto him, I say, by God; because it appears not that God has ever given any such authority to one man over another, as to compel any one to his religion. Nor can any such power be vested in the magistrate by the consent of the people, because no man can so far abandon the care of his own salvation as blindly to leave to the choice of any other, whether prince or subject, to prescribe to him what faith or worship he shall embrace. . . . .

  . . . Not even Americans, subjected unto a Christian prince, are to be punished either in body or goods for not embracing our faith and worship. If they are persuaded that they please God in observing the rites of their own country, and that they shall obtain happiness by that means, they are to be left unto God and themselves.

  John Locke, A Letter Concerning Toleration (1689), reprinted in Founders’ Constitution, supra note 86, at 52, 52, 55; see also 2 Montesquieu, The Spirit of Laws bk. 25, ch. 10 (1748) (“This is then a fundamental principle of the political laws in regard to religion; that when the state is at liberty to receive or to reject a new religion it ought to be rejected; when it is received it ought to be tolerated.”), reprinted in Founders’ Constitution, supra note 86, at 57.
  \item \textsuperscript{104} Samuel Adams wrote that “[i]n regard to Religion, mutual toleration in the different professions thereof, is what all good and candid minds in all ages have ever practiced.” Samuel Adams, The Rights of the Colonists (1772), reprinted in Founders’ Constitution, supra note 86, at 60, 60.
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disestablishment—the rejection of a state religion—gained the upper hand, as our Bill of Rights reflects.\textsuperscript{105}

It is true that “religious pluralism . . . has characterized America from the colonial period and grown more and more pronounced.”\textsuperscript{106} Indeed, the religious pluralism of today, especially as reflected in the case law discussed in this Article, presents greater challenges for societal tolerance than did the pluralism of the late-eighteenth century. Commenting on that earlier period, Thomas Curry has noted:

Throughout the states, Americans found themselves asserting that religion was a matter between God and the individual; that government possessed no intrinsic powers over matters of religion; and that when secular powers interfered in religious affairs, they exceeded their authority, violated religious liberty, and corrupted both Church and State. However, to portray revolutionary America as implementing these principles in all instances would be to misinterpret completely their historical context. In the absence of any significant number of dissenters from the dominant Protestant culture, Americans did not bring their accepted theories of Church and State to bear on the numerous ways by which governments did exercise jurisdiction in religious matters, and they continued to maintain the Christian Protestant society inherited from colonial times.\textsuperscript{107}

It seems beyond debate that “[c]onstitutional interpretation cannot always be bound to the ‘original intent’ of the framers, especially when it is not clear.”\textsuperscript{108} Thus, although exploring the intent of the Framers in construing the current general contours of our religious freedoms may be informative,\textsuperscript{109} recognizing the

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\textsuperscript{105} Philip Kurland has described this evolutionary process that culminated in the birth of our Religion Clauses: “This movement began with the religious intolerance that clearly marked the beginnings of government in New England, continued with the consistently expanding religious tolerance for nonmajority sects that marked later colonial and state governments, and culminated in the right to religious freedom embodied in the first amendment.” Philip B. Kurland, \textit{The Origins of the Religion Clauses of the Constitution}, 27 WM. & MARY L. REV. 839, 856-57 (1986).

\textsuperscript{106} \textit{BellaH ET AL., supra note 81, at 225.}

\textsuperscript{107} \textit{Thomas J. Curry, The First Freedoms: Church and State in America to the Passage of the First Amendment} 190-91 (1986).

\textsuperscript{108} \textit{Derek Davis, Original Intent} 167 (1991).

\textsuperscript{109} As one leading constitutional scholar put it:
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strength of those freedoms—and the related societal interest in tolerating different religious beliefs—in the context of the tort of intentional infliction of emotional distress may be less a matter of close constitutional interpretation (of any kind) than it is, in Guido Calabresi's words, a matter of applying to tort principles some broad "constitutional premises or notions." 110 This is so because in this particular and limited context, one is concerned not with justifying a religious exemption from generally applicable secular law so much as with exploring whether this tort, which seeks to enforce communitarian norms of conduct (and which possesses an almost complete lack of doctrinal limitations of both remedy and substance), should be allowed to impinge upon competing, and arguably superior, societal values. 111 In other words, the key inquiry is whether, given both the constitutional right to free exercise of religion and society's weighty interest in tolerating differing religious beliefs, 112 we should allow juries in tort cases to label as explicitly "outrageous" and "utterly intolerable in civilized society" particular conduct motivated by those beliefs. 113

It is both appropriate and useful to begin all constitutional interpretation by consulting the historical intent of the Framers. Indeed, perhaps "[n]o provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment." But, as is so often true, "[a] too literal quest for the advice of the Founding Fathers [may be] futile and misdirected," because there is no clear record as to the Framers' intent, and such history as there is reflects several varying purposes.


110. CALABRESI, supra note 30, at 45.

111. See supra notes 18-19 and accompanying text.

112. John Fleming, stressing the American jury's positive role in "accommodating the diversities of its people," has asserted that "in America tolerance of different values, reflecting ethnic, social and religious diversity, has in modern times come to be hailed as a cardinal civic virtue." FLEMING, supra note 53, at 116.

113. In the context of an intentional infliction of emotional distress action, the burden on the right of free exercise of religion is two-fold. First, the tort subjects the defendant to the possibility of general and punitive damages for intangible emotional harm to the plaintiff, and second, it directly condemns the defendant's religiously motivated conduct as being "extreme and outrageous" and "utterly intolerable in civilized society." For a full discussion of the importance of the concept of burden in free exercise jurisprudence, see Ira C. Lupu, Where Rights Begin, 102 HARV. L. Rev. 933 (1989).

The reported intentional infliction cases rightly express no doubt that such actions constitute a burden on religion, recognizing the burden implicitly or expressly. See, e.g., Paul v.
An analogous issue may be presented, of course, by all of the flexible terms in tort law. Of the "reasonable man" standard of negligence law, Calabresi has said that

[0]ur definitions of reasonable are profoundly influenced by the fact that we have a Constitution which says something about . . . free exercise of religion. All law responds somewhat to the gravitational pull of legal notions extraneous to the particular area of concern. Inevitably, "ordinary" law such as torts responds especially strongly to the gravitational force that is our Constitution.\textsuperscript{114}

The same can be said, it seems, of our definitions of "outrageous." A jury's willingness to decide that religiously motivated conduct fits that definition, and a judge's willingness to allow a jury to reach such a decision, necessarily involves a judgment about the gravitational pull of the constitutional right to free exercise and the related interest in religious tolerance. When a jury is allowed to determine that religiously motivated conduct is "outrageous" and "utterly intolerable," the court is perhaps suppressing, or failing to recognize, the proper gravitational pull of these competing principles. Mainstream religions have no such problem; when the religious tenets at issue in a case are considered "ordinary," conduct that is motivated by them will seldom be considered "outrageous."\textsuperscript{115} For while we of course have no officially established church, we do have a set of "ins" and "outs," one set of religions that we regard as "real" or "true" and another set of those that are "bogus" or "weird"—those "other people's faiths" that, in the eyes of nonadherents, may be socially intolerable when exercised.\textsuperscript{116} To quote Calabresi again,

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\item Watchtower Bible & Tract Soc'\textsuperscript{y}, 819 F.2d 875, 880 (9th Cir.) ("We agree that the imposition of tort damages on the Jehovah's Witnesses for engaging in the religious practice of shunning would constitute a direct burden on religion."), \textit{cert. denied}, 484 U.S. 926 (1987).
\item \textsuperscript{114} \textit{CALABRESI, supra} note 30, at 46.
\item \textsuperscript{115} Cf. McConnell, \textit{Origins and Historical Understanding, supra} note 18, at 1419-20 ("One rarely sees laws that force mainstream Protestants to violate their consciences.").
\item \textsuperscript{116} To draw such a dichotomy may be overly simplistic; it may be more accurate to say that there is a spectrum of religion, ranging from the "normal" to the "weird," with the merely "quaint" somewhere in between. For an interesting and sometimes lighthearted exploration of this serious subject, see Milner S. Ball, \textit{Normal Religion in America, 4 Notre Dame J.L. Ethics & Pub. Pol'y} 397 (1990). Professor Ball asserts that "we know normal
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In practice, it is not hard to tell what tenets would be deemed reasonable in our society . . . . To identify them, one only has to start with those religions whose ministers, rabbis, or priests are commonly invited to give the invocations and benedictions at large public, non-sectarian, banquets. One must then exclude those beliefs of these ministers, etc., which they cannot give voice to, even by implication, in such invocations. What is left is what is "acceptable," what represents reasonable, moderate faith.\textsuperscript{117}

We pay a high social and psychic cost for our willingness to allow religions outside of this "moderate" group to be condemned by juries applying tort principles, through the mechanism of reaching the determination that religiously motivated conduct is "too outrageous to be protected under the Constitution and too unworthy to be privileged under the law of torts."\textsuperscript{118} This cost is nothing less than an exclusion of certain persons from full membership in society because of their religion. Kenneth Karst aptly calls this "the hurt of exclusion," the avoidance of which is a core responsibility of the larger organized society.\textsuperscript{119} American society gains strength from diversity and from protection of differences, while allowing those of different beliefs and practices to participate fully in that larger society.\textsuperscript{120} The California Supreme Court recognized this phenomenon in its 1964 opinion in \textit{People v. Woody}\textsuperscript{121} when Justice Tobriner wrote, "In a mass society, . . . the protection of a self-expression, however unique, of the individual and the group

\textsuperscript{117} CALABRESI, supra note 30, at 54 (calling these moderate religious beliefs "banquet" beliefs).


\textsuperscript{119} KENNETH L. KARST, BELONGING TO AMERICA 11 (1989).

\textsuperscript{120} Further, to allow juries to condemn the religious practices of minority religions arguably results in a kind of establishment of a set of "acceptable" religions—a kind of establishment by process of elimination. \textit{Cf.} Carl H. Esbeck, \textit{Tort Claims Against Churches and Ecclesiastical Officers}, 89 W. Va. L. Rev. 1 (1986) (stressing Establishment Clause concerns raised by such cases).

\textsuperscript{121} 394 P.2d 813 (Cal. 1964) (reversing criminal convictions of Navajos for possession of peyote used in religious rites).
becomes ever more important. The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty.” 122

Certainly, however, tolerance of religion has its limits. Any broad suggestion that all religiously motivated conduct should be insulated from all government sanction would be both unworkable and foolish. 123 History confirms the truth of Shakespeare’s maxim that “[t]he devil can cite Scripture for his purpose.” 124 There can be no doubt that religion has either motivated or served to justify a litany of horrible acts that today’s government should be able to regulate and even penalize through its courts. Suspected witches were beaten and killed in both England and New England in the name of religion. 125 Long before slaveholding came to the New World, the capture and enslavement of other human beings was rationalized in religious terms. 126 In the southern Colonies, Christianity was used as a means of “exhorting obedience” from slaves. 127 Christianity has been used to justify American imperialism, which has historically involved violent attacks on the persons and prop-

122. Id. at 821.
123. “The state must have the power to intervene in truly exigent matters, even when it means overriding religious authorities acting upon sincerely held beliefs.” Esbeck, supra note 120, at 7 (arguing nonetheless that many tort claims are incompatible with the Religion Clauses).
125. See, e.g., DAVID C. BROWN, A GUIDE TO THE SALEM WITCHCRAFT HYSTERIA OF 1692 (1984); GEORGE L. KITTREDGE, WITCHCRAFT IN OLD AND NEW ENGLAND 274-373 (1929); JOHN M. TAYLOR, WITCHCRAFT DELUSION IN COLONIAL CONNECTICUT 1647-1697 (1908).
126. In the words of a noted historian of slavery,
[T]he religious zeal of Christians and Moslems had helped to revive and spread [slavery]. Members of each faith looked upon the other as infidels, and hence each felt doubly entitled to make slaves of the other. . . . Moors captured in North Africa and in the Spanish peninsula were held in bondage in Italy, Spain, Portugal, and France. Christian prisoners suffered the same fate in the lands of Islam.

Christians and Moslems alike believed it just to hold heathens in servitude, and both found victims among the Negroes of Africa. . . . The Christian purchasers liked to think of themselves as the agents of civilization and of the true religion.
127. A. LEON HIGGINbotham, Jr., IN THE MATTER OF COLOR 37 (1978) (quoting Reverend Thomas Bacon’s sermon to a slave congregation, which stressed that “slaves who desired to be good Christians could become so only by being ‘good slaves’ ”).
erty of citizens of other nations. Today, members of the Pacific Northwest's Aryan Nations "preach[] a religion of white supremacy" and call their movement "The Church of Jesus Christ Christian." The reportedly charismatic young leader of the Colorado Ku Klux Klan has been quoted as saying matter-of-factly that the reason Jews are not welcome in his organization is that it is "a white, Christian organization."

But while allowing religious motivation to excuse all violations of law is not desirable, neither is regarding religious motivation as entirely irrelevant in groping for proper legal solutions to difficult questions. For at this extreme, we ignore the first phrases of the First Amendment, phrases that expressly grant important rights, and indeed we ignore a good deal of our own history. We also place too little emphasis on the value of having persons of various religious views and practices enter into full membership in society without fear of oppression because of their minority religious beliefs.

The important American value of tolerating differing religious views, however, is often difficult to balance against other values more expressive of majoritarian will. As Karst explains,

The venture that is the United States has always included many cultures, founded on a multitude of races and religions and eth-

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128. For example, United States Senator Albert Beveridge told a Chicago audience in 1900 that God's hand has been in American expansionism all along; that "resistance to the continuance to-day of the eternal movement of the American people toward the mastery of the world" is futile; and that this destiny is "definite, splendid and holy." Albert J. Beveridge, The Star of Empire, Speech Opening the Republican Campaign for the West in the Auditorium (Sept. 25, 1900), in THE MEANING OF THE TIMES AND OTHER SPEECHES 118, 142 (1908), reprinted in GOD'S NEW ISRAEL: RELIGIOUS INTERPRETATIONS OF AMERICAN DESTINY 140, 153 (Conrad Cherry ed., 1971). Far from being repudiated by the masses, this speech was later used as a Republican Party campaign document. Id.


131. Of course, we may be dealing here not with religious motivation but rather with the use of religion as mere justification, or mere rationalization, of bad acts. As one article notes, "Religious traditions have always exhibited extraordinary creativity in fashioning justifications for persecution and violent confrontation that apparently are at odds with the progressive implications of their fundamental beliefs." Frederick M. Gedicks & Roger Hendrix, DEMOCRACY, AUTONOMY, AND VALUES: SOME THOUGHTS ON RELIGION AND LAW IN MODERN AMERICA, 60 S. CAL. L. REV. 1879, 1889 (1987).
RELIGIOUSLY MOTIVATED CONDUCT

nic identifications. This fact of American life has always complicated the pursuit of American nationhood—the quest for a culture, a community, an identity that will embrace us all.\textsuperscript{132}

In the context of a case in which the plaintiff alleges that the defendant's religiously motivated conduct satisfies the elements of the tort of intentional infliction of emotional distress, the difficulties are unavoidable. The grand challenge is to develop legal standards that protect all but penalize none unduly on account of religious belief.\textsuperscript{133}

B. Courts’ Avoidance of Adjudicating the Verity of Religion

A chief means of attaining the delicate balance needed to give due weight to society's interests in preserving order while tolerating different religious beliefs and protecting free exercise rights is for secular courts to avoid adjudicating the truth or falsity of religious belief. Our courts have recognized for some time that when the adjudication of some legal question labels, even by implication, a religious doctrine as false or wrong, the court has strayed into a forbidden “theological thicket”\textsuperscript{134} in which other people's faiths may be subjected, improperly, to legal condemnation. Thomas Paine warned of the dangers inherent in such a situation:

With respect to what are called denominations of religion, if every one is left to judge of his own religion, there is no such thing as a religion that is wrong; but if they are to judge of each other's religion, there is no such thing as a religion that is right; and therefore all the world is right, or all the world is wrong.\textsuperscript{135}

\textsuperscript{132} Karst, supra note 119, at 27.

\textsuperscript{133} As the editor of The Christian Century said recently, “The framers of the Bill of Rights could not have anticipated the rich pluralism of contemporary America, but they gave us a framework in which pluralism is something to cherish, not to fear.” James M. Wall, Religious Freedom: Tension and Contentions, 109 The Christian Century 35, 36 (1992).


\textsuperscript{135} Thomas Paine, Rights of Man, Pt. 1 (1791), reprinted in Founders' Constitution, supra note 86, at 95, 95.
Madison himself, the father of the Religion Clauses, labeled as "an arrogant pretension" the notion "that the Civil Magistrate is a competent Judge of Religious Truth."136 Numerous judicial opinions of this century have reflected this sentiment and debated its scope. Indeed, the notion that secular courts have no business adjudicating the truth or falsity of religious belief is one of the bedrock principles utilized in free exercise cases.137 Perhaps no phrase is as commonly invoked in these cases as "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."138

The real landmark among these cases remains the United States Supreme Court’s 1944 opinion in United States v. Ballard,139 in which the majority proclaimed, "[W]e do not agree that the truth or verity of respondents’ religious doctrines or beliefs should have been submitted to the jury. . . . [T]he First Amendment precludes such a course."140 In that case, the leaders of a religious order known as the "I Am movement" had been convicted of mail fraud and conspiracy to defraud. The allegedly fraudulent representations "covered respondents’ alleged religious doctrines or beliefs,"141 including the statement that Guy W. Ballard, "alias Saint Germain, Jesus, George Washington, and Godfre Ray King,"142 and two other family members had supernatural healing powers which they had used to cure hundreds of sick people.143 Representations such as these were used, the indictment charged, "to obtain from persons intended to be defrauded by the defendants, money, property, and other things of value."144 Justice Douglas, writing for the majority, concluded that the trial court had properly kept the issue

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136. JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), reprinted in FOUNDERS’ CONSTITUTION, supra note 86, at 82, 83.
137. Even Smith recognizes this principle. Employment Div. v. Smith, 494 U.S. 872, 877 (1990); see Laycock, supra note 19, at 41–42 (analyzing the practical significance of the Smith Court’s approval of this principle).
139. 322 U.S. 78 (1944).
140. Id. at 86.
141. Id. at 79.
142. Id. at 79–80.
143. Id.
144. Id. at 80.
of the truth or falsity of the religious beliefs from the jury,\textsuperscript{145} stressing the dangers of allowing a jury to decide such an issue:

The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain.\textsuperscript{146}

Yet the majority allowed the fraud conviction to stand, moving Justice Jackson, in dissent, to accuse them of entering the forbidden domain they claimed to be avoiding.\textsuperscript{147} Even though he saw in the I Am movement's religious teachings "nothing but humbug, untainted by any trace of truth,"\textsuperscript{148} Jackson was troubled by the notion that any prosecution for fraud could be based upon admittedly religious representations.\textsuperscript{149} The problem for Jackson was that convicting the Ballards of fraud required the jury to decide, as the indictment alleged, that the Ballards knew their religious representations to be false. As Jackson put it, "[A]s a matter of either practice or philosophy I do not see how we can separate an issue as to what is believed from considerations as to what is believable."\textsuperscript{150} The jury therefore had to perform the "impossible task" of separating "fancied [religious experiences] from real ones, dreams from happenings, and hallucinations from true clairvoyance. . . . When one comes to trial which turns on any aspect of religious belief or representation, unbelievers among his judges are likely not to understand and are almost certain not to believe him."\textsuperscript{151} Thus, Jackson concluded, "Prosecutions of this character easily could degenerate into religious persecution. . . . I would dismiss the indictment and have done with this business of judicially examining other people's faiths."\textsuperscript{152}

\textsuperscript{145} Id. at 88.
\textsuperscript{146} Id. at 87.
\textsuperscript{147} Id. at 95 (Jackson, J., dissenting).
\textsuperscript{148} Id. at 92.
\textsuperscript{149} Id.
\textsuperscript{150} Id.
\textsuperscript{151} Id. at 93.
\textsuperscript{152} Id. at 95.
One device courts have used—and continue to invoke—to avoid the "no heresy trials" prohibition while still allowing government restrictions on religion is the well-worn but largely vacuous "belief/action distinction." This idea made its first appearance in American case law over one hundred years ago, in the United States Supreme Court’s decision in *Reynolds v. United States.* In that case, the Court upheld, over a free exercise defense, the criminal conviction of a Mormon for polygamy, stating that “[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.” To hold otherwise “would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”

The most famous verbal formulation of the idea came sixty years later in *Cantwell v. Connecticut,* in which the Court overturned the criminal conviction of three Jehovah’s Witnesses for proselytizing in a Catholic neighborhood in New Haven, Connecticut. Justice Roberts wrote that the First Amendment “safeguards the free exercise of the chosen form of religion. Thus the 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. Conduct remains subject to regulation for the protection of society.”


154. 98 U.S. 145 (1878).

155. *Id.* at 166.

156. *Id.* at 167.


158. *Id.* at 300-01. The Jehovah’s Witnesses carried pamphlets and records with them door-to-door; they asked each resident for permission to play a record, one of which was titled “Enemies” and contained “an attack on the Catholic religion,” according to the Court. *Id.* at 301. Clearly, the Jehovah’s Witnesses’ religious message was not only unpopular, but deeply offensive to the persons being solicited. Indeed, Jesse Cantwell’s conviction for breach of the peace was based on a near-fight prompted by his playing the “Enemies” record for two Roman Catholic men who became “incensed by the contents of the record and were tempted to strike Cantwell unless he went away.” *Id.* at 303.

159. *Id.* at 303-04 (citing *Reynolds v. United States,* 98 U.S. 145 (1878); *Davis v. Beason,* 133 U.S. 333 (1890)). Mark Tushnet has pointed out that Justice Roberts’ formulation of
In fairness, the belief/action distinction has pure logic on its side. In our three-dimensional world, only actions may be restricted, punished, or regulated; how does one abridge the freedom to think or believe except by striking at some action motivated by that belief? Unless and until the government is able to read its citizens' minds, the government can act against a mere belief only when that belief motivates some action—reading, speaking, moving one's body, and so forth. Only then is the belief apparent, and only by striking at conduct that is motivated by that belief can one attack the belief itself. Thus the belief/action distinction is little more than a truism and fails to provide a meaningful guidepost with which to decide hard questions.

Why, then, does the belief/action distinction retain any vigor? Perhaps it is because the distinction provides a means of what

the belief/action distinction in Cantwell was used in free speech cases as well, being "exactly the one the Court expressed contemporaneously in labor picketing cases." Mark Tushnet, The Constitution of Religion, 18 CONN. L. REV. 701, 714-15 n.67 (1986) (citing Thornhill v. Alabama, 310 U.S. 88, 104-06 (1940)).

160. "Until belief is manifested in conduct," a student commentator has noted, "it cannot possibly offend the law or any person. To speak of constitutional protection for religious belief is thus misleading at best . . . ." Lee W. Brooks, Note, Intentional Infliction of Emotional Distress by Spiritual Counselors: Can Outrageous Conduct Be "Free Exercise"?, 84 MICH. L. REV. 1296, 1302 n.16 (1986).

161. Ira Lupu has not only criticized the belief/action distinction of Reynolds as having "drained the free exercise clause of its primary constitutional function," because "religiously-motivated action that [is] also speech [is] already protected" by other clauses of the First Amendment, he has erected its tombstone and identified its killer. Lupu, supra note 113, at 938. According to Lupu, Braunfeld v. Brown, 366 U.S. 599 (1961), and Sherbert v. Verner, 374 U.S. 398 (1963), implicitly rejected the belief/action distinction by ignoring it. Lupu, supra note 113, at 939-42.

It is certainly true that a line of later cases has revised the simplistic belief/action distinction as the lone inquiry into the degree of permissible burden on the free exercise of religion; that is Lupu's point. Id. at 939-46. Yet at least in the torts cases, the belief/action distinction was often the starting point in courts' analysis of whether the adjudication could proceed in the face of the Free Exercise Clause. The belief/action distinction retains its vitality, then, because it has been supplemented but not entirely supplanted as an analytical tool in many reported cases. See, e.g., Van Schaick v. Church of Scientology, 535 F. Supp. 1125, 1134 (D. Mass. 1982) (quoting with approval Cantwell's formulation of the belief/action distinction); Turner v. Unification Church, 473 F. Supp. 367, 372 (D.R.I. 1978) (same), aff'd, 602 F.2d 458 (1st Cir. 1979); Molko v. Holy Spirit Ass'n, 762 P.2d 46, 56-57 (Cal. 1988) (same), cert. denied, 490 U.S. 1084 (1989); Wollersheim v. Church of Scientology, 260 Cal. Rptr. 331 (Ct. App. 1989) (citing with approval Cantwell's belief/action distinction), cert. denied, 486 U.S. 910 (1990), and vacated, 111 S. Ct. 1298 (1991); McNair v. Worldwide Church of God, 242 Cal. Rptr. 823, 830 (Ct. App. 1987) (same); Nally
Guido Calabresi calls legal subterfuge, a facile way of hiding the hard questions that would otherwise be faced in the absence of such a distinction. Calabresi has identified two types of frequently used subterfuges, and the belief/action distinction seems to fit them both. The first, which Calabresi calls "[t]he most important, and in a way more clearly dishonest," is the subterfuge that is "designed to hide a fundamental value conflict, recognition of which would be too destructive for the particular society to accept." The belief/action distinction thus allows courts to hold that religiously motivated conduct is not worthy of protection from communitarian norms while denying that the underlying religious belief is being subjected to those same norms. Such denial is necessary simply because the command that secular courts should not adjudicate the truth or falsity of religious belief is so well established and well accepted that no judge is willing to admit that in some situations minority religious beliefs must, in fact, be rejected as false for the plaintiff to win a case.

The second type of subterfuge is "a generalization of the slippery-slope argument for absolute language." Calabresi gives the following example of this second type of subterfuge:

If we admit that the state can regulate religion, we are psychologically, if not logically, more likely to allow such regulation than if we say that there can be no regulation of religion and then from time to time define behavior by some cults as not religious and hence subject to regulation. The refusal to permit polygamy among Mormons in the nineteenth century was certainly regulation of religion, but the denial that it was such regulation may have lessened the impact of the decision and led to less regulation of religion than would have followed from an "honest" admission that some religious beliefs are in practice subject to state prohibition.

Thus if we are not to lose the benefits that the belief/action distinction may provide, even through legal subterfuge, we should not...
call for its wholesale elimination in a manner that will lead us
down the slippery slope to acceptance of greater degrees of legal
restriction of religious belief qua belief. Instead, we should simply
strive to avoid legal condemnation of religiously motivated conduct
whenever possible, because adjudication of such matters often
places a court in the theological thicket where the verity of the
beliefs themselves is at issue.166 Further, when such condemnation
cannot be avoided, we should require delicacy in the adjudication
of questions implicating freedom of religion, in the form of narrow-
ly drawn, carefully administered legal standards. The tort of
intentional infliction of emotional distress is not such a standard.

Even with the belief/action distinction in place as a first step in
the analysis of free exercise cases, we cannot in reality avoid the
hard question of when to abridge freedom of religion, which neces-
sarily involves balancing the invasion of constitutional rights
against the need for that invasion. A chief means of engaging in
such balancing has been the “compelling government interest
test,” which originated in Sherbert v. Verner167 and which the
Court criticized and at least partially rejected in Employment Di-
vision v. Smith.168 This test has been used in a variety of contexts,
including tort cases involving allegations that religiously motivated
“outrageous” conduct caused severe emotional distress.169 Basic-
ally, the test provides that government action that burdens reli-
gion is permissible only when justified by a “compelling state in-

166. “The thought that a religion which has no effect upon the secular activities of its
adherents is not a very good religion seems to be one point of agreement between the reli-
gious, the irreligious and the indifferent.” I. Beverly Lake, Freedom to Worship Curiously, 1
“compelling government interest” test in a case in which Native Americans who had been
fired from their jobs as drug counselors for sacramental use of peyote contended that “their
religious motivation for using peyote places them beyond the reach of a criminal law that is
not specifically directed at their religious practice.” Id. at 878. The majority said, “Even if
we were inclined to breathe into Sherbert some life beyond the unemployment compensa-
tion field, we would not apply it to require exemptions from a generally applicable criminal
law.” Id. at 884. For a scathing critique of this aspect of Smith and an analysis of how far
this conception might apply to future cases, see Laycock, supra note 19, at 8-10, 30-33, 54-
68.
169. See infra note 173 for cases containing such allegations.
"It is basic," Justice Brennan, writing for the Court, opined in Sherbert, "that no 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.'" In tort cases, courts have held correctly that imposing tort liability for religiously motivated conduct "presents a sufficient potential deprivation of religious freedom to warrant constitutional scrutiny."

Courts adjudicating intentional infliction claims against churches and church officials have been inconsistent in deciding whether the government's interest is sufficiently compelling to allow tort recovery. The major difficulty, it seems, is that in this context the government interest is especially subject to any number of interpretations. The government interest in these cases may be giving its citizens a forum in which to recover in tort, allowing citizens to recover for intangible emotional harms, or simply deterring outrageous conduct. Thus, even assuming that the "compelling government interest" test survives Smith for use in tort cases generally, it neither provides an efficacious standard in intentional infliction cases nor focuses the court on the most critical question.

170. See Sherbert, 374 U.S. at 403.
171. Id. at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).
173. Compare Paul, 819 F.2d at 883 ("We find the practice of shunning not to constitute a sufficient threat to the peace, safety or morality of the community as to warrant state intervention.") with Wollersheim v. Church of Scientology, 260 Cal. Rptr. 331, 347 (Ct. App. 1989) ("[T]he state has a compelling interest in allowing its citizens to recover for serious emotional injuries they suffer through religious practices they are coerced into accepting."); cert. denied, 495 U.S. 1007 (1989), and vacated, 763 P.2d 948 (Cal. 1988).
174. Murphy, the one reported post-Smith case of religiously motivated "outrageous" conduct, did not use the compelling government interest test but instead focused on a Ballard-type analysis of whether the court could adjudicate the claim without inquiring whether the underlying beliefs were "fundamentally flawed." Murphy, 571 N.E.2d at 348.
that such cases raise: whether adjudicating the claim is possible without deciding that the beliefs that motivated the allegedly outrageous conduct are "fundamentally flawed." When it cannot, adjudication threatens to devolve into a forbidden and pernicious exercise in religious bigotry.

IV. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CASES INVOLVING RELIGIOUSLY MOTIVATED CONDUCT

A. The Jury Verdicts

Cases raising a claim of intentional infliction of emotional distress caused by religiously motivated conduct provide perhaps the clearest illustration of religious intolerance in today's law. Both the process of adjudication, which requires the trier of fact to determine whether the conduct is "outrageous" based on ill-defined communitarian norms of conduct, and the potential results, which include large general damages awards and punitive damages, threaten to abridge both religious freedom rights and religious toleration interests in a way that few other legal actions do. As Douglas Laycock argues, these lawsuits "threaten the very existence of the defendant religion. The trials of these cases are generally characterized by attempts to incite the jury to fear and hatred of a strange faith." There is general agreement that the enforcement of a tort judgment is an exercise of state power. As the United States Supreme Court said in *New York Times v. Sullivan*, "The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised." Thus the cases generally have held that the defendant in a tort action in state court properly may invoke the Free Exercise Clause, made applicable to the states in *Cantwell v. Connecticut*, because court enforcement of the judgment would constitute "state action"

175. See id. at 347-50 (ordering dismissal of the claim because adjudication required an exploration of whether "the disputed [religious] beliefs [were] fundamentally flawed").
176. Laycock, supra note 19, at 45-46 (footnote omitted).
177. 376 U.S. 254 (1964) (holding that state libel laws are subject to the First Amendment).
178. Id. at 265.
179. 310 U.S. 296 (1940).
that may violate the defendant’s free exercise rights. As the Ninth Circuit said in *Paul v. Watchtower Bible & Tract Society*,\(^{180}\)

> [T]he application of tort law to activities of a church or its adherents in their furtherance of their religious belief is an exercise of state power. When the imposition of liability would result in the abridgement of the right to free exercise of religious beliefs, recovery in tort is barred.\(^{181}\)

Yet a number of lower courts—and some higher ones—have allowed such actions to proceed, and several have resulted in jury verdicts. It is not surprising that juries, if asked to assess general damages for intangible emotional harms caused by conduct that is admittedly motivated by unpopular or minority religious beliefs, will respond with large awards. Six recent cases illustrate this tendency: *Christofferson v. Church of Scientology*,\(^{182}\) *Wollersheim v. Church of Scientology*,\(^{183}\) *George v. International Society for Krishna Consciousness*,\(^{184}\) *McNair v. Worldwide Church of God*,\(^{185}\) *Guinn v. Church of Christ*,\(^{186}\) and *Murphy v. I.S.K.Con. of New England, Inc.*\(^{187}\) All of these cases involved suits by former members and/or relatives of former members against religious organizations and their officials. In each case the plaintiff asserted a cause of action for intentional infliction of emotional distress. In each case the defendant’s conduct was found to be, or admitted to be, religious in nature, but in each case the trial court allowed the jury to find the defendant’s conduct “extreme and outrageous” and “utterly intolerable in civilized society.” In each case the jury returned substantial general damages verdicts, and in five of the six,

\(^{180}\) 819 F.2d 875 (9th Cir.) (applying Washington tort law), *cert. denied*, 484 U.S. 926 (1987).

\(^{181}\) Id. at 880.


\(^{185}\) 242 Cal. Rptr. 823 (Ct. App. 1987).

\(^{186}\) 775 P.2d 766 (Okla. 1989).

large punitive awards. That the majority of these verdicts did not withstand appellate review is of course somewhat comforting to the critics of these cases, but cannot diminish the basic point: given the opportunity to assess damages against religious organizations and officials for religiously motivated “outrageous” conduct, juries do so with gusto.

In Christofferson, a former member of the Church of Scientology sued the church, alleging fraud and intentional infliction of emotional distress. Her fraud claims alleged that the church made “misrepresentations regarding the standard, quality, grade, sponsorship, status, characteristics, ingredients, uses, benefits, character or qualities of the courses or goods offered.” The intentional infliction claims alleged both “a scheme to gain control of her mind” and a harmful policy of retribution against her following her withdrawal from the church. A Portland, Oregon jury awarded her two million dollars. The appellate court reversed this verdict and remanded the case for a new trial; in the new trial, the jury awarded her thirty-nine million dollars in punitive damages alone on her fraud claims, which was at the time “by far the largest punitive award ever in the state of Oregon.”

In Wollersheim, a former member of the Church of Scientology of California proved at trial that church members knew he was a manic-depressive and yet subjected him to continued “auditing,” a Scientology indoctrination practice that the court likened to one-on-one sermons. The plaintiff also proved at trial that when he decided to leave the church after ten years of active membership,

189. Id. at 593.
190. Id. at 582.
191. Id. at 591.
194. Fred Leeson, Ore. Jury: Church Must Pay §39M for Fraud, Nat'L J., June 16, 1985, at 8. Twenty million dollars of the award was against the founder of the Church of Scientology, L. Ron Hubbard, $17.5 million against the national church, and $1.5 million against the Portland, Oregon church. Id. This verdict was also reversed. Leeson, supra note 192, at 5.
the church leaders initiated a course of retributory discipline against him that was intended to cause him emotional distress by destroying his business.\textsuperscript{196} In his suit, Wollersheim sought compensatory and punitive damages for both negligent and intentional infliction of emotional distress and fraud; the court dismissed the fraud count but allowed the emotional distress claims to go to the jury.\textsuperscript{197} Rejecting the Church of Scientology's free exercise defense, the jury awarded Wollersheim thirty million dollars—five million in general compensatory damages and twenty-five million in punitive damages.\textsuperscript{198}

An Orange County, California jury granted an even larger award to the plaintiffs in \textit{George v. International Society for Krishna Consciousness}.\textsuperscript{199} In this case, Robin George and her mother sued the Hare Krishnas for false imprisonment, intentional infliction of emotional distress, libel, and the wrongful death of Robin George's father.\textsuperscript{200} Essentially, plaintiffs claimed that officials of the International Society for Krishna Consciousness "'brainwashed' Robin into joining [the religion, then] conspired to conceal her from her parents."\textsuperscript{201} The Krishnas defended their actions in large part on free exercise grounds, claiming that their proselytization and conversion methods are part and parcel of their religion and that the activities plaintiffs complained of were essentially those religious practices.\textsuperscript{202} The trial court allowed the case to go to the jury, which returned a verdict of thirty-two million dollars in general

\textsuperscript{196} \textit{Id.} at 335-36.
\textsuperscript{197} \textit{Id.} at 336.
\textsuperscript{198} \textit{Id.} The California Court of Appeal reversed the judgment on the cause of action for negligent infliction of emotional distress and modified the damages award on the intentional infliction claim to $500,000 in general compensatory damages and $2 million in punitive damages. \textit{Id.} at 355. In \textit{Wollersheim}, 111 S. Ct. 1298, the U.S. Supreme Court ultimately vacated the court of appeal's decision in order to remand for reconsideration in light of \textit{Pacific Mutual Life Insurance Co. v. Haslip}, 111 S. Ct. 1032 (1991).
\textsuperscript{200} \textit{Id.} at 230-31.
\textsuperscript{201} \textit{Id.} at 221.
\textsuperscript{202} \textit{Id.} at 239-40.
compensatory and punitive damages, fourteen million dollars of which was for the intentional infliction claims. 203

In McNair v. Worldwide Church of God, 204 the former wife of an official in the Worldwide Church of God 205 sued the church and two church officials for defamation, intentional infliction of emotional distress, invasion of privacy, and conspiracy. 206 The case arose when, after a schism between “liberals” and “conservatives” over such theological issues as the church’s stand on divorce and remarriage, plaintiff’s husband was demoted and she became disillusioned with the church’s direction. 207 The plaintiff became involved with a publication critical of the church, and when her husband learned of this association, their “personal relationship deteriorated rapidly,” leading ultimately to a divorce. 208 Almost three years after this divorce, a minister of the church wrote an article in its weekly publication, the Pastor’s Report, discussing the church’s theological teachings on divorce and remarriage. In that article, its author accused plaintiff of abandoning her husband and of turning his children against him. 209 When the plaintiff learned about this publication, she became emotionally distressed and sued; her cause of action for intentional infliction of emotional

203. Id. at 231. On their intentional infliction claims, Robin was awarded $250,000 in general compensatory damages and her mother received $1.5 million; jointly they were awarded $12.5 million in punitive damages. Id.
204. 242 Cal. Rptr. 823 (Ct. App. 1987).
205. The court described the Worldwide Church of God as “a fundamentalist Christian faith with an hierarchical structure” whose religious beliefs were “rooted in the Old and New Testaments.” Id. at 825. It was founded as the Radio Church of God in 1933 by Herbert W. Armstrong. Id.
206. Id.
207. Id. at 825-26.
208. Id. at 826.
209. Id. at 828-29. The article laid out the three acceptable grounds for divorce recognized by the church, and in discussing “desertion,” said:

[A] classic example of this would be Mr. Raymond McNair's situation. His wife refused to be a wife to him for over two years—to sleep with him, cook for him, or even civilly communicate with him in a decent manner. Rather, she had left God's Church and was actively FIGHTING God's Church and Mr. McNair, turning his children against him and literally cursing him to his face. Finally, upon advice of Mr. Armstrong and Ted Armstrong, he was finally forced to make legal the already existing FACT that she had deserted him and was no longer his wife in any way whatsoever.

Id. at 829.
distress arose entirely out of the publication of the Pastor's Report.\textsuperscript{210} Rejecting a free exercise defense, the jury awarded $260,000 in general compensatory damages and one million dollars in punitive damages.\textsuperscript{211}

At about the same time that California courts were deciding Wollersheim and George, the Oklahoma Supreme Court decided Guinn v. Church of Christ.\textsuperscript{212} In this case, Marian Guinn, a former member of the Church of Christ, sued church elders and the church for invasion of privacy and intentional infliction of emotional distress resulting from their disciplinary actions against her.\textsuperscript{213} Guinn had become involved in a sexual relationship with a man who was not a member of the church, and the church elders confronted her about it.\textsuperscript{214} Upon her admission of “violating the Church of Christ’s prohibition against fornication,” the elders carried out a Biblical disciplinary procedure against her.\textsuperscript{215} The church elders carried out this procedure in three stages that lasted over a year: the elders first approached plaintiff and her children in a laundromat and asked her to appear before the congregation and repent; later plaintiff met with the elders at the church, at which time the elders instructed her to stop seeing her companion; finally, the elders walked up to the plaintiff and her companion in her driveway and told her that if she did not repent, they would “withdraw fellowship” from her.\textsuperscript{216}

\begin{itemize}
\item \textsuperscript{210} Id.
\item \textsuperscript{211} Id. at 825. The court of appeal reversed and remanded the case for a new trial because the trial judge had not properly instructed the jury on the “actual malice” standard for defamation. Id. at 833-34.
\item \textsuperscript{212} 775 P.2d 766 (Okla. 1989).
\item \textsuperscript{213} Id. at 767-69.
\item \textsuperscript{214} Id. at 767-68.
\item \textsuperscript{215} Id. at 768. The Oklahoma Supreme Court quoted in a footnote the disciplinary procedure, as set forth in Matthew 18:13-17:
\begin{quote}
[I]f thy brother shall trespass against thee, go and tell him his fault between thee and him alone: if he shall hear thee, thou has gained thy brother. But if he will not hear thee, then take with thee one or two more, that in the mouth of two or three witnesses every word may be established. And if he shall neglect to hear them, tell it unto the church: but if he neglect to hear the church, let him be unto thee as a heathen man and a publican.
\end{quote}
Guinn, 775 P.2d at 768 n.1 (emphasis omitted).
\item \textsuperscript{216} Id. at 768.
\end{itemize}
Knowing that the "withdrawal of fellowship" would involve the elders’ telling the entire congregation of her sexual involvement with her companion,217 the plaintiff wrote them a letter of resignation from the congregation.218 When plaintiff met with the elders one last time to dissuade them from reading the charges against her to the congregation, she was told that she had no power to withdraw from the church, based on the religious belief that "all [church] members are a family; one can be born into a family but can never truly withdraw from it."219 Shortly thereafter, plaintiff was "publicly branded a fornicator"220 by the reading of charges against her in the church; in addition, the same information was sent to four other area Church of Christ congregations to be read aloud "[a]s part of the disciplinary process."221

After trial, and over the free exercise objections of the defendants, the jury awarded $441,000 in general compensatory damages and $386,000 in punitive damages for the torts of intentional infliction of emotional distress and invasion of privacy.222 A divided Oklahoma Supreme Court reversed and remanded for a new trial, holding that only those actions by the elders taken after Guinn’s withdrawal from the church could support a tort judgment.223

Finally, and most recently, in Murphy v. I.S.K.Con. of New England, Inc.,224 a mother and her child sued the Hare Krishnas for, among other things, intentional infliction of emotional distress based on their claim that the church had falsely imprisoned the

217. As the court explained the "withdrawal of fellowship" procedure,
When one member has violated the church's code of ethics and refuses to repent, the elders read aloud to the congregation those scriptures which were violated. The congregation then withdraws its fellowship from the wayward member by refusing to acknowledge that person's presence. According to the Elders, this process serves a dual purpose: it causes the transgressor to feel lonely and thus to desire repentance and a return to fellowship with the other members; and secondly, it ensures that the church and its remaining members continue to be pure and free from sin.

Id. n.2.
218. Id. at 768.
219. Id. at 769 (emphasis omitted).
220. Id.
221. Id.
222. Id. Of this amount, $122,000 was for general compensatory damages, and $81,000 was for punitive damages on the intentional infliction claim. Id. at 785 n.77.
223. Id. at 786.
child,\textsuperscript{225} had subjected her to assaults and batteries, and by its indoctrination activities had caused severe emotional distress to both the child and her mother.\textsuperscript{226} The trial court denied a defense motion for a directed verdict at the close of the evidence, and the jury returned a verdict of $610,000 for the plaintiffs.\textsuperscript{227}

B. Classification by Type of Allegedly “Outrageous” Conduct

If categorized according to the type of allegedly “outrageous” conduct they involve, the reported cases of intentional infliction of emotional distress by religiously motivated conduct fall, with few exceptions, into one (or more) of three groups: 1) suits attacking religious indoctrination methods;\textsuperscript{228} 2) suits attacking religious discipline methods, including expulsion from membership;\textsuperscript{229} and 3) suits alleging tortious counseling, akin to “clergy malpractice.”\textsuperscript{230} I will examine each of these groups in turn.

1. Indoctrination

In the reported cases in which the plaintiffs claimed that religious indoctrination methods were “outrageous” so as to support a cause of action for intentional infliction of emotional distress, the vast majority of courts have concluded that the plaintiff failed to state or prove the claim, purporting to avoid any constitutional issues.\textsuperscript{231} Only one reported case has disallowed such a claim ex-

\begin{itemize}
  \item \textsuperscript{225} The child was 13 to 17 years old during the events at issue. \textit{Id.} at 342-44.
  \item \textsuperscript{226} \textit{Id.}
  \item \textsuperscript{227} \textit{Id.} at 345. On their intentional infliction of emotional distress claims, the child and mother won $210,000 and $350,000, respectively, in general compensatory damages. \textit{Id.} The appeals court reversed the judgment on these claims on free exercise grounds. \textit{Id.} at 354.
  \item \textsuperscript{228} See generally Gregory G. Sarno, Annotation, \textit{Liability of Religious Association for Damages for Intentionally Tortious Conduct in Recruitment, Indoctrination or Related Activity}, 40 A.L.R.4th 1062 (1985) (collecting cases on a number of intentional tort theories).
  \item \textsuperscript{229} See T.W. Cousens, Annotation, \textit{Suspension or Expulsion from Church or Religious Society and Remedies Therefor}, 20 A.L.R.2d 421 (1951) (describing legal remedies for expulsion from church membership).
  \item \textsuperscript{230} \textit{See infra} note 454.
\end{itemize}
pressly on free exercise grounds. Two California cases, one involving the Unification Church and the other the Church of Scientology, have allowed such claims.

In *Molko v. Holy Spirit Ass'n*, two former members of the Unification Church, Molko and Leal, sued the church for fraud, intentional infliction of emotional distress, and false imprisonment, on the ground that "they had been fraudulently induced to join the church through a variety of deceptive tactics" that included "an intense program of coercive persuasion or mind control." The trial court granted summary judgment for the church, but the California Supreme Court reversed as to the fraud and intentional infliction claims.

The facts adduced as part of the summary judgment motions were that two members of the Unification Church approached Molko, a twenty-seven year-old law school graduate, at a San Francisco bus stop and invited him to dinner. The two denied having any "religious connection" and did not reveal to Molko their membership in the church. At the dinner, they showed Molko a film of a "farm" and induced him to go there via bus (with twelve others) after dinner; Molko "did not know and was not told [the farm] was an indoctrination facility for the Unification Church." After twelve days of lectures, meetings, and testimonials at two different Unification Church facilities, during which time Molko at several times expressed his desire to go back to San Francisco, he learned for the first time that the group was "part of the Unification Church." Molko agreed to stay with the group.

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235. 762 P.2d 46.
236. *Id.* at 49.
237. *Id.* at 54.
238. *Id.* at 49.
239. *Id.* at 49-50.
240. *Id.* at 50.
241. *Id.*
242. *Id.* at 51. According to the court, on the third day at the farm, Molko was told that "the group's teachings derived from many philosophical sources, including Aristotle, Jeffer-
despite being "confused and angry" and ultimately remained at an indoctrination facility for five to seven weeks before becoming a formal church member.\textsuperscript{243}

Molko's coplaintiff, Leal, a college freshman, was similarly approached in San Francisco, attended a dinner, and then agreed to go to the "farm" with a group of Unification Church members who concealed their group affiliation from her.\textsuperscript{244} On her second day at the farm, Leal asked specifically if the group members were "Moonies," and was told that "they were not Moonies, but were a form of Christian group."\textsuperscript{245} After twenty days at indoctrination centers, Leal learned for the first time that the group was "part of the Unification Church."\textsuperscript{246} She remained with the group after learning its identity and became a formal church member several weeks later.\textsuperscript{247}

Molko and Leal filed suit against the church after "deprogrammers" hired by their respective parents abducted them.\textsuperscript{248} In their suit, Molko and Leal contended that "the same conduct that supports their fraud actions—i.e., misrepresentation and concealment of the church's identity for the purpose of inducing them to submit unknowingly to coercive persuasion—also gives rise to an action for intentional infliction of emotional distress."\textsuperscript{249}

In reversing the grant of summary judgment for the church on the claim for intentional infliction of emotional distress, the California Supreme Court recognized that the church's arguments on appeal turned on negating the element of "outrageousness." The court thus determined that the church's burden on appeal was to establish "as a matter of law that its conduct... was not 'extreme and outrageous.'"\textsuperscript{250} The court said that "conduct is extreme and outrageous when it 'exceeds all bounds [of decency] usually tol-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{243} Molko's last name is also spelled "Moon."\textsuperscript{Id.}
\item \textsuperscript{244} \textsuperscript{Id.} at 51-52.
\item \textsuperscript{245} \textsuperscript{Id.} at 52.
\item \textsuperscript{246} \textsuperscript{Id.}
\item \textsuperscript{247} \textsuperscript{Id.}
\item \textsuperscript{248} Molko was abducted as he left the final day of the California Bar examination. \textsuperscript{Id.} at 51. Leal was abducted as she sold flowers on the street in Los Angeles. \textsuperscript{Id.} at 52.
\item \textsuperscript{249} \textsuperscript{Id.} at 62.
\item \textsuperscript{250} \textsuperscript{Id.} at 63.
\end{itemize}
\end{footnotesize}
erated by a decent society, [and is] of a nature which is especially calculated to cause, and does cause, mental distress. . . .” 251 In this case an issue of fact remained for the jury “as to whether the Church’s conduct was outrageous.” 252

The court rejected the church’s freedom-of-religion-based contention that because “its actions amounted to nothing more than ‘intensive religious practice,’ and therefore were different only in degree, not in kind, from those of many other religious groups,” as a matter of law its conduct could not be deemed “outrageous.” 253 The court found this argument “unconvincing,” saying that “[a]lthough fasting, poverty, silence or cloistered living may constitute intensive religious practice, . . . fraud, even though purported to be religiously motivated, is actionable conduct.” 254

The state supreme court’s determination that the fraud claim was well stated thus supported the same conclusion on the intentional infliction of emotional distress claim. The appellate court had held, in affirming the grant of summary judgment on both claims, that “it would be impossible to consider Molko and Leal’s theory ‘without questioning the authenticity and force of the Unification Church’s religious teachings.’” 255 The supreme court disagreed, however, saying:

The challenge here . . . is not to the Church’s teachings or to the validity of a religious conversion. The challenge is to the Church’s practice of misrepresenting or concealing its identity in order to bring unsuspecting outsiders into its highly structured environment. That practice is not itself belief—it is conduct “subject to regulation for the protection of society.” 256

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251. Id. (quoting Cole v. Fair Oaks Fire Protection Dist., 729 P.2d 743, 747 n.7 (Cal. 1987)).
252. Id.
253. Id.
254. Id.
255. Id. at 58.
256. Id. at 59 (quoting Cantwell v. Connecticut, 310 U.S. 296, 304 (1940)).
That conduct, being fraught with “fraud,” could support a jury determination of outrageousness without any constitutional difficulty, the court concluded.\textsuperscript{257}

Two courts trying earlier cases, one in New York\textsuperscript{258} and the other in Massachusetts,\textsuperscript{259} arrived at a different result when analyzing whether the Unification Church’s indoctrination methods could be labeled “outrageous.” The New York case, \textit{Meroni v. Holy Spirit Ass’n},\textsuperscript{260} is worthy of a closer comparison with \textit{Molko}. In \textit{Meroni}, the court held that motions to dismiss the intentional infliction of emotional distress claims should have been granted.\textsuperscript{261} The facts of the case were tragic: Charles Meroni, a student at Columbia University, had just left a church training program when he committed suicide.\textsuperscript{262} His father thereupon sued the church for intentional infliction of emotional distress on behalf of his deceased son’s estate and himself.\textsuperscript{263} The complaint, which the court presumed to be true for purposes of the motion to dismiss,\textsuperscript{264} alleged that the church subjected the plaintiff’s son to

“highly programmed behavioral control techniques in a controlled environment thereby narrowing his attention and causing him to go into a trance. He was subjected to an intense fasting from foods and beverages, a program of chanting and related activities.” . . . [T]he defendant church sought and succeeded in exercising a “form of hypnotic control, sometimes called ‘brain-
RELIGIOUSLY MOTIVATED CONDUCT

The complaint and bill of particulars further alleged that the church undertook the recruitment of plaintiff's son with the knowledge "that he was at that time 'emotionally disturbed,'" and alleged further that the church subjected him to various "confessions, lectures, and a highly structured work and study schedule" while at the church's training camp.

The New York court accepted the very argument rejected in Molko, concluding that the church's allegedly tortious conduct "constitutes common and accepted religious proselytizing practices, e.g., fasting, chanting, physical exercises, cloistered living, confessions, lectures, and a highly structured work and study schedule." The court held on this ground that the alleged "brainwashing" of plaintiff's son was "a method of religious indoctrination that is neither extreme nor outrageous," and that "the various activities mentioned above, which allegedly induced the 'mind control', are not considered by our society to be beyond all possible bounds of decency." In short, the court in Meroni found that the "recruitment and indoctrination techniques used by the appellant, which are similar to those used by a number of other organizations," could not, as a matter of law, be deemed "outrageous" so as to support a claim for intentional infliction of emotional distress.

The Church of Scientology has also been subject to splits of opinion in the case law as to whether its particular indoctrination methods are "outrageous." One California court has said yes; in two other cases, one from Massachusetts and one from Ore-

265. Id. at 176-77 (quoting Plaintiff's Amended Complaint).
266. Id. at 177.
267. Id.
268. Id.
269. Id.
270. Id.
271. Id.
272. Id.
courts have said no. In Wollersheim v. Church of Scientology,\footnote{275} plaintiff attacked the Church of Scientology's indoctrination methods known as “auditing” and “disconnect,” as well as a church disciplinary practice called “fair game,” as being “outrageous” conduct supporting a claim of intentional infliction of emotional distress.\footnote{277} As mentioned above, a jury awarded Wollersheim thirty million dollars; the California Court of Appeal reduced the award to $2.5 million but affirmed the judgment in all other respects, on the ground that the plaintiff was coerced into the religious practices, thus removing the practices from constitutional protection.\footnote{278}

Wollersheim proved at trial that for a seven-year period he was involved with the Church of Scientology in Los Angeles, during which time he underwent “‘auditing’ at both the basic and advanced levels.”\footnote{279} The court explained that

\begin{quote}
[a]uditing performs a similar function for Scientology as sermons and other forms of mass persuasion do for many religions. In those religions, ministers, priests or other clergy preach to the multitude in order to bring their adherents into line with the religion’s principles. Scientology instead emphasizes a one-on-one approach—the “auditing” process—to accomplish the same purpose.\footnote{280}
\end{quote}

\footnote{276} 260 Cal. Rptr. 331.
\footnote{277} Id. at 336. For the sake of clarity, and following the court’s categorization, the allegations regarding “disconnect” and “fair game” are discussed \textit{infra} notes 399-414 and accompanying text.
\footnote{278} Wollersheim, 260 Cal. Rptr. at 334, 355.
\footnote{279} Id. at 335.
\footnote{280} Id. at 343. The court further explained:

Auditing is a process of one-on-one dialogue between a Scientology “auditor” and a Scientology student. The student ordinarily is connected to a crude lie detector, a so-called “E-Meter.” The auditor asks probing questions and notes the student’s reactions as registered on the E-Meter.

Through the questions, answers, and E-meter readings, the auditor seeks to identify the student’s “n-grams” or “engrams.” These “engrams” are negative feelings, attitudes, or incidents that act as blockages preventing people from realizing their full potential and living life to the fullest. Since Scientology holds the view people actually have lived many past lives over millions of years, they carry “engrams” accumulated during those past lives as well as some from their present ones. Once the auditor identifies an “engram” the au-
The court thus concluded that auditing qualifies as a "religious practice" and conceded that it "may be entitled to immunity from liability for the emotional injuries it causes" as long as the auditing is voluntary. In this case, however, said the court, the auditing was not voluntary: "The evidence establishes Wollersheim was coerced into remaining a member of Scientology and continuing with the auditing process."

The church's coercion of Wollersheim, the determinative factor in the court's ruling, took numerous forms. "To leave the church or to cease auditing," the court said, "he had to run the risk he would become a target of 'fair game,' face an enormous burden of 'freeloader debt,' and even confront physical restraint." These various possible sanctions, according to the court, were reserved for those "who rose to higher levels of auditing and especially those, like Wollersheim, who became staff members—the rough equivalent of becoming a neophyte priest or minister."

Based on this evidence, and relying heavily on Molko, the California Court of Appeal affirmed the trial court's decision that the

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281. Id. at 344.
282. Id.
283. Id. at 347.
284. Id. at 346. "Fair game" is Scientology's "redistributive program." Id. at 341. In describing it, the court drew an analogy to the medieval inquisition, "which neutralized the 'heretic' by stripping this person of his or her economic, political and psychological power." Id.

"Freeloader debt," the court explained, was devised by Scientology founder L. Ron Hubbard as a means of punishing members who, inter alia, chose to leave the church . . .

"Freeloader debt" was accumulated when a staff member received Church courses, training or auditing at a reduced rate. The Church maintained separate records which listed the discounts allowed. If the member later chose to leave, he or she was presented with a bill for the difference between the full price normally charged to the public and the price originally charged to the member. A person who stayed in the Church for five years could easily accumulate a "freeloader debt" of between $10,000 and $50,000.

Id. at 345 (footnote omitted).
285. Id. at 344-45.
constitutional guarantees of freedom of religion\textsuperscript{286} did not insulate the church from liability for any of the actions on which Wollersheim based his intentional infliction of emotional distress claim.\textsuperscript{287} The court held that “the state has a compelling interest in allowing its citizens to recover for serious emotional injuries they suffer through religious practices they are coerced into accepting. Such conduct is too outrageous to be protected under the constitution and too unworthy to be privileged under the law of torts.”\textsuperscript{288}

The Oregon court in \textit{Christofferson v. Church of Scientology}\textsuperscript{289} faced a situation in which a teenager joined the Church of Scientology in Portland shortly after her graduation from a Montana high school, “intending to obtain some work experience before going to college in the fall.”\textsuperscript{290} She enrolled in various courses offered by the church and its affiliates and became a provisional staff member of one of the church’s entities.\textsuperscript{291} Less than a year after her involvement with Scientology began, on a trip to her parents’ home in Montana “to convince them to accept her involvement in Scientology,” she was “locked in the house and ‘deprogrammed.’”\textsuperscript{292} Ultimately she “became active in anti-Scientology activities and participated in ‘deprogramming’ others.”\textsuperscript{293}

Her lawsuit against the church was for both fraud and intentional infliction of emotional distress. On the latter theory she attacked not only the church’s indoctrination methods, alleging “a scheme to gain control of her mind and to force her into a life of service to defendants,”\textsuperscript{294} but also their disciplinary actions against her after her withdrawal.\textsuperscript{285} The conduct she alleged to be “outra-

\begin{footnotesize}
\textsuperscript{286} The Church contended that all of its allegedly “outrageous” courses of conduct “are forms of religious expression protected by the Freedom of Religion clauses of the United States and California Constitutions.” \textit{Id.} at 338. Article I, section 4 of the California Constitution guarantees “[f]ree exercise and enjoyment of religion without discrimination or preference.” \textit{Id.} at 338 n.1 (quoting Cal. Const. art. I, § 4).
\textsuperscript{287} \textit{Id.} at 338.
\textsuperscript{288} \textit{Id.} at 347.
\textsuperscript{290} \textit{Id.} at 580.
\textsuperscript{291} \textit{Id.} at 582.
\textsuperscript{292} \textit{Id.}
\textsuperscript{293} \textit{Id.}
\textsuperscript{294} \textit{Id.}
\textsuperscript{295} \textit{Id.} at 591; \textit{see infra} part IV.B.2.
\end{footnotesize}
geous” included various “drills” connected to the communications course she took from the church’s related entity,296 the “auditing” process,297 and the cloistered day-to-day living arrangements of the church’s members.298

The plaintiff testified at trial that she would spend from two to six hours in each auditing session.299 In addition, she said,

“There was a rule that in auditing that the auditor could never let the person leave when they were upset. And so I remember a number of times that I became real upset and just wanted to leave and go home and get out of the place, but he said: No, just sit down. The way out is the way through, is the phrase he used.”300

For about three months, plaintiff lived in a center operated by the church, sharing a room with two other women and two children and working “from 8:30 a.m. to 11 p.m. or later” for wages of “a few dollars a week.”301 Visits from nonmembers “were not encouraged,” and plaintiff testified that she was reprimanded once for having been visited by her mother and one of her friends.302 Her mail was sometimes opened before she received it.303 Church members ultimately informed her that she would have to “discon-

296. Among the “drills” which comprised the communications course was one called “bullbaiting,” which plaintiff described at trial as being practiced by “sitting with your eyes open facing another person,” and which at times reduced her to tears:

The other person, while you’re sitting there staring at them, tries to distract you by telling you jokes, making fun of you, pointing at you, touching you, making faces at you, trying anything that they can to make you laugh or twitch or cry or frown . . . .

. . . .

They would make fun of me. * * * Well, they teased me about my religion; they teased me about sex; they teased me about my looks. . . . As soon as they found an area that caused me to laugh more or to frown or to cry, they would go into that area in depth and * * * try and get me embarrassed or to cry or make some sort of reaction.

Christofferson, 644 P.2d at 585-86.
297. Id. at 587-88.
298. Id. at 589-90.
299. Id. at 588.
300. Id.
301. Id. at 589.
302. Id.
303. Id.
nect” from her parents and told her that her mother was a “suppressive person” and that such persons could be injured in various ways, including being “destroyed.”

The court concluded on this evidence that, as a matter of law, plaintiff had failed to prove that the church’s conduct was “outrageous in the extreme or beyond the limits of social toleration.” In the eyes of the court, she was not subjected to any “actionable threats or coercion” to join or stay in the church. The court stressed that the plaintiff’s recruitment and indoctrination “were not so very different than might be used by any number of organizations.” Thus, her intentional infliction claim based on indoctrination was reversed on what the court called a “non-constitutional basis”: she failed to prove a requisite element of the tort.

A federal court in Massachusetts reached the same nonconstitutional resolution of a plaintiff’s intentional infliction claims with respect to indoctrination in Van Schaick v. Church of Scientology. In that case, the plaintiff represented a putative class of persons who had been members of the Church of Scientology. The complaint asserted claims for breach of contract, violation of the Fair Labor Standards Act, violation of the Racketeer Influenced and Corrupt Organizations Act, fraud, and intentional infliction of emotional distress.

Van Schaick was a member of the church from 1971 to 1974, having worked full-time for the church for a portion of that

304. Id. at 589-90.
305. Id. at 590. The court noted that Hubbard introduced the so-called “fair game” policy in a policy letter in 1967 stating that “suppressive persons [may be deprived of property or injured by any means by any Scientist.] ... May be tricked, sued, lied to or destroyed.” Id. At trial, defendants asserted that “this policy had been canceled”; the court noted that “[t]here was conflicting evidence” at trial “as to the status of the policy and its meaning.” Id. n.13.
306. Id. at 591.
307. Id.
308. Id. at 590-91.
309. Id. at 590.
310. Id. at 583 n.3.
312. Id. at 1129-30.
time. She contacted Van Schaick, urging her to return to the Church on threat of “fair game.” Unless she returned, “she would be harassed by the Church and its adherents.” She claimed that she was “locked in a furniturerless room” for two weeks and “was audited for alleged ‘crimes’ committed against the Church,” after which time she rejoined the church and remained with it for four more years. During this second stint with the church, plaintiff was ordered to “disconnect” from her husband, and she divorced him. Ultimately she left the church and sued it and numerous related entities and individuals; the church moved to dismiss the complaint on the ground that “the doctrines and actions alleged as the basis for each cause of action are religious beliefs and practices.”

Judge Garrity dismissed the two intentional infliction counts relating to “auditing” and “disconnect,” concluding that the complaint stated insufficient facts. He found that the allegations with respect to “auditing”—essentially that the church improperly disclosed information obtained in auditing—lacked specificity. Finally, as to the “disconnect” practices, Judge Garrity concluded that being “exhorted . . . to sever family and marital ties and to depend solely on the Church for emotional support” does not, as a matter of law, constitute “outrageous” conduct. Such practices, he wrote, “are similar to the demands for single-minded loyalty and purpose that have characterized numerous religious, political, military and social movements over the ages.”

In Orlando v. Alamo, the Eighth Circuit upheld the dismissal of allegations of intentional infliction of emotional distress using nonconstitutional reasoning similar to that employed in Christof-
ferson and Van Schaick: the plaintiff's failure to prove the key element of "outrageousness." In Orlando, the parents of a man who voluntarily joined the Alamo Foundation and repudiated his family "in conformance with the teachings and directives of the [defendants] and under their dominating influence" sued the Alamo Foundation and its founders, Tony and Susan Alamo. The trial court said that the defendants' conduct was "terrible," but concluded as a matter of law that it was not "extreme and outrageous" under Arkansas law. The Eighth Circuit agreed, stating that "[t]hough [defendants'] alleged indoctrination program, religious teachings and tactics may be viewed with some consternation, we hesitate to characterize them as intolerable in a civilized society."

Similarly, in George v. International Society for Krishna Consciousness, the California Court of Appeal looked at the alleged "outrageous" acts of the Hare Krishnas towards Robin George, a member at the time of the acts, and concluded that "[m]any of the acts relied upon by Robin as 'outrageous' are hardly uncommon among cloistered religious groups." The court found that "Robin's religious duties and living conditions were identical to all the other Krishna devotees who voluntarily chose the Krishna lifestyle." The court distinguished Molko on the ground that fraud was a crucial part of the holding on the emotional distress claims, and Wollersheim on the ground that coercion was in-

327. Id. at 1290.
328. Id. at 1289.
329. Id. at 1290.
330. Id. In so holding, the court recognized that it was dealing with a "recently established area of state law," the development of which is "better left to the state courts." Id. at 1290-91 (citing M.B.M. Co. v. Counce, 596 S.W.2d 681, 687 (Ark. 1980)). The court found as an independent reason for dismissal that any intentional infliction claim was barred by the statute of limitations. Id. at 1291.
332. Id. at 237.
333. Id.
335. George, 262 Cal. Rptr. at 237 & n.25.
volved in that case. By contrast, George involved no evidence of physical force or “threats of economic sanctions” against the plain-
tiff. Because the complained-of indoctrination activities could not be considered “outrageous,” and because of a “dearth of evi-
dence suggesting that any of these acts were performed by defend-
ants with the intention of inflicting emotional distress on [George] or even in reckless disregard of that possibility," the jury verdict in George’s favor on the emotional distress claim could not stand.

The indoctrination cases illustrate the dangers inherent in adju-
dicating intentional infliction of emotional distress cases in which the allegedly “outrageous” conduct is motivated by religious be-
liefs. Predictably, courts faced with such claims will try to resolve the cases on nonconstitutional grounds by avoiding entirely any discussion of the role of the right to religious freedom, or the inter-
est in religious tolerance, in their analysis of whether the elements of the tort have been alleged or proved. Courts adopting this approach will determine—or will allow a jury to determine—on an ad-
hoc basis whether the conduct is outrageous. The determination is often based on the similarity of the defendant’s particular prac-
tices to those of other (presumably acceptable) groups in society. When the defendant’s religious indoctrination methods appear similar to the recruitment techniques of groups we all know and respect, then these methods cannot be “outrageous.”

For example, in Meroni the court found that the Unification Church’s allegedly tortious acts “constitute[d] common and ac-
cepted religious proselytizing practices, e.g., fasting, chanting, physical exercises, cloistered living, confessions, lectures, and a

337. George, 262 Cal. Rptr. at 238.
338. Id.
339. In their brief on appeal, the Georges summarized the evidence that supported the jury verdict for the plaintiff on this cause of action, including her being “made to work grueling hours with very little in the way of sleep or sustenance”; having her possessions taken from her; being “required to do menial labor and forced to beg for money”; being “deprived of any meaningful contact” with her family or “the outside world”; and being “deprived of the simple joys of life,” including reading, watching television, and listening to the radio. Id. at 237 n.24.
340. Id. at 237.
341. Id.
highly structured work and study schedule.”\(^{342}\) Likewise in Christofferson, the court reasoned that the plaintiff’s “recruitment and indoctrination . . . were not so very different than might be used by any number of organizations.”\(^{343}\) In Van Schaick, the court found that Scientology’s “disconnect” practices “are similar to the demands for single-minded loyalty and purpose that have characterized numerous religious, political, military and social movements over the ages.”\(^{344}\) Finally, in George the court stated that Hare Krishna indoctrination methods “are hardly uncommon among cloistered religious groups.”\(^{345}\) In other words, when a court is able to deny an intentional infliction claim on the ground that the allegedly outrageous conduct does not seem so different from the kind of conduct that society generally tolerates, it will do so.

This seems to be a common-sense approach to defining the legal contours of the ill-defined term “outrageous,” yet the weaknesses in such an approach are apparent in the two cases that have used it to find that religiously motivated conduct may be “outrageous”: Wollersheim\(^{346}\) and Molko.\(^{347}\) In each of these cases, the court determined that the church’s indoctrination conduct could be considered outrageous by a jury because of the presence of either fraud or coercion or both, given that society tolerates neither fraud nor coercion.\(^{348}\) To the court deciding Wollersheim, the coercive nature of the Church of Scientology’s indoctrination methods, at least as used on Wollersheim, rendered them “too outrageous to be protected under the Constitution and too outrageous to be privileged under the law of torts.”\(^{349}\) Said the court flatly, “A religious practice which takes place in the context of this level of coercion has

\(^{342}\) Meroni v. Holy Spirit Ass’n, 506 N.Y.S.2d 174, 177 (App. Div. 1986). The court further noted that the allegations of “brainwashing” were based upon activities “commonly used by religious and other groups, and . . . accepted by society as legitimate means of indoctrination.” Id. at 178.


\(^{345}\) George, 262 Cal. Rptr. at 237.


\(^{348}\) Id. at 62-63; Wollersheim, 260 Cal. Rptr. at 336-38.

\(^{349}\) Wollersheim, 260 Cal. Rptr. at 347.
less religious value than one the recipient engages in voluntarily.\textsuperscript{350} Similarly, in \textit{Molko}, the court stressed the Unification Church's "misrepresentation and concealment of the Church's identity for the purpose of inducing [plaintiffs] to submit unknowingly to coercive persuasion."\textsuperscript{351} These "continued deceptions," said the court, left a question of fact "as to whether the Church's conduct was outrageous."\textsuperscript{352}

Collectively, these cases represent the view that as long as indoctrination practices of a religious group seem to be similar to those of other accepted groups, then as a matter of law a jury cannot label them "outrageous," and thus "intolerable in a civilized society."\textsuperscript{353} When, however, such indoctrination practices do not comport with the court's view of the type of practices that other accepted groups engage in—as was the case in both \textit{Wollersheim} and \textit{Molko}—a jury may so label them. A religion that is too different from those we consider moderate is therefore always in danger of having its religiously motivated practices condemned as "outrageous" and suffering a large general and perhaps punitive damages verdict.

Certainly, \textit{Wollersheim} and \textit{Molko} stand for the proposition that if a religion's indoctrination methods include too great a degree of deception or coercion, they may be condemned as outrageous and intolerable. Given the indeterminate nature of the tort itself, this determination depends of course on the specific facts and who the trier of fact happens to be.\textsuperscript{354} This proposition should give us pause, however. If we truly believed in a religion that used "deception" or "coercion" as part of its indoctrination methods, would we ever conclude that such methods are intolerable in civilized society? Not if we believed, for example, that these means were necessary, or helpful, to the end of eternal salvation or total enlightenment. As William James pointed out almost a century ago, one cannot "measure the worth" of religiously motivated acts

\textsuperscript{350} Id. at 346.
\textsuperscript{351} \textit{Molko}, 762 P.2d at 62.
\textsuperscript{352} Id. at 63.
\textsuperscript{353} Orlando v. Alamo, 646 F.2d 1288, 1290 (8th Cir. 1981).
\textsuperscript{354} See \textit{Molko}, 762 P.2d at 62-65; \textit{Wollersheim}, 260 Cal. Rptr. at 336-37.
without considering whether the God really exists who is sup-
posed to inspire them. If he really exists, then all the conduct
instituted by men to meet his wants must necessarily be a rea-
sonable fruit of his religion—it would be unreasonable only in
case he did not exist. If, for instance, you were to condemn a
religion of human or animal sacrifices by virtue of your subject-
ive sentiments, and if all the while a deity were really there
demanding such sacrifices, you would be making a theoretical
mistake by tacitly assuming that the deity must be non-existent;
you would be setting up a theology of your own as much as if
you were a scholastic philosopher.355

If one accepts that secular courts should avoid whenever possi-
ble adjudicating the verity of religious doctrine—including implicit
findings that religious belief systems are "fundamentally flawed"—the weaknesses in the nonconstitutional approach to the intentional infliction/indoctrination cases seem clear. We will condemn as outrageous only those things that seem unfamiliar or unlike anything we have seen before. Unfortunately, we have no clear standards to guide us in such adjudication. Only one thing is certain: the mainstream is safe; the indoctrination practices of only “other people’s faiths”356 will be intolerable in our “civilized” society.

Douglas Laycock has decried in harsh terms what he sees as per-
secution of these “other people’s faiths,” reminding us that many
of today’s accepted religions were not always considered socially
acceptable.357 Speaking of the Hare Krishnas, the Unification
Church and the Scientologists, he wrote:

Whatever the merits and demerits of these religions that seem
so odd to most Americans, they are, in historical perspective,
simply the “cults” of our time. Other “cults” appear throughout
the American past. The Baptists, Methodists, Presbyterians,
Mormons and Jehovah’s Witnesses all began as unfamiliar, high-
demand, proselytizing religions, greeted with deep hostility by
more sedate and longer established faiths. . . . Parents of con-
verts reacted in much the same way as modern parents of

355. William James, The Varieties of Religious Experience: A Study in Human Na-
ture 262 (Collier 1961) (1902).
357. Laycock, supra note 19, at 65.
Krishna or Unification converts, and angry parents found professional help. Today's anti-cult psychiatrists diagnose "coercive persuasion"; the nineteenth-century equivalent was "religious insanity."^{358}

In an otherwise bleak landscape, a recent opinion of the Massachusetts Supreme Judicial Court in *Murphy v. I.S.K.Con. of New England, Inc.*^{359} shows great sensitivity to freedom of religion and may provide something of a model for the adjudication of intentional infliction/indoctrination cases. In that case, a jury had awarded substantial damages for intentional infliction of emotional distress to a mother and her daughter, who had been a member of the Hare Krishna religion, Krishna Consciousness.^{360} The Massachusetts Supreme Court reversed on the ground that "the trial below impermissibly infringed on the defendant's right to practice freely its religion."^{361} The Murphys candidly admitted in their brief to the supreme court that their "damages flow from the religious beliefs and practices to which Susan Murphy was exposed while she was a member of the Defendant's religious community,"^{362} but argued that Susan's emotional distress claim was constitutionally permissible because it was based on the Krishnas' "actions of teaching those beliefs to Susan" rather than on the beliefs themselves.^{363}

The plaintiffs' attempt to invoke the belief/action distinction did not solve the constitutional problem, however, in the court's view. "The essence of what occurred in the trial," the court said, "is that the plaintiffs were allowed to suggest to the jury extensively that exposure to the defendant's religious beliefs was sufficient to cause tortious emotional damage and to separate Susan from her mother."^{364} Stressing that "[c]ourts cannot question the verity of religious doctrines or beliefs,"^{365} the court opined:

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358. Id.
360. Id. at 345; see supra note 227 (discussing the amount of damages).
361. Murphy, 571 N.E.2d at 342.
362. Id. at 347 (quoting Plaintiffs' Brief).
363. Id.
364. Id.
365. Id. at 348 (quoting Madsen v. Erwin, 481 N.E.2d 1160, 1164 (Mass. 1985)).
Inherent in the claim that exposure to ISKCON N.E.’s religious beliefs causes tortious emotional damage is the notion that the disputed beliefs are fundamentally flawed and inconsistent with a proper notion of human development. While this issue may be the subject of a theological or academic debate, it has no place in the courts of this Commonwealth. 366

Because the intentional infliction of emotional distress claims “could not stand in the absence of testimony regarding ISKCON N.E.’s religious beliefs,” judgment for defendants on those claims was compelled. 3

Although the court in Murphy asserted that it found the case “unique,” 368 it becomes apparent upon reading the reported indoctrination cases that invariably, testimony or other evidence concerning the religious beliefs and practices of the defendant forms the basis for the claim of intentional infliction of emotional distress. Because plaintiffs must prove that particular conduct is “outrageous,” they will seek to introduce as much detailed evidence as possible about defendants’ religiously motivated practices.

For instance, in Wollersheim, the key factual allegations of the plaintiff’s complaint involved the “auditing,” “fair game” and “disconnect” practices of the Church of Scientology; 369 the California Court of Appeal called the factual allegations about the church’s religious practices the “centerpiece of the case that went to the jury.” 370 The jury was allowed to return a verdict penalizing the defendant for this conduct despite the church’s assertion that “all four courses of conduct comprising the intentional infliction claim are forms of religious expression.” 371

Similarly, in Molko, the California Supreme Court described in some detail “the [Unification] Church’s practice of misrepresenting or concealing its identity in order to bring unsuspecting outsiders

366. Id.
367. Id. at 354.
368. Id. at 345.
370. Id. at 336.
371. Id. at 337-38.
into its highly structured environment.”\textsuperscript{372} The court in \textit{Molko}, though, said that conduct, not belief, was at issue in the case.\textsuperscript{373} Given the tenor of the vast majority of these cases, defendants also will have an incentive to compare their religious indoctrination methods with those of other groups, forcing the court and perhaps the jury to delve more deeply into judging the social acceptability of the defendants’ particular religiously motivated conduct.

The dissenting justice in \textit{Molko} peremptively recognized the dangers of this approach, writing that the “imposition of liability in such cases . . . unnecessarily projects the court into the arena of divining the truth or falsity of religious beliefs.”\textsuperscript{374} Justice Anderson attacked the majority’s intentional infliction holding on two grounds: first, he contended that on the nonconstitutional ground illustrated by \textit{Meroni, Christofferson, Van Schaick}, and \textit{George}, as a matter of law the indoctrination conduct could not be labeled “outrageous”;\textsuperscript{375} and second, he argued that the intentional infliction claim, by incorporating the fraud allegations, involved the court in a forbidden inquiry about the verity of the Unification Church’s doctrine.\textsuperscript{376} He concluded flatly that “religious conversion is simply not subject to judicial review,”\textsuperscript{377} because “brainwashing and conversion are so inextricably intertwined with religious faith that they cannot be scrutinized, much less proven, without questioning the authenticity of the religious teachings of the Church.”\textsuperscript{378} Justice Anderson admitted that “members of this

\begin{itemize}
  \item \textsuperscript{373} Id. at 58.
  \item \textsuperscript{374} Id. at 67 (Anderson, J., dissenting in part and concurring in part).
  \item \textsuperscript{375} Justice Anderson concluded: “The majority opinion rests on a theory of fraudulently induced brainwashing. However, the conduct of ‘brainwashing’ itself is not actionable because that method is commonly employed by religious groups, and it fails to constitute that outrageous conduct which goes beyond the limits of social toleration.” Id. at 75.
  \item \textsuperscript{376} Id. at 75-80.
  \item \textsuperscript{377} Id. at 68.
  \item \textsuperscript{378} Id. at 71. Justice Anderson also asserted, relying on two law review articles by Professor Robert Shapiro, that deception in getting someone into a religion does not invalidate the religion or “raise a presumption of incapacity [of the person so recruited] to affirm the belief as [his] own.” Id. at 69 (citing Robert N. Shapiro, “Mind Control” or Intensity of Faith, 13 Harv. C.R.-C.L. L. Rev. 751, 789 (1978); Robert N. Shapiro, Of Robots, Persons and Protection of Religious Beliefs, 56 S. Cal. L. Rev. 1277, 1295 (1983) [hereinafter Shapiro, Of Robots]).
\end{itemize}
court may detest” the Unification Church’s indoctrination practices.379 “Yet,” he cautioned, “as Judges we must resist the temptation to tread into this theological thicket. For it is neither for governments, nor their instrumentalities, the courts, to divine the truth of those teachings.”380

2. Discipline

Religiously motivated disciplinary actions, including “shunning” and similar practices, have given rise to intentional infliction allegations as well. Unlike indoctrination cases, discipline cases raise the added issue of the ability of a person who has left a religious group to be free from the religiously motivated action of the group. Many of the discipline cases thus exhibit competing free exercise claims—the freedom of the group to practice its disciplinary acts versus the freedom of the ex-member not to practice, or even believe in, the religion.

This dimension of the discipline cases has led one court to hold that discipline taking place prior to the plaintiff’s withdrawal from the religion may not be actionable in tort while discipline occurring after withdrawal may be; the court theorized that the plaintiff consents to discipline while a member but not thereafter.381 This theory has found some support in the academic press.382 Other courts have fallen in line with the majority of the indoctrination cases, determining simply that religiously motivated discipline is not outrageous as a matter of law.383 At least two other cases, however, have drawn no distinction between current and former members and have found flatly that religiously motivated discipline is enti-

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379. Id. at 80.
380. Id.
382. See, e.g., Richard L. Cupp, Jr., Comment, Religious Torts: Applying the Consent Doctrine as Definitional Balancing, 19 U.C. Davis L. Rev. 949, 975-83 (1986) (arguing for and outlining a consent theory under which voluntary membership in a religious group would create a rebuttable presumption that an individual has consented to the group’s religious conduct).
tled to First Amendment protection and cannot form the basis of a suit for intentional infliction of emotional distress.\textsuperscript{384}

In \textit{Guinn}, the Oklahoma Supreme Court reversed a jury verdict in favor of Marion Guinn, whom the church had disciplined for “fornication,” both during her membership and after her withdrawal from the church.\textsuperscript{385} Guinn sued the church and three elders of the church for invasion of privacy and for intentional infliction of emotional distress.\textsuperscript{386} The majority divided the disciplinary acts into two categories, prewithdrawal and postwithdrawal, and determined that prewithdrawal acts were immune from tort liability but postwithdrawal acts were not.\textsuperscript{387} The court began with the premise that “the proper inquiry” in the case was whether the disciplinary actions “constituted such a threat to the public safety, peace or order that it justified the state trial court’s decision to pursue the compelling interest of providing its citizens with a means of vindicating their rights conferred by tort law.”\textsuperscript{388} Those disciplinary actions that the church took against Guinn while she was a member, the court concluded, should be “shielded from scrutiny by secular judicature”\textsuperscript{389} because they cannot constitute such a threat to the public safety, peace, or order.\textsuperscript{390} In reaching this conclusion, the court looked to the consensual nature of the religious organization involved, focusing on the right of the group to be free from government interference and on the right of the individual member to consent to the group’s practices.\textsuperscript{391} In short, “[u]nder the Free Exercise Clause the Elders had the right to rely on Parishioner’s consensual participation in the congregation when they disciplined her as one who had voluntarily elected to adhere to their doctrinal precepts.”\textsuperscript{392} The court quoted with approval Justice Jackson’s dis-

\textsuperscript{384} Paul v. Watchtower Bible & Tract Soc’y, 819 F.2d 875 (9th Cir.) (ruling on the disciplinary action of “shunning”), \textit{cert. denied}, 484 U.S. 926 (1987); Burgess v. Rock Creek Baptist Church, 734 F. Supp. 30 (D.D.C. 1990) (same).
\textsuperscript{385} \textit{Guinn}, 775 P.2d at 767-69.
\textsuperscript{386} \textit{Id.} at 769 & n.3.
\textsuperscript{387} \textit{Id.} at 774, 779.
\textsuperscript{388} \textit{Id.} at 773.
\textsuperscript{389} \textit{Id.} at 775.
\textsuperscript{390} \textit{Id.} at 774.
\textsuperscript{391} \textit{Id.}
\textsuperscript{392} \textit{Id.}
sent in Prince v. Massachusetts:393 "Religious activities which concern only members of the faith are and ought to be free—as nearly absolutely free as anything can be."394

These same arguments could not be applied, however, to disciplinary actions taken against Guinn after she had announced her withdrawal from the church, and the court held those actions to be subject to tort liability because they were "not deserving of First Amendment protection."395 Disciplining Guinn "as if she were still a member by communicating her sin of fornication could be found 'beyond all bounds of decency'"396 and therefore a jury could find the discipline to constitute the "extreme and outrageous" conduct required to establish a claim for intentional infliction of emotional distress.397 "Only those 'who unite themselves' in a religious association impliedly consent to its authority over them and are 'bound to submit to it,'"398 the court said.

The court in Wollersheim399 employed a similar rationale to hold that neither the Church of Scientology's "disconnect" practice, which the court said was "similar in purpose and effect to the 'shunning' practiced by Jehovah's Witnesses and Mennonites, among others,"400 nor its "fair game" disciplinary procedure401 was entitled to First Amendment protection, and therefore both practices could be labeled "outrageous." Regarding the disconnect practice, pursuant to which Wollersheim "isolated himself from his parents, wife and other family members,"402 the court concluded that Wollersheim submitted to the practice only because the church coerced him, thus removing free exercise protection from what would perhaps have been a protected activity had it been vol-

394. Guinn, 775 P.2d at 774 (quoting Prince, 321 U.S. at 177 (Jackson, J., dissenting)). For an interesting article discussing this members/nonmembers distinction, see Stephen L. Pepper, The Case of the Human Sacrifice, 23 Ariz. L. Rev. 897 (1981).
395. Guinn, 775 P.2d at 782.
396. Id. at 783 (quoting Eddy v. Brown, 715 P.2d 74, 77 (Okla. 1986) (setting forth the elements of intentional infliction of emotional distress in Oklahoma)).
397. Id.
398. Id. at 779 (quoting Watson v. Jones, 80 U.S. (13 Wall.) 679, 729 (1872)).
400. Id. at 348.
401. Id. at 341-43.
402. Id. at 348.
The court characterized the “fair game” practice as a sanction used “to induce continued membership in the Church and observance of its practices,” likening it to the Inquisition. In this case the Scientology practice went “far beyond the social ‘shunning’ of its heretic, Wollersheim,” giving the state “a compelling secular interest in discouraging” it.

The Church of Scientology’s “fair game” practice provided a basis for an intentional infliction claim in *Van Schaick* as well. In that case, the plaintiff alleged that Church members, “pursuant to the Fair Game doctrine,” tried to “dissuade her from pursuing her legal rights” by engaging in such conduct as making “slanderous telephone calls to her neighbors and employer, physical threats, and assault with an automobile.” The court found that such allegations did state a claim for intentional infliction of emotional distress, but only after noting that “the Fair Game doctrine has allegedly been repealed as a matter of Scientology doctrine.”

By contrast, the Oregon court in *Christofferson* rejected as a matter of law the contention that “fair game” was “outrageous” conduct, albeit on evidence far different from that presented in *Wollersheim* or that alleged in *Van Schaick*. In *Christofferson*, the

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403. *Id.* at 348-49. The court expressly did not decide whether “disconnect” is protected activity “in ordinary circumstances,” *id.*, although it did hold that “disconnect” is a “religious practice.” *Id.* at 348.

404. *Id.* at 344.

405. *Id.* at 341-43.

406. *Id.* at 342.

407. *Id.* at 343. The court described the “fair game” practice against Wollersheim:

[T]he prime focus of the “fair game” campaign was against the “heretic” Wollersheim's economic interests. Substantial evidence supports the inference Scientology set out to ruin Wollersheim's photography enterprise. Scientologists who worked in the business were instructed to resign immediately. Scientologists who were customers were told to stop placing orders with the business. Most significantly, those who owed money for previous orders were instructed to renege on their payments. Although these payments actually were going to a factory not Wollersheim, the effect was to deprive Wollersheim of the line of credit he needed to continue in business.

*Id.* at 342.


409. *Id.* at 1142.

410. *Id.*

plaintiff claimed that the Church filed a libel action against her without cause, declared her to be a “suppressive person” subject to the “fair game” policy, forbade any friends from communicating with her “through threats of mental and physical harm,” and mailed unwanted materials to her and her family.\textsuperscript{412} The court found that the evidence only partially supported plaintiff’s allegations and, relying heavily on its conclusion that no evidence established any actual threats of harm,\textsuperscript{413} held that the trial court should have granted a directed verdict for defendants on the intentional infliction claim regarding church discipline.\textsuperscript{414}

Two cases have protected Christian churches’ disciplinary actions from intentional infliction claims explicitly on First Amendment grounds.\textsuperscript{416} In \textit{Burgess v. Rock Creek Baptist Church},\textsuperscript{417} the plaintiff had been a member of the Rock Creek Baptist Church for forty years when the church’s minister departed to lead a new church.\textsuperscript{418} The new pastor and secretary construed plaintiff’s help to the departing minister as her resignation from the Rock Creek Church, and they thereafter treated her as a nonmember, barring her from voting in church elections and attending church meetings.\textsuperscript{419} Plaintiff did not want to leave the church and sued for declaratory and injunctive relief and for damages for intentional infliction of emotional distress.\textsuperscript{419}

The federal district court, sitting in diversity, granted summary judgment for the church on the rationale that “the First Amendment to the Constitution precludes civil courts from adjudicating disputes involving matters of ecclesiastical cognizance.”\textsuperscript{420} In holding that the church’s decision as to who is or is not a member of the church was not a matter subject to secular court adjudication,\textsuperscript{421} the court relied heavily on language in \textit{Serbian Eastern Or-
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thodox Diocese v. Milivojevich, in which the United States Supreme Court stressed that "it is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria." In Burgess, the court assumed for the sake of argument that the plaintiff had stated a prima facie case of intentional infliction of emotional distress but found that the defendants' expelling the plaintiff and preventing her from taking part in church activities were privileged actions under the Free Exercise Clause. "[T]he defendants' decision to terminate the plaintiff's RCB Church membership and their subsequent actions are so inextricably linked," the court said, "that for the purposes of the First Amendment analysis, the substance of her lawsuit infringes upon matters of ecclesiastical cognizance." In part, the court relied on the Ninth Circuit opinion in Paul v. Watchtower Bible & Tract Society, a case in which the Jehovah's Witnesses "shunned" a former member in accordance with church doctrine after her withdrawal from the church. Paul sued, alleging defamation, invasion of privacy, fraud, and intentional infliction of emotional distress under Washington state law. The court granted summary judgment for the church, and the Ninth Circuit affirmed in a broadly worded constitutional decision.

Paul claimed that after she had voluntarily withdrawn from the church following the expulsion of her parents, she was treated as an excommunicated, or "disfellowshiped," person and was "shunned." The court described "shunning" as "a form of ostracism" pursuant to which

[m]embers of the Jehovah's witness community are prohibited—under threat of their own disfellowship—from having any

423. Id. at 714-15, quoted in Burgess, 734 F. Supp. at 33.
424. Burgess, 734 F. Supp. at 34.
425. Id.
426. 819 F.2d 875 (9th Cir.), cert. denied, 484 U.S. 926 (1987).
427. Id. at 877.
428. Id.
429. Id. at 883.
430. Id. at 877.
contact with disfellowshiped persons and may not even greet them. Family members who do not live in the same house may conduct necessary family business with disfellowshiped relatives but may not communicate with them on any other subject.\textsuperscript{431}

Paul testified that some years after her withdrawal from the church, she twice returned to the area where she used to live and was shunned by church members;\textsuperscript{432} this treatment prompted her suit.\textsuperscript{433} The Ninth Circuit, upholding summary judgment for the church, said that to allow the suit would constitute a direct burden on the Jehovah's Witnesses' free exercise of religion\textsuperscript{434} and that the practice of shunning did not "constitute a sufficient threat to the peace, safety or morality of the community to warrant state intervention."\textsuperscript{435}

The court deciding \textit{Paul} went on to an even broader ground for its decision, however, reasoning that intangible harms of the kind at issue in any intentional infliction of emotional distress claim simply are not compensable when the allegedly "outrageous" conduct is religiously motivated.\textsuperscript{436} Judge Reinhardt wrote:

\begin{quote}
Intangible or emotional harms cannot ordinarily serve as a basis for maintaining a tort action against a church for its practices—or against its members. Offense to someone's sensibilities resulting from religious conduct is simply not actionable in tort.
\end{quote}

\textsuperscript{431} \textit{Id.} at 876-77.
\textsuperscript{432} The court reported these experiences as follows:
Paul visited her parents There, she approached a Witness who had been a close childhood friend and was told by this person: "I can't speak to you. You are disfellowshiped." Similarly, in August 1984, Paul returned to the area of her former congregation. She tried to call on some of her friends. These people told Paul that she was to be treated as if she had been disfellowshiped and that they could not speak with her. At one point, she attempted to attend a Tupperware party at the home of a Witness. Paul was informed by the Church members present that the Elders had instructed them not to speak with her. \textit{Id.} at 877.

\textsuperscript{433} When Paul left the Church in 1975, she was regarded under Church doctrine not as "disfellowshiped" (the only category of former members subject to "shunning"), but rather as "disassociated." \textit{Id.} However, in 1981, the Governing Body of Jehovah's Witnesses abolished the distinction between "disassociated" and "disfellowshiped" persons, relying on a number of Biblical passages for their revision of policy. \textit{Id.}

\textsuperscript{434} \textit{Id.} at 880.
\textsuperscript{435} \textit{Id.} at 883.
\textsuperscript{436} \textit{Id.}
Without society’s tolerance of offenses to sensibility, the protection of religious differences mandated by the first amendment would be meaningless. 437

The Ninth Circuit’s above-quoted principle would fully support a broad prohibition of intentional infliction of emotional distress claims in which the conduct alleged to be “outrageous” is religiously motivated because, regardless of the kind of religious conduct at issue, the sole damage sought in such claims is for “intangible or emotional harms.” As the court said in its closing sentence, “The constitutional guarantee of the free exercise of religion requires that society tolerate the types of harms suffered by Paul as a price well worth paying to safeguard the right of religious difference that all citizens enjoy.” 438

Other courts, however, have tried to distinguish Paul by limiting it to its facts. 439 The most noteworthy example occurred in Guinn, in which the Oklahoma Supreme Court said that “[f]or purposes of First Amendment protection, religiously-motivated disciplinary measures that merely exclude a person from communion are vastly different from those which are designed to control and involve.” 440 The former kind of discipline does not require the consent of the excluded person, reasoned the court in Guinn; the latter does. 441

Like the indoctrination cases, the church discipline cases illustrate many of the serious difficulties courts face when adjudicating intentional infliction cases involving religiously motivated conduct. With no guidelines to circumscribe the key term “outrageousness,” and no real limitations on damages assessable against the defendant in such actions, courts are forced to grope for means to accommodate the clashing interests that surface in every such case. One

437. Id. (footnotes omitted) (citing Cohen v. California, 403 U.S. 15 (1971); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 646 (1943) (Murphy, J., concurring); Cantwell v. Connecticut, 310 U.S. 296 (1940)).
438. Id. at 884.
439. See, e.g., Wollersheim v. Church of Scientology, 260 Cal. Rptr. 331, 348-49 (Ct. App. 1989), cert. denied, 495 U.S. 910 (1990), and vacated, 111 S. Ct. 1298 (1991) (stressing that Scientology’s “fair game” practice against Wollersheim occurred in a coercive environment); Guinn v. Church of Christ, 775 P.2d 766, 780-81 (Okla. 1989) (distinguishing Paul on the ground that the shunning in that case was “passive,” unlike the actions that the Church of Christ took against Guinn).
440. Guinn, 775 P.2d at 781.
441. Id.
possible solution is found in Paul: simply bar all such actions on the ground that the defendant's free exercise rights, and the "protection of religious differences mandated by the first amendment," are impermissibly harmed by such adjudications.\footnote{442}

A less drastic possibility is the consent theory, adopted in Guinn and in part in Wollersheim: if the plaintiff was a member of the defendant's religion at the time of the allegedly tortious disciplinary acts, then a tort action is barred by the Free Exercise Clause and should be dismissed—unless the plaintiff was coerced into either entering the religion or remaining in it; if the plaintiff was not a member of the defendant's religion at the time of the disciplinary actions, or was coerced into joining or staying in the religion, then not only will the Free Exercise Clause not protect the disciplinary action against liability, but it will tend to operate in the plaintiff's favor by protecting the plaintiff's right not to be subject to the discipline motivated by defendant's religious beliefs.

The consent theory is worthy of a closer look. At first glance, the principle has the ring of common sense and appears to provide a fair accommodation of differing interests. Certainly, the emphasis on consent and noncoercion, which is at the center of the courts' analyses in both Wollersheim and Guinn, seems on its surface to avoid any entangling inquiry into the verity of religious belief. It focuses instead on a straightforward, even "neutral," privilege to intentional torts with its roots in ancient Roman law.\footnote{443} Specifically, the idea is that by voluntarily joining a religious group, one consents to religiously motivated disciplinary actions by other members of the group and therefore cannot complain about harms such actions might cause.\footnote{444}

\footnote{442. Paul, 819 F.2d at 883.}
\footnote{443. See Guinn, 775 P.2d at 784 & n.69 (discussing the maxim volenti non fit injuria).}
\footnote{444. Although it has never applied this sort of rationale to the context of state tort actions, the Supreme Court has done so in a line of ecclesiastical church dispute cases to command secular court abstention from adjudicating matters of ecclesiastical government and religious belief. See Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 724-25 (1976) (stating that when "hierarchical religious organizations . . . establish their own rules and regulations for internal discipline and government, and . . . create tribunals for adjudicating disputes over these matters," then the "Constitution requires that civil courts accept their decisions as binding upon them"); Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 447 (1969) (holding that civil courts have "no role in determining ecclesiastical questions in the process of resolving prop-}
A second related strength of the consent theory in this context derives from the nature of free exercise itself: individuals should be free to practice one religion or another, or none at all. When a person has chosen one organized belief structure, he should be held to it until he chooses to withdraw, and therefore he should not be able to sue his fellow members for disciplining him in accordance with church doctrine and policy. As soon as that person chooses to leave one religion, however, either to join another or to join none at all, the government has an interest in the individual’s free exercise of that choice to leave. The government should then give due weight to the free exercise rights by allowing a suit by a former member to prevent interference with his or her free exercise of religion. Indeed, one justice in Guinn viewed that case in just such a manner, saying it involved “the competing rights of two parties who are each entitled to the same First Amendment protection. . . . [T]he gravamen of the present case resolves upon the plaintiff’s constitutional freedom to pursue any religion, which includes her freedom not to pursue any particular religion.”

A third strength of the consent theory lies in its affinity to other respected notions about the relationship of law to tightly knit communities. Jerold Auerbach has reminded us that American history is replete with examples of discrete groups within our society who rejected “outside” law in favor of alternative means of dispute resolution, including the adoption of alternative substantive standards to apply to those disputes. Of the religious community’s rejection of law in the Colonial period, Auerbach has said:

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Religious piety persistently sustained a coherent community vision. Ideally, law and religion might complement each other. . . . But the mystical core of religion does not easily co-exist with the rationality of law. In New England congregations, among Quakers and Mormons, and in religious utopian communities, Christian doctrine encouraged alternatives to law. Legal institutions languished while religion legitimated the social order. . . . As long as religion remained the source of moral vision, lawyers and courts were superfluous.447

As soon as the community disintegrates, however, the need for law changes. Specifically, individuals resort to the law only when there is division within the community or some lack of consent to the communitarian norms. Guinn, for example, presented exactly this situation: the plaintiff was an “outsider” in need of law who no longer consented to the alternative dispute resolution methods and standards she formerly had embraced as a member of her religious community.448

Yet despite these positive aspects, the consent theory may be fatally defective because it does not avoid embroiling courts in a determination of whether the religious beliefs that motivated the allegedly outrageous conduct are fundamentally flawed. Indeed, the defendant in Guinn pointed out this major conceptual difficulty with the majority’s determinative distinction between pre-withdrawal and postwithdrawal acts.449 The majority held that after Guinn’s withdrawal from the church, the church lost its ability to discipline her with impunity, but the church argued that it “ha[d] no doctrinal provision for withdrawal of membership. . . . [A] member remains a part of the congregation for life. Like those who are born into a family, they may leave but they can never really sever the familial bond.”450 Thus, the church argued, to allow liability to turn on the fact of Guinn’s withdrawal was to recognize a distinction that church doctrine does not recognize and would therefore constitute “a constitutionally impermissible state usurpation of religious discipline.”451 The court rejected this argument,
purportedly without labeling this particular religious belief either flawed or false. The implication, however, is clear: we in secular society do not accept and cannot tolerate any such belief, and if it is acted upon, it will be punished. This is a value judgment about a particular religious doctrine of the Church of Christ; for a court to maintain otherwise is simple subterfuge.

Furthermore, the court in *Guinn* used consent theory to distinguish between “active” discipline of the kind involved in that case (which requires consent) and “passive” discipline of the kind purportedly involved in *Paul* (which does not), a distinction which rests upon a conclusion about the social acceptability of “passive” discipline and the social unacceptability of “active” discipline. To the extent that shunning, or simple exclusion from membership, is construed as “passive,” we will tolerate it. Such behavior does not threaten us as unbelievers. But as soon as it becomes “active,” the discipline cannot be practiced against a nonconsenting person without being subject to being labeled “outrageous” and “intolerable in a civilized society.” Once again, maintaining that this distinction avoids a secular value judgment about religiously motivated discipline is illusory, because this distinction labels active forms unworthy of protection from communitarian norms.

Despite the surface appeal of the consent theory in the context of intentional infliction claims brought against church disciplinary acts, it remains fraught with difficulties. Of the present approaches, the best appears to be that taken in *Paul* and *Burgess*: disciplinary action motivated by religious belief should be insulated from attack as being “outrageous” and the religious disciplinarians therefore should be insulated from liability for infliction of emotional distress. Only this approach gives adequate weight to the right of religious freedom and the interest in religious tolerance and keeps courts from inquiring whether the religious beliefs that motivated the disciplinary action are fundamentally flawed.

3. **Counseling**

A third group of intentional infliction cases concerns allegations that spiritual counseling, or counseling undertaken by a minister,
constitutes "outrageous" conduct. Intentional infliction claims in this factual context are often alleged along with "clergy malpractice" claims or defamation claims and frequently involve allegedly improper advice and improper disclosure of matters discussed between the plaintiff/parishioner and the defendant/religious counselor.

The best known case in this category is Nally v. Grace Community Church, a wrongful death action brought by parents of twenty-four-year-old Kenneth Nally, a member of the church who committed suicide after spiritual and personal counseling by ministers of the church. Among the claims against the defendants were "clergy malpractice" and intentional infliction of emotional distress. The trial court granted the defendants’ motions for summary judgment on all claims, but the California Court of Appeal reversed and remanded. In the latter's view, there remained triable issues of fact concerning the allegation that the ministers had caused Kenneth's suicide by counseling him in a way that "exacerbated [his] preexisting feelings of guilt, anxiety, and depression, knowing that [he] had suicidal tendencies."

In reaching its decision, the court expressly confronted a free exercise issue: whether a "clergyman or church should be immune from liability for intentional infliction of emotional distress caused by the nature or content of counseling simply because the counseling may have a spiritual aspect." The court answered that question in the negative, relying on two cases that had nothing to do


456. Nally I, 204 Cal. Rptr. at 304.

457. See id. at 304-05.

458. Id. at 309.

459. Id. at 305.

460. Id. at 307.
with intentional infliction of emotional distress\textsuperscript{461} and on Lewis\textsuperscript{462} and Christofferson,\textsuperscript{463} neither of which fairly arose within the context of counseling and neither of which found grounds for an intentional infliction claim. A dissenter in Nally I disagreed that any triable issues of fact remained on the intentional infliction claim and, citing the First Amendment,\textsuperscript{464} added a free exercise warning: to allow such an action in a counseling case could have the deleterious effect of opening a virtual Pandora's box of litigation by subjecting all of the various religious faiths and their clergy (e.g., ministers of the numerous Protestant denominations; priests of the Roman Catholic faith and the various Eastern Orthodox religions; rabbis of the Jewish faith, orthodox, conservative and reform, etc.) to wrongful death actions and expensive full-blown trials simply because they were unsuccessful in their sincere efforts through spiritual counseling to help or dissuade emotionally disturbed members of their congregations, who may be suicide prone, from carrying out such a predisposition.\textsuperscript{465}

On remand, the trial court entered nonsuit for defendants; the court of appeal again reversed and remanded.\textsuperscript{466} In so doing, the appellate panel deferred to the determination of the court in Nally I that "the First Amendment does not create immunity shielding these church-affiliated counselors from liability for intentionally or recklessly encouraging a suicidal individual to take his life."\textsuperscript{467} The

\textsuperscript{461} In re Edward C., 178 Cal. Rptr. 694 (Ct. App. 1981) (affirming an order to remove children from their parents' custody because of extreme, religiously motivated discipline); Nelson v. Dodge, 68 A.2d 61 (R.I. 1949) (imposing a constructive trust on gifts to a religious official because of undue influence over the donor). The court in Nally I argued that "both cases affirm the principle that remedies should exist for harm caused by extreme and outrageous conduct even when such conduct involves the expression of religious beliefs," Nally I, 204 Cal. Rptr. at 308, but completely ignored both the contours of the term "extreme and outrageous" as used in the tort of intentional infliction of emotional distress and any distinction between a tort claim and other kinds of actions.


\textsuperscript{464} Nally I, 204 Cal. Rptr. at 321 n.1 (Hanson, J., dissenting).

\textsuperscript{465} Id. at 321 (footnote omitted).


\textsuperscript{467} Id.
panel in Nally II nonetheless engaged in a lengthy discussion of the First Amendment as it applied to the facts of the case, analyzing a great deal of Supreme Court authority and citing numerous law review articles.\footnote{Id. at 230-37.} Interestingly, however, the court relegated perhaps the most critical points in its analysis to two footnotes, first asserting that

the instant civil action does not entail proof that the Grace Community Church’s beliefs or those of their pastoral counselors are false. Instead it requires proof they could foresee young Nally was suicidal and, consistent or inconsistent with their beliefs about the proper remedy, failed to refer him to persons and institutions which are specially authorized and equipped to prevent suicide.\footnote{Id. at 237 n.13.}

The court also admitted that “[t]he content of the religious counseling is relevant” to the intentional infliction claim.\footnote{Id. at 238 n.14.} In other words, the court in Nally II made it pretty clear that a pastor’s conduct could be labeled “outrageous” if his counseling reflected a religious belief that “if one was unable to overcome one’s sins, suicide was an acceptable and even a desirable alternative to living.”\footnote{Id. at 238.} The dissenter in Nally II was thus entirely correct in asserting that “the majority has found one set of views to be false or not adequate, something which it may not do” consistent with the Free Exercise Clause.\footnote{Id. at 245 (Cole, J., dissenting). Judge Cole’s immediate reference for this remark was the religious belief of one defendant that a counselor should not refer his counselee to a psychiatrist except under the most extraordinary circumstances. Id. His point has even greater force against the majority’s assertion concerning religious conceptions of suicide. Indeed, Judge Cole later disagreed (in part, apparently on the same ground) with the majority’s admission of a tape recording of a Bible lesson in which the same defendant said, “Suicide is one of the ways the Lord takes home a disobedient believer. . . . Suicide for a believer is the Lord saying, ‘Okay, come on home. . . . If you’re not going to deal with those things in your life, come on home.’” Id. at 247 & n.9.} The California Supreme Court ultimately reversed Nally II on nonconstitutional grounds.\footnote{Nally v. Grace Community Church, 763 P.2d 948, 955 (Cal. 1988), cert. denied, 490 U.S. 1007 (1989).}
Erickson v. Christenson, in which the Oregon Court of Appeals found that the plaintiff had stated a claim for intentional infliction of emotional distress, provides an interesting contrast. Unlike the intermediate appellate courts in Nally I and Nally II, the Oregon court did not have to delve into any religious beliefs at all in reaching its decision for plaintiff. In Erickson, which involved an appeal from a grant of dismissal for defendants, a member of the Lutheran Church sued her pastor and the church, alleging that the pastor “misused his position as pastor and counselor to abuse her sexually, causing her . . . emotional distress.” The minister invoked the Free Exercise Clause in a limited way, arguing that “because plaintiff’s seduction could not be considered ‘outrageous’ were it not for the fact that he is a pastor, plaintiff’s claim of intentional infliction of emotional distress penalizes him for exercising his religion.”

Although the facts of the case are scantily reported, the court apparently was correct in holding that the pastor’s “arguments misconstrue the nature of plaintiff’s claims.” The “outrageousness” of the conduct, said the court, “is not premised on the mere fact that Christenson is a pastor,” but rather on the fact that he had developed a special relationship of trust with the plaintiff. The “character of Christenson’s relationship with plaintiff” might allow a jury to find that his actions in seducing her “exceeded the limits of social toleration”, thus, the dismissal was erroneous.

Similarly, the Colorado Supreme Court in Destefano v. Grabrian found no free exercise barrier to adjudicating a plaintiff’s intentional infliction of emotional distress claim against a Catholic priest, Grabrian, who had an affair with her while he was counseling her and her husband. Both the husband and wife

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475. Id. at 385.
476. Id. at 386.
477. Id.
478. Id.
479. Id. at 385 (emphasis added).
480. Id. at 386.
481. Id.
482. 763 P.2d 275 (Colo. 1988).
483. Id. at 284.
sued Grabrian and his employer, the Diocese of Colorado Springs, on a number of legal theories, including intentional infliction of emotional distress.\textsuperscript{484} Both defendants argued that all of the plaintiffs' claims were barred by the First Amendment, asserting simply that "the performance of pastoral duties by a Catholic priest, including sacramental counseling of parishioners, is a matter of ecclesiastical cognizance and policy with which a civil court cannot interfere."\textsuperscript{485}

The trial court agreed, but the Colorado Supreme Court did not, pointing out that the specific conduct alleged to be outrageous was Grabrian's inducing the wife "to engage in a sexual relationship during the course, and as a result, of marital counseling,"\textsuperscript{486} and that the defendants had not asserted that this specific conduct was religiously motivated.\textsuperscript{487} The supreme court admitted that "[i]f the alleged conduct of Grabrian was dictated by his sincerely held religious beliefs or was consistent with the practice of his religion, we would have to resolve a difficult first amendment issue."\textsuperscript{488} It found, however, that the defendants' brief disavowed any such contention, noting that

\begin{quote}
[i]t has not been asserted that Grabrian's conduct falls within the practices or beliefs of the Catholic church. Grabrian's and the diocese's brief states that "every Catholic is well aware of the vow of celibacy required of a priest at the time of his ordination." . . . The brief recognizes and admits that sexual activity by a priest is fundamentally antithetical to Catholic doctrine.\textsuperscript{489}
\end{quote}

Thus, the court correctly concluded that the priest's specific conduct was "by definition, not an expression of a sincerely held religious belief"\textsuperscript{490} and therefore the Free Exercise Clause did not bar the intentional infliction claim.\textsuperscript{491}

The contrast between \textit{Nally}, on the one hand, and \textit{Erickson} and \textit{Destefano}, on the other, shows that not all intentional infliction

\begin{footnotes}
\footnotetext[484]{Id. at 278.}
\footnotetext[485]{Id. at 283 (quoting Defendants' Brief).}
\footnotetext[486]{Id. at 284.}
\footnotetext[487]{Id.}
\footnotetext[488]{Id.}
\footnotetext[489]{Id.}
\footnotetext[490]{Id.}
\footnotetext[491]{Id.}
\end{footnotes}
cases in the counseling context necessarily involve the court in a prohibited inquiry into whether the defendant's religious beliefs are false or flawed. This is so mainly because in those cases, the pastoral counseling itself, which will often—although not invariably—reflect religious beliefs, is not always at issue. In Erickson, for example, the mere relationship of trust between the plaintiff and the defendant was the sole area where “religion” was relevant. Because in such cases the action complained of—sexual seduction—is not alleged to have been religiously motivated, the jury is asked to label “outrageous” actions having nothing to do with religious belief or conduct. Likewise, as in Destafano, when the defendant disavows a religious motivation for the specific conduct at issue, adjudication of the outrageousness of the conduct cannot abridge free exercise rights. If, on the other hand, the conduct specifically alleged to be “outrageous” is religiously motivated, as it appeared to be in Nally and as will often be the case whenever the content of spiritual counseling itself is the focus of the claim, it is difficult to see how a court would adjudicate such a claim without entering the theological thicket Justice Anderson warned of in Molko.

In sum, a blanket rule barring intentional infliction of emotional distress actions in the context of religious counseling does not appear to be justified by freedom-of-religion concerns. Instead, courts must look closely at the specific conduct alleged to be outrageous and determine in the first instance whether adjudication will involve critiquing the defendant's religious beliefs. When it will not, there should be no bar to adjudicating the claim.

We see this approach in Snyder v. Evangelical Orthodox Church, in which the California Court of Appeal reversed the trial court's dismissal of an intentional infliction claim. A church bishop, Roberson, and member, Snyder, who were having an extramarital affair, sued the church and other members for invasion of privacy, breach of fiduciary duty, and intentional infliction of emotional distress, among other claims. The plaintiffs alleged that

492. In this context, the court must determine which aspect of the counselor/counselee relationship is at issue in the case: religiously motivated conduct or merely a relationship of trust.
494. Id. at 648.
495. Id. at 641-42.
Roberson voluntarily confessed his affair to two other church officials and received promises of confidentiality; that, in violation of these promises of confidentiality, the two officials told "numerous other persons" about the plaintiffs' affair;\textsuperscript{496} that another church official divulged the affair to the congregation and excommunicated Roberson from the church; that a counselor approached by Snyder divulged the content of their conversation to church officials despite assurances that he would not do so; and that another church official later "disclosed their confidences to a 'gathering of local priests, ministers, pastors and guests.' "\textsuperscript{497} The defendants moved to dismiss on the broadly stated ground that "'the conduct complained of is ecclesiastical in nature,' "\textsuperscript{498} and the trial court granted the motion with respect to the intentional infliction claim.\textsuperscript{499}

The court of appeal reversed and remanded, reasoning that although religious expression was protected by the Free Exercise Clause, the key question—whether the allegedly tortious conduct was in fact "religious expression"—was never asked and could not be answered on the record before the court.\textsuperscript{500} The defendants argued on appeal that adjudicating the plaintiffs' claims would in fact require the court to review such matters as "'whether or not the church's doctrines, teachings and practices called upon [church officials] to reveal the content of the communication to the congregation,' "\textsuperscript{501} but plaintiffs had not even alleged that the actions were taken pursuant to church doctrine.\textsuperscript{502} The court was faced, in essence, with sloppy pleading, and complained:

The trial court was not told, and we do not know, inter alia, whether it is a canon of respondents' belief that confessions . . . are revealed to the congregation unless the offender repents; whether it is church practice for the substance of a confession to be shared among church officials; or whether it is consistent with

\textsuperscript{496} Id. at 642.  
\textsuperscript{497} Id. (quoting Plaintiffs' Complaint).  
\textsuperscript{498} Id. (quoting Defendants' Answer).  
\textsuperscript{499} Id.  
\textsuperscript{500} Id. at 645.  
\textsuperscript{501} Id. (quoting Defendants' Memoranda in Support of the Motion to Dismiss).  
\textsuperscript{502} Id.
church doctrine to reveal the substance of a confession to anyone outside the church, and if so, under what circumstances.\footnote{503}

In short, on a motion to dismiss in a counseling case, the court said that the defendants cannot prevail merely by generally alleging "that their conduct was religious in nature";\footnote{504} they must allege more specifically what particular conduct was religiously motivated.\footnote{505}

In Snyder, the court was clearly right to force defendants to identify more particularly whether the purportedly tortious conduct was religiously motivated. Only in those cases in which the defendant swears that the specific conduct of which the plaintiff complains was religiously motivated should the defendant's free exercise rights, and society's interest in religious toleration, even be implicated. If issues relating to the alleged violations of confidence and breaches of trust can be adjudicated without an inquiry into religious belief or doctrine, those allegations may properly support claims for "outrageous" conduct without free exercise problems, as was the case in Erickson.\footnote{506} In a case such as Nally, however, when the religious content of the counselor's advice appears to be the target of the plaintiff's claim of "outrageousness," adjudication of that claim is likely to embroil the court in a forbidden inquiry into whether the underlying religious belief is fundamentally flawed.

If it were clear that courts would not accept free exercise defenses in intentional infliction/counseling cases unless the specific conduct at issue was religiously motivated, one would expect defendants such as the minister in Erickson to refrain from even making a free exercise argument. Such an approach certainly would be better for the cause of religious freedom.\footnote{507} The present

\footnote{503. Id.}
\footnote{504. Id. at 648.}
\footnote{505. Id. at 647.}
\footnote{506. Erickson v. Christenson, 781 P.2d 383, 386 (Or. Ct. App. 1989); see also Destefano v. Grabrian, 763 P.2d 275 (Colo. 1988) (adjudicating an intentional infliction claim without inquiring into religious beliefs when defendants did not contend that specific acts were religiously motivated).}
\footnote{507. See Esbeck, supra note 120, at 87 ("Few would have the hardihood to claim first amendment immunity in defense of a suit charging a rabbi, priest, or pastor with sexual improprieties involving others connected with the church.")}.
confused state of affairs is perhaps best exemplified by an off-the-cuff remark in an otherwise sound decision by the Ohio Supreme Court in *Strock v. Pressnell*, a case involving a man who claimed that a Lutheran minister counseling him and his wife had an affair with his wife and destroyed his marriage. He sued for, among other things, intentional infliction of emotional distress; the Ohio Supreme Court held that this claim could not stand because in essence it was an attempt to revive the abolished torts of alienation of affections and criminal conversation.

Freedom of religion was not properly an issue on the intentional infliction claim because “it [was] clear that the alleged conduct was nonreligious in motivation—a bizarre deviation from normal spiritual counseling practices of ministers in the Lutheran Church.” In a footnote, the court added that neither the minister nor the church “asserts that the alleged sexual relations were related in any way to the teachings, beliefs or practices of the Lutheran Church.” The court should have stopped there, but it added one more sentence: “Indeed, we find it difficult to conceive of pastoral fornication with a parishioner or communicant as a legitimate religious belief or practice in *any faith*.” Once the motivation for the tortious action is admitted to be nonreligious, the free exercise problem disappears; for the court then to opine about what is or is not “legitimate religious belief” clearly involves it in a forbidden—though, in this case, mercifully truncated—inquiry.

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508. 527 N.E.2d 1235 (Ohio 1988).
509. Id. at 1236.
510. Id. at 1244.
511. Id. at 1238.
512. Id. n.1.
513. Id. (emphasis added).
514. The news recently has been filled with stories about a religion, the Church of the Most High Goddess, that has as one of its central tenets that “only women act as priests, and they absolve the sins of men through sexual rites.” *Priestess* is a *Prostitute, Jury Says*, Chi. Trib., Sept. 10, 1989, at 24. The priestess of the religion, Ellen Tracy, has been quoted as saying that “sexual acts are an integral part of her religion as a ‘path to the divine.’” Steve Padilla, *Woman Tells Court She Performed Sex for Religious Reasons*, L.A. Times, Aug. 31, 1989, at B8. Her husband reportedly testified in court that “he received a revelation from God in 1984 to re-establish a religion he says was practiced in ancient Egypt,” which required his wife “to have sex with 1,000 men to achieve her status as high priestess of the church.” Steve Padilla, *Judge Rejects Claims of Sex Church*, L.A. Times, May 4, 1990, at B3. The church is purported to have 2,000 members. *Religion Based on Sex Gets a Judicial Review*, N.Y. Times, May 2, 1990, at A17. Ms. Tracy served 150 days of a
problem is that we invariably bring our own cultural and intellectual biases to any such question; the challenge is keeping such questions out of the courts.

V. CAN WE STOP JUDGING "OTHER PEOPLE'S FAITHS" IN INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS ACTIONS?

Proposing grand solutions to any doctrinal mess is a risky endeavor if one actually intends to be taken seriously. As Grant Gilmore said in The Ages of American Law, "[W]e will do well to be on our guard against all-purpose theoretical solutions to our problems. As lawyers we will do well to be on our guard against any suggestion that, through law, our society can be reformed, purified, or saved." In the area of freedom of religion and the ways it should best be balanced with other rights and interests, the search for grand solutions seems particularly futile. No such proposal is being championed here. Nonetheless, early in the life of a new tort, when but a few cases involve a particular problem, it seems useful to suggest some possible means of circumscribing what is currently an almost boundless cause of action and to provide needed protection for important rights and interests that are presently being given short shrift. To reiterate, the tort of intentional infliction of emotional distress currently stands as an open-ended invitation for jurors to grant substantial general damages and punitive damages whenever a defendant's conduct may be deemed "outrageous" and "intolerable in civilized society." When the defendant's conduct is religiously motivated, special and serious difficulties with this scheme become apparent; in its broad sweep, the tort may be used as a weapon of religious bigotry, invading the defendant's free exercise rights and society's interest in religious toleration. By allowing juries to ask whether religiously motivated conduct is outrageous—without further guidelines as to


515. As William James said, "The gods we stand by are the gods we need and can use, the gods whose demands on us are reinforcements of our demands on ourselves and upon one another." JAMES, supra note 355, at 264.

what is wrongful about the defendants' conduct, which are available for every other tort or crime—courts in essence allow juries to condemn the defendants' underlying religious beliefs as false or fundamentally flawed. This is something secular courts should avoid whenever possible, because failing to do so allows societal norms to penalize and ultimately to suppress unpopular yet constitutionally protected beliefs. As the dissenter in Molko stated, "'Religious beliefs—whether held by adherents to new sects or by "mainstream believers"—may not be dictated by societal norms. Such norms can easily encourage labels that transform religious beliefs into illnesses.' "517

Because of the serious problems with the tort of intentional infliction of emotional distress in this context, limits on the tort are long overdue. As Laycock put it, "From beginning to end, these cases consist of subjective and intangible elements[,] . . . provid[ing] maximum opportunity for juries to act on their prejudices, and minimum opportunity for judges to control juries."518 At the least, the remedial scheme bears reexamination, as to both its punitive damages and general damages aspects.

Support for such a remedial reform proposal is available by analogy to defamation, another tort in which constitutional rights weigh in the balance. In that area of law, the United States Supreme Court has severely limited both punitive and presumed general damages, when the free speech interests are at their highest; in cases involving either public figures or matters of public concern, presumed or punitive damages are available only when the defendant has spoken with "actual malice."519 The term "actual malice" may sound much like "outrageousness," but in fact the former term, unlike the latter, is not satisfied by the jury's rising red faced and exclaiming, "Malicious!" Instead, "actual malice" has a specific meaning, that the speaker has spoken with knowledge of the statement's falsity or in reckless disregard of its truth or falsity.520 Thus, the malice standard of defamation is far more specific and

518. Laycock, supra note 19, at 65.
520. Id.
definite than the outrageousness standard for intentional infliction of emotional distress, and accordingly provides the judge and jury with much clearer remedial guidelines.

In Pacific Mutual Life Insurance Co. v. Haslip, the Supreme Court correctly recognized that "[i]t would be . . . inappropriate to say that, because punitive damages have been recognized for so long, their imposition is never unconstitutional." Some believe the Court has not gone far enough with this idea, and have proposed that punitive damages never be allowed in defamation cases, arguing that "[t]he threat of enormous and unregulated punitive damages may seriously threaten freedom of expression," citing "the danger that juries might award such damages against unpopular media defendants [even] in situations where the publication was not willful." Justice O'Connor, dissenting in Haslip, observed:

States routinely authorize civil juries to impose punitive damages without providing them any meaningful instructions on how to do so. Rarely is a jury told anything more specific than "do what you think best." . . . [S]uch instructions are so fraught with uncertainty that they defy rational implementation. Instead, they encourage inconsistent and unpredictable results by inviting juries to rely on private beliefs and personal predilections. Juries are permitted to target unpopular defendants, penalize unorthodox or controversial views, and redistribute wealth.

These observations clearly apply to punitive damages awards in intentional infliction cases and have special force when the allegedly outrageous conduct is religiously motivated. Because the jury's focus is on the "outrageousness" of the act rather than defendant's willfulness, there is a grave danger that juries will award substantial punitive damages against those with unpopular religious

522. Id. at 1043 (1991) (upholding a punitive damages award in an insurance fraud case against due process challenge); see also id. at 1054 (Scalia, J., concurring) ("[P]unitiv damages, despite their historical sanction can violate the First Amendment.").
523. Ingber, supra note 63, at 834.
524. Id.
525. Haslip, 111 S. Ct. at 1056 (O'Connor, J., dissenting).
526. See supra notes 44-64 and accompanying text.
beliefs, thereby seriously threatening freedom of religion. Furthermore, allowing punitive damages awards in addition to awards of general damages for intangible emotional harms seems unjustifiably harsh, given that the general damages themselves serve a significant punitive function.\footnote{277}{See supra notes 60-67 and accompanying text; see also Ingber, supra note 63, at 834 n.303 (noting that general and presumed damages serve less a compensatory and more a punitive deterrent function).}

Even if courts were to bar or limit punitive damages in this context, however, the availability of general damages for intangible emotional harms remains problematic. Indeed, the entire dignitary torts scheme of general damages for intangible injuries has been criticized as giving the jury too much discretion to award large verdicts against unpopular defendants,\footnote{278}{See, e.g., Ingber, supra note 63, at 778-79 (noting that “[j]uries are left with nothing but their consciences to guide them” in fixing damages for intangible harms, and that “cases involving intangible injuries are particularly susceptible to the threat of jury bias”). Ingber takes the position that general damages are justified when the tortfeasor has intentionally harmed the plaintiff. \textit{Id.} at 791. However, even if one agrees with him in the abstract, one may question how much “intent” is really required in intentional infliction of emotional distress cases when the focus of the tort is really the outrageousness of the defendant’s act.} and the cases discussed in this Article seem to illustrate that tendency all too well.\footnote{279}{See supra part IV.A.}

A better scheme might be to limit plaintiffs to actual pecuniary losses in such cases, perhaps with some provision for attorney’s fees.\footnote{280}{See \textit{Ingber}, supra note 63, at 812 & n.188 (arguing that if general damages were eliminated, some provision for attorney’s fees would be needed to avoid potential due process problems).} This scheme would actually \textit{compensate} plaintiffs for provable losses\footnote{281}{Cf. \textit{Carey} v. Piphus, 435 U.S. 247 (1978) (requiring proof of actual injury for recovery in a \textsection 1983 case involving procedural due process deprivation); \textit{Memphis Comm. Sch. Dist. v. Stachura}, 477 U.S. 299 (1986) (extending \textit{Carey} to substantive due process violations).} while avoiding the imposition of penalties on religiously motivated persons and groups, and would thus recognize more fully the importance of the defendants’ religious freedom rights and society’s religious tolerance interests, both of which are threatened by this tort.

Even if the damages scheme were radically revised, however, we still would be left with a situation in which a jury is free to label religiously motivated conduct, explicitly and without further specificity, “extreme and outrageous” and “intolerable in civilized soci-
ety.’’ Granted, we allow juries and judges to label conduct, even if religiously motivated, by implication when we allow, for example, a prosecution for murder against a self-described religious leader who ordered the killing of his enemies. The key difference between the kinds of condemnation, however, is that in an action for intentional infliction, the jury’s sole inquiry as to the social acceptability of the defendant’s conduct is whether they would rise and exclaim, ‘‘Outrageous!,’’ whereas in a prosecution for murder, the jury is not free simply to find guilt on the basis of its level of outrage—instead it must find that particular elements, specifically and dispassionately set out by the judge, are satisfied. Thus, although one can think of several examples in which a jury is apparently allowed to find implicitly that a religious belief motivating some heinous act is ‘‘fundamentally flawed,’’ the tort of intentional infliction of emotional distress—unlike any other legal action—focuses the jury’s attention on that issue alone, as part of the unbridled inquiry into whether the religiously motivated conduct at issue is extreme and outrageous. This is a serious problem that calls not for remedial reform alone, but rather for a searching look at the cause of action itself.

Only a radical restriction of the sweep of the tort will ameliorate this problem. The threat from this tort to defendants’ free exercise rights and to society’s strong interest in religious toleration justifies barring its use in cases in which the defendants’ conduct was religiously motivated. If the plaintiff files a complaint containing a cause of action for intentional infliction of emotional distress, the defendant should bear the burden of asserting that the specific conduct alleged in the complaint to be ‘‘outrageous’’ was religiously motivated.


533. As one commentator humorously notes, if the method of adjudication of intentional infliction of emotional distress cases were used in products liability actions, the sole issue determining liability would be whether the jury could rise from their seats and exclaim, ‘‘Defective!’’ Theis, supra note 52, at 290.

534. For example, if Yahweh Ben Yahweh and his followers actually believe that killing wayward sect members is religiously correct, see Resnick, supra note 532, the prosecutor may be asking the jury to condemn that belief implicitly as intolerable in civilized society in order to reach a guilty verdict. See supra notes 355-56 and accompanying text.
It should not be sufficient for the defendant to assert generally that some underlying belief relating in some way to the conduct is religious in nature. For example, if a defendant is sued for infliction of mental distress based on his browbeating a person outside a family-planning clinic, the defendant should have to assert that the browbeating—the specific conduct alleged to be outrageous—was a “religious exercise,” not simply that the defendant believes the Bible forbids abortion. Nor should it be sufficient for a defendant to argue that the nature of the relationship between the plaintiff and defendant was religious in nature, as the defendant attempted to do in Erickson, the Oregon counseling case.535 Only in those cases in which the trier of fact’s inquiry would involve evaluating whether conduct motivated by religious belief is intolerable in civilized society does adjudication of the claim raise problems with the free exercise right and the religious toleration interest.

To have so much turn on religious motivation in adjudicating whether conduct should be deemed “utterly intolerable in civilized society” seems entirely consistent with the role of motivation in tort law generally. “The motive or purpose underlying the defendant’s conduct frequently plays a rather important part in the determination of tort liability.”536 The extent to which motive excuses or justifies the conduct, rendering it insufficiently socially undesirable to be actionable, is the hard issue:

The real problem underlying the question of motive remains one of weighing the conflicting interests of the parties, and determining whether the defendant’s objective should prevail at the expense of the damage to the plaintiff. Whether the social value of that objective is sufficient to outweigh the gravity of the interference often becomes the question of deciding significance.537

Revealingly, too, the vast body of negligence cases shows that motivation behind the allegedly tortious actions is often taken into account in determining, as part of plaintiff’s prima facie case, whether the defendant’s conduct falls below acceptable social norms. One good example of this is the so-called “emergency doc-

536. PROSSER & KEETON, supra note 20, § 5, at 26.
537. Id. at 28.
trine," which provides that one who acts in a certain way because of an emergency is judged by the standard of care of a reasonable person in an emergency, not by the standard of a person who has time to reflect.  

Logic, although perhaps not the "life of the law," also supports the notion that before conduct can be condemned it should be explained; that before we may label conduct antisocial—especially the more extreme our label—we need to know why it occurred. The particular motivation will not always excuse the conduct, of course; the point is that it sometimes will and thus it is logically relevant to our evaluation. In sum, if we seek to deter only socially undesirable conduct, we must always allow a place in that determination for a full explanation of not only the nature of the act but also of why the act was committed, because that explanation may throw an entirely different light on the social desirability of the conduct.

Yet therein lies the danger. When the plaintiff argues expressly that the defendant's conduct is utterly intolerable in civilized society, and when that conduct has been motivated by religious belief, then adjudication of the case is dangerous to the right of free exercise and to the interest in religious toleration. For it is not the mainstream religion that finds its tenets condemned in this manner; rather, it is the new religion, the minority religion, that is held to be inadequate to excuse the "outrageous and intolerable" conduct that it has spawned.

This may be so simply because most Protestants, Catholics, and Jews find that the values of their religions and the values implicit in the secular laws of the United States are generally in accord. Rather than sanctioning the kind of religious intolerance that is the by-product of adjudicating these cases, however, this fact merely exposes the insidious danger inherent in this kind of adjudication. In other words, the majority may predictably regard the defendant's religiously motivated conduct as antisocial simply because they cannot fathom a "true" religion—such as their own—motivating such conduct. We should restrict the majority's

538. See id. § 33, at 196.
chances for making such determinations pursuant to, and with the force of, law whenever we can.°°

Such considerations cut in favor of barring intentional infliction of emotional distress claims when the defendants’ conduct was religiously motivated. However, what would remain of the tort of intentional infliction of emotional distress after any such substantive reform depends upon whether the courts would engage in further inquiry into the bases for a defendant’s assertion of religious motivation. If the courts did inquire further, then only those acts that a court determines are religiously motivated (as opposed to philosophically motivated, for instance), would be removed from the tort’s sweep, leaving all such conduct not so defined vulnerable to being labeled “outrageous.” If courts did not inquire further, then a much wider group of cases would be barred, possibly delivering a death blow to the tort as we know it. Neither solution is problem-free, to say the least, but nor is the status quo.

Only a narrow class of cases would be eliminated from the tort’s purview if courts engaged in a limited inquiry into whether conduct alleged to be religiously motivated was in fact motivated by a religious belief. The fact that courts have engaged in such inquiries, however, does not make the inquiries any easier.°°° The United States Supreme Court, while recognizing that “[o]nly beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion,”°°°° has

540. The people are certainly free to hold and express such views outside the legal setting, and indeed have a constitutionally guaranteed right to free speech that expressly allows criticism of minority religions as false. The evil that this Article explores occurs when that kind of intolerance becomes entrenched in our laws. We are better off as a society in the situation Peter Berger has described:

[R]eligion in America finds itself in a market situation. ... The state coerces no one into this or that religious community, and therefore each such community must inevitably compete with others for the allegiance and support of freely opting individuals. To be sure, such a situation allows all sorts of mediocrities and even charlatans to thrive in religion, as in every other area of culture.

Peter L. Berger, From the Crisis of Religion to the Crisis of Secularity, in Religion and America: Spirituality in a Secular Age 14, 22-23 (Mary Douglas & Steven Tipton eds., 1983).


consistently backed away from defining religion, declaring that “re-
ligious beliefs need not be acceptable, logical, consistent, or com-
prehensible to others in order to merit First Amendment protec-
tion.”543 The possible scope of “religion” is thus quite broad,
although certain belief systems—Thoreau’s, for example—have 
been labeled nonreligious.544

The benefit of this approach would be in limiting the religious-
motivation defense to only those defendants whose motivating be-
liefs are, in a court’s opinion, actually religious. This approach 
previously would prevent believers in the credos of the National 
Rifle Association or the Nazi Party, for example, from asserting 
successfully that their beliefs in those credos are religious in nature 
and that they should therefore be exempt from liability for inten-
tional infliction of emotional distress for specific acts motivated by 
those beliefs. The hurdle of proving the religious nature of the be-
liefs would thus preserve the tort of intentional infliction of emo-
tional distress, carving out of it only a relatively small number of 
cases.

Such a hurdle seems, at least on its surface, both a moderate and 
sensible one. Yet it has serious problems, as many have recog-
nized.545 Its primary problem is that inquiry into whether a belief 
is religious invariably involves the court in the forbidden examina-
tion of the verity of religious beliefs. Inquiries into whether a de-
fendant sincerely believes the religious views he acted upon,546 and

543. Id. at 714. For a provocative and pointed criticism of this state of affairs, see Stanley 
Ingber, Religion or Ideology: A Needed Clarification of the Religion Clauses, 41 STAN. L. 

544. Wisconsin v. Yoder, 406 U.S. 205, 216 (1972) (dictum) (characterizing Thoreau’s be-
liefs as “philosophical and personal rather than religious”).

L. Rev. 578; George C. Freeman, III, The Misguided Search for the Constitutional Defini-
tion of “Religion,” 71 Geo. L.J. 1519 (1983); Mitchell, supra note 541, at 630-63; Note, To-

546. The United States Supreme Court employed such a test in two conscientious-
objector cases. See Welsh v. United States, 398 U.S. 333, 339 (1970); United States v. See-
ger, 380 U.S. 163, 185 (1965). In both cases the Court was interpreting the draft-exemption 
statute, which required that the applicant for exemption be “conscientiously opposed to 
participation in war.” 50 U.S.C. app. § 456(j) (1958). It is perhaps not surprising, then, that 
the Court used a sincerity test in that context. Nonetheless, as one eminent scholar puts it, 
“It is doubtful . . . that ‘sincerity’ can really be examined without treading on the suppos-
edly forbidden area of the content of beliefs.” GERALD GUNTHER, CONSTITUTIONAL LAW 1527 
whether the beliefs espoused are central to his religion, raise the same difficulties. As one scholar has put it, inquiries into the religious nature of beliefs and the sincerity with which they are held “are not only awkward and counterproductive,” but they “also threaten the values of religious freedom.” Another scholar has asserted that any evaluation of the sincerity of a defendant’s assertion “often transforms into determination of religious truth.”

Centrality inquiries, too, invariably invade only “other people’s faiths.” As one scholar has perceptively noted, “Any attempt to declare such standards . . . runs the usual and grave risk of bias toward Western, monotheistic religions, which have a recognized center in worship of a single Supreme Being.” Moreover, all such inquiries create Establishment Clause concerns because “the judicial definition of religion does more than simply limit religion; it places an official imprimatur on certain types of belief systems to the exclusion of others.”

These rather compelling concerns therefore raise questions about whether the court adjudicating an intentional infliction claim should engage in an inquiry that by its nature threatens to abridge the same interests and rights that courts are trying to uphold. The alternative is simply to take at face value each defendant’s sworn assertion that the conduct alleged to be outrageous was religiously motivated. This approach has been called the “self-defining principle,” its thrust being that “a court will know that a belief or practice is ‘religious’ because the claimant says it is.”

Adopting a self-defining principle for the tort of intentional infliction of emotional distress would be, in many ways, logically and

For examples of further analyses of this aspect of the conscientious-objector cases, see Ingber, supra note 543, at 256-62 (citing, inter alia, Kent Greenawalt, All or Nothing at All: The Defeat of Selective Conscientious Objection, 1971 SUP. CT. REV. 31; Christopher H. Clancy & Jonathan A. Weiss, The Conscientious Objector Exemption: Problems in Conceptual Clarity and Constitutional Considerations, 17 ME. L. REV. 143 (1965)).

547. Marshall, supra note 19, at 310.
548. Ingber, supra note 543, at 248.
549. Lupu, supra note 113, at 959.
551. Ingber, supra note 543, at 247-48. Although he is critical of this principle, indeed calling it a “nightmare,” id., in the context of free exercise cases, Ingber nonetheless recognizes that inquiring into the genuineness and sincerity of religious motivation “risks the indirect imposition of an orthodoxy.” Id. at 248.
doctrinally consistent with the arguments made in this Article; it would certainly keep courts out of the business of judicially examining “other people’s faiths,” at least in this particular tort, and it would give great weight to religious freedom and religious toleration. Further, even if such a principle were adopted—if courts adjudicating intentional infliction claims required defendants only to swear that the particular conduct at issue in the claim was religiously motivated—there are some reasons to believe that not every defendant would so swear. The major barrier to such a defense is that even if such an assertion of religious motivation were true, the defendant may be “unwilling to assert that its beliefs and practices dictate or condone the infliction of severe distress by spiritual counselors.” To do so would be to expose the religion to even more popular outrage, which religious groups might wish to avoid above all else. A second barrier is imposed not so much on defendants as on their lawyers: pleading that certain conduct is motivated by religious belief when it is not is forbidden by procedural and ethical rules. Rule 11 of the Federal Rules of Civil Procedure and rules of professional conduct presently forbid frivolous or false assertions by lawyers.

552. Ingber has expressed this general concern, concluding that defining religion is unavoidable, in part because otherwise, persons could get free exercise exemptions from generally applicable laws “as long as they assured the court their request was religion-based.” Id. at 249.

553. Note, Emotional Distress by Spiritual Counselors, 84 Mich. L. Rev. 1296, 1305 (1986) (citing defendants’ pleading in Nally I, which disavowed any contention that their religious beliefs sanctioned intentional infliction of emotional distress); see also, e.g., Strock v. Presnell, 527 N.E.2d 1235, 1238 n.1 (Ohio 1988) (reporting that defendants did not assert that the alleged outrageous acts “were related in any way to the teachings, beliefs or practices of the Lutheran Church”).

554. Rule 11 provides in relevant part that a lawyer (or party if unrepresented by a lawyer) who signs a “pleading, motion or other paper” certifies that “to the best of his knowledge, information and belief . . . it is well-grounded in fact . . . and that it is not interposed for any improper purpose.” Fed. R. Civ. P. 11.

For examples of ethical rules prohibiting false pleadings, see Model Rules of Professional Conduct Rule 3.3(a) (1983) (forbidding lawyers from knowingly making a “false statement of material fact or law to a tribunal” and from “offer[ing] evidence that the lawyer knows to be false,” which is substantially similar to provisions in Model Code of Professional Responsibility DR 7-102(A) (1980)); id. Rule 3.4(b) (“A lawyer shall not . . . falsify evidence [or] counsel or assist a witness to testify falsely.”); id. Rule 4.1(a) (forbidding lawyers “in the course of representing a client” from knowingly making “a false statement of material fact or law to a third person,” which is substantially similar to DR 7-
These provisions certainly will act as a check on some, if not most, attorneys to prevent them from assenting to their clients’ desires to say anything, even if false, in order to be freed from tort liability. Perhaps these rules would have no “teeth” in this context, that is, neither the court nor a disciplinary body would be able to adjudicate whether the attorney violated the rules because the original court could not inquire into the verity of the underlying claim of religious motivation; it does not necessarily follow, however, that no one would comply with them. As a leading legal ethics expert has noted, “The traditions of the practice of law and the decent instincts of most lawyers doubtless supply most of the motivating force behind lawyer observance of mandatory, minimal norms.” Further, empirical data suggest that people comply with legal rules not because they fear punishment for violating them but because they believe compliance is morally right.

Let us assume, however, that if courts were to adopt a policy of dismissing intentional infliction claims whenever a defendant is willing to swear that his allegedly outrageous conduct was religiously motivated, many defendants likely would take advantage of that policy. This would mean that fewer, perhaps far fewer, intentional infliction cases would result in plaintiffs’ either recovering after jury trial or obtaining a settlement in anticipation of possible recovery. Despite the limitations noted above, some adherents to belief systems that would not be labeled “religious” by today’s courts would be able to free themselves from liability from this claim.

One’s assessment of such a development would seem to turn on the degree to which one believes that the tort in its present form is fundamentally flawed. Ironically, those who do not believe that religion should occupy a favored position vis-à-vis other belief systems might well favor a self-defining principle in this tort, if they were willing to see the tort emasculated. A defendant could perhaps escape liability upon swearing that he believes as part of his religion that creditors’ rights are so superior to debtors’ rights that

502(A) (5)); id. Rule 8.4(d) (making it “professional misconduct” to “engage in conduct that is prejudicial to the administration of justice,” which is identical to DR 1-102(A)(5)).
555. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 3.5, at 124 (1986).
any method of bill collection is justified. Another defendant could perhaps get this particular tort claim dismissed by swearing that her religious belief in the superiority of the Caucasian race, and the corollary belief that nonwhites are undeserving of respect, excuses her use of racial epithets in the workplace.

Even if defendants began to make such assertions in many cases, however, with the result that the tort of intentional infliction of emotional distress was rendered wholly impotent, the sky would hardly fall. No well-settled law is at stake; the tort is new and we lived for a long time without it. The tort has resisted doctrinal reform due to its very indeterminacy, and it seems entirely appropriate to limit its application—killing it, if necessary, in the process—when experience tells us it sweeps too broadly. Further, even in those cases in which the tort of intentional infliction is held to be unavailable, recovery for emotional harms would still be available as parasitic damages (pain and suffering) when they are proven to be the result of another tortious act, such as assault, battery, or false imprisonment.

Thus, the defendant who asserts religious motivation as a defense to an intentional infliction claim in a multiclaim tort case would be freed only from the pernicious inquiry into whether his conduct is "outrageous," not from all evaluation of the lawfulness of his conduct. For example, a plaintiff such as Wollersheim might be barred from recovering damages for intentional infliction of emotional distress, but if his allegations were true, he might recover damages for assault, battery, and false imprisonment. Robin George might be barred from recovery on her intentional infliction claim, but could recover for the wrongful death of her father brought on by the stress of looking for her as she was held by the Hare Krishnas.

557. See supra notes 31-41 and accompanying text.
558. This was the state of the law prior to the recognition of the independent tort of intentional infliction of emotional distress. Prosser & Keeton, supra note 20, § 12, at 57.
559. Wollersheim alleged that he was held on board a ship and audited against his will and that when he tried to escape, he was "seized" and held captive until he agreed to remain in the religion. See Wollersheim v. Church of Scientology, 260 Cal. Rptr. 331, 335 (Ct. App. 1989), cert. denied, 495 U.S. 910 (1990), and vacated, 111 S. Ct. 1298 (1991).
560. An expert testified at trial that Jim George's fatal heart attack might have been brought on by the stress occasioned by his search for his daughter. See George v. International Soc'y for Krishna Consciousness, 262 Cal. Rptr. 217, 230 (Ct. App. 1989) (ordered not
In none of these other claims is the jury told to decide, explicitly and as the core of the claim, whether the defendant’s religiously motivated conduct is utterly intolerable in civilized society. Instead, in each of these other claims, the jury is told much more specifically what comprises the wrongful conduct. For example, a plaintiff who claims to have been falsely imprisoned must prove by a preponderance of the evidence that defendant intended to confine, that plaintiff was confined, and that plaintiff was aware of that confinement.\textsuperscript{561} The kind of "condemnation" of defendant’s religion that may be implied in an adjudication of such a claim is very different from that involved in the intentional infliction cases. In short, few if any of these other claims present the same degree or kind of problem with religious rights and interests as does the tort of intentional infliction of emotional distress.

Even if the tort of intentional infliction of emotional distress were to be eliminated entirely, new torts could arise to cover any holes left in the jurisprudential landscape. If, for example, a defendant uses outrageous bill collection methods to harass a plaintiff, and plaintiff suffers emotional distress and no other harm, no barrier exists to a common law court’s creation of an entirely new tort cause of action to apply to the case. Prosser’s hornbook indicates that “[n]ew and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression in which the court has struck out boldly to create a new cause of action, where none had been recognized before.”\textsuperscript{562}

The demise of the intentional infliction tort could be chalked up to fundamental flaws in its character: its attempt to cover too much ground too broadly and to provide too flexible a tool against all kinds of antisocial acts—to be defined on an ad hoc basis—than was ever practically possible. Yet parts of its coverage could be redistributed to new, more specific tort actions with more specific names and more specific elements. In this way, deserving plaintiffs who formerly would have utilized the intentional infliction tort for

\textsuperscript{561} \textit{Restatement (Second) of Torts} § 35 (1965).

\textsuperscript{562} \textit{Prosser & Keeton, supra} note 20, § 1, at 3-4.
recovery would not remain without a remedy, and culpable defendants would not escape justice. Some of these new torts might allow recovery for intangible harms; some might allow recovery of general damages; some might support punitive awards. Revealingly, however, one can scarcely imagine that any new tort would be called "outrageous religious conduct."

VI. Conclusion

The tort of intentional infliction of emotional distress is an effective weapon against defendants who have acted in accordance with their religious beliefs, especially when those beliefs are not accepted by the mainstream. When this tort action is brought by a plaintiff and the allegedly "outrageous" conduct is religiously motivated, an inevitable clash of values emerges: the communitarian values of tort law, committed to enforcing societal norms of acceptability, versus the defendant's right to free exercise of religion and society's strong interest in tolerating religious diversity.

Adjudication of these cases frequently results in and reflects religious bigotry—secular juries' rejection of the social acceptability of "other people's faiths." This is so because the adjudication of the element of "outrageousness" that is the core of the tort involves the jury in an open-ended, ad hoc determination of whether the defendant's religiously motivated conduct is socially intolerable. Such an inquiry necessarily threatens to label a defendant's religious beliefs as either false or fundamentally flawed, thus running afoul of a well-established prohibition on secular courts' adjudicating the verity of religious belief.

Ending this grave problem will require judicial recognition of the negative effects of this tort on the rights of religious freedom and the interest in religious toleration. Certainly such measures as a ban on punitive damages awards, restrictions on the general damages that can be recovered for intangible harms, and changes in the scope of the cause of action itself would improve the situation. Ultimately, the best option may be the most radical: abandoning further development and application of the tort of intentional infliction of emotional distress and beginning anew to develop torts for specific situations now within the tort's purview.