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NOTES

Intentional Infliction of Emotional Distress by Spiritual Counselors: Can Outrageous Conduct Be "Free Exercise"?

You are the judge. A complaint has been filed in your court alleging "clergy malpractice"¹ and the intentional infliction of emotional distress² by a minister in the course of spiritual counseling.³ The facts

1. Clergy malpractice was apparently first alleged in *Nally v. Grace Community Church of the Valley*, 204 Cal. Rptr. 303, 304 (1984) (deleted from official reporter by California Supreme Court, see 157 Cal. App. 3d 940 (1984)). Plaintiffs alleged that defendant church's counselors were "negligent in failing to adhere to and to exercise the standard of care for a clergyman of [their] sect and training in the community." Plaintiff's Complaint at 4, *Nally*.

The innovative cause of action involved in the *Nally* case occasioned much commentary. See H. MALONY, T. NEEDHAM & S. SOUTHARD, *CLERGY MALPRACTICE* (1986); Augspurger, *Legal Concerns of the Pastoral Counselor*, 29 PASTORAL PSYCHOLOGY 109 (1980); Bergman, *Is the Cloth Unraveling? A First Look at Clergy Malpractice*, 9 SAN FERN. V. L. REV. 47 (1981); Bernstein, *A Potential Peril of Pastoral Care: Malpractice*, 19 J. RELIGION & HEALTH 48 (1980); Breecher, *Ministerial Malpractice: Is It a Reasonable Fear?*, 16 TRIAL, July 1980, at 11; Ericsson, *Clergyman Malpractice: Ramifications of a New Theory*, 16 VAL. U. L. REV. 163 (1981); Marty, *Ministerial Malpractice*, 96 THE CHRISTIAN CENTURY 511 (1979); McMenamin, *Clergy Malpractice*, 90 CASE & COM. Sept.-Oct. 1985 at 3; Note, *Seeing in a Mirror Dimly? Clergy Malpractice as a Cause of Action: Nally v. Grace Community Church*, 15 CAP. U. L. REV. 349 (1986); Case Note, *Religious Counseling — Parents Allowed to Pursue Suit Against Church and Clergy for Son's Suicide*, 1985 ARIZ. ST. L.J. 213; Comment, *Made Out of Whole Cloth? A Constitutional Analysis of the Clergy Malpractice Concept*, 19 CAL. W. L. REV. 507 (1983).

Despite all these reviews, the cause of action has not played well in the courts. Clergy malpractice has been alleged in some recent cases. See Carey, *Churches Are Taken to Court More Often In Internal Disputes*, Wall St. J., Apr. 9, 1985, at 1, col. 1; McMenamin, *supra*, at 4, 6; Comment, *supra*, at 508 nn.7-10. However, no reported opinion has yet recognized a cause of action for clergy malpractice. But see *Lund v. Caple*, 100 Wash. 2d 739, 675 P.2d 226, 231 (1984) (en banc) (rejecting a cause of action involving defendant clergyman's sexual "misconduct" with plaintiff's wife as too similar to the abolished action for alienation of affections, but suggesting that "a malpractice action would be appropriate where a counselor fails to conform to an appropriate standard of care, injures the patient/spouse which in turn results in loss of consortium damages to the other spouse").

This Note is not directly concerned with negligence actions against members of the clergy or with the viability of "clergy malpractice" as a distinct cause of action. But see note 8 *infra*.

2. The tort of intentional infliction of emotional distress lies when the actor "by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another." RESTATEMENT (SECOND) OF TORTS § 46(1) (1977).

In *Nally v. Grace Community Church of the Valley*, 204 Cal. Rptr. 303 (1984) (deleted from official reporter by California Supreme Court, see 157 Cal. App. 3d 940 (1984)) the court chose not to reach plaintiff's clergy malpractice claim, and instead upheld a cause of action against a church and members of the church's staff of pastoral counselors for intentional infliction of emotional distress. Plaintiffs alleged that their son, who was known to be suicidal for some months before his death, had been counseled by several pastors of defendant church that suicide by a believer is "acceptable and even a desirable alternative." 204 Cal. Rptr. at 306. The court found there to be sufficient evidence tending to show that the church and its counselors caused the son to become depressed, to believe suicide to be a theologically acceptable response, and ultimately to commit suicide.

The *Nally* court held that "the free exercise clause of the First Amendment does not license intentional infliction of emotional distress in the name of religion and cannot shield defendants from liability for wrongful death for a suicide caused by such conduct." 204 Cal. Rptr. at 308-

are set forth in the complaint and several affidavits as follows:

Pastor Al Kehr is a minister at the Small City Mainstream⁴ Truthful Church. Frank Zeal, a college student from a neighboring state, attended a Mainstream Truthful Church as a child in his hometown. Six months ago, Frank began attending Pastor Kehr's Mainstream Church on a fairly regular basis.⁵ About four months ago, he approached Pastor Kehr after a Wednesday night Bible class and asked if they could talk privately. The two then met in the Pastor's study about once a week for a couple of months. During these sessions Frank complained of anxiety and depression and described various personal problems.

Pastor Kehr felt strongly that he could pull Frank out of his slump by helping him reestablish a firm relationship with God and the Church, but not all of his counseling was specifically religious.⁶ At the

09. The opinion, which was followed by a strong dissent, was subsequently decertified by the California Supreme Court, and thus may not be cited as precedent. Ranii, *Clergy Malpractice — The Prayer for Relief*, Natl. L.J., Mar. 4, 1985, at 1, 31, col. 4.

Although the case was remanded for a second trial, it was dismissed at the close of plaintiff's case. The trial judge ruled: "There is no compelling state interest for this court to interfere in the pastoral counseling activities of Grace Community Church. Such interference could result in excessive entanglement of the state in the church and religious beliefs and teachings." *Judge Dismisses Clergy Malpractice Suit on Coast*, N.Y. Times, May 17, 1985, at 11, col. 1 (city ed.) (quoting Judge J. Kalin).

3. This Note adopts the expression "spiritual counseling" as a generic term for what is often referred to in the Jewish and Christian traditions as "pastoral care," that is, counseling conducted by a personal counselor who is vested with religious authority (a "spiritual counselor") and whose counsel is actually or potentially derived from religious precepts.

4. A well-established, mainstream religious group may be somewhat favored in our courts over a novel and unconventional group. Some recent Supreme Court cases suggest that the more one can point to history and tradition in support of one's practices, the more likely those practices are to be found constitutional. *See, e.g.*, *Lynch v. Donnelly*, 465 U.S. 668 (1984) (legitimate secular purposes for crèche in city Christmas display); *Marsh v. Chambers*, 463 U.S. 783 (1983) (unique history of prayer during legislative sessions).

While new, nonconformist groups do pose some practical difficulties for the courts, *see* Part I *infra* (on distinguishing the religious from the secular) and note 101 *infra* (discussing abusive and deceptive religious practices), "cults" are in theory no less entitled to constitutional protection than other religious groups.

Sociologically, a cult is the starting point of every religion. Its organization is extremely simple. . . . [There are no] scriptures The cult is . . . nonconformist for two reasons.

First, it struggles to start a radically new religious tradition, and, second, it exists in tension and conflict with what it regards as a corrupt, troubled world.

D. BROMLEY & A. SHUPE, JR., *STRANGE GODS: THE GREAT AMERICAN CULT SCARE* 23 (1981).

5. A plaintiff who can be considered a member of a religious group and presumed cognizant of its beliefs and practices is placed at a significant disadvantage in a lawsuit against that group. *See* Part II.B.2 *infra*.

6. To respond meaningfully to the enormous range of counselee problems, spiritual counseling must be much more spontaneous and improvisational than most religious practices. Effective counseling may go on in harmony with fundamental religious doctrines without necessarily being carried out strictly in religious terms or in accordance with rigid or predetermined religious procedures. Thus, a threshold question (discussed more fully in Part I *infra*) is whether spiritual counseling ought to be characterized, for legal purposes, as religious or secular. *See* Brief of Defendant-Respondents at 12, *Nally v. Grace Community Church of the Valley*, 204 Cal. Rptr. 303 (1984) (deleted from official reporter by California Supreme Court, *see* 157 Cal. App. 3d 940

seminary, he had taken a course in pastoral counseling,⁷ in which he had learned the fundamentals of practical psychology. He made use of his psychological knowledge by pursuing several lines of questioning through which he established to his satisfaction that Frank was not suicidal, presented no danger to others, and harbored no deep-seated psychological ailments.⁸ Once this was accomplished, the principal

(1984)) ("Pastoral counseling . . . is so inextricably entwined with religious, spiritual and doctrinal matters that the judicial system is proscribed by the First Amendment from addressing it, unless fraud is alleged."); see also Ericsson, *supra* note 1, at 166-67; Marty, *supra* note 1, at 511; Comment, *supra* note 1, at 514-17. But see Bergman, *supra* note 1, at 57-59 (Spiritual counseling, though incidentally carried out by individuals who also perform purely sacred functions, is essentially secular, and merely ancillary to the counselor's religious role.).

Both extreme views are untenable. The asserted equivalence of spiritual and secular counselors is at odds with the public policy embodied in state statutes specifically exempting spiritual counselors from the licensing requirements applicable to other counselors. *E.g.*, CAL. BUS. & PROF. CODE § 4980.01 (West Supp. 1986); MICH. COMP. LAWS § 333.18214(5) (1979); N.Y. MENTAL HYG. LAW § 31.02(a)(3)(iii) (McKinney 1978). On the other hand, the significant religious aspect of spiritual counseling will not always predominate. See note 7 *infra*. The inconclusiveness of the debate on this point suggests that the sweeping claims on either side are misconceived, and that spiritual counseling is best characterized as a hybrid process, combining religious belief and practice with secular learning and techniques.

7. Such courses are common, and often rely heavily upon secular psychology and psychiatry for a vocabulary and an overview of human development and behavior. See, e.g., THE CATHOLIC UNIV. OF AMERICA, ANNOUNCEMENTS: SCHOOL OF RELIGIOUS STUDIES: 1985-86, at 134 ("Psychological and spiritual models of adult growth and development" used in course "Spiritual Direction and Pastoral Counseling: A Holistic Development Model" in the graduate Department of Theology); GRAND RAPIDS BAPTIST COLLEGE, 1984-86 CATALOG 86 ("Theories of Counseling" and "Techniques of Counseling" included in advanced psychology courses); JEWISH THEOLOGICAL SEMINARY OF AMERICA, ACADEMIC BULLETIN: 1985-86, at 96-97 ("Principles of Counseling," with a prerequisite of two psychology courses, is a required course for ordination candidates in the Rabbinical School's Department of Pastoral Psychiatry.); UNION THEOLOGICAL SEMINARY, CATALOG: 1984-85, at 125-29 (advanced courses such as "Anxiety," "Identity," "Aggression," "The dream and Christian faith," and "Fantasy and religious experience" included in program on "Psychiatry and Religion").

For those who may have missed such courses, an extensive literature exploring the relevance of psychological insights, techniques, and terminology to spiritual counseling is available. See, e.g., E. DRAPER, PSYCHIATRY AND PASTORAL CARE (1965); E. DUCKER, PSYCHOTHERAPY: A CHRISTIAN APPROACH (1964); PSYCHIATRY AND RELIGION (J. Liebman ed. 1948); A. RUNESTAM, PSYCHOANALYSIS AND CHRISTIANITY (1958); H. SIMPSON, PASTORAL CARE OF NERVOUS PEOPLE (1946).

8. If the clergy malpractice concept has a future, it lies most likely in allegations of failure to carry out this sort of inquiry into the nature and gravity of a counselee's concerns and in a consequent failure to refer cases beyond the spiritual counselor's professional competence to those better educated to handle them. A quite different understanding of clergy malpractice, which assumes that spiritual counselors might be held liable for the neglect of a *religious* duty, has been deservedly satirized: "'Seek first his kingdom and his righteousness, and all these things shall be yours as well.' What if, for once, someone would heed such advice and, in the eyes of court, 'all these things' were not added? Sue 'em." Marty, *supra* note 1, at 511.

At least one commentator has suggested that clergy malpractice should be modeled more closely upon psychiatric than upon medical malpractice. See generally Bernstein, *supra* note 1. Limiting the application of clergy malpractice to "negligent failure to refer" would align clergy malpractice more closely with psychiatric malpractice as presently understood. See Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (*en banc*) (recognizing cause of action for psychiatric malpractice founded not upon a failure to treat the patient properly but upon a failure to warn those in the community who were endangered by the patient's release). But see Zipkin v. Freeman, 436 S.W.2d 753, 762 (Mo. 1969) (citing Landau v.

focus of their conversations was the relevance of various Mainstream religious principles to Frank's problems.

On the evening of what turned out to be their last session together, Pastor Kehr, by his account, had been reading from the Bible and certain other well-accepted teachings of his faith. Frank had confessed to certain sins (which the Pastor now declines to detail),⁹ after which, at the Pastor's continued urging, Frank repented and renewed his commitment to God. Although Frank was upset when he left, the Pastor was sure that Frank's soul was on the mend.

Frank views this final session quite differently. He was, he says, visibly upset when he arrived that night. Over the course of the evening he revealed certain highly personal matters to the Pastor and was alarmed to find these matters become the subject of an impassioned assault upon his self-esteem and sensibilities. According to Frank's complaint, the Pastor — whom he had just begun to view as a trusted friend — shouted, raved, and berated him in an outrageous and malicious¹⁰ manner. Reduced to tears, Frank had blubbered for a while about he knew not what, finally rushing off into the night in what his expert witness intends to denominate a "disassociative state."¹¹

Werner, 105 Sol. J. 1008 (1961) (British case holding psychoanalyst liable for mishandling the transference phenomenon)).

Limiting clergy malpractice to cases of "negligent failure to refer" would also tend to clarify the relationship between spiritual and secular counseling and would provide a remedy when spiritual counselors neglect or aggravate their counselees' preexisting mental or emotional illnesses. Thus, the cause of action might properly be recognized on facts such as those alleged in *Nally v. Grace Community Church of the Valley*, 204 Cal. Rptr. 303 (1984) (deleted from official reporter by California Supreme Court, see 157 Cal. App. 3d 940 (1984)) (suicidal man alleged to have been discouraged from keeping appointments with psychiatrist) or in *Meroni v. Holy Spirit Assn. for the Unification of World Christianity*, 125 Misc. 2d 1061, 480 N.Y.S.2d 706 (Sup. Ct. 1984) (emotionally disturbed man alleged to have been "brainwashed," hypnotically controlled, and physically constrained), but the cause of action would not apply to cases such as *Lund v. Caple*, 100 Wash. 2d 739, 675 P.2d 226 (1984) (en banc) (husband alleging that spiritual counselor had sexual relationship with plaintiff's wife).

9. The evidentiary privilege protecting confidential communications between spiritual counselor and counselee, see *McCORMICK ON EVIDENCE* § 76.2 n.5 (E. Cleary 3d ed. 1984) ("All but three states . . . appear to recognize the privilege."), is unlikely to have much bearing on cases of this kind. The privilege protects only confidential communications, not counseling conduct, and has no effect once it is waived by the counselee. At most, this privilege is a minor impediment to factual inquiry.

10. The legal repercussions of a spiritual counselor's malicious conduct are explored at notes 102-03 *infra* and accompanying text.

11. These two accounts conflict on whether Pastor Kehr's conduct was religious and whether it was malicious, but not upon whether he acted intentionally to cause Frank's distress. To the Pastor, Frank's heightened emotion was a positive and necessary step toward spiritual renewal. A first amendment defense under these circumstances is an assertion of the right to inflict distress in the name of religion. Cf. J. HOFFMAN, *ETHICAL CONFRONTATION IN COUNSELING* 88 (1979) (Spiritual counseling's "ethical dimension cannot rest simply with the disinterested clarification of the client's values . . . but must eventuate, on occasion, in a direct and honest confrontation with the moral values of the counselor, even with the possibility of a moral rebuke."). Whether the pastor's conduct was extreme and outrageous and Frank's resultant distress severe are disputed facts of no particular relevance to the first amendment defense.

It is uncontested that two days later Frank attempted suicide, although the seriousness of his attempt remains unclear.

Pastor Kehr, who is insured against damages arising from his counseling activities through the National Council of Mainstream Truthful Churches,¹² is represented by a large law firm from the nearest metropolis. His lawyers have already filed a motion to dismiss, relying solely upon the free exercise clause of the first amendment.¹³ Although you have never heard of "clergy malpractice" and are inclined to doubt that such a cause of action should ever be recog-

12. Although lawsuits stemming from spiritual counseling have been few, *see* notes 1-2 *supra* and 15 *infra*, in recent years a great many religious organizations and individual counselors have begun purchasing "clergy malpractice insurance." *See* H. MALONY, T. NEEDHAM & S. SOUTHARD, *supra* note 1, at 123-35; Bernstein, *supra* note 1, at 56; Breecher, *supra* note 1, at 11; Comment, *supra* note 1, at 508-10. The relative paucity of suits to date may be attributable in part to the impression that religious organizations are immune from suit. Most states, however, have eliminated such immunity. *See* note 19 *infra*. Another reason may be the typically modest personal means of spiritual counselors. This factor becomes irrelevant once counselors are insured against liability for counseling activities.

One press report on the clergy malpractice insurance phenomenon observes that a "safe risk is a powerful bait" for insurance companies, and does not mention the filing of any claims. Freedman, *Malpractice Approaches the Pulpit*, N.Y. Times, June 6, 1982, at F8, col. 5 (city ed.). According to John Cleary, an attorney for Church Mutual Insurance Company,

In the past two years, only about six actions alleging wrongful counseling have been brought against ministers covered by Church Mutual, which insures 27,000 churches in 35 states The low-risk potential has made clerical-malpractice insurance a bargain; \$25 to \$35 on a policy with \$100,000 to \$300,000 liability coverage are ballpark figures for the industry

"The true value in coverage really is in paying the costs of defense," he adds, "They're very minimal risks."

Natl. L.J., July 16, 1984, at 9, 31, col. 1. Nonetheless, a growing awareness of this new "deep pocket" may be "powerful bait" for plaintiffs' attorneys, even as individuals overcome their reluctance to sue spiritual counselors. *See* Carey, *Faith and the Law*, Wall St. J., Apr. 9, 1985, at 1, col. 1 ("There was always the reluctance to sue a member of the clergy," says Lee Boothby, a Michigan attorney 'Lawyers wouldn't even take such cases. That inhibition has left completely.'"). This trend can only be accelerated by opinions such as *Nally v. Grace Community Church of the Valley*, 204 Cal. Rptr. 303 (1984) (deleted from official reporter by California Supreme Court, *see* 157 Cal. App. 3d 940 (1984)) (holding that there can be no free exercise defense to intentional infliction of emotional distress claims). *Cf.* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 80 (Supp. 1979) ("As the notion of what is religious expands . . . and as more diverse forms of religious consciousness emerge, the number of confrontations between religion and an increasingly pervasive state must grow.") (footnote omitted).

13. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"). It is the free exercise clause rather than the establishment clause that is implicated by tort actions against spiritual counselors. In Professor Tribe's terms, if the spiritual counselor's conduct at the time of the alleged tort was "arguably non-religious" it does not implicate the establishment clause. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-6, at 828 (1978); *see also* *Lynch v. Donnelly*, 465 U.S. 668, 681 (1984) (heavy reliance on existence of "legitimate secular purposes" in upholding inclusion of crèche in city Christmas display). However, if the spiritual counselor's conduct was "arguably religious," it implicates free exercise concerns. L. TRIBE, *supra*, § 14-6, at 828; *see also* *Walz v. Tax Commn.*, 397 U.S. 664, 668-69 (1970) ("The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."); Van Patten, *In the End Is the Beginning: An Inquiry into the Meaning of the Religion Clauses*, 27 ST. LOUIS U. L.J. 1, 87 (1983) ("In conflicts between free exercise and nonestablishment, the free exercise principle should be preferred").

nized,¹⁴ your judicial instincts tell you that the first amendment cannot excuse intentional torts of this nature. Yet, you are reluctant to assume that the first amendment has nothing to do with this case. How do you rule on the motion to dismiss? Under what circumstances *might* the first amendment be a defense to allegations of this nature?

Although these facts are similar to — and somewhat more plausible than — facts that have been presented with increasing frequency in actual cases, you will have little luck finding judicial precedent that provides direct and reasoned answers to these questions.¹⁵ There is authority, however, in the form of indirect precedent and general first amendment and tort principles. From this authority, clear and worka-

14. See note 8 *supra*.

15. In the *Nally* case, discussed in notes 1-2 *supra*, the court relied upon three recent cases (none concerned with spiritual counseling *per se*) in which religious organizations raised the first amendment as a defense to allegations of intentional infliction of emotional distress. *Lewis v. Holy Spirit Assn. for the Unification of World Christianity*, 589 F. Supp. 10, 12 (D. Mass. 1983) ("brainwashing and indoctrination" led to "severe psychiatric disorders"); *Turner v. Unification Church*, 473 F. Supp. 367, 371 (D.R.I. 1978), *affd. per curiam*, 602 F.2d 458 (1st Cir. 1979) (plaintiff held against her will and compelled to work long hours without pay for approximately a year, which led to "grave physical, emotional, and economic harm"); *Christofferson v. Church of Scientology of Portland*, 57 Or. App. 203, 205, 644 P.2d 577, 580 (1982), *cert. denied*, 459 U.S. 1206, 459 U.S. 1227 (1983) ("scheme to gain control of [plaintiff's] mind and to force her into a life of service to defendants and a course of retaliatory conduct after plaintiff disassociated herself from defendants"). In all three cases, the complaints were held insufficient to state a claim for intentional infliction of emotional distress; any assertions that a first amendment defense would be invalid were therefore dicta.

The *Lewis* court construed a "seriously flawed" complaint that alleged "brainwashing" as an attempt to plead intentional infliction of emotional distress, but then held the pleading insufficient without commenting on the first amendment's relevance. 589 F. Supp. at 12.

The *Turner* court "initially [found] that the free exercise clause of the first amendment does not immunize the defendants from causes of action that allege involuntary servitude or intentional tortious activity. . . . However, examination reveals, the plaintiff has failed to state any claims upon which relief may be granted." 473 F. Supp. at 371.

That religious defendants are not immune from suit need not imply that there is never a privilege for particular conduct in which they may engage. See notes 19 & 109 *infra* and accompanying text. In reviewing the *Turner* decision, the First Circuit noted, "We need not and do not pass upon the correctness of the lower court's preliminary description of the bearing of the first amendment in cases such as this." 602 F.2d at 458.

In *Christofferson*, the court held "as a matter of law that the conduct shown is not actionable as outrageous conduct, whether viewed as individual acts or as a course of conduct." 57 Or. App. at 227, 644 P.2d at 593.

Two recent cases have upheld the sufficiency of intentional infliction of emotional distress claims against religious groups. In *Van Schaick v. Church of Scientology of Cal., Inc.*, 535 F. Supp. 1125 (D. Mass. 1982), the court dismissed a claim based on counseling but allowed a claim based on harassment of plaintiff after she left the group. See note 103 *infra*. A second case, *Meroni v. Holy Spirit Assn. for the Unification of World Christianity*, 125 Misc. 2d 1061, 480 N.Y.S.2d 706 (Sup. Ct. 1984), held:

This court does not make a determination in any sense as to the underlying beliefs or faith of the Unification Church; however, for the purposes of this motion, merely indicates that the alleged recruitment policies and action of defendant as claimed by plaintiff insofar as it is alleged the church knew the decedent, Meroni, was emotionally disturbed and thereafter subjected him to a process of "brainwashing" which resulted in an emotional breakdown . . . does state a cause of action under our law.

125 Misc. 2d at 1067, 480 N.Y.S.2d at 710; see note 101 *infra*.

ble guidelines for the treatment of a first amendment defense to a claim for intentional infliction of emotional distress arising out of spiritual counseling can be pieced together. This Note reviews that authority and compiles those guidelines.

Part I explains the extent to which courts are competent to decide the threshold question of whether particular conduct is religious. Part II describes the balancing test put forward by the Supreme Court for evaluating free exercise claims, and derives criteria relevant to spiritual counseling from cases involving such claims. Part III summarizes the pertinent criteria and reviews the ways they may be employed to systematize the treatment of spiritual counseling cases.

I. THE THRESHOLD QUESTION: IS THE CONDUCT RELIGIOUS?

The threshold question whenever the free exercise clause is invoked is whether the contested conduct¹⁶ is religious.¹⁷ In the spiritual counseling context, the free exercise clause is relevant only if the defendant can show that the conduct that allegedly caused plaintiff's distress was in fact "part of the beliefs and practices"¹⁸ of the religious group.

To place the inquiry in a clearer light, it may be helpful to review what a first amendment defense does *not* entail. It does not mean that religious institutions are immune from tort liability.¹⁹ Those who in-

16. As a practical matter, it is only conduct, rather than belief, that creates free exercise problems. Until belief is manifested in conduct, it cannot possibly offend the law or any person. To speak of constitutional protection for religious belief is thus misleading at best; it is nonetheless common. See note 37 *infra*.

In a similar sense, the Supreme Court's oft-quoted distinction between conduct and speech, see *United States v. O'Brien*, 391 U.S. 367, 376 (1968), "has no real content. All communication except perhaps that of the extrasensory variety involves conduct." L. TRIBE, *supra* note 13, § 12-7 at 599.

17. See Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753, 754 (1984) ("The claimant in a standard free exercise case, urging that his religious beliefs or activities are being inhibited, needs to show that those beliefs or activities . . . are religious.").

While analytically distinct, the preliminary inquiry into whether a practice is religious is often merged with the consequential inquiry into whether an assertedly religious practice is burdened by state action. See, e.g., *United States v. Lee*, 455 U.S. 252, 256-57 (1982) ("The preliminary inquiry in determining the existence of a constitutionally required exemption is whether the payment of social security taxes and the receipt of benefits interferes with the free exercise rights of the Amish."); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) ("We turn first to the question whether the disqualification for benefits imposes any burden on the free exercise of appellant's religion."). The consequential inquiry is deferred to Part II of this Note.

18. *Christofferson v. Church of Scientology of Portland*, 57 Or. App. 203, 245, 644 P.2d 577, 604 (1982), *cert. denied*, 459 U.S. 1206, 459 U.S. 1227 (1983).

19. At one time, religious organizations were cloaked in a "charitable immunity" from tort liability, which did not rely upon any constitutional grounds. See RESTATEMENT (SECOND) OF TORTS § 895E comments b & c (1977). This immunity has been widely rejected in recent years in conformity with the *Restatement's* view that "[o]ne engaged in a charitable, educational, religious, or benevolent enterprise or activity is not for that reason immune from tort liability." *Id.* at § 895E; see also PROSSER AND KEETON ON THE LAW OF TORTS § 133 at 1070 (W. Keeton, 5th ed. 1984) ("Only two or three states in recent years have insisted on retaining the full immunity in the absence of legislation to the contrary. Even in some of these states, however, the

vite the public into their temples, synagogues, and churches, for example, are under the same duty to maintain safe premises as are other persons.²⁰ Nor may the first amendment be construed to create a blanket tort immunity for those individuals vested with religious authority. Just as members of the clergy may receive traffic tickets, they, and the institutions they serve, may be sued for torts they commit.²¹

Raising the first amendment as a defense *does* entail a claim that legitimate religious beliefs and practices are at issue in the case.²² While the first amendment forbids courts from deciding religious questions,²³ courts may make several determinations to ascertain whether a question of religion has in fact been raised by a given set of facts. First, courts may hold that a first amendment defense is inapplicable because the beliefs or practices in question are properly classed with secular philosophy,²⁴ culture,²⁵ or even aesthetics²⁶ rather than with

immunity is only formally complete, since statutes provide a method for reaching any liability insurance funds covering the charity.") (footnotes omitted) [hereinafter cited as PROSSER AND KEETON]; Caldeira, *Changing the Common Law: Effects of the Decline of Charitable Immunity*, 16 LAW & SOC. REV. 669-70 n.1 (1981-82) ("Thirty-one states, through either the legislature or the state supreme court, have removed the immunity of charitable organizations.").

20. See, e.g., *Heath v. First Baptist Church*, 341 So. 2d 265 (Fla. Dist. Ct. App.), *cert. denied*, 348 So. 2d 946 (Fla. 1977) (allowing negligence action against church for slip and fall in church building); *Fintak v. Catholic Bishop of Chicago*, 51 Ill. App. 3d 191, 366 N.E.2d 480 (1971) (holding defendant religious corporation negligent and liable for injuries suffered from slip and fall in church aisle); *Morgan v. Hartford Accident & Indem. Co.*, 402 So. 2d 640 (La. 1981) (defendant church negligent and strictly liable to plaintiff who fell down eight-inch step in church building).

21. See, e.g., *Bass v. Aetna Ins. Co.*, 370 So. 2d 511, 514 (La. 1979) (church responsible for negligence of pastor who created an unreasonable risk of injury by not clearing aisles of praying parishioners to make way for the "running or moving 'in the Spirit' [which] were common forms of religious expression in Shepard's Fold Church"); *Schoen v. Kerner*, 544 S.W.2d 43 (Mo. Ct. App. 1976) (charitable immunity defense unavailable to individual priests who failed to warn or to abate dangerous condition in rectory); cf. *Meroni v. Holy Spirit Assn. for the Unification of World Christianity*, 125 Misc. 2d 1061, 1067, 480 N.Y.S.2d 706, 710 (Sup. Ct. 1984) ("That one performs a tort or commits a crime in the furtherance of a 'religious' activity or as part of a religious belief does not confer immunity upon such alleged wrongdoer.").

22. Efforts to define "religion" in the abstract are perhaps inevitably futile. See Freeman, *The Misguided Search for the Constitutional Definition of "Religion,"* 71 GEO. L.J. 1519 (1983). The Constitution nonetheless places upon the courts construing it the burden of distinguishing the "free exercise of religion" from other phenomena.

23. *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 729 (1872) ("It is of the essence of . . . religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for."); see also *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969) (The first amendment "commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine.").

24. See *United States v. Seeger*, 380 U.S. 163, 185 (1965) (courts must decide if the individual's belief is religious for purposes of conscientious objection to military service).

25. See *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) ("A way of life, however virtuous and admirable, may not be interposed as a barrier . . . to state regulations . . . if it is based on purely secular considerations . . .").

26. See *Teterud v. Burns*, 522 F.2d 357, 359 (8th Cir. 1975) (long, braided hair is a matter of Indian religion rather than a secular matter of personal preference).

religious beliefs or practices. While these distinctions are surely legitimate, they must just as surely be resorted to cautiously to avoid defining unconventional religions out of legal existence.²⁷

Second, courts may pass judgment upon whether a professed religious belief is sincerely held.²⁸ This is perhaps the most important and most difficult finding courts must make to distinguish legitimate appeals to the free exercise clause from beliefs or conduct undeserving of constitutional protection.

Finally,²⁹ courts may determine whether the particular conduct at

27. The Supreme Court has maintained a deferential approach to this inquiry. In *United States v. Lee*, 455 U.S. 252 (1982), the Court reasoned: "It is not within 'the judicial function and judicial competence' . . . to determine whether appellee or the Government has the proper interpretation of the Amish faith We therefore accept appellee's contention that both payment and receipt of social security benefits is forbidden by the Amish faith." 455 U.S. at 257 (citation omitted).

To be "religious," beliefs need not be conventional, *see United States v. Seeger*, 380 U.S. 163, 165-66 (1965) (conscientious objector status not limited to those who believe in "God"), nor coherent and systematic, *see Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 715 (1981) (to be "religious," beliefs need not be "articulated with the clarity and precision that a more sophisticated person might employ"), nor familiar and well-established, *see Stevens v. Berger*, 428 F. Supp. 896 (E.D.N.Y. 1977). The *Stevens* court explained:

Delicacy in probing and sensitivity to permissible diversity is required, lest established creeds and dogmas be given an advantage over new and changing modes of religious belief. Neither the trappings of robes, nor temples of stone, nor a fixed liturgy, nor an extensive literature or history is required to meet the test of beliefs cognizable under the Constitution as religious.

428 F. Supp. at 900.

28. *United States v. Ballard*, 322 U.S. 78 (1944), held that the issue of the truth or falsity of defendants' religious beliefs could not be submitted to a jury at a criminal trial for mail fraud. The district court had permitted the jury to rule on whether the defendants sincerely believed the statements they made, *viz.* that they were divine messengers with extensive healing powers. Although the Supreme Court did not reach the issue of the propriety of allowing jury determination of sincerity, *Ballard* is routinely cited for the now commonplace proposition that sincerity of religious belief is a prerequisite to a first amendment claim. *See, e.g., People v. Woody*, 61 Cal. 2d 716, 726, 394 P.2d 813, 821, 40 Cal. Rptr. 69, 77 (1964) (en banc) (sincere belief in peyotism); *In re Jenison*, 267 Minn. 136, 137, 125 N.W.2d 588, 590 (1963) (contempt of court conviction reversed when contemner "convincingly demonstrated her sincerity by preferring jail to the compromise of her religious faith").

29. An additional inquiry, into the "centrality" of a given practice within a religion, was undertaken in the celebrated case of *People v. Woody*, 61 Cal. 2d 716, 722, 394 P.2d 813, 818, 40 Cal. Rptr. 69, 74 (1964) (en banc) ("To forbid the use of peyote is to remove the theological heart of Peyotism."). *Cf. Wisconsin v. Yoder*, 406 U.S. 205, 210 (1972) (The Amish "concept of life aloof from the world and its values is central to their faith."). One commentator has recognized that "the *Yoder* 'centrality' test . . . is spurious at best. The truly *central* tenets of the Amish faith concern matters of ritual and faith, not the practical problems of guiding children through adolescence." Stambor, *Manifest Destiny and American Indian Religious Freedom: Sequoyah, Badoni, and the Drowned Gods*, 10 AM. INDIAN L. REV. 59, 68 (1982) (emphasis in original).

To the extent that inquiry into centrality is an effort to determine what is genuinely religious, as opposed to merely "incidental parts of religious belief," it is "beyond the practical and institutional competence of courts." Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 YALE L.J. 350, 360 (1980) (citations omitted). To the extent that centrality indicates the weightiness of a particular burden on religion, *see Part II infra*, rather than whether the practice is religious, the inquiry may be both legitimate and necessary in some free exercise cases. This Note, however, undertakes no inquiry into the "centrality" of spiritual counseling.

issue in a case was merely secular conduct in a religious context.³⁰ Spiritual counseling is a hybrid process, combining elements of both religious practice and secular learning.³¹ As a matter of constitutional law, such activity cannot be immunized from judicial scrutiny solely by virtue of its religious context.³² Because allegations of intentional infliction of emotional distress must include particularized instances of "outrageous conduct" to which the plaintiff's distress is causally linked,³³ the judicial inquiry must focus on whether the particular counseling conduct at issue is religious. Unless the particular conduct alleged to have caused the plaintiff's distress was dictated by religious beliefs or carried out in conformity with religious practice, the conduct was not the "exercise of religion" and does not enjoy constitutional protection.

Depending on a case's facts, these simple principles may lead to several different outcomes. First, the free exercise defense may be exposed as frivolous if there is no religious conduct at issue. Second, despite prima facie legitimacy, the affirmative defense may be withdrawn by a religious group unwilling to assert that its beliefs and practices dictate or condone the infliction of severe distress by spiritual counselors.³⁴ ✓

30. See *Christofferson v. Church of Scientology of Portland*, 293 Or. App. 203, 245, 644 P.2d 577, 604 (1982), cert. denied, 459 U.S. 1206, 459 U.S. 1227 (1983) ("The question which the jury was required to decide in this case was whether, even though the Mission is a religious organization, it offered the services in question here on a wholly non-religious basis.").

31. See notes 6-7 *supra*.

32. A religious context does not immunize a dispute from judicial scrutiny any more than a religious defendant does. See notes 19-21 *supra*. A policy of strict deference to religion, see P. KURLAND, *RELIGION AND THE LAW* 112 (1962) (The Constitution's religion clauses "prohibit classification in terms of religion either to confer a benefit or to impose a burden."), would set an impossibly stringent standard. See Ellman, *Driven from the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 CALIF. L. REV. 1378, 1383 n.17 (1981) ("[E]ven neutral government actions may, in fact, impose greater burdens on some religions."). The Supreme Court has never required strict deference to religion.

At least with respect to disputes concerning religious property, the Supreme Court has approved the "neutral principles of law" approach, which requires a civil court to examine religious documents "in purely secular terms If in such a case the interpretation of the instruments . . . would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body." *Jones v. Wolf*, 443 U.S. 595, 604 (1979).

A similar approach has been adopted in disputes over church discipline. See *Serbian E. Orthodox Diocese for the U.S. and Canada v. Milivojevic*, 426 U.S. 696 (1976) (first amendment disallows court involvement in hierarchical church's defrockment of a bishop); *First Baptist Church v. Ohio*, 591 F. Supp. 676 (S.D. Ohio 1983) (courts may apply presumption that majority of members rule in a congregational church, but first amendment disallows further involvement in disciplinary matters).

33. See note 2 *supra*. But see *Ochoa v. Superior Court*, 39 Cal. 3d 159, 703 P.2d 1, 216 Cal. Rptr. 661 (1985) (en banc) (California Supreme Court for the first time allowing recovery for the negligent infliction of emotional distress without requiring that injury be a "sudden occurrence").

34. See Answer to Petition for Hearing for Plaintiff-Appellants at 3, *Nally v. Grace Community Church of the Valley*, 204 Cal. Rptr. 303 (1984) (deleted from official reporter by California Supreme Court, see 157 Cal. App. 3d 940 (1984)) ("Defendant's [sic] have not said that it is a religious privilege to exacerbate feelings of guilt or that the exacerbation was a result of religious

Yet another possibility is that a plaintiff may willingly concede, or a defendant may demonstrate, that defendant's religion sanctions the conduct alleged. In such a case, plaintiff challenges defendant's legal right to inflict distress upon plaintiff or anyone, regardless of motivation. Implicit in such claims may be plaintiff's disbelief in defendant's religion and a conviction that defendant has no right to proselytize by tortious means.

Finally, plaintiff and defendant may share the same faith, but differ on whether their religion condones the conduct that occurred in this instance. Defendant's sincere religious justification for particular distressing conduct should suffice to support a holding that the conduct was religious for the purposes of a free exercise defense. To hold otherwise would be tantamount to deciding a theological question upon which two members of the same faith differ — whether the distressing conduct has a religious justification — and this the courts may not do.³⁵

Of course, a court's decision that contested conduct is religious by no means assures that the court will ultimately protect the religious defendant from liability. This step does assure, however, that plainly religious conduct — as well as arguably religious conduct that courts are not competent to classify more definitely — receives all due consideration under the free exercise clause. That consideration is properly the primary focus of free exercise analysis. The remainder of this Note examines the essential elements of the inquiry into whether there are valuable religious freedoms burdened by a policy of permitting recovery for intentional infliction of emotional distress by spiritual coun-

conviction. Instead they have denied the exacerbation [sic] and thus raise a question of fact that does not challenge their religious beliefs.").

Of course, a defendant can deny committing the tort and still claim that a free exercise defense applies if liability is established. See FED. R. CIV. P. 8(e)(2) (allowing pleading in the alternative). The first amendment may not be invoked, however, until the defendant presents evidence that commission of this tort is "free exercise of religion" according to that defendant's religious doctrine and practice. Though technically not an admission, this showing would be inconsistent with a denial that the practice in question has been or could well be engaged in by the defendant.

A recent Oklahoma case is instructive on this point. A divorced mother was awarded \$205,000 actual and \$185,000 punitive damages for invasion of privacy and intentional infliction of emotional distress after she was denounced for the "sin of fornication" from the church pulpit. See N.Y. Times, Mar. 19, 1984, at A15, col. 1 (city ed.) (discussing *Guinn v. Collinsville Church of Christ*, No. CT-81-929 (Dist. Ct. Tulsa County, Okla. Mar. 15, 1984), *appeal docketed*, No. 62,154 (Okla. Apr. 11, 1984)); see generally Note, *When Fundamental Rights Collide: Guinn v. Collinsville Church of Christ*, 21 TULSA L.J. 157 (1985) (same). Unlike the *Nally* defendants, the defendant church elders in the Oklahoma case did not deny that their religious faith dictated their tortious conduct. After the verdict, one elder said: "This isn't going to shake our faith. We've [disciplined church members] for 2,000 years, and we'll continue to do it." *Id.* (quoting Elder Ron Witten). Another elder said: "I know why I did what I did, and I felt that after our testimony, everyone would understand. They don't understand the Scriptures and the responsibilities and obligations we have." *Id.* (quoting Elder Allen Cash).

35. See note 23 *supra*.

selors, and, if so, whether compelling state interests served by that policy outweigh the burden.

II. ELEMENTS OF THE BALANCING TEST

A finding that a spiritual counselor's allegedly tortious conduct was dictated by a sincere religious belief "is only the beginning . . . and not the end of the inquiry."³⁶ The Supreme Court has consistently held that while matters of religious doctrine and belief are absolutely protected by the first amendment, religious conduct is not.³⁷ In recent cases, the Court has allowed the state to impose burdens on free exercise interests when essential to further "compelling state interests."³⁸ Constraints on religious conduct that impinges upon public convenience³⁹ or impedes the efficiency of large governmental programs have been held constitutional.⁴⁰ Although even criminal conduct may be

36. *United States v. Lee*, 455 U.S. 252, 257 (1982).

37. *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940) (The Constitution's religion clause "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."); *see also* *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) ("The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order."); *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961) ("[T]he freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions."). *But see* *McDaniel v. Paty*, 435 U.S. 618, 631 n.2 (1977) (Brennan, J., concurring) ("[F]or purposes of defining the protection afforded by the Free Exercise Clause a sharp distinction cannot be made between religious belief and religiously motivated action . . ."); *L. TRIBE*, *supra* note 13, §14-8 at 838 n.13 ("It is somewhat peculiar . . . that the distinction between belief and action would arise at all in the free exercise context, for the guarantee refers explicitly to the *exercise* of religion and would thus seem to extend by its own terms beyond thought and talk.") (emphasis in original).

38. *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) ("[A]ny incidental burden on the free exercise of . . . religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . .'"); *see also* *United States v. Lee*, 455 U.S. 252, 257-58 (1982) ("The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest."); *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (Where state action "interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.").

39. *See, e.g.*, *Heffron v. International Socy. for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) (upholding regulation of proselytizing and religious fundraising that impedes free movement of large crowds at state fair).

40. *See, e.g.*, *United States v. Lee*, 455 U.S. 252 (1982) (denying religious exemption from participation in social security system); *see also* *Bowen v. Roy*, 106 S. Ct. 2147 (1986) (denying religious exemption from disclosing social security number to receive welfare benefits); *Penner v. King*, 695 S.W.2d 887 (Mo. 1985) (en banc) (denying religious exemption from disclosing social security number to receive driver's license); *Mullaney v. Woods*, 97 Cal. App. 3d 710, 158 Cal. Rptr. 902 (1979) (denying religious exemption from disclosing social security number to receive welfare benefits); *cf.* *Callahan v. Woods*, 736 F.2d 1269 (9th Cir. 1984) (remanding for finding of actual cost of accommodation). *But see* *Quaring v. Peterson*, 728 F.2d 1121 (8th Cir. 1984), *affd. per curiam without opinion*, 105 S. Ct. 3492 (1985) (granting religious exemption from supplying photograph for driver's license); *Stevens v. Berger*, 428 F. Supp. 896 (E.D.N.Y. 1977) (granting religious exemption from disclosing social security number to receive welfare benefits).

privileged to protect a significant free exercise interest,⁴¹ "[n]ot all burdens on religion are unconstitutional."⁴²

Making spiritual counselors answerable in secular courts for practices dictated by their religion undoubtedly "interferes with [their] free exercise rights."⁴³ This burden, however, is constitutional if the state's interest in compensating counselees for distress imposed by spiritual counselors is so compelling as to justify the burdens thereby imposed upon the process, practitioners, and beneficiaries of spiritual counseling.

A. *The Burden on Free Exercise*

Assuming that no religious conduct can enjoy absolute protection from legal scrutiny or legal penalties, and that the conduct at issue has been found to be religious, how grave a constitutional matter is it to impose tort liability upon spiritual counselors for the intentional infliction of emotional distress?

Allowing adjudication of such claims places a direct burden on religious freedom by forcing spiritual counselors and religious organizations to defend their religious practices in court. Discomfort or inconvenience occasioned in this manner, however, will not intrude in any serious way upon a spiritual counselor's work. Even allowing recovery against a religious defendant is not in itself a heavy burden upon free exercise; the rare counselor who is neither insured nor backed by a large denominational organization is unlikely to have enough personal wealth to be worth suing.⁴⁴

However, allowing sincere religious counsel to be questioned and penalized in court creates two more serious burdens. In a direct way, such intrusion undermines religious authority and places the court in the position of overseeing and regulating religious practices.⁴⁵ Less directly, publicity attending tort suits founded on counseling conduct tends to distort the counseling process itself.⁴⁶

41. *People v. Woody*, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (en banc) (members of Native American Church may use peyote in well-established religious ceremony). *But see* *United States v. Spears*, 443 F.2d 895 (5th Cir. 1971), *cert. denied*, 404 U.S. 1020 (1972) (defendant failed to establish a religious justification for the use of illegal drugs); *Leary v. United States*, 383 F.2d 851 (5th Cir. 1967), *revd. on other grounds*, 395 U.S. 6 (1969) (same). For a discussion of *Leary*, see Comment, *Free Exercise: Religion Goes to "Pot,"* 56 CALIF. L. REV. 100 (1968).

42. *United States v. Lee*, 455 U.S. 252, 257 (1982).

43. *United States v. Lee*, 455 U.S. 252, 257 (1982).

44. See note 12 *supra*.

45. Cf. Brief of Defendant-Respondents at 22, *Nally v. Grace Community Church of the Valley*, 204 Cal. Rptr. 303 (1984) (deleted from official reporter by California Supreme Court, see 157 Cal. App. 3d 940 (1984)) ("Judicial application of a standard of care to a pastor's counseling ministry would . . . restrict the pastor's calling by inhibiting his communication of religious truths, thereby restricting both his and the counselee's religious freedom.").

46. Cf. *Poll Finds Doctors Fear Being Sued, Cut Services*, *Detroit Free Press*, Aug. 19, 1985, at A3, col. 6 ("66 percent of family physicians who deliver babies either have stopped or plan to reduce that part of their practice, mainly because of the malpractice question").

The latter, indirect, burden raises the more significant constitutional concern. The rapidity with which clergy malpractice insurance has taken hold is evidence of the depth of concern in the clerical community over the (insubstantial, to date) threat posed to it by the civil courts.⁴⁷ Those whose most valuable capital is their reputation for trustworthiness, good sense, and high moral character may be, at times, too easily swayed by a desire to preserve that reputation.⁴⁸ The prospect of lawsuits brought by disaffected counselees will inevitably cause a certain amount of "self-censorship"⁴⁹ among counselors, who may avoid moral confrontation through a retreat to the kind of comfortable "half-truths" that, in their view,⁵⁰ are already available from secular counselors.

Freely allowing lawsuits against spiritual counselors will have the incidental but inevitable effect of discouraging the transmission of pragmatic religious doctrine to those who seek help coping with the normal stresses and losses of life. While there is no absolute constitutional right of spiritual counselors to be free of this burden, the burden is a weighty one. At the least, this "chilling effect" is as serious as would be a comparable effect upon preaching, proselytizing, or other such religious conduct.⁵¹

B. *The Counterweight — Understanding the State's Interest*

By providing a cause of action to vindicate the individual's interest in remaining free of severe emotional distress, the state acknowledges a significant interest in intervening on behalf of counselees who have experienced distress at the hands of spiritual counselors. In hearing these claims, however, the courts cannot ignore the burden that disallowing any first amendment defense would place on the free exercise rights of spiritual counselors.

47. See note 12 *supra*.

48. According to "a recent survey of lay and clergy opinions concerning the ministry . . . pastors are regarded above all else as persons who serve without regard for acclaim. As for pastoral counselors, they are described more in terms of personal characteristics than skills. Counselors are to be compassionate, humble, understanding, and honest." H. MALONY, T. NEEDHAM & S. SOUTHARD, *supra* note 1, at 66.

49. *New York Times v. Sullivan*, 376 U.S. 254, 279 (1964).

50. W. OATES, PASTORAL COUNSELING 27 (1974) ("The pastoral counselor insists upon the whole counsel of God as over against half-truths. . . . insisting on acceptance of the ambiguity of human suffering . . .") (emphasis in original).

51. See *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) ("[T]he right to the free exercise of religion unquestionably encompasses the right to preach, proselyte, and perform other similar religious functions."). Whether spiritual counseling is such a "similar religious function" is an open question. See Petition for Hearing of Defendants-Respondents at 38, *Nally v. Grace Community Church of the Valley*, 204 Cal. Rptr. 303 (1984) (deleted from official reporter by California Supreme Court, see 157 Cal. App. 3d 940 (1984)) (arguing that counseling is essentially a "private sermon," just as a sermon is "mass counseling," and citing *Fowler v. Rhode Island*, 345 U.S. 67 (1953) (striking down law prohibiting sermons in a public park on first amendment grounds)).

Part I of this Note suggested that there are two quite distinct ways in which a plaintiff might respond to a defendant spiritual counselor's legitimate recourse to the free exercise clause.⁵² One response, which one may more easily imagine being made by a plaintiff who does not share defendant's religious faith, is that a religious motivation does not justify the intentional infliction of emotional distress. The other response, which may only properly be attributed to one who shares defendant's faith, is that nothing *in the shared faith* justifies defendant's tortious conduct. The first response raises a legal question as to the limits of the free exercise clause. The second raises primarily, if not solely, a religious issue concerning the true meaning or implications of the teachings of a particular faith.

Ideally, the issue of whether the state's interest in involving itself in the dispute is compelling should be responsive to whether the core dispute is in fact a legal one — as to which the court's competence is unquestioned — or a religious one — as to which it has no competence. In the former case, a straightforward reading of the free exercise clause would seem to forbid efforts to further the goals of one's faith by tortious assaults upon nonbelievers.⁵³ In the latter case, the establishment clause and the free exercise clause both appear to require courts to defer to religious authority on religious questions. Thus, one might argue that, in a contest of religion against nonreligion (or a competing religion), the state's interest in protecting individuals is compelling; in the intrasectarian contest, it is not.

There are, however, difficulties with this simple analysis. First, it seems to require the plaintiff to make out the defense by conceding the truth of defendant's religion. Second, courts are unlikely to defer as readily or as completely to religious authority when tortious invasions of individual rights have occurred as they have in disputes involving church property or discipline.⁵⁴

In the following subsections, this Note argues that courts faced with free exercise claims have, often tacitly, relied heavily upon whether the person disadvantaged by religious conduct is a member of the religious group in question. As a result, the difficult problem of deference to religious authority arises only when a plaintiff was a group member at the time of the alleged tort.

1. *The Nonmember Plaintiff*

Case law and common sense suggest that intentional torts committed in the name of religion against those who are not members of the

52. See text at note 35 *supra*.

53. See section II.B.1 *infra*.

54. The courts only intervene in disputes over church property and discipline to the extent that they may do so without resolving underlying disputes over religious doctrine. See notes 23 & 32 *supra*.

offending religious group cannot be protected by the free exercise clause. In general terms, "[p]erhaps the most obvious limit [on religious action] is that acts cannot be tolerated that involve significant harm to nonconsenting third parties."⁵⁵

In one sense, toleration of such conduct would be tantamount to an establishment of religion because it would encourage groups inclined toward violent proselytization to aggrandize themselves by preying upon the weak.⁵⁶ In a more immediate sense, the free exercise clause cannot permit courts to protect conduct that itself infringes the free exercise rights of others by employing coercion to change religious beliefs.⁵⁷ A free exercise interest in freedom from coercion reinforced by an establishment clause requirement of neutrality is at work in the Supreme Court's intolerance of prayer in public schools,⁵⁸ and of state laws prohibiting the teaching of evolution.⁵⁹ This same dynamic mandates that the courts protect nonmember tort victims.

Furthermore, recent cases have shown that the extent of harm to third parties sufficient to override a free exercise interest falls far short of the harm necessary to state a cause of action for intentional infliction of emotional distress. In some cases, a mere inconveniencing of a portion of the general public has sufficed to justify curtailment of religious conduct.⁶⁰

Therefore, a first amendment defense to intentional tort claims should always fail when asserted against a plaintiff who was not a group member at the time of the tort. The same rule may be derived from the courts' treatment of cases in which tortious conduct was directed at ex-members of the offending group. While the member/non-member criterion has not been expressly relied upon in these cases, courts consistently hold that aggression against ex-members is unprotected by the free exercise clause.⁶¹ On the other hand, judicial reluc-

55. S. Pepper, Reynolds, Yoder, and *Beyond: Alternatives for the Free Exercise Clause*, 1981 UTAH L. REV. 309, 370-71.

56. See *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947) (establishment clause forbids laws that "prefer one religion over another").

57. *Cf. Board of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

58. See *Engel v. Vitale*, 370 U.S. 421, 431 (1962) ("When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.").

59. See *Epperson v. Arkansas*, 393 U.S. 97 (1968).

60. See *Heffron v. International Socy. for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) (upholding regulation of proselytizing and religious fundraising that impedes free movement of large crowds at state fair).

61. See, e.g., *Van Schaik v. Church of Scientology of Cal., Inc.*, 535 F. Supp. 1125 (D. Mass. 1982) (allowing intentional infliction of emotional distress claim for harassment of ex-member); *Bear v. Reformed Mennonite Church*, 462 Pa. 330, 341 A.2d 105 (1975) (allowing claim for interference with business relations and alienation of affections for shunning of excommunicant).

tance to become involved in internal religious disciplinary matters suggests that a different rule should apply to member-plaintiff cases.⁶²

2. *The Member Plaintiff*

As the previous subsection shows, the nonmember-plaintiff case is easily resolved — the free exercise defense should be rejected. A more difficult problem is raised by the much more common circumstance of the plaintiff who was a member of the spiritual counselor's religious group at the time of the allegedly tortious conduct. While nonmember plaintiffs can paint vivid images of violent proselytization or crusading religious retribution, a member plaintiff presumptively professed the same beliefs and adhered to the same practices as are now put forward in defense of the spiritual counselor's conduct. The member plaintiff presents a picture less of naked aggression than of acquiescence, followed by second thoughts and theological disagreement. This is a much less compelling case for governmental intervention than the nonmember's, and a much more appealing case for recognizing a free exercise defense.

a. *Free exercise precedent: the Supreme Court's neutrality cases.* While it is intuitively plausible that group membership should play a part in free exercise analysis, the cases provide little guidance on how — or how much — membership should be taken into account. The Supreme Court has repeatedly addressed the assertion of religious authority over members of religious groups and the proper posture of the civil courts when a group member subsequently seeks to challenge such assertions of authority in court.⁶³ These cases hold that the civil courts may apply an otherwise legal provision regardless of religious context, so long as this application does not require the courts to construe religious doctrine.⁶⁴

However, a court cannot remedy religiously motivated intentional infliction of emotional distress without, in effect, taking sides in a religious dispute.⁶⁵ The principles of neutrality developed by the Supreme Court are, therefore, of no use here. Only if the conduct in question had been held not to be religious could the court avoid inquiry into religious doctrine while awarding damages against a spiritual counselor for counseling conduct.⁶⁶

62. See note 32 *supra*. Cf. *O'Moore v. Driscoll*, 135 Cal. App. 770, 776, 28 P.2d 438, 441 (1933) (excessive church discipline "had no tendency to spread the gospel" and was thus beyond the scope of church authority).

63. See note 32 *supra*.

64. E.g., *Jones v. Wolf*, 443 U.S. 595, 602 (1979) (" 'neutral principles of law' approach is consistent with . . . constitutional principles"); *Maryland & Va. Churches of God v. Sharpsburg Church*, 396 U.S. 367, 368 (1970) (*per curiam*) (construction of church charters and constitution involves "no inquiry into religious doctrine").

65. See text at notes 52-54 *supra*.

66. See Part I *supra*.

Furthermore, spiritual counseling presents difficulties that the Supreme Court has not addressed. Courts have struggled toward neutral methods of dispute resolution when legal documents, such as trust instruments and corporate charters, were available to be construed.⁶⁷ The same courts may throw up their hands when religious authority is exercised through the relatively informal, *ad hoc* application of doctrine or adaptation of religious practice.⁶⁸ Moreover, the right to be free of severe emotional distress is of a different order from the rights of property and contract at stake in the "neutrality" decisions. Thus, these cases provide no guidance on whether the state's interest in intervening in spiritual counseling disputes is compelling.

b. *Wisconsin v. Yoder: deference when neutrality is impossible.* The Supreme Court's opinion in the leading free exercise case of *Wisconsin v. Yoder*⁶⁹ is not as clear and consistent as one might wish. Nonetheless, *Yoder* may provide guidance as to the effect that group membership should have on free exercise analysis. Specifically, one implicit holding is that even an otherwise compelling state interest in intervening on behalf of an individual who, in the state's view, has been seriously harmed by a religious group must sometimes give way to the group's free exercise interest when the individual is a member of that group.

In *Yoder*, the Supreme Court upheld a free exercise exemption to a generally valid and unquestionably important law. Defendants, in obedience to the rules of their religious community, failed to send their children to high school and were fined five dollars each for violating Wisconsin's compulsory school attendance law, which required parents to "cause" their children to attend public or private school until age sixteen.⁷⁰ Six of the seven participating justices⁷¹ refused to intervene in the religious group's exercise of authority (through the parents) over the individual group members who were, in the state's view, seriously harmed by their removal from school. This holding thus holds out some hope for spiritual counselors whose counseling is questioned in court by member counselees.

The issue posed in *Yoder* was whether the "state's interest in universal compulsory education"⁷² is overcome by the Amish free exercise interest. How strong the state interest is perceived to be depends upon how heavily one weighs the interest of the individual Amish children and upon who is permitted to characterize the harm that may befall them if they are removed from school.

67. See notes 23, 32, 64 *supra* and cases cited therein.

68. See note 6 *supra*.

69. 406 U.S. 205 (1972).

70. 406 U.S. at 207-08 n.2.

71. Powell and Rehnquist, JJ., did not participate.

72. 406 U.S. at 215.

Justice Douglas, in his dissent, viewed the state interest as essentially identical to that of the Amish children, some of whom may have preferred to remain in school.⁷³ The Court viewed the children's interests as legally irrelevant, except insofar as they were subsumed in those of their parents and the rest of the Amish community. The state of Wisconsin characterized the children's leaving school as seriously harmful; the Amish community characterized it as beneficial. The Court accepted the Amish characterization; accordingly it viewed the state interest in this case as minimal⁷⁴ and easily outweighed by the strong countervailing free exercise interest.⁷⁵ By characterizing the interests at stake in this way, the Court implicitly acknowledged the def-

73. Justice Douglas contended that the children should have been granted standing in the case. He worried that if a child is "harnessed to the Amish way of life by those in authority over him and if his education is truncated, his entire life may be stunted and deformed." 406 U.S. at 245-46 (Douglas, J., dissenting). Douglas noted that only one of the children of the defendant-respondents "has in fact testified that her own religious views are opposed to high-school education." 406 U.S. at 243 (Douglas, J., dissenting). The Court responded that the child's wishes were "not an issue in the case." 406 U.S. at 231.

Whether the child's expressed choice was an issue or not, the Court did feel the need to address whether the children were harmed. See note 74 *infra*. In rejecting Douglas' argument that the children's interests were distinct from those of their parents, the Court effectively chose to subsume the children's free exercise claim in that of their parents. This approach is especially striking because, while the parents' standing stemmed from their subjection to a strictly nominal five dollar fine, the statute violated was designed to protect the lives and minds of their children. In the state's view, it was the children's interests that may have been permanently harmed by granting an exemption. Cf. Knudson, *The Education of the Amish Child*, 62 CALIF. L. REV. 1506, 1516 (1974) ("The [*Yoder*] majority's reliance on technical standing grounds to avoid assessment of the possible competing interests of parent, child, and state appears more expedient than persuasive.").

74. The Court in *Yoder* adopted two separate approaches in holding that the state interest in universal education (and its associated interest in preventing exploitive child labor) was not compelling. First, any harm done was *de minimis*, because Amish children only lost the marginal benefit of a year or two of high school. 406 U.S. at 222-27. This argument presumes that 16-year-old Amish children would always choose to leave school, in accordance with religious custom. The Court considered the concern that some children would later leave the Amish community, much disadvantaged by their incomplete education, "highly speculative." 406 U.S. at 224. Although the Amish defendants won in the lower court, the Supreme Court chose to characterize the harm done by using a hypothesis that ensures a minimally troubling outcome. The Court also concluded, without discussion, that Amish children are not seriously exploited by being put to work on the family farm. 406 U.S. at 229.

The Court's alternative approach was to contend that the children were not harmed at all because the practical education Amish teenagers would receive at home could be justified "in terms of precisely those overall interests that the State advances in support of its program of compulsory high school education." 406 U.S. at 235. See text at notes 78-85 *infra*.

75. As if seeking to lessen the impact of its holding, the Court emphasized that "probably few other religious groups or sects could make" the kind of "convincing showing" made by the Amish defendants. 406 U.S. at 235-36. The showing made was in fact not as extraordinary as the Court implied and may be conveyed simply in the terms set forth in Parts I and II.A of this Note. The pervasiveness of the Amish objections to high school education established that the objections were in fact religious rather than merely cultural or philosophical. The long history of the Amish religious community tends to corroborate the sincerity of the parents' beliefs. The showing that public high schools tend to undermine efforts to instill an Amish world view suggests that the burden on religion imposed by the compulsory education requirement is a heavy one. There is no reason another religious group should not be able to make the same kind of showing. But see note 85 *infra*.

erence due religious authority when determining the interests of acquiescent group members.

In two ways, the majority opinion seems expressly to belie any such implication of deference to religious authority, but, in each case, the appearance is deceptive. First, by emphasizing that the group members here are minors, the Court suggested that the authority to which it deferred was parental, not religious. However, the Court characterized the authority as "parental control over the *religious* upbringing and education of their minor children."⁷⁶ Thus, it was essentially the religious group's authority, exercised most immediately by the parents, which was at stake.⁷⁷ Furthermore, parental control was exercised in *Yoder* to terminate formal education permanently at a time when, as a practical matter (as well as under Wisconsin law) the children were not competent to take such a momentous step on their own. In effect, the children's opportunity to make a mature choice in the matter of their own education — an opportunity the state reserved for them by statute — was preempted by the Court's deference to religious custom.

A second way in which the Court disguised its deference to religious authority was by justifying "[t]he Amish alternative to formal secondary school education"⁷⁸ in secular terms. That education, the Court argued, equips Amish children well to be not only self-reliant members of a community but also good citizens in the tradition of Thomas Jefferson's "ideal of the 'sturdy yeoman.'"⁷⁹ Neither of these points, however, is responsive to the state's concern that those who do not receive a standard education, or one "substantially equivalent to instruction given to children of like ages in the public or private schools where such children reside,"⁸⁰ have been deprived of a vital benefit.

In making its secular arguments, the Court essentially recast defendants' free exercise arguments in secular terms, thereby assuming its conclusion that religious values should override the secular goal of producing an educated citizenry. The goal of Amish education, the Court observed, is "the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith."⁸¹ Not surprisingly, the Court considered the method of Amish education an "ideal"⁸² way of achieving this goal. Similarly, Jefferson's

76. 406 U.S. at 231 (emphasis added).

77. *But see In re Edward C.*, 126 Cal. App. 3d 193, 178 Cal. Rptr. 694 (1981) (father who claimed his violent physical "discipline" of his children was directed by God).

78. 406 U.S. at 225.

79. 406 U.S. at 225.

80. 406 U.S. at 208 n.2 (quoting WIS. STAT. § 118.15(4) (1969)).

81. 406 U.S. at 222.

82. 406 U.S. at 223.

anachronistic "sturdy yeoman," whose "basic education in the 'three R's' would sufficiently meet the interests of the state,"⁸³ is hardly a model of the citizen who can "participate effectively and intelligently in our democratic process,"⁸⁴ except insofar as his singular "virtues" and religiously motivated separateness make him a good neighbor. Thus, the state's interest in educating children in its chosen way was outweighed by the Amish interest — not because the Amish method of education was just as effective in achieving the state's goals, but because the Amish method was much more effective in achieving Amish goals. This bootstrapping argument suggests that what the Court actually intended to do was to give additional independent value to the interest of preserving Amish religious values.⁸⁵

Stripped of these efforts to find secular cognates for religious values, *Yoder* sets out a free exercise analysis that accords sufficient deference to religious authority over group members to override what would otherwise be a compelling state interest. *Yoder* implicitly holds that if an individual (1) has suffered a prima facie legal harm, (2) as a result of religious practices, (3) is a member of the offending religious group, and (4) has not, in a timely manner, challenged the group's authority or questioned the group's characterization of the prima facie harm as spiritually beneficial, then the courts should discount any asserted state interest in intervening on behalf of that individual.⁸⁶

It by no means follows necessarily that the state interest will always be subservient. *Yoder* suggests, however, that the state's interest in intruding upon spiritual counseling to protect a counselee who alleges intentional infliction of emotional distress may be much less compelling when the counselee is (as will typically be the case) a group member at the time of the allegedly tortious conduct.

c. *Defining membership.* It is implicit in *Yoder* and other free exercise cases that courts should be prepared to defer somewhat to the self-governance of religious organizations even if it means withholding

83. 406 U.S. at 226 n.14.

84. 406 U.S. at 225.

85. It is fair to ask whether *Yoder* indicates principally the Court's zeal to foster the free exercise of religion or its predilection for the quaint customs of the Amish. A recent case sought to raise this very issue with the Court. *Johnson v. Charles City Community Schools Bd. of Educ.*, 368 N.W.2d 74, 84 (Iowa), cert. denied, 106 S. Ct. 594 (1985) (mem.) (holding that Iowa's statutory "Amish exception" to the compulsory school attendance law does not exempt the Calvary Baptist Christian Academy from state regulation, in part because Baptist children's "educational needs are plainly not as circumscribed as those of Amish children"). But cf. *United States v. Lee*, 455 U.S. 252 (1982) (denying Amish exemption from participation in social security system).

86. Thus characterized, it is easy to see why Justice Douglas claimed *Yoder* "opens the way to give organized religion a broader base than it has ever enjoyed; and . . . even promises that in time *Reynolds* will be overruled." 406 U.S. at 247 (Douglas, J., dissenting). *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (denying the Mormons an exemption from the prohibition of polygamy), blithely asserted Congress' right to halt any actions, regardless of their religious nature, "which were in violation of social duties or subversive of good order."

from group members legal protection that would be made available to nonmembers. If such deference is to be accorded, membership must be defined in a way that provides a reasoned basis for the differential treatment of members and nonmembers.

One rationale for the distinction between members and nonmembers appeared over one hundred years ago in the Supreme Court case of *Watson v. Jones*:

All who unite themselves to [voluntary religious organizations] do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if anyone aggrieved by one of their decisions could appeal to the secular courts and have them reversed.⁸⁷

Implied consent to religious governance was not initially conceived as a constitutional theory.⁸⁸ However, the concern with the “subversion” of religious organizations derives some of its urgency from the constitutional stature of religious groups.

In tort law, consent, defined as a “willingness in fact for conduct to occur,”⁸⁹ completely cuts off a defendant’s liability. Consent implied by words or conduct creates just as valid a defense as consent based upon an actual and express willingness for conduct to occur.⁹⁰ It is fairly easy to see how consent — express or implied — can be applied to participation in religious rituals or ceremonies that are well known to group members, such as worship, confession, discipline for moral failings, or spiritual healing. There is express consent if the ceremony itself involves prior explanation and a declaration of a desire to take part. There is implied consent if the participants take part voluntarily after having learned the purpose and procedures of the ceremony. Foreknowledge may come through formal instruction or through having witnessed the ceremony on previous occasions.

A typical spiritual counseling case, however, will not follow either of these patterns. In order for consent to create a complete defense, it must appear that the plaintiff’s consent was “to the particular con-

87. 80 U.S. (13 Wall.) 679, 729 (1872); see also *Rosicrucian Fellowship v. Rosicrucian Fellowship Non-Sectarian Church*, 39 Cal. 2d 121, 131-32, 245 P.2d 481, 487-88 (1952) (en banc) cert. denied, 345 U.S. 938 (1953) (stating that those who join a church agree to submit to its rules); C. ZOLLMAN, *AMERICAN CHURCH LAW* § 328 (1933) (same).

88. *Watson* has been cited repeatedly as stating constitutional principles even though the Court did not view them as constitutional at the time. See, e.g., *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 710-11 (1976); *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 445-46 (1969); *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 115-16 (1952).

89. *RESTATEMENT (SECOND) OF TORTS* § 892(1) (1977).

90. See *RESTATEMENT (SECOND) OF TORTS* § 892(2) (1977) (“If words or conduct are reasonably understood by another to be intended as consent, they constitute apparent consent and are as effective as consent in fact.”); see also *O’Brien v. Cunard Steamship Co.*, 154 Mass. 272, 28 N.E. 266 (1891) (holding plaintiff to have consented to vaccination when she stood in line and presented her arm to the doctor).

duct, or to substantially the same conduct"⁹¹ as caused the alleged injury. Some counseling processes may involve highly standardized, or even ritualistic, procedures, so that informed participation would constitute consent to any possibly tortious aspects of the process.⁹² Spiritual counseling, however, is more commonly an open-ended, interactive process.⁹³ While the procedures to be followed might easily be described in general terms beforehand, specific conduct within that general framework may be relatively spontaneous. Under these circumstances, consent cannot be founded upon foreknowledge of particular conduct, and no tort law defense of consent can be made out.

The Court in *Watson v. Jones*, however, used the concept of "implied consent" not in the strict sense employed in tort law,⁹⁴ but more metaphorically⁹⁵ to describe something like a jurisdictional conflict between the civil courts and religious authority.⁹⁶ The act of taking part in the religious life of a particular group does not imply consent to *any* conduct that may subsequently transpire within that group. Instead, participation suggests that the individual is willing to submit to religious authority to the extent that the chosen group pretends to authority over any given aspect of life.⁹⁷ In other words, when an individual

91. RESTATEMENT (SECOND) OF TORTS § 892A(2)(b) (1977).

92. One such process, which has formed the basis of allegations of intentional infliction of emotional distress, is the Scientologists' technique called "auditing":

The auditor asks questions which locate "Buttons" — a conscious or subconscious indication or response. To help locate "buttons", the auditor uses a Hubbard E-meter, a device which measures skin voltage. During auditing, the auditor pursues lines of questioning on highly personal subjects ("rundowns") to locate the subject's "buttons". The auditor then makes a written record of the disclosures made.

Van Schaick v. Church of Scientology of Cal., Inc., 535 F. Supp. 1125, 1131 n.3 (D. Mass. 1982). Anyone who had once experienced this process, or even heard it described, would appear to have consented to emotional injury by participating, as the process plainly relies upon a simple dynamic of seeking to cause emotional discomfort in the auditee.

93. See notes 6-7 *supra*.

94. *Watson* was not a tort case but a property dispute between rival factions of a Presbyterian Church. 80 U.S. (13 Wall.) at 681.

95. In *Watson*, the phrase "implied consent" was modified by the words "to this government." The Court's view of the religious governance to which consent was implied was, predictably, a formalistic one. The Court envisioned "tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association." 80 U.S. (13 Wall.) at 729. As a practical matter, religious authority is not always exercised in such a formalistic manner. See note 6 *supra*.

96. *Watson* noted that civil courts should not intervene

where a subject-matter of dispute, strictly and purely ecclesiastical in its character, — a matter over which the civil courts exercise no jurisdiction, — a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them, — becomes the subject of its action.

80 U.S. (13 Wall.) at 733; cf. Note, *supra* note 29 (discussing free exercise analysis as a conflict of laws problem).

97. In this respect, members of religious groups are analogous to family members, who arguably "have impliedly consented to most emotional injury by another family member." So long as this implied consent is not exceeded, a level of "emotional 'rough-housing'" that would be

has taken part long enough to understand the beliefs and practices of a group, continued participation gives an appearance of consent to conduct that is consistent with those practices or plainly dictated by those beliefs.⁹⁸

If the courts protect cognizant group members from the religious authority of their own organization, they not only undermine the constitutionally protected authority of the group, but also indirectly infringe the free exercise rights of those group members. A plaintiff cannot undo the implication of consent to defendant's religious conduct that exists at the time of that conduct by arguing, after the fact, that defendant's conduct was unjustifiable. While not as reliable as actual consent to particular conduct in indicating the reasonableness of defendant's facially tortious act, implied consent to religious governance makes the state's interest in intervening to protect group members significantly less compelling than it would otherwise be.

d. *Exceptions to the member criterion.* There is little precedent for the proposition that a free exercise defense to allegations of tortious conduct should be effective if, at the time of the conduct, the plaintiff was a member of the group whose beliefs and practices the defendant is raising as a defense.⁹⁹ However, when courts have held the defense unavailing even though plaintiff and defendant were mem-

intolerable from strangers is routinely tolerated. Cole, *Intentional Infliction of Emotional Distress Among Family Members*, 61 DEN. L.J. 553, 569 (1984). Tolerating such injury is in keeping with the view that "in the interest not only of freedom of speech but also of avoidance of other more dangerous conduct, it is still very desirable that some safety valve be left through which irascible tempers may blow off relatively harmless steam." PROSSER AND KEETON, *supra* note 19, § 12 at 59.

The limitations of this analogy to the family are suggested by the House of Judah case, which involved a self-proclaimed prophet who was deemed to be the "guardian" of his religious community's 66 children for the purposes of a juvenile court hearing into the severe disciplinary practices of the group. Those practices led to the death of one child. See Note, House of Judah: *The Problem of Child Abuse and Neglect in Communes and Cults*, 18 U. MICH. J.L. REF. 1089 (1985).

98. Cf. *O'Moore v. Driscoll*, 135 Cal. App. 770, 776, 28 P.2d 438, 441 (1933) (Excessive church discipline "had no tendency to spread the gospel" and was thus beyond the scope of church authority.). Before consent to spiritual counseling may be implied, a counselee should not only be aware of the theological premises of the counseling but should also be able to perceive that a particular application of them is being made. Cf. *Shulman v. Lerner*, 2 Mich. App. 705, 708, 141 N.W.2d 348, 349 (1966) (no consent to operation, even though patient, a dentist, could be presumed to understand the import of preparatory procedures, because patient expected non-surgical treatment and "could not see or feel the surgery as it progressed.").

99. Two recent trial court actions dismissing cases involving internal religious disputes are suggestive. In one case, an infant died when Christian Scientist practitioners hired by his parents failed to heal him. Though the father chose "alternative health care" rather than a medical doctor (who, concededly, would probably have effected a cure), he sought to have the standard of care applicable to the doctor applied to the practitioners. The father explained, "We were not going to church because we were loyal Christian Scientists We were going for the healing of our son." Detroit News, Sept. 8, 1983, at A1, A6, col. 1. Although there was undeniable and serious harm to an individual, the case was dismissed on the strength of the church's free exercise defense. *Id.*

In the *Nally* case, discussed in notes 1-2 *supra*, the counselee was a member; the case was dismissed twice on first amendment grounds. See *Judge Dismisses Clergy Malpractice Suit on*

bers of the same group, one or the other of two circumstances has generally existed: either the plaintiff was not competent to give full, reasoned assent to the group's beliefs and practices or malice was imputed to the defendant.

Youth or mental instability may render a plaintiff incompetent to assent to religious practices,¹⁰⁰ but so may a defendant's coercive or deceptive recruitment tactics.¹⁰¹ To the extent that a membership criterion relies upon a theory of implied consent to religious governance, it should be clear why practices that overreach proselytes and negate their freedom to adopt or reject religious beliefs would forfeit any

Coast, N.Y. Times, May 17, 1985, at 11, col. 1 (city ed.); see also *Clergy Malpractice Suits Pose Disturbing Questions*, San Fran. Examiner & Chron., May 19, 1985, at A5, col. 1.

100. Incompetence is a fairly clearcut issue when, for example, children, who are not capable of legal consent, act against their own interest. PROSSER AND KEETON, *supra* note 19, at § 18; cf. *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944) ("Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice themselves."); *In re Edward C.*, 126 Cal. App. 3d 193, 200, 178 Cal. Rptr. 694, 698 (1981) (court removed children from their abusive father who "proclaimed that he loved and treated his children equally and that God directed his discipline of them. Counseling would be useless since he had given his heart to the Lord."). But see *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (allowing prima facie harm to children on theory that parents are entitled to direct the education of their minor children). *Yoder*, in which the parents consented on their children's behalf to a statutory harm they deemed beneficial, must be distinguished from the case in which no parental consent was given. If, for example, a 13-year-old runs away from home and joins a religious commune, one might argue that legal consent to the commune's religious practices is impossible.

101. The issue of a plaintiff's competence to assent to religious practices is especially troublesome if the defendant's religious group is the sort of "new religion" or "cult" whose means of gaining and retaining members appear overzealous by comparison to most well-established groups. See, e.g., *Lewis v. Holy Spirit Assn. for the Unification of World Christianity*, 589 F. Supp. 10 (D. Mass. 1983) (alleging brainwashing); *Meroni v. Holy Spirit Assn.*, 125 Misc. 2d 1061, 480 N.Y.S.2d 706 (Sup. Ct. 1984) (same); see also Delgado, *Cults and Conversion: The Case for Informed Consent*, 16 GA. L. REV. 533, 544 (1982) ("[U]ntil recently, religious groups recruited relatively openly and honestly."). There is a serious concern that the tactics of "deception to gain a foothold and coercive persuasion to consolidate it" may result in a gradual destruction of individual autonomy — the capacity to consent. *Id.* at 545; see also Aronin, *Cults, Deprogramming, and Guardianship: A Model Legislative Proposal*, 17 COLUM. J.L. & SOC. PROBS. 163 (1982) (proposing model legislation for guardianship of cult members during deprogramming); Shapiro, *Of Robots, Persons, and the Protection of Religious Beliefs*, 56 S. CAL. L. REV. 1277, 1281 (1983) ("The more serious and exceptional implication of [brainwashing] claims is that a person has become a robot — that as a result of coercive influences, he has lost the attributes of an autonomous being."). But see *Meroni*, 125 Misc. 2d at 1066 ("Despite the possibility of coercive persuasion or 'brainwashing' the right of the individual to make such a choice is so important that it cannot be removed absent the showing of a grave disability.") (quoting *Molko v. Holy Spirit Assn. for the Unification of World Christianity*, No. 769-529 (Cal. Sup. Ct., Oct. 20, 1983), *aff'd. in part, rev'd. in part on other grounds*, 179 Cal. App. 3d 450 (1986); Shapiro, *supra*, at 1281 ("[O]nly if [coercive] influences are applied without consent and, as a result, an individual lacks the capacity to adopt or affirm religious beliefs, may the state intervene to restore such capacity.") (emphasis in original).

Ironically, those who seek to combat the effects of this sort of "persuasion" often resort to physically and emotionally tortious means: "Defacing the image of someone's revered leader or deity, together with profane name-calling, would likely be considered extreme and outrageous. The intent of the actor is to create emotional distress, since deprogrammers hope this distress will jar the subject into a critical analysis of his experience." Case Comment, *Tort Liability for Cult Deprogramming*: *Peterson v. Sorlien*, 43 OHIO ST. L.J. 465, 481 (1982).

group's claim to assert religious authority over group members. For the purposes of free exercise analysis, a court should equate plaintiffs who joined groups after succumbing to "coercive persuasion" with plaintiffs who never joined at all.

Similarly, malicious conduct by a spiritual counselor or religious group will typically vitiate any express or implied consent by group members to cooperate with or abide by actions or decisions taken pursuant to religious authority.¹⁰² One typically joins a religious group in the hope of enhancing one's own welfare. Granted, conceptions of spiritual benefits vary widely; an individual may certainly choose to become a scapegoat or martyr for religious reasons. It is also true that many people adhere to religious institutions for social, cultural, or economic reasons and may be indifferent to whether they derive spiritual benefits from their religious activities. However, it would surely be wrong to infer that any individual, by joining a religious group, consents to be used maliciously by that group as a means to the ends of the group or of some authority figure within it.

Accordingly, the courts have been inclined to deny a free exercise defense when the conduct that would be protected was not merely intended to cause arguably harmful effects (such as emotional distress), but was in fact motivated by hostility or ill will against a member (or ex-member) of the group.¹⁰³ Thus, while malice or overreaching in

102. See Ericsson, *supra* note 1, at 182 (suggesting that an "actual malice" standard be applied in spiritual counselor cases). Malice, or "ill will," is to be distinguished from simple intent. See PROSSER AND KEETON, *supra* note 19, § 8 at 36 ("The intent with which tort liability is concerned is not necessarily a hostile intent, or a desire to do any harm. Rather it is an intent to bring about a result which will invade the interest of another in a way the law forbids.").

103. In *Van Schaick v. Church of Scientology of Cal., Inc.*, 535 F. Supp. 1125 (D. Mass. 1982), the plaintiff claimed intentional infliction of emotional distress based on the Church's counseling technique, "auditing." See note 92 *supra*. The court dismissed this part of the case for failure to state a claim, despite some indications that the technique had been used as a weapon against the plaintiff. (For example, the defendants disclosed confidential information obtained during these sessions to third parties.) The court did allow intentional infliction of emotional distress charges against the Church based on a "Church policy" called the "Fair Game Doctrine" (allegedly "repealed" later by the Church) that permitted harassment of ex-members and other "suppressive persons." The plaintiff's complaint alleged "a course of conduct, including slanderous telephone calls . . . , physical threats, and assault with an automobile, which was designed to dissuade her from pursuing her legal rights." 535 F. Supp. at 1131, 1142.

Van Schaick is in accord with *Bear v. Reformed Mennonite Church*, 462 Pa. 330, 341 A.2d 105 (1975). In *Bear*, the court disallowed a demurrer based on the first amendment to a complaint alleging interference with business relations and alienation of affections. The Church had excommunicated the plaintiff and then taken the further step of instructing members of the Church to "shun" him. The court tentatively ruled that "the courts of this Commonwealth may have the authority to regulate" such practices, despite the first amendment defense, because of the "paramount state concern" with the areas invaded by the Church's conduct. 462 Pa. at 334-35, 341 A.2d at 107 (emphasis in original). It is surely also relevant that "shunning" is a means of helping the Church at the expense of ex-members, who may plausibly argue that they are in no way helped or reformed by the process.

Also in accord are two Ohio cases upholding the inverse proposition — the clergy's right to give *well-intentioned* spiritual counsel to those who request it, even if that counsel may affect the longevity of the counselee's marriage. *Radecki v. Schuckardt*, 50 Ohio App. 2d 92, 94, 361 N.E.2d 543, 544 (1976) (dissenting Catholic bishop counseled that "if necessary, a person should

the form of proselytization abuses makes the state's interest in protecting individual counselees compelling, legal wrong done to a competent, cognizant group member in a sincere effort, undertaken pursuant to religious doctrine, to benefit the counselee does not present an especially compelling opportunity for state intervention, through tort remedies or otherwise.

III. CONSTITUTIONAL PRIVILEGE

The foregoing review and assessment of authorities leaves only one narrow class of cases in which a spiritual counselor's free exercise defense to a claim of intentional infliction of emotional distress merits serious consideration:

(1) The particular conduct alleged to have caused plaintiff's distress must have been dictated by a sincere religious belief and carried out in accordance with the established beliefs and practices of the counselor's religious group;

(2) The plaintiff must have been a member of the counselor's religious group at the time of the alleged tort. That is, it must be reasonable to infer plaintiff's knowledge of and assent to the beliefs and practices of that group. This inference is not reasonable if plaintiff was rendered incompetent to adopt or affirm religious beliefs by coercive or deceptive practices of the group or if plaintiff was incompetent to adopt or affirm religious beliefs at the time of the alleged tort because of youth or another disability; and

(3) The allegedly tortious conduct must not have been malicious. That is, the conduct must not have been motivated by hostility toward the plaintiff or by a desire to benefit the group or a member of it at the plaintiff's expense. In positive terms, the conduct must have been motivated principally or entirely by a desire to benefit the counselee, spiritually or otherwise.

As all three of these criteria require the resolution of potentially difficult factual questions, it will virtually never be appropriate for a court to dismiss an intentional infliction of emotional distress claim against a spiritual counselor as a matter of law on the strength of an asserted free exercise defense. Despite the presence of these sticky issues, however, and perhaps due to an understandable zeal to remain

leave a spouse who interferes with [her] practice of religion."); *Bradesku v. Antion*, 21 Ohio App. 2d 67, 255 N.E.2d 265 (1969) (woman divorced her husband after being counseled that her marriage to a divorced man was adulterous); cf. *Carrieri v. Bush*, 69 Wash. 2d 536, 545, 419 P.2d 132, 137 (1966) ("[O]ne does not, under the guise of exercising religious beliefs, acquire a license to wrongfully interfere with familial relations. Good faith and reasonable conduct are the necessary touchstones to any qualified privilege that may arise from any invited and religiously directed family counseling . . .").

The comments of defendant church elder Allen Cash in the Oklahoma case discussed at note 34 *supra* are again illustrative: "Whether we pay or don't pay, we will be concerned about Marian until her life is made right with the Lord. . . . Everything we did was out of love and concern for Marian." N.Y. Times, Mar. 19, 1984, at A15, col. 1 (city ed.).

"neutral" in all religious disputes,¹⁰⁴ courts have tended to view a proffered free exercise defense as a claim of *immunity* from suit.¹⁰⁵ Not surprisingly, these courts have taken a dim view of such claims, acceptance of which would amount to a reinstatement (for religious organizations) of the charitable immunity doctrine no longer in favor with the courts.¹⁰⁶

The simplest logical response to the rejection of religious immunity from liability for intentional torts is to affirm the negative of the rejected proposition. Thus, in denying the immunity claim, the court presumes that the free exercise clause has nothing to do with the case.¹⁰⁷ It is then but a short step to declaring that, as a matter of constitutional law, there is no circumstance in which the state's interest in protecting individuals from the intentional infliction of emotional distress permits a first amendment defense to be effective.¹⁰⁸ While such an approach may be more likely to lead to correct results in individual cases than a broad immunity rule, it merely circumvents constitutional analysis, which demands an ordered inquiry into the interests at stake in light of the legal damages claimed.

One way to systematize such a constitutional inquiry would be to adopt a spiritual counselor privilege,¹⁰⁹ mandating that facially tortious conduct is protected when the criteria described at the beginning of this part are met.¹¹⁰ The privilege could be adopted by the courts as

104. See note 32 *supra*.

105. See, e.g., *Turner v. Unification Church*, 473 F. Supp. 367, 371 (D.R.I. 1978), *affd. per curiam*, 602 F.2d 458 (1st Cir. 1979) (free exercise clause does not immunize defendants); *Nally v. Grace Community Church of the Valley*, 204 Cal. Rptr. 303 (1984), (deleted from official reporter by California Supreme Court, see 157 Cal. App. 3d 940 (1984)) ("[T]he free exercise clause . . . does not license intentional infliction of emotional distress in the name of religion . . ."); *Meroni v. Holy Spirit Assn. for the Unification of World Christianity*, 125 Misc. 2d 1061, 1067, 480 N.Y.S.2d 706, 710 (Sup. Ct. 1984) ("That one performs a tort or commits a crime in the furtherance of a 'religious' activity . . . does not confer immunity upon such alleged wrongdoer.").

106. RESTATEMENT (SECOND) OF TORTS ch. 45A Introductory Note ("[T]he modern tendency has been to view immunities with a considerable degree of disapproval . . ."); see note 19 *supra*.

107. This appears to be the approach taken in all of the intentional infliction of emotional distress cases cited in notes 2 and 15 *supra*.

108. See note 105 *supra*.

109. Possession of a privilege means "that conduct which, under ordinary circumstances, would subject the actor to liability, under particular circumstances does not subject him to such liability." RESTATEMENT (SECOND) OF TORTS § 10(1) (1977). Tort privileges may arise in order to protect an overriding interest, in which case the privilege is derived from "the value attached to the interest to be protected or advanced by [its] exercise." *Id.* at § 10(2) comment d. A free exercise privilege is thus a narrowly tailored exemption from an admittedly constitutional law. *E.g.*, *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707 (1981) (exemption from rule that employees who quit may not receive unemployment compensation).

An immunity is both broader than a privilege and more dependent upon the actor's status than upon the circumstances of the act. In a spiritual counseling case, existence of privilege would not depend as much upon the religious status of the counselor as upon the religiously motivated nature of the conduct.

110. See conditions listed at beginning of Part III *supra*.

a matter of constitutional law or by legislatures in order to clarify the law prospectively.¹¹¹

At least two advantages would flow from adopting such a privilege. First, in determining the applicability of the free exercise clause, courts could attend systematically to the most pertinent aspects of a case, thereby avoiding arbitrary balancing acts or conclusory rules of thumb. Second, the more clearly and publicly a rule protecting spiritual counseling is announced, the less likely there is to be any burden on free exercise in the form of a "chilling" of the process of counseling due to fear of civil liability. A rule that promised to protect genuinely religious and properly motivated counseling of competent and cognizant adults would serve constitutional goals by removing the burden that diffidence and prudence would otherwise impose on spiritual counseling. At the same time, it would put the less well intentioned on notice that the free exercise clause will not be construed to protect secular activities, overreaching, or malice.

Despite these advantages, this Note stops short of advocating the prospective adoption of a spiritual counselor privilege, for such an approach is not justified by existing authorities. The most those authorities suggest is that cases may yet arise in which courts will be constitutionally compelled to recognize a free exercise defense to intentional infliction of emotional distress (or to other intentional torts). The Supreme Court has never approached the issue, and those cases that have arisen in lower courts have not presented facts upon which a privilege could properly have been granted.¹¹²

111. The following is an illustrative legislative proposal:

§ 1. "Spiritual counselor" means an individual who is endowed by a religious group with the authority to give personal counsel derived from that group's religious tenets.

§ 2. A spiritual counselor is not liable to his or her counselee for the tort of intentional infliction of emotional distress if

- (a) the counselee is a member of the counselor's religious group at the time of the alleged tort;
- (b) the allegedly tortious conduct is
 - (1) dictated by the counselor's religious faith,
 - (2) committed in the course of spiritual counseling, and
 - (3) motivated by a desire to further the counselee's welfare; and
- (c) the counselee
 - (1) does not express lack of consent to the counselor's conduct before or at the time of the alleged tort,
 - (2) is competent to consent at the time of the alleged tort, and
 - (3) has not been rendered incompetent to adopt or affirm religious beliefs by coercive or deceptive practices of the counselor's religious group.

112. Of the intentional infliction of emotional distress cases cited in notes 2 and 15 *supra*, in one, defendants denied that their religion dictated facially tortious conduct, *Nally v. Grace Community Church of the Valley*, 204 Cal. Rptr. 303, 308 (1984), (deleted from official reporter by California Supreme Court, *see* 157 Cal. App. 3d 940 (1984)); in three, plaintiffs failed to state a claim, *Lewis v. Holy Spirit Assn. for the Unification of World Christianity*, 589 F. Supp. 10 (D. Mass. 1983); *Turner v. Unification Church*, 473 F. Supp. 367 (D.R.I. 1978), *affd. per curiam*, 602 F.2d 458 (1st Cir. 1979); *Christofferson v. Church of Scientology of Portland*, 57 Or. App. 203, 644 P.2d 577 (1982), *cert. denied*, 459 U.S. 1206, 459 U.S. 1227 (1983); in another, the conduct alleged was clearly malicious and was directed at an ex-member, *Van Schaick v. Church of*

The most appropriate posture at this time is one of receptivity to the free exercise defense combined with a close scrutiny of the basis upon which the defense is asserted. If future cases are like past ones, the defense will rarely stand up under close scrutiny. However, the ease with which emotional distress may be alleged and the serious burden upon religious freedom that would be posed by a rash of successful suits against spiritual counselors require that recourse to the free exercise clause by religious defendants not be too lightly swept aside.

CONCLUSION

When allegations of intentional infliction of emotional distress arise from spiritual counseling, precipitate rejection of a spiritual counselor's free exercise defense would defy the Constitution's valuation of religious freedom. The state has a significant interest in providing a remedy to intentional tort victims, but providing that remedy is likely to disrupt and distort the spiritual counseling process. In the abstract, both competing interests are compelling; yet neither a flat rejection of free exercise rights nor an immunity for religious tortfeasors is appropriate. As a practical matter, a careful factual analysis of individual cases can probably prevent the serious compromise of either set of values.

While a case such as that set forth in the Introduction to this Note might properly support a free exercise defense, such facts are liable to be the exception. If the particular conduct alleged to have caused plaintiff's distress was not dictated by religious belief or practice, then the conduct was not the free exercise of religion, and the defense is unavailable. If the plaintiff was not a member of defendant's religious group at the time of the allegedly tortious act, the inherent constraints of the free exercise clause itself prevent its use as a defense. The same principle holds if plaintiff was a group member, but was incompetent to assent to religious beliefs, whether because of youth, emotional instability, abusive recruitment practices, or other disabilities. Finally, malice nullifies a free exercise defense at little cost to the social and constitutional values served by spiritual counseling.

— *Lee W. Brooks*

Scientology of Cal., Inc., 535 F. Supp. 1125 (D. Mass. 1982); and in the last, the group was alleged to have overreached an emotionally disturbed man, *Meroni v. Holy Spirit Assn. for the Unification of World Christianity*, 125 Misc. 2d 1061, 480 N.Y.S.2d 706 (Sup. Ct. 1984).