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SCIENTOLOGY IN COURT: A COMPARATIVE ANALYSIS AND SOME THOUGHTS ON SELECTED ISSUES IN LAW AND RELIGION

*Paul Horwitz**

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* LL.M. 1997, Columbia University; LL.B. 1995, University of Toronto; M.S. 1991, Columbia University; B.A. 1990, McGill University. I am grateful to Kent Greenawalt, the members of his seminar on church-state issues, and Paul Michell for their helpful comments on earlier drafts of this Article; to Peter Leube; and to the editors of the DePaul Law Review for their assistance in preparing the paper for publication.

> [I]f there is anyone in the world calculated to believe what he wants to believe it is I.
>
> — L. Ron Hubbard[1]

> The truth is that one man's "bizarre cult" is another's true path to salvation. . . .
>
> — Harvey Cox[2]

INTRODUCTION

A particularly potent source of conflict in church-state relations is the treatment of new or emerging religions. Many of these faiths, those loosely grouped together under the label "cults," have been especially troubling to observers of religion and religious freedom, both for their own behavior and for the way they have been treated.[3] Among the most well-known groups typically identified as cults are such faiths as the Unification Church,[4] the International Society for Krishna Consciousness,[5] and the Branch Davidians.[6] But their numbers vastly exceed the small list of groups most frequently identified as cults; estimates have suggested that as many as 3000 cults may be found in the United States alone.[7]

There appears to be little scholarly consensus about what distinguishes cults—or, to adopt the non-pejorative term which is frequently used to refer to such groups, "new religious movements" (NRMs)[8]—from more mainstream denominations. Similarly, there

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1. RUSSELL MILLER, BARE-FACED MESSIAH: THE TRUE STORY OF L. RON HUBBARD 231 (1987) (attributing the quote to a 1958 lecture on Dianetics and Scientology).

2. Harvey Cox, *Playing the Devil's Advocate, As it Were,* N.Y. TIMES, Feb. 16, 1977, at A25, *quoted in* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-6, at 1181 (2d ed. 1988).

3. JAMES A. BECKFORD, CULT CONTROVERSIES: THE SOCIETAL RESPONSE TO THE NEW RELIGIOUS MOVEMENTS 5-11 (1985); RONALD B. FLOWERS, RELIGION IN STRANGE TIMES: THE 1960s AND 1970s 85-86 (1984); HARRIET WHITEHEAD, RENUNCIATION AND REFORMULATION: A STUDY OF CONVERSION IN AN AMERICAN SECT 20 (1987).

4. *See* BECKFORD, *supra* note 3, at 23; FLOWERS, *supra* note 3, at 91-92. Beckford, however, prefers the term "New Religious Movement" to cult. *See infra* note 8 and accompanying text.

5. *See, e.g.,* SHIRLEY HARRISON & SALLY EVEMY, CULTS: THE BATTLE FOR GOD 10-11 (1990).

6. For a sensitive discussion of this group, and of the dangers of a fearful or hostile approach to cults, see JAMES D. TABOR & EUGENE V. GALLAGHER, WHY WACO?: CULTS AND THE BATTLE FOR RELIGIOUS FREEDOM IN AMERICA (1995).

7. Craig Andrews Parton, Note, *When Courts Come Knocking at the Cult's Door: Religious Cults and the First Amendment,* 9 HASTINGS COMM. & ENT. L.J. 279, 283 (1987) (noting various estimates).

8. *See, e.g.,* BECKFORD, *supra* note 3, at 12-13 (opting to use "new religious movements" as a general reference and "cult" to refer to the popular understanding of groups "considered small, insignificant, inward-looking, unorthodox, weird, and possibly threatening"); ROY WALLIS, THE ROAD TO TOTAL FREEDOM: A SOCIOLOGICAL ANALYSIS OF SCIENTOLOGY 3-4 (1977). *But see, e.g.,* James R. P. Ogloff & Jeffrey E. Pfeifer, *Cults and the Law: A Discussion of the Legality of Alleged Cult Activities,* 10 BEHAV. SCI. & L. 117, 124 (1992) (discussing survey results suggesting

appears to be no clear distinction between new religious movements generally and more specific faiths that may properly be called cults. Efforts to single out those qualities that characterize the religious movements that have emerged in such numbers in the past three decades have included the following observations:

- Many new religious movements claim to have "new and original perceptions" of reality, and believe society to be "evil or at least ignorant of the true nature of reality as it has been revealed to the cult leader and is now in possession of the cult."[9]
- A number of groups have substantially withdrawn from conventional society in anticipation of a coming social transformation; they have aggressively pursued converts and required absolute commitment to the group.[10] Unlike many earlier faiths, they have sought converts individually and not as families, thus increasing potential conflict.[11] Moreover, their "contempt for conventional society [has] led to a lowered level of concern about conformity with the established normative order."[12]
- Though new religious movements may be characterized as highly diverse despite some "superficial similarities,"[13] they do share the trait, attractive to those who join them, of being "self-contained system[s] of assumptions, teachings, and recipes for action."[14]
- Cults have been described as "deviant groups which exist in a state of tension with society"[15] and which, unlike sects that are simply offshoots of established religions, offer "something altogether different."[16]
- A number of scholars have observed that new religious movements require a varying level of commitment to the faith, and provide a varying level of services for their members.[17] The more

that people hold negative attitudes towards both "cults" and "alternative religious movements" and noting that "there is some reason to believe that efforts by some writers to lessen the stigma of alternative religious groups by using terms other than "cult" may not have been as effective as they would have though[t]").

9. FLOWERS, *supra* note 3, at 91.

10. David G. Bromley & Anson Shupe, *Public Reaction Against New Religious Movements, in* CULTS AND NEW RELIGIOUS MOVEMENTS 305, 313 (Marc Galanter ed., 1989).

11. *See id.*

12. *Id.*

13. BECKFORD, *supra* note 3, at 60.

14. *Id.*

15. Marcia R. Rudin, *The Cult Phenomenon: Fad or Fact?*, 9 N.Y.U. REV. L. & SOC. CHANGE 17, 17 (1979-80) (citing Stark & Bainbridge, *Of Churches, Sects, and Cults: Preliminary Concepts for a Theory of Religious Movements*, J. FOR SCI. STUDY OF RELIGION, June 1979, at 125).

16. *Id.*

17. *See generally* BECKFORD, *supra* note 3, at ch. 2; FLOWERS, *supra* note 3, at 90-96; Rudin, *supra* note 15, at 17.

total the commitment demanded by the group, and the more complete the level of services offered to the individual—i.e., the more the group becomes a self-contained entity that deliberately stands apart from common social norms[18]—the greater the level of hostility and opposition the group will face from society at large.[19]

There is little question that new religious movements, whatever their common characteristics, have been a flashpoint of social concern and hostility in the United States[20] and abroad.[21] As such, these "'religions of the perimeter,'"[22] by challenging us to treat "generously and without religious chauvinism"[23] those faiths that least resemble mainstream faiths and most threaten prevailing social norms,[24] serve as the ultimate test of our commitment to religious liberty.

With these background concerns in mind, this Article examines the legal treatment of one new religious movement: the Church of Scientology ("Church"), a self-described "applied religious philosophy"[25] founded by the writer L. Ron Hubbard as an outgrowth of his earlier, more secular applied philosophy, Dianetics.[26] Few emerging faiths have faced as much hostility at the hands of legislators and courts as this group, both in the United States and around the world.[27] At the same time, its history and conduct have raised serious questions about the legitimacy of its origins as a religion[28] and about whether its conduct ought to effectively strip it of any rights or privileges that it may claim as a religion.[29]

Scientology thus serves as a particularly useful "hard case" to illuminate a number of recurring issues in the law of freedom of religion. Because of the international scope of Scientology and the profound suspicion and hostility that this and other new religious movements have engendered in various countries, it also serves as a useful basis

---

18. This is an apt description of Robert Cover's nomic community. *See* Robert M. Cover, *The Supreme Court, 1982 Term: Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4 (1983).

19. *See* BECKFORD, *supra* note 3, at 283; FLOWERS, *supra* note 3, at 95; Rudin, *supra* note 15, at 17.

20. *See infra* Part II.A.

21. *See infra* Part II.B-D.

22. Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1069 (1978) [hereinafter Harvard Note] (quoting C. FERGUSON, THE CONFUSION OF TONGUES 8 (1936)).

23. Harvard Note, *supra* note 22, at 1070.

24. *Id.*

25. Church of Scientology, *Introduction to the Scientology Religion* (visited Nov. 3, 1996) <http://www.scientology.org/p_jpg/wis/wiseng/wis1-3/wis1_1.html> (emphasis omitted).

26. *See* discussion *infra* Part I.A.

27. *See infra* Part II.A (discussing legal treatment of Scientology in the U.S.); Part II.B-D (discussing Scientology's experiences with the legal systems of other countries).

28. *See infra* Part I.

29. *See, e.g., infra* notes 195-99 and accompanying text.

for comparative analysis of how different legal systems have grappled with some of the same basic issues concerning law and religion.

Part I of this Article offers a short history of the Church and a brief examination of its doctrines.[30] Part II examines the legal treatment of Scientology in the United States, England, Australia, and Germany.[31] Parts III and IV discuss two central legal issues which are of particular moment for Scientology: How should "religion" be defined for constitutional purposes, and how should cases of alleged fraud be handled when they involve a religious group?[32] Finally, Part V offers some observations on the issues raised by a comparison of how various legal systems treat freedom of religion.[33]

I. The Church of Scientology

A. *Dianetics*

Both Scientology and Dianetics are the creations of L. Ron Hubbard, a pulp science-fiction writer of the 1930s and 1940s. Hubbard is described as a Jack-of-all-trades and genius by his followers,[34] whose biographical sketch describes him as a blood brother of the Blackfoot Indians,[35] a youthful "world traveller and adventurer,"[36] a student of Eastern holy men,[37] an early student of nuclear physics,[38] a man with a "relentless interest in all forms of human activity,"[39] an explorer and aviator,[40] and a decorated naval officer whose service in World War II left him "crippled and blinded in Oak Knoll Naval Hospital,"[41] and who recovered "in great part [due] to the unusual discoveries [he made]."[42] Other biographies assert that the official version of his life is replete with exaggerations and misstatements, if not outright falsehoods.[43] For example, some biographers assert his hospitalization was

30. *See infra* notes 34-148 and accompanying text.

31. *See infra* notes 151-334 and accompanying text.

32. *See infra* notes 335-460 and accompanying text.

33. *See infra* notes 461-83 and accompanying text.

34. *See, e.g.*, L. Ron Hubbard, Mission Into Time 8-9 (1973) [hereinafter Mission Into Time]; Church of Scientology Int'l, What is Scientology? (1993). What is Scientology? is referred to as "the definitive reference work on Scientology." *The Complete Reference Works on Scientology*, *in* The Church of Scientology: 40th Anniversary, *infra* note 104.

35. Mission into Time, *supra* note 34, at 4.

36. *Id.* at 5.

37. *See id.* at 5-6.

38. *See id.* at 6.

39. *Id.* at 7.

40. *See id.* at 7-9.

41. *Id.* at 10.

42. *Id.*

43. *See, e.g.*, Miller, *supra* note 1.

for mere aches and pains, and Hubbard was certainly never blinded and crippled and so never cured himself.[44]

In any event, relatively little reliable information is available about the actual founding of Hubbard's movements. In an official biographical sketch by the Church, Dianetics and Scientology are largely described as outgrowths of his stay in the Oak Knoll Naval Hospital in Oakland, California, in 1944:

> Altogether, he spent a year at Oak Knoll, during which time he synthesized what he had learned of Eastern philosophy, his understanding of nuclear physics and his experiences among men. . . .
>
> He concluded that the results he was obtaining could help others towards greater ability and happiness, and it was during this period that some of the basic tenets of Dianetics and Scientology were first formulated.[45]

The Church, however, dates the earliest roots of these practices from early 1938, when Hubbard is said to have compiled a "philosophical manuscript, 'Excalibur,'"[46] setting out his insights into the "common denominator of existence."[47] But another writer finds no evidence of any work on anything resembling Dianetics before 1948 or 1949,[48] when Hubbard announced he was working on a "book of psychology."[49] Nevertheless, the lack of clear evidence relating to the origins of Dianetics poses a problem to those who would argue that its offshoot, Scientology, is not a legitimate religion, since no clear proof exists that Dianetics was intended to be a fraud and was not the product of study, insight or revelation.

Dianetics, the apparent result of this work, first appeared as an article in the May, 1950 issue of the pulp magazine *Astounding Science Fiction,* whose cover promised an introduction to a "new science of the mind,"[50] though Hubbard had already begun applying his teachings in 1949.[51] In its initial form, there is little question that Dianetics was a purely secular practice, offered as a highly potent alternative to psychology or psychiatry. Dianetics was portrayed as the result of an application of scientific principles and research to the "operation of

---

44. *See, e.g., id.* at 112.

45. MISSION INTO TIME, *supra* note 34, at 10-11.

46. WHAT IS SCIENTOLOGY?, *supra* note 34, at 40.

47. *Id.*

48. *See* MILLER, *supra* note 1, at 143-45.

49. *Id.* at 144.

50. *Id.* at 153 & illus. 10.

51. *See id.* at 148-49. In fact, one Church text suggests that the first published article on Dianetics appeared in the Winter/Spring 1949-1950 journal of an explorers' club to which Hubbard belonged. WHAT IS SCIENTOLOGY?, *supra* note 34, at 45.

the human mind;"[52] it offered "a technique for curing—not alleviating—ulcers, arthritis, asthma, and many other nongerm diseases,"[53] and provided "[a] totally new conception of the truly incredible ability and power of the human mind."[54] Another Hubbard book, published in 1951 but said to be a manuscript dating from 1948, called Dianetics "an heuristic science built upon axioms.... [where w]orkability rather than Idealism has been consulted."[55] The foundation text of Dianetics, *Dianetics: The Modern Science of Mental Health,* also declares its secularity, if somewhat ambiguously, calling the technique "an organized science of thought built on definite axioms (statements of natural laws on the order of those of the physical sciences)."[56]

The basic premise of Dianetics was the suggestion that the human brain is like an infinitely powerful computer.[57] When it is functioning properly, the brain has the capacity of limitless memory and the ability to: alleviate or cure psychosomatic illnesses including "sinusitis, allergies, some heart trouble, 'bizarre' aches and pains, poor eyesight, arthritis, etc., etc., etc., down through seventy per cent [sic] of man's ills;"[58] speed reaction time; and make one's appearance more youthful.[59] Hubbard argued that the "sentient portion of the mind, which computes the answers to problems and which makes man man, is *utterly incapable of error.*"[60] An individual operating at his or her optimum capacity was called a "clear."[61]

Normal minds, Hubbard asserted, operate at less than this capacity because of aberrations caused by painful memories. Hubbard divided the mind into the "reactive" and "analytical" minds.[62] The reactive mind operates as a sort of safety device, recording occurrences of "physical pain and painful emotion."[63] This "recording of the full perceptic content of a moment of pain, unconsciousness, or emotional loss . . . [is known as an] . . . engram."[64] Any event that bears a simi-

52. MILLER, *supra* note 1, at 145-46.

53. *Id.* at 146.

54. *Id.* (quoting an editorial in ASTOUNDING SCIENCE FICTION touting the upcoming article on Dianetics).

55. L. RON HUBBARD, DIANETICS: THE ORIGINAL THESIS 13 (rev. ed. 1976).

56. L. RON HUBBARD, DIANETICS: THE MODERN SCIENCE OF MENTAL HEALTH (3d ed. 1990) [hereinafter DIANETICS].

57. *Id.* at 26.

58. L. RON HUBBARD, SELF ANALYSIS 14 (7th ed. 1974).

59. MILLER, *supra* note 1, at 153-54; WALLIS, *supra* note 8, at 25-27.

60. DIANETICS, *supra* note 56, at 26.

61. *Id.* at 16.

62. *Id.* at 82.

63. *Id.*

64. WALLIS, *supra* note 8, at 25.

larity to a memory preserved as an engram will trigger the engram, as a kind of warning signal.[65] Thus, for example, a man who has been bitten by a dog will feel some trace reaction upon hearing a dog bark, and behave "in a fearful or irrational manner."[66] While the analytical mind has the incredible potential described above, the reactive mind and its painful engrams are "strong enough to throw part or all the analytical machinery out of circuit . . . . The engram is the single and sole source of aberration and psychosomatic illness."[67] Engrams stem from experiences over the entire course of one's life, including before birth; Hubbard has claimed that a common source of engrams is the painful memory of an attempted abortion experienced by a fetus.[68]

The object of Dianetics, therefore, was to restore the analytic mind to its full capacity by erasing engrams from the reactive mind, so that an individual was not hampered by trace memories, neuroses, psychosomatic illnesses, or other mental impairments.[69] This took place through a process called "auditing," in which the subject, through a process resembling a cross between psychotherapy and a state of quasi-hypnosis, was made to probe his memories and to recover and relive all of the "engram" memories in his reactive mind.[70] As the sociologist Roy Wallis has noted, though Hubbard "asserted the originality of the entire theory and practice and acknowledges having been influenced only in a most general way by other writers,"[71] the practice of auditing closely resembles the longstanding practice of abreaction therapy—the practice of digging up repressed memories, often through hypnosis, in order to restore a patient's mental health or cure psychosomatic symptoms.[72] However, Dianetics certainly incorporated far more than basic therapeutic theory. Texts such as *Dianetics: The Modern Science of Mental Health* presented a substantial theory of human existence and its "dynamic principles."[73] These included a dynamic principle described as "the urge toward survival as a part of or ward of a Supreme Being."[74]

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65. *Id.*

66. FLOWERS, *supra* note 3, at 98.

67. DIANETICS, *supra* note 56, at 91.

68. *See* WALLIS, *supra* note 8, at 27.

69. *Id.* at 26.

70. For a fuller description, see, for example, *id.* at 26-31.

71. *Id.* at 31.

72. *See id.* at 31-38.

73. DIANETICS, *supra* note 56, at 30-46.

74. WALLIS, *supra* note 8, at 39 (quoting 1 L. RON HUBBARD, SCIENCE OF SURVIVAL xi (1951)); *see also* HARRISON & EVEMY, *supra* note 5, at 63 (describing Dianetics' dynamic principles).

Both the book and the practice of Dianetics quickly proved successful.[75] As Wallis notes, it was particularly attractive as a source of succor to uncertain or ambitious individuals in a modern economic society, since it offered a rationale for past failures—one was impaired by engrams—and the promise of a path to future success and fulfillment.[76] The book quickly gave rise to the establishment of a training center which offered training for would-be auditors at a cost of $500.[77] However, the relatively loose structure of the organization resulted in the formation of competing factions of believers in various adaptations of Dianetic theories, an attrition in membership, a lack of sole control by Hubbard over the fruits of his theory, and serious disagreements with financial partners.[78]

B. Scientology

Whether as a result or merely by coincidence, it was at this time that the religion of Scientology emerged, with the delivery of the first lectures on Scientology in 1952 and the incorporation of at least five churches between 1953 and 1954.[79] Some observers have remarked on the obvious fortuity of Hubbard's introduction of the religion of Scientology at the most convenient possible time, when he lacked sole control of Dianetics and its wealth-producing capacity and feared that he would lose any ability to reap future profits from Dianetics, due to his ownership dispute with a financial backer.[80] Russell Miller writes, "[I]t was a development of undeniable expedience, since it ensured he would be able to stay in business even if the courts eventually awarded control of Dianetics and its valuable copyrights to [his opponent]."[81] Perhaps more damningly, Miller reports several instances before and during this period in which Hubbard speculated that "[i]f a man really wanted to make a million dollars, the best way to do it would be to start his own religion."[82] Similarly, Wallis notes that

75. *See, e.g.*, FLOWERS, *supra* note 3, at 96.

76. WALLIS, *supra* note 8, at 65.

77. *See* MILLER, *supra* note 1, at 159-60.

78. *See id.* at 163-219; WALLIS, *supra* note 8, at 77-100.

79. *See* MILLER, *supra* note 1, at 203, 220-21. *But see* WHAT IS SCIENTOLOGY?, *supra* note 34, at 66 (dating Hubbard's insights leading to the founding of Scientology to the Fall of 1951).

80. *See* MILLER, supra note 1, at 200; WALLIS, *supra* note 8, at 77; WHITEHEAD, *supra* note 3, at 67.

81. MILLER, *supra* note 1, at 202-03.

82. *Id.* at 148 (quoting L.A. TIMES, Aug. 27, 1978); *see also id.* at 133 (giving a similar remark) (quoting Interview with Sam Merwin, Editor, *Thrilling* Magazines, in Los Angeles, Cal. (Aug. 1986)); *id.* at 212-13 (discussing "the religion angle" in a letter). The Church has responded that the remark commonly attributed to Hubbard that the best way to make money is to start a religion is in fact a quote from George Orwell. *See* HARRISON & EVEMY, *supra* note 5, at 65.

though "Hubbard's theory and techniques had been moving increasingly in this direction,"[83] it was not until the crisis of control over Dianetics that Scientology emerged.[84] Scientology served as the basis for a renewed and largely successful attempt to reassert centralized control of the Dianetics movement.[85]

While "it is tempting to see these quite worldly considerations of protection and consolidation of authority as the primary impulses behind the rise of the new faith,"[86] which would suggest some strength in an argument against treating Scientology as a legitimate religion, some factors may be counterbalanced against the argument that Scientology was created for purely expedient reasons.[87] Spiritual or non-scientific aspects had crept into Dianetics before the advent of Scientology as a spiritual faith. In particular, an early dispute in the Dianetic movement concerned whether memories or engrams from past lives encountered occasionally during the auditing process should be accepted as legitimate memories.[88] While treating Scientology as a religion had a number of potential financial benefits, it also risked alienating those Dianetics adherents whose attraction to Dianetics was based on its purportedly scientific nature.[89] Though Dianetics appeared to be a scientific theory and Scientology a spiritual theory, the two movements shared many of the same basic tenets and eventually became inextricably linked.[90] Both certainly offered a larger vision of human existence and the principles that ought to guide human conduct. Moreover, other faiths now recognized as legitimate religions have also followed the same pattern of movement from a largely secular philosophy to a religious belief system, in part due to external pressures or power struggles; a prominent example is the development of the Church of Christian Science.[91] Thus, there is some plausibility to the Church's argument that:

> [The founding of the Church] was in keeping with the religious nature of the tenets dating from the earliest days of research. It was obvious that he [Hubbard] had been exploring religious territory

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But see Richard Leiby, *Scientology Fiction: The Church's War Against Its Critics—and Truth*, WASH. POST, Dec. 25, 1994, at C1 (disputing the Church's attribution of the quote to Orwell).

83. WALLIS, *supra* note 8, at 91.

84. *Id.*

85. *Id.* at 91-97.

86. WHITEHEAD, *supra* note 3, at 70.

87. *See supra* notes 79-85 and accompanying text.

88. *See* MILLER, *supra* note 1, at 197; WALLIS, *supra* note 8, at 90; WHITEHEAD, *supra* note 3, at 68-69.

89. *See, e.g.*, WALLIS, *supra* note 8, at 83.

90. *See, e.g.*, BECKFORD, *supra* note 3, at 54.

91. WALLIS, *supra* note 8, at 98-100.

> right along. And whatever the name given to the technique or study and whatever way it had been interpreted by skeptics or sensation-mongers, it was apparent to those with a sense of history and Man's ages-old spiritual quest that this was indeed the realm of the soul and its havens.[92]

C. *Scientology Doctrines and Practices*

Given the volume of writings on Scientology available to non-adherents, most of them written by or attributed to Hubbard himself, and the dizzying complexity and amount of jargon in the writings, this Article can do no more than offer a rudimentary description of some of the basic doctrine of Scientology.[93] Obviously, given both these facts and the fact that some doctrinal materials are reserved for advanced members of the Church, there is a risk of distorting the doctrine and practice of Scientology. In particular, any fair analysis of the Church's doctrine must acknowledge that any apparent inconsistencies or contradictions in the doctrine may simply suggest the outsider's lack of understanding of the intricacies of Scientology doctrine, rather than demonstrating that the Church is a sham. Nevertheless, even a crude outline of the Church's basic tenets may have some value for the purpose of evaluating its status as a religion and for the sake of understanding some practices that have caused Scientology to be treated with suspicion and hostility by state officials or non-adherents.[94]

Scientology has been aptly described as "a movement which straddles the boundary between psychology and religion."[95] While it retains many of the basic principles of Dianetics, as well as the focus on auditing as a course of therapy and self-improvement, it adds an overlay of spirituality, a detailed and somewhat Byzantine cosmology, and a patina of religious ritual. Though Scientology claims some kinship to Eastern religious philosophies such as those contained in Vedic and Buddhist thought,[96] the tangled skein of Scientological doctrine now bears only a fairly casual resemblance to those faiths.

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92. MISSION INTO TIME, *supra* note 34, at 16.

93. *See* WALLIS, *supra* note 8, at 103 ("Several million words have been written on the theory and practice of Scientology, for the most part by Hubbard himself. . . . A full account of the theory and practise [sic] of Scientology and their vicissitudes . . . would be tiresome and unenlightening, perhaps even to the committed adherent."); WHITEHEAD, *supra* note 3, at 168 ("The scientology belief system . . . is encyclopedic and labyrinthine.").

94. *See* discussion *infra* Parts II-III.

95. WALLIS, *supra* note 8, at 4.

96. *See* WHITEHEAD, *supra* note 3, at 71; *see also CNN Today: Scientologists Claim Nazi-Like Persecution in Modern Germany* (CNN television broadcast, Jan. 29, 1997) *available in* LEXIS, News Library [hereinafter *CNN Today*] (noting an interview in which Heber Jentzsch, current

Moving beyond Dianetics' scientistic theory of human psychology, Scientology insists that "[m]an doesn't *have* a soul or spirit—he *is* a spirit. . . . Man *has* a mind and he *has* a body. It is the spirit that *is* the person, that acts, creates and owns things."[97] This spirit is called the "thetan."[98] A thetan may be not billions but *trillions* of years old, and inhabits various bodies over time.[99] Thus, auditing no longer consists only of erasing engrams from one life; rather, one must recover and confront one's memories from *all* of one's lifetimes.[100] Just as Dianetics saw auditing as a way of recovering the full use of one's analytical mind, so Scientology argues that through auditing one erases the engrams of a thousand lifetimes, and becomes a clear—"an integrated, confident, whole personality."[101] Moreover, the thetan is itself the prime cause of all we understand as worldly existence: all of matter, energy, space and time, which Hubbard called "MEST," are but the product of the thetan.[102] A goal of auditing is, therefore, to produce a "clear" individual who is "at cause" over MEST—that is, who understands himself or herself to be a cause rather than an effect of external phenomena.[103] Thus, one Church document summarizes some of its key tenets in this manner:

- Man is an immortal spiritual being.
- His experience extends well beyond a single lifetime.
- His capabilities are unlimited, even if not presently realized.[104]

Beyond these basic tenets, many other beliefs and practices emerge from Scientologist doctrine. For example, one account suggests that thetans are believed to travel to "implant stations" throughout the universe, in which engrams bearing various goals or instructions for the thetan are implanted, before picking up a new body.[105] At higher

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president of the Church of Scientology International, describes Scientology as "more Eastern in concept" than Judeo-Christian).

97. L. RON HUBBARD, CEREMONIES OF THE FOUNDING CHURCH OF SCIENTOLOGY 9 (1959) [hereinafter CEREMONIES].

98. *Id.* at 9.

99. WALLIS, *supra* note 8, at 104.

100. L. RON HUBBARD, HAVE YOU LIVED BEFORE THIS LIFE?: A SCIENTIFIC SURVEY 13 (1958).

101. FLOWERS, *supra* note 3, at 99.

102. *See* GEORGE MALKO, SCIENTOLOGY: THE NOW RELIGION 102-03 (1970).

103. *Id.* at 122-23.

104. *The Religion of Scientology: A Description, in* THE CHURCH OF SCIENTOLOGY: 40TH ANNIVERSARY (1994) (visited Dec. 13, 1996) <http://www.theta.com/goodman/religion.htm>. This Internet location is a World Wide Web page maintained by Leisa Goodman, the Media Relations Director for the Church of Scientology International. The main address of the page is <http://www.theta.com/goodman>. For a similar description of the "central beliefs" of Scientology, see WHITEHEAD, *supra* note 3, at 194.

105. MALKO, *supra* note 102, at 106.

levels of instruction, Scientologists are able to go beyond the status of "clear" and attain various levels of a status called "Operating Thetan[,] . . . [in which] one deals with the individual's own *immortality* as a spiritual being . . . [and so achieves a] . . . state[ ] higher than that of mortal man."[106] Doctrine imparted to Scientologists at later stages of instruction is said to include the information that all cultures and religions derive from an incident that occurred some 75 million years ago.[107] In the incident, according to one account, an evil prince named "Xenu," in order to reduce overpopulation in a "Galactic Confederation" which he ruled, exterminated the peoples from about seventy-six planets, exploded their thetans "by putting H-bombs in volcanoes,"[108] and gathered the thetans on electronic ribbons.[109] The thetans were then implanted with images of the "future societies of Earth."[110] These images were the source of the cultures and religions which subsequently developed on this planet.[111] A critic of Scientology writes that "[Hubbard] said, for example, that Christ is an illusion implanted at this time."[112] Hubbard has also reportedly related his memory of two trips to Heaven, some 43 and 42 trillion years

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106. WHAT IS SCIENTOLOGY?, *supra* note 34, at 151.

107. *See* Jon Atack, *The Total Freedom Trap: Scientology, Dianetics and L. Ron Hubbard* (visited Nov. 3, 1996) <http://www.mpikg-teltow.mpg.de/people/katinka/fishy/TFTrap.html>.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*; *see* Michael Robinson, *Operating Thetan Summary and Analysis* (visited Nov. 3, 1996) <http://www.xs4all.nl/~kspaink/cos/comments/mrsummar.html>. If this doctrine is in fact taught, it might suggest some inconsistency with the Scientology doctrine that adherents may continue to believe and worship as part of another religion. *See infra* notes 133-39 and accompanying text. This in turn would suggest that new members might be induced to join the Church with the mistaken belief that it does not conflict with their religion. Several notes of caution must be struck on this point, however. First, the Church has called descriptions of the documents concerning "Xenu" "purposely distorted" and designed to "hold the church up to ridicule and contempt." Jay Mathews, *Scientology Winning in Court: Mainstream Groups Help Support Church's Fight for Legitimacy*, WASH. POST, Dec. 1, 1985, at A4. Even if the publicly available descriptions of this doctrine are accurate, given the evident intricacies of Church doctrine, the inconsistency may be more apparent than actual or may be cured by other Church doctrines and documents. Moreover, the Church teaches that the "Operating Thetan" ("OT") teaching materials are kept confidential "[b]ecause understanding of and ability to apply the OT materials are dependent upon having fully attained the earlier states of awareness and abilities" that make up the Scientology training process. WHAT IS SCIENTOLOGY?, *supra* note 34, at 461. Thus, the Church appears to present the religious argument that the revelation of some religious doctrines ought to occur only after an adherent has achieved a certain level of spiritual development, just as a mainstream faith might offer more detailed and obscure religious instruction to seminarians than regular parishioners. A claim that a member had been lured into the Church on false premises would thus be highly problematic, given its grounding in Church doctrines and beliefs.

ago;[113] on the second occasion, he noted, its condition had become "shabby."[114]

These doctrines are, however, apparently less essential at the initial stages of membership in Scientology, which remain focused on auditing. However, auditing is now assisted by the use of what is called an "electropsychometer"[115] or "E-Meter," which appears to be "a skin galvanometer, similar to those used in giving lie detector tests. The subject or 'preclear' holds in his hands two tin soup cans . . . linked to the electrical apparatus. A needle on the apparatus registers changes in the electrical resistance of the subject's skin."[116] The device, which registers changes according to factors such as sweat or pressure, is said to aid in auditing by "isolat[ing] readings which reflect changes in the state of the thetan."[117]

The basic course of auditing, advanced courses to reach progressively higher states such as "operating thetan," and personal E-Meters are all available for a significant cost, which appears to follow a fixed fee schedule but is treated by the Church as a donation.[118] As one Church text puts it, "[i]n the Church of Scientology, parishioners make donations for auditing or training they wish to take."[119] This policy of expecting something in return for the value of spiritual treatment and advancement is called the "doctrine of exchange."[120] One highly critical report on the Church suggested that auditing sessions could cost up to $1,000 an hour, or $12,500 for an intensive 12½-hour course of auditing.[121] A Canadian case concerning the Church noted in 1987 that E-Meters were sold for $1,000 to $2,500 (Cdn.).[122] Another account asserted that a lengthy auditing program in Germany could reach costs of more than $50,000.[123] Documents filed with the United States Internal Revenue Service in 1993 suggested that the

113. MALKO, *supra* note 102, at 114-15.
114. MILLER, *supra* note 1, at 248-49.
115. *See, e.g.*, WHAT IS SCIENTOLOGY?, *supra* note 34, at 81.
116. Founding Church of Scientology v. United States, 409 F.2d 1146, 1153 (D.C. Cir. 1969).
117. WALLIS, *supra* note 8, at 116.
118. WHAT IS SCIENTOLOGY?, *supra* note 34, at 246.
119. *Id.* at 450.
120. Hernandez v. Commissioner, 490 U.S. 680, 685 (1989).
121. Richard Behar, *The Thriving Cult of Greed and Power*, TIME, May 6, 1991, at 50.
122. *Re* Church of Scientology & the Queen (No. 6) [1987] 31 C.C.C. (3d) 449, at 482 (Ont. C.A.).
123. Jack R. Payton, *Scientology and Germany: Falling Back into the Past*, ST. PETERSBURG TIMES, Dec. 22, 1996, at 1A, *available in* LEXIS, News Library; *see also* Ray Moseley, *Some Germans Up in Arms Over Scientology*, CHI. TRIB., Feb. 16, 1997, at 11A (reporting the claim of a former German Scientologist that she and her estranged husband's expenditures and debts for courses and contributions to the Church had reached a total of more than $730,000, and of another German Scientologist that she and her husband had spent more than $315,000 on

Church had approximately $400 million in assets, and annual revenues for eighteen of the Church's various incorporated entities were about $285 million; the salaries listed for Church officials, however, were comparable to those paid by mainstream faiths.[124] A Church text states that those who cannot afford donations may receive free auditing from ministerial students.[125]

Scientology has also taken on a number of openly religious customs or practices. For example, a book of ceremonies lists a number of highly informal suggested formats for church sermons, weddings, and christenings.[126] Scientology ordains ministers, who undergo training and may wear clerical collars.[127]

Despite the presence of religious practices and a spiritual cosmology, however, observers have suggested that church officials often downplay the religious aspects of Scientology, emphasizing instead its scientific roots in Dianetics and the pragmatic results of auditing.[128] Depending on the orientation of the individual who displays curiosity about the Church, the Church's mixture of Dianetics' roots and Scientology's cosmology allow it to emphasize either the scientistic or the spiritual elements of Scientology.[129] Wallis writes that many of the more unfamiliar or unusual aspects of Scientology doctrine, such as the existence of past lives, are not held to be required belief, and that Hubbard advised against exposing new followers to such doctrines at an early stage.[130] Past lives and other more unusual matters are discussed in relatively few of the available Scientology materials.[131] Regarding the doctrine of past lives, one Church text notes: "Individuals are free to believe this or not; past lives are not a dogma in Scientology, but generally Scientologists, during their auditing, experi-

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Scientology over a nine-year period); *CNN Today*, *supra* note 96 (reporting the claims of one former German Scientologist that she spent more than $100,000 on the Church of Scientology).

124. Robert D. Hershey, Jr., *Scientologists Report Assets of $400 Million*, N.Y. TIMES, Oct. 22, 1993, at A12.

125. WHAT IS SCIENTOLOGY?, *supra* note 34, at 450.

126. CEREMONIES, *supra* note 97, at 9-54. A sample proceeding is this example of a christening speech to an infant, from an informal christening performed by Hubbard: "(To the child): How are you? All right. Now your name is ____. You got that? Good. There you are. Did that upset you? Now, do you realize that you're a member of the [Church of Scientology]? Pretty good, huh?" *Id.* at 47.

127. *See* WALLIS, *supra* note 8, at 122.

128. *Id.* at 123-26.

129. *See id.* at 124-25 (noting the differentiation between the "esoteric" and "exoteric" ideologies of Scientology); WHITEHEAD, *supra* note 3, at 70-72. More anecdotally, Malko relates a visit to a Scientology branch in which, upon his inquiry about why Scientology is called a religion, a staff member says: "It's a religion only in that it's tax-free." MALKO, *supra* note 102, at 16.

130. WALLIS, *supra* note 8, at 106.

131. *Id.* at 106-07.

ence a past life and then *know* for themselves that they have lived before."[132]

Moreover, Scientology doctrine teaches that a belief in Scientology does not preclude an adherent from retaining his or her other religious beliefs, including membership in another religious faith.[133] A basic guide to Scientology notes:

> Scientology does not conflict with other religions or other religious practices. . . . The Church has no dogma concerning God, and each person's concept is probably different. As a person becomes more aware of himself, others, the environment and God, each person attains his own certainty as to who God is and exactly what God means to him. The author of the universe exists. How God is symbolized or manifested is up to each individual to find for himself.[134]

One of its better-known adherents has observed, "You can be a Catholic, a Jew, a Protestant—and a Scientologist. It doesn't interfere with your beliefs at all. That's a category left up to you. They talk about everything else, but the God aspect, the religious aspect is left up to you."[135] Scientology does appear, however, to retain the belief in an "Eighth Dynamic"[136] of human nature that consists of "the urge toward existence as INFINITY. The eighth dynamic is commonly supposed to be a Supreme Being or Creator. It is correctly defined as infinity. It actually embraces the allness of all."[137] While one writer has noted that Scientology's creed "does not include a belief in a deity or supreme being,"[138] the creed twice refers to "God."[139] On the whole, then, a fairer assessment might be to conclude that Scientology recognizes some ultimate and transcendent principle and does not preclude an individual from understanding and worshipping this principle as a divine force or deity.

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132. WHAT IS SCIENTOLOGY?, *supra* note 34, at 437.

133. *See infra* notes 134-39 and accompanying text.

134. WHAT IS SCIENTOLOGY?, *supra* note 34, at 435-36; *see also The Religion of Scientology: A Description, supra* note 104 ("[A]lthough Scientology affirms the existence of a Supreme Being, its practice does not include the worship of such. Rather, the goal of the Scientology religion is to bring one to a level to make his or her own conclusions. Thus, like many Eastern religions, salvation in Scientology is attained through *personal* spiritual enlightenment.").

135. WENSLEY CLARKSON, JOHN TRAVOLTA: BACK IN CHARACTER 183 (1996).

136. WHAT IS SCIENTOLOGY?, *supra* note 34, at 71.

137. *Id.*

138. James Walsh, Survey, *Tax Treatment of the Church of Scientology in the United States and the United Kingdom,* 19 SUFFOLK TRANSNAT'L L.J. 331, 334 (1995).

139. CEREMONIES, *supra* note 97, at 73-75; WHAT IS SCIENTOLOGY?, *supra* note 34, at 474-75. The references are: "We of the Church believe . . . that no agency less than God has the power to suspend or set aside these [enumerated inalienable] rights, overtly or covertly. . . . And we of the Church believe that the laws of God forbid man [to engage in further enumerated activities, such as] '[t]o destroy his own kind.'" *Id.*

Finally, like Dianetics, Scientology claims that it may influence not only spiritual health but also physical well-being.[140] In particular, Scientology maintains that it can best deal with situations "[w]here tendency to disease or injury exists, or where disease or injury is being prolonged, or where unhappiness and worry causes [sic] mental or physical upset."[141] The Church is careful to note that it makes "no medical recommendations or claims for the processes"[142] it describes, and that "[i]llnesses caused by recognizable bacteria and injury in accident are best treated by physical means. These fall distinctly into the field of medicine and are not the province of Scientology."[143] Within these parameters, however, Scientology does assert its usefulness in alleviating physical illness: "Although not a substitute for medical treatment, many people recover faster from minor or major accidents, illnesses, upsets, losses and a wide range of conditions affecting their well-being [with the aid of Scientological techniques]."[144]

To sum up, despite its clouded origins and its roots in a doctrine which offered itself as a scientific understanding of the human mind, Scientology has taken on a number of aspects of both doctrine and practice that suggest a religious belief system: a mention of a Supreme Being, though little attention appears to be paid to it; a belief in the soul; a belief in past lives; a *soupçon* of religious ritual; the use of a device, the E-Meter, in a way that parallels the use of religious objects in other faiths; and a set of required conduct and practices, the most prominent of which is the course of auditing followed by most members.[145]

It seems clear that the high cost of the Church's services, suggesting as it does the possibility that the Church is simply a money-making scheme, is at the root of much anti-Scientology sentiment.[146] Still, since the Church is hardly unique in seeking and receiving a substantial amount of money from its followers, the mere fact that the Church demands money from its adherents can prove little about its legiti-

140. *See, e.g.*, CHURCH OF SCIENTOLOGY INT'L, ASSISTS FOR ILLNESSES AND INJURIES 2 (n.d.) ("The fact is, after any necessary medical treatment, the individual himself has an enormous capacity to influence the body and its well-being or lack of it.").

141. *Id.* at 6.

142. *Id.* at frontispiece.

143. *Id.* at 5-6.

144. *Id.* at 42.

145. *See supra* notes 69-72, 98-101, 115-17 and accompanying text.

146. This seems to be the case in North America, England and Australia. See discussion *infra* Part II.A-C. In Germany, other significant factors appear to contribute to anti-Scientology hostility. *See* discussion *infra* Part II.D.

macy.[147] As one writer has commented, given the Church's claims about the ability of Scientology training to bring spiritual fulfillment, if not freedom from most physical illness, "why would people not pay that kind of money for what Scientology has to offer?"[148]

II. Scientology at the Hands of the State: A Comparative Look

Scientology is an international phenomenon. Though its current headquarters are in the United States, it was based in England during the late 1950s and early 1960s.[149] Estimates of the worldwide number of adherents vary widely, from 50,000 to about 8,000,000 people.[150] But whatever its actual numerical strength, it has engendered a strong and generally hostile reaction from most of the nations in which it operates. This section will provide a discussion of the treatment of Scientology in a number of nations, with particular attention paid to how the group has fared under the states' varied formal or informal protections for freedom of religion.

A. *United States*

On the whole, the Church of Scientology has faced the least trouble in the United States, an observation which is hardly surprising, given the multiplicity of faiths in this country[151] and the rigorous protection

147. Nikos Passas & Manuel Escamilla, *Scientology and its "Clear" Business,* 10 BEHAV. SCI. & L. 103 (1992) (offering a curious spin on this point). The authors argue that, contrary to depictions of Scientology as an organization at war with societal values, Scientology has come into conflict with societal institutions "precisely because it offers conventional 'goods and services' and competed [sic] with established groups." *Id.* at 103. Moreover, its crimes are described as common white-collar crimes with no "cultic" features. *Id.* at 104. The authors conclude that the importance to Scientology of litigation over whether it is a proper "religion" stem from the *business* necessity of operating with religious status. *Id.*

148. FLOWERS, *supra* note 3, at 100; *see also* HARRISON & EVEMY, *supra* note 5, at 70 (quoting an English Scientologist) ("It *is* quite expensive, though if you are a staff member you don't have to pay for courses. . . . [But w]hat I have gained is priceless. If I look on my life, the things I value, the spiritual values are all down to Scientology."); Elizabeth Neuffer, *Scientology Under Siege in Germany: Church Members Face Surveillance for Roles in "Antidemocratic" Group,* BOSTON GLOBE, June 7, 1997, at A1 ("'I've paid 250,000 to 300,000 DM,' or roughly $156,000 to $187,000, 'over the last 18 years, but this is ridiculously little compared to what I have gotten out of it.'"). But, for stories of people who believe themselves to have been harmed and/or cheated by Scientology, see, for example, cases cited *infra* note 178.

149. *See, e.g.,* MILLER, *supra* note 1, at 233-46.

150. Craig R. Whitney, *Scientology and its German Foes: A Bitter Conflict,* N.Y. TIMES, Nov. 7, 1994, at A12.

151. *See, e.g.,* TRIBE, *supra* note 2, at 1179 ("Religion in America, always pluralistic, has become radically so in the latter part of the twentieth century.").

of the Religion Clauses of the First Amendment.[152] Nevertheless, the group has faced its share of travails in the United States, though mostly with successful results. This section focuses on some notable examples of litigation involving the church and its conflicts with the government and with former members.

The Church's use of E-Meters as an essential part of its auditing process gave rise to a series of important decisions in the late 1960s and early 1970s after E-Meters and church publications were seized in a 1963 raid on the Founding Church of Scientology of Washington by agents of the Food and Drug Administration.[153] The Food and Drug Administration argued that the use of the E-Meter, along with claims of the efficacy of auditing in curing illnesses found in literature sold by the Church, constituted the use of devices with false and misleading labeling, in violation of the Food, Drug and Cosmetic Act.[154] In his opinion for a panel of the District of Columbia Circuit, Judge Wright noted the essential role played by E-Meters in the auditing process, and the substantial cost of auditing: a twenty-five hour course cost $500 at the time of trial, while E-Meters could be purchased for about $125.[155]

The court held that the Church had made out a prima facie case that it is a religion, though the government did not contest the Church's position.[156] The factors found to establish a prima facie case included: the Church's incorporation as a religion; its use of licensed ministers; and the fact that its "fundamental writings contain a general account of man and his nature comparable in scope, if not in content, to those of some recognized religions."[157]

This, in turn, affected the court's analysis of whether there could be a violation of the statute.[158] The crux of the government's case was that any claims made about the power of the E-Meter to heal illnesses were "false or misleading."[159] But the claims about the E-Meter were made in religious materials distributed by Scientology; thus, "a finding that the seized literature misrepresents the benefits from auditing is a finding that their religious doctrines are false."[160] Citing the Supreme

152. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.").

153. Founding Church of Scientology v. United States, 409 F.2d 1146, 1148 (D.C. Cir. 1969).

154. 21 U.S.C. §§ 301-331 (1994); *see Founding Church of Scientology*, 409 F.2d at 1148.

155. *Founding Church of Scientology*, 409 F.2d at 1152-53.

156. *Id.* at 1160.

157. *Id.*

158. *Id.*

159. *Id.* at 1151.

160. *Id.* at 1156.

Court's decision in *United States v. Ballard,*[161] Judge Wright concluded that this would "present the gravest constitutional difficulties."[162] Accordingly, no material "setting forth religious doctrines" could be used to show misleading labeling.[163] The court did, however, conclude that its decision might be different for wholly non-religious literature promulgated by the group, writing: "We do not hold that, even if Scientology is a religion, all literature published by it is religious doctrine immune from the Act."[164]

On a retrial without a jury, the Church faced a far less tolerant and more skeptical court.[165] Describing the Church and its practices, Judge Gesell wrote:

> Hubbard, who wrote much of the material [explaining Scientology], is a facile, prolific author and his quackery flourished throughout the United States and in various parts of the world. . . .
>
> . . . Auditing was guaranteed to be successful. All this was and is false—in short, a fraud. . . .
>
> . . . Unfortunately, the Government did not move to stop the practice of Scientology and a related "science" known as Dianetics when these activities first appeared and were gaining public acceptance. Had it done so, this tedious litigation would not have been necessary.[166]

Judge Gesell concluded that "[a] single false scientific non-religious label claim is sufficient to support condemnation [of the E-Meters], and in fact there are many."[167] He noted that the materials could not simply be viewed separately, but should be considered as a whole, since they would be available in many different combinations.[168] He concluded:

> The Court has attempted to resolve the difficulty thus presented by the Court of Appeals by refusing to consider the truth or falsity of any claim which, in the understanding of the average reader, could be construed as resting on religious faith. . . . But the overall effect of the many separate writings and the writings as a whole cannot be seriously questioned. Whether the documents are viewed singly or as a whole, the proof showed that many false scientific claims permeate the writings and that these are not even inferentially held out as religious, either in their sponsorship or context.[169]

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161. 322 U.S. 78 (1944).
162. *Founding Church of Scientology,* 409 F.2d at 1157.
163. *Id.*
164. *Id.* at 1162.
165. United States v. Article or Device, 333 F. Supp. 357 (D.D.C. 1971).
166. *Id.* at 359.
167. *Id.* at 361.
168. *Id.* at 361-62.
169. *Id.* at 362.

Ultimately, Judge Gesell did not condemn the use of E-Meters entirely, holding instead that the device could be employed only "for use in bona fide religious counseling."[170] The E-Meters would have to bear a prominent warning that any person using it could not "represent that there is any medical or scientific basis for believing or asserting that the device is useful in the diagnosis, treatment or prevention of any disease."[171] Users, purchasers, and distributees were required to sign a written statement acknowledging that they had read and understood the warning.[172] Conditions were also imposed on both the distribution of literature discussing the E-Meter and on sales of E-Meters.[173] "The effect of this judgment," the court wrote, "will be to eliminate the E-meter as far as further secular use by Scientologists or others is concerned."[174]

Despite the apparent reasonableness of the Court of Appeals' dicta suggesting that wholly non-religious literature might reasonably fall under the food and drug statute without raising significant First Amendment problems, Judge Gesell's opinion ultimately suggests just how quickly any attempt to regulate a religious group for fraudulent or misleading conduct turns thorny.[175] It is difficult at best to simultaneously consider religious literature as a whole *and* conclude that particular materials are *wholly* non-religious. Apparently secular claims are likely to be read with some caution by reasonable individuals, given the religious context in which they are encountered. More seriously, it is not clear how a court should evaluate material in order to determine whether it is "secular" or "religious." While that determination may be easy enough in another setting, literature that contains mixed religious and scientific language may simply be too intermixed to allow such distinctions to be made.

Moreover, language must be understood in its context. One pamphlet cited by Judge Gesell as an example of wholly non-religious literature calls Scientology "a precise and exact science, designed for an age of exact sciences."[176] That language would be impossible to misinterpret in some contexts, such as a chemistry textbook. In a pamphlet distributed by a church and intermixed with openly religious materials, there is serious reason to expect that the language might

170. *Id.* at 364.
171. *Id.*
172. *Id.*
173. *Id.* at 364-65.
174. *Id.* at 365.
175. For a more detailed discussion of the issue of prosecution of religious groups for fraud, see discussion *infra* Part IV.
176. *Article or Device*, 333 F. Supp. at 368.

mean something considerably different. Furthermore, a church and its adherents might *believe* in the scientific validity of their faith claims, despite an absence of verifiable proof. These problems are given short shrift in the judgment. Also ignored is the potential for prejudice to play a part in the prosecution of fraud or mislabeling claims involving E-Meters or other religious devices. As one commentator has noted:

> [D]espite any efforts to preclude direct inquiry into the truth or falsity of religious beliefs, the government might be able to take advantage of the possibility that the more incredible an alleged religious belief appears to the finder of fact, or the more socially unacceptable the results of following the religious belief appear to the finder of fact, the more likely the finder of fact is to conclude that the religious belief is not held in good faith.[177]

These concerns are particularly significant in the case of the Church of Scientology, which presents itself as a mixture of science and religion, as a spiritual faith based on the insights of scientific research, rather than separating the two worlds in the way that a more mainstream faith might. Ultimately, and particularly given the degree of intrusion into the purportedly religious conduct of Scientology that was necessary to impose Judge Gesell's segregation of religious claims and scientific claims, this decision suggests that determinations of what is or is not religious may pose special trouble for unconventional faiths such as Scientology.

Scientology has also faced a number of civil suits by former members who have alleged such torts as fraud and infliction of severe emotional injury.[178] As Douglas Laycock notes, despite the apparent neutrality with which the rules of tort law are framed, such suits may be of particular concern to new religious movements:

> These suits [for fraud or intentional infliction of emotional distress brought against high-demand religions] are typically brought by disgruntled members and their families; they often produce multi-million dollar verdicts that threaten the very existence of the defendant religion. The trials of these cases are generally characterized by attempts to incite the jury to fear and hatred of a strange faith. But the liability rules of fraud and emotional distress are formally neutral. . . . From beginning to end, these cases consist of subjective and

177. Sheldon R. Shapiro, Annotation, *Regulation of Health Devices Under Federal Food, Drug, and Cosmetic Act (21 USCS §§ 301* et seq.) *as Affected by Religious Guarantees of First Amendment*, 13 A.L.R. FED. 747 (1996).

178. *See, e.g.*, Van Schaick v. Church of Scientology of California, Inc., 535 F. Supp. 1125 (D. Mass. 1982); Wollersheim v. Church of Scientology of California, 260 Cal. Rptr. 331 (Cal. Ct. App. 1989), *vacated*, 111 S. Ct. 1298 (1991); Christofferson v. Church of Scientology of Portland, 644 P.2d 577 (Or. Ct. App. 1981).

> intangible elements. Even with careful and unbiased effort, it is difficult to separate the actionable wrongdoing, where there is any, from protected religious exercise. These cases provide maximum opportunity for juries to act on their prejudices, neither of which is measurable by any objective standard.[179]

One such case, *Wollersheim v. Church of Scientology of California,*[180] raises the interesting question whether otherwise permissible conduct by a faith will become actionable if accompanied by coercion.[181] The court in this case held that a number of practices were sufficiently coercive that the plaintiff's actions could not be considered "voluntary religious practices,"[182] and the Church's conduct could thus be actionable under a claim of intentional infliction of emotional distress despite its First Amendment interests.[183] Among the Church's questionable conduct: it forcibly detained the plaintiff when he attempted to leave an auditing program on board a ship owned and operated by Scientology; it urged him to end all contact with his wife and family; it forbade him to seek psychological help though he had become suicidal; and it attempted to destroy his photography business by ordering Scientology members to quit their jobs with him, not to place any orders with him, and to renege on any bills they owed him for previous purchases.[184] Finally, the Church had a practice of "freeloader debt," in which staff members who attempted to leave the Church were presented with a bill for the difference between the full price for Church courses or auditing and the discounted rate paid by staff members.[185]

Both forcible detention and efforts to ensure that Scientologists reneged on bills owing to the plaintiff are at least discrete instances of coercive conduct that might be properly regulated while doing minimal damage to religious doctrine. It would likely raise relatively little

179. Douglas Laycock, *The Remnants of Free Exercise,* 1990 SUP. CT. REV. 1, 45-46, 65; *see also* Paul T. Hayden, *Religiously Motivated "Outrageous" Conduct: Intentional Infliction of Emotional Distress as a Weapon Against "Other People's Faiths,"* 34 WM. & MARY L. REV. 580, 581 (1993):

> [Where religion is involved,] any positive abstract characteristics of the tort [of intentional infliction of emotional distress] as a flexible tool against bad conduct take a decidedly negative, and even bigoted, turn. . . . [A]djudication of such claims invariably tends to involve the trier of fact in an inquiry into the verity of the religious belief that motivates the allegedly outrageous conduct.

Id.

180. 260 Cal. Rptr. 331.

181. Richard Delgado, *Religious Totalism: Gentle and Ungentle Persuasion Under the First Amendment,* 51 S. CAL. L. REV. 1 (1977).

182. *Wollersheim,* 260 Cal. Rptr. at 334.

183. *Id.* at 337-38.

184. *Id.* at 335-36.

185. *Id.* at 336.

difficulty if the Church were required to give advance warning of its freeloader debt policy. More generally, it is likely inappropriate for a religion to claim immunity for conduct punishing a *former* member, as opposed to reasonable conduct disciplining a current member, since the ex-member's departure severs the voluntary bonds of belief and association that might justify such conduct.[186] But the other conduct discussed by the court is more problematic. Conduct such as shunning one's wife or family, or refusing to work or associate with an apostate, would generally be treated as voluntary in any other context, and it seems to go to the heart of a religious community's desire and need to order its own private affairs. In particular, since many new religious movements involve some degree of rejection of society at large, holding a refusal to work with an "outsider" to be actionable would be particularly intrusive. The court in *Wollersheim* noted that the plaintiff was already "psychologically susceptible" to injury,[187] a factor which might swing the outcome. Still, it seems clear that if religions are to retain the right to set rigid conditions for pious followers, and to shun those who do not share their faith, then former members of religious groups will be forced to bear more of the burden for voluntarily joining a strict religious movement than they would if the group were non-religious.

The Church has also been the cause or focus of legal controversy on a number of other occasions. Most notoriously, in 1979, a number of Church members and officials, including Hubbard's wife, Mary Sue Hubbard, arranged under a disposition agreement with the government to plead guilty to charges of conspiracy to obstruct justice, conspiracy to burglarize government offices and steal documents, and theft of government property, in relation to a "covert operation[ ] to steal government documents pertaining to Scientology and a conspiracy to obstruct justice in connection with these operations. . . . [The] program was primarily designed to secrete and destroy documentary proof that Mary Sue Hubbard and her husband L. Ron Hubbard engaged in any 'illegal' or 'incriminating activities.'"[188] Hubbard disavowed any connection between the policies he had set as Executive Director of the Church and this and similar behavior by Church offi-

186. For a slightly different argument suggesting that the First Amendment should protect the right of a religion to exclude members but not to punish them, see Michael J. Broyde, *Forming Religious Communities and Respecting Dissenter's Rights: A Jewish Tradition for a Modern Society*, *in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: RELIGIOUS PERSPECTIVES 203, 226-31 (John Witte, Jr. & Johan D. van der Vyver eds., 1996).

187. *Wollersheim*, 260 Cal. Rptr. at 349.

188. United States v. Heldt, 668 F.2d 1238, 1242-43 (D.C. Cir. 1981).

cials.[189] Similarly, a Church member who was an attorney was disbarred for an apparent plan to act as "an undercover agent for the Church."[190] He acted as counsel to the mayor of Clearwater, Florida, the site of a major Church building, in a suit by the mayor against the Church, and thus obtained access to the litigation files of the mayor and other litigants against the Church.[191]

On the legislative or administrative front, the Church has been the apparent target of at least one abortive attempt at regulation: an unsuccessful Nevada bill, introduced by a state senator whose daughter became involved in the Church and spent $30,000 on courses and on loans to friends so they could take courses.[192] The bill would have provided a cause of action for members or former members of cults "for offering or promising psychological benefits to individuals for a fee unless a licensed psychologist or psychiatrist was present."[193] Interestingly, the bill failed in the state assembly "primarily as a result of Mormon influence,"[194] suggesting that other historically disfavored religious groups may be particularly sensitive to the legal travails of new religious movements.

Finally, Scientology faced substantial difficulty in its attempts to receive tax-exempt status as a religious organization. Its contest with the Internal Revenue Service culminated in the Supreme Court's decision in *Hernandez v. Commissioner*,[195] in which the Court ruled that the fixed payments made by Church members for auditing and training services were a quid pro quo exchange of money for services, and not charitable contributions.[196] Ultimately, in October, 1993, the Internal Revenue Service granted tax-exempt status to the Church.[197] While the substantive issues involved in the tax-exempt status issue

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189. *See* HARRISON & EVEMY, *supra* note 5, at 68-69.

190. Florida Bar v. Vannier, 498 So. 2d 896, 897 (Fla. 1986).

191. *See id.* at 898.

192. David Bromley & Thomas Robbins, *The Role of Government in Regulating New and Nonconventional Religions, in* THE ROLE OF GOVERNMENT IN MONITORING AND REGULATING RELIGION IN PUBLIC LIFE 205, 225, 239 n.63 (James E. Wood Jr. & Derek Davis eds., 1993) (citing James T. Richardson, *Consumer Protection and Deviant Religions,* 28 REV. OF RELIGIOUS RES. 168-79 (1986)).

193. Bromley & Robbins, *supra* note 192, at 225.

194. *Id.*

195. 490 U.S. 680 (1989).

196. *Id.* at 691-92. Justice O'Connor, dissenting, argued that there was no more rigid a connection between the adherents' payments and the services received in the case of Scientology than there is in the case of members of other faiths who pay for pews in a church or seats in a synagogue. *Id.* at 708-11 (O'Connor, J., dissenting).

197. Walsh, *supra* note 138, at 339 n.46 (citing Rev. Rul. 93-73, 1993-2 C.B. 75).

are beyond the scope of this Article,[198] it is worth noting the argument that such laws, which grant exemptions on the basis of a general conception of what constitutes religious activity, may disfavor new religious movements, both because their religious practices and precepts may deviate from mainstream faiths' practices, and because of the possibility that "new religious groups will develop innovative means of financing that are consistent with emerging forms of religious expression."[199]

B. *England*

Though England lacks any constitutional protection for civil liberties,[200] rights such as freedom of religion have generally been protected both by the common law and by particular Parliamentary measures.[201] To some degree, the European Convention of Human Rights may also be appealed to, but though its decisions may be used as an aid to statutory interpretation, they do not have fully binding legal status.[202] Though Great Britain retains an established church and Christians comprise the great majority of its citizens, membership in other faiths is expected to reach about 5.7 million people by the year 2000.[203] Given the establishmentarian history of religion in England,[204] it is hardly surprising that the guiding norm for the treatment

198. For an examination of these issues, see, for example, Jerold A. Friedland, *Constitutional Issues in Revoking Religious Tax Exemptions:* Church of Scientology of California v. Commissioner, 37 U. FLA. L. REV. 565 (1985); Terry L. Slye, *Rendering Unto Caesar: Defining "Religion" for Purposes of Administering Religion-Based Tax Exemptions,* 6 HARV. J.L. & PUB. POL'Y 219 (1983); Walsh, *supra* note 138.

199. Bromley & Robbins, *supra* note 192, at 228.

200. For an overview of English law with respect to civil liberties, see S.H. BAILEY ET AL., CIVIL LIBERTIES: CASES AND MATERIALS (3d ed. 1991).

201. *Id.* at 1-12.

202. Peter Cumper, *Religious Liberty in the United Kingdom, in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 205, 212-13 (Johan D. van der Vyver & John Witte, Jr. eds., 1996). In any event, the Convention may be a somewhat chimerical source of hope for new religious movements, since new or untraditional faiths have rarely succeeded before the European Court of Human Rights itself. *See* T. Jeremy Gunn, *Adjudicating Rights of Conscience Under the European Convention on Human Rights, in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 305, 311, 327-28.

203. A. BRADNEY, RELIGIONS, RIGHTS AND LAWS 3 (1993). This sentence should not be read to suggest the *religiosity* of either the Christian majority or the members of minority faiths. To the contrary, regular attendance at religious services, or a belief in spiritual precepts such as the existence of God, appears to be substantially smaller in England than in the United States or Ireland. *See* Cumper, *supra* note 202, at 205.

204. For a history of the English establishment of religion, including laws restricting the practices of minority faiths, the subsequent development of laws of toleration, and the continued preferred position of the Church of England, see, for example, Cumper, *supra* note 202, at 206-19; and Hon. Mr. Justice David Malcolm, *Religion, Tolerance and the Law,* 70 AUSTRALIAN L.J. 976, 977 (1996).

of religion has traditionally been one of "tolerance" of minority faiths.[205] But as one scholar has written, "[t]his liberal declaration of toleration for all save those who posed criminal threats for democracy came to be tested . . . with the case of the Scientologists."[206]

As already noted, Hubbard made England a base for the Church of Scientology during the late 1950s and early 1960s.[207] Accordingly, the 1960s was the period of the greatest conflict between the state and Scientology in England. Thus, in 1968, following inquiries in Parliament, the Minister of Health, Kenneth Robinson, announced that the government had concluded that Scientology was "socially harmful," and would take measures to refuse entry into the United Kingdom of any foreign nationals seeking to work or study with the Church of Scientology.[208] He referred to the Church as a "pseudo-philosophical cult" and not a religion.[209]

The absence of a written Bill of Rights, perhaps combined with an unfavorable view of Scientology, significantly limited the grounds for successful appeal of the measure. In *Schmidt v. Secretary of State for Home Affairs*,[210] the Court of Appeal upheld the measure as a proper exercise of the Home Secretary's power to exclude aliens for the public good.[211] A challenge to the policy under the principle of freedom of movement of labor within the European Community also failed, as the European Court of Justice held that a state could restrict entry on grounds of public policy.[212] Nevertheless, the law was not unanimously approved. A government inquiry into Scientology criticized the ban, noting that "there is nothing in law to prevent [the alien's] fellows who are citizens in this country from practising Scientology here."[213] In 1980, the Home Secretary lifted the entry ban.[214] In the aftermath of this policy, it has been suggested that "the government has chosen to do little in recent times in terms of overt control of new religions. . . . Some have said the government is still embarrassed about the Scientology ban and that it also learned the futility of trying

205. BRADNEY, *supra* note 203, at 9.

206. ST JOHN A. ROBILLIARD, RELIGION AND THE LAW: RELIGIOUS LIBERTY IN MODERN ENGLISH LAW 106 (1984).

207. *See supra* text accompanying note 149.

208. BAILEY, ET AL., *supra* note 200, at 560 (citing 769 H.C. Deb., 25 July 1968, written answers, col. 189).

209. *Id.*

210. 2 Ch. 149 (C.A. 1969).

211. *Id.*

212. Case 41/74, Van Duyn v. Home Office, 1974 E.C.R. 1337.

213. BAILEY, ET AL., *supra* note 200, at 560 (quoting Sir John Foster, *Enquiry into the Practice and Effects of Scientology*, 1971-72 H.C. 52, ch. 9).

214. *Id.* at 561 (citing 988 H.C. Deb., 16 July 1980, written answers col. 578).

to enforce such a policy."[215] In any event, there currently appears to be "no official governmental policy on NRMs."[216]

Not surprisingly, Scientology has also fared poorly at the hands of the courts. In particular, it has fallen prey to a narrow legal definition of religion. Though "English courts have rarely attempted to define religion,"[217] their occasional efforts have struck a distinctly theistic tone, with little real acceptance of the varied structure of religions. One such case, *R. v. Registrar General, Ex p. Segerdal,*[218] concerned whether a chapel on the grounds of Saint Hill Manor, the English headquarters of Scientology, constituted a "place of meeting for religious worship,"[219] a designation which would provide certain tax benefits.[220] Writing one of two majority opinions for the panel, Lord Denning wrote that the word "religion" in this case ought to be read together with the word "worship" for the purpose of construing the statute.[221] He concluded:

> [The phrase "place of meeting for religious worship"] connotes to my mind a place of which the principal use is as a place where people come together as a congregation or assembly to do reverence to God. It need not be the God which the Christians worship. It may be another God, or an unknown God, but it must be reverence to a deity. There may be exceptions. For instance, Buddhist temples are properly described as places of meeting for religious worship. But, apart from exceptional cases of that kind, it seems to me the governing idea behind the words [of the statute] . . . is that it should be a place for the worship of God.[222]

The court held that Scientology did not constitute an exceptional case.[223] Moreover, the court reasoned:

> [Scientology is] more a *philosophy* of the existence of man or of life, rather than a *religion*. . . . The adherents of this philosophy believe that man's spirit is everlasting and moves from one human frame to another; but still, so far as I can see, it is the spirit of man and not of God.[224]

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215. James T. Richardson, *Minority Religions ("Cults") and the Law: Comparisons of the United States, Europe and Australia,* 18 U. QUEENSLAND L.J. 183, 195 (1995).

216. James T. Richardson & Barend van Driel, *New Religious Movements in Europe: Developments and Reactions, in* ANTI-CULT MOVEMENTS IN CROSS-CULTURAL PERSPECTIVE 129, 154 (Anson Shupe & David G. Bromley eds., 1994).

217. BRADNEY, *supra* note 203, at 124.

218. 2 Q.B. 697 (Eng. C.A. 1970).

219. *Id.*

220. *Id.* at 701, 704.

221. *Id.* at 707.

222. *Id.*

223. *Id.*

224. *Id.*

Apart from obvious concerns about the narrow range of faiths covered by the court's definition, the judgment raises the additional question of how the court could justify the creation of an exception for a faith such as Buddhism[225] without granting a similar exception for Scientology. The decision suggests that a narrow definition of religion will create a need for ad hoc exceptions, which will invariably favor more accepted faiths and disfavor newer or more threatening faiths.

Beyond these cases in which courts have directly confronted religious questions concerning Scientology, English courts have also offered highly critical commentary about the Church of Scientology in cases where Scientology's religious nature was not directly at issue. In *Hubbard v. Vosper*,[226] the Court of Appeal considered an attempt by Hubbard to enjoin the publication of a book extremely critical of Scientology.[227] The court concluded that the author could raise the defense of "fair dealing" with respect to his use of substantial extracts from copyrighted Scientology materials.[228] Dispensing with a breach of confidence claim, Lord Denning concluded that an interlocutory injunction against publication would be inappropriate, since "there is good ground for thinking that these [Scientology] courses contain such dangerous material that it is in the public interest that it should be made known."[229] A similar claim was at issue in *Church of Scientology of California v. Kaufman*,[230] in which Justice Goff confronted a claim that a book to be published by a former Scientologist contained substantial extracts from confidential Scientology teaching materials.[231] Justice Goff noted his doubts that Scientology is a religion, seconding Lord Denning's remarks in *Ex p. Segerdal*.[232] Moreover, Justice Goff concluded that equity ought not to intervene to prevent the disclosure of materials which were "pernicious nonsense."[233]

Perhaps the most critical commentary on Scientology in English jurisprudence may be found in a family law decision in which the court was faced with a custody dispute between a divorced couple, in which

225. See generally the entries on Buddhism and Buddhist philosophy in 2 THE ENCYCLOPEDIA OF RELIGION (Mircea Eliade ed., 1987) (noting that in at least some of its forms, Buddhism professes no belief in a supreme or divine entity and appears to require no supernatural belief beyond a belief in reincarnated souls).

226. 2 Q.B. 84 (Eng. C.A. 1972).

227. *Id.* at 91-92.

228. *Id.* at 95.

229. *Id.* at 96.

230. R.P.C. 635 (Ch. 1973).

231. *Id.*

232. *Id.* at 648.

233. *Id.* at 658.

the father was the custodial parent and a committed Scientologist, whereas the mother, the non-custodial parent, had left the Church.[234] The trial judge, Justice Latey, departed from common practice to give his reasons for judgment in open court, noting that the case "raises matters of some general public moment."[235] Justice Latey acknowledged that the children's custodial family was "a warm close family circle in which they are well cared for and thriving,"[236] and admitted that in the absence of the "[S]cientology factor," the best interests of the children would favor leaving the children in their father's custody while retaining generous access rights for their mother.[237] Nevertheless, he granted custody to the mother,[238] after a judgment which consisted primarily of an extremely critical examination of the origins, doctrines and practices of the Church of Scientology.[239] In the course of the judgment, he called Hubbard "a charlatan and worse,"[240] and concluded:

> Scientology is both immoral and socially obnoxious. . . . In my judgment it is corrupt, sinister and dangerous. It is corrupt because it is based on lies and deceit and has as its real objective money and power for Mr Hubbard, his wife and those close to him at the top. It is sinister because it indulges in infamous practices both to its adherents who do not toe the line unquestioningly and to those outside who criticize or oppose it. It is dangerous because it is out to capture people, especially children and impressionable young people, and indoctrinate and brainwash them so that they become the unquestioning captives and tools of the cult, withdrawn from ordinary thought, living and relationships with others.[241]

Like the American tort cases discussed above in Part II.A., Re *B and G* suggests that new religious movements are often particularly susceptible to harm under even ostensibly neutral legal standards such as the "best interests of the child" standard. A prejudiced judge may treat a case as an occasion for a highly intrusive examination of a "cult" and may focus on the strange and unfamiliar aspects of the faith rather than on any ameliorative facts, such as the apparent well-being of the children before him. Such dangers are surely all the more significant in a nation such as England, whose legal and political cultures

234. *Re* B & G, F.L.R. 134 (Fam. Div. 1985).
235. *Id.* at 135.
236. *Id.* at 157.
237. *Id.* at 158.
238. *Id.* at 161.
239. *Id.* at 139-157.
240. *Id.* at 141.
241. *Id.* at 157.

largely agree in their suspicious or hostile view of this new religious movement.

C. *Australia*

Like England, Australia lacks a Bill of Rights. However, its Constitution does provide a somewhat limited protection for religious freedom. Section 116 of the Constitution states:

> The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth (Constitution).[242]

Despite its obvious similarities to the Religion Clauses of the First Amendment,[243] two significant differences distinguish Section 116 from the American protections for religious freedoms. First, the section is not applicable to state laws (though, strangely enough, it appears in a section of the Constitution entitled, "The States").[244] Second, the repeated use of the word "for" has led Australian courts to conclude that only those laws whose *purpose* is to interfere with an enumerated religious freedom will infringe Section 116—a stricter test than that generally required in the United States.[245]

Scientology has faced mixed treatment in Australia, with a significant regime of state hostility toward the movement but at least one noteworthy court decision in its favor.[246] On the legislative front, the Church has faced a long history of discrimination, including state laws banning Scientology entirely and "psychological practices" laws that effectively ban Scientologists from advertising, performing or being paid for their counseling services while "granting exemptions for ministers of other faiths."[247] The Church was also unsuccessful in challenging a policy of the Australian Security Intelligence Organization.[248] The Church complained that the organization monitored church members and reported their association with Scientology to government agencies when Scientologists sought government jobs.[249]

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242. BETH GAZE & MELINDA JONES, LAW, LIBERTY AND AUSTRALIAN DEMOCRACY 245 (1990).

243. *See supra* note 152 and accompanying text.

244. Stephen McLeish, *Making Sense of Religion and the Constitution: A Fresh Start for Section 116*, 18 MONASH U. L. REV. 207, 209 (1992).

245. *Id.* at 209.

246. *See infra* notes 252-67 and accompanying text.

247. Richardson, *supra* note 215, at 200-01 (citing NEW SOUTH WALES ANTI-DISCRIMINATION BOARD, DISCRIMINATION AND RELIGIOUS CONVICTIONS 207-14 (1984)).

248. GAZE & JONES, *supra* note 242, at 282.

249. *Id.* at 282-83.

The Church argued that such conduct constituted a religious test for office, in violation of Section 116.[250] Justice Aickin of the Australian High Court rejected the action, finding that there was no real case to be tried.[251]

Despite this lack of success in some areas, Scientology fared considerably better in a non-constitutional case considering the definition of a "religious institution" for the purposes of a statutory payroll tax exemption. In *Church of the New Faith v. Commissioner for Payroll Tax (Vic.)*,[252] the court explicitly rejected the English courts' approach to the definition of religion.[253] Instead, the majority of the court adopted more of a multi-factor approach in deciding whether a group is a religious institution.[254] Acting Chief Justice Mason and Justice Brennan, in one opinion, opined that while the law "seeks to leave man as free as possible in conscience to respond to the abiding and fundamental problems of human existence,"[255] not all beliefs about human existence necessarily qualify as religious.[256] Rather, "[f]aith in the supernatural, transcending reasoning about the natural order, is the stuff of religious belief."[257] They concluded by crafting a two-fold test for a definition of religion:

> [F]irst, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against the ordinary laws are outside of the area of any immunity, privilege or right conferred on the grounds of religion.[258]

Justices Wilson and Deane adopted a looser multi-factor test, writing:

> There is no single characteristic which can be laid down as constituting a formularized legal criterion, whether of inclusion or exclusion, of whether a particular system of ideas and practices constitutes a religion within a particular State of the Commonwealth. The most that can be done is to formulate the more important of the indicia or guidelines by reference to which that question falls to be answered. Those indicia must, in the view we take, be derived by empirical observation of accepted religions. They are liable to vary

250. *Id.* at 283.
251. *Id.* at 283-84.
252. (1983) 154 C.L.R. 120.
253. *Id.* at 137, 140-41.
254. *Id.* at 136.
255. *Id.* at 133.
256. *Id.* at 134.
257. *Id.*
258. *Id.* at 136.

with changing social conditions and the relative importance of any particular one of them will vary from case to case.[259]

Among the indicia these judges thought would suggest that a set of ideas is religious were: "belief in the supernatural, that is to say, belief that reality extends beyond that which is capable of perception by the senses";[260] "that the ideas relate to man's nature and place in the universe and his relation to things supernatural";[261] that the ideas require or encourage specific conduct or practices;[262] that the group is identifiable as a group;[263] and that the adherents see themselves as a religion.[264]

Similarly, Justice Murphy, noting the significant presence of skepticism about new religions in Australia, and pointing out that any definition of religion would have to include aboriginal Australians' religious beliefs,[265] rejected a single-factor test, writing:

> The better approach is to state what is sufficient, even if not necessary, to bring a body which claims to be religious within the category. . . . On this approach, any body which claims to be religious, whose beliefs or practices are a revival of, or resemble, earlier cults, is religious. Any body which claims to be religious and to believe in a supernatural Being or Beings, whether physical and visible, such as the sun or the stars, or a physical [and] invisible God or spirit, or an abstract God or entity, is religious. . . . Any body which claims to be religious, and offers a way to find meaning and purpose in life, is religious. . . . The list is not exhaustive; the categories of religion are not closed.[266]

Though he did not state specific criteria, Judge Murphy concluded that the Church of Scientology met the test.[267]

Thus, despite the troubles faced by the Church of Scientology in Australia, it is at least clear that the courts are willing to adopt a broad-stroke definition of religion that, unlike the English approach, is capable of welcoming new religious movements. It is not clear whether the indefinite, multi-factor definition crafted in the *Church of the New Faith* decision will lead to an overbroad definition of religion in tax exemption cases or under Section 116 of the Australian Constitution. But since Acting Chief Justice Mason and Justice Brennan

259. *Id.* at 173.
260. *Id.* at 174.
261. *Id.*
262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.* at 151.
266. *Id.*
267. *Id.* at 162.

made it clear that mere inclusion as a religion would not necessarily privilege all religious conduct, the breadth of the definition may have relatively little protective power in and of itself.

D. Germany

On its face, Germany's constitutional protection for freedom of religion has the broadest scope of application of any nation discussed so far. Yet of the nations examined in this Article, it has also been the most hostile to the Church of Scientology.[268] An examination of Germany's treatment of Scientology thus may illuminate the legal or cultural factors, other than the bare text of a constitutional protection for freedom of religion, that have an influence on legislative and judicial responses to new religious movements.

Like the United States and other nations, Germany is a constitutional democracy whose constitutional text guarantees religious liberty. Article 4 of the Basic Law of 1949, Germany's Constitution, states:

> (1) Freedom of faith, of conscience, and freedom of creed, religious or ideological (*weltanschaulich*), shall be inviolable.
> (2) The undisturbed practice of religion is guaranteed.
> (3) No one may be compelled against his conscience to render war service involving the use of arms. Details shall be regulated by a federal law.[269]

While many provisions in the Basic Law explicitly allow specific restrictions on their application,[270] Article 4 is considered a fundamental human right, and the text of the provision contains no specific allowances for its restriction.[271] Nevertheless, the freedom of religion is not absolute, but is implicitly limited by the other rights enumerated in the Basic Law.[272] Thus, under German constitutional law, "only limitations which reconcile [this] human right[ ] with other constitutional rights of the same rank and importance are allowed."[273] More-

268. *See, e.g.*, Richardson, *supra* note 215, at 194; Neuffer, *supra* note 148, at A1 ("Germany has been harsher, and far more alarmist [in its treatment of Scientology], than other European countries.").

269. DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 344 (1994) (quoting the Basic Law for the Federal Republic of Germany, May 23, 1949, as amended [hereinafter Basic Law], art. 4). Selected provisions of the Basic Law are also available in DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY app. A (2d ed. 1997).

270. CURRIE, *supra* note 269, at 13.

271. *Id.* at 12.

272. *Id.* at 13.

273. *See* Dieter Grimm, *Human Rights and Judicial Review in Germany, in* HUMAN RIGHTS AND JUDICIAL REVIEW: A COMPARATIVE PERSPECTIVE 267, 289 (David M. Beatty ed., 1994).

over, under the German constitutional principle of proportionality, "any restriction of human rights not only needs a constitutionally valid reason but also has to be proportional to the rank and importance of the right at stake."[274]

Unlike the Religion Clauses of the First Amendment, Article 4 of the Basic Law leaves little question that religious freedom is to be lumped together with a broader notion of freedom of conscience or ideology, thus suggesting that German courts need be less concerned with whether a group meets a broad or narrow definition of religion, since any group that is close to the line ought to fall within one of the other protected categories in Article 4. Though Article 4(2) only guarantees "[t]he undisturbed practice of religion,"[275] without mentioning the other categories, the word has been interpreted broadly in this context.[276] "Religion" in the German constitution is used "in an unspecific, general way," and may include atheistic or anti-religious philosophies.[277] Nevertheless, some hurdles must be leapt for a group to be considered religious or *weltanschaulich*—a word signifying world-view or world-philosophy rather than a narrower conception of political ideology. First, the religion or world-view must be held among several people; second, the group must share common convictions about "the meaning of human existence and the manner of living";[278] finally, the group must seek to carry out its common conception of its convictions and duties.[279] As one scholar has suggested, this broad conception of a community united by a common vision reflects "the changes occurring in theology and philosophy."[280] This broad definition is of particular interest to a consideration of Scientology, because whatever questions may exist about its status as a religion, its comprehensive vision of reality and requirements for conduct should surely qualify it as a *Weltanschauung* or world-view.[281]

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274. *Id.* at 275.

275. *Supra* text accompanying note 269.

276. KOMMERS, *supra* note 269, at 449.

277. Martin Heckel, *Religious Human Rights in Germany,* 10 EMORY INT'L L. REV. 107, 111 (1996).

278. Klaus Obermayer, *State and Religion in the Federal Republic of Germany,* 17 J. CHURCH & ST. 97, 102 (1975).

279. *Id.*

280. *Id.*

281. *See* WALLIS, *supra* note 8, at 212 ("[I]t offers a total *Weltanschauung*, a complex meaning system which interprets, explains and directs everyday life by alternative means to conventional, common-sense knowledge."). For a reminder that the way in which many individuals in the West actually *experience* religion on a day-to-day basis may not be as all-embracing as is suggested by the word *Weltanschauung,* see LOUIS HENKIN, THE AGE OF RIGHTS 183 (1990) ("Even the large majority of individuals in the United States who are described or who describe them-

Despite the apparent breadth of this protection, a couple of factors combine to limit the scope of its application or interpretation. First, the German constitutional system, which arose in large measure to exalt and preserve democracy in the face of Hitler's ability to subvert the democratic constitution of the Weimar Republic,[282] contains a principle of "militant democracy," in which freedoms may not be abused "to combat the free democratic basic order."[283] This principle manifests itself in constitutional provisions which declare: that political parties which "seek to impair or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany are unconstitutional";[284] and that a number of basic rights, though not the rights contained in Article 4, may be forfeited if they are used "in order to combat the free democratic basic order."[285] Such provisions have been used to outlaw political parties and to justify the issuance of loyalty guidelines to ensure that civil servants are not enemies of the democratic order.[286] The principle of militant democracy is also manifest in the existence of a federal governmental agency, the Office for the Protection of the Constitution, an "anti-extremist watchdog agency"[287] which monitors groups that are thought to threaten the constitutional and democratic order.[288]

Second, while the American constitutional order has traditionally been viewed as a relatively neutral scheme that seeks to preserve freedom by zealously guarding against intrusions into the ordering of private conduct, the German model is more "facilitative," seeking to achieve a kind of freedom that is "achieved in synthesis with community."[289] Thus, German law, in order to create a meaningful degree of

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selves as religious, do not seem to find in religion an all-embracing *Weltanschauung* that includes a complete political and moral ideology (that might not include rights).").

282. *See, e.g.*, ROBERT L. MADDEX, CONSTITUTIONS OF THE WORLD 89-90 (1995); Günter Dürig, *An Introduction to the Basic Law of the Federal Republic of Germany*, *in* THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY: ESSAYS ON THE BASIC RIGHTS AND PRINCIPLES OF THE BASIC LAW WITH A TRANSLATION OF THE BASIC LAW 11, 15-16 (Ulrich Karpen ed., 1988).

283. KOMMERS, *supra* note 269, at 37-38; *see also* CURRIE, *supra* note 269, at 213-14 (noting a number of provisions in the Basic Law "that appear to embody Milton's view that the enemies of freedom are not entitled to its blessings").

284. CURRIE, *supra* note 269, at 352 (citing Basic Law, art. 21, as amended by Federal Statute of Dec. 21, 1993).

285. *Id.* at 351 (citing Basic Law, art. 18, as amended by Federal Statute of June 24, 1968).

286. *See id.* at 213-27.

287. Neuffer, *supra* note 148, at A1.

288. *Id.*; *see* KOMMERS, *supra* note 269, at 224, 232-33.

289. W. Cole Durham, *General Assessment of the Basic Law—An American View*, *in* GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE—A GERMAN-AMERICAN SYMPOSIUM 37, 45 (Paul Kirchhof & Donald P. Kommers eds., 1993).

freedom within the context of a democratic community, may tolerate more intrusion into individual conduct.[290] German constitutionalism "represents a delicate balance between competing rights and values, both personal and communal."[291] This deep concern with any potential threats to the democratic order should not simply be seen as a legal principle; suspicion of "extreme ideologies" such as those often encountered among new religious or political movements is a deep strain in German social thought.[292] In short, as commentators and cases have observed, the German constitutional order—both in its strong desire to preserve democracy and in its embrace of particular values—is emphatically *not* "value-free."[293]

This strain of thought—a deep protectiveness of the democratic order and a belief in the importance of understanding freedom as being situated within a social context—may, in fact, be seen in a number of official German responses to Scientology and other new religious movements.[294] The turn to new religious movements is described as a "flight from reality,"[295] and new religious movements are perceived as threatening social institutions "[b]y dislodging young people from their educational and career trajectories . . . [and so] . . . removing them from a network of mutual responsibilities."[296] Similarly, since German parents often remain legally responsible for the long-term welfare of their children,[297] new religious movements may be seen as presenting the risk to the health of the family—a concern that rises to constitutional levels in a nation whose Basic Law declares that "[m]arriage and family enjoy the special protection of the state."[298]

Another important factor limiting the potential breadth of the protection of religious liberty is the structure of the church-state relationship in Germany. Germany rejects the strict separationist model of church-state relations, treating church and state as "equal partners in the social order."[299] Germany's model of separation is "moderate and

290. *Id.* at 46.

291. KOMMERS, *supra* note 269, at 505.

292. *See, e.g.*, BECKFORD, *supra* note 3, at 252-53; Richardson & van Driel, *supra* note 216, at 150-51.

293. *See, e.g.*, KOMMERS, *supra* note 269, at 32.

294. *See, e.g.*, Neuffer, *supra* note 148, at A1 (quoting Thomas Schaeuble, interior minister for the state of Baden-Weurttemberg) ("Scientology's program is a threat to a state ruled by law.").

295. Richardson & van Driel, *supra* note 216, at 160.

296. *Id.* at 151.

297. *Id.*

298. CURRIE, *supra* note 269, at 345 (citing Basic Law, art. 6(1)).

299. KOMMERS, *supra* note 269, at 489. In a fine essay offering a comparative framework for questions of religious freedom, W. Cole Durham, Jr., calls such models of church-state partnership "cooperationist regimes." *See* W. Cole Durham, Jr., *Perspectives on Religious Liberty: A*

pro-religious."[300] Under a number of articles of the Weimar Constitution that have been absorbed into the Basic Law, religious bodies may operate as "public law" corporations, and they may employ the machinery of the state to collect taxes from their members for religious purposes, among other privileges.[301] Thus, both the established mainline churches[302] and the state may wish to discourage an overbroad definition of religion in order to exclude some groups from the privileges associated with Germany's cooperative model of church-state relations. Citing a decision of the Constitutional Court, one scholar has written that "[t]he state has to prevent the notion of 'religious community' from being abused by dubious commercial enterprises calling themselves 'religions' in order to escape the narrow limits of commercial, social, and competition law."[303]

As a result of these countervailing factors, Scientology in Germany has fared very poorly at the hands of the state and the courts. The past several years have seen a rash of official and quasi-official actions against the Church. Most recently, the German government has decided to place the Church of Scientology under surveillance by its Office for the Protection of the Constitution for a one-year period[304] despite an earlier conclusion by the Ministry of the Interior that there was insufficient evidence to justify such a move.[305] This step, which was taken after a meeting between the federal Interior Minister and the interior ministers of Germany's sixteen states[306] and apparently

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Comparative Framework, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 1, 20 (Johan D. van der Vyver & John Witte, Jr. eds., 1996).

300. Heckel, *supra* note 277, at 108 (emphasis omitted).

301. CURRIE, *supra* note 269, at 246; KOMMERS, *supra* note 269, at 445; Heckel, *supra* note 277, at 108. The provisions are Articles 136 through 139 and Article 141 of the Weimar Constitution, incorporated by reference into the Basic Law in Article 140 of that document. *See* CURRIE, *supra* note 269, at 409.

302. Of the nation's population of about 88 million people, according to a recent report, more than 55 million are Christian, with approximately 28 million Protestants and 27 million Catholics. Michael Page-English, *The Gist: Germany versus Scientology,* SLATE (visited Jan. 20, 1997) <http://www.slate.com/Gist/97-01-17/Gist.asp>.

303. Martin Heckel, *The Impact of Religious Rules on Public Life in Germany, in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 191, 203 (Johan D. van der Vyver & John Witte, Jr. eds., 1996) (commenting on Judgment of Feb. 5, 1991, BVerfGE 83, 341 (353)).

304. Alan Cowell, *Germany Will Place Scientology Under Nationwide Surveillance,* N.Y. TIMES, June 7, 1997, at A1; *see Germany Puts Scientology Under Intelligence Surveillance,* DEUTSCHE PRESSE-AGENTUR, June 6, 1997, *available in* LEXIS, News Library [hereinafter *Scientology Surveillance*]; Mark John, *Germany Puts Scientology Under Nationwide Watch,* REUTERS, June 6, 1997, *available in* LEXIS, News Library; Neuffer, *supra* note 148.

305. *See infra* note 319.

306. Cowell, *supra* note 304, at A1.

was met with widespread public approval,[307] is intended to establish whether the Church is "simply an 'unpleasant group', a criminal organization or an association with anti-constitutional aims."[308]

The surveillance measures used on the Church may include the interception of mail, the tapping of telephone lines, and the infiltration of Scientology offices.[309] The Interior Minister did pledge that there would be no "witch hunt" or immediate ban on the Church.[310] Nevertheless, the Church has vowed to mount a legal challenge to the surveillance decision, which may offer an opportunity for the German Constitutional Court to weigh in on the legal status of Scientology in Germany.[311] The federal government has also announced its intention to work with state governments to create a central coordinating office which would seek to prevent individuals and companies with links to Scientology from obtaining public jobs involving such activities as counseling or teaching.[312]

At the state level, the state of Bavaria, fearing the infiltration of Scientologists into government or state agencies, now requires all state employees or job applicants, including teachers and police officers, to answer a questionnaire about their ties to Scientology in order to ban Scientologists from public service in the state.[313] And, at a quasi-official level, the Christian Democratic Union, Germany's leading political party, resolved at its 1996 annual conference that Church members should be banned from any employment in the public service in Germany, declaring that: "To belong to the Scientology organisation and the public service is incompatible."[314]

It should be noted that a number of these actual or proposed measures would seem to run afoul of Article 136 of the Weimar Constitu-

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307. *Hot Line Set Up for Information About Scientology*, AGENCE FRANCE PRESSE, June 17, 1997, *available in* LEXIS, News Library (reporting that a survey found nearly 90% of Germans supported the decision to place the Church under surveillance).

308. Cowell, *supra* note 304, at A1 (quoting federal Interior Minister Manfred Kanther).

309. *Id.*; *see also* Neuffer, *supra* note 148, at A1 (quoting Kanther as saying that "all spectrum of means" would be used to monitor the Church); *Scientology Surveillance, supra* note 304.

310. *Scientology Surveillance, supra* note 304.

311. Cowell, *supra* note 304; *Scientology Surveillance, supra* note 304; *see also infra* note 320 and accompanying text (discussing the German Federal Constitutional Court).

312. *See Religion Digest: German Party Throws Out Three Scientologists*, ST. PETERSBURG TIMES, Dec. 21, 1996, at 9.

313. *Bavaria Asks Disclosure of Scientology Ties*, N.Y. TIMES, Oct. 30, 1996, at A6; *Scientologists Banned from Public Service in Bavaria from Friday*, AGENCE FRANCE PRESSE, Oct. 29, 1996, *available in* LEXIS, News Library.

314. *Kohl Party Decides to Ban Scientologists from German Public Service*, AGENCE FRANCE PRESSE, Oct. 21, 1996, *available in* LEXIS, News Library. Recently, the party made good on its resolution, expelling three Church members from the party. *See, e.g.*, *Religion in Brief*, ATLANTA J.-CONST., Dec. 28, 1996, at F4, *available in* LEXIS, News Library.

tion, which has been incorporated into the Basic Law. It states in part:

> (3) No one shall be bound to disclose his religious convictions. The authorities shall not have the right to inquire into a person's membership in a religious body except to the extent that rights or duties depend thereon or that a statistical survey mandated by law so requires.
>
> (4) No one may be compelled to perform any religious act or ceremony, to participate in religious exercises, or to take a religious form of oath.[315]

The government has also pressed its struggle against Scientology through the use of public statements. Thus, the German employment minister has called the group "an organisation which will stop at nothing in its desire to spread its purblind ideology world-wide under the guise of religion."[316] The leader of a state organization investigating the Church has said of the Scientologists, "These people are a danger to German security and the German state. . . . It's an extremist movement, a bunch of subversives. They have a well thought-out program to infiltrate the police, the political parties. When they say they are a church, a religion, it's only public relations, just propaganda."[317] And the cabinet minister for Family and Youth Affairs has charged: "Under the cloak of a religious community hides an organization which unscrupulously and unabashedly engages in dubious activities and whose ideology bears totalitarian traits."[318]

Though the Church of Scientology has argued in opposition to these actions that a number of German courts have accepted its validity as a religion,[319] its success has been mixed. German federal appeal courts,

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315. CURRIE, *supra* note 269, at 411 (quoting Weimar Constitution, Art. 136).

316. Andrew Gimson, *Germany Calling*, SUNDAY TELEGRAPH, May 14, 1995, at 23, *available in* LEXIS, News Library.

317. Payton, *supra* note 123, at 1A.

318. Andrew Gray, *Germany Slams Scientology Sect, Urges Vigilance*, REUTERS N. AM. WIRE, Jan. 10, 1996, *available in* LEXIS, News Library; *see also* Rosalie Beck & David W. Hendon, *Notes on Church-State Affairs*, 37 J. CHURCH & ST. 193, 197 (1995) (recounting these and other instances of anti-Scientology activities in Germany); Paul Zielbauer, *Scientology Hit by Anti-Fascist Backlash*, NEWSDAY, Feb. 2, 1997, at A15 (providing a statement by Bavarian minister of the interior calling the Church of Scientology a "totalitarian system").

319. *See* Church of Scientology, *Facts German Officials Ignore: Rulings on Scientology from German Courts* (visited Nov. 14, 1996) <http://hatewatch.freedommag.org/hatewach/legal.htm> (quoting from various German cases); United States Department of State, *Germany Human Rights Practices, 1995* (visited Nov. 21, 1996) <gopher://gopher.state.gov> (Publications—Major Reports; Human Rights Country Practices; 1995 HRC Report; Europe & Canada; Germany) ("Scientologists continued to take such grievances to court, and the courts have frequently ruled in their favor."); *see also* United States Department of State, *Germany Country Report on Human Rights Practices for 1996* (visited Jan. 31, 1997) <http://www.state.gov/www/issues/human_rights/1996_hrp_report/germany.html> ("Legal rulings have been mixed."). This report

which are the courts of final appeal for all cases, are divided into a number of subject-matter jurisdictions: the Federal Administrative Court, the Federal Labor Court, the Federal Finance Court, the Federal Social Court, the Federal High Court of Justice, as well as the Federal Constitutional Court.[320] These courts are not bound by stare decisis and may decline to follow the reasoning of other tribunals or their own decisions, although they frequently refer to other judicial opinions.[321] Among these courts, according to one report, the highest administrative and labor tribunals have both ruled that Scientology does not qualify for the legal benefits of a religious institution.[322]

One such decision, which came from the Federal Labor Court, concerned a former Scientology staff member who brought a claim for the benefits he was entitled to under German labor law.[323] The plaintiff, a Scientologist, was described as having worked for the Church as an administrator of tests to applicants to the Church.[324] As a devotee of the Church, he was paid a minimal wage; in 1990, for example, he earned less than $3000.[325] The plaintiff claimed that his work for the Church had the effect of creating a labor contract entitling him to the protection of national labor laws.[326] The Church argued that under

also notes some limited positive developments in 1996, including the conclusion by the Ministry of the Interior that there was not enough evidence to justify placing the Church under surveillance by the Office for the Protection of the Constitution, despite the ruling Christian Democratic Union's demand for such surveillance. *Id.* However, that conclusion has evidently now been reversed. *See supra* notes 304-310 and accompanying text.

320. While all of these courts may construe the Basic Law in any case that comes before them, only the Constitutional Court may rule a statute unconstitutional. Thus, if a court concludes that a statute may be unconstitutional, it must certify the question to the Constitutional Court. CURRIE, *supra* note 269, at 27. The Constitutional Court itself "has decided relatively few cases involving religion." *Id.* at 244. As of late 1996, no cases involving the Church of Scientology had yet been decided by the Constitutional Court, according to one published report. *See, e.g.*, Associated Press, *Germany Wanting Scientologists Out*, GREENSBORO (N.C.) NEWS & REC., Dec. 19, 1996, at A12, *available in* LEXIS, News Library. However, the decision of the German government to place the Church under surveillance, and the Church's announcement that it will mount a legal challenge to that decision, suggest that the Court might eventually be faced with an appropriate dispute in which to settle the status of Scientology. *See supra* note 311 and accompanying text.

321. KOMMERS, *supra* note 269, at 42. While the Constitutional Court may decline to follow its reasoning from prior cases, its determinations that a law is constitutional, or that it is invalid or void under the Basic Law, as well as the "essential reasoning" of the decisions, do have a legally binding effect on the legislatures and courts. *Id.* at 54.

322. Alan Cowell, *The Test of German Tolerance*, N.Y. TIMES, Sept. 15, 1996, § 4, at 6.

323. Religionsgemeinschaftseigenschaft von Scientology <http://www.mpikg-teltow.mpg.de/people/katinka/fishy/5azb2194.html>. I am grateful to Peter Leube, a 1996-1997 LL.M. student at Columbia Law School, for providing a partial translation of this opinion and discussing it with me.

324. *Id.*

325. *Id.*

326. *Id.*

German law it should be considered a religious community and that its relationship with the plaintiff was religious and not an employer-employee relationship.[327] Accordingly, the question before the court was whether Scientology could properly be considered a religious community.[328]

The court held that a religious community has the following features: (1) a sincere acceptance of a common religion or world-view, and (2) a manifestation of the religion both in belief and in a common course of conduct.[329] But the court noted that a church could lose its status as a religious community if it used that status as a pretext to engage in economic activities.[330] Noting a split in authority among various courts that had considered Scientology's status as a religious community, the court opted to follow those courts that have denied religious community status to the Church.[331] A number of Church practices, such as the high membership fees and the practice of levying fines against staff members who lagged in their sale of Church literature and articles, were found to be typically commercial practices.[332] Thus, the Church was held liable for its obligations to the former employee.[333]

On one level, it might be argued that the court took the proper approach in this case. The court did not hold that Scientology was not a religion at all, but focused instead on whether a religion's activities were sufficiently commercial to subject it to general laws regulating commercial conduct.[334] But this approach carries with it certain significant problems. In particular, it leaves unclear what makes an activity "commercial." Is the mere exchange of money enough? Clearly that cannot be the case, since it is generally accepted that church subscriptions or membership fees do not transform the institution into a commercial enterprise. If the difference in this case was the emphasis on the amount of the membership fees and the importance of selling literature, that still does not offer a clear distinction. Scientology doctrine suggests that adherents ought to make a fair exchange for the valuable services they receive. And many churches at different times engage in fund-raising drives without losing their character as religious communities. It may be that the characterization of an activity

327. *Id.*
328. *Id.*
329. *Id.*
330. *Id.*
331. *Id.*
332. *Id.*
333. *Id.*
334. *Id.*

as commercial is simply more subjective than the court might accept. Distinctions of this kind will inevitably be influenced by a court's view of whether a church is acting out of base financial self-interest or is simply acting in good faith to carry out the legitimate goals of a religious community.

Rather than the broad distinction between commercial and religious activity, a safer distinction might be between activities or employment pursuant to church doctrine and commercial activities that are entirely irrelevant to church doctrine. Such a distinction would likely have favored the Church of Scientology in this case. While this approach may still leave some difficult questions of fact in some cases, it will at least give more weight to a religion's own interpretation of its conduct.

III. Defining Religion in an Age of Pluralism

As Part II made clear, a great deal can turn on how "religion" is defined for legal or constitutional purposes. The issue is particularly sensitive for new and emerging faiths, whose practices may seem either non-religious or simply absurd and false. Accordingly, it is not surprising that courts have expressed a great reluctance to wade into this difficult question.[335] As one of the more skilled judges in this area has remarked:

> Few tasks that confront a court require more circumspection than that of determining whether a particular set of ideas constitutes a religion within the meaning of the first amendment [sic]. Judges are ill-equipped to examine the breadth and content of an avowed religion; we must avoid any predisposition toward conventional religions so that unfamiliar faiths are not branded mere secular beliefs.[336]

The task is complicated by the fact that any effort to define religion risks the favoring of some groups and the exclusion of others. Accordingly, efforts to define religion may run afoul of both the Establishment and Free Exercise Clauses.[337] Yet some kind of effort to

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335. *See infra* notes 336, 345 and accompanying text.

336. Africa v. Pennsylvania, 662 F.2d 1025, 1031 (3rd Cir. 1981) (Adams, J.); *see also* United States v. Seeger, 380 U.S. 163, 174 (1965) ("[I]n no field of human endeavor has the tool of language proved so inadequate in the communication of ideas as it has in dealing with the fundamental questions of man's predicament in life, in death or in final judgment and retribution. This fact makes the task of discerning the intent of Congress in using the phrase 'Supreme Being' a complex one.").

337. *See, e.g.*, 4 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law: Substance and Procedure § 21.6, at 528 (2d ed. 1992) ("Any attempt to define religion, or to test sincerity, raises concerns under both the establishment and free exercise clauses

define religion, if only on a case-by-case or statute-by-statute[338] basis, is unavoidable.[339] If a narrow definition raises concerns that a faith will be excluded, then allowing an extremely broad definition of religion to apply will either create a significant risk of fraudulent claims or may lead courts to weaken the textual power of the First Amendment by diluting the protective content of a claim of religious freedom.[340]

This Part examines some of the competing approaches to the definition of religion that have emerged from American jurisprudence and scholarship on the question of defining religion, with the background premise that any acceptable definition of religion must be able to appreciate the religious nature of groups such as Scientology or other new religious movements, which may bear a partial resemblance or no resemblance to mainstream, traditionally accepted religions.[341] It then offers a tentative proposal for a definition of religion.[342]

Before proceeding, it should be noted that a frequent concern of those commentators who have attempted to propose a definition of religion for constitutional purposes is whether that definition ought to be the same for both Religion Clauses, or whether the Establishment and Free Exercise Clauses each ought to have their own definition.[343] For the purposes of this Article, this question is put aside. This is done for several reasons. First, the argument that the text of the First Amendment uses the word "religion" but once, suggesting that any fidelity to the text requires a unitary definition of "religion," is compelling.[344] Therefore, any distinctions ought to be drawn from the meaning of the words "establishment" and "free exercise" rather than through a bifurcated definition of religion. Second, Scientology and other minority religions are generally more concerned with free exercise problems than with establishment issues, and this Article shares that primary focus on the Free Exercise Clause. Finally, the definition

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of the first amendment."); Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 241 ("To define religion is to limit it.").

338. The words "religion" and "religious" appear in at least 574 sections of the United States Code and 1,490 sections of the Code of Federal Regulations. James M. Donovan, *God is as God Does: Law, Anthropology, and the Definition of "Religion"*, 6 CONST. L.J. 23, 26 (1995).

339. Ingber, *supra* note 337, at 240.

340. *See* Donovan, *supra* note 338, at 27 (noting that courts turn to balancing test or other measures to sift out unworthy claims).

341. *See infra* Part III.A-D.

342. *See infra* Part III.E.

343. *See, e.g.*, TRIBE, *supra* note 2, at 1185-87 (discussing dual definition approach to religion); Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 605-06 (examining the Court's adoption of a dual definition of religion).

344. Everson v. Board of Educ., 330 U.S. 1, 32 (1947) (Rutledge, J., dissenting).

proposed below may be used under either clause. Thus, an extended discussion of the relative merits of unitary versus bifurcated definitions of "religion" would be somewhat superfluous.

A. The Move From Deity-Based to Functional Definitions

Before the 1960s, few decisions of the Supreme Court or lower courts made any concerted effort to arrive at a precise definition of religion.[345] Nevertheless, some decisions did suggest that the courts' working definition conceived of religion as a belief system involving God or a Supreme Being.[346] Thus, in one of the early Mormon cases, the Court said, "[T]he term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his [sic] being and character, and of obedience to his [sic] will."[347] In his dissent in *United States v. Macintosh,*[348] Chief Justice Hughes agreed, saying, "One cannot speak of religious liberty, with proper appreciation of its essential and historic significance, without assuming the existence of a belief in supreme allegiance to the will of God."[349]

In the conscientious objector cases of the 1960s and early 1970s, however, the Supreme Court turned aside from a theistic approach to the definition of religion, to what has been called a "content-free"[350] or "functional"[351] definition. In *United States v. Seeger*[352] and *Welsh v. United States,*[353] the Court held that a conscientious objector statute's protection of religious belief would include "[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption."[354] The Court noted that "[i]f an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain

345. *See, e.g.,* Slye, *supra* note 198, at 224 ("Perhaps the most striking feature of the early cases in which the Supreme Court attempted to define religion was their comparative lateness. No cases raising the issue were presented to the Court during the first . . . [75] . . . years of the nation's existence. Such a pattern suggests a nearly universal perception on the part of the citizenry as to what constituted a 'religion.'").

346. *See infra* notes 347-349 and accompanying text.

347. Davis v. Beason, 133 U.S. 333, 342 (1890).

348. 283 U.S. 605 (1931).

349. *Id.* at 634 (Hughes, C.J., dissenting).

350. *See* Slye, *supra* note 198, at 228.

351. *See* David Young, Comment, *The Meaning of "Religion" in the First Amendment: Lexicography and Constitutional Policy,* 56 UMKC L. REV. 313, 322-24 (1988) (tracing the Court's efforts to define religion).

352. 380 U.S. 163 (1965).

353. 398 U.S. 333 (1970).

354. *Seeger,* 380 U.S. at 176; *Welsh,* 398 U.S. at 339 (quoting *Seeger,* 380 U.S. at 176).

from participating in any war at any time, those beliefs [would be considered to] function as a religion in his life [for the purposes of the statute]."[355] The Court thus rejected a substantive definition of religion, choosing instead to privilege any belief system that is the functional equivalent of religion for an individual.[356]

The functional approach to defining religion cannot be said to have been sanctioned by the Court as a constitutional principle. The conscientious objector cases involved a statutory protection for religious belief, whereas the Religion Clauses may apply only to whatever range of beliefs the Court would consider truly religious.[357] In *Wisconsin v. Yoder,*[358] the Court cautioned that not all belief systems would be considered religion under the First Amendment:

> [I]f the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.[359]

Thus, the Court apparently requires some particular element to be present in a belief system, whether or not the believer considers that element to be the functional equivalent of religion in his or her life.[360] On a practical level, for one seeking to craft a definition that will show some consistency with the Court's previous cases, it may be necessary to isolate a particular quality that is essential to religious belief.

One of the best-known briefs for a functional definition of religion is a 1978 Note in the *Harvard Law Review,* "Toward a Constitutional Definition of Religion."[361] Drawing on the writings of theologian Paul Tillich, as did the Court in *Seeger,*[362] the Note proposed that religion should be defined for Free Exercise Clause purposes as the "ulti-

355. *Welsh,* 398 U.S. at 340.

356. *Id.*

357. The Universal Military Training and Service Act exempted men from enlisting in the war if their objections were "by reason of religion training and belief." *Id.* at 335-36.

358. 406 U.S. 205 (1972).

359. *Id.* at 216.

360. *See id.* at 215-16.

361. Harvard Note, *supra* note 22.

362. For discussion of whether either the author of the Note or the Court properly understood Tillich's writings, compare James McBride, *Paul Tillich and the Supreme Court: Tillich's "Ultimate Concern" as a Standard in Judicial Interpretation,* 30 J. CHURCH & ST. 245 (1988) (arguing that legal scholars have misinterpreted Tillich), with David McKenzie, *The Supreme Court, Fundamentalist Logic, and the Term "Religion",* 33 J. CHURCH & ST. 731, 736 (1991) (arguing that the Court's reliance on Tillich is "not altogether bogus").

mate concern . . . . [in one's life] . . . . which gives meaning and orientation to a person's whole life."[363]

The ultimate concern test, however, suffers from a fatal vagueness which creates the risk that such a test will either protect too little or too much.[364] On the one hand, if read to protect only those beliefs which are truly ultimate, the test would leave in doubt whether practices that are essential to one's religion but far from matters of ultimate concern will be entitled to any real level of protection.[365] On the other hand, if given a broad reading, the test would allow the Religion Clauses to be read as providing little more than a broad protection for freedom of conscience.[366] But while conscience as a general matter may be a penumbral concern of the First Amendment, it is too vague and broad a category of belief to be crammed into the narrow and specific protection accorded religion in the Constitution. While a state may wish to respect all matters of conscience, it is impossible to respect every deeply held belief given the clash of values that is a basic part of democratic government. Moreover, there is nothing about most strongly held beliefs that necessarily lies outside of the competence of legislatures or courts, unlike those qualities peculiar to religion, such as their non-rational and faith-driven nature, that are not easily evaluated by government.[367] To read such a broad guarantee into the Religion Clauses, rather than increasing protection for conscience, would be more likely to dilute the protective power of the Religion Clauses altogether.

Thus, a functional approach to the definition of religion, at least as its advocates have approached it, seems a poor candidate for a lasting and useful definition of religion.

B. *Single-Factor Tests*

Apart from a belief in God or a Supreme Being, a number of other candidates have been proposed for a single essential factor that should define religion. The infirmities of a deistic approach to religion, particularly in light of new religious movements such as Scientology that exalt the immortal soul of man or woman rather than some separate and supreme being, are fairly self-evident. Such a definition would simply eliminate a vast number of faiths which share every other qual-

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363. Harvard Note, *supra* note 22, at 1066-67.

364. *See* Young, *supra* note 351, at 323-24 (asserting that the functional definition for religion has been criticized for being overly broad and vague).

365. *Id.*

366. *Id.*

367. *See* CHOPER, *infra* note 369, at 72.

ity with deistic religions but the one qualification of belief in God. Even an expanded definition which accepts pantheistic beliefs would ignore numerous faiths, such as Buddhism, with explicitly spiritual beliefs. But other candidates may bear examination.[368]

Jesse Choper has proposed a requirement of "extratemporal consequences" for the limited purpose of determining whether claims under the Free Exercise Clause are exempt from generally applicable government regulation.[369] Such a definition would focus on whether claimants sincerely believe "that the results of actions taken pursuant or contrary to the dictates of . . . [their] . . . faith may well extend in some meaningful way beyond their lifetimes, either by affecting their own existence or by producing a permanent and everlasting significance and place in reality for all persons that follow."[370]

Thus, Choper's test is explicitly limited to a narrow set of circumstances. Nevertheless, as a general test for a definition of religion, it is seriously flawed. First, although Choper criticizes other proposed definitions for not limiting themselves to beliefs with which the government "is not competent to interfere,"[371] he grounds his justification for the definition on a judgment that religious believers facing regulation of deeply held beliefs or conduct are more likely to suffer greater "internal trauma" or "emotional anguish" than one whose deeply held beliefs are not accompanied by a fear of extratemporal consequences.[372] It may be difficult as a general rule to make determinations about an individual's claimed emotional anguish. But, however subjective it may be, emotional anguish is still an earthly phenomenon, a state of mind like any other, and the state *is* competent at making determinations on issues of this sort. By grounding his "extratemporal consequences" definition on the *temporal* consequence of emotional anguish, Choper opens himself up to the argument that judges could make case-by-case determinations about whether an individual is suffering from emotional anguish. If emotional anguish is the real concern under the First Amendment, why

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368. Though I have classified the "ultimate concern" test as a functional test rather than discussing it under the single-factor category, since it follows from *Seeger*'s efforts to find those beliefs that are the functional equivalent of religion, it might also have been considered in this section. *See, e.g.*, Kent Greenawalt, Five Questions About Religion Judges are Afraid to Ask 20-23 (rev. draft Oct. 18, 1996) (unpublished manuscript, on file with the *DePaul Law Review*).

369. JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES 77 (1995).

370. *Id.*

371. *Id.* at 72.

372. *Id.* at 75.

should an individual who believes in extratemporal consequences but feels no anguish about them receive the benefit of an exemption?

Moreover, such a definition ignores those who either believe that no extratemporal consequences will attend upon their actions or that they can undo those effects through penance, confession or some other mechanism.[373] Though such individuals may not fear damnation if they are not granted an exemption, their religious beliefs may still be a profound and fundamental part of their identities. To deny protection despite this fact while others enjoy the ability to practice their religion does not seem to fulfill the intended scope of the First Amendment. Ultimately, Choper's approach trivializes religion by treating it as a form of potential emotional infirmity rather than asking what qualities make it valuable and unique to both the adherent and society at large.

Another category often suggested as a single-factor definition of religion is that of a higher, transcendent, or non-material reality, or a reliance on faith.[374] Such proposals are grounded in the argument that most matters of belief or conduct are within the sphere of competence for the government to discuss, evaluate and regulate. No great mystery, for instance, accompanies a determination of what comprises a just and reasonable rate, though it may be a difficult matter of policy and opinion. Similarly, it is entirely possible to debate most issues of philosophy and morality through a common dialogue, based closely or loosely on agreed-upon terms of rational discussion. Thus, one can discuss the question of whether to criminalize the use of marijuana with someone who disagrees. Though they have a fundamental disagreement about the underlying moral issues, they still share the same terms of discussion and are more or less capable of understanding where they differ in their use of these terms.

Religion, however, is different. It is understood to be non-rational, and thus, from a rational outsider's perspective, it is profoundly difficult to evaluate. Moreover, for the believer, a religious belief is often

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373. *See* Greenawalt, *supra* note 368, at 19-20.

374. *See, e.g.*, Andrew W. Austin, *Faith and the Constitutional Reality of Religion*, 22 CUMB. L. REV. 1 (1991) (proposing a definition based upon faith); Dmitry N. Feofanov, *Defining Religion: An Immodest Proposal*, 23 HOFSTRA L. REV. 309 (1994) (defining religion as a manifestly non-rational belief concerning the nature of the universe); Ingber, *supra* note 337 (asserting that religion involves a higher authority); Richard O. Frame, Note, *Belief in a Nonmaterial Reality—A Proposed First Amendment Definition of Religion*, 1992 U. ILL. L. REV. 819 (proposing a definition that requires courts to inquire whether the belief in question is a belief in a nonmaterial reality); Timothy L. Hall, Note, *The Sacred and the Profane: A First Amendment Definition of Religion*, 61 TEX. L. REV. 139 (1982) (proposing a definition which characterizes religion as a way of perceiving reality).

understood not to be a choice among alternative ideas, but rather a transcendent and authoritative truth that has been "externally imposed."[375] This understanding of religion suggests that religious belief, at its core, contains an element of mystery that is simply *sui generis*, and whose unique value requires special protection under the First Amendment.

As much as this factor may be essential to religion, it presents problems as a *single*-factor definition. Its primary difficulty is its vagueness. Employing such a definition, without more, would inevitably lead to the courts being bogged down in efforts to determine what philosophical beliefs involve a "transcendent" or "higher" understanding of the universe, or to distinguish between "non-rational" beliefs and "rational" philosophical or moral beliefs. A more pragmatic and useful definition of religion should at least retain some ability to refer to such factors as whether the practices of a group resemble those of recognized religions.

Still, the worth of the transcendent or higher reality definition should not be discounted entirely. Kent Greenawalt has suggested that the main difficulty of such tests is that they may exclude groups which "engage in practices closely resembling those of traditional religions but that do not assert a realm of meaning inaccessible to ordinary observation."[376] However, this is actually a potential virtue of such tests. A good deal of activity is ritualized, community-based and part of a deeply held belief, but that does not make it religious. For some, membership in a union might qualify; for others, membership in a neighborhood ethnic association would suffice. In particular, there is nothing about such activity that removes it entirely from the competence of government to understand and evaluate it, though the state may wish to respect people's choice to associate and carry out group activities. Thus, the transcendent reality-type test does have some power to single out those belief systems that are of peculiar importance to the First Amendment.

C. *Multiple-Factor Tests*

Recognizing the sheer complexity and diversity of religious practice and the consequent difficulty of finding a single-factor definition of religion that is neither too narrow nor too broad, a number of courts have adopted a multi-factor definition of religion.[377] This approach

375. Ingber, *supra* note 337, at 282.
376. Greenawalt, *supra* note 368, at 23.
377. *See infra* notes 379-98 and accompanying text.

generally sets out a relatively small, fixed number of criteria that indicate a religion or religious practice, eschewing either a single-factor approach or an endless laundry list of criteria.[378] An example of such an approach would be the opinion of Acting Chief Justice Mason and Justice Brennan in the Australian (statutory) *Church of the New Faith* case.[379] That case proposed the two-fold test of a belief in a supernatural being, thing or principle and the acceptance of canons of conduct in order to give effect to the belief.[380]

The leading American proposal for a multi-factor approach stems from criteria proposed in two important decisions by Judge Adams of the Third Circuit Court of Appeals.[381] In *Malnak v. Yogi,*[382] the Third Circuit faced the question of whether the teaching of Transcendental Meditation constituted an establishment of religion, despite the group's contention that it was *not* a religion.[383] In a detailed concurrence which examined the jurisprudence and academic debate over the constitutional definition of religion, Judge Adams suggested three "useful indicia" of religion, while cautioning that they should not be thought of as a "final 'test' for religion."[384] As he summarized them in a later case, the three indicia were as follows:

> First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs.[385]

Judge Adams insisted in *Malnak* that these indicia were not meant to stand as fixed criteria, but were meant as elements for consideration in a more open-ended analogical approach to determining whether a set of beliefs or practices is religious.[386] Subsequent practice, however, suggests that the indicia may properly be treated as comprising a fixed, multi-factor test. For example, in *Africa v. Pennsylvania,*[387] the Third Circuit faced a Free Exercise claim by a revolu-

378. *See infra* notes 385, 395-96 and accompanying text.

379. Church of the New Faith v. Comm'r for Payroll Tax (Vic.) (1983) 154 C.L.R. 120.

380. *Id.* at 136; *see supra* notes 252-58 and accompanying text.

381. Africa v. Pennsylvania, 662 F.2d 1025 (3d Cir. 1981); Malnak v. Yogi, 592 F.2d 197 (3d Cir. 1979).

382. 592 F.2d 197.

383. *Id.* at 199 (noting the appellants' contention in the court below that their activities were not religious) (citing Malnak v. Yogi, 440 F. Supp. 1284, 1315 (D.N.J. 1977)).

384. *Id.* at 208, 210 (Adams, J., concurring).

385. *Africa,* 662 F.2d at 1032.

386. *Malnak,* 592 F.2d at 207, 210 (Adams, J., concurring).

387. 662 F.2d 1025 (3d Cir. 1981).

tionary organization.[388] Judge Adams again described *Malnak* as adopting a "definition by analogy" approach, but once more limited his consideration to the three criteria proposed in that case.[389]

More recently, in *United States v. Meyers*,[390] Judge Brimmer of the District Court for Wyoming offered a multi-factor test to determine whether a defendant's beliefs ought to be considered as "religious" under the Religious Freedom Restoration Act of 1993 ("RFRA").[391] Meyers had been charged with offenses related to the possession and trafficking of marijuana, and claimed protection under RFRA as the founder of the "Church of Marijuana."[392] Judge Brimmer, having decided that the definition of religion under RFRA was the same as the definition of religion for First Amendment purposes,[393] canvassed the cases dealing with the definition of religion and arrived at a multi-factor test.[394] This test was treated as a set of indicia that would suggest religious belief, rather than a set of rigid criteria that would operate to exclude some beliefs.[395] Despite this disclaimer, the breadth of the five factors offered by the court suggest that a set of beliefs falling outside the criteria would be unlikely to succeed in claiming religious status. Judge Brimmer stated that religious beliefs: often address "ultimate ideas"; often involve "metaphysical" or transcendent beliefs; prescribe a moral or ethical way of life; are comprehensive in nature; and typically exhibit certain "accoutrements" or "external signs," such as the presence of a founder or prophet, important or sacred writings, ceremonies, holidays, and organizational structure.[396] Ultimately, the court concluded that Meyers had not met these factors.[397] Although the court explicitly stated that it had not rested its holding on a finding that Meyers' religion was a mere sham, its ruling was surely colored by its observation that "Meyers' professed beliefs have an ad hoc quality that neatly justify his desire to smoke marijuana."[398]

Though the multi-factor test is somewhat more flexible than at least some single-factor tests, it too is flawed. To the degree that it is a *fixed* test, it shares the problem presented by many single-factor tests: it may simply leave out beliefs and practices that ought to be considered

388. *Id.* at 1026.
389. *Id.* at 1032.
390. 906 F. Supp. 1494 (D. Wyo. 1995).
391. 42 U.S.C.A. § 2000bb (West 1993).
392. *Meyers*, 906 F. Supp. at 1495, 1498.
393. *Id.* at 1499.
394. *Id.* at 1501-03.
395. *Id.* at 1501, 1503.
396. *Id.* at 1502-03.
397. *Id.* at 1509.
398. *Id.*

religious, or it may be so broad and vague as to offer little meaningful guidance. But to the extent that it is not fixed, it offers relatively little guidance about how to weigh the various indicia offered as evidence of religious beliefs if some, but not all, of the indicia are present in a given case.[399] For example, should a non-comprehensive belief system that addresses fundamental questions, but contains few signs of formal practice, be considered a religion? If this quandary is answered by fixing a particular indicium as necessary for a finding that a group is religious, then the test largely collapses back into the single-factor test. In sum, a fixed multi-factor test gives the appearance of staking out a middle ground between a single-factor test and a genuinely open-ended test for religion, but ultimately satisfies neither side of the debate.

D. *An Analogical Approach*

Given the difficulties illustrated so far in this survey of proposed definitions, it is not surprising that some writers have decided that no fixed single- or even multi-factor test can arrive at an acceptable definition of religion. Basing their arguments on Wittgenstein's discussion of resemblances, two writers have urged that courts adopt a flexible analogical approach.[400]

Under Greenawalt's version of this approach, courts might still identify various criteria in their efforts to determine whether something is a religion, but no criterion would be considered essential.[401] One would begin by identifying the common or typical elements of those groups that are "undisputably religious."[402] Such factors as a belief in God or a spiritual domain; a particular perspective on moral obligations derived from a moral code, from a conception of God's nature, or from feelings of awe, guilt or adoration; and organization to facilitate and promote certain beliefs and practices, might be identified as common features of generally accepted religions.[403]

In most respects, such a proposal has great merit, and certainly exceeds most other tests in its usefulness and ability to recognize emerging religious movements. But it does have some significant weaknesses. Some commentators have suggested two principal flaws

399. *See* Feofanov, *supra* note 374, at 375.

400. *See* George C. Freeman III, *The Misguided Search for the Constitutional Definition of "Religion"*, 71 GEO. L.J. 1519 (1983); Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753 (1984); Greenawalt, *supra* note 368.

401. Greenawalt, *supra* note 368, at 27.

402. *Id.* at 28.

403. *Id.*

with the flexible analogical approach. First, it is simply too open-ended: by leaving judges with a potentially endless list of relevant bases for comparison and no essential factors, it is "an open invitation to arbitrary, result-oriented jurisprudence."[404] Of course, to some degree all the tests examined so far are sufficiently vague that they can always misapply the test to include or exclude a group based on the result they desire. But the analogical approach, by comparing a new group to a group of established religions whose customs and beliefs span almost the entire range of human conduct, while refusing to deem any factor essential, seems particularly susceptible to this problem. If the guarantee of the Religion Clauses is to do any real work, a stricter definition may be required.

Second, it has been suggested that the analogical approach errs by beginning, as it inevitably must, with those groups, mostly mainstream, that are considered "indisputably religious."[405] The baseline for an analogical approach may do much to determine the result.[406] Many new religious movements resemble mainstream or "indisputable" religions in many significant respects, and a reasonably sensitive judge who gives the issue any thought would likely conclude that a new faith such as Scientology is "indisputably religious." But even such a judge is likely, when imagining a set of "indisputable" religions for the purposes of analogical comparison, to think of mainstream and not unusual or new religions. Such an approach may have a detrimental effect in some instances, where a judge is confronted with a particularly unusual new faith but, out of habit, compares it only with the practices of established faiths. While Scientology or another new religious movement may resemble a mainstream religion in some respects, emerging religions are often marginalized as cults precisely *because* of the ways in which they do *not* resemble established faiths.[407] This applies not only to conduct, but to the very basis of a belief system. In the hands of a more insensitive judge, an analogical approach may be particularly risky for new or unpopular religions.

To these criticisms two others should be added: the analogical approach in practice may prove either so narrow as to largely eliminate the analogical nature of the approach or so broad that it embraces groups that ought not to be protected by the Religion Clauses. The

404. Young, *supra* note 351, at 329.

405. *See, e.g.*, TRIBE, *supra* note 2, at 1181.

406. *See* Phillip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CAL. L. REV. 817, 837 (1984) ("[E]verything depends upon what we choose as the point of comparison from which to analogize.").

407. *See, e.g.*, Rudin, *supra* note 15, at 17; Harvard Note, *supra* note 22, at 1069-70.

risk of a narrow conception comes from the observation that a judge may, in looking at established religions for factors to serve as the basis for an analogy, simply draw on a limited number of qualities that become a de facto single- or multi-factor test, and not an analogical approach at all. For instance, all of the examples cited by Greenawalt of beliefs, practices, and organizations that are indisputably religious fall into a few simple categories: belief in a non-rational reality; a unique or comprehensive set of beliefs about life and/or human conduct; and organization into groups to facilitate a set of beliefs or practices.[408] The analogical approach is premised on the belief that no single factor or set of factors is essential, and that one could draw on other factors in making an analogy between an established religion and a group that claims to be a religion.[409] But it is no coincidence that Greenawalt chose the factors that he did, and it is likely that courts would follow suit in identifying the same few beliefs or practices. If *these* factors are the essence of what we consider religion, then the analogical approach turns out to be more of a fixed multi-factor test.[410]

If that approach is rejected in favor of a genuinely broad-based understanding of those factors that will identify a religion, and no set of factors is viewed as essential, then the opposite problem may result: a test that is simply overbroad. Greenawalt notes that:

> Many features common to religious practices and organizations are also found in nonreligious settings. Professional organizations have nonreligious rituals and ethical codes. Marxism has a comprehensive view about human existence, but is not (usually) considered religious. Ordinary nonreligious psychotherapy helps people assuage their feelings of guilt. . . . One categorizes an organization or set of practices in light of its combination of characteristics, and how these compare with paradigm instances of religion.[411]

But without a sense of what factors are *essential* to a paradigm instance of religion, what grounds do we have for excluding these examples from our definition of religion? If Marxism resembles religion in several ways—it is a deeply held belief, it provides a code of conduct, it is often the source of group association—why is it not a religion?[412]

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408. Greenawalt, *supra* note 368, at 28.

409. *Id.*

410. *See* Young, *supra* note 351, at 330.

411. Greenawalt, *supra* note 368, at 29.

412. PAUL G. KAUPER, RELIGION AND THE CONSTITUTION 31 (1964).

> But if any ideology, creed, or philosophy respecting man and society is a religion, then must not democracy, fascism, and communism also qualify as religions? It is not uncommon to refer to these as secular or quasi religions, for some find in these systems an adequate explanation of the meaning and purpose of life and the source of values that command faith and devotion. Certainly in the case of communism, with its discipline,

The only final answer to this question is that the analogical approach allows a judge to exercise common sense. But at root, a common sense exclusion of a particular group appears to rest on an understanding that some *essential* factor is missing from the claimant group.

Thus, the analogical approach will either be overbroad, due to its potential to embrace "religions" such as Marxism or psychotherapy, or it will conceal a determination that some factors are, in fact, essential to a determination that a group is religious. The former flaw will allow for the treatment of groups such as Scientology as religions, but may also end up including groups that undoubtedly do not belong under the Religion Clauses. The latter will hide the real basis for judicial determinations, since it will require an essential factor or factors while purporting to require no particular factor. These criticisms do not ignore the significant value of the analogical approach. As a methodological approach, it is highly useful; as a means of arriving at a meaningful definition of religion, however, it is incomplete.

E. A Proposed Definition

Having canvassed a number of leading approaches to the definition of religion for constitutional purposes, this Article advances one of its own. But before doing so, it is important to consider what the starting point of an attempt to define religion ought to be. A proper approach to this question must begin by asking *why* we value religion, and particularly why we value it so much that the First Amendment makes particular reference to religion and not to a general right of freedom of belief or conscience. It is true that a number of pragmatic concerns may also enter into the attempt to define religion. Does a proposed definition sweep too broadly, or too narrowly? Can judges apply it consistently? These and other practical considerations cannot be ignored. But neither should they obscure the larger issue: to define religion in the First Amendment, one must ask why we have the Religion Clauses at all.

Though both the higher reality test and the analogical approach have their flaws standing alone, perhaps some mixture of the two offers the best possibility for a definition of religion that will provide judges with flexibility and will not exclude new or unusual religious faiths, while still attempting to identify those factors that are at the

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> its cultus, its sense of community, and its obligation to duties owing to the system, the resemblance to religion in the conventional sense is clearly apparent.

Id.

bedrock of all that we understand to be religion for the purposes of the Religion Clauses.

Accordingly, Greenawalt's analogical approach[413] should be adopted, with two important modifications. The first is that the emphasis on indisputably religious groups as a starting point[414] must be softened. While that may be a useful initial position, it may also risk the institutionalization of a mainstream understanding of what beliefs and practices are common factors in a religion. Accordingly, the explicit understanding that the pool of faiths from which one may analogize ought to be fluid and expanding should be added to the approach. Those religions that are not mainstream but that are at least uneasily accepted as religions[415] would thus be included. This would provide a stronger guarantee that new religious movements such as Scientology, whose beliefs and practices often resemble one another more than they do the mainstream established faiths, would not be overlooked by the analogical method.

Second, one essential factor should be added to the analogical approach: the individual or group must hold a belief or set of beliefs that is *spiritual, supernatural or transcendent in nature.*[416] This quality is at the heart of the textual guarantee of freedom of *religion* in the First Amendment. As important as closely-held beliefs or matters of conscience may be, they are adequately protected through the political process and the other substantial guarantees in the Bill of Rights.[417] Accordingly, the Religion Clauses ought not to be a free-roving guarantee of freedom of association or of conscience. Rather,

413. *See supra* notes 400-03 and accompanying text.

414. Greenawalt, *supra* note 368, at 28.

415. Groups falling under this category might include, for example, the International Society for Krishna Consciousness, or those who engage in some form of Goddess-worship.

416. For an earlier attempt at a definition of religion for the purpose of determining what belief or conduct would be protected by the guarantee of freedom of religion under Section 2(a) of the *Canadian Charter of Rights and Freedoms,* see Paul Horwitz, *The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond,* 54 U. TORONTO FAC. L. REV. 1, 10-11 (1996). That test adopts this requirement but also requires that the belief be "best served or honoured by certain behaviour, whether individually or in a group," and that if the behavior is not actually compelled, it is a part of the regular practice of a group of faith-holders. These two requirements, which were particularly concerned with determining what constitutes religious *conduct,* would now be subsumed into the general analogical approach and would no longer be essential.

417. Key constitutional provisions that help safeguard strongly-held beliefs and freedom of conscience may be found within the First Amendment itself, in the Speech, Press, Assembly, and Petition Clauses. *See* KAUPER, *supra* note 412, at 31-32.

> But whether the Supreme Court would hold the Communist's faith to be protected under the free exercise clause of the First Amendment appears to be purely academic. Belief in communism or any other ideology as a way of life is privileged under the Constitution whether treated as religious belief or not. Likewise, the propagation of

the Religion Clauses are distinguished by their protection of beliefs and conduct that by their nature cannot be commonly understood and evaluated in a pluralistic, liberal society. Most other claims can, to some degree or other, be evaluated in terms common to all citizens. Religion cannot; it is based on beliefs or convictions whose source is beyond common comprehension.

This fact does not make religion a social liability, however, but an asset. Arguments in favor of a transcendent or higher reality definition often suggest that religious freedom should be protected because it would be inconsistent with the liberal belief in "liberty and self-ownership" to coerce non-rational believers "to conform their conduct, and ultimately their beliefs, to a state-mandated rationality."[418] But the very fact that religion, at its core, exceeds or transcends the bounds of liberalism or rationalism is the source of its unique value—that quality that entitles it to special protection in the First Amendment. Because it generates new arguments and new modes of reasoning, religion may serve as a source of new ideas from outside the sphere of common liberal or rational values, and thus as a source of challenge and renewal.[419]

This may be particularly true of new religious movements, which "rais[e] questions of ultimate value, . . . offer[ ] paradigms of commitment, and . . . mak[e] principled challenges to the status quo. Their presence in our society is undeniably disruptive and intentionally so."[420] But this is not necessarily true of other voluntary associations or deeply-held belief systems, which are not non-rational and thus share many or most of the basic premises of rational or liberal dia-

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> any political, economic, or social ideology is protected under the free speech and free press guarantees so long as it does not amount to advocacy of illegal conduct.

Id.

More generally, guarantees in the Bill of Rights such as the Fourth, Fifth, and Sixth Amendments offer important constraints on the ability of the government to persecute its citizens by means of legal coercion. *See, e.g.*, Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 411 (1997) ("The criminal procedure provisions of the Bill of Rights were almost certainly designed with the objective of protecting religious and political dissenters, rather than the sort of criminals . . . they protect today."); William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393 (1995). And the structure of the Constitution, with its distribution of power among the divided branches of government and the states, is intended in part as a means of harnessing the powers of faction and ambition to restrain the abuse of power by the government. *See, e.g.*, THE FEDERALIST Nos. 10, 51 (James Madison).

418. Feofanov, *supra* note 374, at 389-90.

419. For a more extended discussion of the particular values of religion in a liberal democracy, see Horwitz, *supra* note 416, at 47-56.

420. TABOR & GALLAGHER, *supra* note 6, at 186; *see also* GAZE & JONES, *supra* note 242, at 284 ("Without the challenge of new ideas and behaviour, the vibrancy which is the essence of liberalism and progress would not be achieved.").

logue.[421] This is not to suggest that these groups do not make a valuable and necessary contribution to civil and political discourse, or even that they do not raise questions of ultimate value about fundamental issues of human existence. Of course they do. But all such groups offer a contribution drawn from the same set of rationally arrived at premises. By virtue of their rationality, it cannot be said that they draw on sources of insight that are not available to any other thinker. Rationally based thinkers or groups may offer unique or profoundly useful ideas, but they cannot properly be said to offer revelations. That is the role of religion, whose sources of insight transcend human existence and so are not readily accessible to any rational thinker. Defining religion to require a supernatural, spiritual or transcendent belief system recognizes that such systems, more than any other, hold out the possibility of a truly unique and transformative insight.[422]

Thus, an ideal definition of religion for constitutional purposes must have the flexibility to embrace new and unconventional religious belief systems, while limiting itself to those belief systems that have the unique quality that is singled out for protection under the Religion Clauses. The analogical method, modified as suggested above and supplemented by the essential factor of a spiritual, supernatural or transcendent belief, may meet those requirements.

IV. Fraud and New Religious Movements

Even assuming that Scientology or another new religious movement meets the external criteria that make up a "religion," the question might still remain whether the faith as a whole is fraudulent, or whether particular instances of conduct are fraudulent. Given the suspicion with which new religious movements are often regarded, as noted above, how ought the law to deal with claims of fraud with respect to religious groups? Many who would support a broad defini-

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421. For example, though Democrats, Republicans, and Marxists may disagree vehemently on most issues, and may have some moral disagreements so significant that argument about them is largely futile, most of their underlying ideas, as well as their methods of argument, are drawn from the same well of basic beliefs about the world.

422. *See* Theodore Y. Blumoff, *The New Religionists' Newest Social Gospel: On the Rhetoric and Reality of Religions' "Marginalization" in Public Life,* 51 U. Miami L. Rev. 1, 22-23 (1996) ("Nor is there anything remotely similar between the domain of reason and personal religious experience as a source of knowledge. . . . We are here [with religion] dealing not with reasoned understanding, but the 'revelation of a reality *other* than that in which [the actor] participates through . . . ordinary daily life.' . . . To presume that we come to this other reality as we come to an understanding of Marx's *Economic and Philosophical Manuscripts of 1844,* for example, is just wrong.") (footnote omitted).

tion of religion might do so on the supposition that bogus faiths can be rooted out by attacking their fraudulent conduct.[423] But can they?

The principal Supreme Court treatment of this issue, *United States v. Ballard*,[424] left certain questions unresolved. In that case, the Court ruled on the prosecution and conviction of the founders of the "I Am" movement for mail fraud, based on their soliciting funds accompanied by representations that they had the power to heal illnesses and injuries.[425] The district court had ruled that any question of truth or falsity of the Ballards' religious beliefs should be withheld from the jury, who should decide only whether their beliefs were sincerely held.[426]

For the Court, Justice Douglas ruled that the First Amendment precludes a trial with respect to the truth or falsity of religious doctrines or beliefs, suggesting that it would amount to a heresy trial.[427] The Court did not explicitly sanction fraud convictions based solely on sincerity, though it appeared to leave the possibility open.[428]

In dissent, Justice Jackson took a stricter position against any prosecutions of religious leaders for fraud that rely on truth or falsity or sincerity.[429] His particular concern was that it would be impossible to separate the question of sincerity from that of truth: the state would inevitably seek to show that the defendants were insincere by showing that their statements were false, and the trier of fact's determination on the question of sincerity would be colored by his or her assessment whether the defendant's statements were believable.[430] Furthermore, Justice Jackson argued that some degree of skepticism is a normal feature of religious belief, so it would be dangerous to make sincerity a triable question.[431] The Constitution, he concluded, requires us to tolerate a certain amount of fraud rather than weaken the guarantees of the First Amendment.[432] However, his dissent left open the possibility that a fraud conviction could be sought on grounds unrelated to

423. But see Harvard Note, *supra* note 22, at 1080, for the reminder that unscrupulous individuals seeking to take advantage of legal protections offered to religions can always make up faiths that fall within a narrow definition of religion, so a broad definition of religion may not substantially increase the risk of phony faiths. Of course, a broad definition might encourage non-fraudulent groups that are admittedly not religious to seek the benefits of treatment as a religion.

424. 322 U.S. 78 (1944).

425. *Id.* at 79.

426. *Id.* at 80.

427. *Id.* at 86-87.

428. *Id.* at 84-88.

429. *Id.* at 92-95.

430. *Id.* at 93.

431. *Id.*

432. *Id.* at 95.

religion, such as a misrepresentation about what would be done with solicited donations.[433]

The Court left open the question of exactly what constitutes an acceptable test for fraud involving religious defendants: Is a conviction based only on sincerity legitimate, or is Justice Jackson's position opposing truth or sincerity questions the right one? Given this gap, the response of lower courts has varied, with some courts according no real special treatment to religion and others focusing on a sincerity requirement.[434] *Founding Church of Scientology,*[435] as noted previously, forbade any condemnation of E-Meters based on claims made in religious materials while suggesting that a conviction grounded on non-religious literature would be permissible.[436]

In *Christofferson v. Church of Scientology,*[437] the court dealt with a claim by a former Church member alleging outrageous conduct and fraud.[438] The claim alleged that the plaintiff had joined the Church and paid for its programs based on misrepresentations about L. Ron Hubbard's accomplishments, the potentially beneficial effects of Scientology training, the quality of education offered at a Scientology-run school, and some factual inaccuracies.[439] Following Judge Gesell's approach in the E-Meter case,[440] the Oregon Court of Appeals held that the evidence presented a question of whether some of the statements made by the Church to induce the plaintiff to join were of a wholly non-religious nature.[441] For example, the plaintiff presented evidence that she had been told that "the term 'religion' and 'church' were used only for public relations purposes."[442] The jury was thus allowed to determine if the statements had been made for a wholly non-religious purpose; if so, it could determine the truth or falsity of the statements.[443] But the court refused to read *Ballard* as allowing a sincerity test for religious claims, noting:

433. *Id.* at 92-94.

434. Richard Delgado, *Cults and Conversion: The Case for Informed Consent, in* Thomas Robbins et al., CULTS, CULTURE, AND THE LAW: PERSPECTIVES ON NEW RELIGIOUS MOVEMENTS 111, 113 (1985).

435. Founding Church of Scientology v. United States, 409 F.2d 1146 (D.C. Cir. 1969).

436. *See supra* notes 153-64 and accompanying text.

437. 644 P.2d 577 (Or. Ct. App. 1982).

438. *Id.* at 580.

439. *Id.* at 593-97.

440. United States v. Article or Device, 333 F. Supp. 357 (D.D.C. 1971); *see supra* notes 165-74 and accompanying text.

441. *Christofferson*, 644 P.2d at 601-02.

442. *Id.* at 602.

443. *Id.* at 603.

> In the situation here, it is difficult to determine whose sincerity or good faith the jury could be asked to determine. Is the religious organization to be held liable if one of its ministers is less than a true believer? Or is it to be saved from liability if the individual who makes the statement truly believes, but others in the church do not?[444]

The court's approach may be summed up in a three-part test. A group may shelter its statements under the Free Exercise Clause if: (1) it is a religion; (2) the activities or statements complained of relate to the religious beliefs and practices of the group; and (3) the group is not motivated by a wholly non-religious purpose.[445]

Scholarly commentary on the issue of religious fraud has also offered a range of alternative approaches. Marjorie Heins, a lawyer who has defended the Church of Scientology, has argued that once a court has determined that a defendant is religious, any questions of sincerity must be forbidden.[446] She leaves open one significant exception, of the kind employed in *Christofferson*: fraudulent claims made in a wholly non-religious context would be actionable.[447] But she offers a broad interpretation of what constitutes a religious statement, based on a consideration of what is a central feature of a religion.[448] In *Christofferson,* for instance, the quasi-scientific literature and claims would have been considered religious, while false claims about L. Ron Hubbard's education would be actionable.[449] Similarly, Kent Greenawalt approves Justice Jackson's position that the state ought to avoid getting involved in prosecuting religious fraud cases, while noting that sincerity tests may be unavoidable in other areas, such as claims for exemptions under conscientious objector statutes.[450]

By contrast, Stephen Senn, in an article on the prosecution of religious fraud, argues that courts should permit a sincerity test, accompanied by heightened procedural safeguards: once a defendant fails the test, the organization should be entitled to no constitutional privilege for its conduct.[451] The prosecutorial reluctance to pursue such cases,

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444. *Id.* at 604.

445. *Id.* at 603-08; *see* Steven M. Flanagan, Note, *"Go, Therefore, and Make Disciples of All the Nations," But Do Not Offend the State: Tortious Religious Recruitment and the Free Exercise of Religion Defense,* 25 NEW ENG. L. REV. 1071, 1083-84 (1991) (discussing the *Christofferson* test).

446. Marjorie Heins, *"Other People's Faiths": The Scientology Litigation and the Justiciability of Religious Fraud,* 9 HASTINGS CONST. L.Q. 153, 159 (1981).

447. *Id.* at 197.

448. *Id.* at 189-95.

449. *Id.* at 189-94.

450. Greenawalt, *supra* note 368, at 10.

451. Stephen Senn, *The Prosecution of Religious Fraud,* 17 FLA. ST. U. L. REV. 325, 325-26 (1990).

he argues, creates a "malevolent gap in the protections a state owes its citizens."[452] He writes that the following evidence has been used to determine a religious defendant's sincerity:

> (a) actions inconsistent with professed beliefs; (b) the willingness to bear adverse consequences of the religious belief; (c) an alternative secular purpose; (d) the size and history of the religious organization; (e) the extent to which the claimed beliefs parallel traditional beliefs; (f) the intensity of the believer's devotion; (g) the defendant's testimony and statements relevant to the defendant's religious sincerity; (h) whether the challenged tenet is part of an organized faith of which the defendant is a member; (i) the coexistence of secular fraud; (j) previous case law on the defendant, the religious organization, or the religious belief; and (k) evidence of the defendant's attempts to cover up embarrassing or questionable activities.[453]

Fraud prosecutions against religious groups or individuals can thus be seen to present three significant problems. First, if any prosecutions are to be allowed, what test ought to be employed? Second, if tests of sincerity are to be permitted, how are courts to untangle the question of whose good faith is at issue: the religion's founders, its officers, or the speaker who made the representations that are under challenge? Finally, if sincerity is to be tested, what evidence should suffice to prove insincerity?

On the first question, this Article argues that some prosecutions should be allowed beyond the narrow range that would be permitted under Justice Jackson's approach.[454] Overbroad protections for religious fraud pose the same dilemma as overbroad definitions of religion: they run the risk of protecting groups whose conduct is not religious and thus do not merit First Amendment protections. Such overbroad protections encourage courts to find ways of getting around them, thus weakening the strength of the protections for those faiths that are entitled to it.

Second, though testing for sincerity may be fraught with difficulty, it is not significantly more difficult than the initial determination of whether a group is a religion. While the area must be approached with caution, it should be possible to erect sufficient safeguards to protect religious freedom while still attacking obvious instances of fraud that extend beyond mere misrepresentations about spending.

Given the acknowledged risks of prosecuting fraud claims in this area, however, a number of substantive rules must be erected to limit

452. *Id.* at 329.

453. *Id.* at 341-42. While Senn lists the criteria, he does not approve of all of them.

454. *See supra* notes 429-33 and accompanying text.

the scope of such prosecutions. In particular, the courts should keep in mind that no matter what motives an individual may have for starting a religion or engaging in money-making conduct, his or her followers may have entirely different motives. If one accepts for the sake of argument that L. Ron Hubbard began Scientology as a joke and a fraud, the same thing cannot be said of his officers or supporters. Even if some Church officials come to feel that some of the practices and doctrines of the faith serve in large measure as pretexts for profit, they may still believe that other practices are genuine, and that the self-serving conduct of some members of the religious hierarchy does not taint the entire faith. A priest who takes up collections for his parish while harboring doubts about the sincerity of the local bishop does not become a party to fraud.

Conversely, where a church hierarchy exists, it may be problematic to prosecute a lower official for following church doctrine to his benefit while disbelieving the doctrine, since prosecutions may overreach and attack the doubters about whom Justice Jackson warned,[455] and since parishioners in this circumstance have still received proper, if not sincere, attention. A priest who draws a salary without believing the homilies he utters should, therefore, be immune from prosecution, unless he departs from church practice by, for example, taking up a collection for his personal benefit.

Accordingly, the permissible targets of fraud prosecutions in religious cases should be limited to individuals who, with a fraudulent and insincere motive, *invent* and benefit from a religion or a religious doctrine. This includes lower members of a faith who knowingly and insincerely deviate from church doctrine to their own benefit, and those who engage in standard instances of pure fraud unrelated to church doctrine or sincerity, such as a minister who misrepresents the use to which collected funds will be put.

It should be acknowledged that while the latter two categories are more likely to involve obvious acts of fraud that can be grounded on objective evidence, the first category does risk rather intrusive inquiries about largely subjective questions. Even though this category purports to focus on sincerity and not truth, the accusation that an individual has *invented* a religion or religious belief would seem to suggest that the belief is false. But a judge dealing with such a case should understand that the accusation that an individual has invented a religion is concerned with the *insincerity* and *criminal intent* of the action, and *not* with the truth of the belief system. For example, if I

455. *See supra* notes 429-33 and accompanying text.

declare that I have witnessed a manifestation of an angel in my house, and that I will charge admission for those who wish to see it, and my declaration is fraudulent, then a court may properly punish my attempt to profit from insincere statements. But the court ought not to treat the *claim* itself as false, since an angel might in fact appear in my house. My claim was simply insincere, and a court is not competent to determine anything more than that. In Greenawalt's terms, the court's concern is limited to my *state of mind* in making an apparently religious statement, not the truth of my statement.[456]

On the evidence of the cases, the effort to distinguish between religious and non-religious speech has largely been a failure.[457] Given the volume of intermixed literature that may be available from a faith such as Scientology—whose doctrine leaves no real distinction between its scientific and spiritual claims—and given the difficulty a court will have in understanding the linguistic conventions used by a non-rational organization, it will generally be too difficult to ascertain what literature is genuinely non-religious. Thus, except in the most bald cases of non-religious speech that is well segregated from religious speech, courts should not place any faith in their ability to proceed against a religion based on whether its statements are religious or non-religious. This would permit religious groups to make claims about the efficacy or healing power of their faiths and would likely also protect borderline cases where a claim is both religious and secular in nature. For example, an individual might claim that he or she had healed dozens of sick individuals, a claim that is somewhat verifiable but which also implicates the subjective religious beliefs of both "healer" and "healed" as to what constitutes healing. A more directly false claim, such as an individual's claim that he or she has healed a named individual who does not in fact exist, would be easier to attack. But few cases are likely to be this transparently false, and most borderline cases of religious speech about "scientific" matters will thus find some protection.

Finally, what ought to ground a determination of insincerity? Most of the examples cited by Senn[458] raise the same problems as those in the definition of religion area or those raised by Justice Jackson in determining the truth or falsity of religious beliefs or penalizing doubters.[459] Even devout and sincere individuals, for instance, sometimes engage in actions inconsistent with their professed beliefs, while

456. Greenawalt, *supra* note 368, at 7.

457. *See supra* notes 153-64 and accompanying text.

458. *See supra* text accompanying notes 451-53.

459. *See supra* notes 429-33 and accompanying text.

other sincere individuals may lack intensity in their beliefs. Other criteria, such as the size and history of the religious organization or the extent to which the claimed beliefs parallel traditional beliefs, are self-evidently threatening to new and emerging religious movements. Thus, a finding of insincerity should only be permitted in those limited instances where the following kinds of evidence can be adduced: testimony, statements or reliable hearsay testimony concerning admissions against interest *by the defendant*; the coexistence of relevant secular fraud committed by the defendant; and evidence of the defendant's attempts to cover up activities suggesting fraud, though mere evidence of an effort to conceal spiritual doubt should not be permitted. This extremely narrow range of acceptable evidence of insincerity should respond to concerns that in the field of prosecutions for religious fraud, the risks are great and the benefits relatively limited. By limiting the cases in which prosecution or conviction would be possible, and by limiting the scope of permissible evidence on which to ground a conviction, this approach reduces the risk that a prosecutor will act out of religious bias by limiting the scope of cases in which he or she can act at all.

Given the limited scope of the individuals who would be subject to prosecution, the limited kinds of fraudulent conduct that would be a permissible target, and the limited scope of permissible evidence to show insincerity, it is likely this approach would not cause a significant risk of overreaching and prosecuting sincere religious individuals, or even insincere individuals who correctly follow church doctrine. If anything, it shares with Acting Chief Justice Mason and Justice Brennan in *Church of the New Faith* the belief that "charlatanism is a necessary price of religious freedom."[460] Nevertheless, the difficulties inherent in this area should not lead to quitting the field altogether.

V. Conclusion: Some Observations on Religious Freedom and Comparative Law

Since Scientology is an international faith that faces substantially different treatment in different nations, it is appropriate to consider the treatment of the Church across *its* jurisdiction rather than partition the Church according to national boundaries.[461] Yet this examination is also useful as an exercise in comparative law. It suggests a number of tentative conclusions about which legal or cultural factors

460. Church of the New Faith v. Comm'r for Payroll Tax (Vic.) (1983) 154 C.L.R. 120, 141.

461. *See* Durham, *supra* note 299, at 2 ("Like environmental issues, questions of religious affiliation extend across national boundaries. Injuries or burdens imposed in religious communities in one nation are felt by co-religionists in another.").

may influence a nation's treatment of religious groups, particularly new religious movements such as Scientology, under constitutional or common-law principles of freedom of religion.[462] It also offers a parting reminder of the value of comparative law to domestic constitutional law.[463]

First, this examination of the treatment of Scientology suggests that toleration is of little value to new religious movements. England was one of the most hostile legal systems to Scientology examined in this Article, despite its long tradition of toleration for religious faiths.[464] By contrast, the United States has rejected the Lockean tradition of toleration, favoring instead an openly pluralistic approach to religion.[465] With its tradition of "religious pluralism . . . rooted in freedom and equality, not toleration,"[466] the United States has largely (though inconsistently) been protective of Scientology, while Justice Murphy's reference to aboriginal religion in Australia's *Church of the New Faith*[467] case also suggests that where there are a number of religious traditions, judges will be more sensitive to the needs of religious minorities. While toleration may serve as a full guarantee of religious freedom for established faiths, an openly pluralistic system is required for new faiths to flourish.

Secondly, and quite obviously, any form of establishment tradition, even one that purports to guarantee religious freedom and equality, may threaten new religions, as the German and English experiences suggest.[468] Two reasons for this proposition might be suggested. First, of course, those countries with established faiths are likely to view any new faith with suspicion. But an equally important factor in a state such as Germany is the fact that new religious movements may claim the right to enjoy the privileges accorded to churches in non-separationist societies, not the least of which is the apparent imprimatur of

462. For an interesting and useful typology describing four distinct types of national schemes for church-state relations, see Paul Mojzes, *Religious Human Rights in Post-Communist Balkan Countries*, *in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 263, 266-69 (Johan D. van der Vyver & John Witte, Jr. eds., 1996).

463. For a short but interesting comment on the value of comparative law, see Mary Ann Glendon, *Why Cross Boundaries?*, 53 WASH. & LEE L. REV. 971 (1996).

464. *See supra* Part II.B.

465. For a discussion of the history of the Free Exercise Clause that demonstrates a long American tradition of rejecting toleration in favor of religious pluralism, see Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1443-55, 1514-16 (1990).

466. James E. Wood Jr., Editorial, *New Religions and the First Amendment*, 24 J. CHURCH & ST. 455, 456 (1982).

467. Church of the New Faith v. Comm'r for Payroll Tax (Vic.) (1983) 154 C.L.R. 120, 151.

468. *See supra* Part II.B & D.

state approval, or at least recognition.[469] Separationist states such as the United States offer relatively few state benefits to religious organizations, and thus have less to fear in acknowledging them as religions.[470]

Third, this Article cautions that while the concept of defining "religion" may have some weight in determining how a new religious movement fares in a legal system, other legal or non-legal norms may be more important. As Harold J. Berman has written, one must view religious human rights "in the perspective of the positive laws, the moral theories, and the historical experience, of the different places, the different countries, where those rights are claimed."[471] Thus, Germany offers a broad textual protection, not just for religious freedom, but for freedom of conscience and freedom for any organization with a committed world-view, while the definition of religion in the United States remains more limited. However, countervailing legal norms, such as the profound German commitment to militant democracy and the desire to preserve order in a communitarian context, sap these broad guarantees of much of their protective force.[472] In short, no textual guarantee can be understood apart from the cultural context in which it is interpreted and applied[473]—"a form of words by itself secures nothing."[474]

The importance of considering cultural and historical context is important not only to our understanding of how a state will define freedom of religion, but also to the formation of legal and rhetorical strategies to protect this freedom. Again, Scientology's struggle in Germany illustrates this point quite well. Scientology's public response to current and threatened restrictions on its actions in Germany has consisted largely of mounting an international public relations campaign drawing comparisons between Germany's current

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469. *See supra* notes 299-303 and accompanying text.

470. *But see* Durham, *supra* note 299, at 19 (pointing out that at some point, aggressive separationism may shade into hostility toward religion).

471. Harold J. Berman, *Religious Rights in Russia at a Time of Tumultuous Transition: A Historical Theory, in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 285, 285 (Johan D. van der Vyver & John Witte, Jr. eds., 1996).

472. *See supra* notes 282-93 and accompanying text.

473. Indeed, no *word* in a nation's constitutional text or jurisprudence may be understood apart from the wider cultural context. *See* Donald P. Kommers, Commentary, *Comparative Constitutional Law: Casebooks for a Developing Discipline,* 57 NOTRE DAME LAW. 642, 653-54 (1982) (noting that though both German and American courts refer to a principle of state neutrality toward religious belief, "religious neutrality has profoundly different meanings in the constitutional law of these two nations").

474. John T. Noonan, Jr., *The Tensions and the Ideals, in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 593, 594 (Johan D. van der Vyver & John Witte, Jr. eds., 1996).

behavior toward the Church of Scientology and Germany's treatment of its Jewish population during the Third Reich.[475] This strategy has only succeeded in provoking anger and resistance in Germany,[476] as well as risking the potential alienation of some of the Church's supporters in its demands for religious freedom in Germany.[477] Of course, it is *because* of the history of the Third Reich that Germany, with its fear of potentially totalitarian movements, has acted against Scientology.[478] Therefore, the comparison to Nazi Germany is likely to hinder the Church of Scientology in its dealings with the government, not help it. A skeptical view would suggest that the Scientologists' tactic might be aimed more at drawing attention and donations for the Church outside of Germany, while sacrificing the interests of German members of the Church. But on the assumption that the Church is sincere in its desire for religious freedom within Germany, due regard for the cultural and historical context of that nation would counsel rejecting the tactic of drawing comparisons to the terrible past, and appealing instead to modern human rights norms, while emphasizing that the Church offers no real threat to the survival of German democracy.

Finally, this Article also highlights the value of some comparative examination of the conduct of other legal systems. Decisions such as those in the *Church of the New Faith*[479] demonstrate that a number of states are grappling with precisely the same questions of religious freedom, the definition of religion, and the problem of religious fraud, and often arriving at innovative or useful results. It can accurately be

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475. *See, e.g.*, Mary Williams Walsh, *German Policy on Scientology Attacked*, L.A. TIMES, Jan. 11, 1997, at A1, A12 (detailing German reactions to a published open letter by 34 members of the American entertainment industry drawing comparisons between present-day Germany's treatment of Scientology and the Nazi regime's treatment of the Jews); *Practicing Economic Ostracism*, N.Y. TIMES, Nov. 15, 1996, at A15 (advertisement); *Practicing Hate Propaganda*, N.Y. TIMES, Nov. 8, 1996, at A25 (advertisement); *Practicing Religious Persecution*, N.Y. TIMES, Nov. 22, 1996, at A15 (advertisement).

476. *See, e.g.*, Walsh, *supra* note 475; *Scientology Touches Raw Nerve with its Campaign Against Germany*, DEUTSCHE PRESS-AGENTUR, Jan. 30, 1997, *available in* LEXIS, News Library.

477. *See, e.g.*, Katharine Schmidt, *Germany Targets Scientology*, USA TODAY, Jan. 29, 1997, at 4A, *available in* LEXIS, News Library (quoting U. S. State Department spokesman Nicholas Burns criticizing Scientology's campaign as "simply wrong-headed"); *U.S. Said to Step Up Criticism of Germany's Scientology Curbs*, N.Y. TIMES, Jan. 27, 1997, at A4 (quoting Burns, shortly before the State Department issued a report criticizing Germany's conduct, calling Scientology's comparison of the German government with its Third Reich-era counterpart as "outrageous" and "ahistorical").

478. *See* Alan Cowell, *Germany Says It Will Press on with Scientology Investigations*, N.Y. TIMES, Feb. 1, 1997, at 5 ("German officials argue that it is precisely because of their history that they are sensitive to the perils of totalitarian movements growing from modest beginnings.").

479. Church of the New Faith v. Comm'r for Payroll Tax (Vic.) (1983) 154 C.L.R. 120. See *supra* notes 252-67 and accompanying text for a discussion of this decision.

said that "[o]urs is an age of constitutionalism."[480] Though the values attached to the interpretation of constitutional values such as free speech or freedom of religion are intimately connected to the history and culture of this nation, well-established constitutional courts in other nations, or courts of general jurisdiction considering constitutional issues, may yet have much to offer.[481] As Chief Justice Rehnquist observed at the close of a German-American legal symposium: "[I]t is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process."[482] By looking abroad to examine other constitutional visions of religion, we may ultimately gain a better understanding of who *we* are—or who we ought to be.[483]

480. David M. Beatty, *Human Rights and the Rules of Law, in* HUMAN RIGHTS AND JUDICIAL REVIEW: A COMPARATIVE PERSPECTIVE, 1, 1 (David M. Beatty ed., 1994).

481. *See* Kommers, *supra* note 473, at 655-57.

482. William Rehnquist, *Constitutional Courts—Comparative Remarks, in* GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE—A GERMAN-AMERICAN SYMPOSIUM 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993).

483. The point is well stated in a quote by Thomas Mann which serves as the epigraph for Currie's book: "For only by making comparisons can we distinguish ourselves from others and discover who we are, in order to become all that we are meant to be." CURRIE, *supra* note 269, at v.