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The Apostle, Mr. Justice Jackson, and the Pathological Perspective of the Free Exercise Clause

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The Apostle, Mr. Justice Jackson, and the "Pathological Perspective" of the Free Exercise Clause

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Abstract

The generally accepted interpretation of Justice William O. Douglas's majority opinion in United States v. Ballard, *322 U.S. 78 (1944), casts the case as a ringing defense of religious freedom in the United States; a trial court may not charge a jury with inquiring into the factual truth of a defendant's religious beliefs incident to a prosecution for criminal fraud. This interpretation of* Ballard *is, at least arguably, unduly generous. By permitting juries to inquire into a religious leader's subjective good faith belief in the tenets of the faith, the* Ballard *majority provides an insufficient shield against prosecutions based on antipathy toward a particular religious sect's beliefs. The better view, ably expressed by Justice Robert Jackson in his dissent, would have disallowed inquiries into either the factual truth of a religious sect's beliefs or into the subjective beliefs of a religious leader because it is unrealistic to expect jurors to "separate an issue as to what is believed from considerations as to what is believable." If a primary purpose of the Free Exercise Clause is to safeguard absolute freedom of religious belief, Justice Jackson's approach to the problem of religious fraud should be preferred to Justice Douglas's more limited approach. Moreover, courts must recognize that the value of a religious commitment is not dependent on the sincerity of a sect's leaders; the value of a religion to a believer simply cannot be measured by either the good faith of the group's leaders or the plausibility of the group's beliefs to the larger general public. The Article uses the story line of the motion picture* The Apostle *to explore how even an insincere religious leader can facilitate genuine spiritual growth among his congregants. Justice Jackson's* Ballard *dissent places important—and necessary—emphasis on the freedom to believe in an "apostle"*

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and on the significant value that such belief can provide to congregants. Members of a religion should have a right to believe in an "apostle" even if the apostle does not believe in himself and the validity of a religious experience does not necessarily correlate with the subjective good faith of a religious leader.

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I. Introduction

Since the Supreme Court's decision in *Smith*,[1] which essentially ended the *Sherbert*[2]/*Yoder*[3] regime of strict judicial scrutiny of neutral laws of general applicability that burden religiously motivated conduct,[4] the debate about the

1. *See* Employment Div. v. Smith, 494 U.S. 872, 888–90 (1990) (holding that the Free Exercise Clause does not require heightened judicial scrutiny of neutral laws of general applicability).

2. *See* Sherbert v. Verner, 374 U.S. 398, 403–06 (1963) (holding that before the government may substantially burden an individual's religiously motivated behavior through a neutral law of general applicability, it must have a compelling interest and use narrowly tailored means to achieve that interest).

3. *See* Wisconsin v. Yoder, 406 U.S. 205, 230–35 (1972) (applying the *Sherbert* test and holding that requiring Old Order Amish children to attend school beyond the eighth grade would violate the Free Exercise Clause).

4. *See Smith*, 494 U.S. at 876–79 (holding that an individual's religious beliefs do not

proper scope of free exercise rights has raged unabated. Critics of *Smith* denounce the decision as a betrayal of a basic commitment to protecting an important human right—namely, freedom of conscience.[5] The defenders, although fewer in number, have responded by suggesting that *Sherbert* and *Yoder* produced the anomalous result of increasing, rather than reducing, the net disparity in religious liberty enjoyed by members of minority religious sects.[6] The ultimate merits of this debate lie beyond my immediate point of focus, which is a proposition on which all sides of this great debate agree: Whatever else (if anything) the Free Exercise Clause should mean, it should protect religious belief in near absolute terms.[7]

Indeed, going back to early Free Exercise cases decided in the nineteenth century, the Supreme Court itself repeatedly has asserted that the Free Exercise Clause protects religious belief, if not conduct mandated by religious belief, such as the practice of polygamy.[8] Even Justice Scalia, writing for the *Smith* majority, readily acknowledged that the Free Exercise Clause protects freedom of religious belief in nearly absolute terms.[9] Thus, although a religious sect

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excuse him from compliance with an otherwise valid neutral law of general applicability).

5. *See, e.g.*, Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 2 (describing the criticism of *Smith* and arguing that the decision fails to adequately protect the free exercise of religion); Michael McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 116 (1992) (arguing that *Smith* allows the state to interfere with religious practice without any substantial justification).

6. *See, e.g.*, CHRISTOPHER EISGRUBER & LAWRENCE SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 4–10, 14–15, 78–93 (2007) (questioning the wisdom and the fairness of the selective exemptions approach to the Free Exercise Clause and proposing instead an equality-based model); Mark Tushnet, *"Of Church and State and the Supreme Court": Kurland Revisited*, 1989 SUP. CT. REV. 373, 377–83 (arguing that the *Sherbert/Yoder* approach unfairly favored mainstream religions, and particularly Christian sects, but did little to advance the ability of non-traditional religions and religionists to engage in religiously-mandated behavior that would violate a neutral law of general applicability).

7. *See* Employment Div. v. Smith, 494 U.S. 872, 877 (1990) ("The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires."); Michael J. Perry, *Freedom of Religion in the United States:* Fin de Siècle *Sketches*, 75 IND. L.J. 295, 299 (2000) ("Whether or not it is more than an antidiscrimination norm, the free exercise norm is an antidiscrimination norm.").

8. *See* Reynolds v. United States, 98 U.S. 145, 164 (1879) ("Congress was deprived [by the Free Exercise Clause] of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."); *see also* Davis v. Beason, 133 U.S. 333, 342 (1890) ("The first amendment . . . was intended to allow every one such notions respecting his relation to his Maker and the duties they impose as may be approved by his judgments and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others.").

9. *See Smith*, 494 U.S. at 877 ("The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires.").

would not be free to observe the practice of ritual human sacrifice, it should be—and in theory *is*—entirely free to hold the belief that this practice is essential to achieving eternal salvation and, moreover, to teach the necessity of ritual human sacrifice among its members.[10] In sum, "[t]he door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such."[11] Unfortunately, however, our real world commitment to freedom of religious belief might not be as broad as this high sounding judicial rhetoric would suggest.[12]

United States v. Ballard[13] presented this issue front and center: Could the federal government put the truth of particular religious beliefs before a jury, on the theory that the beliefs constituted fraud?[14] The Ballards (Guy, Edna, and son Donald) presided over the "I Am" sect and claimed to have direct contact with God through the intercession of "St. Germain."[15] The Ballards sought and received financial contributions in support of the church.[16] In return for these faith offerings, members of "I Am" could look forward to many benefits, including faith healings.[17] The government brought criminal fraud charges against all three Ballards.[18]

Justice Douglas, writing for the majority, opined that although government could not put the truth or falsity of the Ballards' religious beliefs on trial, it could charge a jury with ascertaining whether a particular religious leader subjectively believed the doctrines that he espoused.[19] Justice Douglas's opinion is a mainstay of First Amendment casebooks and often serves to establish the strong protection that the First Amendment affords to religious

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10. *See Reynolds*, 98 U.S. at 166 ("Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.").

11. Sherbert v. Verner, 374 U.S. 398, 402 (1963).

12. *See generally* WINNIFRED FALLERS SULLIVAN, THE IMPOSSIBILITY OF RELIGIOUS FREEDOM 1–3, 7–8, 36–37, 84–86 (2005) (arguing that pervasive cultural bias makes it difficult, if not impossible, for the law to secure equal rights for all religions and religionists).

13. *See* United States v. Ballard, 322 U.S. 78, 85 (1944) (finding that the question of whether the beliefs of the "I Am" sect were true or false should not have been submitted to a jury).

14. *Id.* at 85.

15. *Id.* at 79.

16. *Id.*

17. *Id.* at 79–80.

18. *Id.* at 79–81. The sect's leader, Guy Ballard, died before the government initiated the fraud prosecution but was named in the indictment anyway. *See id.* at 79–80 (asserting that "Guy W. Ballard, now deceased" and "Guy W. Ballard, during his lifetime," made fraudulent representations to his followers, along with his wife, Edna, and his son, Donald).

19. *Id.* at 88.

belief.[20] This might be an unduly sympathetic reading of the Douglas opinion. To state the matter simply, if minority religions and religionists face pervasive forms of discrimination and widespread hostility within the general culture, is a trial limited to subjective belief likely to afford an adequate margin of protection for strange, or even offensive, religious beliefs?[21] The question does not admit of any easy or obvious answer.

Professor Vincent Blasi famously argued that the Free Speech Clause of the First Amendment could best serve its central purpose by protecting core political speech in times of perceived social and political crisis.[22] The "pathological perspective," Blasi argued, implies that judges should be most vigilant in superintending speech restrictions when the social cost of free speech could be jaw-droppingly high.[23] He also suggested that the scope of free speech protection might best be defined narrowly but deeply;[24] that is to say, if core political speech in times of war or crisis represents the most crucial role for freedom of speech, then it would be best for judges to hold their powder for use in this context, rather than in cases involving so-called "low value" speech, such as pornography or commercial advertising.[25] The smaller

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20. *See generally* DANIEL FARBER, THE FIRST AMENDMENT (2003); KATHLEEN SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW (2003).

21. Consider, for example, the cold war waged between the Internal Revenue Service and the Church of Scientology in the 1970s and 1980s. For a discussion of this conflict, see Hernandez v. Comm'r, 490 U.S. 680 (1989); Paul Horwitz, *Scientology in Court: A Comparative Analysis and Some Thoughts on Selected Issues in Law and Religion*, 47 DEPAUL L. REV. 85 (1997). In contemporary Germany, efforts to suppress the Church of Scientology not only exist, but clearly enjoy official government approval and support. *See* Michael Cieply & Mark Landler, *Plot Thickens in a Tom Cruise Film, Long Before the Cameras Begin to Roll*, N.Y. TIMES, June 30, 2007, at B7 (discussing the German government's efforts to suppress the Church of Scientology, which it views as a "dangerous cult" that some government officials believe should be "banned"); Michael Browne, *Should Germany Stop Worrying and Learn to Love the Octopus?: Freedom of Religion and the Church of Scientology in the United States*, 9 IND. INT'L & COMP. L. REV. 155, 194–98 (1998) (same).

22. *See* Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449–50 (1985) ("[T]he overriding objective at all times should be to equip the first amendment to do maximum service in those historical periods when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically. The first amendment . . . should be targeted for the worst of times.").

23. *Id.* at 456–58, 464–66.

24. *See id.* at 479–80 ("But the pathological perspective counsels that this development will best serve the constitutional regime if it proceeds cautiously, with careful attention to the costs of expanding the amendment's reach. Those costs seem highest when the activities encompassed by a doctrinal innovation bear little intuitive resemblance in terms of social function or moral significance to the activities that have been at the center of the traditional understanding of the first amendment.").

25. *See id.* at 474–80 (describing the proper limits of free speech protection).

universe of constitutionally protected "free speech" would enjoy deeper protection precisely because the scope of the right would implicate less speech, thereby lowering (at least in theory) the potential social cost of providing near-absolute protection from government regulation or proscription.

This Article argues that the federal courts would do well to apply the "pathological perspective" to the Free Exercise Clause. By this, I mean to suggest that freedom of religious belief really should enjoy absolute protection from government abridgement as a function of the Free Exercise Clause precisely because when the reasons for suppressing religious beliefs seem sufficiently important,[26] the legal bulwark designed to protect religious belief must be equal to the challenge. And, in this regard, the dissenting opinion of Mr. Justice Jackson in *Ballard*[27] has much more to recommend it than does the majority opinion of Mr. Justice Douglas.

Finally, drawing on Robert Duvall's masterful film, *The Apostle*,[28] this Article attempts to demonstrate the dangers inherent in permitting prosecutors and jurors to plumb the hearts and consciences of religious believers to ascertain whether a particular religious leader possesses subjective belief in the

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26. For example, the emergence of new high demand religions in the 1960s and the 1970s, pejoratively labeled "cults," led to a great deal of legal scholarship dedicated to justifying and privileging highly invasive "deprogramming" tactics, including kidnapping and coercive interrogation methods. Were such tactics used to convince a Presbyterian to change her religious stripes, there would be no serious question about the criminal law and tort implications of the "deprogramming." For examples of this scholarship, see generally Douglas Aronin, *Cults, Deprogramming, and Guardianship: A Model Legislative Proposal*, 17 COLUM. J.L. & SOC. PROBS. 163 (1982); Richard Delgado, *Religious Totalism: Gentle and Ungentle Persuasion Under the First Amendment*, 51 S. CAL. L. REV. 1 (1977); Richard Delgado, *When Religious Exercise is Not Free: Deprogramming and the Constitutional Status of Coercively Induced Belief*, 37 VAND. L. REV. 1171 (1984); Robert J. Shapiro, *Of Robots, Persons, and the Protection of Religious Beliefs*, 56 S. CAL. L. REV. 1277 (1983); Margaret T. Singer, *Coming Out of the Cults*, 12 PSYCH. TODAY 72, 72–73 (1979). In other words, if a religious group maintains sufficiently outrageous beliefs, there is a strong social tendency to accept efforts to subordinate or destroy the organization. For a discussion of this phenomenon, see Ronald J. Krotoszynski, Jr., *If Judges Were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of* Smith, 102 NW. U. L. REV. 1189, 1220–49 (2008). *See also* The Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 66 (1890) (upholding a law that disincorporated the Church of Jesus Christ of Latter-Day Saints and seized all of its assets); Laycock, *supra* note 5, at 62–63 (discussing the pervasive persecution of the Mormons by both the federal and state governments). For an overview of the problem of pervasive social hostility to new and high demand religions, see generally Cynthia Norman Williams, *America's Opposition to New Religious Movements: Limiting the Freedom of Religion*, 27 LAW & PSYCHOL. REV. 171 (2003).

27. *See* United States v. Ballard, 322 U.S. 78, 92–93 (1944) (Jackson, J., dissenting) (noting that prosecutions requiring the determination of the sincerity of an individual's religious beliefs could easily degenerate into religious persecution).

28. THE APOSTLE (Butcher's Run Films 1998).

doctrines and dogmas she espouses. The protection of religious belief, which should lie at the very center of the Free Exercise Clause, requires that the federal courts summarily reject any government effort, whether direct or indirect, to call into question the validity of religious beliefs.

II. The Protection of Religious Belief and the Free Exercise Clause

As noted in the Introduction, whatever else the Free Exercise Clause might mean, at a minimum it protects the freedom to believe whatever religious tenets one wishes to embrace. As Chief Justice Warren once stated the matter, "[t]he freedom to hold religious beliefs and opinions is absolute."[29] If this represents the central mission of the Free Exercise Clause, one might consider endorsing a kind of "pathological perspective" on the Free Exercise Clause that works to secure this central purpose in a reliable, if not entirely reflexive, fashion. As this section will demonstrate, however, the federal courts have failed to secure freedom of religious belief in absolute terms.

A. The Belief/Conduct Dichotomy and the Free Exercise Clause

Going back to the major free exercise cases of the nineteenth century, the Supreme Court consistently has held that the Free Exercise Clause protects freedom of belief, if not freedom of action mandated by religious belief. Thus, in 1879, the Supreme Court observed that "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[30] At the same time, however, the Supreme Court squarely rejected the proposition that the Free Exercise Clause provided any protection whatsoever to religiously motivated conduct that ran afoul of neutral laws of general application: "It was never intended or supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society."[31] The Supreme Court rejected the notion that the Free Exercise Clause protected action, rather than belief, because "[t]o permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in

29. Braunfield v. Brown, 366 U.S. 599, 603 (1961).

30. Reynolds v. United States, 98 U.S. 145, 166 (1879).

31. Davis v. Beason, 133 U.S. 333, 342 (1890); *see also Reynolds*, 98 U.S. at 166 (holding that the Free Exercise Clause protects religious beliefs, but not conduct mandated by such beliefs).

effect to permit every citizen to become a law unto himself."[32] "Government could exist only in name under such circumstances."[33]

The Supreme Court significantly expanded the scope of the Free Exercise Clause in a line of cases beginning with *Sherbert v. Verner*[34] and ending with *Employment Division v. Smith*.[35] During the *Sherbert* era, the Supreme Court protected religiously mandated behavior by applying strict scrutiny to neutral laws of general applicability that burdened religiously motivated conduct.[36] Justice Brennan explained that "[i]t is basic that no showing of merely a rational relationship to some colorable state interest would suffice" to justify a "substantial infringement of appellant's First Amendment right."[37] *Sherbert* thus undermined the belief/conduct dichotomy reflected in the Supreme Court's nineteenth century free exercise precedents. Subsequent cases, such as *Wisconsin v. Yoder*,[38] applied heightened forms of judicial scrutiny to neutral laws of general applicability that, as applied, impeded religiously motivated conduct.

During this period, however, the Court's commitment to protecting freedom of belief never waivered; the *Sherbert/Yoder* era provided enhanced protection for religiously motivated conduct, but this did not imply any reduced protection for religious belief (which, since *Reynolds* and *Davis*, the Justices declared to be within the aegis of the Free Exercise Clause). Indeed, in *Sherbert* itself, Justice Brennan began his legal analysis by stating and

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32. *Reynolds*, 98 U.S. at 167.

33. *Id.*; *see* Krotoszynski, *supra* note 26, at 1199–1207 (discussing the belief/conduct dichotomy and the principal cases addressing it).

34. *See* Sherbert v. Verner, 374 U.S. 398, 403–06 (1963) (holding that before the government may substantially burden an individual's religious liberty it must have a compelling interest and use the least burdensome means to regulate religiously motivated conduct to achieve its interest).

35. *See* Employment Div. v. Smith, 494 U.S. 872, 888–90 (1990) (concluding that the Free Exercise Clause does not require more than traditional rationality review for neutral laws of general applicability); EISGRUBER & SAGER, *supra* note 6, at 78–79, 83–87, 257–67 (describing the expansion of the Free Exercise Clause).

36. For examples of cases that apply *Sherbert*'s strict scrutiny analysis, see Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707 (1981); Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136 (1987).

37. *Sherbert*, 374 U.S. at 406.

38. *See* Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) (holding that for Wisconsin to compel school attendance beyond the eighth grade over free exercise objections, the State must either, in fact, not burden religious exercise, or present an interest "of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause").

reaffirming the proposition that the Free Exercise Clause bars "any government regulation of religious *beliefs* as such."[39]

The Supreme Court ultimately reversed course and restored the pre-*Sherbert* belief/conduct dichotomy in *Smith*. Writing for the majority, Justice Scalia opined that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[40] Even as Justice Scalia eviscerated the *Sherbert/Yoder* line of precedents, he cheerfully acknowledged that "[t]he free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires."[41]

Without taking a firm position on the merits of *Smith* in this venue,[42] it suffices simply to note that an unbroken line of precedent stands for the proposition that, as an incident of the Free Exercise Clause, religious beliefs are to be entirely free from government regulation. The question then arises: How dedicated, in practice, are the federal courts to ensuring that religious beliefs are not subject either to direct or indirect forms of government coercion?

B. Ballard *and Freedom of Religious Belief*

In 1944, in *United States v. Ballard*,[43] the Supreme Court noted that "[h]eresy trials are foreign to our Constitution"[44] and held that citizens "may believe what they cannot prove" and "may not be put to the proof of their religious doctrines or beliefs."[45] In so ruling, the Supreme Court reversed the Ninth Circuit's contrary holding that permitted a jury to "question the truth of the representations concerning [the Ballards'] religious doctrines or beliefs."[46] The standard reading of *Ballard* scores the decision as a victory for religious freedom because it disallows government from putting the truth of religious beliefs (quite literally) on trial. To some extent, the decision bears out this

39. *Sherbert*, 374 U.S. at 402.

40. *Smith*, 494 U.S. at 879 (internal quotations and citations omitted).

41. *Id.* at 877.

42. For my views on *Smith*'s merits, see generally Krotoszynski, *supra* note 26.

43. *See* United States v. Ballard, 322 U.S. 78, 85 (1944) (holding that a trial court should not submit to a jury the question of whether the beliefs of the "I Am" sect are factually true or false, but also holding that a jury could constitutionally determine whether the "I Am" sect's leaders actually believe the sect's teachings).

44. *Id.* at 86.

45. *Id.*

46. *Id.* at 85–86.

reading—undoubtedly having jurors determine religious truth would ill serve freedom of conscience in matters of faith.

Justice Douglas, writing for the majority, reinstated the district court's approach, which the court of appeals had rejected.[47] The district court instructed the jury not to consider the ultimate truth of the Ballards' religious claims, but stated the controlling issue in the fraud trial as follows:

> Did these defendants honestly and in good faith believe those things? If they did, they should be acquitted. I cannot make it any clearer than that.
>
> If these defendants did not believe those things, they did not believe that Jesus came down and dictated, or that Saint Germain came down and dictated, did not believe the things that they wrote, the things that they preached, but used the mail for the purpose of getting money, the jury should find them guilty. Therefore, gentlemen, religion cannot come into this case.[48]

Justice Douglas squarely endorsed these jury instructions, holding that "we conclude that the District Court ruled properly when it withheld from the jury all questions concerning the truth or falsity of the religious beliefs or doctrines of [the Ballards]."[49] Thus, for the majority, the Free Exercise Clause precludes asking a jury to inquire into the truth of particular religious beliefs, but does not preclude a jury from determining subjective good faith (i.e., whether a religious leader actually subjectively believes what she professes).[50]

If the alternative would be permitting jurors to engage in religious fact findings, limiting the jury's inquiry to subjective good faith plainly represents the better course of action.[51] But a serious question exists regarding whether an average juror can distinguish between actual subjective good faith belief and the general plausibility of a religious belief (viewed through the lens of the belief systems of the dominant religious groups within the culture, whose members are quite likely to staff petit juries). The stranger or more outlandish a

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47. *Id.* at 88.

48. *Id.* at 81–82.

49. *Id.* at 88.

50. *Id.*

51. *But cf. id.* at 89–90 (Stone, C.J., dissenting) ("I cannot say that freedom of thought and worship includes freedom to procure money by making knowingly false statements about one's religious experiences. . . . The state of one's mind is a fact as capable of fraudulent misrepresentation as is one's physical condition or the state of his bodily health."). Chief Justice Stone would have reversed the Court of Appeals and simply reinstated the convictions obtained following the district court trial. *See id.* at 92 (Stone, C.J., dissenting) ("As no legally sufficient reason for disturbing it appears, I think that the judgment below should be reversed and that of the District Court reinstated.").

religious belief appears, when viewed through the lens of the dominant culture, the less likely a juror will be to find that a defendant actually believes the dogma in question. Thus, asking a juror to assess subjective belief is in practice not really very far removed from asking the juror to assess religious truth.

C. Mr. Justice Jackson and the Pathological Perspective

Justice Robert Jackson dissented strongly from the majority's holding that the district court properly instructed the jury to consider the issue of the Ballards' subjective good faith belief in the doctrines of the "I Am" cult.[52] Jackson questioned whether "misrepresentation of religious experience or belief is prosecutable" and emphasized "the danger of such prosecutions."[53]

To be clear, Justice Jackson did not appear to be particularly sympathetic to the Ballards or their cult: "I should say that the defendants have done just that for which they are indicted. If I might agree to their conviction without creating a precedent, I cheerfully would do so. I can see in their teachings nothing but humbug, untainted by any trace of truth."[54] Thus, he was not any more subjectively convinced of the value of the "I Am" cult than the majority or other dissenting members of the Court.

The problem, however, was the plausibility of distinguishing subjective good faith belief from assessing the truth of a religion's precepts more generally. "In the first place, as a matter of either practice or philosophy I do not see how we can separate an issue as to what is believed from considerations as to what is believable."[55] This is so because "[t]he most convincing proof that one believes his statements is to show that they have been true in his experience."[56] Justice Jackson also asked rhetorically: "How can the Government prove these persons knew something to be false which it cannot prove to be false?"[57] He comes to the heart of the matter when he asserts that "[i]f we try religious sincerity severed from religious verity, we isolate the dispute from the very considerations which in common experience provide its most reliable answer."[58]

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52. *Id.* at 95 (Jackson, J., dissenting).
53. *Id.* at 92 (Jackson, J., dissenting).
54. *Id.* (Jackson, J., dissenting).
55. *Id.* (Jackson, J., dissenting).
56. *Id.* at 92–93 (Jackson, J., dissenting).
57. *Id.* at 93 (Jackson, J., dissenting).
58. *Id.* (Jackson, J., dissenting).

Serious social costs would result from the adoption of Justice Jackson's approach; persons susceptible to the siren song of a modern day Elmer Gantry might well part with good portions of their wealth in aid of currying favor with God via a complete charlatan. Thus, barring inquiries into either the truth of a religion or the good faith subjective belief of its leaders would surely open up the community to intentional forms of religious fraud. Jackson acknowledges this fact and frankly admits that "[t]he Ballards are not alone in catering to [the public's need for spiritual reassurance and enlightenment] with a pretty dubious product."[59]

The problem is that the benefits of any religious commitment are intrinsically non-material; there is no market price for peace of mind in troubled times:

> If members of the [I Am] sect get comfort from their 'Saint Germain,' however doubtful it seems to me, it is hard to say that they do not get what they pay for. Scores of sects flourish in this country by teaching what to me are queer notions. It is plain that there is wide variety in American religious taste.[60]

To be sure, a sense of profound disillusionment must accompany a loss of faith in a religion or a religious leader. People "live in mental confusion or moral anarchy and seek vaguely for truth and beauty and moral support. When they are deluded and then disillusioned, cynicism and confusion follow."[61] Thus, the main harm of religious frauds "is not in the money the victims part with half so much as in the mental and spiritual poison they get."[62]

Even so, a meaningful commitment to freedom of religious belief requires protection of both Billy Graham and Elmer Gantry. Justice Jackson argues, persuasively, that "the price of freedom of religion or of speech or of the press is that we must put up with, and even pay for, a good deal of rubbish."[63] This is not because "rubbish" has constitutional value, but rather because "[p]rosecutions of this character easily could degenerate into religious persecution."[64] This does not mean that religion insulates fraud that relates to the material, as opposed to the spiritual, plane. Justice Jackson explains that he does "not doubt that religious leaders may be convicted of fraud for making

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59. *Id.* at 94 (Jackson, J., dissenting); *see also id.* (Jackson, J., dissenting) ("There appear to be persons—let us hope not many—who find refreshment and courage in the teachings of the 'I Am' cult.").

60. *Id.* (Jackson, J., dissenting).

61. *Id.* at 95 (Jackson, J., dissenting).

62. *Id.* (Jackson, J., dissenting).

63. *Id.* (Jackson, J., dissenting).

64. *Id.* (Jackson, J., dissenting).

false representations on matters other than faith or experience, as for example if one represents that funds are being used to construct a church when in fact they are being used for personal purposes."[65] That said, if a fraud prosecution does not relate to a specific non-belief related claim, the prosecution "reaches into a wholly dangerous ground."[66]

Jackson asks "when does less than full belief in a professed credo become actionable fraud if one is soliciting gifts or legacies?"[67] Inquiry into subjective belief presents real jeopardy to the virtuous as well as the wicked. For example, the recently published writings of Mother Teresa indicate that she experienced serious moments of spiritual doubt and uncertainty;[68] would this mean that Mother Teresa would have been subject to criminal trial and conviction for fraud if she subjectively harbored doubts about the central tenets of Roman Catholicism, yet nevertheless solicited financial contributions in aid of it?[69] As Justice Jackson argues, "[s]uch inquiries may discomfort orthodox as well as unconventional religious teachers, for even the most regular of them are sometimes accused of taking their orthodoxy with a grain of salt."[70]

In the end, Justice Jackson admonishes that the more prudent course of action would be to disallow not merely inquiries into religious truth, but also inquiries into subjective good faith belief. "I would dismiss the indictment and have done with this business of judicially examining other people's faiths."[71]

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65. *Id.* (Jackson, J., dissenting).

66. *Id.* (Jackson, J., dissenting).

67. *Id.* (Jackson, J., dissenting).

68. *See* MOTHER TERESA & BRIAN KOLODIEJCHUK, MOTHER TERESA: COME BE MY LIGHT 178–83 (2007) (describing her own spiritual struggles); *see also* Editorial, *A Saint of Darkness*, N.Y. TIMES, Sept. 5, 2007, at A26 (discussing Mother Teresa's doubts about the existence of God in her personal, private writings); Michael Gerson, *The Torment of Teresa*, WASH. POST, Sept. 5, 2007, at A21 ("What are we to make of Mother Teresa's letters . . . which reveal decades of spiritual depression, loneliness, and doubt? Should this console us or disturb us?").

69. Of course, this hypothetical is deeply counterfactual: No sane prosecutor would initiate charges against a figure like Mother Teresa, precisely because her religious views and ethics, to say nothing of her public reputation as a living saint while alive, rest so squarely within the religious mainstream in the contemporary United States. This is another important aspect of the problem: The motive to initiate a prosecution itself stems, more likely than not, from religious antipathy. Whether such a prosecution would be initiated against the self-proclaimed returned Christ and general purpose "messiah," the Rev. Sun Myung Moon, is a different question entirely. My question: Should it be, in a nation ostensibly dedicated to freedom of religious belief? *Cf.* Robert Sherrill, *Uncle Sam and Rev. Moon*, WASH. POST, May 26, 1991, at X7 (describing the prosecution of Rev. Moon).

70. United States v. Ballard, 322 U.S. 78, 95 (1944) (Jackson, J., dissenting).

71. *Id.* (Jackson, J., dissenting).

III. The Problem of Pervasive Discrimination Against Unpopular Religious Minorities and the Concomitant Need to Protect Religious Belief Absolutely

Justice Jackson's dissenting opinion in *Ballard* endorses a broad prophylactic rule against inquiries not only into religious truth, but also into the subjective good faith of a religious leader.[72] Justice Douglas, by way of contrast, believes that inquiries into subjective good faith are not inconsistent with a meaningful commitment to protecting freedom of conscience.[73] So, where do the merits lie? In my view, Justice Jackson has the better of the argument. Pervasive hostility to non-traditional religions and religionists[74] means that inquiries into subjective good faith are virtually certain to devolve into questions about the cultural acceptability—indeed plausibility—of a particular sect.

Professor Winnifred Fallers Sullivan has written lucidly about the "impossibility" of religious freedom because of the limitations that culture erects around the very concept of "religion."[75] Simply put, the average juror (or judge) is incapable of divorcing completely the plausibility of a defendant's

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72. *Id.* (Jackson, J., dissenting).

73. *See id.* at 83–88 (holding that the government may require the Ballards to demonstrate their faith in the "I Am" religion and finding the imposition of this obligation to be entirely compatible with the proposition that the Free Exercise Clause prevents the Ballards from having to prove the truth of their religious beliefs).

74. In an ideal world, unfamiliar religious beliefs and believers would not provoke fear or anger—but we do not live in such a world. *See, e.g.*, Andrea Stone, *Muslim Sect Resisted In Md.*, USA TODAY, Oct. 1, 2007, at 3A (reporting on local efforts to block construction of a mosque and community center in rural Walkersville, Maryland). One resident of Walkersville, Maryland explained opposition to the Ahmadiyya Muslim Community's efforts to build facilities in the area in the following terms: "There's a lot of animosity. No, that's not a good word. There's a lot of, shall we say, apprehension." *Id.* Interestingly, "[t]he Ahmadis are considered heretics by Islam's Sunnis and Shiites and maintain no ties to mainstream Muslims." *Id.* Having left inhospitable places, such as Pakistan, where the government declared the members of the sect to be "non-Muslims," the sect has found itself facing religious discrimination and hostility in a nation ostensibly dedicated to respecting religious pluralism. *Id.*

75. *See* SULLIVAN, *supra* note 12, at 1–8, 35–36, 61–62, 84–85 (arguing that religious freedom is impossible because the law requires believers to define their religion in a fashion persuasive to government officials who do not share the same religious beliefs or commitments; thus, an essential precondition to achieving full religious equality cannot be met because everyone maintains different—and fundamentally incompatible—definitions of what constitutes "religion"); *see also* EISGRUBER & SAGER, *supra* note 6, at 6–11, 86–108 (proposing an overarching "equal liberty" theory of the Religion Clauses and questioning the basic fairness of a patchwork approach to religious exemptions that treats some religious groups significantly better than others without any apparent neutral reason for so doing).

religious claims from her own religious experiences and commitments.[76] If the claims seem odd or, worse yet, offensive, it is unlikely that a reasonable juror would find that a person held a subjective good faith belief in the tenets of the faith. As Justice Jackson put the matter, it is quite impossible to divorce entirely the question of what is believed from the question of what is believable.[77]

If pervasive social prejudice against new, oddball religions and religionists is a social fact, then protecting belief requires more than simply refraining from submitting the truth of a religion's tenets to a jury. A jury will draw on its own cultural understanding of religion in judging whether or not a defendant possesses a subjective good faith belief in the tenets of her faith. And, in this calculus, Moonies and Gozer worshippers[78] are very likely to come out less well than Orthodox Jews and Episcopalians.[79]

IV. The Theory Applied: Sonny Dewey and the Problem of Ascertaining Subjective Religious Belief

In his critically acclaimed film, *The Apostle*,[80] Robert Duvall wrote, directed, and starred as Euliss F. "Sonny" Dewey, a Pentecostal minister leading a megachurch congregation in metropolitan Houston, Texas. Sonny learns that his wife, Jessie (played by Farrah Fawcett), has been engaged in an ongoing adulterous relationship with the church's youth minister, Horace. A separation follows and Jessie and Horace end up in control of both Sonny's

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76. *See* SULLIVAN, *supra* note 12, at 8 (arguing that "[f]orsaking religious freedom as a legally enforced right might enable greater equality among persons and greater clarity and self-determination for religious individuals and communities" because it is "arguably impossible [to justly enforce] laws granting persons rights that are defined with respect to their religious beliefs or practices"); *id.* at 154 (arguing that efforts to protect "religion" inevitably entail gross forms of social and cultural bias, asserting "religion is not always, in fact, absolutely free, legally speaking," and positing that "[t]he right kind of religion, the approved religion, is always that which is protected, while the wrong kind, whether popular or unpopular, is always restricted or prohibited").

77. *See* United States v. Ballard, 322 U.S. 78, 92–93 (1944) (Jackson, J., dissenting) ("I do not see how we can separate an issue as to what is believed from considerations as to what is believable.").

78. *See* Krotoszynski, *supra* note 26, at 1195–96, 1196 n.33 (arguing that discrimination against unpopular religions with unfamiliar, or even offensive, beliefs is probably inevitable and using a hypothetical sect of Gozer worshippers to make this point, drawing on the fictional theology of the motion picture *Ghostbusters*).

79. *See* SULLIVAN, *supra* note 12, at 7–8 (describing how current law consistently and predictably disadvantages members of nonmainstream faiths).

80. THE APOSTLE (Butcher's Run Films 1998).

children and his megachurch. Unhappy with this outcome, Sonny consumes a great deal of alcohol and, in a drunken rage, beats Horace to death with a baseball bat in front of a stunned audience at a youth league baseball game. Fleeing arrest and criminal charges, Sonny relocates to a (fictional) small Louisiana town, Bayou Boutte, and establishes a new congregation. His efforts in the small town are nothing short of transformative; he brings hope and, indeed, salvation, to the town and its denizens.

I always have viewed Sonny as a fraud. After all, how could Sonny claim a sincere vocation after having attacked and murdered his wife's lover with a baseball bat in front of an audience of stunned children and parents? Moreover, Sonny was incapable of fidelity to his wife and, even while on the lamb in Bayou Boutte, repeatedly attempts double adultery (both he and the object of Sonny's affections are legally married) with the secretary at the local radio station.[81] Sonny also is a shameless liar and a manipulator; for example, he tells Brother Blackwell, a friendly local retired minister that "God sent me" when in fact Sonny relocates to Bayou Boutte after being told by another person that an abandoned church, once pastored by his cousin, is there.[82] It would have been far more accurate—and truthful—to say that "your cousin sent me." Truth and Sonny travel different roads.

Finally, the film prominently features several extended scenes in which Sonny engages in a monologue with the deity. Alas, God does not seem to be taking Sonny's calls—something that Sonny seems to realize. My interpretation of the movie has always been that although Sonny brought hope and meaning to his congregants in Bayou Boutte, he himself lacked both (i.e., that he was a fraud, in the sense that Sonny himself either lacked faith or possessed grave doubts about his relationship to God).[83] In light of his poor

81. Alas, the secretary's virtue proves more resilient than Sonny's and his efforts at seduction prove unavailing. A later scene in the movie shows the secretary having dinner at a local restaurant with her husband and children, implying that she might well have reconciled with him.

82. Showing good sense, Brother Blackwell refuses to credit at face value the Apostle E.F.'s claim that God sent him to Blackwell, asking Sonny, "How do I know that it wasn't the Devil who sent you to me?" Blackwell ultimately sees the merit of Sonny's efforts to restore and rebuild his ministry, and he becomes a firm backer of Sonny's "One Way to Heaven" church.

83. Interestingly, my interpretation of the film was not shared by Roger Ebert, the prominent cinasté and film critic, who felt that Duvall intends for us to believe that Sonny is entirely sincere in his religious beliefs and is not, in fact, a fraud. *See* Roger Ebert, *The Apostle* (Jan. 30, 1998), http://rogerebert.suntimes.com/apps/pbcs.dll/article?AID=/19980130/REVIEWS/801300301/1023 (last visited June 16, 2008) (explaining that Sonny has an authentic religious calling) (on file with the Washington and Lee Law Review). This might be a distinction without a difference: I do not think Sonny sought to defraud his congregants for his own financial or personal aggrandizement (i.e., he is no Elmer Gantry), yet I *do* think that Duvall clearly implies

character, penchant for mendacity and adultery, and his clear love of nice cars, fancy houses, and well-tailored suits, I interpreted the character as little different from a talented thespian—the Shakespearian ringer who can, seemingly without effort, nail highly complex tragic characters like Lear or Titus Andronicus.

In other words, I interpreted "the Prophet E.F." (Sonny's alias while in Bayou Boutte) as a skilled performer, but a performer who was quite self-aware at some level that he was a performer rather than a genuine holy man. The irony of the movie, at least for me, was that the Prophet E.F. did in fact serve as an apostle; he did bring hope and meaning to the people of Bayou Boutte, and their spiritual development was not in any way contingent on whether or not Sonny subjectively believed in Jesus, God, or the Holy Trinity.

The emotional highlight of the film involves, quite literally, a "Come to Jesus" moment when a racist redneck, artfully played by Billy Bob Thornton, threatens to bulldoze the "One Way to Heaven Church" because of its integrated congregation. The Apostle E.F. works his magic and Thornton's character experiences a tearful epiphany, recognizes the basic humanity of all people in God's eyes, and ceases and desists in his effort to tear down (literally) the church. The conversion was real, the effects were real, and the reintegration of Thornton's character into the community was real. Whether or not Sonny was channeling the Holy Ghost or Laurence Olivier simply did not matter—the outcome was profound, real, and important.

Suppose, as happened to Guy, Edna, and Donald Ballard, a local federal prosecutor initiated charges against Sonny for fraud. Suppose that Sonny solicits, over the airwaves and by mail, donations in exchange for faith healings or other forms of divine intercession—as he in fact does in the film. Would Sonny be subject to criminal conviction and imprisonment if a prosecutor can convince a jury that Sonny does not subjectively believe that he has the power to heal physical ailments or to speak with the deity on behalf of congregants?

To be clear, the harm to freedom of religious belief is not to Sonny (by stipulation, under my interpretation of the character, he does not actually believe what he says) but rather to Sonny's congregants; they have a right to believe in Sonny even if Sonny does not believe in himself. In fact, this was the central dramatic strength of the *The Apostle*: Sonny *was* an "apostle" even though he seriously doubted his own relationship to God precisely because he facilitated the faith and spiritual healing of his congregants. The subjective

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that Sonny seriously doubts his relationship to God and perhaps even his own faith. To me, to preach faith in God while not believing in God is to commit a kind of fraud, although a fraud of a spiritual sort rather than the more mundane financial sort.

belief of a religious leader has no necessary bearing on the effect of the leader on his followers' spiritual development. To attack the leader as a fraud by implication impugns the validity of the congregants' religious experiences, for if the leader of a congregation is in bad faith—is a sort of fraud—how could the congregants' religious experiences not also be fraudulent, false, and ersatz?

The answer, it seems to me, is that there can be no such thing as "fraud" in the realm of religious belief. The value of a spiritual leader or advisor is not measured in dollars and cents, but rather in terms of the effect of that leadership on congregants. And because spiritual growth and inner peace are not traded on the Chicago commodities exchange, it simply is not possible to ascertain whether someone has obtained a good deal or a bad deal in supporting a particular religious organization or religious leader.

V. Conclusion

Justice Douglas's opinion in *Ballard* receives a warmer reception than it should from those who believe that the Free Exercise Clause should secure total freedom of religious belief. Instead, advocates of strong protection for freedom of belief should cast their lot with Justice Jackson's more comprehensive protection of the concept.

Protecting religious belief requires more than fending off direct efforts to impose burdens or withhold benefits based on religious convictions; instead, a meaningful commitment to protecting religious belief requires government to abstain from attempting to define religious truth via both direct and indirect means. Justice Jackson recognized that a genuine commitment to religious freedom of belief prevents the government not only from putting faith directly on trial, but also requires preventing the government from putting the perceived plausibility of faith on trial.[84] Attempting to ascertain whether a person subjectively believes the tenets of her faith calls into question the believability of those tenets, when viewed through the lens of the dominant religious culture.

The Apostle frames the issue in the starkest possible terms: Whether a person possesses subjective belief in particular religious tenets can be a remarkably difficult matter to ascertain correctly. Should chronic behavior totally inconsistent with the ethics and morality of a religious group be sufficient evidence to conclude that a particular religious leader does not, in

84. *See* United States v. Ballard, 322 U.S. 78, 92–93 (1944) (Jackson, J., dissenting) (arguing that the Free Exercise Clause should prevent a trial court from either charging a jury with determining the factual truth of a religion's precepts or with determining a religious leader's subjective belief in the tenets of her faith).

fact, believe what he professes? In the real world, a reasonable juror could certainly find murder, serial adultery, and persistent untruthfulness a sufficient basis for concluding that a defendant religious leader lacks subjective, good faith belief in the standard Judeo-Christian doctrines (indeed, Sonny had serious difficulty obeying several of the Ten Commandments and seemed very little troubled by these unholy habits).

Surely it is at least *plausible* to worry that a juror is as likely to measure the existence or non-existence of subjective belief by behavior that seems consistent (or inconsistent) with those beliefs as from any sworn testimony offered at trial. Moreover, the more outlandish the beliefs, at least when viewed through the prism of local religious culture, the less likely it will be that a person drawn from that culture will find subjective belief exists. Thus, a seeming hypocrite espousing weird or offensive religious viewpoints would be unlikely to receive a sympathetic hearing, were charges for fraud lodged against her.

Protecting religious belief entails abjuring not only heresy trials, but also trials of the heart, soul, and mind. Mr. Justice Jackson understood this, but Mr. Justice Douglas did not. For this reason, Justice Jackson's dissent in *Ballard* deserves a more prominent place in our discussions of the core meaning of the Free Exercise Clause. If, as Justice Brennan insisted, the "door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such,"[85] it might well be necessary, as a kind of prophylactic measure, to protect absolutely the ability of religious leaders to make theological claims—however untrue, mendacious, or financially-motivated they might seem to a non-believer.

Free exercise means the ability to find an Apostle and to follow him (or her) by one's own best lights; freedom implies the ability to make both good and bad choices—and to live with the consequences. Justice Jackson understood these realities and accepted, indeed embraced, the implications of full and total freedom of religious belief; Justice Douglas, by way of contrast, understood the nature of the problem only imperfectly and thus failed to "tightly close the door" against indirect efforts to regulate religious belief. Simply put, the need to protect the overly credulous from themselves does not—and cannot—outweigh the need to secure absolutely the freedom of belief concerning matters of ultimate reality.

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85. Sherbert v. Verner, 374 U.S. 398, 402 (1963).