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Regulation of Religious Proselytism in the United States

Howard O. Hunter & Polly J. Price[*]

I. INTRODUCTION

The public regulation of "proselytism" has engendered a great deal of discussion about the persecution of religious groups in various parts of the world. Much publicity and protest occurred when Russia undertook to regulate religious groups and to limit the freedom of those who wished to engage in proselytism within that country.[1] Likewise, there has been a great deal of discussion about the persecution of Christians and other religious groups in China and in various Islamic theocracies. Within the United States, as in other parts of the world, there is a growing concern about "dangerous cults,"[2] fueled in part by instances of religiously motivated suicides. In France, for instance, the French National Assembly established in 1995 a Parliamentary Commission on Cults to identify and investigate so-called "sects" and "new religions."[3] The Commission issued a final report identifying 172 religious groups as "harmful and dangerous cults," and it urged the National Assembly to enact legisla-

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1. One recent news article described the accumulation of religious restrictions in various parts of the world:

> In September 1997, Russian President Boris Yeltsin signed the Law on Freedom of Conscience and Religious Association instituting a strict system of state registration and regulation of religious groups. Greece had already banned proselytizing. And in December, Austria passed a law designating that minority faiths can gain legal status only after a 10- to 20-year probation.

Julia Lieblich, *Faith vs. Faith: Scholars and Missionaries Search for More Ethical Ways to Evangelize*, FORT WORTH STAR-TELEGRAM, June 20, 1998, Life & Arts, at 3.

2. *See id.*

3. *See* Keturah A. Dunne, Comment, *Addressing Religious Intolerance in Europe: The Limited Application of Article 9 of the European Convention of Human Rights and Fundamental Freedoms*, 30 CAL. W. INT'L L.J. 117, 119 (1999).

tion to curtail their activities.[4] In the United States as well, one state recently designated a commission to examine the activities of so-called "cults" and make appropriate recommendations.[5]

The First Amendment to the United States Constitution[6] provides a strong legal basis for the protection of religious expression—along with speech in general—and Americans often set themselves up as arbiters of what is an acceptable level of government regulation of religious activities. State regulation of religious activities, including proselytism, in the United States is nonetheless problematic in many respects. The U.S. legal system currently supports numerous limitations on proselytism that have been found to be acceptable within the United States. The boundaries of those limitations, the justifications for them, and the likely areas of future conflict are the principal issues on which this article will focus.

Americans' views of religious freedom within the United States are often bound by the particular religion at issue. According to 1999 estimates, some 86% of the U.S. population claims a Christian religious preference (59% Protestant, 27% Catholic); another 2% are Jewish, 5% report "other," and approximately 7% express no religious preference.[7] Thus, the overwhelming majority of U.S. residents express a religious heritage derived from one religious tradition.

Proselytism is a central feature of evangelical Christianity, but all denominations of devout Christians are called to one degree or another to spread the word of God. Other religions, or sub-sects of other religions, follow similar patterns. In some instances the call to public worship, such as the public dancing, chanting, and solicitations of the Hare Krishnas, could fall under the rubric of proselytism. We use the term "proselytism" here to include speech and associated conduct involved in spreading the word of God and persuading others to convert or to follow the message delivered by the person or group of persons engaged in proselytism. The term does not include

4. *Id.* at 119–20.

5. A Maryland task force was established in 1998 by the state's legislature to probe the extent of "cult" activity at the state's public universities and colleges. The task force is the subject of a lawsuit filed in 1999 by several groups and individuals, including the International Coalition for Religious Freedom, which is associated with the Reverend Sun Myung Moon's Unification Church. Diego Ribadeneira, *Ire at School: Star of David Unites ACLU, Pat Robertson*, BOSTON GLOBE, Aug. 21, 1999, at B2.

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

7. *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 1999, tbl.89 (1999).

all aspects of the free exercise of religion. The focus is on preaching, soliciting, canvassing, distributing tracts, and other methods of persuasion and teaching about one's religion. Case law that deals with various other aspects of "free exercise," such as snake handling, animal sacrifice, the use of hallucinogenic mushrooms, or the wearing of items of apparel, may have collateral relevance in the development of an understanding of the full scope of legal regulation of religion in the United States, but those cases are not directly applicable to the speech and behavior encompassed within the definition of proselytism as used in this article.

This article will consider various aspects of the U.S. legal system that affect proselytism. Although the United States has had a longstanding constitutional guarantee of the "free exercise" of religion, there are nonetheless significant constraints upon free exercise directly relating to proselytism. Some legal commentators, including Douglas Laycock, have argued that our decentralized system of government leads to insufficient protection of religious liberty, especially for religious minorities.[8] Most case law on the subject in the United States, as well as most attempts to regulate behavior by ordinance or statute, have developed in response to groups or individuals that are outside the mainstream. As the number of adherents to religions other than Judaism or Christianity increases within the United States and as the number of activist, evangelical sects of established religions, grows, we are likely to see more instances of clashes between religious activism and the secular legal system.

II. Regulation of Proselytism in Public Spaces: Overview of Constitutional Practices

Courts in the United States have treated proselytism as a form of free speech within the coverage of the First Amendment to the United States Constitution. Particular expressions of proselytism, usually by members of minority religious sects, have been the basis for several judicial decisions that have helped to create the current American constitutional law on the permissible scope of state regulation of speech in public spaces.

Those engaged in the spread of the Word have been door-to-door solicitors, fiery street preachers, demonstrators, and pamphleteers. They have ignored or disobeyed or been prosecuted under or-

8. Douglas Laycock, *Religious Freedom and International Human Rights in the United States Today*, 12 EMORY INT'L L. REV. 951, 951 (1998).

dinances pertaining to permits, disturbing the peace, "fighting words," or the protection of privacy and security. The courts have expressed concern about the level of discretion given to permitting or regulating authorities and the potential for abuse of that discretion. Some of the factors used in deciding these cases include the age or make-up of the targeted audience, the character of the particular space, and the content and style of the message. The protection of the public from terrorists and other criminals has justified some limitations on access, and thereby on speech, as has the government's interest in the protection of national security on military bases and other sensitive locations. Ironically, too much government solicitude for the freedom to speak—and to proselytize—may raise questions under the Establishment Clause of the First Amendment if a government agency provides a sympathetic forum for religious speech.

The number of cases on speech in public places is large, and the issues have been covered in great detail elsewhere.[9] Most of the relevant disputes have arisen under state and local law, and, until 1925, the Supreme Court had not applied the First Amendment to the states.[10] Although it is fair to characterize the legal regulation of proselytism in public spaces today as fairly "settled," at least in terms of constitutional doctrine, these standards are quite different from regulations considered acceptable a century ago. An examination of state and local laws of the nineteenth century discloses a wide range of restrictions that would not be countenanced today.[11]

9. *See, e.g.*, KATHLEEN M. SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW (1999); JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES (2000); Tad Stahnke, *Proselytism and the Freedom to Change Religion in International Human Rights Law*, 1999 BYU L. REV. 251.

10. *See, e.g.*, Gitlow v. New York, 268 U.S. 652 (1925); Fiske v. Kansas, 274 U.S. 380 (1927).

11. Perhaps the decision most pertinent to this discussion was *Davis v. Massachusetts*, 167 U.S. 43 (1897), in which the Supreme Court upheld a Massachusetts law that banned all public speaking on a public commons without having first obtained a permit from the Mayor. The Supreme Judicial Court of Massachusetts stated, "'For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house.'" *Id.* at 47; *see generally* Howard Owen Hunter, *Problems in Search of Principles: The First Amendment in the Supreme Court from 1791–1930*, 35 EMORY L.J. 59 (1986); David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205 (1983); David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514 (1981).

A. Distributing Religious Tracts: The Case of Alma Lovell

One of the most famous cases was that of Alma Lovell, a Jehovah's Witness who was convicted of a misdemeanor for having failed to get a permit from the city manager of Griffin, Georgia, prior to distributing religious tracts.[12] The ordinance required that anyone who sought to distribute "circulars, handbooks, advertising, or literature of any kind" first had to obtain a permit from the city manager. Lovell did not do so for religious reasons. She was called by God to spread the word and she needed no permit from a secular authority. Indeed, in her religion's view, to seek a permit would have been an insult to God. The Supreme Court ruled in Lovell's favor because the ordinance was overbroad and granted too much discretion to one charged with a ministerial function.[13] In effect, the ordinance allowed the city manager to act as censor and to impose a prior restraint on the exercise of the right of free speech or, in this instance, the right freely to distribute religious tracts. Although Alma Lovell set out to proselytize, the decision in her case likely would have been the same if the speech had been purely secular. The key problems were the absence of standards in the ordinance for the issuance of permits based upon legitimate state interests, such as traffic control and public safety, and the prior restraint inherent in the permit requirement itself.[14]

The content of Alma Lovell's speech—spreading the word of God as understood by members of the Jehovah's Witness sect—was not relevant to the decision. She could have been distributing tracts on any number of subjects, secular or religious. The ordinance was unconstitutional because it granted to a government official so much discretion that he could act as a censor.[15] The constitutional issue was one of equal access without content discrimination. In fact, the Supreme Court has noted the importance of door-to-door solicita-

12. *See* Lovell v. Griffin, 303 U.S. 444 (1938).

13. *See id.* at 451.

14. In general, a prior restraint on speech, regardless of content, is unconstitutional. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713 (1971); Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175, 181–85 (1968); Near v. Minnesota, 283 U.S. 697, 712–23 (1931).

15. *See, e.g.*, FW/PBS, Inc. v. Dallas, 493 U.S. 215 (1990) (holding unconstitutional an ordinance that required licensing of sexually oriented businesses because of the absence of time restraints on the exercise of the licensors' authority and the absence of a procedure for timely judicial review); Freedman v. Maryland, 380 U.S. 51 (1965) (holding unconstitutional a Maryland motion picture censorship law for lack of procedural safeguards).

tion to groups that have little means of access to advertising or to the media. Even a facially reasonable ordinance, such as a prohibition of door-to-door solicitations in an industrial town to prevent annoyance to night shift workers who sleep during the day, has been held to be overly broad and burdensome upon what Justice Black characterized as "poorly financed causes of little people."[16]

Alma Lovell's case did not decide all issues having to do with permits. She was but one person using public spaces—city streets and sidewalks—for the distribution of literature. If a group wants to hold a parade or a demonstration or a public religious service, there are legitimate state interests in maintaining traffic control and protecting public safety. Some areas, such as sidewalks, public parks, courthouse grounds and capitol grounds, are traditionally considered to be locations for public speech. They are natural and historical gathering places, but, even so, the state or local government wants to maintain some order so that all users can have reasonable access. Some permitting is allowable for planning purposes. Other cases have developed guidelines on the scope of allowable permitting based upon the location, size of the group, nature of the speech activity, and other factors. The religious content of the speaker's message may have little or nothing to do with the protection of a proselytizer, but there is a high degree of protection for speech in most public spaces.

B. Public Demonstrations, Parades, and Gatherings

The government does have a legitimate interest in maintaining order in public spaces, and, to do so, a government may require a permit to protect the movement of traffic and to ensure equality of access even if the content of the expression is religious. In *Cox v. New Hampshire*,[17] a group of Jehovah's Witnesses marched on city sidewalks in a New Hampshire town without having first obtained a parade permit. They carried placards and apparently caused some disruption in the flow of pedestrian traffic. A unanimous Supreme Court upheld their convictions for violating a state law that prohibited parades or processions on public streets without a permit and without paying a fee.[18] The Witnesses had refused to seek a permit for the same reason as Alma Lovell—they were following God's mandate to spread the word and they needed no human permission

16. Martin v. Struthers, 319 U.S. 141, 146 (1943).

17. 312 U.S. 569 (1941).

18. *See id.* at 575–77.

to do so. The Supreme Court concluded, however, that New Hampshire had the power to police the public streets and sidewalks to maintain order and safety. Requiring a permit allowed the police to make reasonable preparations for traffic control and also avoided the problem of competing parades. The statute was drawn narrowly enough, and it served a legitimate governmental interest.

The traffic control justification will not save all ordinances that require parade permits. There must be reasonable, clear, and narrowly drawn standards to prevent the possible abuse of discretion by a permitting official who may not like the message being delivered by the group seeking a permit.[19] Likewise, a reasonable purpose, such as limiting loud noises in residential areas, might not be enforced by a complete ban on instruments such as bullhorns or loudspeakers, but by the promulgation of rules that limit decibel volumes or the times during which amplification devices can be used in certain areas.[20]

To handle the costs of expected crowds or hostile reactions, some local governments have tried to charge substantial fees for permits. In early 1987, a small group of civil rights demonstrators attempted to march in Forsyth County, Georgia, to mark the holiday for Martin Luther King, Jr. They were thwarted by a much larger crowd of hostile demonstrators who were committed to the maintenance of Forsyth County's reputation as the "whitest" county in America. There was considerable public outcry, and a few weeks later there was a large parade of some 20,000 civil rights supporters from a shopping center to the county seat. There were about 1,000 counter-demonstrators, but there were no incidents due in large measure to the presence of some 3,000 police and members of the National Guard. The county subsequently passed an ordinance that required a fee of up to $1,000 per day for demonstrations on public property if the permitting authority determined that the demonstration was likely to present the county with unusual costs. In a 1992 decision, the Supreme Court found the ordinance to be facially invalid as "standardless" and a "tax" on free expression.[21] There may be some fee for a permit to use public property, but it cannot be so sub-

19. *See, e.g.*, Hague v. Committee for Indus. Org., 307 U.S. 496, 496 (1939).

20. *Compare* Saia v. New York, 334 U.S. 558 (1948), *with* Kovacs v. Cooper, 336 U.S. 77 (1949). *See also* Ward v. Rock Against Racism, 491 U.S. 781 (1989).

21. Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992). The complainant organization wanted to hold a demonstration to protest the creation of the King Holiday, and they challenged the requirement of a $100 fee. *See id.* at 136–37; Collin v. Smith, 447 F. Supp. 676 (N.D. Ill. 1978), *aff'd*, 578 F.2d 1197 (7th Cir. 1978).

stantial as to amount to a tax or a fine, nor can the permitting authority have the discretion to charge differing fees in a way that might constitute content discrimination.

The reasonableness of state regulations will vary depending on the location of the speech activity. Alma Lovell was walking on city sidewalks. If she went to the door of a private residence, the resident could ask her to leave or could refuse to come to the door, but the City of Griffin could not require her to seek permission in the first place to move around on city streets and sidewalks. Persons have the right to gather on open public property to exercise speech rights but may be required to give notice or to abide by regulations that seek to avoid conflicting events in the same place at the same time. Public parks, sidewalks, and streets are presumptively public fora in which the freedom to speak is at a very high level. But what of other spaces, such as libraries, schools, courthouses, airports, and state fairgrounds where large numbers of people congregate? In general, the Supreme Court has distinguished traditional public fora, in which little regulation beyond traffic control is permissible, from other spaces in which more regulation is constitutional.[22]

The 1981 Supreme Court decision in *Heffron v. International Society for Krishna Consciousness, Inc.* (ISKCON)[23] is instructive. The annual Minnesota State Fair is a large event that, at the time of the litigation, drew about 100,000 daily attendees. The rules of the fair required that anyone who wanted to distribute or sell merchandise of any kind, including pamphlets, tracts, or other documents, had to do so from a designated booth. The booths were available on a non-discriminatory, first-come, first-serve basis. ISKCON challenged the booth rule as an impediment to religious beliefs and the practice of Sankirtan, a ritual that requires members to distribute literature and to solicit contributions for the religion in public places. The Supreme Court found the rule to be a reasonable exercise of the police power to maintain public order and safety at the state fair.[24] The state did not treat ISKCON any differently from any other group,[25] and the religious nature of the message did not give it any higher priority

22. *See, e.g.*, Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998); Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37 (1983).

23. 452 U.S. 640 (1981).

24. *See id.* at 647–55.

25. *See id.* at 649.

than the message of any other group.[26] The decision provided a sound basis for similar rules in other busy locations, such as airports.

Two decisions in 1966 affirmed the use of public spaces other than streets, parks, and sidewalks for the dissemination of ideas orally or in writing but subject to reasonable regulation appropriate to the principal uses and functions of the particular space. In the first case, five young black men in 1964 entered a segregated public library in Louisiana and asked for a book. The librarian told them it would be ordered and suggested they return later after it had arrived. She then asked them to leave because the library was reserved for the use of white patrons. They politely refused and quietly sat and read until the sheriff came and arrested them for breach of the peace. On appeal, the Supreme Court reversed their convictions, partly on due process grounds and partly because they were exercising the right of peaceable assembly in a public space to petition for the redress of a grievance against the government—the racial segregation of public libraries.[27] The location was directly related to the purpose of the symbolic speech, and the young men did nothing to disrupt the function of the library.[28] There was a similar result in another civil rights case that involved praying and singing on the grounds of the state capitol in Columbia, South Carolina.[29]

For a person interested in proselytism, a library might not be a good location for oral messages, but it could be a prime location for quiet distribution of written materials. The grounds of a state capitol may be more suited for political demonstrations, but it is also a community gathering place and a seat of government where there may be good opportunities or reasons for engaging in proselytism.

Somewhat greater state regulation has been condoned in connection with demonstrations or speech in or near jails and schools. In the former instance, there is always the concern for the maintenance of order,[30] and, in the latter, the school officials want to assure the safety of the children and to protect the integrity of the educational mission. In *Grayned v. Rockford*,[31] the Supreme Court upheld an or-

26. *See id.* at 652.

27. *See* Brown v. Louisiana, 383 U.S. 131 (1966).

28. *See id.* at 142.

29. *See* Gregory v. Chicago, 394 U.S. 111 (1969); Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963).

30. *See, e.g.*, Adderly v. Florida, 385 U.S. 39 (1966).

31. 408 U.S. 104 (1972).

dinance that barred a demonstration near a school. In the majority opinion, Justice Marshall articulated the reasons for various kinds of "time, place, and manner" restrictions on otherwise protected speech in public spaces:

> 'Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'. . . The right to use a public place for expressive activity may be restricted only for weighty reasons. Clearly, government has no power to restrict such activity because of its message. Our cases make equally clear, however, that reasonable 'time, place and manner' regulations may be necessary to further significant governmental interests, and are permitted. For example, two parades cannot march on the same street simultaneously, and government may allow only one . . . . A demonstration or parade on a large street during rush hour might put an intolerable burden on the essential flow of traffic, and for that reason could be prohibited. . . . If overamplified loudspeakers assault the citizenry, government may turn them down. . . . Subject to such reasonable regulation, however, peaceful demonstrations in public places are protected by the First Amendment. . . . The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.[32]

Military bases are subject to even more limitations for reasons of security and military order.[33] The base commander has a considerable amount of discretion in fashioning regulations particular to the base, although both soldiers and civilian employees continue to have basic First Amendment rights.[34] Military bases have not been the sites for proselytism cases of the Alma Lovell type, but it is fair to say that the courts are likely to continue a pattern of deference to military commanders in the management of their particular bases so long as there

32. *Id.* at 115–16 (citing, inter alia, Shuttlesworth v. Birmingham, 394 U.S. 147, 152 (1969); *see also* Brown v. Louisiana, 383 U.S. 131 (1966); Kunz v. New York, 340 U.S. 290, 293 (1951); Cox v. New Hampshire, 312 U.S. 569, 576 (1941); Hague v. Committee for Indus. Org., 307 U.S. 496, 515 (1939)).

33. The rules may even extend to the wearing of religious articles of clothing. *See* Goldman v. Weinberger, 475 U.S. 503 (1986) (upholding a ban on the wearing of nonmilitary headgear, i.e., a yarmulke).

34. *See, e.g.*, United States v. Albertini, 472 U.S. 675 (1985); Greer v. Spock, 424 U.S. 828 (1976).

is a rational connection between a regulation and the maintenance of good order and discipline essential to the proper functioning of the military services.

C. Proselytism Activities in Airports and Shopping Centers

More recent cases have involved airports. Since the rash of hijackings that plagued the airline industry a quarter century ago, all commercial airports in the United States have been required to institute a series of strict security procedures. Travelers are familiar with the metal detectors and x-ray machines through which people and their belongings must pass. Those in charge of security go to some lengths to protect what are known as the "sterile" zones—the areas past the security checkpoints—to make sure that no unauthorized persons are in those zones. If there is a threat of a terrorist attack, the protected zone may be extended so that the time a vehicle may stop to load or unload passengers can be limited or the time that individuals can stand on the sidewalks outside the airport may be limited. An airport, however, is a public facility and the gathering point for large numbers of people. It is a logical place for a speaker who wants to preach to crowds or to distribute handbills. All substantial commercial airports are publicly owned. The private airlines and the many vendors who have space within the buildings lease space from the public authority (or the city, county, state, or other government that owns the airport). The airlines solicit customers and, by implication, the friends and families of those customers who escort them to and from the airport. The other business enterprises want as much traffic as possible. Subject to the legitimate concerns about protection from hijackers or terrorists as well as ordinary criminals, an airport is an open public space to which large numbers of people are encouraged to come and which usually is accessible by inexpensive public transportation. During the year 2000, for example, the number of passengers who used the Hartsfield International Airport in Atlanta was roughly equivalent to the total population of Germany, and that figure does not include visitors who were not passengers.

There should be no surprise, then, that airports have become favored locations for proselytizing, nor that there might be some friction between the person who wants the freedom to preach without interference and those who are responsible for security. For order and security reasons, the Port Authority of New York and New Jersey, which controls the three major New York airports (Newark, La-

Guardia, and Kennedy), promulgated an outright ban on the solicitation of money by anyone and on the sale and distribution of literature within airport terminal buildings by groups other than concessionaires who were leasing space. This ban was challenged by ISKCON in a case that resulted in a 1992 Supreme Court decision. The Court upheld the ban on the solicitation of money but struck down the ban on the sale or distribution of literature.[35] One-on-one solicitations of money raise questions about fraud, overreaching, possible preying on the vulnerable, and so forth, and, in general, courts tend to allow considerable flexibility in regulating such solicitations. Striking down the ban on the distribution of literature was not surprising, but the surprise in the Court's opinion was the decision (by a 5-4 margin) that an airport is not a public forum for purposes of speech activities. The victory was a pyrrhic one for ISKCON and other proselytizing groups. The majority focused on the main purpose of an airport—to facilitate travel and to promote commerce.[36] In the majority's view, an airport was not a traditional space for expressive activity, as, for example, a town square or the steps of a state capitol would be.[37] Expressive activities were secondary notwithstanding the large numbers of persons passing through an area supported by the commercial activities of airlines and concessionaires and also by public tax monies.

The airport cases illustrate the hierarchy that occurs in the treatment of speech in public spaces. There are some governmental concerns common to all spaces, e.g., traffic control, reasonable order (avoiding two parades on the same street at the same time), and public safety. To protect those interests, a government may require some advance notice or place some modest restrictions, such as decibel maximums on the speaker, but the constitutional tilt is in favor of the speaker and not the regulator. There are, in addition, spaces in which speech is more likely to be protected than in other places. The courts seem to focus on the following questions: (1) Has the space traditionally been used for expressive activities? (2) Are there serious security concerns? (3) Who are the persons likely to be the target audience within the space? That leads, if one looks at all the cases, to an

35. International Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992); Lee v. International Soc. for Krishna Consciousness, Inc., 505 U.S. 830 (1992).

36. *See Lee*, 505 U.S. at 682–83.

37. *See id.* at 680.

ordering of public spaces from high to low in the protection of speech. Town squares, public parks, sidewalks, and areas around legislative or executive office buildings or courthouses are high protection areas. For example, the threat of terrorism and the bombings of buildings such as the Murrah Federal Building in Oklahoma City have led to security measures that have gone well beyond the immediate perimeter of a public building, resulting in the curtailment of the use of some traditional fora. Consider, for example, the closing of Pennsylvania Avenue in front of the White House. School grounds and the interiors of buildings such as courthouses and capitols are areas of lower protection, or, put another way, the level of regulation may be higher. Airports and military bases are in a third category. They are defined out of the "public forum" category because they are not spaces traditionally reserved for expressive activity. The level of regulation may be high and may include outright prohibition of speech that may be constitutionally protected in another space.

Those who engage in public proselytism must be aware of these distinctions and the limitations that may be imposed on religious expression in certain public spaces. Nevertheless, the categorization of spaces employed by the Supreme Court is unnecessarily rigid—whether one is considering religious expression or another form of speech. There can be little quarrel with the concept of reasonable time, place, and manner restrictions. Public spaces are meant for use by all, and reasonable traffic rules assist in the efficient and fair use of such spaces by all speakers.[38] Fair standards can be applied to all public spaces taking into account the varying purposes of such spaces and the legitimate questions of security and efficient use. Placing different spaces into different categories that increase or decrease the presumptive First Amendment rights of users is unnecessary. An airport may not be the same as a town meeting hall in New Hampshire, but it is a public space where a large number of people congregate and where there are constant examples of expressive activity. The walls are covered with advertisements. Many waiting areas are outfit-

38. Even so, there may be a cost to one such as a Jehovah's Witness who considers it wrong to have to ask permission from any secular authority to do God's work. What may seem a minor, non-intrusive, and reasonable regulation to the majority of speakers, religious or not, may be a major intrusion to some. In this way Alma Lovell's case illustrates one of the most basic and probably irreconcilable points of conflict between secular authority and an individual's personal relationship with God.

ted with television sets tuned to CNN—and they cannot be turned off. These televisions blare forth the news of the day, stories about business, sports, the weather, fashion, travel, even religion. The stories are interrupted by advertisements for all kinds of products. Most larger airports are like shopping malls with stores for every conceivable product, each seeking to gain the attention of passers-by. There are usually several public address systems. There are bars, restaurants, private lounges, children's play rooms, special rooms for smokers, shower rooms, and, almost always, one or more interfaith chapels. Thus, the patrons of an airport can learn the news (press freedom), be bombarded by commercial messages (freedom of speech), and pray (religious freedom), all within the terminal buildings. There is nothing to stop a person from expressing to all within voice range a political opinion on a topic of the day. No wonder that some might consider an airport to be fertile ground for religious expression in the form of proselytism.

The uses of spaces change over time, and that point has been well illustrated by the tension between private property and individual free expression. A by-product of the industrial revolution was the creation of the "company town." An industrial enterprise would build modest houses on company-owned property adjacent to a mill and rent the homes to workers. A passer-by would see a "town" of similar houses, usually built on a grid, with a general store in the middle. A Jehovah's Witness was stopped from distributing literature in a company town because the whole town, streets and all, were private property. The Supreme Court disagreed and held in a 1946 decision that the company town had all the earmarks of an ordinary town.[39] As such, it was presumptively open to public use of the streets and sidewalks for free speech, which included the right to distribute religious literature.

The company town analogy failed, however, when applied to shopping centers a generation later. The argument that shopping centers had supplanted traditional town centers as the natural gathering places for the community seemed at first to carry the day. In 1968 the Supreme Court held that a state trespass law could not be used to halt peaceful union picketing of a store in a private shopping center,[40] but, in two subsequent decisions, four and eight years later,

39. *See* Marsh v. Alabama, 326 U.S. 501 (1946).

40. *See* Amalgamated Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308

the Court reversed itself and held that the property owner's right of exclusion trumped any individual's right of free expression on the private property of a shopping center.[41] The rules may be different under a state constitution,[42] but, for the time being, the federal interpretation is clear—the company town analogy does not extend to modern shopping centers. In a shopping center—whether an enclosed mall or an open air collection of stores—proselytism is by invitation only.

D. "Fighting Words," Hostile Audiences, and Religious Speech

Sometimes the problem of security is the result of the tension between a speaker and the audience. A proselytizer who sharply criticizes another religious group or calls into question a set of fundamental beliefs may provoke a reaction from the crowd. How are the police to handle such conflicts? By stopping the speaker? By trying to control the audience? By separating the antagonists? All these methods have been tried, with varying legal results.

In a 1940 decision, the Supreme Court reversed the conviction of a Jehovah's Witness who was charged with inciting a breach of the peace by reason of the content of his proselytizing speech on the streets of New Haven, Connecticut. He was noisy and vocally critical of all organized religious groups, but most especially the Roman Catholic Church. New Haven has a large number of Catholic residents, and people on the streets complained to the police that they were highly offended. One said he felt like hitting the speaker, although he did not do so. The Court, however, found no basis for the conviction and stated that the speech was protected no matter how offensive some might find the criticism of the Roman Catholic Church or other religious groups.[43]

But in a case decided two years later, the Supreme Court sustained the conviction of another Jehovah's Witness under a New Hampshire law that prohibited a speaker from addressing another person in an offensive or derisive manner in a public space. The speaker also strongly criticized organized religion, but he went on to

(1968).

41. *See* Hudgens v. NLRB, 424 U.S. 507 (1976); Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551 (1972).

42. *See* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980).

43. Cantwell v. Connecticut, 310 U.S. 296 (1940).

call particular individuals "racketeers" and "fascists." The Court reasoned that such language might provoke a violent response from the target and that the state could prohibit or punish such speech in order to maintain the peace.[44] The case has come to represent the "fighting words" exception to First Amendment protection.

Although the "fighting words" case never has been overruled, the likelihood of a conviction for similar speech today is low. Not only has society become more tolerant of the public utterance of impolite or offensive speech on all manner of subjects, the subsequent cases have tended to protect the speaker rather than the sensibilities of the hearer. In a well-known 1971 decision, the Supreme Court held that a young man could not be punished for wearing a jacket that had been embroidered with a four-letter word expressing an opinion about the military draft even though he wore the jacket inside a courthouse.[45] The next year the Court reversed a Georgia conviction of an anti-war demonstrator who called a police officer foul names and cursed while the police officer tried to clear a pathway among the demonstrators into a draft-induction center.[46] The same year a majority of the Court vacated three convictions for the use of foul and offensive language at a school board meeting at which children, as well as adults, were present.[47] There has been a considerable amount of controversy about the "fighting words" cases,[48] but the Supreme Court has carved out a broad range of protected speech that may include curse words, epithets, scatological terms, sexual terms, and highly critical statements or opinions about the religious beliefs, philosophy, personal code of conduct, or political beliefs of one or more of those in the audience.

The "hostile audience" cases present a somewhat different picture. A speaker was convicted of breach of the peace because he called members of an audience "slimy scum," but the Supreme Court reversed the conviction. Even though the speech encouraged

44. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

45. *See* Cohen v. California, 403 U.S. 15 (1971).

46. *See* Gooding v. Wilson, 405 U.S. 518, 519–20 (1972).

47. *See* Brown v. Oklahoma, 408 U.S. 914 (1972); Lewis v. New Orleans, 408 U.S. 913 (1972); Rosenfeld v. New Jersey, 408 U.S. 901 (1972).

48. *See, e.g.*, Daniel A. Farber, *Civilizing Public Discourse: An Essay on Professor Bickel, Justice Harlan, and the Enduring Significance of* Cohen v. California, 1980 DUKE L.J. 283; Kent Greenawalt, *Insults and Epithets: Are They Protected Speech?*, 42 RUTGERS L. REV. 287 (1990).

disputes, the Court reasoned that encouraging disputes is the purpose of free speech.[49] But in a case two years later, the Court sustained the conviction of a fiery civil rights speaker who exhorted a crowd on a sidewalk to fight for civil rights and who called President Truman a "bum" and the American Legion a "Nazi Gestapo."[50] An outraged onlooker threatened to throw the speaker off his soapbox and shut him up. The police did so instead and justified the action as necessary to prevent a minor riot. During the civil rights period in the 1960s, the Supreme Court began to take a more tolerant view toward fiery speakers and to suggest that the police should prevent disorderly conduct by concentrating on crowd control and management rather than by squelching speech.[51]

One of the more effective means of dealing with hostility between speaker and audience has been to create areas of separation. This has been accomplished in some instances by court order[52] and in other instances by statute.[53] Separating the speaker from the hostile audience, so that words may flow back and forth but physical confrontations are not likely, serves the reasonable interests of both speaker and audience.

E. Entanglement with Religious Speech

Allowing speech, religious or otherwise, may create the impression that a public agency is supportive of the speech in question. That is one reason why military base commanders are wary of partisan political speech on base—the military is to serve the civilian government without regard to the identity of the political party of the governmental leadership. If the content of the speech being tolerated or apparently sponsored by a governmental unit is religious, then there may be an Establishment Clause problem. The issue has arisen most recently in the context of public schools. Students in public

49. Terminiello v. Chicago, 337 U.S. 1 (1949).

50. Feiner v. New York, 340 U.S. 315 (1951).

51. *See, e.g.*, Gregory v. Chicago, 394 U.S. 111 (1969); Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963).

52. *See, e.g.*, Schenck v. Pro-Choice Network, 519 U.S. 357 (1997); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994); Galella v. Onassis, 533 F. Supp. 1076 (S.D.N.Y. 1982).

53. *See* Hill v. Colorado, 530 U.S. 703 (2000) (upholding statute that prohibited any person from knowingly approaching within eight feet of another person near a health care facility without that person's consent).

schools are entitled to follow their own religious beliefs, even if those may conflict from time to time with secular ceremonies (pledging allegiance to the flag)[54] or even school attendance laws.[55] They also may participate in groups that have religious connections if those groups are treated equally with nonreligious groups and there is no governmental favoritism toward the religious groups.[56]

There is a fine distinction between tolerance for religious expression within a school by making facilities available for student religious groups the same as for the Science Club or the Math Club and institutional entanglement with religion. In 2000, the Supreme Court held that public prayer by a student at a school sporting event violated the Establishment Clause, notwithstanding that the speaker had been chosen in a democratic election by the students.[57] That ruling protects the interests of those who are members of minority religious groups and those outside the mainstream. In a school election, the most probable representative to be chosen by popular vote is one who is a member of the dominant religion or culture. Justice Stevens, writing for the Court, stated:

> This policy likewise does not survive a facial challenge because it impermissibly imposes upon the student body a majoritarian election on the issue of prayer. Through its election scheme, the District has established a governmental electoral mechanism that turns the school into a forum for religious debate. It further empowers the student body majority with the authority to subject students of minority views to constitutionally improper messages. The award of that power alone, regardless of the students' ultimate use of it, is not acceptable. . . . Such a system encourages divisiveness along religious lines and threat-

54. *See, e.g.*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (finding that a Jehovah's Witness could not be compelled to pledge allegiance to the flag).

55. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972).

56. *See, e.g.*, Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995) (finding that the Ku Klux Klan could not be barred from erecting a cross on a public forum—a state-owned plaza around the Capitol in Columbus, Ohio—because the cross was a form of private expression); Lambs Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (finding a school district that allowed after-hours use of school buildings for social, civic, and recreational purposes and by political organizations could not exclude an organization because it had a religious affiliation, having created a public forum); Widmar v. Vincent, 454 U.S. 263 (1981) (holding that a state university that allowed registered student groups to use its facilities could not bar one such group from using a space for religious worship and discussion).

57. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

> ens the imposition of coercion upon those students not desiring to participate in a religious exercise. Simply by establishing this school-related procedure, which entrusts the inherently nongovernmental subject of religion to a majoritarian vote, a constitutional violation has occurred.[58]

Chief Justice Rehnquist, joined by Justices Scalia and Thomas, dissented from the Court's opinion. The dissenters disagreed with the decision that the school policy was unconstitutional on its face because the speaker, selected by the students, could have spoken on a nonreligious topic.[59]

III. TORT LAW AND PROSELYTISM

The methods of persons engaged in proselytism in the United States are subject not only to ordinance and statute (including in some instances criminal law) but also to civil damages in lawsuits brought by persons who claim to have been harmed by those activities. Lawsuits between private individuals and groups, apart from direct government regulation, play an important role in the legal environment governing proselytism in the United States. Recently, one of the most prominent areas of contention relevant to proselytism has been the application of traditional tort law principles to religiously motivated activities.[60] In recent decades, a stark rise in the number of tort lawsuits involving proselytism activities has raised fundamental questions in the United States about the limits of religious freedom. In what circumstances will the methods of religious proselytism constitute a tort? What types of harms should be compensated, and who determines when "harm" has occurred?

Tort law, along with contract and property law, provides a litigation forum for private individuals and groups in relationship with each other. In these lawsuits, the government, through the courts, stands theoretically as a passive arbiter of the dispute. Tort law is frequently said to preserve public order by providing a dispute resolu-

58. *Id.* at 2283.

59. *See id.* at 2285. (Rehnquist, C.J., dissenting).

60. For articles summarizing tort suits in the religious proselytism context, see Barry A. Fisher, *Devotion, Damages and Deprogrammers: Strategies and Counterstrategies in the Cult Wars*, 9 J.L. & RELIGION 151 (1991); Laura B. Brown, Note, *He Who Controls the Mind Controls the Body: False Imprisonment, Religious Cults, and the Destruction of Volitional Capacity*, 25 VAL. U. L. REV. 407 (1991); Note, *A New Cause of Action for Members of Religious Groups Suing Their Parents for Attempting to Deprogram Them*, 7 AM. J. TRIAL ADVOC. 656 (1984).

tion mechanism when private persons believe themselves to have been harmed by other individuals or groups.[61] These judgments reflect social conventions and tend to reflect what the majority believes to be acceptable behavior.

The fundamental approach of American tort law generally has been to provide for monetary damages to a person who has been harmed because a defendant's conduct is deemed tortious. One scholar has noted:

> The law of torts is a powerful weapon in society's suppression of intolerable activities; its doctrines are flexible and open-ended and the contours of those doctrines often are filled in by juries rather than by legal elites. Tort law is thus extraordinarily responsive to and reflective of societal mores, and serves a useful function in allowing persons who are harmed by another's actions to sue to recover damages for their injuries, judged by a common-sense standard of social tolerance.[62]

In the United States, courts recognize certain common law doctrines in tort to provide monetary damages to individuals who claim to have been harmed by the religious conduct of others. Common law tort doctrines vary from state to state but are essentially similar in recognizing some privacy interest and bodily, if not also mental, integrity for both groups and individuals with respect to religious conduct. A difficult question for many of these cases is whether the use of tort law in cases of religiously motivated activities is a valid protection of the interests of individuals, or whether instead some such lawsuits tend toward religious persecution of unpopular minority religions. Competing interests include freedom to express religious faith through sharing with others and teaching about one's religion—the attempt to "convert" others to a particular style of religious thought—an endeavor which may be a requirement of a particular religion. On the other side, targets of proselytism may have their own religious beliefs or may be equally interested in protecting their sphere of privacy. What role should courts play, particularly when a freedom to change religion underlies what many believe to be the

61. "Every legal society from the most primitive to the most modern must develop some set of rules that prevents one individual from harming another, and to offer redress for harms once inflicted." RICHARD A. EPSTEIN, TORTS xxvii (1999).

62. 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. 579, 580 (1993).

most important religious right to be protected by the government?

Tort law generally recognizes First Amendment free speech interests in attempts to persuade others in matters of belief that are nonreligious. Less well developed in the tort context is recognition of the free exercise of religion under the First Amendment. As is true in the nonreligious "persuasion" context, there is as yet no immunity for religious proselytism against generally applicable rules of civil law. Although there is usually no free exercise problem in holding religious groups to the ordinary rules of contract, property, and tort, to some religious freedom advocates, some tort cases have exhibited a preference for Christian over "cult" proselytizing that is at least in some sense an ideological judgment. Of primary concern, perhaps, is the potential for judicial and juror viewpoint discrimination in tort cases concerning proselytism activities, particularly those that challenge religious indoctrination methods. As discussed in more detail further in this article, one problem to consider in the tort context is whether cases alleging inappropriate proselytism (short of physical harm) should be submitted to juries as a matter of course.

A. Tort Cases Involving Proselytism: Recent History

Lawsuits seeking damages for harms allegedly caused by religious proselytizing activities fall into a number of areas of traditional tort law. Courts have responded in various ways, though rarely have "free exercise" issues played a central role. Suits brought by individuals attacking religious indoctrination methods usually raise some or all of the following tort claims: intentional or negligent infliction of emotional distress, false imprisonment, fraud, and sometimes defamation. Proselytism that takes place on private property is a trespass, and the owner may use tort law to enforce his or her private property right of exclusion.

Proselytism that intrudes into a person's private space may be an invasion of privacy, and, again, the individual may use the law of torts in response. One of the distinct forms of invasion of privacy recognized by the Restatement (Second) of Torts is the "unreasonable intrusion upon the seclusion of another."[63] This claim has been successful in at least one case alleging harsh or excessive proselytism.[64]

63. RESTATEMENT (SECOND) OF TORTS § 652A (2)(a) (1965).

64. *See* George v. International Soc'y for Krishna Consciousness, Inc., 4 Cal. Rptr. 2d

Proselytism that includes coercive behavior, such as persuasive inducements or "strong-arm" tactics against vulnerable persons, such as teenage runaways, may support tort actions of various kinds. In cases in which physical abuse occurs, tort claims may include assault and battery. More common have been tort suits brought against "cults" for coercive behavior that falls short of assault or battery, and there have been other suits brought against de-programmers for "kidnaping" cult members and using intense psychological techniques to bring them back to the mainstream. These actions, most recently one from the state of Washington,[65] bear some resemblance to the use of tort cases against groups such as the Ku Klux Klan by the Anti-Defamation League and Southern Poverty Law Center.[66]

1. Tort judgments in favor of disaffected members of "cults"

Since the mid 1980s, legal claims based on so-called brainwashing by some minority religions have had some success, most notably in several cases that resulted in large tort awards. Most of these suits involved no claims of physical violence but instead were based upon allegations of "tortious communications—misrepresentation, infliction of emotional distress—that were intertwined with the defendants' religious beliefs in ways never clearly separated at trial."[67] Perhaps the most controversial basis for some of these lawsuits are claims that include failure to deliver on promises of greater happiness and well-being.[68]

The tort of "intentional infliction of emotional distress," a relatively recent addition to tort law generally in the United States, is open-ended and invites judges (and particularly juries) to apply a community-based standard of behavior to the activity complained of.

473 (Ct. App. 1992), *review denied and opinion withdrawn*, 1992 Cal. LEXIS 2267 (Apr. 29, 1992).

65. *See* Scott v. Cult Awareness Network, 140 F.3d 1275 (9th Cir. 1998), *cert. denied*, 526 U.S. 1033 (1999).

66. *See generally* MORRIS DEES & STEVE FIFFER, HATE ON TRIAL (1993) (describing litigation against KKK).

67. Thomas C. Berg, *The Constitutional Future of Religious Freedom Legislation*, 20 U. ARK. LITTLE ROCK L.J. 715, 750 (1998).

68. *See, e.g.*, Molko v. Holy Spirit Ass'n. for the Unification of World Christianity, 762 P.2d 46 (1988); Richard Delgado, *Religious Totalism: Gentle and Ungentle Persuasion Under the First Amendment*, 51 S. CAL. L. REV. 1 (1977); James T. Richardson, *"Brainwashing" Claims and Minority Religions Outside the United States: Cultural Diffusion of a Questionable Concept in the Legal Arena*, 1996 BYU L. REV. 873.

According to the Restatement (Second) of Torts, the basis for the cause of action is as follows:

> § 46 OUTRAGEOUS CONDUCT CAUSING SEVERE EMOTIONAL DISTRESS
>
> (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.
>
> (2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress
>
> (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or
>
> (b) to any other person who is present at the time, if such distress results in bodily harm.[69]

The tort of intentional infliction of emotional distress, or "outrage" as it is sometimes called, is a standard addition to lawsuits against so-called "cults" by disaffected members, used to challenge proselytism tactics ranging from intense indoctrination ("brainwashing") to impairing a person's ability or will to disassociate from the group.

Courts in many states also permit claims for "negligent" infliction of emotional distress, that is, behavior directed toward another that posed a significant risk of causing emotional distress, whether or not the defendant specifically intended to cause the psychological harm.[70] The preference for "intentional" over "negligent" infliction of emotional distress in the proselytism cases to date no doubt reflects the availability of punitive damages only in the intentional context.

Some of these suits may be part of a deliberate tactic of the so-called anti-cult movement in an attempt to drive such groups out of business. In one instance, a jury awarded a judgment of $32 million against the Hare Krishna for various torts allegedly committed by religious speech and by persuasion of new adherents. The lawsuit,

69. RESTATEMENT (SECOND) OF TORTS § 46 (1965).

70. *See id.* §§ 312, 313.

brought by Robin George and her mother, alleged that the defendants began brainwashing Robin into joining the Krishna movement when she was fourteen years old and conspired to conceal her from her parents.[71] The jury found for the Georges, awarding them compensatory and punitive damages in excess of $32 million (which were later reduced by the trial court). Robin's compensatory award (in excess of $1.8 million) included damages for false imprisonment, intentional infliction of emotional distress, wrongful death, and libel; Marcia George's $1,510,000 compensatory award was based on emotional distress and libel.[72] The trial judge reduced the award to about $10 million, and the state appellate court reduced it further to about $6 million. The largest of the judgments against the Hare Krishna was vacated.[73] Other large jury verdicts also have been reversed on appeal.[74] Some courts have rejected tort claims based on "brainwashing" theories as not legally cognizable.[75]

"Brainwashing" claims in the religious context are particularly problematic. In the nonreligious context, courts recognize "loss of will" and "coercive persuasion" as factors to be considered in some financial disputes, such as those involving wills, inter vivos gifts, and contracts. As one legal scholar has noted,

> Coercive persuasion occurs when one is persuaded to do something that, but for the influence or coercion, one would not have chosen to do. In effect, when one is "persuaded" to do something, his or her will is overcome by the persuasion as to that particular act. . . . [I]n [some] areas, the "loss of will" is neither minimal nor beneficial to society or the coerced individual . . . . The two main kinds of coercion that offend a sense of fairness and autonomy are short-

71. George v. International Soc'y for Krishna Consciousness, Inc., 4 Cal. Rptr. 2d 473, 478 (Ct. App. 1992), *review denied and opinion withdrawn*, 1992 Cal. LEXIS 2267 (Apr. 29, 1992).

72. *See id.*

73. *See* International Soc'y for Krishna Consciousness, Inc. v. George, 499 U.S. 914 (1991) (remanding to California court for reconsideration of punitive damages award in light of *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991)). For a discussion of the case and its effect upon Hare Krishna activities in California, see Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 FORDHAM L. REV. 883, 888–89 (1994).

74. *See, e.g.*, Christofferson v. Church of Scientology, 644 P.2d 577 (Or. Ct. App. 1982) (reversing a $2 million verdict for plaintiff who claimed brainwashing).

75. *See* Lewis v. Holy Spirit Ass'n for the Unification of World Christianity, 589 F. Supp. 10 (1983); Meroni v. Holy Spirit Ass'n for the Unification of World Christianity, 506 N.Y.S.2d 174 (1986); People v. Murphy, 413 N.Y.S.2d 540 (1977); Fisher, *supra* note 60, at 153 n.8.

term physical duress and long-term coercive persuasion.[76]

Long-term coercive persuasion was one ground of the claim by the plaintiffs in *George v. International Society for Krishna Consciousness of California*,[77] although other claims included false imprisonment, intentional infliction of emotional distress, fraud, and even wrongful death.[78]

2. Counter-proselytism: "Deprogramming" the cult member

Physical abductions of persons associated with religious movements peaked in the 1970s and early 1980s but still occur from time to time. Known as "deprogramming," the operative theory was that the individual had been drawn into a cult through mind control or brainwashing and thus had no ability to consent to the control of the "cult."[79] "Exit programming" is the preferred term for "counter-proselytism" among Christian groups today. Individuals forcibly removed from a religious group by deprogrammers have brought suit under a number of tort law theories, including false imprisonment, intentional infliction of emotional distress, assault, and battery.[80]

In 1999, the U.S. Supreme court denied certiorari in a "deprogramming" case from the Ninth Circuit.[81] Jason Scott was 18 when

76. Ann Penners Wrosch, Comment, *Undue Influence, Involuntary Servitude and Brainwashing: A More Consistent, Interests-Based Approach*, 25 LOY. L.A. L. REV. 499, 499–500 (1992) (footnotes omitted).

77. 4 Cal. Rptr. 2d at 478.

78. Robin George's compensatory award in excess of $1.8 million included damages for false imprisonment, intentional infliction of emotional distress, wrongful death, and libel. The jury awarded Robin compensatory damages in the amount of $75,000 on her wrongful death cause of action, which was upheld on appeal. *See id*. at 512. Jim George, Robin's father, died of a heart attack four months after Robin returned home. Plaintiffs' expert witness testified that the father suffered significant stress in losing and trying to regain his daughter from the Hare Krishna. "[T]he trouble he had, trying to locate her, the blind alley that he went up, the contact that he had with the Krishna organization and with the police department, et cetera, continued to aggravate his coronary disease." *Id*. at 511. The expert concluded that these events significantly accelerated Jim George's illness and that his delayed response to the stress—his suffering a heart attack nearly four months after Robin's return home—was a relatively common occurrence. *See id*.

79. *But cf.* Catherine Wong, *St. Thomas on Deprogramming: Is it Justifiable?*, 39 CATH. LAW. 81 (1999) (reviewing history of anti-cult movement in the United States).

80. *See, e.g.*, Eilers v. Coy, 582 F. Supp. 1093 (D. Minn. 1984); Cooper v. Molko, 512 F. Supp. 563 (N.D. Cal. 1981); Mandelkorn v. Patrick, 359 F. Supp. 692 (D.D.C. 1973); Peterson v. Sorlien, 299 N.W.2d 123 (Minn. 1980), *cert. denied*, 450 U.S. 1031 (1981); Katz v. Superior Court, 141 Cal. Rptr. 234 (1977).

81. *See* Scott v. Cult Awareness Network, 140 F.3d 1275 (9th Cir. 1998), *cert. denied*,

he was taken from his mother's home, at her request, to an isolated beach house for five days of religious "deprogramming" from his membership in Bellevue Life Tabernacle Church, affiliated with the United Pentecostal Church. The deprogrammers and others were arrested and charged with unlawful imprisonment. They were acquitted of criminal charges, and the tort suit followed.

Scott's suit named the nonprofit organization Cult Awareness Network ("CAN"), the individual "deprogrammer," and other persons as defendants, alleging state law negligence claims, the tort of "outrage," and conspiracy to deprive him of his civil rights. One defendant settled before trial. A jury returned a verdict against the remaining defendants, awarding $875,000 in compensatory damages and $4 million in punitive damages. The jury allocated ten percent of the negligence liability and $1 million in punitive damages against CAN. A panel of the Ninth Circuit Court of Appeals affirmed the judgment and rejected CAN's argument that the imposition of liability violated the defendants' First Amendment rights.[82]

Judge Kozinsky dissented from the denial of rehearing *en banc*.[83] His objection was not about the correctness of the judgment against the individual defendants. Rather, Judge Kozinsky expressed concern with the application of vicarious liability against CAN itself, the organization that allegedly sponsored and encouraged the individual defendants to act. Judge Kozinsky argued that this case should be controlled by *NAACP v. Claiborne Hardware*,[84] because the judgment effectively put CAN out of business and "silenced its message" without sufficient proof that the organization itself had known about, condoned, or ratified the actions taken by one of its "volunteers."[85] "[T]o impose liability . . . would impermissibly burden the rights of political association that are protected by the First Amend-

526 U.S. 1033 (1999).

82. *Id.* at 1280.

83. Scott v. Cult Awareness Network, 151 F.3d 1247, 1248 (9th Cir. 1998) (Kozinsky, J., dissenting from order rejecting suggestion for rehearing *en banc*). CAN filed for bankruptcy protection. *Id.*

84. *See* 458 U.S. 886 (1982). *But cf.* Eric William Cernyar, *The Checking Value of Free Exercise: Religious Clashes with the State*, 3 TEX. REV. L. & POL. 191, 220 (1999) (arguing that *Claiborne Hardware* principles prevent punishment or liability for actions of individual participants to be placed on a church itself, unless the church or religious organization "ratifies" the illegal activity).

85. *Scott*, 151 F.3d at 1248–49 (quoting *Claiborne Hardware*, 458 U.S. at 931) (Kozinsky, J., dissenting from the order denying rehearing en banc).

ment."[86] Kozinsky analogized this case to allowing tort judgments to shut down Planned Parenthood because a pro-choice doctor illegally performs an abortion on a minor without obtaining parental consent, or imposing liability on ACT-UP because one of its members punches a photographer.[87]

3. Statutory civil rights claims

A number of lawsuits against "cult" deprogrammers invoke the federal laws of 42 U.S.C. §§ 1983 and 1985 to remedy civil rights violations. One advantage of plaintiffs in such actions is the award of attorneys' fees in the event the plaintiff prevails on the civil rights claim. Another advantage, arguably, is a wider choice of forum for the plaintiff. A claim under the federal civil rights statute creates independent federal question jurisdiction in the federal courts.

The reported cases to date reflect divergent views among courts about the applicability of the federal civil rights statutes to the varying facts in cases involving religious cults and deprogramming.[88] Religious groups have been considered a protected class under § 1985(3).[89] Some courts have held that the federal civil rights statute is not implicated because no "class based animus" motivated the deprogramming activities complained of.[90] More recent cases, including *Scott v. Cult Awareness Network*,[91] have permitted the claims to proceed to trial for a jury to consider whether "religious discrimination" has occurred that is akin to invidious racial bias.[92] Other sect members have successfully sued their parents and others for deprivation of

86. *Id.* at 1249 (quoting *Claiborne Hardware*, 458 U.S. at 931).

87. *See id.* at 1250.

88. *See generally* Andrew P. Bacus, Note, *The Adjudication of Religious Beliefs in Section 1985(3) Deprogramming Litigation*, 11 OKLA. CITY U. L. REV. 413 (1986); Michael F. Coyne, Note, *Federal Regulation of Intra-Family Deprogramming Conspiracies Under the Ku Klux Klan Act of 1871:* Ward v. Connor, 23 B.C. L. REV. 789 (1982); John D. Ensley, Note, *Civil Rights: A Civil Remedy for Religious Deprogramming Victim Under 42 U.S.C. § 1985(3)*, 21 WASHBURN L.J. 663 (1982).

89. *See, e.g.*, Ward v. Connor, 657 F.2d 45 (4th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982).

90. Weiss v. Patrick, 453 F. Supp. 717, 723 (D.R.I. 1978), *aff'd*, 558 F.2d 818 (1st Cir. 1978), *cert. denied*, 442 U.S. 929 (1979) (citing Baer v. Baer, 450 F. Supp. 481 (N.D. Cal. 1978)).

91. 140 F.3d 1275 (9th Cir. 1998), *cert. denied*, 526 U.S. 1033 (1999).

92. *See, e.g.*, Taylor v. Gilmartin, 686 F.2d 1346 (10th Cir. 1982), *cert. denied*, 459 U.S. 1147 (1983); *Ward*, 657 F.2d 45; Eilers v. Coy, 582 F. Supp. 1093 (D. Minn. 1984); Cooper v. Molko, 512 F. Supp. 563 (N.D. Cal. 1981).

civil rights related to attempts to force them away from the minority religious group.[93] A number of criminal proceedings against Ted Patrick, a cult deprogrammer, resulted in convictions for "kidnapping" and unlawful imprisonment under state law.[94]

4. Guardianship proceedings and other defenses

One tactic of cult deprogramming groups has been to ask a court to appoint a guardian for a cult member in order to begin deprogramming proceedings. The tactic is preemptive litigation used to immunize a subsequent deprogramming regimen from civil suit.[95] At the instigation of family members, a number of state and federal courts have considered whether to grant a conservatorship or guardianship of an adult based on allegations that the person has been brainwashed by a religious cult or organization.[96] Some courts have granted guardianships or conservatorships to parents of adult children in order to force the individual into a deprogramming regimen.[97] Other courts have refused such requests, at least when the subject of the proposed guardianship is an adult and usually on

93. *See, e.g.*, *Ward*, 657 F.2d 45 (finding that plaintiff stated claim under 42 U.S.C. 1985(c)); Mandelkorn v. Patrick, 359 F. Supp. 692 (D.D.C. 1973) (holding that plaintiff stated claim against parents and others under 42 U.S.C. § 1983).

94. *See* People v. Patrick, 179 Cal. Rptr. 27 (1982) (recounting felony and misdemeanor convictions); People v. Patrick, 541 P.2d 320, 322 (Colo. Ct. App. 1975) (finding a conviction of false imprisonment). Other criminal proceedings against Ted Patrick are detailed in Fisher, *supra* note 60, at 172 n.61.

95. *See* Douglas Aronin, *Cults, Deprogramming, and Guardianship: A Model Legislative Proposal*, 17 COLUM. J.L. & SOC. PROBS. 163 (1982); Robert N. Shapiro, *Of Robots, Persons, and the Protection of Religious Beliefs*, 56 S. CAL. L. REV. 1277, 1279–80 (1983); Panel Discussion, *Regulation of Alternative Religions by Law or Private Action: Can and Should We Regulate?*, 9 N.Y.U. REV. L. & SOC. CHANGE 109 (1979–80); Michael S. Bernick, Comment, *To Keep Them Out of Harm's Way? Temporary Conservatorships and Religious Sects*, 66 CAL. L. REV. 845 (1978).

96. *See* Gregory G. Sarno, Annotation, *Validity of Guardianship Proceeding Based on Brainwashing of Subject by Religious, Political, or Social Organization*, 44 A.L.R. 4th 1207 (1986).

97. *See, e.g.*, *In re* Estate of Langford, 364 N.E.2d. 735 (Ill. App. Ct. 1977) (reversing an order denying a petition for appointment of a conservator, associated with the "Christ is the Answer" ministry). Unreported trial court opinions granting conservatorships or guardianships that were not appealed are difficult to document. However, trial courts in several cases initially granted a conservatorship or guardianship but were reversed on appeal. *See* Rankin v. Howard, 457 F. Supp. 70 (D. Ariz. 1978) (granting defendant probate judge's summary judgment motion under 42 U.S.C. § 1983), *rev'd in part*, 633 F.2d 844 (9th Cir. 1978), *cert. denied*, 451 U.S. 939 (1979); *In re* Guardianship of Polin, 675 P.2d 1013 (Okla. 1983) *cert. denied*, 469 U.S. 850 (1984); Katz v. Superior Court, 141 Cal. Rptr. 234 (Ct. App. 1977).

grounds that application of the state's conservatorship proceedings to this context would render the statute void because of unconstitutional vagueness.[98]

A court-appointed guardianship or conservatorship legalizes the seizure and confinement of cult members. A substantial number of such cases occurred in the 1970s and 1980s but are less common at present because of a number of court rulings challenging the constitutionality of court-ordered conservatorships under the Federal Civil Rights Act.[99] In *Katz v. Superior Court*,[100] a California appellate court set aside a temporary conservatorship granted in favor of the parents of five adult members of the Unification Church. The court did so, in part, because it believed the evidence was insufficient to establish that the five adults were incompetent or represented a danger to themselves or to others: "in the absence of such actions as render the adult believer himself gravely disabled . . . the process of this state cannot be used to deprive the believer of his freedom of action and to subject him to involuntary treatment."[101] Relying on *Katz*, the Tenth Circuit also reversed a lower court order granting parents a conservatorship over their adult son.[102] Like *Katz*, the federal appeals court declined to hear evidence relating to competence due to a jurisdictional bar.[103] Guardianship and conservatorship proceedings in order to force a cult member into deprogramming are less likely to be brought today, in light of the relative success of subsequent suits by the cult member against deprogrammers and family members for violation of civil rights.[104]

When deprogrammers are sued in civil actions, they usually attempt something similar to the "necessity" defense used in criminal

98. *See, e.g.*, *Katz*, 141 Cal. Rptr. 234.

99. *See* Fisher, *supra* note 60, at 174–75 nn.67–75.

100. 141 Cal. Rptr. 234.

101. *Id.* at 256.

102. *See* Taylor v. Gilmartin, 686 F.2d 1346 (10th Cir. 1982), *cert. denied*, 459 U.S. 1147 (1983).

103. *See id.* at 1351–52.

104. *See Taylor*, 686 F.2d 1346 (reversing summary judgment in favor of defendants on the ground of the invalidity of their attempt to insulate themselves from liability for false imprisonment by a temporary guardianship order); Rankin v. Howard, 633 F.2d 844 (9th Cir. 1978) (reversing a finding that the state probate judge was absolutely immune from suit on federal civil rights claim of conspiracy with codefendants to create fraudulently an *ex parte* guardianship); *Katz*, 141 Cal. Rptr. 234.

actions.[105] These defenses on occasion have been successful, with the result that the deprogrammers sometimes escape any liability for their actions, which have sometimes involved kidnaping adults off the streets and incarcerating them against their will. The more recent trend is to deny the "choice of evils" or "necessity" defense used by deprogrammers unless the defendant can show that there was a danger of imminent physical injury to the "cult" member or others.[106] According to one scholar, the trend for courts in such cases today is to permit the necessity defense "in order to prevent imminent physical injury, but not to combat the effects of a cult's alleged use of mind control or brainwashing."[107]

B. First Amendment Considerations and "Religious Torts"

A number of potential "free exercise" issues remain to be resolved in civil litigation involving religious proselytism. Constitutional law as yet has provided no blanket immunity in tort claims because of religiously motivated conduct. When religious organizations are sued by private individuals for allegedly tortious conduct, the First Amendment is not deemed to bar or circumscribe those activities that fall squarely within traditional tort law. Few would argue that religious conduct should be constitutionally protected even when it harms others, so long as the harm to others is outweighed by the importance of the conduct to the religious actor.[108]

A problematic feature of religious tort lawsuits to date has been the varying results in the face of similar fact patterns. In religious tort cases involving proselytism, some courts have held that the Free Exercise Clause does not apply at all, while others have invoked the Free Exercise Clause to prevent recovery.[109] The most important

105. *See, e.g.*, State v. Howley, 920 P.2d 391, 396 (Idaho 1996); People v. Brandyberry, 812 P.2d 674 (Colo. Ct. App. 1990); *see generally* Wong, *supra* note 79, at 90–91; Ellen M. Babbitt, Note, *The Deprogramming of Religious Sect Members: A Private Right of Action under § 1985(3)*, 74 NW. U. L. REV. 229 (1979).

106. *See* Eilers v. Coy, 582 F. Supp. 1093, 1097 (D. Minn. 1984); *Brandyberry*, 812 P.2d 674 (rejecting defendant's choice of evils defense as justification for conspiracy and kidnaping); People v. Patrick, 179 Cal. Rptr. 276, 282 (Ct. App. 1981) (rejecting defendant deprogrammer's defense of necessity where defendant failed to prove "a danger of imminent physical harm").

107. Wong, *supra* note 79, at 91.

108. Characterizing this view as "normatively unappealing" is Eugene Volokh, *A Common-law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1510 (1999).

109. See discussion in Lee W. Brooks, Note, *Intentional Infliction of Emotional Distress*

cases exhibiting ad hoc free exercise analysis have come in the context of religious tort claims that allege intentional infliction of emotional distress.[110] In one such instance, a widow claimed intentional infliction of emotional distress and fraud based upon a church's solicitations and representations in television broadcasts and mail marketing promising that a miracle cure had already occurred for her husband, who subsequently died.[111] A Texas court held that the widow's claims were barred by the First Amendment and the state constitution, because the claim for intentional infliction of emotional distress and fraud would require judicial scrutiny into the truthfulness or reasonableness of the church's religious beliefs.[112] The First Amendment has also been held to limit the scope of fraud causes of action in connection with recruitment and indoctrination practices.[113] By contrast, other courts have held that the First Amendment does not necessarily bar suits challenging a group's indoctrination practices.[114]

In 1990, the U.S. Supreme Court changed its approach to free exercise analysis in *Employment Division v. Smith*.[115] In *Smith*, the Court rejected the application of the "compelling interest" standard to examine claims for individual exemptions from generally applicable laws based on religious belief. The Court stated 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.'"[116] Although the context of the case was a claimed exemption from statutes governing the use of controlled substances (peyote), the broader implication applies as well to otherwise generally applicable tort law. As noted below, the Court's decision in *Smith* instigated responsive legislation from Congress and a number of states to "overturn" the decision by restoring the "compelling interest" standard to

by Spiritual Counselors: Can Outrageous Conduct Be "Free Exercise"?, 84 MICH. L. REV. 1296 (1986), and Daryl L. Wiesen, Note, *Following the Lead of Defamation: A Definitional Balancing Approach to Religious Torts*, 105 YALE L.J. 291, 291–92 (1995).

110. *See* Wiesen, *supra* note 109, at 291–92.

111. *See* Smith v. Tilton, 3 S.W.3d 77, 80 (Tex. Ct. App. 1999).

112. *See id.* at 87–88.

113. *See, e.g.*, Van Schaick v. Church of Scientology, Inc., 535 F. Supp. 1125 (D. Mass. 1982).

114. *See, e.g.*, Scott v. Cult Awareness Network, 140 F.3d 1275 (9th Cir. 1998), *cert. denied*, 526 U.S. 1033 (1999).

115. 494 U.S. 872 (1990).

116. *See id.* at 879.

state and federal laws of general application which are alleged to pose a restriction on the free exercise of religion.

Assuming the Court's articulation of free exercise analysis in *Smith* remains the constitutional norm, the result for tort cases involving proselytism would likely be less favorable to defenses based upon religious motivation in the conduct that is the subject of the lawsuit. If the "compelling interest" test is restored, arguably such defenses are bolstered in some tort cases involving proselytism: Certain conduct that might otherwise be actionable as fraud or outrageous conduct, for example, might be immunized from tort liability on the basis of a religious exemption for conduct falling short of physical abuse or false imprisonment.

Almost all the cases that have tested the boundaries of First Amendment protection within tort law[117] have involved what many Americans would consider to be fringe groups—Jehovah's Witnesses, the Hare Krishna, "Moonies," and Scientologists. As the American religious scene becomes ever more diverse, conflicts are likely to arise in connection with the practices of groups that may seem on the fringe to mainstream Jews and Christians, even though some of these groups may have large numbers of adherents elsewhere in the world and may be mainstream in other countries. From the perspective of constitutional law there must be concern for oppression of the minority from the tyranny of the mainstream. Some of the bitter reaction to the Supreme Court's decision in the *Smith* case about the use of peyote reflects a concern for the minority or the disenfranchised. (Some also may reflect disdain for hypocrisy since there was a religious exception for ceremonial wine during Prohibition.)

A continuing discussion of the role of the Free Exercise Clause in defining the boundaries of proselytism in tort law may assist in protecting the interests of religious minorities. The law does give considerable protection to speech, even speech by what many would consider to be "oddballs," but categorizing proselytism as not only "speech" but also as an example of "free exercise" may raise it to a higher level of protection than other types of behavior that are sub-

117. Many types of tort cases brought against religious bodies do not involve proselytism activities per se, such as suits by parishioners against clergy for sexual misconduct or by third parties related to employment. Such suits are not discussed here, except to the extent the Free Exercise Clause analysis used in these cases may be analogous to tort suits involving proselytism. *See generally* Scott C. Idleman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 IND. L. J. 219, 245–49 (2000).

ject to tort lawsuits in the United States.

In recent years, legislation has provided important developments concerning government recognition and regulation of religious activity in the United States. The Religious Freedom Restoration Act (RFRA), passed by Congress in 1997 in response to the *Smith* case, shortly thereafter was declared unconstitutional in some aspects by the U.S. Supreme Court.[118] RFRA has spawned a plethora of similar legislation at the state level. Moreover, at the time of this writing, a bill pending in Congress, the Religious Liberty Protection Act of 1999, provides that whenever a religious individual or institution is substantially burdened by any law the government may not enforce its law unless it proves the law is enacted for a compelling interest and is the least restrictive means of achieving that interest.

One scholar has criticized the broad language of the proposed act on two grounds. First, its broad language would cover activities that absent religious motivation are crimes or torts, including "child abuse; endangerment; neglect laws, including those requiring medical treatment to prevent death or permanent disability; civil rights laws . . . domestic violence laws and land use laws."[119] Second, the bill requires that the government must prove that its law is the "'least restrictive means' with respect to the particular believer."[120] The pending bill enacts the same standard to be applied to all general laws, as did RFRA. Both the ACLU and the NAACP have expressed concerns about the proposal to the extent it curtails other civil rights laws.[121]

C. Juries and the Counter-Majority Problem

Proselytism and counter-proselytism pose problems in tort law because of the risk that a civil jury will award damages based upon the religious conviction of the make-up of its members. In the types of cases described above, the financial assets of religiously motivated groups are potentially depleted through such lawsuits. The risk is that juries apply their own collective religious belief in determining liability, and, as a statistical matter, the jurors will represent the

118. *See* City of Boerne v. Flores, 521 U.S. 507, 507 (1997).

119. Marci A. Hamilton, *Religious Conduct Crosses the Line*, ATLANTA CONST., Sept. 7, 1999, at A9.

120. *Id.* (quoting RFRA).

121. *See id.*

dominant religious belief. The problem also occurs in criminal proceedings for forcible deprogramming. The defendants in *Scott v. Cult Awareness Network*[122] were acquitted of false imprisonment and kidnapping, for example, and similar cases have resulted in a mix of convictions and acquittals. To pose the issue squarely: are juries the best "neutral" decision makers to apply "neutral" tort doctrines to religiously motivated activities? The risk is real: one tactic by litigants seeking to prove tortious behavior by a religious group is to provide the jury with a witness who is an expert in cults, presumably to portray deviant religious behavior.[123]

One argument suggests that tort law is traditionally intolerant of socially undesirable conduct as defined by majority sentiment, most notably the tort of "outrage" or intentional infliction of emotional distress. Although judges exercise some control in this area,[124] at least one scholar has argued that courts should not adjudicate claims of intentional infliction of emotional distress when the defendant's allegedly tortious actions are religiously motivated.[125] The tort of intentional infliction of emotional distress, usually said to be reserved for conduct that is "outrageous" and "utterly intolerable in civilized society," is controversial in its own right, apart from application in cases involving proselytism.[126]

Clearly, a preference for Christian over "cult" proselytizing is at least in some sense an ideological judgment. In tort law, apart from "free speech" claims, courts have yet to safeguard religious proselytism against judicial and juror viewpoint discrimination. In the tort context, should cases alleging inappropriate proselytism be submitted to juries as a matter of course?

Of particular interest might be the development of a religious privilege in tort actions that is akin to the free speech privilege in defamation and invasion of privacy cases. Since 1964, libel and slander defendants have enjoyed a substantial level of constitutional pro-

122. 140 F.3d 1275.

123. *See, e.g.*, O'Neil v. Schuckardt, 733 P.2d 693, 699 (1986) (finding that the director of a cult awareness center testified that the practices of a church had many similarities to those of a cult).

124. Murphy v. International Soc'y of Krishna Consciousness, Inc., 571 N.E.2d 340, 340 (Mass. 1991) (overturning a multimillion-dollar judgment against Hare Krishnas for alleged "brainwashing" and infliction of emotional distress in religious recruiting and practices).

125. *See* Hayden, *supra* note 62, at 581–82.

126. *See generally* William H. Theis, *The Intentional Infliction of Emotional Distress: A Need for Limits on Liability*, 27 DEPAUL L. REV. 275, 290 (1977).

tection.[127] Defamation suits and invasion of privacy suits[128] may go forward and may be successful, but the defendants begin with an advantage not generally available to ordinary tort defendants—a presumption of at least some level of constitutional protection. Because speech is presumptively protected, the defamation plaintiff must plead and prove that the speech complained of is outside the area of presumptive protection. The burden on the plaintiff varies depending on the status of the plaintiff (public official, public figure, private figure) and the substance of the speech (to what does it relate), but the fact remains that there is a constitutional impediment to successful defamation and invasion of privacy actions in many situations. Might there be a similar privilege for religious speech? It need not be absolute, and there might be varying standards as in the defamation area,[129] but a presumption in favor of such speech would limit the power of the state through the use of the courts to hear and to enforce tort actions for damages or injunctive relief based upon religious activity that does not violate bodily integrity or private property rights. It might provide a basis as well for treating certain questions as "legal" issues to be decided by a judge rather than "factual" issues to be decided by juries.

Early on, the United States rejected the prohibition against "blasphemous libel" in the common law of England. Other nations have more severe forms of "blasphemous libel" prohibitions, including Sudan.[130] Although United States courts have long been unanimous that ideological or content objections should not be the basis for tort actions, there is no way to know whether jurors base their decisions in whole or in part on these objections. Harm resulting from method is different, and tort doctrines themselves are viewed to recognize this distinction. However, there may be a need to protect

127. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (establishing a privilege for speech about public officials unless the speech was both false and made with actual malice or reckless disregard for the truth). The privilege was subsequently extended to cover speech about "public figures," who are not public officials. Curtis Pub'g Co. v. Butts, 388 U.S. 130 (1967). Speech about a private figure is not so privileged; the plaintiff need not meet the "actual malice/reckless disregard" standard, although state law may not impose liability for speech without fault. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985).

128. A similar privilege exists in privacy cases as well. *See, e.g.*, Time, Inc. v. Hill, 385 U.S. 374 (1967).

129. *See* Wiesen, *supra* note 109, at 291.

130. *See* Stahnke, *supra* note 9, at 335 n.240 and accompanying text.

minority religious traditions from the dominant religious tradition of the majority reflected through the jury system.

D. Proselytism and U.S. Tort Law in the International Human Rights Perspective

How well does the legal regulation of proselytism in the United States fit within the emerging framework of international human rights? Article 18 of the International Covenant on Civil and Political Rights provides:

> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
>
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
>
> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.[131]

Similarly, the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 9, provides that "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance."[132] The European Court of Human Rights has held that proselytism is a component of the freedom of religion guaranteed by Article 9 of the European Convention.[133]

These international human rights documents (and others with similar wording)[134] address proselytism only generally and indirectly,

131. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, art. 18, 999 U.N.T.S. 171.

132. European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, art. 9, 213 U.N.T.S. 221, *in* INTERNATIONAL LAW: SELECTED DOCUMENTS 464, 467–68 (Barry E. Carter & Phillip R. Trimble eds., 1995).

133. Kokkinakis v. Greece, 260 Eur. Ct. H.R. (ser. A) at 17 (1993).

134. *See* Stahnke, *supra* note 9, at 268–69 and accompanying notes ("All major interna-

leading one scholar to conclude that

> [T]he effect of international human rights obligations on conflicts engendered by proselytism has been minimal. International bodies have either not dealt extensively with the problem or have not been particularly aggressive in defining the parameters of the freedom to engage in proselytism. This silence, or reluctance to deal with proselytism issues, may be the result of the widely divergent practices of states, ranging from severe limitations on the activity in all of its forms to broad freedom to engage in the activity regardless of the effect it may have on the target.[135]

Tort lawsuits in the United States have provided courts with numerous opportunities to define the boundaries of the freedom to engage in proselytism, though with widely divergent results. Nonetheless, even those courts that have permitted tort judgments against defendants engaged in proselytism seem to do so in general agreement with these international human rights norms.

IV. Conclusion

The legal regulation of proselytism in the United States is both public and private. Governments regulate proselytism in public spaces, and tort law enforces some privacy and freedom interests in private spaces. In the public arena, courts have taken the lead in defining "public" and "private" areas and in defining the boundaries under the First Amendment between the rights of proselytizers and the interests of government. No great changes in this balance are likely to occur with any of the recent legislation in Congress related to the Religious Freedom Restoration Act. On the other hand, private litigation in tort has exploded in recent years concerning the subject of religious proselytization and persuasion tactics of some so-called "cults." Courts in this area seem less sure how to define the boundaries of First Amendment rights in individual contexts. The individual cases alleging tortious behavior vary widely, not only in the facts they present, but also in the analysis engaged in by courts to resolve the dispute.

The competing interests in proselytism-related tort cases are the right of religious expression, on the one hand, and the full panoply

tional human rights documents recognize the right to freedom of religion, which includes not only the freedom to hold religious beliefs, but also the freedom to manifest those beliefs.").

135. Stahnke, *supra* note 9, at 339.

of privacy and freedom rights historically recognized in tort law in the United States, on the other. Because the Supreme Court has clearly relegated proselytism in private spaces to a lesser-protected sphere, many courts question whether the First Amendment is applicable in these cases at all, at least where no state action is involved. How well the traditional tort system in the United States handles these cases remains to be seen. The likelihood is high, however, that tort cases in the "private" sphere will continue to pose significant issues in regulation of proselytism in the United States.