

## Articles

# The Outrageous God: Emotional Distress, Tort Liability, and the Limits of Religious Advocacy

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When Matthew Snyder died fighting for his country, his memory was celebrated, and his loss mourned.<sup>1</sup> The Westboro Baptist Church conducted a celebration of a different kind by picketing near Matthew's funeral service.<sup>2</sup> The church held signs that read, "You are going to hell," "God hates you," "Thank God for dead soldiers," and "Semper fi fags."<sup>3</sup> In the weeks following the funeral, the church posted on its

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1. *See Snyder v. Phelps*, 533 F. Supp. 2d 567, 571-72 (D. Md. 2008).

2. *Id.* at 569-70.

3. *Id.* at 570.

website, godhatesfags.com, an “epic” entitled “The Burden of Marine Lance Cpl. Matthew Snyder.”<sup>4</sup> Matthew’s burden, as the church saw it, was that he had been “raised for the devil” and “taught to defy God.”<sup>5</sup> Matthew’s father, Albert Snyder, brought a civil action against the Westboro Baptist Church in federal district court, asserting a claim for intentional infliction of mental and emotional distress (among other causes of action).<sup>6</sup> He was awarded \$10.9 million in compensatory and punitive damages.<sup>7</sup>

That judgment, as such judgments against religious entities are wont to do, occasioned protest from First Amendment advocates concerned that, under the open-ended standard of outrageousness, “[l]iability easily ends up turning on how much juries condemn the speaker’s viewpoint.”<sup>8</sup> Cautioned by the Supreme Court that “[o]utrageousness’ in the area of political and social discourse has an inherent subjectiveness about it,”<sup>9</sup>

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4. *Id.* at 569-70.

5. *Id.* at 570.

6. *Id.*

7. *Id.* at 569. Snyder originally brought suit on five counts: defamation, intrusion upon seclusion, publicity given to private life, intentional infliction of emotional distress, and civil conspiracy. The court granted defendants’ motions for summary judgment on the claims for defamation and publicity given to private life. *Id.* at 572-73. The court held, however, that the remaining claims raised genuine issues of material fact. *Id.* at 573. The case is now on appeal before the United States Court of Appeals for the Fourth Circuit. The Westboro Baptist Church has been involved in similar suits. See *Phelps-Roper v. Nixon*, 509 F.3d 480 (8th Cir. 2007) (denying preliminary injunction against statute that criminalized picketing of funeral service or procession); *Phelps-Roper v. Taft*, 523 F. Supp. 2d 612 (N.D. Ohio 2007) (upholding as narrowly tailored portion of state statute creating fixed buffer zone within which picketing of funeral service was prohibited; striking down as constitutionally overbroad portion of same statute creating a floating buffer zone), *aff’d*, *Phelps-Roper v. Strickland*, No. 07-3600, 2008 U.S. App. LEXIS 18017 (6th Cir. 2008); *St. David’s Episcopal Church v. Westboro Baptist Church*, 921 P.2d 821 (Kan. Ct. App. 1996) (upholding preliminary injunction against picketing house of worship), *cert. denied*, 519 U.S. 1090 (1997).

8. Posting of Eugene Volokh to The Volokh Conspiracy, [http://volokh.com/posts/chain\\_1194479521.shtml](http://volokh.com/posts/chain_1194479521.shtml) (November 7, 2007, 19:02); see also, posting of Sam Bayard to Citizen Media Law Project, <http://www.citmedialaw.org/blog/2007/snyder-v-phelps-westboro-verdict-criticized-unconstitutional> (Nov. 13, 2007) (arguing that application of intrusion tort to Westboro’s picketing activities is constitutionally impermissible). See generally, 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 (1993) (open nature of emotional distress tort claim threatens religious freedom and diversity).

9. *Hustler v. Falwell*, 485 U.S. 46, 55 (1988) (“If it were possible by laying down a principled standard to separate [outrageous speech] from [protected speech], public discourse would probably suffer little or no harm. But we doubt that there is any such standard, and we are quite sure that the pejorative description ‘outrageous’ does not supply one. ‘Outrageousness’ in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors’ tastes or views, or perhaps on the basis of their dislike of a particular expression. An ‘outrageousness’ standard thus runs afoul of our longstanding refusal to allow

courts hearing outrage suits are on guard against breaches of objectivity that would disadvantage minority religions. However, to avoid the appearance of religious viewpoint discrimination, judges often resort to fine, almost scholastic, distinctions between what is secular and what is religious; between what is central to a religion's belief and practices and what is theologically insignificant; and, even more tenuously, between what is belief and what is conduct. This is caution to a fault. These distinctions have produced a results-oriented jurisprudence that, paradoxically, involves the courts in precisely the kind of entanglement with religious affairs they seek to avoid, and does so while leaving ill defined the threshold that separates protected religious advocacy from religiously motivated conduct subject to tort liability.

This essay argues that emotional distress claims are well suited to suggest the outer limits of civil tolerance for religious advocacy.<sup>10</sup> Such tort suits serve socially valuable punitive and prophylactic functions, providing vulnerable individuals with a remedy against the most offensive and intrusive forms of religious conduct.<sup>11</sup> That protection need not come at the cost of constitutional privilege for religious entities. Where no intra-church dispute is involved, the only question a court is obligated, and entitled, to consider is whether the religious entity's conduct was of a type that no decent society should tolerate. Tort liability is not premised on the judgment that a religious belief is somehow "fundamentally flawed"<sup>12</sup> or not worthy of constitutional

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damages to be awarded because the speech in question may have an adverse emotional impact on the audience.") (alterations in original).

10. For cases involving other types of tort suits against religious entities, see Carl H. Esbeck, *Tort Claims Against Churches and Ecclesiastical Officers: The First Amendment Considerations*, 89 W. VA. L. REV. 1, 76-91 (1986). See generally Alan Stephens, Annotation, *Free Exercise of Religion Clause of First Amendment as Defense to Tort Liability*, 93 A.L.R. FED. 754 (1989); Gregory G. Sarno, Annotation, *Liability of Religious Association for Damages for Intentionally Tortious Conduct in Recruitment, Indoctrination, or Related Activity*, 40 A.L.R. 4th 1062 (1985).

11. See, e.g., Howard O. Hunter and Polly J. Price, *Regulation of Religious Proselytism in the United States*, 2001 B.Y.U. L. REV. 537, 555-56 (2001) ("Tort law is frequently said to preserve public order by providing a dispute resolution mechanism when private persons believe themselves to have been harmed by other individuals or groups."); cf. Hayden, *supra* note 8, at 580 ("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.").

12. *Murphy v. I.S.K.Con. of New England*, 571 N.E.2d 340, 348 (Mass. 1991) (vacating judgment on emotional distress claim against religious organization because "[i]nherent in the claim that exposure to [defendant's] religious beliefs causes tortious emotional damage is the notion that the disputed beliefs are fundamentally flawed").

protection. To the contrary, whether religious advocacy was meant to and did inflict severe emotional distress is a question that can be adjudicated by the neutral and generally applicable principles of tort law.<sup>13</sup>

Of course, emotional distress suits based on religious conduct may test the factfinder's objectivity, but that much is true by definition of all outrageous conduct cases, religious or secular. Indeed, because the bar an emotional distress claimant must hurdle is a high one,<sup>14</sup> such cases provide a way to establish limitations on religious freedom—"limitations which of necessity bound religious freedom"<sup>15</sup>—that need not infringe upon individual religious rights or the institutional autonomy of religious entities. This essay proposes that the specter of subjectivity can be alleviated by permitting emotional distress suits only where religious advocacy personally targets a captive and private listener. Such a standard leaves alone the area of political and social discourse,<sup>16</sup> and even in the area of private discourse it places on the listener the burden of avoiding offense, if possible.<sup>17</sup> This standard goes a long way toward

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13. See *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 879 (1990) ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability. . .'" (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment))); see also, e.g., *Smith v. O'Connell*, 986 F. Supp. 73, 80 (D.R.I. 1997) (finding that "there is no question that the principles of tort law, at issue, are both neutral and generally applicable"); *Doe v. Hartz*, 970 F. Supp. 1375, 1431-32 (N.D. Iowa 1997) (First Amendment does not bar tort claim against church defendants because claim can be assessed applying neutral principles of law); *Isely v. Capuchin Province*, 880 F. Supp. 1138, 1151 (E.D. Mich. 1995) (no constitutional bar to adjudication of tort claim because "'neutral' principles of law can be applied without determining underlying questions of church law and policies" (citing *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976))); *Moses v. Diocese of Colorado*, 863 P.2d 310, 320-21 (Colo. 1993) (First Amendment does not bar civil suit because deciding claims does "not require interpreting or weighing church doctrine and neutral principles of law can be applied"); *Fortin v. Roman Catholic Bishop of Portland*, 871 A.2d 1208, 1225 (Me. 2005) ("[C]ourts do not inhibit the free exercise of religion by applying neutral principles of law to a civil dispute involving members of the clergy."); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 45-46 (1990) (adjudication of emotional distress cases applies neutral rules); cf. *Jones v. Wolf*, 443 U.S. 595, 606 (1979) (applying "neutral-principles approach" to dispute over ownership of church property does not inhibit free exercise of religion); *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969) (same).

14. See *Murphy*, 571 N.E.2d at 348. See generally Esbeck, *supra* note 10 and accompanying text.

15. *Prince v. Massachusetts*, 321 U.S. 158, 177 (1944) (Jackson, J., concurring in the judgment).

16. See *Hustler v. Falwell*, 485 U.S. 46, 56 (1988); see also *infra* Part II.A.

17. Cf. *Cohen v. California*, 403 U.S. 15, 21 (1971) (persons confronted with defendant's jacket bearing the words "Fuck the Draft" could effectively "avoid further bombardment of their sensibilities simply by averting their eyes").

guaranteeing both the freedom to disseminate a religious message and the freedom to walk away from unwanted religious advocacy.

Part I of this essay argues that it is entirely consistent with legal precedent and longstanding social policy to hold religious groups liable in tort when their religious advocacy subjects others to extreme mental or emotional distress. The courts generally agree that only those who freely choose to unite themselves in religious association are subject to that entity's governance.<sup>18</sup> Religious entities are not protected when they impose their will on those unwilling to submit to it.<sup>19</sup> Thus, once a member withdraws consent,<sup>20</sup> or where a religious entity has undermined a member's capacity to consent,<sup>21</sup> the constitutional shield that protects religious conduct from judicial inquiry is broken.<sup>22</sup>

However, basing a theory of liability on associative voluntariness raises a host of difficult secondary questions.<sup>23</sup> Must religious entities obtain consent before engaging in aggressive religious advocacy? How much information must a religious recruit have to make a truly informed choice? When is a religious recruit rendered incapable of autonomous decision-making? Do children (or other psychologically vulnerable persons) who are subject to religious indoctrination freely choose to unite

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18. See *infra* Part I.

19. See, e.g., *Guinn v. Collinsville Church of Christ*, 775 P.2d 766, 781 (Okla. 1989) (“[T]he First Amendment will not shield a church from civil liability for imposing its will, as manifested through a disciplinary scheme, upon an individual who has not consented to undergo ecclesiastical discipline.”).

20. See, e.g., *id.* (“Parishioner voluntarily joined the Church of Christ and by so doing consented to submit to its tenets. When she later removed herself from membership, Parishioner withdrew her consent, depriving the Church of the power actively to monitor her spiritual life through overt disciplinary acts.”); cf. *Bear v. Reformed Mennonite Church*, 341 A.2d 105, 107 (Pa. 1975) (reversing dismissal of tort suit by former member of church). But cf. *Paul v. Watchtower Bible & Tract Soc’y of N.Y.*, 819 F.2d 875, 883 (9th Cir. 1987) (holding that members of church were free not to associate with former member).

21. See, e.g., *Molko v. Holy Spirit Ass’n for the Unification of World Christianity*, 762 P.2d 46, 56-63 (Cal. 1988) (reversing summary judgment for church on emotional distress claim where atmosphere of coercive persuasion rendered plaintiffs incapable of deciding not to join church); *Wollersheim v. Church of Scientology of Cal.*, 66 Cal. Rptr. 2d 1, 7-19 (Cal. Ct. App. 1989) (affirming emotional distress judgment for plaintiff where church conducted religious practices in coercive environment).

22. See, e.g., *Guinn*, 775 P.2d at 776 (“No real freedom to choose religion would exist in this land if under the shield of the First Amendment religious institutions could impose their will on the unwilling and claim immunity from secular judicature for their tortious acts.”).

23. On the question of consent in the context of religious advocacy, see, for example, Richard Delgado, *Cults and Conversion: The Case for Informed Consent*, 16 GA. L. REV. 533 (1982); Comment, *Religious Torts: Applying the Consent Doctrine as Definitional Balancing*, 19 U.C. DAVIS L. REV. 949 (1986). On consent to religious deprogramming, see Douglas H. Cook, Comment, *Tort Liability for Cult Deprogramming*: *Peterson v. Sorlien*, 43 OHIO ST. L.J. 465, 481-89 (1982).

themselves in voluntary association? The open-ended nature of emotional distress claims and the grounding of liability on amorphous principles of self-determination preclude a formulaic response to tough cases. Put simply, the decision to hold a religious entity liable for a tort action is a challenging one.<sup>24</sup>

Part II of this essay proposes that a “captive or unwilling listener” doctrine may help define those cases where religious advocacy or indoctrination goes too far.<sup>25</sup> In Part II.A, this essay looks at the *Snyder* case and considers how the court, by relying on the Supreme Court’s cases establishing “[t]he right to avoid unwelcome speech,”<sup>26</sup> could have 1) more clearly defined the boundaries of the church’s liability, and

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24. See, e.g., *Murphy v. I.S.K.Con. of New England*, 571 N.E.2d 340, 349-50 (Mass. 1991) (“The decision whether the free exercise clause bars a particular tort action is not necessarily determined by the presence of tortious activity but by other factors such as the nature of the evidence which must be presented to support such a claim, or the effect that liability for a successful claim would have on free exercise rights.”).

25. On the captive audience doctrine, see *Hill v. Colorado*, 530 U.S. 703, 716-18 (2000) (upholding statute that prohibited speakers from approaching unwilling listeners outside health care facilities); *Madsen v. Women’s Health Ctr.*, 512 U.S. 753, 768 (1994) (targeted picketing of a hospital or clinic threatens psychological well-being of the patient held “captive” by medical circumstance); *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (residential privacy protects the “unwilling listener” from unwanted and intrusive speech); *Carey v. Brown*, 447 U.S. 455, 478 (1980) (Rehnquist, J., dissenting) (describing the psychological tensions and pressures that result from targeted residential picketing); *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (“Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual’s right to be left alone plainly outweighs the First Amendment rights of an intruder.” (citing *Rowan v. U.S. Post Office Dep’t*, 397 U.S. 728 (1970))); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209-10 (1975) (noting that restrictions on speech are warranted when the degree of captivity “makes it impractical for the unwilling viewer or auditor to avoid exposure”); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (riders on city transit system are captive audience); *Rowan v. U.S. Post Office Dep’t*, 397 U.S. 728, 738 (1970) (“We therefore categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even ‘good’ ideas on an unwilling recipient. That we are often ‘captives’ outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere.” (citing *Public Utilities Comm’n v. Pollak*, 343 U.S. 451 (1952))); *Pollak*, 343 U.S. at 468 (1952) (Douglas, J., dissenting) (riders on street railway and bus system are captive audience); *Kovacs v. Cooper*, 336 U.S. 77, 86-87 (1949) (citing *Schneider v. State*, 308 U.S. 147, 162 (1939)) (“The unwilling listener is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it.”); *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932) (viewers of display advertising on billboards and street car placards have messages thrust upon them “without the exercise of choice or volition on their part”); cf. *Cohen v. California*, 403 U.S. 15, 21-22 (1971) (persons confronted with defendant’s jacket bearing the words “Fuck the Draft” could have avoided “further bombardment of their sensibilities simply by averting their eyes”); *Collin v. Smith*, 578 F.2d 1197, 1207 (7th Cir. 1978) (residents could “simply avoid” Nazi-affiliated protest activities).

26. *Hill*, 530 U.S. at 716.

2) set appropriate limits on its right to express and disseminate religious doctrine. It is difficult to imagine a time and place where the state's interest in protecting its citizens' privacy applies with greater force than the momentary sanctuary afforded the family in mourning.<sup>27</sup> In Part II.B, this essay argues that because children are unable freely to choose a religious association—because, in other words, children are “like a captive audience,”<sup>28</sup> subject to someone else's will—their indoctrination must be consistent with well-settled principles of psychological development. When religious entities veer far from such principles, they should incur civil liability for emotionally abusive advocacy. The tort of intentional infliction of emotional distress provides a remedy for the most egregious forms of behavior that impair a “child's emotional development or sense of self-worth,”<sup>29</sup> and, because it provides a remedy *only* for the most egregious forms of misconduct, there is little risk that the adjudication of such suits will unduly restrict religious freedom.

Constraining religious advocacy that is truly outrageous offers a measure of civility to govern the marketplace of religious ideas.<sup>30</sup> Some brake on indoctrination of religious belief is necessary to guarantee a civil space for religious diversity, and to ensure room in the public

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27. See, e.g., *Phelps-Roper v. Taft*, 523 F. Supp. 2d 612, 618 (N.D. Ohio 2007) (state “has a significant interest in protecting its citizens from disruption during the events associated with a funeral or burial service”); *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 992 (E.D. Ky. 2006) (funeral attendees have an interest in avoiding unwanted communications “which is at least similar to a person's interest in avoiding such communications inside his home”); cf. *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 168 (2004) (“Family members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own.”). But see *Phelps-Roper v. Nixon*, 509 F.3d 480, 486 (8th Cir. 2007) (no significant state interest in protecting funeral attendees).

28. *Ginsberg v. New York*, 390 U.S. 629, 649 (1968) (Stewart, J., concurring in the judgment) (“[A] State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees.”) (footnote omitted).

29. The definition of “child abuse and neglect” under the federal Child Abuse and Prevention Treatment Act of 1996 (CAPTA) includes serious emotional harm. 42 U.S.C. § 5106g (2007). The U.S. Department of Health and Human Services defines emotional abuse as “a pattern of behavior that impairs a child's emotional development or sense of self-worth. This may include constant criticism, threats, or rejection, as well as withholding love, support, or guidance.” U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *WHAT IS CHILD ABUSE AND NEGLECT?*, 3 (2008), available at <http://www.childwelfare.gov/pubs/factsheets/whatiscan.pdf>.

30. See, e.g., *Engel v. Vitale*, 370 U.S. 421, 429 (1962) (noting that, at time of adoption of Constitution, there was widespread awareness of “anguish, hardship and bitter strife” that can come with zealous religious rivalries); *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 8-9 (1947) (describing “turmoil, civil strife, and persecutions” generated by religious sects).

square for religious minorities. While “[r]eligious activities which concern only members of the faith are and ought to be free—as nearly absolutely free as anything can be,”<sup>31</sup> tort liability protects the rights of others to choose religious belief or to choose none at all. Far from threatening the expressive liberty of religious entities, the limitations created by tort liability work to ensure a civic order where all people are equally free to express their deepest beliefs, whether that freedom lies in the right to disseminate religious belief or in the right to avoid unwanted and offensive religious advocacy.

## I

The Constitution requires tolerance of religious differences. Under the Free Exercise Clause, “many types of . . . belief can develop unmolested and unobstructed.”<sup>32</sup> In effect, the Free Exercise Clause embodies a non-molestation principle guaranteeing “the right to organize voluntary religious associations.”<sup>33</sup> Those who belong to a religious association consent to submit to its polity and practices and, for this reason, as the Supreme Court held in *Watson v. Jones*, religious entities enjoy a constitutional shield against some judicial inquiries:

The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed.<sup>34</sup>

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31. *Prince v. Massachusetts*, 321 U.S. 158, 177 (1944) (Jackson, J., concurring in the judgment).

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

33. *Watson v. Jones*, 80 U.S. 679, 728 (1871). Colonial charters reflected this non-molestation principle “[by] protect[ing] residents from being in any way ‘molested, punished, disquieted, or called in question, for any differences in opinion, in matters of religion.’” *City of Boerne v. Flores*, 521 U.S. 507, 551 (1993) (O’Connor, J., dissenting) (quoting RHODE ISLAND CHARTER OF 1667); cf. Letter from Thomas Jefferson to Rev. Samuel Miller (Jan. 23, 1808), in 9 THE WRITINGS OF THOMAS JEFFERSON 174 (P. Ford ed. 1898) (“I consider the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises.”); Letter from James Madison to Reverend Adams, in 9 THE WRITINGS OF JAMES MADISON 487 (Gaillard Hunt ed., 1910) (religious liberty requires “entire abstinence of the Govt. from interference” with internal affairs of religious organizations).

34. 80 U.S. at 728-29.



First promulgated in 1878, the doctrine of *Watson v. Jones* has enjoyed a lengthy and influential career.<sup>35</sup> When civil courts undertake to resolve ecclesiastical controversies, the Court repeatedly has made caution its jurisprudential watchword.<sup>36</sup> In such circumstances, “the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern.”<sup>37</sup> These hazards arise when courts seek to determine what is religiously normative—in other words, when courts try to resolve controversies about the theological correctness of doctrine and practice.<sup>38</sup> With no neutral principles of law to settle such matters,<sup>39</sup> the

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35. See *Jones v. Wolf*, 443 U.S. 595, 606 (1979); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713 (1976); *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox in North America*, 344 U.S. 94, 116 (1952); *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16-17 (1929).

36. See *Jones v. Wolf*, 443 U.S. at 602 (“[T]he First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice.”); *Serbian E. Orthodox*, 426 U.S. at 724-25 (“[T]he First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters. When this choice is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decisions as binding upon them.”); *Hull Church*, 393 U.S. at 449 (“First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern.”); *Kedroff*, 344 U.S. at 116 (“The opinion [in *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 729 (1872)] radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”); *Watson*, 80 U.S. at 728-79; see also *United States v. Ballard*, 322 U.S. 78 (1944) (courts will not inquire as to the truth or sincerity of religious beliefs). On judicial authority to resolve religious questions, see, for example, Jared A. Goldstein, *Is There a Religious Question Doctrine?: Judicial Authority to Examine Religious Practices and Belief*, 54 CATH. U. L. REV. 497 (2005); Kent Greenawalt, *Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance*, 71 S. CAL. L. REV. 781 (1998); Samuel J. Levine, *Rethinking the Supreme Court’s Hands-Off Approach to Questions of Religious Practice and Belief*, 25 FORDHAM URB. L.J. 85 (1997). For consideration of the state’s interest in religious questions, see Richard W. Garnett, *Assimilation, Toleration, and the State’s Interest in the Development of Religious Doctrine*, 51 UCLA L. REV. 1645 (2004) (“[I]t is precisely because secular, liberal, democratic governments have an ‘interest’ in the content, and therefore in the ‘development,’ of religious doctrine—an interest that such governments will, if permitted, quite understandably pursue—that religious freedom is so fragile.”).

37. *Hull Church*, 393 U.S. at 449.

38. On the distinction between normative and positive religious questions, see GOLDSTEIN, *supra* note 36.

39. Where the resolution of complaints against religious entities can be made on objective, hence neutral, grounds, the rationale for judicial abstention is absent. See, e.g.,

risk is necessarily great that factfinders will impose their own ideas of correctness, a risk that may well justify fear of judicial subjectivity.<sup>40</sup>

It is often assumed that disputes between a church and its members require the courts to settle normative religious questions. Thus, where a plaintiff has freely chosen to adhere to a religious entity, courts show a reasonable reluctance to adjudicate tort claims based on religiously motivated conduct (and a reasonable reliance on the plaintiff's volitional capacities).<sup>41</sup> Most obviously, action taken by a religious entity against a current member may be constitutionally protected,<sup>42</sup> provided that such conduct does not "constitute a sufficient threat to the peace, safety, or morality of the community as to warrant state intervention."<sup>43</sup> The fullest elucidation of this principle may be that of the Oklahoma

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Jones v. Wolf, 443 U.S. at 602 (approving "neutral principles of law" approach to church property dispute); *Hull Church*, 393 U.S. at 449 (same).

40. In *Gonzales v. Roman Catholic Archbishop of Manila*, the Court indicated its readiness to intervene in cases involving "fraud, collusion, or arbitrariness" on the part of church authorities. 280 U.S. 1, 16-17 (1929). The arbitrariness exception to the rule of judicial abstention suggested that courts could employ neutral principles of law to determine whether a religious entity had complied with its own rules and regulations. That proposition was rejected by the Court in *Serbian Eastern Orthodox*: "For civil courts to analyze whether the ecclesiastical actions of a church judicatory are in that sense 'arbitrary' must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow, or else in to the substantive criteria by which they are supposedly to decide the ecclesiastical question. But this is exactly the inquiry that the First Amendment prohibits; recognition of such an exception would undermine the general rule that religious controversies are not the proper subject of civil court inquiry, and that a civil court must accept the ecclesiastical decisions of church tribunals as it finds them." 426 U.S. at 713.

41. See, e.g., *Guinn v. Church of Christ of Collinsville*, 775 P.2d 766, 773 (Okla. 1989) ("When people voluntarily join together in pursuit of spiritual fulfillment, the First Amendment requires that the government respect their decision and not impose its own ideas on the religious organization.").

42. See, e.g., *Paul v. Watchtower Bible and Tract Soc'y of N.Y.*, 819 F.2d 875, 883 (9th Cir. 1987) ("Courts generally do not scrutinize closely the relationship among members . . . of a church."); cf. *Meroni v. Holy Spirit Ass'n for the Unification of World Christianity*, 506 N.Y.S.2d 174, 178 (N.Y. App. Div. 1986) (dismissing emotional distress action against religious entity because church member "chose to subject himself to the church's discipline"). But not all religiously motivated conduct is protected even if it is based on the consent of current members. See generally *Prince v. Massachusetts*, 321 U.S. 158 (1944) (upholding conviction for violation of child labor laws); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (upholding constitutionality of law requiring vaccinations for communicable diseases); *Reynolds v. United States*, 98 U.S. 145 (1878) (upholding law against polygamy). Of course, religious entities are held liable for secular conduct. See generally *Malloy v. Fong*, 232 P.2d 241 (Cal. 1951) (holding religious corporation liable for employee's negligent driving).

43. *Paul*, 819 F.2d at 883. To what extent such provisos have historically qualified the principle that religious entities are subject to neutral laws has been the subject of robust debate. Compare *City of Boerne v. Flores*, 521 U.S. 507, 539-40 (Scalia, J., concurring in part) (provisos negated license to act in violation of neutral laws), with *id.* at 552-57 (O'Connor, J., dissenting) (provisos would be superfluous unless right of free exercise was viewed as generally superior to ordinary legislation).

Supreme Court, which, in *Guinn v. Church of Christ of Collinsville*, used the member/non-member distinction to delineate the proper boundaries between civil and ecclesiastical spheres of adjudicatory authority.<sup>44</sup> In *Guinn*, church elders carried out a biblically-mandated disciplinary procedure against the plaintiff, a parishioner who, it was rumored, was having sexual relations in violation of the denomination's code of ethics.<sup>45</sup> When the plaintiff discovered that the elders intended to tell the congregation about her private affairs, she sought to end her affiliation with the church.<sup>46</sup> She implored the elders to inform the congregation only that she had withdrawn from membership.<sup>47</sup> In response to the plaintiff's requests, she was told that withdrawal from church fellowship was "*doctrinally impossible*"<sup>48</sup>: "*The Church of Christ believes that all its members are a family; one can be born into a family but can never truly withdraw from it. A Church of Christ member can voluntarily join the church's flock but cannot then disassociate oneself from it.*"<sup>49</sup> Publicly denounced as a fornicator, the plaintiff sued for intentional infliction of emotional distress and invasion of privacy.<sup>50</sup>

The *Guinn* court was Solomonic in setting the parameters of judicial authority to resolve civil disputes against religious entities. For the court, ecclesiastical discipline (that is, "[t]he right to express dissatisfaction with the disobedience of those who have promised to adhere to doctrinal precepts and to take ecclesiastically-mandated measures to bring wayward members back within the bounds of accepted behavior"<sup>51</sup>) amounts to intra-church activity protected by the Free Exercise Clause; accordingly, the church was immune from tort claims for its conduct prior to the parishioner's withdrawal.<sup>52</sup> But, the church was not shielded from scrutiny "for imposing its will, as manifested through a disciplinary scheme, upon an individual who has not consented to undergo ecclesiastical discipline."<sup>53</sup> Further, the right "to *recede* from one's religious allegiance" is also constitutionally protected.<sup>54</sup> Consent to submit to governance by religious authority does not equate with "consent to relinquishing a right which the civil law guarantees."<sup>55</sup> In

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44. See *Guinn*, 775 P.2d at 786.

45. *Id.* at 767-68.

46. *Id.* at 769.

47. *Id.* at 768.

48. *Id.* at 769 (italics in original).

49. *Id.* (italics in original).

50. *Id.*

51. *Id.* at 779.

52. *Id.*

53. *Id.* at 781.

54. *Id.* at 776.

55. *Id.* at 777.

short, the plaintiff was as free to leave the church as she was to join it. While the Free Exercise Clause mandates judicial deference to the adjudicatory provenance of religious authorities, “the constitutionally protected freedom to impose even the most deeply felt, spiritually-inspired disciplinary measure is forfeited when the object of ‘benevolent’ concern is one who has terminated voluntary submission to another’s supervision and command.”<sup>56</sup> For the *Guinn* court, the member/non-member distinction is a jurisdictional threshold, one that provides courts, if not a bright line, at least a real measure of clarity in deciding whether to hear tort suits against religious entities.<sup>57</sup>

It is well settled, then, that the First Amendment does not require non-members—that is, those who choose not to submit to the authority of a religious association—to “be tolerant of that group’s attempts to govern them.”<sup>58</sup> No court has suggested that religious entities can treat non-members as though they had consented to ecclesiastical governance and discipline. Implicating no intra-church concerns, tort suits by non-members do not raise normative religious questions; thus, religious entities need no immunity from such claims, even when they arise out of religiously motivated conduct.<sup>59</sup> Nothing in the adjudication of tort suits

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56. *Id.* at 779.

57. Thus, the court remanded “to separate on review [plaintiff’s] recovery for the injury occasioned her by the prewithdrawal acts from that which stems from postwithdrawal harm.” *Id.* at 786. Not all courts would agree that disciplinary measures taken against former members are constitutionally unprotected. In *Paul v. Watchtower Bible and Tract Soc’y of N.Y.*, 819 F.2d 875, 883 (9th Cir. 1987), the Ninth Circuit held that the practice of shunning is protected activity whether directed at current or former members. Here too, however, the principle of consent was at work. The court noted that a constitutional defense to tort liability was particularly appropriate in that the plaintiff was a former church member, presumably because membership implied consent to post-resignation discipline. *Id.* The *Guinn* court distinguished *Paul* on the ground that shunning is an essentially passive activity, a punishment that is “merely a reiteration of [the plaintiff’s] prior rejection, not an active attempt to involve her in the religious practices of a church whose precepts she no longer followed.” *Guinn*, 775 P.2d at 780.

58. *Guinn*, 775 P.2d at 779.

59. See, e.g., *Van Schaick v. Church of Scientology of Cal.*, 535 F. Supp. 1125, 1135 (D. Mass. 1982) (tort liability may be upheld “even if the alleged wrongdoer acts upon a religious belief or is organized for a religious purpose”); *Turner v. Unification Church*, 473 F. Supp. 367, 371-72 (D.R.I. 1978) (religious activities not solely in “ideological or intellectual realm” are subject to tort liability); see also *Murphy v. I.S.K.Con. of New England, Inc.*, 571 N.E.2d 340, 347 (Mass. 1991) (“[R]eligiously motivated activity is not categorically immunized from tort liability by the free exercise clause of the First Amendment.”); *Molko v. Holy Spirit Ass’n*, 762 P.2d 46, 57 (Cal. 1988) (courts will recognize tort liability even for acts that are religiously motivated); *Hester v. Barnett*, 723 S.W.2d 544, 551 (Mo. Ct. App. 1987) (torts of a cleric are actionable, even though incidents of religious practice and belief) (citing *Bear v. Reformed Mennonite Church*, 341 A.2d 105, 108 (Pa. 1975)); *Meroni v. Holy Spirit Ass’n for the Unification of World Christianity*, 506 N.Y.S.2d 174, 176 (N.Y. App. Div. 1986) (church may be held liable for tortious conduct, even if that conduct is carried out as part of the church’s religious

against religious entities requires a court to retreat from “the foundational rule” that the First Amendment prohibits civil courts from intervening in internal ecclesiastical disputes.<sup>60</sup>

The case law on judicial abstention is driven by the concern that courts will entangle themselves in ecclesiastical questions, the settlement of which more properly belongs to those authorities granted adjudicatory responsibility by church members. But, tort claims do not necessarily ask the Court to render a decision about “discipline, faith, internal organization, or ecclesiastical rule, custom or law,”<sup>61</sup> to “second-guess ecclesiastical decisions made by hierarchical church bodies,”<sup>62</sup> or to determine “the correctness of an interpretation of canonical text.”<sup>63</sup> Nor is the adjudication of such claims likely to demand a judgment about the truth or falsity of religious belief.<sup>64</sup> The rationale for judicial abstention is especially weak when the court is not called upon to resolve an intra-church dispute.<sup>65</sup> Where controversy is concerned with the conformity of religiously motivated acts to church doctrine, it makes good sense for courts to let ecclesiastical authorities settle the matter. But where a plaintiff seeks relief for harms suffered as a result of conduct that is presumably consistent with the governing law of a religious entity, the interests protected by judicial abstention are not endangered.<sup>66</sup> In such

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practices); *Carrieri v. Bush*, 419 P.2d 132, 137 (Wash. 1966) (church members not entitled, “under the guise of exercising religious beliefs,” to interfere wrongfully with familial relationships).

60. *Madsen v. Erwin*, 481 N.E.2d 1160, 1167 (Mass. 1985) (quoting *Alberts v. Devine*, 479 N.E.2d 113, 122 (Mass. 1985)).

61. *Bell v. Presbyterian Church (U.S.A.)*, 126 F.3d 328, 331 (4th Cir. 1997) (quoting *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 724-25 (1976)).

62. *Serbian E. Orthodox*, 426 U.S. at 724-25.

63. *Paul v. Watchtower Bible and Tract Soc’y of N.Y.*, 819 F.2d 875, 878 n.1 (9th Cir. 1987).

64. *See generally* *United States v. Ballard*, 322 U.S. 78 (1944). *But see* *Pleasant Glade Assembly of God v. Schubert*, No. 05-0916, 2008 WL 2572009, at \*8 (Tex. June 27, 2008) (assessing emotional damages against church for engaging in religious practice of “laying hands” would unconstitutionally “embroil this Court in an assessment of the propriety of those religious beliefs”) (citing *Ballard*, 322 U.S. at 86-88). While the rule of *Ballard* would seem to offer poor fodder for literary exploitation, one episode of the television series *Law & Order* features a homicide defendant who offers as a justification defense his belief that God would strike dead his daughter if the deceased continued to teach her “godless” evolutionary theory. *See Law & Order: Good Faith* (NBC television broadcast March 30, 2007). When the state objects to the defense, the court declares that it is no business of the judiciary to judge the veracity of the defendant’s belief in divine retribution. *See id.*

65. *See* *Gen. Council on Fin. & Admin. v. Super. Ct. of Cal.*, 439 U.S. 1355, 1373 (1978) (Rehnquist, Cir. J.) (judicial abstention is “premised on a perceived danger that in resolving intrachurch disputes the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs”).

66. *Paul*, 819 F.2d at 878 n.1 (where plaintiff seeks relief for harms suffered as a result of conduct that is presumably consistent with governing law of religious entity,

cases, the “justification for judicial abstention is nonexistent” because the dispute does not relate to ecclesiastical affairs;<sup>67</sup> and because the dispute is not an ecclesiastical one, its outcome can be determined by neutral principles of tort law. To the extent that religious entities are held responsible for their misconduct, the burden they suffer is “merely the incidental effect of a generally applicable and otherwise valid provision,” the enforcement of which by civil adjudication does not offend the Free Exercise Clause.<sup>68</sup>

Obligating religious entities not to commit outrageous acts, and judging outrageousness by neutral standards, is far more supportable than the constitutional hair-splitting in which courts routinely indulge to avoid the appearance of meddling with religious matters. Courts tread warily when religious entities are sued—indeed, too warily, for in their struggle to avoid infringing upon religious activity, courts end up making dubious judgments about matters that border theological territory: what is religious as opposed to secular conduct, what is central to a religion’s beliefs and practices (and the restriction of which would be a substantial burden) as opposed to what is not a significant religious imperative, and what is belief as opposed to conduct. In cases involving emotional distress claims, however, none of these vexing questions really needs to be asked. The focus of the court’s inquiry should be solely on the same factors that determine the resolution of claims involving secular entities. The danger of religious viewpoint discrimination emerges, paradoxically, when too much attention is paid to the religious status of the defendant.

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“doctrine of *Serbian E. Orthodox* does not apply”); *cf.* *Guinn v. Church of Christ of Collinsville*, 775 P.2d 766, 773 (Okla. 1989) (“Parishioner did not attack the Elders’ disciplinary actions on the basis that they contravened established Church of Christ polity. Rather, she claimed that the Elders’ actions—whether or not in conformity to established church doctrine—amounted to a tortious invasion of her rights for which she was entitled to recover. While this dispute involved a religiously-founded disciplinary matter, it was not the sort of private ecclesiastical controversy which the Court has deemed immune from judicial scrutiny.”).

67. *Guinn*, 775 P.2d at 773 (where controversy is concerned with tortious nature of religiously motivated acts and not with their conformity to church doctrine, “justification for judicial abstention is nonexistent”).

68. *Employment Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872, 878 (1990). This is, or should be, the lesson of *Smith*. Where pre-*Smith* courts did not abstain from consideration of tort suits against religious entities, they generally employed some form of compelling interest test. *See, e.g., Guinn*, 775 P.2d at 771 n.16 (equating compelling governmental interest with a threat to “public safety, peace, or order” (quoting *Sherbert v. Verner*, 374 U.S. 398, 403 (1963))); *Molko v. Holy Spirit Ass’n*, 762 P.2d 46, 56-57 (Cal. 1988) (“Government action burdening religious conduct is subject to a balancing test, in which the importance of the state’s interest is weighed against the severity of the burden imposed on religion. The greater the burden imposed on religion, the more compelling must be the government interest at stake.”) (citations omitted).

When courts choose to impose tort liability on religious entities, they often do so by finding that the misconduct is entirely secular,<sup>69</sup> or, if religious, not part of (or, worse, not a central part of) the religious teachings of the defendant,<sup>70</sup> and, thus, prohibition of that conduct is no burden on free exercise.<sup>71</sup> It would have been easy enough for the *Snyder v. Phelps* court to say that targeted verbal abuse is not religious conduct or that it is not part of (or a central part of) the teaching and practices of the Westboro Baptist Church. But, this type of inquiry *does* entangle the court in a theological debate about the meaning of religion or the doctrine of specific faiths. We may all agree that negligently driving a church school bus is not a religiously mandated activity,<sup>72</sup> but the question whether engagement in personal invective is a defendant's religious obligation is not so easily answered. It may well be.<sup>73</sup> Who is to say that restricting a church's recruiting practices imposes burdens that "while real, are not substantial,"<sup>74</sup> or that requiring a father to "limit sharing certain aspects of his beliefs with his children" imposes "only a minimal burden" on his right to practice his religion freely?<sup>75</sup>

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69. For instance, sexual misconduct cases are generally treated as involving non-religious conduct. *See, e.g., Sanders v. Casa View Baptist Church*, 134 F.3d 331, 336 (5th Cir. 1998) (activities complained of by the plaintiffs were not rooted in defendant's religious belief). *See generally Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988) (same).

70. Whenever courts consider "the severity of the burden imposed on religion," *Molko*, 762 P.2d at 56, they do so despite the Supreme Court's admonition that that it "is not within the judicial ken to question the centrality of particular beliefs or practices to a faith," *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 699 (1989). *See also Smith*, 494 U.S. at 887 (Stevens, J., concurring) ("Judging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims.'" (quoting *United States v. Lee*, 455 U.S. 252, 263 n.2 (1983))).

71. *See, e.g., Molko*, 762 P.2d at 60 ("Being subject to liability for fraud does not in any way or degree prevent or inhibit Church members from operating their religious communities, worshipping as they see fit, freely associating with one another, selling or distributing literature, proselytizing on the street, soliciting funds, or generally spreading Reverend Moon's message among the population. . . . At most, it potentially closes one questionable avenue for bringing new members into the Church.") (citation omitted); *Kendall v. Kendall*, 687 N.E.2d 1228, 1236 (Mass. 1997) (court order limiting father from sharing "certain aspects" of his religious beliefs with his children imposes only a minimal burden on free exercise).

72. *Malloy v. Fong*, 232 P.2d 241, 244 (Cal. 1951). Unless, of course, it is. *See infra* note 73.

73. *Cf. Destefano*, 763 P.2d at 284 (if clergy member asserted that sexual misconduct "was dictated by his sincerely held religious beliefs or was consistent with the practice of his religion, [the court] would have to resolve a difficult first amendment issue"); *see also Sanders*, 134 F.3d at 338 n.7 (noting that court did not decide whether the "First Amendment *would* protect a minister asserting that his civil misconduct was rooted in religious belief") (emphasis in original).

74. *Molko*, 762 P.2d at 60.

75. *Kendall*, 687 N.E.2d at 1236.

When courts choose not to impose tort liability on religious entities, they often hide behind the rationale that such liability would infringe belief as opposed to conduct.<sup>76</sup> This reasoning, despite its good pedigree,<sup>77</sup> involves distinctions even more tenuous than those that purport to separate religious from secular conduct. The state has no “window into men’s souls,”<sup>78</sup> and the absolute freedom to believe is in little need of constitutional guarantee.<sup>79</sup> What needs protection is conduct, the right to practice what one believes. The right of free exercise has always meant more than the right to believe. Jefferson understood it to mean that government could not “restrain the profession *or propagation of* [religious] principles.”<sup>80</sup> If religious freedom leaves “all men . . . free to profess, and by argument to maintain, their opinion in matters of religion,”<sup>81</sup> then it is disingenuous—and certainly of little comfort to religious entities—for a court to say that it is not penalizing belief when it subjects religious advocates to tort liability.<sup>82</sup>

It is not uncommon for courts adjudicating civil complaints against religious entities to make both kinds of mistake—that is, they judge whether, or to what extent, conduct has religious significance and, subsequently, whether restriction of such conduct substantially burdens

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76. See, e.g., *Pleasant Glade Assembly of God v. Schubert*, No. 05-0916, 2008 WL 2572009, at \*7 (Tex. June 27, 2008) (adjudication of emotional distress claim “would necessarily require an inquiry into the truth or falsity of religious beliefs that is forbidden by the Constitution” (quoting *Tilton v. Marshall*, 925 S.W.2d 672, 682 (Tex. 1996))); *Murphy v. I.S.K.Con. of New England, Inc.*, 571 N.E.2d 340, 347-48 (Mass. 1991) (“[T]he defendant has been required to do what the First Amendment has forbidden; it has been forced to attempt to prove to a jury that the substance of its religious beliefs is worthy of respect.”).

77. See generally *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Reynolds v. United States*, 98 U.S. 145 (1878).

78. The quotation “I would make no windows into men’s souls” is attributed to Queen Elizabeth I. See WINSTON CHURCHILL, *HISTORY OF THE ENGLISH-SPEAKING PEOPLES II*, 82-83 (1963).

79. See *Cantwell*, 310 U.S. at 303-04 (“[The Free Exercise Clause] embraces two concepts, freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.”).

80. Thomas Jefferson, *The Statute of Virginia for Religious Freedom*, in *THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM: ITS EVOLUTION AND CONSEQUENCES FOR AMERICAN HISTORY*, xvii (Merrill D. Peterson & Robert C. Vaughan eds., 1988) (emphasis added).

81. *Id.* at xviii.

82. Cf. Hayden, *supra* note 8 at 611 (“Unless and until the government is able to read its citizens’ minds, the government can act against a mere belief only when that belief motivates some action—reading, speaking, moving one’s body, and so forth. Only then is the belief apparent, and only by striking at conduct that is motivated by that belief can one attack the belief itself. Thus the belief/action distinction is little more than a truism and fails to provide a meaningful guidepost with which to decide hard questions.”) (footnote omitted).



religious conduct. In *Alberts v. Devine*,<sup>83</sup> the church defendants argued that because an ecclesiastical rule required them to seek out private medical information, any judicial inquiry into their actions (that allegedly violated physician-patient confidentiality) was constitutionally barred.<sup>84</sup> The court held, correctly in my view, that even if a rule imposed upon church authorities a duty to secure confidential medical information, the First Amendment does not preclude the imposition of liability for violations of physician-patient confidentiality.<sup>85</sup> But the court arrived at this conclusion by deciding that “the dispute [was not] about religious faith or doctrine nor about church discipline or internal organization”<sup>86</sup> and that “a rule that prevents interference with physician-patient relationships will have little impact on the free exercise of religion.”<sup>87</sup> Thus, like courts before and after it,<sup>88</sup> the *Alberts* court reached the conclusion that judicial abstention was not warranted by engaging in precisely the type of inquiry about religious questions that most warrants judicial abstention.<sup>89</sup>

The better approach is to view religious advocacy, whether we call it belief or conduct, as subject to the legal standards of tort law. If the legal question can be settled without requiring the court to 1) referee an intra-church dispute, or 2) pass judgment on the truth or falsity, or the relative merits, of religious belief, and if the matter can be resolved in a non-discriminatory manner,<sup>90</sup> the fact that ecclesiastical rule mandates the conduct—that is, the fact that conduct is religiously significant and restriction of that conduct is substantially burdensome—is beside the point. Indeed, given the unique social and psychological volatility of disagreement about religious imperatives,<sup>91</sup> advocacy that bears the imprimatur of religious doctrine or belief may be more subject to the limits created by tort liability than similar secular conduct.<sup>92</sup> Those

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83. 479 N.E.2d 113 (Mass. 1985).

84. *Id.* at 122.

85. *Id.*

86. *Id.*

87. *Id.* at 123.

88. *See supra* text accompanying notes 69-82.

89. *Alberts*, 479 N.E.2d at 123.

90. If a law is not religiously neutral and of general application, it must be shown to serve a compelling governmental interest and to be narrowly tailored to advance that interest. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531-32 (1993).

91. *See supra* note 30.

92. On the other hand, emotional distress claims must satisfy an objective standard; thus, some religiously motivated practices that might seem intolerable in a secular context may not rise to the requisite level of outrageousness. For example, in *George v. I.S.K.Con.*, 262 Cal. Rptr. 217, 236 (Cal. App. Dep’t Super. Ct. 1989), the appellate court, which reversed the trial court’s judgment in favor of the plaintiff on an emotional distress claim, reached its decision by comparing the defendant church’s conduct to that

limits operate whenever religious activities “begin to affect or collide with liberties of others or of the public.”<sup>93</sup> As the *Snyder v. Phelps* court put it (relying on *Guinn*), religious entities are not free to “impose their will on the unwilling and claim immunity from secular judicature for their tortious acts.”<sup>94</sup>

## II

First Amendment freedoms of expression have long been tied to the Supreme Court’s sense of constitutional geography. Though “jealous to preserve access to public places for purposes of free speech,”<sup>95</sup> the Court has nonetheless insisted that the character of public space is often a matter of context.<sup>96</sup> Where there is room for disagreement (in the meeting hall, park, street corner, or public thoroughfare), and where there is opportunity for the unwilling recipient of someone else’s communication to look the other way (in both real and metaphorical senses), “First Amendment values inalterably prevail.”<sup>97</sup> The right of others to communicate, however, must be balanced with the right of every person to be let alone.<sup>98</sup> While the home remains a traditional

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of similarly situated, if more familiar, religious groups. The plaintiff was 14 years old when she joined the Hare Krishnas. The record included the following accounts of her life with the defendants:

- All of her possessions were taken away; she was forced to plead for such common items as shoes, clothing and health care.
- She was required to do menial labor and forced to beg for money.
- Robin was deprived of any meaningful contact with the outside world. She was separated from the nurturing influence of family and friends; she was not even allowed to correspond.
- Robin was deprived of the simple joys of life. She was not permitted to read books or newspapers, view television or even listen to the radio.
- Most important, Robin was moved from place-to-place without regard to her personal wishes.

*Id.* at 237. The court concluded that these acts were not tortious, observing that “[m]any of the acts relied on by [the plaintiff] are *hardly uncommon among cloistered religious groups.*” *Id.* (emphasis added).

93. See *Prince v. Massachusetts*, 321 U.S. 158, 177 (1944) (Jackson, J., concurring in the judgment).

94. 533 F. Supp. 2d 567, 580 (D. Md. 2008) (quoting *Guinn v. Church of Christ in Collinsville*, 775 P.2d 776, 779 (Okla. 1989)).

95. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974).

96. *Id.*

97. *Id.*

98. See *Rowan v. U.S. Post Office Dep’t*, 397 U.S. 728, 737 (1970); see also *Hill v. Colorado*, 530 U.S. 703, 716 (2000); cf. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975) (“In this sphere of collision between claims of privacy and those of [free speech or] free press, the interests on both sides are plainly rooted in the traditions and significant concerns of our society.”).

sanctuary from unwanted communications,<sup>99</sup> “the very basic right to be free from sights, sounds, and tangible matter we do not want” may outweigh the right to communicate in other, less traditional settings.<sup>100</sup> Open spaces, in other words, may not be as open as they seem at first glance.<sup>101</sup> In effect, we carry with us a measure of protection from confrontational acts—when we go to and from work,<sup>102</sup> when we view display advertising,<sup>103</sup> when we use the city transit system,<sup>104</sup> when we seek out medical care<sup>105</sup>—and when communication is forced upon us, the right to be left alone must prevail. The captive audience doctrine is often described as addressing a conflict of constitutional rights,<sup>106</sup> but it is better understood as reflecting basic common law tort principles.<sup>107</sup> The common law protects against the improper revelation of private matters; likewise, it protects privacy by providing a remedy for

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99. See *Frisby v. Schultz*, 487 U.S. 474, 485 (1988); *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 748 (1976); *Rowan*, 397 U.S. at 737.

100. *Rowan*, 397 U.S. at 736; see also *Hill*, 530 U.S. at 717 (“The right to avoid unwelcome speech has special force in the privacy of the home and its immediate surroundings, but can also be protected in confrontational settings.”) (citations omitted).

101. Cf. *Hill*, 530 U.S. at 716 (“The recognizable privacy interest in avoiding unwanted communication varies widely in different settings. It is far less important when strolling through Central Park than when in the confines of one’s own home, or when persons are powerless to avoid. But even the interest in preserving tranquility in the Sheep Meadow portion of Central Park may at times justify official restraints on offensive musical expression.”) (internal quotations and citations omitted).

102. See *Am. Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 204 (1921) (“How far may men go in persuasion and communication and still not violate the right of those whom they would influence? In going to and from work, men have a right to as free a passage without obstruction as the streets afford, consistent with the right of others to enjoy the same privilege. We are a social people and the accosting by one of another in an inoffensive way and an offer by one to communicate and discuss information with a view to influencing the other’s action are not regarded as aggression or a violation of that other’s rights. If, however, the offer is declined, as it may rightfully be, then persistence, importunity, following and dogging become unjustifiable annoyance and obstruction which is likely soon to savor of intimidation. From all of this the person sought to be influenced has a right to be free, and his employer has a right to have him free.”).

103. See generally *Packer Corp. v. Utah*, 285 U.S. 105 (1932).

104. See *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303-04 (1974).

105. See generally *Hill*, 530 U.S. at 703; *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753 (1994).

106. See, e.g., *Lehman*, 418 U.S. at 307 (Douglas, J., concurring) (“In asking us to force the system to accept his message as a vindication of his constitutional rights, the petitioner overlooks the constitutional rights of the commuters. While petitioner clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it. In my view the right of the commuters to be free from forced intrusions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience.”).

107. See *Hill*, 530 U.S. at 717 n.24 (characterizing “right to avoid unwelcome speech” as a common-law “‘interest’ that States can choose to protect in certain situations”).

communications thrust upon us against our will.<sup>108</sup> Like privacy, the concept of captivity is a flexible one, able to accommodate many forms of entrapment, from the geographical to the psychological.<sup>109</sup> As such, it can be a useful way to chart the uncertain boundary line between the varieties of protected religious advocacy and conduct so offensive and intrusive as to be intolerable in a civilized society.

## A

The conduct of the Westboro Baptist Church at Matthew Snyder's funeral was not the kind of religious activity protected by the Free Exercise Clause. (The court dismissed defendants' free speech defense as "without merit," concluding that the plaintiff was a private figure.<sup>110</sup>) The freedom to organize voluntary religious associations brings with it the right of religious advocacy, the right to express and disseminate religious doctrine.<sup>111</sup> But, the district court followed Supreme Court precedent on two key points limiting that right. First, it distinguished speech that is of public concern (perhaps even the "vilification of men

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108. Justice Louis Brandeis was instrumental in developing both types of common law privacy protection. His essay on the right to be left alone has been widely relied upon for the proposition that "[t]he common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others." Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198 (1890). Brandeis also wrote the opinion in *Packer Corporation v. Utah*, 285 U.S. 105 (1932), which relied in part on the captive audience doctrine. See 285 U.S. at 110 (distinguishing "forms of advertising [that] are ordinarily seen as a matter of choice on the part of the observer" from those seen "without the exercise of choice or volition"); see also *Hill*, 530 U.S. at 716 ("The unwilling listener's interest in avoiding unwanted communication has been repeatedly identified in our cases. It is an aspect of the broader 'right to be let alone' that one of our wisest Justices characterized as 'the most comprehensive of rights and the right most valued by civilized men.'" (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting))).

109. For concern about the "malleability" of "the so-called 'right to be let alone' of unwilling listeners," see William E. Lee, *The Unwilling Listener: Hill v. Colorado's Chilling Effect on Unorthodox Speech*, 35 U.C. DAVIS L. REV. 387, 413, 412-17 (2002).

110. *Snyder v. Phelps*, 533 F. Supp. 2d 567, 576-77 (D. Md. 2008) ("[T]he Supreme Court has recognized that there is not an absolute First Amendment right for any and all speech directed by private individuals against other private individuals.").

111. See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940) ("In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.") (emphasis added); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728-29 (1871).

who have been, or are, *prominent in church or state*<sup>112</sup>) from “speech directed by private individuals against other private individuals.”<sup>113</sup> Second, the court distinguished religious advocacy that conveyed a general viewpoint from that which expressed particularized messages personally directed at the Snyder family.<sup>114</sup> These are distinctions that make a real constitutional difference. Quite simply, the targeted personal attack on Matthew Snyder, a complete stranger to the defendant church,<sup>115</sup> is of negligible value in the area of social and political discourse. But, the district court missed an opportunity to make clearer the scope of its authority to adjudicate complaints about religiously motivated activity. Not only did the church target a private citizen for mere personal vilification, it did so when the grieving family was, in effect, held captive by special circumstances. By borrowing from the doctrinal underpinnings of the Supreme Court’s “captive audience” cases, the court could have tied the church’s tort liability to conduct, however sincerely motivated by religious belief, that personally targets an audience unwilling to receive offensive communication and, yet, unable to avoid it.

The Supreme Court has long held that “not all speech is of equal First Amendment importance.”<sup>116</sup> While religious entities are free to spread their message, they are not free to do so in a way that violates the personal rights of private individuals.<sup>117</sup> In *Cantwell v. Connecticut*, the

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112. *Cantwell*, 310 U.S. at 310.

113. *Snyder*, 533 F. Supp. 2d at 570 (“The Supreme Court of the United States has specifically held that First Amendment protection of particular types of speech must be balanced against a state’s interest in protecting its residents from wrongful injury.” (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342-43 (1974))).

114. *Id.* at 570, 577; *cf.* *Frisby v. Schultz*, 487 U.S. 474, 486 (1988) (“The type of focused picketing prohibited by the [city] ordinance is fundamentally different from more generally directed means of communication that may not be completely banned in residential areas.”).

115. On the church’s argument that the Snyder family made their son’s death a matter of public controversy, see *infra* note 129.

116. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985); see also *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988); *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 747 (1978) (content that is “vulgar,” “offensive,” and “shocking” is not entitled to absolute constitutional protection); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (state can lawfully punish individual for use of words “which by their very utterance inflict injury or tend to incite an immediate breach of the peace”).

117. Or in a way that disrupts the public peace. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972) (governmental regulation of conduct prompted by religious beliefs is permissible when such conduct poses “some substantial threat to public safety, peace or order” (quoting *Sherbert v. Verner*, 374 U.S. 398, 403 (1963))); *Cantwell*, 310 U.S. at 304 (“[A] state may by general and non-discriminatory legislation . . . safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment.”); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728-29 (1871) (religious freedom includes right to express and disseminate religious

Supreme Court considered the tension between the right of religious advocacy and the equal right of private individuals “to the exercise of their liberties.”<sup>118</sup> Jesse Cantwell’s arrest for soliciting without a license, in violation of a Connecticut state statute regulating religious solicitation, is a familiar enough one, as is the Court’s holding that Connecticut’s regulation of religious solicitation amounted to a prior restraint on and censorship of religion.<sup>119</sup> But, Cantwell was also arrested, on common law grounds, for invoking or inciting others to breach of the peace, and the Court’s holding on this point created a set of significant markers by which to judge the legal limits of religious advocacy.<sup>120</sup> The Court’s decision was narrowly fact-based:

The facts which were held to support the conviction of Jesse Cantwell on [this] count were that he stopped two men in the street, asked, and received, permission to play a phonograph record, and played the record “Enemies,” which attacked the religion and church of the two men, who were Catholics. Both were incensed by the contents of the record and were tempted to strike Cantwell unless he went away. On being told to be on his way he left their presence. There was no evidence that he was personally offensive or entered into any argument with those he interviewed.<sup>121</sup>

Acknowledging the state’s authority to prevent or punish a threat to public safety, peace, or order,<sup>122</sup> the Court focused on these facts: Cantwell requested permission to play the record and permission was granted;<sup>123</sup> no claim was made that Cantwell “intended to insult or affront the hearers by playing the record,” only that he wished “to interest them in his propaganda”;<sup>124</sup> and Cantwell’s conduct involved “no assault or threatening of bodily harm, no truculent bearing, no intentional

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doctrine “*which does not violate the laws of morality and property, and which does not infringe personal rights*”) (emphasis added).

118. See 310 U.S. at 310.

119. *Id.* at 305 (“[T]he Act requires an application to the secretary of the public welfare council of the State; that he is empowered to determine whether the cause is a religious one, and that the issue of a certificate depends upon his affirmative action. If he finds that the cause is not that of religion, to solicit for it becomes a crime. He is not to issue a certificate as a matter of course. His decision to issue or refuse it involves appraisal of facts, the exercise of judgment, and the formation of an opinion. He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth.”).

120. *Id.* at 309.

121. *Id.* at 302-03.

122. *Id.* at 308.

123. *Id.*

124. *Id.* at 308-09.

discourtesy, no personal abuse.”<sup>125</sup> On these facts, the Court reasoned that Cantwell had invaded no private right or interest because he 1) used no coercive means to spread his message to unwilling listeners,<sup>126</sup> and 2) used no “abusive remarks *directed to the person of the hearer*.”<sup>127</sup>

*Cantwell* teaches that “[r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.”<sup>128</sup> By this measure, mere personal vilification would not be constitutionally protected against the lesser penalty of tort liability. When religious advocacy is used to attack private individuals,<sup>129</sup> assuredly the principle of voluntariness offers no basis for immunity from civil redress.

The constitutional safeguard against tort liability is especially unwarranted, as *Cantwell* also suggests, when religious entities direct speech at private individuals who are held captive by special circumstances. Though “we are often “captives” outside the sanctuary of the home and subject to objectionable speech,” the constitutional commitment to open discourse “does not mean we must be captives everywhere.”<sup>130</sup> The Supreme Court has unhesitatingly protected the “unwilling listener” when protesters invade residential privacy.<sup>131</sup>

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125. *Id.* at 310 (“We find in the instant case no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse. On the contrary, we find only an effort to persuade *a willing listener* to buy a book or to contribute money in the interest of what Cantwell, however misguided others may think him, conceived to be true religion.”) (emphasis added).

126. *See id.*

127. *Id.* at 309 (emphasis added); *cf.* *Cohen v. California*, 403 U.S. 15, 20 (1971) (“While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not ‘directed to the person of the hearer.’” (quoting *Cantwell*, 310 U.S. at 309)).

128. *Cantwell*, 310 U.S. at 309-10.

129. *See Snyder v. Phelps*, 533 F. Supp. 2d 567, 570 (2008) (“[T]his case involves . . . the rights of other private citizens to avoid being personally assaulted by outrageous speech and comment.”). The district court considered “without merit” the church’s argument that the Snyder family invited the attention of or provoked comment from the Westboro Baptist Church. 533 F. Supp. 2d at 577. The fact that Matthew’s funeral attracted public attention does make him a public figure. “A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention.” *Wolston v. Reader’s Digest Ass’n*, 443 U.S. 157, 167 (1979). The church’s reasoning would in effect nullify the Supreme Court’s precedents that establish the contours of the public figure doctrine. *See Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). There was no indication that Matthew or his family assumed a prominent role in public controversy, *see Gertz*, 418 U.S. at 351, or that the Snyders sought to use Matthew’s funeral “as a fulcrum to create public discussion,” *see Wolston*, 443 U.S. at 168.

130. *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (quoting *Rowan v. U.S. Post Office Dep’t*, 397 U.S. 728, 738 (1970)).

131. *Frisby*, 487 U.S. at 484.

[A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom.<sup>132</sup>

When the Court has invalidated bans on expressive activity, it has hastened to affirm the principle that unwilling listeners may be protected within their own homes.<sup>133</sup> By analogy, the Court has applied the state's interest in residential privacy to medical privacy.<sup>134</sup> In both residential and medical settings, the Court objected to the harm caused by focused or targeted picketing as opposed to "more generally directed means of communication."<sup>135</sup> The two types of speech are "fundamentally different": focused picketing "do[es] not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way."<sup>136</sup> That "way" has what the Court referred to as the "unique and subtle impact" of entrapping the target—figuratively, if not literally—"with no ready means of avoiding the unwanted speech."<sup>137</sup> (It is easy to see the unique impact of such picketing. Its subtlety is a bit more elusive.) Of particular importance to emotional distress claimants, the Court has not hesitated to protect the psychological well-being of those who cannot escape unwanted

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132. *Id.* at 484-85; *see also, e.g.*, *FCC v. Pacifica Found.*, 438 U.S. 726, 748-749 (1978); *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 736-37 (1970); *Kovacs v. Cooper*, 336 U.S. 77, 86-87 (1949).

133. *See Frisby*, 487 U.S. at 485 ("In *Schneider* [*Schneider v. State*, 308 U.S. 147 (1939)], for example, in striking down a complete ban on handbilling, we spoke of a right to distribute literature only to one willing to receive it. Similarly, when we invalidated a ban on door-to-door solicitation in *Martin* [*Martin v. City of Struthers*, 319 U.S. 141 (1943)], we did so on the basis that the home owner could protect himself from such intrusion by an appropriate sign that he is unwilling to be disturbed. We have never intimated that the visitor could insert a foot in the door and insist on a hearing. There simply is no right to force speech into the home of an unwilling listener.") (internal quotations and citations omitted).

134. *See Madsen v. Women's Health Ctr.*, 512 U.S. 753, 768 (1994) ("We conclude that the reasoning underlying this government interest in residential privacy applies even more convincingly to the state interest in ensuring medical privacy." (citing *Operation Rescue v. Women's Health Ctr.*, 626 So. 2d 664, 672 (Fla. 1993))).

135. *Frisby*, 487 U.S. at 486; *cf. Madsen v. Women's Health Ctr.*, 512 U.S. 753, 769 (1994) ("We have noted a distinction between the type of focused picketing banned from the buffer zone and the type of generally disseminated communication that cannot be completely banned in public places, such as handbilling and solicitation.").

136. 487 U.S. at 486; *cf. Rosenfeld v. New Jersey*, 408 U.S. 901, 905 (1972) (Powell, J., dissenting) ("[T]he exception to First Amendment protection recognized in *Chaplinsky* is not limited to words whose mere utterance entails a [call to violence]. It also extends to the willful use of scurrilous language calculated to offend the sensibilities of an unwilling audience.").

137. 487 U.S. at 487.



speech.<sup>138</sup> “[W]hile targeted picketing of the home threatens the psychological well-being of the ‘captive’ resident, targeted picketing of a hospital or clinic threatens not only the psychological, but also the physical, well-being of the patient held ‘captive’ by medical circumstance.”<sup>139</sup> Other courts have extended the “captive listener” principle to houses of worship<sup>140</sup> and funerals.<sup>141</sup>

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138. *Madsen*, 512 U.S. at 768.

139. *Id.* (citing *Operation Rescue v. Women’s Health Ctr.*, 626 So. 2d 664, 672 (Fla. 1993)); *see also Frisby*, 487 U.S. at 486; *Carey v. Brown*, 447 U.S. 455, 478 (1980) (Rehnquist, J., dissenting) (describing the psychological tensions and pressures that result from targeted residential picketing) (citing *City of Wauwatosa v. King*, 182 N.W.2d 530, 537 (Wis. 1971)).

140. *St. David’s Episcopal Church v. Westboro Baptist Church*, 921 P.2d 821, 830 (Kan. Ct. App. 1996) (“[I]n addition to the government interest in protecting residential and clinical privacy, the government has a legitimate interest in protecting the privacy of one’s place of worship as well.”); *cf. Tompkins v. Cyr*, 995 F. Supp. 664, 681 n.10 (N.D. Tex. 1998) (“The Court is troubled by the notion that a person may be subjected to focused picketing at their place of worship. Indeed, the right to engage in quiet and reflective prayer without being subjected to unwarranted intrusion is an essential component of freedom of religion. The government certainly has a significant interest in protecting this important First Amendment right.”). *But see Olmer v. City of Lincoln*, 192 F.3d 1176, 1182 (8th Cir. 1999) (“Allowing other locations, even churches, to claim the same level of constitutionally protected privacy [as residences] would, we think, permit government to prohibit too much speech and other communication.”).

141. *See Phelps-Roper v. Taft*, 523 F. Supp. 2d 612, 619 (N.D. Ohio 2007) (“Because the mourners are a captive audience unable to avoid communications simply by averting their eyes, the Court finds that the State of Ohio has a significant interest in protecting its citizens from disruption during the events associated with a funeral or burial service.”); *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 992 (E.D. Ky. 2006) (“A funeral is a deeply personal, emotional and solemn occasion. Its attendees have an interest in avoiding unwanted, obtrusive communications which is at least similar to a person’s interest in avoiding such communications inside his home. Further, like medical patients entering a medical facility, *funeral attendees are captive.*”) (emphasis added); *cf. National Archives & Records Admin. v. Favish*, 541 U.S. 157, 168 (2004) (“Family members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own.”). *But see Phelps-Roper v. Nixon*, 509 F.3d 480, 486-87 (8th Cir. 2007) (no significant state interest in protecting funeral attendees). On the constitutionality of funeral picketing statutes, *see Kara Beil*, Note, *Funeral Protest Bans: Do They Kill Speech or Resurrect Respect for the Dead?*, 42 VAL. U. L. REV. 503 (2008); Stephen R. McAllister, *Funeral Picketing Laws and Free Speech*, 55 U. KAN. L. REV. 575 (2007); Robert F. McCarthy, Note, *The Incompatibility of Free Speech and Funerals: A Grayned-Based Approach for Funeral Protest Statutes*, 68 OHIO ST. L.J. 1469 (2007); Lauren M. Miller, Comment, *A Funeral for Free Speech?: Examining the Constitutionality of Funeral Picketing Acts*, 44 HOUS. L. REV. 1097 (2007); Cynthia Mosher, Comment, *What They Died to Defend: Freedom of Speech and Military Funeral Protests*, 112 PENN. ST. L. REV. 587 (2007); Katherine A. Ritts, Note, *The Constitutionality of “Let Them Rest in Peace” Bills: Can Governments Say “Not Today, Fred” to Demonstrations at Funeral Ceremonies?*, 58 SYRACUSE L. REV. 137 (2007); Njeri Mathis Rutledge, *A Time to Mourn: Balancing the Right of Free Speech Against the Right of Privacy in Funeral Picketing*, 67 MD. L. REV. 295 (2008); *see also Volokh*, *supra* note 8.

The Constitution did not require the Snyder family to welcome unwanted speech of a personally abusive nature into the sanctuary set aside for a moment of private bereavement. No one could reasonably have regarded the church's words as anything other than "a direct personal insult,"<sup>142</sup> though "delivered in the milieu of religious practice."<sup>143</sup> If the Snyders could have avoided "bombardment of their sensibilities simply by averting their eyes,"<sup>144</sup> the words and actions of the Westboro Baptist Church would possibly warrant the protection of the Free Exercise Clause. But, funeral attendees are captive in a way that deserves the same recognition afforded the resident in his or her home, or the patient in a medical facility.<sup>145</sup> The *Snyder* court should have more explicitly drawn upon the principle of constitutional captivity and thus more exactly defined the threshold—the line where the unwilling listener is compelled to endure a targeted personal attack—separating protected from unprotected religious advocacy. The Supreme Court has said that "[a]s a general matter, . . . *in public debate* our own citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate "breathing space" to the freedoms protected by the First Amendment,"<sup>146</sup> but hurtful speech, when directed at private individuals unable to avoid exposure to it,<sup>147</sup> hardly merits constitutional protection, even when that speech is enmeshed with matters of public import. Where substantial privacy interests are invaded in an intolerable manner,<sup>148</sup> tort liability for emotional distress provides a mechanism—a flexible (yet narrowly tailored<sup>149</sup>) alternative to governmental

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142. Cf. *Cohen v. California*, 403 U.S. 15, 20 (1971) ("No individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult.").

143. *Hester v. Barnett*, 723 S.W.2d 544, 559 (Mo. Ct. App. 1987).

144. *Cohen*, 403 U.S. at 21; see also *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209-11 (1975) (absent degree of captivity that makes it impractical to avoid exposure, burden "normally falls" on viewer to avert his eyes).

145. See *supra* note 25.

146. *Boos v. Barry*, 485 U.S. 312, 322 (1988) (emphasis added) (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988)) (holding "that public figures and public officials may not recover for the tort of intentional infliction of emotional distress" without showing that "a false statement of fact . . . was made with actual malice").

147. See *Erznoznik*, 422 U.S. at 209 (restrictions on speech are valid when "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure").

148. See *id.* at 209-10 ("The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." (quoting *Cohen*, 403 U.S. at 21) (alteration in original)).

149. Cf. *Molko v. Holy Spirit Ass'n*, 762 P.2d 46, 61 (1988) ("[T]o allow injured parties to bring private actions for fraud is the least restrictive means available for advancing the state's interest in protecting individuals and families from the harmful effects of fraudulent recruitment.").

regulation<sup>150</sup>—that can shut off outrageous discourse (or make speakers pay for the severe emotional distress that their words inflict) while ensuring a robust marketplace for religious ideas.

The outcome of *Snyder v. Phelps* was determined by the applicable principles of tort law. There was no intra-church dispute, and, thus, the court properly avoided the kinds of questions that entangle courts in controversies internal to religious entities. The court made no judgment about the truth or falsity of the church's religious beliefs; it passed no judgment about the relative merits of the church's religious viewpoint. The district court considered the only question it was permitted to consider; and, with no offense to core constitutional principles, it decided that the conduct of the Westboro Baptist Church was of a type that no decent society should tolerate.

## B

The “captivity” of the Snyder family was limited in time and place, a geographical constraint not unlike those in the Court's residential and medical privacy (and other captive audience) cases. Some courts have been confronted with captivity of a psychological sort, the kind of incapacity to make decisions that may afflict those who endure coercive indoctrination techniques.<sup>151</sup> In *Molko v. Holy Spirit Ass'n*, the plaintiffs contended that “the Church's agents had rendered them incapable of deciding *not* to join the Church, by subjecting them, without their knowledge or consent, to an intense program of coercive persuasion or mind control.”<sup>152</sup> “[By] the time the church disclosed its true identity,” the plaintiffs argued, “their involuntary indoctrination was accomplished.”<sup>153</sup> The state supreme court held that whether the church, through its indoctrination regimen, had brainwashed the plaintiffs was a triable issue of fact, thus precluding summary judgment on the emotional

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150. Compare *Rowan v. U. S. Post Office Dep't*, 397 U.S. 728, 737 (1970) (residents may give mailer notice that they wish no further mailings), with *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 75 (1983) (government may not prohibit unsolicited mailing of contraceptive advertisements).

151. On coercive indoctrination techniques, see generally MARK GALANTER, *CULTS: FAITH, HEALING, AND COERCION* (1989); JOHN LOFLAND, *DOOMSDAY CULT: A STUDY OF CONVERSION, PROSELYTIZATION, AND MAINTENANCE OF FAITH* (1966); THOMAS ROBBINS, *CULTS, CONVERTS, AND CHARISMA: THE SOCIOLOGY OF THE NEW RELIGIOUS MOVEMENTS* (1988); *CULTS, CULTURE, AND THE LAW: PERSPECTIVES ON NEW RELIGIOUS MOVEMENTS* (Thomas Robbins et al. eds., 1985); A. JAMES RUDIN & MARCIA R. RUDIN, *PRISON OR PARADISE?: THE NEW RELIGIOUS CULTS* (1980); Richard Delgado, *Religious Totalism: Gentle and Ungentle Persuasion Under the First Amendment*, 51 S. CAL. L. REV. 1 (1977).

152. 762 P.2d at 54.

153. *Id.*

distress claim.<sup>154</sup> Though brainwashing remains a controversial theory,<sup>155</sup> more than a few courts have recognized that coercive persuasion in religious settings may vitiate consent.<sup>156</sup>

However controversial brainwashing is, the idea that aggressive religious indoctrination can have a captivating influence on children is hardly to be questioned.<sup>157</sup> The Supreme Court has long recognized that young people are peculiarly vulnerable to outside influences,<sup>158</sup> that “minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.”<sup>159</sup> Indeed, the Court has on more than one occasion asserted the need to regulate “otherwise protected expression” in light of the special sensitivities of children.<sup>160</sup> In some areas of the law, “a child [is] like

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154. *Id.* at 61-62.

155. *Id.* at 54.

156. *See, e.g.*, Peterson v. Sorlien, 299 N.W.2d 123, 126 (Minn. 1980) (“Coercive persuasion is fostered through the creation of a controlled environment that heightens the susceptibility of a subject to suggestion and manipulation through sensory deprivation, physiological depletion, cognitive dissonance, peer pressure, and a clear assertion of authority and dominion. The aftermath of indoctrination is a severe impairment of autonomy and the ability to think independently, which induces a subject’s unyielding compliance and the rupture of past connections, affiliations and associations.”); *see also* Molko v. Holy Spirit Ass’n, 762 P.2d 46 (Cal. 1988); Wollersheim v. Church of Scientology of Cal., 66 Cal. Rptr. 2d 1 (Cal. Ct. App. 1989); Katz v. Superior Court, 141 Cal. Rptr. 234 (Cal. Ct. App. 1977); Lewis v. Holy Spirit Ass’n, 589 F. Supp. 10 (D. Mass. 1983); Schuppin v. Unification Church, 435 F. Supp. 603 (D. Vt. 1977); Meroni v. Holy Spirit Ass’n, 480 N.Y.S.2d 706 (1984).

157. On children’s religious development, *see generally* ROBERT COLES, THE SPIRITUAL LIFE OF CHILDREN *passim* (Houghton Mifflin 1990); JAMES W. FOWLER, STAGES OF FAITH: THE PSYCHOLOGY OF HUMAN DEVELOPMENT AND THE QUEST FOR MEANING *passim* (Harper & Row 1981); THE HANDBOOK OF SPIRITUAL DEVELOPMENT IN CHILDHOOD AND ADOLESCENCE *passim* (Eugene C. Roehlkepartain et al. eds., Sage Publications 2005); CHRISTIAN SMITH, SOUL SEARCHING: THE RELIGIOUS AND SPIRITUAL LIVES OF AMERICAN TEENAGERS *passim* (Oxford Univ. Press 2005); Emily Buss, *The Adolescent’s Stake in the Allocation of Educational Control*, 67 U. CHI. L. REV. 1223, 1264-67 (2000); Note, *Children as Believers: Minors’ Free Exercise Rights and the Psychology of Religious Development*, 115 HARV. L. REV. 2205, 2220-25 (2002).

158. *See, e.g.*, Bellotti v. Baird, 443 U.S. 622, 635 (1979) (citing *McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971) (“Viewed together, our cases show that although children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children’s vulnerability.”)).

159. *Id.* at 635.

160. *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 749 (1978) (government’s interest in well-being of youth justifies regulation of otherwise protected expression); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 102 (1976) (Stevens, J., concurring in part and dissenting in part) (“The State’s interest in protecting a young person from harm justifies the imposition of restraints on his or her freedom even though comparable restraints on adults would be constitutionally impermissible.”); *see also* *Rowan v. U.S. Post Office Dep’t*, 397 U.S. 728, 738 (1970) (householder should not have to risk that offensive material may come into the hands of his children); *Ginsberg v. New York*, 390 U.S. 629, 638 (1968) (“[E]ven where there is an invasion of protected

someone in a captive audience”—not possessed of the full capacity for individual choice<sup>161</sup>—and “the State has an interest ‘to protect the welfare of children’ and to see that they are ‘safeguarded from abuses’ which might prevent their ‘growth into free and independent well-developed men and citizens.’”<sup>162</sup> One of those possible abuses is aggressive religious advocacy. Children lack the capacity to assert, or to choose not to assert, a personal religious identity. They are, one might say, spiritually captive to the will of others. “[P]arents and religious leaders define a child’s religious identity under the rules of the religion they practice. Often such rules impose a presumed religious identity upon a child without requiring the child’s consent or understanding.”<sup>163</sup> Thus, those in charge of a child’s religious upbringing assume what amounts to a spiritual fiduciary duty, at least until the child is mature enough to assert a legally cognizable religious identity.<sup>164</sup> The contours of that duty are, as one might expect, hotly contested,<sup>165</sup> but as with any other fiduciary duty, the law must offer a remedy for gross breaches of spiritual caretaking.<sup>166</sup> It is axiomatic that the state has an independent

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freedoms ‘the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.’” (quoting *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944)); cf. *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring) (“[C]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State’s duty towards children.”).

161. *Ginsberg*, 390 U.S. at 649 (Stewart, J., concurring in the judgment) (footnote omitted).

162. *Id.* at 640-41 (quoting *Prince*, 321 U.S. at 165).

163. *Zummo v. Zummo*, 574 A.2d 1130, 1148-49 (Pa. Super. Ct. 1990).

164. *See id.* at 1149 (“In order to avoid arrogating to itself unconstitutional authority to declare orthodoxy in determining religious identity, courts only recognize a *legally* cognizable religious identity when such an identity is asserted by the child itself, and then only if the child has reached sufficient maturity and intellectual development to understand the significance of such an assertion. Though no uniform age of discretion is set, children twelve or older are generally considered mature enough to assert a religious identity, while children eight and under are not. With those ranges as a starting point, judges exercise broad discretion on a case by case basis in determining whether a child has sufficient capacity to assert for itself a personal religious identity.”).

165. Compare JOEL FEINBERG, *The Child’s Right to an Open Future*, in WHOSE CHILD? CHILDREN’S RIGHTS, PARENTAL AUTHORITY, AND STATE POWER 124 (William Aiken & Hugh LaFollette eds., 1980), with Shelley Burtt, *The Proper Scope of Authority: Why We Don’t Owe Children an Open Future*, in CHILD, FAMILY, AND STATE 243 (Stephen Macedo & Iris Marion Young eds., 2003).

166. On the fiduciary duty of religious entities to their members, see Dan B. Dobbs, *Undertakings and Special Relationships in Claims for Negligent Infliction of Emotional Distress*, 50 ARIZ. L. REV. 49, 67-68 (2008). Claims for breach of fiduciary duty arise most often in sexual misconduct and pastoral counseling cases. *See, e.g.*, Zanita E. Fenton, *Faith in Justice: Fiduciaries, Malpractice & Sexual Abuse by Clergy*, 8 MICH. J. GENDER & L. 45 (2001); Zshonette Reed, *Clergy Malpractice: Defining the Duty and Dismissing the Claim*, 4 J. LEGAL ADVOC. & PRAC. 122 (2002); Marjorie A. Shields, *Liability of Church or Religious Organization for Negligent Hiring, Retention, or*

interest in the welfare of young people.<sup>167</sup> It should be equally clear that where the indoctrination of minors causes serious emotional harm, the state may secure that interest by imposing tort liability upon religious entities.

Oddly enough, the law does provide a remedy against outrageous religious indoctrination for those children whose world has already been shattered by domestic conflict, for children whose parents, having divorced, find themselves unable to agree on the spiritual upbringing of their minor children.<sup>168</sup> Where conflict generated by religious differences may result in harm to the child, courts do place limits on parental religious rights, including the right to expose children to religious advocacy.<sup>169</sup> This is especially true in cases where one parent

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*Supervision of Priest, Minister, or Other Clergy Based on Sexual Misconduct*, 101 A.L.R.5th 1 (2002); cf. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 40 cmt. 1 (Tentative Draft No. 5, 2007) (school's duty of care to students derives, in part, from fact that schools function in place of parents).

167. See, e.g., *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976) ("The Court indeed, however, long has recognized that the State has somewhat broader authority to regulate the activities of children than of adults."); *Ginsberg*, 390 U.S. at 640 ("The State also has an independent interest in the well-being of its youth."); *Prince*, 221 U.S. at 168 ("A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers, within a broad range of selection.")

168. On the constitutional implications of spiritual custody cases, see generally, for example, Jennifer Ann Dobrac, *For the Sake of the Children: Court Consideration of Religion in Child Custody Cases*, 50 STAN. L. REV. 1609, 1620 (1998); Michael Loatman, Note, *Protecting the Best Interests of the Child and Free Exercise Rights of the Family*, 13 VA. J. SOC. POL'Y & L. 89 (2006); Collin Mangrum, *Exclusive Reliance on Best Interest May Be Unconstitutional: Religion as a Factor in Child Custody Cases*, 15 CREIGHTON L. REV. 25 (1981); Jordan C. Paul, Comment, "You Get the House. I Get the Car. You Get the Kids. I Get Their Souls." *The Impact of Spiritual Custody Awards on the Free Exercise Right of Custodial Parents*, 138 U. PA. L. REV. 583 (1989); Carl E. Schneider, *Religion and Child Custody*, 25 U. MICH. J.L. REFORM 879 (1992); Jeffrey Shulman, *Spiritual Custody: Relational Rights and Constitutional Commitments*, 7 J.L. & FAM. STUD. 317 (2005); Note, *The Establishment Clause and Religion in Child Custody Disputes: Factoring Religion into the Best Interest Equation*, 82 MICH. L. REV. 1702 (1984).

169. See, e.g., *Zummo*, 574 A.2d at 1154-55 ("The vast majority of courts addressing this issue, before and after *Morris*, have concluded that each parent must be free to provide religious exposure and instruction, as that parent sees fit, during any and all period of legal custody or visitation without restriction, unless the challenged beliefs or conduct of the parent are demonstrated to present a substantial threat of present or future, physical or emotional harm to the child in absence of the proposed restriction.") (citing cases); *In re Marriage of Murga*, 163 Cal. Rptr. 79, 82 (Cal. Ct. App. 1980) ("[I]n the majority of American jurisdictions that have considered the question, the courts have refused to restrain the noncustodial parent from exposing the minor child to his or her religious beliefs and practices, absent a clear, affirmative showing that these religious activities will be harmful to the child.") (citing cases). See generally George L. Blum, Annotation, *Religion as Factor in Child Custody Cases*, 124 A.L.R. 5th 203 (2004);

uses religious beliefs to alienate a child's affections from the other parent.<sup>170</sup>

*Kendall v. Kendall* is a telling example of the potentially damaging psychological consequences of religious advocacy.<sup>171</sup> In *Kendall*, the state supreme court upheld restrictions on the father's right to "share his religious beliefs with the children if those beliefs cause the children significant emotional distress or worry."<sup>172</sup> The mother was an orthodox Jew. The father was a member of the Boston Church of Christ, a fundamentalist Christian faith. The trial court concluded that substantial harm to the children had been demonstrated based on the following findings, among others:

- \* The Boston Church of Christ taught that those who do not accept the church's faith are damned to go to hell, where there will be "weeping and gnashing of teeth."
- \* The oldest child concluded that his mother may go to hell, a prospect that caused him "substantial worry and upset."
- \* The father fostered negative and distorted images of the Jewish culture. He insisted that people who do not accept his beliefs "are sinners who are destined to tortuous punishment."
- \* The children were likely to "experience choosing a religion as choosing between [their] parents, a task that is likely to cause [them] significant emotional distress." In fact, the children were "perilously close to being forced to choose between their parents, and to reject one."
- \* If the children were to accept their father's beliefs, "they are likely to come to view their mother negatively and as a person who will be punished for her sins," a result that, to the children's "substantial detriment," would make it difficult to accept "guidance and nurturance" from her.<sup>173</sup>

The evidence was sufficient to convince the court that "[the defendant's] religion may alienate the children from their custodial parent (she is bad, she will burn in hell), and may diminish their own sense of self-worth and self-identity (Jews are bad, Jews will burn in

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George L. Blum, Annotation, *Religion as Factor in Visitation Cases*, 95 A.L.R. 5th 533 (2002).

170. See generally, e.g., Jeffrey Shulman, *What Yoder Wrought: Religious Disparagement, Parental Alienation and the Best Interests of the Child*, 53 VILL. L. REV. 173 (2008).

171. 687 N.E.2d 1228 (Mass. 1997).

172. *Id.* at 1231; see also *LeDoux v. LeDoux*, 452 N.W.2d 1 (Neb. 1990) (upholding prohibition of a child's exposure to parent's religion where a child psychologist found the child suffered from "serious" stress).

173. 687 N.E.2d at 1233-35 (alterations in original).

hell);”<sup>174</sup> and the threat of such harm was substantial enough to justify a judgment that significantly interfered with the father’s freedom to convey his religious beliefs to his own children:

The [defendant] shall not take the children to his church (whether to church services or Sunday School or church educational programs), nor engage them in prayer or bible study if it promotes rejection rather than acceptance, of their mother or their own Jewish self-identity. *The [defendant] shall not share his religious beliefs with the children if those beliefs cause the children significant emotional distress or worry about their mother or about themselves.*<sup>175</sup>

Thus, for example, the father could have pictures of Jesus Christ hanging on the walls of his residence, but he could not take the children to religious services where they would receive “the message that adults or children who do not accept Jesus Christ as their lord and savior are destined to burn in hell.”<sup>176</sup>

The *Kendall* court rightly focused its inquiry on objective measures of emotional and psychological harm to the children,<sup>177</sup> not the merit or worthiness of the parents’ religious teachings.<sup>178</sup> While the substantial harm standard may not provide children the full measure of protection children need,<sup>179</sup> it does set an outer limit to the right of religious

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174. *Id.* at 1235.

175. *Id.* at 1231 (emphasis added). Illustrating the predilection of courts “to question the centrality of particular beliefs or practices to a faith,” *Hernandez v. Comm’r of Internal Revenue*, 490 U.S. 680, 699 (1989), the *Kendall* court concluded that “the divorce judgment is limited in scope and imposes a minimal burden on the defendant’s right to practice religion by requiring only that he limit sharing certain aspects of his beliefs with his children.” 687 N.E.2d at 1236.

176. 687 N.E.2d at 1231.

177. *See id.* at 1233 (noting that “[t]he GAL’s report was based on interviews with the parents, the children, and the children’s teachers, psychological tests, and observations of the children interacting with both parents”); *see also LeDoux*, 452 N.W.2d at 5 (“There is ample evidence to conclude that the stress [child] was experiencing posed an immediate and substantial threat to his well-being. The stress that [child] was experiencing was neither hypothetical nor tenuous.”); *cf. Goldstein, supra* note 36, at 502-03 (“[P]ositive religious questions, such as those concerning the content of religious beliefs or the importance of a religious practice within the context of a religion, do not call on courts to employ anything other than ordinary tools of judicial fact-finding and can be resolved through resort to traditional evidence, such as reliance on expert witnesses, treatises, and factual testimony.”).

178. *See* 687 N.E.2d at 1236 (restriction on father’s right to share religious belief with his children “does not foster excessive government entanglement because the focus of any judicial inquiry will center on the emotional or physical harm to the children rather than the merit or worthiness of the parties’ respective religious teachings”).

179. *See generally* Shulman, *supra* notes 168, 170 (arguing that harm standard fails to protect the best interests of the child); *cf. Kendall*, 687 N.E.2d at 1232-33 (“Very few [cases] have actually ruled that substantial harm had been demonstrated.”) (collecting cases).



advocacy in the custody context. But it makes no sense to apply that standard where the family unit has been ruptured and, yet, not to protect children from aggressive religious indoctrination in other contexts. The courts assume that fit parents act in the best interests of their children,<sup>180</sup> but no such favorable presumption exists for religious advocates who proselytize to children too young to define, let alone assert, their own spiritual preferences, children who may be especially susceptible to influences of a religious character.<sup>181</sup>

Tort liability for emotional distress complements other measures that protect children. The state would intervene if religious beliefs or practices endangered the physical health or safety of a child.<sup>182</sup> The state would intervene if solely secular conditions endangered the emotional health of a child.<sup>183</sup> But in cases where minors claim that indoctrination techniques caused emotional distress, judicial concern about becoming embroiled in what would amount to a heresy trial has limited consideration of religious matters. In *Murphy v. I.S.K.Con. of New England*, for example, the defendant church objected to testimony about its religious doctrine, arguing that tort liability amounted to punishment for religious heterodoxy.<sup>184</sup> The state supreme court agreed and barred what it considered to be an impermissible evaluation of the defendant's religious beliefs: "The essence of what occurred in the trial is that the plaintiffs were allowed to suggest to the jury extensively that exposure to the defendant's *religious beliefs* was sufficient to cause tortious emotional damage. . . ."<sup>185</sup> No defendant, the court opined, should be forced to prove "that the substance of its religious beliefs is worthy of respect."<sup>186</sup>

The *Murphy* court cited *Madsen v. Erwin* for the proposition that adjudication of a claim was barred where such inquiry would "involve

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180. *Troxel v. Granville*, 530 U.S. 57, 68 (2000) (quoting *Parham v. J.R.*, 442 U.S. 584, 602 (1979)) ("[N]atural bonds of affection lead parents to act in the best interests of their children."). On parental rights to determine a child's religious upbringing, see *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) ("[T]he values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society."); see also *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

181. See *supra* text accompanying notes 157-67.

182. See, e.g., *People v. Hodges*, 13 Cal. Rptr. 2d 412 (Cal. App. Dep't Super. Ct. 1992) (failure to report child abuse not protected conduct under the First Amendment, even if motivated by sincere religious belief); *In re Interest of T.M.B.*, 491 N.W.2d 58 (Neb. 1992) (abusive discipline not protected under Free Exercise Clause).

183. See, e.g., *Josephine B. v. Alaska, Dep't of Health and Social Services*, 174 P.3d 217, 223 (Alaska 2008) (parent caused emotional harm and mental injury by subjecting children to "to a chronic, pervasive climate of fear").

184. 571 N.E.2d 340, 345 (Mass. 1991).

185. *Id.* at 347 (emphasis added).

186. *Id.* at 348.

the court in a review of an essentially ecclesiastical procedure.”<sup>187</sup> But while the *Madsen v. Erwin* court thought that review of intra-church employment procedures would require consideration of religious doctrine (and, thus, was constitutionally impermissible),<sup>188</sup> the court allowed the plaintiff to plead her tort claims, stating that “[u]nder the banner of the First Amendment provisions on religion, a clergyman may not with impunity defame a person, intentionally inflict serious emotional harm on a parishioner, or commit other torts.”<sup>189</sup>

For the *Murphy* court, the key question—really, the only question—was whether plaintiffs’ testimony related to conduct or belief.<sup>190</sup> The court rejected the plaintiffs’ argument that religious teaching is activity, not belief: “Inherent in the claim that exposure to [defendant’s] religious beliefs causes tortious emotional damage is the notion that the disputed beliefs are fundamentally flawed.”<sup>191</sup> But, whether or not the defendants’ beliefs were, in fact, “fundamentally flawed” was really irrelevant.<sup>192</sup> To borrow from the law of evidence, the court did not need to decide the truth of the matter asserted.<sup>193</sup> The legal question was not whether the female form is truly evil (as the church taught),<sup>194</sup> but whether the minor plaintiff could show that the church was subject to tort liability for indoctrinating her in this belief (among others). That liability could arise from conduct or belief. While most outrage claims focus on the method of indoctrination, the lesson of *Kendall*, and parental alienation cases in general, is that the content of religious teaching, regardless of its truth or falsity, can also cause substantial harm. A religious entity is free to espouse and teach what it will, but it should not be free, and the

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187. *Id.* at 350 (citing *Madsen v. Erwin*, 481 N.E.2d 1160, 1166 (Mass. 1985)).

188. *Madsen*, 481 N.E. 2d at 1165-66.

189. *Id.* at 1167 (plaintiff’s complaint alleged defamation, interference with advantageous relations, interference with employment contract, invasion of privacy, and intentional infliction of emotional distress).

190. *Id.*

191. *Murphy v. I.S.K.Con. of New England*, 571 N.E.2d 340, 348 (Mass. 1991).

192. *Cf. Molko v. Holy Spirit Ass’n for the Unification of World Christianity*, 762 P.2d 46, 59 (Cal. 1988) (“[T]he legal question here does *not* require a court to determine whether anyone’s faith, current *or* past, is or was real. . . . The legal question is simply whether a religious organization can be held liable on a traditional cause of action in fraud for deceiving nonmembers into subjecting themselves, without their knowledge or consent, to coercive persuasion.”); *Kendall v. Kendall*, 687 N.E.2d 1228, 1236 (Mass. 1997) (“[T]he focus of any judicial inquiry will center on the emotional or physical harm to the children rather than the merit or worthiness of the parties’ respective religious teachings.”).

193. *See* FED. R. EVID. 801(c). In *Peterson v. Sorlien*, 299 N.W.2d 123 (Minn. 1980), the plaintiff, a member of a religious group called The Way, was held against her will as part of a deprogramming episode, and she sued for false imprisonment. The court ruled that evidence of The Way’s activities and practices was admissible to show defendants’ state of mind (which was a question relevant to the assessment of punitive damages).

194. *See Murphy*, 571 N.E.2d at 346.

Constitution does not require that it must be free, from tort liability when its indoctrination of children—who, after all, are not free to reject that indoctrination—amounts to the intentional infliction of emotional distress.

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The possibility of viewpoint discrimination in emotional distress cases is a real one, and courts should abstain from adjudicating intra-church disputes or evaluating the worthiness of religious belief. However, the state has a compelling interest in providing its citizens a remedy against outrageous conduct. In most cases, it may be that the advocacy of religious beliefs will fail to satisfy the elements of an emotional distress claim. It may well be that “intangible or emotional harms cannot ordinarily serve as a basis for maintaining a tort cause of action against a church for its practices,”<sup>195</sup> but the emotional distress claim protects against conduct that is by definition extraordinary in character. To not provide a remedy in exceptional circumstances would be to allow every religious entity to become a law unto itself.<sup>196</sup>

Of course, the state has an equally compelling interest in creating a civil space where robust religious advocacy and debate can flourish. By restricting those claims to circumstances where religious advocacy targets a captive and private listener, the courts can provide a remedy for truly outrageous conduct without harm to the public discourse and without fear of sacrificing First Amendment freedoms. Indeed, such a standard for adjudicating emotional distress claims can help create a civic order that provides the freedom to disseminate religious beliefs and the equal freedom to avoid unwanted and offensive religious advocacy.

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195. *Paul v. Watchtower Bible & Tract Soc’y of N.Y.*, 819 F.2d 875, 883 (9th Cir. 1987).

196. *See Reynolds v. United States*, 98 U.S. 145, 166-67 (1878) (“Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.”).