Following the Lead of Defamation: A Definitional Balancing Approach to Religious Torts

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In the landmark 1964 case of *New York Times v. Sullivan*,[1] the United States Supreme Court confronted the tensions that existed between the traditional tort of defamation and the First Amendment to the Constitution. Acknowledging that allowing recovery for defamation raised free speech questions, the Court did not completely eliminate the tort, but rather limited both the definition of defamation that states could apply and the damages that plaintiffs could recover. In the end, recovery became more difficult, but not impossible.

Recently, courts again are confronting the tensions between the First Amendment and tort law. This time, however, the First Amendment questions arise from the Free Exercise Clause, and the tort action, less established than defamation, is intentional infliction of emotional distress.[2] In these "religious tort" cases, plaintiffs allege that religiously motivated conduct has resulted in a tortious injury to them.

Religious tort suits arise in a number of factual contexts. Some involve methods of religious recruitment;[3] others involve religiously motivated counseling.[4] One specific type concerns a religious group's practice of shunning ex-members.[5] Applying traditional, ad hoc free exercise analysis[6] to religious tort claims, however, has led to varying results in the face of

1. 376 U.S. 254 (1964). The Court in *New York Times* prohibited a public official "from recovering damages for a defamatory falsehood relating to his official conduct unless he [could] prove[] that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279–80. For a more detailed discussion of all elements of the test that the Supreme Court adopted in defamation cases, see *infra* Part II.

2. For a discussion of the tort of intentional infliction of emotional distress, see *infra* Section I.A.

3. *See, e.g.*, Molko v. Holy Spirit Ass'n, 762 P.2d 46 (Cal. 1988), *cert. denied*, 490 U.S. 1084 (1989); Murphy v. International Soc'y of Krishna Consciousness, 571 N.E.2d 340 (Mass.), *cert. denied*, 502 U.S. 865 (1991).

4. *See, e.g.*, Nally v. Grace Community Church, 204 Cal. Rptr. 303 (Ct. App. 1984), depublished by the California Supreme Court, *see* 763 P.2d 948, 949 (Cal. 1988).

5. *See* Justin K. Miller, Comment, *Damned If You Do, Damned If You Don't: Religious Shunning and the Free Exercise Clause*, 137 U. PA. L. REV. 271 (1988); *see also* Wollersheim v. Church of Scientology, 260 Cal. Rptr. 331 (Ct. App. 1989), *cert. denied*, 495 U.S. 910 (1990), *vacated and remanded*, 499 U.S. 914 (1991) (remanded on issue of punitive damages only) (considering disciplinary methods of Church of Scientology toward former member).

6. For a discussion of this traditional analysis, see *infra* Section I.B. Allowing recovery in tort is sufficient state action to implicate constitutional limits. *See New York Times*, 376 U.S. at 265.

similar fact patterns. In confronting religious tort cases, courts have held either that the Free Exercise Clause does not apply or, conversely, that it completely prevents recovery.

The unpredictability created by both the application of traditional, ad hoc free exercise analysis and the open-endedness of the intentional infliction of emotional distress tort may have a chilling effect on religious actions. Unable to predict the legal implications of their religiously motivated actions, risk-averse religious actors may cease to engage not only in actionable conduct, but also in conduct that would be protected under the Free Exercise Clause.

To address the possible chilling effect in religious tort cases, I propose that the "definitional balancing"[7] approach established in defamation law should be extended to cases alleging "outrageous" religious conduct. This approach allows recovery in tort but balances First Amendment concerns within the definition of the tort itself by making recovery more difficult. Part I outlines the tort of intentional infliction of emotional distress; the traditional, ad hoc balancing analysis used by courts in free exercise cases; and the constitutional questions raised by religious tort claims alleging intentional infliction of emotional distress. This part shows how the open-endedness of the intentional infliction of emotional distress tort, combined with the free exercise balancing analysis, produces ad hoc results in cases against religious defendants. Part II briefly summarizes defamation law as the Supreme Court has outlined it and details the elements of the definitional balancing approach adopted by the Court. Finally, Part III proposes that a definitional balancing approach similar to the one used in defamation law should be applied in religious tort cases alleging intentional infliction of emotional distress. This part reviews previous incomplete attempts to apply definitional balancing (either implicitly or explicitly) in religious tort cases. It then proposes a comprehensive solution, suggesting that the proper application of the intentional infliction of emotional distress tort to religiously motivated conduct will include a standard for recovery requiring proof of common law malice, a higher standard of proof, and limits on damages.

7. This term appears to have been used initially by Professor Nimmer. *See* Melville B. Nimmer, *The Right to Speak from* Times *to* Time: *First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 944 (1968). The term is no longer used in Nimmer's treatise now that it is authored by Professor Smolla. *See* RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT § 2.01[3], at 2–7 n.7 (1994) ("The term 'definitional balancing' was used extensively by Professor Nimmer in the first edition of this treatise. The term has not caught on, and has been abandoned in this edition."). Nevertheless, I agree with Professor Nimmer that the term is an appropriate shorthand, and I will continue to use it.

I. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AS A RELIGIOUS TORT

Claims of intentional infliction of emotional distress against religious actors based upon religiously motivated conduct raise concerns involving the free exercise of religion. First, courts' emphasis on the "outrageous conduct" element of the tort grants broad discretion to juries regarding liability and damages. This discretion may lead juries to hold unpopular defendants liable, which in turn may chill constitutionally protected behavior. Second, in free exercise cases, courts employ an ad hoc balancing analysis to determine whether a government action impermissibly burdens a person's free exercise of religion. These two elements combine to produce inconsistent results in religious tort cases. These ad hoc results can themselves lead to a chilling effect; religious actors may not practice or preach their religion for fear of being held liable in court. This part addresses each of these topics in turn.

A. *The General Tort*

Although the original *Restatement of Torts* did not include the tort of intentional infliction of emotional distress, the authors of the *Restatement (Second)* decided that the tort had been accepted in enough jurisdictions to warrant inclusion.[8] The general tort is outlined in section 46 of the *Restatement (Second)*:

> One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.[9]

The tort thus contains three main elements: (1) "extreme and outrageous" conduct that (2) intentionally or recklessly causes (3) severe emotional distress.

The tort is far from well-defined. The commentary in the *Restatement (Second)* explains:

> Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the

8. The reporter included a caveat explaining that the tort was still developing and that the *Restatement (Second)* would therefore not describe it in its totality. *See* RESTATEMENT (SECOND) OF TORTS § 46 caveat (1965).

9. *Id.* § 46.

> community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"[10]

Although courts have not provided much guidance in defining the outrageousness element, in practice it tends to be the only question asked: If the plaintiff proves "extreme and outrageous" conduct, then intentionality (or recklessness) and severe emotional distress quickly follow. The *Restatement (Second)* even acknowledges and seems to condone this collapsing of elements.[11]

Moreover, the outrageousness element affects the interpretation of intentionality or recklessness. According to the *Restatement (Second)*, a defendant must "intentionally or recklessly cause[] severe emotional distress." Courts, however, apply the question of intentionality to the extreme and outrageous conduct instead of to the injury. In other words, they ask whether the defendant intentionally acted outrageously instead of asking whether the defendant intentionally injured the plaintiff.[12] By applying the intentionality or recklessness standard to the outrageousness element, courts allow a plaintiff to prove all elements of the tort simply by proving that the defendant knowingly acted outrageously.

Courts' focus on outrageousness grants juries significant discretion regarding liability and damages. Like the question of reasonableness posed in negligence actions, outrageousness, as it is defined, is inherently a jury question—whether a reasonable member of the community would proclaim, "Outrageous!" Thus, questions of liability turn on jurors' notions of outrageousness. This jury discretion also leads to damages being open-ended.[13] Moreover, due to the difficulty of determining "actual injury" in intentional infliction of emotional distress cases, damages that are compensatory in name tend to be punitive in nature.[14]

Separate from compensatory relief, the availability of actual punitive damages in intentional infliction of emotional distress cases compounds the problem of unlimited liability. Because the tort requires a showing of intentionality or recklessness, simply proving the elements of the tort often will

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10. *Id.* § 46 cmt. d.

11. *See id.* § 46 cmt. j (noting that "in many cases the extreme and outrageous character of the defendant's conduct is in itself evidence that the distress has existed"); *see also* Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 46 (1982) (noting collapsing of elements).

12. Givelber, *supra* note 11, at 46 ("Courts have interpreted the intent or recklessness element of the tort as referring to whether defendant intended to act towards plaintiff in a manner that can be considered outrageous . . . .").

13. *See* 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, 592 (1993).

14. *See id.* at 592–93 ("This scheme of awarding damages . . . clearly has little to do with compensation. Rather, damages in an intentional infliction of emotional distress case are designed primarily to punish the defendant.").

allow a plaintiff to recover punitive damages.[15] By allowing punitive damages, courts create virtually no limit on the liability that could accrue to a defendant. All these factors have led one commentator to conclude that, "In sum, we have a doctrine that defies consistent definition, and presents all the problems inherent in that lack of definition compounded by a prominent punitive component."[16]

The open-endedness of both the tort and the damages creates a risk of inconsistent, or even arbitrary, application of the tort to different circumstances. "The concept [of outrageousness] . . . fails to provide clear guidance either to those whose conduct it purports to regulate, or to those who must evaluate that conduct."[17] More importantly, the tort may be applied in an especially harsh way to unpopular views and defendants. "[F]actfinders may confuse outrageous with unpopular so that fear of tort judgments might chill constitutionally protected (or at least socially important) behavior."[18]

B. *Free Exercise of Religion*

The current test for whether a state action impermissibly burdens the free exercise of religion is an ad hoc balancing test involving a compelling state interest standard.[19] This section summarizes the compelling state interest test used in free exercise cases and describes how this ad hoc balancing analysis, announced and then abandoned by the Supreme Court, has ultimately been restored by Congress. Together with the previous section, this section outlines the legal framework currently applied to religious tort cases.

Supreme Court doctrine on the Free Exercise Clause has taken some interesting twists and turns in the last five years. Before 1990, *Sherbert v. Verner*[20] defined the form of analysis applicable to free exercise claims. *Sherbert* set forth an ad hoc balancing test, asking three questions: (1) Is the conduct based on sincere religious beliefs?[21] (2) Does the regulation impose

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15. *See* Givelber, *supra* note 11, at 54 ("If the defendant is deserving of condemnation . . . [the] plaintiff may sometimes not only recover for whatever injuries he or she has suffered, but in some jurisdictions he or she may also be entitled to punitive damages."); Hayden, *supra* note 13, at 580–81 ("Punitive damages are also available virtually any time the tort itself is established, because by definition a liable defendant's conduct is 'extreme and outrageous.'") (quoting DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 7.3, at 530 (1973)).

16. Givelber, *supra* note 11, at 75.

17. *Id.* at 51.

18. *Id.* at 52; *see also* Hayden, *supra* note 13, at 586 ("Yet [tort law's open texture] is a danger because it may extend too ready an invitation for law to intrude . . . where it should not go, and may allow majoritarianism to ride roughshod over unpopular or minority rights and beliefs, the protection of which is an important societal value.").

19. The compelling state interest test is referred to as an "ad hoc" balancing test. *See Developments in the Law—Religion and the State*, 100 HARV. L. REV. 1606, 1712 & n.49 (1987).

20. 374 U.S. 398 (1963).

21. *See id.* at 399 n.1 (noting that "no question ha[d] been raised . . . concerning the sincerity of appellant's religious beliefs").

a substantial burden on free exercise?[22] (3) If so, does a compelling state interest justify the infringement?[23] In *Sherbert*, the Supreme Court considered a claim for unemployment benefits filed by a Seventh Day Adventist who was unable to find employment because her religion prohibited her from working on Saturday.[24] The Court found no narrowly tailored compelling state interest to justify the denial of benefits and therefore reversed the denial as violative of the Free Exercise Clause.

In 1990, the Supreme Court changed the structure of free exercise analysis in *Employment Division v. Smith*.[25] The Court concluded that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability.'"[26] It rejected the application of the compelling state interest standard to claims for individual exemptions from generally applicable laws based on religious belief. As Justice Scalia wrote for the majority, "To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling' . . . contradicts both constitutional tradition and common sense."[27]

Congress, however, has recently restored the pre-*Smith* status quo. In 1993, President Clinton signed into law the Religious Freedom Restoration Act (RFRA).[28] The explicit purpose of RFRA is "to restore the compelling interest test . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened."[29] Under RFRA, "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[30] RFRA applies to all legally created burdens, including nonstatutory state law, and therefore should apply to cases involving religious torts.[31]

Currently, courts apply the compelling state interest test to analyze claims

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22. *Id.* at 406.

23. *Id.*

24. *Id.* at 399–401.

25. 494 U.S. 872 (1990).

26. *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)).

27. *Id.* at 885.

28. Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (Supp. V 1993)).

29. 42 U.S.C. § 2000bb(b)(1) (Supp. V 1993). No free exercise case has reached the Supreme Court, however, since the adoption of RFRA. Thus, RFRA may not have this intended effect.

30. *Id.* § 2000bb-1(b). RFRA arguably demands the continued application of ad hoc balancing in questions relating to the Free Exercise Clause. If the definitional balancing test proposed in Part III of this Note were adopted, however, the tort suits would not create a "substantial[] burden" on religion, *id.* § 2000bb(a)(3), and therefore the approach would be consistent with RFRA.

31. *See id.* § 2000bb-3(a); *see also* Shea Sisk Wellford, *Tort Actions Against Churches—What Protections Does the First Amendment Provide?*, 25 MEM. ST. U. L. REV. 193, 207 (1994) (speculating that RFRA likely applies to state tort actions against churches).

that raise free exercise concerns. While the Supreme Court temporarily deviated from this standard in *Smith*, Congress has reinstated the traditional, ad hoc balancing approach through the adoption of the Religious Freedom Restoration Act.

C. *Intentional Infliction of Emotional Distress as Applied to Religious Defendants*

The open-endedness of the tort of intentional infliction of emotional distress and the ad hoc free exercise balancing analysis combine to produce ad hoc results in religious tort cases. In addition, applying the tort to religiously motivated actions is likely to create emotional responses in juries, which may lead to punishment of unpopular views rather than an even application of the law. "The danger is particularly serious when the conduct at issue is religiously motivated because invariably the religious beliefs motivating the conduct are, in the eyes of the jury, 'other people's faiths.'"[32] All these factors may chill protected behavior that is based upon religious beliefs and hence raise important free exercise concerns.

This section highlights the ad hoc results of religious tort cases and argues that the ad hoc free exercise balancing analysis increases the possibility of a chilling effect. While the number of suits claiming intentional infliction of emotional distress based upon religiously motivated conduct is rising, the consistency of outcomes among similar cases is not. Courts have found either that (1) the Free Exercise Clause completely prevents recovery or (2) the Free Exercise Clause is totally inapplicable. The unpredictability regarding the legal liability created by an action may produce a chilling effect because religious actors may avoid engaging in protected actions for fear of liability.

Religious tort cases can be categorized according to their factual contexts. One commentator has divided these cases into three categories: (1) indoctrination cases, (2) discipline cases, and (3) cases involving religious counseling or clergy malpractice.[33] Using cases from each category, this section discusses the results of suits in which courts considered the First Amendment defense.[34] It concludes that a better approach is needed to avoid inconsistent results.

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32. Hayden, *supra* note 13, at 594.

33. Hayden performs a comprehensive study of these cases and divides them into three separate categories of "outrageous conduct." *See id.* at 622–62.

34. Many cases are decided without reaching the First Amendment issues. Instead, courts often find that the actions of a defendant are not outrageous as a matter of law. *See, e.g.*, Meroni v. Holy Spirit Ass'n, 506 N.Y.S.2d 174, 177 (App. Div. 1986); Christofferson v. Church of Scientology, 644 P.2d 577, 591 (Or. Ct. App. 1982), *cert. denied*, 459 U.S. 1206 (1983). They then can dismiss the case without confronting the First Amendment questions. This approach, however, leaves religious defendants unsure of the status of their actions. The courts decide these cases on very individualized, fact-based grounds. The cases I will discuss do confront and decide the constitutional questions.

1. *Indoctrination Cases*

First Amendment defenses have been both successful and unsuccessful in indoctrination cases. On the one hand, in *Murphy v. International Society for Krishna Consciousness*,[35] the Supreme Judicial Court of Massachusetts held that the First Amendment prevented a lawsuit arising from the indoctrination methods of the Society for Krishna Consciousness. On the other hand, in *Molko v. Holy Spirit Ass'n*,[36] the Supreme Court of California held that the First Amendment did not prevent a suit arising from the recruitment methods of the Unification Church.

In *Murphy*, a mother and daughter sued the International Society for Krishna Consciousness (I.S.K.Con.) for damages arising from the involvement of the daughter, Susan, with the religion. Beginning at age thirteen, Susan affiliated with the religion for many years. During this time, she ran away with her "husband" and was sheltered by group members around the country. Upon her return to Boston, Susan received permission from her mother to live at the I.S.K.Con. temple.[37] Her relationship with the temple ended, however, when her mother discovered a secret plan to send Susan to West Germany.[38] After jointly deciding to terminate Susan's relationship with I.S.K.Con., Susan and her mother sued the group for damages incurred as a result of Susan's interactions with them. One claim was for intentional infliction of emotional distress.

A jury found for both Susan and her mother on the intentional infliction of emotional distress claim and awarded them $210,000 and $350,000, respectively.[39] I.S.K.Con. appealed to the state's highest court, arguing that the introduction of evidence about the Society's religious beliefs "allowed the jury to punish [I.S.K.Con.] for the content of its unorthodox religious beliefs through the imposition of tort liability, thereby depriving [I.S.K.Con.] of its constitutional right to practice freely its religion."[40] The court agreed.[41]

The court applied the compelling state interest test to analyze the imposition of tort liability under the Free Exercise Clause of the First Amendment.[42] It believed that the veracity of the defendant's religious beliefs had been placed on trial. "[T]he defendant has been required to do what the First Amendment has forbidden," the court observed. "[I]t has been forced to

35. 571 N.E.2d 340 (Mass.), *cert. denied*, 502 U.S. 865 (1991).
36. 762 P.2d 46 (Cal. 1988), *cert. denied*, 490 U.S. 1084 (1989).
37. *Murphy*, 571 N.E.2d at 343.
38. *Id.* at 344.
39. *Id.* at 345.
40. *Id.*
41. *Id.* at 345–50.
42. Although the defendants alleged violations of their rights under both the Massachusetts and Federal Constitutions, all the arguments presented were based on the Federal Constitution. Hence the court limited its analysis to the federal questions. *See id.* at 345 n.7.

attempt to prove to a jury that the substance of its religious beliefs is worthy of respect."[43] The court determined that "[t]he defendant cannot be forced to choose between censoring its religious scriptures to remove material which may be offensive to contemporary society and paying tort damages for the privilege of maintaining unpopular religious beliefs."[44] Although the jury had found that the defendants had committed an intentional tort, the court concluded that they might still be afforded constitutional protection:

> [C]ourts have recognized that the free exercise protection provided by the First Amendment is not automatically withheld from activity which constitutes an intentional tort. 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.[45]

In contrast, the California Supreme Court, in *Molko*, held that the First Amendment did not bar an intentional infliction of emotional distress claim brought against a religious organization for its methods of indoctrination. Members of the Unification Church recruited plaintiff David Molko without revealing their identity. Despite his explicit questions about whether the group had any religious affiliations, Molko was not told of the group's ties to the Unification Church for twelve days. After his parents hired people to abduct and "deprogram" him, he sued the group for intentional infliction of emotional distress, among other things.[46]

The court held that the First Amendment did not bar Molko's claims. First, the court noted that "in appropriate cases courts will recognize tort liability even for acts that are religiously motivated."[47] It did not question that the recruitment in this case was based on a sincere religious belief, but it found

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43. *Id.* at 348.

44. *Id.*

45. *Id.* at 349–50. The *Murphy* court concluded that beliefs, not conduct, were placed on trial. The belief/conduct distinction has been important in free exercise jurisprudence, but the distinction is far from clear. In Cantwell v. Connecticut, 310 U.S. 296 (1940), the Supreme Court argued that the Free Exercise Clause's protection of beliefs was absolute, but that the state could regulate conduct based upon those beliefs. *Id.* at 303–04 ("Thus, the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."). Although many courts continue to apply this distinction, religious tort cases demonstrate that it is so malleable as to be meaningless. *Compare Murphy*, 571 N.E.2d at 348 (equating challenge to teaching of doctrine with challenge to beliefs) *with* Nally v. Grace Community Church, 204 Cal. Rptr. 303, 308–09 (Ct. App. 1984), depublished by California Supreme Court, *see* 763 P.2d 948, 949 (Cal. 1989) (equating challenge to teaching of beliefs, via counseling, with challenge to conduct).

46. Molko v. Holy Spirit Ass'n, 762 P.2d 46, 50–51 (Cal. 1988), *cert. denied*, 490 U.S. 1084 (1989).

47. *Id.* at 57 (citing O'Moore v. Driscoll, 28 P.2d 438 (Cal. Ct. App. 1933) and Bear v. Reformed Mennonite Church, 341 A.2d 105 (Pa. 1975)).

that the case involved religiously motivated conduct, not beliefs.[48] Next, the court asked whether liability in tort would burden this conduct and concluded that "[such liability's] very purpose is to discourage the Church from putting such belief into practice by subjecting the Church to possible monetary loss for doing so."[49]

The court then performed the ad hoc free exercise balancing test, comparing the burden on the Church to the state's interest in allowing recovery in tort for the challenged type of recruitment. It concluded that "[t]he state clearly has a compelling interest in preventing its citizens from being deceived into submitting unknowingly to such a potentially dangerous process."[50] Therefore, even though the court accepted that the Church's actions were religiously motivated, it concluded that the First Amendment did not bar the suit and remanded the case for presentation to a jury.

Both *Murphy* and *Molko* involved seemingly inappropriate indoctrination methods and yet they reached different conclusions about the applicability of a First Amendment defense. In *Murphy*, a religious group recruited a minor, sheltered her while she was a runaway, and hatched a secret plan to separate her from her mother. The religious group in *Molko* directed its deception at the recruit himself. Both cases involved religiously motivated actions; similar negative effects on free exercise from tort recovery; and the same state interest, protecting citizens by allowing recovery for injury. Nevertheless, the courts reached contradictory results despite these similarities in the facts relevant to the traditional, ad hoc balancing test. The *Murphy* court even acknowledged the limited precedential value of its decision within its jurisdiction, noting that the holding was limited to "the unique circumstances of this case."[51]

The courts' inconsistent decisions highlight the ad hoc nature of the analysis and the danger of a chilling effect on religiously motivated behavior. A definitional balancing test, however, would cause courts to focus on the relevant questions. In particular, as proposed in Section III.C of this Note, courts would concentrate on a religious actor's motivation. In both *Murphy* and *Molko*, for example, bad faith can be detected and should bolster the case for allowing recovery.

48. *Id.* at 58–59. For a discussion of the belief/conduct distinction, see *supra* note 45.

49. *Id.* at 59.

50. *Id.* at 60. In an opinion concurring in part and dissenting in part, Justice Anderson argued that the First Amendment mandated dismissal of the intentional infliction of emotional distress and fraud claims. He concluded "that the imposition of tort liability for 'heavenly deception' in proselytizing and for its ensuing 'systematic manipulation of social influences' (religious persuasion) runs counter to established legal precedents and the free exercise clause of the First Amendment." *Id.* at 67 (Anderson, J., concurring and dissenting).

51. *Murphy*, 571 N.E.2d at 345.

2. *Discipline Cases*

Many courts have grappled with the issue of whether a plaintiff can state a claim in tort based on a religious group's disciplinary measures against former members. As with the indoctrination cases, courts employing the ad hoc free exercise balancing analysis have reached different results in similar cases.

In *Paul v. Watchtower Bible and Tract Society*,[52] the Ninth Circuit held that a former Jehovah's Witness could not recover for injuries arising from the Church's use of shunning as a disciplinary method.[53] Janice Paul was raised as a Jehovah's Witness. In November 1975, when Paul withdrew from the Church, it did not shun people who voluntarily left. On the basis of a new biblical interpretation, this policy changed in 1981. As a result, many childhood friends later shunned Paul. She subsequently filed suit, including among her causes of action a claim for outrageous conduct or intentional infliction of emotional distress.

The Ninth Circuit concluded that the First Amendment prevented her from recovering. Both Paul and the court accepted that the shunning was religiously motivated and that allowing recovery in tort would directly burden the free exercise of religion:

> Imposing tort liability for shunning on the Church or its members would in the long run have the same effect as prohibiting the practice and would compel the Church to abandon part of its religious teachings. Were we to permit recovery, "the pressure . . . to forego that practice [would be] unmistakable."[54]

Having found a direct burden on free exercise, the court proceeded to apply the traditional, ad hoc balancing test. It concluded that "the practice of shunning [does] not . . . constitute a sufficient threat to the peace, safety, or morality of the community as to warrant state intervention."[55] Therefore, since the state interest in preventing shunning did not outweigh the Church's interest in the free exercise of religion, no action in tort could stand.[56]

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52. 819 F.2d 875 (9th Cir.), *cert. denied*, 484 U.S. 926 (1987).

53. In Bear v. Reformed Mennonite Church, 341 A.2d 105 (Pa. 1975), the Supreme Court of Pennsylvania reached the opposite conclusion, holding that a plaintiff could state a cause of action for harms caused by religiously motivated shunning. The Church had excommunicated Bear, and the bishops had ordered that the members, including his wife and children, shun him. The Church demurred, raising only a First Amendment defense. *Id.* at 107. The court determined that the complaint, alleging alienation of affections and tortious interference with business relationships, "raises issues that the 'shunning' practice of appellee church and the conduct of the individuals may be an excessive interference within areas of 'paramount state concern,' . . . which the courts of this Commonwealth *may* have authority to regulate, even in light of the 'Establishment' and 'Free Exercise' clauses of the First Amendment." *Id.*

54. *Paul*, 819 F.2d at 881 (quoting Thomas v. Review Bd., 450 U.S. 707, 717 (1981)) (alterations in original).

55. *Id.* at 883.

56. *Id.*

In *Guinn v. Church of Christ*,[57] the Supreme Court of Oklahoma arrived at a different conclusion regarding liability in tort for a church's disciplinary actions against a member who withdrew from the congregation. Marian Guinn joined the Collinsville Church of Christ in 1974. After an initial harmonious period, Guinn began to experience difficulties with the Church in 1980. The Church had an extremely strict and public disciplinary process, and Guinn realized that the Elders intended to denounce her publicly for fornication. She decided to leave the Church to avoid this denunciation. The Elders of the Church, however, believed that members could not withdraw from the congregation and proceeded to "disfellowship" Guinn by publicly announcing her sins and reading the biblical passages she had violated.

Guinn sued the Church under a number of tort theories, including intentional infliction of emotional distress. She received over $400,000 in compensatory and punitive damages. On appeal, the Supreme Court of Oklahoma addressed the issue of whether the First Amendment prevented recovery for church disciplinary methods found to constitute tortious conduct. The court held that Church actions taken while Guinn was still a member were protected by the First Amendment, but that actions taken after her withdrawal were not.

The court reasoned that the prewithdrawal actions were protected under a consent theory: While Guinn was a member, the Church had a right to rely on her consent to its disciplinary precepts.[58] In balancing the interests at stake, the court concluded, "[w]hile the state has a compelling interest in providing a forum where its citizens can adjudicate their rights under tort law, the intrusion into the Elders' First Amendment freedoms which that interest requires is not constitutionally supportable" with respect to their actions before Guinn's withdrawal.[59]

The court reached a different conclusion, however, when it applied the ad hoc free exercise balancing test to the actions taken by the Elders after Guinn's withdrawal.[60] It decided that a church did not have a legitimate religious interest in disciplining a nonmember.[61] The court distinguished *Paul* by explaining that shunning is passive, while the measures taken in this case were active—the Elders publicly denounced Guinn as a fornicator and even informed other area congregations of her disfellowship. "For purposes of First

57. 775 P.2d 766 (Okla. 1989).

58. *Id.* at 774.

59. *Id.*

60. The Elders claimed that Church doctrine rendered voluntary separation by members impossible. Therefore, they argued that Guinn never separated from the Church and hence all disciplinary actions should be protected. The court disagreed, explaining that individuals had an assumed right to separate themselves from religious organizations. Guinn did not waive this right upon joining the Church because she was unaware of the Church doctrine prohibiting separation. Thus, the court held that Guinn could, and did, withdraw from the church. *Id.* at 775–77.

61. *Id.* at 779.

Amendment protection," the court reasoned, "religiously-motivated disciplinary measures that merely *exclude* a person from communion are vastly different from those which are designed to *control* and *involve*."[62] Therefore, the court concluded, the First Amendment defense did not protect the Church from liability in tort to nonmembers.[63]

Comparing the courts' analyses in these cases again illustrates the unpredictable results achieved under an ad hoc balancing test. The *Guinn* court's distinction between active and passive discipline does not sufficiently explain the different results reached in similar cases. Both disciplinary methods involved actions taken by church members; neither entailed any coercive action aimed at the disciplined member. Thus, the precedents discussed in this section indicate that the jurisdiction in which a suit is brought may well determine whether a church will be held liable in tort for its disciplinary methods, even though the claimed protection stems from the Federal Constitution.[64]

3. *Tortious Counseling*

Claims of tortious counseling[65] have been on the rise in the last

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62. *Id.* at 781.

63. In Korean Presbyterian Church Normalization Comm. v. Lee, 880 P.2d 565 (Wash. Ct. App. 1994), a Washington appeals court considered a claim partially based on a public announcement of excommunication that included the Church-defined crime that had triggered the excommunication. The court concluded that no compelling state interest justified allowing recovery in tort for this action and dismissed the suit. *Id.* at 570.

64. Some courts have applied the doctrine of ecclesiastical abstention to questions of excommunication. *See, e.g.*, Grunwald v. Bornfreund, 696 F. Supp. 838, 840 (E.D.N.Y. 1988) (holding that ecclesiastical abstention doctrine prevented determination of appropriateness of excommunication). The doctrine prohibits secular courts from hearing and deciding litigation about religious doctrines. *See* Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 709–10 (1976); Wellford, *supra* note 31, at 196–201.

65. Cases involving tortious counseling by clergy warrant subdivision into two categories. As the analysis outlined in this Note is only appropriate for cases in the first subcategory, I will limit my discussion to cases in this classification.

The first subcategory includes allegations that the counseling was religiously proper but nevertheless constituted tortious conduct. *See* Nally v. Grace Community Church, 204 Cal. Rptr. 303 (Ct. App. 1984), depublished by the California Supreme Court, *see* 763 P.2d 948, 949 (Cal. 1988). The argument in this category is similar to that of the discipline and indoctrination cases: Plaintiffs simply allege that religiously motivated conduct resulted in an injury redressable by tort law.

The second subcategory consists of cases in which an individual alleges that he or she was injured when a clergy member improperly executed religious counseling methods. These cases often involve a sexual relationship with a counselee. *See, e.g.*, Dausch v. Rykse, No. 92-C3029, 1993 U.S. Dist. LEXIS 1448 (N.D. Ill. Feb. 9, 1993), *rev'd in part on other grounds*, No. 93-1459, 1994 U.S. App. LEXIS 35213 (7th Cir. Dec. 16, 1994); Schmidt v. Bishop, 779 F. Supp. 321 (S.D.N.Y. 1991). Courts must analyze such cases according to a two-step process. First, the court must determine the general standard of conduct of a reasonable clergy member of the particular faith group. Second, the court must decide whether the challenged actions met that standard of care.

The *Schmidt* court properly concluded that analysis under the Establishment Clause governs this type of case:

> Any effort by this Court to instruct the trial jury as to the duty of care which a clergyman should exercise, would of necessity require the Court or jury to define and express the standard of care to be followed by other reasonable Presbyterian clergy of the community. This in turn would require the Court and the jury to consider the fundamental perspective and approach to

decade.[66] These claims allege that religious leaders have violated their duties to those whom they are counseling. Many of these cases include claims of intentional infliction of emotional distress. Although a number of "clergy malpractice" cases have been reported in recent years, only *Nally v. Grace Community Church*[67] involves allegations that truly stem from religiously motivated conduct.[68]

In *Nally*, a California appeals court considered a clergy malpractice claim despite a proposed First Amendment defense. Kenneth Nally's parents sued the Grace Community Church and various Church leaders alleging that their intentional infliction of emotional distress caused Kenneth's suicide.[69] Kenneth had sought counseling from the Church, and his parents claimed that the advice he received included the Church's view that, for some people, suicide represented "one of the ways that the Lord takes home a disobedient believer."[70] The court concluded that the Church's spiritual vision did include this type of counseling.

The religious basis for the counseling forced the court to address the question of whether the First Amendment prevented a church from being held

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> counseling inherent in the beliefs and practices of that denomination. This is as unconstitutional as it is impossible. It fosters excessive entanglement with religion [in violation of the third prong of Lemon v. Kurtzman, 403 U.S. 602, 614–15 (1971)].

779 F. Supp. at 328; *see also* Roppolo v. Moore, 644 So. 2d 206, 208 (La. Ct. App. 1994) ("To do as plaintiff requests would require this Court to apply different standards to different litigants depending on their religious affiliations. . . . [T]his Court has no authority to determine or enforce standards of religious conduct and duty."). The inquiry required by the first step of the analysis would violate the "entanglement" prong of the *Lemon* test and thereby implicate Establishment Clause analysis. Therefore, the balancing test suggested in this Note is inapposite for cases in the second subcategory.

The distinction between the two subcategories becomes apparent through consideration of two cases involving wrongful death claims stemming from faith healing in the Christian Science Church. In Lundman v. McKown, No. C1-94-891, 1995 Minn. App. LEXIS 462 (Ct. App. Apr. 4, 1995), a father brought a wrongful death action for the death of his son, Ian. Ian's mother, who had custody of him, followed the tenets of Christian Science and called in Christian Science healers when Ian became ill. Despite the healers' efforts, Ian died of juvenile-onset diabetes, a disease that "is usually responsive to insulin, even up to within two hours of death." *Id.* at *6. Ian's father sued the mother, the faith healers, and the Mother Church for wrongful death, alleging that he should receive compensation even though the treatment Ian received "conformed to [the] genuine religious beliefs" of Christian Science followers. *Id.* at *18. Because this claim does not necessitate a determination of the proper standard of care for Christian Science healers, it can be analogized to intentional infliction of emotional distress cases in the first subcategory.

McKown stands in contrast with Baumgartner v. First Church of Christ, Scientist, 490 N.E.2d 1319 (Ill. App. Ct.), *cert. denied*, 479 U.S. 915 (1986). *Baumgartner* involved a suit for wrongful death brought against the Christian Science Mother Church and certain Christian Science healers. Unlike in *McKown*, however, the plaintiff alleged that the defendants "deviated from the standard of care of an ordinary Christian Science practitioner and nurse when they treated decedent," who died from acute prostatitis. *Id.* at 1323. The court concluded "that the first amendment precludes such an intrusive inquiry by the civil courts into religious matters." *Id.* at 1324. This case can be analogized to cases in the second subcategory.

66. *See generally* Carl H. Esbeck, *Government Regulation of Religiously Based Social Services: The First Amendment Considerations*, 19 HASTINGS CONST. L.Q. 343, 407 (1992) (noting explosion of tort claims against churches).

67. 204 Cal. Rptr. 303 (Ct. App. 1984), depublished by the California Supreme Court, *see* 763 P.2d 948, 949 (Cal. 1988).

68. *See supra* note 65.

69. *See Nally*, 204 Cal. Rptr. at 304–05.

70. *Id.* at 306.

liable in tort for spiritual counseling.[71] Holding that the counseling constituted religious conduct, the court concluded that previous cases "affirm[ed] the principle that remedies should exist for harm caused by extreme and outrageous conduct even when such conduct involves the expression of religious beliefs."[72] After only a cursory consideration of the free exercise questions, the court decided that the First Amendment did not protect the defendants from liability because of the intentional nature of the tort and the horrible outcome of the counseling: "[T]he free exercise clause of the First Amendment does not license intentional infliction of emotional distress in the name of religion and cannot shield defendants from liability for wrongful death for a suicide caused by such conduct."[73] The *Nally* court conducted a traditional free exercise balancing analysis and held that a compelling state interest permitted the suit to go forward.

With only one reported case in this subcategory of tortious counseling cases, it is impossible to determine whether inconsistent results would be reached by other courts considering similar facts. Nevertheless, the *Nally* court's focus on intentionality and its application of the ad hoc free exercise balancing analysis suggest that inconsistent decisions are likely. Ad hoc results mean continued uncertainty for religious defendants and a likely chilling effect on religiously motivated behavior.

This review of cases involving all three categories of religious torts illustrates the ad hoc balancing test and resultant inconsistent decisions in this area of jurisprudence. Courts have applied free exercise law to religious defendants for allegedly outrageous actions. Some of these courts have held that the Free Exercise Clause completely prevents recovery in tort and have denied redress to those claiming injury. Other courts, by contrast, have allowed recovery, thereby threatening religious groups' rights to exercise their religion. This uncertainty about potential liability forces religious groups to factor lawsuits into their decisions regarding religiously based actions. More importantly, ad hoc decisions may lead religious groups to err on the side of not committing tortious conduct, thereby "chilling" protected religious action.

II. THE MIDDLE GROUND OF DEFAMATION

Over thirty years ago, defamation law addressed similar tensions between a First Amendment guarantee and the right to recovery in tort. Confronted with tensions between the tort of defamation and the right to free speech, the Supreme Court adopted a definitional balancing test. Instead of applying the traditional balancing test used in free speech law, the Court established a

71. *Id.* at 307.
72. *Id.* at 308.
73. *Id.* at 308–09.

standard within the definition of the defamation tort itself, a standard that balances the tensions between the rights of the two parties involved. Most importantly, this definitional balancing test enables people to assess the liability that may arise from their actions, thereby limiting or preventing a chilling effect. This part of the Note examines the Supreme Court's definitional balancing analysis in defamation cases.

In its landmark 1964 holding in *New York Times v. Sullivan*,[74] the Supreme Court proclaimed that the tort of defamation, as applied to public officials by the state courts in Alabama, was "constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments . . . ."[75] The case involved an advertisement in the *New York Times* that criticized a local Alabama government's treatment of civil rights demonstrators. Based upon the newspaper's admission of some factual mistakes, an Alabama jury awarded $500,000 against the *New York Times*. The Supreme Court reversed the jury's award. Although the Court did not hold that the newspaper possessed an inherent right to print false and defamatory material, a majority of the Court nevertheless determined that the First Amendment required breathing space for speech. The majority wrote that, "[a]s Madison said, 'Some degree of abuse is inseparable from the proper use of every thing . . . .'"[76] and continued that "the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive."[77] In other words, if newspapers could be punished for everything false they published, then they would become timid and would not publish some true material that would be difficult to defend in court; the Court worried about a "chilling effect" on free speech.

As with American constitutional law generally, however, nothing can be decided in one case. *New York Times v. Sullivan* raised more questions than it answered. During the thirty years since *New York Times*, the Supreme Court has often revisited defamation questions to define terms as they were used in that case and to further enhance the doctrine. Through these cases, the Court has worked to achieve a balance between First Amendment rights and the protection of individuals through tort actions.[78] Instead of holding that the

74. 376 U.S. 254 (1964).

75. *Id.* at 264.

76. *Id.* at 271 (quoting 4 ELLIOTT'S DEBATES ON THE FEDERAL CONSTITUTION 571 (New York, Burt Franklin 1876)).

77. *Id.* at 278.

78. The Court did not employ its traditional test for determining whether something that limits speech violates the First Amendment in these cases. It never subjected defamation to the high standard of the "compelling state interest" test, as elaborated in Capitol Square Review & Advisory Bd. v. Pinette, 115 S. Ct. 2440, 2446 (1995). Instead, the Court immediately moved to a definitional balancing test in which the state interest does not need to be compelling. *See New York Times*, 376 U.S. at 266.

Not all members of the Supreme Court agreed that this balance needed to be achieved through the adoption of the *New York Times* malice standard. *See infra* Section II.A. Justices Black and Douglas

Constitution completely eliminated such a well-established tort action or that the Constitution did not affect defamation, the Court "struggled . . . to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment."[79]

In these subsequent cases, the Court elaborated on the interests to be weighed in defining this balance. In *Gertz v. Robert Welch, Inc.*, the Court explained the need to balance individuals' rights to recover damages for reputational injuries against First Amendment protections. The Court recognized a state interest in allowing recovery for defamatory statements, an interest that it felt should not be eliminated completely:

> [A]bsolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation.
>
> The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose . . . .[80]

The Court felt that some standards were necessary to define the limits imposed by the Constitution in this area:

> Theoretically, of course, the balance between the needs of the press and the individual's claim to compensation for wrongful injury might be struck on a case-by-case basis. . . . But this approach would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable. Because an *ad hoc* resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application.[81]

The Court concluded that a number of elements must be considered (and changed from their common law form) to achieve the proper, constitutionally mandated balance. Accordingly, over the last thirty years, the Court has created constitutional limitations on the tort of libel or defamation through the use of

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interpreted the First Amendment literally, concluding that there should be *no* laws inhibiting freedom of speech. Therefore, they believed that all defamation actions violated the Constitution and that the First Amendment completely obliterated the tort. Justice Black, joined by Justice Douglas, stated that:

> In my opinion the Federal Constitution has dealt with this deadly danger to the press in the only way possible without leaving the free press open to destruction—by granting the press an absolute immunity for criticism of the way public officials do their public duty. Stopgap measures like those the Court adopts are in my judgment not enough.

New York Times, 376 U.S. at 295 (Black, J., concurring) (citation omitted). A majority of the Justices, however, felt that the First Amendment itself did not outline the balance but rather mandated that a balance be achieved, with the benefit of the doubt favoring the freedom of speech.

79. Gertz v. Robert Welch, Inc., 418 U.S. 323, 325 (1974).

80. *Id.* at 341.

81. *Id.* at 343–44 (citation omitted).

four factors: (1) the stringency of the liability standard; (2) the standard of proof; (3) the burden of proof; and (4) the remedies allowed.

A. *The Stringency of the Liability Standard*

In *New York Times v. Sullivan*, the Supreme Court established a more stringent standard for use when a public official sues for defamation based on criticism of government actions. The Court held that

> constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[82]

The *New York Times* malice standard imposes a significantly higher burden on the plaintiff than any previously applied. Initially, defamation was a tort of strict liability. A plaintiff did not need to prove any amount of fault by the defendant, only that the defendant had published a defamatory falsehood. The Court, however, felt that this standard would infringe unduly on free speech:

> Our decisions recognize that *a rule of strict liability* that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship. Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties.[83]

The standard adopted in *New York Times* more than eliminates strict liability in cases involving public officials (and, later, public figures). This standard establishes that mere negligence does not suffice to allow recovery for a defamatory statement. The *New York Times* Court concluded that "the evidence against the Times supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice."[84]

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82. *New York Times*, 376 U.S. at 279–80. This standard now is referred to as the "*New York Times* malice," "constitutional malice," or "actual malice" standard to distinguish it from the common law concept of malice. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), extended the standard to apply to "public figures," not just "public officials." For private figures, states may adopt whatever standard they wish; the Constitution, however, prevents adoption of a strict liability standard. *See Gertz*, 418 U.S. at 347; *see also* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 775 (1986) (holding that when speech is of private concern and involves private plaintiff, "the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape").

83. *Gertz*, 418 U.S. at 340 (emphasis added) (describing *New York Times* standard). *Gertz* also recognizes that the *New York Times* malice test "shields the press and broadcast media from the rigors of strict liability for defamation." *Id.* at 348.

84. *New York Times*, 376 U.S. at 288.

B. *The Standard of Proof*

The *New York Times* Court also limited the ability of public officials to recover for defamation by changing the standard of proof. Most civil actions require only that plaintiffs prove their cases by a preponderance of the evidence. The *New York Times* Court raised this standard to make recovery more difficult.[85] Justice Powell explained in *Gertz* that public figures "may recover for injury to reputation only on *clear and convincing proof* . . . ."[86] Just as employing a "beyond a reasonable doubt" standard of proof in criminal prosecutions grants the benefit of the doubt to a defendant, so requiring a "clear and convincing evidence" standard of proof in defamation cases grants a similar benefit to a defendant, thereby favoring free speech rights in close cases.

C. *The Burden of Proof*

While *New York Times* raised and initially addressed questions regarding the stringency of the liability standard and the standard of proof, it did not discuss the question of the burden of proof for issues of falsity. Subsequently, however, the Supreme Court did address this question. In *Philadelphia Newspapers, Inc. v. Hepps*,[87] the Court changed the traditional burden of proof in defamation cases.

At common law, the defendant bore the burden of proving truth because truth was an affirmative defense to a defamation action.[88] The *Hepps* Court worried, however, that placing the burden of proof on the defendant would chill speech. The media would not publish all things it believed to be true, but instead would limit its publications to those that it believed it could *prove* to be true in court.[89] To solve this problem, the Court held that "the common law's rule on falsity—that the defendant must bear the burden of proving truth—must similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages."[90]

85. *Id.* at 285–86 (noting that "the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands").

86. *Gertz*, 418 U.S. at 342 (emphasis added).

87. 475 U.S. 767 (1986).

88. *See id.* at 776–77.

89. *See id.*

90. *Id.* at 776; *see also id.* at 777 ("Because such a 'chilling' effect would be antithetical to the First Amendment's protection of true speech on matters of public concern, we believe that a private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant.").

The Court believed that in situations of uncertainty, the benefit of the doubt should favor free speech:

> Because the burden of proof is the deciding factor only when the evidence is ambiguous, we cannot know how much of the speech affected by the allocation of the burden of proof is true and how much is false. . . . [W]here the scales are in such an uncertain balance, we believe that the Constitution requires us to tip them in favor of protecting true speech.[91]

To assure that the benefit of the doubt favors speech rights over tort recovery, the Court again altered the common law standards for defamation. At common law, the burden of proving truth rested on the defendant; the Supreme Court concluded that this burden must be shifted to the plaintiff.

D. *The Remedies Allowed*

Although the Alabama courts allowed presumed and punitive damages in *New York Times*,[92] the Supreme Court later limited presumed and punitive damage awards to protect freedom of speech. The Court held in *Gertz* that the state interest in allowing tort recovery for reputational injury, which must be balanced against First Amendment interests, does not extend beyond "actual injury." The Court stated that "this countervailing state interest extends no further than compensation for actual injury. . . . [W]e hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth."[93]

The wide discretion given to juries in awarding damages warrants limiting punitive and presumed damages. Otherwise, juries could use these types of damages to punish controversial views and opinions:

> The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact.[94]

91. *Id.* at 776.
92. New York Times v. Sullivan, 376 U.S. 254, 262 (1964) (quoting jury instructions).
93. Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974).
94. *Id.*

The Court saw the same potential for abuse in awards of punitive damages:[95] "[J]uries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views."[96] The Court also found that punitive damages are irrelevant to the state interest in compensating defamed parties.

By adopting a definitional balancing test in defamation law, the Supreme Court has substantially decreased the risk of a chilling effect on free speech. Actors can better predict the likelihood of liability. Moreover, the standard has made recovery more difficult, thus favoring the constitutional right of free speech in close cases.

III. A BETTER SOLUTION: DEFINITIONAL BALANCING

The solution to the problem of ad hoc decisions in religious tort cases can be gleaned from defamation law. The Supreme Court rejected an ad hoc balancing approach in defamation law. Spurred by fear of a potential chilling effect on free speech, the Court instead adopted a definitional balancing test. Similarly, fear of a chilling effect on the free exercise of religion arises in religious tort cases. Thus, a definitional balancing test should be applied to intentional infliction of emotional distress claims based on religiously motivated conduct. This approach would allow recovery for actual injury but also would protect individuals' free exercise rights.

Courts and commentators have noted the problem of the potential chilling effect of religious tort cases. One court explained that the fear of large damage

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95. In Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1 (1991), the Supreme Court considered a due process challenge to punitive damages in general. The Court held that, in the case at bar, "the instructions gave the jury significant discretion in its determination of punitive damages. But that discretion was not unlimited." *Id.* at 19. The Court concluded that "[a]s long as the discretion is exercised within reasonable constraints, due process is satisfied." *Id.* at 20.

Justice O'Connor, in dissent, argued that punitive damages granted too much discretion to juries in all situations. She argued that common law procedures for awarding punitive damages "encourage inconsistent and unpredictable results by inviting juries to rely on private beliefs and personal predilections. Juries are permitted to target unpopular defendants, penalize unorthodox or controversial views, and redistribute wealth." *Id.* at 43 (O'Connor, J., dissenting). To support her position, Justice O'Connor explicitly referred to the treatment of punitive damages in defamation law. "Over the last 20 years, the Court has repeatedly criticized common-law punitive damages procedures on the ground that they invite discriminatory and otherwise illegitimate awards. *E.g.*, *Gertz*, 418 U.S. at 350." *Id.* at 54 (O'Connor, J., dissenting) (additional citations omitted). Despite the Court's acceptance of these arguments in defamation cases, they failed to carry the day in a general due process challenge.

96. *Gertz*, 418 U.S. at 350. Justice White felt that the main purpose of the constitutionalization of defamation law was to protect media defendants from crippling damage awards. Therefore, limiting presumed and punitive damages was a particularly important element of defamation doctrine.

> The necessary breathing room for speakers can be ensured by limitations on recoverable damages; it does not also require depriving many public figures of any room to vindicate their reputations sullied by false statements of fact. . . . [T]he *New York Times* standard was formulated to protect the press from the chilling danger of numerous large damage awards.

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 771–72 (1985) (White, J., concurring).

awards may affect a religious group's conduct: "[T]he fear of being called before a court to defend against unfounded claims for punitive damages might . . . improperly affect the way in which a religious organization carries out what it views as its religious mission."[97] Definitional balancing helps avoid the chilling effect by establishing a standard by which people can measure their actions *ex ante* and predict their potential liability.[98]

A. *Previous Movement of Definitional Balancing into Intentional Infliction of Emotional Distress Claims Against Religious Defendants*

Previous courts and commentators have set the stage for adopting a definitional balancing analysis in religious tort cases but have not proposed a complete approach. The Supreme Court applied a definitional balancing approach to the tort of intentional infliction of emotional distress in *Hustler Magazine, Inc. v. Falwell*.[99] In *McNair v. Worldwide Church of God*,[100] a California court of appeals used definitional balancing to analyze the tensions between the Free Exercise Clause and defamation. Finally, a number of student commentators have made proposals that move in this direction.[101] None of these courts or commentators, however, has suggested a comprehensive structure for analyzing cases involving religiously motivated tortious conduct.

1. *The (Incomplete) Movement in Case Law*

No court has applied a definitional balancing test when weighing the right to recover for intentional infliction of emotional distress against the constitutional right to the free exercise of religion. The Supreme Court, however, has applied a form of this analysis when balancing the right to recover for intentional infliction of emotional distress against the right of free speech. In addition, definitional balancing has been used to balance reputational injuries against free exercise rights.

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97. Rowe v. Superior Court, 19 Cal. Rptr. 2d 625, 638 (Ct. App. 1993); *see also id.* (noting "the potentially chilling effects upon the practices of religious groups resulting from the threat of litigation over unfounded punitive damages claims"); Wollersheim v. Church of Scientology, 260 Cal. Rptr. 331, 344 (Ct. App. 1989), *cert. denied*, 495 U.S. 910 (1990), *vacated and remanded*, 499 U.S. 914 (1991) (remanded on issue of punitive damages only) (expressing concern about "lawsuits which might chill religious practices"); Roppolo v. Moore, 644 So. 2d 206, 208 (La. Ct. App. 1994) ("The same threat [of a 'chilling effect'] applies equally to the First Amendment right of the free exercise of religion."). Commentators have also noted the possible chilling effect. *See, e.g.*, Lee W. Brooks, Note, *Intentional Infliction of Emotional Distress by Spiritual Counselors: Can Outrageous Conduct be "Free Exercise"?*, 84 MICH. L. REV. 1296, 1309 (1986); Richard L. Cupp, Jr., Comment, *Religious Torts: Applying the Consent Doctrine as Definitional Balancing*, 19 U.C. DAVIS L. REV. 949, 969–70 (1986).

98. *See* Brooks, *supra* note 97, at 1324 ("[T]he more clearly and publicly a rule protecting spiritual counseling is announced, the less likely there is to be any burden on free exercise in the form of a 'chilling' of the process of counseling due to fear of civil liability."); Cupp, *supra* note 97, at 973.

99. 485 U.S. 46 (1988).

100. 242 Cal. Rptr. 823 (Ct. App. 1987).

101. *See infra* Subsection III.A.2.

In *Hustler Magazine, Inc. v. Falwell*,[102] the Supreme Court extended the definitional balancing test used in defamation law to the tort of intentional infliction of emotional distress in a free speech context. *Hustler* magazine published a parody advertisement stating that the Reverend Jerry Falwell's "first time" was with his mother in the outhouse after they had consumed a large quantity of alcohol. Falwell sued for both defamation and intentional infliction of emotional distress. The Supreme Court held that Falwell was a public figure and hence the actual malice standard of *New York Times* applied to his defamation action, thereby preventing him from recovering on this claim.

Nevertheless, Falwell argued that this heightened standard did not apply to his intentional infliction of emotional distress claim.[103] The Court disagreed and extended the actual malice standard of *New York Times*:

> We conclude that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with "actual malice" . . . .[104]

Although the Court left unclear exactly how "actual malice" could be shown in a case of this sort,[105] it extended its application of this standard to claims for intentional infliction of emotional distress, thus applying a form of definitional balancing when tort recovery would conflict with free speech.

In *McNair v. Worldwide Church of God*,[106] a California appellate court applied the actual malice standard to a case involving religious defamation. A Church leader, in explaining the Church's doctrine regarding divorce, allegedly defamed the plaintiff. In his speech, the leader used the McNairs as an example, and his version of the history of their relationship was partially false. The court concluded that this case necessitated "balanc[ing] the reputational interest of our citizenry against the interests protected by the First Amendment's free exercise of religion clause."[107]

The court turned to the definitional balancing approach of defamation law to determine the proper outcome. It noted that, were this a traditional defamation case, negligence, not actual malice, would be the applicable

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102. 485 U.S. 46 (1988).

103. *Id.* at 52–53.

104. *Id.* at 56.

105. The ad in question was clearly a parody—it was labeled as such. The outrageousness of the ad informed readers that it was not intended to portray the true relationship between Falwell and his mother or to explain his sexual experiences. All the parties acknowledged that the ad was not true. As a parody, it was not intended to be taken as true. Thus, it is difficult to understand the Court's application of a standard that revolves around falsity.

106. 242 Cal. Rptr. 823 (Ct. App. 1987).

107. *Id.* at 831 & n.10 (noting that this case involved religious actions because "[d]octrinal explanation by a duly authorized minister is as much an exercise of religion as any other religious practice").

standard because the plaintiff was a private figure.[108] In this case, however, the free exercise right, not the free speech right, was under consideration. The court concluded that, although the balance with free speech did not mandate that actual malice be shown, the balance with free exercise did.[109] To achieve the proper balance between the right to recover for reputational injuries and the right to the free exercise of religion, the court adopted a definitional balancing approach that parallels the one used in defamation cases.

2. *The (More Complete) Movement in the Academic Literature*

Academic commentators also have looked at the possibility of applying definitional balancing to religious tort cases. In 1981, as the tort of clergy malpractice first was emerging, one commentator suggested that "[b]y analogy [to *New York Times*], the free exercise clause . . . should receive similar safeguards. . . . Arguably, counseling by religious groups and clergy that is shown to be malicious should not receive first amendment protection. A narrow 'actual malice' test may avoid first amendment obstacles."[110] Another commentator, in suggesting remedial limitations for actions against religious groups for intentional infliction of emotional distress, also drew parallels to the logic of *New York Times*: "Support for such a remedial reform proposal is available by analogy to defamation, another tort in which constitutional rights weigh in the balance."[111] Both of these authors, however, failed to outline fully a theory of definitional balancing for religious tort cases.

Richard Cupp has attempted to describe a definitional balancing approach to religious torts.[112] In particular, he proposes a definitional balancing test based on the consent theory of tort law.[113] Drawing a parallel to *New York Times*, Cupp suggests:

> Voluntary membership in a religious group should create a rebuttable presumption that an individual consents to the group's

108. *Id.* at 832–33.

109. *Id.* at 833 (holding that actual malice must be shown by clear and convincing evidence).

110. Samuel E. Ericsson, *Clergyman Malpractice: Ramifications of a New Theory*, 16 VAL. U. L. REV. 163, 182 (1981) (citation omitted).

111. Hayden, *supra* note 13, at 664.

112. *See* Cupp, *supra* note 97.

113. For authorities using consent theory to address similar questions, see Guinn v. Church of Christ, 775 P.2d 766, 775–77 (Okla. 1989) (holding that First Amendment defense turns on plaintiff's consent); Brooks, *supra* note 97, at 1310–16 (discussing importance of membership in analysis of clergy malpractice claims). Brooks implicitly applies a form of definitional balancing. His test, applied only to clergy malpractice cases, would initially ask whether a plaintiff was a member of the defendant's religious organization. *Id.* at 1311. Brooks argues that the state has less interest in allowing a member-plaintiff to recover since the plaintiff presumably consented to the religious actions when he or she joined the group. Nevertheless, this consent can be vitiated if (1) the plaintiff was not competent to consent, or (2) the defendants acted with (common law) malice. *See id.* at 1322 (outlining "narrow class of cases in which a spiritual counselor's free exercise defense . . . merits serious consideration"). Overall, Brooks does not believe that the free exercise defense should protect defendants in many clergy malpractice situations.

> religious conduct. Shifting the burden of proof to the member/plaintiff would reduce ad hoc considerations, and make recovery more difficult. . . . Equally important, the presumption would recognize that the plaintiff's voluntariness greatly reduces the government interest in allowing tort recovery.[114]

In Cupp's view, just as the state interest in allowing recovery for defamation of public figures—who voluntarily have thrust themselves into the public eye—is less than it is for private figures, so the state interest in protecting individuals from intentional religious torts is less if they have joined the group voluntarily.

Cupp would structure the First Amendment defense in the following manner. Initially, the defendant must show that (1) the challenged actions were religiously motivated, and (2) the plaintiff was a member of the religious group. The burden then shifts to the plaintiff to prove lack of consent.[115] If the plaintiff fails to prove this, he or she loses the suit.

After drawing an initial parallel to defamation law, however, Cupp fails to follow through. He considers the question of consent to be an all-or-nothing issue. Thus, if a plaintiff fails to prove that he or she did not consent, the suit is over. Cupp analogizes this threshold to one in defamation law, but draws the wrong parallel: "[In defamation law] the plaintiff's preliminary barrier to recovery is proving knowing falsity or reckless disregard for the truth."[116] The appropriate comparison, however, is to whether the plaintiff is a public or private figure. For, while the lawsuit proceeds regardless of this determination, a public-figure plaintiff will face a larger barrier to recovery. Although Cupp accurately demonstrates the need for a definitional balancing standard in religious tort cases, he fails to propose an adequate definitional balance.

Cupp's theory also fails to fully protect important free exercise rights. Consider the discipline cases, *Paul*, *Bear*, and *Guinn*. In all three of these cases, the plaintiffs were no longer members of the church in question. Nevertheless, they challenged actions the churches took after separation. According to Cupp's theory, each of these plaintiffs was a nonmember and therefore did not consent either explicitly or implicitly to the group's action. Thus, Cupp would argue that the churches in these cases could not assert a First Amendment defense.[117]

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114. Cupp, *supra* note 97, at 975.

115. *Id.* at 976–79. Tort law provides some insight into how a plaintiff could rebut the presumption of consent. First, some people are incapable of consent. *Id.* at 979–81. Second, a member-plaintiff could "prov[e] that the tortious conduct was outside the scope of the consent implied by her membership." *Id.* at 981. Finally, if the defendant fraudulently obtained consent, the plaintiff's consent would not be valid. *Id.* at 982–83. Unlike at least one commentator, *see* Richard Delgado, *Cults and Conversion: The Case for Informed Consent*, 16 GA. L. REV. 533 (1982), Cupp would not require a standard of informed consent. *Id.* at 983.

116. Cupp, *supra* note 97, at 977.

117. *Id.* Brooks's analysis would be similar under the circumstances. *See* Brooks, *supra* note 97, at

A church should not automatically lose its First Amendment protection, however, simply because its actions affect a nonmember. Consider shunning. When a member or ex-member is shunned, other members act in concert in a way that affects a nonmember. But allowing recovery in tort would still raise free exercise questions because liability would still arise from religiously motivated conduct. Thus, although Cupp's theory seems to be helpful in some situations, it does not completely capture the relationship between the Free Exercise Clause and tort recoveries against religious defendants.[118]

The definitional balancing approach proposed in this Note rectifies these deficiencies. Following directly the adaptations to the common law adopted by the Supreme Court's defamation jurisprudence, this Note proposes a definitional balance that more appropriately considers the relationship between the right to free exercise of religion and the right to recovery in tort.

B. *A Comprehensive Proposal for Definitional Balancing*

One commentator has explained that "[t]he grand challenge is to develop legal standards that protect all but penalize none unduly on account of religious belief."[119] I now turn to this grand challenge. Explicitly drawing parallels to defamation law at each step of my analysis, I propose a form of definitional balancing that will properly accommodate the state interest in allowing recovery for intentional infliction of emotional distress and the free exercise rights guaranteed by the First Amendment. Each proposed modification of the common law standards will follow directly from a modification made in defamation law.

1. *A More Stringent Liability Standard*

As a parallel to the more stringent standard of "actual malice" in defamation law, I propose two changes in the application of the intentional infliction of emotional distress tort to religiously motivated actions. The first is simply a more stringent application of the tort as it was initially created; the second is an additional requirement.

1310–11.

118. Consent theory is not particularly helpful in coercive indoctrination cases. Cupp and Brooks acknowledge situations in which a religious-group member was not competent to consent to the group's actions, and therefore his or her consent is vitiated. The question of incompetent consent, however, brings the courts right back to where they started. A jury must weigh, in an ad hoc manner, various factors to determine whether a member consented. This question almost certainly will turn on a "battle of the experts," who will analyze the indoctrination method of the religious organization in detail. A jury may simply proclaim that it believes the plaintiff's experts and then proceed to award large damages against the defendant.

119. Hayden, *supra* note 13, at 607.

As noted in Section I.A, liability for intentional infliction of emotional distress has turned on just one element of the tort—outrageousness. This focus exacerbates conflicts with the Free Exercise Clause because the jury concentrates solely on whether the defendant's religiously motivated conduct was outrageous. Instead, all three elements of the tort should have to be proven explicitly to allow recovery. Carefully defining and explaining causation issues is especially important. That a defendant intentionally acted outrageously is insufficient; the defendant must intentionally (or recklessly) cause the severe emotional distress. Focusing the members of the jury on this causal analysis will force them to consider what was done intentionally by the defendant.

A special verdict form would force the jury to analyze each element of the tort separately. Specifically, requiring a special verdict would prevent the jury from simply returning a general verdict against the defendant and collapsing elements of the tort without actually considering the appropriate causal analysis.[120] A jury instructed on the proper causal chain and forced to answer, specifically and in writing, each question that builds the causal chain—Was the defendant's action outrageous? Did the defendant intentionally or recklessly cause injury? Was the emotional injury severe?—will be more likely to analyze the tort properly.

My second proposal is to increase the stringency of the liability standard. While the standard of actual malice could be imported directly from defamation law,[121] its focus on the distinction between truth and falsity makes it inappropriate in the religious tort context. Actual malice was defined in *New York Times* as "with knowledge that it was false or with reckless disregard of whether it was false or not."[122] The question of actual malice could be interpreted in two ways in the context of religiously based conduct: (1) Does the defendant know that the religious belief underlying the alleged tortious conduct is false? or (2) Does the defendant know that the challenged conduct is based on a false interpretation of the underlying religious belief? Courts should avoid attempting to answer either of these questions. With respect to the first question, investigating the veracity of religious beliefs lies outside the appropriate realm of the courts. As the Supreme Court noted many years ago in *United States v. Ballard*, "Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put

120. *See, e.g.*, Suter v. San Angelo Foundry & Mach. Co., 406 A.2d 140, 142 (N.J. 1979) (using special verdict form to focus jury on each element of negligence claims); Elizabeth A. Faulkner, *Using the Special Verdict to Manage Complex Cases and Avoid Compromise Verdicts*, 21 ARIZ. ST. L.J. 297 (1989) (discussing use of special verdict forms to assist and focus juries).

121. Some commentators have proposed the importation of the actual malice standard. *See* Ericsson, *supra* note 110, at 182.

122. New York Times v. Sullivan, 376 U.S. 254, 280 (1964).

to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others."[123]

The second interpretation of actual malice presents a more interesting question. Given that religious beliefs are taken on faith, a defendant theoretically could not act with reckless disregard of whether his or her conduct was based on a proper interpretation of the underlying religious belief. In other words, analyzing whether an individual "recklessly took something on faith" does not make sense. *Ballard*, however, allows courts to investigate whether an individual truly believed a religious claim.[124] Thus, a court in a religious tort case could assess whether an individual believed that the actions he or she was taking were religiously mandated. While such an interpretation of actual malice might be constitutionally permissible, it would not properly balance the right to engage in religious conduct against the right to recover for tortious actions. For example, in some situations, recovery in tort may be appropriate even if the challenged conduct is truly based on accepted religious beliefs.

I propose a higher standard that is a form of common law malice. Rather than asking whether the defendant acted knowing that he or she was espousing false beliefs or false interpretations thereof, a court should focus on motivation. To avoid being malicious,

> the conduct must not have been motivated by hostility toward the plaintiff or by a desire to benefit the group or a member of it at the plaintiff's expense. In positive terms, the conduct must have been motivated principally or entirely by a desire to benefit the [plaintiff], spiritually or otherwise.[125]

Under my proposal, a plaintiff can recover only if he or she proves that the defendant acted with common law malice of this sort.

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123. United States v. Ballard, 322 U.S. 78, 86 (1944). The Court further noted:

> The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position.

Id. at 87.

124. *Id.* at 84. *Ballard* involved a mail-fraud charge in which the defendants were accused of making false representations about religious beliefs. *Id.* at 79. The Supreme Court considered whether the Free Exercise Clause prevented such charges.

125. Brooks, *supra* note 97, at 1322. Korean Presbyterian Church Normalization Committee v. Lee, 880 P.2d 565 (Wash. Ct. App. 1994), approvingly cites Brooks's discussion of the definition of malice, *id.* at 569, although the *Lee* court does not reach the issue of defining malice itself. One inappropriate definition of malice would be that the religious leaders did not properly follow church doctrine. This definition would embroil secular courts in determining what proper doctrine entails, an action prevented by the ecclesiastical abstention doctrine, discussed *supra* note 64. *See Lee*, 880 P.2d at 570.

This standard appropriately balances the plaintiff's right of recovery in tort against the defendant's free exercise rights. An action taken to benefit the church at the expense of someone else should not be protected. The common law malice standard closely parallels the common-interest privilege applied in religious defamation cases.[126] The *Restatement (Second) of Torts* notes that "[t]he common interest of members of religious . . . associations is recognized as sufficient to support a privilege for communications among themselves concerning the qualifications of the officers and members and their participation in the activities of the society."[127] If such comments are made maliciously, however, the privilege is lost.[128] Similarly, the state interest in protecting religious conduct undertaken maliciously is less than that in protecting other religious conduct. Therefore, when balancing interests in a case alleging intentional infliction of emotional distress from religiously motivated conduct, recovery should be allowed only if the defendant's actions can be proven to be motivated by malice.

2. *The Standard of Proof*

While the standard of proof in civil cases is a preponderance of the evidence, I propose that a standard of clear and convincing evidence be applied to cases alleging intentional infliction of emotional distress based on religiously motivated conduct. The Supreme Court applied this heightened standard in defamation law to tip the balance in favor of free speech rights.[129] Similarly, raising the standard of proof to clear and convincing evidence for claims of intentional infliction of emotional distress against religious defendants would put a thumb on the scale in favor of the free exercise of religion. This "thumb" would help to limit any possible chilling effect created by allowing recovery because religious actors will know that plaintiffs must prove all elements of the tort, including common law malice, by clear and convincing evidence.[130]

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126. It also parallels suggestions made by some courts and judges in religious tort litigation. *See, e.g.*, Paul v. Watchtower Bible & Tract Soc'y, 819 F.2d 875, 883 n.7 (9th Cir.), *cert. denied*, 484 U.S. 926 (1987); Guinn v. Church of Christ, 775 P.2d 766, 791–92 (Okla. 1989) (Wilson, J., dissenting in part and concurring in part) ("In First Amendment religious freedom cases punitive damages may not be imposed upon defendants unless evidence of actual or implied malice is tendered to support the claim."); *Lee*, 880 P.2d at 569 ("Where a plaintiff can establish that the defendant acted with actual malice, such malice negates any claim that the action was undertaken for religious purposes.").

127. RESTATEMENT (SECOND) OF TORTS § 596 cmt. e (1965).

128. *See* C. Jhong, Annotation, *Defamatory Nature of Statements Reflecting on Plaintiff's Religious Beliefs, Standing, or Activities*, 87 A.L.R.2d 453, 473 (1963) ("[T]he defense of privilege founded on the contention that the statement or charge related to church matters has been denied where it appeared that the communication was made maliciously and fraudulently . . . .").

129. *See supra* Section II.B.

130. For a discussion of the common law malice standard, see *supra* Subsection III.B.1.

3. *The Burden of Proof*

The definitional balance I propose requires no burden shifting. In defamation law, the defendant initially bore the burden of proving truth because it was an affirmative defense. The Supreme Court shifted the burden to the plaintiff to prove falsity in order to avoid any chilling of protected speech.[131] In intentional infliction of emotional distress suits, however, defendants bear no such burden. As in defamation cases, plaintiffs must prove all elements of the tort—they have the burden of proof. Thus, a definitional balance that accounts for the free exercise implications of allowing recovery for intentional infliction of emotional distress requires no change in the common law assignment of burdens.

4. *Limitations on Remedies*

Finally, I propose limits on damages. The definitional balance employed in defamation law limits the types of damages that can be recovered because the risk of large awards would increase the chilling effect on speech.[132] This same risk exists in intentional infliction of emotional distress cases, and therefore limits on damages are appropriate.

When juries have considered cases of intentional infliction of emotional distress based on religiously motivated conduct, they have tended toward large damages awards.[133] For example, in *Christofferson v. Church of Scientology*,[134] the jury awarded thirty-nine million dollars in punitive damages.[135] In *Wollersheim v. Church of Scientology*,[136] the jury awarded a total of thirty million dollars: five million dollars in compensatory damages and twenty-five million dollars in punitive damages.[137] Awards of this size certainly threaten to chill religious activity. Groups faced with this open-ended potential for damages must either limit their religious conduct to activities that they are sure will not subject them to liability or continue their activities and risk large damages awards.

Many courts have acknowledged that the risk of large damages awards constitutes the major underlying threat to free exercise that stems from allowing recovery for intentional infliction of emotional distress. For example,

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131. *See supra* Section II.C.

132. *See supra* Section II.D.

133. *See generally* Hayden, *supra* note 13, at 615–22 (discussing large damage awards against religious defendants when cases are sent to juries).

134. 644 P.2d 577 (Or. Ct. App. 1982).

135. Hayden, *supra* note 13, at 617 (citing Fred Leeson, *Ore. Jury: Church Must Pay $39 M for Fraud*, NAT'L L.J., June 10, 1985, at 8, 8).

136. Wollersheim v. Church of Scientology, 260 Cal. Rptr. 331 (Ct. App. 1989), *cert. denied*, 495 U.S. 910 (1990), *vacated and remanded*, 499 U.S. 914 (1991) (remanded on issue of punitive damages only).

137. *Id.* at 336.

in *Murphy v. International Society of Krishna Consciousness*,[138] the court noted that a religious actor "cannot be forced to choose between censoring its religious scriptures to remove material which may be offensive to contemporary society and *paying tort damages* for the privilege of maintaining unpopular religious beliefs."[139]

As in defamation cases, the state has an interest in allowing recovery for actual injuries, not in allowing individuals to punish groups for holding unpopular religious beliefs. For this reason, punitive and exemplary damages should not be allowed in suits alleging intentional infliction of emotional distress based on religious conduct.[140] Furthermore, even determining compensatory damages in these cases is difficult. As noted in Section I.A, compensatory damages in such actions often serve to punish the defendant, because actual damages are difficult to calculate when the sole injury suffered is severe emotional distress. One solution "might be to limit plaintiffs to actual pecuniary losses in such cases, perhaps with some provision for attorney's fees. This scheme would actually *compensate* plaintiffs for provable losses while avoiding the imposition of penalties on religiously motivated persons and groups . . . ."[141] By limiting damages in these ways, the definitional balance would appropriately favor the free exercise of religion, allowing plaintiffs to recover for their demonstrable injuries while minimizing the consequent chilling effects.

C. *An Application of the Definitional Balancing Approach*

The definitional balancing approach outlined in this Note would increase individuals' ability to predict the outcome of tort litigation stemming from religiously motivated actions. The facts of *Wollersheim v. Church of Scientology*[142] provide an example for a hypothetical application of this balancing test. In *Wollersheim*, the plaintiff was a member of the Church of Scientology who attempted to leave the Church. Each time he considered leaving, Church members threatened to apply their retributive doctrines against him. The court held that these doctrines were religiously motivated. In

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138. 571 N.E.2d 340 (Mass.), *cert. denied*, 502 U.S. 865 (1991).

139. *Id.* at 348 (emphasis added); *see also* Paul v. Watchtower Bible & Tract Soc'y, 819 F.2d 875, 880 (9th Cir.), *cert. denied*, 484 U.S. 926 (1987) (noting "that the imposition of tort damages . . . would constitute a direct burden on religion"); Rowe v. Superior Court, 19 Cal. Rptr. 2d 625, 637–38 (Ct. App. 1993) ("'Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.'" (quoting Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 336 (1987))); McNair v. Worldwide Church of God, 242 Cal. Rptr. 823, 830 n.7 (Ct. App. 1987) ("Imposition of money damages is a burden upon religious action.").

140. *See* Wellford, *supra* note 31, at 231 ("[P]unitive damages should not be available in actions against churches.").

141. Hayden, *supra* note 13, at 666 (footnotes omitted). Pecuniary losses might include such things as the costs of associated medical bills, legal fees, and other demonstrable monetary damages.

142. 260 Cal. Rptr. 331 (Ct. App. 1989), *cert. denied*, 495 U.S. 910 (1990), *vacated and remanded*, 499 U.S. 914 (1991) (remanded on issue of punitive damages only).

addition, the court decided that the Church of Scientology initiated specific retributive doctrines with the intention of destroying Wollersheim's business and with knowledge of his deteriorating mental condition.[143] The Church identified Wollersheim as "suppressive" and therefore authorized that he be "neutralize[d]," "economically, politically and psychologically."[144]

The *Wollersheim* court conducted a lengthy, traditional free exercise balancing analysis. It considered whether each Church action that allegedly inflicted injury warranted First Amendment protection. For each, the court concluded that no protection was warranted.[145] Although the court treated this as an easy case, a more rigorous application of the traditional free exercise analysis indicates that it should not have been so simple.

The basic free exercise question is whether allowing recovery in tort constitutes a narrowly tailored means to serve a compelling state interest. The court's discussion of "auditing" provides insight into its reasoning.[146] Arguing that many religions seek to force individuals to conduct intensive self-reflection, the court determined that voluntary auditing might be protected by the First Amendment even though it may cause psychological injury to some members.[147]

Nevertheless, the court distinguished the auditing of Wollersheim because it was conducted in a coercive environment. It concluded that Wollersheim was coerced because his position in the Church alerted him to the retributive doctrines—he knew the risks of refusing auditing.[148] The court held that the state had a compelling interest in preventing such coercion. Unfortunately, the court did not explain either the link between knowledge of possible punishments and coercion or the link between coercion and a compelling state interest. Ignoring these issues, however, made the case an easy one for the court to resolve.

Unlike the ad hoc free exercise balancing analysis used by the *Wollersheim* court, the definitional balancing test outlined in this Note can be applied in a straightforward manner. Moreover, a court's decision under the definitional balancing test would be predictable. The plaintiff would have the burden of proving by clear and convincing evidence that the Church maliciously engaged in extreme or outrageous behavior that intentionally or recklessly caused severe emotional distress; if a jury found for the plaintiff, damages would be limited. A careful analysis of the *Wollersheim* facts under the proposed test

143. *Id.* at 336–37.
144. *Id.* at 336.
145. *Id.* at 337–49.
146. *Id.* at 343–48. Auditing involves intense, one-on-one, personal questioning to discover incidents "that act as blockages preventing people from realizing their full potential and living life to the fullest." *Id.* at 343.
147. *Id.* at 344.
148. *Id.* at 344–45.

demonstrates that the Church would still be liable but that the damages awarded in the case would be significantly lower.

Under the proposed test, the plaintiff would have to prove each element of the action by clear and convincing evidence, specifically common law malice and the elements of the intentional infliction of emotional distress tort. First, the plaintiff would have to prove common law malice on behalf of the defendant, which could be demonstrated in this case. The Church's policies specifically were held to be retributive in nature. Moreover, the Church did not act with any intent to help Wollersheim, but rather wanted to punish him for choosing to leave the Church. Even while he was a member of the Church, he often was coerced to continue exercises that he wanted to stop because he believed they were worsening his psychological condition. Thus, the Church was motivated "by hostility toward the plaintiff or by a desire to benefit the group . . . at the plaintiff's expense,"[149] and therefore acted maliciously.

Second, the elements of the tort of intentional infliction of emotional distress must be considered. The *Wollersheim* court conducted an extensive and correct analysis of this question.[150] Under the proposed definitional balance, the plaintiff would have to prove each element by clear and convincing evidence, as opposed to the preponderance of the evidence standard used by the court. The facts of *Wollersheim* at least would raise a question for the jury as to the existence of each element.

Finally, if a jury found that the plaintiff had proven all elements by clear and convincing evidence, the amount of damages would be limited. In the actual case, the jury awarded compensatory and punitive damages.[151] Under the proposed definitional balance, however, punitive damages would not be available. Although the Church acted with malicious intent, the underlying religious motivation protects it from punishment for the challenged actions. But the Church could still be forced to pay compensatory damages.[152]

Wollersheim would likely recover under the definitional balance proposed in this Note. Although the court treated the case as an easy one under traditional free exercise analysis, the case is not so clear when the traditional test is rigorously applied. Under the test applied in this Note, however, the case would be straightforward.

149. Brooks, *supra* note 97, at 1322.

150. *Wollersheim*, 260 Cal. Rptr. at 336–37.

151. *Id.* at 336.

152. The appellate court reduced the compensatory damages from $5 million to $500,000 because the jury award was "grossly disproportionate to the evidence concerning Wollersheim's damages." *Id.* at 353. This result is more consistent with the balance outlined in this Note.

IV. CONCLUSION

When constitutional rights are at issue, courts often perform an ad hoc balancing test, weighing societal interests against an individual's interest in exercising a fundamental right. In defamation law, however, the Supreme Court has adopted a definitional balancing test, changing the definition of the tort itself to reflect the appropriate balance between free speech rights and the right to recover for injury to reputation. This Note has argued that courts should follow the lead of defamation law and adopt a definitional balancing approach to claims alleging intentional infliction of emotional distress based on religiously motivated conduct. The intentional infliction of emotional distress tort presents the same need to balance constitutional rights against the right to tort recovery, has the same problem of a chilling effect and, like defamation, can be resolved most consistently through the adoption of a definitional balancing test.