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Suing churches for brainwashing: Legitimate tort or a new threat to religious freedom?

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SUING CHURCHES FOR BRAINWASHING:

LEGITIMATE TORT OR A NEW THREAT TO RELIGIOUS FREEDOM?

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ABSTRACT

Judicial activism is a corruption of the nature of judicial power and is nowhere more evident than in the law of torts. One result has been the creation of the new tort, "brainwashing." The California courts first allowed the "brainwashing" tort to be used against a church in Molko v. Holy Spirit Association. Through judicial activism this court fundamentally altered tort law. By allowing a church to be sued for its methods of evangelism, Molko also seriously threatened religious liberty. The balancing test used in Molko, rooted in judicial activism, promoted religious toleration instead of religious liberty, and thus contradicted the framers' idea of religious liberty. Churches should take some steps to protect themselves from the new "brainwashing" tort, but legislative or judicial action will be necessary to restore true religious liberty. A recent Supreme Court decision has lent some hope that the framers' understanding of religious liberty will be restored.

"Civil and religious liberty generally go hand in hand, and the suppression of either one of them, for any length of time, will terminate the existence of the other."

New York Chancellor James Kent

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I

INTRODUCTION

During the last three decades, numerous new religious movements have surfaced in American culture. One group in particular, the Unification Church, was introduced into American society during the late 1960's and experienced much growth during the 1970's. By 1988, the Church claimed over 2,000,000 members worldwide, with over 40,000 adherents in the United States.[1] However, this growth did not come without controversy. The Unification Church has come under attack in both the legislative and judicial arenas. In state legislatures across the country bills have been introduced to establish special guardianships or conservatorships for the victims of so-called cults, whose values have been substantially altered by "coercive persuasion" or "brainwashing."[2] In court actions, the problems of the Unification Church have involved matters

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[1] Charles F. Petranek, "Recruitment and Commitment," Society 25, No.2 (January - February 1988):49.

[2] The New York legislature passed such a bill in 1980 and 1981 which was vetoed. Other states that have attempted such legislation (so far unsuccessfully) are: Ohio, Kansas, Texas, Oregon, Connecticut and Delaware. See, Thomas S. Brandon, Jr., New Religions, Conversions and Deprogramming: New Frontiers of Religious Liberty (Oak Park, Illinois: Center for Law & Religious Freedom, 1982), 33-43.

such as lawsuits stemming from deprogramming activities[3] to the conviction of the Church's founder, the Reverend Sun Myung Moon, on charges of tax fraud.[4]

One of the latest cases involved two former members of the Unification Church, David Molko and Tracy Leal. In the latter part of 1979, while they were both still members of the Church, Molko and Leal were each forcibly abducted on separate occasions, by third parties. They were taken to a private house in which they were confined for some time. During this period, they were "persuaded to relinquish their belief in and association with the [Unification] Church."[5] In 1980, after being "deprogrammed," they filed suit against the Church alleging that they had been fraudulently induced into joining. The plaintiffs also alleged intentional infliction of emotional distress and false imprisonment in association with the fraud and deceit claims.

In support of their claims, the plaintiffs offered expert testimony to establish that both of them had experienced what some doctors referred to as a "systematic manipulation of social influences." In layman's terms,

[3] "Deprogramming" is generally defined as the forcible abduction of a cult member (usually arranged by the parents through some agent) and the coercive re-education of the cult member to reject his new found religious beliefs. See, Id. at 15-17.

[4] Holy Spirit Association for Unification of World Christianity v. Tax Commissioner of the City of New York, 450 N.Y.2d 292, 435 N.E.2d 662 (1982).

[5] Molko v. Holy Spirit Association, 224 Cal.Rptr. 817, 821 (1986).

these doctors testified that Molko and Leal had been "brainwashed." According to the brainwashing scientific model, the process consisted of control over their social and physical environment, separation from the outside world, including family and friends, influencing their behavior through rewards and punishments, oppression of criticism, and finally, an attainment of a uniform state of mind. The doctors who espoused this theory suggested that "systematic manipulation of social influences" had robbed the subjects of their free will and independent judgment until they became "robot-like" in their behavior. Another group of doctors has described the experience of Molko and Leal as nothing more than a religious conversion and subsequent indoctrination, albeit somewhat intensive. In the minds of these doctors, the two did nothing more than voluntarily join a very closely knit religious community. The question arises, was their experience brainwashing or was it simply religious conversion?

At a hearing on the matter, the Superior Court of the County of Alameda rejected the plaintiffs' claims on First Amendment grounds and granted summary judgment in favor of the defendant Church.[6] In the spring of 1986, the plaintiffs appealed to the California Court of Appeals. The Court concluded that the summary judgment in favor of the

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[6] 198 Cal.App.3d 199, 224 Cal.Rptr. 817 (Cal.App. 1st Dist., Mar 31, 1986) (No. A025338, A020935).

defendant had been properly granted.[7] In 1987 Molko and Leal once again appealed, this time to the California Supreme Court. In Molko v. Holy Spirit Association for the Unification of World Christianity,[8] California's high court reversed the decisions of the two lower courts, and for the first time in America, allowed disgruntled, former adult members to sue a church for injuries allegedly caused by "brainwashing."

By labelling the Church's methods of indoctrinating new believers "brainwashing,"[9] the California Supreme Court justified this intrusion into the constitutionally sensitive area of free exercise of religion. In doing so, the Court said in effect that this behavior was socially harmful and must be stopped. In rendering its decision, the Court accepted as fact a very controversial, new psychological theory of brainwashing; it also chose to disregard years of established tort and constitutional law precedents. If this precedent is followed in the future, the very core beliefs and practices of some religions will be subjected to unprecedented judicial scrutiny. What are the causes of

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[7] 228 Cal.Rptr. 159, 721 P.2d 40 (Cal., Jul 24, 1986).

[8] 46 Cal.3d 1092, 252 Cal.Rptr. 122, 762 P.2d 46 (1988), cert. den. 488 U.S. ___, 109 S.Ct. 2110, 104 L.Ed. 2d 670 (1989).

[9] The terms "brainwashing," "coercive persuasion" and "mind control" were all used interchangeably by the Court. See, Molko, 762 P.2d 46, 54, n.10.

this new threat to religious freedom? And what does the Court's decision mean for religious freedom in America?

In Molko, the religious practices of a church, that historically were outside the jurisdiction of civil courts, were not only burdened by judicial action but were also subjected to the possibility of future liability. This precedent has eroded the traditional legal protections American society has offered all religious believers. The result today has been a growing acceptance of the idea that churches and ministers may be subjected to liability for whatever they say and do, no matter how intimately tied to religious faith the conduct may be. Constitutional scholar Carl Esbeck spoke of the threat to churches at a recent National Institute on Tort and Religion, sponsored by the American Bar Association:

> When a church or other religious society is sued in a complaint sounding in tort, assumption of jurisdiction by the court makes the judge a 'state actor.' In affording a common law remedy for plaintiff's injury, and in refusing to dismiss once defenses are properly raised, the civil court thereby regulates the activities of the Church.[10]

Although the recent rise in religious tort litigation has focused primarily on minority religious movements, the Molko case and other similar precedents will put the religious freedom of even major Christian denominations at

[10] Carl H. Esbeck, "Concepts of Church Autonomy in the First Amendment," National Institute on Tort and Religion, San Francisco, California, May 4-5, 1989, by the American Bar Association Section on Tort and Insurance and Division for Professional Education, 412.

substantial risk. In an article published by Chalcedon Report, attorney J. Shelby Sharpe of Fort Worth, Texas, has written of the threat posed to orthodox Christian churches: "[P]rivate litigants have begun to bring suits against the Church and Christian ministries," and "[a]ll signs point toward a rapid escalation of these attacks . . . in the very near future."[11]

Any erosion of religious liberties presents a threat to all civil liberties. As the Nineteenth Century, New York Chancellor James Kent said, "Civil and religious liberty generally go hand in hand, and the suppression of either one of them, for any length of time, will terminate the existence of the other."[12] Therefore, the protection of religious liberty, even for unpopular groups, is essential and should not be considered as evidence of tacit approval of their beliefs or their practices. Thomas Jefferson felt that protecting the religious beliefs of minority religions from governmental interference showed a genuine commitment to the principle of religious liberty. In a letter to Benjamin Rush in 1803, he said: "[I]t behooves every man who values liberty of conscience for himself to resist

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[11] J. Shelby Sharpe, "The Coming Nuclear Attack on Christianity in America," The Chalcedon Report, No. 291 (October 1989):2 (emphasis added).

[12] James Kent, Commentaries on American Law, I, 10th edition (Boston: Little, Brown, and Co., 1860), 657.

invasions of it in the case of others; or their case may, by change of circumstances, become his own."[13]

Ironically, the main threat to religious freedom in American has come from the very institution set up to protect that freedom -- the courts, mainly through judicial activism. An examination of the Molko decision will demonstrate the prevalence of judicial activism in the constitutional law area. "The current state of constitutional doctrine is such that judges have considerable discretion in the adjudication of disputes involving governmental practices and public policy. Judges are said to be interpreters of a 'living Constitution.'"[14]

Judicial activism, however, has not been limited to the area of constitutional law, it has also been rampant in the state courts, especially in the area of tort law. In the law of torts activist judges have ignored common law tort doctrines, imposed new standards of conduct, and ultimately, created new tort causes of action. This is the subject of the second chapter, where I will demonstrate the failure of the California Supreme Court to address two critical tort law issues in the Molko case. This section will also illustrate how activist judges have significantly modified

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[13] Thomas Jefferson, April 21, 1803 Letter to Benjamin Rush, quoted in Thomas S. Brandon Jr., New Religions, Conversions and Deprogramming, New Frontiers of Religious Liberty, Center for Law & Religious Freedom, January 1982, preface.

[14] Jonathan K. Van Patten, "Judicial Independence and the Rule of Law," Benchmark II (May - August 1986): 119.

traditional tort rules and abandoned others altogether in the last thirty years. The consequences of this creation of new standards of conduct will also be examined as well as the effect these tort decisions have on societal norms.

In the third chapter, I will examine the constitutional implications of the Molko decision. Again in this section, I will illustrate how most of the First Amendment problems in this case can be attributed to judicial activists. These activists, while claiming historical support for their positions, have radically departed from the intentions of the framers of the free exercise clause of the First Amendment. By an examination of the historical documents of Virginia, I will also demonstrate how judicial activism in constitutional law has actually created a free exercise clause test that runs exactly contrary to the intentions of the framers, mistakenly establishing religious toleration instead of true religious liberty.

This search will study the record of the First Congress, which drafted the Bill of Rights, as well as the historical documents surrounding Virginia's struggle for religious freedom. In the course of this inquiry, the principle of the free exercise clause will be clearly set out. The religious liberty principle embodied in both the First Amendment and the Virginia Declaration of Rights will be shown to be one of limited jurisdiction which teaches that government has no right to interfere in man's personal beliefs or in the way he professes his faith to others.

The fourth and final chapter will make some suggestions of how churches can protect themselves from this new type of tort suit. Recommendations for correcting the problems, by both legislative and judicial means, will also be made. Special attention will be given to juridical concepts that have done more to erode religious freedom than protect it. At the conclusion of this in-depth analysis, I will argue that the threat to religious liberty is so great and the problems so fundamental, that only a re-establishment of the principle of limited jurisdiction to the First Amendment law, as understood by the framers, will restore true religious freedom. Furthermore, I will demonstrate how a recent Supreme Court decision presents an excellent opportunity to re-assert the founding principles of religious freedom.

II

"BRAINWASHING" THEORY: A CORRUPTION OF TORT LAW

In Molko v. Holy Spirit Association[15] a six-to-one majority of California's highest court decided that former members of a religious organization could state a valid cause of action for fraud and deceit against that religious organization based solely on the allegation that the religious body had "brainwashed" them into becoming members.[16] The disturbing nature of the facts in this case may be what prompted the California Supreme Court to take the unprecedented step of allowing a tort action for "brainwashing" against the Unification Church.

The facts of the case indicate that at separate times, David Molko and Tracy Leal were both approached by Unification Church members while waiting for a bus in the San Francisco, California bus terminal. The members befriended Molko and Leal and invited them to dinner the same evening, never disclosing the fact that the group was

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15 Supra. note 8.

16 Jeremiah S. Gutman, "Tort Liability for 'Brainwashing' -- A Threat to the First Amendment," National Institute on Tort and Religion, San Francisco, California, May 4-5, 1989, by the American Bar Association Section on Tort and Insurance and Division for Professional Education, 169.

part of the Unification Church or that the purpose of the invitation was to recruit the two as new members. In fact, Church members specifically denied any "religious connection,"[17] telling the plaintiffs that the group was an "international community"[18] called the "Creative Community Project."[19] Dinner was followed by a lecture on social problems and a slide show of the organization's farm at Boonville, which was located a few hours north of the city. Both plaintiffs were invited to visit the farm for a rural retreat. After being persuaded to accept the invitation, Molko and Leal both agreed to visit the farm; unbeknownst to the two, the farm at Boonville was the Church's regional center for indoctrination of new members. During the course of a two-week stay at the farm, both plaintiffs were exposed to the teachings of Reverend Sun Myung Moon, participated in a rigorous daily routine of physical activity, and eventually, were told the true identity of the Church. Shortly after their respective stays at the Boonville farm, both Molko and Leal decided to join the Unification Church.

Admittedly, the facts in Molko are somewhat disturbing. When deception is involved in a religious conversion, as was the case in Molko, it casts a shadow of doubt over the entire conversion experience. Proselytes in our society

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17 Molko, 762 P.2d 46,50.

18 Id.

19 Id. at 51.

normally know ahead of time the nature of the group they are joining; however, religious conversions by nature often involve previously unexpected (and sometimes radical) changes in beliefs, attitudes and fundamental values. Such changes are part and parcel of any new choice of faiths. But subsequent dissatisfaction with those choices does not justify legal action against the group, especially if the organization is a church, with its attendant First Amendment protections. Furthermore, judges should not let the particular circumstances of a case, no matter how egregious they may seem, prejudice their legal judgement. Judges should apply the law fairly and perform their duties with impartiality.

The following analysis of the Molko opinion, written by Justice Stanley Mosk, will show that the California Supreme Court was neither impartial nor unbiased in rendering its 1988 decision. Instead, the Court lived up to its reputation "as the nation's leading activist court."[20] A brief description of what the Court did in this decision runs the gamut of judicial activist endeavors in tort law. The Molko court ignored basic elements of tort law, imposed new standards of conduct, disregarded well established common law tort doctrines, and created by judicial fiat a new tort cause of action. This chapter will analyze the

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[20] Edward J. Erler, (Senior Ed.), "Editor's Introduction," Benchmark II, Nos. 3 & 4 (May - August 1986): 113.

examples of judicial activism evident in Molko, but before examining these specific points, it is important to review the nature and limits of judicial power generally.

The Nature of Judicial Power

Judicial activism can be attributed, at least in part, to an erosion of the historical understanding of the proper role of the judiciary. The parameters of judicial authority, although not specifically spelled out in the Constitution, were clear in the minds of the framers. These historical guidelines were incorporated in the principle of separation of powers. Under this principle the legislative, executive and judicial branches each have certain designated powers and duties. The framers' original understanding of the duties of the judiciary were described by Chief Justice John Marshall in the landmark case of Marbury v. Madison:[21]

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.[22]

This view of the limited nature of the judiciary's role to "say what the law is" rather than make law, was well-established in America during the Eighteenth Century. It can be found in the most influential legal writings of the period, including Blackstone's Commentaries on the Laws of England. According to Blackstone, judges did not make the

21 5 U.S. (1 Cranch) 137 (1803).

22 Id. at 177.

law, they only discovered, stated, and applied it. Therefore, a judge's opinion in a particular case was not law; it was only evidence of law.[23] Thus, if a court overruled a prior precedent, Blackstone claimed that the "judges do not pretend to make a new law, but to vindicate the old one from misrepresentation."[24] This was the traditional view of the role of courts in America until well into the nineteenth century.

In stark contrast to the traditional historical view of the nature and limits of judicial power, most modern jurists and commentators have viewed judicial law-making as one of their most important functions. Leo Pfeffer, a well respected writer on constitutional issues has taken this view in his comments on the Supreme Court:

> In short, while the Constitution provides formal methods for its amendment, the Supreme Court can be considered a de facto continuing convention expanding or rewriting the Constitution as the need arises. This, of course, applies . . . to all . . . parts of the Constitution, and explains why it has remained, with so few formal amendments, a vital and viable charter for almost two centuries.[25]

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[23] Herbert W. Titus, God, Man and Law: The Biblical Principles (Virginia Beach, Virginia: CBN University, a.k.a, Regent University, 1983), 128.

[24] Sir William Blackstone, Commentaries on the Laws of England, I (Oxford: Clarendon Press, 1769), 69-70.

[25] Leo Pfeffer, God, Caesar, and the Constitution (Boston, Massachusetts: Beacon Press, 1975), 31 (emphasis original).

In this respect, judges have come to be interpreters of a "living Constitution." Judge F. Douglas McDaniel[26] has seen a real threat to our form of government in this modern trend of judicial law-making. Writing in Benchmark he has noted:

> Judicial activism of this nature strikes at the very heart of constitutional government. Constitutional government, as the framers of both the United States Constitution and the California Constitution knew only too well, is grounded in the separation of powers. Law-making belongs to the legislative branch of government because the legislature is the branch most representative of the people. It is true that the executive and judicial branches have an agency in lawmaking, as in the veto power of the executive and the power of judicial review in the judiciary. However, the power of judicial review cannot be transmogrified into the power to legislate without denying the people's right to self governance.[27]

Judicial Activism in the Area of Torts

The modern trend of judicial activism has been nowhere more evident that in the law of torts. America's leading tort expert of the twentieth century, the late William L. Prosser, has admitted that "in tort law as elsewhere, courts are making new law."[28] In tort decisions judges are called upon to discern and apply their most fundamental moral values to the broad array of human activities. Therefore,

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[26] Judge McDaniel is an Associate Justice on the California Court of Appeals.

[27] F. Douglas McDaniel, "Preface: Judicial Activism and Citizen Responsibility," Benchmark II, Nos. 3 & 4 (May - August 1986), 109 (emphasis added).

[28] William Prosser and W. Page Keeton, Prosser and Keeton on Torts, 5th ed. (St. Paul, Minnesota: West Publishing Co., 1984), 18.

tort decisions have often reflected the values of society at large, creating in effect a microcosm of the conflict between opposing values. In his treatise on the subject, Prosser has recognized the potential conflict of values in the tort arena: "Perhaps more than any other branch of the law, the law of torts is a battleground of social theory."[29]

What is a Tort?

To explain the reasons why tort law has become a "battleground of social theory" it is necessary to define some of the key concepts in tort law. An explanation of the key tort concepts will also set the stage for exploring the implications of the new social theories advanced by judicial activists in the tort arena. Any definition of a tort should be prefaced with a confession of inadequacy, for no matter how one defines a tort, inevitably there will be some torts that do not fall precisely within the definition. Even Prosser has admitted that "a really satisfactory definition of a tort is yet to be found."[30] Nevertheless, what follows is an attempt at a general definition. Some of the key concepts included in this definition will in turn be more carefully defined for the purposes of this discussion.

A tort is an act or omission resulting in the breach of a legal duty that causes some damage to another person or

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[29] Id. at 15.

[30] Id. at 1.

property, outside the area of contractual agreement. A valid tort claim must contain at least four elements: the existence of a legal duty to another, the breach of the legal duty to that person, resulting damage, and a causal link between the breach and the resulting damage (i.e., proximate cause). The concepts of "legal duty" and "proximate cause" carry a great deal of legal significance both in tort law and in this discussion; therefore, they will be discussed more in detail in a later section.

In torts where the damage was the result of someone's negligence, the recoverable damages are usually limited to monetary compensation for the resulting economic loss, plus any other loss that can be readily verified. In tort cases where the harm suffered is the result of someone's intentional or reckless actions, in addition to compensation, the injured person may be awarded punitive damages. These are designed to punish the person who caused the harm and to deter such future action.

In a tort suit the proper role of the judiciary is the same as in any lawsuit: to accurately say what the law is in a particular matter and to insure that the law is accurately applied to the facts of the case and upheld. In some controversies, the judge may simply look to the statutes of the jurisdiction that define the nature of the legal duty that exists. However, in most tort cases questions of legal duty arise that simply do not fall specifically within the scope of a statute. In such cases

the judge must look to established custom as a guide to legal duty. Whether a judge looks to a statute or to custom, the obligation is the same: As Marshall and Blackstone said, he must first declare or say what is the relevant legal duty. Professor John K. Van Patten[31] has explained it this way: "The judge is not to be swayed by personal or public opinion on a legal matter, but must uphold the law, whether it be in the form of the Constitution, a statute or a common law precedent."[32] This responsibility of course requires objectivity and impartiality; it follows that any deviation from these guiding principles is a violation of the judge's most vital responsibility.

Declarations of legal duty are also particularly important because they are the threshold matter upon which the entire tort analysis rests. If there is no relevant legal duty, then there can be no breach, and therefore, no tort. In exercising their powers, judges must be careful to declare and uphold only recognized legal duties as dictated by statute, by well-established case precedent or by custom. Judges must not attempt to enforce or impose what are purely moral duties, but only those duties clearly recognized in law. Nineteenth and early twentieth century legal

[31] John K. Van Patten is a Professor of Law at the University of South Dakota School of Law.

[32] Jonathan K. Van Patten, "Judicial Independence and the Rule of Law," Benchmark II, Nos. 3 & 4 (May - August 1986): 117 (emphasis added).

commentators understood this clear limitation on a judge's power.

In his Treatise On The Law of Torts, Thomas M. Cooley recognized the distinction between legal and moral duty when he wrote:

> An act or omission may be wrong in morals, or it may be wrong in law. It is scarcely necessary to say that the two things are not interchangeable. No government has undertaken to give redress whenever an act was found to be wrong, judged by the standard of a strict morality; nor is it likely that any government ever will.[33]

Cooley cited many cases which recognized both the distinction between legal and moral duty and the judge's incapacity to enforce duties that are purely moral in nature. For example, in Mahoney v. Whyte[34] the court declared: "It is not appointed to human tribunals to sit in judgment upon the moral delinquencies or abstract wrongs affecting only the conscience."[35] This principle of limitation has continued up to the present time, although it has not been given much attention in the modern tort treatises.[36]

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[33] Thomas M. Cooley, A Treatise On The Law Of Torts, I (4th ed.) (Chicago, Illinois: Callaghan and Company, 1932), 4 (emphasis added).

[34] 49 Ill.App. 97 (1893).

[35] Cooley, supra note 33, at 4, n. 3.

[36] See, e.g., J. D. Lee and Barry A. Lindhal, Modern Tort Law, Liability and Litigation (Rev. ed.) (Deerfield, Illinois: Callaghan and Company, 1977, updated to 1988), sec. 2.01 at 10.

The importance of this threshold question of legal duty, however, cannot be overstated because it should serve as a threshold check on the judge. Perhaps, the reason that modern commentators have paid so little attention to legal duty as a limit on judicial power is that the concept no longer serves that purpose. To the modern jurist the question of whether a legal duty exists, and if so what it entails, by necessity involves value judgments and moral choices. G. Edward White[37] has put it this way: "[F]rom its origins tort law has been concerned with a fundamental moral question, the question of answerability for a perceived 'wrong.'"[38] Under this view, the moral choices a judge makes are dictated by his system of values which, in turn, impact future court opinions by defining acceptable legal standards of conduct. The impact on society is obvious: As the judge declares what standards of conduct are acceptable and unacceptable (and therefore actionable), the norms of society begin to reflect the judge's values.

This process creates a dynamic interaction between tort decisions and societal norms: judges base their legal decisions on what they perceive are the norms of society, while at the same time, the norms of society are shaped by

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[37] G. Edward White is the John B. Minor Professor of Law and History at the University of Virginia.

[38] G. Edward White, "The Moral Dimensions of Tort Law," The World and I (February 1989): 483.

the decisions made by judges. Prosser endorsed this process of change:

> [A]s our ideas of human relations change the law as to duties changes with them. Various factors undoubtedly have been given conscious or unconscious weight, including convenience in administration, capacity of the parties to bear the loss, a policy of preventing future injuries, the moral blame attached to the wrongdoer, and many others. Changing social conditions lead constantly to the recognition of new duties. No better general statement can be made than the courts will find a duty where, in general, reasonable persons would recognize it and agree that it exists.[39]

It is not surprising that as the popular norms and values of society have changed, unprincipled judges have created new legal duties that in their minds best reflect society's "evolving standards." Modern American public life has become increasingly dominated by "secular" values. John Whitehead has noted this in his book, The Second American Revolution:

> We are all captives, to a greater or lesser extent, of the age in which we live. In our case we are locked into an age where [secular] humanism has come to full flower and is now confronting Christianity with a fierceness as never before. Autonomous, secular humanism has replaced Christianity as the consensus of the West. This has had devastating effects....[40]

As the influence of secular values has increased in society, traditional Judeo-Christian notions of morality have lost their influence. This shift in values has had a direct

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[39] Prosser, supra note 28, at 359 (footnotes omitted; emphasis added).

[40] John Whitehead, The Second American Revolution (Elgin, Illinois: David C. Cook Publishing Co., 1982), 40.

impact on tort law, and one of the areas of tort law where the changes have been most evident has been the changing notions of legal duty.

Legal Duty versus Moral Duty

In tort law the broad concept of duty presumes standards of right and wrong to which man in society will be held accountable. These standards of right and wrong are inherent in the tort law system. Most legal commentators have agreed that "from its origins tort law has been concerned with a fundamental moral question, the question of answerability for a perceived 'wrong.'"[41] Certain acts or omission in human activity will inevitably violate some of society's standards of right and wrong. Historically, only those acts or omission deemed punishable by civil government were considered legal wrongs and thus within the jurisdiction of civil government. Other violations that were purely moral in nature, offended only the conscience or the heart of man and thus were subject only to moral censure or societal disapprobation. To the degree that these moral violations actively involved other parties and were actions with significant civil implications, they were deemed to be breaches of legal duty. Therefore, the concept of legal duty involved actions or omissions with direct civil implications that could be regulated by civil government.

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41 White, supra note 38, at 483.

In contrast, moral duties or those matters regulated only by the heart or conscience were beyond the regulatory power or jurisdiction of civil government.

The fact that some "wrong" behavior was subject only to moral censure and not punishable at law was simply one way to distinguish the breach of a legal duty from the breach of a purely moral duty. H.L.A. Hart and A.M. Honore in their classic work Causation in the Law have recognized this clear distinction between legal and moral duties:

> [W]e must bear in mind the many factors which must differentiate moral from legal responsibility in spite of their partial correspondence: the law is not only not bound to follow the moral patterns of attribution of responsibility but, even when it does, it must take into account, in a way which the private moral judgement need not and does not, the general social consequences which are attached to its judgements of responsibility; for they are of a gravity quite different from those attached to moral censure. The use of the legal sanctions of imprisonment, or enforced monetary compensation against individuals, has such formidable repercussions on the general life of society that the fact that individuals have a type of connexion with harm which is adequate for moral censure or claims for compensation is only one of the factors which the law must consider, in defining the kinds of connexion between actions and harm for which it will hold individuals legally responsible.[42]

Various reasons have been suggested for the vastly different treatment of breaches in moral and legal duties. Hart and Honore have offered two of the most common:

> Always to follow the private moral judgment . . . would be far too expensive for the law: not only in the crude sense that it would entail a vast machinery of courts and officials, but in a more

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[42] H. L. A. Hart and A. M. Honore, Causation in the Law (Oxford: Clarendon Press, 1959), 62 (emphasis added).

> important sense that it would inhibit or discourage too may other valuable activities of society.[43]

The principal reasons for distinguishing between moral and legal duties can be classified in two categories: reasons of practicality and reasons of propriety. The practical reasons for differentiating legal and moral duties have involved considerations of the time and money that would be spent enforcing purely moral standards. Prosser has recognized the difficulties the law would encounter in attempting to enforce moral duties:

> [T]here are . . . many immoral acts which do not amount to torts, and the law has not yet enacted the golden rule. It is impossible to afford a lawsuit for every deed of unkindness or betrayal, and there is much evil in the world which must necessarily be left to other agencies of social control.[44]

The impossibility of enforcing purely moral duties has arisen not only from the limitations on resources such as time and money but also from the physical impossibility of policing the hearts and minds of citizens.

In addition to the practical difficulties of enforcing moral duties, there have been compelling reasons of propriety which also proscribed the civil enforcement of these duties. Unquestionably, moral duties such as kindness and charity are matters which originate in, and indeed are controlled by, the heart or conscience. Traditionally, it has been deemed improper for the civil government to enforce

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[43] Id.

[44] Prosser, supra note 28, at 23 (emphasis added).

these duties through the use of force. An example of this historic prohibition on civil enforcement of moral duties can be found in the Virginia Constitution of 1776, which stated that certain duties could "be directed only by reason and conviction, not by force or violence."[45] This distinction is crucial because it speaks of the nature of the moral duties: they are motivated by love for one's fellow man, not by fear of civil penalty.

Since moral duties originate in and are controlled by the heart, any enforcement mechanism other than reason or conviction, such as force or violence, would destroy the very nature of these duties. In view of the civil government's incapacity to enforce these moral duties, by virtue of its lack of jurisdiction over the heart and conscience, it has been the responsibility of other social institutions to foster obedience and respect of these moral duties. The other social institutions charged with that responsibility are the family, community and church, whose task it has been to inculcate and encourage moral behavior. It is clear that there were both reasons of propriety and practicality to reinforce the jurisdictional distinction between moral and legal duties. In a 1908 law review

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[45] William T. Hutchinson and William M. E. Rachal, et. al., eds., The Papers of James Madison, I (Chicago: University of Chicago Press, 1962), 175.

article,[46] the late Francis H. Bohlen gave several examples of the distinction, including the following:

> Carpenter, C. J., says in Buch v. Amory Co., 69 N.H. 257 (1897): 'With purely moral obligations the law does not deal. For example, the priest and the Levite who passed by on the other side were not, it is supposed, liable at law for the continued suffering of the man who fell among thieves, which they might and morally ought to have prevented and relieved.'[47]

It is significant that Chief Justice Carpenter chose a Church teaching, the story of the good Samaritan, to illustrate the unenforceability of moral duties at law. This is further evidence that at common law, moral duties were considered to be exclusively the responsibility of other social institutions, such as family, church, and community.

Because no social institution was foolproof, the mechanisms available for the enforcement of moral duties, namely moral censure and societal disapprobation, sometimes fell short of their goal of ensuring moral behavior. However, this failure on the part of other social institutions to enforce moral duties did not entitle civil government to step in and enforce them through force or violence. Indeed, there have been several examples of morally reprehensible conduct that cause harm yet go unpunished. Prosser recognized this when he wrote that

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[46] Francis H. Bohlen, "The Moral Duty to Aid Others as a Basis of Tort Liability," University of Pennsylvania Law Review 56 (1908), 217-244.

[47] Id. at 218, n.3.

"many a moral scoundrel has been guilty of moral outrages, such as base ingratitude, without committing any tort. It is legal justification which must be looked to: the law will hold the defendant responsible for what the law regards as unjustified,"[48] not for deeds for which we simply have moral compunction.

The failure of other social institutions, such as community, family and church, to effectively enforce moral behavior, and the ensuing societal frustration at the lack of enforcement, has led to a breakdown of the moral and legal duty distinction and its accompanying jurisdictional principle. This breakdown has led legal commentators, such as Prosser, to minimize the legal and moral duty distinction, and most activist courts to disregard the distinction entirely.

Particularly distasteful to activist courts and commentators like Prosser are the "rescue" cases; however, these are the precedents that perhaps most clearly illustrate the distinction between moral duties and legal duties. The common law has consistently held that although there may be a moral duty to aid one in peril, there is not a legal duty. In his 1908 article, Bohlen cited one of the early cases describing the moral duty in rescue cases:

> 'It is undoubtedly the moral duty of every person to extend to others assistance when in danger. And if such efforts should be omitted by any one when they can be made, without imperiling his own

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[48] Prosser, supra note 28, at 4 (emphasis original).

> life, he would by his conduct draw upon himself the just censure and reproach of good men; but this is the only punishment to which he would be subjected by society.'[49]

This common law rule was followed well into this century. In Osterlind v. Hill (1928),[50] an expert swimmer stood by and watched another man drown, even though there was a boat and a rope readily available with which to save the drowning man. Although it did recognize a moral duty to save the drowning man, the court recognized the common law distinction and did not impose a legal duty to rescue the victim. An even later case affirmed the same common law rule in yet another rescue case. In Yania v. Bigan (1959),[51] one man asked another to jump into a large open trench in a strip mining area that contained eight to ten feet of water. While Yania drowned, Bigan made no effort to rescue the man. As in Osterlind, the court refused to impose any liability on the defendant for making no effort to rescue the drowning victim.

No matter how these cases offended the judges' sense of moral duty, they nevertheless remained faithful to the principle that government could not, through its judicial arm, enforce purely moral duties. Therefore, the rescue cases remain as classic examples of how courts observed the

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[49] U.S. v. Knowles, 26 F.Cas. 800, 806, No. 15, 540; 4 Sawy. 517 (D.C.Cal. 1864), as cited in Bohlen, supra note 46, at 218 (emphasis added).

[50] 263 Mass. 73, 160 N.E. 301 (1928).

[51] 397 Pa. 316, 155 A.2d 343 (1959).

proper jurisdictional bounds of civil government and left moral duties to be inculcated and enforced by other social institutions such as community, family and church. Ultimately, the common law tradition recognized that moral duties were matters of the heart and could only be enforced through reason and conviction.

The distinction between legal and moral duties, evident in the rescue cases, not only taught the important jurisdictional principle that civil government had no authority over the heart or mind of man, the distinction also incorporated a vital presumption about the nature of man. This moral and legal duty distinction recognized that man was in essence a moral creature not simply an animal or a machine that reacted to environmental stimuli or input, but rather, a rational being that made choices with regard to his course of conduct. This moral model of man presupposed a mind and a free will that was able to think, evaluate, analyze and make independent choices about his behavior. However, the moral model of man did not minimize the fact that man did indeed react (sometimes very strongly) to outside stimuli, but it did dictate that because he was a moral thinking creature, he was required to take responsibility for his own choices and actions.

This is one of the underlying presuppositions of the jurisdictional principle, which dictates that the state cannot command people to do good. Another way to view this distinction is to note that the law only reaches

misfeasance, not nonfeasance. The latter are matters of the heart, enforceable only through conscience. Even Prosser has, albeit reluctantly, recognized the fact that such inaction cannot be punished by civil government: "The remedy in such cases," he has written, "is left to the 'higher law' and the 'voice of conscience'...."[52]

Molko v. Holy Spirit Association: The Duty Question

The question of duty is a threshold question in any tort action. The Court must always ask: Is there a legally enforceable duty? Surprisingly, this issue received no attention in Molko v. Holy Spirit Association.[53] True to its liberal, activist reputation, the California Supreme Court skirted the threshold question by ignoring it altogether. After an extensive recitation of the facts, the Court launched directly into an analysis of the fraud claim -- not even pausing to ask if the duty to be truthful in the context of evangelization was legally enforceable.

By ignoring the important threshold question of legal duty, the Court presumed that there was a legal duty to be truthful in the context of proselytization.[54] But was this presumption justified? From an historical perspective,

[52] Prosser, supra note 28, at 375.

[53] Supra note 8.

[54] The legal duty of honesty imposed by the Molko court can be distinguished from the defense of "truth" in a defamation action, where truth is not an element of the tort itself but rather, a defense to the tort action.

courts have very rarely recognized a legal duty of honesty outside of commercial transactions.[55] The only exceptions to this rule are misrepresentations that have other significant civil or criminal ramifications, well within the jurisdiction of civil government. For example, misrepresentation actions have been upheld where the fraud resulted in damage to property; where it resulted in a physical injury; where one partner was enticed into an invalid marriage; and where an adult was fraudulently induced into employing a minor, thereby incurring criminal penalties.[56] The traditional limitation of fraud actions to the commercial arena has been reinforced by Prosser. While describing the history of these actions, he has written: "[I]n the great majority of the cases that have come before the courts the misrepresentations have been made in the course of a bargaining transaction between parties. . . [Misrepresentation] has been confined in practice very largely to the invasion of interests of a financial or commercial character, in the course of business dealings."[57]

When the Molko court presumed a legal duty of honesty in an area outside of commercial transactions, it totally disregarded the common law of fraud and other established

[55] Although David Molko did seek restitution of a $6,000 gift he made to the Church, even the Supreme Court admitted that the real "transaction" in question was the joining of the Church. See, Molko, 762 P.2d 46, 53-54.

[56] Prosser, supra note 28, at 726.

[57] Id.

legal precedents. Careful consideration of the legal duty question was especially important in Molko, because it was a religious fraud case. Such cases, which call into question religiously motivated conduct, have raised serious constitutional issues. The nature of fraud actions is such that inquiries must be made into the truth or falsity of the representation; yet, under the First Amendment, such judicial inquiries are strictly prohibited. U.S. v. Ballard[58] is an excellent example of the care courts have taken in a religious fraud action. Ballard involved the prosecution of a religious group for criminal fraud. The defendants were founders of a religious group called "I am," who were accused of fraudulently representing that they were divine healers. Through these representations, they had induced members of the public to send money through the U.S. mail. The trial court (respecting the constitutional issues) carefully excluded from the jury's consideration the matter of the truth or falsity of the Ballards' claim of divine powers. On the sole issue of whether the respondents made those claims in "good faith," the Ballard court said this was a matter of law for the court, not for the jury. In upholding the trial court decision, the Supreme Court said:

> The religious views espoused by the 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

[58] 322 U.S. 78 (1944).

> 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 forbidden domain.[59]

The Ballard court showed a great respect for the jurisdictional concept that civil courts have no authority over the area of thoughts and beliefs -- a principle embodied in the First Amendment of the Constitution. In contrast, the Molko court showed little respect for the jurisdictional principle embodied in the Bill of Rights, paying only lipservice to the First Amendment through application of the compelling state interest balancing test. Clearly, fraud or misrepresentation claims in a religious context such as Ballard, and by analogy Molko, raise serious constitutional questions. Recognizing this fact, the California Supreme Court should have been much more thorough in its tort analysis, and it should not have simply presumed the existence of a legal duty. By ignoring this essential threshold question of legal duty in its tort analysis, the Court ventured unjustifiably into a judicial activism that threatens First Amendment religious liberty.

Not surprisingly, some of the California high court's greatest abuses of judicial authority have come in the area of duty. "There is little analysis of duty in the courts. Frequently, it is dealt with in terms of what is called 'proximate cause.'"[60] As Prosser has noted:

[59] United States v. Ballard, 332 U.S. 86-87 (1944) (emphasis added).

[60] Prosser, supra note 28, at 358.

> [Duty's] artificial character is readily apparent; in the ordinary case, if the court should desire to find liability, it would be quite easy to find the necessary 'relation' in the position of the parties toward one another, and hence to extend the defendant's duty to the plaintiff.[61]

Where common law notions of duty stand in the way of a desired result, activist courts have not hesitated to create an exception to the rule and imposed a duty where none had existed previously.

A perfect example of the judicial creation of a previously non-existent legal duty is Tarasoff v. Regents of University of California,[62] where the California Supreme Court created a new duty of psychotherapists to third persons who may be the victims of violence committed by a patient. Although the Tarasoff court admitted that there was little precedent for finding a legal duty where no special relationship had previously existed, the Court nevertheless proceeded to impose a new legal duty on psychotherapists. Not only did the court in Tarasoff disregard case precedent, it also judicially overturned a state statute that cloaked doctors with immunity from this type of tort action. This bold creation of a new legal duty is the same type of judicial activism present in Molko, where the California Supreme Court repeated its performance in Tarasoff and judicially created a new legal duty.

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[61] Id. at 357 (footnote omitted).

[62] 17 Cal.3d 425, 131 Cal.Rptr. 14, 551 P.2d 334 (1976).

Professor John Wettergreen has noted the rapid decay of the concept of duty in California tort decisions. As an example of the manipulation of the duty concept, he cited Dillon v. Legg (1968)[63]:

> The Court declared that duty is not a moral entity, dependent upon the individual's capacity for free choice. Indeed, to [Justice] Tobriner, the concept of 'duty' is not even an aid to legal analysis, but just a legalistic 'shorthand statement of a conclusion' that a defendant must pay.[64]

Since about 1960, California courts and those of many other states have joined the rapid retreat from any articulated concept of individual moral duties. As the moral duties have lost their significance, so has the legal and moral duty distinction, and when that distinction is gone, so is the jurisdictional principle it reinforces. The predictable result has been that courts have imposed legal duties where none existed previously and where they had no right to regulate conduct. In their crusade to abolish moral absolutes, the activist courts have substituted a theory of social fault for individual moral duty. This new definition of duty has resulted in the resurgence of a radically different concept of "duty" in tort law. Under this modern duty analysis, the individual is no longer "at fault" for his actions; it is "the system" or society that

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[63] 68 Cal.2d 728, 441 P.2d 912, 69 Cal.Rptr. 72 (1968).

[64] Wettergreen, John A., "The Bird Court on the Law of Torts," Benchmark II, Nos. 3 & 4 (May-August 1986), 135 (emphasis added).

caused the damage. The function of the courts in such a system has been to play the role of social engineers, fine-tuning the ills of society. With this self-imposed mandate, judicial activist courts have been free to tinker with the "artificial" concept of duty and have imposed liability in whatever manner they believed would best reform society.[65]

Perhaps in recognition of the overextension of legal duties in Tarasoff and subsequently in Molko, the California Supreme Court more recently refused to create a new legal duty in the religious counseling field. In the highly publicized Nally v. Grace Community Church of the Valley,[66] parents whose son committed suicide sued the Church and Church-related counselors where their son had been a member. Under a theory of "clergy malpractice," the parents alleged negligent religious counselling had, at least in part, led their son to commit suicide. In contrast to Molko, the Court did an extensive duty analysis, and five of the seven justices decided that pastoral, nontherapist counselors had no duty to refer a potentially suicidal person to a professional therapist.[67] Even more striking, the Nally court said that "extending liability to voluntary,

[65] Id. at 131-132.

[66] 47 Cal.3d 278, 253 Cal.Rptr. 97, 763 P.2d 948 (1988).

[67] Two other justices (J. J., Kaufman and Broussard), decided that such a duty did exist; however, they found insufficient evidence that the duty had been breached. Accordingly, they concurred with the majority decision to dismiss the action.

noncommercial and noncustodial relationships [was] contrary" to public policy![68] Although Nally may signal a return to more principled legal duty analysis in California's Supreme Court, subsequent courts will still have to contend with a long history of judicial activism that has significantly altered this common law concept. As noted earlier in a quote from Prosser, modern jurists have little difficulty in altering "duty" in order to impose liability on whomever they desire.

Causation Problems in the Molko Tort Analysis

Ignoring the fact that courts have never before imposed a legal duty of honesty in religious recruitment and that such a duty runs contrary to both the common law and constitutional law, the Molko Court proceeded to analyze the fraud and misrepresentation claim. The essential elements of the fraud claim as stated by this court were: "(1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of the falsity (scienter); (3) intent to defraud (i.e. to induce reliance); (4) justifiable reliance; and (5) resulting damages."[69] The Church conceded, for pleading purposes, the existence of: element (1) the Church's agents had made a false statement when they denied any affiliation with the Unification

[68] Nally, supra note 66, at 298, 253 Cal.Rptr. 97, 109 (emphasis added).

[69] Molko, 762 P.2d 46, 53 (citing, Seeger v. Odell, 18 Cal.2d 409, 414, 115 P.2d 977 (1941)).

Church; element (2) the statements were known to be false at the time they were made; element (3) the Church members intended to mislead and induce the reliance of the plaintiffs; and element (5) the plaintiffs incurred some resulting damage.

The Court explained the remaining fourth element of "justifiable reliance" as follows: If the facts showed (or raised a significant question) that the misrepresentations were the immediate cause of the plaintiff's joining the Church and that without such misrepresentation, the plaintiffs would not have entered into the "transaction,"[70] then the question of justifiable reliance should be decided by a jury, and the Church was not entitled to its motion for summary judgment. If in contrast, the facts fail to show (or raise a significant question) that the plaintiffs relied on the misrepresentation at the time they joined the Church and that such reliance was justified in view of all the facts, then there was no justifiable reliance and the defendant was entitled to summary judgment. This would dictate that the question be withheld from the jury.

The issue of "justifiable reliance" is essentially one of causation. Who actually caused the harm the plaintiffs allegedly suffered, the Church or the plaintiffs themselves? There was no question that the Church at first misrepresented itself to Molko and Leal, but the facts are

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[70] Molko, 762 P.2d 46, 53-54.

undisputed that at the time of the "transaction" (i.e. joining the church), Molko and Leal were fully aware of the true identity of the Church. In fact, the dissent cited many statements from the plaintiffs' own depositions which indicated that the choice to join the Church was both voluntary and deliberate -- facts which the majority conveniently left out of its analysis.[71] As a matter of law, in California and in other jurisdictions, a plaintiff's knowledge of the fraud before the occurrence of the transaction absolutely negates justifiable reliance.[72] The reason for this rule is that there can be no reliance on a representation where actual knowledge of the falsity exists.[73] The two lower courts held accordingly.

How then, could the California Supreme Court have arrived at the exact opposite conclusion? The answer to this question, like the answer to many other questions surrounding this case, lies in judicial activism. Through judicial activism, the Court judicially created a new tort

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[71] Id. at 68-69.

[72] See, e.g., Chavez v. Citizens for a Fair Farm Labor Law, 148 Cal.Rptr. 278, 84 Cal.App.3d 77 (Cal.App. 1978); Smith v. Brown, 59 Cal.App.2d 836, 140 P.2d 86 (Cal.App. 1943); Re Estate of Newhall, 190 Cal.Rptr. 109, 214 P.231, 28 A.L.R. 778 (Cal. 1923); Maxon-Nowlin Co. v. Norswing, 166 Cal.Rptr. 509, 137 P. 240 (Cal. 1913); Van Ettinger v. Pappin, 588 P.2d 988 (Mont. 1978); and see, generally, 34 Cal Jur 641, Fraud and Deceit, (3d.ed. 1977 & Supp. 1987), sec 43, and Restatement (Second) of Torts, sec. 541 and comment.

[73] See, People v. Alba, 46 Cal.App.2d 859, 117 P.2d 63 (Cal.App. 1941); Elko Mfg. Co. v. Brinkmeyer, 216 Cal.Rptr. 658, 15 P.2d 751 (Cal. 1932).

action of "brainwashing" and then embarked upon a process of using the brainwashing theory to satisfy the necessary element of the justifiable reliance. In the process, the Court disregarded the undisputed facts, ignored prior case precedent, and ultimately adopted a rule that threatens to alter the moral nature of man recognized at common law.

Only by accepting the plaintiffs' theory that "brainwashing" does exist and that Molko and Leal were victims of such a process, was the Court able to satisfy the necessary element of justifiable reliance. The Court accepted the plaintiffs' argument that, by the time the Church disclosed its true identity, the Church's agents had already "brainwashed" Molko and Leal, turned them into "robots," and rendered them incapable of deciding not to join the Church.[74] In essence, the Court reasoned that there was sufficient evidence to indicate that the brainwashing had robbed the plaintiffs of their mental capacity to know or realize the identity of the Church. The Court then said that because the plaintiffs did not have the requisite mental capacity at the time of the transaction (i.e., joining the Church), this established justifiable reliance. In reality, the majority used the "brainwashing" theory to ignore the law of justifiable reliance and in the process, adopted a new rule about the moral nature of man.

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[74] Molko, 762 P.2d 46, 53-54.

By accepting this brainwashing theory to explain what happened to Molko and Leal, the Court was in effect using a scientific-medical model of human relations to substitute for a moral model. For only by saying that they were "brainwashed" could the plaintiffs escape the personal, moral responsibility of their own decision to join the Church. Two lower courts recognized that the plaintiffs were not entitled, at least under the law of fraud, to escape personal moral responsibility for their own decision by arguing a questionable scientific theory of brainwashing had robbed them of their free will and had, in effect, turned them into "robots."

Why was the California Supreme Court so unwilling to place the moral responsibility for their own actions on the plaintiffs? The answer, in part, lies in California Supreme Court's well established policy of favoring the plaintiff in tort suits, rather than being neutral and objective. Professor John A. Wettergreen made this point in his article on judicial activism in California tort cases: "Throughout the [California] Court's tort decisions, there is this simple, systematic bias in favor of plaintiffs, which is not even touched by the pretense of judicial impartiality."[75] This unabashed partiality is justified, at least in this Court's mind, by their duty to correct society's ills.[76]

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[75] Wettergreen, supra note 64, at 137.

[76] Id. at 137-138.

Besides the obvious problems with judicial partiality, there is a fundamental question with the Court's justifiable reliance analysis: Can a court use a scientific theory to alter the normal moral responsibility the law of fraud places on a plaintiff's own shoulders when he acts with full knowledge of the alleged deception? The answer required by case precedent and well established law is clearly no.[77] However, this Court assumed that if there was any scientific evidence that might explain the behavior of the plaintiffs, then this transformed what was normally a legal question for a court to decide into a factual question for the jury. In the process of making this decision, the Court virtually disregarded the fact that scientists are not even in agreement that "brainwashing" exists.[78]

Can scientific evidence transform what is normally a legal question into a prima facie case for the jury? Phrased more directly in terms of this case: Can scientific evidence transform a very basic presupposition of man as a morally responsible being into just another cause and effect relationship? By allowing scientific evidence on this question to go to a jury, the Molko court has altered the very moral nature of man fundamental to our legal system. Instead of accepting the presupposition of the common law

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[77] See, supra note 72.

[78] See, infra notes 90-95, and accompanying text for discussion of scientific aspects of the "brainwashing theory."

and the law of fraud, that man is a rational, moral being with a free will who is responsible for his own actions, this court substituted a "scientific" view of man that treats man as if he were just another animal reacting to stimuli or even worse, as if he were a cause-and-effect machine that will react in a scientifically predictable manner to certain input.

Harvard Law Professor Laurence Tribe has addressed the question of whether scientific evidence should be allowed to overcome conclusive legal presumptions. In his Harvard Law Review article entitled, "Trial by Mathematics: Precision and Ritual in the Legal Process,"[79] Tribe concluded that even though science (or mathematics) may contradict certain legal presumptions, those presumptions should not, for that reason, be discarded. For instance, Tribe has pointed out that, although one cannot possibly justify the legal presumption of innocence in criminal law through mathematics or science, this presumption nevertheless is so integral to our legal system that it must be maintained:

> The presumption [of innocence] retains force not as a factual judgment, but as a normative one -- as a judgment that society ought [legally] to speak of accused men as innocent, and treat them as innocent, until they have been properly convicted after all they have to offer in their defense has been properly weighed.[80]

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[79] 84 Harvard Law Review 1329 (April 1971).

[80] Id. at 1371 (emphasis original).

The implication of Tribe's thesis in the civil context of tort law is similar: scientific theory (no matter how persuasive) should not be used to alter the legal presumption about man as an individually responsible moral agent. And, if such a legal presumption is to be altered, that is a task for the legislatures, not for the courts -- an admonition that fell on deaf ears in Molko. The common law and the law of fraud presume that each adult has the moral capacity to evaluate the facts before entering into any transaction, and that if the plaintiff discovered the fraud before the transaction, he may not rely on any previous misrepresentation. This rule of law is consistent with the conclusive legal presumption of the moral nature of man.

In Molko, the plaintiffs admitted that they were "fully aware" of the Church's identity at the time that they joined,[81] but they utilized the scientific theory of brainwashing to convince the Court that even though they were told the Church's real identity, their knowledge, awareness, and free will were effectively "washed" away. What is so surprising is that the Court in Molko accepted this questionable scientific theory to supplant an established legal presumption about the nature of man.

Using clearly established tort law, supported by ample evidence, to find the Church liable is one thing, but

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[81] See, supra note 71, and accompanying text.

judicially "creating" a new tort whose validity is questionable is quite another. By using a highly questionable scientific theory[82] in support of a judicially created tort (brainwashing) to satisfy the lacking element of the fraud action, the Court's reasoning was more analogous to legal chicanery than sound jurisprudence. No wonder the dissent criticized the majority's decision as "judicial activism of the first degree."[83]

The Court's Reliance on the "Brainwashing" Theory

The credibility of the majority opinion rises or falls upon the strength or weakness of the "brainwashing" theory.[84] If the legitimacy of this theory can be disproved or sufficiently questioned, the entire holding can be undermined. The Court accepted the theory primarily in reliance upon two sources, the testimony of the plaintiffs, David Molko and Tracy Leal, and the declarations of two doctors, psychologist Dr. Margaret Singer and psychiatrist Dr. Samuel Benson. The plaintiffs claimed "that due to the rigid indoctrination, psychological and emotional pressure, they lost their ability to freely decide to stay with the

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82 See, infra note 90-95, and accompanying text.

83 Molko, 762 P.2d 46, 76, (Anderson, J., dissenting).

84 The Court stated: "We use the terms 'coercive persuasion,''mind control,' and 'brainwashing' interchangeably to refer to the intense indoctrination procedures herein." Id. at 53, n. 10.

group and, instead, they acted in a robot-like manner,"[85] contrary to their better judgment.

Yet the Court could not conscientiously allow such a revolutionary theory as brainwashing to rest simply on the self-contradicting testimony of two disgruntled former Church members. Indeed, as might be expected, the Court did not venture into bold judicial activism by creating this new tort based solely on the plaintiffs' testimony. The Court admitted that the doctors' testimony "provide[s] a scientific basis for and lend[s] support to plaintiffs' brainwashing theory."[86]

Expert testimony was offered by doctors Singer and Benson to show that the brainwashing was achieved by what they label "systematic manipulation of social influences" which consisted of five main elements:

> (1) control over the social and physical environment; (2) separation of the recruits from the outside world (including friends and family members); (3) influencing individual behavior through rewards, punishments and experiences; (4) oppression of criticism of the Church; and (5) attainment of a special uniform state of mind.[87]

A thorough reading of the Molko opinion shows that the theory of brainwashing adopted by the Court depended almost

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[85] Id. at 69, (Anderson, J., dissenting).

[86] Id. at 55.

[87] Interestingly, Judge Anderson noted in his dissent that "All of these methods are used by the more widely accepted and/or more tolerated churches in effecting religious conversions." Id. at 74 (Anderson, J., dissenting).

entirely on the testimony of the two mental health professionals. Of the two, Dr. Singer is the most renowned.

> Singer has been [the theory's] primary activist agent relative to testifying in legal trials. Indeed, Singer's testimony in civil suits based on her brainwashing argument may constitute all by itself the most effective tactic of the anti-cult movement. She has testified in 37 of these suits and acknowledged that in 1987, for instance, she worked at least one half time in these activities.[88]

The essential theories of the brainwashing model have been summarized and published by Dr. Singer in conjunction with Dr. Richard Ofshe:

> [This] paper analyzes the literature concerning the use of massive social pressure to substantially modify a person's world view. The use of 'coordinated programs of coercive influence and behavior control' in China and the Soviet Union as well as in American cultic, 'growth,' and psychotherapy organizations is considered. . . . It is suggested that the technology of this sort of influence has developed well beyond what was employed in the Soviet Union and China . . . Evidence . . . reviewed . . . suggests that there is a risk factor associated with exposure to the type of influence tactics used by some organizations that attempt thought reform.[89]

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[88] Dick Anthony, "Evaluating Key Testimony in Trials Involving Brainwashing Allegations Against Religious Movements," National Institute: Tort and Religion, San Francisco, California, May 4-5, 1989, by the American Bar Association Section on Tort and Insurance and Division for Professional Education, 142.

[89] Richard Ofshe and Margaret T. Singer, "Attacks on Peripheral versus Central Elements of Self and the Impact of Thought Reforming Techniques," National Institute: Tort and Religion, San Francisco, California, May 4-5, 1989, by the American Bar Association Section on Tort and Insurance and Division for Professional Education, 89-112.

Scientific Problems with the "Brainwashing" Model

Although Dr. Singer has gained wide recognition in legal and psychiatric circles as the leading expert on the techniques of mental coercion, coercive persuasion, and brainwashing, the Molko court's reliance on her expert testimony was unwarranted. Her work has come under increasing criticism for several reasons, including: 1) methodological problems with her research; 2) conflicts between her testimony and most research on the new religions; and 3) its lack of adherence to the diagnostic standards of the American Psychiatric Association.[90]

California psychologist Dick Anthony conducted an exhaustive review and critique of Dr. Singer's testimony given at the many trials in which she has been called as an expert witness.[91] This painstaking review of her trial and deposition testimony was necessary because, in Anthony's words: "[T]he theory that she expresses in these suits, which she designates 'The Systematic Manipulation of Social and Psychological Influence'. . . has never been published and thus has not been available for scholarly evaluation and critique."[92]

In his article entitled "Evaluating Key Testimony in Trials Involving Brainwashing Allegations Against Religious

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90 Anthony, supra note 88, at 141.

91 Id. at 142.

92 Id.

Movements,"[93] Dr. Anthony has taken Singer's theory, as expressed by her at trials and depositions, and refuted it point by point. He began by questioning her research methods and her framework of analysis:

> Singer's paradigm . . . involves the transfer to 'cults' of the brainwashing model of mental coercion that ha[s] already been demonstrated to be of no scientific value in its original purpose of explaining Communist influence on western prisoners in Korea and China.[94]

The rest of Dr. Anthony's evaluation of Singer's work continued in the same vein. He discussed each element of Singer's brainwashing theory and concluded:

> Singer's theory is thus contradicted by research data in eight primary areas: (1) the area of conversion; (2) the area of predisposing motives; (3) the area of physical coercion; (4) continuity of social and psychological techniques of influence with those in conventional institutions; (5) the area of conditioning; (6) the area of psycho-physiological stress debilitation; (7) the area of deception; [and] (8) the area of dissociation/hypnosis/suggestibility.[95]

According to Dr. Anthony's in-depth analysis of Singer's "brainwashing" theory, her theory is not supported by valid scientific evidence. In sum, Dr. Anthony concluded that there was no valid evidence to support the theory that through these persuasive techniques cults can achieve

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93 Id.

94 Id. at 145 (emphasis added).

95 Id. at 147.

absolute control over a person's will. However, Anthony did not negate the efficacy of the techniques in achieving a high degree of persuasion and behavior modification, especially when accompanied by threats of physical coercion and actual physical force. Whether or not Dr. Anthony is correct in his assessment of Dr. Singer's work, at least his research showed that there were serious doubts about the "brainwashing" model in the scientific community.

General Problems with Religious Conversion Inquiries

Even on a more general scientific level, judicial review of cases involving religious conversion and indoctrination should be discouraged because there simply is not enough hard scientific evidence on the matters. This is proven by all the conflicting scientific theories trying to explain the cult movement and mass religious movements.[96] The late William James, the father of American Psychology, shed light on the limitations of psychology when he explained religious conversion:

> To say that a man is 'converted' means, in these terms, that religious ideas, previously peripheral in his consciousness, now take a central place, and that religious aims form the habitual centre of his energy.
>
> Now if you ask of psychology just how the excitement shifts a man's mental system, and why aims that were peripheral become at a certain moment central, psychology has to reply that although she can give a general description of

[96] See, generally, Charles F. Petranek, "Recruitment and Commitment," Society 25, No. 2 (January-February 1988): 49-51.

> what happens, she is unable in a given case to account accurately for all the single forces at work. . . . [F]aith in itself is belief in something not otherwise provable or it would not be faith.[97]

As Dr. James keenly observed, the experience of religious conversion is simply incapable of a precise psychological explanation or scientific measurement. "Psychology is unable to answer the questions of conversion vs. brainwashing."[98] This fundamental incapacity to measure and explain such psychological phenomena as conversion is recognized by the mental health profession as the passage by Dr. James shows. Why then did the California Supreme Court presume the capacity to accept the "brainwashing" theory as scientific fact to such an extent that it is willing to raise a First Amendment issue? One answer is suggested by the dissent: "The . . . creation of this new tort liability . . . constitutes judicial activism of the first degree."[99]

False Imprisonment Claim

The rampant judicial activism evident in the fraud claim was surprisingly absent from the Molko court's analysis of the false imprisonment claim. This is surprising because the "brainwashing" theory, as accepted by

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[97] William James, Varieties of Religious Experience (New Hyde Park, New York: University Books 1963), 193.

[98] Brandon, supra note 2, at 47.

[99] Molko, 762 P.2d 46, 76 (Anderson, J., dissenting).

the majority, would seem to have been most applicable to false imprisonment, in view of the Court's definition:

> 'The tort of false imprisonment is the nonconsensual, intentional confinement of a person, without lawful privilege, for an appreciable length of time, however short' [citation]. A person is falsely imprisoned 'if he is wrongfully deprived of his freedom to leave a particular place by the conduct of another' [citation].[100]

If the brainwashing theory were valid, under this definition the Court could have easily accepted plaintiff Tracy Leal's[101] claim. She argued "that her 'imprisonment arose from the harm she came to believe would result if she left the community.' That harm specifically was that her family 'would be damned in Hell forever and they would forever feel sorry for having blown their one chance to unite with the Messiah and make it to Heaven.'"[102] Under the fraud and brainwashing theories the Court had already accepted, the "brainwashing" was certainly classified as nonconsensual. The entire basis of the Court's ruling in the fraud claim was that brainwashing "robbed" the plaintiffs of their "consent or knowledge;" furthermore, the result of the brainwashing, according to the plaintiffs, was

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100 Id. at 63-64.

101 David Molko dropped the false imprisonment claim after the appellate level. Therefore, his claim was not addressed by the California Supreme Court.

102 Molko, 762 P.2d 46, 64.

an intentional confinement. Nevertheless, the Court rejected the false imprisonment claim outright.

In light of the apparent applicability of the brainwashing theory to false imprisonment, why did the activist court not apply it? There are two plausible explanations: First, the reluctance to further extend the brainwashing model shows a lack of confidence in the validity of the theory and its applicability in this case. Second, the constitutional law precedents in the area of free speech are less flexible, and therefore, less susceptible to judicial activism than the compelling state interest test used in the religious freedom area. These two reasons suggest why the false imprisonment analysis in Molko was more characteristic of a free speech case than a religious freedom case. The Court was actually extending constitutional protection to the content of the speech rather than the religious nature of the activity. This point is borne out by the conclusion of the false imprisonment section of the opinion where the Court stated: "such threats [of divine retribution] are protected religious speech."[103]

Conclusion

It is paradoxical that the Molko Court recognized the limitations on its authority in the free speech area, while at the same time it ignored them in the free exercise area.

103 Id. (emphasis added).

After all, both the proselytizing involved in the fraud claim and the threats of divine retribution alleged in the false imprisonment claim were in essence forms of speech. The Court should have acknowledged its lack of jurisdiction in both areas because both were matters controlled by religious beliefs and therefore, subject only to reason and conviction.

Instead, the Court accepted the questionable scientific theory of "brainwashing" and proceeded to rule that society's interest in protecting its citizens from this "grave" threat outweighed the Church's First Amendment rights to freely propagate its faith. Through its judicial activism in Molko, the California Supreme Court created two major threats: first, it threatened the principle of jurisdiction which ensures religious liberty, and second, it accepted a scientific theory that alters the legal presumption about the moral nature of man.

When the Court ignored the moral and legal duty distinction at the threshold level, it started to infringe on a matter of the heart by imposing a purely moral duty. The infringement continued when the Court accepted the brainwashing theory. By subsuming the brainwashing tort into an action for fraud, the majority ignored the fact that civil courts do not have jurisdiction over matters of the heart, such as religious persuasion. The state's jurisdiction begins when the interaction between the parties becomes physically coercive, e.g., assault, battery or false

imprisonment, or when there are significant civil implications to the interaction, e.g., marriage contracts or commercial transactions. Historically, the area of religious belief has been subject only to reason and conviction, never force or violence. The fact that the entire discussion of justifiable reliance centered, and indeed turned, on the existence of "brainwashing" is evidence that the real tort action in question was not the fraud claim but rather the judicially created tort of brainwashing.[104]

Accepting the brainwashing theory was dangerous not only because it overruled established tort law doctrines, but because it threatened to redefine the nature of man which is fundamental to our legal system and indeed integral to all human relationships. This is the second major threat brought about by the judicial activism in Molko: the alteration of the moral nature of man. When the Court substituted a scientific model of man for the moral model it both altered basic presuppositions about moral fault and responsibility and threatened the entire basis of human relationships and community. It is clear that judicial activism was the root cause of all the problems in the Molko

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[104] Molko and Leal argued that the same conduct that supported their fraud action also gave rise to intentional infliction of emotional distress. The California Supreme Court accepted this argument and, accordingly, ruled that there was a sufficient question of fact for the jury as to whether the Church's conduct also constituted intentional infliction of emotional distress. See, Id. at 61-63.

court's tort analysis. It is not surprising then, that the test employed by the Molko court in evaluating the religious freedom issues also has its roots in judicial activism, this time in the constitutional law area.

III

CONSTITUTIONAL PROBLEMS IN MOLKO V. HOLY SPIRIT ASSOCIATION

In disregarding the common law tort distinctions between moral and legal duties, distorting the essential element of causation and dismantling the nature of human relations, the Court in Molko has simply balanced the interests of society against the interests of the individual. Prosser has discussed this process in tort law which is typically applied by most judicial activists. He has characterized the main process of tort law as follows:

> The administration of the law becomes a process of weighing interests for which the plaintiff demands protection against the defendant's claim to untrammeled freedom. . . . When the interests of the public is [sic] thrown onto the scales and allowed to swing the balance for or against the plaintiff, the result is a form of 'social engineering.' . . . This process of weighing the interests is by no means peculiar to the law of torts, but it has been carried to its greatest lengths and has received its most general conscious recognition in this field.[105]

Not surprisingly, the Molko court did the same thing with the religious freedom issues in the case. Utilizing the "compelling state interest" balancing test, which itself originated in the judicial activism of the last few decades, the Court dealt with the constitutional law problems in the

[105] Prosser, supra note 28, at 16-17 (emphasis added).

following manner: first, the Court labeled the Church's method of proselytizing and indoctrination "brainwashing." Then the Court stated the issue as follows: "The challenge here, as we have stated, is not to the Church's teachings or to the validity of a religious conversion. The challenge is to the Church's practice. . . . That practice is not itself belief -- it is conduct 'subject to regulation for the protection of society.'"[106]

If the crucial language that conduct was "subject to regulation for the protection of society," taken from Cantwell v. Connecticut,[107] is not applied circumspectly, it creates a risk of serious infringement of a precious constitutional liberty. For this reason Dean M. Kelley[108] has written:

> Beware [of] the prosecutor who intones with an air of great profundity those familiar words: 'The [First] 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' [citation]! That prosecutor has concluded that the particular act he is about to prosecute is one of those 'subject to regulation for the protection of society.'[109]

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106 Molko, 762 P.2d 46, 59 (quoting Cantwell v. Connecticut, 310 U.S. 296, 304 (1940)) (emphasis original).

107 310 U.S. 296 (1940).

108 Director, Religious and Civil Liberty, The National Council of the Churches of Christ in the U.S.A., Division of Church and Society.

109 Dean M. Kelley, "The Proper Relations of Religions and Government," National Institute: Tort and Religion, San Francisco, California, May 4-5, 1989, by the American Bar

However, this warning was of no avail in Molko. The judges opened the door to a private tort claim and placed in the hands of private individuals a powerful tool to regulate religious conduct, and thus, protect society from what is perceived to be a grave threat. In the process, the Court has set a dangerous precedent that threatens orthodox Christian forms of evangelism and indoctrination. If methods of evangelism and indoctrination are made the subject of court scrutiny, under the "compelling state interest" test, then religious freedom has become subject to whatever a judge deems socially tolerable.

History of the "Compelling State Interest" Test

The threat to religious freedom created by decisions such as Molko may have started with decisions dating back to the 1940's and 1950's, but it was not until 1963 that the case of Sherbert v. Verner[110] first utilized the "compelling state interest" test to resolve a claim under the free exercise clause of the First Amendment. Constitutional law scholar, Herbert W. Titus, has given the historical background of this test:

> Justice Brennan derived this new test from Thomas v. Collins, 323 U.S. 516 (1945), an early free speech case resolved by the Court under the old case-by-case due process methodology that was

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Association Section on Tort and Insurance and Division for Professional Education, 385.

[110] 374 U.S. 398 (1963).

> championed by Justice Felix Frankfurter. According to Frankfurter, the due process clause was a term of 'convenient vagueness' that allowed judges to define and redefine its meaning depending upon the circumstances.[111]

Apparently, Justice Brennan wanted to use the "convenient vagueness" of the "compelling state interest" test in religious liberty cases to "define and redefine" the meaning of the First Amendment religion clauses. Sherbert and subsequent free exercise cases, such as Wisconsin v. Yoder[112] and United States v. Lee,[113] refined the test, which quickly became the conventional means to determine the extent of religious free exercise. In Molko the court stated the test as follows:

> Government action burdening religious conduct is subject to a balancing test, in which the importance of the state's interest is weighed against the severity of the burden imposed on religion [citation]. The greater the burden imposed on religion, the more compelling must be the government interest at stake [citation].[114]

This amorphous and ill-defined test has given activist judges a judicial carte blanche. They may determine for themselves what is and is not a "compelling state interest," and as the popular values of society change, may modify or

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111 Herbert W. Titus, "Religious Freedom: The War Between Two Faiths," Journal of Christian Jurisprudence 5 (1984-85), 121.

112 406 U.S. 205 (1972).

113 101 U.S. 1051 (1982).

114 Molko, 762 P.2d 46, 56-57.

expand the concept. Lynn R. Buzzard and Samuel Ericsson[115] have ably summarized the problem:

> A 'compelling state interest' is nothing other than what a judge has decided is more important than other interests at stake . . . the threat is that such 'compellingness' is in fact largely a sociologically and politically assessed reality. Such interests are the products and conclusions of a society. As the values of society evolve and are shaped, as they are now, by a strident secularism and a growing state, those ideas will decide what is 'compelling.'[116]

Balancing Test Applied in Molko

The essential question asked in the compelling state interest balancing test, as applied by the Molko court was, "whether the state's interest in allowing tort liability for the Church's deceptive practices is important enough to outweigh any burden such liability would impose on the Church's religious conduct."[117] In overriding the Church's right to convert nonbelievers by its chosen methods, the court said:

> [T]hese burdens . . . are not substantial. Being subject to liability . . . does not in any way or

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[115] Lynn R. Buzzard is the former executive director of the Christian Legal Society and author of several books on religious freedom issues as well as the coeditor of The Religious Freedom Reporter. Samuel Ericsson is the former executive director of the Christian Legal Society and former national coordinator for the Center for Law and Religious Freedom of the Christian Legal Society.

[116] Lynn Buzzard and Thomas J. Brandon, Jr., Church Discipline and the Courts (Wheaton, Illinois: Tyndale House Publishers, Inc., 1986), 226.

[117] Molko, 762 P.2d 46, 59.

> degree prevent or inhibit Church members from operating their religious communities, worshipping as they see fit, freely associating with one another, selling or distributing literature, proselytizing on the street, soliciting funds, or generally spreading Reverend Moon's message among the population . . . . At most, it potentially closes one questionable avenue for bringing new members into the Church.[118]

Apparently, the court failed to recognize (or simply ignored) the fact that imposing liability for the Church's established proselytizing methods directly "inhibits or prevents" the spreading of their message among the population. In fact, it is likely to curtail that method substantially. Furthermore, the Court also ignored a Supreme Court precedent on this point. In McDaniel v. Paty,[119] the U.S. Supreme Court stated: "the right to the free exercise of religion unquestionably encompasses the right to preach, proselyte, and perform other similar religious functions . . . ."[120]

Even if the legitimacy of the balancing test is accepted, another question is raised: How does the court rationalize its bold attempt to regulate protected religious functions? The court advanced two compelling state interests that supposedly justified the so-called "marginal" burden on the Church's free exercise rights. First, the court noted a "clear" compelling interest in "preventing its

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118 Id. at 60 (emphasis added).

119 435 U.S. 618 (1978).

120 Id. at 626 (emphasis added).

citizens from being deceived into submitting unknowingly to such a potentially dangerous process"[121] as brainwashing. Second, the court said it had "an equally compelling interest in protecting the family institution."[122] The threat, according to the Molko court, was that the family suffered "great stress and sometimes incurred significant financial loss when one of its members" is brainwashed.[123]

As the following analysis will show, the two "compelling state interests" advanced by the Molko court to justify the burden of liability on the Church's proselytizing were not persuasive. In advancing the first compelling state interest, the Court labeled the indoctrination process of the Unification Church "potentially dangerous,"[124] because of the alleged adverse psychological effects "brainwashing" has had on some former adherents. From this premise, the court reasoned that the indoctrination process constituted a "substantial threat to 'public safety, peace or order,'"[125] and therefore, was subject to judicial regulation under Sherbert. However, to label the indoctrination process of any church "dangerous" is nothing more than a thinly-veiled, subjective value

121 Molko, 762 P.2d 46, 60 (emphasis added).

122 Id.

123 Id.

124 Id.

125 Id. (quoting, Sherbert v. Verner, 374 U.S. at 403, 83 S. Ct. at 1793 (1963)).

judgement, criticizing the religious tenets of a church. Such judicial evaluations of church doctrine are not permitted under the First Amendment. This point was established by an analogous religious fraud case, United States v. Ballard.[126]

In Ballard, the defendants were the founders of a religious group called, "I am," who had fraudulently represented that they were divine healers. They told people they had miraculous powers to heal all diseases and, in fact, had cured hundreds of afflicted people. As a result of these misrepresentation, they obtained money from the public through the mail. The trial court carefully excluded from jury consideration the matter of the truth or falsity of the Ballards' claim of divine powers. On the sole issue of whether the respondents made those claims in "good faith," the Ballard court said that this was a matter of law for the court to decide, not the jury. In upholding the trial court decision, the Supreme Court said:

> Heresy trials are foreign under our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. . . Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. The religious views espoused by the respondents might seem incredible . . . 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

126 322 U.S. 78 (1944).

> triers of fact undertake that task, they enter forbidden domain.[127]

Clearly, when the Molko court labeled the Unification Church's indoctrination process "dangerous" they were entering the "forbidden domain" of religious doctrine, and thus, were outside of their jurisdictional limits.

As a second compelling state interest, the court claimed to be protecting the family institution. It cited cases that outlawed polygamy[128] and permitted the establishment of Church schools that met minimal standards.[129] Certainly, monogamy and parental rights to educate children are crucial elements of the family. However, the Molko court stretched the analogy too far when it attempted to label "financial loss" and "great stress" as major threats to the family institution. If financial and psychological stress were as great a threat as the majority in Molko suggested, the institution would have disappeared long ago. Rather than grave threats, financial and psychological stress would have more properly been categorized as common experiences for many families.

There can be little doubt that the Molko court attempted to justify its regulation of religious activity, which it deemed harmful to society, by creatively constructing "compelling state interests." However, the

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127 Id. at 86-87.

128 Reynolds v. United States, 98 U.S. 145 (1878).

129 Pierce v. Society of Sisters, 268 U.S. 510 (1925).

compelling state interests that were advanced were not only unpersuasive, they violated established court precedent and infringed on legislative functions. Courts should not be in the business of deciding what are and what are not a civil government's compelling state interests. These decisions should be left to the democratically elected legislatures, which are representative of the people. One lesson made abundantly clear by Molko is that the compelling state interest test has led courts beyond the proper scope of judicial authority and allowed them to engage in legislative functions. The dissent in Molko made a similar observation:

> When scrutinizing conduct which is ostensibly subject to constitutional protection and which can be regulated only by a showing of a compelling state interest, the judiciary should tread cautiously in independently creating such governmental interests without any prior consideration by the Legislature. The Legislature is far better equipped than this court to undertake the factual investigation and to formulate social policies which justify restrictions on exercising religious freedoms.[130]

The dissent in Molko also pointed out that while previous cases had "merely upheld state regulations curbing religious conduct," the majority in this case "created" such a regulation. The entire balancing procedure in Molko was nothing more than an attempt at expansive judicial policy-making and not a very persuasive one. This prompted the dissent to criticize the majority by saying: "[the] creation

[130] Molko, 762 P.2d 46, 76 (Anderson, J., dissenting) (emphasis original).

of this new tort liability in such a historically heretofore sensitive area, without either legislative initiative or guidance, constitutes judicial activism of the first degree."[131]

Balancing Test in Question

The judicial activism evident throughout Molko was not only permitted but invited by the compelling state interest test. Although this test has been the standard applied to free exercise cases for well over twenty-five years, it has recently been rejected by a five-member majority of the U.S. Supreme Court in Employment Division, Department of Human Resources of Oregon v. Smith.[132] In an opinion written by Justice Antonin Scalia, the Court refused to apply the balancing test as prescribed by Sherbert v. Verner.[133] The Court left open one narrow exception where the balancing test may still apply: the very limited circumstances that lend themselves "to individualized governmental assessment of the reasons for the relevant conduct."[134] In Smith, the plaintiffs were denied a religious exemption from a generally applicable criminal law which prohibited use of the hallucinogenic drug peyote in the State of Oregon.

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131 Id. (emphasis added).

132 No. 88-1213 (U.S. Apr. 17, 1990) [hereinafter, Smith].

133 374 U.S. 398 (1963) [hereinafter, Sherbert].

134 Smith, supra note 132, slip op. at 11.

The departure from what was once thought to be the established constitutional test in free exercise cases cannot be overestimated. Many First Amendment experts have noted the surprising rejection of the balancing test in free exercise cases. University of Chicago law professor Michael McConnell, an expert on the religion clauses, noted the radical departure from what was once thought to be established "law." McConnell called the decision "one of the clearest reversals of important constitutional precedent in a decade."[135] This important shift indicated not only that the Supreme Court perceived a problem with the traditional broad application of the balancing test, but it also has raised the question of whether the balancing test will even be applied in future religious free exercise cases.

In Smith, the two plaintiffs Alfred Smith and Galen Black had engaged in the sacramental use of the hallucinogenic drug peyote in a Native American Church religious ceremony. The plaintiffs were then dismissed from their jobs as drug rehabilitation counselors. When they applied with the state for unemployment compensation, they were denied on the grounds that they had been discharged for

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[135] Ruth Marcus, "Court: States Can Ban Peyote in Rites; Religious Freedom Does Not Justify Breaking Valid Law, Scalia Says," Washington Post News Service, Executive News Service, April 18, 1990. Accord, see, John W. Whitehead, "Peyote, Legal Precedent and Religious Liberty," Issued Statement, (Charlottesville, Virginia: The Rutherford Institute, April, 1990) 2.

criminal misconduct. Smith and Black challenged the law as a violation of their free exercise rights. The high Court held that the two men's free exercise rights were not violated, saying that the free exercise clause permitted the state to regulate the sacramental use of the drug peyote. Justice Scalia, writing for the majority, said: "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate."[136]

The ruling in Smith has direct application to the Molko case. Under Smith, the threshold question has become: Is the state free to regulate the conduct in question? In Molko the question has become: Is the state free to regulate the profession of beliefs or the proselytizing activities of a Church? The U.S. Supreme Court already answered this question in McDaniel v. Paty[137] when it stated: "the right to the free exercise of religion unquestionably encompasses the right to preach, proselyte, and perform other similar religious functions . . . ."[138] The Smith court did not leave the matter of "what the state is free to regulate" totally open. Justice Scalia referred to several activities the state may not regulate:

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136 Smith, No. 88-1213, slip op. at 6.

137 435 U.S. 618 (1978).

138 Id. at 626 (1978) (emphasis added).

> But the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytization, abstaining from certain foods or certain modes of transportation. It would be true, we think (though no case of ours has involved the point), that a state would be 'prohibiting the free exercise [of religion]' if it sought to ban such acts or abstentions only because they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of 'statues that are to be used for worship purposes,' or to prohibit bowing down before a golden calf.[139]

Under Smith the focus of the free exercise inquiry has been totally transformed. Lost is the former balancing question: "Does the government have a compelling state interest in regulating this religious activity?" Under the new Smith standard, the ultimate question has become: "Is this an area that the state is free to regulate?" Scalia has said, in effect, that it does not matter how compelling the state interest is, if the area of activity is not one which the government is free to regulate, then there can be no government regulation. In taking this approach, the Court has returned the free-exercise clause to its historical meaning and purpose.

The Historical Meaning of Religious Liberty

The Supreme Court has repeatedly expressed its willingness to use an historical approach in deciphering the

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[139] Smith, supra note 132, slip op at 5 (emphasis added).

meaning of the religion clauses of the First Amendment. In Everson v. Board of Education,[140] the Court specifically mentioned the importance of Virginia's history of religious freedom, particularly the work of James Madison.

> No provision of the Constitution is more closely tied to or given content by its generating history than the religious clauses of the First Amendment. It is at once the refined product and the terse summation of that history. The history includes not only Madison's authorship and the proceedings of the First Congress, but also the long and intensive struggle for religious freedom in America, more especially in Virginia, of which the Amendment was the direct culmination.[141]

Although jurists have generally agreed that First Amendment history -- particularly Virginia's -- is the key to applying the religion clauses, there has been great disagreement as to exactly what that history teaches.

For the last twenty-seven years -- with a few notable exceptions[142] -- the prevailing view of the free exercise clause was that it was meant to insure that government does not overburden religious exercise. This view was embodied in the compelling state interest balancing test, which prohibited infringement on religious exercise unless the governmental interest was sufficiently compelling. The effect of this standard was to tolerate religious views and

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140 330 U.S. 1 (1947).

141 Id. at 33 (Rutledge, J., dissenting).

142 See, e.g. McDaniel v. Paty, 435 U.S. 618 (1978) and Smith, No. 88-1213 (U.S. Apr. 17, 1990).

activities, unless they conflicted with an important governmental policy or function.

An opposing view has held that the free-exercise clause was never intended to promote the greatest possible religious toleration. Rather, the intent of the framers was to articulate in one short phrase an absolute guarantee of religious liberty. This expression of religious liberty incorporated an understanding of the principle of jurisdiction which was pre-eminent in the minds of the framers.

Debates on the Bill of Rights in the First Congress

The acts of the First U.S. Congress of 1789, which adopted the Bill of Rights, provide some of the most important evidence in answering the question: What did the framers intend with the wording of the First Amendment? James Madison of Virginia, a strong advocate for the federal Constitution, was one of the leading proponents of the Bill of Rights in the First Congress. From an array of proposed constitutional amendments submitted by the several states, he compiled a list of amendments which he introduced in June of 1789.

In his proposed bill of rights, Madison intended a short simple expression of general principles, as he explained during the congressional debates on the bill of rights: "[I]f we confine ourselves to an enumeration of simple, acknowledged principles, the ratification will meet

with but little difficulty."[143] Madison proposed a freedom of religion clause worded as follows:

> The Civil rights of none shall be abridged on account of religious belief or worship . . . nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.[144]

From this proposed language, it is clear Madison intended the religion clause of the Bill of Rights to encompass at least two principles: first, that the federal government should be precluded from abridging religious worship and belief, and second, from infringing on the rights of conscience. While the proposed language was changed, the fundamental principles were not. When the amendment emerged from committee in the more concise form: "No religion shall be established by law, nor shall the equal rights of conscience be infringed,"[145] and reached the floor of the House for debate, the first part of the amendment (the establishment clause) received by far the most attention. In fact, "this proposal was debated by the First Congress at greater length than almost any other item in the Bill of Rights."[146] By comparison, the "rights of

[143] Joseph Gales, ed., The Debates and Proceedings in the Congress of the United States, I (Washington, 1834), 738 [hereinafter, Annals].

[144] Annals I, 434.

[145] Annals I, 729.

[146] Michael J. Malbin, Religion and Politics: The Intentions of the Authors of the First Amendment (Washington, D.C.: American Enterprise Institute for Public Policy Research, 1978), 5.

conscience" provision received very little attention. Even the substitution of the words, "prohibiting the free exercise" of religion, did not prompt any significant debate in either House.[147]

What can be gleaned from the sparse legislative history of the free exercise clause? The record shows, at least, that the primary concern of the First Congress in passage of the Bill of Rights was the protection of religious liberty. The presence of the free exercise clause in several draft versions and in the final version, combined with the lack of evidence from the Congressional record, shows there was little vocal disagreement among members of Congress as to the wording of the free exercise clause. Apparently, "free exercise of religion" was sufficiently well defined in the other documents of that period.[148]

The Virginia Context: Religious Liberty vs. Religious Toleration

Since the legislative "records of the debates in the First Congress on the free exercise clause are virtually nonexistent,"[149] other contemporary sources must be consulted in order to discover what the framers understood

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147 U.S. Constitution, amend. I (emphasis added).

148 See, Annals I, 730-739.

149 Daniel Dreisbach, Real Threat and Mere Shadow: Religious Liberty and the First Amendment (Westchester, Illinois: Crossway Books, 1987), 85.

by the phrase "free exercise of religion." Constitutional scholars generally have agreed on the source of the language "free exercise of religion." Most commentators have traced the source directly to Virginia's historical documents,[150] particularly the Virginia Constitution promulgated in 1776. This Constitution contained a declaration of rights, and Section XIV of that document embodied the declaration of religious freedom:

> That religion, or the duty which we owe to our CREATOR, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience, and that it is the mutual duty of all to practice Christian forbearance, love, and charity, towards each other.[151]

To best discern the principles embodied in the final version of Article XVI, it is helpful to compare it with an earlier draft proposed by George Mason, which read as follows:

> That religion, or the duty which we owe to our CREATOR, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore, all men should enjoy the fullest toleration in the exercise of religion, according to the dictates of conscience, unpunished and unrestrained by the magistrate unless, under colour of religion, any man disturb

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150 The phrase also appeared in the Georgia Constitution of 1789, art. IV, sect. 5. See, Herbert W. Titus, "Religious Freedom: The War Between Two Faiths," The Journal of Christian Jurisprudence 5 (1984-1985), 128.

151 William T. Hutchinson and William M. E. Rachal, et al., eds., The Papers of James Madison, I (Chicago: University of Chicago Press, 1962), 175 (emphasis added).

> the peace, the happiness, or safety of society. And that it is the mutual duty of all to practice Christian forbearance, love, and charity, towards each other.[152]

Mason's emphasis was clearly not on religious liberty (a right) but rather on religious toleration (a privilege). Madison vigorously objected to the use of the word "toleration" because it implied something which could be given or revoked by the civil government. Madison believed that the right to religious liberty was an inalienable right given by God and not bestowed by any earthly sovereign. In fact, in an intermediate version of the proposal that was later amended, Madison had inserted the phrase that "all men are equally entitled to enjoy free exercise of religion, according to the dictates of conscience, unpunished and unrestrained by the magistrate."[153] Madison's proposed wording showed his belief that the right to religious freedom was absolute and not subject to restraint by any civil magistrate, or in the framer's language, one of liberty not tolerance.

This pronouncement of religious freedom has become important for a number of reasons. First, it incorporated a clear definition of what the founders understood by the word "religion": "the duty which we owe to our CREATOR, and the

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[152] Robert A. Rutland, ed. The Papers of George Mason, 3 Vols. (Chapel Hill: University of North Carolina Press, 1970) 1:278 (emphasis added).

[153] Hutchinson, supra note 151, at 174-175 (emphasis added).

manner of discharging it." Second, the clause embodied a jurisdictional principle: the view that religion was totally outside the jurisdiction of the civil government. By stating that religion is a "duty we owe to our Creator," the authors have established that man's obligation to God is owed solely to Him and not to civil government. The statement that only man's own "reason and conviction" can direct duties to God, likewise presumes that civil government has no business in the area of "reason and conviction." In these areas the people "owe" nothing to civil authorities. By explicit contrast, the things that have been left to the jurisdiction of civil government are those which can be directed only by "force or violence."

The phrase "all men are equally entitled to the free exercise of religion," establishes the inalienability of the rights of free exercise, which is subject only "to the dictates of conscience." This means that each man must decide for himself according to his own conscience how he will carry out his duties to God. Clearly, as far as the framers were concerned, the areas of belief and actions carrying out those beliefs were two categories outside of the power of civil government.

The history of the religious freedom clause of the Virginia Declaration of Rights should be seen as a rejection of the English concept of religious privileges or tolerance, which, more often than not, resulted in religious intolerance. Under the English system, what was religious

tolerance under one sovereign could easily become intolerance under the next. Mere religious toleration was anathema to a system based on absolute religious liberty. The crucial distinction between the two concepts has been recognized by several historians. For example, Daniel L. Dreisbach writes in his book, Real Threat and Mere Shadow, Religious Liberty and the First Amendment:

> Historically speaking, religious toleration is to be contrasted with religious liberty. The former implies the existence of an established Church and is always the revocable product of legislative benevolence rather than a defensible right. It is clear from the importance Madison attached to religious liberty that, in his mind, it was too valuable to be cast in the form of a mere privilege to be granted and enjoyed as an act of legislative grace. Rather, he viewed religious liberty as an inalienable right, which was, indeed should be, beyond the reach of civil government.[154]

Clearly, Virginia's religious freedom history, which the Supreme Court has claimed to follow, shows an outright rejection of the concept of religious tolerance. If the right was, as has been asserted, an absolute inalienable right "beyond the reach of civil government," then it is obvious that such a right would not be subject to either judicial or legislative acts of balancing the right against some governmental interest. In fact, the concept, as understood by the framers, required an absolute legislative deference; hence, the language of the First Amendment:

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[154] Dreisbach, supra note 149, at 137 (footnotes omitted).

"Congress shall make no law . . . prohibiting the free exercise [of religion]."[155] This understanding of the history of religious freedom directly contradicts the idea of religious tolerance promoted by the compelling state interest balancing test.

> The entire concept of a compelling state interest was eliminated by the [Virginia] Convention's specific rejection of Mason's view that religion as defined, could be restrained and punished by the magistrate when 'under color of Religion, any man disturb the Peace, the Happiness, or the Safety of Society, or of Individuals.'[156]

Therefore, it can be safely said that the balancing test, which has dominated religious free exercise cases for the last twenty-five years, runs absolutely contrary to the intent of the framers with regard to religious liberty.

It follows that Justice Brennan's balancing test in matters of religious liberty (drawn from Sherbert) was historically indefensible because it promoted religious tolerance instead of religious liberty. By rejecting the compelling state interest balancing test in religious freedom cases, as he did in Smith, Justice Scalia's approach was more historically accurate. The test which Scalia has substituted for the balancing test more closely resembled a true religious liberty test. Scalia's threshold question in

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155 U.S. Constitution, amend. I.

156 Kerry Morgan, The American Founding and Religious Liberty, unpublished manuscript (CBN University [a.k.a., Regent University], Sept. 17, 1989), 4.

Smith was: Is this an area in which the government is free to regulate? This question presupposed that there are some areas totally beyond the reach of government regulation, i.e., areas of complete religious liberty. These areas, as recognized by the Virginia history of religious freedom, are reason, conviction, thought, and belief, and are carried over from the common law matters of the heart or conscience.

Judicial Treatment of These Concepts

The Smith case represents a step in the right direction of restoring the inalienability of religious liberty; however, Smith must contend with decades of free exercise law that have treated this right as a mere privilege. If the concept of religious liberty as an inalienable right is not soon restored to constitutional law, it is in danger of being lost or extremely diluted, and will become a mere privilege, subject to the vicissitudes of the state, rather than a matter of individual liberty. However, there is hope that the concept of civil government's lack of jurisdiction in matters of religion will be reestablished in constitutional law. Besides Smith, there is a line of cases, starting in the last century, that have consistently upheld the jurisdictional principle in matters of religious faith. The problem is that, up until recently, the courts have construed the jurisdictional principle found in these cases rather narrowly.

The first significant Supreme Court case that asserted the civil government's lack of jurisdiction in religious matters was Watson v. Jones (1872), where the court stated:

> In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for ecclesiastical government of all individual members, congregations and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them, reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.[157]

Watson made it clear that matters controlled by religious doctrine were outside the competence of the court. There are several important points about Watson that must be made: first, technically, it was not a constitutional law case; that is, it was not based on the First Amendment. Nevertheless, Watson has subsequently acquired

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[157] Watson v. Jones, 80 U.S. (13 Wall.) 679, 728-729 (1872).

constitutional law status because it has been cited in many First Amendment cases dealing with ecclesiastical matters.[158] Second, the fact that it was a common law case, not based on the Constitution, shows an interesting parallel between common law and constitutional law -- the jurisdiction principle. Because Watson v. Jones set questions of religious "discipline, faith, ecclesiastical rule, custom or law"[159] outside the reach of the civil courts, it reaffirmed the principle of jurisdiction originally embodied in both the First Amendment's religion clauses and the Virginia Declaration of Rights. That principle stated: matters controlled only by "reason and conviction" are beyond the reach of civil government. Under this principle the civil government had authority only over those duties controlled by "force or violence."

Although the principle of limited jurisdiction first articulated in Watson[160] has been applied in First Amendment cases where courts are faced with resolving purely ecclesiastical or intra-Church matters, the principle has not gained wide acceptance outside this limited area. However, this principle of jurisdiction, which most closely

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158 See, Jones v. Wolf, 443 U.S. 595 (1979); Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Presbyterian Church v. Hull Church, 393 U.S. 440 (1969); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952).

159 Watson, 80 U.S. (13 Wall.) 679, 727.

160 Id.

embodied the historical understanding of the First Amendment and the Virginia Declaration, merits wider application. The concept that matters of the heart and mind are not subject to civil jurisdiction would be helpful in resolving many legal issues. For instance, this same principle that defines religious liberty would be helpful in understanding the distinctions between moral and legal duties previously addressed in Chapter II, in the discussion of tort law.[161] Again, in this respect, the Smith opinion has shown encouraging signs in the right direction. For example, Justice Scalia showed a basic -- if not clearly articulated -- understanding of the court's lack of jurisdiction over matters of thought and belief when he criticized the balancing test's requirement of measuring the centrality of the adherent's religious belief. Scalia explained:

> It is no more appropriate for judges to determine the 'centrality' of religious beliefs before applying the 'compelling interest' test in the free exercise field than it would be for them to determine the 'importance' of ideas before applying the 'compelling state interest' test in the free speech field. . . . What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims.' [citation]. . . '[I]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretation of those creeds.' [citation]. Repeatedly . . . we have warned that courts must not presume to

161 See, supra notes 41-52, and accompanying text.

> determine the place of a particular belief in a religion or the plausibility of a religious claim.[162]

Interestingly, in support of this proposition, Scalia cited a number of jurisdiction cases in the same line as Watson.[163] Hopefully, this has signaled a return to a broader application of the principle that civil government has no jurisdiction over matters of the heart. Perhaps, Scalia recognized that these matters are subject only to "reason and conviction" and never "force or violence." A resurgence of this principle in future religious freedom cases would help to re-establish the framers' intent in First Amendment law. In light of Molko v. Holy Spirit Association,[164] with the advent of the "brainwashing" theory in tort law, the need to re-establish the original meaning of the First Amendment free exercise clause is particularly vital.

Religious Freedom and "Brainwashing"

Even assuming that the theory of "brainwashing" was scientifically valid, it would still be indistinguishable from the other types of religious conversion and indoctrination. As the dissenting judge in Molko keenly observed:

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162 Smith, supra note 132, slip op. at 14.

163 Presbyterian Church v. Hull Church, 393 U.S. 440 (1969), and Jones v. Wolf, 443 U.S. 595 (1979).

164 Supra note 8.

> [W]hat this expert evidence characterizes as indicia of brainwashing or mind control, might very well be equated with the more popularly accepted symptoms of genuine religious conversion. Religious behavioral change induced by the mystery of faith cannot be proved or disproved by secular science, which limits its scope of inquiry to tangible, rational and logical phenomena, comprehensible and explainable by human reasons.[165]

Under proper First Amendment scrutiny the Molko court should have asked the question: Can the process of religious conversion or persuasion[166] be the subject of legal sanctions? As the preceding discussion has illustrated, the answer demanded by the free exercise clause is, no. Therefore, the dissent in Molko was correct when it observed: "[T]he indoctrination achieved by persuasion absent physical force or violence is not unlawful; religious conversion is simply not subject to judicial review."[167]

The constitutional difficulties raised by the regulation of conversion and indoctrination stem from an inherent limitation of courts. They simply are not equipped (nor can they ever be) to measure and thus regulate the realm of faith and ideas. The civil government has no authority in this area. Matters of faith and ideas are subject only to the jurisdiction of the heart and mind. As

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165 Molko, 762 P.2d 46, 74 (Anderson, J., dissenting).

166 Since it has been established that the brainwashing theory is not supportable (see, supra notes 91-95), The legitimate terms for the process shall be substituted and used interchangeably: conversion and indoctrination.

167 Molko, 762 P.2d 46, 68.

Thomas J. Brandon, Jr. of the Center for Law & Religious Freedom wrote in his booklet, New Religions, Conversions and Deprogramming: New Frontiers of Religious Liberty:

> If it is impossible for a psychologist to determine the fitness of the individual or the truth or falsity of his religion under color of state law . . . then the same principle applies for theologians, parents and judges or anyone else in a legal proceeding. The state has no right to take away or even severely restrict the liberty of an adult who has committed no criminal act and who is capable of handling his own affairs.[168]

Applying this principle to the brainwashing cause of action alleged by plaintiffs in Molko, the limitations of civil government become clear. No matter how objectionable the method of proselytizing, anything short of the use of threats of physical retribution and actual physical force is simply not cognizable in a court of law. Correctly applying this principle, the U.S. Supreme Court has recognized that "the right to the free exercise of religion unquestionably encompasses the right to preach, proselyte, and perform other similar religious functions."[169] Therefore, civil courts must never presume the capacity to rule on the propriety of methods of proselyting, simply because the convert objects to the doctrine he was taught or to the effect it had on him. Put more succinctly, courts have no

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168 Brandon, supra note 2, at 47 (emphasis added).

169 McDaniel v. Paty, 435 U.S. 618, 626 (1978).

authority to determine what is the proper standard of conduct with regard to religious practice.

Despite the jurisdictional barrier enforced by the Constitution and the tort law problems of legal duty and causation, the judicial activist Molko court boldly proceeded to create a new tort action of brainwashing. The California Supreme Court's disregard for tort law standards alone was indefensible, but to have engaged in such rampant judicial activism in the sensitive area that crossed over into First Amendment religious freedom was totally inexcusable.

With this type of judicial abuse occurring under the compelling state interest test (which was supposed to protect religious freedom), it is not surprising that a conservative majority on the U.S. Supreme Court has rejected, or at least severely restricted, the compelling state interest test in free exercise cases.

Conclusion

In the Molko case, two dangerous legal movements converged: judicial activism in the tort and First Amendment areas. The result was the creation of new tort theories that are already being used by California courts[170] and in

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[170] See, Stansfield v. Starkey, ___ Cal.Rptr. ___ 1990 W.L. 60655 (Cal.App. 1990); Wollersheim v. Church of Scientology of California, 260 Cal. Rptr. 331, 212 Cal.App.3d 872 (Cal.App. 1989).

other jurisdictions against evangelical churches.[171] This new development in tort law has presented a grave threat to religious liberty. If the precedents in this case are followed, subsequent decisions could present absolute prohibitions on certain Christian activities such as aggressive evangelism.

By making religious conversion the subject of tort suits -- as the Molko court did successfully -- the government through its judicial system has begun to set the standards for proper religious practice. This judicial regulation of an area historically subject only to reason and conviction has signalled a fundamental breakdown of the founding principle of the free exercise clause: the jurisdictional principle, which teaches that government has no authority over matters subject only to reason and conviction. This principle desperately needs to be reasserted.

Until this principle of limited jurisdiction is restored to First Amendment religious freedom cases, tort suits, of the sort encountered in Molko, will remain a major threat to churches. The decay of the jurisdiction principle through judicial activism has now threatened the very core of orthodox Christianity, the conversion and indoctrination process. Until the judicial activism is stopped and Molko is overturned, there are some things that churches can do to

[171] See, In re The Bible Speaks, 869 F.2d 628 (C.A.1 1989).

help avoid tort liability. The next chapter sets out some measures churches can take to reduce their exposure to tort liability. It also makes some suggestions for remedying the situation through legislative and judicial means.

IV

HOW TO RESPOND TO THE THREAT TO RELIGIOUS FREEDOM

As this analysis of Molko has shown, tort suits against churches have created a serious new threat to religious freedom. Not only have they threatened to erode the legal protection guaranteed under the First Amendment, they have also threatened the existence of some churches which could face paralyzing liability and exorbitant legal fees.[172] However, the most dangerous repercussion of Molko, has been its unpredictability. With this powerful new weapon in the hands of private litigants, ultimately, juries will decide whether or not a church can be adequately protected. Undoubtedly, jury prejudice against unpopular religions of the day could lead to a new form of religious persecution. As the frequency of tort suits against churches has grown, so has the financial burden imposed by the judgements. In the past few years juries have shown a tendency to grant huge damage awards against unpopular religious views. In 1985, an Oregon jury awarded $39 million to a woman who had withdrawn from the Scientologists; she had alleged that

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[172] Even if one successfully defeats one of these suits, the attorney's fees and costs in successfully defending the suit can reasonably range between $20,000 and $250,000 or more. See, Sharpe, supra note 11, at 3.

their promises of a better life for her were fraudulent.[173] More recently, a jury in the Superior Court of Orange County, relying in part on the Molko "brainwashing" theory, awarded damages in excess of $32 million against the International Society for Krishna Consciousness; however, the trial court reduced the award to $2.9 million.[174]

In the face of such crushing liability and bold judicial activism that disregards or rationalizes established case precedents and arrogantly creates new tort liability, what can a church do to protect itself? Until Molko is overruled there is very little; however, by implementing the few suggestions that follow, churches should be able to decrease the likelihood of such a tort suit prevailing.[175]

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[173] Buzzard, supra note 116, at 176.

[174] See, George v. International Society for Krishna Consciousness of California, 262 Cal.Rptr. 217 (Cal.Ct.App. 1989), where the California Court of Appeal affirmed in part and reversed in part the decision of the trial court and reinstated part of the jury's verdict, bringing the damage award to $5 million.

[175] The scope of precautions a church can take to protect itself from costly tort litigation is as wide as the number of tort actions. This section is purposely limited to suggestions that will effectively reduce the possibility of a tort suit styled after the one in Molko v. Holy Spirit Association. For helpful suggestions on what churches can do to protect themselves from tort suits based on church discipline actions, see, generally, Buzzard, supra note 116, passim.

What Can Churches Do to Avoid Costly Litigation?

In a tort suit against a church or minister, the threshold question asked by the court is: Are the Church's activities in question of a secular or religious nature? Once an activity has been labeled "secular conduct," the most powerful shield of religion -- the First Amendment -- is gone. The Church must then rely only on the defenses available in tort law. This often puts the Church at a disadvantage because many factors rely on matters of faith that simply are not provable in court.

"But the Church is not powerless. There are steps it can take to minimize the likelihood of liability thereby discouraging frivolous lawsuits. When these steps do not compromise any biblical principles or theological convictions they are clearly appropriate."[176] One way a Church can protect itself from a possible tort claim (such as brainwashing) is to have a clearly articulated theological rationale for its existence and for all of its membership practices, from the initial stages of evangelism and baptism to church discipline and expulsion procedures. As far as is practicable, there should be some religious purpose stated in all the church's formal documents as well as the literature the church prints.[177]

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176 Id. at 236.

177 Id. at 240-241.

Another way to avoid tort liability for coercive persuasion, brainwashing and even intentional infliction of emotional distress, is not only to have a sound biblical basis for each aspect of church life, but most crucially, to impart these principles to all the members of the church. All the membership should be encouraged to share candidly the biblically based principles with any prospective members when asked to do so. If a particular member does not feel competent to share these principles, there should be a readily accessible church staff member, deacon or elder to assist in the impartation of such information.

To best avoid the possibility of tort liability, the Biblical rationale for church practices should be shared with all prospective members, whenever practical or appropriate and, by all means, before the prospective member formally joins the church. As long as each new member is made fully aware of all the church policies and standards regarding membership, then such knowledge will act as a waiver of implied consent to church procedures.

The process of teaching, learning and sharing these Biblically based church membership principles will accomplish two beneficial goals: it will serve to edify the Church, but it will also show any court of law that a challenged church practice is simply the outgrowth of a sincerely held religious belief.[178] Although not conclusive

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[178] Id. at 240-241.

on the issue, implementation of these procedures will raise a strong presumption that the challenged church practice is more religious than secular. A statement made by the dissent in Molko supported this assertion:

> [A] persuasive argument may be made that the principal wrong here claimed . . . is not subject to government intervention at all, because it includes doctrinal matters rather than operational activities. . . . [T]he First Amendment ensures wide protection for religious persuasion....[179]

The next suggestion on avoiding liability may seem obvious but bears mentioning. If a church goes through all of these essential steps of developing and communicating church policy and its biblical bases, it must also carefully adhere to all the stated policies. "If the church shows patterns of inconsistency, discrimination, and uncertainty about applying its standards and principles, it ought not be surprised if a [plaintiff] calls foul."[180] It would only complicate issues further for a church if evidence were to surface at trial that the church had been inconsistent in following its own stated policies. Such evidence could undermine the church's First Amendment defense and cause the judge to question the sincerity of the beliefs.[181]

In order to defeat any accusations of insincerity or misrepresentation -- such as those levelled in Molko -- a

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[179] See, Molko, 762 P.2d 46, 76 (Anderson, J., dissenting).

[180] Buzzard, supra note 116, at 242.

[181] Id. at 241.

church should strive to implement its policies with absolute accuracy and good faith. Any communications with prospective members and present members should be factually accurate and not misleading, candidly revealing any information that the member or prospective member has a legitimate right to know. No matter how hard one strives for accuracy, circumstances may occur where someone who was sincerely communicating what he believed to be accurate information was mistaken in his reliance on the statement's accuracy. In such situations the good faith requirement is especially important. If a person's motives were proper, that is, if he sincerely believed the information he communicated was true and if that belief was reasonable, then courts will usually extend a qualified privilege to a factually inaccurate statement.

The "good faith" requirement takes on even greater importance in light of Molko. If courts follow the dangerous precedent in that case and further intrude into religious practices, then accuracy and good faith will be the best ways for churches to defend against charges of coercive persuasion, mind control or brainwashing. The Molko court rationalized its judicial inquiry into the Church's indoctrination procedures by calling attention to the initial fraud or misrepresentation committed by the Church. In an effort to get the non-members at least to listen to the Church's teaching, when asked about their affiliation with the Unification Church, the members denied

any such connection. Although genuine Christian churches are very unlikely to engage in this type of outright deception, they should, nevertheless, endeavor to maintain absolute accuracy and good faith, especially in evangelism.

Statutory Exemptions

No matter how careful a church may be in its operations there will always be a risk of tort suits. The unequivocal answer to the pastor who asks, "Can they sue?" is: "Yes, people can always sue a church." The question soon becomes: "Will they win?" The answer to this question depends on several factors, some of which were covered in the previous section. But there are even more effective ways to protect churches from dangerous tort suits: statutory exemptions or immunities.

There was a time in American law when churches could not be sued at all. This doctrine, based on an English case of 1846, was known as "charitable immunity."[182] American courts followed this common law tradition for many years; however, charitable immunity today has been abrogated in virtually all states, sometimes by judicial decision, and, at other times, by statute.[183] Prosser has written that only two states, Arkansas and Maine, have retained full

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182 Prosser, supra note 28, at 1069.

183 Id. at 1070.

immunity for charities "in the absence of legislation to the contrary."[184]

Legislation has effectively restored the immunity of charities in some states, but only for some limited purposes. One example is a New Jersey statute[185] that provides for "religious, charitable, educational or hospital" immunity as to those who are beneficiaries of the charitable work. The same kind of statute could be adopted on the state level that would effectively restore charitable immunity to churches as to any act done in furtherance of the faith. This type of limited charitable immunity would accomplish two beneficial goals: first, it would restore the First Amendment free exercise principle that government should not interfere in areas subject only to reason and conviction. A reassertion of this historical view of jurisdiction would also help to re-establish the legal duty and moral duty distinction that is all but lost in tort law. Second, the immunity would have a beneficial effect on evangelism activities that, in the light of Molko, might otherwise be discouraged.

The legislative methods of dealing with the problems raised by Molko take on new importance in light of the Smith decision. In Smith, Justice Scalia has written that just because a particular value, such as religious liberty, is

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184 Id.

185 N.J.S.A. 2A:53A-7.

enshrined in the Bill of Rights does not mean that it is banished from the political process.[186] In fact, there was dicta in Smith that encouraged state legislatures to draft "nondiscriminatory religious-practice exemption[s]" just as several states have done.[187] However, Justice Scalia also recognized the limitations of the political process:

> It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.[188]

At the same time Justice Scalia pointed out the evils of the "compelling state interest" balancing test as applied to religious matters, he opened the door to "nondiscriminatory" state exemptions in such matters. This encouraging dicta provides excellent support for state legislated religious exemptions to certain tort actions, if the activity in question involved the propagation of one's faith. Such an exemption obviously would not grant immunity from intentional torts actions such as false imprisonment, assault or battery. All of these tort actions can be distinguished from the activity involved in Molko on the

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186 Smith, supra note 131, slip op. at 17.

187 Id.

188 Id.

grounds that these intentional torts necessarily involve either physical acts of restraint or aggressive physical acts of intimidation (actual or threatened). Civil government should and generally does punish any such conduct, whether religiously motivated or not.

The proposed religious propagation immunity would extend only to the area of profession of beliefs and would have assumedly prevented a suit like Molko, where there was no physical coercion, only mental persuasion done in the context of proselytization. Such an exemption would also reaffirm the principle embodied in the First Amendment free exercise clause as the framers understood it and its integral principle of jurisdiction. By reasserting this principle, such immunity laws would not only protect religious freedom but would also help restore the moral/legal duty distinction in tort law and thus reduce the exposure of churches to tort liability.

Restoration of Historical View of First Amendment Needed

All of the preceding suggestions will reduce the risk of tort liability in cases like Molko; however, in the final analysis, the brainwashing tort is such a fundamental violation of the First Amendment that there can be no adequate protection from such intrusions into internal church matters. Even with statutory exemptions, churches may not be safe; the activist Supreme Court of California has already demonstrated its willingness to disregard a

statutory tort immunity in cases like Tarasoff. No matter how careful churches are, no matter how much they plan, with precedents like Molko, none of the Church's internal matters will be safe from judicial regulators. What is necessary is a fundamental change in First Amendment law, one that will restore the religious freedom envisioned by the framers of the Bill of Rights.

In Chapter III, the historical view of the First Amendment religion clauses was examined. It was shown that the free exercise clause embodied essentially the same principle that is found in the Virginia Declaration of Rights: government has no authority over the mind and the heart. Throughout this paper, this same unifying principle has reappeared in different contexts. In the moral vs. legal duty section of the tort analysis (Chapter II), it was stated that civil government could not enforce purely moral duties because there were matters of the heart, subject only to the restrictions of conscience and societal restraints. In the discussion of Watson in the last chapter, this same principle was at the root of the lack of civil court jurisdiction over ecclesiastical matters. In that context, the principle was stated that civil courts have no jurisdiction in these matters because the issues had their origin in matters of faith and belief. The principle is the same: civil government simply has no authority over the mind and heart.

This same jurisdictional principle forbids governmental intrusion into the area of personal beliefs and over the acts done in furtherance thereof. With the objective of guaranteeing religious freedom to the fullest extent possible under our Constitution, the framers put an absolute prohibition on Congress, forbidding the passage of any law that would prohibit the free exercise of religion. This proscription, they believed, would best secure religious liberty. As University of Chicago Professor Michael McConnell stated: "The Free Exercise Clause guarantees the widest possible scope for religious activity. . . ."[189]

The "compelling state interest" balancing test has not achieved the purposes of the free exercise clause. By prescribing a system of balancing the governmental interest against the free exercise right of the individual it can, at most, promote a system of religious toleration -- the exact condition the framers sought to guard against! A litany of cases decided under the compelling state interest balancing test will demonstrate that it has not been a great boon to religious liberty. In almost every significant case at the Supreme Court level where it has been applied, it has resulted in a subordination of the religious exercise to the

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[189] Michael McConnell, "'Free Exercise' as the Framers Understood It," Proceedings of the National Religious Freedom Conference of the Catholic League for Religious and Civil Rights, "Turning the Religion Clauses on Their Heads," Washington D.C. November 17, 1988, by the Catholic League for Religious and Civil Rights (Milwaukee, WI, 1989), 49.

state interest.[190] Only a return to the original jurisdictional interpretation of the First Amendment religion clauses will adequately protect religious freedom in our nation today.

Such a restoration is appealing for at least three reasons. First, there is a strong historical basis to support it. The historical evidence from Virginia's struggle for religious liberty supports the jurisdictional view of the free exercise clause of the First Amendment, and there is no evidence from the congressional debates surrounding the Bill of Rights that contradicts the jurisdictional approach to the First Amendment. In fact, the subsequent acts of the Congress of 1789 are consistent with such an interpretation. The contemporary writings of the framers only lend further support to the notion that a proper understanding of jurisdiction is the key to the free exercise clause.

The second reason for restoring the jurisdictional concept to First Amendment law is more along the lines of a justification. There is ample Supreme Court precedent to restore the jurisdictional concept as the guiding principle

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[190] See, e.g., Susan and Tony Alamo Foundation v. Secretary of Labor, 471 U.S. 290 (1985), requiring a religious organization's compliance with federal minimum wage laws despite religious objections; Bob Jones University v. United States, 461 U.S. 574 (1983), withdrawal of tax exempt status for religiously motivated racially discriminatory policy; and U.S. v. Lee, 455 U.S. 252 (1982), requiring the participation of religious objectors in the social security system despite their religious convictions against it.

of the First Amendment. The Court has shown a reliance on history in applying the First Amendment.[191] The problem is that most of the history the Court has used to supports its rulings since the 1940's has been fundamentally flawed in that it promoted religious toleration instead of religious liberty. Unfortunately, these mistakes were perpetuated by subsequent courts that relied on the history of earlier case law instead of independently evaluating the historical data. The result is a fifty year history of First Amendment cases that pay lip service to the intent of the framers, but in reality are a vast departure from their true intentions.

In order to return to the actual intent of the framers in First Amendment law, the Supreme Court should look to case precedents that correctly apply the jurisdictional principle to matters of church and state. One of the first Supreme Court cases of this sort is Watson v. Jones.[192] This 1872 case recognized that religious matters were outside the competence of the civil courts for two main reasons: civil courts were untrained and thus incompetent in religious matters, but more importantly, because of the common law notion of jurisdiction which proscribed governmental interference in such matters. This principle later became synonymous with constitutional prohibitions against government interference in religious free exercise.

[191] See, McCollum v. Board of Education, 33 U.S. 203 (1948); Everson v. Board of Education, 330 U.S. 1 (1947).

[192] See, supra note 157, and accompanying text.

As the Supreme Court stated in Watson, questions of religious "discipline, faith, ecclesiastical rule, custom or law,"[193] are outside the reach of the civil courts.

The principle in Watson is much broader than simply a restriction on civil court subject matter jurisdiction over intra-church disputes, as has been asserted.[194] The underlying principle is the same one embodied in the Virginia Declaration of Rights: civil government has no authority over areas subject only to reason and conviction. Only duties enforceable through force or violence are reachable by civil authorities. This principle was also clearly stated in the 1873 case Watson v. Garvin:[195] "[I]n matters purely religious or ecclesiastical, the civil courts have no jurisdiction."[196] Constitutional scholar Laurence Tribe has acknowledged this same principle, although he gives it a different title. He has written that the main intent of the framers of the religion clauses was the "core ideal of religious autonomy."[197] This concept of "religious autonomy," like the principle of jurisdiction, speaks of

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193 Id. at 727.

194 See, e.g., Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Presbyterian Church v. Hull Church, 393 U.S. 440 (1969); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952).

195 54 Mo. 353 (1873).

196 Id. at 378.

197 Laurence Tribe, American Constitutional Law (Mineola, New York: Foundation Press, 1988), 1154.

separate spheres of authority for civil government and religion. The government sphere is controlled by force and violence, while the religious sphere only by reason and conviction.

Other constitutional scholars have also recognized the historical accuracy of the jurisdictional view of the First Amendment. They have recognized that this view brings the most stability to this controversial area of law. For example, Carl H. Esbeck,[198] commenting on the First Amendment religion clauses, has observed:

> The ordering principle at work is one of mutual forbearance whereby 'both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.' [citation] Those who were influential in our nation's history envisioned the churches and the state in a kind of parallelism, with neither subordinate to the other.[199] Each should eschew being co-opted by the other. Importantly, it the First Amendment's structural separation of these two circles of authority in society is reciprocal, then religious organizations are afforded a high level of freedom from governmental interference with their affairs.[200]

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[198] Carl H. Esbeck is a Professor of Law at University of Missouri-Columbia, Columbia, MO.

[199] Derr, "The First Amendment as a Guide to Church-State Relations: Theological Illusions, Cultural Fantasies, and Legal Practicalities," Church, State and Politics 75, 83 (J. Hensel ed. 1981), as quoted in Carl Esbeck, "Concepts of Church Autonomy in the First Amendment," National Institute on Tort and Religion, sponsored by the ABA Section of Tort and Insurance Practice, Division of Professional Education, San Francisco, CA, May 4-5, 1989, 405 (emphasis added).

[200] Esbeck, Id. (emphasis added).

Faithfully applying this jurisdictional principle throughout the last century, the Supreme Court only assumed jurisdiction in church disputes when they involved eminently secular matters, such as determining rights in real property disputes.[201] "None of these cases, however, sought to invoke the civil courts in the resolution of questions touching religious doctrine or practice."[202] However, in this century, particularly during the last fifty years, there has been increasingly less reliance on this principle of jurisdiction. Another free exercise test with no historical basis -- the compelling state interest balancing test -- has come to dominate free exercise jurisprudence.

If the Supreme Court had concentrated on applying the well-established principle of jurisdiction instead of creating new First Amendment tests, some of the worst First Amendment precedents of the last fifty years could have been avoided. Undoubtedly, religious freedom would not be as threatened today. An emphasis of the government's lack of jurisdiction over religious practices certainly would have yielded a much different result in Molko. Constitutional law professor Lynn R. Buzzard has written that the jurisdictional principles of Watson hold the key to defending churches in tort suits:

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201 Id. at 418, n. 46.

202 Id.

> The Watson principles seem directly relevant to [church tort cases]. The recognition of 'implied consent' of persons who voluntarily join the church, the dangers of intrusion into church doctrine even when on the surface the issues may appear purely secular, such as tort issues, and the 'strict deference' concepts all would argue against any court jurisdiction in these matters.[203]

Clearly, the jurisdictional view of the First Amendment religion clauses is well supported by history, by case law, and by legal scholars. Therefore, there is ample precedent for the Supreme Court to re-emphasize this jurisdictional principle in religion-clause cases today. With the recent rejection of the compelling state interest test in Smith, the time is right for a reassertion of this principle. Besides Smith, there is one other example, since the advent of the Sherbert balancing test in 1963, of the Supreme Court's applying a different test to free exercise claims: McDaniel v. Paty.[204] In this case, the Supreme Court struck down as unconstitutional a Tennessee statute that disqualified ministers and priests from serving as state legislators. Saying the right to free exercise of religion encompassed a right to preach, proselyte and perform other similar religious functions, it has been one of the few recent free exercise cases to hold that the free exercise clause encompassed active rights and not simply a right of exemption from government requirements (i.e. toleration).

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[203] Buzzard, supra note 116, at 212 (emphasis original).

[204] 435 U.S. 618 (1978).

Not surprisingly, this right was asserted only in the absence of the compelling state interest balancing test. The case is also significant because Justice Brennan who originated the "compelling state interest" test in Sherbert v. Verner,[205] did not even use his own test to decide the case. Both McDaniel and Smith have offered hope that the true historical meaning of the free exercise clause -- the principle of jurisdiction -- will begin to be reasserted in free exercise cases.

The Strategic Response to Smith

By abandoning a strict application of the compelling state interest balancing test in Smith, the U.S. Supreme Court has shown its dissatisfaction with the broad application of that test. In a decisive step, a five-member majority of the court has rejected judicial activism and reasserted the historic limitations on judicial power in religious freedom cases. Significantly, there is evidence in Smith that the Court has also begun to recognize the jurisdiction principle that lies at the heart of the First Amendment religious freedom.

In light of Smith's profound impact upon the law of free exercise, what has been the response of religious liberty advocates in America? Almost without exception, these groups have been critical of the Smith decision! For instance, Steven Shapiro of the American Civil Liberties

205 374 U.S. 398 (1963).

Union, which filed a friend of the court brief on behalf of the Native Americans, said the ruling "significantly erodes the protection for religious freedom."[206] Accordingly, a coalition of seventeen religious liberty advocacy groups including the American Jewish Congress, the American Civil Liberties Union, People for the American Way, and Americans United for Separation of Church and State have petitioned the Supreme Court for a rehearing on the matter, warning that the reasoning in the decision seriously "jeopardizes religious freedom."[207] It is understandable that organizations like the ACLU, who are openly committed to wholesale judicial activism, would be distressed by Smith. But, amazingly, even some conservative religious liberty advocates, such as the Rutherford Institute and the Christian Legal Society, have bemoaned the demise of the balancing test and joined the petition for rehearing. For example, John Whitehead, President of the Rutherford Institute, recently criticized the Smith decision for abandoning the balancing test and "plac[ing] this traditional safeguard of religious liberty in serious jeopardy."[208]

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206 Ruth Marcus, "Court: States Can Ban Peyote in Rites; Religious Freedom Does Not Justify Breaking Valid Law, Scalia Says," Washington Post News Service, Executive News Service, April 18, 1990, 4.

207 Edward E. Plowman, ed., National & International Religion Report 4, No. 11 (May 21, 1990): 3.

208 John Whitehead, "Peyote, Legal Precedent and Religious Liberty," Issued Statement, (Charlottesville,

Whether the twenty-seven year history of the balancing test in constitutional law merits the title "traditional safeguard of religious liberty" is very questionable.[209] The Molko decision and a number of other religious liberty cases[210] have shown that the balancing test is an open invitation to judicial activism that has, in fact, provided very little protection for religious liberty. Furthermore, the history of the free exercise clause (examined in detail in Chapter III) has shown the balancing test to be a direct contradiction of the framers' intent, because it has promoted religious toleration instead of religious liberty. What should be the response to Smith, if the objective is a restoration of true religious liberty in America?

The Smith decision has provided what the late Dr. Francis A. Schaeffer[211] called an "open window."[212] It has presented a rare opportunity to reassert the true historical foundations of religious freedom. If the object is to restore true religious liberty (and not to perpetuate religious tolerance) in First Amendment law, then it would

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Virginia: The Rutherford Institute, April 1990), 2 (emphasis added).

209 See, supra note 190.

210 See, Id.

211 Dr. Francis A. Schaeffer is widely recognized as one of the most influential Christian thinkers of the Twentieth Century.

212 See, Francis A. Schaeffer, A Christian Manifesto (Westchester, Illinois: Crossway Books, 1981), 73-89.

be much more effective not to bemoan the loss of a twenty-seven-year doctrine, but rather, to reassert a 120-year tradition of limited jurisdiction in upcoming First Amendment free exercise cases. Therefore, the next strategic step should be to persuade the Court that the jurisdictional principle of Watson and its companion First Amendment cases, provide the key principle to a historically accurate view of the free exercise clause.

While Smith has offered a perfect opportunity to reinstitute the jurisdictional principle in future free exercise cases, it also has presented great risk. Unless the jurisdictional principle is strongly and properly reasserted in future cases, the opportunity could be lost, and a new test emphasizing some principle hostile to the First Amendment could replace it. The importance of reasserting the traditional view of religious liberty has become even more crucial in view of the fact that our culture is increasingly being dominated by the law.

Conclusion

In his commencement address at Harvard, "A World Split Apart," Aleksandr Solzhenitsyn warned the West of the dangers of the growing legalism that has increasingly come to dominate the culture. As Solzhenitsyn keenly observed:

> Western society has chosen for itself the organization best suited to its purposes and one I might call legalistic. The limits of human rights and rightness are determined by a system of laws; . . . Every conflict is solved according to the

> letter of the law and this is considered to be the ultimate solution. If one is right from a legal point of view, nothing more is required, nobody may mention that one could still not be entirely [morally] right, and urge self-restraint or a renunciation of these rights, call for self-sacrifice and selfless risk: this would simply sound absurd.
>
> I have spent all my life under a Communist regime and I will tell you that a society without any objective legal scale is a terrible one indeed. But a society with no other scale but the legal one is also less than worthy of man. A society based on the letter of the law and never reaching any higher fails to take advantage of the full range of human possibilities. The letter of the law is too cold and formal to have a beneficial influence on society. Whenever the tissue of life is woven of legalistic relationships, this creates an atmosphere of spiritual mediocrity that paralyzes man's noblest impulses.[213]

The judicial activism rampant in modern courts is symptomatic of the "legalistic" society Solzhenitsyn talked about. Judicial activism seeks to make all the conflicts of life legal ones, so that "[e]very conflict is solved according to the ... law and this is considered the ultimate solution." No matter on what level the dispute has originated, be it moral, religious, or scientific, judicial activists have determined that the legal arena is the only appropriate setting in which to settle it. As Solzhenitsyn said: "law" is considered to be the "ultimate solution." Judicial activists believe they are to be the final arbiters of what will be permitted in society. No wonder the court

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[213] Aleksandr I. Solzhenitsyn, "A World Split Apart, Address at Harvard," as published in Robert Berman (ed.), Solzhenitsyn at Harvard (Washington, D.C.: Ethics and Public Policy Center, 1980), 7-8 (emphasis added).

in Molko ignored the traditional institutions of the community, family and church as institutions that could satisfactorily regulate immoral conduct: judicial activists seek not only to ignore but to replace these institutions as problem solving entities.

In Molko, the court, true to its judicial activist reputation,[214] ignored the common law legal and moral duty distinction, distorted the traditional tort analysis, upset legal presumptions about the nature of man, and rejected historical constitutional doctrines. In so doing, the court sought to regulate all conduct, even the area of thought and belief. But even more dangerously, the court displaced the other essential social institutions of community, family and Church, which are relegated to a level of secondary importance, thereby destroying the nature of human relations.

Solzhenitsyn's philosophy was very evident in the Molko court's treatment of both the tort claims and the constitutional issues. The danger of such arrogant behavior, as Solzhenitsyn said, is a society "less than worthy of man," that "fails to take advantage of the full range of human possibilities." This legalistic way of life promoted by judicial activism has infringed on religious liberty and thus, "create[d] an atmosphere of spiritual mediocrity that paralyzes man's nobles impulses." As

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[214] See, supra note 20.

everything becomes subject to the legalistic standards of judicial activists, even eminently "spiritual" conduct will become subject to tort liability, and all religious activity will be stifled. As this occurs, the nature of community life will be fundamentally altered and ultimately destroyed but, even more seriously, so will the nature of religious life.

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