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Free Exercise of the Courtroom: Why Perpetrators of Religiously Motivated Violence Can No Longer Hide behind the First Amendment.

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COMMENTS

FREE EXERCISE OF THE COURTROOM: WHY PERPETRATORS OF RELIGIOUSLY MOTIVATED VIOLENCE CAN NO LONGER HIDE BEHIND THE FIRST AMENDMENT

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I. INTRODUCTION

A. *Laura's Case*

When Tom and Judy Schubert went out of town for a weekend in 1996, they thought their seventeen-year-old daughter Laura would be safe at an "all-nighter" youth event at the family's Pentecostal church.[1] But during Sunday evening prayer services, Laura collapsed.[2]

Believing Laura was possessed by demons, the youth pastor instructed several young parishioners to perform a common ritual, known as "laying on hands," to rid Laura of the purported possession.[3] As part of the ritual, the minor congregants physically restrained Laura and prayed over her for more than two hours.[4] Laura later testified, "I was being grabbed by my wrists, on my ankles, on my shoulders, everywhere. I was fighting with everything I had to get up, I was telling them, no. I was telling them, let go, leave me alone. They did not respond at all."[5] All those present agree that during the ritual "Laura clenched her fists, gritted her teeth,

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1. Pleasant Glade Assembly of God v. Schubert, 264 S.W.3d 1, 3 (Tex. 2008) (detailing the facts underlying Laura Schubert's lawsuit against Pleasant Glade Assembly of God for the psychological injuries she suffered following an exorcism performed upon her at church leaders' direction), *cert. denied*, 129 S.Ct. 1003 (2009).

2. *In re* Pleasant Glade Assembly of God, 991 S.W.2d 85, 87 (Tex. App.—Fort Worth 1998) (describing Laura's collapse at the altar after testifying before the congregation), *rev'd*, 264 S.W.3d 1 (Tex. 2008), *cert. denied*, 129 S.Ct. 1003 (2009). Though Laura's symptoms were consistent with dehydration and exhaustion, it is undisputed that Laura was also deeply distressed by an event that occurred at the church on Friday night and about which she had just testified before collapsing. *Id.* During the Friday "all-nighter," one member of the youth congregation claimed to have seen a demon trying to enter the sanctuary. *Id.* In response to this declaration, the youth minister and his wife, listed among the defendants in Laura's lawsuit, collected all the children present and had them anoint everything in the church with holy oil while praying to cast out the demons. *Id.* The youth minister only announced the demons defeated at 4:30 a.m., leaving the children with only a short time to sleep before working at a church garage sale the next day. *Id.* Laura admitted that the events of Friday night frightened and exhausted her. *Id.*

3. *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d at 3 ("During the evening service, Laura collapsed. After her collapse, several church members took Laura to a classroom where they 'laid hands' on her and prayed.").

4. *Id.* at 15 (Jefferson, C.J., dissenting).

> [M]embers of Pleasant Glade restrained Schubert on two separate occasions against her will. During the first encounter, seven members pinned her to the floor for *two hours* while she cried, screamed, kicked, flailed, and demanded to be released. This violent act caused Schubert multiple bruises, carpet burns, scrapes, and injuries to her wrists, shoulders, and back. . . . Fifteen minutes later, at the direction of Pleasant Glade's youth pastor, a different group of seven church members physically restrained her for an hour longer.

Id. (emphasis in original).

5. *Id.* Despite her vehement resistance, Laura was not let alone until she calmed down and complied with orders to say the name "Jesus." *Id.* at 4 (majority opinion).

foamed at the mouth, made guttural noises, cried, yelled, kicked, sweated, and hallucinated."[6] After the church members released Laura, she was so weak from exhaustion that she could barely stand on her own.[7]

Despite the terrifying experience, Laura remained at the church and continued to participate in youth activities over the next two days.[8] But on Wednesday evening, she collapsed again and began writhing on the floor.[9] The youth pastor directed the other young parishioners to restrain Laura while the church's senior pastor was summoned.[10] Upon his arrival, the senior pastor placed his hand on Laura's forehead and prayed for her while the youth parishioners continued to hold her down, spread-eagled, crying, screaming, and thrashing on the floor.[11] During the event, Laura suffered only carpet burns, scrapes, and minor bruises on her back, wrists, and shoulders.[12] Shortly thereafter, Laura and her family resigned their membership from the church.[13]

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6. *Id.* at 3 (majority opinion) (describing Laura's behavior during the incident). The parties disagreed, however, as to the cause of Laura's actions. *Id.* Church members contended, without substantiation, that Laura's actions may have been a ploy for attention, rather than the result of her restraint. *Id.*

7. *Id.* at 15 (Jefferson, C.J., dissenting).

8. *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d at 4 (majority opinion) ("On Monday and Tuesday, Laura continued to participate in church-related activities without any problems, raising money for Vacation Bible School and preparing for youth drama productions.").

9. *Id.* During Wednesday evening services, Laura was still shell-shocked from Sunday night's laying on hands ritual, and she resisted another youth congregant when he attempted to put his arm around her. *Id.* at 15 (Jefferson, C.J., dissenting). Not wanting to be touched, Laura testified, "I tried to scoot away from him. He scooted closer. He was more persistent. Finally, his grasp on me just got hard . . . before I knew it, I was being grabbed again." *Id.*

10. *Id.* at 4.

11. *Id.* at 15 (Jefferson, C.J., dissenting).

> According to Laura, the youth, under the direction of [the youth pastor] and his wife, Holly, held her down. Laura testified, moreover, that she was held in a "spread eagle" position with several youth members holding down her arms and legs. The church's senior pastor, Lloyd McCutchen, was summoned to the youth hall where he played a tape of pacifying music, placed his hand on Laura's forehead, and prayed.

Id. at 4 (majority opinion).

12. *Id.* at 4 (majority opinion) (describing the physical injuries that Laura suffered from the incident).

13. Pleasant Glade Assembly of God v. Schubert, 264 S.W.3d 1, 4 (Tex. 2008) (stating that Laura's parents decided to leave the church because of their disappointment with how the church ministers and members treated their daughter), *cert denied*, 129 S.Ct. 1003 (2009).

Though Laura's physical injuries from the incidents were slight, she immediately exhibited signs of psychological trauma.[14] As later detailed by the Texas Supreme Court:

> Over the next months, several psychologists and psychiatrists examined Laura, documenting her multiple symptoms, such as angry outbursts, weight loss, sleeplessness, nightmares, hallucinations, self-mutilation, fear of abandonment, and agoraphobia. Despite the psychiatric counseling, Laura became increasingly depressed and suicidal, eventually dropping out of her senior year of high school and abandoning her former plan to attend Bible College and pursue missionary work. Finally, in November 1996, Laura was diagnosed as suffering from post-traumatic stress disorder, which the doctors associated with her physical restraint at the church in June 1996. One of the expert witnesses at trial testified that Laura would "require extensive time to recover trust in authorities, spiritual leaders, and her life-long religious faith." Ultimately, Laura was classified as disabled by the Social Security Administration and began drawing a monthly disability check.[15]

Laura and her parents later sued the church, the youth pastor, the senior pastor, and other church members for, inter alia, negligence, intentional infliction of emotional distress (IIED), false imprisonment, assault, battery, and child abuse.[16] A jury awarded Laura damages for her mental, emotional, and psychological injuries resulting from the two incidents, and the court of appeals remanded with orders to dismiss.[17]

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14. *Id.* at 4–5 (listing Laura's emotional symptoms).

15. *Id.*

> Laura's family strongly believed that the church's actions "caused Laura 'mental, emotional and psychological injuries including physical pain, mental anguish, fear, humiliation, embarrassment, physical and emotional distress, post-traumatic stress disorder, and loss of employment.'"

Id. at 5.

16. *Id.* at 5.

17. *In re* Pleasant Glade Assembly of God, 991 S.W.2d 85, 88–90 (Tex. App.—Fort Worth 1998) (finding that church leaders had a protected free exercise right to engage in laying on hands and, therefore, could not be liable for negligent or intentional infliction of emotional distress), *rev'd*, 264 S.W. 3d 1 (Tex. 2008), *cert. denied*, 129 S.Ct. 1003 (2009). "Regarding negligent and intentional infliction of emotional distress, the First Amendment gives Pleasant Glade the right to engage in driving out demons-intangible or emotional harm cannot ordinarily serve as a basis for maintaining a tort cause of action against a church for religious practices." *Id.* at 89.

The Texas Supreme Court reversed the jury's findings.[18] The divided majority concluded that Laura failed to state a cognizable, secular claim and dismissed the suit for lack of jurisdiction.[19] In his opinion for the majority, Justice David Medina cited a twenty-year-old Ninth Circuit opinion asserting that emotional or intangible harms generally cannot form the basis of a personal injury claim against a church for religiously motivated conduct involving its members.[20] The court further concluded that Laura's claim for IIED, in particular, would necessarily require forbidden inquiry into the verity of the church's religious belief in possession by malevolent forces.[21] According to the majority, even though the elements of the alleged tort are based on secular principles of law, the application of those elements to a church engaged in religious conduct would intrude upon the church's free exercise right to interpret religious doctrine and apply it to its parishioners.[22]

In the final lines of the decision, the court commented on the fact that laying on hands is a common practice in the church and "not normally dangerous or unusual."[23] Thus, the court found that because the practice is both accepted and expected by parishioners, the fact "[t]hat a particular member may find the practice emotionally disturbing and non-consensual when applied to her does not transform the dispute into a secular matter."[24] The majority concluded with the bare assertion that while a parishioner might foreseeably have a compensable claim for emotional damages resulting from a church's religiously motivated conduct, Laura's case did not present such a claim.[25]

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18. *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d at 2 (concluding that "the case as tried, presents an ecclesiastical dispute over religious conduct that would unconstitutionally entangle the court in matters of church doctrine").

19. *Id.* at 13 ("Because determining the circumstances of Laura's emotional injuries would, by its very nature, draw the Court into forbidden religious terrain, we conclude that Laura has failed to state a cognizable, secular claim to this case.").

20. *Id.* at 8 (citing Paul v. Watchtower Bible & Tract Soc'y of N.Y., 819 F.2d 875, 883 (9th Cir. 1987)) ("Therefore, '[a] religious organization has a defense of constitutional privilege to claims that it has caused intangible harms-in most, if not all, circumstances.'" (quoting *Paul*, 819 F.2d at 883)).

21. *Id.* at 9 ("This type of intangible, psychological injury, without more, cannot ordinarily serve as a basis for a tort claim against a church or its members for its religious practices.").

22. *Id.* at 11 (dismissing Justice Paul W. Green's dissenting argument that Laura's claim could still be adjudicated on "neutral principles of tort law"). The majority found that Laura's claims were inseparable from both the congregation's beliefs in demonic possession and Laura's internalization of church leaders' discussion of those beliefs. *Id.*

23. *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d at 12–13.

24. *Id.* at 13.

25. *Id.*

B. *The Problem*

Laura's case illustrates a contentious issue in free exercise jurisprudence: should parishioners be permitted to recover for purely *intangible* damages caused by the religiously motivated conduct of churches and other religious actors? Numerous courts and scholars have struggled with this question but have failed to reach an overriding consensus.[26]

This complex and nuanced constitutional issue must be carefully evaluated with consideration for both religious actors' free exercise rights and parishioners' rights to physical and emotional integrity. First, a reviewing court must determine whether constitutional rights are implicated by a particular controversy. Free exercise is not threatened when the church conduct is not religiously compelled, as when a child is sexually abused by a renegade pastor or priest.[27] But when the disputed conduct is funda-

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> The Free Exercise Clause prohibits courts from deciding issues of religious doctrine. Here, the psychological effect of church belief in demons and the appropriateness of its belief in "laying hands" are at issue. Because providing a remedy for the very real, but religiously motivated emotional distress in this case would require us to take sides in what is essentially a religious controversy, we cannot resolve that dispute.

Id.

26. *See, e.g.,* Molko v. Holy Spirit Ass'n for the Unification of World Christianity, 762 P.2d 46, 63 (Cal. 1988) (finding that whether the church conduct was sufficiently outrageous to uphold a claim for IIED is a question of fact, thereby precluding summary judgment based on the church's free exercise defense), *cert. denied*, 490 U.S. 1084 (1989). The court also maintained, however, that the church's practice of "Heavenly Deception," or lying to prospective adherents in order to provide them the opportunity to hear the reverend's teachings, is purely religious conduct that cannot give rise to liability for fraud. *Id.* at 58; Guinn v. Church of Christ of Collinsville, 775 P.2d 766, 775 (Okla. 1989) (denying recovery for emotional damages sustained by a Church of Christ congregant after church leaders publicly condemned her for having an extra-marital affair in violation of church teachings). Though Guinn was unable to recover for injuries incurred during her membership in the church, she was permitted recovery for her injuries sustained during the period after her resignation from the congregation, during which church leaders continued to defame her publicly. *Guinn*, 775 P.2d at 783; *see also* MICHAEL S. ARIENS & ROBERT A. DESTRO, RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY 867–83 (1996) (discussing the various issues raised by application of the free exercise defense in tort law); Paul T. Hayden, *Religiously Motivated "Outrageous" Conduct: Intentional Infliction of Emotional Distress as a Weapon Against "Other People's Faiths,"* 34 WM. & MARY L. REV. 579, 581 (1993) (arguing for application of the free exercise defense to all claims for IIED brought against religious organizations). "Through its remedial and substantive aspects, the tort threatens both defendants' right of religious freedom and society's important interesting in tolerating differing religious views." Paul T. Hayden, *Religiously Motivated "Outrageous" Conduct: Intentional Infliction of Emotional Distress as a Weapon Against "Other People's Faiths,"* 34 WM. & MARY. L. REV. 579, 581 (1993).

27. Jones *ex rel.* Jones v. Trane, 591 N.Y.S.2d 927, 931 (N.Y. Sup. Ct. 1992) (stating that the First Amendment does not protect conduct that has nothing to do with religious creed); *see also* Alberts v. Devine, 479 N.E.2d 113, 124 (Mass. 1985) (imposing liability against clerical superiors for inducing a minister's psychiatrist to disclose confidential pa-

mental to the expression of legitimately held religious beliefs, such as the laying on hands ritual in Laura's case,[28] courts must decide whether assessing liability for the conduct impedes the church's right to free exercise.[29] If it does, the question becomes whether the burden on free exercise is justified in furtherance of some other legitimate end, namely, compensating the plaintiff for her injuries.

In cases like Laura's, in which religious conduct became violent because of the plaintiff's vehement resistance to it and resulted in severe emotional disturbance,[30] courts must balance the constitutionally protected right of religious actors to the free exercise of their beliefs against the fundamental right of plaintiffs to physical and emotional security.[31] The balancing act becomes more difficult as the religious significance of the act increases and the degree of the plaintiff's injuries diminishes. Even more challenging are cases in which the violent conduct resulted in no physical injury but did cause severe emotional harm. At what point should the plaintiff have to bear the burden of her psychological injuries in favor of the defendant's right to unobstructed worship?

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tient information), *cert. denied*, 474 U.S. 1013 (1985); Olson v. First Church of Nazarene, 661 N.W.2d 254, 265–66 (Minn. Ct. App. 2003) (permitting claim for IIED and negligence against pastor who had an illicit sexual affair with parishioner-plaintiff's wife, but not against the church); Hester v. Barnett, 723 S.W.2d 544, 561 (Mo. Ct. App. 1987) (allowing claim for, inter alia, IIED based on minister's divulgence to the congregation of confidential information from plaintiffs' counseling sessions); Strock v. Pressnell, 527 N.E.2d 1235, 1244 (Ohio 1988) (immunizing church against IIED liability for errant minister's sexual relationship with parishioner-plaintiff's ex-wife); Christofferson v. Church of Scientology, 644 P.2d 577, 602–03 (Or. Ct. App. 1982) (finding religious organization not exempt from liability for fraud if statements by organization's agents do not concern the religious beliefs or practices of the organization), *rev. denied,* 650 P.2d 928 (Or. 1982), *cert. denied,* 459 U.S. 1206 (1983).

28. *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d at 3 (describing Laura's experience).

29. *Id.* at 12 (citing Serbian E. Orthodox Diocese for the U.S. and Can. v. Milivojevich, 426 U.S. 696, 709–10 (1976); Westbrook v. Penley, 231 S.W.3d 389, 396 (Tex. 2007)) (explaining the dilemma that courts face when a claim for IIED is based on a fundamental religious practice). "Although the Free Exercise Clause does not categorically insulate religious conduct from judicial scrutiny, it prohibits courts from deciding issues of religious doctrine." *Id.*

30. *Id.* at 18 (Jefferson, C.J., dissenting) ("[This case] is about violent action-specifically, twice pinning a screaming, crying teenage girl to the floor for extended periods of time.").

31. *See id.* at 16 ("It is a basic tenet of tort law that emotional damages may be recovered for intentional torts involving physical invasions, such as assault, battery, and false imprisonment." (citations omitted)).

Courts and scholars have yet to agree upon an answer to this query.[32] Several jurisdictions have taken the same approach as the Texas Supreme Court, shying away from the issue altogether by labeling these claims too perilously intertwined with religious doctrine for review by the secular judiciary.[33] Particularly regarding claims for IIED, which requires only that the defendant's conduct be "extreme and outrageous,"[34] some fear that any evaluation of the conduct would compel judges and juries to determine the verity and acceptability of particular religious beliefs.[35] Some advocate completely barring claims for IIED in these cases, arguing that the free exercise rights of unpopular minority religions cannot be adequately protected when subject to this type of liability.[36]

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32. *Compare* Paul v. Watchtower Bible & Tract Soc'y of N.Y., 819 F.2d 875, 880 (9th Cir. 1987) ("When the imposition of liability would result in the abridgement of the right to free exercise of religious beliefs, recovery in tort is barred."), *cert. denied*, 484 U.S. 926 (1987), *with* Molko v. Holy Spirit Ass'n for the Unification of World Christianity, 762 P.2d 46, 56–57 (Cal. 1988) (holding that government action burdening free exercise may withstand constitutional scrutiny if it is the least burdensome and non-discriminatory means of achieving a compelling, secular governmental interest), *cert. denied*, 490 U.S. 1084 (1989), *and* MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 8 (2005) ("Every citizen has at least as much right to be free from harm as the religious entity has to be free from government regulation.").

33. *See, e.g.,* Glass v. First United Pentecostal Church, 676 So. 2d 724, 732 (La. Ct. App. 1996) ("It is without question that religious organizations are no longer immune from tort liability. However, the cloak of the religious protections of the First Amendment remains to bar certain actions on the basis of the wall of separation between the church and state."); Guinn v. Church of Christ of Collinsville, 775 P.2d 766, 774 (Okla. 1989) ("The trial court's refusal to give summary judgment to the Elders on Parishioner's [pre-resignation] tort claims and its adjudication of this protected conduct constituted a governmental burden on the Church of Christ's right to its free exercise of religion."); Tilton v. Marshall, 925 S.W.2d 672, 677 (Tex. 1996) ("[W]hen a plaintiff's suit implicates a defendant's free exercise rights, the defendant may assert the First Amendment as an affirmative defense to the claims against him.").

34. RESTATEMENT (SECOND) OF TORTS § 46(1) (1965) ("One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress.").

35. Paul T. Hayden, *Religiously Motivated "Outrageous" Conduct: Intentional Infliction of Emotional Distress as a Weapon Against "Other People's Faiths,"* 34 WM. & MARY L. REV. 579, 583 (1993) (calling for a restriction on IIED "in a manner that would result in greater protection of religious freedom"). "Such a restriction, perhaps a radical one, is fully justified because the adjudication of these intentional infliction claims embroils courts in forbidden inquires." *Id.* at 583–84. "[T]he tort of intentional infliction of emotional distress is a powerful weapon against socially intolerable conduct. Indeed, it is one of the most sweeping causes of action in all of tort law." *Id.* at 581.

36. *E.g., id.* (arguing for restricting the scope and viability of claims for IIED when brought against religious entities acting in a religious context).

> I suggest the need for courts, utilizing traditional common law powers, to restrict the scope of this particular common law tort in a manner that would result in greater

Unfortunately, as evidenced by Laura's case, the timidity of courts faced with these challenging claims often leaves legitimate victims of religiously motivated violence without a legal remedy.[37] This raises yet another dilemma: how can courts preserve religious liberty in these cases without denying parishioners the same legal protections as secular citizens? Had Laura been forcibly held against her will by students at her public high school, rather than by other members of her church, the courts would not hesitate to evaluate her claims for emotional injury.[38] By refusing to do so, courts permit religious groups to injure their members with impunity under the cloak of religious justification.[39] This especially holds true for women and children adherents of minority religions, who are particularly vulnerable to religiously motivated violence.[40] If courts continue to recoil from these lawsuits, those individuals most in need of legal protection will remain marginalized and vulnerable.

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protection of religious freedom, broadly defined, and in the accordance of greater weight to the societal interest in tolerating various religious beliefs.

Id.

37. *See* MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 8–9 (2005) (arguing that religious entities have worked diligently to immunize their conduct from the law and have been lobbying for the privilege of hurting others with no repercussions).

38. *See* Molko v. Holy Spirit Ass'n for the Unification of World Christianity, 762 P.2d 46, 61 (Cal. 1988) (suggesting that because a nonreligious organization engaged in the same fraudulent conduct as the defendant-religious organization would be held legally liable for its conduct, the defendant should not be excused from liability merely because of its religious affiliation), *cert. denied*, 490 U.S. 1084 (1989).

39. *See* MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 10 (2005) (arguing that exemptions for religious entities from generally applicable laws have led to nationwide tolerance of abuse of congregants, most of which is never reported).

40. *See, e.g., id.* at 24 (describing the situation in the border towns of Colorado City, Arizona and Hildale, Utah, in which the secretive and reclusive Fundamentalist Church of Latter-day Saints sect sanctions physical and sexual abuse of children while local authorities, themselves members of the sect, turn a blind eye to the violations); J. P. LARSSON, UNDERSTANDING RELIGIOUS VIOLENCE: THINKING OUTSIDE THE BOX ON TERRORISM 30–31 (2004) (analyzing religious violence as it manifests in families and on the individual level); Sima Wali, *Muslim Refugee, Returnee, and Displaced Women: Challenges and Dilemmas, in* FAITH AND FREEDOM: WOMEN'S HUMAN RIGHTS IN THE MUSLIM WORLD 175, 182 (Mahnaz Afkhami ed., 1995) (discussing the subjugation of females in Muslim refugee communities and the use of religion to justify the abuse). "The tragedy visited upon uprooted populations in general, and upon women and girls specifically, produces unfathomable, lifelong psychological effects." Sima Wali, *Muslim Refugee, Returnee, and Displaced Women: Challenges and Dilemmas, in* FAITH AND FREEDOM: WOMEN'S HUMAN RIGHTS IN THE MUSLIM WORLD 175, 182 (Mahnaz Afkhami ed., 1995).

C. *The Solution*

I propose that, in order for courts faced with these claims to protect both religious freedom and parishioners' rights, the free exercise defense should only be permitted where the allegedly tortious conduct is nonviolent. In other words, the nature of the religious conduct, rather than the nature of the plaintiff's injuries, should determine the applicability of the defense. This standard affords courts a clear directive for deciding these difficult cases by drawing a bright line between conduct that is always permissible free exercise and conduct that should always be subject to judicial scrutiny.

Following this Introduction, Part II discusses the history of the Free Exercise Clause as a defense to parishioners' claims for emotional damages. Part II attempts to distinguish those cases in which claims against religious organizations were upheld and those in which claims for emotional damages and IIED were rejected. In Part III, I present my critique of the traditional rejection of claims for intangible harms in religious conduct cases. I argue this approach to the law leaves members of minority religions, particularly women and children, vulnerable to religiously motivated abuse and denies this class of persons the same legal rights as other citizens. This section further explores my proposal for an alternative approach to the problem: permitting recovery for emotional injuries and IIED where the religious conduct is violent, as opposed to merely passive, nonviolent behavior or religious speech. Finally, in Part IV, I conclude by discussing how my alternative approach adequately protects the free exercise rights of defendants while still compensating the victims of abuse.

II. LEGAL BACKGROUND: THE FREE EXERCISE DEFENSE

A. *The Free Exercise Clause and Government Regulation of Religious Conduct*

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof.*"[41] Courts have traditionally construed this provision to restrain the government from suppressing the profession or promulgation of religious beliefs.[42] Delineating between

41. U.S. CONST. amend. I, § 1 (emphasis added).

42. *E.g.,* Reynolds v. United States, 98 U.S. 145, 163 (1878) (discussing legislation proposed prior to the passage of the Bill of Rights defining the Founders' notions of religious freedom).

> [R]eligious freedom is defined; and after a recital 'that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propaga-

what is the province of the government to regulate and what is absolutely protected by the Free Exercise Clause, the United States Supreme Court, quoting Thomas Jefferson, declared it the duty of civil government to interfere in religious principle only when that principle manifests as "overt acts against the peace and good order of society."[43] In 1940, the Court applied this doctrine to the states.[44]

The Supreme Court has consistently distinguished between religious belief and religiously motivated conduct, finding the former inviolable by civil authority and the latter within government's prerogative to regulate or even proscribe in the interests of society.[45] The Court explained in *Reynolds v. United States*, "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[46] To permit religious adherents to knowingly and intentionally break the law with impunity for their religious beliefs would, the Court warned, enable every citizen to place himself above the law.[47] Thus, in order to protect freedom of belief itself, courts must distinguish it from conduct and regulate the latter accordingly.[48]

Resolving alleged infringements upon the free exercise of religion, the threshold question courts must answer is whether resolution of the claim

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> tion of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty,' it is declared 'that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order.' In these two sentences is found the true distinction between what properly belongs to the church and what to the State.

Id.

43. *Id.* (discussing the government's limited ability to interfere with religious activity).

44. Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940) (recognizing that although the Fourteenth Amendment embraces the concepts of freedom to believe and act, "[c]onduct remains subject to regulation for the protection of society"). "The freedom to act must have appropriate definition to preserve the enforcement of that protection." *Id.*; *see also* U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

45. *See, e.g., Cantwell*, 310 U.S. at 303–04 ("Thus the Amendment embraces two concepts, -freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."); *Reynolds*, 98 U.S. at 166. The *Reynolds* Court elaborated:

> Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

Reynolds, 98 U.S. at 166.

46. *Reynolds*, 98 U.S. at 166.

47. *Id.* at 167.

48. *Id.* at 166.

would require a judicial determination of the truth or falsehood of a religious belief.[49] If resolution of the claim would require such a determination, the issue is one of religious belief and is, thus, beyond the discretion of the courts to review.[50] Courts are equally without license to resolve matters that are purely ecclesiastical in nature.[51] The Supreme Court has defined such purely ecclesiastical matters as those concerning "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them."[52] Courts may, however, question whether or not a religious belief is sincerely held by the party or religious organization claiming free exercise protection.[53]

Religious groups are never protected by the Free Exercise Clause when their conduct is neither religious in nature nor religiously motivated.[54]

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49. *See* United States v. Ballard, 322 U.S. 78, 86 (1944) (finding that the First Amendment precludes putting questions of the verity of religious beliefs before juries).

50. *See id.* ("The law knows of no heresy, and is committed to the support of no dogma, the establishment of no sect." (citation omitted)).

51. Watson v. Jones, 80 U.S. (13 Wall.) 679, 733 (1871).

> [N]o jurisdiction has been conferred on the tribunal to try the particular case before it, or that in its judgment, it exceeds the powers conferred upon it, or that the laws of the church do not authorize the particular form of proceeding adopted; and in a sense of ten used in the courts, all of those may be said to be questions of jurisdiction.

Id.

52. *Id.*

> But it is easy to see that if the civil courts are to inquire into all these matters . . . [they] may, and must, be examined into minuteness and care, for they would become, in almost every case, the criteria by which the validity of the ecclesiastical decree would be determined in the civil court.

Id. (emphasis omitted).

53. Tilton v. Marshall, 925 S.W.2d 672, 678 (Tex. 1996) ("[W]hile courts have the capacity to inquire into the sincerity of a person's beliefs, the First Amendment prohibits courts from determining the veracity of religious tenet. . . . To avoid conducting 'heresy trials,' courts may not adjudicate the truth or falsity of religious doctrines or beliefs." (citation omitted)).

54. *See, e.g.*, Alberts v. Devine, 479 N.E.2d 113, 185-86 (Mass. 1985) (imposing liability against church for tortiously inducing minister's psychiatrist to disclose confidential patient information), *cert. denied*, 474 U.S. 1013 (1985); Olson v. First Church of Nazarene, 661 N.W.2d 254, 265–66 (Minn. Ct. App. 2003) (ruling that the courts have jurisdiction over a claim of IIED and negligence for a pastor having an affair with a church member's wife); Hester v. Barnett, 723 S.W.2d 544, 560 (Mo. Ct. App. 1987) (concluding that a party can raise an IIED claim against a minister's unlawful actions that are not religious in nature); Strock v. Pressnell, 527 N.E.2d 1235, 1244 (Ohio 1988) (holding that a church cannot be held liable under agency principles for a pastor's negligence that was not associated with the pastor's duties for the church); Christofferson v. Church of Scientology, 644 P.2d 577, 603 (Or. Ct. App. 1982) (finding religious organization not exempt from liability for fraud if statements by organization's agents do not concern the religious beliefs or practices of the organization), *rev. denied*, 650 P.2d 928 (Or. 1982), *cert. denied*, 459 U.S. 1206 (1983).

For instance, the Fifth Circuit overruled a Baptist minister's free exercise defense to allegations of malpractice and breach of fiduciary duty, reasoning that because he was engaged in secular marital counseling at the time the alleged torts were committed, he could not be exempted from civil liability.[55] Similarly, in a New York civil case, a Catholic church was found not liable for the conduct of a priest accused of sexually molesting a minor congregant, as the priest's conduct was unauthorized and in violation of church canons.[56]

While the secular conduct of religious groups and individuals is always subject to governmental regulation, courts must determine whether regulations or prohibitions of conduct impermissibly burden free exercise.[57] In two important decisions, the Supreme Court judged facially neutral laws against claims that the laws unduly burdened the right of some religious adherents to observe their religious rituals.[58] In both cases, the

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55. Sanders v. Casa View Baptist Church, 134 F.3d 331, 335–36 (5th Cir. 1998).

> Although [minister's] contention that the Free Exercise Clause prohibits the judiciary from reviewing the conduct of those involved in relationships that are not purely secular in nature might, if adopted, foster the development of some important spiritual relationships by eliminating the possibility of civil or criminal liability for participating members of the clergy, the constitutional guarantee of *religious* freedom cannot be construed to protect *secular* beliefs and behavior, even when they comprise part of an otherwise religious relationship between a minister and a member of his or her congregation. To hold otherwise would impermissibly place a religious leader in a preferred position in out society.

Id. at 336 (emphasis in original) (citation omitted).

56. Jones *ex rel.* Jones v. Trane, 591 N.Y.S.2d 927, 933 (N.Y. Sup. Ct. 1992) ("[P]laintiffs have tendered no case in this jurisdiction imposing *respondeat superior* liability for intentional sexual misconduct by an employee, which on its own face scarcely seems to fall within the scope of employment of a priest."(emphais original)).

57. Cantwell v. Connecticut, 310 U.S. 296, 304 (1940).

58. Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 547 (1993). In *Lukumi Babalu Aye*, residents of Hialeah, Florida responded to a Santeria church's announcement of plans to establish a house of worship within city limits by passing a resolution noting residents' "concern" over the church's ritual slaughter and sacrifice of animals. *Id.* at 523–31. Residents condemned the sacrifices as inconsistent with public morals and passed several ordinances banning the practice of slaughtering animals only for religious purposes. *Id.* One ordinance defined "sacrifice" as "'to unnecessarily kill . . . an animal in a . . . ritual . . . not for the primary purpose of food consumption,' and prohibit[ed] the 'possess[ion], sacrifice, or slaughter' of an animal if it is killed in 'any type of ritual.' . . ." *Id.* The U.S. Supreme Court found the ordinances not neutral, as they were clearly targeted at members of the church, not generally applicable because of exemptions for butchers and other non-religious entities, and not justified by any overriding governmental interest. *Id.* at 546; Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 885 (1990). In *Employment Division*, two members of the Native American Church were fired from their jobs at a private drug rehabilitation center for ingesting peyote, a hallucinogenic drug, for sacramental purposes. *Employment Div.*, 494 U.S. at 874. When the State of Oregon denied them unemployment benefits based on the illegal substance use,

Court held that in order for a law to withstand constitutional scrutiny, it must be both neutral in effect and generally applicable, and it must be the least restrictive means of achieving a compelling governmental interest.[59] When the disputed law meets all three criteria, the state has the discretion to accommodate a violation committed for religious reasons, but it is not obligated to do so.[60]

When a law does disproportionately burden a particular religious practice, courts have found the burden permissible where the religious practice overtly disturbs societal notions of peace and good order.[61] For instance, in *Reynolds*, a federal law proscribing bigamy was found constitutional as applied to a Mormon man with two wives.[62] Though the Court acknowledged that bigamy in the United States was practiced almost exclusively by Mormons, it nonetheless upheld the prohibition on grounds that the practice has always been considered "odious" in Anglo-American society.[63] In light of the established holding of *Reynolds*, sub-

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the fired church members alleged that their First Amendment free exercise rights were violated by the denial. *Id.* The U.S. Supreme Court, reversing Oregon's high court, found that because the prohibition on peyote use was both facially neutral and generally applicable, the fact that it incidentally burdened some religious practices did not mandate a religious exemption for those burdened practitioners. *Id.* at 884. According to the Court, "The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'" *Id.* at 885 (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988)).

59. *Lukumi Babalu Aye*, 508 U.S. at 531–32 ("A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest."); *Employment Div.*, 494 U.S. at 885; *see also* Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981); Tilton v. Marshall, 925 S.W.2d 672, 678 (Tex. 1996).

60. *Employment Div.*, 494 U.S. at 888.

61. Reynolds v. United States, 98 U.S. 145, 163–66 (1878) (upholding anti-polygamy laws as applied to Mormons). *But see* Wisconsin v. Yoder, 406 U.S. 205, 214–37 (1972) (finding no such violation of societal peace and good order where Amish parents withdrew their children from public school after the eighth grade in violation of a state law requiring all children to attend school until age sixteen).

62. *Reynolds*, 98 U.S. at 166. The court reasoned:

> So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

Id. at 166–67.

63. *Id.* at 164. Reflecting a somewhat racist rationale, the Court explained:

> Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature

sequent courts continue to balance the interests of society as a whole against the constitutional liberties of the burdened religion's adherents.[64]

Another important free exercise consideration applies to conduct involving minors.[65] Under the doctrine of *parens patriae*, the state has an obligation to protect those members of society who are unable to protect themselves, including children.[66] Accordingly, the Supreme Court concluded in *Prince v. Massachusetts* that the government has a particular interest in the health and well-being of youth.[67] The Court asserted, "The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death."[68] In order to resolve a claimed infringement upon free exer-

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of the life of Asiatic and of African people. At common law, the second marriage was always void . . . and from the earliest history of England polygamy has been treated as an offence against society.

Id.

64. *E.g.*, Cantwell v. Connecticut, 310 U.S. 296, 311 (1940) (finding Connecticut's interest in licensing solicitation of funds not to outweigh the free exercise rights of Jehovah's Witnesses who were arrested for inciting breach of the peace by soliciting publicly); Alberts v. Devine, 479 N.E.2d 113, 123 (Mass. 1985) ("A law, legislatively or judicially created, that would regulate or prevent religiously motivated conduct does not violate the First Amendment if the State's interest in the law's enforcement outweighs the burden that the law imposes on the free exercise of religion."), *cert. denied*, 474 U.S. 1013 (1985).

65. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (upholding prosecution of Jehovah's Witnesses for using children to distribute religious literature in violation of child labor laws). The Supreme Court noted:

[N]either rights of religion nor rights of parenthood are beyond limitation acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance. Regulating or prohibiting the child's labor and in many other ways it's authority is not unified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience.

Id. (citations omitted).

66. BLACK'S LAW DICTIONARY 1144 (8th ed. 2004). *Parens patriae* is defined as:

[Latin "parent of his or her country"] 1.) The state regarded as a sovereign; the state in its capacity as provider of protection to those unable to care for themselves the attorney general acted as *parens patriae* in the administrative hearing. 2.) A doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen, esp. on behalf of someone who is under a legal disability to prosecute the suit *parens patriae* allowed the state to institute proceedings.

Id.

67. *Prince*, 321 U.S. at 165–66. The Court stated:

It is in the interest of youth itself, and of the *whole community*, that children be safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens. . . . Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control.

Id. (emphasis in original).

68. *Id.* at 166–67 (citing People v. Pierson, 68 N.E. 243, 246–47 (N.Y. 1903)). In fact,

cise, the Court proposed that the government action must fail unless it can be demonstrated "to be necessary for or conducive to the child's protection against some clear and present danger" posed by the religious practice.[69] Therefore, while courts are generally hesitant to scrutinize the conduct of religious groups with respect to their members, church conduct involving children is subject to sharper scrutiny.[70]

B. *The Free Exercise Clause as a Defense to Tort Liability for Religious Conduct*

When a party seeks civil damages against a church or individual engaged in religiously motivated conduct, courts have found that state laws permitting recovery in tort constitute state action subject to the limitations imposed by the First and Fourteenth Amendments.[71] Consequently, courts cannot uphold civil liability where the tort action itself violates a person's or group's right to free exercise.[72] In such cases, certain forms of conduct, such as indoctrination and initiation procedures, are generally beyond the authority of the civil courts to evaluate.[73] In addition, churches are generally afforded wide latitude in the discipline of their own members.[74] As the Supreme Court noted, "To permit civil courts to probe deeply enough into the allocation of power within a hier-

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> The state's authority over children's activities is broader than over like actions of adults. This is peculiarly true of public activities and matters of employment. A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers, within a broad range of selection.

Id. at 168.

69. *Id.* at 167.

70. *See id.* at 171 (noting that the Court's holding in *Prince* is limited to the facts of that case alone). "We [do not] lay the foundation for any (that is, every) state intervention in the indoctrination and participation of children in religion which may be done 'in the name of their health and welfare.' . . ." *Id.*

71. *See* Paul v. Watchtower Bible & Tract Soc'y of N.Y., 819 F.2d 875, 880 (9th Cir. 1987) ("State law . . . including tort rules, constitute state action.").

72. *Id.* at 883 ("When the imposition of liability would result in the abridgement of the right to free exercise of religious beliefs, recovery in tort is barred.").

73. *See, e.g.,* Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich, 426 U.S. 696, 708 (1976) (concluding that the courts did not have the power to evaluate hierarchical authority over the defrockment of a bishop); *Paul*, 819 F.2d at 883 (dismissing a claim against a Jehovah's Witness congregation for, among other things, IIED, brought by a former member who was shunned by fellow congregants); Turner v. Unification Church, 473 F. Supp. 367, 371 (D.R.I. 1978) (denying courts the authority to evaluate indoctrination and initiation procedures), *aff'd*, 602 F.2d 458 (1st Cir. 1979); Rasmussen v. Bennett, 741 P.2d 755, 759 (Mont. 1987) (refusing to evaluate ecclesiastical condemnation of parishioner conduct).

74. *See Serbian E. Orthodox Diocese*, 426 U.S. at 708; *Paul*, 819 F.2d at 883; Smith v. Calvary Christian Church, 614 N.W.2d 590, 593 (Mich. 2000).

archical church so as to decide . . . religious law (governing church polity) . . . would violate the First Amendment in much the same manner as civil determination of religious doctrine."[75]

Similarly, in claims involving civil liability, courts are reluctant to delve into the conduct of churches with respect to their current and former parishioners.[76] As a general rule, courts tend to adhere to the view espoused by Justice Jackson in his concurring opinion in *Prince*,[77] in which he argued that the relationship between churches and their parishioners ought to be as close to absolutely free as possible.[78]

For instance, in an Oklahoma case, the court's decision ultimately turned upon the plaintiff's status as a member of the defendant church.[79] In that case, the plaintiff sued for invasion of privacy and IIED after church leaders publicly chastised her before the Church of Christ congregation for having an extramarital affair in violation of church canons.[80] Rejecting the plaintiff's claim, the court concluded that the allegedly tortious conduct occurring prior to the plaintiff's resignation from the church was constitutionally protected, as it did not pose a significant threat to public health, safety, or welfare.[81] According to the court, the plaintiff's willing submission to church dogma and discipline, coupled with the church leaders' reliance upon that submission, protected the church against liability for its election to internally discipline the plaintiff

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75. *Serbian E. Orthodox Diocese*, 426 U.S. at 709 (citing Md. and Va. Eldership of Churches of God v. Church of God at Sharpsburg, 396 U.S. 367, 369 (1970)).

76. *See Paul*, 819 F.2d at 883 (refusing to uphold liability for congregation's shunning of an excommunicated parishioner). *See generally* Alan Stephens, Annotation, *Free Exercise of Religion Clause of First Amendment as Defense to Tort Liability,* 93 A.L.R. FED. 754 (1989) (surveying courts' acceptance or rejection of the free exercise defense within a variety of tort claims, including IIED).

77. *See, e.g., Paul*, 819 F.2d at 883 ("Courts generally do not scrutinize closely the relationship among members (or former members) of a church. Churches are afforded great latitude when they impose discipline on members or former members.").

78. Prince v. Massachusetts, 321 U.S. 158, 177 (1944) (Jackson, J., concurring). Justice Jackson explained:

> My own view may be shortly put: I think the limits begin to operate whenever activities begin to affect or collide with liberties of others or of the public. Religious activities which concern only members of the faith are and ought to be free-as nearly absolutely free as anything can be.

Id.

79. Guinn v. Church of Christ of Collinsville, 775 P.2d 766, 779 (Okla. 1989).

80. *Id.* at 768–69. In this case, the public condemnation before the Church of Christ congregation was made all the more disgraceful for the plaintiff by the fact that the congregation comprised about five percent of the town's population. *Id.* at 768.

81. *Id.* at 775 ("[W]e hold that, on the record of this case, the Elders' prewithdrawal acts are shielded from scrutiny by secular judicature. The Parishioner could not possibly recover [for the Elders' religious actions].").

for her errant behavior.[82] A church may not, however, invoke the Free Exercise Clause as protection against liability for denying its members other constitutional rights.[83]

C. *The Free Exercise Defense and Intangible Damages*

Civil remedies are typically unavailable to plaintiffs alleging that a religious group's tortious conduct has caused them some intangible or emotional harm.[84] In fact, the Ninth Circuit held, "A religious organization has a defense of constitutional privilege to claims that it has caused intangible harms-in most, if not all, circumstances."[85] Other courts have applied this doctrine to preclude civil liability, especially where the allegedly tortious conduct has produced little or no tangible, physical harm.[86]

The rationale underlying this approach is best described in *Cantwell v. Connecticut*, in which the Supreme Court, rejecting criminal liability for intangible harm to society, explained that "[t]he essential characteristic of [free exercise] liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds."[87] In other words, in order to live in a religiously diverse society, citizens must develop thicker hides,

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82. *Id.* ("By voluntarily uniting with the church, [the parishioner] impliedly consented to submitting to its form of religious government.").

83. *Id.* ("[The parishioner] did not . . . consent to relinquishing a right which the civil law guarantees her as its constitutionally protected value."); *see also* Turner v. Unification Church, 473 F. Supp. 367, 372 (D.R.I. 1978) (holding that the Free Exercise Clause does not immunize defendant Unification Church from parishioner's causes of action alleging involuntary servitude and intentional tortious activity), *aff'd*, 602 F.2d 458 (1st Cir. 1979). "The Unification Church cannot seek the protection of one constitutional amendment while it allegedly deprives citizens the protection of other constitutional guarantees." *Turner*, 473 F. Supp. at 372.

84. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 311 (1940); Paul v. Watchtower Bible & Tract Soc'y of N.Y., 819 F.2d 875, 883 (9th Cir. 1987); Murphy v. I.S.K. Con. of New England, 571 N.E.2d 340, 348 (Mass. 1991), *cert. denied*, 502 U.S. 865 (1991); Pleasant Glade Assembly of God v. Schubert, 264 S.W.3d 1, 13 (Tex. 2008), *cert. denied*, 129 S.Ct. 1003 (2009).

85. *Paul*, 819 F.2d at 883 (footnote omitted) ("As the United States Supreme Court has observed, '[t]he values underlying these two provisions [of the First Amendment] relating to religion have been zealously protected, sometimes even at the expense of others interests.'" (quoting Wisconsin v. Yoder, 406 U.S. 205, 214 (1972))).

86. *See, e.g., Murphy*, 571 N.E.2d at 348 ("Intangible or emotional harms cannot ordinarily serve as a basis for maintaining a tort cause of action against a church for its practices-or against its members." (quoting *Paul*, 819 F.2d at 883)); *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d at 13 ("Because providing a remedy for the very real, but religiously motivated emotional distress in this case would require us to take sides in what is essentially a religious controversy, we cannot resolve that dispute.").

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

tolerating the expression of diverse beliefs with which even the majority may not agree.[88] If the law may be used as a weapon to punish persons for their idiosyncratic beliefs, it would effectively create an establishment of those religions that the majority can agree to tolerate, contravening the most basic constitutional principles.[89]

Courts are even less inclined to permit recovery for intangible harms because of the plaintiff's presumed consent to the conduct by membership in the religious organization.[90] For instance, in Laura Schubert's case, the Texas Supreme Court applied the laissez-faire principle of judicial deference to religious groups' internal governance to a minor child's claim of tortious physical abuse.[91]

In fact, even outside the religious context, common law courts have long been reluctant to compensate mental anguish as an injury in itself, rather than as parasitically attached to some tangible damage.[92] It was

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88. *See Paul*, 819 F.2d at 883 ("Without society's tolerance of offenses to sensibility, the protection of religious differences mandated by the [F]irst [A]mendment would be meaningless."). *But see* GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM 57 (1985). Professor Calabresi asserts:

> [Tort law] highlights the ugly side of the melting pot. It declares in profoundly practical terms . . . that newcomers, new believers, new religions may indeed have equality in this land, but only if they give up those tenets of their faith that do not fit; ones that are somehow not of the 'banquet' variety.

Id.

89. *See* Paul T. Hayden, *Religiously Motivated "Outrageous" Conduct: Intentional Infliction of Emotional Distress as a Weapon Against "Other People's Faiths,"* 34 WM. & MARY L. REV. 579, 581 (1993) ("Through its remedial and substantive aspects, [IIED] threatens both defendants right of religious freedom and society's important interest in tolerating different religious views.").

90. *See* Guinn v. Church of Christ of Collinsville, 775 P.2d 766, 774 (Okla. 1989); *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d at 13. As Chief Justice Jefferson explained in his dissenting opinion:

> Nevertheless, the Court treats church membership as an across the board buffer to tort liability. The problems with this approach are obvious. It is impossible to apply the Court's standard in the absence of factual development or determination in the trial court. We are in no position to decide that the ordeal to which Schubert was subjected was so "expected" and "accepted by those in the church" as to overcome Schubert's vehement denial of consent at the time of the incidents.

Pleasant Glade Assembly of God v. Schubert, 264 S.W.3d at 20 (Jefferson, C.J., dissenting).

91. *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d at 10 ("[A]lthough Laura's secular injury claims might theoretically be tried without mentioning religion, the imposition of tort liability for engaging in religious activity to which the church members adhere would have an unconstitutional 'chilling effect' by compelling the church to abandon core principles of its religious beliefs.").

92. *See* RESTATEMENT (SECOND) OF TORTS 46 cmt. b (1965) ("Because of the fear of fictitious or trivial claims, distrust of the proof offered, and the difficulty of setting up any satisfactory boundaries to liability, the law has been slow to afford independent protection

not until the twentieth century that the American Law Institute added IIED to the Restatement of Torts as an independent cause of action.[93] The Second Restatement of Torts defines IIED as "extreme and outrageous conduct intentionally or recklessly caus[ing] severe emotional distress to another."[94] Though courts have been slow to accept IIED as an independent tort, they are generally in agreement as to what conduct meets this definition.[95] According to the official commentary to the Second Restatement:

> Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"[96]

Courts, however, have rarely permitted plaintiffs to recover for IIED where the allegedly outrageous conduct was religious in nature.[97]

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to the interest in freedom from emotional distress standing alone."); W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 12, at 54–55 (5th ed. 1984) ("Mental pain or anxiety,' said Lord Wensleydale in a famous English case, 'the law cannot value, and does not pretend to redress, when the unlawful act causes that alone.'"). *But see* Wilkinson v. Downton, [1897] 2 Q.B. 57, 58–59 (permitting recovery for the functional equivalent of intentional infliction of emotional distress for possibly the first time in common law). The English court held:

> [The rule that] illness through mental shock is a too remote or unnatural consequence of an [injury] to entitle the plaintiff to recover in a case where damage is a necessary part of the cause of action . . . [cannot] be adopted as a general application without results which it would be difficult or impossible to defend.

Id. at 59–60.

93. *See* RESTATEMENT OF TORTS § 46 (1934).

94. RESTATEMENT (SECOND) OF TORTS, § 46(1) (1965).

95. *See id.* cmt. c ("The law is still in a stage of development, and the ultimate limits of this tort are not yet determined.").

96. *Id.* cmt. d ("The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. . . . There is no occasion for the law to intervene in every case where some one's feelings are hurt.").

97. *See generally, e.g.*, Paul v. Watchtower Bible & Tract Soc'y of N.Y., 819 F.2d 875 (9th Cir. 1987); Molko v. Holy Spirit Ass'n for the Unification of World Christianity, 762 P.2d 46 (Cal. 1988), *cert. denied*, 490 U.S. 1084 (1989); Glass v. First United Pentecostal Church, 676 So. 2d 724 (La. Ct. App. 1996); Murphy v. I.S.K. Con. of New England, 571 N.E.2d 340 (Mass. 1991), *cert. denied*, 502 U.S. 865 (1991); Olson v. First Church of Nazarene, 661 N.W.2d 254 (Minn. Ct. App. 2003); Meroni v. Holy Spirit Ass'n for the Unification of World Christianity, 506 N.Y.S.2d 174 (N.Y. App. Div. 1986); Guinn v. Church of Christ of Collinsville, 775 P.2d 766 (Okla. 1989); Pleasant Glade Assembly of God v. Schubert, 264 S.W.3d 1 (Tex. 2008), *cert. denied*, 129 S.Ct. 1003 (2009); *In re* Pleasant Glade Assembly of God, 991 S.W.2d 85 (Tex. App.—Fort Worth 1998), *rev'd*, 264 S.W.3d 1 (Tex.

But, as the Supreme Court pointed out in *Cantwell*, nothing in the law immunizes religious groups from liability for either illegal or tortious conduct.[98] Even the cherished principle of religious freedom must, at times, be inconvenienced for the sake of protecting the health, safety, and general welfare of the public.[99] In weighing the interests of society against those of religious freedom itself, courts must take care to preserve pure religious belief, internal church discipline, and the special relationship between churches and their parishioners. Yet, courts must remember that while "[t]he First Amendment guards religious liberty[,] it does not sanction intentional abuse in religion's name."[100]

III. Legal Analysis: Why Perpetrators of Religiously Motivated Violence Can No Longer Hide Behind the First Amendment

A. *The Traditional Approach: Judicial Tolerance of Abuse*

Traditionally, courts have been reluctant to impose liability for a parishioner's emotional or intangible harms where the allegedly wrongful conduct was religiously motivated.[101] While many courts have, for that reason, denied claims against religious organizations for IIED, several states have effectively barred these claims altogether.[102]

The traditional approach, however, is fundamentally flawed. The dismissal of claims for emotional damages of victims of religiously motivated violence, particularly women and children members of minority reli-

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2008), *cert. denied*, 129 S.Ct. 1003 (2009). *But see generally, e.g.,* Madsen v. Erwin, 481 N.E.2d 1160 (Mass. 1985); Jones *ex rel.* Jones v. Trane, 591 N.Y.S.2d 927 (N.Y. Sup. Ct. 1992); Erickson v. Christenson, 781 P.2d 383 (Or. Ct. App. 1989).

98. Cantwell v. Connecticut, 310 U.S. 296, 306 (1940) ("Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public.").

99. *Id.* at 306–07.

100. *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d at 13 (Jefferson, C.J., dissenting).

101. *See, e.g., Paul*, 819 F.2d at 883.

102. *See, e.g., id.*; *Murphy*, 571 N.E.2d at 354; *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d at 13. Chief Justice Jefferson of the Texas Supreme Court explained:

> The Court today essentially bars all recovery for mental anguish damages stemming from allegedly religiously motivated, intentional invasions of bodily integrity committed against members of a religious group. This overly broad holding not only conflicts with well-settled legal and constitutional principles, it will also prove to be dangerous in practice. Texas courts have been and will continue to be confronted with cases in which a congregant suffers physical or psychological injury as a result of violent or unlawful, but religiously sanctioned, acts.

Pleasant Glade Assembly of God v. Schubert, 264 S.W.3d at 22 (Jefferson, C.J., dissenting).

gions,[103] contravenes fundamental principles of tort law aimed at protecting society's weakest members from unchecked abuse.[104] Proponents of limiting recovery for parishioners' intangible damages argue that this approach benefits minority religions by immunizing them against judgment according to standards of reasonableness defined by an intolerant majority.[105] But proponents of the traditional approach fail to consider the impact of this policy on the victims of violent religious conduct. Where the religiously motivated conduct at issue is violent, the traditional application of the free exercise defense protects those who abuse vulnerable women and children in the name of religion at the expense of the abused.

While I do not advocate complete abandonment of judicial tradition in this area of the law, I do propose that courts permit recovery for purely emotional or intangible damages in cases where the plaintiff is a parishioner victim of religiously motivated violence. This approach preserves the traditional considerations afforded to religious groups, particularly unpopular religious minorities, while still providing legal protection for the victims of violent conduct that, regardless of motivation, cannot be tolerated in a civilized society. The ideals of religious freedom and plurality inherent in the First Amendment must be safeguarded, but not at the expense of the safety and health of the individual believers to whom the liberty was given.

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103. *See* DAVID E. GUINN, FAITH ON TRIAL: COMMUNITIES OF FAITH, THE FIRST AMENDMENT AND THE THEORY OF DEEP DIVERSITY 175 (2002) (noting that the United States' growing number of religious minorities are often members of ethnic minorities as well); Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093, 1095 (1996) ("[V]ictims and potential victims in such circumstances have no hope of relief in the future.").

104. Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093, 1095 (1996) (arguing against culturally individualized justice, which has been used by immigrants and members of cultural and religious minorities to evade liability for violent conduct that would be tolerable in the defendant's native country or culture, but is illegal in the United States). Professor Coleman describes the impact of culturally individualized justice:

> What happens to the victims—almost always minority women and children—when multiculturalism and individualized justice are advanced by dispositive cultural evidence? The answer, both in theory and in practice, is stark: They are denied the protection of the criminal laws because their assailants generally go free, either immediately or within a relatively brief period of time.

Id.

105. Paul T. Hayden, *Religiously Motivated "Outrageous" Conduct: Intentional Infliction of Emotional Distress as a Weapon Against "Other People's Faiths,"* 34 WM. & MARY L. REV. 579, 586 (1993) ("[I]t is a danger because it may extend too ready an invitation for law to intrude in many places where it should not go, and may allow majoritarianism to ride roughshod over unpopular or minority rights and beliefs, the protection of which is an important societal value.").

B. *Intangible Harms as Parasitic Damages*

The majority approach to resolution of tort claims for emotional damages caused by religious conduct is best articulated in a frequently cited decision of the Ninth Circuit Court of Appeals, *Paul v. Watchtower Bible*.[106] In that case, a Jehovah's Witness sued her church for, inter alia, outrageous conduct because it encouraged its members to shun her after she was disfellowshipped[107] from the congregation.[108] Upholding summary judgment for the church, the Ninth Circuit reasoned that a state's decision to designate a certain behavior as criminal or tortious is not dispositive of whether state interference with the behavior in a religious context violates free exercise rights.[109] According to the court, only religious behavior that poses a direct "threat to the peace, safety, or morality of the community,"[110] or that directly harms individuals,[111] such as an assault or battery,[112] warrants governmental intervention over the free exercise defense.[113] The court concluded that shunning former members did not constitute any such threat or harm and, thus, Janice Paul's claim could not override the church's free exercise rights.[114]

In cases involving similarly passive, non-violent behavior in which the parishioner-plaintiffs were only indirectly harmed, courts have consistently referred to the rule in *Paul* when denying plaintiffs recovery for

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106. *See Paul*, 819 F.2d at 883 ("Although we recognize that the harms suffered by [plaintiff] are real and not insubstantial, permitting her to recover for intangible or emotional injuries would unconstitutionally restrict the Jehovah's Witnesses free exercise of religion.").

107. *Id.* (defining "disfellowshiped" Jehovah's Witnesses as former congregants "who have been excommunicated from the church"). The court explained:

> One consequence of disfellowship is "shunning," a form of ostracism. Members of the Jehovah's Witness community are prohibited-under threat of their own disfellowship-from having any contact with disfellowshipped persons and may not even greet them. Family members who do not live in the same house may conduct necessary family business with disfellowshipped relatives but may not communicate with them on any other subject.

Id. at 876–77.

108. *Id.*

109. *Id.* at 881 n.5.

110. *Id.* at 883 ("We find the practice of shunning not to constitute a sufficient threat to the peace, safety, or morality of the community as to warrant state intervention.").

111. *Paul*, 819 F.2d at 878 ("The state is legitimately concerned with [shunning's] regulation only to the extent that individuals are directly harmed.").

112. *Id.* at 883 ("The harms suffered by [plaintiff] as a result of her shunning by the Jehovah's Witnesses are clearly not the type that would justify the imposition of tort liability for religious conduct. No physical assault or battery occurred.").

113. *Id.*

114. *Id.*

their emotional suffering.[115] This approach reflects an historical favoring of free exercise interests over many others, even those of significant social importance.[116] For instance, Marian Guinn was humiliated when the leaders of her Church of Christ congregation publicly branded her a fornicator before the church's members, "approximately five percent of the town's population."[117] Yet, despite Marian's undeniable interests in privacy and an untarnished reputation, the Supreme Court of Oklahoma denied recovery for her intangible damages because doing so would unduly burden the church's right to condemn her religiously errant extra-marital affair.[118]

Comparing Marian Guinn's case with Janice Paul's, the most notable distinction lies in the nature of the church conduct. The Jehovah's Witnesses turned their backs on Janice, both figuratively and literally,[119] but they did not affirmatively act to punish her by impugning her dignity, as in Marian's case.[120] Yet, despite the factual difference, neither woman was permitted to recover for her emotional injuries.[121] The *Paul* court justified its decision, stating that "although shunning is intentional, the activity is not malum in se. The state is legitimately concerned with its regulation only to the extent that individuals are directly harmed."[122] Similarly, the *Guinn* court explained:

> In testing the constitutionality of the court's action against the Elders and the jury's verdict in Parishioner's favor, the proper inquiry is whether, on the record, the Elders' decision to discipline Parishioner constituted such a threat to the public safety, peace or order that it justified the state trial court's decision to pursue the compelling in-

115. *E.g.*, Glass v. First United Pentecostal Church, 676 So. 2d 724, 733 (La. Ct. App. 1996); Murphy v. I.S.K. Con. of New England, 571 N.E.2d 340, 348 (Mass. 1991), *cert. denied*, 502 U.S. 865 (1991); Guinn v. Church of Christ of Collinsville, 775 P.2d 766, 773 (Okla. 1989); Pleasant Glade Assembly of God v. Schubert, 264 S.W.3d 1, 18 (Tex. 2008), *cert. denied*, 129 S.Ct. 1003 (2009); Westbrook v. Penley, 231 S.W.3d 389, 400 (Tex. 2007), *reh'g denied* (Sept. 28, 2007).

116. Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) ("The values underlying [the Free Exercise Clause] have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance.").

117. *Guinn*, 775 P.2d at 768.

118. *Id.* at 774–75 (remanding with instructions to render judgment against Guinn for the portion of her claim based on the church's conduct prior to her resignation from the congregation).

119. *Paul*, 819 F.2d at 876–77.

120. *Guinn*, 775 P.2d at 768.

121. *Paul*, 819 F.2d at 883; *Guinn*, 775 P.2d at 775.

122. *Paul*, 819 F.2d at 878.

> terest of providing its citizens with a means of vindicating their rights conferred by tort law.[123]

Thus, it appears both courts' decisions rested on the fact that the allegedly tortious conduct was not a threat to public peace or safety.[124] Even where, as in *Guinn*, the church conduct was not merely passive, but rather an affirmative attempt to injure the plaintiff's interests, the non-violent nature of the conduct is what ultimately immunized it from tort liability.[125]

Certainly, both Guinn and Paul were injured, albeit intangibly, by the respective conduct of their churches. In both cases, had the women been subjected to the exact same conduct committed for secular purposes by persons not affiliated with the churches, they would likely recover for their emotional injuries.[126] But courts acknowledge the special right of religious institutions to the unfettered freedom to practice their beliefs, especially with respect to their own members.[127] As the *Guinn* court reasoned:

> If members of religious organizations could freely pursue their doctrinal grievances in civil courts, or legislatures could pass laws to inhibit or enhance religious activities, ecclesiastical liberty would be subjected to governmental interference and the "unmolested and unobstructed" development of opinion and belief which the First Amendment shield was designed to foster could be secularly undermined.[128]

Unfortunately, in many cases, judicial concern for religious organizations' free exercise rights fails to secure the interests of parishioners who have suffered emotional injuries as a result of the violent, yet religiously

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123. *Guinn*, 775 P.2d at 773.

124. *Paul*, 819 F.2d at 878; *Guinn*, 775 P.2d at 773.

125. *See Guinn*, 775 P.2d at 773.

126. *See* Molko v. Holy Spirit Ass'n for the Unification of World Christianity, 762 P.2d 46, 61 (Cal. 1988) (suggesting that because a nonreligious organization engaged in the same fraudulent conduct as the defendant-religious organization would be held legally liable for its conduct, the defendant should not be excused from liability merely because of its religious affiliation), *cert. denied*, 490 U.S. 1084 (1989).

127. *Paul*, 819 F.2d at 883 ("Intangible or emotional harms cannot ordinarily serve as a basis for maintaining a tort cause of action against a church for its practices-or against its members."); Pleasant Glade Assembly of God v. Schubert, 264 S.W.3d 1, 9 (Tex. 2008) (concluding that "the imposition of tort liability for engaging in religious activity to which the church members adhere would have an unconstitutional 'chilling effect' by compelling the church to abandon core principles"), *cert. denied*, 129 S.Ct. 1003 (2009).

128. *Guinn*, 775 P.2d at 772.

motivated conduct of their churches.[129] Violence need not always produce tangible, physical injury.[130] Recall Laura's case, in which the congregation forcibly restrained her for hours against her aggressive resistance, causing her to suffer post-traumatic stress disorder but only minor scrapes and bruises.[131] Because cases like Laura's exist, the prohibition on recovery for emotional damages in these scenarios leaves victims of religious violence without a judicial remedy. Consequently, under the current regime, courts must make a zero-sum choice between two competing interests: protecting the free exercise rights of religious groups and defending the health and safety of the faithful.

The approach barring claims for emotional damages in religious conduct cases purports to serve another admittedly laudable objective: to protect religious institutions from arbitrary and capricious imposition of liability for damages that are notoriously difficult to prove or measure.[132] As one legal scholar puts it, "[T]he adjudication of these . . . claims embroils courts in forbidden inquiries. These inquiries have few boundaries or even guidelines and concern the verity, social value, and acceptability of particular religious beliefs. This is a major, not a minor, flaw."[133] Particularly where the underlying religious beliefs are unusual or belong to an unfamiliar religious minority, free exercise may be threatened by potentially unlimited liability for intangible damages.[134]

Nevertheless, assessing a dollar amount to emotional injury is not a new concept, and common law courts have been doing so since at least the nineteenth century.[135] Indeed, "mental suffering is scarcely more difficult of proof, and certainly no harder to estimate in terms of money,

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129. MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 10 (2005).

130. *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d at 17 (Jefferson, C.J., dissenting) ("This is common sense: many experiences including some sexual assaults and certain forms of torture are extremely traumatic yet result in no serious physical injury."); Wilson v. Lund, 491 P.2d 1287, 1291 (Wash. 1971) ("'Intangible-emotional' injuries can and do constitute real and significant harms."); 20 William V. Dorsaneo III, *Texas Litigation Guide* § 331.06 (2009) ("Mental suffering caused by a false imprisonment, including humiliation, shame, fright, and anguish, is also compensable, regardless of whether any physical harm was inflicted on the plaintiff.").

131. *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d at 4.

132. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 12, at 55 (5th ed. 1984) (referring to intangible damages).

133. Paul T. Hayden, *Religiously Motivated "Outrageous" Conduct: Intentional Infliction of Emotional Distress as a Weapon Against "Other People's Faiths,"* 34 WM. & MARY L. REV. 579, 584 (1993).

134. *Id.* at 586 (discussing the danger of permitting juries to calculate damages based solely on "the degree of social undesirability of the defendant's conduct").

135. W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 12, at 55 (5th ed. 1984); *see also* Wilkinson v. Downton, [1897] 2 Q.B. 57, 58 (upholding a cause of action

than the physical pain of a broken leg, which never has been denied compensation."[136] To compensate victims of physical injury while denying recovery in cases involving intangible harms denies a long history of acceptance of the reality of emotional suffering.[137]

Further, where the religiously motivated conduct in question is violent, choosing the right of the religious organization to free exercise over the right of the victim to physical and emotional integrity undermines several fundamental goals of tort law.[138] Excusing violent conduct based on the defendant's argument that "my religion made me do it" sends a message to minority religious communities that violence is tolerable so long as it is committed under the guise of piety.[139] Pursuant to this message, abusers learn that they may abuse with impunity, while the abused conclude that they are entitled to no legal protection against violence in their communities.[140]

While proponents of the traditional approach contend that the law's understanding of religious conduct need not automatically require tolerance of it,[141] tolerance is precisely the result where minority religious communities are led to believe that certain forms of conduct are permissi-

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brought by a woman who suffered severe emotional distress after the defendant, intending a practical joke, told her that her husband had been critically injured in an accident).

136. W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 12, at 55 (5th ed. 1984).

137. *See id.*

138. *See id.* § 1, at 6. Prosser and Keeton explain:

> [T]o strike some reasonable balance between the plaintiff's claim to protection against damage and the defendant's claim to freedom of action for defendant's own ends, and those of society, occupies a very large part of the tort opinions. . . . Sometimes it must range rather far afield, and look primarily to the social consequences which will follow.

Id.

139. *See* Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma,* 96 COLUM. L. REV. 1093, 1138 (1996) (describing how courts' acceptance of the cultural defense in criminal law convinces women in cultural minority communities that they are unworthy of the same legal protections as European-American women). Coleman argues:

> This different standard may defeat the deterrent effect of the law, and it may become precedent, both for future cases with similar facts, and for the broader position that race-or national origin-based applications of the criminal law are appropriate. Thus, the use of cultural defenses is anathema to another fundamental goal of the progressive agenda, namely the expansion of legal protections for some of the least powerful members of American society: women and children.

Id. at 1095.

140. *See id.*

141. CATHARINE COOKSON, REGULATING RELIGION: THE COURTS AND THE FREE EXERCISE CLAUSE 188 (2001).

ble.[142] Failure to hold religious actors liable for their tortious acts does little to deter other actors from engaging in similar conduct.[143] Tort law is designed to deter unreasonable conduct, such as violence and other intrusions upon a person's physical and mental security, by threatening actors with the possibility of liability for their conduct.[144] To condone unreasonable conduct because of its religious nature is counterproductive to this end.

In addition, where the threat of liability is removed for some actors but not others, the law creates a system of individualized justice that is inconsistent with American legal values.[145] As one scholar, arguing in the criminal context, notes, "To insist that people have a constitutional *right* to exemptions from the criminal law for religiously motivated behavior would render ineffectual the criminal law and produce a kind of anarchy."[146] Not only is this result antagonistic to the constitutional command that the laws apply equally to all persons,[147] but it harms society as a whole by arbitrarily exempting some actors from liability for conduct that the broader community has deemed intolerable or undesirable.[148] Moreover, courts have established that when the offense is a positive act,

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142. *See* Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma,* 96 COLUM. L. REV. 1093, 1138 (1996) (describing the impact upon Chinese-American women of a New York case in which a Chinese-American man received only five years of probation for bludgeoning his wife to death because he argued that Chinese custom permits men to punish their wives for unfaithfulness in this manner).

> One battered Chinese woman told a worker at the New York Asian Women's Center, "Even thinking about that case makes me afraid. My husband told me: 'If this is the kind of sentence you get for killing your wife, I could do anything to you. I have the money for a good attorney.'"

Id.

143. *See id.* at 1136. Professor Coleman explains:

> Failure to punish a defendant for his intentionally criminal act on the basis of an expert's testimony that "his culture made him do it" does little to deter others in the defendant's circumstances from committing the same act; or to deter the defendant himself from repeating his offense; or to assure the victims and potential victims of such criminal conduct that society is willing to protect them; or to punish the defendant for the harm created by his act.

Id.

144. W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 1, at 6 (5th ed. 1984).

145. *See id.*; Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093, 1135–36 (1996).

146. BETTE NOVIT EVANS, INTERPRETING THE FREE EXERCISE OF RELIGION: THE CONSTITUTION AND AMERICAN PLURALISM 185 (1997) (emphasis in original).

147. *See* Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093, 1135–36 (1996).

148. *See* MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 48 (2005).

committed knowingly and intentionally, it is dangerous to permit the actor to escape punishment for his conduct simply because his religious beliefs motivated the affirmative disregard for the law.[149] For this reason, "the government's obligation is to persist in choosing the public good over all other concerns."[150]

It cannot be denied, however, that religion supports the public good in many ways.[151] As George Washington emphasized in his storied farewell address, "[A]mong many others, religion can be considered a great social good in supporting a strong, positive moral environment through the creation of a moral citizenry."[152] And, as one scholar notes, "Religious beliefs and speech are also a crucial source of critique of the state, and at their best bring the human drive to power into perspective."[153] But religion is no casual bystander in a global history of strife and violence,[154] and to completely disregard the role of religion in the pain and suffering of citizen-parishioners is to ignore both reason and common sense. Particularly in minority religious communities, the risk of internal violence is greatly magnified by secrecy and exclusivity.[155] In these cases, where the elements of bad conduct may be secularly judged for reasonableness without implicating the religious beliefs underlying the act itself, the legal system should not excuse violent behavior simply because it is religiously motivated.[156]

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149. *Id.* at 67 (quoting State v. Barlow, 153 P.2d 647, 653 (Utah 1944), *appeal dismissed for want of a substantial federal question*, 324 U.S. 829 (1945), *reh'g denied* (Apr. 23, 1945)); *see also In re* Black, 283 P.2d 887, 904 (Utah 1955) ("However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed *with reference to actions regarded by general consent as properly the subjects of punitive legislation.*" (emphasis in original)), *cert. denied*, 350 U.S. 923 (1955).

150. MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 72 (2005).

151. *Id.* at 4.

152. DAVID E. GUINN, FAITH ON TRIAL: COMMUNITIES OF FAITH, THE FIRST AMENDMENT AND THE THEORY OF DEEP DIVERSITY 175 (2002).

153. MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 4 (2005).

154. DAVID E. GUINN, FAITH ON TRIAL: COMMUNITIES OF FAITH, THE FIRST AMENDMENT AND THE THEORY OF DEEP DIVERSITY 174 (2002).

155. *See* MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 24 (2005) (describing conditions in a desert enclave that is home to members of the secretive Fundamentalist Church of Latter-day Saints (FLDS)). In this community, "[t]he complete disregard for state and federal law and the arrogation of the right to make and enforce [the FLDS's] own law is about as anarchical as an organization can get." *Id.*

156. Pleasant Glade Assembly of God v. Schubert, 264 S.W.3d 1, 13 (Tex. 2008) (Jefferson, C.J., dissenting) ("This sweeping immunity is inconsistent with United States Supreme Court precedent and extends far beyond the protections our Constitution affords religious conduct."), *cert. denied*, 129 S.Ct. 1003 (2009); DAVID E. GUINN, FAITH ON TRIAL: COMMUNITIES OF FAITH, THE FIRST AMENDMENT AND THE THEORY OF DEEP DI-

The argument for across-the-board exemptions for religiously motivated conduct suggests that, in the name of religious pluralism, the tremendous advances in equal protection gained by minorities, and minority women in particular, should be ignored.[157] After generations of formal discrimination in the law, women have, in most areas, finally attained the right to be secure against legally sanctioned violence and abuse.[158] However, because women and children are most often the victims of religiously motivated violence,[159] courts must remember that taking a permissive stance on religious violence endangers those individuals the law and society have deemed especially worthy of protection.[160]

Children are also particularly vulnerable to religious violence when the law is primarily concerned with protecting child abusers as religious entities.[161] Where the religious beliefs of those who violently abuse children are permitted to justify the wrongdoing, the children are victimized twice—once by their abusers and again by the legal system that should have compensated them for their injuries.[162] The state has a special obligation to protect children, one that the Supreme Court has held cannot be limited by free exercise concerns alone.[163]

VERSITY 170 (2002) ("[W]here this position has merit, the absoluteness of its formulation precludes consideration of what can be rationally justified and argued.").

157. *See* Lama Abu-Odeh, *Crimes of Honour and the Construction of Gender in Arab Societies*, *in* FEMINISM AND ISLAM: LEGAL AND LITERARY PERSPECTIVES 141, 146 (Mai Yamani ed., 1996) (describing the efforts of Laure Mughayzil, a Lebanese lawyer, who has argued that laws in Arab countries that exempt men from criminal liability for so-called 'honor killings,' in which men murder their wives or female relatives for their alleged unchaste conduct, reinforce a tribal mentality that is inconsistent with intellectual and social development in the area of women's legal rights); Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093, 1142 (1996).

158. Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093, 1142 (1996).

159. *Id.* at 1095.

160. *See id.* at 1142.

161. *See id.* at 1143. Coleman warns:

> In the name of rejecting cultural relativism in the law, child-victims of immigrant crime (victims, essentially, of cultural pluralism) have been—and, if the cultural defense continues to be accepted, will continue to be—left without protection by the criminal law. This result serves neither the intent of deterrence nor that of retribution, two principal penalogical purposes of the criminal law. The children are thus victims twice, once physically, and then legally.

Id.; MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 13 (2005).

162. *See* Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093, 1143 (1996).

163. Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944) (upholding criminal prosecution of Jehovah's Witnesses employing child labor to distribute religious literature).

A case in point: a splinter sect of the Mormon Church, the Fundamentalist Church of Jesus Christ of Latter-day Saints, commonly known as the FLDS, has raised tremendous controversy in the western United States and Canada for illegally practicing polygamy and promoting child marriage.[164] Several former members have sued the FLDS for the forced marriage and rape of minor children, allegedly committed pursuant to the sect's core beliefs.[165] For instance, Deborah Palmer was forced at only age fifteen to marry a man nearly three times her age, who already had five wives.[166] As his concubine, Deborah was reduced to chattel status in the community and required to bear as many of her husband's children as possible, lest her soul "burn for all eternity in Hell."[167] In these isolated communities, the underage brides and their children frequently suffer physical and sexual abuse,[168] and they are further isolated by the secular government's refusal to prosecute their abusers.[169]

Because the women and children victims of FLDS-sanctioned abuse are often emotionally and psychologically traumatized by their experiences, but not physically scarred, the law as it currently stands may not provide an adequate remedy for those who manage to escape the sect and sue for their injuries.[170] The law must protect freedom of religion, but not at the expense of victims of religiously motivated violence. Where this type of violence has purely intangible harms, it cannot be excused simply because the physical violation left no visible marks. Abuse is abuse, and the law must deter its commission against susceptible women and children in order to protect society as a whole.

Another issue complicating claims involving religious conduct within the congregation is that of consent. Does membership within a religious organization automatically equate to consent to all religiously motivated conduct? As courts are generally reluctant to closely scrutinize the rela-

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"The right to practice religion freely does not include liberty to expose . . . the child to communicable disease or the latter to ill health or death." *Id.*

164. MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 21 (2005).

165. *Id.* at 22–23.

166. *Id.* at 23.

167. *Id.* (noting that, in the FLDS, a woman's "life's purpose is to assist the men in reaching 'godhood,' which is attained if the man has many concubines").

168. *Id.* at 73.

169. MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 73–74 (2005). In fact, in the neighboring cities of Colorado City, Arizona and Hildale, Utah, the local law enforcement belong to the FLDS and routinely turn a blind eye to the violence that occurs daily in those communities. *Id.* at 24.

170. *Id.* at 76 ("[I]t is the obligation of the legislators to determine what is in the best interests of all the people—men, women, children, and society as a whole. And the debate belongs in the legislature, not the courts.").

tionship between churches and their congregants,[171] they are equally hesitant to resolve disputes involving the voluntariness of a congregant's submission to a particular ritual or behavior.[172] Thus, a growing number of courts have simply concluded that consent to church rituals is implied by voluntary membership in the religious group.[173]

This approach, however, misapplies the established doctrine forbidding judicial inquiry into matters of ecclesiastical government and internal discipline.[174] As noted by the Supreme Court, the law should not intrude upon purely internal matters of religious government,[175] and voluntary membership in a religious organization does imply consent to the internal governance thereof.[176] But voluntary membership does not imply consent to the relinquishment of fundamental rights to physical and emotional integrity.[177] Just as a battered spouse is not presumed to consent to physical or emotional violence by marrying or remaining married to the abuser,[178] a religious adherent should not be presumed to consent to violence by joining the congregation.

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171. *See* Prince v. Massachusetts, 321 U.S. 158, 177 (1944) (Jackson, J., concurring) (arguing that church conduct involving only church members should be generally beyond the purview of the courts).

172. *See, e.g.,* Van Schaick v. Church of Scientology of Cal., 535 F. Supp. 1125, 1144–45 (D. Mass. 1982). The district court held:

> Although there may be ways in which a party could . . . [prove] that "forms of religious organizations were created for the sole purpose of cloaking a secular enterprise with the legal protection of a religion," . . . a general inquiry into whether individual members of a religion hold in good faith the belief they assert is not one of them.

Id.

173. *E.g.,* Paul v. Watchtower Bible & Tract Soc'y of N.Y., 819 F.2d 875, 883 (9th Cir. 1987); Guinn v. Church of Christ of Collinsville, 775 P.2d 766, 777 (Okla. 1989); Pleasant Glade Assembly of God v. Schubert, 264 S.W.3d 1, 12–13 (Tex. 2008), *cert. denied,* 129 S.Ct. 1003 (2009).

174. *See* Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich, 426 U.S. 696, 708–09 (1976).

175. *Id.* (quoting Md. & Va. Eldership of Churches of God v. Church of God at Sharpsburg, 396 U.S. 367, 369 (1970) (Brennan, J., concurring)).

176. *Guinn*, 775 P.2d at 777.

177. *See Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d at 20 (Jefferson, C.J., dissenting). As Chief Justice Jefferson contended:

> [T]he Court treats church membership as an across the board buffer tort liability. The problems with this approach are obvious . . . we are in no position to decide that the ordeal to which [the Plaintiff] was subjected was so "expected" and accepted by those in the church as to overcome [the Plaintiff's] vehement denial of consent at the time of the incidents.

Id. (citations omitted).

178. State v. Smith, 481 S.E.2d 747, 751 (W. Va. 1996). The court reiterated:

> In the context of a claim of self-defense by a battered spouse, our Supreme Court has explained: 'A woman whose husband has repeatedly subjected her to physical abuse

A special problem arises where the plaintiff-parishioner is a child. Some courts have extended the implied consent reasoning to cases involving minor parishioners, reasoning that children impliedly consent to religious conduct by church membership in the same way that adults do.[179] Courts generally respect a child's membership in a religious community, even if that membership is merely derivative of the parents' membership.[180] In the case of a child who belongs to her parent's church, the child has not consented to any intrusive or violent religious conduct, nor should she be permitted to do so, even if her parents did. Adolescents are especially impressionable and susceptible to coercive conduct, yet the law routinely fails to consider the rights of minors in religious settings.[181] The particular vulnerability of children should, on the contrary, compel stricter oversight of religious conduct involving minors, and courts must not continue to blithely dismiss the claims of child victims of religious violence.[182]

C. *Intentional Infliction of Emotional Distress*

Additional complications arise when plaintiffs seek redress for intangible harms via claims of IIED because the nature of the tort itself raises

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does not, by choosing to maintain her family relationship with that husband and their children, consent to or assume the risk of further abuse.'

Id.

179. *E.g.*, Murphy v. I.S.K. Con. of New England, 571 N.E.2d 340, 349 (Mass. 1991), *cert. denied*, 502 U.S. 865 (1991). The Massachusetts Supreme Court found:

> [W]e are not persuaded that [plaintiff's] age alleviates the free exercise concerns raised by the jury's evaluation of the defendant's religious beliefs. The fact that [plaintiff] was a minor when she was involved with the defendant may lessen the degree of constitutional protection. . . . However, the nature of the challenge to the defendant's beliefs . . . embroils the court in an assessment of the propriety of those beliefs regardless of the age of the plaintiffs. This court may not engage in such deliberations.

Id.; *see also Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d at 9–10.

180. *See, e.g., Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d at 9–10.

181. MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 12 (2005) ("[T]he law fails to consider adolescents' peculiar circumstances, [their] potential susceptibility to coercion [and] the manner in which the legal system views adolescents' impressionability and their ability to perceive (or to misperceive) government endorsement of religion or of religiously influenced practices.").

182. *See id.* Hamilton explains:

> Young people are at risk from religious adults and institutions in two ways: (1) through the religious power to abuse the child; or (2) through their parents' religiously motivated medical neglect or physical abuse. The suffering is often unimaginable, because the children lack the ability to protect themselves from death, permanent disability, or severe abuse-at the hands of those they have been taught are here on earth to care for them.

Id.

new concerns about the application of tort liability to cases involving religious conduct and parishioners. While claims for other forms of tortious conduct do not raise free exercise concerns unless the damage caused is purely intangible, IIED, by definition, produces intangible harms. The dilemma courts face in IIED cases is not only the intangibility of the damages, but also the fact that the conduct itself is only wrong if the actor knew or should have known that it would produce extreme emotional distress.[183] Thus, claimants alleging IIED ask courts to determine whether the defendant's religious conduct was wrong solely because it was so outrageous that it injured the plaintiff's emotional well-being.

Because this type of claim necessarily embroils courts in dangerous inquiries regarding the reasonableness and acceptability of religious conduct, some scholars have argued in favor of definitively barring IIED claims against religious actors,[184] and several jurisdictions have effectively complied.[185] Courts and scholars advocating this approach contend that barring IIED claims will protect unpopular minority religions from having their religious conduct judged by the majority under a reasonableness standard.[186] In addition, they argue that adjudicating these claims threatens freedom of belief itself because it punishes religious actors for conduct that may be fundamental to their faiths.[187]

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183. *See* RESTATEMENT (SECOND) OF TORTS § 46 (1965).

184. *E.g.*, Paul T. Hayden, *Religiously Motivated "Outrageous" Conduct: Intentional Infliction of Emotional Distress as a Weapon Against "Other People's Faiths,"* 34 WM. & MARY L. REV. 579, 583 (1993). Professor Hayden proposes:

> I suggest the need for courts, utilizing traditional common law powers, to restrict the scope of this particular common law tort in a manner that would result in greater protection of religious freedom, broadly defined, and in the accordance of greater weight to the societal interest in tolerating various religious beliefs. Such a restriction, perhaps a radical one, is fully justified because the adjudication of these intentional infliction claims embroils courts in forbidden inquiries.

Id. at 583–84.

185. *E.g.*, Paul v. Watchtower Bible & Tract Soc'y of N.Y., 819 F.2d 875, 883 (9th Cir. 1987); Guinn v. Church of Christ of Collinsville, 775 P.2d 766, 777 (Okla. 1989); Pleasant Glade Assembly of God v. Schubert, 264 S.W.3d 1, 13 (Tex. 2008), *cert. denied*, 129 S.Ct. 1003 (2009).

186. *E.g.*, Paul T. Hayden, *Religiously Motivated "Outrageous" Conduct: Intentional Infliction of Emotional Distress as a Weapon Against "Other People's Faiths,"* 34 WM. & MARY L. REV. 579, 586 (1993). Hayden explains:

> There is no better example of the danger come to fruition than when a person sues another alleging that religiously motivated conduct forms the basis of a claim for intentional infliction of emotional distress. In such a case, the plaintiff urges the court to find that the particular religiously motivated conduct is extreme and outrageous, utterly intolerable in a civilized society, and that it has caused some intangible harm for which the defendant should pay.

Id.

187. *Id.* at 581.

By definition, the injury caused by IIED is intangible (extreme emotional distress)[188] and, therefore, difficult to quantify. And, as noted by opponents of IIED's application to cases involving religious conduct, the damages assessed are often a function of the degree to which the jury feels the defendant's conduct is extreme and outrageous.[189] Consequently, the amount of damages rests upon the jury's evaluation of the legitimacy and reasonableness of the defendant's religious beliefs, thereby inviting the majority to suppress the unpopular beliefs of the minority.[190]

In claims for IIED, which requires that the conduct be "outrageous . . . and utterly intolerable in a civilized community,"[191] critics of imposing liability caution that juries might label a panoply of unpopular religious practices sufficiently "outrageous" and "intolerable" to merit plaintiffs' recovery.[192] Indeed, as Justice O'Connor wrote in her concurring opinion in *Employment Division v. Smith*:

> [T]he First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility. The history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups such as the Jehovah's Witnesses and the Amish.[193]

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188. RESTATEMENT (SECOND) OF TORTS § 46 (1) (1965) ("One who by extreme and outrageous conduct intentionally or recklessly causes *severe emotional distress* to another is subject to liability for such *emotional distress, and if bodily harm to the other results from it, for such bodily harm.*" (emphasis added)).

189. Paul T. Hayden, *Religiously Motivated "Outrageous" Conduct: Intentional Infliction of Emotional Distress as a Weapon Against "Other People's Faiths,"* 34 WM. & MARY L. REV. 579, 586 (1993) ("Fixing the amount of such damages is left largely to the discretion of the jury, which awards damages on the basis of its sense of the degree of social undesirability of the defendant's conduct and of the severity of the harm to the particular plaintiff.").

190. *Id.* at 582.

191. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

192. Paul T. Hayden, *Religiously Motivated "Outrageous" Conduct: Intentional Infliction of Emotional Distress as a Weapon Against "Other People's Faiths,"* 34 WM. & MARY L. REV. 579, 580 (1993); *see also* Cantwell v. Connecticut, 310 U.S. 296, 310 (1940). In *Cantwell*, the Supreme Court asserted:

> [O]ne man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader . . . resorts to exaggeration, to vilification . . . and even to false statement. But the people of this nation have ordained . . . that . . . in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

Cantwell, 310 U.S. at 310.

193. Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 902 (1990) (O'Connor, J., concurring).

One scholar even contends that tort law and free exercise are "diametrically opposed," as "[t]he former represents the enforcement of communitarian intolerance of antisocial acts; the latter represents the protection of unpopular, even antisocial, views and practices from the majority's tendency to want to squelch them."[194]

But barring IIED claims involving religious conduct fundamentally mischaracterizes the traditional relationship between religious pluralism and the law in the United States.[195] Within a breath of securing the right to free exercise of religion, the drafters of the Bill of Rights ensured that the law shall not establish any religion as entitled to greater protection than another.[196] It follows that the law cannot prefer religious conduct to secular conduct either. Thus, while the law must tolerate diverse beliefs and practices, it cannot excuse antisocial behavior simply because it is religiously motivated, while punishing similar behavior because it is secular.

The law should intervene to prevent a bigoted majority from unfairly punishing unpopular religious conduct, but it must also recognize that some conduct is unpopular for good reason.[197] In cases involving extremely antisocial behavior, courts have unapologetically sanctioned direct burdens on free exercise and have repeatedly pledged to further restrict any religious conduct that is so outrageous that it threatens the health, safety, or general welfare of society at large.[198] Unfortunately, the line distinguishing legally acceptable religious behavior from that

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194. Paul T. Hayden, *Religiously Motivated "Outrageous" Conduct: Intentional Infliction of Emotional Distress as a Weapon Against "Other People's Faiths,"* 34 WM. & MARY L. REV. 579, 597–98 (1993); *see also* GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM 47 (1985) ("In a sense, the court answered Pilate's celebrated question 'What is truth?' with a facile reply, 'A popularity contest.'").

195. *See* GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM 54 (1985) (analyzing the historical import of the Establishment Clause as applied to tort law).

196. U.S. CONST. amend. I, § 1 ("Congress shall make no law respecting an establishment of religion. . . .").

197. *See* GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM 60 (1985) (explaining the need for tort laws to reject personal idiosyncrasies as evidence of reasonableness when evaluating conduct). To permit "[t]his would mean individuals would be able to accept—'free of charge'—gifts of the evil deity when the society as a whole would rather have rejected." *Id.* Regardless, "beliefs, however unorthodox in their unorthodoxality are part of what constitutes reasonable prudence." *Id.* at 52.

198. *See generally*, *e.g.*, Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990); Reynolds v. United States, 98 U.S. 145 (1878); Hill v. State, 88 So. 2d 880 (Ala. Ct. App. 1956), *cert. denied*, 88 So. 2d 887 (Ala. 1956).

which is beyond the pale is elusory at best.[199] As a result, courts have often shied away from deciding these tough cases.[200]

Striking a balance between the defendant's right to act and the plaintiff's right to protection against injury is among the principle aims of tort law.[201] This balancing act requires looking beyond the defendant's state of mind or motivations, even when perfectly reasonable from the perspective of anyone in the defendant's position.[202] It may be difficult for courts to entrust juries with the task of evaluating the reasonableness of faith,[203] so some other factor must guide them in determining whether the conduct itself is intolerable, despite its motivations. As Prosser and Keeton assert, "[The law] may consider that the actor's behavior, although entirely reasonable in itself . . . has created a risk or has resulted in harm to neighbors which is so far unreasonable that the actor should nevertheless pay for the harm done."[204] In these difficult cases, where religiously motivated conduct has caused a parishioner some intangible harm, the deciding factor for liability should be the nature of the conduct itself, rather than the underlying motivation. While nonviolent religious conduct rarely poses such a threat to the public welfare that the state may have an interest in curtailing it, violent conduct simply cannot be excused under the guise of genuine religious inspiration.

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199. *See* Paul T. Hayden, *Religiously Motivated "Outrageous" Conduct: Intentional Infliction of Emotional Distress as a Weapon Against "Other People's Faiths,"* 34 WM. & MARY L. REV. 579, 580 (1993) ("[IIED's] substantive standards are ill defined, requiring the trier of fact in each case to render an ad hoc judgment about the outrageousness of the particular defendant's particular conduct.").

200. *E.g.*, Pleasant Glade Assembly of God v. Schubert, 264 S.W.3d 1, 13 (Tex. 2008), *cert. denied*, 129 S.Ct. 1003 (2009).

201. W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 1, at 6 (5th ed. 1984).

202. *Id.*

203. Paul T. Hayden, *Religiously Motivated "Outrageous" Conduct: Intentional Infliction of Emotional Distress as a Weapon Against "Other People's Faiths,"* 34 WM. & MARY L. REV. 579, 598 (1993). Hayden explains:

> Tort law's open texture, its ability to respond to and reflect changing social mores and allow for the ad hoc condemnation of conduct that strikes a jury as socially undesirable, is both boon and danger in a democracy. It is a boon because it prevents doctrinal moribundity and stagnation and forestalls the widening of any gap between communitarian notions of right and wrong and the legal standards that both enforce and influence those notions. Yet it is a danger because it may extend too ready an invitation for law to intrude into places where it should not go, and may allow majoritarianism to ride roughshod over unpopular or minority rights and beliefs, the protection of which is an important societal value.

Id. at 586.

204. W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 1, at 6 (5th ed. 1984).

D. *A Proposal*

In actions against religious organizations, courts should permit parishioners to recover for their intangible damages where the underlying religiously motivated conduct was violent in nature. By permitting this type of recovery, the law may better protect members of religious communities who are victims of abuse perpetrated by the very persons and institutions upon which they rely for spiritual guidance and guardianship. Particularly where the parties are members of minority religions, courts have an obligation to defend not only the interests of the minority faith itself, but also its adherents. The well-intentioned approach of several jurisdictions, essentially barring a cause of action for IIED in religious conduct cases in order to preserve religious pluralism,[205] incorrectly applies First Amendment free exercise jurisprudence at the expense of America's faithful.

Accordingly, my proposal aims to correct an unintended oversight in the traditional approach to resolving these claims. Sometimes violence does not result in the kind of physical, tangible injury courts consistently deem worthy of civil compensation, even over free exercise objections.[206] For instance, Laura Schubert's physical injuries were negligible after she was forcibly restrained and treated for demonic possession against her will.[207] And in the FLDS case, young girls were forced to marry much older men and repeatedly raped in order to bear those men as many children as possible.[208] After years of systematic, community-sanctioned molestation, the only scars these girls often bore were psychological.[209] Courts must tailor their approach to the free exercise defense in light of the fact that violence can and does produce intangible injury independent

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205. *See generally, e.g.,* Paul v. Watchtower Bible & Tract Soc'y of N.Y., 819 F.2d 875 (9th Cir. 1987); Molko v. Holy Spirit Ass'n for the Unification of World Christianity, 762 P.2d 46 (Cal. 1988), *cert. denied*, 490 U.S. 1084 (1989); Glass v. First United Pentecostal Church, 676 So. 2d 724 (La. Ct. App. 1996); Murphy v. I.S.K. Con. of New England, 571 N.E.2d 340 (Mass. 1991), *cert. denied*, 502 U.S. 865 (1991); Olson v. First Church of Nazarene, 661 N.W.2d 254 (Minn. Ct. App. 2003); Meroni v. Holy Spirit Ass'n for the Unification of World Christianity, 506 N.Y.S.2d 174 (N.Y. App. Div. 1986); Guinn v. Church of Christ of Collinsville, 775 P.2d 766 (Okla. 1989); Pleasant Glade Assembly of God v. Schubert, 264 S.W.3d 1 (Tex. 2008), *cert. denied*, 129 S.Ct. 1003 (2009); *In re* Pleasant Glade Assembly of God, 991 S.W.2d 85 (Tex. App.—Fort Worth 1998), *rev'd*, 264 S.W.3d 1 (Tex. 2008), *cert. denied,* 129 S.Ct. 1003 (2009).

206. *Pleasant Glade Assembly of God v. Schubert,* 264 S.W.3d at 18 (Jefferson, C.J., dissenting); Wilson v. Lund, 491 P.2d 1287, 1291 (Wash. 1971) ("'[I]ntangible-emotional' injuries can and do constitute real and significant harms.").

207. *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d at 4–5.

208. MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 73 (2005).

209. *Id.* at 73–74.

of physical harm and with due regard for the consequences of permitting conduct that would, in a secular context, "[exceed] all bounds [of decency] usually tolerated by a decent society, [and be] of a nature which is especially calculated to cause, and does cause, mental distress."[210]

Even more compelling is the fact that both Laura and the young girls victimized by the FLDS were children when they were abused,[211] incapable of consenting to the abusive religious conduct courts have repeatedly sanctioned.[212] Because courts have often permitted religious violence based on the premise that membership in a religious organization necessarily implies consent to generally accepted religious practices,[213] it is especially important for courts to consider the impact of this interpretation of the law on children. The law, as applied, fails to provide for the "peculiar circumstances" of children, particularly their "potential susceptibility to coercion."[214] A child cannot consent to religious abuse, even if she belongs to her parents' church, willingly participates in church rituals, and claims to adhere to the church's beliefs, as a child is simply too vulnerable and impressionable to make informed choices about whether to submit to psychologically troubling rituals. This factor is yet another oversight of the prevailing approach that could be remedied by the religious violence exception I advocate.

While those who champion the traditional approach warn that permitting recovery in these cases invites judges and juries to penalize minority beliefs and traditions based on their perceived "social undesirability,"[215] an exception for conduct that is truly heinous would not unduly burden religious pluralism. As one scholar puts it, "The First Amendment was

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210. *Molko*, 762 P.2d at 63.

211. *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d at 3; MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 22 (2005).

212. *See* ROGER J. R. LEVESQUE, NOT BY FAITH ALONE RELIGION, LAW, AND ADOLESCENCE 126 (2002). Levesque explains:

> The rule that emerges, then, supports the view that when a religious community seeks protection, the Court will protect the religious community's interest in being left alone but will not offer it affirmative assistance. Where the rights and needs of adolescents fit into these patterns remains to be determined, in these cases, the potential individual interests of adolescents were not separated from the conflict among the parents, the communities, and the state. In fact . . . we do not know much about what the 'children' wanted, even more important, the [Court] did not require that we know their preferences.

Id.

213. *E.g., Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d at 15.

214. ROGER J. R. LEVESQUE, NOT BY FAITH ALONE RELIGION, LAW, AND ADOLESCENCE 154 (2002).

215. Paul T. Hayden, *Religiously Motivated "Outrageous" Conduct: Intentional Infliction of Emotional Distress as a Weapon Against "Other People's Faiths,"* 34 WM. & MARY L. REV. 579, 586 (1993).

not crafted to protect conduct that harms others, even if the actor is unpopular or powerless."[216] In fact, the First Amendment was designed to prevent government from intruding upon the freedom of individuals to worship, not the freedom to abuse members of their communities with impunity.[217] Most forms of religiously motivated conduct should certainly be beyond the power of courts to punish by imposing civil damages.[218] Passive conduct in particular, such as shunning former members or denouncing morally errant behavior, should not be banned or restricted simply because the actor is acting upon unpopular beliefs.[219] But jurists are dangerously misguided if they believe that shunning is comparable to battery and rape; the fact that the former is protected should not be construed as requiring courts to condone the latter scenarios.

Further, tort law already contains an internal mechanism to protect against the presumptively intolerant majority. A defendant's conduct must be judged according to what would be reasonable for someone in the defendant's position, even if that position is occasioned by the defendant's unusual beliefs.[220] Thus, the law compels courts to tolerate most religious conduct, however unusual or unpopular, "in order to avoid distinguishing between 'acceptable' and 'non-acceptable' religions."[221] The First Amendment, however, does not require society at large to completely relinquish the power to punish acts that harm the community.[222] Religious actors threaten the public safety and welfare as much as anyone

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216. MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 72 (2005).

217. Paul T. Hayden, *Religiously Motivated "Outrageous" Conduct: Intentional Infliction of Emotional Distress as a Weapon Against "Other People's Faiths,"* 34 WM. & MARY L. REV. 579, 596 (1993) ("[T]he government position is one of 'benign neutrality' towards religion." (footnote omitted)).

218. *See* Prince v. Massachusetts, 321 U.S. 158, 177 (1944) (Jackson, J., concurring). Justice Jackson argued:

> My own view may be shortly put: I think the limits begin to operate whenever activities begin to affect or collide with liberties of others or of the public. Religious activities which concern only members of the faith are and ought to be free-as nearly absolutely free as anything can be.

Id.

219. *See* Paul v. Watchtower Bible & Tract Soc'y of N.Y., 819 F.2d 875, 883 (9th Cir. 1987) ("Without society's tolerance of offenses to sensibility, the protection of religious differences mandated by the [F]irst [A]mendment would be meaningless.").

220. GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM 52 (1985) (stating that religious "beliefs, however unorthodox . . . are part of what determines reasonable prudence").

221. *Id.*

222. *Id.*

else committing violent offenses.[223] Where the interest of society at large, specifically the interest in preventing and punishing violence against women and children, outweighs the benefit of fostering religious freedom, it behooves everyone for courts to permit a violence exception to the free exercise defense.

Fundamentally, the law values people more than the beliefs they hold. Courts recognize this by, for instance, requiring Christian Scientists to vaccinate against deadly diseases[224] and forbidding members of the Native American church from using hallucinogenic drugs in tribal rituals.[225] In both cases, courts restricted individuals from engaging in self-destructive conduct motivated by religious beliefs.[226] So why should religious actors be absolutely entitled to harm others when they have no absolute right, based on the same beliefs, to harm themselves? If there was ever an occasion to limit or proscribe religious conduct, it should certainly be where the conduct is outwardly violent.[227] The fact that the violence causes no physical injury should not spare the actor from taking responsibility for his voluntary acts.

Finally, it bespeaks an appalling lack of regard for minority victims of religious violence when the law turns a blind eye to their suffering. Minorities, usually vulnerable women and children, are too often victimized by their religious leaders and fellow parishioners in a manner wholly inconsistent with the American values of liberty and justice.[228] When the legal system ensures justice for the victims of secular violence, while at once disregarding the legitimate emotional injuries of victims of religiously motivated violence, the system creates a double standard favoring the secular victims.[229] This double standard is especially perilous for minorities, often immigrants, who are most frequently members of insular religious communities.[230] Nothing in the current approach harms minorities and immigrants more than denying them the same treatment under the law as everyone else.

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223. MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 67 (2005).

224. Jacobson v. Massachusetts, 197 U.S. 11, 38 (1905).

225. Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 884 (1990).

226. *Jacobson*, 197 U.S. at 38.

227. *See* MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 72 (2005).

228. Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093, 1138 (1996).

229. *See id.*

230. DAVID E. GUINN, FAITH ON TRIAL: COMMUNITIES OF FAITH, THE FIRST AMENDMENT AND THE THEORY OF DEEP DIVERSITY 175 (2002) ("[I]n many cases that these diverse religions are also associated with ethnic minorities.").

The law must protect religious liberty, but not at any cost. Violence committed upon one member of society is an injustice committed upon society as a whole.[231] While courts rightly reject liability in most civil cases involving parishioners and religiously motivated conduct, physical abuse should always be compensable, even if the damage is minor or intangible. Particularly in cases involving religious minorities, pluralism and tolerance cannot be furthered if minority believers do not receive equal protection under the law.

IV. Conclusion: Free Exercise of the Courtroom

It is time for the legal system to acknowledge that emotional suffering can be as real and as painful, if not more so, than any physical hurt. For Laura, this meant cutting herself over one hundred times over the course of several years while terrified to leave her home and, finally, slitting her wrists with a box cutter.[232] The fact that her pain was caused by a religious group engaged in religiously motivated conduct does not diminish the degree or reality of her suffering.

The Texas Supreme Court held that because at least part of Laura's trauma stemmed from the church members' statements that Laura was possessed by demonic forces, her injuries arising from the physical contact cannot be distinguished from those caused solely by the discussion of demons.[233] As Chief Justice Wallace Jefferson explains in his dissenting opinion, "[T]he difficulty in this type of hybrid case lies in separating the wheat from the chaff."[234] But, as the Chief Justice argues, the wheat and the chaff may indeed be separated, and a jury may reasonably be instructed to award damages only for those mental injuries that would have been sustained had the physical assault been committed in a secular context.[235]

Rejecting the Chief Justice's suggestion, the majority argues:

> [E]ven though the elements of a common law tort may be *defined* by secular principles without regard to religion, it does not necessarily follow that *application* of those principles to impose civil tort liability

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231. Marci A. Hamilton, God vs. The Gavel: Religion and the Rule of Law 67 (2005).

232. *In re* Pleasant Glade Assembly of God, 174 S.W.3d 388, 393 (Tex. App.—Fort Worth 2005), *rev'd*, 264 S.W.3d 1 (Tex. 2008), *cert. denied*, 129 S.Ct. 1003 (2009).

233. Pleasant Glade Assembly of God v. Schubert, 264 S.W.3d 1, 10–11 (Tex. 2008), *cert. denied*, 129 S.Ct. 1003 (2009).

234. *Id.* at 21 (Jefferson, C.J., dissenting).

235. *Id.*

> would not run afoul of protections the constitution affords to a church's right to construe and administer church doctrine.[236]

Attempting to compensate some of Laura's injuries, when even her psychologist could not assign a percentage to those injuries that were solely caused by the physical contact, the court reasoned, would have an unconstitutional chilling effect on the church's freedom to practice its core beliefs.[237]

I argue that courts need not attempt to separate the wheat from the chaff, nor must a plaintiff's claim for intangible harms be thrown out simply because the court is unable, or unwilling, to do so. The bright-line standard I advocate—compensating all victims of religiously motivated violence, regardless of the nature of their injuries—does not require courts to tread lightly where the imposition of liability would have a chilling effect on religious practice. On the contrary, liability *should* have a chilling effect where religious practice is violent. If the threat of liability for intangible harms does not deter religious groups from abusing their own members, there can be no protection for minority religious adherents, especially those women and children so often lacking a voice outside of the courtroom.

Women and children like Laura Schubert will never be fully protected under the law until courts acknowledge intangible suffering as a legitimate injury in cases involving religious violence. Those women and children who are members of insulated religious communities, in particular, can never be safe from abuse if courts continue to place the free exercise rights of religious institutions above the rights of minority congregants to physical and emotional well-being. After all, "there is no constitutional right to harm others simply because the conduct is religiously motivated."[238] When courts excuse violent conduct, they effectively create such a right in complete disregard for the victims of violence.

I do not argue for a radical change in the law as it stands today. In fact, I find it hard to contemplate many scenarios in which violent, abusive conduct would produce only intangible damages. Certainly, the most blatantly abusive behavior most often produces readily compensable physical injuries, the kind that courts have never been hesitant to remedy. I

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236. *Id.* at 10 (majority opinion) (citing Westbrook v. Penley, 231 S.W.3d 389, 400 (Tex. 2007), *reh'g denied* (Sept. 28, 2007)) (emphasis in original).

237. *Id.*

238. MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 11 (2005) ("Therefore the rule of law . . . must be applied evenhandedly to all religious entities. Legislatures can exempt the religious from some laws, but only where the religious entities have borne the burden of proving that exempting them renders no harm.").

merely suggest that the free exercise defense should be permitted *only if* the religiously motivated conduct was non-violent.

For Laura, the pain and suffering she has endured for over ten years cannot be erased by a monetary reward. However, a favorable decision in her case could have helped minority victims of religious abuse throughout the United States.[239] The First Amendment protects a precious right of all Americans: the freedom to worship without fear of governmental persecution. For adherents of minority faiths, this right is particularly sacred because it prevents the majority from silencing the expression of those beliefs that are different or unusual. But for those adherents whose faith exposes them to violence in religion's name, nothing can be more sacred than the freedom to exercise the courtroom to demand justice.

239. Unfortunately, the United States Supreme Court denied certiorari in Laura's case on January 21, 2009. Schubert v. Pleasant Glade Assembly of God, 129 S.Ct. 1003, 1003 (2009).