"Other People's Faiths": The Scientology Litigation and the Justiciability of Religious Fraud

By MARJORIE HEINS*

> Then stood there up one in the council, a Pharisee, named Gamaliel, a doctor of the law, had in reputation among all the people, and commanded to put the apostles forth a little space;
>
> And said unto them, Ye men of Israel, take heed to yourselves what ye intend to do as touching these men. . . .
>
> . . . .
>
> . . . Refrain from these men, and let them alone: for if this counsel or this work be of men, it will come to nought:
>
> But if it be of God, ye cannot overthrow it; lest haply ye be found even to fight against God.[1]

Introduction

The proliferation of new religions has engendered hot dispute.[2]

* Associate, Palmer & Dodge, Boston. B.A., 1967, Cornell University; J.D., 1978, Harvard University. The author represented several churches of Scientology while an associate at Silverglate, Shapiro & Gertner (now Silverglate & Gertner), Boston, in 1979 and 1980. Discussions with Harvey A. Silverglate and Thomas G. Shapiro helped to formulate some of the ideas expressed in this article.

1. *Acts of the Apostles* 5:34-39 (King James).

2. In popular parlance, these new religious groups are known as cults. Although the word has attained a derogatory connotation, it simply means a new religion, often centering around a charismatic leader. A sect, by contrast, is a secession from, or subgroup of, a more stable and "often culturally dominant religious group." *See* S. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE 473 (1972). *See generally* S. AHLSTROM, *supra*, at 473-74; Wilson, *The Historical Study of Marginal American Religious Movements*, in RELIGIOUS MOVEMENTS IN CONTEMPORARY AMERICA 603-11 (I. Zaretsky & M. Leone eds. 1974); Colloquium, *Alternative Religions: Government Control and the First Amendment*, 9 N.Y.U. REV. L. & SOC. CHANGE 1 (1980).

New religions, whether originating as sects or cults, are characteristic of United States history. "In the radical antinomian tradition alone, the accretions have been continuous, from Mistress Anne Hutchinson in the 1630's to Timothy Leary in the 1960's." S. AHLSTROM, *supra*, at 4. In the contemporary revival, at least four strains have been identified: "human-potential" movements, evangelical fundamentalism, "Eastern" mystical religions, and authoritarian cults. *See* Anthony, *The Fact Pattern Behind the Deprogramming Controversy: An Analysis and an Alternative*, in Colloquium, *supra*, at 73, 75. A 1976 estimate put total membership in the "one thousand religious cults active in the United States" at "three

These groups, despite wide divergence in views and practices, are often regarded as manifestations of the same social phenomena. They usually are thought to have in common a demand for more intense commitment on the part of adherents than conventional churches require, a penchant for highly effective persuasive techniques, and a particular appeal to the young.[3] Opposition to the new religions has ranged from impassioned journalism to hearings before legislative committees and direct action in the form of by now commonplace deprogramming escapades. In the manner of other highly charged and perhaps intractable social antagonisms, the battle also has found its way into the courts.

Some of the early litigation involved guardianship or conservatorship proceedings. The results of these contests were mixed, since courts generally understood the formidable constitutional obstacles to adjudicating claims that otherwise competent young adults had been brainwashed by religion.[4] There also were legal skirmishes over

million young Americans." F. CONWAY & J. SIEGELMAN, SNAPPING 12 (1978) (citing U.S. NEWS & WORLD REP., June 14, 1976, at 52).

The revival has, of course, not been limited to new religions: fundamentalist Christianity and Judaism have also gained adherents. *See* C. STONER & J. PARKE, ALL GOD'S CHILDREN xiii (1977).

3. Descriptive literature on the new religions abounds. It ranges from undogmatic, scholarly work, *e.g.*, RELIGIOUS MOVEMENTS IN CONTEMPORARY AMERICA, *supra* note 2, to highly emotional polemics, *e.g.*, A. RUDIN & M. RUDIN, PRISON OR PARADISE?: THE NEW RELIGIOUS CULTS (1980). Opponents sometimes seek to distinguish the new groups in some fundamental way from past bizarre or demanding faiths, *e.g.*, F. CONWAY & J. SIEGELMAN, *supra* note 2, at 37-52, while advocates of First Amendment equal protection argue for even-handedness, *e.g.*, Pfeffer, *Equal Protection for Unpopular Sects*, in Colloquium, *supra* note 2, at 9, 15. In his exhaustive study, Professor Delgado attempts to differentiate the new religions from earlier ones to justify a program of intervention in their activities at a variety of points, from regulation of recruitment to after-the-fact damage suits. Delgado, *Religious Totalism: Gentle and Ungentle Persuasion Under the First Amendment*, 51 S. CAL. L. REV. 1 (1977).

4. *See, e.g.*, Schuppin v. Unification Church, 435 F. Supp. 603 (D. Vt. 1977) (dismissing parents' action seeking adjudication of daughter's mental competency); Katz v. Superior Court, 73 Cal. App. 3d 952, 141 Cal. Rptr. 234 (1977) (reversing trial court's grant of conservatorship over young adult members of Unification Church); Helander v. Salonen, No. HC 7-75 (D.C. Super. Ct. Sept. 23, 1975) (order dismissing habeas corpus petition for custody of Unification Church member); *In re* Shapiro, Civ. No. 471805 (Middlesex, Mass. P. Ct. June 24, 1977) (refusing to grant guardianship over member of International Society for Krishna Consciousness). A brief in *Katz* described that conservatorship proceeding in part as follows: "Typically, (the parents') attorney . . . would read a passage from the *Divine Principle*, the major theological work of the Church, and then ask the proposed conservatee: 'And you, student with college-level education, seriously believe this?!' " Note, *Conservatorships and Religious Cults: Divining a Theory of Free Exercise*, 53 N.Y.U. L. REV. 1247, 1255 n.53 (1978). *See also* Note, *Legal Issues in the Use of Guardianship Procedures to Remove Members of Cults*, 18 ARIZ. L. REV. 1095 (1976); Comment, *"Mind Control" or Intensity of Faith: The Constitutional Protection of Religious Beliefs*, 13 HARV. C.R.-C.L. L. REV. 751 (1978); Note, *People v. Religious Cults: Legal Guidelines for Criminal Activities, Tort*

deprogramming,[5] sometimes with allegations of kidnapping or false imprisonment on one side, and with allegations of mental coercion or trickery on the other.[6] In the midst of this often emotional spectacle of parents seeking to "rescue" their adult children from "pseudoreligions," the First Amendment came in for a measure of abuse.[7]

Damage lawsuits, often for large sums, have also been brought. Parents may allege a tort cause of action for loss of services or alienation of affections.[8] Former adherents, on the other hand, frequently

---

Liability, and Parental Remedies, 11 SUFFOLK L. REV. 1025 (1977); Note, *Abduction, Religious Sects and the Free Exercise Guarantee*, 25 SYRACUSE L. REV. 623 (1974).

5. *See, e.g.*, Alexander v. Unification Church of America, 634 F.2d 673 (2d Cir. 1980) (deprogrammers' allegations that church used litigation in attempt to destroy them, and that it maintained constant surveillance of them, held sufficient to state claims for abuse of process and intentional infliction of emotional distress); Rankin v. Howard, 633 F.2d 844 (9th Cir. 1980) (no dismissal on judicial immunity grounds where judge alleged to have conspired with parents to attain guardianship and effect deprogramming); United States v. Patrick, 532 F.2d 142 (9th Cir. 1976) (dismissing on double jeopardy grounds government's appeal from Patrick's acquittal on kidnapping charge; trial court had permitted defense of necessity); Mandelkorn v. Patrick, 359 F. Supp. 692 (D.D.C. 1973) (denying motion to dismiss 42 U.S.C. § 1985 conspiracy action against Patrick and others).

6. *See, e.g.*, Weiss v. Patrick, 453 F. Supp. 717, 723 (D.R.I.), *aff'd per curiam*, 588 F.2d 818 (1st Cir. 1978), *cert. denied*, 442 U.S. 929 (1979) (judgment for defendant deprogrammers in action for false imprisonment, assault and battery and civil rights violations because court disbelieved plaintiff's testimony that she had been restrained against her will and found, in any case, that "limitation upon her personal mobility was not her primary concern"); Peterson v. Sorlien, 299 N.W.2d 123, 129 (Minn. 1980) (parents' restriction of their adult child's freedom for purpose of deprogramming held not to constitute false imprisonment where they believed child's "judgmental capacity" was impaired and sought to extricate her from what they "reasonably" thought to be a "religious or pseudo-religious cult," and she later consented); People v. Murphy, 98 Misc. 2d 235, 413 N.Y.S.2d 540 (Sup. Ct. 1977) (dismissing, on First Amendment grounds, unlawful imprisonment and attempted grand larceny indictments against members of International Society for Krishna Consciousness; the grand jury had initially investigated an alleged kidnapping of a member by her mother and a deprogrammer). Another tort suit against deprogrammers has been brought in Buffalo, New York, by a twenty-seven-year-old woman who was a student at Maharishi International University and a practitioner of transcendental meditation. N.Y. Times, Feb. 15, 1981, at 44, col. 1. Whether or not victims of such kidnappings ultimately win damages from deprogrammers or parents, of course, the parents have in many cases paid substantial amounts of money for what turned out to be unsuccessful "cures." *See, e.g.*, C. STONER & J. PARKE, *supra* note 2, at 377-409.

7. *See, e.g.*, F. CONWAY & J. SIEGELMAN, *supra* note 2, at 16 (cults rely on "the impenetrable legal sanctions of the First Amendment"); Delgado, *supra* note 3, at 46-48 (proselytizing and religious practices not protected because of "deception and intensive mind control techniques" which "diminish, rather than increase, the ability of the victim to make private decisions about his life"; First Amendment is designed "to prevent oppression of small, struggling minorities rather than affording them a right to become more powerful relative to other groups"); C. STONER & J. PARKE, *supra* note 2, at xvii ("we've heard parents argue persuasively that the first amendment to our Constitution should be modified for Americans' own protection").

8. *See, e.g.*, Kieffer v. Holy Spirit Ass'n for Unification of World Christianity, Civ. No.

claim fraud or breach of contract on the theory that promises or representations made to them by the church, or by a minister or recruiter, were false. Such promises range from the relatively worldly and specific (*e.g.*, salary or certain level of economic support in exchange for church work) to the ineffable and primarily spiritual (*e.g.*, cure of neurosis or general unhappiness in exchange for adherence). Suits by relatives and renegades also have included claims of intentional infliction of emotional distress, false imprisonment or even involuntary servitude, and coercive persuasion or mind control.[9]

Such tort and contract litigation has been particularly persistent against one of the older and better established of the controversial new religions, Scientology.[10] This article is drawn in part from issues raised and work done in connection with the defense of several churches of Scientology in four lawsuits brought in Boston in 1979 and 1980.[11] In these suits, former Scientologists sought multi-million dollar damages for allegedly fraudulent misrepresentation of the benefits to be derived from auditing,[12] Scientology's main practice, and the process by which

77-381-D (D.N.H. Sept. 23, 1980) (order setting aside damage judgment and ordering new trial); Schuppin v. Unification Church, 435 F. Supp. 603 (D. Vt. 1977).

9. *See, e.g.*, Turner v. Unification Church, 473 F. Supp. 367 (D.R.I. 1978), *aff'd per curiam*, 602 F.2d 458 (1st Cir. 1979); cases cited in note 8 *supra* & note 11 *infra*.

10. There is not room here to do justice to the intriguing story of Scientology's founding, originally as "Dianetics," by L. Ron Hubbard from strands of science fiction and occultism; its development from a "science of mental health" into a church; and its intricate theology. An intelligent, nonpolemical account is rendered by Whitehead, *Reasonably Fantastic: Some Perspectives on Scientology, Science Fiction and Occultism*, in RELIGIOUS MOVEMENTS IN CONTEMPORARY AMERICA, *supra* note 2, at 550-87.

11. Van Schaick v. Church of Scientology of California, Civ. No. 79-2491-G (D. Mass. filed Dec. 13, 1979); Church of Scientology of Boston, Inc., v. Garritano, Civ. No. 40906 (Mass. Super. Ct., Suffolk County, counterclaim dismissed in part, July 14, 1980); Troy v. Church of Scientology of Boston, Civ. No. 41073 (Mass. Super. Ct., Suffolk County filed Apr. 2, 1980); Hansen v. Church of Scientology of Boston, Civ. No. 41074 (Mass. Super. Ct., Suffolk County filed Apr. 2, 1980). The first judgment against a Church of Scientology for consumer fraud and "outrageous conduct," Christofferson v. Church of Scientology of Portland, No. A7704-05184 (Or. Cir. Ct., Multnomah County Sept. 5, 1979), *appeal docketed*, No. 15952 (Ct. App. Oct. 31, 1979), totalling $2.3 million, may have inspired the Boston suits.

12. During auditing, the member speaks about his or her problems with an auditor, who is like a minister, while holding cans connected to a skin galvanometer called the Hubbard Electrometer, or E-meter, which registers responses. A stable E-meter reading means that the member has successfully worked through a particular problem. The auditor takes copious notes which are later reviewed by a supervisor.

The theory is that the verbal exchange enables the "preclear" adherent to discover the aberrations or "engrams" (imprints of traumatic events in his or her past life or lives) that inhibit the full flowering of mental powers, and attendant spiritual and physical well-being. The goal is an enhanced and potent mental state called "clear." The concept thus resembles both religious and secular forms of therapy, as well as more traditional faith healing.

The plaintiffs alleged that they had been told auditing would cure neurosis, heighten

it seeks to assuage mental and spiritual ills. They also claimed breach of contract, based on the same representations or promises, and intentional infliction of emotional distress, allegedly caused by auditing and other church practices to which they had consented at the time of their membership. None of the plaintiffs accused the church of inflicting physical harm.[13] Some of the plaintiffs had themselves been auditors or recruiters for the church before quitting; one had returned for additional auditing periodically for some ten years. Others had been in and out of the organization within six months.[14]

These contract, fraud and mind–control claims put squarely in issue the truth or falsity, as well as the propriety, of doctrines that had been held out as religious. The plaintiffs argued that questioning the verity of these doctrines was permissible, first, because Scientology was not really a religion, and second, even if it were, its founder, organizers, and recruiters were not sincere in the beliefs they preached. To support this second theory, the plaintiffs accused the church of harboring commercial rather than spiritual motivations and spread through their pleadings and briefs allusions to tortious conduct and to the recent criminal convictions of eleven leading Scientologists.[15] The relief sought in one suit was virtual dissolution of the church.[16]

It is the argument of this article that where a religion is attacked as not *bona fide*, allegations of crimes, torts or commercial motives beg the First Amendment question, for although a church may be guilty of secular offenses, it nonetheless remains a church, entitled to whatever

---

resistance to colds, increase their IQ's, improve eyesight, increase career opportunities, and enhance domestic life. Plaintiffs Troy and Hansen also claimed that the church had falsely promised that it was working for a better world. Amended Complaint at 2, Troy v. Church of Scientology of Boston, Civ. No. 41073 (Mass. Super. Ct., Suffolk County filed Apr. 2, 1980); Amended Complaint at 2-3, Hansen v. Church of Scientology of Boston, Civ. No. 41074 (Mass. Super. Ct., Suffolk County filed Apr. 2, 1980).

13. In the one case where false imprisonment was pleaded, Church of Scientology v. Garritano, Civ. No. 40906 (Mass. Super. Ct., Suffolk County, counterclaim dismissed in part, July 14, 1980), the tort was based on allegations of mental, rather than physical, coercion.

14. The four counterclaimants in Church of Scientology v. Garritano, Civ. No. 40906 (Mass. Super. Ct., Suffolk County, counterclaim dismissed in part, July 14, 1980), were long-standing members. Plaintiffs Troy and Hansen had remained in the church only a few months. Plaintiff Van Schaick had been in and out of the Nevada church over a period of about nine years.

15. United States v. Hubbard, Crim. No. 78-0401 (D.D.C., findings of guilt entered, Oct. 26, 1979). Decisions on various pretrial motions are reported at 474 F. Supp. 64, 90 (D.D.C. 1979) and 493 F. Supp. 202, 206, 209 (D.D.C. 1979).

16. The complaint in Van Schaick v. Church of Scientology, Civ. No. 79-2491-G (D. Mass. filed Dec. 13, 1979) sought $200 million plus attachment of church real estate and a receivership over church assets.

shield the Constitution offers, unless its doctrines are simply not religious in a broad functional sense. Religious groups undoubtedly are not immune from tort claims, including those brought for some varieties of fraud. Where the alleged fraud derives from the church's beliefs, however, courts ought to be wary of entertaining such claims, regardless of the sincerity or hypocrisy with which the beliefs are propounded.

Courts should be equally wary of religious fraud claims asserted in the more loaded terminology of mind control or brainwashing, for, as one court noted in the context of a conservatorship case, the issue is the same: "Evidence was introduced of the actions of the proposed conservatees in changing their life style. When the court is asked to determine whether that change was induced by faith or by coercive persuasion is it not in turn investigating and questioning the validity of that faith?"[17]

The starting point of any discussion of religious fraud is the Supreme Court's decision in *United States v. Ballard*.[18] That case, discussed in Part I,[19] held that in a fraud prosecution of religious leaders, the factfinder was constitutionally prohibited from inquiring into the truth or falsity of the defendants' religious representations and beliefs. *Ballard* left open questions, however, that have since worried courts in a variety of other contexts. This article specifically addresses three of those questions: (1) What constitutes religious *status* that will trigger *Ballard* immunity? (2) Can a test of *sincerity* substitute for the inquiry into religious truth proscribed by *Ballard*? (3) In what *context* will a representation be deemed religious rather than secular, thus rendering the immunity appropriate?

Whether parties asserting religious status satisfy the constitutional definition of religion must be the first inquiry. It is preliminary, of course, to determining whether or not First Amendment protection attaches, but it also is necessary to preserve the integrity of religion and conscience as constitutional and moral categories. No matter how difficult and value laden the application of a present-day constitutional definition of religion may be, courts cannot avoid it. In the long run it is easier and less intrusive on religious liberty than is inquiring into the

17. Katz v. Superior Court, 73 Cal. App. 3d 952, 987, 141 Cal. Rptr. 234, 255 (1977). A thoughtful analysis of the "serious epistemological problems" attending use of the term mind control in the context of the new religions is offered by Robbins, *Religious Movements, the State, and the Law: Reconceptualizing "the Cult Problem,"* in Colloquium, *supra* note 2, at 33, 37.

18. 322 U.S. 78 (1944).

19. *See* text accompanying notes 27-95 *infra*.

truth of beliefs or into the sincerity with which they are held. The constitutional test of religious status, which derives from conscientious objector litigation and modern theology and focuses on beliefs that radiate ultimate concern about life and its meaning, is outlined in Part II.[20]

Once a party's religious status is established, it ought not be put to a further test of sincerity. An allegation that a church is not *bona fide* or that some of its members or its ruling hierarchy are not genuine believers should not render judicially cognizable issues of religious verity or legitimacy that otherwise would be beyond a court's capacity. Even though some religious hucksters may escape liability because of this rule, its justifications outweigh its defects. A central justification, as Justice Jackson pointed out in his separate opinion in *Ballard*,[21] is that questions of religious sincerity cannot meaningfully be separated from questions of religious falsity or truth. The issue of sincerity is analyzed in Part III.[22]

Religious status, however, does not protect a church or minister whose statements or actions were made in a secular context. Nor, as the Supreme Court pointed out in *Cantwell v. Connecticut*,[23] could an imposter gain comfort from the free exercise clause if accused of fraudulently impersonating a representative of a particular faith. Part IV addresses the problem of separating religious from secular contexts.[24]

This article deals with the scope and applicability of the *Ballard* immunity, including the threshhold questions of status, sincerity and context introduced above.[25] Because such questions should be ad-

20. *See* text accompanying notes 96-142 *infra*.

21. 322 U.S. at 92-95 (Jackson, J., dissenting).

22. *See* text accompanying notes 143-81 *infra*.

23. 310 U.S. 296 (1940).

24. *See* text accompanying notes 182-211 *infra*.

25. This article does not survey the entire range of First Amendment issues lurking behind the Boston Scientology litigation or in like cases elsewhere. Questions of religious freedom arise in almost every stage of these suits, from applicability of the Fair Labor Standards Act, 29 U.S.C. § 201-19 (1938), *see, e.g.*, Mitchell v. Pilgrim Holiness Church Corp., 210 F.2d 879 (7th Cir. 1954), to scope of discovery, *see, e.g.*, Worldwide Church of God, Inc. v. California, 623 F.2d 613 (9th Cir. 1980). Nor does it address the compelling state interest and least restrictive alternative analysis that would be called upon when a religious practice conflicts with public interests or with the rights of persons outside the church. Although a simple belief-action distinction is not dispositive of such issues, *see, e.g.*, McDaniel v. Paty, 435 U.S. 618, 635 n.2 (1978) (Brennan, J., concurring), the compelling state interest test is arguably irrelevant where the claims, however imaginatively framed, in essence attack belief and verbal persuasion. For the development of compelling state interest analysis and the belief-action dichotomy see, *e.g.*, McDaniel v. Paty, 435 U.S. 618, 626-27 (1978); Wisconsin v. Yoder, 406 U.S. 205, 220 (1972); Sherbert v. Verner, 374 U.S. 398, 406 (1963); Cantwell v. Connecticut, 310 U.S. 290, 303-04 (1940); Reynolds v. United States, 98 U.S. 145 (1878).

dressed early in religious fraud litigation, a brief final section touches on the appropriate procedural stages for deciding them.[26]

I. *Ballard* and its Reverberations

A. Pre-*Ballard* Litigation

The Ballard family was not the first to be accused of mail fraud based on religious representations. *New v. United States*[27] involved the prosecution of a Dr. New and others and reached the Ninth Circuit Court of Appeals in 1917. The adjudicability of religious falsity was decided by that court much the same way that the trial judge was to resolve it twenty–five years later in *Ballard*.[28] Citing as authority two earlier mail fraud decisions,[29] the Ninth Circuit, in response to Dr. New's argument that the indictment violated his religious freedom, explained:

> The government in no way sought by the indictment to prevent the defendants from honestly and sincerely entertaining the views

26. *See* text accompanying notes 212-16 *infra*.

27. 245 F. 710 (9th Cir. 1917), *cert. denied*, 246 U.S. 665 (1918).

28. The pertinent parts of the trial judge's instructions in *Ballard* are recorded both by the Supreme Court, 322 U.S. at 81-82, and by the court of appeals, 138 F.2d 540, 545 (9th Cir. 1943).

29. United States v. White, 150 F. 378 (C.C.S.D.N.Y. 1906); Post v. United States, 135 F. 1 (5th Cir. 1905). In *Post*, the court reversed a mail fraud conviction; the court reported that the defendant had claimed "to possess the power to cure all, or nearly all, diseases; to remove the conditions that produce poverty, and to inspire or cause those conditions that bring success; to restore hair to its natural color, and to grow it on bald heads; to alleviate or remove many unfavorable conditions; to remove the evidences of old age, and to restore youth, if the patient had faith that it could be done . . . ." *Id.* at 3. The court thought the government had not proved its case. "If the defendant intended to administer and did administer the treatment she advertised, she is not guilty of the fraud charged, although the treatment may be in fact . . . valueless." *Id.* at 5.

White involved a reported jury charge drawing the familiar, if elusive, distinction between bad faith and viability. The defendant had claimed to "impart most wonderful and important knowledge and power," 150 F. at 380, by means of charms, amulets, parchments and hypnotism.

Similar issues have arisen in other cases. *See* Dolan v. Hurley, 283 F. 695 (D. Mass. 1922) (lucky stones); State v. Handzik, 410 Ill. 295, 102 N.E.2d 340 (1951) (faith healing), *cert. denied*, 343 U.S. 927 (1952); McMasters v. State, 21 Okla. Crim. 318, 207 P. 566 (1922) (spiritualism); cases discussed in text accompanying notes 185-90 *infra*. A 1924 civil fraud claim, similar in some respects to the contemporary suits against Scientology, resulted in plaintiffs' recovery of property they had donated to a group called the House of David in order to become members. Hansel v. Purnell, 1 F.2d 266 (6th Cir.), *cert. denied*, 266 U.S. 617 (1924). The court found that the leader had fraudulently claimed the group was organized for the advancement of the Kingdom of God, when in fact he was motivated by desire for private gain and gratification of lust. 1 F.2d at 270. The record of Purnell's "licentious practices" so scandalized the court that it found them to be proof of religious insincerity. *Id.* at 271-72.

> the indictment alleges they pretended to entertain, nor from honestly and sincerely endeavoring to persuade others, by any legitimate means, to embrace the same notions. But what the government did undertake to do . . . was to prevent by indictment the defendants thereto from *pretending* to entertain the views therein specifically alleged for the false and fraudulent purpose of procuring money or other things of value from third parties by use of its post office establishment.[30]

The factual question of pretense was thus thought to be separate from the truth or falsity of the claims Dr. New had made regarding his possession of supernatural powers to "conquer disease, death, poverty, and misery," which in turn he claimed to have achieved through various forms of "righteous conduct."[31] The court noted the government's allegations that Dr. New

> had no supernatural power or authority of any kind or character, but was an imposter, an heretic, a seeker of vainglory, a coveter of his neighbor's goods and his neighbor's wife, and was also an habitual indulger in each and every of the sins and practices he pretended to condemn.[32]

This accusation obviously muddled the separate issues of truth and good faith, yet the court appeared to ground its affirmance on evidence of Dr. New's hypocrisy.[33] There was neither separate analysis of the constitutional issue nor investigation of falsity as an essential element of fraud.

B. The *Ballard* Opinions

Guy and Edna Ballard had founded the "I Am" movement in 1930. Combining right-wing demagoguery with theosophy and recipes for healing, personal self-fulfillment and success, the movement spread with alacrity and "filled the largest halls in one city after another."[34] Guy Ballard claimed to be a divine messenger of St. Germain and to be capable, as he asserted his wife Edna and son Donald were, of supernatural feats, including "the power to heal persons of ailments and diseases."[35] Followers contributed funds on the basis of such claims; they also purchased phonograph records that were said to bestow "great blessings."[36]

In the trial of Edna, Donald and others for mail fraud (Guy died

30. 245 F. 710, 712 (9th Cir. 1917), *cert. denied*, 246 U.S. 665 (1918) (emphasis added).
31. 245 F. at 713.
32. *Id.*
33. *Id.*
34. S. AHLSTROM, *supra* note 2, at 927, 1043.
35. United States v. Ballard, 322 U.S. 78, 80 (1944).
36. *Id.* at 84 n.1.

before trial), the judge, reasoning as the court of appeals had in *New*, instructed the jury not to pass on the truth or believability of the Ballards' claims, but to decide only whether the defendants "honestly and in good faith" believed "that Jesus came down and dictated, or that Saint Germain came down and dictated"[37] to them. If they did not so believe, but instead "used the mail for the purpose of getting money, the jury should find them guilty."[38] This instruction, the trial court said, assured that "religion cannot come into this case."[39]

The Ninth Circuit Court of Appeals, perhaps aware that the sort of religious fraud instructions it had previously approved in *New* sanctioned conviction without a finding as to actual falsity, reversed the Ballards' convictions. The court held that the question of verity could not be taken from the jury.[40] The government appealed that ruling, while the defendants urged that reversal of their convictions was justified in any event on other grounds.[41]

The Supreme Court reversed, holding that religious falsity could not be adjudicated. Justice Douglas, writing for the majority, proclaimed that "[f]reedom of thought, which includes freedom of religious belief, . . . embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths."[42] Justice Douglas illustrated this point with an easily accessible reference:

> Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings

37. *Id.* at 81-82.

38. *Id.* at 82.

39. *Id.*

40. Ballard v. United States, 138 F.2d 540, 545 (9th Cir. 1943). In explaining why the issue of verity should not have been taken from the jury, Judge Denman, concurring in the denial of the government's petition for rehearing, said, "It would be strong evidence in support of this issue of the mental condition of belief, that these transactions with Jesus actually occurred in their presence. The right to produce such evidence was denied appellants . . . ." *Id.* at 546. If the reason for excluding such evidence is "because such facts could occur in no possible chain of natural material causation, it is a denial to the religious of the right to prove one of the bases of their [religious] belief in the intervention of the supernatural in the daily lives of human beings—an obvious denial of the freedom of religion of the First Amendment." *Id.* It is difficult to say whether or not the foregoing was written with tongue in cheek.

41. 322 U.S. at 85.

42. *Id.* at 86.

false, little indeed would be left of religious freedom.[43]

That the Ballards' claims were bizarre, extreme, or incredible to most pious Americans made no difference, because the First Amendment was designed precisely to afford "the widest possible toleration of conflicting views."[44] If a jury could decide their truth or falsity, "then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain."[45]

Despite its inspirational ring, this language did not resolve the underlying problem in the *Ballard* prosecution. The decision sidestepped the crucial issue of sincerity. That, in addition to all other questions raised but not treated in the opinion, was left for the court of appeals on remand.[46]

Chief Justice Stone, writing separately for himself and Justices Roberts and Frankfurter, would have reversed the appellate decision and reinstated the convictions, thus rejecting the defendants' remaining contentions. Stone did not believe that "freedom of thought and worship includes freedom to procure money by making knowingly false statements about one's religious experiences."[47] For him, the issue of

---

43. *Id.* at 87.

44. *Id.*

45. *Id.*

46. *Id.* at 88. Because of Justice Jackson's dissent (actually a concurring opinion as to the issue decided and only a dissent as to the outcome—remand versus dismissal), some commentators have assumed that *Ballard* expressly allowed adjudication of sincerity in religious fraud cases, or at least approved the trial court's instruction in that respect, *e.g.*, R. MORGAN, THE SUPREME COURT AND RELIGION 150 (1972); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 859 (1978); Boyan, *Defining Religion in Operational and Institutional Terms*, 116 U. PA. L. REV. 479, 492 n.54 (1968); Delgado, *supra* note 3, at 38; Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1063 n.43 (1978). *See also* Justice Brennan's separate opinion in Braunfeld v. Brown, 366 U.S. 599, 610 (1961), in which he cited *Ballard* to counter the *Braunfeld* majority's statement that a state might believe sincerity inquiries would "run afoul of the spirit of constitutionally protected religious guarantees." *Id.* at 609 (majority opinion); People v. Woody, 61 Cal. 2d 716, 726, 394 P.2d 813, 821, 40 Cal. Rptr. 69, 77 (1964).

Although the *Braunfeld* majority ignored *Ballard* when it made its intriguing suggestion, the text of the *Ballard* opinion does not support the implication Justice Brennan derived from it, and the difficulties in the sincerity adjudication have been noted repeatedly by the Court since *Braunfeld*. *See* Gillette v. United States, 401 U.S. 437, 457 (1971); Sherbert v. Verner, 374 U.S. 398, 407 (1963) (a Brennan opinion). Both courts and commentators have recognized that in fact the *Ballard* majority skirted the issue. *See* Katz v. Superior Court, 73 Cal. App. 3d 952, 988, 141 Cal. Rptr. 234, 256 (1977); M. KONVITZ, RELIGIOUS LIBERTY AND CONSCIENCE 39 (1968); P. KURLAND, RELIGION AND THE LAW OF CHURCH AND STATE AND THE SUPREME COURT 78 (1962). Two courts have read Justice Jackson's views into the majority opinion, Banks v. Board of Pub. Instruction, 314 F. Supp. 285, 295-96 (S.D. Fla. 1970), *vacated and remanded*, 401 U.S. 988, *aff'd per curiam*, 450 F.2d 1103 (5th Cir. 1971); Sheldon v. Fannin, 221 F. Supp. 766, 775 (D. Ariz. 1963).

47. 322 U.S. at 89 (Stone, C.J., dissenting).

verity was simply swallowed up in the single overriding question of good faith or fraudulent intent. He noted that "[s]ince the indictment and the evidence support the conviction, it is irrelevant whether the religious experiences alleged did or did not in fact occur or whether that issue could or could not, for constitutional reasons, have been rightly submitted to the jury."[48]

Justice Jackson, by contrast, agreed with the majority but urged that it should have gone on to eliminate the sincerity issue as well. His dissent is probably the most cogent appreciation extant of the essential indissolubility of the inquiries into verity and sincerity in determinations of religious fraud.

Jackson began the argument by noting, "as a matter of either practice or philosophy,"[49] the difficulty of separating the sincerity and verity issues.[50] He then discussed the nonjusticiability, on psychological grounds, of questions of "intellectual honesty in religion."[51] Relying upon William James' studies, he contended that:

> [Psychic experiences] cannot be verified to the minds of those whose field of consciousness does not include religious insight. When one comes to trial which turns on any aspect of religious belief or representation, unbelievers among his judges are likely not to understand and are almost certain not to believe him.[52]

Justice Jackson argued further that the issue of sincerity was very likely irrelevant in any case:

> I do not know what degree of skepticism or disbelief in a religious representation amounts to actionable fraud. . . . Some who profess belief in the Bible read literally what others read as allegory or metaphor, as they read Aesop's fables. Religious symbolism is even used by some with the same mental reservations one has in teaching of Santa Claus or Uncle Sam or Easter bunnies [to] dispassionate judges. It is hard in matters so mystical to say how literally one is bound to believe the doctrine he teaches and even more difficult to say how far it is reliance upon

48. *Id.* at 90.

49. *Id.* at 92 (Jackson, J., dissenting).

50. "I do not see how we can separate an issue as to what is believed from considerations as to what is believable. The most convincing proof that one believes his statements is to show that they have been true in his experience. Likewise, that one knowingly falsified is best proved by showing that what he said happened never did happen. How can the Government prove these persons knew something to be false which it cannot prove to be false? If we try religious sincerity severed from religious verity, we isolate the dispute from the very considerations which in common experience provide its most reliable answer." *Id.* at 92-93 (Jackson, J., dissenting).

51. *Id.* at 93.

52. *Id.*

> a teacher's literal belief which induces followers to give him money.[53]

The dissent concluded with an intellectual's perhaps obligatory statement of aversion to the "mental and spiritual poison"[54] purveyed by the Ballards and their ilk. "But that is precisely the thing the Constitution puts beyond the reach of the prosecutor, for the price of freedom of religion or of speech or of the press is that we must put up with, and even pay for, a good deal of rubbish."[55] Fraudulent representations by religious entrepreneurs on "matters other than faith or experience" were surely not protected, but litigating statements about religious beliefs, experiences, and powers "reaches into wholly dangerous ground. . . . I would dismiss the indictment and have done with this business of judicially examining other people's faiths."[56]

C. Reasoning: The Majority's and Justice Jackson's Views

As several commentators have acknowledged, Justice Jackson was right.[57] The very reasons underlying the majority holding demonstrate the cogency of his dissent. The primary reason, of course, is the text and history of the First Amendment. Subjecting religious beliefs, no matter how outlandish, to adjudication by juries or even by judges affords the occasion to suppress heresy. Indeed, the characterization of outlandishness is already value laden, for the beliefs of the Ballards, of Scientologists, and of many others are absurd only in the minds of nonbelievers. The innumerable healings and other miraculous events that form the core of conventional Christian doctrine surely seem equally outlandish by any evidentiary courtroom test.[58]

---

53. *Id.* at 93-94.

54. *Id.* at 95.

55. *Id.* Jackson did not distinguish here among religion, speech, and press guarantees. Of course, the issue in *Ballard* was whether or not statements otherwise actionable as fraud, despite freedom of speech, were nonetheless not actionable because religious.

56. *Id.* On remand, the court of appeals again did not grapple with sincerity, except to approve the Chief Justice's view. At first, it affirmed the convictions without opinion; later, in denying a petition for rehearing, it did produce a brief written decision, 152 F.2d 941 (9th Cir. 1945), *rev'd on other grounds*, 329 U.S. 187 (1946). Judge Denman wrote a lengthy and vigorous dissent. For an exhaustive analysis of the Supreme Court's three opinions in *Ballard*, see Weiss, *Privilege, Posture, and Protection: "Religion" in the Law*, 73 YALE L.J. 593 (1964).

57. *E.g.*, M. KONVITZ, *supra* note 46, at 41-44; P. KURLAND, *supra* note 46, at 78-79; L. TRIBE, *supra* note 46, at 860-62; Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development—Part I, the Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1417-18 (1967). Giannella would limit the reach of Jackson's argument to "cases where government would otherwise act to protect gullible citizens from spurious religious movements" and would not apply it to cases wherein "individuals make claim for special treatment vis-à-vis the state." *Id.* at 1418.

58. A jury instruction sometimes given to illustrate the nature of inference, for example,

That accusations of religious falsity will, in great likelihood, be made only against churches or cults considered abhorrent or threatening[59] underlines the constitutionally fundamental nature of *Ballard*, for protection from majoritarian persecution above all else forms the basis not only of the twin religion clauses, but also, as the Supreme Court has noted, of the founding of the nation: "Nothing but the most telling of personal experiences in religious persecution suffered by our forbears . . . could have planted our belief in liberty of religious opinion any more deeply in our heritage."[60]

This primary textual and historical reason for *Ballard* also can be understood either in terms of the proscription against governmental establishments of religion or simply in terms of equal protection.[61] That is, to allow adjudication of the verity of beliefs would be to oppress the weaker or less popular faiths by treating them differently from the more popular ones, thereby "establishing" the latter. In a nation whose history has been and remains crowded with iconoclastic cults, sects, and insular theocratic communities, such a nondiscrimination or nonestablishment standard both protects and explains the multiplicity of religions.

Whether viewed in terms of free exercise, of nonestablishment, or of equal treatment, the essence of the constitutional text and history is a fear of witch hunts—a concern for tolerance. It is just this fear and concern that both compels the *Ballard* holding and informs Justice Jackson's dissent.

Beyond text and history, and common to both free exercise and freedom of speech, is the notion of "breathing space,"[62] needed if the "free competition of the market" is to flourish.[63] To forestall suffoca-

describes going to sleep after observing bare ground, waking up to find snow, and concluding that it had snowed during the night. A religious explanation might well be otherwise.

59. Occasional exceptions to this general rule can be found. *See, e.g.*, Hallinan v. Roman Catholic Archbishop, 247 Cal. App. 2d 410, 55 Cal. Rptr. 542 (1966) (challenging Roman Catholic doctrine), *cert. denied*, 389 U.S. 820 (1967).

60. School Dist. v. Schempp, 374 U.S. 203, 214 (1963).

61. *See* McDaniel v. Paty, 435 U.S. 618, 643-46 (1978) (White, J., concurring); Sherbert v. Verner, 374 U.S. 398, 409-10 (1963); Fowler v. Rhode Island, 345 U.S. 67, 70 (1953) (Frankfurter, J., concurring). In the much-quoted language of Everson v. Board of Educ., 330 U.S. 1, 15 (1947), "Neither a state nor the Federal Government can . . . pass laws which aid one religion, aid all religions, or prefer one religion over another." The first two of these three proscriptions focus on nonestablishment; the third has an equal protection cast. *See also* Gillette v. United States, 401 U.S. 437, 449-51 (1971); Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968).

62. The respiratory metaphor is from New York Times Co. v. Sullivan, 376 U.S. 254, 272 (1964).

63. The economic metaphor is from Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), and although the free marketplace idea has some weaknesses, par-

tion, courts should scrutinize closely litigation that threatens to choke religious speech or exercise. The very inquiry into belief, whether by the courts, by government agencies, or by adverse parties through discovery, tends to inhibit religious practice and excessively entangles secular bodies in religious doings.[64] This is true whether the inquisitions probe verity or sincerity.

Another reason for the majority decision in *Ballard* is simply a concern for the sanctity of religious conscience. Its importance has been recognized in conscientious objector cases[65] and probably accounts for the long standing congressional willingness to exempt religious pacifists from military service, despite the Supreme Court's stated view that Congress is not obliged to do so.[66] As Chief Justice Hughes explained in a famous dissent: "[I]n the forum of conscience, duty to a moral power higher than the State has always been maintained."[67] That the duty in question must be spiritually generated before its custodian qualifies for exemption illustrates the difficulty of subjecting either truth *or* sincerity of belief to adjudication.

One further reason underlying *Ballard* finds root in a long standing Supreme Court doctrine. In 1872, the Court had decided, without recourse to the First Amendment, that courts could not adjudicate internal religious factional disputes.[68] Fleshing out this proscription in a

---

ticularly where heavy expenditure can distort electoral choice, *see* First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978); Buckley v. Valeo, 424 U.S. 1 (1976), it is apt in describing the process by which religious entities unknown a generation ago have successfully competed for the loyalty of a portion of American youth. For whatever might be said in derogation of the techniques employed by the new religions, their means of persuasion operate at considerable disadvantage in comparison with the opportunities for "mind control" of an established religion which may educate and indoctrinate children before they have learned to read and may continue the process through their childhoods and teens. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 634 (1971) (Douglas, J., concurring); Everson v. Board of Educ., 330 U.S. 1, 22-24 (1947) (Jackson, J., dissenting).

64. *Cf.* Lemon v. Kurtzman, 403 U.S. 602, 620 (1971) ("state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids"); Walz v. Tax Comm'n, 397 U.S. 664, 674-75 (1970) (taxing religious organizations would lead to more entanglement than maintaining tax exemptions); Zorach v. Clauson, 343 U.S. 306, 314 (1952) (no excessive entanglement where state merely suspends school hours so that those students who so desire may "repair to their religious sanctuary"); Surinach v. Pesquera de Busquets, 604 F.2d 73, 75-78 (1st Cir. 1979) (Puerto Rico's regulatory scheme bodes excessive entanglement with church schools).

65. Gillette v. United States, 401 U.S. 437, 445 (1971); United States v. Seeger, 380 U.S. 163, 170-72 (1965); United States v. Sisson, 297 F. Supp. 902, 910-11 (D. Mass. 1969), *appeal dismissed*, 399 U.S. 267 (1970). *See also* M. KONVITZ, *supra* note 46, at 86-87.

66. *See* Welsh v. United States, 398 U.S. 333, 356 (1970) (Harlan, J., concurring); Hamilton v. Board of Regents, 293 U.S. 245, 264-65 (1934); Jacobson v. Massachusetts, 197 U.S. 11, 29 (1905).

67. United States v. Macintosh, 283 U.S. 605, 633 (1931) (Hughes, C.J., dissenting).

68. Watson v. Jones, 80 U.S. (13 Wall.) 679 (1872). Although it did not rely upon the

series of modern cases, the Court has distinguished between church disputes that can be resolved by neutral legal principles and those that would require judicial immersion in ecclesiastical practice or doctrine.[69] Where a dispute is incapable of neutral resolution, religious authority becomes the only recourse, even if unpalatable results sometimes ensue.[70]

This principle is a corollary of *Ballard*: By the terms of the establishment and free exercise clauses, controversies turning on the examination of religious tenets or the interpretation of orthodoxy are not justiciable. This is true whether those inviting the courts into religious quagmires are dissident church members, former members, or relatives of members. It is not material, for constitutional purposes, whether a lawsuit seeks judicial intervention in church doctrine in favor of a particular faction or judgment that a religion is a fraud.

Finally, implicit in the *Ballard* holding is a consciousness of the nonjusticiability, on a pragmatic level, of the verity of religious claims—the inherent incapability of assessing spiritual phenomena by reasonable inferences, more-likely-than-not standards, and evidentiary rules about admissibility, reliability, competence and expert scientific opinion. This, of course, is one of Justice Jackson's main points. As do the other reasons underlying *Ballard*, it enforces the wisdom of his view.

D. Emergence of the Status, Sincerity, and Context Questions

1. Carruthers

Barely a year after *Ballard*, the Seventh Circuit Court of Appeals said in *United States v. Carruthers*[71] that a jury could assess not only

---

First Amendment analysis, the Court in *Watson* did point out that judicial intervention in religious controversies would entangle judges in "the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religous denomination." *Id.* at 733.

69. *See, e.g.*, Serbian Eastern Orthodox Diocese for the United States and Canada v. Milivojevich, 426 U.S. 696 (1976) (reversing Illinois Supreme Court judgment that a bishop's defrocking violated fundamental fairness as well as the church's own procedures); Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969) (refusing to decide whether church had departed from its doctrine in suit over church property); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952) (invalidating statute that transferred church control from Soviet Union to North America as unlawful interference with free exercise).

70. *See* Serbian Eastern Orthodox Diocese for the United States and Canada v. Milivojevich, 426 U.S. 696, 714-15 (1976); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 130 (1952) (Jackson, J., dissenting).

71. 152 F.2d 512 (7th Cir. 1945), *cert. denied*, 327 U.S. 787 (1946).

sincerity but also the religious nature of representations; that is, whether or not the defendant "was claiming to advance a religious doctrine."[72] In *Carruthers*, the defendant, founder and head of an ethically flavored self-improvement racket in which he sold shares with certain promises of return, had not held the enterprise out as religious. At his trial, however, he raised a religion defense as to some of his representations. The jury was told not to consider the truth or falsity of any statement which *it* found had been made in a religious context.[73]

Carruthers thus permitted a jury to determine—or, in essence, define—what is religious, at least where a party had not erected a religious framework beforehand and in that sense had put potential adherents on notice as to the nature and ultimate unprovability of statements made.[74] Arguably, *Carruthers* is wrong even on this narrow point. The secular-religious distinction is delicate and is subject to majoritarian abuse; like other "constitutional fact" determinations, it should be made by a judge.[75] Certainly, where a religious stage *has* been set beforehand, it should not be questioned by either judge or jury unless the "religion" does not qualify as such in a definitional sense.

2. *Founding Church*

A generation after *Ballard*, the decision was applied to the young Church of Scientology in *Founding Church of Scientology of Washington, D.C. v. United States*.[76] The United States had brought a condemnation action under the Federal Food, Drug, and Cosmetic Act[77] against the "E-meter," a skin galvanometer used in auditing sessions to ascertain the subject's emotional response.[78] The government said that the device had been falsely represented ("mislabeled") in Scientology literature as efficacious in treating physical ills.[79] At the time, auditing was done both as a church service and as the therapeutic aspect of the secular discipline, Dianetics, which predated Scientology.

---

72. 152 F.2d at 518. This issue was undisputed in *Ballard*. The trial judge in Christofferson v. Church of Scientology of Portland, No. A7704-05184 (Or. Cir. Ct., Multnomah County Sept. 5, 1979), *appeal docketed*, No. 15952 (Ct. App. Oct. 31, 1979), did the same even though the parties had stipulated that Scientology was a religion.

73. 152 F.2d at 518.

74. *See* text accompanying notes 182-211 *infra*.

75. *See* Jacobellis v. Ohio, 378 U.S. 184, 187-89 (1964); P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 601-10 (2d ed. 1973).

76. 409 F.2d 1146, 1161 (D.C. Cir.), *cert. denied*, 396 U.S. 963 (1969).

77. 21 U.S.C. §§ 301-92 (1976).

78. For a description of auditing, see note 12 *supra*.

79. 409 F.2d at 1151.

On appeal of a jury's findings of falsity in labeling and of a district court's judgment condemning the meter and ordering its destruction, Judge Wright, for the District of Columbia Circuit, applied the teaching of *Ballard*. He concluded that, in view of the appellants' claim that statements made about the E-meter and its role in auditing manifested Scientology's religious belief, any falsity in such statements could not be considered "labeling" within the meaning of the federal law.[80] This was because in adjudicating false labeling, the jury might have inquired, contrary to *Ballard*, into the validity of religious beliefs.[81] A new trial was ordered, at which only literature or statements that had been offered in a secular context would be submitted to the falsity factfinder.[82]

Judge Wright alluded repeatedly to the government's failure to challenge the church's assertion that it was a religion.[83] It is unclear from the decision, however, how the government could have rebutted the church's *prima facie* showing of religious status, which the court said it had made through evidence of religious incorporation; performance by licensed ministers of marriages, burials, and the like; and, most importantly, "fundamental writings contain[ing] a general account of man and his nature comparable in scope, if not in content, to those of some recognized religions."[84]

Since the creed and literature of Scientology set out a comprehensive religious system that addressed questions of "man and his nature,"[85] the court's suggestion that a showing might be made of "merely a commercial enterprise, without the underlying theories of man's nature or his place in the Universe which characterize recognized religions,"[86] would seem to have been foreclosed. The government's

80. 409 F.2d at 1159-60. The court noted that "[t]he statements concerning the powers of auditing over the ills of mind and body are not readily separable from general statements of Scientological doctrines concerning the nature of man and the relationship of his mind to his body. Many will find these doctrines, those which relate to health as well as those which do not, absurd or incoherent. But the *Ballard* case makes suspect the legal inquisition of such doctrines where they are held as religious tenets." *Id.* at 1159. The belief that auditing could cure a wide variety of physical ailments derived from Dianetics' view of their psychosomatic origin. *See id.* at 1151-52. *See generally* notes 10 & 12 *supra*.

81. 409 F.2d at 1161-62, 1164.

82. The court thus rejected both the government's position that since action and not just belief was involved, the First Amendment was irrelevant, and the church's position that the entire case must fail as an unconstitutional persecution of religion. *Id.* at 1154.

83. *Id.* at 1154, 1156, 1159, 1160, 1161, 1162, 1165.

84. *Id.* at 1160. For a discussion of the definition of religion and qualification for religious status, see text accompanying notes 94-142 *infra*.

85. 409 F.2d at 1160.

86. *Id.*

rebuttal thus could only have been an attempted proof of insincerity or of sham on the part of the founding or current hierarchy of the church.[87] The difficulties of such proof, as outlined by Justice Jackson in *Ballard* and as acknowledged by Judge Wright,[88] are compounded when corporate or group sincerity is at issue.[89] Judge Wright appeared to recognize all this when he opined that *Ballard* would apply to civil suits for fraud and deceit:

> [U]nder *Ballard* it seems unlikely that a disgruntled former adherent could sue a church for fraud and deceit because it had collected money from him on the basis of allegedly "false" doctrines concerning salvation, heaven and hell—or for that matter on the basis of doctrines, such as those of the Christian Scientists, concerning the cause and cure of disease.[90]

There was no suggestion that such suits could go forward simply if a plaintiff pleaded that the Church of Christ, Scientist, or a particular Christian Science practitioner, had been insincere.

On remand, District Judge Gesell employed a context inquiry, attempting to distinguish secular from religious use of the E-meter.[91] Condemning Scientology as quackery, the judge found that the "bulk of the material [on auditing] is replete with false medical and scientific claims devoid of any religious overlay or reference."[92] The writings and E-meters had been distributed to the public and were used by laymen for secular purposes.[93] He accordingly ordered cessation of auditing outside the religious context, but, following the appellate court decision in *Founding Church*, said he could not prohibit auditing, use of the E-meter, or distribution of Scientology literature under religious auspices.[94] He did, however, order that a caveat be affixed to the books and meters disclaiming medical or scientific efficacy.[95]

While *Ballard* forecloses direct inquiry into the truth or falsity of

87. *Id.* at 1162. Judge Wright cited tax exemption, conscientious objector, and drug cases in which sincerity was thought properly to be at issue. *Id.* at 1160 nn.45-49.

88. *Id.* at 1160 n.46.

89. In the Boston Scientology cases, *see* note 11 *supra*, the complaints alleged skepticism or impurity of motive on the part of virtually all church founders and organizers, as well as of recruiters and administrators in the Boston, Nevada, Florida, New York, and California churches, over a decade's time.

90. 409 F.2d at 1156 n.32.

91. United States v. An Article or Device, 333 F. Supp. 357, 361-62 (D.D.C. 1971), *amended*, No. 71-2064 (D.C. Cir. March 1, 1973) (per curiam). There was no jury on remand.

92. 333 F. Supp. at 361.

93. *Id.* at 362.

94. *Id.* at 363-64.

95. *Id.* at 364-65. The court of appeals simplified the order to avoid "excessive entanglement with religion." No. 71-2064, slip op. at 1 (D.C. Cir. March 1, 1973). The court-

beliefs in religious fraud litigation, courts applying *Ballard*, as shown above, can diverge over issues that the decision left unresolved. Consistent application of the *Ballard* immunity presupposes consistent approaches to the integrally related questions of religious status, sincerity and context. These questions are explored in the next three sections.

II. Status—The Definitional Dilemma

A. The Early Theism Test

The Supreme Court's definition of religion has relaxed considerably since the early days when legitimate faiths were confined to the conventionally theistic, and even then, only to doctrines or practices not thought improper or immoral.[96] From its rejection of a constitutional challenge to a criminal conviction for polygamy in *Reynolds v. United States*,[97] to its approval, eleven years later, of the government's dissolution of the Mormon Church,[98] the Court simply defined out of constitutional existence, as either nonreligious or only pretextually so, tenets with which conventional Judeo-Christianity took issue:

> One pretence for this obstinate course is, that [the Mormons'] belief in the practice of polygamy, or in the right to indulge in it, is a religious belief, and therefore, under the protection of the constitutional guaranty of religious freedom. This is altogether a sophistical plea. . . .
>
> The State has a perfect right to prohibit polygamy, and all other open offences against the enlightened sentiment of mankind, notwithstanding the pretence of religious conviction by which they may be advocated and practised.[99]

In the time between the Mormon decisions and the debate over conscientious objection from which the present functional definition of religion emerged, both the Supreme Court and lower courts almost unthinkingly favored theism.[100] The first well-known judicial deviation

ordered disclaimer was duly rendered; by the mid-1970's, auditing was performed only under the aegis of the church.

96. *See generally* Linford, *The Mormons and the Law: The Polygamy Cases*, 9 UTAH L. REV. 308 (1964).

97. 98 U.S. 145 (1879).

98. Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890).

99. *Id.* at 49-50. Similarly, in Davis v. Beason, 133 U.S. 333, 341-42 (1890), involving a test oath, the unanimous Court proclaimed of polygamy and bigamy that "[t]o call their advocacy a tenet of religion is to offend the common sense of mankind."

100. One famous example is Chief Justice Hughes' dissent in United States v. Macintosh, 283 U.S. 605, 633-34 (1931), *overruled on other grounds*, Girouard v. United States, 328 U.S. 61 (1946), in which he said, "The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation." To be fair, the question of

from the narrow view was a World War II conscientious-objector case, *United States v. Kauten*,[101] in which Judge Augustus Hand, in rejecting the objector's claim, nevertheless interpreted the "religious training and belief" requirement of the Selective Training and Service Act of 1940[102] to denote

> a sense of the inadequacy of reason as a means of relating the individual to his fellow-men and to his universe—a sense common to men in the most primitive and in the most highly civilized societies. It accepts the aid of logic but refuses to be limited by it. It is a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets.[103]

While the Second Circuit adopted Judge Hand's dicta in the same year,[104] the Ninth Circuit, three years later, took the more traditional view that religion presupposed a Supreme Being.[105] Congress wrote that traditional test into the statute in 1948.[106]

B. "Ultimate-Concern": The Functional Test

In the late 1950's, both a federal and a state court abandoned theism as a definitional prerequisite to religious exemption and held that both Ethical Culture and Secular Humanism, respectively, by virtue of their doctrinal concern with matters of ultimacy and their structural

---

nontheistic religious belief was not in issue here, and Hughes did "[put] aside dogmas with their particular conceptions of deity" and imply that "freedom of conscience" may also enjoy constitutional protection. 283 U.S. at 634.

101. 133 F.2d 703 (2d Cir. 1943).

102. Selective Training and Service Act of 1940, ch. 720, § 5, 38 Stat. 887 (1940) (expired 1947) (current version at 50 U.S.C. App. § 456(j) (1976)), which permitted exemption for those who conscientiously oppose "participation in war in any form," provided their opposition arises "by reason of religious training and belief."

103. 133 F.2d at 708. Judge Hand went on to discuss how Socrates, Martin Luther, and the Greek poet Menander each bowed to a conscientious duty so profound as to be religious. Even Wordsworth characterized "Duty" as "the 'Stern Daughter of the Voice of God.'" *Id.* Kauten's conviction for failing to appear for induction was upheld on the ground that nothing in the record convinced the court that the failure was due to "a compelling voice of conscience, which we should regard as a religious impulse." *Id.*

104. United States *ex rel.* Phillips v. Downer, 135 F.2d 521, 523-24 (2d Cir. 1943).

105. Berman v. United States, 156 F.2d 377 (9th Cir.), *cert. denied*, 329 U.S. 795 (1946). Judge Denman, dissenting in *Berman*, cited the Hand opinion with approval. 156 F.2d at 384.

106. Selective Service Act of 1948, ch. 625 § 6(j), 62 Stat. 612 (1948) (current version at 50 U.S.C. App. § 456(j) (1976)). *See* Welsh v. United States, 398 U.S. 333, 349-51 (1970) (Harlan, J., concurring); United States v. Seeger, 380 U.S. 163, 176 (1965). The test was phrased in terms of Chief Justice Hughes' dissent in *Macintosh*, *see* note 100 *supra*. In 1967, after the decision in *Seeger*, the "Supreme Being" language was removed. Pub. L. No. 90-40, § 1(7), 81 Stat. 100-02, 104 (1967).

similarity to conventional faiths, were entitled to property tax exemption.[107] The opinion of the state court laid the theoretical groundwork and provided some of the language for the Supreme Court's decision in *United States v. Seeger*[108] eight years later.

Seeger, in essence, read the "Supreme Being" phrase out of the Selective Service Act of 1948.[109] The Court in *Seeger* interpreted the statutory requirement of belief in a Supreme Being to mean belief that "occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."[110] This was one way to save the conscientious-objector exemption from constitutional infirmity as a preference for one type of religion over another or even over secular conscience.[111] The *Seeger*

107. Washington Ethical Society v. District of Columbia, 249 F.2d 127 (D.C. Cir. 1957) (Burger, J.); Fellowship of Humanity v. County of Alameda, 153 Cal. App. 2d 673, 315 P.2d 394 (1957).

108. 380 U.S. 163 (1965). The California decision stated that the "only inquiry" can be the "objective one of whether or not the belief occupies the same place in the lives of its holders that the orthodox beliefs occupy in the lives of believing majorities, and whether a given group that claims the exemption conducts itself the way groups conceded to be religious conduct themselves." Fellowship of Humanity v. County of Alameda, 153 Cal. App. 2d 673, 692, 315 P.2d 394, 406 (1957). Both opinions also provided footing for the Supreme Court's observation in Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961), that some "religions in this country . . . do not teach what would generally be considered a belief in the existence of God." *Torcaso* struck down a theism test for the office of notary public, but its reasoning suggests that any religious test would have been invalid as a discrimination against nonbelievers.

109. 380 U.S. at 173-80. *See* note 106 *supra*.

110. 380 U.S. at 166. The definition was elaborated upon in Welsh v. United States, 398 U.S. 333, 339-40 (1970) (belief must be held "with the strength of traditional religious convictions"), and in Gillette v. United States, 401 U.S. 437, 447-48 (1971) (objection to particular wars not within exemption even if it has "such roots in a claimant's conscience and personality that it is 'religious' in character"). *See also* Thomas v. Review Bd. of the Ind. Employment Security Div., 450 U.S. 707, (1981) (reversing Indiana Supreme Court's ruling that a Jehovah's Witness was not entitled to unemployment compensation because his departure from his weapons manufacturing job was a merely " 'personal philosophical choice rather than a religious choice.' " *Id.* at 713 (quoting 391 N.E.2d at 1131)).

111. The effort became more strained in Welsh v. United States, 398 U.S. 333 (1970) which, as Justice Harlan observed in concurrence, "performed a lobotomy" on the statute by "reading out" of it "any distinction between religiously acquired beliefs and those deriving from 'essentially political, sociological, or philosophical views or a merely personal moral code' "—the very distinction that § 456(j) insists upon. *Id.* at 351 (Harlan, J., concurring).

Both Justice Harlan's view and that of the majority in *Welsh* embody the broad functional definition of religion. The majority, however, by performing the surgery to which Harlan alluded, essentially merged religion and conscience when conscience is so demanding that it "occupies a place in the life of its possessor parallel to that filled by . . . orthodox belief in God." *Id.* at 344-45. This is as it should be, and as Judge Hand understood it to be in *United States v. Kauten*. *See* text accompanying notes 101-03 *supra*. In early drafts, in fact, the First Amendment referred to conscience as well as religion and used the terms

definition thus necessarily has more than statutory application, for earlier courts would have seen little problem with a theistic model that accorded exemption only to conventional Western religious creeds.[112]

In reflecting and articulating a liberalization of the judicial view of religion, the *Seeger* decision was openly influenced by contemporary theology; it borrowed from Dr. Paul Tillich's definition of God as "the power of being, which works through those who have no name for it."[113] "Religious training and belief," said the Court, was belief "based upon a power or being or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent."[114] This ultimate concern, or functional view of religion, is now generally accepted by commentators[115] and by courts.[116] Anything more restric-

interchangeably. *See* Everson v. Board of Educ., 330 U.S. 1, 39 n.27 (1947) (Rutledge, J., dissenting); M. DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY 20-21 (1965).

That Chief Justice Burger, at least, would not explicitly go this far despite *Seeger* and *Welsh* is evident from his assertion in the majority opinion in Wisconsin v. Yoder, 406 U.S. 205, 216 (1972), that Thoreau's choice of lifestyle was "philosophical and personal rather than religious." Justice Douglas, dissenting in part in *Yoder*, disputed that point. *Id.* at 247-48. *See also* Africa v. Pennsylvania, Civ. No. 81-2325, slip op. at 19-21 (3d Cir. Oct. 30, 1981) (denying prisoner's claim that MOVE, a back-to-nature movement, was a religion, but noting, "[i]t is possible, of course, to take issue with the Supreme Court's classification of Thoreau-like beliefs as non-religious." *Id.* at 20 n.17.

112. The majority in *Seeger* protested, perhaps too much, that it was not abandoning the theistic cast of the statute, but simply giving it wide scope. The issue may be only semantic, but if theism refers to a belief in a god or gods, *see* 380 U.S. at 174, *Seeger* clearly seems to tolerate a nontheistic equivalent, if adhered to with the requisite intensity.

113. 380 U.S. at 180 (quoting 2 P. TILLICH, SYSTEMATIC THEOLOGY 12 (1957)). *See also* P. TILLICH, DYNAMICS OF FAITH 1-4 (1957). "Faith is the state of being ultimately concerned: the dynamics of faith are the dynamics of man's ultimate concern." *Id.* at 1.

114. 380 U.S. at 176.

115. *E.g.*, L. TRIBE, *supra* note 46, at §§ 14-16; Boyan, *Defining Religion in Operational and Institutional Terms*, 116 U. PA. L. REV. 479 (1968); Giannella, *supra* note 57, at 1423-31; Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978); Note, *Defining Religion: Of God, the Constitution, and the D.A.R.*, 32 U. CHI. L. REV. 533 (1965);.

116. *E.g.*, Malnak v. Yogi, 592 F.2d 197, 199-200 (3d Cir. 1979) (Science of Creative Intelligence/Transcendental Meditation is religion and thus cannot be taught in public schools); Founding Church of Scientology of Washington, D.C. v. United States, 409 F.2d 1146, 1160-62 (D.C. Cir.) (Scientology meets *prima facie* test of religion), *cert. denied*, 396 U.S. 963 (1969); Remmers v. Brewer, 361 F. Supp. 537, 540-42 (S.D. Iowa 1973), *aff'd per curiam*, 494 F.2d 1277 (8th Cir.) (Church of New Song, a prison group, found to be religion, not sham), *cert. denied*, 419 U.S. 1012 (1974). *But see* Theriault v. Silber, 453 F. Supp. 254 (W.D. Tex.) (Church of New Song found to be sham, largely on basis of antisocial actions and perceived insincerity of founders), *appeal dismissed*, 579 F.2d 302 (5th Cir. 1978). The *Church of the New Song* cases are discussed at notes 127-31 and accompanying text *infra*.

Judge Adams, concurring in *Malnak v. Yogi*, noted the confusion in some cases between the definitional and sincerity issues and suggested that in the *Theriault* litigation the *Seeger* definition "cannot be said to have completely carried the field." 592 F.2d at 206 n.30. Another indication that *Seeger* has not penetrated universally is the Missouri Supreme

tive, whether in terms of theistic belief, of organized hierarchy, or of ritual, would offend the nondiscrimination spirit of both *Ballard* and *Everson v. Board of Education*.[117]

C. Testing for Sham

The gradual erosion of the theistic definition and its replacement by a nondiscriminatory functional approach to religion does not obviate the need for careful assessment of whether a litigant meets the standard. If anything, the breadth of the test suggests that courts should be scrupulous in its application and should not accept without scrutiny bald assertions by litigants that their beliefs or conduct are religious. A great deal depends on the initial determination, especially if, as is argued here, once a belief or set of beliefs qualifies as religious, their truth or falsity is not justiciable in civil courts, regardless of the insincerity of persons or organizations advancing them.

Without investigating sincerity, however, a court should probably have some leeway to determine that the doctrines offered as religious are only a sham. In most circumstances, this should be evident from the frivolity of the doctrines themselves. As Chief Justice Burger observed in *Thomas v. Review Board of the Indiana Employment Security Division*,[118] "[o]ne can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause . . . ."[119] Thus, the ultimate-concern

Court decision in Missouri Church of Scientology v. State Tax Commission, 560 S.W.2d 837, 840 (1977) (en banc), *appeal dismissed*, 439 U.S. 803 (1978), in which the "religious worship" requirement of the relevant tax statute was construed to demand "as a necessary minimum a belief in the Supreme Being of the universe." *Seeger* was distinguished because its definition was "not one of constitutional construction but of statutory interpretation." 560 S.W.2d at 841-42.

117. 330 U.S. 1, 15 (1947); for a quotation from *Everson* on the non-discrimination aspect of the First Amendment see note 61 *supra*. The external factors played a part in Fellowship of Humanity v. County of Alameda, 153 Cal. App. 2d 673, 693, 315 P.2d 394, 406-07 (1957), but their absence should not be held against a religious claimant. *See* Malnak v. Yogi, 592 F.2d 197, 209 (3d Cir. 1979) ("formal, external, or surface signs" cannot be "determinative, at least by their absence, in resolving a question of definition. But they can be helpful in supporting a conclusion of religious status given the important role such ceremonies play in religious life"); Morey v. Riddell, 205 F. Supp. 918 (S.D. Cal. 1962) (tax deductions for contributions to religious group permissible even though group lacked identifying name, permanent headquarters, or comprehensive records). *But see* Universal Life Church, Inc. v. United States, 372 F. Supp. 770, 772-73, 776 (E.D. Cal. 1974) (mail-order church entitled to tax refund even though ministerial degrees were sold as "a kind of stock in trade" and the church's philosophy was "do whatever is right," since the church had an organizational structure and the court viewed the government's challenge to asserted religious status as an invitation to "consider the merits or fallacies of a religion").

118. 450 U.S. 707 (1981).

119. *Id.* at 715. The comment was occasioned by dispute over whether or not the peti-

and sham tests can be seen as opposite approaches to the same question.

United States v. Kuch[120] illustrates the point. The defendant's claim, that her use of marijuana was religiously inspired by the tenets of the Neo-American Church, was defeated simply by enumerating the church's policies and doctrines: the ministers were called "Boo Hoos"; the symbol was a three-eyed toad; the bulletin was the "Divine Toad Sweat"; the church key was a bottle opener; the official songs were "Puff, the Magic Dragon" and "Row, Row, Row Your Boat"; the motto was "Victory over Horseshit!"[121] The church catechism, said the court, was "full of goofy nonsense."[122] Although there is danger in any judgment about religious seriousness, *Kuch* is ample indication that some line has to be drawn. Without denigrating the possible role of humor in religion or the cheerful times that must have inspired the creation of this church and its trappings, one must acknowledge that the judge in *Kuch* correctly perceived that this was a little too cute to be a religion.

A more careful effort to invest drug ingestion with the aura of a spiritual quest might have enabled Kuch to qualify her Neo-American Church as a religion under *Seeger*, or at least to have made hers a closer case; this, of course, would not necessarily have exempted her from prosecution.[123]

In contrast with *Kuch*, the Fifth Circuit Court of Appeals in *Leary v. United States*[124] seemed not to treat with adequate deference doctrines that, as described in the court's opinion, appeared serious enough to meet the ultimate-concern test. This is not to say either that Leary adequately proved that the use of marijuana was as integral to his faith as the ingestion of peyote was to the Native American Church in *People v. Woody*,[125] or that the court in *Leary* was wrong to hold that a com-

---

tioner's conscientious objection to participation in weapons manufacture, an objection not shared by all members of his faith, was in fact religious.

120. 288 F. Supp. 439 (D.D.C. 1968).

121. *Id.* at 443-45.

122. *Id.* at 444.

123. On balancing of religious liberty against a state's compelling interests, see cases cited in note 25 *supra*.

124. 383 F.2d 851 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969).

125. 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (holding that honest and good-faith use of peyote by the Native American Church as its central ritual was constitutionally protected). The decision is a near anomaly; most courts, faced with "Woody" defenses to drug prosecutions, simply distinguish Peyotism and uphold the convictions. *E.g.*, People v. Crawford, 69 Misc. 2d 500, 328 N.Y.S.2d 747 (Dist. Ct. 1972), *aff'd*, 72 Misc. 2d 1021, 340 N.Y.S.2d 848 (Sup. Ct. 1973).

pelling state interest justified infringement upon Leary's religion.[126] But Leary made the effort that Kuch apparently had not. The opinion reflects a substantial evidentiary showing of the connection between hallucinogenic experience and Timothy Leary's variety of Hinduism. Arguably, then, the court should have found the defendant's drug devotion to be religious.

A series of prison cases involving the "Church of the New Song"[127] also illustrates definitional, or sham, adjudication. This church, also known as Eclatarianism, was developed by a federal prisoner named Henry Theriault and was spread by him and his disciples throughout prisons in the South and Midwest. Most of the lawsuits brought by the church or its members simply sought the same opportunities for religious exercise as those permitted prisoners adhering to conventional faiths.

Although Fifth, Seventh, and Eighth Circuit decisions differed on

126. 383 F.2d at 869-70.

127. In the Fifth Circuit, the litigation began with Theriault v. Carlson, 339 F. Supp. 375 (N.D. Ga. 1972), 353 F. Supp. 1061 (N.D. Ga. 1973), in which Chief District Judge Edenfield ordered prison authorities to allow Theriault to exercise his religion, then held them in contempt for failing to do so. The court of appeals vacated and remanded this case along with one arising in the Western District of Texas, where Theriault had been transferred, and where his request for an evidentiary hearing had been denied, 495 F.2d 390 (5th Cir. 1974). The two cases were consolidated in Texas, where, after hearing, Judge Wood found that the Church of the New Song was not a religion and dismissed the suit. Theriault v. Silber, 391 F. Supp. 578 (W.D. Tex. 1975). The Fifth Circuit vacated and remanded on the ground that the trial court's findings were inadequate. "We ought not to explore this profound problem without full ventilation by the trial court. When reconsidering what constitutes a religion, a thorough study of the existing case law should be accompanied by appropriate evidentiary exploration of philosophical, theological, and other related literature and resources on this issue." 547 F.2d 1279, 1281 (5th Cir. 1977) (footnote omitted). On remand, the trial judge merged discussion of definition, sincerity, and compelling state interest, finding against the church on all three issues, and concluding that "[p]etitioner and his cohorts have formed an organization whose purpose is to improve the position of member prison inmates vis-à-vis the prison administrations. To obtain leverage for the organization and to enable it to operate more freely within the Federal Penitentiaries, petitioner has Christened it a 'religion' and endowed it with the trappings thereof. Thus, it is that the unmistakable stench of the skunk is found emanating from that which petitioner has declared a rose." Theriault v. Silber, 453 F. Supp. 254, 260 (W.D. Tex.), *appeal dismissed*, 579 F.2d 302 (5th Cir. 1978).

In the Eighth Circuit, a free-exercise claim by two Eclatarians at Iowa State Penitentiary was upheld in Remmers v. Brewer, 361 F. Supp. 537 (S.D. Iowa 1973) (again upholding the free-exercise claim), *aff'd per curiam*, 494 F.2d 1277 (8th Cir.), *cert. denied*, 419 U.S. 1012 (1974), *further proceedings*, 396 F. Supp. 145 (S.D. Iowa 1975), *remanded*, 529 F.2d 656 (8th Cir. 1976), *on remand sub nom.* Loney v. Scurr, 474 F. Supp. 1186 (S.D. Iowa 1979).

The Seventh Circuit, where Theriault had also initiated litigation after his transfer to the federal penitentiary at Marion, found the Texas adjudication controlling and affirmed a district court's dismissal on res judicata grounds. Church of the New Song v. Establishment of Religion on Taxpayers' Money, 620 F.2d 648 (7th Cir. 1980).

whether or not this church qualified for First Amendment status,[128] the standards they applied were not very different. The Fifth Circuit, instructing the Texas judge below on the necessary elements of a definitional analysis, pointed out that "[obvious] shams and absurdities" should not be considered religions despite superficial resemblance of their dogmas to doctrines of ultimate-concern.[129] District Judge Hanson, in Iowa, applied a "pervasively pretextual" standard[130] addressed to the same need: maintaining the balance between not passing judgment on the value or verity of religious belief, on the one hand, and preventing abuse of the liberality of the functional definition, on the other. The differences in result among these cases seem to have been caused, in large part, by the importation into the Texas decisions of matters irrelevant to the definitional inquiry: Theriault's violent behavior, the court's judgments about sincerity, and the church's concern with prison reform.[131]

D. Dubious Criteria

In cases involving recognized religions, the definitional phase of religious fraud litigation is not necessary. When a party's religious status is open to question, however, the ultimate-concern approach, or its converse, a consideration of superficiality or sham (but not of sincerity), can be used for the initial determination of whether or not a religion is involved. Even if a party qualifies, of course, the statements challenged as fraudulent may be unprotected because made outside the religious context. Once First Amendment status attaches, however, no further inquiry into the sincerity of individuals or the *bona fides* of the church should be made.

During a hearing in Boston federal court on a motion to dismiss one of the Scientology suits, Judge Garrity asserted his belief, based largely on the findings of Judge Wright in *Founding Church of*

128. *See* note 127 *supra*.

129. Theriault v. Silber, 495 F.2d 390, 395 (5th Cir. 1974). The court cited *Kuch* approvingly, although in its later decision it criticized the trial judge for adhering too closely to the *Kuch* analysis, which it rejected as inconsistent with *Seeger* to the extent that it suggested that belief in a Supreme Being was a prerequisite to religious status. 547 F.2d 1279, 1281 (5th Cir. 1977).

130. Loney v. Scurr, 474 F. Supp. 1186, 1192 (S.D. Iowa 1979). Professor Tribe's "arguably religious" standard, *see* L. TRIBE, *supra* note 46, at 829-31, appears to afford about the same leeway to free-exercise claims. *See also* Wilson v. Beame, 380 F. Supp. 1232, 1242 (E.D.N.Y. 1974) (government must avoid "inhibiting any thoughts or deeds reasonably characterized as religious").

131. *See* text accompanying notes 132-42 *infra*.

Scientology v. United States,[132] that the defendant Scientology churches had *prima facie* religious status, and he obtained a concession from plaintiffs' counsel to this effect.[133] He then inquired if the plaintiffs, by their allegations that the churches were not true religions, intended in effect to rebut, in the manner suggested in *Founding Church*, the *prima facie* case.

Such a rebuttal would inevitably deteriorate into a sincerity trial. Factors extraneous to the ultimate-concern definition, such as criminal behavior, commercial motivation, cynicism on the part of particular individuals, or actions not conforming to church stricture, would come into evidence. The adjudication would thus turn from the nature and scope of Scientology's doctrines to the conduct, social acceptability and level of skepticism of church members or of the movement as a whole. As previously noted, in the Church of the New Song litigation, such considerations invaded at least one court's determination of whether or not the doctrines did in fact meet the test of religious status.[134] Such considerations obviously are not probative of whether a church's system of beliefs is sufficiently concerned with "man's nature and his place in the universe," or sufficiently fills a place in adherents' lives comparable to that filled by older religions in the lives of others, to qualify as religious. As Judge Hanson pointed out in *Loney v. Scurr*,[135] no prisoner would be entitled to exercise his religion if criminality contraindicated faith.[136]

Justice Douglas made the same point in *Wisconsin v. Yoder*,[137] in which the Court upheld a free-exercise claim by the Amish for exemption from compulsory education laws. In *Yoder*, Justice Douglas took the majority to task for stressing the law-abiding nature of the sect:

> A religion is a religion irrespective of what the misdemeanor or felony records of its members might be. I am not at all sure how the Catholics, Episcopalians, the Baptists, Jehovah's Witnesses,

132. 409 F.2d 1146 (D.C. Cir.), *cert. denied*, 396 U.S. 963 (1969). For a discussion of this case, see text accompanying notes 76-95 *supra*.

133. Hearing before the Honorable W. Arthur Garrity, Jr., Sept. 10, 1980, Van Schaick v. Church of Scientology of California, Civ. No. 79-2491-G (D. Mass. filed Dec. 13, 1979). Judge Garrity has not yet decided the motion as this article went to press.

134. *Compare* Church of the New Song v. Establishment of Religion on Taxpayer's Money, 620 F.2d 648, 652 (7th Cir. 1980) (court pointed to findings of violence by Theriault as evidence that the religion was a sham) *with* Loney v. Scurr, 474 F. Supp. 1186, 1189 (S.D. Iowa 1979) (there was no evidence that the Church counseled violence nor was there evidence linking Church activities to disturbances at the Iowa prison).

135. 474 F. Supp. 1186 (S.D. Iowa 1979).

136. *Id.* at 1195. For an extreme example, see also F. DOSTOEVSKY, THE BROTHERS KARAMAZOV, bk. V, ch. V.

137. 406 U.S. 205, 241 (1972) (Douglas, J., dissenting in part).

> the Unitarians, and my own Presbyterians would make out if subjected to such a test. It is, of course, true that if a group or society was organized to perpetuate crime and if that is its motive, we would have rather startling problems akin to those that were raised when some years back a particular sect was challenged here as operating on a fraudulent basis. *United States v. Ballard* . . . . But no such factors are present here, and the Amish, whether with a high or low criminal record, certainly qualify by all historic standards as a religion within the meaning of the First Amendment.[138]

Determination of religious status thus should rest on the doctrines themselves and not on the criminal activity or tortious conduct of one or more adherents.

Commercial motivation is also irrelevant to the definitional determination. This point was made in *Murdock v. Pennsylvania*,[139] one of a spate of early 1940's cases arising from suppression of proselytizing by Jehovah's Witnesses. *Murdock* involved a tax on the sale of religious literature, defended by the state on the ground that it was simply a license fee on commercial activity. The Court disagreed:

> The mere fact that the religious literature is "sold" by itinerant preachers rather than "donated" does not transform evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church service a commercial project. . . . It is plain that a religious organization needs funds to remain a going concern. But an itinerant evangelist, however misguided or intolerant he may be, does not become a mere book agent by selling the Bible or religious tracts to help defray his expenses or to sustain him. Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way.[140]

Indeed, in *Ballard* itself, the basis for prosecution was the procurement of money and the sale of phonograph records upon false representations. If an organization or individual satisfies the definitional test, it should not matter how much money is made, or whether the money is procured by donations, sale of tracts or fees for auditing, so long as it is derived from religious activity. Consideration of a religion's gross earnings as evidence that its doctrines are a sham would not sit well with the hierarchy of Catholicism or Christian Science any more than it would with Scientology.[141]

All that has been said of defining religion should apply as well

138. *Id.* at 246-47 (citation omitted).

139. 319 U.S. 105 (1943). *See also* Follett v. McCormick, 321 U.S. 573, 576 (1944).

140. 319 U.S. at 111.

141. In the free speech realm, *see also* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762-65 (1976); Bigelow v. Virginia, 421 U.S. 809,

where a party is not, as a whole or for all purposes, religious, but insists that particular representations were made in a religious vein. That is, a determination of whether or not the listener (or the consumer, if you will) could fairly be thought to be on notice that the representations were on matters of faith and ultimacy would be based on the criteria of *Seeger*. The focus here is on context, an issue that must be faced even where the party as a whole does qualify as religious. It is the argument here that after determining status, context should be the only remaining threshold question,[142] for sincerity is too much a proxy for verity itself to be a permissible subject of pursuit.

III. Sincerity

Courts in a variety of situations have assumed that the sincerity of a litigant's religious beliefs is a productive and relevant inquiry. The case subjects include conscientious objection,[143] other government-granted exemptions or benefits,[144] religious observance in prisons,[145] and defense to criminal prosecutions for drug use,[146] snake handling,[147]

818-21 (1975); Ginzburg v. United States, 383 U.S. 463, 474 (1966); New York Times Co. v. Sullivan, 376 U.S. 254, 265-66 (1964).

142. For a discussion of context, see text accompanying notes 182-211 *infra*.

143. *E.g.*, Welsh v. United States, 398 U.S. 333, 338-39 (1970); United States v. Seeger, 380 U.S. 163, 185 (1965).

144. *E.g.*, Wisconsin v. Yoder, 406 U.S. 205, 216-19 (1972) (compulsory education past eighth grade); United States v. Hillyard, 52 F. Supp. 612, 615 (E.D. Wash. 1943) (exemption from jury duty); Dobkin v. District of Columbia, 194 A.2d 657, 659 (D.C. 1963) (exemption from appearance in court on Saturday); *In re* Jenison, 265 Minn. 96, 104, 120 N.W.2d 515, 520 (exemption from jury duty), *remanded*, 375 U.S. 14, *on remand*, 267 Minn. 136, 125 N.W.2d 588 (1963). *But see* Braunfeld v. Brown, 366 U.S. 599, 609-10 (1961); Sheldon v. Fannin, 221 F. Supp. 766, 775 (D. Ariz. 1963).

145. *E.g.*, Theriault v. Silber, 453 F. Supp. 254, 261 (W.D. Tex. 1978) (right to practice religion); United States v. Kahane, 396 F. Supp. 687, 698 (E.D.N.Y.), *remanded on other grounds sub nom.* United States v. Huss, 520 F.2d 598 (2d Cir.) (kosher food), *aff'd as modified sub nom.* Kahane v. Carlson, 527 F.2d 492 (2d Cir. 1975); Teterud v. Gillman, 385 F. Supp. 153, 156-57 (S.D. Iowa 1974), *aff'd sub nom.* Teterud v. Burns, 522 F.2d 357 (8th Cir. 1975) (religious obligation to wear long hair); Remmers v. Brewer, 361 F. Supp. 537, 541-42 (S.D. Iowa 1973) (right to practice religion); United States *ex rel.* Goings v. Aaron, 350 F. Supp. 1, 4 (D. Minn. 1972) (religious obligation to wear long hair).

146. *E.g.*, *In re* Grady, 61 Cal. 2d 887, 888, 394 P.2d 728, 729, 39 Cal. Rptr. 912, 913 (1964) (religious use of peyote—remanded for trial on sincerity); People v. Woody, 61 Cal. 2d 716, 726, 394 P.2d 813, 821, 40 Cal. Rptr. 69, 77 (1964) (religious use of peyote not criminal if defendant's belief is held "honestly and in good faith"); State v. Bullard, 267 N.C. 599, 603, 148 S.E.2d 565, 568 (1966) (suggesting religious assertions as to marijuana and peyote were insincere).

147. *E.g.*, State *ex rel.* Swann v. Pack, 527 S.W.2d 99, 105-12 (Tenn. 1975) (obvious sincerity—in fact, hysterical devotion—of pentecostal snake handlers inspired the court to consider their First Amendment claims scrupulously and to observe that the relevant statute did not forbid the practice if done prudently), *cert. denied*, 424 U.S. 954 (1976); Kirk v.

and practicing medicine without a license.[148] But the extreme difficulty of making this delicate judgment on sincerity and the probability that the nondiscrimination aspect of the religion clauses will be abused in the process have been recognized.[149] A few judges have struck down the "reasonable accommodation" of religion requirement in Title VII of the 1964 Civil Rights Act,[150] in part because they thought it invited or required an overly entangling adjudication of sincerity.[151] One

Commonwealth, 186 Va. 839; 847-48, 44 S.E.2d 409, 413 (1947) (erroneous instruction on levels of intent in homicide prosecution arising from snake handling). Most decisions have deemed sincerity irrelevant to prosecutions for handling venomous snakes, *e.g.*, Hill v. State, 88 So. 2d 880 (Ala. Ct. App.), *cert. denied*, 88 So. 2d 887 (Ala. 1956); Lawson v. Commonwealth, 291 Ky. 437, 164 S.W.2d 972 (1942); State v. Massey, 229 N.C. 734, 51 S.E.2d 179, *appeal dismissed sub nom.* Bunn v. North Carolina, 336 U.S. 942 (1949); Harden v. State, 188 Tenn. 17, 216 S.W.2d 708 (1948). *See also* Harris v. Harris, 343 So. 2d 762 (Miss. 1977) (mother could not be deprived of custody because of membership in snake-handling church where no evidence of danger to child). The Biblical origin of this practice is *Mark* 16:17-18.

148. *E.g.*, People v. Vogelgesang, 221 N.Y. 290, 293, 116 N.E. 977, 978 (1917) (good faith could not justify "combin[ing] faith with patent medicine"); People v. Cole, 219 N.Y. 98, 110-12, 113 N.E. 790, 794-95 (1916) (conviction of Christian Science practitioner reversed because jury should have been instructed to pass on his good-faith compliance with religious tenets); State v. Verbon, 167 Wash. 140, 146, 149, 8 P.2d 1083, 1085, 1086 (1932) (good faith irrelevant to determining whether faith healer practiced medicine without a license).

149. *See* Gillette v. United States, 401 U.S. 437, 457 (1971) (sincerity is "a concept that can bear only so much adjudicative weight"); United States v. Kahane, 396 F. Supp. 687, 698 (E.D.N.Y. 1975); Teterud v. Gillman, 385 F. Supp. 153, 157 (S.D. Iowa 1974) ("[t]he court can never know with assurance whether Teterud is sincere or insincere"); Katz v. Superior Court, 73 Cal. App. 3d 952, 987-88, 141 Cal. Rptr. 234, 255-56 (1977) (question of proof of sincerity "not settled" by *Ballard*). *See also* M. KONVITZ, *supra* note 46, at 27-50; Greenawalt, Book Review, 70 COLUM. L. REV. 1133, 1135-37 (1970) (disputing Konvitz' view that there should be no sincerity tests in First Amendment litigation). In Brown v. Dade Christian Schools, 556 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978), a case involving claimed exemption from civil rights suit liability, Judge Goldberg, concurring in the denial of such exemption, noted that the "fine and searching distinctions among various free exercise claimants" that would be required if exemptions were recognized "would raise serious constitutional questions with respect to the proper functioning of courts in sensitive religion clause adjudication. Courts are of course competent to sort sincere from insincere religious contentions, but the process of doing so, and of striking different balances when confronted with sincere claims posing subtle variations in religious dogma, inevitably embroils courts undesirably in religious controversies." 556 F.2d at 323.

150. 42 U.S.C. § 2000e(j) (1974). The requirement did not appear in the original 1964 enactment, but the section was amended in 1972 to define religion as "includ[ing] all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103.

151. *See* Anderson v. General Dynamics Convair Aerospace Div., 489 F. Supp. 782, 791 (S.D. Cal. 1980), *rev'd and remanded*, 648 F.2d 1247 (9th Cir. 1981); Isaac v. Butler's Shoe Corp., 511 F. Supp. 108 (N.D. Ga. 1980); Gavin v. Peoples Natural Gas Co., 464 F. Supp. 622, 632 (W.D. Pa. 1979), *vacated and remanded on other grounds*, 613 F.2d 482 (3d Cir. 1980). *See also* TWA v. Hardison, 432 U.S. 63 (1977) (constitutional question not reached);

court, in upholding the right of Jehovah's Witnesses in a public school not to stand, for religious reasons, during the singing of the National Anthem, noted, "[N]o matter how unfounded or even ludicrous the professed belief may seem to others, [the First Amendment] guarantees to the plaintiffs the right to claim that their objection to standing is based upon religious belief, and the *sincerity or reasonableness* of this claim may not be examined by this or any other Court."[152] Sincerity thus becomes interwoven with reasonableness or verity of beliefs, as Justice Jackson warned it must. The court's refusal to inquire into "sincerity or reasonableness" illustrates Jackson's thesis that the two are not properly separable.[153]

In *Sherbert v. Verner*,[154] the Supreme Court alluded obliquely to this point. That case involved South Carolina's requirement that applicants for state unemployment compensation be willing to work Saturdays. The Court struck down this interpretation of the unemployment law because it unjustifiably burdened Ms. Sherbert's exercise of her Seventh Day Adventist faith and impermissibly favored Sunday worshippers. Responding to the articulated fear that "the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might not only dilute the unemployment compensation fund but also hinder the scheduling by employers of necessary Saturday work," the Court noted, first, that "there is no proof whatever to warrant such fears of malingering or deceit," and second, that

> [e]ven if consideration of such evidence is not foreclosed by the prohibition against judicial inquiry into the truth or falsity of religious beliefs, *United States v. Ballard*, . . .—a question as to which we intimate no view since it is not before us—it is highly doubtful whether such evidence would be sufficient to warrant a substantial infringement of religious liberties. For even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First

Cummins v. Parker Seal Co., 516 F.2d 544, 552-53 (6th Cir. 1975) (upholding reasonable accommodation provision), *aff'd by an equally divided court*, 429 U.S. 65 (1976); Dewey v. Reynolds Metals Co., 429 F.2d 324, 334-35 (6th Cir. 1970) (upholding reasonable accommodation EEOC guideline), *aff'd by an equally divided court*, 402 U.S. 689 (1971).

152. Sheldon v. Fannin, 221 F. Supp. 766, 775 (D. Ariz. 1963) (emphasis added). *Ballard*, among others, was cited for this proposition. The court in *Sheldon* observed that the sincerity of the religious objection "may strain credulity." *Id.* *See also* Banks v. Board of Pub. Instruction, 314 F. Supp. 285, 295-96 (S.D. Fla. 1970).

153. *See* United States v. Ballard, 332 U.S. 78, 92-93 (1944) (Jackson, J., dissenting). *See* note 50 *supra*.

154. 374 U.S. 398 (1963).

Amendment rights.[155]

Justice Brennan in this passage suggests not only that the issue left undecided by *Ballard* is still very much open, but also that the holding of *Ballard* may well compel the outcome that Justice Jackson insisted it must, for "fraudulent claims by unscrupulous claimants" and "malingering or deceit" signal a sincerity, not a truth-or-falsity, issue; South Carolina did not argue that the Adventists' interpretation of scripture was misguided.

Parenthetically, sincerity was largely irrelevant to South Carolina's concern. It was feared that numbers, not profundity, of claims might dilute the fund and disrupt the rhythms of industry. This possibility existed regardless of the sincerity of the claimants. If the dilemma arose in sufficiently compelling fashion and no less restrictive alternatives were available, the state interest would presumably justify the infringement of religious consciences regardless of whether they were genuine or feigned.

Despite the irrelevance of sincerity, testing for it is easier in the *Sherbert* situation than in religious fraud cases in which the claimant asserts not that her belief prevents her from working on the Sabbath, but that the practice or dogma of her church will yield salvation. For example, the sincerity of the conscientious objector can sometimes be tested by relatively objective evidence, without assessing the credibility of belief. Such a test was performed, for instance, in *Dobkin v. District of Columbia*,[156] where a Saturday Sabbatarian's claim to exemption from court attendance was viewed skeptically after he had been discovered working at his office on Saturday.

If sincerity could always be measured by the disparity between actions and professed beliefs, it would be somewhat less constitutionally troublesome.[157] But even this apparently simple test, on closer examination, becomes problematic. Occasional deviation from Sabbath observance does not prove full-blown hypocrisy, just as occasional indulgence at a non-kosher restaurant ought not to preclude all claim of need for a kosher diet.[158] To one unacquainted with the intricacies of particular religious commandments, evidence of any incongruity be-

155. *Id.* at 407. Justice Harlan, dissenting, thought that *Sherbert* overruled Braunfeld v. Brown, 366 U.S. 599 (1961), which had upheld Sunday closings against a free-exercise challenge. 374 U.S. at 421-23.

156. 194 A.2d 657 (D.C. 1963).

157. One commentator appears to view it in this sense. Comment, *supra* note 4, at 763-64, 777 n.151.

158. In this connection it might be noted that Dr. New's deviations from rectitude did not really prove that he was insincere in preaching its value. *See* text accompanying notes 27-33 *supra*.

tween practice and asserted belief may seem damning. Religious practice is not a perfect science, however. Under this "incongruity" approach, new or sudden converts would have little chance to prove their sincerity.[159] Moreover, the prospect of government agents or tort plaintiffs dogging the heels of religious claimants for evidence of deviation from asserted belief is not particularly attractive.[160]

Where there is no congruence between the exemption claimed and "objective" evidence of deviation from belief, discerning sincerity is even more vexing. Attention or inattention to the Sabbath, for instance, would be irrelevant to a conscientious objector's claim that his religion precluded participation in war, even if the belief were said to derive from orthodox Seventh Day Adventism, for surely one need not adhere to every detail of a creed in order to be sincere. In fact, some creeds, such as Judaism, themselves acknowledge different levels of adherence. In many conscientious-objector cases, there will be no objective evidence to which to turn, save the young person's articulation of his beliefs and the seriousness or eloquence with which he declaims them to his draft board. Not the insincere, but only the less articulate, are likely to be weeded out by a sincerity standard in such a situation.[161]

Occasionally, sincerity may be thought to be sufficiently evident by the circumstances of the claim. In *In re Jenison*,[162] a woman's willingness to face imprisonment for contempt of court was enough to show her sincere opposition to jury duty. Similarly, in *United States v. Kahane*,[163] Rabbi Meir Kahane's insistence on his right to receive kosher food while in prison was thought sincere in part because of the "repetitive and spartan nature" of the strict kosher diet under prison conditions.[164]

159. *See e.g.*, Clay v. United States, 403 U.S. 698, 702-04 (1971) (per curiam) (Clay's belief not necessarily insincere simply because recently manifested).

160. *See, e.g.*, United States v. Seeger, 380 U.S. 163, 185 (1965) (FBI available to assist draft boards in determining sincerity).

161. As the Court in *Gillette* explained, "There is even a danger of unintended religious discrimination [in a sincerity inquiry]—a danger that a claim's chances of success would be greater the more familiar or salient the claim's connection with conventional religiosity could be made to appear." 401 U.S. at 457. *See also* Thomas v. Review Bd. of the Ind. Employment Security Div., 450 U.S. 707 (1981).

162. 265 Minn. 96, 120 N.W.2d 515 (exemption from jury duty), *remanded*, 375 U.S. 14, *on remand*, 267 Minn. 136, 125 N.W.2d 588 (1963).

163. 396 F. Supp. 687, 698 (E.D.N.Y. 1975).

164. *Id.* at 703. *See also* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 643 (1943) (Black & Douglas, JJ., concurring) (devoutness of children's belief "is evidenced by their willingness to suffer persecution and punishment, rather than make the pledge"); Stevens v. Berger, 428 F. Supp. 896, 901 (E.D.N.Y. 1977) (religious objection to furnishing

While this is a nice solution, it might be thought to refine the sincerity inquiry out of existence. That, in fact, may have been Judge Weinstein's purpose in *Kahane*, for while he recognized the right of the government in theory "to determine the sincerity of religious beliefs where obligations and rights flow from that determination," he realized that "such inquiry must proceed cautiously since the state should generally avoid placing itself in the position of deciding which religious claims are meritorious."[165] If the "repetitive and spartan nature" of a kosher diet under prison conditions were not enough to dispose of the fear of a flood tide of false claims, Judge Weinstein left room for an obvious "shams and absurdities" standard of review.[166] This, in turn, as we have seen, is really a definitional inquiry. The result of *Kahane* is that once a claim is judged truly religious in the definitional sense, that is, deriving from some core of beliefs reflecting concern with ultimate issues in human life, it should be honored, absent countervailing state interests of sufficient magnitude.

The Supreme Court, *sub silentio*, may have embraced this view as well. In *Thomas v. Review Board of the Indiana Employment Security Division*,[167] which involved the voluntariness of a job termination for purposes of unemployment compensation, the Court paid lip service to the requirement that the claimant's religious compulsion for leaving work be "honest," but also expressed its discomfort with any in-depth sincerity inquiry: "[A]lthough detailed inquiry by employers into applicants' religious beliefs is undesirable, there is no evidence in the record to indicate that such inquiries will occur in Indiana, or that they have occurred in any of the states that extend benefits to people in the petitioner's position."[168]

The Supreme Court's earlier delphic aside in *Sherbert* does not indicate whether it considered these complications to be inherent in sincerity tests.[169] At the very least, the Court in both *Sherbert* and *Thomas* blended the ideas of sincerity and verity in a way that indicates that it does not view *Ballard* as having approved adjudication of the former.

Religious fraud cases, unlike other situations in which sincerity or good faith may be at issue, merge these matters with truth or falsity in a

social security numbers upheld; witness thought claimants were sincere because "I don't believe they would have gone through all this if they were not").

165. 396 F. Supp. at 698 (citing United States v. Ballard, 322 U.S. 78 (1944)).

166. *Id.* at 703.

167. 450 U.S. 707 (1981).

168. *Id.* at 1432.

169. *See* text accompanying notes 154-55 *supra*.

fundamental legal sense; that is, falsity of an asserted faith or belief is crucial to fraud adjudication. Fraud presupposes falsity, and if that issue cannot be litigated, the central element of the tort dissolves. The Supreme Court did not face this salient point in *Ballard*; only Chief Justice Stone's dissent denied the materiality of actual falsity, thus reading that element out of fraud.[170] Without falsity, however, both the harm and the causation are gone from the suit. As Professor Kurland, discussing *Ballard*, observed, "the very essence of the charge required proof of the falsehood of the assertions."[171]

In the *Ballard* trial itself, as Judge Denman demonstrated in a dissent to the court of appeals decision on remand,[172] the distinction between truth and sincerity had not been maintained. When a juror asked one of the defendants "if he ever precipitated anything,"[173] the defendant did not answer,

> [w]hereupon the court abandoned its ruling excluding evidence upon which the jury could "speculate" "whether these incidents actually happened." Instead of declaring the question of the happening of the fact of such a "divine" miracle as irrelevant and its pursuit a denial of the accused's religious liberty, the court itself asked, "Did you yourself ever precipitate?"[174]

Ultimately, the court told the jury that the question of precipitation would be argued by both sides and was " 'a matter for you gentlemen to decide.' "[175] The prosecutor took advantage of the opportunity and made "sneering remarks about the absence of any proof of such divine and supernatural happening as the precipitation of precious metals."[176] The *Ballard* trial thus incarnated the very fusion of sincerity and verity that the trial judge thought could be avoided.[177]

A recent review of the career of the renowned theosophist, Madame Blavatsky, a precursor of the Ballards, makes this same point.[178] Blavatsky's popularity derived in part from her claims to have received,

---

170. *See* text accompanying notes 47-48 *supra*.

171. P. KURLAND, *supra* note 46, at 77.

172. 152 F.2d 941, 944 (9th Cir. 1945) (Denman, J., dissenting).

173. *Id.* at 947. The religious claims had included supernatural ability to precipitate "money, riches, and other material needs." *Id.*

174. *Id.*

175. *Id.* (emphasis omitted).

176. *Id.* The prosecutor also disparagingly compared the claimed "ascension" of Guy Ballard after his death with Jesus Christ's, and accused the Ballards of being "false prophets." Record Appendix, vol. IV, Transcript of Record, at 1516, 1524, United States v. Ballard, 322 U.S. 78 (1944).

177. *See* notes 37-39 and accompanying text *supra*.

178. Zweig, *Talking to the Dead and Other Amusements*, N.Y. Times Book Rev., Oct. 5, 1980, at 11, col. 1.

via precipitation, letters from "Mahatmas" in Tibet. Skeptics proved the letters to be fake, but, as the reviewer perceived, "Confronted with [Blavatsky], we are obliged to rethink our ideas of sincerity and truth, for there is a kind of obsessive fraudulence that is so passionate, so engrossing, that it imposes itself, for all intents and purposes, as fact."[179]

The rejection of a sincerity test in religious fraud cases may well mean that classic charlatans, if they are careful to maintain a front of coherent religious doctrine and religious context when purveying their views, will continue, unabated by civil or criminal liability, to relieve spiritually impoverished or vulnerable Americans of substantial funds or even to impel them to alter their lives radically. The rule of religious *caveat emptor* is proper, however, because the First Amendment imports it into our constitutional law. That is to say, "spiritual poison" is "precisely the thing the Constitution put[s] beyond the reach of the prosecutor"[180] and of the civil claimant. If, as Professor Kurland suggests, this makes religious fraud "the insoluble problem under any theory of the meaning of the first amendment religion clauses,"[181] that is a relatively small price to pay for the salutary principle that religious "hypocrisy" as well as religious "falsity" is constitutionally unassailable.

IV. Context

Religious status obviously does not bestow immunity from liability for all "fraudulent" statements or promises, but only for those made in a religious context. The fund collector who pretends affiliation with a particular church and the money-diverting minister are two jurisprudential examples of religious defrauders who are subject to suit because their representations do not involve matters of religious persuasion and belief.[182]

Those are easy cases. A harder one, raised in the Scientology litigation, is belief about cause and cure of disease. As Judge Wright pointed out in *Founding Church*, "[w]e cannot assume as a matter of law that all theories describing curative techniques or powers are medi-

179. *Id.* In a more contemporary illustration, the *New York Times* reported that evangelist Oral Roberts had received nearly $5 million "after sending supporters a letter in which he said he had had a talk with a 900-foot tall Jesus Christ." N.Y. Times, Nov. 1, 1980, at 12, col. 6 (city ed.).

180. United States v. Ballard, 322 U.S. 78, 95 (1944) (Jackson, J., dissenting).

181. P. KURLAND, *supra* note 46, at 75.

182. The former example is from Cantwell v. Connecticut, 310 U.S. 296, 306-07 (1940); the latter is from Justice Jackson's dissent in United States v. Ballard, 322 U.S. at 92.

cal and therefore not religious. Established religions claim for their practices the power to treat or prevent disease, or include within their hagiologies accounts of miraculous cures."[183] Such curative phenomena range from the supposed healing powers of sacred shrines such as Lourdes to wholesale focus of a religious system upon a spiritual theory such as the Christian Scientists' view of physical ailing and healing. Christian Science literature, in particular, is replete with most explicit representations. For example, "[t]he adoption of scientific religion and of divine healing will ameliorate sin, sickness, and death. . . . Mind as far outweighs drugs in the cure of disease as in the cure of sin."[184] When representations like these are made in a religious context, the listener or potential adherent must be deemed on notice that he or she is in a realm of faith and belief far distant from the territory of civil adjudication.

Just as clearly, however, consumers should be protected from false curative claims not made in a religious context, and judging the context can be arduous. Even in a church, not every statement about disease partakes of the spiritual; even in a baseball park, an evangelist may preach or practice faith healing. Two New York cases involving faith healers suggest some elements of the necessary analysis.

In *People v. Cole*,[185] the court of appeals reversed a Christian Scientist's conviction for practicing medicine without a license on the ground that he qualified for the statutory exemption involving healing efforts performed in conjunction with the "religious tenets of any church."[186] The defendant had represented that he cured by prayer, and the court found that he did so in good faith.[187]

A year later, in *People v. Vogelgesang*,[188] the court affirmed the conviction of a defendant who, although claiming to be a spiritualist, had given medicine, had rubbed the patient's body with liniment, and

183. 409 F.2d at 1161.

184. M. EDDY, SCIENCE AND HEALTH WITH KEY TO THE SCRIPTURES 141, 149 (1971). Ahlstrom describes Christian Science as an outgrowth of Swedenborgian spiritualism, "precisely formulated, highly organized, and authoritatively led." S. AHLSTROM, *supra* note 2, at 487.

185. 219 N.Y. 98, 113 N.E. 790 (1916).

186. *Id.* at 102, 113 N.E. at 794.

187. *Id.* at 103-05, 110-12, 113 N.E. at 792, 794. To bolster its conclusion, the court noted that the defendant did not attempt to diagnose, nor was there "laying on of hands, manipulation, massage, or outward ceremonial." *Id.* at 108, 113 N.E. at 793. It is not clear whether or not those factors could in themselves tip the scale against a defendant if belief, prayer, and religious practice are held out as the main avenues to health, *i.e.*, if the context is plainly and primarily religious.

188. 221 N.Y. 290, 116 N.E. 977 (1917) (Cardozo, J.).

had "never uttered a word about Spiritualism."[189] The court asserted that "things were done by this defendant which no good faith could justify. He combined faith with patent medicine."[190]

It is possible that the court of appeals was simply reflecting an unacknowledged preference for more respectable types of religious exercise. But whatever is thought of the factual line drawn in these two cases, a workable principle emerges. Where a patient, consumer, or adherent is fairly on notice that the relief offered addresses the spiritual aspects of physical ills, failure to cure or lack of medical support for the theory of cure advanced should not, even in the absence of a statutory exemption, be actionable as breach of contract, fraud, or practicing medicine without a license, no matter how emphatic or hypocritical the assurances of the religious healer.

In the Boston Scientology cases, the plaintiffs attempted to distinguish the claims of cure that Scientology literature made from more traditional faith-healing promises on the basis of Scientology's alleged emphasis on "scientific proof" of the efficacy of auditing.[191] The reference may have been either to Dianetics' science-and-technology jargon in describing mental processes and aberrations or merely to the numbers of "success stories" that the church sometimes publicizes. If the latter, Scientology claims do not differ much from those of classic faith healing; if the former, the issue is more tangled because insistence on scientific, as opposed to religious or spiritual, healing may be a factor suggesting that a potential adherent was not put sufficiently on notice that he or she was being told about a religious system. A preliminary factual inquiry might thus be appropriate to assess how much the religious aspect of auditing, and that of Scientology generally, was set forth—in other words, a context test.

But mere inclusion of the word "science," as the Christian Science movement itself illustrates, does not obliterate a religious context. In our time, when even mystical experience is capable of neurological explanation,[192] it simply may be anachronistic to think in terms of a sharp

189. *Id.* at 291, 116 N.E. at 977. *See also* People v. Handzik, 410 Ill. 295, 102 N.E.2d 340 (1951), *cert. denied*, 343 U.S. 927 (1952) (conviction upheld; defendant not within faith-healing exemption because she used title of doctor, as well as "holy" water and "atomic" water, and various machines and "hot wires"); State v. Verbon, 167 Wash. 140, 8 P.2d 1083 (1932) (conviction upheld, relying in part on *Vogelgesang*, because of bad faith and use of drugs).

190. 221 N.Y. at 293, 116 N.E. at 978.

191. Hearing on defendants' motion to dismiss, Sept. 10, 1980, Van Schaick v. Church of Scientology of California, Civ. No. 79-2491-G (D. Mass. filed Dec. 13, 1979) (Garrity, J.).

192. *See, e.g.*, F. CONWAY & J. SIEGELMAN, *supra* note 2, at 134-82 (discussing possible physiological explanations for religious conversion experiences); Comment, *supra* note 4, at

dichotomy between religion and science. Scientology, with its emphasis on mental and psychosomatic causes of affliction, is an example of the overlap; yet overall, its doctrines, as Judge Wright recognized, are religious.[193] It is difficult to see how, with this doctrinal background, an institution that calls itself a church could be said to offer its major activity or service in a secular context.

What has been said above concerning faith healing and physical cures applies as well as to other accusations made by litigants against Scientology: false promises regarding auditing's ability to increase IQ, enhance creativity, and promote success in school or career. Aside from the secular difficulties in adjudicating such claims because of the relatively vague and indefinable nature of the alleged promises,[194] the truth of those statements—like the truth of claims about improved physical health—should be nonjusticiable when religiously framed. Whether implicitly or explicitly made, such promises about future potency and happiness are in fact common to most religions.

In determining religious context, a useful analogy may be drawn to the concept of "centrality" found elsewhere in free-exercise case law. In *Wisconsin v. Yoder*,[195] the insistence by the Amish on removing their children from school after the eighth grade, although superficially appearing distant from religious dogma, was found, on closer analysis, to be central to the sect's faith.[196] Similarly, in cases involving claimed exemption from drug laws, a critical inquiry has been whether the sacramental drug-induced state was a "cornerstone" of the defendant's faith or whether he could conscientiously practice his religion without it.[197] Opinions reaching different conclusions on the centrality of long hair in American Indian religion provide other examples.[198]

---

770 n.95 and sources cited therein (religious beliefs "implicate the individual's interior ordering of his world. Whether this 'ordering' is 'merely' a series of electrochemical brain states or something qualitatively different, it is wholly personal to the believer").

193. Founding Church of Scientology of Washington, D.C. v. United States, 409 F.2d 1146, 1160 (D.C. Cir. 1969).

194. *Cf.* Turner v. Unification Church, 473 F. Supp. 367, 378 (D.R.I. 1978) (promises of a "better world" not cognizable in *quantum meruit* because plaintiff did not expect compensation for work), *aff'd*, 602 F.2d 458 (1st Cir. 1979); A. CORBIN, CONTRACTS § 145 (1950) ("illusory" contracts unenforceable).

195. 406 U.S. 205 (1972).

196. *Id.* at 215-19.

197. *See* text accompanying notes 120-26 *supra*.

198. *Compare* Teterud v. Gillman, 358 F. Supp. 153 (S.D. Iowa 1974) *with* New Rider v. Board of Educ., 480 F.2d 693 (10th Cir. 1973) *and* United States *ex rel.* Goings v. Aaron, 350 F. Supp. 1 (D. Minn. 1972). *Cf.* Ho Ah Kow v. Nunan, 12 F. Cas. 252 (C.C.D. Cal. 1879) (cutting of queue, a mark of disgrace in Chinese prisoner's religion, violated equal protection clause).

The centrality test itself has been criticized as invasive of the First Amendment.[199] In one recent case,[200] a court held that the Unitarian Church's program of sex education, part of its Sunday school curriculum, was constitutionally protected on religious grounds regardless of its centrality: "The protection the Constitution extends to the exercise of religion does not turn on the theological importance of the disputed activity."[201] If centrality is seen, as it was here and in the *Leary* case,[202] as a way of trying to separate important religious practices from peripheral ones, it does indeed seem to intrude into territory made sacrosanct by *Ballard*. But if it is viewed and used as a way of distinguishing a church's religious pursuits from its secular ones, it can be a guide to context.

In the Scientology cases, for example, it was evident from the pleadings that auditing was the central practice of the religion, since auditing was the process by which one cleared away aberrations or "engrams" and achieved the wholesome states of "clear" and "beyond."[203] Representations made about the benefits of auditing were therefore made in a religious context, much as are representations about the benefits of Roman Catholic confession or of unburdening oneself on Yom Kippur. In one of the Boston cases, in fact, the complaint specified that auditing had been likened to confession, only "better."[204] Such a comparison, in the absence of an explicit secular reference, would seem to make the religious context fairly clear and to put the potential convert on notice that, should auditing fail for her, she would no more be entitled to sue the Church of Scientology for fraud than to sue the Roman Catholic Church.

By contrast, alleged misrepresentations in Scientology literature about the educational attainments of the founder, L. Ron Hubbard,[205]

199. *See* Brown v. Dade Christian Schools, 556 F.2d 310, 318 n.7 (5th Cir. 1977) (Goldberg, J., concurring) (noting apparent irrelevance of centrality in conscientious-objector adjudication); M. KONVITZ, *supra* note 46, at 79; Marcus, *The Forum of Conscience: Applying Standards Under the Free Exercise Clause*, 1973 DUKE L.J. 1217, 1250-51 (once practice deemed religious, "questions regarding what is 'essential' . . . [or] 'indispensable' . . . better left to the theologians").

200. Unitarian Church West v. McConnell, 337 F. Supp. 1252 (E.D. Wis. 1972), *aff'd without opinion*, 474 F.2d 1351 (7th Cir. 1973), *vacated on other grounds*, 416 U.S. 932 (1974).

201. *Id.* at 1257.

202. *See* text accompanying notes 124-26 *supra*.

203. For a more complete description of auditing, see note 12 *supra*.

204. Amended Complaint at 3, Troy v. Church of Scientology of Boston, Civ. No. 41073 (Mass. Super. Ct., Suffolk County filed Apr. 2, 1980).

205. All the Boston Scientology complaints alleged that the church had claimed Hubbard was a nuclear physicist with degrees from Princeton and George Washington Universities. In its appellate brief in Christofferson v. Church of Scientology of Portland, No.

do not appear to involve religious belief or practice. A lawsuit limited to allegations of this sort probably would not, on its face, run afoul of the First Amendment. The materiality of such allegations is questionable; however, the extent to which confidence in Hubbard's credentials influenced a decision to join the church might be marginal. Although former adherents probably could argue persuasively their right to litigate this question of causation, their claims would be weak ones if only this type of representation, and not statements about auditing, were justiciable.

A variation on the context theme arises where a concededly religious institution makes promises which are at once religious and secular, as in *Securities and Exchange Commission v. World Radio Mission, Inc.*[206] Although the Mission was " 'a religious organization engaged in worldwide evangelical religious activities' " and there was "no dispute" about its religious purpose or the sincerity of its leaders,[207] the First Circuit Court of Appeals thought these facts irrelevant to the Commission's plea for a preliminary injunction against fraudulent representations as to the Mission's sale of "Land Bonus Loan Plans." The plans were securities within the purview of the law regardless of the possible truth of the Mission's claim that the investor "also, in effect, subscribes to religious 'articles of faith' " and contentions that the investments could be viewed as religious donations.[208] The misrepresentations that the Commission sought to curtail, concerning the terms of the investments and the seller's financial condition, bore little relation to religious practice; thus, although the Mission was religious, these promises were secular.

The key factors in a context analysis are similar to those used to determine religious status: The representations must appeal to faith or belief and emphasize ultimate concerns of conscience, spiritual health or human existence. Secondary factors might be outward signs such as ritual or prayer.[209]

A7704-05184 (Or. Cir. Ct., Multnomah County Sept. 5, 1979, *appeal docketed*, No. 15952 (Ct. App. Oct. 31, 1979), the church suggested that "mythology" about its founder was entitled to First Amendment protection, but the argument seems dubious, at least absent evidence of religious or mythical context.

206. 544 F.2d 535 (1st Cir. 1976).

207. *Id.* at 537.

208. *Id.* at 538 (emphasis omitted). A similar fact situation was presented recently in United States v. Rasheed, 663 F.2d 843 (9th Cir. 1981) (affirming mail fraud convictions based on religiously flavored pyramid scheme). The court held that the religious aspect made no difference where the defendants were "insincere"; a better approach might have analyzed whether the solicitation of "donations" based on promises of fourfold increases in returns was primarily secular or religious in context.

209. *But see* note 117 *supra*.

Although the context inquiry will sometimes be very tricky, the line drawing required ultimately seems less problematic and less intrusive of First Amendment values than does a sincerity probe. This is so because, unlike sincerity criteria, the context test could be in large part prescriptive; individuals and institutions could conform their conduct to it. At least as to the context element, then, immunity from religious fraud liability would be largely within the control of the groups potentially vulnerable to it rather than in the hands of courts or juries. Any religious organization would then be on notice that if it concealed its religious orientation while making potentially fraudulent representations, it could lose First Amendment protection. In borderline cases, we would know that a statement was made in a religious context "when we are told that it is."[210]

A religious context test would have a threefold salutary effect. First, it would offer a measure of deterrence in that some speakers might eschew religious orientation for fear of detracting from an otherwise forceful or convincing appeal. On the other side, the listener either would be aware of the religious context of representations and weigh that factor in his decision whether or not to rely on them, or would be able to sue for fraud. Second, religious speakers would know how to avoid fraud liability without suffering any inhibition of their proselytizing activities.[211] Willingness to clarify religious context would earn them *prima facie* protection on that issue (although failure explicitly to identify the context as religious should not preclude a finding that it was in fact religious where other evidence suggests that it was). Third, and finally, courts would have a relatively objective and workable standard for adjudication of this aspect of religious fraud.

V. The Procedural Scheme

The inquiries into *prima facie* religious status and into religious context should be made by a judge. They are issues of constitutional law, or mixed questions of fact and constitutional law, which cannot be left to the majoritarian pressures that a jury usually reflects. Similarly, they should be fully reviewable on appeal.[212]

They are also preliminary questions. Deferring them to trial, or

210. Weiss, *Privilege, Posture and Protection—"Religion" in the Law*, 73 YALE L.J. 593, 604 (1964). Weiss would go considerably further than this author, by dispensing with the definitional inquiry and accepting as "in the religious domain" any claim that "is held out as being religious in nature." *Id.*

211. *See* text accompanying notes 57-70 *supra*.

212. *See* Jacobellis v. Ohio, 378 U.S. 184, 187-89 (1964); Brown v. Dade Christian Schools, 556 F.2d 310, 316-17 (5th Cir. 1977) (Goldberg, J., concurring).

even to a summary judgment that may come after years of extensive discovery, subjects churches to oppressive and potentially destructive litigation. Thus, for the same reason that "chilling effect" is a factor in free speech litigation,[213] these issues should be decided early in the lawsuit—on the pleadings if possible.

There is no good reason to defer resolution of these questions when they arise in a religious fraud lawsuit. If a complaint on its face reveals that the representations at issue were made in a religious context, a motion to dismiss is appropriate; if a factual showing is necessary, it can be limited to religious status and context in the manner of evidentiary considerations commonly permitted pursuant to motions to dismiss for lack of personal jurisdiction or venue. Discovery can be similarly confined by protective order until the preliminary issues are decided. A conclusory complaint that in broad strokes attempts to circumvent religious fraud immunity by failing to define the context, or by alleging "mind control" without more, should be subject to a motion to dismiss, or to strike for failure to particularize, like any other sort of fraud claim.[214] If the claimant intends to rely upon clear sham, facts suggesting why the religion in question does not meet the ultimate-concern test should be particularized.

There has been occasional reference in free-exercise cases to allocation of the burden of proof; the question has not often proved decisive.[215] Although that issue is beyond the scope of the present study, it seems reasonable that the burden of establishing a *prima facie* case of religious status falls on the party asserting the immunity. The relevant facts, witnesses and doctrinal works are within that party's control.

Often a *prima facie* case of status can be made by judicial notice or by reference to the pleadings. Sometimes submission of relevant literature and testimony by ministers or outside experts would be called for. The burden ought then to shift to the party asserting that the immunity does not apply in order to rebut the *prima facie* showing if he or she can. The rebuttal should not be an inquisition about sincerity, but "pervasive pretext" might be shown through introduction of "doctrinal" literature not offered by the other side. More likely, the literature and testimony in any case of disputed religious qualification will itself either suffice or be seen by the judge as obvious sham.

213. *See* Dombrowski v. Pfister, 380 U.S. 479, 486-87 (1965); New York Times Co. v. Sullivan, 376 U.S. 254, 272 (1964); NAACP v. Button, 371 U.S. 415, 433 (1963).

214. *See* FED. R. CIV. P. 9(b), 12(e)-(f).

215. *See, e.g.*, Surinach v. Pesquera de Busquets, 604 F.2d 73, 76 (1st Cir. 1979); *In re* Grady, 61 Cal. 2d 887, 888, 394 P.2d 728, 729, 39 Cal. Rptr. 912, 913 (1964); Giannella, *supra* note 57, at 1428.

Unless the pleadings specify how the statements or actions sued upon were outside a religious context, it ought to be the burden of the plaintiff at this preliminary stage to show that the claim deals only with secular matters. These facts are within his or her knowledge. Relevant here would be evidence that the party now claiming religious immunity either concealed its religious status at material times or disclaimed reliance upon religion in advertising benefits, cures, or the like. The content of the representations and their centrality to the religion's beliefs and practices also plays a role. The overall focus, however, should be on: (1) protecting religions, especially strange or obnoxious ones, from claims that ultimately are not adjudicable without trampling the free-exercise guarantee and (2) protecting them at the earliest possible stage of litigation.

Conclusion

In the heat of debate over the new religions, their great similarity to earlier American organizations and movements is sometimes overlooked. It is unclear whether or not today's parents are more distressed by their children's seemingly mindless devotion to local gurus than were onlookers in the last century when Shakers, Mennonites, Hutterites, Mormons, theosophists, faith healers, speakers-in-tongues, Montanists, Donatists, perfectionists, Jehovah's Witnesses, Seventh Day Adventists, and other groups abounded.[216] However untenable these older beliefs or their modern counterparts appear, and however cynical their purveyors may be, the Court in *Ballard* made clear that in a substantive sense our Constitution does not tolerate a cause of action for religious fraud. Since testing sincerity is too nearly a proxy for a substantive inquiry into truth, the remaining tasks facing a court in any fraud-based claim against a new religion are to determine the religious status of the organization and the context in which the alleged fraud took place. If the defendant is, for constitutional purposes, a religion, and if the alleged representations were made in a religious context, the matter should not be justiciable.

216. *See generally* S. AHLSTROM, *supra* note 2.