

SHOULD GERMANY STOP WORRYING AND LOVE THE OCTOPUS? FREEDOM OF RELIGION AND THE CHURCH OF SCIENTOLOGY IN GERMANY AND THE UNITED STATES

*Religion hides many mischiefs from suspicion.*¹

I. INTRODUCTION

Recently the City of Los Angeles dedicated one of its streets to the founder of the Church of Scientology, renaming it "L. Ron Hubbard Way."² Several months prior to the ceremony, the Superior Administrative Court of Münster, Germany held that Federal Minister of Labor Norbert Blüm was legally permitted to continue to refer to Scientology as a "giant octopus" and a "contemptuous cartel of oppression."³ These incidents indicate the disparity between the way that the Church of Scientology is treated in the United States and the treatment it receives in Germany.⁴ Notably, while Scientology has been recognized as a religion in the United States,⁵ in Germany it has struggled for acceptance and, by its own account, equality under the law.⁶ The issue of Germany's treatment of the Church of Scientology has reached the upper echelons of the United States

1. MARLOWE, *THE JEW OF MALTA*, Act 1, scene 2.

2. Formerly known as Berendo Street, the street links Sunset Boulevard with Fountain Avenue in the Hollywood area. At the ceremony, the city council president praised the "humanitarian works" Hubbard has instituted that are "helping to eradicate illiteracy, drug abuse and criminality" in the city. *Los Angeles Street Named for Scientology Founder*, DEUTSCHE PRESSE-AGENTUR, Apr. 6, 1997, available in LEXIS, News Library, DPA File.

3. The quoted language is translated from the German "*Riesenkrake*" and "*menschenverachtendes Kartell der Unterdrückung.*" Entscheidungen des Oberverwaltungsgerichts [OVG] [Administrative Court of Appeals] Münster, 5 B 993/95 (1996), (visited Oct. 21, 1997) <<http://wpxx02.toxi.uni-wuerzburg.de/~krasel/CoS/germany/ovg0696.html>>.

4. See *Germany, America and Scientology*, WASH. POST, Feb. 1, 1997, at A20. For general reports on the Germany-Scientology controversy, see also *All Things Considered* (NPR radio broadcast, Mar. 12, 1997), available in 1997 WL 12833039; Rick Atkinson, *Germany, Church of Scientology Feuding in Print and Political Arena*, WASH. POST, Jan. 30, 1995, at A11; Richard Cohen, *Germany's Odd Obsession with Scientology*, WASH. POST, Nov. 15, 1996, at A31; Alan Cowell, *The Test of German Tolerance*, N.Y. TIMES, Sept. 15, 1996, § 4, at 6; Matt Johanson, *Germany vs. Scientology*, GERMAN LIFE, Nov. 30, 1997, available in 1997 WL 11624340; Craig R. Whitney, *Scientology and Its German Foes: A Bitter Conflict*, N.Y. TIMES, Nov. 7, 1994, at A12.

5. The Internal Revenue Service recognized Scientology as a "charitable and religious organization" in 1993. Stephen Labaton, *Scientists Granted Tax Exemption by the U.S.*, N.Y. TIMES, Oct. 14, 1993, at A1.

6. See sources cited *supra* note 4. See also, e.g., Clive Freeman, *Scientists Stage "Religious Freedom" Protest March in Berlin*, DEUTSCHE PRESSE-AGENTUR, Oct. 27, 1997, available in LEXIS, News Library, DPA File.

government,⁷ and it has become the basis for a dispute between the two nations.⁸ The controversy surrounding Germany's treatment of Scientology is perhaps best illustrated by an "open letter" to German Chancellor Helmut Kohl that appeared as a full-page advertisement in the *International Herald Tribune* on January 9, 1997.⁹

The letter compared the current treatment of Scientologists in Germany to that of the Jews in the 1930s¹⁰ and was signed by numerous American entertainment-industry luminaries, none of whom claim to be Scientologists.¹¹ The advertisement condemned Germany based on a general

7. See Jeffrey Ressler, *For Bill, Another Satisfied Customer*, TIME, Sept. 22, 1997, at 20 and L. Ron Clinton, NEW REPUBLIC, Oct. 13, 1997, at 12 (reporting on conversation President Clinton had with cinema star and noted Scientologist John Travolta about the Scientology situation in Germany). See also U.S. DEPT. STATE, GERMANY COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1996 (Feb. 1997). For evidence of increasing State Department attention to the matter, compare GERMANY COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1996 with U.S. DEPT. STATE, GERMANY COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1995 (Feb. 1996), U.S. DEPT. STATE, GERMANY COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1994 (Feb. 1995), and U.S. DEPT. STATE, GERMANY COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1993 (Feb. 1994).

8. See *U.S. Attacks German Position on Scientology*, DEUTSCHE PRESSE-AGENTUR, Jan. 27, 1997, available in LEXIS, News Library, DPA File; *German Minister Slams U.S. Trade Sanctions Threat*, AGENCE FR. PRESSE, Feb. 18, 1997, available in LEXIS, News Library, AFP File (reporting on a meeting between U.S. Secretary of State Madeline Albright and German Foreign Minister Klaus Kinkel in which they disagreed about Germany's treatment of Scientology).

9. The ad itself helped to stoke the controversy. See, e.g., Alan Cowell, *Germany Says it Will Press on with Scientology Investigations*, N.Y. TIMES, Feb. 1, 1997, § 1, at 15.

10. The letter stated:

"In the 1930s, it was the Jews . . . Today it is the Scientologists. The issue is not whether one approves or disapproves of the teachings of Scientology. Organized governmental discrimination against any group on the basis of its beliefs is abhorrent even where the majority disagree with those beliefs."

Germany is Focus of Scientology Dispute, CHRISTIAN CENTURY, Feb. 5, 1997, at 123 (quoting the letter).

11. Hollywood lawyer Bertram Fields conceived the advertisement and wrote the letter. He has defended the comparison by pointing out that it refers to Germany in the pre-Holocaust 1930s. See Frank Rich, *Show Me the Money*, N.Y. TIMES, Jan. 25, 1997, § 1, at 23. Some observers have suggested ulterior motives for the letter: "[W]ere any of the letter's signatories to actually look into complaints against Scientology, they might risk forgoing business with two of the [movie] industry's most bankable stars." *Id.* (referring to Scientologists John Travolta and Tom Cruise). The comparison provoked angry responses from German and Jewish leaders, as had previous Scientology-placed advertisements that made the same comparison. See Abraham Foxman, National Director of the Anti-Defamation League, Letter to the Editor, N.Y. TIMES, Sept. 29, 1994, at A24; Cowell, *supra* note 9 (discussing German reactions to Scientology, the advertisements, and criticism from the U.S. government).

notion of freedom from government discrimination on the basis of belief.¹² What it ignored, however, is the controversy surrounding the Church's beliefs and tactics in the United States — despite its “official” religious status — and the fundamental differences between German and American concepts of freedom.

The Germany-Scientology controversy merits scrutiny because it illustrates the differences between German and American freedom of religion jurisprudence and the underlying concepts of liberty on which these views are based. Part II of this Note briefly examines the origins and operations of the Church of Scientology. Part III surveys German and American protections of religious liberty. Part IV discusses the degree to which each country's concept of freedom of religion has been extended to the Church of Scientology and the justifications for those policies. Part V summarizes the differences between the countries highlighted by their treatment of the Church and concludes that acknowledging those differences is a prerequisite for productive German-American debate on the controversy.

II. THE CHURCH OF SCIENTOLOGY

A. L. Ron Hubbard and “Dianetics”

Scientology originated in the science fiction writing of its founder, Lafayette Ronald (“L. Ron”) Hubbard. Hubbard was born in Tilden, Nebraska in 1911 and died in Creston, California in 1986.¹³ Beyond these facts, Hubbard's biography has been widely disputed. The official Church version, based on Hubbard's own account, describes him as a heroic and altruistic Renaissance man.¹⁴ Hubbard's critics, however, have systematically debunked much of the myth-making surrounding his life.¹⁵ By any

12. See *Germany is Focus of Scientology Dispute*, *supra* note 10, at 123. Advertisements purchased by the Church began appearing in the *Washington Post* and the *New York Times* in 1994 and 1995, first touting the rise of neo-Nazi extremism in Germany and then making the direct comparison between Nazi treatment of Jews and contemporary German treatment of Scientologists. See Josef Joffe, *Germany vs. the Scientologists*, N.Y. REV. BOOKS, Apr. 24, 1997. For an example of an advertisement that ran in the fall of 1996, see *Practicing Religious Intolerance* (advertisement), N.Y. TIMES, Oct. 17, 1996, at A17.

13. See Robert Lindsey, *L. Ron Hubbard Dies of Stroke; Founder of Church of Scientology*, N.Y. TIMES, Jan. 29, 1986, at A21.

14. See CHURCH OF SCIENTOLOGY INTERNATIONAL, *WHAT IS SCIENTOLOGY?* 25-52 (1993). See also, Heber Jentsch, *The Principles on Which Scientology is Based*, GLOBE & MAIL (Toronto), Jan. 27, 1998, at A19 (describing Hubbard's life).

15. See BENT CORYDON & L. RON HUBBARD, JR., *L. RON HUBBARD: MESSIAH OR MADMAN?* 219-29 (1987). See also Paul Horwitz, *Scientology in Court: A Comparative Analysis and Some Thoughts on Selected Issues in Law and Religion*, 47 DEPAUL L. REV. 85, 89-90 (1997) (noting the disagreement about Hubbard's biography). Incidentally, the Church's

account, Hubbard was a prolific writer, and in the 1930s and 1940s much of his work appeared in the "pulp" science fiction magazines that flourished in those years. The magazine *Astounding Science Fiction* introduced Hubbard's concept of "Dianetics" to the world,¹⁶ and Hubbard's book *Dianetics: the Modern Science of Mental Health*¹⁷ followed soon thereafter.

Dianetics represents the quasi-scientific formulation of Hubbard's elaborate theories on the human mind, and it forms the basis for Scientology.¹⁸ Hubbard's theory emphasizes the dual nature of the human mind — the "analytical" and the "reactive."¹⁹ According to Hubbard, in its unimpaired or "clear" state, the analytical mind is a source of limitless power and the essence of human perfection. The reactive mind, however, is the source of all that is commonly viewed as human weakness, confusion, and folly.²⁰

Hubbard believed that traumatic events leave imprints on the human psyche called "engrams." Dianetics defines an engram as a mental snapshot of all sensory perception gathered at the time of the negative experience; when later events trigger a recall of that initial experience, the engram releases pent up emotional responses that impair rational thought.²¹ The way

account of his discovery of Dianetics, as described in *What is Scientology?*, corresponds nicely with the archetypal myth of the hero as it is presented by comparative mythologist Joseph Campbell in *The Hero with a Thousand Faces*: The hero ventures forth into the world of the unknown — Hubbard the brave young adventurer goes off to war; the hero encounters seemingly insurmountable obstacles there — Hubbard is crippled and blinded in battle. The hero overcomes his limitations and is transformed — Hubbard synthesizes all he has learned about the mind, eastern spirituality, and his "experiences among men" and is able to harness the power of his unimpaired analytical mind to heal himself. The hero returns to his community and bestows on it a boon that will transform their lives by showing them how to overcome their limitations — Hubbard's article on Dianetics is published in *Astounding Science Fiction*, and he becomes the center of a new mythology for his followers. See CHURCH OF SCIENTOLOGY INTERNATIONAL, *supra* note 14, at 42-47; JOSEPH CAMPBELL, *THE HERO WITH A THOUSAND FACES* (1946).

16. Hubbard's article on Dianetics appeared in the May 1950 issue of *Astounding Science Fiction*. See ROY WALLIS, *THE ROAD TO TOTAL FREEDOM: A SOCIOLOGICAL ANALYSIS OF SCIENTOLOGY* 24 (1977).

17. L. RON HUBBARD, *DIANETICS: THE MODERN SCIENCE OF MENTAL HEALTH* (1950).

18. Hubbard described his new "science" as "a milestone for Man comparable to his discovery of fire and superior to his inventions of the wheel and the arch . . . The hidden source of all psychosomatic ills and human aberration has been discovered and skills have been developed for their invariable cure." RUSSELL MILLER, *BARE-FACED MESSIAH: THE TRUE STORY OF L. RON HUBBARD* 155 (1987). See generally HUBBARD, *supra* note 17.

19. Some observers have described Dianetics as a kind of "lay psychotherapy," with the concepts of the analytical and reactive mind corresponding to the conscious and unconscious mind. See, e.g., *THE OXFORD DICTIONARY OF WORLD RELIGIONS* 869 (John Bowker ed., 1997).

20. See L. RON HUBBARD, *DIANETICS: THE MODERN SCIENCE OF MENTAL HEALTH* (1992).

21. See *id.* at 91.

to get clear — to unlock the unlimited potential of the analytical mind — is to remove the engrams.²² The way to remove the engrams is to relive the traumatic experiences that created them in what is called an “audit.”²³ In an auditing session, the subject, or “preclear” in Scientology parlance, undergoes a hypnotic confessional therapy in which the engram is eliminated by reliving the corresponding trauma.²⁴

Dianetics sold quickly,²⁵ and Dianetics training centers began springing up around the United States.²⁶ Its popularity can be attributed to two related characteristics that stem from the proposed dual nature of the human mind. First, with the reactive mind concept, Dianetics provides a convenient explanation for human failure; any human error or perceived inadequacy can be attributed to the external cause of a traumatic event and the ensuing engram.²⁷ Second, Dianetics instills hope in the perfectibility of the individual and, by extension, of humanity, by asserting that all human beings

22. See WALLIS, *supra* note 16, at 26

23. *Id.* at 28-31.

24. Sociologist Roy Wallis has noted parallels between auditing and “abreaction therapy,” in which patients are guided through their own “reliving” of a traumatic memory. WALLIS, *supra* note 16, at 31-38. Heber Jentzsch, the current president of the Church of Scientology International, has likened auditing to replaying a mental “videotape” of the traumatic event in which “everything was recorded.” *All Things Considered*, *supra* note 4. In a letter to the Toronto *Globe & Mail* responding to criticism of the Church, Jentzsch described auditing in greater detail:

The primary means by which Scientology’s basic truths are applied to the rehabilitation of the human spirit is called ‘auditing.’ It is the central practice of Scientology. . . .

One could imagine something that has been troubling all ones’ life—a feeling or attitude or experience. Then one could imagine sitting with an auditor and being asked an exact question, the right question that enables one to suddenly, instantly, see the truth of this situation, the real source of it. This is what auditing is, and the result is revelatory: tremendous relief, understanding, a sense of freedom, the ability to see everything more clearly, an increased awareness.

Jentzsch, *supra* note 14. Discussing Scientology’s goal to “find the earliest engram and erase it and then proceed to erase all other engrams,” Josef Joffe noted that “[d]isaffected Freudians might tell you a similar tale; it is called ‘interminable analysis.’” Joffe, *supra* note 12.

25. The book was immediately popular among science-fiction fans who “were buying the book and auditing their friends, who then rushed out to buy the book so they could audit their friends.” MILLER, *supra* note 18, at 159.

26. *See id.* at 159-60.

27. “[Dianetics] offered a rationale for failure in social mobility and in social interaction. It provided an explanation in terms of traumatic incidents in which the individual had been unwittingly involved, and thereby relieved him of responsibility for his failure.” WALLIS, *supra* note 16, at 65.

possess a supercharged analytical mind.²⁸ When properly controlled, the mind is capable of "limitless memory,"²⁹ of curing "sinusitis, allergies, some heart trouble, 'bizarre' aches and pains, poor eyesight, arthritis, etc.,"³⁰ and of decreasing reaction time and maintaining a youthful appearance well into old age.³¹

B. *The Emergence of "Scientology"*

Hubbard made no claim that Dianetics was a religion.³² He presented the aforementioned concepts of Dianetics as proven scientific facts,³³ underscoring the secular nature of the theory. As interest in Dianetics spread, however, Hubbard elaborated on the doctrine, renamed it "Scientology," and presented it as a new religion.³⁴ Hubbard began lecturing on Scientology as early as 1952, and the first Churches of Scientology were founded soon thereafter.³⁵ Many critics of Scientology maintain that Hubbard's decision to "go religious" was motivated by his lust for the power and financial profit to be gained from controlling the growing Dianetics movement.³⁶ Indeed, Hubbard is frequently quoted as having said that "[i]f a man really wanted to make a million dollars, the best way to do it would be to start his own religion."³⁷ Regardless of his motive, Hubbard

28. *Id.*

The theory of Dianetics assured its follower that his 'true self', [sic] his conception of what he believed he was really capable of achieving, was indeed as he conceived it. It reaffirmed this idealization of self and promised a means of eliminating the barriers to its fulfilment, of eradicating the gap between his 'true self' and the identity that was typically confirmed in social interaction.

Id.

29. Horwitz, *supra* note 15, at 91.

30. *Id.*

31. *See id.*

32. *See* HARRIET WHITEHEAD, *RENUNCIATION AND REFORMATION: A STUDY OF CONVERSION IN AN AMERICAN SECT* 45 (1987).

33. Russell Miller notes that Hubbard's theory on Dianetics was presented as a "dissertation" based on "years of diligent research and study," and that "his usual racy prose was replaced by a sober, textbook style" reflecting the approach "of an engineer seeking practical, scientific solutions to the mysteries of the human mind." MILLER, *supra* note 18, at 153.

34. *See* WHITEHEAD, *supra* note 32, at 45. For a detailed discussion of the growth of Dianetics into Scientology, *see id.* at 45-77.

35. *See* MILLER, *supra* note 18, at 220-21.

36. *Id.* *But see* Horwitz, *supra* note 15, at 94-95 (listing factors weighing against the notion that Hubbard's decision to form a religion was motivated by sheer lust for wealth and power).

37. MILLER, *supra* note 18, at 148. *See also* Richard Leiby, *Scientology Fiction; The Church's War Against Its Critics—and Truth*, WASH. POST, Dec. 25, 1994, at C1. (discussing the vigor with which the Church of Scientology denies Hubbard ever made the comment).

devised Scientology as a religion³⁸ with an intricate system of metaphysical beliefs and goals, from which outsiders can discern a few basic tenets.³⁹

C. *The Tenets and Goals of Scientology*

Scientology encompasses the theory of Dianetics and incorporates its aims of clearing mankind of its engrams, thereby creating a world without crime, insanity, or war and teeming with happy and fulfilled people.⁴⁰ It holds that human beings are essentially immortal spirits called "Thetans," who, according to the Scientology story of creation, were banished to earth and implanted in giant volcanoes millions of years ago by an evil galactic overlord named Xenu.⁴¹ After undergoing enough auditing⁴² to remove his engrams,⁴³ the Scientologist is "clear" and enters the higher spiritual level of an "Operating Thetan."⁴⁴ At this stage, Scientologists are deemed prepared to view the most sacred of Scientology texts, including the creation story.⁴⁵ Scientologists take courses and become "auditors" as they advance

38. For Scientology's variations on traditional religious trappings and practices, see L. RON HUBBARD, *CEREMONIES OF THE FOUNDING CHURCH OF SCIENTOLOGY* 9-54 (1959) and Horwitz, *supra* note 15, at 101. See also CHURCH OF SCIENTOLOGY INTERNATIONAL, *supra* note 14, at 168 (describing Scientology sermons).

39. Scientology's belief system has been described as "encyclopedic and labyrinthine," and it combines elements of various philosophical, religious, and psychological theories. See, e.g., WALLIS, *supra* note 16, at 4-5. See also WHITEHEAD, *supra* note 32, at 168.

40. See OXFORD DICTIONARY OF WORLD RELIGIONS, *supra* note 19.

FOUNDED on principles of the mind and life discovered by L. Ron Hubbard, Scientology defies easy comparison or categorization. It follows a religious tradition that is at least 10,000 years old, yet what it ultimately represents is new. . . . Scientology comprises a body of knowledge that extends from certain fundamental truths. Prime among these are that man is a spiritual being; that his experience extends well beyond a single lifetime; and that his capabilities are unlimited, even if not currently realized.

Jentzsch, *supra* note 14.

41. See WALLIS, *supra* note 16, at 103-04; Richard Behar, *The Thriving Cult of Greed and Power*, TIME, May 1991, at 50. Regarding this aspect of Scientology, comparisons are often made with some of the "stranger" teachings of mainstream religions, such as *The Bible's* creation story and the Eucharist. *Leaders: Religion, good and bad*, ECONOMIST, Apr. 11, 1998, at 14. See also Jentzsch, *supra* note 14.

42. Auditing is conducted with the aid of an "Electropsychometer" or "E-Meter," which is similar to a lie detector. When a person is being audited, he holds the E-Meter's electrodes and the auditor detects engrams based on the electric current passing through the subject's body. See CHURCH OF SCIENTOLOGY INTERNATIONAL, *supra* note 14, at 81.

43. Because each Thetan has been around for billions of years and has seen countless reincarnations into human form, the number of engrams on a given human mind (and the amount of auditing a recruit requires) is potentially limitless. See WALLIS, *supra* note 16, at 104.

44. CHURCH OF SCIENTOLOGY INTERNATIONAL, *supra* note 14, at 150-51.

45. See *id.* at 461.

toward the upper levels of Scientology spirituality. The training can be expensive, and payments for Scientology courses are regarded as donations to the church.⁴⁶ Because church members in effect purchase their spiritual advancement, many detractors of Scientology claim it is really a business and is thus undeserving of the protections the Constitution affords religions.

III. FREEDOM OF RELIGION IN THE UNITED STATES AND GERMANY

A. *Freedom of Religion in the United States*

1. *Introduction to the Religion Clauses*

Religion played a critical role in the formation of the American colonies and pervaded the lives of American colonists.⁴⁷ Generally speaking, the framers of the Constitution took for granted that religious morality and knowledge were prerequisites for a smooth-functioning, democratic republic.⁴⁸ As a result, religion's place in the Bill of Rights was hardly controversial.⁴⁹

The First Amendment's religion clauses,⁵⁰ the Free Exercise Clause and the Establishment Clause, are interrelated and reflect two basic ideas: (1) that religion is a matter of individual choice,⁵¹ and (2) "that both religion

46. See *id.* at 246, 450. See also *infra* notes 243-44 and accompanying text discussing the Supreme Court's ruling in *Hernandez v. Commissioner*.

47. For a detailed discussion of the formation of the American colonies against the background of the British Reformation, see SIDNEY AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* 84-134 (1972).

48. That is, for a free republic to work, the citizenry must be virtuous, and religion gives it a moral underpinning. See LEO PFEFFER, *CHURCH STATE AND FREEDOM* 3-30 (1967) [hereinafter PFEFFER, *CHURCH*].

49. See ARLIN M. ADAMS & CHARLES J. EMMERICH, *A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES* 16-19 (1990). For a discussion of the major influences on the drafters of the Bill of Rights, see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-4 (2d ed. 1988).

50. The First Amendment begins, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" U.S. CONST. amend. I.

51. Constitutional scholar Laurence Tribe identifies this as the principle of "voluntarism":

The free exercise clause was at the very least designed to guarantee freedom of conscience by preventing any degree of compulsion in matters of belief. It prohibited not only direct compulsion but also any indirect coercion which might result from subtle discrimination; hence it was offended by any burden based specifically on one's religion. . . . The establishment clause . . . can be understood as designed in part to assure that the advancement of a church would come only from the voluntary support of its followers and not from the political support of the state.

and government function best if each remains independent of the other."⁵² Thus, together the religion clauses aim to promote religious life by restricting government involvement in religion.⁵³ However, as the government's sphere of influence expands, conflicts with pervasive religious life are inevitable.⁵⁴ As a result, the meaning of the religion clauses has evolved, and each clause has spawned an observable system of jurisprudence in the rulings of the Supreme Court.⁵⁵

The Establishment Clause has developed into a general prohibition on government aid to religion.⁵⁶ The Court applies a three-part test to determine

TRIBE, *supra* note 49, § 14-3 at 1160.

52. *Id.* § 14-3, at 1161 (characterizing the quoted language as Madison's view). This, according to Tribe, exemplifies the principle of "separatism." See also PFEFFER, CHURCH, *supra* note 48, at 70, (noting that "[r]eligious liberty is generally most secure where church and state are most completely separated. Conversely, religious liberty suffers where the state seeks to make the church an engine to further national policy, or the church seeks to utilize the compulsive arm of the state to further religious interests.") However, Professor Tribe also notes:

[Despite the popularity of viewing] both the free exercise clause and the establishment clause as expressions of voluntarism and separatism[,] . . . a growing body of evidence suggests that the Framers principally intended the establishment clause to perform two functions: to protect state religious establishments from national displacement, and to prevent the national government from aiding some but not all religions.

TRIBE, *supra* note 49, § 14-3, at 1161.

53. "Both clauses apply to state as well as federal action through the incorporation of their principles into the fourteenth amendment due process clause." TRIBE, *supra* note 49, § 14-2, at 1156. See *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (holding that the Free Exercise Clause applies to the states); *Everson v. Board of Education*, 330 U.S. 1 (1947) (holding that the Establishment Clause applies to the states).

54. See Harold J. Berman, *Religious Freedom and the Challenge of the Modern State*, 39 EMORY L. J. 149, 152 (1990) (noting that in the 18th and 19th centuries American social life was dominated by religion and relatively unaffected by government, whereas today those roles have been juxtaposed, with government taking on an increasingly prominent role in the lives of Americans while the role of religion has dwindled, and emphasizing the flexibility the years have drawn out of the religion clauses as America has grown from a Protestant Christian nation into a nation of plural religions).

55. Present in both streams of religion clause jurisprudence is a core notion that the state is unfit to rule on matters of religion. See Angela C. Carmella, *The Religion Clauses and Acculturated Religious Conduct: Boundaries for the Regulation of Religion*, in *THE ROLE OF GOVERNMENT IN MONITORING AND REGULATING RELIGION IN PUBLIC LIFE* 21, 25 (James E. Wood, Jr. & Derek Davis eds., 1993). Therefore, the state must remain "neutral" toward religion. This principle of neutrality requires "that the government act to achieve only secular goals and that it achieve them in a religiously neutral manner." 4 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW* § 21.1, at 446 (2d ed. 1992). See also TRIBE, *supra* note 49, § 14-7, at 1188-1201 (discussing the neutrality principle).

56. This view is countered by a strongly-held dissenting view that government encouragement of religion as a secular good is constitutionally permissible. For example, in his dissenting opinion in *Wallace v. Jaffree*, 472 U.S. 38 (1985), Justice Rehnquist stated:

the constitutionality of a state action challenged under the Establishment Clause: In order for state aid to religion to be constitutional, the state action must (1) have a secular purpose, (2) have a primary secular effect, and (3) not cause excessive government entanglement in religion.⁵⁷ In recent years, Establishment Clause cases have spawned modifications of this test focusing on whether the state action *endorses* a particular religion,⁵⁸ or *coerces* participation in religious activity.⁵⁹

In free exercise cases, the Court has developed a framework for balancing the interests of the state against the individual's liberty of religious activity: To have a colorable free exercise claim, the plaintiff must (1) have a sincerely held religious belief that (2) is burdened by a government requirement.⁶⁰ Once these elements are met, the state must show that its requirement (3) is aimed at an important government interest, the pursuit of which would (4) be hindered if the exemption were granted.⁶¹ Whether the exemption is granted often depends on the degree of scrutiny the Court applies in ascertaining the importance of the government interest and how closely the requirement is tailored to advance that interest.⁶²

[The historical evidence shows] that the Establishment Clause . . . forbade establishment of a national religion, and forbade preference among religious sects or denominations . . . [It] did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion. There is simply no historical foundation for the proposition that the Framers intended to build the "wall of separation" that was constitutionalized in *Everson*.

Id. at 106 (Rehnquist, J., dissenting).

57. The Court laid out the three-part test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971): "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Id.* at 612-13 (citations omitted).

58. See *Wallace v. Jaffree*, 472 U.S. at 38 (regarding an Alabama statute authorizing a one-minute period of silence in all public schools for "meditation or voluntary prayer"); *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (holding that a display of a creche impermissibly endorsed Christianity while displaying a menorah next to a Christmas tree and a sign saluting liberty outside the city-county building did not).

59. See *Lee v. Weisman*, 505 U.S. 577 (1992) (involving the practice of public school officials inviting clergy to offer invocation and benediction prayers at graduation ceremonies).

60. See *TRIBE*, *supra* note 49, § 14-12, at 1242-51.

61. See *id.* The Court has used various formulations of this basic four-step process. See *id.* § 14-13, at 1251-75 (tracing the development of the state's required showing from 1939 to 1987).

62. Under strict scrutiny, the state must show that the interest advanced by the requirement is *compelling* and that the requirement is the *least restrictive means available* to advance that interest, while under moderate scrutiny the state need only show its interest is *substantial* and that the requirement is *rationaly related* to it. See, e.g., *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141-42 (1987) (describing standards for strict and moderate scrutiny). After *Employment Division v. Smith*, 494 U.S. 872 (1990) (declining

Thus, in contrast to Establishment Clause cases, which have typically involved challenges to government *benefits* conferred upon religious groups (or upon religion itself), free exercise claims are typically brought by individuals seeking to avoid state-imposed *burdens* on religious activity. However, the distinction between burdens and benefits is not always clear, and the Supreme Court has tried to outline a “zone of permissible accommodation” of religion where the demands of the two religion clauses seem to conflict.⁶³

2. *The Supreme Court’s Conception of Religion*

Because it does not define the word “religion,” the Constitution⁶⁴ has

to apply strict scrutiny in a case involving the use of peyote for religious purposes) and *Boerne v. Flores*, 521 U.S. 507 (1997) (declaring unconstitutional the Religious Freedom Restoration Act of 1993, 42 U.S.C.A. § 2000bb et seq., which would have required courts to apply strict scrutiny to claims in which generally applicable, religiously-neutral laws substantially burdened the free exercise of religion), the only free exercise claims that will receive strict scrutiny are those that (1) challenge a law that is not religiously neutral and generally applied, see *Smith*, 494 U.S. at 877-78, (2) are paired with another constitutional claim, see *id.* at 881, or (3) arise in the context of an in-place system of institutionalized religious exemptions. See *id.* at 884. For a case involving a law that is not neutral toward religion, see *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 580 U.S. 520 (1993), in which the Court invalidated a law restricting animal slaughter because the law targeted practitioners of Santeria.

63. TRIBE, *supra* note 49, § 14-4, at 1166-69. The area of permissible accommodation lies between Establishment Clause-barred aid to religion and religion-based exemptions required by the Free Exercise Clause. See, for example, *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987), in which a provision exempting religious organizations from the federal statute prohibiting religion-based employment discrimination was upheld under a rational-basis analysis. See also *Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), in which a state law required that Sabbath observers be allowed to miss work “no matter what burden or inconvenience [it] impose[d] on the employer or fellow workers.” *Id.* at 708-09. The court held that this law had a “primary effect that impermissibly advance[d] a particular religious practice” and thus violated the Establishment Clause. *Id.* at 710.

64. One commentator has specifically recognized the Framers’ wisdom in not defining “religion” in the Constitution:

To define the term would have placed a permanent imprimatur upon only those forms of faith and belief that conformed to their definition. The [F]ramers instead chose to leave the term undefined, thereby protecting a diversity of beliefs, not merely the traditional ones, from undue advancement or prohibition of expression by government. This guarantee of freedom of religion, the centerpiece of American liberties, has served to protect all religions, old and new, against governmental preference, intrusion, and harassment.

Derek Davis, *The Courts and the Constitutional Meaning of “Religion”: A History and Critique*, in *THE ROLE OF GOVERNMENT IN MONITORING AND REGULATING RELIGION IN PUBLIC LIFE* 89, 90 (James E. Wood, Jr. & Derek Davis, eds. 1993). Furthermore, Davis argues that a constitutional definition of religion would be counterproductive to the aims

allowed the meaning of religion clauses to evolve with changes in society. This omission has left the courts with broad discretion in determining when First Amendment protections of religion may be invoked.⁶⁵ The evolution of the Supreme Court's concept of religion has been both a reflection of and an impetus to⁶⁶ the "radical diversity" that characterizes the current state of religion in America.⁶⁷ Early Supreme Court interpretations of the religion clauses illustrate that in late eighteenth and early nineteenth century America, "religion" essentially meant the "relationship between a person and some Supreme Being"⁶⁸ and that First Amendment protection did not extend far beyond Protestant Christianity.⁶⁹ Practices of minority religious groups that fell outside the bounds of the prevailing public morality were often denied free-exercise protection, and the Court's view of religion remained focused on the Christian god, "God."⁷⁰ The view of religion expressed in these early rulings may be characterized as a "substantive" definition of religion because it focused on the content of the beliefs.⁷¹ The Supreme Court's shift away from a substantive view of religion came in *United States v. Ballard*,⁷² in

expressed in the religion clauses themselves, stating that "any definition would arguably have the effect of dictating to religions, past and present, what they must be, and would therefore violate the Free Exercise Clause[.]" and that "because defining religion would approve of or support religions that conform to the definition in preference to those that do not, the Establishment Clause is arguably contravened as well." *Id.* at 91.

65. *See id.* at 90-91.

66. *See id.* at 92.

67. AHLSTROM, *supra* note 47, at xiv. *See also id.* at 1091-94 (discussing developments in American religious life in the 1960s).

68. *See Davis, supra* note 64, at 92. *See, e.g., Reynolds v. United States*, 98 U.S. 145 (1878) (in ruling that a Mormon's bigamy was not protected under the Free Exercise Clause, the Court considered the views of the Framers, which corresponded to the prevailing view at the time, and concluded that religion referred to man's relationship with a supreme being).

69. *See Davis, supra* note 64, at 93. However, as America experienced large increases in immigration from south and central Europe, it became less a Protestant nation and more a nation of plural religions that included large numbers of Roman Catholics, Jews, and Orthodox Christians. The shift in European immigration "was augmented by migrations across the Mexican-American border and by an influx of Chinese and Japanese along the Pacific Coast," which in turn added to the religious diversity of the United States. EDWIN GAUSTAD, *A RELIGIOUS HISTORY OF AMERICA* 178 (1990).

70. In an 1890 ruling upholding an Idaho statute prohibiting the suffrage of bigamists and polygamists, the Supreme Court clearly expressed its understanding of religion, noting that "[t]he term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will." *Davis v. Beason*, 133 U.S. 333, 342 (1890). The Court held that the conduct of the plaintiff, unlike his beliefs, was not protected by the First Amendment, stating that "[c]rime is not the less odious because sanctioned by what any particular sect may designate as 'religion.'" *Id.* at 345.

71. *See Note, Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1060-63 (1978).

72. *United States v. Ballard*, 322 U.S. 78 (1944).

which the Court held that no inquiry could be made into the validity of an individual's religious beliefs.⁷³ In the *Ballard* dissenting opinion, Justice Robert H. Jackson noted that the price of the Constitution's broad protection of religious liberty "is that [Americans] must put up with, and even pay for, a good deal of rubbish."⁷⁴

The next major shift in judicial conceptions of religion was marked by the emergence of the "functional" definition of religion, which focuses on the role of the avowed belief in the life of the individual rather than on the content of the belief itself.⁷⁵ The first indication of this shift to a functional definition of religion has been attributed to an opinion written by Judge Augustus Hand.⁷⁶ In a case involving the conscientious objector exemption to the Selective Training and Service Act of 1940, Justice Hand proclaimed:

Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellow-men 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 [Conscientious objection] may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse.⁷⁷

73. The leader of the "I Am" movement, Guy W. Ballard, was charged with mail fraud in connection with his proselytizing for the movement through the postal system. The Supreme Court held that the district court was correct in precluding the jury from considering the credibility of Ballard's doctrines, and its opinion widened the scope of religious clause protection:

[Freedom of religion] 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. . . . Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law.

Id. at 86-87.

74. *Id.* at 95 (Jackson, J., dissenting). Justice Jackson's comment illustrates that in a pluralistic society, individuals will inevitably disapprove of, or doubt the authenticity of, some religions but must tolerate them to ensure that everyone enjoys the same freedom. That is to say, determining what is a religion and what is rubbish is a personal, subjective choice, but the freedom to choose whether to practice a particular religion, free of compulsion from the state, is unequivocally guaranteed by the religion clauses.

75. See Note, *supra* note 71, at 1061.

76. Derek Davis described Judge Hand's opinion in *Kauten* as a "landmark" in freedom of religion jurisprudence "because it was the first to offer a functional definition of religion." Davis, *supra* note 64, at 96.

77. *United States v. Kauten*, 133 F.2d 703, 708 (2d Cir. 1943).

The functional view acknowledges views of human consciousness and self-awareness beyond orthodox religions and could thus include broader varieties of religious experience. *Kauten* helped pave the way for Supreme Court opinions in the ensuing decades that recognized a wide array of spiritual orientations beyond the theological boundaries of mainstream Christianity and other well-established faiths. For example, in *Torcaso v. Watkins*,⁷⁸ the Supreme Court unanimously invalidated a provision of Maryland's Constitution invoked to prevent an avowed Secular Humanist from becoming a notary public because of his refusal to take an oath declaring his belief in God.⁷⁹ The Court reasoned that the Establishment Clause prohibited government compulsion to proclaim belief or disbelief in any religion, to aid religions over nonreligious spiritual groups, or to aid particular religions over others.⁸⁰ Soon thereafter, in *United States v. Seeger*⁸¹ and *Welsh v. United States*,⁸² the Court recognized as "religious" all sincerely held beliefs "based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent,"⁸³ and then extended this characterization by holding that a sincere petitioner for draft exemption could only be denied if his professed

78. *Torcaso v. Watkins*, 367 U.S. 488 (1961).

79. *See id.* at 496.

80. *See id.* at 495.

81. *United States v. Seeger*, 380 U.S. 163 (1965).

82. *Welsh v. United States*, 398 U.S. 333 (1970).

83. *Seeger*, 380 U.S. at 176. In *Seeger*, the Court relied on the views of progressive theologian Paul Tillich and adopted his "ultimate concern" concept of religion. Tillich's thesis is:

that the concerns of any individual can be ranked, and that if we probe deeply enough, we will discover the underlying concern which gives meaning and orientation to a person's whole life. It is of this kind of experience, Tillich tells us, that religions are made; consequently, every person has a religion

As Tillich sees it, for some, "God" is an appropriate label for this ultimate concern; for others, the word is an obstacle. He is certain, however, that it is ultimate concern, and not the label "God," which defines religion.

Note, *supra* note 71, at 1067 & n.68.

Under the functional definition, it has been observed, even the Constitution itself could form the basis of a religion. *See* W. Tarver Roundtree, Jr., *Constitutionalism as the American Religion: The Good Portion*, 39 EMORY L.J. 203 (1990) (The Constitution serves what sociologists have identified as the four primary functions of religion -- (1) cementing the culture together, (2) providing "emotional support in the face of uncertainties about the future," (3) forming the basis for and reinforcing society's values and norms, and (4) providing channels "through which reality can be dealt with by reference to the mandates of the 'faith.'" *Id.* at 206-07. *But see* Note, *supra* note 71, at 1076 n.110 (noting that "[t]he American scheme of government contemplates that certain fundamental questions are reserved for individual decision and beyond the reach of the state" and that "[t]hus, by its own terms, a civil religion based upon American constitutionalism properly perceived can never be unconditional.").

beliefs did not “rest at all upon moral, ethical, or religious principle[s] but instead rest[ed] solely upon considerations of policy, pragmatism, or expediency.”⁸⁴

The aforementioned rulings signaled a broadening in American society’s concept of religion, paralleling the postwar boom in the “new religious movements” that have since become fixtures on the landscape of American religion.⁸⁵ The significant role of new and non-mainstream religious groups in the development of American freedom of religion jurisprudence has been widely recognized.⁸⁶ These groups are often perceived as a threat to society because of the apparent strangeness of their ways and the high degree of “internal group commitment” that characterizes “fringe” religious groups or “cults.”⁸⁷

Because the Supreme Court’s functional approach to religion broadens the scope of the Constitution’s protection of freedom of religion, difficulties arise when the state attempts to restrain the activities of potentially subversive groups that present themselves as “religious,”⁸⁸ and the “cloak of

84. *Welsh*, 398 U.S. at 342-43.

85. Derek Davis has observed that the rulings in *Ballard*, *Kauten*, *Torcaso*, *Seeger* and *Welsh* “expanded the constitutional meaning of religion in a way that paralleled the expanding pluralism of American religion” beyond the established Judeo-Christian religious traditions contemplated by the Framers. Davis, *supra* note 64, at 100.

86. See David Bromley & Thomas Robbins, *The Role of Government in Regulating New and Nonconventional Religions*, in *THE ROLE OF GOVERNMENT IN MONITORING AND REGULATING RELIGION IN PUBLIC LIFE* 205 (James E. Wood, Jr. & Derek Davis, eds., 1983). Bromley and Robbins present two explanations for why conflicts between the state and new religious groups have “loomed so large in church-state litigation in the United States”: (1) discrimination (“marginal and exotic groups have been victimized by an institutional system which tends to accommodate to the more powerful and established competitors of marginal movements”) and (2) fear (“‘cults’ represent a sinister menace that has confronted courts and other law enforcement agencies with unique control problems”). *Id.* at 208-09.

87. Bromley and Robbins maintain that “[t]he challenge such groups pose to the fundamental assumptions on which the social order is founded and the limited investment such groups have in institutional arrangements produce the mutual rejection that is characteristic of sect-society relationships.” *Id.* at 209-10. See also JAMES A. BECKFORD, *CULT CONTROVERSIES* 289 (1985) (“[F]aced with the teachings and practices of [new religious movements] which are not all compatible with liberal, utilitarian individualism, agents of the state tend to become suspicious. They are affronted by what is perceived as authoritarian, sectional, and irrational collectivism in some movements.”).

88. Davis, *supra* note 64, at 101.

As the diversity of religions benefitting from First Amendment protection has expanded, the ability of government to regulate religion on definitional grounds has correspondingly diminished. The judicial means by which this development has occurred has been the adoption of functional criteria, in replacement of substantive criteria, for defining religion.

religion" thereby becomes an effective shield from government scrutiny.⁸⁹ The experience of non-mainstream religious groups thus becomes an important indicator of the status of religious liberty in a given society, especially in comparison to state efforts to protect the social order.⁹⁰

3. *The Government's Regulation of Religion via Taxation*

The United States has a long history of granting federal tax exemption to churches and religious organizations,⁹¹ and this practice has withstood numerous constitutional challenges before the Supreme Court.⁹² In an

89. This also applies to the defining of unlawful or "immoral" activities as matters of "ultimate concern." For a detailed discussion of religious fraud in the post-*Ballard* era, see Marjorie Heins, 'Other People's Faiths': *The Scientology Litigation and the Justiciability of Religious Fraud*, 9 HASTINGS CONST. L.Q. 153 (1981) (maintaining that in fraud-based claims against new religions, the Court must determine the religious status of the organization and the context in which the alleged religious fraud took place, and that if the organization is a religion for constitutional purposes, and if the allegedly fraudulent representations were made in a religious context, then the claim is not justiciable).

90. See James E. Wood, Jr., *Government Intervention in Religious Affairs: An Introduction*, in THE ROLE OF GOVERNMENT IN MONITORING AND REGULATING RELIGION IN PUBLIC LIFE 1, 15 (James E. Wood, Jr. & Derek Davis, eds., 1983). Wood notes that "[i]n any society, the status of religious liberty is most readily discerned by the treatment accorded new and marginal religious groups." *Id.* at 15. Wood names several such groups, including the International Society for Krishna Consciousness (ISKCON, a.k.a. "the Hare Krishna movement"), the Unification Church, and the Church of Scientology, which he asserts have "experience[d] considerable disfavor as a result of their winning converts from mainline churches and the Jewish community." *Id.* at 16. In *Larson v. Valente*, 456 U.S. 228 (1982), the Court held that a state law imposing special reporting and registration requirements of religious organizations that solicited more than half of their funds from nonmembers impermissibly targeted members of the Unification Church ("the Moonies"). *Id.* at 253-55.

91. In *Religion, State and the Burger Court*, Leo Pfeffer notes that tax exemption for churches "may be as old as taxation itself," and traces tax exemption of church-owned property back to Genesis 47:26. LEO PFEFFER, RELIGION, STATE AND THE BURGER COURT 1 (1984) [hereinafter PFEFFER, RELIGION]. "[F]ederal tax exemption for churches has long been recognized in the United States, dating back to the early stages of federal income taxation, as set forth in the Corporation Excise Tax of 1909 [in Chapter 6, Section 38, 36 Stat. 11]." Stanley S. Weithorn & Douglas F. Allen, *Taxation and the Advocacy Role of the Churches in Public Affairs*, in THE ROLE OF GOVERNMENT IN MONITORING AND REGULATING RELIGION IN PUBLIC LIFE 51, 53 (James E. Wood, Jr. & Derek Davis, eds., 1983). Current provisions of the Internal Revenue Code continue the policy of allowing exemptions to churches, mandating that the church in question be organized and operated exclusively for religious purposes, that no part of the church's net earnings may go to the benefit of any private individual or shareholder, and that the church abstain from certain involvements in political campaigns and attempts to influence legislation. See I.R.C. § 501(c)(3) (West 1998), amended by Pub. L. No. 105-206 (West Supp. 1998).

92. See, e.g., *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 680 (1970) (holding that tax exemption for churches is beneficial for all concerned because it avoids excessive governmental entanglement with religion).

environment where few groups that claim to be religious are deprived of constitutional protection,⁹³ and where the United States government has been forced to explore non-judicial means to maintain a measure of control over suspect religious groups,⁹⁴ the Internal Revenue Service, by virtue of its power to decide what organizations qualify for religious exemptions from paying taxes, has become an important arm of the state in monitoring and, in some cases, suppressing the activities of religious groups that pose a threat to society.⁹⁵ Like the Supreme Court, the Internal Revenue Service has struggled to define the terms "church" and "religion" in order to determine which groups qualify for tax exemption.⁹⁶

Many groups that have achieved legal recognition as churches or religious organizations by courts of the United States, and are thus in principle entitled to religious tax exemptions, have nonetheless been denied exemption on other grounds.⁹⁷ In addition, some groups claim to have been victims of "selective prosecution"⁹⁸ by the Internal Revenue Service because

93. See Davis, *supra* note 64, at 101. As Davis notes, "Under [the Court's] content-neutral, functional approach, few of the 'new' religions are deprived of religious status." *Id.* at 102.

94. See *id.* at 101.

95. See, e.g., PFEFFER, RELIGION, *supra* note 91, at 1-13, 201-34. Pfeffer maintains that the favorable result of using tax laws for the prosecution of Al Capone established revenue law as a viable means for dealing with government targets who might otherwise be difficult to control. Pfeffer notes that "[s]uccess evokes emulation, so it is not surprising that prosecutions for revenue-law violations should be resorted to as a means to destroy unpopular religions." *Id.* at 12. See also Weithorn & Allen, *supra* note 91, at 59-60. "Because it holds the power to revoke the tax-exempt status of churches, the Internal Revenue Service is given an opportunity to control, through intimidation, those ideas it deems socially or politically unacceptable." *Id.*

96. Weithorn and Allen decry the Internal Revenue Service's "serious problem regarding the definition of terms such as 'church' and 'religious purposes'" and maintain that the "lack of workable guidelines [in the Internal Revenue Code], especially in dealing with the marginal church," permits the Internal Revenue Service "to attack [marginal churches] as the political pressures of the majority view of society may dictate." Weithorn & Allen, *supra* note 91, at 53, 59.

97. They have been denied primarily under the limitations of I.R.C. § 503(c)(3) (West 1998).

98. Wood, *supra* note 90, at 16 (discussing the case of Reverend Sun Myung Moon, founder of the Unification Church, who was convicted of income-tax evasion "for doing essentially what many other religious leaders of mainline groups have done through the years"). The Supreme Court declined to review Moon's conviction and he went to prison. See *Moon v. United States*, 466 U.S. 971 (1984). See also CONSTITUTIONAL ISSUES IN THE CASE OF REV. MOON (Herbert Richardson ed., 1984). The latter source includes the complete texts of amicus curiae briefs submitted to the Court in support of Moon. The authors of those briefs include, among others, the American Civil Liberties Union, the Catholic League for Religious and Civil Rights, the Center for Judicial Studies, the Church of Jesus Christ of Latter-Day Saints, the Institute for the Study of American Religion, the National Association of Evangelicals, the National Bar Association, the National Council of the Churches of Christ,

their beliefs or activities run counter to those of more established churches and the traditional norms of society.⁹⁹ The argument that the government has targeted some new or unconventional religious groups and their leaders for selective prosecution or disproportionately harsh scrutiny by the Internal Revenue Service has received support from many commentators on freedom of religion in America.¹⁰⁰ However, this argument must be viewed in the context of the formidable challenge the Internal Revenue Service faces in applying tax law to self-described religious organizations. The Internal Revenue Service must avoid (1) granting so many claims for religious exemptions¹⁰¹ that it limits the effectiveness of the government's taxation program and (2) casting so broad a net against fraudulent claims that sincere claims are denied — while remaining mindful of the Supreme Court's prohibition on excessive entanglement in religious affairs.¹⁰² At the very least, the claims of "targeted" religious groups illustrate one way in which the concept of legitimate state activities¹⁰³ can be stretched to allow government-sanctioned suppression of unorthodox groups. This implies that although the United States sees itself as "the embodiment of the liberty principle,"¹⁰⁴ the United States government has little trouble denying

the American Association of Christian Schools, the Southern Christian Leadership Conference, several states, and Senator Orrin G. Hatch, Chair of the Subcommittee on the Constitution of the Senate Committee on the Judiciary. *See id.* at 347, 407, 421, 449, 519, 545, 607, 681.

99. *See, e.g.,* PFEFFER, RELIGION, *supra* note 91, at 12 (discussing prosecutions for tax-law evasions of Jehovah's Witnesses in America as an example of how tax law enforcement can be subverted by "efforts primarily aimed at eliminating [unpopular groups] as an enemy of the people" rather than at the mere collection of revenue).

100. *See, e.g., id.;* Wood, *supra* note 90, at 16; Weithorn & Allen, *supra* note 91, at 56, 60.

101. Some claims for exemption may be fraudulent. Weithorn and Allen highlight both the benefits to qualifying for "church" status under the tax code and the potential incentive for opportunistic abuse those benefits create:

An organization labeling itself a 'church' is, in contrast to the secular nonprofit organization, largely insulated from financial scrutiny by the Internal Revenue Service. These groups, many with only a marginal relationship to "mainstream" churches, initially at least, enjoy a constitutionally created freedom of organization and action that does not exist for secular, nonprofit groups — a special benefit that results in the growth of tax evasion schemes under the umbrella of the "church."

Weithorn & Allen, *supra* note 91, at 58. For cases involving fraudulent religious tax exemption, see *Basic Bible Church v. Comm'r*, 74 T.C. 846 (1980) and *Riker v. Comm'r*, 244 F.2d 220 (9th Cir. 1957).

102. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971).

103. Here, the legitimate state activity is the enforcement of revenue laws.

104. Herbert Winkler, *Total Liberty is the American Ideal*, DEUTSCHE PRESSE-AGENTUR, Jan. 30, 1997, available in LEXIS, News Library, DPA File. For a collection of essays discussing the United States government's justifications for denying First Amendment rights through various developments in American history, see SILENCING THE OPPOSITION: GOVERNMENT STRATEGIES OF SUPPRESSION (Craig R. Smith ed., 1996). For a discussion of

constitutional liberties to disfavored groups.

B. *Freedom of Religion in Germany*

1. *Church and State*¹⁰⁵

Germany's *Grundgesetz* or "Basic Law" states, "There shall be no state church."¹⁰⁶ Yet this principle of "nonestablishment" has been interpreted by Germany's Federal Constitutional Court to have a much narrower meaning than that which the Supreme Court has drawn out of the Establishment Clause of the United States Constitution.¹⁰⁷ Where the Supreme Court has read the Establishment Clause to prohibit aid to religion, the Federal Constitutional Court has not extended the meaning of the Basic Law's prohibition of an official state religion beyond its facial meaning (*i. e.*, that the government may not proclaim an official German church).¹⁰⁸ Besides, many other provisions of the Basic Law expressly provide for state support of religion. For example, article 4(3) of the Basic Law extends armed service exemption to anyone with a conscientious objection, article 7(3) of the Basic Law provides for religious instruction in state schools, article 137(6) of the Weimar Constitution entitles religious bodies to tax their members, and article 139 of the Weimar Constitution protects Sundays and holidays as "days of rest from work and of spiritual edification."¹⁰⁹

Thus, a fundamental distinction can be made between the German and American church-state relations: Unlike the U.S. system of strict *separation* between church and state, Germany has developed an elaborate system of *cooperation* between church and state. Further, Germany has been identified

the government's denial of free exercise protection to Native American religions, see Craig Smith et al., *Suppression of Native American Culture*, in *SILENCING THE OPPOSITION: GOVERNMENT STRATEGIES OF SUPPRESSION* 81 (Craig R. Smith ed., 1996).

105. For a detailed overview of church-state relations in Germany, see Donald Kommers, *West German Constitutionalism and Church-State Relations*, 19 *GERMAN POL. & SOC'Y* 1 (1990).

106. The language appears in article 137 of the German Constitution of 11 August 1919 (WEIMAR CONST.), which is incorporated into the Basic Law — along with articles 136, 137, 138, 139, and 141 of the Weimar Constitution, all of which relate to the rights of religious communities — under the Basic Law's article 140. GRUNDGESETZ [Constitution] [GG] art. 140, WEIMAR CONST. art. 137.

107. See DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 444 (1997).

108. See DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 267 (1994).

109. GG arts. 4(3), 7(3), WEIMAR CONST. arts. 137(6), 139. See also CURRIE, *supra* note 108, at 245 (discussing these and other articles of the Basic Law). "Several questions as to the permissibility of particular state actions arguably supporting religion in Germany are expressly resolved by [the Basic Law's] provisions" *Id.*

as the "prototypical example" of a "cooperationist" regime, which according to W. Cole Durham, Jr., is characterized in part by the employment of various "patterns of aid or assistance that benefit larger denominations in particular" without official endorsement of any religion and by an official policy "affording equal treatment to all religious organizations."¹¹⁰

From an American or "separationist" perspective, the most striking example of Germany's system of church-state relations is the Basic Law's provision allowing German churches to tax their congregations.¹¹¹ The church tax is rooted in the historically close connection between Germany's mainline churches and state authority; its presence in the Basic Law is indicative of the churches' role in rebuilding postwar Germany.¹¹² Because of the churches' historical dependence on state authority for protection, both the Protestant and Catholic churches developed into "essentially conservative

110. W. Cole Durham, Jr., *Perspectives on Religious Liberty: A Comparative Framework*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE 1, 20-21 (Johan D. van der Vyver & John Witte, Jr. eds., 1996). Durham presents a continuum of church-state regimes including "absolute theocracies" (which are stereotypically associated with Islamic fundamentalism), regimes with official "established churches" (a broad category which may include governments that afford equal treatment for other churches, e.g., Great Britain), regimes with "endorsed churches" (typical of countries where a particular religion predominates but with constitutions guaranteeing equal protection to other faiths, e.g., Spain), "cooperationist regimes" (e.g., Germany), "accommodationist regimes" (which generally recognize the cultural importance of religion yet remain neutral toward religious bodies and maintain a fundamental separation between church and state), "separationist regimes" (such as the United States, where any suggestion of special treatment for religious groups is suspect and state support for religion, e.g., religious indoctrination in public schools, is strictly prohibited), regimes characterized by their "inadvertent insensitivity" toward religion (which overlap with stricter forms of separation) and, finally, regimes characterized by "hostility and overt persecution" of religious groups. *Id.* at 19-23.

111. The provision, contained in Weimar article 137(6), reads: "Religious communities that are public corporations shall be entitled to levy taxes in accordance with Land law on the basis of the civil taxation lists." GG, WEIMAR CONST. art. 137(6). It is qualified by limiting those who may be taxed to current church members (not, for example, former members or spouses of current members) and by Weimar article 137(5), which provides:

Religious communities shall remain public corporations if they have enjoyed that status hitherto. Other religious communities shall be granted like rights upon application where their constitution and the number of their members offer an assurance of their permanency. Where several such public religious communities form one organization it too shall be a public corporation.

GG, WEIMAR CONST. art. 137(5). For a list of citations to major Constitutional Court cases involving the church tax, see KOMMERS, *supra* note 107, at 587 n.57.

The current "assurance of permanency" requires a thirty-year existence and a membership comprising at least one percent of the population of the state where the church is located, which provisions effectively ensure that the church tax will remain the province of the mainline churches. As Donald Kommers notes, "The primary beneficiaries of this constitutional policy are the Catholic and Protestant (Reformed and Evangelical) churches and the relatively small Jewish religious community." KOMMERS, *supra* note 107, at 484.

112. See *infra* notes 117-20 and accompanying text.

institutions"¹¹³ inclined to support the status quo.¹⁴ In exchange for ecclesiastical support, the ruling monarchs gave the churches a variety of privileges, including substantial tax benefits.¹¹⁵ The Protestant church, in particular, received privileged status, and in most German states Lutheranism was the de facto official religion.¹¹⁶ The church tax itself was established in 1919, along with Germany's first constitutional democracy, and it was revived as part of the Basic Law in 1949, coinciding with a period in German history that "saw the German churches at their most influential [position in Germany society] since the Reformation."¹¹⁷

The postwar era in German history entrenched the mainline churches in German public life and laid the foundation for their continued influence in the Federal Republic. David Conradt noted:

Because the churches were regarded by military occupiers as untainted by Nazism, the best way to get permission during the occupation period for opening or reopening a business or starting a newspaper or a political party was to have ample references from, or some affiliation with, one or both churches.¹¹⁸

In addition to their practical role in helping to reestablish German institutions after the war, the churches helped foster unity among a defeated and demoralized postwar German population.¹¹⁹ Many Germans thus formed close bonds with their churches during the post-Nazi renewal of religious life in Germany, and few opposed the incorporation of the church tax into the Basic Law.¹²⁰ Allowing churches to tax their members¹²¹ has also enabled the churches to benefit German society via church-run public services.¹²²

113. DAVID P. CONRADT, *THE GERMAN POLITY* 60 (6th ed. 1996). "Since the Reformation, the religious and regional division of the country has meant that the dominant church in any given area was dependent on existing state authority, that is, on the respective princes who acted as protectors of the faith in their territories." *Id.*

114. *See id.*

115. *See id.*

116. *See* GORDON A. CRAIG, *THE GERMANS* 83-103 (1991).

117. FREDERIC SPOTTS, *THE CHURCHES AND POLITICS IN GERMANY* at x (1973).

118. CONRADT, *supra* note 113, at 60.

119. "In the postwar era," Jürgen Moltmann has written, "the churches were certainly the strongest organizations for the unity of the German people." Jürgen Moltmann, *Religion and State in Germany: West and East*, 403 *ANNALS AM. ACAD. POL. & SOC. SCI.* 110, 112-13 (1986).

120. *See id.*

121. The tax, in the form of an eight to ten percent surcharge on the taxable income of church members, is collected by the German states and then distributed to the churches, making the qualifying German churches "among the most affluent in the world[.]" CONRADT, *supra* note 113, at 60. Between 1989 and 1992, for example, approximately \$35 billion was collected for the Catholic and Protestant churches. *See id.* at 74 n.18.

122. *See* KOMMERS, *supra* note 107, at 485.

The churches have ample opportunity to influence German society by other means as well, considering that both the Catholic and Protestant churches are by law represented on the boards of major radio and television broadcasting networks, have representatives sitting on various advisory commissions at federal and state levels, and maintain Bonn and Berlin offices to ensure that their views are well-represented in the government and parliament.¹²³

Although state support of religion is well-established in German history¹²⁴ and is expressly provided for in the Basic Law, the Basic Law does mandate that the German government maintain a position of neutrality toward all religious groups.¹²⁵ In view of the benefits and influence accorded the Protestant and Catholic churches, this principle of neutrality has not played out in reality, considering that smaller and newer churches have little chance of achieving corporate status.¹²⁶ According to one commentator, a series of recent court rulings has exacerbated this problem and undermined Germany's official commitment to religious tolerance and pluralism.¹²⁷ The

123. See CONRADT, *supra* note 113, at 146.

124. See Martin Heckel, *Religious Human Rights in the World Today: A Report on the 1994 Atlanta Conference: Legal Perspectives on Religious Human Rights: Religious Human Rights in Germany*, 10 EMORY INT'L L. REV. 107 (1996) (focusing on the historical relationship between church and state in Germany).

125. The German concept of neutrality is in part embodied in the provisions of article 3(3) of the Basic Law, which bans legislative classifications based on religious opinions, and article 4(1), which guarantees freedom of conscience. GG arts. 3(3), 4(1). However, as outlined by Cole Durham, German neutrality may be understood in terms of the state's "nonintervention," that is, "disentanglement from religious organizations in the interest of preserving their autonomy," and "nonidentification," the requirement that the state "refrain from taking sides in religious conflicts and from endorsing any religion or ideology[.]" regarding religious affairs, in addition to the aforementioned concept of cooperation. KOMMERS, *supra* note 107, at 466. See also *id.*, at 586 n.38 (citing Cole Durham, Religion and the Public Schools: Constitutional Analysis in Germany and the United States, 14-23 (Oct. 21, 1977) (unpublished paper presented at the First Annual Conference of the Western Association for German Studies)).

126. This seems especially true for any religious groups that pose a threat to the mainstream churches, given that the ruling Christian Democratic Union political party was formed (in the late 1940s) largely by members of the Catholic and Protestant churches who sought to "[apply their] general Christian principles to politics" and take advantage of their "ties to the churches . . . the one pre-Nazi social institution that survived the war with some authority, legitimacy, and organizational strength." CONRADT, *supra* note 113, at 119. The party played a significant role in the formation of the Federal Republic, as many of the drafters of the Basic Law were members of the newly formed party and its older and more liberal counterpart, the Social Democrats. See JOHN F. GOLAY, *THE FOUNDING OF THE FEDERAL REPUBLIC OF GERMANY 18-22* (1965). See also *id.*, app. C, at 265-75 (listing brief biographies of Parliamentary Council leaders).

127. See Norbert Kirsch with Irving Hexham, *Religious Freedom Under Threat?* (visited Oct. 21, 1997) <<http://www.acs.ucalgary.ca/~hexham/germany/NOR-1.html>>. Kirsch isolates a 1988 ruling by the Mannheim Administrative Court (upheld by the Federal Administrative Court in 1993) as a turning point in the decline of religious freedom in

apparent favoritism afforded by the church tax illustrates Cole Durham's assertions of the ease with which cooperationist regimes can "slip . . . into patterns of state preference"¹²⁸ and the frequency with which cooperationist regimes raise complex "problems of equal treatment."¹²⁹ Finally, although most Germans accept the traditional cooperation between church and state as legitimate,¹³⁰ there is growing sentiment among the population that at least the church tax should be "reduced or eliminated."¹³¹

2. *Scope of Protection For Religious Activity*

The Basic Law contains an elaborate web of provisions protecting religious exercise that together may be seen as an analogue to the U.S. Constitution's Free Exercise Clause.¹³² The focal point of these provisions is Article 4, which proclaims that freedom of "faith," "conscience" and "creed," whether religion or ideology, is "inviolable."¹³³ Other provisions of the Basic Law prohibit discrimination based on "faith, religion or political opinions,"¹³⁴ guarantee equal civil and political rights without regard to "religious denomination" or "non-adherence to a denomination,"¹³⁵ and

Germany. The ruling upheld the government's duty to issue warnings on potentially dangerous religious groups, *i.e.*, those whose morals and practices appear to be at odds with conventional Christian principles and with the values embodied in the Basic Law. As a result of these government warnings, Kirsch argues, the targeted groups are ostracized from society and thus become victims of a kind of legalized discrimination. *See id.*

128. Durham, *supra* note 110, at 21.

129. *Id.* Problems which arise in cooperationist programs may be avoided in regimes that officially endorse churches or maintain a limited program of accommodation — *i.e.*, "cooperationism without the provision of any direct financial subsidies to religion or religious education." *Id.*

130. According to David Currie, in general, Germans are "less hostile to public support of religion" than Americans. CURRIE, *supra* note 108, at 247. Similarly, David Conradt maintains that "[c]riticism of state financial support [of religion] and the advocacy of a clear separation of church and state" are not widespread in Germany and notes that, in general, proponents of these views have been limited to "small groups of liberal intellectuals centered in the larger metropolitan areas" of Germany. CONRADT, *supra* note 113, at 148.

131. CONRADT, *supra* note 113, at 148. "To avoid paying the tax and to neutralize the effect of new tax increases in 1995, record numbers of members left both churches." *Id.*

132. *See* KOMMERS, *supra* note 107, at 443.

133.

(1) Freedom of faith and conscience as well as freedom of creed, religious or ideological, are inviolable.

(2) The undisturbed practice of religion shall be guaranteed.

(3) Nobody may be forced against their conscience into military service involving armed combat. Details shall be made the subject of a federal law.

GG art. 4.

134. GG art. 3(3). Article 3(3) also includes the provision that "[n]o one may be discriminated against on account of their disability." *Id.*

135. GG art. 33(3).

prohibit obligatory disclosure of "religious convictions" and compulsory performance of "any religious act or ceremony."¹³⁶ In addition, "free exercise" rights in the Basic Law include the right of religious communities "to regulate and administer [their own] affairs."¹³⁷ Together these provisions show that the Basic Law's free exercise protections (1) encompass non-religious belief, (2) are explicitly connected to guarantees of equal rights and equal protection of the law, and (3) embody some aspects of the "separationist" requirement that the state abstain from government entanglement in religious affairs.¹³⁸

Although the Basic Law's protections bear a passing similarity to the Supreme Court's free exercise jurisprudence, the Federal Constitutional Court¹³⁹ has been more liberal than the Supreme Court in according "special privileges" to religious individuals and organizations, most notably in permitting religion-based exemptions to generally applicable, religiously neutral laws.¹⁴⁰ One important case arose when a commercial rag dealer sought recourse for the loss of business he experienced when a Catholic youth organization began publicizing its charitable clothing drive from the church pulpit.¹⁴¹ The rag dealer had the clothing drive enjoined under a law prohibiting unethical competition, but the Constitutional Court ruled that the clothing drive was a religious exercise and therefore deserved "special protection" from the law.¹⁴² This ruling established the Constitutional Court's doctrine of allowing religious exemptions from generally applicable civil laws,¹⁴³ and it now illustrates how free exercise protection has been interpreted by the Constitutional Court to extend to church-related actions in

136. GG, WEIMAR CONST. art. 136(4).

137. GG, WEIMAR CONST. art. 137(3).

138. See *supra* note 57 and accompanying text.

139. The Federal Constitutional Court (*Bundesverfassungsgericht*) is devoted exclusively to constitutional questions. Like the Supreme Court, it is the ultimate source of constitutional interpretation. See GG art. 93. See also KOMMERS, *supra* note 107, at 3-29 (discussing the role of the Federal Constitutional Court).

140. CURRIE, *supra* note 108, at 257-58. "[A]s in the United States, the religious and conscientious freedoms of the Basic Law confer no absolute exemption from generally applicable laws[.]" but various opinions of the Constitutional Court "plainly establish that in some instances religious individuals and institutions are entitled to special privileges, as the Supreme Court for a brief period acknowledged before flatly holding to the contrary in the controversial peyote case in 1990 [Employment Div. v. Smith, 494 U.S. 872 (1990)]." *Id.*

141. See *Entscheidungen des Bundesverfassungsgericht [BverfGE]* [Federal Constitutional Court] 24, 236 (1968), translated in KOMMERS, *supra* note 107, at 445-49.

142. *Id.* Discussing the case, David Currie noted that "the Constitutional Court did what the Supreme Court refused to do in the flag-salute case of *Minersville School District v. Gobitis* [310 U.S. 586 (1940)]: it carved out on the basis of religious freedom an exception from a generally applicable law assumed to be valid on its face." CURRIE, *supra* note 108, at 259.

143. See CURRIE, *supra* note 108, at 259.

secular contexts.

The Constitutional Court has allowed religion-based exemptions from criminal laws as well, establishing its doctrine in the *Blood Transfusion Case*.¹⁴⁴ In that case, the Constitutional Court held that article 4 exempted a husband, who was a member of the Association of Evangelical Brotherhood, from a conviction for criminal charges for failing to help his wife before she died.¹⁴⁵ The Court held that article 4(1) mandated a "relaxation of criminal law" in situations where an individual is placed in a state of "spiritual distress" by his conflicting duties to faith and to the law.¹⁴⁶ Although in that case the Constitutional Court stopped short of declaring "that criminal laws must *always* take second place to religious convictions[.]" it conclusively affirmed that religious liberty sometimes requires exceptions to criminal laws.¹⁴⁷

Another important aspect of the Basic Law's free exercise protection is the degree of autonomy it affords religious organizations in conducting their own affairs. The relevant provision reads: "Every religious community shall regulate and administer its affairs independently within the limits of the law valid for all. It shall confer its offices without the participation of the state or the civil community."¹⁴⁸ This right has been interpreted to extend far beyond the apparent limitations of the Basic Law's language.¹⁴⁹ For example, the Constitutional Court has declared that the internal affairs of the church are beyond the reach of generally applicable laws.¹⁵⁰

144. See BVerfGE 32, 98 (1971), translated in KOMMERS, *supra* note 107, at 449-52.

145. *See Id.*

146. *Id.* The opinion reads:

The duty of all public authority to respect sincere religious convictions, [as] contained in Article 4(1) of the Basic Law, must lead to a relaxation of criminal laws when an actual conflict between a generally accepted legal duty and a dictate of faith results in a spiritual crisis for the offender that, in view of the punishment labeling him a criminal, would represent an excessive social reaction violative of his human dignity.

Id. Here, the Federal Constitutional Court's consideration of "spiritual distress" is analogous to the Supreme Court's discussion in *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 140-44 (1987), of the "cruel choice" between following one's religious beliefs and obeying the law.

147. CURRIE, *supra* note 108, at 261.

148. GG, WEIMAR CONST. art. 137(3).

149. David Currie has written, "Ironically, of all the religion clauses in the German constitution this provision [Weimar article 137(3)] appears most clearly to say precisely the opposite [of what it has been interpreted to mean]." CURRIE, *supra* note 108, at 263.

150. Summarizing the Constitutional Court's position as outlined in BVerfGE 42, 312 (333-34) (1976), Currie writes:

The commentators all agreed, the Court declared, that the reference to general laws in Article 137(3) was not to be taken literally . . . not even a generally applicable law could validly interfere with a religious body's regulation of its

The Constitutional Court's rationale for maintaining this position is that regulations that would affect religious bodies more profoundly than secular bodies are unconstitutional as applied to religious bodies.¹⁵¹ This interpretation, according to David Currie, "establish[es] a standard of de facto inequality under [article] 137(3)."¹⁵² In 1985, the Court applied this approach in two notable cases.¹⁵³ In the first, the Court held that a general law prohibiting arbitrary dismissal of employees did not apply to a church-affiliated hospital that fired a doctor for publicly disavowing the church's prohibition on abortion. In the second, the Court ruled that a similar law did not apply to a Catholic youth home that dismissed a clerk who was no longer a member of the church.¹⁵⁴

Determining whether an organization qualifies for religious status, and thereby receives the benefit of the Constitutional Court's liberal application of Weimar article 137(3), is left up to the state in which the organization is located.¹⁵⁵ The Constitutional Court has ruled that, in cases in which the status of an organization is disputed, the courts of the German states may use their own criteria to establish whether a group qualifies as "religious" for constitutional purposes.¹⁵⁶ This confers liberal discretion on the lower courts¹⁵⁷ and reduces the breadth of protection afforded by Weimar article 137(3) in the sense that a group's religious status may be determined independent of the group's own "self-understanding."¹⁵⁸

3. *The Basic Law's Restrictions on Basic Rights*

There are two principal doctrines under which the Constitutional Court has interpreted the Basic Law to allow restrictions on basic rights:¹⁵⁹ the

own truly internal affairs, and a merely "indirect" effect on the outside world did not remove the matter from the internal sphere.

CURRIE, *supra* note 108, at 263.

151. *See id.* at 263-64 (citing BVerfGE 42 (334)).

152. *Id.* at 264 n.105. *See also* KOMMERS, *supra* note 107, at 493-95.

153. *See* BVerfGE 70, 138 (162-72) (1985). Both cases are briefly discussed in CURRIE, *supra* note 108, at 266 nn.113-14.

154. Compare these two cases with *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987), in which the Supreme Court upheld a provision exempting religious organizations from the federal statute prohibiting religion-based employment discrimination.

155. *See* Kirsch, *supra* note 127, at 9-10.

156. *Id.* (citing BVerfGE 83, 353 (1991)).

157. *See id.*

158. *Id.* (citing this development as an indication that constitutional protection of freedom of religion is waning in Germany).

159. *See* KOMMERS, *supra* note 107, at 239. The first 19 articles of the Basic Law guarantee a series of basic rights and liberties arranged "to underscore the priority of individual freedom in the scale of German constitutional values." *Id.* The articles describe:

“objective order of values”¹⁶⁰ and the “militant democracy.”¹⁶¹ The Constitutional Court has viewed the order of values less as a doctrine for restricting basic rights than as a method of interpreting the constitution “as a unified structure of *substantive* values.”¹⁶² It is the means by which the Constitutional Court resolves conflicts between constitutionally protected basic rights and makes those rights binding against state encroachment and individual actions.¹⁶³ The Constitutional Court first recognized the Basic Law’s order of values in a case involving freedom of expression¹⁶⁴ and applied it to freedom of religion in the *Tobacco Atheist Case*.¹⁶⁵

In the *Tobacco Atheist Case*, the Constitutional Court invoked the Basic Law’s order of values by finding that the Article 1 guarantee of human dignity was “a limitation not only on state action but also on the rights of other individuals.”¹⁶⁶ The Court used this limitation to uphold the denial of parole to a prison inmate on the grounds that he “attempted to bribe fellow inmates by offering them tobacco to forswear their religion.”¹⁶⁷ The Court said this was not an infringement on the would-be parolee’s religious freedom. Rather, the Constitutional Court held, “[a]rticle 4 protected the right to proselytize for or against religion only to the extent consistent with the dignity of others,”¹⁶⁸ and “[t]o exploit the constraints of prison life by offering such inducements was morally reprehensible . . . , an abuse . . . of

[the principle of human dignity (article 1), the right to life and personal inviolability (article 2),] equality under law (article 3), religious liberty (article 4), freedom of expression (article 5), parental rights (article 6), educational rights (article 7), freedom of assembly (article 8) and association (article 9), privacy of posts and telecommunications (article 10), freedom of movement (article 11), occupational rights (article 12), the right to conscientious objection (article 12a), inviolability of the home (article 13), and the right to property (article 14). Articles 15, 16, 16a, and 17 deal, respectively, with public ownership, citizenship, asylum, and the right of petition. Article 18 provides for the forfeiture of certain basic rights if they are used to threaten Germany’s political democracy. Article 19, finally, emphasizes the value of these guaranteed rights by declaring that “in no case may [the state] encroach upon the content of a basic right.”

Id.

160. *Id.* at 47-48, 363-64.

161. *Id.* at 37-38, 217-37.

162. *Id.* at 47.

163. This is referred to as the *Drittwirkung*, or “third party effect.” See CURRIE, *supra* note 108, at 182-87.

164. BVerfGE 7, 198 (1958), translated in KOMMERS, *supra* note 107, at 361-68.

165. BVerfGE 12, 1 (1960). The case is discussed in KOMMERS, *supra* note 107, at 452-53 (quoting the opinion) and CURRIE, *supra* note 108, at 253.

166. CURRIE, *supra* note 108, at 253.

167. *Id.* See also KOMMERS, *supra* note 107, at 452-53 (discussing the same case).

168. CURRIE, *supra* note 108, at 253. The preeminent value in the order is human dignity. GG art. 1(1).

religious freedom, and thus not protected by Article 4.”¹⁶⁹ In short, according to the Constitutional Court, “[o]ne who violates limitations erected by the Basic Law’s general order of values cannot claim freedom of belief.”¹⁷⁰

Finally, the order of values doctrine is controversial among Constitutional Court justices and constitutional scholars.¹⁷¹ Justice Wolfgang Zeidler, former President of the Court, maintains that the order of values is “presupposed, not substantiated.”¹⁷² Critics see it “as a kind of ‘scaffold’ superimposed on the structure of the [Basic Law]” that “permits interpreters to wash the structure in religious and ideological solvents of their own choosing.”¹⁷³ They claim that the concept creates a standard of review for fundamental rights conflicts that is overly broad and indeterminate and thus gives judges too much discretion.¹⁷⁴ As a result, some critics have referred to the order of values as a “tyranny of values” that jeopardizes the Basic Law’s commitment to tolerance and pluralism.¹⁷⁵

In contrast to the order of values, the militant democracy doctrine has never been applied to restrict the right to religious exercise,¹⁷⁶ because it is essentially a political measure.¹⁷⁷ However, the breadth of the Basic Law’s freedom of belief protections¹⁷⁸ and the legal position of organizations of disputed religious character¹⁷⁹ make an overview of the militant democracy

169. CURRIE, *supra* note 108, at 253.

170. KOMMERS, *supra* note 107, at 452 (quoting BVerfGE 12 (4-5)).

171. *See id.* at 313.

172. *Id.*

173. *Id.*

174. *See id.* Zeidler has said that “[w]hoever controls the [meaning of the] order of values” thereby “controls the Constitution.” *Id.* (quoting from an unpublished paper by Zeidler).

175. Ulrich Karpen, *The Constitution in the Face of Economic and Social Progress*, in *NEW CHALLENGES TO THE GERMAN BASIC LAW* 87, at 99 (Christian Starck ed., 1991). Ulrich Karpen summarizes this view in the following excerpt, which also touches on the idea of modern German constitutionalism as a kind of civil religion:

The Constitution is no longer primarily a basic organization of the state to regulate the contest of pluralistic values in the political process, but rather a value system in itself. . . .

Everybody deserves orientation, and while and because religions and consent to ethics are losing strength, modern society looks at the Constitution as a basis of consensus and a value system. This is, to a certain extent, legitimate and useful, but it embraces the danger of the “tyranny of values,” which might jeopardize tolerance and pluralism.

Id. at 99.

176. Or at least it has not been acknowledged to have done so.

177. *See* CURRIE, *supra* note 108, at 213.

178. *See, e.g.*, GG art. 4(1) (including freedom of ideological creed); GG art. 3(3) (prohibiting discrimination on the basis of political opinion as well as religion).

179. *See supra* notes 155-58 and accompanying text.

relevant to a discussion of religious freedom in Germany.

The phrase "militant democracy"¹⁸⁰ refers to the Basic Law's authorization of restrictions on, or revocations of, the rights of groups and individuals who use their constitutionally-protected rights to subvert the constitutional democracy established by the Basic Law. The central provision is article 21(2), which provides: "Parties which by reason of their aims or the conduct of their adherents seek to impair or do away with the free democratic basic order or threaten the existence of the Federal Republic of Germany shall be unconstitutional."¹⁸¹ Additionally, article 9, which governs freedom of association, provides that "[a]ssociations whose aims or activities contravene criminal law or are directed against the constitutional order or the notion of international understanding shall be banned."¹⁸² Article 18 provides for the forfeiture of certain basic rights¹⁸³ by those who "abuse" them "in order to undermine the free democratic basic order."¹⁸⁴ The Constitutional Court has the exclusive power to ban political parties under article 21, while "anti-constitutional" associations may be banned by executive order.¹⁸⁵

The militant democracy provisions were incorporated into the Basic Law as a reaction to the weaknesses of the Weimar Constitution.¹⁸⁶ It is a

180. The term was first used, as "*streitbare Demokratie*" or "*wehrhafte Demokratie*," in BVerfGE 5, 85 (139) (1956) (ruling that the German Communist Party was unconstitutional). See KOMMERS, *supra* note 107, at 222-23.

181. GG art. 21(2).

182. GG art. 9(2).

183. It provides for the forfeiture of the rights to freedom of expression, freedom of teaching (both are covered by article 5), freedom of assembly (article 8), freedom of association (article 9), privacy of correspondence, posts and telecommunications (article 10), property (article 14), or the right of asylum (article 16a). GG art. 18. See, e.g., Ferdinand Protzman, *Germany to Try to Revoke Rights of 2 Neo-Nazis*, N.Y. TIMES, Dec. 10, 1992, at A15 (discussing the German government's announcement that it would ask the Federal Constitutional Court to invoke Article 18 to stop two reputed neo-Nazi leaders from "whipping up hysteria against foreigners and Jews").

184. GG art. 18. In addition, article 5(3) provides that "[f]reedom of teaching shall not absolve anybody from loyalty to the constitution." GG art. 5(3).

185. GG art. 21. This provision was exercised by the government in 1992 in the wake of a series of violent attacks on foreigners by right-wing groups in Germany. See Ferdinand Protzman, *Germany Moves to Ban a Second Neo-Nazi Party*, N.Y. TIMES, Dec. 11, 1992, at A15 (discussing Germany's decision to ban the Deutsche Alternativ party for "inciting racial hatred," after having recently banned the Nationalist Front for similar activities).

186. The Weimar regime, representing Germany's first attempt at democracy, ended in catastrophe as Hitler was able to ascend to power and dissolve the republic's democratic institutions by legal means. Thus, the Weimar Constitution, and particularly its deficiencies, provided a model for establishing a postwar constitution with strong and irrevocable democratic institutions and protections of fundamental rights. As Peter Graf Kielmansegg put it,

There is general agreement that the Basic Law first and foremost is a reactive

tool for eliminating extremist parties and associations before they can gain momentum;¹⁸⁷ the difficulty in using this tool is in deciding when a group poses a real threat to the constitutional order.¹⁸⁸ The Constitutional Court has provided guidance, ruling that "mere advocacy of overthrow" is insufficient to justify banning a party and that the issue is whether the "party has a fixed purpose constantly and resolutely to combat the free democratic basic order" and manifests this purpose "in political action according to a fixed plan."¹⁸⁹ The Constitutional Court stated that the purpose or plan must be discerned from the party's official declaration of its program, from statements of its leaders, and from its educational materials.¹⁹⁰

Related aspects of the militant democracy that the Constitutional Court has upheld include: the interest of state agencies in issuing public reports about associations, parties, and other organizations whose members are suspected of engaging in anti-constitutional activities;¹⁹¹ restrictions on article 10 rights to privacy of mail and telecommunications if the intrusions "serve to protect the free democratic basic order or the existence of the federation or a state;"¹⁹² and the exclusion of applicants who have engaged in "anti-

constitution. The past that had shaped the political outlook of the founding fathers and mothers had two faces: an ill-functioning, weak, and helpless democracy on the one hand and a cruel despotism on the other. Four fundamental conclusions were drawn from these memories: a constitution which effectively protected individual rights was to be the new sovereign; parliamentary democracy was to be institutionalized in such a way that strong and effective government was possible; democracy had to be enabled to defend itself against its enemies; and . . . the future Germany had to be definitely tied to the idea of peaceful cooperation among nations.

Peter Graf Kielmansegg, *The Basic Law—Response to the Past or Design for the Future*, in FÖRTY YEARS OF THE GRUNDGESETZ 5, 6 (1990). See also the language of the Constitutional Court's opinion banning the German Communist Party, BVerfGE 5, 85 (1956): "Article 21(2) . . . expresses the conviction of the [drafters of the Basic Law], based on their concrete historical experience, that the state could no longer afford to maintain an attitude of neutrality toward political parties." KOMMERS, *supra* note 107, at 223.

187. See KOMMERS, *supra* note 107, at 218.

188. Compare, e.g., BVerfGE 2, 1 (1952) (banning the Socialist Reich Party) and BVerfGE 5, 85 (1956) (banning the German Communist Party) with BVerfGE 40, 287 (1975) (deciding not to ban an extreme right-wing group). These cases are discussed in KOMMERS, *supra* note 107, at 218-24.

189. KOMMERS, *supra* note 107, at 223.

190. See *id.*

191. See *id.* at 224 (discussing BVerfGE 40, 287 (1975)). This interest has also been recognized in the context of potentially subversive religious organizations. See Kirsch, *supra* note 127.

192. KOMMERS, *supra* note 107, at 228 (discussing BVerfGE 30, 1 (1970)). The Constitutional Court stated: "Enemies of the Constitution must not be allowed to endanger, impair, or destroy the existence of the state while claiming protection of rights granted by the Basic Law." *Id.* at 228 (quoting BVerfGE 30 (19-20)). The primary intruder on Article 10 privacy rights is the Office for the Protection of the Basic Law, Germany's domestic

constitutional” activities from jobs in the civil service.¹⁹³

While the intolerant and suppressive aspects of the militant democracy doctrine would seem to be clearly unconstitutional in the United States, during times of crisis in American history, the U.S. Supreme Court has upheld measures by the United States government “strikingly similar in effect”¹⁹⁴ to those allowed by the Basic Law’s militant democracy.¹⁹⁵ This underscores a contrast between the Basic Law and the U.S. Constitution: the militant democracy exemplifies the forthrightness with which the Basic Law sets out the duties attached to rights of individual autonomy — the right to self-determination is coupled with a duty to respect the constitutional order.¹⁹⁶ The more idealistic approach embodied in the United States Constitution — guaranteeing individual autonomy without explicit qualifications — has led to a less direct means of restricting the rights of those who abuse them, that is, Supreme Court interpretations allowing individual rights to be restricted under “competing state interest” analyses.¹⁹⁷ As a self-proclaimed religious group, viewed by German and American government institutions as dangerous and fraudulent, Scientology becomes an interesting focus for a comparison of the German and American systems.

intelligence agency. *See id.* at 228-29. *See also infra* note 263 and accompanying text (noting the Office’s surveillance of the Church of Scientology).

193. *See* BVerfGE 39, 334 (1975), translated in KOMMERS, *supra* note 107, at 229-32. Specifically, this ruling upheld the constitutionality of “loyalty guidelines” that federal and state governments began issuing, after a turbulent period of terrorist attacks and student uprisings, in order to exclude “enemies of democracy” from public service jobs. *Id.* *See also* CURRIE, *supra* note 108, at 222 (discussing the same case).

194. CURRIE, *supra* note 108, at 215.

We like to think we are more tolerant in this country. Our Constitution contains no comparable provisions But the fact is that in periods of real or imagined danger we have tended to adopt measures strikingly similar in effect to those expressly countenanced by the Basic Law, and the Supreme Court has tended to uphold them — in the teeth of an ostensibly absolute constitutional protection.

Id.

195. *See id.* n.175 (citing *Schenck v. United States*, 249 U.S. 47 (1919) (involving the Espionage Act); *Gitlow v. New York*, 268 U.S. 652 (1925); *Whitney v. California*, 274 U.S. 357 (1927) (involving state syndicalism laws); *Dennis v. United States*, 341 U.S. 494 (1951) (involving the Smith Act); *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961) (involving the Subversive Activities Control Act).

196. *See* Kielmansegg, *supra* note 186, at 14 (discussing the lack of consensus in Germany as to “what kind of democratic self-defense is legitimate and against whom it is necessary”).

197. *See, e.g.*, *Schenck v. United States*, 249 U.S. 47 (1919) (restricting free speech that posed a “clear and present danger” to the United States). *See generally* SILENCING THE OPPOSITION, *supra* note 104; TRIBE, *supra* note 49, §§ 12-9 to 12-11, at 841-61.

IV. THE CHURCH OF SCIENTOLOGY IN THE UNITED STATES AND GERMANY

A. *The Church of Scientology in the United States — Controversy Surrounding the Church*

In the latter half of the twentieth century, as more and more people have abandoned traditional religion — either as being intellectually unsustainable or simply incompatible with modern life — the United States has seen unprecedented growth in the number and variety of new religious movements.¹⁹⁸ Most of these new movements, sometimes called “cults,” briefly flourish and then die out, rarely outliving their founders.¹⁹⁹ Those that survive beyond their initial fruition may eventually be accepted as legitimate religions.²⁰⁰ However, no religious group that has emerged in the last fifty years has even begun to approach a level of popularity and social acceptance akin to that of traditional mainstream religions.²⁰¹

From its earliest stages of development, Scientology has aimed for the mainstream of American religious life,²⁰² and the Church's promise of

198. See generally AMERICA'S ALTERNATIVE RELIGIONS (Timothy Miller ed., 1995). In his introductory essay, Miller writes,

American religion has been going through a great diversification and decentralization in the waning years of the twentieth century. . . . [T]he largest denominations have been losing members; world religions other than Christianity and Judaism have . . . grown substantially; [and] new and previously obscure groups have found themselves front and center in the news.

Id. at 1.

199. Timothy Miller defines a “cult” as “a small, intense religious group” with little connection “to mainstream religion and culture,” often espousing a system of belief with origins rooted outside of traditional mainstream religion, and frequently “under the personal direction of a single charismatic leader.” *Id.*

200. Mormons and Jehovah's Witnesses are two religious groups that have outlasted the “cult” and gained social acceptance in the last fifty years. See Wood, *supra* note 90, at 15-16.

201. This can be attributed in part to the modern trend, especially among Americans with substantial disposable income, toward personalizing religion (in the functional sense) and seeking a more individualistic spirituality than that offered by traditional religions — a trend that overlaps with the rise of the “new age” movement and the increasing popularity of spiritual “self help” books. See, e.g., J. Gordon Melton, *Whither the New Age?*, in AMERICA'S ALTERNATIVE RELIGIONS 347 (Timothy Miller ed., 1995).

202. For instance, one Scientologist organization has been placing copies of Hubbard's *The Way to Happiness* in hotel rooms for years. See Edwin McDowell, *Bible Now Shares Hotel Rooms With Some Other Good Books*, N.Y. TIMES, Dec. 26, 1995, A14. Not that such strategically-placed spiritual guidebooks are always used for their intended purpose — said one California hotel manager, “If I had a nickel for every time I found a condom in the Bible, . . . I would be able to retire.” *Id.*

temporal and eternal success²⁰³ has attracted people whose spiritual longings found no comfort in traditional religions.²⁰⁴ Along the road to religious acceptance, however, Scientology has met diverse and emphatic opposition at every turn,²⁰⁵ and controversy has surrounded the Church's activities in the United States.²⁰⁶ In May 1991, *Time* magazine published a cover story by Richard Behar that pulled together most of the criticism that has been leveled at the Church.²⁰⁷ Behar's article portrayed the Church as a ruthless and greedy global racket that uses its pseudo-religious nonsense to numb the minds and pick the pockets of troubled souls seeking spiritual direction.²⁰⁸ Describing Scientology's business practices, for example, Behar wrote:

Scientology doctrine warns that even adherents who are 'cleared' of engrams face grave spiritual dangers unless they are pushed to higher and more expensive levels. According to the [C]hurch's latest price list, recruits — 'raw meat,' as Hubbard called them — take auditing sessions that cost as much as \$1,000

203. This is embodied in the concept of clearing the individual of his engrams and thereby enabling him to improve his life. See *supra* Part II.

204. See *All Things Considered*, *supra* note 4.

205. For the most part, it is the high cost of Scientology's services that arouses suspicions that the Church is more a racket than a religion. See Horwitz *supra* note 15, at 101-02.

206. This has been the case internationally as well. See, e.g., *Scientology Not a Religion, Swiss Court Says*, DEUTSCHE PRESSE-AGENTUR, Feb. 13, 1997, available in LEXIS, News Library, DPA File; *Germany is Focus of Scientology Dispute*, *supra* note 10 (citing Scientology trouble in Greece); *Spanien: Scientologen unter Anklage*, DIE WOCHE, May 12, 1995, at 27 (noting Church controversy in Spain); *French Minister Says No Tax Breaks for Scientology Church*, AGENCE FR. PRESSE, July 30, 1997, available in LEXIS, News Library, AFP File. Noting the "strong and generally hostile reaction [Scientology has received] from most of the nations in which it operates," one commentator observed that Scientology has had the *least* trouble in the United States. Horwitz, *supra* note 15, at 102-03.

207. See Behar, *supra* note 41. There is no shortage of material directly criticizing the Church. It ranges from sober psychological and sociological analysis, see BRIAN R. WILSON, *Scientology: A Secularized Religion*, in THE SOCIAL DIMENSIONS OF SECTARIANISM: SECTS AND NEW RELIGIOUS MOVEMENTS IN CONTEMPORARY SOCIETY 267 (1990), to exposés such as Behar's, to naked ridicule, see Mark Ebner, *Do You Want to Buy a Bride?*, SPY, Feb. 1996 ("For hundreds of thousands of dollars and year upon year of brainwashing, you get secrets and revelatory experience tantamount to the understanding of a bad episode of *Star Trek*."). For another representative report on the controversy surrounding the Church, see *All Things Considered*, *supra* note 4.

208. See Behar, *supra* note 41. Behar's article became the subject of a great deal of litigation, including a \$416 million libel suit brought by the Church of Scientology International against Time-Warner, Inc., *Time* magazine, and Behar himself. The suit was dismissed by a federal judge in 1996 and is currently under appeal. See *The Media Business*, N.Y. TIMES, Nov. 1, 1996 at D2. The Church brought related actions against *Reader's Digest* (for publishing a condensed version of the article) and against several sources Behar used for the article. See William W. Horne, *The Two Faces of Scientology*, AM. LAW., July 1992, at 74. See also *A Litany of Scientology Litigation*, NAT'L. L.J., June 14, 1993, at 38.

an hour, or \$12,500 for a 12 ½-hour 'intensive.' Psychiatrists say these sessions can produce a drugged-like, mind controlled euphoria that keeps customers coming back for more. To pay their fees, newcomers can earn commissions by recruiting new members, become auditors themselves ([current Scientology leader David] Miscavige did so at age 12), or join the [C]hurch staff and receive free counseling in exchange for what their written contracts describe as a 'billion years' of labor. 'Make sure that lots of bodies move through the shop,' implored Hubbard in one of his bulletins to officials. 'Make money. Make more money. Make others produce so as to make money. . . . However you get them in or why, just do it.'²⁰⁹

Behar's story included personal accounts of individuals who were cheated, abused and otherwise traumatized by their former association with the Church of Scientology.²¹⁰ Reports decrying the "sophisticated techniques of mind control" it employs²¹¹ are common in the voluminous criticism devoted to the Church.²¹² However, because joining the Church and following its protocol are voluntary decisions, and because of courts' inability to effectively rule on cases involving allegations of religious fraud and the government's inability to directly regulate church activities,²¹³

209. Behar, *supra* note 41. *But see* Nikos Passas & Manuel Escamilla Castillo, *Scientology and its 'Clear' Business*, 10 BEHAV. SCI. & L. 103 (1992) (arguing that the Church, when "analyzed as a successful commercial enterprise which, seeking to achieve its goals, occasionally adopts illicit means," actually "functions like an ordinary profit-making enterprise that both reflects and relies on dominant cultural values in the West and in particular in the USA").

210. *See* Behar, *supra* note 41. *But see* PFEFFER, RELIGION, *supra* note 91, at 211 (questioning the motivation for and truth behind penitent ex-cultists' "horrendous" tales of their cult experience). "[I]t is fairly certain that many [such reports] are not or at least not fully true. . . . Monetary and other tangible benefits, such as favorable news stories, can be the reward for penance and confession." *Id.*

211. Thomas Robbins, *Profit for Prophets: Legitimate and Illegitimate Economic Practices in New Religious Movements*, in MONEY AND POWER IN THE NEW RELIGIONS 78, at 105 (James T. Richardson ed., 1988). Thomas Robbins stated that at the very least, Scientology's "auditing-plus-manipulative-pressures" are "psychologically intrusive and sometimes traumatizing processes which can undermine personal autonomy and/or mental health, particularly in the case of persons who are already unstable or borderline." *Id.* For more material devoted to the "brainwashing" capabilities of religious cults, see THOMAS W. KEISER & JACQUELINE L. KEISER, THE ANATOMY OF ILLUSION: RELIGIOUS CULTS AND DESTRUCTIVE PERSUASION (1987) and ROBERT J. LIFTON, THOUGHT REFORM AND THE PSYCHOLOGY OF TOTALISM 419 (1961) (outlining eight characteristics of totalitarian control).

212. *See* James Walsh, *Tax Treatment of the Church of Scientology in the United States and the United Kingdom*, 19 SUFFOLK TRANSNAT'L L. REV. 331, 334 n.21 (1995) (listing articles criticizing the Church for brainwashing, harassment, criminal behavior, etc.).

213. *See supra* notes 88-89 and accompanying text.

disgruntled Scientologists generally have little hope for legal recourse.²¹⁴

In addition, Behar chronicled the Church's shrewd bid for credibility, which has included establishing various "front organizations" with names like "Applied Scholastics," "Citizens Commission on Human Rights," and "Concerned Businessmen's Association of America" that allegedly support Scientology interests under false pretenses.²¹⁵ Other means by which the Church has sought respectability, or at least popularity, include recruiting high-profile entertainers by offering them the quiet and luxurious comfort of the Church's celebrity chateau and spa in southern California;²¹⁶ establishing substance-abuse treatment programs and health clinics²¹⁷ — both of which bring prospective members into the Scientology fold and associate the Church with clean and healthy living; and allegedly directing Church members and franchises to purchase massive quantities of L. Ron Hubbard's books in order to create the illusion of a respectable best-selling author.²¹⁸ Finally, critics have accused the Church of having participated in various

214. This has not been for a lack of trying. See, e.g., Marcia Chambers, *Suit Challenges Tactics of Church*, N.Y. TIMES, Apr. 27, 1986, at 1:1. In rare cases, former-Scientologist plaintiffs have been awarded damages in tort claims against the Church. See Horwitz, *supra* note 15, at 106-09. See also Horne, *supra* note 208. Most civil claims brought against the Church have been for intentional infliction of emotional distress, with unlawful imprisonment being the next most common claim. See *id.* For a discussion of other legal issues involved in claims against religious cults, see James R. P. Ogloff & Jeffrey E. Pfeifer, *Cults and the Law: A Discussion of the Legality of Alleged Cult Activities*, 10 BEHAV. SCI. & L. 117 (1992).

215. Behar, *supra* note 41. See also *All Things Considered*, *supra* note 4. In a related development, Scientology actually obtained the rights to the name of its arch foe, the Cult Awareness Network (CAN), which was "driven to financial ruin" by litigation brought by the Church and its affiliates. Frank Rich, *Who Can Stand Up?*, N.Y. TIMES, Mar. 16, 1997, § 4, at 15. See also Andrew Blum, *Anti-Cult Group: Foe Ruined Us*, NAT'L. L.J., July 29, 1996, at A6; Darryl Van Duch, *Anti-Cult Group's Assets Bought by Scientologist: Church Get's Foe's Name in Bankruptcy*, NAT'L. L.J., Dec. 23, 1996, at A6.

216. See Behar, *supra* note 41. See also Douglas Frantz, *Scientology's Star Roster Enhances Image*, N.Y. TIMES, Feb. 13, 1998, at A2. The Church maintains additional "Celebrity Centres" in Paris, Vienna, Hamburg, Düsseldorf, Munich, London, New York, Las Vegas, Nashville, and Washington, D.C. See CHURCH OF SCIENTOLOGY INTERNATIONAL, *supra* note 14, at xix. Also, the Church allegedly uses intimate details gleaned from auditing sessions to prevent its star recruits from leaving the Church. See Behar, *supra* note 41. See also Greg Sinclair, *Stripped Bare: Tom Cruise and the Weird Cult*, DAILY MIRROR, Apr. 13, 1994, at 19 (discussing how a well-known celebrity Scientologist was "'reminded' of his past sexual behavior when he considered quitting the [C]hurch"); Alan Hall, *How Cult led Jacko up the Aisle with Two Tin Cans and a Ball of String*, DAILY MIRROR, July 14, 1994, at 7.

217. See *All Things Considered*, *supra* note 4. See also Behar, *supra* note 41. Hubbard's *Dianetics* was on *The New York Times'* bestseller list, under "Advice, How-To and Miscellaneous," as recently as 1990. *Paperback Best Sellers*, N.Y. TIMES, Mar. 25, 1990, § 7, at 34.

218. See Behar, *supra* note 41. Additionally, this practice enabled Hubbard to receive "huge royalties" on the sale of his books. Robbins, *supra* note 211, at 89.

financial scams and its leaders of having secretly diverted millions of dollars in Church funds to foreign bank accounts for their personal use.²¹⁹

According to critics of the Church, the intensity and persistence with which Scientology combats its "enemies" represent the Church's implementation of Hubbard's "fair game" policy, an unequivocal directive from the Church's founder authorizing Church members to employ whatever means necessary to subdue enemies of the Church.²²⁰ According to this policy, anyone who attacks the Church may be justifiably lied to, tricked, harassed, or "destroyed."²²¹ As examples of fair game in action, critics typically cite systematic smear campaigns that Church organizations have launched against Scientology's detractors and competitors, who include psychiatrists and makers of antidepressants, because their therapy cuts into Scientology's market.²²² The Church's intelligence unit, "the Guardian's Office," is reportedly responsible for much of the harassment associated with fair game,²²³ while the Church itself has employed private investigators to find or fabricate information to be used against foes of Scientology.²²⁴

Litigation is perhaps Scientology's most effective weapon against its perceived enemies.²²⁵ The Church can afford to employ tenacious attorneys,²²⁶ many of whom are themselves Scientologists,²²⁷ who are "quick to battle its opponents with tough, take-no-prisoners legal tactics."²²⁸ Hubbard himself identified harassment and annoyance as the primary purposes of litigation,²²⁹ and Church lawyers have been criticized for using the legal system to pummel Church foes into submission.²³⁰ The Church

219. See, e.g., Robert Lindsey, *Scientology Chief Got Millions, Ex-Aides Say*, N.Y. TIMES, July 11, 1984 at A1; Behar, *supra* note 41.

220. Hubbard wrote the doctrine in October 1967 and, the Church claims, rescinded it a year later. See Horne, *supra* note 208.

221. Behar, *supra* note 41 (quoting Hubbard).

222. See *id.*

223. Horne, *supra* note 208.

224. See, e.g., Behar, *supra* note 41; Horne, *supra* note 208.

225. See Horne, *supra* note 208.

226. According to *The New York Times*, the Church recently counted assets of approximately \$400 million and "appears to take in nearly \$300 million a year from counseling fees, book sales, investments and other sources." Robert D. Hershey, Jr., *Scientists Report Assets of \$400 Million*, N.Y. TIMES, Oct. 22, 1993, at A12. See also Horne, *supra* note 208 (discussing the Church's high-priced "bulldog" attorneys).

227. See Horne, *supra* note 208.

228. *A Litany of Scientology Litigation*, *supra* note 208. For a discussion of the Church's early conflicts with the FDA regarding the purported scientific healing power of the E-meter and related religious equipment, see Horwitz, *supra* note 15, at 103-06.

229. See Behar, *supra* note 41.

230. See Horne, *supra* note 208. Tactics include "flooding dockets with motions" and filing retaliatory suits, in multiple jurisdictions, against Church opponents and their lawyers. *Id.*

employed these and other fair game tactics in the mother of all Church wars — Scientology's struggle with the IRS for religion-based tax exemption.²³¹

B. *Official Recognition as a Religion*

By any account, the Church charges and receives a great deal of money from its members.²³² Based on its self-proclaimed religious character, the Church sought and received religion-based income tax exemption from the IRS in 1957.²³³ In 1967, however, the IRS reversed its position and revoked the Church's exemption.²³⁴ For the next twenty-five years, the IRS fought to maintain its position against scores of Church-filed legal challenges.²³⁵

The primary reason the IRS denied the exemption was not that Scientology was not a religion. In *Founding Church of Scientology vs. United States*,²³⁶ the U.S. Court of Appeals for the District of Columbia decided that, on its face, Scientology was a religion.²³⁷ Rather, the IRS revoked the Church's exemption based on a finding that, "even if religious in nature," the Church was operated "for the enrichment of specific private individuals."²³⁸ Thus, the Church did not conform to the mandate of the relevant portion of the *Internal Revenue Code*, which required that it be organized and operated exclusively for religious (or charitable, etc.) purposes in order to qualify for income tax exemption.²³⁹

Apart from the deluge of litigation brought by its attorneys, the Church reportedly hired private investigators to harass IRS employees and smudge their reputations.²⁴⁰ In return, the Church claims that the IRS had unjustifiably targeted the Church for audits (of the accounting variety) and other instances of administrative discrimination in an effort to destroy the

231. See Douglas Frantz, *Taxes and Tactics: Behind an I.R.S. Reversal — A Special Report: Scientology's Puzzling Journey From Tax Rebel to Tax Exempt*, N.Y. TIMES, Mar. 9, 1997, § 1, at 1 [hereinafter Frantz, *Puzzling Journey*]; Douglas Frantz, *Taxes and Tactics: An Ultra-Aggressive Use of Investigators and the Courts*, N.Y. TIMES, Mar. 9, 1997, § 1, at 31 [hereinafter Frantz, *Taxes and Tactics*].

232. See *supra* notes 209, 226 and accompanying text.

233. See Frantz, *Puzzling Journey*, *supra* note 231.

234. See *id.*

235. See *id.* At several junctures in its ongoing battle for tax exemption, Scientology had more than 100 suits pending against the IRS. See *id.*

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

237. The government did not contest the issue, and based on the lack of any claim to the contrary the court held Scientology was *prima facie* a religion. See *id.* at 1154.

238. Walsh, *supra* note 212, at 337-38.

239. See I.R.C. § 501(c)(3) (West 1998).

240. See Frantz, *Puzzling Journey*, *supra* note 231. For example, the Scientology-funded gumshoes looked for IRS employees who drank too much or may have been having affairs, and they snooped around the homes, peeked in the windows and dug through the garbage, etc., of IRS staffers. See *id.*

Church.²⁴¹

By the end of the 1980s, the IRS had won several major legal victories and appeared firmly entrenched in its position. Notably, a total of eleven Scientologists were sentenced to prison terms in 1979 and 1980 for federal crimes arising from their attempts to steal, copy, and destroy various IRS and Justice Department documents pertaining to Church activities,²⁴² and in *Hernandez vs. Commissioner*,²⁴³ the Supreme Court ruled that so-called "donations" to the Church from its members in exchange for auditing and other services were not tax deductible.²⁴⁴ Hence, news of the Internal Revenue Service's 1993 decision to settle with the Church and grant the exemption came as a major shock.²⁴⁵ By some accounts, Scientology's pervasive and aggressive opposition simply wore the IRS down to a point where it could no longer afford the battle.²⁴⁶ However, the Church contends

241. See *id.* Thus echoing Leo Pfeffer's comments characterizing the IRS as a tool for government suppression of unpopular religious groups. See PFEFFER, RELIGION, *supra* note 91, at 1.

242. In December 1979 Hubbard's wife and several upper-level Church officials were convicted of conspiracy to obstruct justice, conspiracy to burglarize government offices and steal documents, and theft of government property in connection with an attempt to steal IRS files on the Church. See Horwitz, *supra* note 15, at 108. In November 1980, two more high-ranking Scientologists were convicted of burglary in connection with break-ins at offices of the IRS and the Justice Department. See 2 *Scientology Aides Guilty of Burglary*, N.Y. TIMES, Nov. 27, 1980, § 1, at 17. The bungled Church program leading to the arrests was code-named "Operation Snow White." Frantz, *Puzzling Journey*, *supra* note 231.

243. *Hernandez v. Comm'r*, 490 U.S. 680 (1989).

244. *Hernandez* was a major victory for the IRS. The Court ruled 5-2 that the IRS was correct in denying the contested deductions because they were fixed payments for services rendered (an essential quid pro quo arrangement) rather than charitable contributions. See *id.* at 690-94. However, the dissenting opinion of Justices O'Connor and Scalia gave credence to Scientology's consistency argument, which asserted that there was no meaningful distinction between payment for Scientology services and payments for pew rentals and the like in established churches (which were tax deductible). See *id.* at 708-11 (O'Connor, J. and Scalia, J., dissenting).

245. "This puts an end to what has been an [sic] historic war. . . . It's like the Palestinians and the Israelis shaking hands." Labaton, *supra* note 5 (quoting Marty Rathbun, president of one of the more than 150 Scientologist corporations that received a tax exemption). Reportedly, "10,000 cheering Scientologists thronged the Los Angeles Sports Arena to celebrate the most important milestone." Frantz, *Puzzling Journey*, *supra* note 231.

246. See Frantz, *Taxes and Tactics*, *supra* note 231. Details of the settlement have not been made public; it is rumored to have been instigated by an impromptu meeting between then IRS Commissioner Fred Goldberg, Jr. and two Scientology leaders. See Douglas Frantz, *Scientology Denies an Account of an Impromptu I.R.S. Meeting*, N.Y. TIMES, Mar. 19, 1997, at A18. See also IRS News Release, IR-97-50, Dec. 31, 1997 ("The Church of Scientology was recognized as tax exempt after establishing that it was an organization operated exclusively for religious and charitable purposes. Recognition was based upon voluminous information provided by the Church regarding its financial and other operations to the Internal Revenue Service."); *Closing Agreement Reveals Scientology Paid \$12.5 Million*, EOTR WKLY., Jan. 12, 1998 (discussing the details of the settlement).

that it won on the merits of its case.²⁴⁷ By virtue of its tax exempt status, Scientology is now able to claim official recognition as a religion in the United States, and the State Department regards the Church's claims of religious persecution abroad as human rights complaints.²⁴⁸

Since 1993, Scientology has remained controversial, largely for the same reasons discussed above,²⁴⁹ while public awareness of the controversy surrounding the Church has increased as the war between Scientology and its critics has spilled onto the Internet.²⁵⁰ Scientology's lawyers have been

247. The Church maintains that after unprecedentedly thorough investigations the IRS realized that Scientology was a "benign nonprofit organization entitled under tax law to be underwritten by American taxpayers." Rich, *supra* note 215. See also Monique E. Yingling, *Scientology Won Tax Exemption on the Merits*, N.Y. TIMES, March 18, 1997, at A20. The author is a lead tax attorney for the Church; the text is from her letter to the editor disputing the paper's treating the IRS reversal as suspicious (see Frantz, *Puzzling Journey*, *supra* note 231).

248. The State Department first mentioned Scientologists' complaints of discrimination and harassment in Germany in its 1993 human rights report, released just four months after the IRS granted the Church's exemption. See Frantz, *Puzzling Journey*, *supra* note 231. See also sources cited *supra* note 7. In a related development, a German Scientologist "who claimed that she would be subjected to religious persecution" had she been forced to return to Germany was recently granted asylum by a federal immigration court judge in Florida. Douglas Frantz, *U.S. Immigration Court Grants Asylum to German Scientologist*, N.Y. TIMES, Nov. 8, 1997, at A1.

249. The most serious case is that of Lisa McPherson, a Florida Scientologist who died of dehydration two weeks after being released from the hospital under the care of Scientologists who objected to her undergoing psychiatric evaluation after she was discovered nude, disoriented, and crying for help following a minor traffic accident. See *All Things Considered*, *supra* note 4. See also Douglas Frantz, *Distrust in Clearwater: Death of a Scientologist Heightens Suspicions in a Florida Town*, N.Y. TIMES, Dec. 1, 1997, at A1. For another discussion of the McPherson case and other cases in which people drawn to Clearwater, Florida (site of a major Scientology center) by their involvement in the Church have turned up dead, allegedly under suspicious circumstances, see Lucy Morgan, *For some Scientologists, Pilgrimage has been Fatal*, ST. PETERSBURG TIMES, Dec. 7, 1997, at 1A. For a recent article discussing retaliatory tactics reportedly employed by Scientologists against a Church critic, see David O'Reilly, *Church of Scientology Hits Critics Where They Live*, SEATTLE TIMES, Dec. 28, 1997, at A18.

250. "The Church of Scientology is battling a band of on-line dissidents who have used the Internet to mail out globally its secret scriptures, for which some members must pay thousands of dollars." Mike Allen, *Dissidents Use Computer Network to Rile Scientology*, N.Y. TIMES, Aug. 14, 1995, at A12 [hereinafter Allen, *Dissidents*]. The copyrighted secret scriptures, from the seventh level of spirituality, were obtained from public court records. See Mike Allen, *Internet Gospel: Scientology's Expensive Wisdom Now Comes Free*, N.Y. TIMES, Aug. 20, 1995, § 4, at 2 [hereinafter Allen, *Gospel*]. The documents were posted by a former Scientologist (who described them as "the big secret at the end of the rainbow") on the newsgroup "alt.religion.scientology" and, when news spread on the Internet of the Church having obtained an order from a federal judge in Virginia for the confiscation of the man's computer ("they even took my mouse and modem," he said), civil-libertarian net-people from the world over began posting the sacred texts on public web pages as a kind of game designed to frustrate the Church. Allen, *Dissidents*, *supra*. Reading the scriptures without having

trying to keep copyrighted Church scriptures out of publicly accessible cyberspace, and the accompanying legal battles have spurred debate in intellectual property law.²⁵¹ Apart from these developments, the most noteworthy issue affecting Scientology in America has been Scientologists' treatment in Germany.²⁵²

C. *The Church of Scientology in the Federal Republic of Germany*

1. *The German Government's View of Scientology*

At all levels, the German government has taken a strong stance against the Church of Scientology.²⁵³ The German government has issued reports that are essentially warnings of Scientology's anti-democratic nature and what it regards as the Church's plan to infiltrate strategic areas of German

undergone the proper training was strictly forbidden by the Church (and purported to cause pneumonia). *See Allen, Gospel, supra.*

251. *See generally* *Speech in Electronic Space*, WASH. POST, Aug. 22, 1995, at A16 (editorial commenting on the copyright issues raised by the Scientology case); James Brooke, *Scientologists Lose a Battle on the Internet*, N.Y. TIMES, Sept. 14, 1995, at B14 (discussing a similar case in Colorado); Alison Frankel, *Making Law, Making Enemies*, AM. LAW., Mar. 1996, at 68 (commenting on the Church's victory in an Internet copyright case); *Religious Technology Center v. Lerma*, 908 F. Supp. 1353 (E.D. Va. 1995).

252. *See supra* Part IV(B).

253. This has continued in spite of increased pressure from the United States government to recognize Scientology as a religion, which has been applied largely through State Department Human Rights Reports (*see generally* sources cited *supra* note 7) and the actions of members of congress who have taken up the Scientologists' cause. *See* Cowell, *supra* note 9; Jan van Flocken, *Scientology: Treibjagd auf die Thetanen*, FOCUS, Aug. 19, 1996, at 26. *See also* *U.S. Congressional Panel Blasts Germany over Scientology*, AGENCE FR. PRESSE, Oct. 31, 1997, available in Westlaw at 1997 WL 13424766 (discussing the House Foreign Relations Committee's adoption of a resolution "condemning the actions and statements of Federal and State officials in Germany who have fostered an atmosphere of intolerance towards certain minority religious groups," including Scientologists). The resulting motion was rejected by the House, 318 to 101. *See U.S. Congress Rejects Motions Condemning Germany over Scientology*, AGENCE FR. PRESSE, Nov. 10, 1997, available in 1997 WL 13430905.

Ursula Caberta, who has been assigned by the city of Hamburg to monitor Scientology activities in Germany, said of the Church, "These people really mean business. This is a new form of political extremism and I can't help it if the U.S. doesn't realise what a danger to our society Scientology represents." *Scientology Touches Raw Nerve with its Campaign Against Germany*, DEUTSCHE PRESSE-AGENTUR, Jan. 30, 1997, available in LEXIS, News Library, DPA File. Estimates of the number of Scientologists in Germany range from thirty thousand to two million. *Id.* But, the most common estimate is thirty thousand. *See, e.g.,* Cowell, *supra* note 4.

industry, government, and society.²⁵⁴ Evidence for such fears exists in policy letters from L. Ron Hubbard and other Scientology documents that essentially claim that democracy is foolish for tolerating its own enemies.²⁵⁵ Thus, the dictates of the Church's fair game policy are an oft cited justification for opposing Scientology as an intolerant and anti-democratic organization.

Government reports and much of the German media attention has focused on what has been described as a kind of psychological control that Scientology maintains over its members in the hierarchical system by which Scientologists ascend to higher spiritual levels by taking more courses.²⁵⁶ This is an extremely sensitive area for Germany because it recalls the elaborate mythology of racial superiority that was indoctrinated by the Nazis.²⁵⁷ Although critics of the Church have been hesitant to explicitly

254. See Norbert Blüm, *Scientology: Die Profit-Sekte*, DIE WOCHE, May 12, 1995, at 1 (Blüm is Germany's Federal Labor Minister). See also Nolte *Seeks Legal Sanctions Against Scientology Saying it Undermines Democracy*, WK. GERMANY, Jan. 19, 1996, available in LEXIS, News Library, WKGEM File (referring to Claudia Nolte, Federal Minister of the Family); Craig R. Whitney, *Officials in Germany Denounce Sect as a Menace to Democracy*, N.Y. TIMES, Oct. 13, 1994, at A6.

255. See Hans-Gerd Jaschke, *Gutachten: Auswirkungen der Anwendung scientologischer Gedankengüter auf eine pluralistische Gesellschaft oder Teile von ihr in einem freiheitlich demokratisch verfaßten Rechtsstaat* (visited Oct. 24, 1997) <<http://wpxx02.toxi.uni-wuerzburg.de/~krasel/CoS/germany/jaschke.html>> (reporting for the Interior Ministry of Nordrhein-Westfalen); Ralf B. Abel, *Gutachtliche Stellungnahme zu der Frage "Ist das Menschen- und Gesellschaftsbild der Scientology-Organisation vereinbar mit der Werte- und Rechtsordnung des Grundgesetzes?"* (visited Oct. 24, 1997) <<http://wpxx02.toxi.uni-wuerzburg.de/~krasel/CoS/germany/abel.html>> (reporting for Schleswig-Holstein).

256. See Abel, *supra* note 255. See also van Flocken, *supra* note 253. These allegations are similar to the charges of "brainwashing" that the Church has faced in the United States. See Horne, *supra* note 208. Commentary in the German press has been mixed with respect to the government's position on Scientology, with some observers apparently taking the government warnings to heart and others maintaining that they are excessive. Compare *Wie erkenne ich einen Scientologen?*, BUNTE, Aug. 22, 1996, at 30 (listing 13 characteristics of Scientologists to help readers "protect themselves"); Bernd Marz, *Weder Kirche noch Sekte*, DIE WOCHE, Aug. 23, 1996, at 31 (claiming Scientology is not a religion); Thomas Roell, *Sekten: Neue Strategie*, FOCUS, Sept. 1, 1997, at 31 (listing Scientologist "front groups" that are active in Germany); and William Horsley, *Germany's Mental Fight: National Opposition to the Church of Scientology*, NEW STATESMAN, Nov. 1, 1996, at 26 (noting that "[I]liberal opinion [in Germany] is troubled by the denunciation campaign" against Scientology and quoting Josef Joffe, foreign editor of Munich's *Süddeutsche Zeitung*, as saying that Germans "should show more self-assurance" toward their laws and government).

257. In this environment, the claim that Scientology can unlock a person's superhuman potential arguably resembles the Nazi ideology of the Aryan "superman." See, e.g., CRAIG, *supra* note 116, at 33-34.

make this comparison,²⁵⁸ the Church has been quick to draw parallels between Nazism and contemporary German treatment of Scientologists.²⁵⁹ Ironically, the German government is being compared to the Nazis for using the very tools the Basic Law gives it to protect against a Nazi-like insurrection.²⁶⁰

2. *Anti-Scientology Measures*

Federal and state authorities in Germany have taken numerous actions against the Church of Scientology. These anti-Scientology measures range from Bavaria's requirement that state employees divulge any ties to the Church,²⁶¹ to the federal employment office keeping inventory of employers linked to the Church,²⁶² to the federal government placing the Church under nationwide surveillance.²⁶³ In addition, German intelligence authorities have

258. Critics of the Church typically refer to its "totalitarian" and "extremist" nature. See, e.g., Hans-Peter Bartels, *Kampfplatz Deutschland*, DIE WOCHE, Nov. 22, 1996, at 37 (referring to the Church's aim of creating a totalitarian society).

259. This, of course, has done nothing to increase public acceptance of the Church. See *supra* text accompanying notes 10-12.

260. See *supra* notes 176-97 and accompanying discussion of the militant democracy.

261. This measure was intended to "prevent Scientologists from infiltrating public positions," and the decree also "requires private companies awarded state contracts in 'sensitive' fields to sign a statement saying they will not use [Scientology's] methods." *Bavaria Asks Disclosure of Scientology Ties*, N.Y. TIMES, Oct. 30, 1996, at A6.

262. Employees at the federal labor office reportedly "marked an 'S' on the files of any company considered to be influenced by the Church of Scientology." *Inventory Kept of Companies Linked to Scientology in Germany*, AGENCE FR. PRESSE, Mar. 17, 1997, available in LEXIS, News Library, AFP File.

263. This decision came despite German intelligence officials' initial reluctance to assign agents to the Church for fear that the investigators "might confront brain-washing and 'considerable psychological influences' that would lead them to becoming Scientologists themselves." *Scientologists Could Win over German Spies: Report*, AGENCE FR. PRESSE, Apr. 5, 1997, available in LEXIS, News Library, AFP File. The decision to place the Church under surveillance (which groups the Church with Germany's neo-Nazi and extreme leftist parties) was described as the German government's "sharpest action yet" in its battle with Scientology, because it authorized German intelligence operatives to tap the phones, intercept the mail, and pose as Scientologists in order to infiltrate the offices of the Church. Alan Cowell, *Germany Will Place Scientology Under Nationwide Surveillance*, N.Y. TIMES, June 7, 1997, § 1, at 1. Interior Minister Manfred Kanther "said the year's surveillance would establish whether the [Church] was simply an 'unpleasant group,' a criminal organization or an association with anti-constitutional aims." *Id.* At least one German state (left-leaning Schleswig-Holstein) said it would decline to implement the action because it conflicts with existing state legislation. See *German State Rules Out Monitoring of Scientologists*, AGENCE FR. PRESSE, Aug. 26, 1997, available in LEXIS, News Library, AFP File. (For a discussion of German federalism, see KOMMERS, *supra* note 107, at 61).

German officials have since ordered the surveillance to continue, based on a two-year investigation of the Church's activities that concluded with a determination that the

set up a hotline to “help former cult or family members find an outlet for pressure they are facing” from the Church,²⁶⁴ and Chancellor Helmut Kohl’s Christian Democratic Union party has banned Scientologists from joining its ranks — a policy that was upheld in court because Scientology’s “internal structures” were deemed undemocratic and “their treatment of critics and former members” was incompatible with party principles.²⁶⁵

The most important court ruling concerning the Church of Scientology came in a 1995 Federal Labor Court decision holding that Scientology is a for-profit enterprise and not a religion.²⁶⁶ This ruling was especially significant given that Germany confers such a high degree of autonomy to churches in governing their internal affairs,²⁶⁷ while commercial organizations must register all financial activity with German authorities.²⁶⁸ Although lacking the supreme constitutional authority of a Federal Constitutional Court decision, the ruling came from the next highest level in the German court system²⁶⁹ and was hailed as a crushing blow to the Church.²⁷⁰

Church was “an organisation with political goals.” *Scientology Threat to Democracy: German Commission*, AGENCE FR. PRESSE, June 19, 1998, available in 1998 WL 2305457. Church leaders strongly condemned the report. See *Scientologists call German Commission ‘Medieval Inquisitors’*, AGENCE FR. PRESSE, June 22, 1998, available in 1998 WL 2307234.

264. *Hot Line Set up for Information about Scientology*, AGENCE FR. PRESSE, June 17, 1997, available in LEXIS, News Library, AFP File. Shortly after it was installed, the hotline was flooded with calls from outraged Scientologists. See *Scientologists Call Germany’s New Anti-Scientology Hotline*, DEUTSCHE PRESSE-AGENTUR, July 26, 1997, available in LEXIS, News Library, DPA File.

265. *Court Confirms Kohl Party Ban on Scientologists*, AGENCE FR. PRESSE, July 9, 1997, available in LEXIS, News Library, AFP File. See Landgericht [LG] [Trial Court] Bonn 7 O 55.97 (1997) (visited Oct. 21, 1997) <<http://wpxx02.toxi.uni-wuerzburg.de/~krasel/CoS/germany/lg5597.html>>.

266. See Bundesarbeitsgericht [BAG] [Supreme Labor Court] 5, 21/94 (1995), (visited Oct. 21, 1997) <<http://wpxx02.toxi.uni-wuerzburg.de/~krasel/CoS/germany/bag5azb.html>>. The court ruled that the Hamburg branch of the Church was not a religion under article 4 of the Basic Law (granting freedom of faith, conscience, and creed), or Article 137 of the Weimar Constitution (governing the rights of religious communities) because its activities were chiefly commercial in nature. See *id.*

267. See GG, WEIMAR CONST. art. 137.

268. See *Administrative Court: Scientology is a Business*, WK. GERMANY, Mar. 3, 1995, available in LEXIS, News Library, WKGEM File.

269. Federal courts are subject-specific in Germany and are the highest courts available for non-constitutional issues. See KOMMERS, *supra* note 107, at 3.

270. See *Administrative Court*, *supra* note 268. Since that ruling, Germany’s Federal Administrative Court declined to rule on Scientology’s religious status and returned the case to an administrative appeals court in Mannheim to decide whether a Scientology mission in Stuttgart is “a business or a not-for-profit organization concerned with ‘spiritual advisement.’” Anne Thompson, *German Court Shies Away from Scientology Ruling*, AP, Nov. 6, 1997, available in 1997 WL 4891399. The court said that Scientology “would be considered a business only if it made a profit from selling educational materials to non-members.” *Id.*

Although measures taken by the German government against the Church may seem extreme, or even blatantly unconstitutional by American standards, none have been struck down by German courts.²⁷¹ Further, if it is unable to invoke the Basic Law's protection as a religion, the Church is unlikely to mount a successful challenge to any action the government has taken against it.²⁷² In addition, such actions would likely withstand a constitutional challenge, given the Court's previous interpretations of Basic Law doctrines that have been used to preserve the constitutional order²⁷³ and the social values it embodies.²⁷⁴ They are all, at least constructively, authorized by the Basic Law's order of values doctrine. Moreover, the Church could conceivably be banned as an extremist "party" or "association" under the militant democracy doctrine given that (1) government actions against the Church focus on its "totalitarian" nature and "anti-democratic" structure and (2) German courts need not consider an organization's self-concept in determining whether it is a religion.²⁷⁵

In response to Germany's anti-Scientology activities, the Church has lodged complaints with the United Nations²⁷⁶ and with the European Commission on Human Rights.²⁷⁷ The Church has also recently organized a group called "Freedom for Religions in Germany,"²⁷⁸ which according to a spokesman for the group, "has promised confidentiality to members of any religious minorities that had proof of harassment or intimidation by German officials."²⁷⁹ In addition, the Church has recently held religious freedom

271. This has been disputed by Scientology leaders, but a diligent search revealed no such rulings as of August 1998.

272. Thus, the Federal Labor Court ruling may have spurred the Church's decision to intensify its international publicity campaign against the German government, which has increased markedly since 1995. See *supra* notes 4-12 and accompanying text.

273. See *supra* notes 176-97 and accompanying text (discussing the militant democracy).

274. See *supra* notes 162-75 and accompanying text (discussing the Basic Law's order of values).

275. See *supra* notes 176-97 and accompanying text. This seems unlikely, however, given that the Church has apparently gained a powerful ally — one that it shares with Germany — in the U.S. government.

276. See *Scientologists Urge U.N. Probe of Alleged Discrimination in Germany*, DEUTSCHE PRESSE-AGENTUR, Aug. 14, 1996, available in LEXIS, News Library, DPA File. Abdelfattah Amor, special investigator for the U.N., rejected the charges, stating, "This comparison between modern Germany and Nazi Germany is so shocking as to be meaningless and puerile." *U.N. Derides Scientologists' Charges about German 'Persecution'*, N.Y. TIMES, Apr. 2, 1998, at A3.

277. See *Scientologists Lose Case Against Germany*, N.Y. TIMES, Apr. 10, 1997, at A3 (dismissed on grounds that the Church had not exhausted domestic legal channels).

278. *U.S. Group Seeks Religious Minorities Alleging Abuses in Germany*, DEUTSCHE PRESSE-AGENTUR, Apr. 16, 1997, available in LEXIS, News Library, DPA File.

279. *Id.*

protests in Frankfurt²⁸⁰ and Berlin,²⁸¹ both of which were attended by American celebrity Scientologists.²⁸²

V. CONCLUSION

*Scientologists are not storm troopers, and Germany is not the Fourth Reich.*²⁸³

Norbert Blüm's characterization of the Church of Scientology as a "giant octopus"²⁸⁴ aptly demonstrates the German government's attitude toward Scientology. The attitude is a mixture of hysteria and disgust, and the image of an octopus spreading its tentacles is a fine metaphor for Germany's fear of being infiltrated and suffocated by an insidious cult. The question posed in the title of this note refers to whether Germany would be better off relaxing its position on Scientology and, more generally, putting greater trust in its democratic foundations and the marketplace of ideas.²⁸⁵ Thus, to "love the octopus" means to follow the United States and accept Scientology as part of the price a society must pay if it wishes to enjoy extensive rights and liberties.²⁸⁶ The question is complicated by the controversy surrounding the Church. It is an organization whose religious

280. Organizers said 500 people attended the rally. See *Scientologists Urge Religious Freedom in Frankfurt Protest*, AGENCE FR. PRESSE, July 21, 1997, available in LEXIS, News Library, AFP File.

281. An estimated 2,000 supporters attended the march at the Brandenburg Gate, the highlight of which was the broadcast of a taped message from John Travolta. See Alan Cowell, *Scientology Rally in Germany Sparsely Attended*, N.Y. TIMES, Oct. 28, 1997, at A11.

282. See *id.*

283. Joffe, *supra* note 12.

284. See *supra* note 3 and accompanying text.

285. Discussing Germany's response to American criticism of Germany's treatment of the Church of Scientology, Josef Joffe wrote:

Invariably, Germans will argue that their history is not as happy as that of the United States, that they cannot be as sanguine about the good beating out the bad in the marketplace of ideas. Hence, goes the standard formula, freedom cannot be extended to those who would destroy it.

Joffe, *supra* note 12.

286. In Justice Jackson's terms, it is part of the "rubbish" that must be endured and even paid for in exchange for permissive liberties. See *United States v. Ballard*, 322 U.S. 78, 95 (1944) (Jackson, J., dissenting). See also Joffe, *supra* note 12.

If liberty is to have real meaning, the true test is how we treat groups we find ridiculous or repulsive. The test is hardly an easy one. It presupposes a society that believes in its institutions, and does not have to search for the enemy within in order to find faith in itself.

Id. Regarding Joffe's last comment, see generally ALBERT BERGESEN, *THE SACRED AND THE SUBVERSIVE: POLITICAL WITCH-HUNTS AS NATIONAL RITUALS* (1984) (discussing the reinforcing of democratic forms by targeting perceived threats to democracy).

nature has been widely disputed, and its expensive training and aggressive tactics justifiably create suspicion and skepticism.

In the United States, the Church is generally accepted as a religion, in part because the Scientologists won their battle for religion-based tax exemption. More importantly, America's system of strict separation of church and state and its broad, functional view of religion have created an environment in which groups like Scientology cause relatively little stir. In addition, with its strong tradition of democracy and liberal personal freedoms, the United States has shown that, for the most part, it can absorb a wide variety of strange and potentially dangerous groups without perceiving any as a threat to its people or institutions. In this setting, the Church of Scientology looks harmless, more like a baby squid than a menacing octopus.

Given that postwar Germany has established a government that in many ways resembles that of the United States — both are constitutional democracies with broad fundamental rights protections — from an American perspective, German fears that Scientology will topple its constitutional democracy seem absurd, and Germany's strong anti-Scientology actions seem excessive, unlawful, or both. However, concluding that Germany is simply wrong, and should be more like America, is a poor "solution" to the problem because it overlooks important differences between the two countries.

First, a general distinction can be made between traditional German and American concepts of freedom: The American view focuses on the sovereign individual, while the German view focuses on the relationship between individual and community. In German political philosophy, liberty is defined primarily in "collectivist" terms. Because the individual depends on the state or collective for his safety, his freedom is limited in the sense that it can only be realized to the extent allowed by the prevailing mores of society.²⁸⁷

Second, because Germany is relatively new to constitutional democracy, it lacks America's self-assurance regarding its democratic institutions and the functioning of the marketplace of ideas. This problem is exacerbated by Germany's historical consciousness of the Nazi experience, that is, of actually having been overtaken by a menacing cult with a

²⁸⁷ The Federal Constitutional Court's interpretation of the Basic Law echoes this view: The image of man in the Basic Law . . . is not that of an isolated, sovereign individual; rather, the Basic Law has decided in favor of a relationship between individual and community in the sense of a person's dependence on and commitment to the community, without infringing upon a person's individual value.

BVerfGE 4, 7 (15-16) (1954) (quoted in KOMMERS, *supra* note 107, at 305). See generally LEONARD KRIEGER, *THE GERMAN IDEA OF FREEDOM* (1972).

charismatic leader — to oversimplify the matter considerably. The result is an extremely low threshold for what appears to constitute a threat to Germany.

Third, Germany's constitutional democracy has explicit powers to protect itself.²⁸⁸ The Basic Law authorizes militant democracy restrictions on fundamental rights when they are used to undermine or combat the free democratic order. In addition, the Federal Constitutional Court has been forthright in its interpretation of the normative character of the Basic Law — its objective order of values²⁸⁹ — arguably to the detriment of the Basic Law's commitment to tolerance and diversity.²⁹⁰

Finally, Germany's tradition of cooperation between church and state creates pressure against extending religious protection to the Church of Scientology. With the Catholic and Protestant churches entrenched in influential positions in German public life, affording Scientology similar privileges would dilute the power and influence of these mainstream religions. Thus, there is additional tension in Germany between the desire to maintain the norms embodied in the constitution and undergirded by the values of the major religions without unduly disfavoring smaller religions with different methods and ideals.

Together these differences, and the background from which they developed, help to explain how Germany can justify its treatment of the Church of Scientology. What the Scientologists see as unconstitutional religious persecution, the German government sees as its constitutional duty to protect its people and institutions from subversive influences. To judge Germany's treatment of Scientology by American standards, independent of these considerations, is irresponsible. However, a blanket defense or rationalization of Germany's position would seem to condone the apparent hysteria fueling Scientology's most vigilant attackers. Thus, part of the problem is to avoid becoming desensitized to claims of persecution, without giving credence the sensationalist and historically inaccurate Nazi comparisons.

Despite the apparent possibility that Germany is creating more problems for itself than unchecked Scientologists could ever cause — in

288. The provisions that make up the militant democracy “reflect the bitter experience of the Weimar Republic, in which antidemocratic forces took advantage of political freedoms to subvert the constitution itself.” CURRIE, *supra* note 108, at 214-15. See also *supra* note 186 and accompanying text.

289. The drafters of the Basic Law agreed that they were creating a “normative constitution embracing values, rights and duties,” obviating the sort of debate common in America as to “whether the Constitution is primarily procedural or value-oriented” and preclude the sort of precedential wrangling the Supreme Court has been forced into in times of crisis. KOMMERS, *supra* note 107, at 32.

290. See *supra* note 175 and accompanying text.

which case it *should* relax its position — an examination of the controversy shows that, at least for now, Germany is incapable of trusting its institutions and its citizens enough to love the octopus. Meanwhile, many Americans condemn Germany's stance on Scientology without first trying to understand it. To remedy the situation, Germany and America can learn from each other's experiences and their different views of freedom of religion. Comparing how the countries have received the Church of Scientology reveals the variety and complexity of the problems underlying the Germany-Scientology controversy. In turn, a greater understanding of these problems can only lead away from the extreme rhetoric that has surrounded the controversy to date and toward a more productive public debate of the issues involved.

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