

**SAVING THE WORLD, ONE CADILLAC AT A TIME: WHAT CAN BE DONE WHEN A RELIGIOUS OR CHARITABLE ORGANIZATION COMMITS SOLICITATION FRAUD?**

## I. INTRODUCTION

You wait with anticipation as the whisper of the crowd rises to a murmur. The man in the wheelchair at the end of the row is beaming in hopeful joy. The lady to your left is gazing to the ceiling with a look of desperation. She mumbles to herself, “please help me.” Hundreds of thousands of Americans gather in front of their television sets to witness a miracle. The lights surge and music begins to play. From behind a curtain emerges a small Middle-Eastern man wearing a gleaming white suit. His name is Benny Hinn.<sup>1</sup> He conducts a sermon about the power of faith. He is interrupted abruptly by a spiritual sensation. “There is somebody on the balcony who has a problem with her leg and her hip and if you move your leg, you’ll find that the pain is gone.”<sup>2</sup> She confirms

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<sup>1</sup> Benny Hinn is a “televangelist” which means he is a minister who conducts his worship service on television. According to Ole Anthony, head of the Trinity Foundation, a group that monitors Christian media, “he’s probably the fastest-growing ministry in America.” John Camp, *The Miracles and the Money* (visited September 10, 1999) <<http://www.rickcross.com/reference/hinn2.html>. His style is to gather large groups of followers together in sports arenas and stadiums around the country and deliver sermons in much the same fashion as conventional ministers. *See id.* What makes Hinn so interesting are the portions of his show in which he purports to heal those with physical ailments. *See id.*

<sup>2</sup> David Lees, *Blow Me Down Jesus: Canada’s Benny Hinn May be the Next Great Televangelist*, SATURDAY NIGHT, Dec. 1, 1994 at 50. Hinn claims to have a special relationship with God. It began when the Holy Spirit walked into his room one night. He felt a jolt of electricity overcome his body. Once, he woke to find little boys in white robes flying above his bed. Another time, he encountered the spirit of death wearing a black hood and a black robe. The spirit was sent by Satan to choke him. After he cried out for help, four angels burst into the room. Two slammed Death into the wall while another, Michael, stared at Hinn until the fourth told Michael that someone else needed his help. Dissatisfied with Death’s work, Satan arrived one night. He had a goat’s face and smoke surrounded him. Fortunately for Hinn, the Holy Spirit drew a blanket over him to keep him safe. Finally, God dropped by. He hovered in the air covered entirely in flames. He told Hinn, “Preach the gospel.” Hinn refused. Two nights later, God came back and pleaded with him. He showed him a vision of people falling into Hell and the souls that were damned because Hinn would not preach. He still refused. Finally, Hinn gave in. He told the Lord, “I will preach the gospel on one condition: that you be with me in every service.” God agreed. Now Hinn claims to be able to use his ministry as a way to heal people. *Id.* At one service, Hinn bragged, “I was in Ghana just recently—we had half a million people show up—and a man was raised from the dead on the platform. That’s a fact, people. A man was raised from the dead on the platform. We have it on video.” Camp, *supra* note 1. When later asked for a copy of the video, Hinn’s producer, Jeff Pitman, said Hinn misspoke, and the cameras did not capture the miracle on film. *Id.*

his assertion. Then he blows into the microphone and many in attendance are knocked to the floor, slain by the power of the Holy Spirit.<sup>3</sup> At the end of the show, he reaches his hands toward the cameras and says, “[y]ou may want to come and touch the screen. A heart condition has just been healed. Diabetes has been healed.”<sup>4</sup> Although there was no admission for attending tonight’s service, you notice thousands voluntarily donating money.<sup>5</sup> They believe that a generous contribution is a small price to pay for the wonderful service that Hinn is providing.<sup>6</sup>

Later, while watching television, you are taken by a commercial depicting an African child with a bloated stomach, obviously malnourished, ignoring the swarming flies.<sup>7</sup> For just fifteen or twenty dollars, you can save some starving children.<sup>8</sup> The

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<sup>3</sup> Lees, *supra* note 2, at 50. This illustrates a criticism of Hinn’s ministry. “The issue is not whether the Holy Ghost [heals people], but the manner in which Benny Hinn preside[s] over the event[s].” *Id.* Those in attendance may collapse when they feel the presence of the Holy Spirit, but Hinn makes it seem as though he is generating the spiritual feeling of the crowd. *See id.* He “blows on his followers, knocks them gently under the chin, rubs his suit jacket over his body-which he says is electric with the power of the Holy Spirit-and flicks it at the audience like a whip.” Lee Romney, *Televangelist Hinn Building TV Studio, Ministry in O.C. Religion: Faith Healer Appeals to Believers for Donations to Finance \$4.5-million Facility in Aliso Viejo*, L.A. TIMES, Aug. 24, 1997 at A1.

<sup>4</sup> Camp, *supra* note 1. Benny Hinn has been criticized for deceiving his followers. One criticism is that he convinces his followers with injuries or illness that they are healed and they discontinue use of their medications or stop attending treatment with their physicians. Ole Anthony, founder of the Trinity Foundation, said, “[w]e feel that it’s deceptive what he’s doing, in giving false hope to these people, millions of people.” Lee Romney, *Televangelist Building O.C. Studio Religion: Florida-based Benny Hinn, Seen as One of Nation’s Fastest-Rising TV Preachers, Plans Aliso Viejo Facility. Some Question his Faith-Healing Practices*, L.A. TIMES, Aug. 24, 1997, at A3.

<sup>5</sup> *See* Lees *supra* note 2, at 50. According to Lees, “[h]is blatant manipulations for money were troubling, but only to someone like me, an infiltrator who shared none of the beliefs that were necessary to make sense of it.” *Id.* Religious organizations like Hinn’s ministry have a tremendous ability to raise money. *See* discussion *infra* Part III A. At his revivals, Hinn asks those in attendance to contribute \$100 to \$1000 to support the ministry. With attendance nearing 25,000 at times as well as an enormous television audience, it is not surprising to learn that Hinn’s ministry takes in \$20 million per year. *See* Lee Moriwaki, *Do You Believe in Miracles? Benny Hinn Packs Tacoma Dome With Thousands of People Who Do*, THE SEATTLE TIMES, Aug. 18, 1995, at A1.

<sup>6</sup> *See* Sally Macdonald, *Faith Healer Brings Crusade to Seattle-Followers Laud Him; Skeptics Call it Theatrics*, SEATTLE TIMES, Aug. 20, 1997, at B3.

<sup>7</sup> Eric Malnic & Russell Chandler, *International Christian Aid Founder L. Joe Bass - a Man on a Mission or a Power Trip?*, L.A. TIMES, April 8, 1985, at 1; Eric Malnic & Russell Chandler, *Says Only a Small Part of ICA Money is Used for Relief Ex-Charity Aide Tells of Donations Drain*, L.A. TIMES, Jan. 27, 1985, at 1.

<sup>8</sup> Steve Emmons, *O.C. Rich Lode for Charity Swindlers Fund-raising: Every one of its 31*

scene changes to a room full of operators who are now standing by to take your call. As you watch, people are calling in to make pledges. The money, however, is not going to Africa; it is going to the organization that solicited it. In either case, the contributors to such organizations have fallen victim to religious and charitable fraud.<sup>9</sup>

The use of electronic media by religious and charitable organizations to solicit money from consumers has developed into a multi-billion dollar industry in a relatively short period of time.<sup>10</sup> Solicitation through electronic media generally takes on one of two forms. In some instances, the solicitations are general in nature.<sup>11</sup> In other instances, the organization soliciting funds does so for a specifically stated goal of the ministry.<sup>12</sup> Either way, on many occasions, religious and charitable organizations

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*Cities has a Different Ordinance to Control those Seeking Donations. As a result, Enforcement is Practically Nil*, L.A. Times, Dec. 15, 1992, at 1.

<sup>9</sup> Fraud is defined as:

An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. . . .

BLACK'S LAW DICTIONARY 660 (6<sup>th</sup> Ed. 1990).

<sup>10</sup> See *infra* Part III A.

<sup>11</sup> Jonathan Turley, *Laying Hands on Religious Racketeers: Applying Civil RICO to Fraudulent Religious Solicitation*, 29 WM. & MARY L. REV. 441, 455-57 (1988). Solicitations that are general in nature do not make any promises to the consumers as to how the money will be spent, beyond simply telling them that the money will be used to support the ministry.

In one instance involving televangelist Jim Bakker, the PTL Club of which Bakker was the head, reportedly paid \$265,000 of church funds to suppress the release of information about Bakker's adulterous heterosexual and homosexual affairs. It was also revealed that Bakker was receiving a salary near \$5 million despite his assurances to viewers that his net worth was \$15,000. The Bakkers also used money they received from their organization to purchase \$700,000 worth of real estate and luxury cars. Similarly, televangelist Oral Roberts, whose program raised approximately \$88 million each year, was criticized when he purchased a 2.5 million dollar home in Beverly Hills. The money used in these instances did not involve embezzlement of church funds, rather, it was money received from the church over the approval of church leaders. *Id.*

<sup>12</sup> *Id.* at 459-60. Solicitations for a specific goal include campaigns to raise money to aid starving children or to help refugees. Televangelist Jimmy Swaggart was accused of diverting funds raised for the purpose of saving starving children. *Id.* at 460. Jerry Falwell was accused of sending only \$150,000 of \$6 million raised to aid refugees in northern Thailand. *Id.* Even a scandal involving the Roman Catholic Church was uncovered to reveal that of \$20 million raised to support missions in underdeveloped countries, only four cents for every dollar raised was used for its stated purpose. *Id.* at 461.

soliciting money from consumers engage in fraud.

Recognizing that controversies involving religious and charitable organizations have puzzled the courts throughout this century,<sup>13</sup> this paper will examine specific instances of religious and charitable fraud.<sup>14</sup> It will discuss the potential remedies that are available by donors who fall victim to the perpetrators of this fraud.<sup>15</sup> Finally this paper will suggest a more feasible method by which victims may recover than the conventional approaches.<sup>16</sup>

## II. THE SHAMAN:<sup>17</sup> VALIDATING THE FAITH HEALER'S CLAIM?

Whether televangelists are truly blessed with a special power to heal their followers' ailments may never be known. People claiming to have the power to heal others is not a new phenomenon. Accounts of individuals capable of healing their fellow man date back to prehistoric times.<sup>18</sup> Early accounts credit the power of healers to divine gifts from the gods.<sup>19</sup> In addition to the power to heal, some accounts attribute a variety of supernatural powers to the shaman.<sup>20</sup>

In virtually all healer-patient relationships, the method of curing the afflicted

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<sup>13</sup> See Barry Nobel, *Religious Healing in the Courts: The Liberties and Liabilities of Patients, Parents, and Healers*, 16 U. PUGET SOUND L. REV. 599, 600-02 (1993).

<sup>14</sup> See *infra* Part III B.

<sup>15</sup> See *infra* Part IV A through C.

<sup>16</sup> See *infra* Part IV D.

<sup>17</sup> Rogers states:

The shaman is a professional, probably the first learned professional in the evolution of human society. He has been respected for his knowledge and power, and feared for his intimacy with the spirits. He has been frequently hated for his avarice, but often rewarded lavishly for his successes in prognostication and healing. In some cultures, he has been punished for his failures, even with death

SPENCER L. ROGERS, PH.D., *THE SHAMAN; HIS SYMBOLS AND HIS HEALING POWER* 7 (1982).

<sup>18</sup> WALTER ADDISON JAYNE, M.D., *THE HEALING GODS OF ANCIENT CIVILIZATIONS* 31 (1962). Healing is mentioned in the earliest known records of human activities, so it can be concluded that healing existed before that time. DR. ROBERT BUCKMAN & KARL SABBAGH, *MAGIC OR MEDICINE? AN INVESTIGATION OF HEALING & HEALERS* 10 (1995).

<sup>19</sup> JAYNE, *supra* note 18, at 31-32. The duties of the healer included watching over the welfare of the people in their communities, defending against the machinations of their enemies, and through their superior knowledge, they healed the sick and devised means by which evil spirits were exorcized. *Id.*

<sup>20</sup> ROGERS, *supra* note 17, at 10-12. Shamans are technicians of magic. They are able to locate lost property and sense when an enemy is approaching. They can reveal the unknown past, present and future. They can make things disappear. They can communicate with the dead. They can kill someone miles away by merely pointing a finger. *Id.*

follows a consistent path. First, the patient approaches the healer with the belief that something is wrong.<sup>21</sup> The healer then searches for the cause of the problem.<sup>22</sup> Next, the healer intervenes by prescribing a drug, a spell, a recommendation or something else.<sup>23</sup> At this point, the healer is rewarded by either the patient or society as a whole for his or her service.<sup>24</sup> Finally, a measure of the success or failure of the treatment is in order.<sup>25</sup>

To illustrate how this works in a modern televangelical setting, an example of faith-healer Tim Storey<sup>26</sup> will be given. At a Jubilee Revival, Storey parades up and down the isles of the Christian Center searching for those who have come for his healing touch. One heavysset, middle aged woman complains of having a pain in her lower back. The healer extends the palm of his hand onto her forehead. She collapses into the arms of the usher.<sup>27</sup> She gets back up and informs the audience that her pain is

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<sup>21</sup> BUCKMAN, *supra* note 18, at 28.

<sup>22</sup> *Id.* Each time a healer examines a patient to diagnose the problem, a similar scenario unfolds.

In each instance, an expert scrutinizes something that is often unintelligible to the patient—a high white cell count, a silhouette on an X-ray image-intensifier—and says (or implies), “I have seen many things of this sort. In my experience what I have found here suggests that in this particular case the problem is due to the appendix/blockage of energy flow/disturbance of the spirit.”

*Id.* at 35. When diagnosing patients, healers use common perception as a critical aid. Almost anyone can detect many general signs of illness with no medical training or special powers. Some clues that someone may be ill are: pale complexion, suggesting anaemia; recent weight loss, evidenced by sunken cheeks or loose shirt collar; slow, painful movements, suggesting arthritis or back trouble; breathlessness, suggesting lung disease; anxious, worried looks and so on. *Id.* at 36-37.

<sup>23</sup> *Id.* at 28. This is the treatment phase. This is the reason people go to healers. Not much satisfaction would be had in simply being diagnosed without more. “An ill person-like nature-abhors a vacuum.” *Id.* at 44-45.

<sup>24</sup> *Id.* at 28. The most prevalent reward for the healer comes directly from the patient in the form of monetary payment. There are many ways in which healers are paid however. Some receive gifts, ceremonies in their honor, or a gratuity. *Id.* at 45-46. “In every case, however, there is a statement being made—what occurs between the patient and the healer is, in some respects, a transaction and that transaction has a value.” *Id.* at 46.

<sup>25</sup> *Id.* at 28. Once a suitable time has passed since treatment, only three outcomes are possible. The patient's problem can get better, worse or stay the same. *Id.* at 47.

<sup>26</sup> Tim Storey is an employee of the Jubilee Christian Center in San Jose. See Will Harper, *Touched by God*, (visited September 10, 1999) <<http://metroactive.com/papers/metro/10.09.97/cover/god-9741.html>>.

<sup>27</sup> *Id.* at 2. An usher follows Storey around as he heals those in attendance. The usher catches the *patients* as they shake and fall to the floor after Storey touches them. This is

gone.<sup>28</sup> Now the healer must be rewarded for his service. The audience collectively gasps and erupts into applause as an apparent reward.<sup>29</sup> Storey quickly silences the audience, for the reward he seeks is not audible gratitude, but something else.<sup>30</sup>

### III. SHOW ME THE MONEY

#### A. *America; A Vast Market Upon Which to Prey*

Every year, Americans give more than \$18 billion to religious organizations.<sup>31</sup>

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described as being “slain in spirit.” For those who are seriously slain, a staff member waits with a blanket as they may be down a while. *Id.*

<sup>28</sup> *Id.* Could this woman’s pain be miraculously destroyed or is something else at work? One possibility is the placebo effect. A placebo is “any therapeutic procedure (or that component of therapeutic procedure) which is deliberately given to have effect on, or does have an effect on, a symptom, syndrome or disease, but which is without specific activity for a condition to be treated.” MICHAEL JOSPE, *THE PLACEBO EFFECT IN HEALING* xiii (1978). The attitude of the healer has a direct impact on the placebo effect. The healer’s “faith, belief, enthusiasm, conviction, commitment, optimism, interest, positive and negative expectations, skepticism, disbelief, and pessimism about treatment” all affect the patient’s recovery. *Id.* at 104-05. If the lady’s perception of Storey was that he was committed to healing her and confident in his ability to do so, there is a chance that if her back actually quit hurting, it was a result of the placebo effect. *See id.* *See generally* Camp, *supra* note 1. According to Dr. Herbert Benson of Harvard University, “There are cases where faith healers bring about miraculous cures. Many people do get better, but it may not be the faith healer that’s doing it. It may be their belief in the faith healer and what the faith healer represents.” *Id.* at 2.

An illustration of this is found in the case of Natalia Barsed, who suffered from a rare cancer with secondaries in the bones. The cancer had progressed to the point at which it was resistant to chemotherapy. She was given powerful pain killers to ease her misery. She visited a healing ceremony held in a large stadium conducted by faith-healer Maurice Cerullo. She was invited on stage. Maurice asked her to walk unassisted across the stage. She was able to do this with little pain. Maurice told her to tell her doctors that she had been cured of her cancer. She soon visited her doctors to learn that the cancer had not been cured. She still required large doses of pain killers to ease the misery for the rest of her short life. “The effect seen on stage was simply a temporary decrease in her perception of pain due to the effect of her conscious mind and will to improve.” BUCKMAN, *supra* note 18, at 161-62.

Another possibility is that it is a sham. Perhaps the lady was a plant. Dean Van Druff, a Christian from San Jose, said of the revival, “I suppose what bugs me the most is that it is a lie.” HARPER, *supra* note 26, at 12.

<sup>29</sup> *See generally* Harper, *supra* note 26.

<sup>30</sup> *See id.*

<sup>31</sup> CARL BAKAL, *CHARITY USA; AN INVESTIGATION INTO THE HIDDEN WORLD OF THE MULTI-BILLION CHARITY INDUSTRY* 85 (1979). Overall, Americans contribute \$150 billion to support charitable organizations. Lisa Loftin, Note, *Protecting the Charitable Investor: A Rationale for Donor Enforcement of Restricted Gifts*, 8 B.U. PUB. INT. L.J. 361, 364 (1999). Colleges and universities receive \$9 billion in private donations each year. *Id.*

Of that amount, about \$1 billion is given to the top television ministries and another \$1 billion is given to smaller, more localized television ministries and religious fund-raising charities.<sup>32</sup> In fact, Americans give more money to charities each year than any other country.<sup>33</sup>

This money is not raised by chance. Heavy solicitation campaigns are waged to open the pocket books of trusting men and women watching from America's living rooms.<sup>34</sup> These campaigns were originated by a cerebral palsy charity in 1951.<sup>35</sup> The New York based charity<sup>36</sup> decided to hold its annual benefit show on television. Raising more money that night than it had in the previous year, the "telethon" was born.<sup>37</sup>

That same year, Billy Graham<sup>38</sup> became the first minister to take his message to the television airwaves.<sup>39</sup> Soon thereafter, large television studios began to replace churches and cathedrals as ministers entered the market place of religion.<sup>40</sup>

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<sup>32</sup> Richard N. Ostling, *TV's Unholy Row; A Sex and Money Scandal Tarnishes Electronic Evangelism (Jim Bakker affair)*, TIME, Apr. 6, 1987 at 60.

<sup>33</sup> Jennifer Reingold, *A Continent of Givers; Why do North Americans give more to charity than Europeans?*, FINANCIAL WORLD, Aug. 3, 1993 at 69. This phenomenon is attributed primarily to the tax deductible status afforded charitable contributions in the United States. See discussion *infra*, Part IV, A 3. The large amount of donations to charities is also attributable to the active role taken by churches and religious organizations. *Id.* The comparison, however, may be skewed. For example, in countries like Germany, the government includes an optional income tax for charity, so donations take the form of a tax rather than a charitable contribution. *Id.* The large donation figures in the United States have continued to surge despite repeated publicized scandals involving fiscal impropriety among church leaders. Larry Witham, *Financial Sins of Church Leaders Don't Stop Faithful From Tithing*, INSIGHT MAGAZINE, March 27, 1995 at 32.

<sup>34</sup> See David Johnston & Jennifer Leonard, *TV Charities: Let the Giver Beware*, L.A. Times, Jan. 20, 1985 at 3. "TV and charity have formed a grandly profitable partnership that is one of the last great unregulated financial frontiers in America." *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> The charity was United Cerebral Palsy. *Id.*

<sup>37</sup> *Id.* The first telethon raised \$276,408, a large sum of money for 1951. *Id.* By 1985, this telethon was grossing sums close to \$17+ million. *Id.*

<sup>38</sup> Billy Graham is a televangelist who's ministry started out in the streets of Manhattan in the 1950s. He has been a prominent figure in the Christian community and his spiritual advice has been sought by many world leaders. Considered one of the "major religious figures of the twentieth century," he is classified among people like Karl Barth, Pope John Paul II and Mother Theresa. Tim Stafford & Ted Olsen, *When Evangelicals Look in the Mirror, do we See the Host of 'The 700 Club' Staring Back?*, CHRISTIANITY TODAY, Aug. 12, 1996, at 26.

<sup>39</sup> Ostling, *supra* note 32, at 62.

<sup>40</sup> See *id.* at 62-67.

Now the campaigns for financial contributions to ministries range from requests for money to save starving children in third-world countries<sup>41</sup> to claims that, without viewer support, the minister will not be able to continue the healing work of Christ.<sup>42</sup> Many “victims” of such solicitations suffer a devastating effect when they contribute money they cannot afford to lose, often under the belief that the Lord will reimburse them.<sup>43</sup> A variety of reports have revealed that many of these efforts at raising money are scams. Some examples follow.

*B. The Lord is Broke, and Only You Can Help*

In 1987, televangelist Oral Roberts<sup>44</sup> broadcast that “God would ‘call Oral Roberts Home’ unless by March 31 believers came up with \$4.5 million for missionary work.”<sup>45</sup> He later proclaimed, “It’s April, and I’m still alive” for his plea was successful in raising \$3.5 million more than originally requested.<sup>46</sup> Unwilling to settle for the \$8 million he just received, he announced that he had been given a new message from God: “We must raise \$8 million every year for the rest of our lives until Jesus returns.”<sup>47</sup>

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<sup>41</sup> Johnston, *supra* note 34, at 3. One campaign featured Gary Collins and wife Mary Ann Mobley on a stage set with clocks reminding viewers that time is running out for a starving child somewhere on Earth. Viewers are asked to call and exercise their power to save those children. *Id.* Another shows Rev. Maurice Mosley unveiling a dead African baby as the child’s mother erupted into hysterics in the background. Rev. Mosley then pleads, “Don’t wait . . . last night, 40,000 people died.” *Id.* International Christian Aid ran a campaign that broadcast a poor Portugese woman handing over her five children to the organization because she could not afford to feed them. The smiling children were taken away as the host lectured the viewers to pay close attention to what was described as not a staged event. The camera zoomed in on the mother who was experiencing convulsions from an apparent seizure. *Id.*

<sup>42</sup> See *infra*, notes 44-47 and accompanying text.

<sup>43</sup> See Art Levine, *Detectives for Christ Ole Anthony and his Merry Band Take on the Televangelists*, U.S. NEWS & WORLD REPORT, Dec. 8, 1997. Harry Guetzlaff, a 53 year-old former follower of minister Robert Tilton, said that he lost his home, marriage and business when he donated thousands of dollars to the ministry. He said he was induced to pledge money he didn’t have, and God would reimburse it a hundredfold. He ended up broke. *Id.*

<sup>44</sup> Oral Roberts is a Pentecostal preacher who began to hold revivals in the 1940s. He began to broadcast his revivals on television in the mid 1950s. He heads Oral Roberts University and the City of Faith, a medical complex that offers spiritual as well as physical healing. He has claimed to have the power to heal people merely by laying his hands on them. Ostling, *supra* note 32, at 63.

<sup>45</sup> *Id.* at 60.

<sup>46</sup> Lucia Soldrzano, *TV Preachers and Public Trust*, U.S. NEWS & WORLD REPORT, Apr. 13, 1987, at 15.

<sup>47</sup> *Id.* In a U.S. News-CNN Poll, only 12 percent of those interviewed said that Roberts truly believed that God would “call him home.” *Id.* Seventy-five percent believed the statement was Robert’s “clever way of raising money to save his university.” *Id.*

In December 1988, another famous scandal occurred. The founder of PTL<sup>48</sup> Jim Bakker was charged with 24 counts of fraud and conspiracy for stealing millions of dollars from PTL funds and for deceiving viewers.<sup>49</sup> According to the government, the purpose of the crimes was to “create and continue lavish and extravagant life-styles.”<sup>50</sup>

The jury found him guilty on all 24 counts, and he was sentenced to 45 years in prison and fined \$500,000.<sup>51</sup> The Court of Appeals remanded the case, however, because in sentencing Bakker, the judge injected his own religious sentiment.<sup>52</sup> He ended up

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<sup>48</sup> PTL stands for either “Praise the Lord” or “People that Love” depending on who you ask. It was a \$203 million religious empire created by Jim and Tammy Bakker. It consisted of a television and theme-park ministry. David Brand, *God and Money; PTL, Facing Bankruptcy, Fights for Survival*, TIME, Aug. 3, 1987, at 48.

<sup>49</sup> Richard N. Ostling, *Jim Bakker’s Crumbling World; The Founding Father of PTL is Charged with Fraud and More*, TIME, Dec. 19, 1988, at 72. Bakker and other top officials in PTL were accused of taking \$4 million from PTL. *Id.* They were also accused of vastly overselling lifetime “partnerships” promising lodging at the Grand Hotel among other accommodations at the Heritage USA theme park which is run by Bakker. *Id.* Part of the scam included selling to 9,700 “partners” the right to stay in what was later discovered to be a single bunkhouse with 48 beds. *Id.*

<sup>50</sup> *Id.* The money was used to give Jim Bakker and his wife Tammy \$3.4 million in bonuses and \$279,000 to buy silence from Jessica Hahn, with whom Jim Bakker had an affair. *Id.*

<sup>51</sup> *United States v. Bakker*, 925 F.2d 728, 732 (1991). An illustration of how severe this sentence is can be shown by comparing sentences for other crimes. The average sentence for murder is 20.4 years, 9.4 years for rape, 8 years for arson, 3.9 years for fraud, and Bakker was sentenced to 45 years. Alain L. Sanders, *The Wrath of “Maximum Bob”: Jim Bakker’s Stiff Punishment Raises Questions Over Sentencing*, TIME, Nov. 6, 1989, at 62.

<sup>52</sup> *Baker*, 925 F.2d at 740-41. During the sentencing phase of the trial, the judge told Bakker that “[h]e had no thought whatever about his victims and those of us who do have a religion are ridiculed as being saps from money-grubbing preachers or priests.” *Id.* at 740. The appellate judge said that while trial judges have the authority to lecture the defendant on behalf of society as a whole, in this case, it was too apparent that the judge relied on his own religious convictions in determining the sentence. *Id.*

Regrettably, we are left with the apprehension that the imposition of a lengthy prison term here may have reflected the fact that the court’s own sense of religious propriety had somehow been betrayed. In this way, we believe that the trial court abused its discretion in sentencing Bakker. . . . We remand this case with genuine reluctance because Bakker’s assignment of error at the trial phase only underscore a proceeding which was fairly conducted in the face of trying circumstances. As our prior discussion has made plain, we have carefully scrutinized the record and we are confident that the district court meticulously observed this defendant’s rights at trial. We thus refuse to accept Bakker’s contention that we should somehow give any alleged error at sentencing retroactive effect by saying that it infected the trial.

spending 4 ½ years in prison and is currently on probation.<sup>53</sup>

In the mid-1980s, the charity of choice seemed to be providing food and medical attention to the famine ridden country of Ethiopia. One organization that capitalized on Americans' sympathy for starving children was International Christian Aid (ICA).<sup>54</sup> ICA, through solicitation, raised \$33 million for Ethiopian aid at times.<sup>55</sup> Although it is not clear how much, if any, of the money and supplies ultimately made it to Africa, evidence indicates that it was very little.<sup>56</sup> Much of the money that was collected from donors was used to enrich the lives of those who worked for ICA. Top officials earned hefty salaries,<sup>57</sup> select employees received low interest home loans from the organization,<sup>58</sup> and an enormous amount of money was spent on the elaborate headquarters.<sup>59</sup>

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*Id.* at 740-41.

<sup>53</sup> *Bakker Now Preaching 'Gospel of Meekness'; Ministry: Former televangelist, who says he experienced a radical theological shift in prison, seems to be taking on a more public life. He has signed a contract for a book about his downfall*, L.A. TIMES, March 2, 1996, at 4. Bakker's sentence was reduced in 1991 to 18 years. *Bakker Expresses Remorse, Gets 18 Years Instead of 45*, L.A. TIMES, Aug. 24, 1991, at 2. His sentence was reduced again in 1992. This time it was reduced to eight years. *Sentence Reduced for Televangelist Bakker*, L.A. TIMES, Dec. 23, 1992, at 14.

<sup>54</sup> Doug Smith & Russell Chandler, *Relief Agency Denies Failure to Dispatch Aid*, L.A. TIMES, Jan. 15, 1985, at 3. The organization claimed to funnel money and supplies to other charities registered in Ethiopia for relief aid. Representatives of the other organizations denied receiving any shipments from ICA. *Id.*

<sup>55</sup> *Grand Jury Probing Refugee-Aid Group*, SEATTLE TIMES, March 1, 1985, at B9.

<sup>56</sup> *Ethiopia-Relief Group Accused of Collecting Much But Aiding Little*, SEATTLE TIMES, Jan. 12, 1985 at A2. The organization claimed that because it was not licensed with the Ethiopian government, it has turned over supplies to a French organization, Doctors Without Borders. A spokesman from that group said that it has not received a cent from ICA. *Id.* A spokesman from a Los Angeles medical aid group said, "[t]hey are real skilled at collecting money and real reticent about spending it." *Id.* A representative of Catholic Relief Services said it had concerns with organizations claiming to be "working in places that they aren't. . . and ICA does not have a presence in Ethiopia." *Id.*

<sup>57</sup> Eric Malnic & Russell Chandler, *Says Only a Small Part of ICA Money is Used for Relief Ex-Charity Aide Tells of Donations Drain*, L.A. TIMES, Jan. 27, 1985, at 1. Joe Bass, who founded and controls the organization earned \$70,000, expenses, a BMW, and other perks. Another managing official, Melanie Cross, received close to \$50,000, expenses and other perks. *Id.*

<sup>58</sup> *Id.* Cross was given a \$109,000, low interest home loan and baby-sitting expenses. *Id.* Bass' son Mark received a \$41,000 home loan at a rate at least 4% below the prevailing mortgage rate plus nearly \$7,000 for college expenses. *Id.*

<sup>59</sup> *Id.* The organization headquarters was built in 1982 for a cost of \$3 million. It contained a sophisticated security system. "The outside of the building, the doors and the windows, had sensors, interior hallways were monitored with invisible, infrared beams. There were cameras

The organization began to thrive only after its attention was focused toward refugee aid rather than evangelism.<sup>60</sup> “Bass learned it was far easier to raise money by showing films of children with bloated bellies than...for smuggling Bibles into Russia.”<sup>61</sup>

In one campaign, ICA claimed to be raising money for Somalian refugees. The aid, it said, would help 1.5 million refugees; however, at the time, there were only about 500,000 refugees in the area.<sup>62</sup>

#### IV. WHAT CAN BE DONE?

##### A. Government Enforcement

##### 1. The Federal Trade Commission (FTC)<sup>63</sup>

The FTC enforces, through litigation, the Federal Trade Commission Act<sup>64</sup> which prevents the use of “unfair or deceptive acts or practices in or affecting commerce.”<sup>65</sup> On its face, the statute appears to exempt non-profit and charitable

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in the lobby, at the rear door and in the mail-processing room, videotaping constantly. . . .” Bass’ office had its own security system, and if anyone penetrated it, a panic button was connected to a direct link to the police. *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Ethiopia-Relief Group Accused of Collecting Much But Aiding Little*, *supra* note 56, at A2.

<sup>63</sup> The Code of Federal Regulations provides:

The Federal Trade Commission is an independent administrative agency which was organized in 1915 pursuant to the Federal Trade Commission Act of 1914 (38 Stat. 717, as amended; 15 U.S.C. 41-58). It is responsible for the administration of a variety of statutes which, in general, are designed to promote competition and to protect the public from unfair and deceptive acts and practices in the advertising and marketing of goods and services.

It is composed of five members appointed by the President and confirmed by the Senate for terms of seven years.

16 C.F.R. § 0.1 (1999).

<sup>64</sup> 15 U.S.C. § 45

<sup>65</sup> *Id.*

(a)(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(a)(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions. . . , Federal credit unions. . . , common carriers. . . , air carriers. . . and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921. . . , from using unfair methods of

organizations from the FTC's jurisdiction. The statute only applies to "persons, partnerships or corporations."<sup>66</sup> The FTC may assert jurisdiction over charitable organizations if the activities of the organization resemble the activities of a business.<sup>67</sup> Courts generally adhere to a test, announced by the Commission, which focuses attention to the effect on the consumer.<sup>68</sup>

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competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce. . . .

(b) Proceeding by Commission; modifying and setting aside orders

Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. . . .

(m)(1)(A) The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule under this chapter respecting unfair or deceptive acts or practices. . . with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than \$10,000 for each violation. . . .

(n) The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. . . .

*Id.*

<sup>66</sup> *Id.*

<sup>67</sup> Tara Norgard, Note, *How Charitable is the Sherman Act?*, 83 MINN. L.REV. 1515, 1515-1516 (1999).

Despite the legal privileges the charitable sector enjoys, it is constrained by finite dollars to meet a seemingly infinite charitable need. As a result, charities employ sophisticated business techniques to compete effectively for the dollars that are available in the charitable marketplace. When charities behave like businesses they must operate according to the same laws that constrain traditional businesses.

*Id.*

<sup>68</sup> See *Federal Trade Commission v. Pantron I Corp.*, 33 F.3d 1088 (1994).

[T]he Commission announced a three-part test for determining whether an advertisement is misleading and deceptive in violation of section 12.

In *FTC v. Saja*, a fund raising organization engaged in a fraudulent fund raising scheme whereby it deliberately deceived consumers.<sup>69</sup> The FTC brought charges against the organization for violating section 5 of the FTC Act.<sup>70</sup> The organization presented several theories for a defense. First, it argued that the FTC has no jurisdiction over not-for-profit organizations.<sup>71</sup> The court held that the defendant's status as a fund raiser for a non-profit organization, alone, does not exempt it from the jurisdiction of the FTC.<sup>72</sup>

Next, the organization argued that the FTC has no jurisdiction over the activity of charitable fund raising.<sup>73</sup> The organization argued that section 45(a)(2) of the FTC Act provides that the jurisdiction of the FTC is limited to conduct "in or affecting commerce,"<sup>74</sup> thus, the FTC should not have jurisdiction over the activities of the organization because charitable fund raising does not affect commerce.<sup>75</sup> The court was more persuaded by the FTC's argument that because the organization "solicit[s] donations throughout the country over interstate telephone lines and collect[s] the resulting pledges by mail or through United Parcel Service COD deliveries...[and] some of Defendants' solicitations are for the purchase of advertising in a publication,... Defendants' activities affect interstate commerce."<sup>76</sup>

Finally, the organization argued that the FTC Act was unconstitutional because it is overbroad, including "protected constitutional freedoms within [its] reach."<sup>77</sup> The court noted that the organization failed to identify what constitutional freedoms were prohibited by the FTC Act.<sup>78</sup> The court went on to hold that "the First Amendment does not shield a person committing a fraud on the public even where the purpose is protected by the First Amendment."<sup>79</sup>

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Under this test, the Commission will find an act or practice deceptive if, first, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material.

*Id.* at 1095.

<sup>69</sup> Federal Trade Commission v. Saja, No. Civ-97-0666-PHX-SMM, 1997 WL 703399 at \*1 (D. Ariz. Oct. 7, 1997).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at \*2.

<sup>73</sup> *Id.* at \*1.

<sup>74</sup> 15 U.S.C. § 45(a)(2).

<sup>75</sup> *Saja*, 1997 WL 703399, at \*2.

<sup>76</sup> *Id.* at \*2-\*3.

<sup>77</sup> *Id.* at \*3.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* The government has a compelling interest in protecting the public from fraudulent

Another instance in which the FTC brought suit against a charitable organization for engaging in unfair and deceptive practices is *FTC v. NCH, Inc.*<sup>80</sup> That case involved telephone solicitation. The solicitors misrepresented to the consumers the nature and scope of the charitable activities.<sup>81</sup> Furthermore, the organization promised consumers that in return for their contributions, they would receive prizes. They never provided the consumers with the prizes.<sup>82</sup> The court found that the organization engaged in deceptive and misleading representations to the consumers.<sup>83</sup>

## 2. Federal Communications Commission (FCC)

Another government agency that may take an active role in combating fraud committed by religious and charitable organizations is the FCC. The FCC enforces the Communications Act of 1934 which regulates the broadcast spectrum.<sup>84</sup>

In the interest of protecting the public as a whole,<sup>85</sup> the FCC regulates the information projected through broadcast media as well as the electronic media itself.<sup>86</sup>

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practices, and may restrict fraudulent and misleading speech as long as the restriction is narrowly-tailored. *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940).

<sup>80</sup>106 F.3d 407, No. 95-16893, 1997 WL 22246, \*1 (9<sup>th</sup> Cir. (Nev.) Jan. 15, 1997).

<sup>81</sup> *Id.* The solicitors contended that they were under the belief that the organization was going to be able to continue to provide shelter and help to needy children and homeless people. *Id.*

<sup>82</sup> *Id.* at \*2.

The district court found that NCH solicitors guaranteed consumers that they would receive a prize worth no less than \$3,500. The appellants argue that one of the prizes offered to consumers was a chance to receive a fair share of the \$25,000 goldrush prize. Some consumers did receive minor awards, including plaques, jewelry, and gold colored coins, that ostensibly qualified as their fair share of the goldrush, but were valued at less than \$100. The appellants argue that there is a genuine issue as to whether the goldrush representations were deceptive. The appellants are incorrect.

*Id.*

<sup>83</sup> *NCH, Inc.*, 106 F.3d 407, No. 95-16893, 1997 WL 22246 at \*3.

<sup>84</sup> 47 U.S.C. §§ 301-309 (1999).

<sup>85</sup> *See Red Lion Broadcasting Co. v. Federal Communications Comm'n*, 395 U.S. 367 (1969).

[T]he people as a whole retain their interest in free speech by radio [as well as other types of broadcast media] and their collective right to have the medium function consistently with the ends and purposes of the First Amendment . . . it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.

*Id.* at 390.

<sup>86</sup> *See Federal Communications Comm'n v. League of Women Voters of Cal.*, 468 U.S. 364 (1984). "Congress may . . . seek to assure that the public receives through this medium a

Because of the scarcity of the frequencies upon which the electronic media rely, the government is “permitted to put restraints on licensees...on this unique medium.”<sup>87</sup> One such restraint was placed on licensees through an FCC regulation that promoted minority ownership of television licenses.<sup>88</sup> In that case, Metro Broadcasting and Rainbow Broadcasting both applied for the same television license from the FCC. The license was awarded to Rainbow Broadcasting primarily because of its minority ownership. The Court held that the FCC had not violated the Constitution and the restraint was allowed.<sup>89</sup>

In another case, Faith Center, Inc. applied to the FCC for renewal of its license to broadcast on an FM radio frequency.<sup>90</sup> The Commission had previously denied Faith Center’s application on the grounds that it did not properly comply with application procedure.<sup>91</sup> The failure stemmed from a refusal by Faith Center to comply with an administrative law judge’s order to complete discovery requests in an investigation surrounding Faith Center’s fund raising tactics.<sup>92</sup> Addressing Faith Center’s application for further review by the Commission, the FCC determined that “the Commission is unable to fin[d] that a grant of the...license renewal application would serve the public interest, convenience and necessity.”

### 3. Internal Revenue Service (IRS)

The IRS is by far the most active government agency in combating religious wrongdoing. The agency has initiated numerous suits against religious organizations

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balanced presentation of information on issues of public importance that otherwise might not be addressed if control of the medium were left entirely in the hands of those who own and operate broadcasting stations.” *Id.* at 377.

<sup>87</sup> *Red Lion*, 395 U.S. at 390.

<sup>88</sup> *Metro Broadcasting, Inc. v. Federal Communications Comm’n*, 497 U.S. 547 (1990), *overruled* in part by *Adarand Constructors v. Pena*, 515 U.S. 200 (1995).

<sup>89</sup> *Id.* at 548. Metro proceeded on the theory that the Federal Communications Commission guideline giving preferential treatment to minorities in application proceedings for FCC licenses violated the Equal Protection Clause of the Constitution. The Court disagreed holding that the policies “bear the imprimatur of longstanding congressional support and direction and are substantially related to the achievement of the important governmental objective of broadcast diversity.” *Id.* See also *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989) (holding that the FCC could constitutionally prohibit obscene telephone messages).

<sup>90</sup> *In re Applications of Faith Center, Inc.*, 89 F.C.C. 2d 1054 (1982).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* The information sought was going to be used by the Commission to determine whether Faith Center engaged in fraudulent conduct in its over-the-air fund raising. The Commission also sought to determine whether Faith Center had refused to cooperate with Commission investigators. *Id.*

alleging violations of federal tax laws.

United States law allows for a tax exemption for certain religious and charitable organizations.<sup>93</sup> The rationale for such a tax exemption is that society benefits from churches and other charitable organizations, and rather than taxing them and spending the money on public projects, the government leaves the money with the organizations that will, presumably, perform community services that promote the public good.<sup>94</sup> Many have argued that under this rationale, the exemption should extend to religious for-profit organizations as well as religious non-profit organizations.<sup>95</sup> They argue that a competitive market for the services provided by these organizations would result in most of the tax subsidy being used to produce the services to society.<sup>96</sup> One reason for the distinction is that if the exemption applied to religious organizations that enriched the people who operate them, the IRS would have difficulty determining which profitable organizations were actually religious and which ones were merely calling themselves religious in order to receive tax exempt status.<sup>97</sup> The relative significance of the public charity tax exemption status under section 501(c)(3) of the Internal Revenue Code is illustrated by its vast application. For example, “a single exemption to the United States

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<sup>93</sup> I.R.C. § 501 (1999).

(a) Exemption from taxation.- An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503.

(c) List of exempt organizations.- The following organizations are referred to in subsection (a): . . .

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, ... or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

*Id.*

<sup>94</sup> Brian H. Redmond, J.D., *Federal Tax Exemption: When Do Earnings of Religious, Charitable Educational, or Similar Organization Inure to Benefit of Private Shareholders or Individuals Within Meaning of 26 U.S.C.A. § 501(c)(3)?*, 92 A.L.R. FED. 255 (1989).

<sup>95</sup> Trevor A. Brown, Note, *Religious Nonprofits and the Commercial Manner Test*, 99 YALE L.J. 1631, 1634, (1990).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 1635. The main problem is that there is not a precise definition for “religious.” “The prohibition against private inurement allows the I.R.S. and the courts to avoid inquiry into religiosity or sincerity in these cases and turn instead to a determination of whether an organization is nonprofit.” *Id.*

Catholic Conference... includes over 70,000 subordinate churches and administrative units.”<sup>98</sup>

One of the most persistent complaints the IRS makes against organizations qualifying for tax-exempt status is that the organizations’ net earnings have inured to private individuals.<sup>99</sup> In *Unitary Mission Church v. Commissioner*, the cofounder and trustee of the church accepted from it parsonages for services he performed.<sup>100</sup> The amounts of the parsonages for three consecutive years amounted to \$13,600, \$35,650, and \$12,000.<sup>101</sup> Two other ministers of the church received parsonage allowances as well.<sup>102</sup> The court held that the church was not entitled to federal tax exemption status

<sup>98</sup> Oliver A. Houck, *With Charity for All*, 93 YALE L.J. 1415, 1426, (1984).

<sup>99</sup> Redmond, *supra* note 94, at 255.

In religious organizations, inurement of earnings to the benefit of a private individual may appear in a number of guises. A religious organization’s payment of living expenses for its members has been held in some cases to constitute such inurement of its net earnings. . . , although in other cases, such payments did not result in inurement. . . . Expenditures of any kind by a religious organization give rise to the spectre of proscribed inurement; rental payments and other debt payments have been held to constitute inurement. . . , as have disbursement in the form of loans or donations, without terms of repayment. . . .

*Id.* See also, *Christian Echoes Nat’l. Ministry, Inc. v. U.S.*, 470 F.2d 849 (10<sup>th</sup> Cir. 1972)(holding that the revocation of tax exempt status for a religious organization whose continuous activities substantially contributed to influencing or attempting to influence legislation did not violate First Amendment or deny due process); *Universal Life Church Inc. v. U.S.*, 13 Cl.Ct. 567 (1987)(holding that church who provided tax advice for others engaged in nonexempt activities); *Inc. Trustees of the Gospel Worker Society v. U.S.*, 510 F.Supp. 374 (D.D.C. 1981)(holding that organization which published religious literature no longer qualified as a tax exempt organization); *Presbyterian and Reformed Publishing Co. v. Comm’r of Internal Revenue*, 743 F.2d 148 (3<sup>rd</sup> Cir. 1984)(affirming the revocation of tax exempt status for religiously oriented publishing house); *Freedom Church of Revelation v. U.S.*, 588 F. Supp. 693, 696 (D.D.C. 1984)(holding that church who failed to prove that it operated exclusively for tax exempt purposes and that no part of its net earnings inured to the benefit of any private individual would not be afforded tax exempt status under 501(c)(3) of the Internal Revenue Code).

<sup>100</sup> *Unitary Mission Church of Long Island v. Comm’r of Internal Revenue*, 74 T.C. 507 (1980). Kenneth W. Bucher founded the church, services of which, were held in the basement of his home. The church consisted of eleven members. No application for recognition as a tax-exempt organization was filed with the Internal Revenue Service. The church operated for three years as though tax exempt before receiving notice from the Commissioner that it would have to submit information for a determination of tax status to be made. *Id.* at 508-13.

<sup>101</sup> *Id.* at 513. The services for which Bucher was paid were leading the Sunday services and making himself available for pastoral counseling. *Id.*

<sup>102</sup> *Id.* The other two ministers received parsonage allowances that fluctuated greatly from

under sections 501(a) and 501(c)(3) of the Internal Revenue Code.<sup>103</sup> The reason given for the denial of tax exemption was “the inurement of church property to the private benefit of its trustee, Kenneth.”<sup>104</sup> The court relied on the fact that no explanation was given as to why Bucher’s parsonage allowance more than doubled in the second year and fell to its lowest amount in the third year.<sup>105</sup> Furthermore, there was no evidence that the other ministers of the church performed any services for it.<sup>106</sup>

Another case involving the denial of tax exemption status to a church is *Founding Church of Scientology v. U.S.*<sup>107</sup> In that case, the founder of the church was paid a salary, commissions from the proceeds of the church, royalties on books promoted through the church, lecture fees, and received loans and reimbursements for expenditures.<sup>108</sup> The court held that tax exempt status should not be given to the church because benefits inured to private individuals.<sup>109</sup>

Another way the IRS may combat religious and charitable wrongdoing is by denying the contributor the ability to claim a tax deduction for money donated to religious and charitable organizations.<sup>110</sup> In *Katherine Jean Graham v. Commissioner*,<sup>111</sup> petitioners were members of the Church of Scientology.<sup>112</sup>

year to year. *Id.*

<sup>103</sup> *Id.* at 509.

<sup>104</sup> *Id.* at 513.

<sup>105</sup> *Id.* at 513.

<sup>106</sup> *Id.* at 513.

<sup>107</sup> *Founding Church of Scientology v. U.S.*, 412 F.2d 1197 (1969).

<sup>108</sup> *Id.* at 1199-1201.

<sup>109</sup> *Id.* at 1199. The church sought to be covered by a number of cases which hold that a reasonable salary paid by a corporation to an officer does not result in the inurement of benefits to a private individual. The court replied,

[e]ven had the compensation paid to Hubbard been demonstrably reasonable, however, this showing would not remedy the defects in proof concerning the additional payments to Hubbard, or, of course, his family. If in fact a loan or other payment in addition to salary is a disguised distribution or benefit from the net earnings, the character of the payment is not changed by the fact that the recipient’s salary, if increased by the amount of the distribution or benefit, would still have been reasonable.

*Id.* at 1202.

<sup>110</sup> I.R.C. § 170 (1999). This section allows a personal tax deduction for individuals who contribute to any charity. This is defined as contributions to organizations with “religious, charitable, scientific literary, or educational purposes. . . .” *Id.* With a few exceptions, the purposes described in this section are the same as those described in section 501(c)(3). Houck, *supra* note 98, at 1426. Section 170(c) precludes deductions to be taken for contributions that result in private inurement, lobbying and political activity. I.R.C. § 170(c) (1999).

<sup>111</sup> 83 T.C. 575 (1984), *aff’d* 822 F.2d 844 (9<sup>th</sup> Cir. 1987), *vacated & remanded* Comm’n v. Foley,

Scientists believe that the unconscious mind is filled with mental images that are often responsible for irrational behavior.<sup>113</sup> The church engages in a practice known as “auditing” which helps an individual gain spiritual competence.<sup>114</sup> Scientists believe that auditing confers upon them a benefit.<sup>115</sup> When a Scientist receives a benefit, he or she must give something back.<sup>116</sup> Petitioners received auditing and other services provided by the church. They made payments to the church in return for the benefit that they received. On their tax return for the same years as their payments, they claimed charitable contribution deductions in the amounts of their payments. The court held that the contributions made to the church were not deductible under section 170 of the Internal Revenue Code.<sup>117</sup>

#### 4. Fraud Against the Federal Government

One remedy against religious and charitable wrongdoers outside the province of regulatory agencies is the prosecution for the crime of fraud. In *United States v. Rasheed*, Rasheed, the founder of a church, and his associate, Phillips, were indicted on several counts including mail fraud.<sup>118</sup> The conduct in which the two were engaged

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490 U.S. 1103 (1989), *cert. granted* *Graham v. Comm’r*, 486 U.S. 1022 (1988).

<sup>112</sup> *Id.* at 577.

<sup>113</sup> *Id.* at 577.

<sup>114</sup> *Id.* This process is said to erase the reactive mind. It is also called “processing,” “counseling,” and “pastoral counseling.” *Id.*

<sup>115</sup> *Id.* The benefit is realized in degrees or steps. The sessions in which the mind is cleared are called “intensives.” *Id.*

<sup>116</sup> *Id.* One tenet of Scientology is the doctrine of exchange. That is, for any benefit an individual receives, that individual must pay something back. Under this doctrine, the individual receiving the audit must make donations according to a fixed amount. At the time of this case, a 12 ½- hour intensive cost \$625. A 25- hour intensive cost \$1,250. A 50-hour intensive cost \$2,350. For a 75-hour intensive the cost was \$3,350, and a 100-hour intensive cost \$4,250. *Id.* at 578.

<sup>117</sup> *Id.* at 581. Because the church always required payment for these services and petitioners expected a benefit in return for their contributions, they did not amount to a “gift” as described in the law. The court explained that “a gift is generally defined as a voluntary transfer of property by the owner to another without consideration therefor[e].” *Id.* at 580. At least two authors believes that deductions should be allowed to be taken for contributions to religious organizations when the donor receives a religious benefit in exchange for his contribution. See Mark L. Geier, *What the Good Lord Giveth, Uncle Sam Taketh Away: A Proposal Allowing Payments Made in Exchange for Religious Benefits to be Tax Deductible*, *Hernandez v. Commissioner*, 109 S. Ct. 2136, *Reh’g Denied*, 110 S. Ct. 16 (1989), 13 *HAMLIN L. REV.* 433 (1990); Joseph M. Kuznicki, Comment, *Section 170, Tax Expenditures, and the First Amendment: The Failure of Charitable Religious Contributions for the Return of a Religious Benefit*, 61 *TEMP. L. REV.* 443 (1988).

<sup>118</sup> 663 F.2d 843, 845 (9<sup>th</sup> Cir. 1981). Rasheed was indicted on six counts of mail fraud, one

involved a pyramid scheme. The church focused on the ability to attain material wealth.

The church taught the “law of increase, or the law of cosmic abundance, which provided that if one gave freely one would receive returns greater than the initial gift.”<sup>119</sup> Rasheed established the “Dare to be Rich” program which provided that if somebody donated money to the church, that person would receive four times that amount in the form of an “increase in God.”<sup>120</sup> Rasheed represented to the donors that the increases in God would come from profits made by investments of the church.<sup>121</sup> It was later discovered that the funds for the Dare to be Rich program came from the donors themselves. It was a pyramid scheme whereby increases paid to donors came not from investments, but from other members’ subsequent donations.<sup>122</sup> The jury convicted both Rasheed and Phillips on the mail fraud counts.<sup>123</sup> The Court of Appeals affirmed the decision on the ground that there was sufficient evidence by which a jury could find that the two had engaged in conduct that they knew to be deceitful.<sup>124</sup>

Likewise, in *New v. United States*, John Fair New was convicted of mail fraud when he received donations through the mail after soliciting them by insisting that he

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count of obstruction of justice, and one count of making a material false declaration to a grand jury. Rasheed’s associate, Phillips, was charged with five counts of aiding and abetting with respect to Rasheed’s mail fraud activities, two counts of obstruction of justice, and one count of making a material false declaration to a grand jury. The two were tried together. *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* The return would be received in a period of time depending on the amount of the donation.

Fourfold increases for donations of \$1 to \$ 249 were received in 70 days; increases for donations from \$250 to \$24,999 in 90 days; increases from \$25,000 to \$999,999 in 9 months; and increases for donations of \$1,000,000 or more in 3 years. These time periods were based on “psychic birth cycles,” which Rasheed claimed had a basis in scripture. The cycles were supposed to coincide with levels of consciousness. The shortest cycle indicated that the donor had not transcended greed. Thus, donors were encouraged to give large amounts and to redonate their increases to the program to reach higher levels of consciousness.

*Id.* at 845-46.

<sup>121</sup> *Id.* Only those who attained the status of minister could participate in the Dare to Be Rich program. To be a minister, church members had to pay an enrollment fee to the church. Rasheed told the donors that the profits would be distributed to the active ministers rather than the church keeping them. Rasheed increasingly downplayed the source of the funds. When a member would inquire as to the source of the money, they were told that because they lacked sufficient faith, they could not yet donate to the program. *Id.*

<sup>122</sup> *Id.* at 847.

<sup>123</sup> *Id.* at 845. Phillips was convicted on the obstruction charges. Both were acquitted on the false statement counts. *Id.*

<sup>124</sup> *Id.* at 849.

had supernatural powers.<sup>125</sup> He claimed to have the power to conquer disease, death, poverty and misery, and he could transmit this power if others would accept his teachings and pay the sums he demanded.<sup>126</sup> The court found enough evidence that New “was not the immaculate parsonage he pretended to be, and that the jury was entirely right in finding in effect that he used the mails of the government as a means of obtaining money of others in pursuance of the grossly fraudulent scheme....”<sup>127</sup>

In *U.S. v. Heinmann*, an organization sold “ministries” in certain churches to people so that they could avoid income tax.<sup>128</sup> The court upheld convictions of conspiracy to defraud the United States.<sup>129</sup>

### 5. Individual State Actions

State law enforcement agencies have also demonstrated that they have, at least some, ability to pursue religious and charitable wrongdoers. The law has developed in such a way that states may criminally prosecute individuals or groups whose illegal conduct have been predicated upon religious activity.<sup>130</sup>

One area in which states have exercised the strong arm of the law is faith-healing. In *People v. Cole*, a faith-healer in New York City was charged with “the crime of practicing medicine without lawful authorization and registration.”<sup>131</sup> An undercover investigator for the New York Medical Society visited the healer claiming to need treatment. Despite the fact that the investigator was told that she could heal herself through prayer and that her understanding was that the healer told her that her

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<sup>125</sup> 245 F. 710, 713 (9<sup>th</sup> Cir. 1917).

<sup>126</sup> *Id.* He claimed to be of divine origin and birth. He said he was “a son of the Holy Ghost, greater in authority, majesty, and power than was Moses, Elijah, or John the Baptist; yes, that the mantle of the ‘Man Galilea’ had fallen upon him, and he had received the ‘keys of the kingdom of Heaven.’” *Id.*

<sup>127</sup> *Id.* at 721-22.

<sup>128</sup> 801 F.2d 86, 88 (2d Cir. 1986). The ministries reduced taxes in two ways. One was the “vow of poverty method.” Under this scheme, the minister would renounce interest in income in favor of the church. The paychecks would then be deposited in the church’s account which then paid for the ministers personal, family and living expenses. The other method is the “50% plan.” Under this plan, the minister would deposit up to 50% of his or her income into the church’s account. The minister could then claim a charitable contribution deduction from the adjusted gross income. The minister retained control over these “charitable contributions.” *Id.*

<sup>129</sup> *Id.* at 96.

<sup>130</sup> See John S. Hilbert, Comment, *God in a Cage: Religion, Intent, and Criminal Law*, 36 BUFF. L. REV. 701, 721-22 (1987).

<sup>131</sup> 113 N.E. 790, 791 (1916).

cure would be brought about by prayers to God, the healer was convicted.<sup>132</sup>

Despite these successful government efforts in pursuing religious and charitable wrongdoers, government entities are faced with enormous difficulty when attempting to proceed against such entities.<sup>133</sup> As we shall see in the next section, the main barrier to government enforcement over religious organizations is the First Amendment to the Constitution.

### B. First Amendment Limitations

The First Amendment to the constitution provides that "[c]ongress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."<sup>134</sup>

The religious element of the First Amendment is divided into two prongs, governmental establishment of religion<sup>135</sup> and the free exercise thereof.<sup>136</sup> The prong

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<sup>132</sup> *Id.* at 792. *See also* Walker v. Superior Ct., 222 Cal. Rptr. 87 (Cal. Ct. App. 1986), *superseded by* Walker v. Superior Ct. 715 P.2d 260 (1988). (upholding a denial of a motion to dismiss charges against parents whose four year old daughter died when parents relied on treatment from Christian Science practitioners rather than treatment from medical professionals).

<sup>133</sup> *See* Turle, *supra* note 11, at 475-76. *See also* Stephen Senn, *The Prosecution of Religious Fraud*, 17 FLA. ST. U. L. REV. 325, 328-29 (1990)(arguing that while the government often clearly has the power to prosecute religious fraud, it rarely does because of the reluctance of prosecutors to bring charges against religious organizations).

<sup>134</sup> U.S. CONST. AMEND. I.

<sup>135</sup> A law does not unconstitutionally establish religion if the following test is met: "first, the statute must have a secular legislative purpose; second, its principle primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612, 612-613, (1971). "Plain intentional discrimination should give rise to a presumption, which may be overcome by a showing of compelling purpose and close fit, that the challenged government conduct constitutes and endorsement of the favored religion or a disapproval of the disfavored." *Lynch v. Donnelly*, 465 U.S. 668, 689 (1984) (Justice O'Connor concurring).

<sup>136</sup> The current analysis under Free Exercise Clause is set out in *Sherbert v. Verner*, 374 U.S. 398 (1963), *limited by* *Employment Division v. Smith*, 494 U.S. 872 (1990). That case involved a Seventh Day Adventist who refused employment that required her to work on Saturday. South Carolina's unemployment law provided benefits only to those who were involuntarily out of work, not because of personal circumstances, however compelling they might be. Claimant was denied benefits. The case was heard by the Supreme Court. The Court developed a three-prong analysis for Free Exercise cases. First, the Court determines whether the religious practice poses a substantial threat to the public safety, peace and order. Second, the Court determines whether the state action "imposes any burden on the fee

that is of primary interest in prosecuting religious and charitable organizations is free exercise. Because of the high level of protection against government interference that this clause provides, government prosecution of religious and charitable organizations is severely limited.<sup>137</sup>

In *U.S. v. Ballard*, defendants were indicted and convicted for mail fraud.<sup>138</sup> The defendants established corporations, sold and distributed literature, solicited funds and sought membership in the “I Am” movement by means of the Postal Service.<sup>139</sup> One of the eighteen false representations charged in the twelve-count indictment was a claim that defendants possessed supernatural powers to heal ailments and diseases that doctors and modern medical science could not.<sup>140</sup> The trial court instructed the jury that the issue would not be the defendants’ religious beliefs; rather, it would be whether the defendants, in good faith, actually believed what they claimed to believe.<sup>141</sup> The

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exercise of religion.” Finally, if the state action constitutes a burden on the exercise of religion, the Court must determine whether the state had a compelling interest in doing the action. *Id.*

<sup>137</sup> See Herbert W. Titus, *The Free Exercise Clause: Past, Present and Future*, 6 REGENT U.L. REV. 7 (1995).

<sup>138</sup> 322 U.S. 78 (1944), *remanded* Ballard v. U.S., 152 F.2d 941 (9<sup>th</sup> Cir. 1945), *rev’d* 329 U.S. 187 (1946). The statute prohibiting mail fraud under which defendants were convicted is “a generally applicable and religiously neutral statute. . . .” Titus, *supra* note 137, at 28.

<sup>139</sup> *Ballard*, 322 U.S. at 79.

<sup>140</sup> *Id.* at 80.

[Defendants], by reason of their alleged high spiritual attainment and righteous conduct, had been selected as divine messengers through which the words of the alleged ‘ascended masters,’ including the alleged Saint Germain, would be communicated to mankind under the teachings commonly known as the ‘I Am’ movement;...[defendants had] by reason of supernatural attainments, the power to heal persons of ailments and diseases and to make well persons afflicted with any diseases, injuries, or ailments, and did falsely represent to persons intended to be defrauded that the [defendants] had the ability and power to cure persons of those diseases normally classified as curable and also of diseases which are ordinarily classified by the medical profession as being incurable diseases; and did further represent that the [defendants] had in fact cured either . . . hundreds of persons afflicted with diseases and ailments.

*Id.* at 79-80.

<sup>141</sup> *Id.* at 81. While it might be difficult or even impossible for some to understand how anyone could believe in certain religious experiences, the Free Exercise Clause permits such belief. It seems improbable to many that Jesus would appear and issue defendants instructions and shake hands with them. As improbable as it seems, the jury was not to consider its validity. It was instructed only to consider defendants’ good faith belief in those things. *Id.*

appellate court reversed because of the limitation placed on the issue.<sup>142</sup> The Supreme Court granted certiorari to determine whether the Free Exercise Clause precluded a prosecution for mail fraud if the crime involved representations by the defendants based upon substantive religious claims that were not true.<sup>143</sup> The Court held that “the District Court ruled properly when it withheld from the jury all questions concerning the truth or falsity of the religious beliefs or doctrines of respondents.”<sup>144</sup> The strict application of the Free Exercise Clause “absolutely precludes the application of a generally applicable law if to apply that law the civil authorities would be required to resolve a dispute over religious practices and church government.”<sup>145</sup>

In *Ballard*, the Court dismissed the false representations of the defendants as

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<sup>142</sup> *Id.* at 83. The Court of Appeals did not want the issue limited to good faith because in order to prove that the defendants devised the scheme described in the indictment, the United States would have to prove at least some of the representations that they schemed to make were false. This could not be accomplished with such a limited issue. *Id.* See also Titus, *supra* note 137, at 28-29.

<sup>143</sup> *Ballard*, 322 U.S. at 83-84.

<sup>144</sup> *Id.* at 88.

<sup>145</sup> Titus, *supra* note 137, at 29.

Heresy trials are foreign to our Constitution. 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. Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left to religious freedom. The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men could agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views....The religious views espoused by the respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect.

*Ballard*, 322 U.S. at 86-87. *But see* Riley v. Nat'l Federation of the Blind of N.C., 487 U.S. 781(1988) (holding that states need not “sit idly by and allow their citizens to be defrauded . . . the interest in protecting . . . the public from fraud is, of course, a sufficiently substantial interest to justify a narrowly tailored regulation”).

involving alleged religious doctrines of belief.<sup>146</sup> As a result, the Court may not be strictly precluded from addressing other issues of religious fraud when the fraud is not directly rooted in religious belief.<sup>147</sup> Nonetheless, there is no ban on religious fraud, and the Free Exercise Clause has operated as a barrier to its prosecution.<sup>148</sup>

### C. *Private Actions*

#### 1. State Common Law

While the Free Exercise Clause places restrictions upon state actions against religious wrongdoers, the restrictions it places upon the rights of private individuals to bring actions when they are wronged are not as great.<sup>149</sup> The limitations, as we shall see, stem from a conspicuous absence of religious and charitable organizations in state deceptive sales statutes<sup>150</sup> and, in the cases where remedies may be found in the statute, insufficient damage provisions that would offer incentives for private litigants to pursue a costly legal battle.<sup>151</sup>

In *Marcus v. Jewish National Fund, Inc.*, supporters of certain groups that aim to develop Jewish life in Israel and territories acquired during the Six-Day War filed a complaint against Jewish National Fund.<sup>152</sup> The complaint alleged that “for more than twenty years, defendant has misrepresented in its advertisements, circulars, brochures and literature that it allocates funds for charitable use throughout Israel, including beyond the Green Line, when, in fact, it has failed to distribute resources to Green Line areas, thereby deceiving and misleading contributors and potential donors.”<sup>153</sup> The court held that while the solicitations were not strictly commercial, even though they sought monetary contributions, they were not exempt from the strict laws governing false advertising and other deceptive practices.<sup>154</sup>

<sup>146</sup> Senn, *supra* note 133, at 333.

<sup>147</sup> *Id.* “Ballard does not involve objectionably demonstrable falsehoods, such as false promises to use money raised for a certain purpose.” *Id.*

<sup>148</sup> *See id.* at 334.

<sup>149</sup> *See* Lee W. Brooks, Note, *Intentional Infliction of Emotional Distress By Spiritual Counselors: Can Outrageous Conduct Be ‘Free Exercise’?*, 84 MICH. L. REV. 1296, 1300-03 (1986). The most obvious interest in limiting religious practices is that acts that significantly harm nonconsenting third parties cannot be tolerated. *Id.* at 1311.

<sup>150</sup> *See infra* Part IV D.

<sup>151</sup> *See* Turley, *supra* note 11, at 467-68.

<sup>152</sup> 158 A.D.2d 101,103 (N.Y. App. Div.) (1990). Jewish National Fund, Inc. is a United States charity that collects contributions for projects in Israel. *Id.*

<sup>153</sup> *Id.* In its solicitation of donations, the defendant depicted a map showing Judea, Samaria, Gaza and the Golan Heights, territories over the Green Line, falsely suggesting that contributions received from Americans would be used in these regions. *Id.*

<sup>154</sup> *Id.* at 105. The defendant failed to convince the court that non-profit organizations meet an

The activities that occurred in that case were not religious. They were secular. A religious organization will only be afforded the protection of the First Amendment if it can establish that the tortious actions of which it is accused relate to religion or religious belief.<sup>155</sup> This is known as the doctrine of ecclesiastical abstention.<sup>156</sup> When one invokes this doctrine, the court will either decline jurisdiction over the matter or apply neutral principles of law to resolve the conflict.<sup>157</sup> If the wrongful conduct for which the plaintiff seeks redress contains aspects of religious ideology or religious practice, the plaintiff is typically out of luck as the First Amendment will provide a defense.<sup>158</sup> Even if religious belief or practices are not the thrust of the litigation, the court will be required to determine if the state's application of the law was the least restrictive means of achieving some compelling state interest.<sup>159</sup>

In addition to the religious belief and practice barriers to litigation provided by the First Amendment, the Constitution provides another obstacle to private litigation against religious and charitable organizations. That obstacle is the constitutional right to associational privacy.<sup>160</sup> That right was at issue in *Church of Hakeem v. Superior*

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exception that would protect their fund raising activities from the prohibitions against committing dishonest or fraudulent acts that applies to groups and individuals engaged in commerce. *Id.*

<sup>155</sup> Steven M. Flanagan, Note, *Go Therefore, and Make Disciples of all the Nations, But Do Not Offend the State: Tortious Religious Recruitment and the Free Exercise of Religion Defense*, 25 NEW ENG. L. REV. 1071, 1080 (1991).

<sup>156</sup> Shea Sisk Wellford, Note, *Tort Actions Against Churches-What Protections Does the First Amendment Provide*, 25 U. MEM. L. REV. 193, 194 (1994). This doctrine arose from the First Amendment's prohibition of courts from attempting to resolve disputes over church property, church policy, or church administration. *Id.*

<sup>157</sup> *Id.* at 194-95.

<sup>158</sup> Gregory G. Sarno, J.D., *Liability of Religious Association for Damages for Intentionally Tortious Conduct in Recruitment, Indoctrination or Related Activity*, 40 A.L.R. 4<sup>th</sup> 1062 (1985).

<sup>159</sup> *Id.* See also *Bear v. Reformed Mennonite Church*, 462 Pa. 330, 341 (1975) (holding that the state had a compelling interest in preventing a church from interfering with family and marriage relationships, affections and business relationships).

<sup>160</sup> See *National Ass'n for the Advancement of Colored People v. Alabama*, 357 U.S. 449 (1958), *rev'd* *National Association for the Advancement of Colored People v. State of Alabama*, 360 U.S. 240 (1959).

[C]ompelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective . . . restraint on freedom of association . . . . This Court has recognized the vital relationship between freedom to associate and privacy in one's associations . . . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.

*Court.*<sup>161</sup> In *Hakeem*, plaintiffs brought suit against the church to recover money that they had donated.<sup>162</sup> They alleged that the church and its officials engaged in securities fraud, fraud, intentional and negligent misrepresentations, breach of fiduciary duties, breach of contract, conspiracy, and conversion.<sup>163</sup> The church failed to comply with a discovery request to provide the names and addresses of all the members of the church. The leader of the church, Dr. Hakeem Abdul Rasheed, was found in contempt of court for failing to comply with the request.<sup>164</sup> The Court of Appeals reversed. It held that the plaintiffs failed to demonstrate a compelling state interest in requiring the disclosure of information of members of the organization.<sup>165</sup> The membership's anonymity was protected by their right of associational privacy.<sup>166</sup>

## 2. RICO Actions

One author suggests that the most effective way for a private litigant to seek damages for religious and charitable deception is through civil RICO actions.<sup>167</sup> One advantage of RICO, as opposed to other remedies, is that it creates a sanction, not a

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*Id.* at 462. *But see* *Britt v. Superior Ct.*, 20 Cal.3d 844,848-49 (1978)(holding that the right to associational privacy is not absolute, and if a private litigant can establish a compelling state interest in the sought after discovery, the court will require the disclosure of membership information).

<sup>161</sup> 110 Cal.App.3d 384 (1980)

<sup>162</sup> *Id.* at 387. In return for the money that the donors gave, they received membership into the church would entitled them to become ministers. *Id.*

<sup>163</sup> *Id.* Plaintiffs sought to recover for themselves and all other member-ministers the amount of money they had donated to the church. *Id.*

<sup>164</sup> *Id.* The judge sentenced him to five days in jail.

<sup>165</sup> *Id.* at 390.

<sup>166</sup> *Id.*

<sup>167</sup> Turley, *supra* note 11, at 445. The Racketeering Influenced Corrupt Organization (RICO) Act was originally designed to combat organized crime. It allows individuals to stand in the shoes of prosecutors and bring actions against people engaging in rackets or organized crime. The individual plaintiff can keep the proceeds of the suit. In order to encourage people to bring such actions against potentially dangerous criminals, Congress set a very low burden of proving the "pattern of racketeering" required by the statute. This type of suit can be used against organizations that use electronic media to fraudulently solicit money. *Id.*

To pursue a suit under RICO, a plaintiff must first allege an injury. An injury is defined by "the harm caused by the predicate acts sufficiently related to constitute a pattern."

Next, a plaintiff must establish that at least two predicate offenses were committed in the same ten-year period. Plaintiff must then prove a pattern of racketeering. This can be accomplished by showing that the two predicate acts are in some way related to a racketeering enterprise. Finally, the existence of a "racketeering enterprise" must be established. This distinguishes cases of common-law fraud from racketeering fraud. *Id.* at 485-87.

price, for the crime of racketeering.<sup>168</sup> To accomplish this, it allows for a recovery of the external costs to society resulting from the violation of the law.<sup>169</sup>

The drawback of using RICO for this purpose is that it will often completely destroy a business or organization that is relying on racketeering or fraud for only a small portion of its revenues.<sup>170</sup> This could have a devastating impact on large organizations that are, for the most part, legitimate, but have a fragmented body within engaging in fraud.<sup>171</sup>

#### D. A New Approach

Because of the severe limitations and shortfalls of the current remedies available either by government or private actions, it appears that a new approach may be a more attractive option. Perhaps the best way to provide a remedy to religious and charitable fraud is to establish a federal statute that would treat religious and charitable organizations the same way businesses and other services are treated under state deceptive sales practices statutes.<sup>172</sup> States developed consumer protection statutes in the 1960s and 70s because the Federal Trade Commissions Act<sup>173</sup> does not provide a private cause of action.<sup>174</sup> These statutes came on the heels of President John F. Kennedy's call for states to enact legislation to protect consumers.<sup>175</sup> Many of the

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<sup>168</sup> *Id.* at 482.

<sup>169</sup> *Id.* The idea is to sanction the wrongdoer into insolvency rather than punish them once and allow them to continue engaging in the prohibited activity. *Id.*

<sup>170</sup> *Id.* at 488-89.

<sup>171</sup> *See id.* RICO does not reflect actual damages and may be overkill in some circumstances. *See id.*

<sup>172</sup> *See* Albert Norman Shelden *et al*, *A Truncated Overview of State Consumer Protection Laws*, C998 ALI-ABA 523, 525-531 (1995).

<sup>173</sup> *See* discussion *supra* Part IV A 1.

<sup>174</sup> Debra D. Burke, *The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?*, 15 CAMPBELL L. REV. 223, 224 (1993).

<sup>175</sup> Shelden, *supra* note 172, at 527-28. His message called for a number of consumer protections including:

1. The right to safety, including the right to be protected against the marketing of goods which are hazardous to health or life.
2. The right to be informed, including the right to be protected against fraudulent, deceitful or misleading information, advertising, labeling and other such practices and the right to be given the facts necessary to make informed choices.
3. The right to choose among a variety of products and services at competitive prices.
4. The right to be heard, including the right of consumer interests to receive full and sympathetic consideration in the formulation of government policy.

states have statutes that allow individuals to proceed against violators as “private attorneys general.”<sup>176</sup>

An effective statute would have to exist on the federal level. The reason for this is to allow uniform protection against organizations that solicit money in every state. The first provision of the statute should deal with the standing of a donor to bring suit. This can be accomplished by properly defining the word donor.<sup>177</sup> It should be defined broadly as “one who makes a gift.”<sup>178</sup>

The next provision of the statute should establish what organizations should be covered. Some deceptive sales statutes explicitly cover suppliers, which include sellers and lessors.<sup>179</sup> An effective statute that will provide a realistic remedy against charitable malefactors will explicitly include them in its text in the place of “supplier.” For example, a provision covering charities and religious organizations may say, “‘organization’ includes any entity, religious, charitable or otherwise, engaging in the solicitation of funds for any purpose.”<sup>180</sup>

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*Id.* Since Kennedy’s call for consumer protection, courts have added a fifth “right.” That is the right for a consumer to recover from the seller if the consumer was induced to engage in a transaction by the seller when the seller based his or her inducement upon a violation of one of the consumer’s rights. *Id.* at 528.

<sup>176</sup> *Id.* at 535. There are typically two ways in which these statutes work. First, state law enforcement officials may proceed against the wrongdoers. Second, private attorneys general and class action litigants may sue violators of the statute to vindicate frauds against the public. *Id.*

<sup>177</sup> See Loftin, *supra* note 31, at 364. Only those with special interest will have standing. *Id.* at 378. Various states define “consumer” or “person” differently indicating that clarification must be made as to who is entitled to bring an action under such a law. Often, “person” is defined to include individuals, corporations, government entities or other legal entities. O.R.C. § 1345.01 (B) (West 1999); TEX. REV. CIV. STAT. ANN. art. 2 § 17.45 (3) (West 1999); CAL. BUS. & PROF. CODE § 302 (West 1999); IND. CODE § 24-5-0.5-2 (1999). “Consumer” has been defined as “a person who engages in a consumer transaction with a supplier.” § 1345.01(D), or  
 an individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services, except that the term does not include a business consumer that has assets of \$25 million or more, or that is owned or controlled by a corporation or entity with assets of \$25 million or more.  
 art. 2 § 17.45 (4).

<sup>178</sup> BLACK’S LAW DICTIONARY 489 (6<sup>th</sup> ed. 1990).

<sup>179</sup> O.R.C. § 1345.01 (C) (West 1999); IND. CODE § 24-5-0.5-2 (3) (1999).

<sup>180</sup> See Turley, *supra* note 11, at 465. Without broad, encompassing statutes that allow civil remedies against such organizations, individual victims of charitable fraud must rely on often inadequate remedies offered by the state. Without specifically including such organizations in the breadth of coverage, the weapons to combat religious fraud remain severely limited. *Id.*

Once the relevant parties are established, it is necessary to determine exactly what conduct should be prohibited. This must be done carefully or victims may not be properly able to utilize the statute against organizations in violation of the law.<sup>181</sup> Existing state statutes dealing with consumer fraud lend valuable language. The statute should prohibit deceptive and unfair conduct or advertising in the solicitation of funds. An example of a statute that is very broad in its coverage of deceptive acts and unfair conduct is Nebraska's deceptive trade practices statute.<sup>182</sup> The problem with this

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<sup>181</sup> See *Shawmut Community Bank, N.A. v. Zagami*, 586 N.E. 2d 962 (Mass. Sup. Ct. 1992), *partial summ. judgement denied, summ. judgment granted*, *Zagami v. Shawmut Bank N.A.*, 1994 Mass. Super. LEXIS 168 (Super. Ct. Oct. 17, 1994). (holding that loans and mortgage obtained by borrower were not "purchases" from lender, and therefore, not covered by the consumer protection act).

<sup>182</sup> See NEB. REV. STAT. § 87-302 (1998).

- (a) A person engages in a deceptive trade practice when, in the course of his or her business, vocation, or occupation, he or she:
- (1) Passes off goods or services as those of another;
  - (2) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
  - (3) Causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another;
  - (4) Uses deceptive representations or designations of geographic origin in connection with goods or services;
  - (5) Represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he or she does not have;
  - (6) Represents that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used, or secondhand, except that sellers may repair damage to and make adjustments on or replace parts of otherwise new goods in an effort to place such goods in compliance with factory specifications;
  - (7) Represents that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;
  - (8) Disparages the goods, services, or business of another by false or misleading representation of fact;
  - (9) Advertise goods or services with intent not to sell them as advertised;
  - (10) Advertise goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;
  - (11) Makes false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;
  - (12) Uses or promotes the use of a chain distributor scheme in connection with the solicitation of business or personal investments from members of

statute, as well as those from other states, is that it covers “goods or services”<sup>183</sup> or “consumer transactions,”<sup>184</sup> but does not deal with the solicitation of charitable funds. A simple adjustment to the language of a statute like Nebraska’s will suffice to incorporate fraudulent charitable solicitors into the coverage of the law.<sup>185</sup>

Next, the issue of damages must be addressed. In consumer protection statutes the issue of damages is important because without special damages provisions, individuals may find little incentive to litigate claims under the law.<sup>186</sup> As a way to encourage private attorneys general to pursue their claims, many statutes have allowed for recovery in excess of actual damages.<sup>187</sup> An effective statute should contain a provision that allows attorneys fees as well as damages, treble in the amount the donor contributed to the organization.<sup>188</sup>

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the public; or

(13) With respect to a sale or lease to a natural person of goods or services purchased or leased primarily for personal, family, household, or agricultural purposes, uses or employs any referral or chain referral sales technique, plan, arrangement, or agreement.

*Id.*

<sup>183</sup> *Id.*; MASS GEN. LAWS ch. 93A § 9 (West 1999).

<sup>184</sup> WYO. STAT. ANN. § 26-13-103 (West 1999); CAL. BUS & PROF CODE § 325 (West 1999); N.Y. GEN. BUS. LAW § 349 (Consol. 1999) “deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing or any service in this state . . .” *Id.*

<sup>185</sup> Such language may simply add “non-profit organization, charity or the solicitation of funds therefor” to § 87-302 (a). Such language would incorporate these organizations into the coverage of the law.

<sup>186</sup> Burke, *supra* note 174, at 238.

<sup>187</sup> *Id.* In North Carolina, if the plaintiff can establish that a violation of the Act has occurred, he or she is entitled to damages treble the amount fixed by the verdict. Attorneys fees may also be awarded in the discretion of the judge. *Id.* at 238-40. Some courts will allow double damages under the theory that a plaintiff can recover from the defendant under a tort analysis for the wrongs committed, and the plaintiff may also recover under a contract analysis for breach of the duty of good faith and fair dealing implicit in every contract. A. Michael Ferrill & Charles A. Japhet, *Deceptive Trade Practices-Consumer Protection Act*, 51 SMUL. REV. 909, 928 (1998).

<sup>188</sup> See CAL. BUS. & PROF. CODE §17082 (West 1999).

In any action under this chapter, it is not necessary to allege or prove actual damages or the treat thereof, or actual injury or the threat thereof, to the plaintiff. But, in addition to the injunctive relief, any plaintiff in any such action shall be entitled to recover three times the amount of the actual damages, if any, sustained by the plaintiff, as well as three times the actual damages, if any, sustained by any person who has assigned to the plaintiff his claim for damages resulting from a violation of this chapter.

In any action under this chapter in which judgement is entered against the

When viewed against the other potential remedies, a federal “donor protection” statute appears to be an attractive alternative. Establishing a claim under this type of statute is easier than most common law remedies.<sup>189</sup> Furthermore, as opposed to a state or federal law enforcement agency taking punitive actions against a wrongdoer or private common law litigation, this type of statute allows for a more substantial recovery by the particular individual harmed.<sup>190</sup>

## V. CONCLUSION

Religious and charitable fraud remains one of the most challenging legal areas with which the courts must deal.<sup>191</sup> Americans have proven to be very willing to comply with the wishes of charitable and religious solicitors, to the tune of \$18 billion per year.<sup>192</sup> Despite the public exposure of many of the scam artists, the donations pour in. When an individual learns that they have been had, they are left with few remedies. The conventional remedies have not been very successful in compensating those who have fallen victim to fraud. Perhaps the only alternative is to try a new approach.

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defendant the plaintiff shall be awarded a reasonable attorney’s fee together with the costs of suit.

*Id.*

<sup>189</sup> Burke, *supra* note 174, at 236. Plaintiffs claiming common law fraud must prove (1) a false representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) intent to deceive, (4) which in fact does deceive, (5) resulting in damages. *Id.* at 235-36.

<sup>190</sup> *See id.* at 237-41.

<sup>191</sup> *See* Nobel, *supra* note 13, at 601-02.

<sup>192</sup> *See* discussion *supra* Part III A.