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He Who Controls the Mind Controls the Body: False Imprisonment, Religious Cults, and the Destruction of Volitional Capacity

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NOTES

HE WHO CONTROLS THE MIND CONTROLS THE BODY: FALSE IMPRISONMENT, RELIGIOUS CULTS, AND THE DESTRUCTION OF VOLITIONAL CAPACITY

The pressures and stresses of life in modern society can overwhelm all of us at times. The competing demands on time and financial resources created by marriage, family, and career responsibilities are becoming increasingly difficult to balance.[1] At one time or another, each of us may secretly wish that our lives were less stressful and demanding.[2] At such times, we might be tempted to abandon pressing responsibilities to explore an alternative lifestyle.[3] Yet, few of us would be willing to give up our ability to choose to return to our former lives as part of the bargain.

Since the 1960's, the prevalence of religious cults[4] in America has grown steadily in proportion to the increase in societal pressures and problems.[5] Countless examples exist of converts who renounce families, friends, and career plans to devote all of their resources and energy to extremist and even bizarre

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1. T. KEISER & J. KEISER, THE ANATOMY OF ILLUSION: RELIGIOUS CULTS AND DESTRUCTIVE PERSUASION 3 (1987).

2. *Id.*

3. The communal environment offered by a religious cult is illustrative of such an alternative. *Id.* For specific examples of reasons why some persons might find religious cults attractive, see *infra* notes 20-22 and accompanying text.

4. T. KEISER & J. KEISER, *supra* note 1, at 4. The word "cult" derives from the Latin word "cultus" meaning "to worship." *Id.* Although broad enough to refer to any religious group whose beliefs and practices differ from those considered traditional (thereby encompassing "sects" or "denominations" stemming from a "parent" faith), the word is used more restrictively here to refer to non-mainstream religious groups that utilize recruitment and indoctrination tactics that have come under attack in recent years for brainwashing inductees (examples are the Unification Church, The Way International, and the Hare Krishna, among others). *See generally* P. LOCHHAAS, HOW TO RESPOND TO THE NEW CHRISTIAN RELIGIONS (1979); J. SPARKS, THE MIND BENDERS (1977). Some estimate that there are as many as 3,000 such destructive cults in the United States with a combined membership of some 3,000,000 people. S. HASSAN, COMBATTING CULT MIND CONTROL 36 (1988). Others place the estimate of the number of cults at somewhere in the range of 200 to 1,000. Delgado, *Religious Totalism: Gentle and Ungentle Persuasion Under the First Amendment*, 51 S. CAL. L. REV. 1, 6 n.24 (1977).

5. T. KEISER & J. KEISER, *supra* note 1, at 4.

religious groups.[6] Critics of religious cults charge that the cults' sole purpose is to prey on and exploit unsuspecting youths for selfish ends.[7] Such critics tell stories of "slave-like"[8] devotees who work endless hours to make their leaders rich[9] while themselves living in conditions seriously detrimental to their physical health and mental stability.[10] Cultists[11] respond that the foregoing criticisms are merely the result of hysterical parents who cannot accept the right of their adult children to choose a religion that is at odds with their own.[12]

Cults are currently attacked for using coercive persuasion or brainwashing techniques during recruitment and indoctrination.[13] More specifically, cult critics[14] have charged cults with using deceptive recruitment tactics to lure vulnerable young persons into attending initial meetings and retreats, passing the cult off as an organization concerned with social or political problems.[15] While attending these meetings and retreats, critics contend, young persons are subjected to methods of behavior modification and psychological manipulation aimed at creating complete emotional and mental dependency on the cult.[16]

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6. A. PAVLOS, THE CULT EXPERIENCE 26 (1982) (religious cults "demand that cult members remove themselves from their friends and family and relinquish any ... connection to personal property and educational goals"). *See, e.g.*, Lewis v. Holy Spirit Ass'n for the Unification of World Christianity, 589 F. Supp. 10 (D. Mass. 1983) (college student left university to live in commune of Unification Church); Molko v. Holy Spirit Ass'n for the Unification of World Christianity, 46 Cal. 3d 1092, 762 P.2d 46, 252 Cal. Rptr. 122 (1988), *cert. denied*, 109 S. Ct. 2110 (1989) (recent law graduate abandoned legal career upon associating with Unification Church); George v. International Soc'y for Krishna Consciousness, 213 Cal. App. 3d 729, 262 Cal. Rptr. 217 (1989) (fifteen-year-old girl dropped out of high school to join the Hare Krishnas); Wollerscheim v. Church of Scientology of California, 212 Cal. App. 3d 872, 260 Cal. Rptr. 331 (1989) (Scientology member required to "disconnect" from his wife, parents, and family members).

7. T. KEISER & J. KEISER, *supra* note 1, at 35.

8. *Id.* at 5.

9. *Id.*

10. *Id.* ("leaders ... maintained converts on low protein diets, depriving them of sleep and medical treatment for serious illnesses ..." In some converts the experience "produce[s] confusion, regression, and personality change of major proportions"). *See also* Delgado, *supra* note 4, at 10-25 (describing various psychiatric disorders, such as schizophrenia, borderline psychosis, inability to differentiate between fantasy and reality, and creation of "autisticlike" personalities).

11. A "cultist" is an individual who is a member of a cult group; *see* WEBSTER'S NEW COLLEGIATE DICTIONARY 274 (1981) ("cultist" is listed as the personal conjugation of "cult"). The term is used here to refer specifically to members of religious cults.

12. T. KEISER & J. KEISER, *supra* note 1, at 7.

13. *See generally* T. KEISER & J. KEISER, *supra* note 1; S. HASSAN, *supra* note 4; Delgado, *supra* note 4.

14. Critics of religious cults include parents, mental health professionals, and public interest groups. T. KEISER & J. KEISER, *supra* note 1, at 5.

15. *See, e.g.*, HASSAN, *supra* note 4, at 99. T. KEISER & J. KEISER, *supra* note 1, at 5; Delgado, *supra* note 4, at 38-41. *See generally* Delgado, *Cults and Conversion: The Case for Informed Consent*, 16 GA. L. REV. 533 (1982) [hereinafter *Informed Consent*].

16. S. HASSAN, *supra* note 4, at 80-81.

The most serious charge is that the processes that young recruits are subjected to results in complete mind control and loss of individual autonomy;[17] eventually, converts become robot like, with every thought and action controlled by the cult.[18]

Of course, any person is contacted by a cult recruiter has the right to voluntarily choose to associate with a religious cult.[19] Certainly, plausible reasons exist as to why a young person might find a religious cult attractive. Disillusionment with the immorality of today's society might cause some people to seek a haven in religious sects which strictly regulate alcohol, sex, and money.[20] Some people might find that a cult's communal environment fulfills a need for sorely lacking interpersonal contact,[21] while others might find welcome relief from frustration and uncertainty in a cult's rigidly prescribed lifestyle.[22] Whatever the reason, a person clearly has the right to remain in a cult environment as long as he has voluntarily chosen to do so.

Equally certain, however, is the right of any individual who is contacted by a cult recruiter to choose *not* to associate with a religious cult.[23] Indeed, several deleterious effects associated with life in a cult environment have

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17. Shapiro, *Of Robots, Persons, and the Protection of Religious Beliefs*, 56 S. CAL. L. REV. 1277, 1281 (1983) ("[t]he more serious ... implication ... is that a person has become a robot--that as a result of coercive influences, he has lost the attributes of an autonomous being").

18. S. HASSAN, *supra* note 4, at 79 (cult "doctrine becomes the 'master program' for all thoughts, feelings, and actions").

19. A right of "freedom of association" has been described as deriving by implication from the express guarantees of speech, press, petition, and assembly contained in the first amendment. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976); United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); NAACP v. Button, 371 U.S. 415 (1963); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958). Typically, the freedom to associate is construed as "a right to join with others to pursue goals independently protected by the first amendment." L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-23, at 702 (1978). As religious worship is a protected first amendment freedom, U.S. CONST. amend. I, a right to associate for such a purpose would stem therefrom. However, use of the word "associate" here is intended to refer only to the right of an individual to choose to participate in the religious practices of the religious organization of his choice, as guaranteed by the free exercise clause of the first amendment. Any independent associational rights which may be implicated are beyond the scope of this note.

20. Katz, *Regulating Unpopular Religious Sects and Deprogrammers*, 5 GLENDALE L. REV. 115, 117 (1983) ("[t]he upsurgence of non-traditional religious sects [may be a response to] the current social climate ... Sex is more acceptable, drugs are more understandable and greed is a part of life. In contrast, many of the new religious sects strictly regulate sex, alcohol, drugs and money ... [thereby] isolat[ing] the member from a [perceived] sinfully oriented society.").

21. *Id.* (The lack of interpersonal contact in modern life caused by rising divorce rates, the breakdown of the traditional family structure, and the increased urbanization of society causes recruits to seek companionship in the communal atmosphere offered by religious cults.)

22. *Id.*

23. A right to freely participate in the practices of the group of one's choice necessarily implicates a right not to participate in the practices of groups not chosen.

compelled some individuals to leave. For example, one cannot ignore the destructive experiences of ex-members who tell of deception, manipulation, and psychological dominance that left them "zombielike"[24] and unable to think or function on their own. Furthermore, some ex-cultists have suffered severe psychological trauma and dysfunction as a result of cult practices.[25] Clearly, an individual has the right to choose not to expose himself to the risk of such harms. Consequently, an individual must not be forced to remain in a cult environment by preventing him from voluntarily choosing to leave.

Yet, when a religious cult subjects a potential recruit to a brainwashing environment,[26] that individual's ability to freely choose to leave the cult may be destroyed.[27] Brainwashing can completely subordinate the will of some recruits to the cult's control.[28] As a result, the recruit may be rendered incapable of forming an independent volition.[29] When brainwashing destroys a recruit's volitional capacity,[30] the recruit's ability to freely choose to leave the cult is destroyed.[31] Therefore, when a cult intentionally brainwashes a recruit, the cult compels the recruit to remain with it as effectively as if the cult had physically restrained the recruit.

Under the first amendment to the Constitution, every person in the United States has the right to freely believe in and practice the religion of his or her choice.[32] A corollary to that freedom is the right of any religious group to

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24. Delgado, *supra* note 4, at 22.

25. *See id.* at 22-23, nn.130-36 (reporting experiences of ex-cult members who reported that cults "ripped-off" their mind and free will and that cult practices completely broke down their rational faculties).

26. The components of a brainwashing environment are described *infra* at part II; *see* notes 40-43 and accompanying text.

27. S. HASSAN, *supra* note 4, at 84 (cult members cannot choose to leave the cult environment because they have been "locked in a psychological prison").

28. *Id.* at 80-81.

29. *See* Shapiro, *supra* note 17, at 1286-92 (describing how brainwashing impedes the ability of some individuals's to form a cognitive will, defining the cognitive will as the ability to form a desire to do something).

30. "Volitional capacity" is used here to refer to the ability of an individual to mentally form a desire to do something, which desire can be transformed into action. The term is a hybrid term, derived from the definitions of "volition" and "capacity," respectively. "Volition" is defined as "the act of willing or choosing: the act of deciding (as on a course of action or an end to be striven for)". WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2562 (1966). "Capacity" is defined as the "capability or faculty for executing, considering, appreciating, or experiencing". *Id.* at 330.

31. If one cannot form a desire, one cannot make a choice to act upon that desire. *See generally* B. WALLACE & L. FISHER, CONSCIOUSNESS AND BEHAVIOR (2d ed. 1987).

32. The first amendment provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof ... " U.S. CONST. amend I.

persuade and attract new members to its ranks.[33] However, when the process by which a religious group proselytizes forces an individual to associate with the group by destroying the individual's ability to freely choose not to, a point is reached where that religious group has misused its free exercise rights to invade the individual's right of personal liberty. Such a point is reached when a cult uses brainwashing techniques to destroy a recruit's volitional capacity. Therefore, an individual whose right to exercise free choice has been violated in this manner should be able to petition a court to intervene and protect his liberty against the religious cult that has abused free exercise rights.[34]

This note argues that the tort of false imprisonment can be used to protect individuals' liberty interests against abuse from the brainwashing tactics that are used by religious cults. Part I will delineate the methods of brainwashing, focusing particularly on how religious cults incorporate those methods into their recruitment and indoctrination processes to constrain a recruit's volitional capacity. Part II will then analyze the tort of false imprisonment and demonstrate how the intentional destruction of volitional capacity falsely confines an individual. Finally, Part III will focus on the free exercise consequences of imposing false imprisonment liability on religious cults that employ brainwashing techniques, and conclude by asserting that imposing such liability is, indeed, constitutionally permissible.

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33. McDaniel v. Paty, 435 U.S. 618, 626 (1978) ("the right to the free exercise of religion unquestionably encompasses the right to preach, proselyte, and perform other similar religious functions").

34. A false imprisonment action against a religious cult premised on brainwashing would necessarily have to be brought by a recruit who had been thus brainwashed after he had somehow been removed from the cult. There are several ways in which brainwashed recruits may be removed from cults; typically, removal involves the assistance of a third party. For example, some brainwashed individuals have been removed from cults by deprogrammers, persons hired by the individuals' families to extricate the individuals from the cult environment and de-brainwash them. *See generally* S. HASSAN, *supra* note 4 (the author is one such "deprogrammer" and he describes in some detail how brainwashed recruits can be removed from the cult and restored to their own mind). Alternatively, sometimes families of brainwashed recruits attempt to remove them by trying to get a conservatorship order. *See, e.g.*, Katz v. Superior Court, 73 Cal. App. 3d 952, 141 Cal. Rptr. 234 (1977). However, the specific methods by which a brainwashed recruit is removed from the cult by a third party, and any independent problems associated with such intervention is beyond the scope of this note.

I. BRAINWASHING AND CULT RECRUITMENT

A. The Method of Brainwashing

The word "brainwashing" was first used to describe the experiences of American POWs during the Korean War.[35] Also, called coercive persuasion or menticide,[36] the term was used to describe indoctrination techniques used by Chinese Communists to convert American prisoners to the Communist ideology.[37] Through a process of isolation, deprivation, psychological assault and interrogation, Korean War prisoners were brainwashed into accepting the beliefs of their Communist captors.[38]

The goal of brainwashing is to gain control of an individual by controlling the individual's mind.[39] A number of environmental factors have been identified which operate to break down a person's will and rational capacity, replacing the individual's independent thought processes with ordered, prescribed thought patterns.[40] Physical exhaustion, isolation from familiar frames of reference, and intense criticism and humiliation create confusion, anxiety, and psychological disorientation in the brainwashing victim.[41] In addition, strict control over communication and information work to short-circuit rational thought so that patterned responses and a simplistic, dichotomous

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35. A. PAVLOS, *supra* note 6, at 51. The term is a translation of the chinese "hsi nao", literally meaning "wash brain" and was translated by the American journalist Edward Hunter. R. LIFTON, THOUGHT REFORM AND THE PSYCHOLOGY OF TOTALISM 3 (1963).

36. Katz, *supra* note 20, at 119.

37. A. PAVLOS, *supra* note 6, at 51.

38. *Id.* at 52. *See generally*, R. LIFTON, *supra* note 35; E. SCHEIN, COERCIVE PERSUASION (1961).

39. S. HASSAN, *supra* note 4, at 80-81.

40. Psychologist Robert Lifton has identified eight distinct characteristics of a thought reform environment. These characteristics are: 1) "Millieu Control", or intensified control of communication within an environment designed to manage an individual's inner communications (or thoughts and feelings); 2) "Mystical Manipulation", in which a deified individual completely dictates the specific behavior and emotional patterns of his followers in such a way as to make them appear to be spontaneous reactions; 3) the "Demand for Purity", which reduces everything in the world to "good" and "evil" and demands internal purification by removing evil ideas (those contrary to the prescribed ideology) from oneself; 4) the "Cult of Confession", or use of pressurized public and self-criticism to increase guilt and shame for labeled impurities; 5) the "Sacred Science", where the leader claims his principles are absolute scientific truths, thereby legitimizing and prohibiting questioning of their logic; 6) "Loading the Language", or the use of "thought-terminating", all-encompassing cliches to which any complex questions can be reduced; 7) "Doctrine Over the Person", in which the ideology dictates patterns of feelings and thought responses to all human experiences; and 8) "Dispensing of Existence", which creates a "being vs. nothingness" dichotomy where only those who are insiders have a right to exist. R. LIFTON, *supra* note 35, at 419-37. *See also* S. HASSAN, *supra* note 4, at 59-67 (describing four components of mind control: control of behavior, control of thoughts, control of emotions, and control of information).

41. R. LIFTON, *supra* note 35, at 419-37.

perception of reality may be substituted.[42] Eventually, prescribed thought patterns are ingrained on the victim's mind, controlling his independent will.

Many of the processes common to the brainwashing environment are evident in the recruitment and conversion practices of religious cults.[43] However, while the brainwashing techniques used in the Korean War and the indoctrination methods of cult groups bear striking similarities, the comparison may lead to a misleading conclusion.[44] Korean POWs knew at the outset that they were in the hands of the enemy; therefore, Chinese Communist indoctrination often involved physical abuse and torture to coerce compliance and thought change.[45] By contrast, physical force is rarely present in the cult setting.[46] As a result, the absence of coercive force is often pointed to as support for the arguments of those who say that individuals voluntarily adopt the cultic reality.[47]

A cult's subtlety, however, is precisely what makes its imposition of mind control even more involuntary and harmful than POW brainwashing. Cult recruiters approach a prospect on his own terms[48] so that the recruit views the indoctrinators as friends or peers. Consequently, unlike Korean POWs, the cult recruit is deceived and manipulated while his defenses are down, unknowingly facilitating the brainwashing process by cooperating with his controllers.[49] Because the recruit is non-resistant from the outset, cults are able to achieve even greater influence and control over him than Chinese Communists could achieve over Korean POWs.[50]

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42. *Id.*

43. A. PAVLOS, *supra* note 6, at 27 (1982); R. ENROTH, YOUTH, BRAINWASHING, AND THE EXTREMIST CULTS 156-65 (1977).

44. S. HASSAN, *supra* note 4, at 55.

45. *Id.*

46. *Id.*

47. *E.g.*, Katz, *supra* note 20, at 122 ("[t]he success of the conversion ... must be judged with regard to the participant's willingness to act ... in a belief transformation"); Shapiro, *supra* note 17, at 1294.

48. S. HASSAN, *supra* note 4, at 41-42 (Recruiters assess potential converts as one of four personality types: "thinkers", or intellectuals'; "feelers", or those who approach life with their emotions; "doers", or action-oriented individuals; and "believers", or searchers of spiritual truth. The approach is then modified so that the recruiter casts his group as most concerned with areas these personality types would be most responsive to. Thus, for example, for "thinkers", a "deliberate misimpression" is given that scientific or academic concerns form the focus of group goals. Likewise, for "feelers", the group's main objective is presented as bringing "real" love into an uncaring world.) *See also Informed Consent*, *supra* note 15, at 546-47 (the recruiter elicits conversation about topics of concern to the prospect, "such as war, race, poverty, the impersonality of the university, or the moral ambiguities of modern life").

49. S. HASSAN, *supra* note 4, at 56.

50. *Id.*

B. How Brainwashing is Used in Cult Recruiting

While individuals from all walks of life have been recruited into religious cults,[51] a composite picture may be drawn of the typical cult recruit. Most new recruits are bright, young people, from average, middle class homes.[52] Most are educated and psychologically stable.[53] The majority of recruits fall prey to cults during a stressful or transitional period in their lives because most are vulnerable to the friendly approach of cult recruiters during stressful periods.[54]

Typically, a cult will employ a definite, methodical strategy to lure a prospective recruit into the cult. Initially, the prospect is contacted in his own environment by an experienced recruiter who expresses interest and concern in the prospect and his problems.[55] After some engaging conversation, the prospect is invited to a small evening gathering at which, the recruiter promises, the prospect will have the opportunity to meet new friends concerns and experiences similar to his own.[56] Throughout the evening gathering, the susceptive youth is bombarded with flattery and attention[57] to heighten the youth's interest in the group and make the youth feel accepted and responsive towards his new-found friends. This seeming warmth, however, is permeated with deception and evasiveness[58] designed to suppress the youth's doubts and concerns. Finally, as the evening draws to a close, the recruit is persuaded to

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51. T. KEISER & J. KEISER, *supra* note 1, at 6 ("Commitment to a religious cult is not limited to idealistic youth ... [For example,] a middle-aged housewife [left] her husband and children to pursue cosmic realization at the feet of an ex-psychologist turned guru ... [and a] wealthy retired couple turned over their property and other assets to an Indian Swami ... [to] live in overcrowded conditions and work long hours without pay, medical care, or proper diet.")

52. R. ENROTH, *supra* note 43, at 149; S. HASSAN, *supra* note 4, at 50.

53. R. ENROTH, *supra* note 43, at 149; S. HASSAN, *supra* note 4, at 76; Katz, *supra* note 20, at 118 n.22 (58% of cult members have had some level of college education).

54. R. ENROTH, *supra* note 43, at 149; S. HASSAN, *supra* note 4, at 49 (typical transition periods include moving to a new town, starting a new job, ending a relationship, losing a loved one, or experiencing financial troubles).

55. S. HASSAN, *supra* note 4, at 41-42; *Informed Consent, supra* note 15, at 547.

56. R. ENROTH, *supra* note 43, at 158 (the Unification Church, for instance, combines a free dinner and lecture session); *Informed Consent, supra* note 15, at 547.

57. S. HASSAN, *supra* note 4, at 49 (typical recruiting plan involves "effusive praise and flattery"). *See also Informed Consent, supra* note 15, at 546-47.

58. R. ENROTH, *supra* note 43, at 158 ("Moon's witnesses have been known to deny flatly any association with the Korean evangelist in the preliminary contacts with recruits"); S. HASSAN, *supra* note 4, at 49 (recruiters regularly practice "deliberate deception about the group, and evasive maneuvering to avoid answering questions").

attend a weekend retreat where he can relax and learn more about his new friends.[59]

At the retreat, the recruit encounters a strictly regimented indoctrination environment, radically different from what his initial encounters with cult members let him to expect.[60] The recruit is soon subjected to a "constant barrage"[61] of group interaction, such as lectures, sermons, meditation, chanting, singing, and other organized activities, that keep the recruit occupied and deprive him of an opportunity to privately reflect on and process the new information.[62] The constant barrage of activity, combined with restricted food intake and little sleep, leave the recruit physically exhausted and mentally fatigued, thereby impairing his rational capacity.[63] The recruit is then emotionally manipulated by the imposition of guilt, fear, and anxiety.[64] Isolated from familiar frames of reference for reinforcement,[65] and trapped in an environment where questions and dissent are prohibited,[66] the recruit's identity is gradually stripped away and supplanted by the cult's version of reality.[67]

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59. S. HASSAN, *supra* note 4, at 14 (for instance, at one such evening gathering, "[n]o fewer than thirty times [cult members] invited [the recruit] to go with them for a weekend away from the city for a retreat in a beautiful place upstate"); *Informed Consent, supra* note 15, at 548.

60. S. HASSAN, *supra* note 4, at 14-18.

61. R. ENROTH, *supra* note 43, at 159.

62. *Id.*; *see also Informed Consent, supra* note 15, at 548-50.

63. R. ENROTH, *supra* note 43, at 160 ("suppression of the individual's rational judgment processes is fostered by sleep deprivation and sensory bombardment"); A. PAVLOS, *supra* note 6, at 24 ("under extreme sensory deprivation people often show decreased intellectual functioning and ... diminished ... ability to resist attitude and belief changes").

64. R. ENROTH, *supra* note 43, at 160; S. HASSAN, *supra* note 4, at 82.

65. R. ENROTH, *supra* note 43, at 159, 162 (recruits are required to sever ties with family, friends, and community); T. KEISER & J. KEISER, *supra* note 1, at 5 (leaders prohibit contact between recruits and families or non-members, censor mail, deny visitors to recruits, and relocate recruits to another state if families persist in attempting to contact them).

66. R. ENROTH, *supra* note 43, at 159 ("questioning is discouraged and dissent is not tolerated"). *See also* S. HASSAN, *supra* note 4, at 80-81 (absolute obedience is demanded so that the "entire sense of reality becomes externally referenced ... [and dependent on] the external authority figure").

67. R. ENROTH, *supra* note 43, at 161 (characterizing a "stripping process" where the identity of the individual is peeled away; this is often reinforced externally by adoption of uniform styles of dress and new names); S. HASSAN, *supra* note 4, at 54 ("any reality that might remind [a recruit] of his previous identity ... is pushed away and replaced by the group's reality").

C. *The Effect of Brainwashing on Cult Recruits*

While individuals subjected to a cultic brainwashing environment can be harmed in many ways,[68] the most serious effect is the domination of the individual's will by the cult[69] and the subsequent destruction of the individual's ability to exercise independent choice.[70] The essence of individual autonomy is awareness of and control over one's choices;[71] that is, the capacity to form and exercise free will.[72] Of course, one may exercise free will by consciously choosing to subordinate one's free choices to the will of another.[73] However, the loss of volitional capacity[74] experienced by cult recruits when a cult controls the recruit's mind involves not only the loss of the ability to exercise free will, but also the ability to form an independent volitional desire.[75] When the individual autonomy of a cult recruit is thus destroyed, the individual becomes like a "robot": an entity programmed from the outside.[76]

Because a cult's brainwashing tactics extinguish a recruit's will, the psychological possibility of the recruit's choosing to leave the group is eliminated. When brainwashing gives the cult control over a recruit's mind, the recruit loses the ability to control the formation and exercise of his volition. Because volition controls the physical body,[77] in this circumstance, the recruit is effectively physically confined in the cult environment because he is psychologically incapable of forming a will to leave.[78]

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68. For example, malnutrition, weight loss, and illness can ensue from poor diet and lack of sleep. *See* Delgado, *supra* note 4, at 10-25. In addition, confusion, disorientation, and psychological dependency can occur. *Id.*; *see also* T. KEISER & J. KEISER, *supra* note 1, at 37-39 (difficulty focusing attention and concentrating [including] depression, acute anxiety, and psychosis).

69. H. Fingarette, *Coercion, Coercive Persuasion, and the Law, reprinted in* CULTS, CULTURE, AND THE LAW 82 (T. Robbins, W. Shepherd, & J. McBride eds. 1985).

70. Delgado, *supra* note 4, at 22.

71. Shapiro, *supra* note 17, at 1289 ("[h]owever defined, autonomy involves the capacity for independent choice").

72. *Id.* at 1287-88.

73. *See id.* at 1283-92.

74. *See supra* note 30.

75. Shapiro, *supra* note 17, at 1283-92.

76. *Id.* at 1288.

77. Aside from certain involuntary bodily functions, such as pupil dilation, heart palpitation, and gland production, all other body movements are consciously controlled by the brain. *See* B. WALLACE & L. FISHER, *supra* note 31, at 20. Conscious control requires an independent choice, or will, to move the body where one pleases. *See* WEBSTER'S NEW COLLEGIATE DICTIONARY 238 (1981) (conscious is defined as "capable of or marked by thought, will, [or] design"). Therefore, a recruit who lacks volitional capacity is physically confined in the sense that he cannot consciously control where his physical body remains.

78. *See infra* notes 79-187 and accompanying text.

II. SHAPING A FALSE IMPRISONMENT CLAIM OUT OF CONSTRAINT OF VOLITIONAL CAPACITY

The legal system has long recognized that one individual can tortiously supplant and impose his will on that of another. For example, courts have in some cases imposed constructive trusts on fraudulently induced wills.[79] Similarly, courts have returned gifts procured by undue influence.[80]

Recent cases have even taken cognizance of the ability of brainwashing tactics to destroy an individual's volitional capacity.[81] In fact, the theory of brainwashing has been raised specifically in a number of contexts. For example, brainwashing has been offered as a defense in the court martial proceedings of POWs[82] and in criminal cases such as those of Patty Hearst[83]

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79. *See, e.g.*, Latham v. Father Divine, 299 N.Y. 22, 85 N.E.2d 168 (1949) (imposing constructive trust on will bequest to religious cult leader on the ground that the leader used false representations to prevent the testator from revoking his will); Seventh Elect Church in Israel v. First Seattle Dexter-Horton Nat'l Bank, 162 Wash. 437, 299 P. 357 (1931).

80. *See, e.g., In re* The Bible Speaks, 73 Bankr. 848 (Bankr. D. Mass. 1987) (ordering return of donations to a clergyman in excess of $6 million on grounds of undue influence); Nelson v. Dodge, 76 R.I. 1, 68 A.2d 51 (1949).

81. *See* Molko v. Holy Spirit Ass'n for the Unification of World Christianity, 46 Cal. 3d 1092, 762 P.2d 46, 252 Cal. Rptr. 122, 137 (1988), *cert. denied*, 490 U.S. 1084 (1989). In reversing summary judgment granted to Unification Church in action by two former members of Church for fraudulent recruitment practices, which alleged that the Church lied about its true identity in order to brainwash the plaintiffs into joining the Church, the court noted that "a triable issue of fact exist[ed] as to...whether [the plaintiffs] were, by means of coercive persuasion, rendered unable to respond independently [at the time that the plaintiffs formally joined the Church]."; Peterson v. Sorlien, 299 N.W.2d 123, 128 (Minn. 1980) (The plaintiff, a member of The Way Ministry, brought a false imprisonment action against her parents for abducting her and, over the course of 16 days, attempting to deprogram her indoctrination into the church. In discussing whether the plaintiff's manifested willingness to remain with her parents during the last 13 days of the deprogramming period constituted consent sufficient to bar the action, in light of the plaintiff's manifested unwillingness during the first three days, the court, while noting that consent is a function of time, stated that, as a result of cultic brainwashing indoctrination, the plaintiff's "volitional capacity ... may well have been impaired".); Meroni v. Holy Spirit Ass'n for the Unification of World Christianity, 125 Misc. 2d 1061, 480 N.Y.S.2d 706, 709 (N.Y. Sup. Ct. 1984) (quoting People v. Murphy, 98 Misc. 2d 235, 239-40, 413 N.Y.S.2d 540 (N.Y. App. Div. 1977)) *rev'd*, 119 A.D. 2d 200, 506 N.Y.S.2d 174 (1986) (in denying Unification Church's motions to dismiss, in an action brought by estate administrator of former recruit who committed suicide for wrongful death and intentional infliction of emotional distress, the court noted that brainwashing produces "destruction of 'the free will of the alleged victims, obtaining over them mind control to the point of absolute domination'"). *But see* Lewis v. Holy Spirit Ass'n for the Unification of World Christianity, 589 F. Supp. 10, 12 (1983) (refusing to find a cause of action for the tort of brainwashing in religious indoctrination due to a lack of precedent, and dismissing a cause of action for negligence and gross negligence premised on brainwashing for failure to state a claim upon which relief could be granted).

82. *See Informed Consent, supra* note 15, at 534 n.7.

83. United States v. Hearst, 412 F. Supp. 863 (N.D. Cal. 1976) (alleging brainwashing in connection with armed robbery).

and Charles Manson.[84] In conjunction with religious cults in particular,[85] brainwashing methods have been implicated in claims for fraud,[86] restitution of gifts,[87] and intentional infliction of emotional distress.[88] However, when cultic brainwashing methods have been implicated in claims for false imprisonment, the claims have been met with mixed results.[89]

The tort of false imprisonment requires a "confinement"[90] against a person's will,[91] and consequently, courts faced with false imprisonment claims raised in connection with the brainwashing activities of religious cults have frequently interpreted the confinement to require restraint by physical force.[92]

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84. People v. Manson, 61 Cal. App. 3d 102, 132 Cal. Rptr. 265 (1976) (alleging brainwashing in connection with murder charges).

85. *See generally*, Annotation, *Liability of Religious Association for Damages for Intentionally Tortious Conduct in Recruitment, Indoctrination, or Related Activity*, 40 A.L.R. 4th 1062 (1985).

86. *E.g.*, Molko v. Holy Spirit Ass'n for the Unification of World Christianity, 46 Cal. 3d 1092, 762 P.2d 46, 252 Cal. Rptr. 122, 130, *cert. denied*, 490 U.S. 1084 (1989) (alleging that fraudulent recruitment tactics were used by Unification Church to induce plaintiffs to attend meetings and retreats where the plaintiffs were then indoctrinated by brainwashing); Christofferson v. Church of Scientology, 57 Or. App. 203, 644 P.2d 577, *cert. denied*, 459 U.S. 1206, 459 U.S. 1227 (1982) (alleging that the Church of Scientology fraudulently induced the plaintiff to submit to "auditing" for the purpose of brainwashing the plaintiff into joining the Church).

87. *E.g.*, *In re* The Bible Speaks, 73 Bankr. 848 (Bankr. D. Mass. 1987) (action for restitution under theory of undue influence, alleging that brainwashing induced the plaintiff to make a donation to religious cult).

88. *See, e.g.*, Wollerscheim v. Church of Scientology, 212 Cal. App. 3d 872, 260 Cal. Rptr. 331 (1989) (alleging that members of the Church of Scientology intentionally induced the plaintiff to submit to auditing designed to brainwash the plaintiff into joining the church, which caused the plaintiff to suffer psychological deterioration to the point of contemplating suicide); *Molko*, 46 Cal. 3d 1092, 762 P.2d 46, 252 Cal. Rptr. at 137-39 (In alleging that the Unification Church fraudulently induced the plaintiffs to attend meetings and retreats for the purpose of using brainwashing to indoctrinate the plaintiffs into the Church, the plaintiff argued that the brainwashing process itself was the emotional distress); Meroni v. Holy Spirit Ass'n for the Unification of World Christianity, 125 Misc. 2d 1061, 480 N.Y.S.2d 706 (N.Y. Sup. Ct. 1984) *rev'd*, 119 A.D.2d 200, 506 N.Y.S.2d 174 (1986) (asserting that brainwashing induced former Church member, the plaintiff's son, to commit suicide, thereby causing the plaintiff to suffer emotional distress).

89. *See infra* notes 93, 96 and accompanying text.

90. *See* RESTATEMENT (SECOND) OF TORTS § 35(1) (1979).

91. *Id.*

92. The confinement required for false imprisonment need not be effectuated by physical force; threats of physical force or other forms of duress sufficient to compel an individual to remain or go where he does not wish to be will suffice. *See, e.g.*, Mendoza v. K-mart, Inc., 587 F.2d 1052, 1058 (10th Cir. 1978) (quoting Martinez v. Sears, Roebuck and Co., 81 N.M. 371, 467 P.2d 37, 39 (Ct. App. 1970)) ("restraint constituting false imprisonment 'may arise out of words, acts, gestures or similar means which induce reasonable apprehension that force will be used if the plaintiff does not submit...[that] operate upon the will of the person threatened and result in a reasonable fear of personal difficulty or personal injuries' "); Foley v. Polaroid Corp., 400 Mass. 82, 91, 508 N.E.2d 72, 77 (1987) (action by employee-at-will against employer, alleging that the employee had been falsely imprisoned because the employer had detained the employee in a room for four hours under a threat that the employee would be fired if he left the room; although the court

As a result, false imprisonment claims involving religious cults have only been successfully brought by cult members themselves, in suits against

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found the threat of discharge insufficient to effectuate a false imprisonment because the employee was not entitled to continued employment, the court noted "that a plaintiff who relinquishes his right to move about freely as the only available alternative to relinquishment of another right...is restrained, or imprisoned, in the sense of tortious false imprisonment"); Clark v. Skaggs Companies, Inc., 724 S.W.2d 545, 549 (Mo. App. 1986) (citing Munsell v. Ideal Food Stores, 208 Kan. 909, 494 P.2d 1063, 1076 (1972)) ("Although physical restraint is not essential, there must, in absence of such restraint, be words or conduct that induce the reasonable belief that resistance or attempted flights would be futile."); West v. King's Department Store, Inc., 321 N.C. 698, 365 S.E.2d 621, 624 (1988) (quoting Hales v. McCrory-McClellan Corp., 260 N.C. 568, 570, 133 S.E.2d 225, 227 (1963)) (" '[f]orce is essential only in the sense of imposing restraint...If the words or conduct are sufficient to induce a reasonable apprehension of force, and the means of coercion are at hand, a person may be as effectively restrained and deprived of liberty as by prison bars.' ") *See also* RESTATEMENT (SECOND) OF TORTS §§ 38-41 (1979) (The Restatement suggests five means by which confinement may be caused: actual or apparent physical barriers; physical force; threats of physical force; duress; and asserted legal authority.) Because cultic brainwashing typically does not involved the erection of physical barriers (*see e.g., Molko*, 46 Cal.3d 1092, 762, P.2d 46, 252 Cal. Rptr. 122, 126-27 (1988), *cert. denied* 490 U.S. 1084 (1989) (brainwashed recruit allowed to go out into the city to "sell flowers and 'witness' for the Church")), and because brainwashing operates on an individual's will, false imprisonment claims against religious cults premised purely on brainwashing are typically brought under threat or duress theories. *See, e.g.*, George v. International Soc'y for Krishna Consciousness, 213 Cal. App. 3d 729, 262 Cal. Rptr. 217 (1989) (false imprisonment claim against Hare Krishnas asserting that brainwashing constituted sufficient force to overcome the plaintiff's will, implying, though not expressly stating, a general duress theory). However, because of a fear of impermissibly interfering with a cult's absolute first amendment right to religious belief, (*see infra* notes 192-95 and accompanying text), courts have consistently required actual or threatened use of *physical force* as a pre-requisite to a successful false imprisonment claim against a religious cult, thereby causing claims that have been premised purely on brainwashing to fail. *See, e.g., Molko*, 46 Cal. 3d at 1123, 762 P.2d at 64, 252 Cal. Rptr. at 140 (false imprisonment claim premised on brainwashing failed because the plaintiff was "not physically restrained, subjected to physical force, or subjectively afraid of physical force" and because the plaintiff's assertion that she was also threatened by cult members with "divine retribution" if she left the cult "implicate[d] the church's beliefs[,...which] threats [were] protected religious speech"); *George*, 213 Cal. App. 3d at ___, 262 Cal. Rptr. at 236 (in rejecting false imprisonment claim premised purely on brainwashing, the court stated: "physical force or the threat of it is a necessary element of a false imprisonment cause of action even in the context of a brainwashing claim"). *Cf.* Candy H. v. Redemption Ranch, Inc., 563 F. Supp. 505, 516 (M.D. Ala. 1983) (action under 42 U.S.C. § 1985(3), alleging a conspiracy to deprive the plaintiffs of equal protection, brought by former residents against religious home for girls that confined girls to the home by locking the doors from both the inside and the outside, a practice ostensibly based on religious beliefs; in finding that the plaintiffs had alleged sufficient independent unlawfulness of the acts alleged to further the conspiracy, the court noted that the plaintiffs had alleged sufficient facts to constitute the common law tort of false imprisonment); Gallon v. House of Good Shepherd, 158 Mich. 361, 370-71 (1909) (sustaining a false imprisonment action against a religious reformatory home for girls because "those in charge proposed that [the plaintiff] should remain whether she desired to remain or not...[and because when] she sought to go away,...[she] discovered the purpose of those in charge to prevent her from doing so"; the context of the opinion implies, without expressly so stating, that physical force was used against the plaintiff).

deprogrammers[93] hired by the members' families to attempt to remove the members from the cult.[94] Because physical force is typically absent from cultic brainwashing,[95] courts have been reluctant to interfere[96] with a cult's recruitment and indoctrination techniques out of fear of infringing on the cult's free exercise rights.[97] Consequently, courts have failed to recognize that the constraint of volitional capacity caused by a cult's brainwashing techniques can accomplish a constructive physical restraint just as effectively as actual physical force.[98]

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93. *See, e.g.*, Eilers v. Coy, 582 F. Supp. 1093 (D. Minn. 1984); Peterson v. Sorlien, 299 N.W.2d 123 (Minn. 1980). "Deprogramming" is the process by which cult members who have been brainwashed are removed from cult influences and restored to their former identities. *See Peterson*, 299 N.W.2d at 127 ("[t]he avowed purpose of deprogramming is to break the hold of the cult over the individual through reason and confrontation"); *see generally*, S. HASSAN, *supra* note 4. In false imprisonment cases against deprogrammers, physical force is usually clearly present, and consequently, those claims have been relatively successful. *See, e.g., Eilers*, 582 F. Supp. at 1095 (cult member was "grabbed from behind" and abducted by deprogrammers, "handcuffed to a bed", and "heavily guarded"); *Peterson*, 299 N.W.2d at 128 (false imprisonment action by cult member against her father after the father, under false pretenses of returning to the family home, drove the member to another's home in a failed deprogramming attempt; although the court found sufficient evidence of restraint against the plaintiff's will in the initial stages of the deprogramming, the court held that the action was barred because the plaintiff's subsequent manifestations of willingness constituted consent sufficient to vitiate the action).

94. Sometimes the cult will even coerce members to initiate actions against their families as well. S. HASSAN, *supra* note 4, at 28. *See, e.g., Peterson*, 299 N.W.2d at 127 (after failed deprogramming attempt and upon returning to the cult, recruit "was directed to counsel and initiated [a false imprisonment] action against her parents").

95. S. HASSAN, *supra* note 4, at 55.

96. *E.g.*, Molko v. Holy Spirit Ass'n for the Unification of World Christianity, 46 Cal. 3d 1092, 762 P.2d 46, 252 Cal. Rptr. 122, 140 (1988), *cert. denied*, 490 U.S. 1084 (1989) (denied false imprisonment claim premised on brainwashing because the plaintiff was neither physically restrained nor threatened with physical force); George v. International Soc'y for Krishna Consciousness, 213 Cal. App. 3d 727, 262 Cal. Rptr. 217, 235-36 (1989) (same). *But see* Turner v. Unification church, 473 F. Supp. 367, 376 (D.R.I. 1978) (denying involuntary servitude claim based on brainwashing because the federal criminal statute under which the claim was brought did not contemplate a civil cause of action, and suggesting that a state tort claim of false imprisonment would be a more appropriate remedy).

97. *See, e.g.*, Lewis v. Holy Spirit Ass'n for the Unification of World Christianity, 589 F. Supp. 10, 12 (D. Mass. 1983) ("Indoctrination and initiation procedures ... [of] a religious organization are generally not subject to judicial review"). *Cf.* Katz v. Superior Court, 73 Cal. App. 3d 952, 141 Cal. Rptr. 234, 255 (1977) (denying appointment of a conservatorship in order to remove an allegedly brainwashed individual from a religious cult on the grounds that inquiry into psychological methods used to proselytize and hold the allegiance of recruits to the church was forbidden by the first amendment).

98. *See supra* notes 92, 96.

A. The Nature of the Tort of False Imprisonment

The tort of false imprisonment occurs when a person intentionally obstructs the ability of another to leave a particular place.[99] The tort is thus designed to protect an individual's interest in freedom from restraint of movement.[100] The nature of the injury resulting from false imprisonment is often restated as an interference with personal liberty[101] or restraint of a person against his will.[102] Consequently, the essence of the tort of false imprisonment lies in the physical nature of the restraint effectuated in the victim rather than the physical nature of the force used to produce the restraint.[103] That it is the restraint, and not the force, which must be physical is clearly evidenced by the fact that direct threats, fraud, or other forms of duress are sufficient restraining forces.[104]

The interest violated by false imprisonment "is in a sense a mental one"[105] similar to the apprehension of contact in assault cases.[106] Courts' use of phrases like "violation of liberty" or "restraint against the will"[107] to describe the interest invaded emphasizes the fact that it is not the literal physical body which is restrained but the right of the mind to choose to leave; i.e., the right to form and exercise volition to compel the physical body to move.[108] Just as an assault occurs the moment one mentally comprehends the approaching

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99. Schanafelt v. Seaboard Finance Co., 108 Cal. App. 2d 420, 422-23, 239 P.2d 42 (1951) (an individual is falsely imprisoned when "he is wrongfully deprived of his freedom to leave a particular place by the conduct of another").

100. P. KEETON, D. DOBBS, R. KEETON, & OWEN, PROSSER AND KEETON ON TORTS § 11, at 47 (5th ed. 1984) [hereinafter *Prosser*].

101. Peterson v. Sorlien, 299 N.W.2d 123, 128 (Minn. 1980) (defendants "unlawfully interfered with her personal liberty").

102. State v. Streath, 73 N.C. App. 546, 327 S.E.2d 240, 244 (1985) ("restraint against the will of the victim").

103. George v. International Soc'y for Krishna Consciousness, 213 Cal. App. 3d 729, 262 Cal. Rptr. 217, 231 (1989) ("the 'violation of personal liberty' which the tort of false imprisonment contemplates necessarily involves a physical restraint of the plaintiff. This not to say, however, that the plaintiff must in fact be physically restrained ... ").

104. Molko v. Holy Spirit Ass'n for the Unification of World Christianity 46 Cal. 3d 1092, 762 P.2d 46, 252 Cal. Rptr. 122, 140 (1988), *cert. denied*, 490 U.S. 1084 (1989) ("false imprisonment may be effected by ... fraud or deceit"); *Streath*, 73 N.C. App. 546, 327 S.E.2d at 244 ("It is not necessary ... [to] show actual force; threat or even fraud resulting in coerced consent may suffice"). *See also* RESTATEMENT (SECOND) OF TORTS §§ 38-40 (1979).

105. *Prosser, supra* note 100, § 11 at 47. Significantly, the Restatement of Torts describes the interest harmed as an interest in "freedom from the realization that one's will to choose one's location is subordinated to the will of another...." RESTATEMENT (SECOND) OF TORTS § 35, comment h (1979).

106. *Prosser, supra* note 100, § 10 at 43 (the tort of assault protects the "interest in freedom from apprehension of a harmful or offensive contact with the person").

107. *See supra* notes 101, 102.

108. *See supra* note 78.

contact,[109] a false imprisonment occurs the moment one's volitional capacity is restrained.[110]

B. Fashioning a False Imprisonment Claim out of Restraint of Volitional Capacity

Section 35 of the Restatement of Torts outlines three essential elements of the tort of False Imprisonment.[111] The Restatement requires an intentional restraining force,[112] a resulting confinement,[113] and awareness of confinement by, or harm ensuing to, the individual confined.[114] Consequently, in order to establish a false imprisonment claim against a religious cult premised on brainwashing, an ex-recruit would have to show: 1) that the cult

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109. An assault occurs when an actor intentionally puts another in apprehension of imminent bodily contact. *See* RESTATEMENT (SECOND) OF TORTS § 21(1) (1979) ("An actor is subject to liability to another for assault if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, *or an imminent apprehension of such a contact*, and (b) the other is thereby put in such imminent apprehension") (emphasis added). The apprehension necessary to effectuate an assault need not rise to the level of actual fear; it is enough that the one assaulted perceive that imminent contact is threatened even if he believes the contact will not in fact occur. "It is not necessary that the other believe that the act done by the actor will be effective in inflicting the intended contact upon him. It is enough that he believes that the act is capable of immediately inflicting the contact upon him unless something further occurs." *Id.* at § 24, comment b. Moreover, an assault occurs even if the actor himself does not intend to inflict the contact and the other is aware that the actor does not so intend. *Id.* at § 28; *see also id.* at § 28, Illustration 1 (As a guiding illustration, the Restatement provides: "A, an expert knife thrower, intending to frighten B, who is standing against a wall, throws a knife toward him not intending to hit him. B, though knowing A's intention, does not share A's perfect confidence in his marksmanship and is put in apprehension of being struck by the knife. A is subject to liability to B.") Thus, an assault clearly occurs the moment one becomes apprehensive of, or perceives or comprehends that, imminent contact is possible. *See* WEBSTER'S NEW COLLEGIATE DICTIONARY 55 (1981) (apprehension is defined as "the act or power or perceiving or comprehending").

110. The interest protected by the tort of false imprisonment is the mental interest in freedom to choose where to place one's physical person. *See supra* notes 105, 107-08 and accompanying text. Similarly, the interest protected by the tort of assault is the mental interest in freedom from involuntarily being subjected to apprehension of imminent physical contact with the body. *See supra* note 106. An assault occurs the moment one is made apprehensive; i.e., the moment one's mental peace is invaded by another's act subjecting one to involuntary apprehension. *See supra* note 109. In a similar manner, a false imprisonment occurs the moment one's mental capacity to independently choose the locus of the physical body is invaded by another's act in frustrating one's ability to make that choice. *See infra* notes 125-31 and accompanying text.

111. The Restatement provides that "An actor is subject to liability for false imprisonment if: (a) he acts intending to confine the other or a third person within boundaries fixed by the actor, and (b) his act directly or indirectly results in such a confinement of the other, and (c) the other is conscious of the confinement or is harmed by it." RESTATEMENT (SECOND) OF TORTS § 35(1) (1979).

112. *Id.* at § (1)(a) (act intended to confine).

113. *Id.* § (1)(b) (direct or indirect confinement).

114. *Id.* at § (1)(c).

intentionally used brainwashing to restrain him; 2) that brainwashing in fact caused him to be confined; and 3) that he was aware of or harmed by his confinement.

1. Brainwashing as the Restraining Force

A false imprisonment must be accomplished by an intentional act of restraint.[115] However, the act creating the restraint need not be physical; a confinement[116] may be accomplished by forces[117] that operate psychologically on the victim to restrain him. For example, an individual may be restrained by direct threats[118] or fraud.[119]

In particular, Section 40A of the Restatement provides that confinement may be accomplished by submission to duress.[120] The Restatement then defines the duress sufficient to effectuate a confinement as "those forms of duress that are quite drastic in their nature and that clearly and immediately amount to an *overpowering of the will.*"[121] Thus, the Restatement

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115. RESTATEMENT (SECOND) OF TORTS § 35(1)(a) (1979).

116. *See infra* notes 125-27 and accompanying text.

117. The word "force" is used here in the sense of an energy source as opposed to violence or physical strength. *See* WEBSTER'S NEW COLLEGIATE DICTIONARY 444-45 (1981) (force is defined as "strength or energy exerted or brought to bear: cause of motion or change: active power").

118. For example, confinement can be created by threats. *See* RESTATEMENT (SECOND) OF TORTS § 40 (1979). However, in order for a threat to sufficiently cause a confinement, the one threatened must remain within the limits fixed by the actor for the purpose of averting the threat and believe that the actor has the ability to carry the threat into effect. *Id.* at comments b, c. *See, e.g.*, West v. King's Dept. Store, Inc., 321 N.C. 698, 365 S.E.2d 621 (1988) (action by customer against store alleging that the store manager falsely imprisoned the customer by repeatedly, but wrongly, accusing the customer of thievery and threatening to have the customer arrested, in the presence of a police officer; the court found that the officer's presence was enough to cause the customer to reasonably believe that the manager was capable of carrying out the threat, and that therefore the threat was sufficient to effectuate the confinement necessary for false imprisonment).

119. *See* State v. Streath, 73 N.C. App. 546, 327 S.E.2d 240, 244 (1985) (*citing* State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971)) (criminal conviction for false imprisonment where the defendant fraudulently induced victim to get into the defendant's car by offering victim a ride home from a shopping mall when her car shouldn't start and taking the victim to another deserted parking lot, where the defendant sexually assaulted the victim; in upholding the conviction, the court noted that to establish a false imprisonment "[i]t is not necessary that the state show actual force; threats or even fraud resulting in coerced consent may suffice").

120. *Id.* at § 40 A ("The confinement may be by submission to duress other than threats of physical force, where such duress is sufficient to make the consent given ineffective to bar the action.")

121. *Id.* at § 892B, comment j (emphasis added). For instance, situations where such duress has been found include threats to an individual's family or valuable property. The Restatement is quick to point out, however, that "[t]he cases ... do not indicate that these are the limits of the

contemplates that a force which restrains an individual's volition is sufficient to create a false imprisonment.

The methods cults utilize to brainwash a recruit create the type of duress contemplated by the Restatement. The Restatement provides that duress is sufficient to create a confinement when it is "drastic" and it "overpowers the will."[122] A brainwashed recruit's will is overpowered because brainwashing destroys his volitional capacity.[123] Moreover, the methods cults use to brainwash a recruit, such as isolation, sleep and food deprivation, and continuous repetitious activity,[124] may certainly be considered drastic. Therefore, brainwashing constitutes a drastic form of duress sufficient to create a false imprisonment.

2. Constructive Confinement Through Destruction of Volitional Capacity

The Restatement of Torts provides that in order for an individual to be falsely imprisoned, the individual must be completely confined within fixed boundaries.[125] Section 36(2) defines what constitutes complete confinement: "[t]he confinement is complete although there is a reasonable means of escape, unless the other knows of it."[126] The Restatement's emphasis on whether or

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duress that will render consent ineffective; ... [a]ge, sex, *mental capacity*, the relation of the parties and *antecedent circumstances* all may be significant"). *Id.*

122. The Restatement provides that duress is sufficient to constitute confinement "whenever the duress is sufficient to make ineffective the consent which would otherwise be involved in the submission." RESTATEMENT (SECOND) OF TORTS § 40A (1979). Section 892B of the Restatement then states that duress sufficiently renders consent ineffective when the duress is "drastic in [its] nature and...clearly and immediately amount[s] to an overpowering of the will." *Id.* at § 892B, comment j.

123. *See supra* notes 74-76 and accompanying text.

124. *See supra* notes 63-67 and accompanying text.

125. RESTATEMENT (SECOND) OF TORTS § 36 (1) (1979) ("To make the actor liable for false imprisonment, the other's confinement within the boundaries fixed by the actor must be complete.") *See, e.g.*, Bower v. Weisman, 639 F. Supp. 532, 540 (S.D.N.Y. 1986) (plaintiff, for whom the defendant allegedly agreed to provide with a rent-free condo until she remarried, failed to state cause of action for false imprisonment after defendant allegedly changed the locks while the plaintiff was not at home and stationed armed guards at the door, because although the plaintiff may have felt like a prisoner, the plaintiff was free to go to work, and because only persons other than the plaintiff and her daughter were excluded from the condo); Snyder v. Evangelical Orthodox Church, 216 Cal. App. 3d 297, 264 Cal. Rptr. 640 (1989) (church bishop ordered by parishioners to meditate for a week in isolation upon threat of exposing bishop's extra-marital affair was not falsely imprisoned because the bishop was not physically restrained and was free to leave at any time).

126. *Id.* at § 36(2). As illustrative examples, the Restatement offers the following:

> 1. A locks B, an athletic young man, in a room with an open window at a height of four feet from the floor and from the ground outside. A has not confined B.
>
> 2. A locks B, who is suffering from a disease which makes any considerable exertion dangerous to him, in such a room as supposed in Illustration 1. A has confined B.

Id. at Illustrations 1, 2.

not an individual is aware of a means of escape suggests that the completeness of the confinement depends on the subjective position of the victim and not on the objective type of force used upon him. The restraining force need not create absolute barriers; a confinement exists as long as the victim is unaware that a means of escape is available.[127]

An individual who is prevented from leaving a cult by brainwashing is constructively confined because even though means of leaving the cult may be available,[128] he is unable to take advantage of them. Because brainwashing destroys a recruit's volitional capacity, he is psychologically incapable of freely choosing to leave.[129] As a result, the recruit is effectively unaware of a means of escape; since the recruit's volition is controlled by the cult,[130] which does not want him to leave, the recruit is cognitively unable to recognize an avenue of exit independently. Therefore, the brainwashed recruit is constructively confined because the cult intentionally causes him to be unaware of a means of leaving its control.[131]

3. Harm Resulting From Confinement

The Restatement, in Section 35(1)(c), states that a person cannot be falsely imprisoned unless he is conscious of his confinement or is harmed by it.[132]

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127. *See, e.g.*, Talcott v. National Exhibition Co., 144 A.D. 337, 128 N.Y.S. 1059 (1911).

128. Typically, however, the means of leaving will be controlled by the cult. For instance, a cult usually will not allow new recruits to drive themselves to a retreat; rather, the recruit will ride along in a member's car. S. HASSAN, *supra* note 4, at 14-15. In addition, any possibility of family members coming to pick up a recruit is controlled by the cult since the cult strictly controls, and often prohibits, any contact a recruit may have with non-members. *See supra* note 65. Sometimes cults will relocate recruits to branches of the cult in other geographical areas to prevent families from assisting removal. *See, e.g.*, George v. International Soc'y for Krishna Consciousness, 213 Cal. App. 3d 729, 262 Cal. Rptr. 217 (1989).

129. *See supra* notes 74-76 and accompanying text.

130. *Id.*

131. The boundaries required by the Restatement are sufficiently fixed if an individual prevents another from leaving his presence. *See* RESTATEMENT (SECOND) OF TORTS § 36, comment c (1979) ("If an actor ... compels another to accompany him from place to place, he has as effectively confined the other as though he had locked him in a room.")

132. *Id.* at § 35 (c). Knowledge of confinement is required, in the absence of harm ensuing to the one confined, because a "mere dignitary interest in being free from an interference with ... personal liberty", discovered only later, is not protected by the tort. *Id.* at § 42, comment a.

> Compare the following illustrations, offered in the Restatement by way of example:
> A calls an employee, B, into his office to explain his connection with speculations which have been going on in A's business, and stations a guard at the door with instructions not to let B leave the room unless A sounds a buzzer. B does not know of these instructions. B's explanations are satisfactory. The buzzer is sounded and B is allowed to pass unhindered. A is not liable to B.

Id. at Illustration 2.

Awareness of confinement is typically required on the rationale that, because the right invaded by false imprisonment is the freedom to go where one *pleases*,[133] the interest is not interfered with until the individual knows he cannot go where he wants to.[134] However, a brainwashed recruit cannot independently "please" to go anywhere. Moreover, because a brainwashed recruit does not know that his volitional capacity has been supplanted by the will of the cult,[135] the recruit cannot, by definition, be aware that he is "confined against his will" even though he is so confined. Therefore, the awareness requirement could cause a false imprisonment claim brought by an ex-recruit against the cult that brainwashed him to fail.

However, the Restatement notes that if an individual is harmed in fact by a confinement, a false imprisonment may be complete even though the individual may have been unaware of his confinement.[136] As a guiding illustration, the Restatement offers the following example:

> A kidnaps B, a wealthy idiot, locks him up, and holds him for ransom. B is found and released by the police without ever being aware that he has been confined. B has been deprived of the custody and care of his relatives. A is subject to liability to B for false imprisonment.[137]

> [X], a diabetic, is suffering from shock brought on by an overdose of insulin. [Y] believes [X] to be drunk, and without any legal authority to do so arrests [X] and locks him up over night in jail. In the morning [X] is released while still unconscious and unaware that he has been confined. On learning what has occurred [X] is greatly humiliated, and suffers emotional distress, with resulting serious illness. [Y] is subject to liability to [X] for false imprisonment.

Id. at Illustration 5.

In the former illustration, B neither became aware of his confinement nor suffered any harm upon later having learned A had intended to confine him. Consequently, B suffered no injury other than to his dignitary interest in freedom from restraint, which is not actionable. By contrast, in the latter example, X suffered serious emotional and physical trauma upon learning he had been wrongfully locked in jail. As a result, more than X's mere dignitary interest was affected by his confinement, even though during his confinement, X was just as unaware of it as B was of his own confinement. Thus, because X suffered harm as a result of his confinement, X will be able to recover against Y even though X was unaware of his confinement.

133. *See* PROSSER, *supra* note 100, § 11 at 47-48 (emphasis added).

134. *Id.*

135. S. HASSAN, *supra* note 4, at 53 (noting that one cannot know that one is under mind control at the time).

136. RESTATEMENT (SECOND) OF TORTS § 46, comment b (1979) (In "situations in which actual harm may result from a confinement of which the plaintiff is unaware at the time[,]...more than the mere dignitary interest...[is] involved, and the invasion becomes sufficiently important for the law to afford redress.")

137. *Id.* at Illustration 4.

A brainwashed recruit is similar to the Restatement's wealthy idiot in that both are cognitively incapable of knowing that they are confined. However, unlike the Restatement's wealthy idiot, the recruit's incapacity to be conscious of his confinement is caused by those who confine him. As a result, the case for false imprisonment liability is even more compelling for the brainwashed recruit than it is for the wealthy idiot, since the recruit has suffered a harm simply because he is unaware of his confinement. In addition, the recruit suffers deprivation of family care,[138] and can also suffer severe physiological and psychological harms,[139] as a result of cultic brainwashing. Therefore, because the cult intentionally confines the recruit and the recruit is clearly harmed by the confinement, the cult should be liable for false imprisonment.

C. Overcoming a Potential Obstacle: The Defense of Consent

Consent may frustrate the success of a false imprisonment claim against a religious cult premised on brainwashing. An individual who consents to an otherwise tortious invasion of his interest cannot recover in tort for that invasion.[140] Consent [141] may be express,[142] as by words or actions of direct agreement, or apparent,[143] as by words or actions that may reasonably be perceived as manifesting willingness. Consent will bar recovery for an otherwise tortious invasion because the law assumes that one cannot be harmed by conduct to which one agrees to submit.[144] Therefore, even if an ex-recruit who was brainwashed by a cult can successfully demonstrate the elements of restraining force, confinement, and actual harm,[145] the cult cannot be held

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138. *See supra* note 65.

139. *See supra* note 65.

140. RESTATEMENT (SECOND) OF TORTS § 892(A)(1) (1979) ("[o]ne who effectively consents to conduct of another intended to invade his interests cannot recover in an action of tort for the conduct or for the harm resulting from it"). *See also* PROSSER, *supra* note 100, § 18 at 12 ("Consent ordinarily bars recovery for intentional interferences with person or property. It is not, strictly speaking, a privilege or even a defense, but goes to negative the existence of any tort in the first instance.").

141. Consent is defined as "willingness *in fact* for conduct to occur." RESTATEMENT (SECOND) OF TORTS § 892 (1) (1979) (emphasis added). *See also* WEBSTER'S NEW COLLEGIATE DICTIONARY 39 (1981) ("compliance in what is done by another"). The word "consent" is used in this subsection to mean both "express" and "apparent" consent, unless otherwise indicated. As to the distinction between "express" and "apparent" consent, see *infra* notes 142, 143.

142. RESTATEMENT (SECOND) OF TORTS § 892, comment b (1979) (consent may be "manifested directly to the other by words or acts that are *intended to indicate* that it exists") (emphasis added).

143. *Id.* at comment c (consent may be manifested by "words or acts or silence and inaction ... understood by a reasonable person as intended to indicate consent"). Note that the Restatement emphasizes the objective reasonableness of the assumption; if a reasonable person would not assume that consent is intended, no apparent consent exists. *Id.*

144. *Id.* at § 892(A), comment a.

145. *See supra* notes 111-14 and accompanying text.

liable for falsely imprisoning the recruit if the recruit has consented to remain with the cult.

In order to bar liability for otherwise tortious conduct, consent must be effective.[146] In general, consent is effective when a competent individual[147] willingly agrees to the conduct[148] intended to invade his interest. However, consent may be rendered ineffective to bar recovery if the consent is vitiated because a necessary element is lacking[149] or withdrawn before the tortious conduct ceases.[150] Similarly, consent may be rendered ineffective if the actor's conduct exceeds its limits.[151] If consent is rendered ineffective, recovery for ensuing tortious conduct will not be barred.

Consent thus poses a potential obstacle to recovery for an ex-recruit alleging that he was falsely imprisoned by cultic brainwashing. When a potential recruit is initially approached by a cult member and assents to attend a cult meeting or retreat, the recruit still possesses control over his own volition, and any express consent[152] given is therefore facially valid. Moreover, the recruit apparently consents[153] to remain with the cult by virtue of the fact that he does not leave. Consequently, the recruit's consent appears to be effective within the meaning of the Restatement.[154] Therefore, an ex-recruit will not

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146. RESTATEMENT (SECOND) OF TORTS § 892(A)(1) (1979).

147. *Id.* at § (2)(a) ("To be effective, consent must be by one who has the capacity to consent ... ").

148. *Id.* at § (2)(b) ("To be effective consent must be ... (b) to the particular conduct, or to substantially the same conduct.").

149. For example, consent is vitiated if given involuntarily because the actor induced the consent. RESTATEMENT (SECOND) OF TORTS § 892(A), comment a (consent is not freely given, and thus not voluntary, if it is induced by fraud, mistake, or duress).

150. *Id.* at § 892(A)(5) ("Upon termination of consent its effectiveness is terminated."). *See generally*, Note, *A Misconceived Issue in the Tort of False Imprisonment*. 44 MOD. L. REV. 166 (1981).

151. RESTATEMENT (SECOND) OF TORTS § 892(A)(4) ("If the actor exceeds the consent, it is not effective for the excess.")

152. The recruits consent is express here because his words and/or actions in attending an initial meeting or retreat directly indicate a willingness to accompany the recruiter. *See supra* note 142. That this initial express consent may be flawed, and, therefore, ineffective to bar recovery, is discussed *infra* at notes 156-60 and accompanying text.

153. The recruit's consent here is apparent because his failure to leave seems to qualify as inaction perceived as indicating agreement. *See supra* note 143. However, one may question whether the cult may claim apparent consent by a cult's failure to leave, since that failure is *caused* by the cult's conduct in brainwashing the recruit. Thus it could be considered unreasonable for a cult to have "understood" that the recruit intended to consent by not leaving. *Id.* Moreover, any apparent consent that may be construed by the recruit's failing to manifest objection to the forces of brainwashing used upon him may be vitiated because the recruit does not know that he is being brainwashed while it is happening. S. HASSAN, *supra* note 4, at 53. Thus, the recruit cannot apparently consent to what he in fact does not know.

154. *See supra* notes 147-48 and accompanying text.

be able to recover for false imprisonment unless he can show that his initial consent was ineffective to absolve liability.[155]

1. Vitiation and Constructive Withdrawal

Several factors unique to the cult recruiting and indoctrination process[156] suggest that an ex-recruit's consent can be rendered ineffective to bar recovery for false imprisonment. For instance, the recruit's initial consent may be vitiated because the consent was procured involuntarily.[157] A religious cult may deliberately withhold information about the group's identity when soliciting recruits[158] and blatantly deny association with any religious organization.[159] In such a situation, the recruit may be unaware that he is participating in aggressive proselytizing when he assents to go with the group. As a result, the recruit's initial consent would be ineffective to bar recovery because the consent was involuntarily induced by the recruiter's misrepresentation.[160]

In addition, the destruction of the ex-recruit's volitional capacity caused by brainwashing may amount to a constructive withdrawal of consent.[161] In order to be effective, consent must be given by an individual with the capacity to consent.[162] However, a brainwashed recruit cannot form an independent volition and therefore he lacks the capacity to manifest willingness[163] voluntarily.[164] Because effective consent requires capacity, effective consent

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155. *See supra* notes 149-51 and accompanying text.

156. *See Informed Consent*, *supra* note 15, at 550-52.

157. *See supra* note 149. *See generally Informed Consent*, *supra* note 15 (proposing an informed consent requirement for cultic religious proselytizing).

158. S. HASSAN, *supra* note 4, at 49.

159. *Id.*

160. *See* RESTATEMENT (SECOND) OF TORTS § 892(B)(2) (1979) ("If the person consenting to the conduct of another is induced to consent ... by the other's misrepresentation, the consent is not effective"). *See also* PROSSER, *supra* note 100, § 18 at 120 ("active misrepresentation ... has been held to invalidate the consent").

161. Consent may be withdrawn in fact at any time. *See* Note, *supra* note 150, at 169 ("[c]onsent to submission of liberty can generally be withdrawn at any time, and any further restriction of liberty after withdrawal of consent ... is false imprisonment"). *See also* RESTATEMENT (SECOND) OF TORTS § 892(A), comment i (1979) ("on termination of the consent it ... ceases to be effective"). As to how the recruit's consent may be constructively withdrawn, see *infra* notes 162-65 and accompanying text.

162. *See* RESTATEMENT (SECOND) OF TORTS § 892(A)(2)(a). Capacity requires one to be capable of cognitive appreciation. *Id.* at comment b.

163. *See supra* notes 141-43 and accompanying text.

164. "Voluntariness" is used here to indicate independence, as opposed to agreeance. *See* WEBSTER'S NEW COLLEGIATE DICTIONARY 1303 (1981) ("proceeding from the will or one's own choice").

terminates at the moment when capacity ceases.[165] Therefore, the recruit's consent is constructively withdrawn when his volitional capacity is destroyed, and any time that the recruit remains with the cult thereafter is without consent.

Thus, the ex-recruit's initial consent to remain with the cult may be rendered ineffective in two ways. First, any initial consent to go with the recruiter voluntarily may be vitiated by the intentional fraudulent misrepresentation as to the group's identity.[166] Second, any initial consent given may be constructively withdrawn when the recruit loses his capacity to exercise independent volition as a direct result of the cult's intentional brainwashing techniques.[167] Once initial consent is vitiated or constructively withdrawn, the recruit is being falsely imprisoned during the time he thereafter remains with the cult.

Finally, because brainwashing is a lengthy process and an individual subjected to it cannot recognize when he loses volitional capacity, the recruit's apparent consent in remaining with the cult may be ineffective because

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165. *See* RESTATEMENT (SECOND) OF TORTS § 892(A)(2)(a) (1979) ("To be effective, consent must be (a) by one who has the capacity to consent ... "). *See also Id.* at § 59 ("[t]he rule as stated in § 892(A)(2) as to incapacity to consent applies to intentional invasions of interests of personality"), illustration 2 ("B is so drunk as to be incapable of appreciating the consequences of what he is doing. A induces B to drink more whiskey in such quantities as to cause him a serious illness. A is subject to liability to B"). The importance of the Restatement's example is that prior to his commencing to drink, B had the capacity to give effective consent. However, once B's drunkenness rendered him incapable of cognitive appreciation, B lacked capacity to consent, and any consent B gave thereafter was ineffective to absolve A of liability. Significantly, the Restatement states "A induces B to drink *more* whiskey". The implication is that had A begun inducing B to drink whiskey before the precise moment his drunkenness had destroyed his capacity, even though B had already been drinking, B's consent would have been valid, but that the effectiveness of B's consent would have terminated the moment his capacity ceased. This would amount to a constructive withdrawal of consent because normally termination of consent must be manifested by the consenting party. *See Id.* at § 892(A), comment i (termination of consent "may be manifested to the actor by any words or conduct inconsistent with continued consent or it may be apparent from the terms of the original consent itself, as when a specified time limit expires"). B, while so intoxicated, cannot manifest withdrawal of consent to A, yet his consent is nonetheless terminated when his capacity to consent ceases. Significantly, intoxication occurs gradually and a precise determination of the point where capacity ceases is almost impossible. Similarly, a precise determination of when a recruit's volitional capacity is destroyed is almost impossible.

166. *See* Molko v. Holy Spirit Ass'n for the Unification of World Christianity, 46 Cal. 3d 1092, 762 P.2d 46, 252 Cal. Rptr. 122, 141 (1988), *cert. denied*, 490 U.S. 1084 (1989) (allowing a cause of action for fraudulent recruiting by a religious cult, the court noted that "a triable issue of fact exists as to whether [the plaintiff] lost his ability to make independent decisions as a result of being deceived into submitting unknowingly to coercive persuasion [brainwashing]").

167. *See supra* notes 161-63 and accompanying text.

voluntariness and capacity are never present simultaneously.[168] First, in the initial stages of indoctrination, when the recruit still possesses capacity to consent, his consent lacks voluntariness because the cult intentionally misrepresents the nature of its identity.[169] Moreover, the cult usually will not reveal its identity until the recruit has been subjected to the brainwashing environment for a considerable time.[170] However, at this point, the recruit lacks the capacity to consent because his control over his volition has been destroyed.[171] Therefore, any consent is vitiated because the information necessary to render the consent voluntary is not presented until capacity is absent.[172]

2. Exceeding Consent

Even when a recruit is made aware of the group's identity at the outset and can thus voluntarily and competently consent to remain with a cult, his consent may nonetheless be rendered ineffective if the cult's conduct exceeds the recruit's intended limits.[173] A recruit's consent to voluntarily investigate the cult is not equivalent to consent to submit to the forces of duress applied to brainwash him.[174] The recruit is not told that he will be subjected to a mind control environment that will cause him to lose his volitional capacity.[175] Consequently, the recruit's consent does not extend to brainwashing.[176] Therefore, when a cult subjects a recruit to brainwashing, it exceeds the limits of the recruit's consent and renders the consent ineffective to absolve false imprisonment liability.

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168. Voluntariness and capacity are two essential elements of effective consent in that consent, by definition, requires knowing compliance, and effectiveness requires capacity. *See supra* notes 147, 149. *See also Informed Consent*, *supra* note 15, at 551.

169. *See supra* notes 157-60 and accompanying text.

170. *See Informed Consent*, *supra* note 15, at 547-49.

171. *See supra* notes 162-64 and accompanying text. *See also Informed Consent*, *supra* note 15, at 548-49.

172. *Informed Consent*, *supra* note 15, at 548-49 (suggesting that when the recruit finally does get information about the cult's identity he is unable to process or evaluate it in terms of his own personal judgment or choice because his ability to exercise his own choice has been deliberately worn down due to the environmental "set-up" techniques used by the cult). *See also* Shapiro, *supra* note 17, at 1294 ("[n]o effective consent to a process of change induced by deception is ... possible").

173. PROSSER, *supra* note 100, § 18 at 118 ("if the defendant goes beyond the consent given ... he is liable"). A court can determine the intended limits of express consent by its explicit terms, and those of implied consent by what a reasonable person would have properly assumed the manifestation to indicate, based on the surrounding circumstances.

174. *See generally*, Shapiro, *supra* note 17, at 1296-1300.

175. *Id.*

176. *See* RESTATEMENT (SECOND) OF TORTS § 892(A)(2)(b) (1979) ("To be effective, consent must be ... to the particular conduct ...").

D. The Case for Liability

Unfortunately, courts have insisted on restricting the application of the tort of false imprisonment by placing too much emphasis on a literal interpretation of the tort.[177] Consequently, courts have consistently refused to recognize that the destruction of a brainwashed recruit's volitional capacity confines him equally as effectively as actual physical force.[178] As a result, ex-recruits who were confined by religious cults because of brainwashing have been unable to recover for false imprisonment.[179]

However, in Section 870, the Restatement of Torts provides that when a restrictive interpretation of a traditional tort can be expanded without destroying its underlying policy, the interpretation should be expanded to compensate for intentionally inflicted harm.[180] The rationale behind this rule is that when the culpability of an actor's conduct[181] and the injury to another[182] are substantial, liability should ensue even though the conduct may exceed the narrow confines of the tort.[183] The Restatement's rationale has been used, for example, to expand the tort of wrongful death in order to compensate for injury to an unborn fetus.[184] Similarly, the rationale has been used to fashion a new

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177. PROSSER, *supra* note 100, § 11 at 47 ("too much emphasis has been placed on the technical name of the tort"). *See generally,* Comment, *"Nowhere to Go and Chose to Stay": Using the Tort of False Imprisonment to Redress Involuntary Confinement of the Elderly in Nursing Homes and Hospitals*, 137 U.PA. L. REV. 903 (1989).

178. *See supra* note 98.

179. *Id.*

180. *See* RESTATEMENT (SECOND) OF TORTS § 870, comment j (1979).

181. *See id.* at comment e (culpable conduct is that which is "blameworthy [because it is] not in accord with community standards of right conduct"). Under this definition, brainwashing would be culpable conduct because intentionally supplanting an individual's volition with one's own is not considered in accordance with standards of right conduct. That the foregoing conclusion is correct is evidenced by the fact that subordinating a person's volition in other contexts is legally redressable. *See supra* notes 79-80 and accompanying text.

182. *See* RESTATEMENT (SECOND) OF TORTS § 870, comment e (1979) (injury is defined as "the invasion of any legally protected interests of another"). Invasion of an individual's freedom to go where he pleases is an interest legally protected by the tort of false imprisonment.

183. *Id.* at comments b-i. As one legal scholar cogently noted in urging courts to take an aggressive stance in developing and expanding existing tort law:

> [T]he injury is the primary and paramount consideration, not the character of the defendant who inflicts it, nor the nature of the act itself. If causation and injury can be established, and the defendant acted wrongfully, the law will give a remedy.

Albertsworth, *Recognition of New Interests in the Law of Torts*, 10 CALIF. L. REV. 461, 463 (1922).

184. Volk v. Baldazo, 103 Idaho 570, 651 P.2d 11 (1982). *Cf.* Payton v. Abbott Labs, 386 Mass. 540, 437 N.E.2d 171 (1982) (in denying recovery for intentional infliction of emotional distress, premised on fear of developing reproductive defects, to daughters of women who ingested DES during pregnancy, the court noted that although these plaintiffs could not recover because they failed to show a physical injury, as required by an emotional distress claim, a cause of action could nonetheless be maintained for injury to a plaintiff in utero).

cause of action for intentional invasion of a legally protected interest, even though the invading conduct was not proscribed by a traditional tort.[185] Clearly, then, the confines of a traditional tort may be extended when culpable conduct intentionally inflicts injury.

Applying the rule stated in Section 870 of the Restatement[186] would clearly support the imposition of liability for brainwashing-induced false imprisonment. As the essence of false imprisonment is restraint against a person's free *will*, the policy behind the tort would only be enhanced by recognizing that the intentional destruction of volitional capacity constitutes false imprisonment. Therefore, religious cults that intentionally confine recruits through brainwashing should be liable for false imprisonment.[187]

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185. *E.g.*, White v. Unigard Mut. Ins. Co., 112 Idaho 94, 730 P.2d 1014 (1986) (recognizing a tort action for an insurer's bad faith in claim settlement distinct from an action on the contract); Porter v. Crawford & Co., 611 S.W.2d 265 (Mo. App. 1980) (creating a tort action against an insurance company for intentionally stopping payment on a settlement check).

186. *See supra* notes 180-83 and accompanying text.

187. One may question why the tort of false imprisonment should be extended to address the injury of a brainwashed cult recruit when the injury appears to be so psychological in nature as to be compensable under the tort of intentional infliction of emotional distress. Indeed, claims against religious cults alleging brainwashing that sounded in a cause of action for intentional infliction of emotional distress have been successful. *See* Molko v. Holy Spirit Ass'n for the Unification of World Christianity, 46 Cal. 3d 1092, 762 P.2d 46, 252 Cal Rptr. 122, 137-39 (1988), *cert. denied* 490 U.S. 1084 (1989) (reversing summary judgment granted to religious cult on an intentional infliction of emotional distress claim brought by two ex-recruits; the court found that the techniques of coercive persuasion or brainwashing used by the cult were sufficient to constitute the "outrageous conduct" required for an intentional infliction of emotional distress claim). *Cf.* George v. International Soc'y for Krishna Consciousness, 213 Cal. App. 3d 729, 262 Cal. Rptr. 217, 238-39 (1989) (A jury verdict in favor of the parents of a brainwashed ex-recruit, finding the defendant religious cult liable for intentional infliction of emotional distress to the parents because the cult intentionally moved the recruit from city to city to prevent the parents from knowing the recruit's whereabouts or interfering with the recruit's indoctrination, was upheld. "For much of the time, the [parents] did not know where there [sic] daughter was or what condition she was in. It is hardly surprising that this uncertainty was a significant cause of emotional distress.") *But see* Lewis v. Holy Spirit Ass'n for the Unification of World Christianity, 589 F. Supp. 10 (D. Mass. 1983) (refusing to sustain cause of action for negligent infliction of emotional distress premised on brainwashing, brought by ex-recruit against religious cult, because the plaintiff failed to allege sufficient facts to support the action in his complaint). However, the tort of false imprisonment and the tort of intentional infliction of emotional distress protect distinct interests, and the fact that the restraint effecting the false imprisonment in the brainwashed recruit is psychological in nature should not be used to distort or cloud the interest invaded by a false imprisonment.

The tort of intentional infliction of emotional distress occurs when one intentionally or recklessly causes severe emotional distress to another by extreme and outrageous conduct. *See* RESTATEMENT (SECOND) OF TORTS § 46(1) (1979) ("[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress..."). The tort is designed to compensate extreme "[e]motional...reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea." *Id.* at comment j. Because the tort is intended to compensate one for "emotional

III. JUSTIFYING LIABILITY UNDER THE FIRST AMENDMENT

In proposing to impose tort liability for false imprisonment based upon the brainwashing methods practiced by religious cults, one must bear in mind that, under the first amendment, the free exercise of religion is cautiously protected.[188] The basic goal of the free exercise clause is to insure that the government will not deter one from freely pursuing the religion of his or her choice.[189] That the free exercise of religion is constitutionally protected,

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reactions," the tort is designed to compensate one for intense feelings that are conscious responses to shocking treatment by the actor. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 742, 1889 (1966) ("emotion" is defined as "the affective aspect of consciousness: feeling...[or] a reaction of or effect upon this aspect of consciousness"; "reaction" is defined as "a particular response to a particular treatment, situation, or other stimulus").

By contrast, the tort of false imprisonment protects one's right to choose the locus of one's body. *See Prosser, supra* note 100, § 11 at 47-48 ("the right is one of freedom to go where the plaintiff *pleases*") (emphasis added); *see also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1738 (1966) ("please" is defined as "*to be the will* or pleasure *of*") (emphasis added). Thus, the tort of false imprisonment essentially protects a right to form and exercise independent volition for the purpose of compelling one's physical body to move. *See supra* note 108 and accompanying text. The injury compensated by the tort of false imprisonment is therefore quite different from the emotional reaction compensated for by the tort of intentional infliction of emotional distress. *Cf.* Gadsen Gen. Hosp. v. Hamilton, 212 Ala. 531, 103 So. 553 (1925) (appeal from judgment against the defendant Hospital for falsely imprisoning the plaintiff by preventing her from leaving the hospital, wherein the defendant alleged that the trial court incorrectly allowed the plaintiff to recover for "mental anxiety" suffered as a result of the false imprisonment; the court held that the mental anxiety constituted a distinct element of damages and that the plaintiff had properly been allowed to recover for it, suggesting that the injury of mental anxiety is distinct from the injury incurred by a false imprisonment). Consequently, even though a brainwashed recruit may also suffer psychological and emotional reactions that would be compensable under the tort of intentional infliction of emotional distress, the restraint of a brainwashed recruit's volitional capacity, which prevents a recruit from forming and exercising an independent choice to either stay with or leave the cult, is a separate injury which should be compensated for by the tort of false imprisonment.

188. The first amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ... " U.S. CONST. amend. I. For a general discussion of the nature and scope of the restrictions on government action under the religion clauses, *see* L. TRIBE, *supra* note 19, § 14 at 812-15. While it is true that "judicial sanctioning of tort recovery constitutes state action sufficient to invoke the same constitutional protections applicable to statues and other legislative actions," Molko v. Holy Spirit Ass'n for the Unification of World Christianity, 46 Cal. 3d 1092, 762 P.2d 46, 252 Cal. Rptr. 122 (1988), *cert. denied*, 490 U.S. 1084 (1989) (citing New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964)), "[i]t is that free exercise clause rather than the establishment clause that is implicated by tort actions against spiritual ... [groups]" Note, *Intentional Infliction of Emotional Distress by Spiritual Counselors: Can Outrageous Conduct be "Free Exercise"?*, 84 MICH. L. REV. 1296, 1300 n.13 (1986).

189. *Molko*, 46 Cal. 3d 1092, 762 P.2d 46, 252 Cal. Rptr. at 132. Although the first amendment expressly prohibits "Congress" from inhibiting the free exercise of religion, the fourteenth amendment has made the prohibition equally applicable to the states. Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940). However, the constitutional protections of the free exercise clause, as incorporated under the Fourteenth Amendment, are available only against actions

however, does not mean that religious associations are immune from tort liability.[190] Rather, the consequence is that any claim in tort against a religious organization will be subject to careful analysis to ensure that the free exercise rights of the organization are not abridged arbitrarily.

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of the State that infringe upon free exercise rights. *See* Shelley v. Kraemer, 334 U.S. 1, 13 (1948) ("the action inhibited by...the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct,..."). Nonetheless, that a tort action, such as one for false imprisonment, commences between two private individuals does not exempt the action from constitutions protection; state action exists when the State indirectly enforces or sanctions the constitutionally violative conduct of private parties equally as well as when the State initiates such conduct. *See, e.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (finding no state action in the State Liquor Licensing Control Board's mere issuance of a liquor license to a private club that racially discriminated in its membership policies, but holding state action did exist where the Board's regulations required the club to adhere to its constitution, submitted with the license application, wherein its discriminatory policy was created).

The Supreme Court has expressly held that "the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment,..." *Shelley*, 334 U.S. at 14. Moreover, judicial action constitutes state action irrespective of whether the court acts under statute or common law principles. *Id.* at 20 ("judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy"). As a result, state action sufficient to invoke constitutional safeguards exists whenever a state court resolves disputes, even between purely private parties. *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429, 432 n.1 (1984) (state action sufficient to invoke equal protection concerns existed where state court modified a child custody award on the basis of the social stigma the child could suffer as a result of her mother's recent inter-racial marriage); New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964) (finding state action in civil libel action between private parties where state courts applied common law rule which, as applied, violated the First Amendment's free speech and free press clauses; "[t]he test is not the form in which the state power has been applied but, whatever the form, whether such power has in fact been exercised"); Shelley v. Kraemer, 334 U.S. 1, 22 (1948) (finding state action in judicial enforcement of privately entered restrictive covenant forbidding the sale of property to racial minorities; "[t]he Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals"). Consequently, the action of a court in allowing a false imprisonment claim to be brought against a religious cult premised on brainwashing would constitute state action sufficient to invoke free exercise protection for the cult.

190. Turner v. Unification Church, 473 F. Supp. 367, 371 (D.R.I. 1978) ("the free exercise clause of the first amendment does not immunize the defendants from causes of action that allege ... intentional tortious activity ... "). *E.g.*, O'Moore v. Driscoll, 135 Cal. App. 770, 28 P.2d 438 (1933) (allowing imprisonment action by priest against his superiors for conduct in attempting to physically force a confession); Bear v. Reformed Mennonite Church, 462 Pa. 330, 341 A.2d 105 (1975) (permitting causes of action for tortious interference with marriage and business interests caused by church ordered "shunning" practices of a religious group against a former member). *Cf.* Malloy v. Fong, 37 Cal. 2d 356, 232 P.2d 241 (1933) (religious corporation held liable for employee's negligent driving); Bass v. Aetna Insurance Co., 370 So. 2d 511 (La. 1979) (church held liable for negligence of pastor in not clearing aisles for the "running in the spirit", a regular form of religious expression in the church).

A. The Nature and Scope of the Free Exercise Clause: Belief v. Conduct

The protection of the free exercise clause encompasses both the freedom to believe and the freedom to act according to those beliefs.[191] The freedom to hold religious beliefs is unconditionally protected.[192] Consequently, the government may not coerce one to adopt a religious belief[193] nor penalize one for the beliefs he holds.[194] In addition, no inquiry may be made into the truth or falsity of a religious belief.[195] However, while a court may not test the veracious nature of a religious belief itself, the court may probe the sincerity with which that belief is held[196] without violating constitutional prohibitions.

The freedom to engage in religious conduct, as distinguished from belief, may be limited where necessary to protect the interests of society.[197] Thus, for sufficiently compelling reasons[198] the government may restrict active conduct or compel it in the face of objection, even though predicated on

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191. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

192. *Id.* at 303-04 (the first amendment "embraces two concepts, freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be"). *See also* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234-35 (1977) ("at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State").

193. Torcaso v. Watkins, 367 U.S. 488, 495 (1961) (invalidating a Maryland statute that required holders of public office to take an oath declaring a belief in God).

194. Fowler v. Rhode Island, 345 U.S. 67, 69 (1953) (declaring a municipal ordinance unconstitutional, as applied to convict a Jehovah's Witness for preaching at a religious meeting in a public park, which ordinance prohibited public addresses but not church services in parks; the Court found that the conviction penalized the defendant because his religion conducted worship in an unconventional manner).

195. United States v. Ballard, 322 U.S. 78, 86-88 (1944) (refusing to permit inquiry as to the verity of religious doctrines under a mail fraud claim); Christofferson v. Church of Scientology, 57 Or. App. 203, 644 P.2d 577, 601 (1982).

196. United States v. Seeger, 380 U.S. 163, 185 (1965) (establishing sincerity of religiously held beliefs as a determinative factor in deciding whether conscientious objectors qualify for exemption from combatant service in the armed forces). *See* In re The Bible Speaks, 73 Bankr. 848 (Bankr. D. Mass. 1987) (allowing the return of donations procured by statements assertedly based on religious beliefs under a fraud theory because the beliefs inducing the statements were insincerely held).

197. Cantwell v. Connecticut, 310 U.S. 296, 304 (1940) (religiously-motivated "[c]onduct remains subject to regulation for the protection of society"). Such societal interests, however, must be sufficiently important before religious conduct may be restricted to protect them. *See* Wisconsin v. Yoder 406 U.S. 205, 215 (1972) (the societal interest must be "of the highest order"); Sherbert v. Verner, 374 U.S. 398, 406 (1963) (the societal interest must be "paramount").

198. *See* Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944) (religious operations that endanger public safety, threaten disorder, endanger the health of a member, or drastically differ from societal norms may be regulated or prohibited).

religious belief.[199] However, governmental regulation of religious conduct, even where supported by important interests, is not permissible if the effect of the regulation discriminates either among religions[200] or between religion and non-religion.[201]

A court must employ a two-step analysis in assessing whether assertedly religious conduct may nonetheless be lawfully regulated by the state. As a threshold inquiry, the court must first determine that the conduct legitimately falls within the parameters of the free exercise clause.[202] Conduct may be subject to free exercise protection only when it is predicated upon a sincerely-held[203] religious[204] belief, and only where the proposed regulation places a

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199. *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (upholding refusal to grant tax-exempt status to a private religious school that refused to admit students who engaged in interracial dating, because of overriding governmental interest in "eradicating racial discrimination in education"); United States v. Lee, 455 U.S. 252 (1982) (sustaining compulsory contributions to the Social Security system over the objections of an Amish employer because essential to the fiscal vitality of the system); Prince v. Massachusetts, 321 U.S. 158 (1944) (sustaining validity of child labor laws that prohibited Jehovah's Witness children from selling religious magazines, even though their religion required children to preach the gospel, because necessary to protect the childrens' health); Cox v. New Hampshire, 312 U.S. 569 (1941) (social need to maintain safety on public highways sufficient to permit state to require religious organizations to obtain a license before parading, even where the purpose of the parade is to proselytize); Reynolds v. United States, 98 U.S. 145 (1878) (upholding prohibition of the practice of polygamy because necessary to the moral well-being of the society and to maintain social order).

200. *E.g.*, Fowler v. Rhode Island, 345 U.S. 67 (1953) (declaring unconstitutional as applied a statute prohibiting public addresses in parks because it discriminated against Jehovah's Witnesses, whose mode of religious worship consisted of open preaching at group meetings, while other religions were permitted to conduct more conventional worship services in the parks); Cantwell v. Connecticut, 310 U.S. 296 (1940) (invalidating a statute requiring religious organizations to obtain a license before publicly soliciting funds because it required the state to determine the religious status of a proposed solicitor).

201. Braunfeld v. Brown, 366 U.S. 599, 607 (1961) ("If the purpose or effect of a law is to impede the observance of ... all religions ... that law is constitutionally invalid"). *See, e.g.*, McDaniel V. Paty, 435 U.S. 618 (1978) (declaring unconstitutional as violative of free exercise rights a Tennessee statute that prohibited clergymen from holding public office solely because of their status as religious ministers).

202. Professor Ira Lupu calls this established a prima facie case of free exercise violation. *See*, Lupu, *When Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 953-60 (1989). To establish a prima facie case of free exercise violation, a proponent must show that the regulated conduct is motivated by a religious, as opposed to moral or personal, belief; that the belief is sincerely held; that the conduct is a central aspect of his religion; and that the regulation produces a cognizable burden on his ability to engage in the conduct. *Id. See also infra* notes 212-48 and accompanying text.

203. United States v. Seeger, 380 U.S. 163, 185 (1965) ("the significant question [of] whether [a religious belief] is 'truly held' ... is the threshold question of sincerity which must be resolved in every case"). Sincerity is analogous to honesty or good-faith, and the requirement is intended to prevent religion from being used as a "fraudulent cloak" to shield one from governmental action. *See generally* L. TRIBE, *supra* note 19, § 14-11 at 859-62. *Cf.* Lupu, *supra* note 202, at 954-57 (suggesting that sincerity is a poor threshold test for legitimacy of a free exercise claim because

burden[205] on engaging in the conduct. If the conduct meets the threshold test

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ascertainment is difficult due to sincerity's subjective nature; measurement is precarious because it must rely upon external criteria, including the belief itself, and is therefore subject to the impermissible bias of the decision-maker as to the belief's validity; and precedential value is virtually non-existent, since each determination is unique to the religious proponent).

204. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) ("A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of [conduct] if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief.") The determination of what constitutes religion has perpetually troubled the Court. *See generally* Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233 (1989). At one time, the Court measured religion in terms of an objective test; see *Seeger*, 380 U.S. at 176 (adopting a "parallel position" test for determining whether an asserted belief is, in fact, religious: "[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those [following traditional religions]"). However, since *Seeger*, the Court has moved towards a more subjective test, giving great deference to the religious characterization offered by the individual proponent; *see, e.g.*, United States v. Lee, 455 U.S. 252, 257 (1982) (accepting Amish assertion that compulsory payment of social security taxes offends a religious conviction without inquiry, in spite of the government's contention that payment would not contravene observance of the Amish faith); Thomas v. Review Bd., Ind. Employment Sec. Div., 450 U.S. 707, 715-16 (1981) (sustaining a Jehovah's Witness' characterization of his objection to working in a factory producing armaments as religiously based, even though another Jehovah's Witness testified that he would have no such objection). Nonetheless, the Court's move towards a more subjective measurement does not mean that *every* assertedly religious belief must necessarily be accepted as such; *see e.g.*, *Thomas*, 450 U.S. at 715 ("[o]ne can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause"). For a discussion of the problems with using religiosity to assess the validity of a free exercise claim, *see* Lupu, *supra* note 202, at 957-58.

205. "Burden" necessarily implies that the government action interferes in some tangible way with the ability to engage in religious conduct. However, mere interference with religious conduct does not automatically constitute a protected "burden", for "[n]ot all burdens on religion are unconstitutional." *Lee*, 455 U.S. at 257. Thus, for example, the state has been permitted to prohibit children from selling religious magazines under its child labor laws, even though this interfered with the child's ability to "preach" according to his faith; *see* Prince v. Massachusetts, 321 U.S. 158 (1944).

To constitute a legally cognizable burden on free exercise, the interference created by the government action must be substantial. Therefore, a mere increase in economic cost or inconvenience associated with practicing a religion does not amount to substantial interference so as to invoke free exercise protection. *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (holding that denial of tax-exempt status to a private school engaging in religiously-motivated discrimination would not unduly burden its free exercise rights because it would only increase tuition cost while not preventing the school from continuing such practices); Braunfeld v. Brown, 366 U.S. 599 (1961) (increased economic cost impacted upon Jewish businessmen as a result of requiring them to abide by Sunday closing laws, even though their religion required them to stop business on Saturdays as well, not sufficient to unduly burden the businessmen's free exercise of religion since the law did not prevent observance of a Saturday Sabbath, but only made it more expensive). *But see* Sherbert v. Verner, 374 U.S. 398 (1963) (refusal to grant unemployment compensation to Seventh-Day Adventist who observed a Saturday Sabbath because she refused to accept suitable employment that required her to work Saturdays, was a violation of free exercise rights; the burden, although indirect, was nonetheless substantial, since the availability of benefits was conditioned upon her willingness to violate a cardinal principle of her faith).

and falls within the scope of free exercise protection, then the court must strictly scrutinize[206] the proposed regulation and conclude that the infringement it will inflict upon the free exercise rights of the religious organization is justified. Regulation may justifiably infringe upon free exercise rights only when it promotes a compelling government interest that overrides the burden placed on religion,[207] and only when the means of regulation are no more restrictive[208] than necessary.

Under the above analysis, the activities of religious organizations may be permissibly limited for only one of two reasons. First, the regulation may be sustained if the conduct fails to qualify as protected free exercise.[209] Alternatively, if the conduct does qualify as protected free exercise, the regulation may nonetheless be sustained because any legitimate free exercise right is outweighed by an overriding state interest.[210] Thus, imposing false imprisonment liability upon religious cults premised on brainwashing may be possible by showing either that the brainwashing techniques used in recruitment

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The legitimacy of a burden upon free exercise has recently been measured in terms of the coercive effect of the government regulation; that is, no legally cognizable burden exists unless the government action compels one to either act contrary to one's beliefs, or refrain from acting as mandated by one's beliefs. *See, e.g.*, Lyng v. Northwest Indian Protective Ass'n, 485 U.S. 439 (1988) (refusing to enjoin construction of road through natural site historically used by Indians for religious rituals, even though it would substantially adversely affect the exercise of those rituals, because the Indians would not be compelled as a result of the road to act contrary to their beliefs, nor prevented from conducting the rituals elsewhere). *See generally* Lupu, *supra* note 202, at 961-66; Note, *Burdens on the Free Exercise of Religion: A subjective Alternative*, 102 HARV. L. REV. 1258 (1989).

206. *See* Thomas v. Review Bd., Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest.")

207. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) ("only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion").

208. Braunfeld v. Brown, 366 U.S. 599, 607 (1961) (a statute is valid, when justified by a compelling interest, in spite of a burden on religion, "unless the State may accomplish its purpose by means which do not impose such a burden").

209. This threshold test employs several "gatekeeper" doctrines to insure that only bona fide free exercise claims force the state to justify regulation with a compelling, overriding interest. The "gatekeeper" doctrines include the required showings of sincerity, religiosity, and burden before a court will engage in strict scrutiny of the regulation; if one of the factors is not shown, a free exercise claim will fail and the government regulation may stand. *See* Lupu, *supra* note 202, at 953-60. The threshold inquiry has been proposed as required by Article III's "case or controversy" requirement for federal justiciability of claims. *Id.* at 960. Under this approach, the burden requirement presumably shows actual or imminent injury to the religious proponent, while the sincerity and religiosity requirements show that the claim legitimately falls under the constitutional provision which gives rise to the right.

210. United States v. Lee, 455 U.S. 252, 257-58 (1982) ("The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding government interest."). For specific examples of government interests that have been considered overriding, see supra note 197.

do not constitute the free exercise of religion, or, if they do, that the state's interest in protecting persons from false imprisonment by brainwashing is sufficiently compelling to override those rights.[211]

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211. *But see* Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595 (1990). *Smith* appears to hold that where a law is neutral, no free exercise claim exists and a strict scrutiny inquiry into either the strength of the government interest or the scope of the means used to achieve the interest is required. *Id.* at 1603 ("We...hold the [compelling interest] test inapplicable to...challenges [to t]he government's ability to enforce generally applicable [laws]...To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling'--...--contradicts both constitutional tradition and common sense.") In *Smith*, two Native American Church members, Smith and Black, were discharged from their jobs with a private drug rehabilitation organization because they sacramentally ingested peyote, a drug whose possession is illegal under Oregon law, during a religious ceremony. Smith and Black were subsequently declared ineligible to receive unemployment compensation by the Employment Division because their discharge had been for work-related "misconduct" according to Division regulations.

The Oregon Supreme Court had held that the Employment Division had violated Smith and Black's free exercise rights in denying them unemployment compensation because the purpose of the misconduct provision upon which the denial was based was to preserve the financial integrity of the compensation fund, a purpose inadequate to justify the burden denial imposed on Smith and Black's free exercise rights. *See* Smith v. Employment Div., Dep't of Human Resources, 301 Or. 209, 217-19, 721 P.2d 445, 449-50 (1986). The Employment Division appealed to the United States Supreme Court, claiming that the illegality of the peyote consumption was relevant to Smith and Black's constitutional claim. Significantly, the Supreme Court initially vacated the judgment of the Oregon Supreme Court and remanded the case for a determination of whether the *sacramental* use of peyote was prohibited by the Oregon statute, noting that "if a State has prohibited through its *criminal laws* certain kinds of religiously motivated conduct without violating the First Amendment, it certainly follows that it may impose the lesser burden of denying unemployment compensation benefits to persons who engage in that conduct." *See* Employment Div., Dep't of Human Resources v. Smith, 485 U.S. 660 , 670, 674 (1988) (*Smith I*) (emphasis added). On remand, the Oregon Supreme Court held that the Oregon statute prohibiting possession of peyote made no exception for religious use of the drug, and that therefore, Smith and Black's sacramental use of peyote was indeed prohibited by the statute. *See* Employment Div., Dep't of Human Resources, 307 Or. 68, 72-73, 763 P.2d 146, 148 (1988). The Employment Division then appealed to the United States Supreme Court a second time for resolution of the constitutional issue.

On the Employment Division's second appeal, the Supreme Court held that the free exercise clause does not require a State to justify interference with an individual's religiously-motivated conduct when that conduct is criminally proscribed by a neutral, generally applicable law. Employment Div., Dep't of Human Resources, 110 S. Ct. 1595, 1603 (1990) (*Smith II*). The Court reasoned that the right of free exercise does not relieve an individual from the obligation to obey "a 'valid and neutral law of general applicability'," *Id.* at 1600 (quoting United States v. Lee, 445 U.S. 252, 263 n. 3 (1982) (Stevens, J., concurring)), and that to exempt an individual from complying with such a law unless the State can demonstrate a compelling interest would "permit him, by virtue of his beliefs, 'to become a law unto himself[.]'" *Id.* at 1603 (quoting Reynolds v. United States, 98 U.S. 145, 167 (1879)). The Court noted that "[t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections..." *Id.* at 1601, and found that Smith and Black's use of peyote "[did] not present such a hybrid situation[.]" *Id.* at 1602. Furthermore, the Court explicitly rejected the compelling interest test of *Sherbert v. Verner*, 374 U.S. 398 (1963), finding that even though

in recent years the Court had limited application of the *Sherbert* test to the unemployment compensation field, and even though *Smith II* involved the denial of unemployment compensation, the *Sherbert* test was nonetheless inapplicable because the denial of benefits to Smith and black was based upon an "across-the-board criminal prohibition on a particular form of conduct." *Smith II*, 110 S. Ct. at 1602-03. Therefore, the Court found that the Employment Divisions' denial of unemployment benefits based upon Smith and Black's violation of Oregon's drug law in sacramentally using peyote did not unconstitutionally violated Smith and Black's free exercise rights. *Id.* at 1606.

Because imposing false imprisonment liability upon religious cults whose use of brainwashing volitionally confines an individual would involve the application of a neutral, generally applicable law, as any entity that so utilized brainwashing would be equally subject to liability (*see infra* notes 274-77 and accompanying text), *Smith II* would arguably permit the imposition of false imprisonment liability upon the cult without requiring the State to demonstrate a compelling, overriding government interest. Indeed, in the aftermath of *Smith II*, some Circuits have held that the application of *any* neutral, across-the-board law precludes a free exercise claim under *Smith II*. *See, e.g.*, St Bartholomew's Church v. City of New York, 914 F.2d 348, 354 (2d Cir. 1990) (in holding that the application of a municipal landmark law that prevented a Church from renovating a religious building did not violate the Church's free exercise rights, the court noted that "[t]he critical distinction [in determining whether the free exercise clause is implicated] is thus between a neutral, generally applicable law that happens to bear on religiously motivated action, and a regulation that restricts certain conduct because it is religiously oriented"); South Ridge Baptist Church v. Industrial Comm'n, 911 F.2d 1203, 1213 (6th Cir. 1990) (Boggs, J., concurring) (citing *Smith II*, 110 S. Ct. at 1600) (noting that "[*Smith II*] indicates that the right of free exercise is limited by the necessity 'to comply with a valid and neutral law of general applicability[,]' " and concurring in the Court's determination that requiring Church to pay premiums into a public workers' compensation program on behalf of its employees did not violate the free exercise clause, despite Church's claim that its religion considered such payments sinful); Intercommunity Center for Justice and Peace v. I.N.S., 910 F.2d 42, 44 (2d Cir. 1990) (in holding that Immigration Reform and Control Act's requirement that employers verify work authorization status of each employee did not violate Center's free exercise rights despite Center's contention that its religion required it to provide employment to needy persons without regard to immigration status, the court stated "[the Act] is a valid, neutral law of general application that happens to compel action contrary to certain religious beliefs. No free exercise claim exists under such circumstances"). If such an interpretation of *Smith II* is correct, imposing false imprisonment liability on a cult whose use of brainwashing volitionally restrains a recruit could arguably be permissible without regard to any free exercise claims of the cult.

However, several aspects of *Smith II* indicate that liberally interpreting the case to preclude free exercise analysis in the context of imposing false imprisonment liability on religious cults may be inappropriate. First, the Court in *Smith II* relied heavily on the fact that the peyote use in question violated a generally applicable *criminal* statute. *Smith II*, 110 S. Ct. at 1603; *see also Id.* at 1607 (O'Connor, J., concurring) ("the Court holds that where the law is a generally applicable *criminal* prohibition, our usual free exercise jurisprudence does not even apply") (emphasis added). Indeed, the Supreme Court initially remanded the case to the Oregon Supreme Court for determination of whether the *religious* use of peyote was, in fact, proscribed by Oregon's drug statute, indicating that the criminality of religiously-motivated conduct is relevant to, maybe even determinative of, the existence of a free exercise claim. Employment Div., Dep't of Human Resources v. Smith, 485 U.S. 660, 670-74 (1988) (*Smith I*); *see also Smith II*, 110 S. Ct. at 1607 (O'Connor, J., concurring) ("respondents...were denied unemployment compensation benefits because their sacramental use of peyote constituted work-related "misconduct," not because they violated Oregon's general criminal prohibition against possession of peyote. We held, however, in [*Smith I*] that whether a State may, consistent with federal law, deny unemployment compensation

benefits to persons for their religious use of peyote *depends on whether the State*, as a matter of state law, *has criminalized the underlying conduct*") (emphasis added). Accordingly, the *Smith II* holding that a State need not justify burdening religiously motivated conduct with a compelling interest where the burden is imposed by a generally applicable, neutral law, may be limited to applications of criminal laws. Therefore, as the imposition of false imprisonment liability on a religious cult would involve civil, not criminal law, *Smith II* may not circumvent the necessity for compelling interest scrutiny. *But see* St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990) (decided five months after *Smith*, and holding that because a municipal Landmarks Law that prevented a Church from renovating one of its buildings was generally applicable, no free exercise violation had occurred).

Second, in declining to apply the compelling interest test and substituting the generally applicable, neutral law test, the court in *Smith II* noted that the only cases in which the First Amendment had been held to ban the application of a generally applicable law were cases where the free exercise clause had been implicated with another constitutional claim, and that the sacramental use of peyote did not involve such a hybrid situation. *Smith II*, 110 S. Ct. at 1601-02. By contrast, the use of brainwashing as a recruiting method arguably does involve a hybrid situation because such proselytizing implicates First Amendment free speech rights as well as free exercise rights (although an analysis of any free speech rights implicated in proselytizing through brainwashing is beyond the scope of this note). *See id.* at 1601 (as examples of hybrid cases combining free exercise claims with free speech claims, the Court includes Murdock v. Pennsylvania, 319 U.S. 105 (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas) and Cantwell v. Connecticut, 310 U.S. 296 (1940) (invalidating a licensing system for religious and charitable organizations under which the administrator had discretion to deny a license to any cause he deemed non-religious)). Consequently, because restricting the use of brainwashing as a recruiting method by exposing a cult to false imprisonment liability would involve a hybrid situation, strict scrutiny may still be required under *Smith II*. *See* Intercommunity Center for Justice and Peace v. I.N.S., 910 F.2d 42 (2d Cir. 1990) (citing *Smith II*, 110 S. Ct. at 1602) (in finding that an I.N.S. statute requiring employers to verify the work authorization status of every employee did not infringe upon the free exercise rights of Center which claimed that its religion required it to offer employment to needy persons irrespective of immigration status because the I.N.S. statute was a generally applicable law, the court noted, "[u]nlike the cases applying strict scrutiny to invalidate a law on free exercise grounds, this case does not involved a hybrid claim in which other constitutional concerns bolster the free exercise claim").

Finally, *Smith II* involved a statutory prohibition of the possession of peyote. Significantly, the Court denoted a religiously-based exemption to generally applicable statute a "negative protection" of free exercise, and suggested that providing such negative protection would be a more appropriate task for the legislature. *Smith II*, 110 S. Ct. at 1606 ("a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation[; for example,]...a number of States have made an exception to their drug laws for sacramental peyote use"). Moreover, circuit cases in the aftermath of *Smith II* that have relied on the case to circumvent compelling interest scrutiny have all involved statutory laws. *See* St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990) (municipal landmark law); South Ridge Baptist Church v. Industrial Comm'n, 911 F.2d 1203 (6th Cir. 1990) (Boggs, J., concurring) (state workers' compensation statute); Intercommunity Center for Justice and Peace v. I.N.S., 910 F.2d 42 (2d Cir. 1990) (federal Immigration Reform and Control Act). By contrast, allowing a civil false imprisonment claim premised on brainwashing to be brought against a religious cult would be a matter of common law, not statutory law. Accordingly, "negative protection" of a religious cult's free exercise rights via legislative accommodation would not be possible, because the basis for liability in the first instance originates with the State's judicial, and not its legislative, power. Consequently, the court's delegation of free exercise protection to the legislature in *Smith II* appears inapplicable in the context of a civil false imprisonment claim against a religious cult.

B. Crossing the Threshold: The Prima Facie Claim of Free Exercise

1. Sincere Religious Motivation

Before a religious cult could implicate the free exercise clause as a shield from potential liability for brainwashing induced false imprisonment, the cult would have to show that the brainwashing techniques used to recruit potential converts are, in fact, religiously motivated.[212] Absent such a conclusion, the free exercise clause is irrelevant to a claim against a religious group for intentionally tortious conduct.[213] Therefore, the free exercise clause possesses no potential to obstruct a claim against a religious cult for brainwashing-induced false imprisonment unless the techniques so used stem from motivations which promote "[c]hurch beliefs and practices."[214]

The brainwashing activities engaged in by religious cults may be construed as stemming from secular purposes.[215] Indeed, the immediate intent of submersing potential recruits in a brainwashing environment is to prevent the recruits from leaving the cult so as to impose the cult's doctrines upon them.[216] If interpretation of the purpose for engaging in brainwashing activities is confined to the cult's immediate goal of preventing recruits from leaving, the conduct of the cult would arguably serve a clearly secular purpose. Construed in this light, a claim against a religious cult for false imprisonment in a brainwashing context would be free from constitutional scrutiny.[217] However, the immediate goal of preventing a recruit from leaving may be

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Therefore, despite Smith, a court faced with the prospect of imposing on a religious cult false imprisonment liability premised on brainwashing will, in the face of a free exercise challenge, still have to engage in traditional strict scrutiny analysis to determine whether such liability is constitutionally permissible.

212. Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972) ("Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests"). *But see* In re The Bible Speaks, 73 Bankr. 848, 865 (Bankr. D. Mass. 1987) ("[a] court should not normally, over the protests of a party, label as unreligious the statements or actions of that party"). In any event, one must bear in mind that the definition of "religious", as it relates to conduct, is liberally construed. *See supra* note 202.

213. *See Yoder*, 406 U.S. at 215-16 ("[a] way of life, however virtuous and admirable, [receives no first amendment protection] if it is based on purely secular considerations"). *See generally*, Note, *supra* note 188, at 1302-07.

214. *In re* The Bible Speaks, 73 Bankr. 848, 865 (Bankr. D. Mass. 1987).

215. *See, e.g.*, Molko v. Holy Spirit Ass'n for the Unification of World Christianity, 46 Cal. 3d 1092, 762 P.2d 46, 252 Cal. Rptr. 122, 141 (1988) *cert. denied*, 490 U.S. 1084 (1989) (holding that by coercive persuasion techniques a religious cult "established ... its dominant psychological position" for the purpose of compelling the plaintiff to make donations).

216. S. HASSAN *supra* note 4, at 80-81.

217. *See supra* note 213.

considered inseparable from the cult's ultimate goal of imposing its ideology[218] on the recruit. In this sense, the brainwashing activities of a religious cult are religiously motivated, and any attempt to regulate[219] them would therefore be subject to free exercise analysis.

In addition to religious motivation, a preliminary determination must also be made that the brainwashing tactics the cult uses are dictated by sincerely held beliefs.[220] Sincerity would be established by a demonstration that the cult honestly believes that brainwashing potential converts is dictated by religious convictions.[221] Although sincerity is an important threshold element, wide deference is usually given to the characterization given by the proponent of the religious belief because sincerity must be evaluated in terms of the subjective perspective of the proponent.[222] Furthermore, the inability of an entity to possess "heart-felt commitment"[223] would virtually require a court to accept a cult's characterization if its belief in brainwashing as sincere.[224] Therefore, the cult would probably be able to meet the sincerity threshold as well.

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218. Such a goal clearly promotes the cult's "beliefs and practices." *See In re* The Bible Speaks, 73 Bankr. 848 (Bankr. D. Mass. 1987).

219. This might be by imposing liability for false imprisonment upon the cult when brainwashing activity results in the destruction of a recruit's volitional capacity.

220. *See supra* note 203 and accompanying text.

221. *See supra* note 203. Because of the harmful and unconventional nature of brainwashing techniques, one may understandably be skeptical of whether any cult could sincerely believe that brainwashing stems from a religious conviction. Nonetheless, as such a conclusion really rests upon an objective assessment of the belief itself, such a conclusion would be forbidden. *See* United States v. Ballard, 322 U.S. 78, 86 (1944) (the First Amendment "embraces the right to maintain [religious] theories ... which are rank heresy to followers of the orthodox faiths"). Thus, the dangerous or morally reprehensible consequences that may stem from an alleged religious belief cannot be considered as an indication of whether that belief is sincerely held by its proponent. *See; e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574, 580 (1983) (discrimination against interracial couples predicated upon belief that the Bible forbids such relationships found genuine even though the moral reprehensibleness of such conduct justified denial of tax-exempt status); Leary v. United States, 383 F.2d 851, 860 (5th Cir. 1967) (in holding that the dangerous effects produced by marijuana justified refusal to except use its use for religious ritual from prohibition of use of marijuana, the Court noted that the sincerity of the petitioner's belief in the religious benefits of marijuana was not at issue).

222. *See e.g.*, Thomas v. Review Bd., Ind. Employment Sec. Div., 450 U.S. 707, 715-16 (1981) (accepting proponent's objection to directly assisting the production of armaments as a sincerely-held religious conviction even though another member of the same faith stated his religion did not dictate such an objection, and even though the proponent said he could *indirectly* assist armament production in good conscience). Such deference may be necessary because a court is forbidden from assessing the validity of an assertedly religious belief. United States v. Ballard, 322 U.S. 78, 86-88 (1944).

223. *See* Lupu, *supra* note 202, at 955-56.

224. This presumably would not be the case if the action were brought against one or more individual members of the cult, as opposed to the cult as an association. In the former instance, a court would be required to determine whether each individual sincerely held a belief that brainwashing is religiously dictated.

2. Legally Cognizable Burden

If a religious cult could show that its use of brainwashing tactics is necessary to exercise sincerely-held religious beliefs, the cult would also have to show that allowing former recruits to bring a claim for false imprisonment against the cult creates a legally cognizable burden.[225] Subjecting religious cults that engage in brainwashing activities to liability for false imprisonment would definitely interfere with the cults' free exercise rights. Since the ultimate goal of volitionally restraining potential recruits is to impose upon the recruits acceptance of the cult's ideology, liability in this context would directly infringe upon the cult's right to proselytize.[226] Clearly, some recruits whose volitional capacity becomes destroyed by brainwashing might nonetheless have voluntarily chosen to join the cult had they retained the capacity to freely choose to do so. Under such circumstances exposure to liability for false imprisonment would not impede the cult's right to proselytize as to those recruits. However, other brainwashed recruits, had their volitional capacity remained intact, would have not have chosen to join the cult. Under these circumstances, exposure to false imprisonment liability would inhibit the cult's attempt to indoctrinate these recruits to its ideology. Consequently, deterring a cult from engaging in brainwashing activities which result in unlawful confinement by exposing the cult to tort liability could impair the cult's ability to add new members to its ranks.[227]

In addition, allowing former recruits to recover for false imprisonment in the brainwashing context might interfere with a cult's free exercise rights in several indirect ways.[228] To allow courts to adjudicate such a claim imposes

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225. *See supra* note 205 and accompanying text.

226. *See* McDaniel v. Paty, 435 U.S. 618, 626 (1978) ("the right to the free exercise of religion unquestionably encompasses the right to preach, proselyte, and perform other similar religious functions").

227. Molko v. Holy Spirit Ass'n for the Unification of World Christianity, 46 Cal. 3d 1092, 762 P.2d 46, 252 Cal. Rptr. 122, 135-36 (1988) *cert. denied*, 490 U.S. 1084 (1989) (in upholding cause of action for fraudulent recruitment practices, the court noted that exposure to such liability "presumably impairs the Church's ability to convert nonbelievers, because some potential members who would have been recruited by deception will choose not to associate with the church when they are told its true identity"). Similarly, exposure to false imprisonment liability would impair a cult's ability to convert those potential recruits who might associate with the cult once exposure to brainwashing destroys their volitional capacity, because those same recruits might choose not to associate with the cult when their capacity to freely choose to leave remains intact.

228. That the interference with free exercise rights cause by governmental action is indirect rather than direct by no means indicates that such burden is incidental and therefore does not merit first amendment protection. *See, e.g.*, Thomas v. Review Bd., Ind. Employment Sec. Div., 450 U.S. 707, 717-18 (1981) (though conditioning receipt of unemployment benefits upon appellant's willingness to work in armament production in contravention of his faith not a direct compulsion to violate his religion, the indirect pressure to modify his behavior in contravention of his beliefs created a substantial and impermissible burden on his free exercise rights); Sherbert v. Verner, 374

on the cult the inconvenience of having to engage in litigation[229] and exposes the cult to potential monetary loss.[230] Moreover, the potential for adverse publicity, due to the sensational nature of such a claim, could further hamper the cult's ability to increase its membership[231] even by legitimate means, because such adverse publicity could create public reluctance to associate with the group. In addition, negative publicity could cause the cult to suffer injury to its reputation and character.

However, while these direct and indirect burdens on a cult's free exercise rights are real, they may not be severe enough to warrant protection under the free exercise clause. Imposing liability for false imprisonment effected by brainwashing activities would in no way compel a religious cult to act in direct contravention of its beliefs or force a cult to refrain from acting in accordance with its beliefs,[232] since cult members would still be free to worship and associate with each other, and to proselytize generally to the public.[233] With the exception of the effect of limiting available recruitment methods,[234] the

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U.S. 398, 404 (1963) (similar pressure conditioning unemployment benefits on willingness to work on Saturday, appellant's observed Sabbath).

229. *See* Note, *supra* note 188, at 1308.

230. *See Molko*, 46 Cal. 3d 1092, 762 P.2d 46, 252 Cal. Rptr. at 135. Such monetary loss would include not only costs incurred due to litigation, but also any decline in contributions due to the adverse effects of publicity surrounding a pending suit.

231. *See* Note, *supra* note 188, at 1308 n.46.

232. In recent years, the Court has refused to recognize a cognizable burden on free exercise rights absent a direct coercive impact stemming from government action. *See* Lyng v. Northwest Indian Protective Ass'n, 485 U.S. 439, (1988) (in refusing to enjoin construction of the Gasquet-Orleans road through historically sacred ground that would virtually destroy the Indians' ability to worship, the Court noted that the "incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, [do not] require government to bring forward a compelling justification"). *See also* Bowen v. Roy, 476 U.S. 693, 700-01 (1986) (mandatory use of a Social Security number for each household member as a condition of receiving benefits under the Aid to Families with Dependent Children program did not impair appellee's ability to express or exercise his religion, despite his religious objection that assigning a Social Security number to his daughter would "rob [her] spirit"). *But see* Thomas v. Review Board, Ind. Employment Sec. Div., 450 U.S. 707, 717-18 (1981) (coercive impact of indirect pressure to modify behavior in contravention of religious belief, though not a direct compulsion, sufficient to create a legally cognizable burden on free exercise).

233. *Cf.* Molko v. Holy Spirit Ass'n for the Unification of World Christianity, 46 Cal. 3d 1092, 762 P.2d 46, 252 Cal. Rptr. 122, 136 (1988) *cert. denied*, 490 U.S. 1084 (1989) (exposure to liability for fraudulent recruiting practices "does not in any way or degree prevent or inhibit Church members from operating their religious communities, worshipping as they see fit, freely associating with one another, or generally spreading [their] message among the population").

234. *See Informed Consent*, *supra* note 15, at 569 (alternative recruiting methods still available include preaching, leafletting, door-to-door canvassing, and advertising). Moreover, the Supreme Court has consistently held that mere inconvenience does not constitute a substantial burden. *See supra* note 205. Therefore, the inconvenience associated with restricting available recruiting methods would probably not be considered a substantial burden. *Cf.* Cox v. New Hampshire, 312

burdens imposed are no more than those a religious group already carries in conjunction with any potential tort liability.[235] Consequently, the impact of these burdens upon cult activities is relatively insignificant.[236]

Before assessment of the severity of a burden placed upon free exercise rights is complete, however, consideration must be given to the centrality[237] of the conduct at issue to the religious belief motivating the conduct.[238] A cult's interest in falsely confining a recruit would not seem to be buttressed by a central element of the cult's ideology, since existing members could continue to associate with one another, conduct rituals, and hold onto the cult's belief system[239] without brainwashing recruits. Moreover, imposing liability for brainwashing that results in false imprisonment, although limiting the cult's ability to attract new members, would not threaten the continued existence of the

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U.S. 569, 575-76 (1941) (requiring Jehovah's Witnesses to obtain a parading license before group proselytizing on a public street upheld as reasonable time, place, and manner regulation). Analogously, inhibiting the use of brainwashing in recruiting by subjecting cults to false imprisonment liability could be considered a reasonable regulation of a cult's manner of recruitment, since its ability to recruit by other means would not be restricted.

235. *See supra* note 190.

236. *Cf. Molko*, 46 Cal. 3d 1092, 762 P.2d 46, 252 Cal. Rptr. at 136 (eliminating fraud in recruitment "[a]t most ... potentially ... closes one questionable avenue for bringing new members into the church").

237. The element of "centrality" is a consideration of how essential to the religion is the conduct affected by government action. Practices considered central to a religion have been described as based on a "fundamental belief" that "pervades and determines the entire mode of life of its adherents," Wisconsin v. Yoder, 406 U.S. 205, 210 (1972) (exempting Amish children from compulsory secondary education laws because the Amish practice of providing vocational training in a separate religious community was found central to its faith); as dictated by a "cardinal principle of ... religious faith," Sherbert v. Verner, 374 U.S. 398, 406 (1963) (exempting Seventh-Day Adventist from requirement of accepting Saturday work as a condition to receiving unemployment benefits because observance of Saturday Sabbath considered a central element of her religion and as stemming from the "theological heart" of the religion, People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 818, 40 Cal. Rptr. 69 (1964) (exempting Indians' use of peyote for religious rituals from general proscription of peyote use because the peyote ritual was central practice of the Indians' religion). *See generally*, TRIBE, *supra* note 19, § 14-11 at 862-65.

238. *But see* Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595, 1604-05 (1990) (*Smith II*) (suggesting that inquiry into the centrality of a religious belief may be an inappropriate inquiry for a court). However, *Smith II* may be limited to the context of free exercise challenges to the application of criminal statutes; *see supra* note 211. As of this writing, no Circuit cases applying *Smith II* have addressed the centrality issue. Moreover, at least one Circuit has appeared to have adhered to the traditional, pre-*Smith II* analysis to which the centrality inquiry would apply, although the opinion centered around the least-restrictive means analysis because the parties conceded that the other aspects of traditional free exercise analysis had been met. *See* South Ridge Baptist Church v. Industrial Comm'n, 911 F.2d 1203, 1206 (6th Cir. 1990) ("under the free exercise clause of the first amendment, three factors must be weighed: the magnitude of the burden on a defendant's exercise of religion; the existence of a compelling state interest justifying the burden; and the extent to which accommodation of the burden would impede the State's objectives").

239. *See Informed Consent, supra* note 15, at 569.

cult's faith, since other methods of soliciting membership would still be available.[240] Therefore, the cult's interest in engaging in brainwashing activity does not come close enough to a "theological core"[241] of the cult's ideology to warrant considering brainwashing a central practice. Consequently, centrality analysis does not necessitate allocating additional weight to any burden on a cult's free exercise rights created by exposing the cult to false imprisonment liability.

Because restricting the ability of a cult to practice brainwashing by subjecting the cult to liability for false imprisonment would not produce any coercive effects[242] upon a cult's religious practices, and because brainwashing would probably not be considered a practice central to the cult's religion,[243] the burdens placed on a cult by such liability would very likely fail to be substantial enough[244] to warrant first amendment protection.[245] Consequently, the free exercise clause would not erect any hurdles obstructing a false imprisonment claim by subjecting the merits of allowing such an action to constitutional scrutiny.[246] If, however, a court considering such a claim against a cult were to conclude that false imprisonment liability would substantially burden a cult's free exercise rights, a prima facie violation of the cult's free exercise rights would exist.[247] In such a circumstance, the court would have to conclude that the interests advanced by allowing a false imprisonment claim override the burden imposed on the cult[248] before liability could permissibly ensue.

C. Justifiable Infringement: Surviving Constitutional Scrutiny

In order for any government action to permissibly encroach upon conduct legitimately subject to free exercise protection,[249] the justifications for restriction must be greater than the burden the restriction places upon free

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240. *Id.* (alternative recruiting methods still available include preaching, leafletting, door-to-door canvassing, and advertising).

241. *Id.* The term "theological core" is merely an alternative way of characterizing the requisite nature of the belief supporting a practice before the practice may be deemed "central." *See supra* note 237.

242. *See supra* notes 232-33 and accompanying text.

243. *See supra* notes 237-41 and accompanying text.

244. *See supra* note 205.

245. *See supra* note 210.

246. *See supra* notes 207-08 and accompanying text.

247. *See supra* notes 202.

248. *See supra* note 210 and accompanying text.

249. This is because such conduct has met the threshold tests of sincerity, religiosity, and substantial burden.

exercise rights.[250] Such justification occurs only when the restriction advances compelling government interests[251] in the least-restrictive manner.[252]

1. The Compelling Government Interest

Sustaining a cause of action for false imprisonment against a cult when the cult's brainwashing techniques destroy the volitional capacity of recruits would directly promote important government interests. On the surface, the tort of false imprisonment exists to protect the right to be free from intentionally created barriers to freedom of motion.[253] However, the interest in freedom from restraint protected by false imprisonment extends beyond the physiological body. The "interest is in a sense a mental one,"[254] and as such, stems from a right to exercise personal liberty.[255] Consequently, the state has a compelling case for judicial intervention when religious conduct violates such an elemental interest.

Moreover, the unique character of false imprisonment effected by brainwashing implicates a violation of personal autonomy as well as bodily

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250. *See* Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) ("a state's interest ... however highly we rank it, is ... [subject to] a balancing process when it impinges on fundamental rights and interests ... protected by the Free Exercise Clause").

251. *See* Sherbert v. Verner, 374 U.S. 398, 406 (1963) ("no showing merely of rational relationship to some colorable state interest would suffice ... '[o]nly the graves abuses, endangering paramount interests, give occasion for permissible limitation'") (citing Thomas v. Collins, 323 U.S. 516, 530 (1945)). Characterization of government interests as "compelling" implies that causes promoted by governmental restrictions of free exercise are more important than (outweigh) the interest in religious liberty. For examples of interests found sufficiently compelling to outweigh free exercise rights, see *supra* note 199.

252. Thomas v. Review Bd., Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981) ("[t]he state may justify an inroad on religious liberty by showing that it is the least-restrictive means of achieving [the] compelling state interest"). *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 306-07 (1940) (conditioning religious solicitation upon a license granted based on the state's determination of the religious character of the applicant was impermissible, despite legitimate goal of preventing fraud and preserving peace and safety, because less-drastic means were available to promote those interests, such as penal laws or reasonable time and manner regulation of solicitors in general). For a general discussion of both the "compelling interest" and "least-restrictive means" requirements, see L. TRIBE, *supra* note 19, §§ 14-20 at 846-59.

253. *Prosser, supra* note 100, at 47 (the tort of false imprisonment "protects the personal interest in freedom from restraint of movement").

254. *Id.*

255. Although "liberty", in a constitutional sense, is broadly defined (*see, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (liberty encompasses "not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children ... ")), "liberty" is used here to apply to the right to choose the locus of the body, which would fall under the freedom from bodily restraint.

integrity. The capacity to form and exercise free will is the very essence of personhood.[256] Consequently, when a cult's brainwashing tactics confine a recruit by destroying his volitional capacity, the cult simultaneously invades both the recruit's liberty and his privacy.[257] The added invasion of privacy strengthens the interest of the state in protecting recruits from intentional confinement imposed upon them by brainwashing.

Finally, a victim of volitional confinement effected by brainwashing is put at risk of incurring a number of other substantial harms.[258] Serious

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256. *See supra* notes 71-72 and accompanying text.

257. The Constitution guarantees a right to privacy, Roe v. Wade, 410 U.S. 113, 152 (1973), at whose base lies "'the principle of an inviolate personality'". Shapiro, *supra* note 17, at 1302, *quoting* Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890). The right to privacy encompasses an individual right to control one's own mental processes, "from the intake of sensory data, to the neurophysiological processes that integrate such data into the personality, to the ultimate emission of expressions of ideas or feelings." L. TRIBE, *supra* note 19, § 15-5 at 899. Since the formation of volition is clearly a mental process, the right to do so independently would therefore stem from one's right to privacy.

The government has been explicitly prohibited from invading an individual's privacy by "imping[ing] upon the autonomy of the individual's mental processes." Stanley v. Georgia, 394 U.S. 557, 565 (1969) ("our whole constitutional heritage rebels at the thought of giving government the power to control men's minds"). Notably, in the unique context of brainwashing-induced false imprisonment, the invasion of psychological privacy cannot be separated from the invasion of physical liberty, since it is the very invasion of psychological processes--the destruction of volitional capacity--that effectuates the restraint. Consequently, the state has an added interest in protecting individuals from unwilling confinement induced by brainwashing, since the restraining force invades the individual's privacy as well as his liberty. Just as the state itself is scrupulously guarded against interfering with an individual's psychological privacy, so should the state be equally scrupulous to guard an individual's mental processes from intentional invasion by others.

Compare Stanley, 394 U.S. at 564-68 (reversing conviction for private possession of obscene materials on the ground that, even though the state has broad power to regulate obscenity, the state cannot interfere with an individual's private, internal thoughts) *with* Roth v. United States, 354 U.S. 476, 485 (1957) (sustaining conviction for mailing obscene materials over free speech objections). The fact that Stanley's conviction for possessing obscenity privately was not permissible, while Roth's conviction for *distributing* obscene materials to others was, suggests that while the government cannot interfere with what an individual freely and privately chooses to inhabit his mind, the government has an important and legitimate interest in protecting an individual's mind and preventing another from imposing his own ideas on the individual. Because the government interest in protecting an individual's mind from an outsider's attempt to invade it was compelling enough in *Roth* to override free speech rights (free speech, like religious freedom, is among the most highly protected first amendment freedoms; *see* U.S. CONST. amend. I), the same interest is compelling enough to justify infringing upon free exercise rights as well.

258. *See* Molko v. Holy Spirit Ass'n for the Unification of World Christianity, 46 Cal. 3d 1118, 762 P.2d 60, 252 Cal. Rptr. 122, 136 (1988) *cert. denied*, 490 U.S. 1084 (1989) (allowing cause of action for fraud against a religious cult for misrepresenting its identity with intent to induce the plaintiff to unknowingly submit to brainwashing indoctrination, the court stated "some individuals who experience coercive persuasion ... develop serious and sometimes irreversible physical and psychiatric disorders, up to and including schizophrenia, self-mutilation, and suicide.... The state clearly has a compelling interest in preventing its citizens from being deceived into

physiological and psychological disorders have been noted in victims of brainwashing.[259] Significantly, the government interest in protecting individuals from these harms has been found by courts to be sufficiently compelling to override a cult's free exercise claims in other brainwashing contexts.[260] Such harms are equally compelling to favor imposition of liability for false imprisonment created by the same conduct.

Taken together, the government's interests in protecting an individual's exercise of liberty,[261] personal autonomy,[262] and physiological and psychological safety[263] from intentionally tortious invasion are strikingly compelling. By comparison, the burden imposed upon the cult's free exercise rights by restricting brainwashing activities is relatively insubstantial.[264] Therefore, the imposition of liability for false imprisonment caused by brainwashing seems to be constitutionally justifiable.

2. The Least-Restrictive Means

A burden placed upon free exercise is not automatically constitutionally permissible even though a compelling government interest justifies it.[265] To pass constitutional scrutiny, the government action creating the burden must impose a lesser burden than any other[266] and must nondiscriminatorily advance the government's interest.[267] Thus, imposing liability for false imprisonment when brainwashing techniques are utilized by a religious group in recruitment will be permissible only if it is the least-drastic measure that will advance the

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submitting unknowingly to such a potentially dangerous process"); Peterson v. Sorlien, 299 N.W.2d 123, 129 (Minn. 1980) (in upholding trial court's failure to subject *deprogrammers* to liability for false imprisonment, notwithstanding the fact that the plaintiff had been tricked and forcefully held against her will, the court noted: "although carried out under colorably religious auspices, the method of cult indoctrination ... is predicated on a strategy of coercive persuasion that undermines the capacity for informed consent[;] ... society, therefore, has a compelling interest favoring intervention").

259. *See supra* note 68.

260. *See Molko*, 46 Cal. 3d 1118, 762 P.2d 60, 252 Cal. Rptr. at 136; *Peterson*, 299 N.W.2d at 129 (in refusing to hold deprogrammers liable for false imprisonment whose intervention with the plaintiff's association with the cult was based on a reasonable fear of the harms of brainwashing, the court noted: "[s]ociety ... has a compelling interest favoring intervention").

261. *See supra* note 255.

262. *See supra* note 257.

263. *See supra* note 68.

264. *See supra* notes 225-36 and accompanying text.

265. Thomas v. Review Bd., Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981).

266. Sherbert v. Verner, 374 U.S. 398, 406 (1963).

267. Braunfeld v. Brown, 366 U.S. 599, 607 (1961).

state's interests,[268] and only if its effect does not single out certain religions to bear its burden.

The burden imposed upon free exercise by exposing cults to false imprisonment liability for brainwashing is less restrictive than other possible alternatives. For example, one commentator has suggested subjecting cults to liability for slavery for brainwashing.[269] However, such liability involves violation of federal criminal statutes[270] and therefore could subject the cult to criminal penalties.[271] The potential for criminal liability would pose a significantly greater burden on a religious cult than would civil tort liability for false imprisonment.[272] Similarly, exposure to liability for false imprisonment after the fact, when an ex-recruit brings a claim, would create a lesser burden on free exercise than would judicially sanctioned self-help to remove a recruit from a cult.[273]

Moreover, subjecting religious groups that use brainwashing techniques to destroy the volitional capacity of recruits to liability for false imprisonment would directly protect those recruits from unwilling confinement without invidiously discriminating against specific religions or religion in general.[274] First of all, liability would ensue equally to any religious group that employed brainwashing tactics whenever those tactics falsely imprison a recruit by

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268. The state's interests include protecting individuals from invasions of liberty, autonomy, and physiological and psychological harm. *See supra* notes 253-64 and accompanying text.

269. *See* Delgado, *Religious Totalism as Slavery*, 9 N.Y.U. REV. L. & SOC. CHANGE 51 (1980-81).

270. The thirteenth amendment absolutely prohibits slavery of any form in the United States. U.S. CONST. amend. XIII ("slavery ... shall [not] exist within the United States, or any place subject to their jurisdiction"). A number of federal statutes have been enacted under this amendment prohibiting peonage and involuntary servitude. *See, e.g.*, 18 U.S.C. § 1581(a) (1976); 18 U.S.C. § 1584 (1976).

271. *See id.*

272. *Cf.* Molko v. Holy Spirit Ass'n for the Unification of World Christianity, 46 Cal. 3d 1118-19, 762 P.2d 60-61, 252 Cal. Rptr. 122, 136-37 (1988) (criminal penalties for brainwashing activities "would clearly impose a greater burden on religion than would civil tort liability for fraud").

273. For example, permitting forceful deprogramming would interfere more with a cult's free exercise rights since it is initiated by third parties (typically the recruit's family members), and could therefore potentially reach some recruits who have not been volitionally restrained. For an explanation of how deprogramming works, *see generally* S. HASSAN, *supra* note 4.

274. *See* Braunfeld v. Brown, 360 U.S. 599, 607 (1961) ("[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate *invidiously* between religions, that law is constitutionally invalid) (emphasis added). The word "invidious" suggests that the discriminatory effect of the law must be something more than innocent or incidental to its primary purpose. *See* WEBSTER'S NEW COLLEGIATE DICTIONARY 603 (1981) (invidious is defined as "tending to cause discontent [or] animosity; ... of an unpleasant or objectionable nature").

destroying his volitional capacity.[275] The fact that only a few religious groups may presently use brainwashing techniques in recruitment would not invidiously single out those groups for special treatment because liability would not foreclose any avenues of recruitment those groups which would be available to others.[276] Furthermore, imposing liability would not discriminate against religion in general because the same liability for false imprisonment would extend beyond the religious sphere to any organization that utilized brainwashing to destroy an individual's volitional capacity.[277] Therefore, liability for brainwashing-induced false imprisonment nondiscriminatorily advances the state's interest.

In sum, the imposition of tort liability for false imprisonment created by brainwashing would appear to pass constitutional scrutiny. The burden placed upon the free exercise rights of cults would be slight compared to the compelling interest the state has in protecting personal autonomy and bodily integrity. Moreover, the imposition of false imprisonment liability would be non-discriminatory and no more restrictive on the cult's free exercise than necessary to protect individuals from unwilling confinement. Therefore, any obstacles posed by the First Amendment should be surmountable.

IV. CONCLUSION

The tort of false imprisonment exists to protect an individual's right to be free from constraint of his choice of where he goes or stays.[278] As one's choices are implementations of one's desires, the right protected by false imprisonment necessarily encompasses independent control over one's desires;[279] that is, control over one's own volition. When a religious cult intentionally brainwashes a recruit and takes control over his will, the cult has constrained the recruit's ability to form an independent volition. Therefore, the

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275. *Cf. Molko*, 46 Cal. 3d 1119, 762 P.2d 61, 252 Cal. Rptr. at 137.

276. *Cf.* Sherbert v. Verner, 374 U.S. 398, 406 (1963) (denial of unemployment benefits to Seventh-Day Adventist who observed Saturday Sabbath for refusing to work on Saturday had a discriminatory effect because the ability of Sunday worshippers to observe their Sabbath under the statute was not affected, while the ability of Saturday worshippers to observe their Sabbath could be completely removed if they wished to obtain benefits); Fowler v. Rhode Island, 345 U.S. 67, 69 (1953) (conviction of a Jehovah's Witness under a statute prohibiting public addresses in parks was unconstitutional for discriminating against his message, since other religious groups were allowed to preach at group worship services in public parks). Unlike situations *Sherbert* and *Fowler*, the ability of cults to recruit new members would remain on equal footing with that of other religions if the use of brainwashing was restricted, since the same alternative recruitment methods would be available. *See supra* note 240.

277. *See* Molko v. Holy Spirit Ass'n for the Unification of World Christianity, 46 Cal. 3d at 1119, 762 P.2d 61, 252 Cal. Rptr. at 137 (1988), *cert. denied*, 490 U.S. 1084 (1989).

278. *See supra* note 105 and accompanying text.

279. *See supra* note 77.

cult has invaded the very right protected by false imprisonment: the right to freely exercise independent choice over where one pleases to be.

However strong a religious cult's free exercise right to proselytize is, that right should not enable a cult to intentionally usurp a recruit's right to individual liberty. For just as the free exercise clause protects the right of a religious group to add new members to its ranks, the free exercise clause equally protects the right of a recruit to independently choose whether or not he remains with a religious group.[280] The first amendment stands to protect equally the right of the religious group and the individual recruit to free exercise, and neither should be able to usurp the other on its own strength.

Imposing liability for false imprisonment on a religious cult that destroys the volitional capacity of recruits can be used to protect ex-recruits whose right to independently choose whether to remain with the cult was invaded by brainwashing. In addition, exposing cults to liability for brainwashing-induced false imprisonment would protect the same right of future potential recruits by deterring cults from using brainwashing tactics in recruitment and indoctrination. Moreover, false imprisonment liability would protect the recruits' rights without unconstitutionally invading the cult's free exercise rights, since the cult would still be free to proselytize and attract new members by other, legitimate means.[281] In addition false imprisonment liability would not, in any way, inhibit the ability of an individual to remain with a cult as long as the decision was freely and independently made by the individual and not imposed on him by the cult.

In sum, the framework is available upon which a court could construct a false imprisonment cause of action premised on brainwashing against a religious cult. He who controls the mind controls the body. The tort of false imprisonment, unlike any other, protects the individual's right to freely control the exercise of his personal liberty: the right to control of his own mind, to freely choose where he pleases to remain. Therefore, the tort of false imprisonment should protect that right from intentional violation by cultic brainwashing.

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280. *See supra* note 192; *see also supra* note 19.

281. *See supra* note 240.