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Murphy v. I.S.K.Con. of New England, Inc. and Intentional Infliction of Emotional Distress: An Alternative Analysis under the Free Speech Clause

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MURPHY v. I.S.K.CON. OF NEW ENGLAND, INC. AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS: AN ALTERNATIVE ANALYSIS UNDER THE FREE SPEECH CLAUSE

I. INTRODUCTION

The Free Exercise Clause of the First Amendment to the United States Constitution,[1] as applied through the Fourteenth Amendment,[2] prevents the states from prohibiting the free exercise of religion. The concept of free exercise contains two components: belief and activity.[3] Although the government cannot regulate religious beliefs,[4] it may regulate conduct motivated by religious beliefs.[5]

Because religious beliefs are afforded absolute protection from government regulation, judicial inquiry into the truth or falsity of religious

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1. The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

2. The relevant part of the Fourteenth Amendment provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The free exercise right is one of the liberty interests that the Fourteenth Amendment protects. *E.g.*, Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 876-77 (1990) ("The Free Exercise Clause of the First Amendment . . . has been made applicable to the States by incorporation into the Fourteenth Amendment . . . ." (citing Cantwell v. Connecticut, 310 U.S. 296, 303 (1940))).

However, the protection of the First Amendment is triggered only when there is "state action" within the meaning of the Fourteenth Amendment. *E.g.*, Cohen v. Cowles Media Co., 111 S. Ct. 2513, 2517 (1991). When a state court applies state rules of law in a manner alleged to restrict First Amendment freedoms, state action exists. *Id.*; *see, e.g.*, Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 n.51 (1982); New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964). Thus, the imposition of tort liability constitutes state action warranting constitutional scrutiny when rights guaranteed by the Constitution are impinged. Murphy v. I.S.K.Con. of New England, Inc., 571 N.E.2d 340, 346 (Mass.), *cert. denied*, 112 S. Ct. 191 (1991); *see, e.g.*, Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988); *New York Times*, 376 U.S. at 265.

3. *E.g.*, *Smith*, 494 U.S. at 877; Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

4. *E.g.*, *Smith*, 494 U.S. at 877; Sherbert v. Verner, 374 U.S. 398, 402 (1963); United States v. Ballard, 322 U.S. 78, 86 (1944); *Cantwell*, 310 U.S. at 303; *see infra* notes 116-26 and accompanying text.

5. *E.g.*, *Smith*, 494 U.S. at 878-79; *Sherbert*, 374 U.S. at 402-03; *Cantwell*, 310 U.S. at 304; Reynolds v. United States, 98 U.S. 145, 166-67 (1879). The Free Exercise Clause "embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." *Cantwell*, 310 U.S. at 303-04.

beliefs is prohibited.[6] However, when the religious status of a party is disputed, courts can inquire into whether or not alleged "religious" beliefs are, in fact, "religious" in nature and thus qualify for protection under the Free Exercise Clause.[7]

The Massachusetts Supreme Judicial Court recently applied the Free Exercise Clause in *Murphy v. I.S.K.Con. of New England, Inc.*[8] In *Murphy* the court held that the admission in evidence of scriptural passages of the Krishna Consciousness religion,[9] as the basis of the plaintiff's claim of intentional infliction of emotional distress,[10] was constitutionally impermissible as a violation of the Free Exercise Clause.[11] In vacating a trial court judgment in favor of the plaintiff,[12] the court said the trial judge should have granted the defendant's motion for judgment notwithstanding the verdict on the plaintiff's intentional infliction of emotional distress claim.[13]

While the court's reliance on the Free Exercise Clause was appropriate,[14] the intentional infliction of emotional distress claim could also have been disposed of under the Free Speech Clause of the First Amendment,[15] which, like the Free Exercise Clause, applies to the states

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6. *E.g.*, *Ballard*, 322 U.S. at 86; *see infra* notes 124-26 and accompanying text.

7. *E.g.*, United States v. Seeger, 380 U.S. 163, 185 (1965); *see, e.g.*, Malnak v. Yogi, 592 F.2d 197, 199-200 (3d Cir. 1979) (affirming district court finding that Science of Creative Intelligence/Transcendental Meditation is religion for purposes of First Amendment's Establishment Clause). To qualify for First Amendment protection, the claimant also must show that the religious beliefs are sincerely held. *E.g.*, *Seeger*, 380 U.S. at 185; *see, e.g.*, *Ballard*, 322 U.S. at 81-82, 84, 88; United States v. Kuch, 288 F. Supp. 439, 444-46 (D.D.C. 1968).

8. 571 N.E.2d 340 (Mass.), *cert. denied*, 112 S. Ct. 191 (1991).

9. Krishna Consciousness is also known as the Hare Krishna religion. *Id.* at 342. The religious status of I.S.K.Con. of New England, Inc. (ISKCON N.E.), the defendant, was undisputed at trial. *Id.* at 342 n.3. Susan Murphy, the plaintiff whose claim this Note addresses, "stipulated that Krishna Consciousness is an established religion and that ISKCON N.E. is a religious organization sincerely dedicated to the ideals of Krishna Consciousness." *Id.*

10. In *Murphy* there were two plaintiffs, Susan Murphy and her mother, Mary Murphy. *Id.* at 342. Their case went to trial on six separate counts of tortious activity, including separate claims by both Susan and Mary of intentional infliction of emotional distress. *Id.* at 344. This Note will address only Susan's claim of intentional infliction of emotional distress. For a discussion of the facts of the case, including the various tort claims, see *infra* notes 26-69 and accompanying text.

11. *Murphy*, 571 N.E.2d at 345-50; *see infra* notes 70-103 and accompanying text.

12. *Murphy*, 571 N.E.2d at 354; *see infra* note 103.

13. *Murphy*, 571 N.E.2d at 350; *see infra* note 103 and accompanying text.

14. *See infra* notes 116-30 and accompanying text.

15. The Free Speech Clause provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

The court did not address the free speech issue because no free speech defense was raised in *Murphy*. *See Murphy*, 571 N.E.2d at 342. Such a defense was unnecessary due to the free exercise defense, *see id.*, as the religious status of both Krishna Consciousness and ISKCON N.E. were undisputed at trial, *see supra* note 9.

through the Fourteenth Amendment.[16] If free exercise concerns were placed aside, the plaintiff's intentional infliction of emotional distress claim could not have survived free speech analysis. Because the defendant's expressions of belief upon which the plaintiff's claim was based[17] were not provable as false, the statements were not actionable.[18]

While the free speech defense was unnecessary in *Murphy*, as there was no dispute over the religious status of the defendant,[19] the religious status of a party is not always so clear.[20] Therefore, future cases involving alleged religious beliefs may raise a serious question as to whether or not the Free Exercise Clause applies.[21]

In such cases involving facts otherwise similar to those in *Murphy*, the Free Speech Clause could be used to dispose of intentional infliction of emotional distress claims,[22] making it unnecessary for courts to engage in the difficult determination of whether the defendant qualifies for the protection afforded by the Free Exercise Clause.[23] Reliance on the Free Exercise Clause is unnecessary because the Free Speech Clause absolutely prohibits intentional infliction of emotional distress claims predicated on speech on matters of public concern *not* provably false.[24] Only when speech *is* provably false is the Free Exercise Clause necessary to shield defendants from liability.[25]

This Note first summarizes the facts and reasoning of *Murphy*. Next, it analyzes the Massachusetts Supreme Judicial Court's application

16. *E.g.*, Gitlow v. New York, 268 U.S. 652, 666 (1925) ("[F]reedom of speech . . . which [is] protected by the First Amendment . . . [is] among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."). See *supra* note 2 for the text of the Fourteenth Amendment's Due Process Clause.

17. *See infra* notes 78-84 and accompanying text.

18. *See infra* notes 157-263 and accompanying text.

19. *See supra* note 9.

20. *See, e.g.*, United States v. Seeger, 380 U.S. 163 (1965); Malnak v. Yogi, 592 F.2d 197 (3d Cir. 1979); *see infra* notes 132-43 and accompanying text.

21. *See infra* notes 132-43 and accompanying text.

22. In recent years, a number of cases have been reported involving former religious cult members' tort claims of intentional infliction of emotional distress against the respective cults to which the members belonged. *See, e.g.*, Molko v. Holy Spirit Ass'n for Unification, 46 Cal. 3d 1092, 762 P.2d 46, 252 Cal. Rptr. 122 (1988), *cert. denied*, 490 U.S. 1084 (1989); Christofferson v. Church of Scientology, 644 P.2d 577 (Ct. App.), *petition denied*, 650 P.2d 928 (Or. 1982), *cert. denied*, 459 U.S. 1206, *and cert. denied*, 459 U.S. 1227 (1983); *see also* Ann P. Wrosch, Comment, *Undue Influence, Involuntary Servitude and Brainwashing: A More Consistent, Interests-Based Approach*, 25 LOY. L.A. L. REV. 499 (1992) (discussing intentional infliction of emotional distress claims in cases involving religious cults).

23. *See infra* notes 157-263 and accompanying text.

24. *See infra* notes 182-202 and accompanying text.

25. *See infra* notes 182-202 and accompanying text.

of the Free Exercise Clause to the plaintiff's intentional infliction of emotional distress claim. After concluding that the court correctly decided the case under the Free Exercise Clause, this Note suggests an alternative basis for resolving *Murphy* under the Free Speech Clause. This Note discusses the potential advantages of the alternative approach in future cases and then examines *Murphy* as a free speech case. This Note concludes that when it is uncertain whether or not the Free Exercise Clause applies in cases otherwise factually similar to *Murphy*, courts should first look to the Free Speech Clause and only turn to the Free Exercise Clause if the speech at issue is actionable under the Free Speech Clause.

II. *MURPHY V. I.S.K.CON. OF NEW ENGLAND, INC.*

A. Facts

In late 1971 thirteen-year-old Susan Murphy began exploring the beliefs of the Hare Krishna religion, also known as Krishna Consciousness.[26] Susan periodically attended Sunday feasts at a Krishna temple in Boston prior to the summer of 1972, at which time she began to visit the temple more often after becoming acquainted with Doug Hewer, an occasional Krishna Consciousness practitioner approximately six years her senior.[27] Hewer became Susan's boyfriend during the fall of 1972.[28]

Mary Murphy, Susan's mother, did not learn of her daughter's interest in Krishna Consciousness or frequent attendance at the Krishna temple in Boston until February or March of 1973.[29] Mary then forbade her daughter from attending the temple again, but Susan ignored Mary and secretly continued visiting the temple.[30]

In February 1973, Susan, while meeting with Hewer and a Krishna sannyasi[31] named Vishnu-Jana, expressed her "desire to become 'Krishna conscious' by living according to the principles of Krishna Consciousness."[32] She also informed Vishnu-Jana that Mary was unwilling to permit Susan's attendance at the Krishna temple.[33] Vishnu-Jana then told Susan and Hewer that "the most important goal for Susan was to become Krishna conscious," and that Susan should therefore do any-

26. *Murphy*, 571 N.E.2d at 342.
27. *Id.*
28. *Id.* at 342-43.
29. *Id.* at 343.
30. *Id.*
31. A sannyasi, or swami, is a spiritual authority in the Krishna Consciousness religion. *Id.* at 343 & n.4.
32. *Id.* at 343.
33. *Id.*

thing necessary to attain her goal.[34] After this meeting, Susan and Hewer presented themselves as a married couple, as they deemed themselves married by the power of Vishnu-Jana's advice.[35]

Approximately one month later, Susan ran away with Hewer, first to Toronto and then to Los Angeles.[36] Susan and Hewer received assistance from several Krishna Consciousness practitioners who befriended them during their travels.[37] In the fall of 1973, Susan spoke with her mother by telephone and, after returning with Hewer to Massachusetts, resumed living with her mother.[38] About two months later, Susan and Hewer again ran away to Toronto and then to Los Angeles.[39] While in Los Angeles, they were regular visitors to a Krishna temple.[40] They then moved to Hawaii before returning to Massachusetts to live together in late 1973 or early 1974.[41] After several weeks, they were on the move again, first to Los Angeles for several more weeks, then to Pittsburgh, where they lived in a local Krishna temple.[42]

In February 1974, I.S.K.Con. of New England Inc. (ISKCON N.E.), the defendant, was incorporated in Massachusetts.[43] Susan and Hewer returned to Massachusetts in the summer of 1974 and one month later moved into the apartment of two ISKCON N.E. temple members.[44] Susan visited the temple and regularly participated in ISKCON N.E. activities.[45] After Susan and Hewer moved into the apartment of two other temple members around September 1974, they moved to another apartment.[46] In November 1974, Susan and Hewer requested the temple president's permission to move into ISKCON N.E.'s temple.[47] The temple's president said Susan could live in the temple only if Mary consented and

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34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* Clearly, the case's statement of the facts includes some inaccuracies regarding the timing of certain events. According to the "facts" of the case, Susan and Hewer: (1) returned to Massachusetts "in the *fall of 1973*"; (2) stayed in Massachusetts for "[a]pproximately *two months*"; (3) traveled to Toronto; (4) moved to Los Angeles, where they stayed for "*several months*"; (5) moved to Hawaii; and (6) returned to Massachusetts in "*late 1973* or early 1974." *Id.* (emphases added).
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*

Susan agreed to participate regularly in temple activities, maintain a vegetarian diet and refrain from gambling, intoxicants and illicit sex.[48] Susan agreed to these conditions and her mother gave permission, on certain conditions, for Susan to live in the temple.[49]

Susan and Hewer moved into ISKCON N.E.'s temple, but slept apart, in the women's and men's quarters, respectively.[50] Hewer and Susan disagreed over her wish "to remain celibate in accordance with Krishna principles," and, apparently as a result of this disagreement, Hewer left the temple.[51] At this point, Susan ceased to consider herself married to Hewer.[52] While living at the temple, Susan regularly participated in Krishna Consciousness practices at the temple.[53] In December 1974 or January 1975, Susan agreed to her mother's request to sleep at Mary's house on weekends, but Susan still spent most of her time at the temple.[54] Susan formally became a Krishna Consciousness "devotee" in January or February 1975.[55] Shortly thereafter Susan began to spend all her nights at her mother's house, though she still spent her days at the temple.[56]

In April 1975, Mary discovered that several members of ISKCON N.E.'s temple planned to send her daughter to West Germany without Mary's knowledge or consent.[57] Mary then enlisted the help of a police officer, Henry Vanasse, who agreed to speak with Susan.[58] After Vanasse told Susan that she might face legal action if she ran away again, Susan reluctantly agreed to her mother's demand that she sever all ties with the temple.[59]

In April 1977, approximately two years after withdrawing from the temple, Susan sued ISKCON N.E. for intentional infliction of emotional distress.[60] At trial she presented evidence allegedly demonstrating that

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48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 343-44.
54. *Id.* at 344.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* Originally, Susan and Mary filed a complaint that alleged nine causes of action against three different defendants, including ISKCON N.E. *Id.* By the time the case went to trial in May 1987, ISKCON N.E. was the sole remaining defendant and had been granted summary judgment on Susan's claims of false imprisonment and fraud and Mary's claim of seduction. *Id.* The case went to trial on five counts in addition to Susan's claim of intentional

her experience with ISKCON N.E. caused her "to experience 'post-traumatic stress disorder,' a low sense of self-esteem, and an inability to maintain a healthy relationship with men."[61] She was allowed to read passages from scriptural texts to the jury and to testify as to what she had learned with respect to the role of women in Krishna Consciousness.[62] She testified that she learned the following from certain scriptural texts: "(1) 'women are inferior to men'; (2) 'the female form is the form of evil'; and (3) 'one should be very careful to cover the body so that men are not attracted to [women].' "[63] She also testified that she learned from other scriptural passages that:

> ([4]) "it is better for a woman to have to bear a son and that female children are not as good as male children"; ([5]) "[wo-

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infliction of emotional distress. *Id.* Mary brought her own claim of intentional infliction of emotional distress. *Id.* Susan and Mary brought separate claims of intentional interference with the Murphy family structure. *Id.* Susan's remaining claims were that ISKCON N.E. failed in its duty to provide adequately for her welfare while she was under its care and aided and abetted Hewer's commission of assault and battery on her by way of nonconsensual sexual intercourse. *Id.* ISKCON N.E.'s potential liability was limited to its actions during the time period between its incorporation and Susan's departure from its temple. *Id.*

Under Massachusetts law, a defendant is subject to liability for the tort of intentional infliction of emotional distress when the defendant, "by extreme and outrageous conduct and without privilege, causes severe emotional distress to another." Agis v. Howard Johnson Co., 355 N.E.2d 315, 318 (Mass. 1976). Massachusetts follows the *Restatement (Second) of Torts* in allowing the plaintiff to recover for emotional distress as well as bodily harm resulting from such distress. *Id.* at 317-18; *see* RESTATEMENT (SECOND) OF TORTS § 46 (1965). Virtually all states today recognize the tort of intentional infliction of emotional distress as defined in the Restatement. RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 1029 (5th ed. 1990); *see* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 53 (1988); *Agis*, 355 N.E.2d at 317 n.3.

A plaintiff must establish four elements to prevail on a claim of intentional infliction of emotional distress. *E.g.*, *Agis*, 355 N.E.2d at 318. First, the plaintiff must show that the defendant intended to inflict emotional distress or knew or should have known that the plaintiff would suffer emotional distress due to the defendant's conduct. *E.g.*, *id.*; RESTATEMENT (SECOND) OF TORTS, *supra*, § 46 cmt. i. Second, the plaintiff must prove that the defendant's conduct was so outrageous and extreme that society regards the conduct as atrocious, intolerable and beyond all bounds of decency. *E.g.*, *Agis*, 355 N.E.2d at 319; RESTATEMENT (SECOND) OF TORTS, *supra*, § 46 cmt. d. The requirement of extreme and outrageous conduct means that a defendant cannot be liable for "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." Foley v. Polaroid Corp., 508 N.E.2d 72, 82 (Mass. 1987); RESTATEMENT (SECOND) OF TORTS, *supra*, § 46 cmt. d. "The extreme and outrageous character of the conduct may arise from the actor's knowledge that the other is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity." *Id.* cmt. f. Third, the defendant's conduct must be shown to be the cause of the plaintiff's distress. *E.g.*, *Agis*, 355 N.E.2d at 319; RESTATEMENT (SECOND) OF TORTS, *supra*, § 46. And fourth, the emotional distress sustained by the plaintiff must be severe and of a nature that a reasonable person could not be expected to endure it. *E.g.*, *Agis*, 355 N.E.2d at 319; RESTATEMENT (SECOND) OF TORTS, *supra*, § 46 cmt. j.

61. *Murphy*, 571 N.E.2d at 344.

62. *Id.* at 346.

63. *Id.* (alteration in original).

> men] should always consult a higher person before making any type of decision because women are less intelligent than men"; and ([6]) "the woman has no position which is independent of man and she should take her husband as her spiritual authority."[64]

Additionally, Susan's expert psychiatric witness testified that Susan "suffered from 'post-traumatic stress disorder' from her 'experience in the Hare Krishna movement.' "[65]

ISKCON N.E. moved for a directed verdict on two separate occasions, but the trial court denied these motions.[66] The jury then found for Susan on her intentional infliction of emotional distress claim, awarding her $210,000 on this count.[67] The court denied ISKCON N.E.'s motions for new trial and for judgment notwithstanding the verdict.[68] The Massachusetts Supreme Judicial Court took the case on its own motion after ISKCON N.E. appealed.[69]

B. Reasoning of the Massachusetts Supreme Judicial Court

In *Murphy* the Massachusetts Supreme Judicial Court held that the judgment against ISKCON N.E. violated the Free Exercise Clause of the United States Constitution.[70] The court agreed with ISKCON N.E.'s contention that the introduction of substantial and detailed testimony regarding the unorthodox religious beliefs of Krishna Consciousness deprived ISKCON N.E. of its free exercise rights because the jury was allowed to impose tort liability on ISKCON N.E. as punishment for the content of these beliefs.[71]

The court began its analysis by noting that in cases where First Amendment issues are raised, an appellate court must independently review the trial record.[72] In such a situation, " 'an appellate court has an

64. *Id.* at 346 n.8 (third alteration in original).

65. *Id.* at 347. ISKCON N.E. claimed that Susan's testimony regarding what she learned from certain scriptural passages, *see supra* text accompanying notes 63-64, formed the basis of the expert's opinion. *Murphy*, 571 N.E.2d at 346-47.

66. *Murphy*, 571 N.E.2d at 345.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 345, 350. ISKCON N.E. also claimed the judgment violated the state free exercise guarantee, but because its brief to the Massachusetts Supreme Judicial Court only discussed the Free Exercise Clause of the First Amendment to the United States Constitution, the court only addressed the First Amendment in considering ISKCON N.E.'s claims. *Id.* at 345 & n.7.

71. *Id.* at 345.

72. *Id.*

obligation to "make an independent examination of the whole record" in order to make sure that "the judgment does not constitute a forbidden intrusion on the field of free expression." ' "[73] Constitutional scrutiny is required in this case because religious freedom is potentially threatened when tort liability is imposed for acts allegedly motivated by religious belief.[74]

Next, the court stated that while religiously motivated conduct is not immune from government regulation, religious beliefs are absolutely protected by the First Amendment.[75] As a result, the court found the jury's verdict constitutionally problematic because the admission in evidence of certain scriptural passages[76] endangered "ISKCON N.E.'s right to believe freely in the principles of Krishna Consciousness."[77]

Susan admitted that the jury was allowed "to consider the content of [ISKCON N.E.'s] religious scriptures."[78] Her brief even stated "that '[s]ome of [her] damages flow from the religious beliefs and practices to which [she] was exposed while she was a member of the Defendant's religious community.' "[79] Despite this, however, Susan suggested that her claim was based on ISKCON N.E.'s *actions* of teaching its religious beliefs to her, rather than on its *beliefs per se*.[80]

The court was unpersuaded by Susan's attempt to characterize her testimony as pertaining to ISKCON N.E.'s activity as opposed to its belief.[81] "The essence of what occurred in the trial is that [Susan was] allowed to suggest to the jury extensively that exposure to the defendant's religious beliefs was sufficient to cause tortious emotional damage . . . ."[82] To support its conclusion, the court also mentioned the fact that the trial judge instructed the jury, in admitting Susan's disputed scriptural testimony, that the testimony was to be used to ascertain whether or not Susan was exposed to the Krishna teachings and, if she was, how these teachings affected her, if at all.[83] Additionally, Susan's counsel, in his closing argument to the jury, contended that Susan suffered psychological damage because she was subjected to the Krishna teach-

73. *Id.* (quoting Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499 (1984)).
74. *Id.* at 346.
75. *Id.*
76. *See supra* text accompanying notes 63-64.
77. *Murphy*, 571 N.E.2d at 346.
78. *Id.* at 347.
79. *Id.* (first alteration in original).
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*

ings as a juvenile.[84]

Since Susan's tort claim was based on the alleged emotional damage she suffered as a result of exposure to ISKCON N.E.'s religious beliefs, the court reasoned that her claim was proscribed by the Free Exercise Clause, which guarantees freedom of religious belief, including the freedom to maintain theories which others may think heretical.[85] The court stated: " 'Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs.' "[86] However, the court recognized that at trial ISKCON N.E. was required to pursue a course forbidden by the First Amendment; it was forced to try to convince the jury that the religious beliefs of Krishna Consciousness are worthy of respect.[87]

The court observed that inherent in Susan's claim that she suffered tortious damage because of exposure to these beliefs is the view that ISKCON N.E.'s religious beliefs are fundamentally abnormal and incompatible with a proper notion of human development.[88] The court remarked that this issue may properly be the subject of scholarly or theological debates, but it is not an issue for courts to decide.[89] ISKCON N.E. "cannot be forced to choose between censoring its religious scriptures to remove material which may be offensive to contemporary society and paying tort damages for the privilege of maintaining unpopular religious beliefs."[90]

While Susan's age had some significance constitutionally, because "a State has greater leeway under the First Amendment to infringe on religious activity involving children than it does on religious activity which involves only adults,"[91] the court believed her minority did not alleviate the free exercise concerns raised in this case.[92] The court reasoned that if Susan's claim were based on ISKCON N.E.'s religiously motivated *activity*, her age might reduce the level of constitutional protection afforded ISKCON N.E.[93] However, Susan's claim required the court to assess the propriety of ISKCON N.E.'s *beliefs*, regardless of her age.[94] The court

84. *Id.* at 348.
85. *Id.*
86. *Id.* (quoting United States v. Ballard, 322 U.S. 78, 86 (1944)).
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 349.
92. *Id.*
93. *Id.*
94. *Id.*

refused to engage in such an assessment.[95] In support of its position, the court noted that Susan learned the scriptures at issue during regularly scheduled temple meetings, and under the Constitution courts lack competence " 'to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings.' "[96]

The court also found that the trial judge compounded the error of allowing the jury to consider ISKCON N.E.'s religious beliefs by erroneously instructing the jury that the First Amendment does not protect defendants from intentional infliction of emotional distress claims.[97] This erroneous instruction "may have invited the jury to ignore the defendant's free exercise rights in determining ISKCON N.E.'s tort liability."[98] The court said that in certain circumstances the Free Exercise Clause protects activity which constitutes an intentional tort.[99] Whether a particular tort claim is barred by the Free Exercise Clause depends on "factors such as the nature of the evidence which must be presented to support such a claim, or the effect that liability for a successful claim would have on free exercise rights."[100] For example, it has been "held that claims of intentional infliction of emotional distress are barred by the First Amendment to the extent they are based on protected religious speech."[101]

The court concluded that Susan's intentional infliction of emotional distress claim "could not stand in the absence of testimony regarding ISKCON N.E.'s religious beliefs."[102] Therefore, the court said ISKCON N.E.'s motion for judgment notwithstanding the verdict should have been granted.[103]

III. ANALYSIS

The court in *Murphy* correctly held that the judgment against ISKCON N.E. was impermissible. Under the Free Exercise Clause, the

95. *Id.*

96. *Id.* at 349 n.11 (quoting Fowler v. Rhode Island, 345 U.S. 67, 70 (1953)).

97. *Id.* at 349.

98. *Id.*

99. *Id.*

100. *Id.* at 349-50.

101. *Id.* at 350 (citing Molko v. Holy Spirit Ass'n for Unification, 46 Cal. 3d 1092, 1120, 762 P.2d 46, 61, 252 Cal. Rptr. 122, 137 (1988), *cert. denied*, 490 U.S. 1084 (1989)).

102. *Id.*

103. *Id.* The court, in vacating the judgment on Susan's intentional infliction of emotional distress claim and remanding the remaining claims for retrial, *id.* at 354, stated that on retrial, Susan's alleged damages for "intentional infliction of emotional distress may be considered to the extent that such damages are an element of the claims of *physical and sexual abuse* of Susan," *id.* at 350 (emphasis added).

government is absolutely prohibited from regulating religious beliefs.[104] Because Susan's claim essentially was that exposure to ISKCON N.E.'s religious beliefs caused her emotional damage,[105] the judgment against ISKCON N.E. amounted to an improper regulation of those beliefs.[106]

In *Murphy* though, the Free Exercise Clause was not necessary to shield ISKCON N.E. from liability. Wholly apart from free exercise concerns, the Free Speech Clause could have protected ISKCON N.E. There obviously was no need to resort to the Free Speech Clause in *Murphy*, as it was undisputed that ISKCON N.E. qualified for the Free Exercise Clause's absolute protection.[107] However, not all parties who claim their beliefs are religious qualify for protection under the Free Exercise Clause.[108] Therefore, in future cases where the applicability of the Free Exercise Clause is contested, the free exercise question becomes moot if the beliefs at issue are immunized by the Free Speech Clause.[109]

While the Free Speech Clause does not provide *absolute* protection,[110] it amply shelters speech that falls under its umbrella. Under the decision and rationale of the United States Supreme Court in *Hustler Magazine, Inc. v. Falwell*,[111] intentional infliction of emotional distress claims are limited by the Free Speech Clause.[112] When the result in *Falwell* is combined with the Court's opinion in *Milkovich v. Lorain Journal Co.*,[113] it is clear that a defendant's speech on matters of public concern is not actionable for intentional infliction of emotional distress unless the speech is provably false.[114] Since the speech at issue in *Murphy* was not provably false, the outcome of the case did not hinge on ISKCON N.E.'s status as a religious organization.[115]

A. Murphy *Under the Free Exercise Clause*

The court was correct in disposing of the intentional infliction of emotional distress claim on free exercise grounds. As ISKCON N.E.'s religious status was undisputed, ISKCON N.E. unquestionably qualified

104. *See infra* notes 116-26 and accompanying text.
105. *See supra* notes 78-84 and accompanying text.
106. *See infra* notes 127-30 and accompanying text.
107. *See supra* note 9.
108. *See infra* notes 132-43 and accompanying text.
109. *See infra* notes 203-63 and accompanying text.
110. *See infra* notes 146-56 and accompanying text.
111. 485 U.S. 46 (1988).
112. *See infra* notes 157-202 and accompanying text.
113. 110 S. Ct. 2695 (1990).
114. *See infra* notes 182-202, 213-44 and accompanying text.
115. *See infra* notes 250-63 and accompanying text.

for free exercise protection,[116] which, through the Fourteenth Amendment,[117] absolutely prohibits state regulation of religious beliefs.[118] As the United States Supreme Court recently reiterated in *Employment Division, Department of Human Resources v. Smith*:[119]

> The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all "governmental regulation of religious *beliefs* as such." The government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma.[120]

The Court first addressed the constitutionality of judicial determinations of the truth or falsity of religious beliefs in *United States v. Ballard*.[121] In that case, the respondents, leaders of the "I Am" movement, were convicted of using and conspiring to use the mails to defraud.[122] The respondents had been charged with soliciting funds and seeking membership in the "I Am" movement by making knowingly false representations, covering their alleged religious doctrines or beliefs, regarding their ability to cure diseases.[123] The Court held that the Free Exercise Clause would be violated if the jury were allowed to determine the truth or falsity of the respondents' representations.[124] The jury could only decide whether the respondents sincerely believed the representations they made.[125] The Court stated:

> Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. It embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their reli-

116. *See supra* note 9.

117. *See supra* note 2 and accompanying text.

118. *E.g.*, Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 877 (1990); Sherbert v. Verner, 374 U.S. 398, 402 (1963); United States v. Ballard, 322 U.S. 78, 86 (1944); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

119. 494 U.S. 872 (1990).

120. *Id.* at 877 (citations omitted) (quoting Sherbert v. Verner, 374 U.S. 398, 402 (1963)).

121. 322 U.S. 78 (1944).

122. *Id.* at 79.

123. *Id.* at 79-80.

124. *Id.* at 86.

125. *See id.* at 84-88.

> gious doctrines or beliefs. . . . The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain.[126]

In light of both *Ballard* and *Smith*, the Massachusetts Supreme Judicial Court decided Susan's claim in *Murphy* correctly. As Susan's claim rested on the notion that exposure to the beliefs of Krishna Consciousness caused her psychological damage,[127] her claim could not be

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126. *Id.* at 86-87 (citation omitted). In addition to the free exercise guarantee, the First Amendment forbids governmental establishment of religion. U.S. CONST. amend. I. The Establishment Clause, which applies to the states through the Fourteenth Amendment, Everson v. Board of Educ., 330 U.S. 1, 8 (1947), prohibits, among other things, excessive church-state entanglement, Lemon v. Kurtzman, 403 U.S. 602, 613 (1971). Any judicial determination of religious "truth," in addition to violating the Free Exercise Clause, would seem to run afoul of the Establishment Clause by excessively entangling the government with religion. *See Ballard*, 322 U.S. 78; LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-11 (2d ed. 1988). For the text of the Establishment Clause, see *supra* note 1.

127. *See supra* notes 78-84 and accompanying text. If the court had accepted Susan's suggestion that her claim was based on ISKCON N.E.'s religious activity rather than its religious beliefs, *see supra* note 80 and accompanying text, ISKCON N.E. would not have received absolute First Amendment protection because the government may legitimately regulate conduct motivated by religious beliefs. *E.g.*, Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 878-79 (1990); Sherbert v. Verner, 374 U.S. 398, 402-03 (1963); Cantwell v. Connecticut, 310 U.S. 296, 304 (1940); Reynolds v. United States, 98 U.S. 145, 166-67 (1879).

Under free exercise jurisprudence before *Smith*, government regulation that substantially burdened religiously motivated conduct could only be justified by means narrowly tailored to achieve a compelling government interest. *Smith*, 494 U.S. at 894 (O'Connor, J., concurring); *see, e.g.*, Hernandez v. Commissioner, 490 U.S. 680, 699 (1989); United States v. Lee, 455 U.S. 252, 257-58 (1982); Thomas v. Review Bd., 450 U.S. 707, 718 (1981); *Sherbert*, 374 U.S. at 403. However, this is no longer the case, at least in the criminal law context. In *Smith* the Court held the compelling government interest test inapplicable to challenges, based solely on free exercise grounds, of generally applicable criminal laws. 494 U.S. at 884-85. However, in a "hybrid situation," *id.* at 882, where a free exercise challenge to a generally applicable criminal law is joined "with other constitutional protections, such as freedom of speech and of the press," *id.* at 881, the compelling government interest test apparently still applies. *See id.* at 881-82.

Outside the criminal law context, it is unclear whether the compelling government interest test still applies to free exercise challenges when religiously motivated conduct is burdened, because the Court has not yet addressed this question. Wrosch, *supra* note 22, at 515 n.147; *see, e.g.*, Vandiver v. Hardin County Bd. of Educ., 925 F.2d 927, 932 (6th Cir. 1991). However, language in *Smith*, *see, e.g.*, *Smith*, 494 U.S. at 878 ("[I]f prohibiting the exercise of religion . . . is not the object of the [law] but merely the incidental effect of a *generally applicable and otherwise valid provision*, the First Amendment has not been offended." (emphasis added)); *id.* at 885 ("The government's ability to enforce *generally applicable prohibitions of socially harmful conduct*, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual

adjudicated[128] without offending the Free Exercise Clause.[129] If tort liability could be imposed on ISKCON N.E. because a jury finds ISKCON N.E.'s beliefs improper or offensive, "little indeed would be left of religious freedom."[130]

B. Advantages of the Free Speech Approach in Future Cases

Although the Free Exercise Clause forbids inquiry into the truth or falsity of religious beliefs,[131] courts *are* permitted to determine as a threshold matter whether or not alleged "religious" beliefs are, in fact, "religious" in nature.[132] "Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion."[133]

Judicial determinations of what is "religious" present obvious problems, not the least of which is arriving at a workable definition of "religion." Courts have not settled on a uniform approach to defining religion.[134] Since "[t]heologians, sociologists, and others have struggled mightily with definitional questions"[135] regarding religion, this result is

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development.' " (emphasis added) (quoting Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988))), lower court interpretations of *Smith*, *e.g.*, *Vandiver*, 925 F.2d at 932 ("While *Smith* addresses the conflict between a criminal statute and behavior allegedly protected by the free exercise clause, other circuits have extended its holding to neutral civil statutes as well."); Salvation Army v. Department of Community Affairs, 919 F.2d 183, 195 (3d Cir. 1990) ("[T]he rationale of the *Smith* opinion is not logically confined to cases involving criminal statutes."); *see, e.g.*, Rector of St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1103 (1991); Intercommunity Ctr. for Justice & Peace v. INS, 910 F.2d 42 (2d Cir. 1990), and other Supreme Court decisions, *see* Cohen v. Cowles Media Co., 111 S. Ct. 2513 (1991) (applying generally applicable state promissory estoppel law against newspaper publisher without heightened scrutiny because law only incidentally burdened freedom of press guaranteed by First Amendment), indicate that the *Smith* rationale applies to *all* regulation of religiously motivated conduct.

Although government regulation of ISKCON N.E.'s "activity" would not be absolutely barred, presumably the judgment against ISKCON N.E. could only be justified if it passed the strict scrutiny of the compelling interest test. This is either because the *Smith* rationale might only apply to criminal statutes, or, much more likely, because Susan's claim involved a hybrid situation where a free exercise claim is connected with the communicative activity of teaching religious beliefs.

128. *See supra* note 2 and accompanying text.

129. *See, e.g.*, *Ballard*, 322 U.S. at 86-87.

130. *Id.* at 87.

131. *See supra* notes 116-26 and accompanying text.

132. *E.g.*, United States v. Seeger, 380 U.S. 163, 185 (1965); *see, e.g.*, Malnak v. Yogi, 592 F.2d 197, 199-200 (3d Cir. 1979) (affirming district court finding that Science of Creative Intelligence/Transcendental Meditation is religion for Establishment Clause purposes).

133. Thomas v. Review Bd., 450 U.S. 707, 713 (1981).

134. TRIBE, *supra* note 126, § 14-12, at 1243.

135. Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 957 (1989).

not surprising. The United States Supreme Court has held that purely secular philosophies do not constitute "religion."[136] Additionally, the Court has noted that some asserted religious beliefs may be "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause."[137] However, there appears to be a low threshold for proving that a belief is "religious."[138] Despite this low threshold, courts have on occasion held that a belief is not "religious."[139]

While the Free Exercise Clause's protection of religion demands that "religion" be defined, a broad definition of religion is required in order to achieve the goals of religious freedom, as the number and diversity of faiths is increasing.[140] However, an overly broad definition would protect some beliefs that were not intended to be protected by the clause.[141] Furthermore, "[e]xcessive judicial inquiry into religious beliefs may, in and of itself, constrain religious liberty."[142]

Therefore, where the defendant's religious status is earnestly disputed in cases otherwise factually similar to *Murphy v. I.S.K.Con. of New*

136. TRIBE, *supra* note 126, § 14-12, at 1243; *see* Wisconsin v. Yoder, 406 U.S. 205, 216 (1972) ("[I]f the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority . . . their claims would not rest on a religious basis. . . . [A] choice [which is merely] philosophical and personal . . . does not rise to the demands of the Religion Clauses.").

137. *Thomas*, 450 U.S. at 715.

138. TRIBE, *supra* note 126, § 14-12, at 1243. For example, in *Thomas*, the claimant admitted he was "struggling" with his beliefs. 450 U.S. at 715. His actions seemed inconsistent with his beliefs, TRIBE, *supra* note 126, § 14-12, at 1243; *see Thomas*, 450 U.S. at 711 & n.3, and he disagreed with other members of his religion about what actions their religion forbade, *id.* at 715-16. Nevertheless, the Free Exercise Clause applied, as "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Id.* at 714.

139. *See, e.g.*, Africa v. Pennsylvania, 662 F.2d 1025 (3d Cir. 1981) (holding that belief system called MOVE was not religion; claimant had referred to MOVE as revolutionary organization and MOVE lacked organization, structure, clergy, ceremonial functions, formal services, holiday observances and other characteristics typically associated with traditional religions), *cert. denied*, 456 U.S. 908 (1982); Theriault v. Silber, 453 F. Supp. 254 (W.D. Tex.) (holding that Church of the New Song, whose leader had acquired Doctor of Divinity Certificate by mail order, was not religion; sole purpose of "religion" was to cause or encourage disruption of prison discipline for sake of disruption), *appeal dismissed*, 579 F.2d 302 (5th Cir. 1978), *cert. denied*, 440 U.S. 917 (1979).

140. TRIBE, *supra* note 126, § 14-6, at 1180-81.

141. *See* Marsh v. Chambers, 463 U.S. 783, 812 (1983) (Brennan, J., dissenting) ("Under the Free Exercise Clause, religiously motivated claims of conscience may give rise to constitutional rights that other strongly held beliefs do not."); TRIBE, *supra* note 126, § 14-6, at 1182 ("To be sure, courts should be wary of sudden births of religions that entitle practitioners to special rights or exemptions.").

142. TRIBE, *supra* note 126, § 14-6, at 1181; *see id.* §§ 14-11 to -12. Any such inquiry also runs the risk of violating the Establishment Clause's proscription of excessive church-state entanglement. *See supra* note 126.

England, Inc.,[143] protection under the Free Exercise Clause may not be readily available. However, in intentional infliction of emotional distress cases predicated on alleged "religious" speech, reliance on the Free Exercise Clause is not required if the speech at issue is immunized by the Free Speech Clause. Indeed, if the speech at issue is not actionable under the Free Speech Clause, the free exercise question becomes irrelevant. Thus, courts should first look to the Free Speech Clause; only if the speech is actionable under that clause must the court turn to the Free Exercise Clause.

C. *The Free Speech Clause's Limitations on Intentional Infliction of Emotional Distress Claims:* Hustler Magazine, Inc. v. Falwell

According to the Free Speech Clause of the First Amendment of the United States Constitution, "Congress shall make no law . . . abridging the freedom of speech."[144] The Free Speech Clause applies to the states through the Fourteenth Amendment.[145]

Although the free speech right is a fundamental one, "it is well understood that the right of free speech is not absolute at all times and under all circumstances."[146] For example, "certain well-defined and narrowly limited classes of speech,"[147] such as " 'fighting' words"[148] and obscene speech,[149] are unprotected by the First Amendment. These classes consist of speech "which by [its] very utterance inflict[s] injury or tend[s] to incite an immediate breach of the peace."[150] Such utterances "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[151]

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143. 571 N.E.2d 340 (Mass.), *cert. denied*, 112 S. Ct. 191 (1991).

144. U.S. CONST. amend. I.

145. *E.g.*, Gitlow v. New York, 268 U.S. 652, 666 (1925) ("[F]reedom of speech . . . which [is] protected by the First Amendment . . . [is] among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.").

146. Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942).

147. *Id.*

148. *Id.* at 572.

149. *E.g.*, Miller v. California, 413 U.S. 15 (1973).

150. *Chaplinsky*, 315 U.S. at 572.

151. *Id.* The language in *Chaplinsky* is based on Justice Holmes's "marketplace of ideas" theory of the First Amendment. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Under this theory, freedom of speech is a means to the end of discovering "truth." *E.g.*, TRIBE, *supra* note 126, § 12-1, at 785-86. In his famous *Abrams* dissent, Justice Holmes stated:

Additionally, even when a form of speech is protected by the First Amendment, the protection is not absolute. When the government's action is not aimed at the communicative impact of speech but incidentally restricts the flow of information, the constitutionality of the government's action is tested by a balancing of the government interest against the adverse effect on free expression.[152] When a governmental regulation *is* aimed at the communicative impact of protected speech,[153] the regulation violates the First Amendment unless it is necessary to further a compelling government interest and narrowly drawn to achieve that interest,[154] or it is aimed at a less protected category of speech and meets the relevant test for that category.[155] When none of the categorical tests

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> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, . . . or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. . . . I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

Abrams, 250 U.S. at 630 (Holmes, J., dissenting).

152. "[R]egulatory choices aimed at harms not caused by ideas or information as such are acceptable so long as they do not *unduly* constrict the flow of information and ideas." TRIBE, *supra* note 126, § 12-2, at 791; *see, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (government may impose reasonable time, place and manner restrictions on protected speech if restrictions are justified without reference to speech content and narrowly tailored to further significant government interest while leaving open ample alternative channels to communicate message); United States v. O'Brien, 391 U.S. 367, 376-77 (1968) (when "speech" is combined with "nonspeech" elements in same course of conduct, government regulation is sufficiently justified if it is within constitutional power of government and if incidental restriction on free speech is no greater than is essential to furtherance of important or substantial government interest unrelated to suppression of free expression). For a critical look at *Ward* as well as an excellent summary of First Amendment analysis, see Carney R. Shegerian, *A Sign of the Times: The United States Supreme Court Effectively Abolishes the Narrowly Tailored Requirement for Time, Place and Manner Restrictions*, 25 LOY. L.A. L. REV. 453 (1992).

153. Such restrictions can be either content-based, *see, e.g.*, Mills v. Alabama, 384 U.S. 214 (1966) (invalidating prohibition against electioneering or soliciting votes on election day for or against candidate or proposition), or viewpoint-based, *see, e.g.*, Stromberg v. California, 283 U.S. 359 (1931) (invalidating state's attempt to ban display of red flag which symbolically opposed government).

154. *E.g.*, Frisby v. Schultz, 487 U.S. 474, 481 (1988); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

155. Examples of such less protected categories of speech include indecent speech, *see, e.g.*, FCC v. Pacifica Found., 438 U.S. 726 (1978), nonobscene sexually explicit speech, *see, e.g.*, Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), commercial speech, *see, e.g.*,

are satisfied and the government attempts to justify its regulation as narrowly tailored and necessary to further a compelling government interest, the regulation will be invalidated if further speech could avert the harm feared; in such a situation, suppression of speech is unnecessary to further the government interest.[156]

Until 1988 the United States Supreme Court had not addressed the question of whether the First Amendment is implicated when an intentional infliction of emotional distress[157] claim involves speech by the defendant on publicly important matters.[158] Then, in *Hustler Magazine, Inc. v. Falwell*,[159] the Court found that a state's interest in shielding public figures from the intentional infliction of emotional distress was insufficient to deny First Amendment protection to patently offensive speech.[160]

Falwell involved a parody of an advertisment which included Jerry Falwell's[161] name and picture that was published in *Hustler*, a nationally

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Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980), and defamatory speech, *see, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964). In the area of defamation, a number of specific tests have been developed, depending on whether the plaintiff is a public or a private figure and whether the speech addresses a matter of public or "purely private concern." Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 759 (1985) (Powell, J., plurality). When the plaintiff is a public official and the alleged defamatory statement relates to the plaintiff's official conduct, in order to recover damages the plaintiff must prove that the statement was false and "was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times*, 376 U.S. at 279-80. The same test applies when the plaintiff is a public figure. *See, e.g.*, Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

When the plaintiff is a private figure and the defamatory speech addresses a matter of public concern, the plaintiff still must prove the falsity of the statement, but the states can define their own liability standards for actual injury suffered by the plaintiff "so long as they do not impose liability without fault." Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974). To recover punitive or presumed damages, the plaintiff, in addition to proving falsity, must meet the *New York Times* actual malice standard. *Id.* at 349-50. In *Dun & Bradstreet*, 472 U.S. 749, a case involving a private-figure plaintiff and speech about a private concern, the Court held that the actual malice standard was inapplicable, *id.*, but left unclear the liability standard as well as the question of whether the plaintiff had the burden of proving falsity or the defendant had the burden of proving truth, *see id.* For a discussion of the development of First Amendment law concerning defamatory speech, including the definitions of "public official," "public figure" and "private figure," see TRIBE, *supra* note 126, §§ 12-12 to -13.

156. *E.g.*, Texas v. Johnson, 491 U.S. 397, 419 (1989) (" 'If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence.' " (quoting Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring))); TRIBE, *supra* note 126, § 12-8, at 833-34.

157. See *supra* note 60 for a discussion of the elements of intentional infliction of emotional distress.

158. *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988).

159. 485 U.S. 46 (1988).

160. *Id.* at 50.

161. Jerry Falwell is "a nationally known minister who has been active as a commentator

circulated magazine.[162] The parody was based on a series of actual print ads for Campari Liqueur that contained interviews with celebrities about their "first times."[163] While the ads used the sexual double entendre regarding "first times," it was clear by the end of each interview that the phrase referred to the first time the interviewee tried Campari.[164] *Hustler*'s editors copied the form and layout of Campari's ads and created a fictional "interview" with Falwell "in which he states that his 'first time' was during a drunken incestuous rendezvous with his mother in an outhouse."[165] *Hustler*'s parody portrayed Falwell and his mother as intoxicated and immoral, and it suggested that Falwell was "a hypocrite who preache[d] only when he [was] drunk."[166] In the magazine's table of contents, the ad was listed as " 'Fiction; Ad and Personality Parody,' " and the ad contained, in small print, a disclaimer at the bottom of the page which said, " 'ad parody—not to be taken seriously.' "[167]

Shortly after the issue containing the ad became publicly available, Falwell sued *Hustler*, Larry Flynt (*Hustler*'s publisher) and Flynt Distributing Co. in federal court for libel and intentional infliction of emotional distress.[168] The jury found for the defendants on the libel claim, as a reasonable person could not believe the ad parody was describing genuine facts about Falwell or real events in which he participated.[169] However, the jury ruled in favor of Falwell on his intentional infliction of emotional distress claim and, in addition to awarding him $100,000 in compensatory damages, assessed punitive damages in the amount of $50,000 each against *Hustler* and Flynt.[170] *Hustler* and Flynt moved for judgment notwithstanding the verdict, but the district court denied their motion.[171]

Hustler and Flynt appealed, but the Court of Appeals for the Fourth

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on politics and public affairs." *Id.* at 47. For First Amendment purposes, he is clearly a "public figure," *id.* at 57, a conclusion which neither party disputed, *id.* at 57 n.5.

162. *Id.* at 47-48.

163. *Id.* at 48.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 47-48. Falwell also tried to recover damages for invasion of privacy, *id.*, but the district court granted a directed verdict for the defendants on Falwell's invasion of privacy claim, *id.* at 48.

169. *Id.* at 49.

170. *Id.* Flynt Distributing Co. was not found liable at all and therefore was not a party when the case reached the Supreme Court. *Id.* at 49 n.2.

171. *Id.* at 49.

Circuit affirmed the judgment against them.[172] The court of appeals agreed that because of Falwell's status as a public figure, *Hustler* and Flynt were "entitled to the same level of first amendment protection in the claim for intentional infliction of emotional distress that they received in Falwell's claim for libel."[173] But the Fourth Circuit believed this did not mean that a literal application of the *New York Times Co. v. Sullivan*[174] "actual malice" rule[175] was appropriate in a claim for intentional infliction of emotional distress.[176] The appeals court interpreted *New York Times* as placing emphasis for constitutional purposes on the actual malice standard's heightened culpability requirement rather than on the falsity of the statement at issue.[177] The appeals court found the *New York Times* standard satisfied because under Virginia law, defendants must act intentionally or recklessly to be liable for intentional infliction of emotional distress, and the jury found *Hustler* and Flynt had acted with such a mental state.[178] The court rejected as irrelevant "the contention that because the jury found that the ad parody did not describe actual facts about [Falwell], the ad was an opinion that is protected by the First Amendment."[179] The court believed the issue was whether the par-

172. Falwell v. Flynt, 797 F.2d 1270 (4th Cir. 1986), *rev'd sub nom.* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988).

173. *Id.* at 1274.

174. 376 U.S. 254 (1964).

175. *See supra* note 155.

176. *Falwell*, 485 U.S. at 49; *Falwell*, 797 F.2d at 1274.

177. *Falwell*, 485 U.S. at 49.

178. *Id.* at 49-50 & 50 n.3.

179. *Id.* at 50. Until recently, there appeared to be a clear distinction between statements of "opinion" and statements of "fact" for First Amendment purposes. *See* Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2705-06 (1990). Prior to the *Milkovich* decision, a number of lower courts and commentators believed that opinions were absolutely privileged under the First Amendment and that only false statements of fact were actionable. *See, e.g., id.*; Ollman v. Evans, 750 F.2d 970, 979 (D.C. Cir. 1984) (evaluating totality of circumstances, considering four factors, to determine whether statement was fact or opinion; four factors were: (1) specific language of statement; (2) verifiability of statement; (3) full context of statement; and (4) broader context or setting in which statement appeared), *cert. denied*, 471 U.S. 1127 (1985). The following dictum from Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), provided the basis for this belief, *see Milkovich*, 110 S. Ct. at 2705-06:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.

Gertz, 418 U.S. at 339-40 (footnote omitted).

In *Milkovich*, however, the Court stated:

> [W]e do not think this passage from *Gertz* was intended to create a wholesale . . . exemption for anything that might be labeled "opinion." Not only would such an interpretation be contrary to the tenor and context of the passage, but it would also ignore the fact that expressions of "opinion" may often imply an assertion of objective fact.

ody was outrageous enough to be actionable for intentional infliction of emotional distress.[180]

The United States Supreme Court reversed the judgment of the court of appeals, finding that an award of damages based on Falwell's claim would be inconsistent with the First Amendment.[181] The Court began its analysis by stressing the importance of the First Amendment in American society as a means for seeking truth as well as a valuable end in itself:

> At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions

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110 S. Ct. at 2705 (citation omitted). The Court rejected the proposition that the First Amendment mandates a decision of whether a statement is "fact" or "opinion" to determine whether it is actionable, stating that the lower courts erroneously relied on the *Gertz* dictum in developing tests to decide which is which. *Id.* at 2706. The Court stated that there was no need to create "an artificial dichotomy between 'opinion' and fact," because existing constitutional doctrine, based on requirements developed from prior cases, adequately protects freedom of expression. *Id.* Foremost among the requirements is "the proposition that a statement on matters of public concern must be provable as false before there can be liability." *Id.* Thus, partially because "a statement of opinion relating to matters of public concern *which does not contain a provably false factual connotation* will receive full constitutional protection," *id.* (emphasis added), the Court was "not persuaded that, in addition to [existing] protections, an additional separate constitutional privilege for 'opinion' is required to ensure the freedom of expression guaranteed by the First Amendment," *id.* at 2707.

Justice Brennan, in his dissenting opinion, agreed with the Court's analysis of the protection to be afforded statements of opinion, but disagreed with the Court's application of the specified general rules to the facts of the case. *Id.* at 2708-09 (Brennan, J., dissenting). According to Justice Brennan, "while the Court today dispels any misimpression that there is a so-called opinion privilege *wholly in addition* to the protections we have already found to be guaranteed by the First Amendment, it determines that a protection for statements of pure opinion is dictated by *existing* First Amendment doctrine." *Id.* at 2708 (Brennan, J., dissenting). While the Court in *Milkovich* "reserved judgment on cases involving nonmedia defendants," *id.* at 2706 n.6, regarding the question of whether "a statement on matters of public concern must be provable as false before there can be liability," *id.* at 2706, Justice Brennan stated that " 'a distinction [between media and nonmedia defendants] is "irreconcilable with the fundamental First Amendment principle that '[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of the source, whether corporation, association, union, or individual,' " ' " *id.* at 2708 n.2 (Brennan, J., dissenting) (second alteration in original) (quoting Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 780 (1986) (Brennan, J., concurring) (citations omitted)).

While the *Milkovich* decision did not provide lower courts with much guidance on the question of whether a statement is provable as false and therefore actionable, *Milkovich* will not change the law regarding this question in many jurisdictions because lower courts have used criteria since *Gertz* that are consistent with the *Milkovich* limitations. *The Supreme Court, 1989 Term—Leading Cases*, 104 HARV. L. REV. 219, 219 (1990). For further discussion of *Milkovich*, including its application to Murphy v. I.S.K.Con. of New England, Inc., 571 N.E.2d 340 (Mass.), *cert. denied*, 112 S. Ct. 191 (1991), see *infra* notes 237-63 and accompanying text.

180. *Falwell*, 485 U.S. at 50.

181. *Id.* at 57.

> on matters of public interest and concern. "[T]he freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole." We have therefore been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions.[182]

Accordingly, "[t]he First Amendment recognizes no such thing as a 'false' idea."[183]

Conversely, however, false statements of fact have little value, as "they interfere with the truth-seeking function of the marketplace of ideas."[184] Moreover, in defamation cases, such falsehoods damage the reputation of an individual that cannot be remedied easily by counterspeech,[185] even when such counterspeech is persuasive or effective.[186] But despite the minimal value of these falsehoods, "they are 'nevertheless inevitable in free debate.' "[187] Therefore, to provide breathing space for freedom of expression and alleviate the "chilling" effect on constitutionally valuable speech relating to public figures, the actual malice standard of *New York Times Co. v. Sullivan*[188] was developed.[189]

The Court rejected the Fourth Circuit's view that as long as the elements of intentional infliction of emotional distress were present it was constitutionally irrelevant whether the statement at issue was an opinion or a fact, or whether it was true or false.[190] Although the intent to cause emotional distress understandably has been made civilly culpable in most if not all jurisdictions when the conduct at issue is sufficiently intolerable, in the context of discourse about public affairs the First Amendment protects a speaker even when he or she is motivated by ill will or hatred.[191] The Court noted:

> "Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances

182. *Id.* at 50-51 (alteration in original) (quoting Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 503-04 (1984)).

183. *Id.* at 51.

184. *Id.* at 52.

185. *See supra* note 156 and accompanying text.

186. *Falwell*, 485 U.S. at 52.

187. *Id.* (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974)).

188. 376 U.S. 254 (1964). See *supra* note 155 for discussion of the actual malice standard.

189. *See Falwell*, 485 U.S. at 52.

190. *See id.* at 52-53.

191. *Id.* at 53.

> honestly believed contribute to the free interchange of ideas and the ascertainment of truth."[192]

Additionally, the Court feared that unpopular views would be censored if a speaker could be held liable for "outrageous"[193] speech on matters of public importance. " 'Outrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression."[194] The Court noted an "outrageousness" standard is inconsistent with its longstanding refusal to allow damage awards based on the audience's potentially adverse emotional reaction to speech.[195]

The Court therefore concluded that the actual malice standard from *New York Times Co. v. Sullivan*[196] applied to intentional infliction of emotional distress claims brought by public officials and public figures based on a defendant's speech.[197] In order to recover damages, public officials and public figures must show, in addition to the other elements of the tort claim, that the defendant made a false statement with knowledge of the statement's falsity or reckless disregard as to its truth.[198] The *New York Times* standard is not blindly applied in this context; rather it is necessary to provide sufficient "breathing space" to First Amendment freedoms.[199] As it was not reasonable to believe that the ad parody stated actual facts[200] about Falwell, whose status as a public figure was

192. *Id.* (quoting Garrison v. Louisiana, 379 U.S. 64, 73 (1964)).

193. *See supra* note 60.

194. *Falwell*, 485 U.S. at 55.

195. *Id.* The Court stated:

> "[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas."

Id. at 55-56 (alteration in original) (quoting FCC v. Pacifica Found., 438 U.S. 726, 745-46 (1978)).

196. 376 U.S. 254 (1964).

197. *Falwell*, 485 U.S. at 56.

198. *Id.*

199. *Id.*

200. In Milkovich v. Lorain Journal Co., 110 S. Ct. 2695 (1990), the Supreme Court said that "statements that cannot 'reasonably [be] interpreted as stating actual facts' " are not actionable. *Id.* at 2706 (alteration in original) (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988)). Such protection is necessary to guarantee "that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hypberbole' which has traditionally added much to the discourse of our Nation." *Id.*

undisputed,[201] the First Amendment barred Falwell from recovering damages for intentional infliction of emotional distress.[202]

D. Murphy *Under the Free Speech Clause*

When the applicability of the Free Exercise Clause is doubtful or questionable, the Free Speech Clause by itself will often protect defendants from intentional infliction of emotional distress claims. To demonstrate this, imagine a case with facts identical to *Murphy v. I.S.K.Con. of New England, Inc.*,[203] with the exception that the defendant does not unequivocally qualify for free exercise protection.[204]

As an initial matter, ISKCON N.E. is entitled to free speech protection because its status as "a corporation does not remove its speech from the ambit of the First Amendment."[205] Next, Susan's claim implicates the Free Speech Clause's guarantees because it involves state action within the meaning of the Fourteenth Amendment.[206] Susan's claim is not based on ISKCON N.E.'s conduct; it is based on ISKCON N.E.'s speech, in that Susan claims her damages flow from exposure to ISKCON N.E.'s beliefs[207] regarding the relative value and proper role of women in society.[208] Because a judgment for Susan on her intentional infliction of emotional distress claim would amount to a viewpoint-based[209] restriction[210] of ISKCON N.E.'s speech, the First Amendment limits her ability to recover damages.[211]

After *Hustler Magazine v. Falwell, Inc.*[212] it is clear that First Amendment principles limit "a State's authority to protect its citizens from the intentional infliction of emotional distress."[213] This is because of "the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern."[214] When the plaintiff is a public

201. *See supra* note 161.

202. *See Falwell*, 485 U.S. at 57.

203. 571 N.E.2d 340 (Mass.), *cert. denied*, 112 S. Ct. 191 (1991).

204. For the sake of clarity, this Note will continue to refer to ISKCON N.E. as the defendant, but will assume ISKCON N.E. is not clearly entitled to free exercise protection.

205. Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 657 (1990).

206. *See supra* note 2.

207. *See supra* notes 61, 65, 78-84 and accompanying text.

208. *See supra* notes 62-64 and accompanying text.

209. *See supra* notes 88, 90 and accompanying text.

210. *See supra* note 153 and accompanying text.

211. *See supra* notes 157-202, *infra* notes 212-63 and accompanying text.

212. 485 U.S. 46 (1988).

213. *Id.* at 50.

214. *Id.*

official or a public figure,[215] the actual malice[216] standard from *New York Times Co. v. Sullivan*[217] applies to intentional infliction of emotional distress claims.[218] In such circumstances, recovery is barred unless the plaintiff shows that the defendant either knowingly made a false statement or made a false statement with reckless disregard as to its truth or falsity.[219]

However, Susan cannot by any means be considered a public figure or a public official, so the *Falwell* standard cannot apply. To what extent, then, does the First Amendment limit Susan's claim? One way to determine the appropriate standard is to borrow the analogous standard from the area of defamation,[220] much as the *Falwell* Court borrowed the *New York Times* standard.[221] Surely, the same considerations that led the Court in *Falwell* to conclude that the *New York Times* "standard is necessary to give adequate 'breathing space' to the freedoms protected by the First Amendment"[222] would lead to the conclusion that Susan must at least[223] meet the parallel defamation standard in order to recover damages.[224]

As ISKCON N.E.'s expression of ideas regarding the worth and function of women in society[225] pertains to matters of public concern,[226] at a minimum the *Gertz v. Robert Welch, Inc.*[227] standards would appear to apply.[228] Under *Gertz*, in order for Susan as a private figure to clear the hurdle presented by the First Amendment and have an actionable claim for compensatory damages, she would have to prove that ISKCON

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215. *See supra* note 155.

216. See *supra* note 155 for discussion of the actual malice standard.

217. 376 U.S. 254 (1964).

218. *See supra* note 197 and accompanying text.

219. *See supra* note 198 and accompanying text.

220. For a discussion of the various defamation standards, see *supra* note 155.

221. *See Falwell*, 485 U.S. at 56; *see also* Foretich v. Glamour, 753 F. Supp. 955, 970 (D.D.C. 1990) ("[T]he Supreme Court [in *Falwell*] concluded that the First Amendment's concern for robust public debate is applicable to emotional distress claims as well as defamation claims.").

222. *Falwell*, 485 U.S. at 56.

223. *See infra* note 231.

224. *See Falwell*, 485 U.S. at 50-56.

225. *See supra* text accompanying notes 62-64.

226. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761-62 (1985) (Powell, J., plurality); Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 671 (1990) ("[M]ost would unquestionably consider as public discourse the public discussion of such [an] issue[] as the proper role of motherhood . . . even if this discussion did not occur within the specific context of any proposed or actual government action.").

227. 418 U.S. 323 (1974).

228. *See supra* note 155.

N.E. made at least one false statement with some level of fault.[229] *Gertz* would require Susan to meet the *Falwell/New York Times* standard in order to recover punitive damages.[230]

However, the requisite level of culpability[231] is not the key consideration in determining whether Susan can recover for intentional infliction of emotional distress. The critical element of the *Falwell* standard which surely applies to Susan's claim, even though she is a private figure, is the requirement that a false statement was made by ISKCON N.E.[232] While *Falwell* involved a public-figure plaintiff, the rationale and language of the Court's opinion show that the threshold requirement of a false statement also applies in cases where private-figure plaintiffs seek damages for emotional distress resulting from the expression of "ideas and opinions

229. *See supra* note 155.

230. *See supra* note 155.

231. Arguably, the *Gertz* standard for actual damages should not apply to intentional infliction of emotional distress claims such as Susan's, and the plaintiff should be required to prove that the defendant's allegedly false statements, *see infra* notes 32-49 and accompanying text, were made with a greater level of culpability than mere negligence. The Court in *Falwell* stated that "[f]alse statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, *and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective*." *Falwell*, 485 U.S. at 52 (emphasis added). This rationale is only partly applicable to a claim such as Susan's, as the speech in question, regarding the value and proper role of women, is not about Susan as an individual. Therefore, the speech in question cannot damage *her* reputation. But see Beauharnais v. Illinois, 343 U.S. 250 (1952) (5-4 decision), in which the Supreme Court upheld a conviction under a group libel statute that prohibited the publication or exhibition of materials promoting racial or religious hatred. However, many courts and commentators "have expressed doubt . . . that *Beauharnais* remains good law at all after the constitutional libel cases." Collin v. Smith, 578 F.2d 1197, 1205 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978); *see, e.g.*, American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 331 n.3 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986); TRIBE, *supra* note 126, § 12-12, at 861 n.2.

When the plaintiff has no reputational interest at stake, the threat that false statements pose to "the truth-seeking function of the marketplace of ideas," *Falwell*, 485 U.S. at 52, does not seem as great as the danger presented by the *Gertz* negligence standard, a rule of liability which would chill constitutionally valuable speech about matters of public concern. *See, e.g.*, *id.* at 52-53. Additionally, effective and timely counterspeech can correct any malfunction of the marketplace of ideas' ascertainment of the truth, *see supra* note 151, and easily repair any damage an individual might suffer as a result of exposure to false statements. *See supra* note 156 and accompanying text. For all of these reasons, when the speech in question is not about the plaintiff, the *Falwell/New York Times* actual malice standard might apply even when the plaintiff is a private figure who seeks only actual damages for intentional infliction of emotional distress caused by allegedly false statements of public concern. *See also Dun & Bradstreet*, 472 U.S. at 756-61 (Powell, J., plurality) (balancing First Amendment interest in freedom of expression against competing state interest in compensating private-figure plaintiffs for reputational damage when defamatory statements do not involve issue of public concern).

232. *See* Deupree v. Iliff, 860 F.2d 300, 304-05 (8th Cir. 1988); Walko v. Kean College, 561 A.2d 680, 685-86 (N.J. Super. Ct. Law Div. 1988).

on matters of public interest and concern."[233] Such opinions must be allowed to flow freely, even when the plaintiff is a private figure, because freedom of speech is an end in itself as well as a means to the discovery of truth through the operation of the marketplace of ideas.[234] These principles would be undermined if liability for speech could be imposed merely because society finds the ideas expressed offensive, distasteful or outrageous.[235] Susan's claim is therefore barred by the First Amendment if none of ISKCON N.E.'s statements are provable as false.[236]

In *Milkovich v. Lorain Journal Co.*[237] the United States Supreme Court held "that a statement on matters of public concern must be provable as false before [a defendant] can be liab[le]" for the statement.[238] Chief Justice Rehnquist, writing for the majority in *Milkovich*, stated that "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection."[239] While the Court did not give much guidance[240] on the question of whether a statement contains a factual connotation that is provably false, the Court did give an example of a statement that would be actionable and contrasted it with an example of a statement that would not be actionable.[241] The Court stated: "Unlike

233. *Falwell*, 485 U.S. at 50.

234. *E.g.*, *id.* at 50-52.

235. *E.g.*, *id.* at 55; *see also* Street v. New York, 394 U.S. 576, 592 (1969) ("[T]he public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . .").

236. Susan's status as a minor should not change the requirement that she must prove the defendant made a false statement before liability can attach. While it is true the state's interest in protecting children from exposure to speech that may be considered harmful is greater than the state's interest in protecting adults from such speech, *see, e.g.*, FCC v. Pacifica Found., 438 U.S. 726 (1978), the danger that the inherently subjective "outrageousness" test will allow juries to censor unpopular views, *Falwell*, 485 U.S. at 55; *see supra* notes 193-95 and accompanying text, is not diminished by a plaintiff's minor status and necessitates proof of falsity before there can be liability. *See supra* notes 91-95 and accompanying text. Moreover, since ISKCON N.E. made the statements at regularly scheduled meetings that Susan attended, *see supra* text accompanying note 96, regulation of these statements through the imposition of tort liability without proof of falsity, even for the compelling purpose of protecting children, is not narrowly tailored enough to pass strict scrutiny, as such regulation would have the invalid effect of confining the content of ISKCON N.E.'s meetings to material that is fit for children to hear, *see, e.g.*, Sable Communications, Inc. v. FCC, 492 U.S. 115, 131 (1989).

237. 110 S. Ct. 2695 (1990). For a further discussion of *Milkovich*, see *supra* note 179.

238. *Milkovich*, 110 S. Ct. at 2706.

239. *Id.* A statement that "impl[ies] an assertion of objective fact," *id.* at 2705, is one that "contain[s] a provably false factual connotation," *id.* at 2706. *See id.* at 2705-06.

240. *See supra* note 179.

241. *See Milkovich*, 110 S. Ct. at 2706.

the statement, 'In my opinion Mayor Jones is a liar,' the statement, 'In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin,' would not be actionable."[242] The Court also focused on the need for "a core of objective evidence" to determine whether a statement is actionable.[243] " 'Unlike a subjective assertion . . . language [is actionable if it] is an articulation of an objectively verifiable event.' "[244]

In *Foretich v. Glamour*,[245] a post-*Milkovich* decision, one of the statements at issue was " 'that a mother shall protect her young, no matter the cost to herself.' "[246] The United States District Court for the District of Columbia recognized that *Milkovich* controlled the disposition of claims based on this statement and, as a matter of law, required that these claims be dismissed.[247] The court said the statement was merely opinion; it was clear that the truth or falsity of any facts stated or reasonably implied from this statement could not be proven.[248] "That a mother must protect her young . . . cannot be deemed [a] verifiable statement[ ] of fact."[249]

When the six statements by ISKCON N.E. upon which Susan based her intentional infliction of emotional distress claim are analyzed, it is apparent that her claim is barred because none of these statements are provable as false. ISKCON N.E.'s first statement at issue is that " 'women are inferior to men.' "[250] This statement is not actionable because it neither states nor implies any objectively verifiable fact;[251] the concept of "inferiority" is inherently subjective and cannot be objectively measured.[252] The second statement, that " 'the female form is the form of evil,' "[253] and the fourth statement, that " 'it is better for a woman to have to bear a son and that female children are not as good as male

242. *Id.*

243. *Id.* at 2707.

244. *Id.* (quoting Scott v. News-Herald, 496 N.E.2d 699, 707 (Ohio 1986)).

245. 753 F. Supp. 955 (D.D.C. 1990). While the claims, facts and status of the parties in *Foretich* differed substantially from those in *Murphy*, those differences are not relevant to a determination of whether the statements at issue are provably false.

246. *Id.* at 965.

247. *Id.*

248. *Id.* at 966.

249. *Id.*

250. Murphy v. I.S.K.Con. of New England, Inc., 571 N.E.2d 340, 346 (Mass.), *cert. denied*, 112 S. Ct. 191 (1991); *see supra* text accompanying note 63.

251. *See supra* note 239.

252. In this respect, it is similar to the example given in *Milkovich* of a statement that is not actionable. *See supra* text accompanying note 242.

253. *Murphy*, 571 N.E.2d at 346; *see supra* text accompanying note 63.

children,' "[254] are not actionable for the same reason. Both statements are simply " 'subjective asertion[s].' "[255]

Another subjective assertion, that " 'the woman has no position which is independent of man,' "[256] is found in the first half of the sixth statement. The second half of that statement, that a woman " 'should take her husband as her spiritual authority,' "[257] is similar to the statement at issue in *Foretich* and therefore not factually verifiable.[258] Likewise, the third statement, that " 'one should be very careful to cover the body so that men are not attracted to [women],' "[259] is not factually verifiable by objective evidence.

The remaining statement is that women " 'should always consult a higher person before making any type of decision because women are less intelligent than men.' "[260] Of the six statements, this one comes closest to containing an objectively verifiable fact. Ultimately, however, it is not actionable. The first part of the statement, regarding what women "should" do, is another assertion similar to that in *Foretich*. To the extent that the statement implies that men are "higher" than women, it is merely another subjective assertion.

However, the second part of the statement, stating that men are more intelligent than women, is not dismissed quite so easily. Whether the statement can be interpreted to assert that the average man is more intelligent than the average woman, or that all men are more intelligent than all women, it *appears* objectively verifiable and hence capable of being proven false. After all, there are scales which measure intelligence,[261] and one could examine results from a statistically appropriate

254. *Murphy*, 571 N.E.2d at 346 n.8; *see supra* text accompanying note 64.

255. *Milkovich*, 110 S. Ct. at 2707 (quoting Scott v. News-Herald, 496 N.E.2d 699, 707 (Ohio 1986)); *see supra* text accompanying note 244.

256. *Murphy*, 571 N.E.2d at 347 n.8; *see supra* text accompanying note 64.

257. *Murphy*, 571 N.E.2d at 347 n.8; *see supra* text accompanying note 64.

258. *See supra* notes 245-49 and accompanying text. To the extent that the statement that a woman "should take her husband as her spiritual authority" connotes that marriage is desirable, the statement is merely a subjective assertion; to the extent that the statement implies or assumes that many or most women *are* married, no objectively verifiable assertion is made regarding what percentage of women are married. Even if such an objectively verifiable statement *were* made, it is difficult to imagine what emotional damage could flow from a false statement regarding the incidence of marriage.

259. *Murphy*, 571 N.E.2d at 346 (alteration in original); *see supra* text accompanying note 63.

260. *Murphy*, 571 N.E.2d at 346-47 n.8; *see supra* text accompanying note 64.

261. The intelligence test most widely used is the Wechsler Adult Intelligence Scale, *e.g.*, HAROLD I. KAPLAN, M.D. & BENJAMIN J. SADOCK, M.D., SYNOPSIS OF PSYCHIATRY 156 (6th ed. 1991), while another commonly used test is the Stanford-Binet Test, *see, e.g.*, *id.* at 157. *See also* United States v. Masthers, 539 F.2d 721, 724 & n.16 (D.C. Cir. 1976) (noting

sample of men and women to see if the statement is "true." In spite of the fact that a given group's scores on an intelligence test could be objectively compared to those of another group, the *scores themselves* cannot be said to objectively measure intelligence. First, available intelligence tests cannot measure increments of intellectual ability past the age of fifteen.[262] In addition:

> As measured by most intelligence tests, [the intelligence quotient or] I.Q. is an interpretation or classification of a total test score in relation to norms established by a group. . . . A person's I.Q. must be examined in the light of past experiences . . . .
>
> The I.Q. itself is no indicator of the origins of its reflected capacities, genetic (innate) or environmental. The most useful intelligence test must measure a variety of skills and abilities, including verbal and performance, early learned and recently learned, timed and untimed, culture-free and culture-bound. No intelligence test is totally culture-free, although tests do differ significantly in degree.[263]

Therefore, as no objective measure of intelligence exists, the statement is not actionable.

Since none of ISKCON N.E.'s statements are provably false, ISKCON N.E. could not be held liable for intentional infliction of emotional distress under the Free Speech Clause. Ultimately, this result "is dictated by the fundamental proposition that if [free speech] rights are to remain vital for all, they must protect not only those society deems acceptable, but also those whose ideas it quite justifiably rejects and despises."[264]

IV. CONCLUSION

The Massachusetts Supreme Judicial Court correctly decided *Murphy v. I.S.K.Con. of New England, Inc.*[265] Susan's intentional infliction of emotional distress claim was based on the notion that exposure to Krishna Consciousness caused her tortious emotional damage. She supported her claim by reading passages from scriptural texts and testifying as to what she had learned regarding the role of women in Krishna Con-

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that appellant's score on Revised Beta Intelligence Test equated to mild retardation under Wechsler and Stanford-Binet schemes).

262. *E.g.*, KAPLAN & SADOCK, *supra* note 261, at 155.

263. *Id.* at 156.

264. Collin v. Smith, 578 F.2d 1197, 1210 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

265. 571 N.E.2d 340 (Mass.), *cert. denied*, 112 S. Ct. 191 (1991).

sciousness. The verdict in her favor infringed ISKCON N.E.'s right to freely believe the principles of its chosen religion; the jury had been permitted to penalize ISKCON N.E. for the content of its unusual religious beliefs, a result clearly proscribed by the Free Exercise Clause.

However, reliance on the Free Exercise Clause, while unquestionably warranted in this case, was not crucial to a finding in favor of ISKCON N.E. As the statements upon which Susan based her claim were not provably false, her claim was not actionable for intentional infliction of emotional distress under the Free Speech Clause. In future cases factually similar to *Murphy*, where a defendant's ability to use the Free Exercise Clause as a shield from liability is uncertain because of the defendant's unclear religious status, the free exercise question will often be moot because courts can dispose of intentional infliction of emotional distress claims on free speech grounds.

Mark A. Snyder *

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