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## COMMERCE IN RELIGION

*Bernadette Meyler\**

### INTRODUCTION

Given the multifarious debates about the definition of religion among philosophers, sociologists, and even adherents of religion,<sup>1</sup> it should come as no surprise that secular courts have engaged in advanced acrobatics in the attempt to avoid determining religion's limits and bounds. A central aim of what Kent Greenawalt and others have termed the U.S. Supreme Court's hands-off approach to religious liberty<sup>2</sup> is to avert the problems that might arise if nonreligious

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\* Associate Professor, Cornell Law School. I am very grateful for the comments of the participants in the American Association of Law Schools' (AALS) 2008 panel on "The Supreme Court's 'Hands-Off' Approach to Religious Liberty" and I benefited greatly from discussions with Doug Kysar and Nelson Tebbe. I owe much as well to the excellent research assistance of Greg Demers and to the fine work of the editors of the *Notre Dame Law Review*.

1 For instance, detailing influential theorist of religion John Hick's account of how religions could be defined cross-culturally, Brian Hebblethwaite has written that Hick has become less optimistic about cognitive complementarity [among religions], and tends to fall back on comparable salvific efficacy.

This means that the ultimate referent of religious language—the noumenal Real, lying behind all phenomenal representations—becomes more and more vague and unknown as Hick's Copernican revolution gets further developed. As with Kant's noumenon, virtually nothing can be said about it.

Brian Hebblethwaite, *John Hick and the Question of Truth in Religion*, in *READINGS IN PHILOSOPHY OF RELIGION* 383, 387 (Andrew Eshleman ed., 2008).

2 See Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 *COLUM. L. REV.* 1843, 1843, 1885–1906 (1998) (treating the "neutral principles" and "polity-deference" rationales for courts' refusal to adjudicate religious property disputes); Samuel J. Levine, *Rethinking the Supreme Court's Hands-Off Approach to Questions of Religious Practice and Belief*, 25 *FORDHAM URB. L.J.* 85, 87 (1997) (exploring the Court's expansion of judicial noninterference in deciding questions of religious belief and practice).

courts were to choose among disparate accounts of church doctrine.<sup>3</sup> Similarly fraught questions are posed when a court attempts to decide whether or not a particular set of beliefs and practices counts as religious. Although the law does, in a number of areas, make implicit judgments about what fits within the rubric of religion, the Supreme Court has notoriously refrained from providing a comprehensive account of what “religion” means within the context of the First Amendment.<sup>4</sup> The conception of religion that has emerged from the European Court of Human Rights’ (ECHR) adjudication of religious liberty claims under the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention)<sup>5</sup> partakes of a similarly capacious imprecision.<sup>6</sup> Although the ECHR is charged with the implementation of a treaty, not a Constitution, the European Convention itself has, during the course of its history, assumed increasingly constitutional status within Europe.<sup>7</sup> A variety of factors, including the development of an evolving individual rights jurisprudence and the internalization of ECHR protections into member countries’ domestic legal regimes, have contributed to this trans-

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3 See Jared A. Goldstein, *Is There a “Religious Question” Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U. L. REV. 497, 498–504 (2005) (describing the Supreme Court’s increasing tendency to avoid inquiry into matters of religious doctrine, culminating in the 1990 decision in *Employment Division v. Smith*, 494 U.S. 872 (1990)); see also Richard W. Garnett, *Assimilation, Toleration, and the State’s Interest in the Development of Religious Doctrine*, 51 UCLA L. REV. 1645, 1652–60 (2004) (detailing and critiquing the Court’s “no religious decisions” rule).

4 See Goldstein, *supra* note 3, at 526–27 (“Although no agreed meaning of the term ‘religion’ has emerged under the First Amendment, a problem that has long vexed courts and commentators, courts must nonetheless decide what constitutes a religion in construing the state and federal tax codes, the Religious Freedom Restoration Act (RFRA), the Free Exercise Clause, state constitutions, and hundreds (if not thousands) of statutes that give special treatment to religious bodies and religious practices.” (footnotes omitted)).

5 Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention], available at <http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/0/englishanglais.pdf>.

6 See, e.g., Jonas E. M. Machado, *Freedom of Religion: A View from Europe*, 10 ROGER WILLIAMS U. L. REV. 451, 480 (2005).

7 See Alec Stone Sweet & Helen Keller, *The Reception of the ECHR in National Legal Orders*, in A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS 1, 7 (2008) (explaining that “[a]s a result of [various] developments, scholars and judges now engage in a lively debate about the regime’s constitutionalization, and its possible constitutional futures” and elaborating that “it is undeniable that, in the 21st century, the Convention and the Court perform functions that are comparable to those performed by national constitutions and national constitutional courts in Europe,” while “the Court itself has come to see its role in constitutional terms”).

formation.<sup>8</sup> On account of the European Convention regime's quasi-constitutional status, the religious jurisprudence of the ECHR provides an instructive comparison to that of the U.S. Supreme Court.

Considering the rhetoric of religious liberty decisions issued by both bodies reveals that, despite in general displaying a shared reluctance to clearly demarcate the boundary between religion and non-religion, the ECHR and the U.S. Supreme Court have adopted significantly disparate understandings of the compatibility of religion with the commercial sphere. Although the Supreme Court opinions demonstrate a willingness to treat apparently commercial activities as falling outside the purview of the financial immunity accorded to religious activity under taxation and other regulatory schemes, they tend not to separate out religious from commercial activity *per se*.<sup>9</sup> Hence a practice might be viewed under the American framework as protected by the Free Exercise Clause of the First Amendment<sup>10</sup> but nevertheless be seen as subject to those federal laws applicable to commercial activity. By contrast, in the ECHR context, once a particular religion or a certain part of its purportedly religious enterprises becomes characterized as commercial, this aspect of the religion is quickly deemed either nonreligious or marginal to religious concerns. As a variety of religions come to incorporate more commercial features or to conceive of themselves as engaging in competition with other entities within a marketplace, this jurisprudential difference may produce increasingly significant divergences in the treatment of religious liberty claims within Europe and the United States.<sup>11</sup>

The Supreme Court's decisions themselves do not, however, appear entirely self-consistent. In some instances—such as the cases involving the proselytizing activities of Jehovah's Witnesses from the World War II period<sup>12</sup>—the Court has eschewed a formal analysis of whether an activity should be considered commercial, instead asking whether the overarching purpose of the activity is religious.<sup>13</sup> On other occasions—including the treatment of the Church of

8 *Id.* at 6–7.

9 *See infra* notes 117–24 and accompanying text.

10 U.S. CONST. amend. I (“Congress shall make no law . . . prohibiting the free exercise [of religion] . . .”).

11 *See, e.g.,* Rebecca French, *Shopping for Religion: The Change in Everyday Religious Practice and Its Importance to the Law*, 51 *BUFF. L. REV.* 127, 139, 195–99 (2003) (discussing “a shift in the *nature* of religion as evidenced in a move toward the displacement and consumer commodification of religion”).

12 *See, e.g.,* *Jones v. Opelika (Jones I)*, 316 U.S. 584 (1942), *vacated per curiam*, *Jones v. Opelika (Jones II)*, 319 U.S. 103 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

13 *See infra* notes 56–68 and accompanying text.

Scientology's practice of "auditing"—the Court has maintained that the simple existence of a quid pro quo, regardless of the value of what is exchanged, renders a transaction commercial, even if it is also viewed as religious.<sup>14</sup> Despite this seeming discrepancy, the cases share an emphasis on the sincerity of the vantage point of the particular actors involved. Whereas the religious purpose behind Jehovah's Witnesses' proselytizing led the Court to determine that they should not be subject to a license tax,<sup>15</sup> it was precisely the Scientologists' belief that they were receiving a valuable service as manifested by the fact that they were willing to pay for auditing that led the Court to refuse them a tax exemption.<sup>16</sup>

This emphasis on sincerity furnishes one of the central reasons why U.S. courts are reluctant to follow the European model. Whereas the Supreme Court displays a concern with individual sincerity—whether that of the founders of a religion, its proselytizers, or its adherents—the ECHR tends to view religion from a much more institutional perspective and to endorse efforts to prevent the consumers of religion from being misled.<sup>17</sup> The contrast roughly reflects the priority placed upon religious organizations in the European context and that given to individual claims of religious liberty in the U.S. system.<sup>18</sup>

Another set of reasons consists in doctrinal distinctions between the ECHR's and the Supreme Court's treatments of the intersection of speech and religion and in the dynamics of the two courts' protection of commercial speech. In cases that could be deemed to involve either freedom of expression or the manifestation of religion, the ECHR has often considered the claim solely as one of speech, whereas the Supreme Court treats the combination of expression and free exercise as entitled to special status as a "hybrid right."<sup>19</sup> In addition,

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14 See *infra* notes 122–24 and accompanying text.

15 See *infra* note 75 and accompanying text.

16 See *infra* notes 118–24 and accompanying text.

17 See *infra* notes 83–104 and accompanying text.

18 See Bernadette Meyler, *The Limits of Group Rights: Religious Institutions and Religious Minorities in International Law*, 22 ST. JOHN'S J. LEGAL COMMENT. 535, 535–36 (describing the different roles of religious individuals and religious institutions in U.S. and European jurisprudence).

19 See *Employment Div. v. Smith*, 494 U.S. 872, 881 (1990) ("The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press . . ."); see also *infra* notes 83–97 and accompanying text (discussing the ECHR's tendency to separate questions of religious freedom from those of free expression).

both the EHCR and the Supreme Court view commercial speech less deserving of protection than its noncommercial counterparts.<sup>20</sup> Hence, religious expression that falls within a commercial framework has been devalued as speech meriting reduced regard.<sup>21</sup>

A final potential reason is more speculative. The disestablishment of religion occurred later and more gradually in Europe than in the United States—and it is still not fully completed.<sup>22</sup> Because establishment entails state funding for recognized religious groups, the more prominent religious institutions would be less dependent for survival upon the financial contributions of their adherents in countries maintaining an establishment of religion. Primarily those religions that are new or represent minority denominations not acknowledged by the state would be obliged, in that context, to resort to methods of fundraising that might recall the form of commercial transactions. This circumstance could render it more likely that seemingly commercial conduct of religion would be treated with disfavor in systems, like those present in large parts of Europe, that currently maintain or were historically accustomed to an establishment of religion.

The remainder of this Essay examines how commercial concerns emerge at the moments of founding, propagating, and practicing a religion. In Part I, the Essay explores the U.S. Supreme Court's suspicion regarding state efforts to prosecute religious fraud, a suspicion that lacks parallel within the jurisprudence of the ECHR. Part II then turns to the question of the standards by which the Supreme Court and the ECHR determine whether, if ever, proselytizing can be considered commercial, and how this commercial aspect would affect its legal treatment. Finally, Part III asks what understanding of religious valuation emerges when courts view practices that religious adherents claim are central to their religion as commercial.

### I. FRAUDULENT FOUNDING

Imagine an individual who, upon thinking deeply about the conditions of existence and the world as it appears to us, develops on her

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20 See *infra* Part II.

21 See *infra* notes 54–96 and accompanying text.

22 See R. STEPHEN WARNER, *A CHURCH OF OUR OWN* 14–15 (2005) (“In Europe, Christianity achieved a state monopoly in the fourth century, a religious establishment that was consolidated over the next thousand years. Recent centuries in Europe have seen the erosion of this establishment, an erosion properly known as ‘secularization.’ In the United States, secularization, or disestablishment, took place soon after the Revolution, when the First Amendment prohibition of a federal religious establishment was extended to the states.”).

own a comprehensive account of life, death, and the place of humankind in the universe. Imagine also that she cannot quite persuade herself to believe in this narrative that she has generated. Nevertheless, falling upon hard times, she realizes that the story is sufficiently captivating that others might find it compelling and that she could profit financially from presenting it as a new religion. After she has collected revenues for ten years from a growing flock of followers, one of these adherents discovers her diary, in which she has written of her scheme and explained that she herself believes none of what she has claimed. Would the disciple, in this case, necessarily discount the entire religion as fraudulent? Or would he instead deem the founder's own belief in the truth of the religious worldview that she had disseminated immaterial?

According to one view of religious truth, the sincerity of the founder of a religion would not determine the resulting tradition's validity. To the extent that a religious person perceives a divine order, the author of that order need not be—and usually is not—human; furthermore, the human instrument by which the particular order has been revealed may or may not be aware of the significance of her discovery. Insofar as a religious system is deemed transcendent, it therefore remains epistemologically valid prior to its construction by a particular human agent, including the agent who has seemingly founded it. Even if the bad faith of the person who established the religion in question has been definitively established, individual believers could still be justified in continuing to adhere to its principles.

The 1944 U.S. Supreme Court case of *United States v. Ballard* (*Ballard I*)<sup>23</sup> has entered the law and religion pantheon for the general proposition that courts may not determine the truth or falsity of a religious claim.<sup>24</sup> What is somewhat less remarked upon is the majority's surprising conclusion that, although a decision on truth or falsity might be impermissible, a jury *could* evaluate the sincerity of the religious adherent's belief in the propositions he or she had presented.<sup>25</sup> This emphasis on sincerity, while seeming to extricate courts from entanglement in the intricacies of religious doctrine, simultaneously suggests that the members of a religious movement receive a particular type of product: the relevant product consists not in the precise

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23 322 U.S. 78 (1944).

24 *Id.* at 86; see, e.g., Goldstein, *supra* note 3, at 510 (“*Ballard* thus announces that the Constitution cordons off a ‘forbidden domain’ that courts may not enter: courts may not determine the truth or falsity of religious claims.” (quoting *Ballard I*, 322 U.S. at 87)).

25 See *Ballard I*, 322 U.S. at 85.

doctrines subject to religious belief, which might not be verifiable according to contemporary standards of proof, but instead in the sincere belief of the founders of a particular religion. As long as the putative religion's creators have acted in good faith, the Court seems to say, civil tribunals will not be able to judge the value created, and will simply accept that it exists.

*Ballard I* involved an appeal from a mail fraud prosecution against Edna W. Ballard and her son Donald, founders of the "I Am" religious movement.<sup>26</sup> Edna's husband, Guy, had originally been indicted as well, but died before trial.<sup>27</sup> The defendants were charged with making false representations—including representations about their contact with Jesus and their power to heal others—and doing so knowingly.<sup>28</sup> The trial court instructed the jury *not* to assess whether the underlying representations were true or false, but rather to evaluate only the question of whether the defendants did "honestly and in good faith believe those things."<sup>29</sup> On appeal, the Ninth Circuit reversed the conviction, reasoning that "the restriction of the issue in question to that of good faith was error," and that, in order to succeed, the government would have to prove that at least some of the representations the defendants had made were false.<sup>30</sup> The Supreme Court, in an opinion by Justice Douglas, held that the trial court had properly instructed the jury and that the court could only legitimately determine sincerity.<sup>31</sup> The majority thus treated the religious beliefs in question as a kind of black box, attempting to circumnavigate them by resorting to an assessment of whether the defendants' beliefs were or were not sincerely held.

While this result might seem satisfying on a formal level, as it avoids the courts' direct entanglement in assessing the truth or falsity of religious beliefs, the situation viewed as a whole raises difficult questions. How, for instance, could one justify a fraud prosecution against a religion unless one were assuming that what the religious movement alleged as a truth was not? Might one not resort to proof of the falsity of the underlying religious statements as a demonstration of a religious proselytizer's bad faith? What even constitutes defrauding in the religious sphere if we assess religious value through the eyes of the receiver?

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26 *Id.* at 79–80.

27 *See* *Saint Germain Found. v. Comm'r*, 26 T.C. 648, 656–57 (1956).

28 *Ballard I*, 322 U.S. at 79–82.

29 *Id.* at 81 (quoting the language of the trial court in advising the jury).

30 *Id.* at 83.

31 *Id.* at 84.



Justice Jackson's dissent in the case emphasized some of these points.<sup>32</sup> As Justice Jackson elaborated with respect to the perspective from which the assessment of religious value should occur:

There appear to be persons—let us hope not many—who find refreshment and courage in the teachings of the “I Am” cult. If the members of the sect get comfort from the celestial guidance of their “Saint Germain,” however doubtful it seems to me, it is hard to say that they do not get what they pay for. Scores of sects flourish in this country by teaching what to me are queer notions. It is plain that there is wide variety in American religious taste. The Ballards are not alone in catering to it with a pretty dubious product.<sup>33</sup>

These comments reveal a conflict between the majority's stance on the source of religious value—seemingly embodied for them in the sincerity of the founders of the religion—and Justice Jackson's own perspective, which appears to exalt the viewpoint of the consumer of religion.

When the case returned to the Court in 1946, in the aftermath of new objections against the exclusion of women from the jury, Justice Jackson concurred in the majority's dismissal of the indictment on the grounds he had offered in his earlier dissent.<sup>34</sup> In addition, he insisted that the potential insincerity of the Ballards' representations could not, in and of itself, provide a sufficient basis for a conviction of fraud.<sup>35</sup> As he maintained, the Court's earlier determination that the trial could not consider whether the Ballards' religious assertions were true or false “leaves no statutory basis for conviction of fraud” because “[fraud] requires . . . a provably false representation in addition to knowledge of its falsity to make criminal mail fraud.”<sup>36</sup> Although the majority seemed assured that the federal government would simply reindict the Ballards,<sup>37</sup> the prosecution may have been convinced by Justice Jackson's reasoning; in any event, no additional charges were filed and the “I Am” movement appears to have been thriving through at least 1950.<sup>38</sup> A website for the Saint Germain Foundation confirms

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32 *Id.* at 93 (Jackson, J., dissenting). For example, Justice Jackson explained “that one knowingly falsified is best proved by showing that what he said happened never did happen. How can the Government prove these persons knew something to be false which it cannot prove to be false?” *Id.*

33 *Id.* at 94.

34 *Ballard v. United States (Ballard II)*, 329 U.S. 187, 196–97 (1946) (Jackson, J., concurring).

35 *Id.*

36 *Id.*

37 *Id.* at 196 (Majority opinion).

38 *See Saint Germain Found. v. Comm'r*, 26 T.C. 648, 657 (1956).

that the religion still persists.<sup>39</sup> Nor has governmental recognition continued to be withheld. Indeed, in 1956, the Tax Court determined that the "I Am" church was entitled to partake of the benefits of the tax exemptions reserved for organizations operated exclusively for religious purposes, despite the government's earlier prosecution of the Ballards.<sup>40</sup>

## II. PROTECTED PROSELYTIZING

Envision a church that wishes to increase its membership by proselytizing on a radio station. In order to present its message, the church must purchase an advertising slot. The resulting broadcast focuses predominantly upon criticizing well-established religious traditions and promoting the doctrines of this particular organization. The presentation also includes information about how to procure a pamphlet about the church for a certain amount of money. Is the institution's speech rendered commercial simply because it fits the form of an advertisement or contains a request for money in exchange for the publication? If, on one account, the speech involved falls under the rubric of commerce, either because it results from purchasing airtime or because it solicits an exchange of funds for literature, is it rendered any less religious for that reason?

Although some measure of First Amendment protection is now granted to commercial speech under the U.S. Constitution,<sup>41</sup> the Supreme Court's jurisprudence tended to devalue commercial speech through much of the twentieth century.<sup>42</sup> A number of cases from the

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39 See The "I Am" Activity of Saint Germain Foundation, <http://www.saintgermainfoundation.org> (last visited Nov. 23, 2008).

40 *Saint Germain Found.*, 26 T.C. at 660.

41 See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980) ("In commercial speech cases . . . a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761-65 (1976) (elaborating upon the reasons for protecting even commercial speech under the First Amendment).

42 See, e.g., *Breard v. Alexandria*, 341 U.S. 622, 641-44 (1951) (affirming a magazine subscription solicitor's conviction partly because "the fact that periodicals are sold," while not "put[ting] them beyond the protection of the First Amendment," does "bring[] into the transaction a commercial feature" that weighs against the solicitor in the balance between the First Amendment interests he derives from the maga-

World War II period involving Jehovah's Witnesses' efforts to engage in door-to-door proselytizing through the sale of religious literature therefore include significant debate about whether the Witnesses' activities should or should not be considered commercial. The position that gained ascendance in a set of cases decided in 1943—right before the Court heard *Ballard I*—maintained that the Witnesses' solicitation did not fall within a commercial framework.<sup>43</sup> The general view that religious and charitable appeals for funds should not be deemed commercial was reaffirmed by the Court in 1980 even after commercial speech had begun to enjoy the protections of the First Amendment.<sup>44</sup>

By contrast, although the ECHR has determined that proselytism falls within the purview of the religious liberties protected by Article 9 of the European Convention,<sup>45</sup> it has been much more willing than the U.S. Supreme Court to disaggregate speech from religion, to accept the characterization of proselytism involving financial incentives as a form of commercial speech and, as a consequence, to grant it lesser consideration than other kinds of religion or speech. Hence, in the 2003 case of *Murphy v. Ireland*,<sup>46</sup> the ECHR, while not itself categorizing the relevant speech as commercial rather than religious,

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zine publisher and those of the private householder); *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (“[T]he streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and . . . , though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. . . . [T]he Constitution imposes no such restraint on government as respects purely commercial advertising.”).

43 See *infra* notes 72–78 and accompanying text.

44 See *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980) (“[C]haritable appeals for funds, on the street or door to door, involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment. Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease. Canvassers in such contexts are necessarily more than solicitors for money. Furthermore, because charitable solicitation does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services, it has not been dealt with in our cases as a variety of purely commercial speech.”).

45 European Convention, *supra* note 5, art. 9; see also *infra* notes 75–76 and accompanying text (discussing the inclusion of proselytism in Article 9 of the European Convention, which protects freedom of thought, conscience, and religion).

46 38 Eur. H.R. Rep. 212 (2003), available at <http://www.echr.coe.int/echr>.

was willing to uphold a state-imposed restriction on religious radio advertisement on the grounds that Ireland could permissibly distinguish between religious advertisements and religious programming and ban the former while allowing the latter.<sup>47</sup>

In both contexts, the notoriously vexed categorization of speech as “commercial” provides a backdrop for the treatment of religious proselytizing. Although Article 10 of the European Convention—that protecting the freedom of expression—does not contain an explicit distinction among forms of speech,<sup>48</sup> the ECHR’s jurisprudence has, like that of the U.S. Supreme Court, differentiated between commercial and non-commercial varieties and, while including commercial speech within the compass of Article 10, given it reduced protection.<sup>49</sup> The rationales for treating commercial speech distinctly have been more fully explored in the U.S. than in the European context, in part because, as one commentator has recently opined, “the categorization approach to issues of freedom of expression may itself be attributed broadly to American origins.”<sup>50</sup> Both speaker- and listener-focused grounds have been adduced for including commercial speech within the embrace of the First Amendment.<sup>51</sup> Those advocating in favor of

47 See *infra* notes 85–97 and accompanying text.

48 Article 10 of the European Convention reads as follows:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

European Convention, *supra* note 5, art. 10.

49 See Colin R. Munro, *The Value of Commercial Speech*, 62 CAMBRIDGE L.J. 134, 138–41 (2003) (elaborating upon the ECHR’s treatment of commercial speech). As a recent article explains, while commercial speech has not been highly valued by the ECHR, the court’s rationale behind deferring more to member states’ judgments when commercial speech is involved has not yet fully emerged. See generally Maya Hertig Randall, *Commercial Speech Under the European Convention on Human Rights: Subordinate or Equal?*, 6 HUM. RTS. L. REV. 53, 77–84 (2006).

50 Munro, *supra* note 49, at 135.

51 See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762–64 (1976) (explaining that the fact that an advertiser’s interests are economic does not in and of itself justify removing his speech from First Amendment

enhancing protections for commercial speech have often relied on a particular vision of the marketplace of ideas and the autonomy of the consumer, who, they claim, should be presented with the full range of his choices in order to determine the best product for his needs.<sup>52</sup> By contrast, those criticizing the notion that commercial speech is deserving of regard under the First Amendment have sometimes emphasized that a corporate speaker cannot assert the same autonomy interests as other kinds of participants in the public arena because the fiduciary duty to shareholders to maximize profits itself dictates the permissible range of the corporation's speech.<sup>53</sup> Both in the U.S. and European systems, however, the level of protection of commercial speech has not been so high as to preclude the state from protecting consumer interests of various kinds.

The Supreme Court's continued adherence to a distinction between commercial speech and varieties of proselytism involving monetary exchange may therefore not only signal an aim of treating economic activities as compatible with religion but might also be con-

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protection, and contending further that "the particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate" and that "society also may have a strong interest in the free flow of commercial information").

52 See, e.g., R.H. Coase, *Advertising and Free Speech*, 6 J. LEGAL STUD. 1, 1-2 (1977) (arguing that there are equally compelling reasons for valuing speech in the marketplace of goods as in the marketplace of ideas); Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 255-60 (1998) (contending that "the listener's rights should be recognized as an independent basis on which to protect expression" and that giving these rights their proper due suggests the desirability of protecting commercial speech); see also Symposium, *Thoughts on Commercial Speech: A Roundtable Discussion*, 41 LOY. L.A. L. REV. 333, 338 (2007) (Kathleen M. Sullivan commenting) ("We fear government for speech more than markets; we have an anti-paternalism principle for government telling us what to think and say in a way that we don't have an anti-paternalism principle for government telling us how many hours we can work, or what wages we can receive, in part because we're afraid of government manipulating ideas and engaging in thought control as a means of serving other values. And when we tell people what they can hear or read, or listen to or watch, we're doing it to prevent ideas from reaching and influencing them. That has a different valence than the direct regulation of conduct.").

53 See C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 34-36 (1976) (emphasizing that speech functions as a manifestation of the self and that, on account of the profit requirement, corporations cannot be considered as possessing the same interests in self-expression as other individuals or entities); see also Symposium, *supra* note 52, at 336 (Steven H. Shiffrin commenting) ("I think one can also say [commercial speech] should be lower in the hierarchy of First Amendment values because of the—in the case of corporations in particular—lack of a liberty interest of the speaker.").

nected with the permissible restrictions on commercial speech itself. As the Court has observed, because commercial speech may mislead the consumer, it can be subjected to regulation designed to reduce the likelihood of fraud.<sup>54</sup> The *Ballard I* case, however, demonstrates that the Court will intervene in the assessment of whether fraud has occurred in the religious sphere only under a very specific and narrow range of circumstances.<sup>55</sup> Within U.S. constitutional jurisprudence, therefore, religion has been granted substantial latitude to pursue paths that, if engaged in by nonreligious entities, would be considered commercial, without itself being given that label.

This was not always, however, the state of affairs. Indeed, the U.S. Supreme Court initially took a tack similar to that which the ECHR later adopted, but it changed course in the space of a year and the rehearing of a single case. In 1942, in *Jones v. Opelika (Jones I)*,<sup>56</sup> the Court considered and rejected the free exercise claims in consolidated cases of Jehovah's Witnesses who had been jailed for violating ordinances requiring them to obtain and pay licensing fees for a permit to engage in public sales or door-to-door solicitation.<sup>57</sup> Those who pursued this form of proselytism would purchase a set of pamphlets from the national organization and charge an additional amount to members of the public or householders who decided to acquire one or more.<sup>58</sup> There was some evidence that a number of Jehovah's Witnesses would provide the literature gratis to those who were unwilling or unable to pay but still wished to receive the materi-

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54 See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564 (1980) (excepting misleading speech from any First Amendment protection); *Va. Pharmacy Bd.*, 425 U.S. at 771-72 ("Nor is there any claim that prescription drug price advertisements are forbidden because they are false or misleading in any way. Untruthful speech, commercial or otherwise, has never been protected for its own sake. Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem. The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely." (footnote and citations omitted)).

55 See *supra* notes 23-31 and accompanying text.

56 316 U.S. 584 (1942), *vacated per curiam*, *Jones II*, 319 U.S. 103 (1943). For a discussion of the historical context of this reversal, see Patrick J. Flynn, "Writing Their Faith into the Laws of the Land: Jehovah's Witnesses and the Supreme Court's Battle for the Meaning of the Free Exercise Clause, 1939-1945," 10 *TEX. J. C.L. & C.R.* 1, 32-34 (2004), and William Shepard McAninch, *A Catalyst for the Evolution of Constitutional Law: Jehovah's Witnesses in the Supreme Court*, 55 *U. CIN. L. REV.* 997, 1034-40 (1987).

57 *Jones I*, 316 U.S. at 586.

58 See *Murdock v. Pennsylvania*, 319 U.S. 105, 119 (1943) (Reed, J., dissenting).

als; nevertheless several lower courts determined that the defendants had actually obtained money from sales.<sup>59</sup>

The opinion for the divided Court, authored by Justice Reed, stated as “[t]he sole constitutional question . . . whether a nondiscriminatory license fee, presumably appropriate in amount, may be imposed upon [the defendants’] activities.”<sup>60</sup> Rejecting the distinction between a license and a tax on income or gross receipts,<sup>61</sup> the five-Justice majority characterized the proselytizing in question as different in kind rather than degree from the pursuit of religious rituals because money was involved.<sup>62</sup> While refraining from determining that the Jehovah’s Witnesses’ sale of religious literature was an activity exclusively commercial in nature, Justice Reed insisted that, because the transactions fit a commercial form, they could appropriately be subjected to a licensing fee.<sup>63</sup>

The dissenting Justices, by contrast, emphasized that the Court should examine the purpose rather than the form of the Jehovah’s Witnesses’ activities and deem the overarching motivations non-commercial in nature.<sup>64</sup> As Justice Stone argued,<sup>65</sup> criticizing the deployment of a licensing fee rather than a tax upon revenue, “[t]he

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59 *Jones I*, 316 U.S. at 587 (“The court . . . found petitioner guilty on evidence that, without a license, he had been displaying pamphlets in his upraised hand and walking on a city street selling them two for five cents.”); *id.* at 591 (“The jury was instructed to acquit unless it found the defendant was selling books or pamphlets. It returned a verdict of guilty.”).

60 *Id.* at 592–93.

61 *Id.* at 597.

62 *Id.* at 598 (“If we were to assume, as is here argued, that the licensed activities involve religious rites, a different question would be presented. These are not taxes on free will offerings. But it is because we view these sales as partaking more of commercial than religious or educational transactions that we find the ordinances, as here presented, valid.”).

63 *Id.* at 596–97 (“Casual reflection verifies the suggestion that both teachers and preachers need to receive support for themselves as well as alms and benefactions for charity and the spread of knowledge. But when, as in these cases, the practitioners of these noble callings choose to utilize the vending of their religious books and tracts as a source of funds, the financial aspects of their transactions need not be wholly disregarded. To subject any religious or didactic group to a reasonable fee for their money-making activities does not require a finding that the licensed acts are purely commercial. It is enough that money is earned by the sale of articles.”); *id.* at 597 (“When proponents of religious or social theories use the ordinary commercial methods of sales of articles to raise propaganda funds, it is a natural and proper exercise of the power of the State to charge reasonable fees for the privilege of canvassing.”).

64 *Id.* at 602 (Stone, C.J., dissenting).

65 Justice Stone’s opinion in this case has sometimes been viewed as articulating a “Preferred Freedoms Doctrine,” “heighten[ing] judicial protection to certain critical rights listed in the First Amendment” rather than simply providing equal treatment.

defendants' activities, if taxable at all, are taxable only because of the funds which they solicit. But that solicitation is for funds for religious purposes, and the present taxes are in no way gauged to the receipts."<sup>66</sup> Although acknowledging that "[t]he immunity which press and religion enjoy may sometimes be lost when they are united with other activities not immune," Justice Stone maintained that the relevant immunity had not been sacrificed in this case and that "[t]he constitutional protection of the Bill of Rights is not to be evaded by classifying with business callings an activity whose sole purpose is the dissemination of ideas, and taxing it as business callings are taxed."<sup>67</sup> Despite possessing a superficially commercial form, the Jehovah's Witnesses' proselytizing could not, according to Justice Stone, be crammed into a commercial box.

The other dissenters, led by Justice Murphy, similarly emphasized the religious rather than commercial purpose and motivations of the defendants. As they explained, "It does not appear that their motives were commercial, but only that they were evangelizing their faith as they saw it."<sup>68</sup> They similarly concluded that "[t]he exercise, without commercial motives, of freedom of speech, freedom of the press, or freedom of worship are not proper sources of taxation for general revenue purposes."<sup>69</sup> Rather than disregarding the economic realities faced as much by religious adherents as other members of the general public, these dissenters observed that most individuals would require some means of compensation for engaging even in the highest spiritual calling lest they be deprived of all livelihood.<sup>70</sup> As Justice Murphy elaborated:

It matters not that petitioners asked contributions for their literature. Freedom of speech and freedom of the press cannot and must not mean freedom only for those who can distribute their broadsides without charge. There may be others with messages more vital but purses less full, who must seek some reimbursement for their outlay or else forego passing on their ideas.<sup>71</sup>

He thereby dispensed with the majority's apparent conception of a religiosity purified of all material and economic needs.

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Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 *FORDHAM L. REV.* 459, 502 (2001).

66 *Jones I*, 316 U.S. at 609 (Stone, C.J., dissenting).

67 *Id.* at 608.

68 *Id.* at 612 (Murphy, J., dissenting).

69 *Id.* at 620.

70 *Id.* at 612-19.

71 *Id.* at 619.



The following year, the dissenters gained the ascendancy after the reargument of *Jones v. Opelika*—aided by the resignation of Justice Byrnes and the appointment of Justice Rutledge.<sup>72</sup> In several cases that came down on the same day,<sup>73</sup> the Justices further played out the arguments for treating the Jehovah's Witnesses' methods of proselytizing as religious or commercial. The new majority explored the historical grounding of the practices that the Witnesses had selected, explaining in *Murdock v. Pennsylvania* that “[t]he hand distribution of religious tracts is an age-old form of missionary evangelism—as old as the history of printing presses” and “has been a potent force in various religious movements down through the years.”<sup>74</sup> Furthermore, they suggested that the sincerity of the Witnesses' beliefs and practices weighed in their favor.<sup>75</sup> They likewise emphasized that the Jehovah's Witnesses were far from unique among religions in the attempt to gain financing through activities associated with religious practice.<sup>76</sup> As Justice Douglas suggested in *Murdock*, some aspects of even as traditional a type of practice as Catholic worship would be rendered non-religious by circumscribing too narrowly the scope of noncommercial religious activities: “[T]he mere fact that the religious literature is ‘sold’ by itinerant preachers rather than ‘donated’ does not transform

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72 *Jones II*, 319 U.S. 103 (1943) (reargued Mar. 10–11, 1943). For a discussion of the significance of the switch in Justices and an account of the gradual rise of Justice Stone's position on religious liberty from *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), to the decision after reargument in *Jones II*, see generally Alpheus Thomas Mason, *The Core of Free Government, 1938–40: Mr. Justice Stone and “Preferred Freedoms,”* 65 YALE L.J. 597 (1956) (tracing Justice Stone's decisions). See also David M. Levitan, *The Effect of the Appointment of a Supreme Court Justice*, 28 U. TOL. L. REV. 37, 57 (1996) (“Justice Rutledge took his seat on the Court on February 15, 1943, and on that very day the Court granted a petition for a rehearing and restored the *Jones* case to the docket for reargument. It was reargued on March 10 and 11, 1943, and was decided, and the earlier decision reversed, by a five-to-four vote on May 3, 1943. Justice Rutledge obviously cast the crucial and deciding vote, since none of the other Justices shifted their positions from the earlier decision.” (footnotes omitted)).

73 See *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

74 *Murdock*, 319 U.S. at 108.

75 See *id.* at 109 (“The integrity of this conduct or behavior as a religious practice has not been challenged. Nor do we have presented any question as to the sincerity of petitioners in their religious beliefs and practices, however misguided they may be thought to be.”).

76 For an excellent discussion of how the majority in *Jones II* attempted to bolster support for the practices of the Jehovah's Witnesses, whose movement was “unpopular and unfamiliar” at the time, by appealing to their similarity to the activities of more established groups, see Samuel J. Levine, *Toward a Religious Minority Voice: A Look at Free Exercise Law Through a Religious Minority Perspective*, 5 WM. & MARY BILL RTS. J. 153, 164–65 (1996).

evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church service a commercial project.”<sup>77</sup> While acknowledging that, on occasion, transactions engaged in by a religion or its adherents might fall on the commercial side, Justice Douglas urged caution in so categorizing religious endeavors.<sup>78</sup>

Those who had comprised the majority in *Jones I* became, on the other hand, more vehement in their efforts to prove the inherently commercial nature of the Witnesses’ proselytizing. Justice Jackson, for example, called into question the assumption that the Jehovah’s Witnesses comprised a non-profit organization and contended that the financial information needed to determine this status was not forthcoming.<sup>79</sup> Others, led by Justice Reed, who played on the distinction between pecuniary and otherwise “free” forms of religious exercise,<sup>80</sup> insisted that the form of the transaction should dictate its treatment:

The *quid pro quo* is demanded. . . . The Witness sells books to raise money for propagandizing his faith, just as other religious groups might sponsor bazaars, or peddle tickets to church suppers, or sell Bibles or prayer books for the same object. However high the purpose or noble the aims of the Witness, the transaction has been found by the state courts to be a sale under their ordinances . . . .<sup>81</sup>

Nor was it only the reciprocity of payment and receipt between the Witnesses and those who bought their literature that proved relevant to these dissenters. As Justice Frankfurter’s dissent argued, the Witnesses had received the benefits of state revenue expenditure, and were therefore under an obligation to reciprocate the state’s investment.<sup>82</sup> For the dissenters, the mere fact of an exchange for value—

77 *Murdock*, 319 U.S. at 111.

78 *See id.* at 110–12.

79 *See Douglas v. City of Jeannette*, 319 U.S. 157, 169–70 (1943) (Jackson, J., concurring in part and dissenting in part) (“The assumption that it is a ‘non-profit charitable’ corporation may be true, but it is without support beyond mere assertion. In none of these cases has the assertion been supported by such usual evidence as a balance sheet or an income statement. What its manufacturing costs and revenues are, what salaries or bonuses it pays, what contracts it has for supplies or services we simply do not know.”).

80 *See Murdock*, 319 U.S. at 122 (Reed, J., dissenting).

81 *Id.* at 119.

82 *Id.* at 140 (Frankfurter, J., dissenting) (“The ultimate question in determining the constitutionality of a tax measure is—has the state given something for which it can ask a return? There can be no doubt that these petitioners, like all who use the streets, have received the benefits of government. Peace is maintained, traffic is regulated, health is safeguarded—these are only some of the many incidents of municipal administration.”).

whether between the Witnesses and recipients of their literature or the state and religious practitioners—definitively placed the kind of proselytism at issue in *Jones* and related cases on the commercial side of the divide between commerce and religion.

The ECHR has similarly been reluctant to extend protection for proselytism to activities that bear a commercial semblance. In the 1992 case of *Kokkinakis v. Greece*,<sup>83</sup> the ECHR determined, in the face of Greece's prohibition on proselytism and the conviction of a Jehovah's Witness for violating this restriction, that Article 9 of the European Convention includes proselytism within the protection it accords to the freedom to "manifest [one's] religion."<sup>84</sup> More recently, however, the ECHR's 2003 decision in *Murphy v. Ireland* revealed that this liberty would not stretch far into what might be deemed the commercial sphere. In *Murphy*, the ECHR considered a claim brought by a pastor of the Irish Faith Centre, a Christian ministry in Dublin.<sup>85</sup> The pastor claimed that his Article 9 rights had been violated because Irish law prevented him from broadcasting an advertisement about his church.<sup>86</sup>

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83 260 Eur. Ct. H.R. (ser. A) at 6 (1993).

84 *Id.* at 17 ("As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, skeptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. While religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to 'manifest [one's] religion.' Bearing witness in words and deeds is bound up with the existence of religious convictions." (alteration in original)); see also European Convention, *supra* note 5, art. 9 ("Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.").

85 38 Eur. H.R. Rep. 212, 216 (2003), available at <http://www.echr.coe.int/echr>.

86 *Id.* at 216–18. Although Murphy was unsuccessful in his application to the ECHR, Irish law was subsequently somewhat altered in the aftermath of the adjudication of his case in Ireland. See G.F. Whyte, *The Frontiers of Religious Liberty: A Commonwealth Celebration of the 25th Anniversary of the U.N. Declaration on Religious Tolerance—Ireland*, 21 EMORY INT'L L. REV. 43, 53–54 (2007) ("Section 20(4) of the Broadcasting Authority Act of 1960 and Section 10(3) of the Radio and Television Act of 1988 prohibited the broadcasting of, *inter alia*, any advertisement 'which [was] directed towards any religious . . . end.' However, in 2001 this ban was modified somewhat by Section 65 of the Broadcasting Act of 2001 to permit the broadcasting of advertisements for religious publications, religious events, and religious ceremonies. Such was permitted, provided the broadcasts did 'not address the issue of the merits or other-

Rather than considering the applicant's claim as one that implicated both speech and religion, the ECHR categorized the matter as involving expression, not free exercise, opining that "the matter essentially at issue in the present case is the applicant's exclusion from broadcasting an advertisement, an issue concerning primarily the regulation of his means of expression and not his profession or manifestation of his religion."<sup>87</sup> Thus, despite the applicant's insistence that his efforts to advertise the church were protected by Article 9 of the European Convention,<sup>88</sup> the ECHR instead evaluated his claim under Article 10.

Although the ECHR's opinion initially classified the relevant speech as religious more than commercial expression, stating that "[t]he Court notes at the outset that the nature and purpose of the expression contained in the relevant advertisement accords with its being treated as religious, as opposed to commercial, expression even if the applicant purchased the relevant broadcasting time,"<sup>89</sup> the ECHR ultimately accepted the distinction that Ireland endeavored to draw between the status of religious programming and advertisements.<sup>90</sup> According to Article 10 and the jurisprudence of the ECHR, a governmental interference with speech may be justified if prescribed by law and necessary in a democratic society.<sup>91</sup> In assessing whether Ireland's restriction on speech was, in this case, "necessary in a democratic society," the ECHR considered the fact that the prohibition on religious speech was limited to advertising.<sup>92</sup> The ECHR therefore seemingly endorsed Ireland's attempt to differentiate between religious programming and religious advertising:

Moreover, the prohibition related only to advertising. This Court considers that this limitation reflects a reasonable distinction made by the State between, on the one hand, purchasing broadcasting time to advertise and, on the other, coverage of religious mat-

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wise of adhering to any religious faith or belief or of becoming a member of any religion or religious organisation." (alteration in original) (footnotes omitted).

87 *Murphy*, 38 Eur. H.R. Rep. at 232. To the extent that the ECHR did deem the expression at issue religious, this determination did not aid Murphy's application. Instead, the ECHR has granted states a much broader margin of appreciation for regulation in the area of religious expression than in other spheres. See George Letsas, *Two Concepts of the Margin of Appreciation*, 26 OXFORD J. LEGAL STUD. 705, 724–28 (2006) (explaining the ECHR's special treatment of expression that might offend others' religious or moral sensibilities).

88 *Murphy*, 38 Eur. H.R. Rep. at 229–32.

89 *Id.* at 235.

90 *See id.* at 236.

91 *See* European Convention, *supra* note 5, art. 10.

92 *See Murphy*, 38 Eur. H.R. Rep. at 233–38.

ters through programming (including documentaries, debates, films, discussions and live coverage of religious events and occasions). Programmes are not broadcast because a party has purchased airtime and, as outlined by the Government, they must be impartial, neutral and balanced, the objective value of which obligation the parties did not dispute. The applicant retained the same right as any other citizen to participate in programmes on religious matters and to have services of his Church broadcast in the audiovisual media. Advertising, however, tends to have a distinctly partial objective . . . .<sup>93</sup>

Despite its claim to be treating Murphy's potential speech as religious rather than commercial, the ECHR thus endorsed Ireland's implicit devaluation of advertising, including advertising of a religious variety.<sup>94</sup> On this basis, the ECHR deemed valid the Irish government's claim that the prohibition on religious advertising was necessary to prevent religious strife in a country that had previously been subject to such strife.<sup>95</sup> Article 10 of the European Convention was, therefore, not violated, according to the ECHR.<sup>96</sup>

### III. COMMERCIAL CONDUCT

Think of a religion that, as part of providing a comprehensive worldview to believers, decides to give its members religious alternatives to a variety of services that they would otherwise take advantage of within secular society. Among the offerings of this religion are sessions that seem functionally similar to psychotherapy and activities that increase physical fitness in ways that resemble classes at a gym. Suppose also that this religion requires that adherents pay a fixed "contribution" for each of these sessions. Should these sessions be envisioned as taxable products? If so, are they thereby rendered non-religious? If the religion in question features many of these kinds of services, is it really a religion or does it constitute a commercial enterprise?

These questions have been raised most concretely in legal decisions concerning the Church of Scientology. The Church of Scientology has been confronted in a number of different nations with the charge of being a commercial rather than a religious entity.<sup>97</sup>

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93 *Id.* at 236.

94 *See id.* at 238.

95 *Id.* at 234-38.

96 *Id.* at 238.

97 For a comparison of American, English, Australian, and German approaches to considering whether the Church of Scientology is a religion, see Paul Horwitz, *Scientology in Court: A Comparative Analysis and Some Thoughts on Selected Issues in Law*

For example, in Germany in the early 1990s, this accusation was spread widely by the Federal Parliament in Bonn as well as the Parliaments of the *Länder*, and the major German political parties excluded Scientologists from membership.<sup>98</sup>

Individual adherents of Scientology have also faced challenges with respect to the religious character of one of the practices they consider essential, that of auditing. The process has been described as follows:

Scientologists believe that an immortal spiritual being exists in every person. A person becomes aware of this spiritual dimension through a process known as “auditing.” Auditing involves a one-to-one encounter between a participant (known as a “preclear”) and a Church official (known as an “auditor”). An electronic device, the E-meter, helps the auditor identify the preclear’s areas of spiritual difficulty by measuring skin responses during a question and answer session. . . .

. . . .  
The Church charges a “fixed donation,” also known as a “price” or a “fixed contribution,” for participants to gain access to auditing and training sessions. . . . This system of mandatory fixed charges is based on a central tenet of Scientology known as the “doctrine of exchange,” according to which any time a person receives something he must pay something back.<sup>99</sup>

As one might anticipate from the invocation of a “doctrine of exchange” and the fact that a price is set for auditing sessions, the sale

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*and Religion*, 47 DEPAUL L. REV. 85 (1997). For a discussion of the widespread belief that Scientology is a commercial enterprise rather than a religion, see generally Benjamin Beit-Hallahmi, *Scientology: Religion or Racket?*, 8 MARBURG J. RELIGION 1 (2003). As Beit-Hallahmi writes,

Since the 1960s, courts and governments have ruled that Scientology is a secular, profit-making organization, and should be treated as such. Thus, the tax-exempt status of the organization in France was revoked in 1985, after it had been determined that its aim was profit-making. Later on, Spain, Greece, Germany, and Denmark decided to treat it as a for-profit organization.

*Id.* at 15.

98 *Scientology Kirche Deutschland v. Germany*, App. No. 34614/96, 89-A Eur. Comm’n H.R. Dec. & Rep. 163, 165 (1997). For an assessment of the respective treatments of Scientology in Germany and the United States concluding that the German approach to the movement has been more rigid than the American, see Michael Browne, Comment, *Should Germany Stop Worrying and Love the Octopus? Freedom of Religion and the Church of Scientology in Germany and the United States*, 9 IND. INT’L & COMP. L. REV. 155, 186–99 (1998).

99 *Hernandez v. Comm’r*, 490 U.S. 680, 684–85 (1989) (footnote and citations omitted).

of E-meters and the payment for auditing sessions have in many contexts been deemed commercial activities. For example, even the U.S. Supreme Court refused to find that individual Scientologist's payments for auditing services were tax deductible or that this violated the Free Exercise Clause.<sup>100</sup> In doing so, it applied a formal test—akin to that used by the Court in *Jones I*—that assessed the existence of a quid pro quo.<sup>101</sup> Despite this determination, however, the Court did continue to view auditing as a religious activity, assuming that the value of the quid pro quo was assessed in the eyes of the religious beholder.<sup>102</sup> By contrast, the ECHR classifies activities like purchasing an E-Meter or investing in auditing services as commercial and therefore refuses to view them as falling within the European Convention's provisions protecting the manifestation of religion.<sup>103</sup> Whereas under the U.S. model religion and commerce can coexist, under the European paradigm, once an activity or entity is deemed commercial, it fails to be considered religious at all.

The European mode of addressing the relationship between the commercial and the religious is exemplified by the European Commission of Human Rights' (Commission) decision in *X. & Church of Scientology v. Sweden* finding the Church of Scientology's claim of a violation of the "freedom to manifest a religious belief in practice" protected by Article 9 of the European Convention inadmissible.<sup>104</sup> The Church had been prohibited by a judicial injunction in Sweden from publishing an advertisement for the E-Meter that read "Scientology technology of today demands that you have your own E-meter. The E-meter (Hebbard Electrometer) is an electronic [instrument] for measuring the mental state of an individual and changes of the state. There exists no way to clear without an E-meter. Price: 850 CR."<sup>105</sup>

The injunction demanded alterations in the language and representations of the advertisement before it could be published and was justified on the grounds of protecting potential consumers.<sup>106</sup> Before assessing whether this particular injunction violated the European Convention, the Commission declared that it was "of the opinion that the concept, contained in the first paragraph of Article 9, concerning the manifestation of a belief in practice does not confer protection on

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100 *Id.* at 684.

101 *Id.* at 689.

102 *See id.* at 694.

103 *See X. & Church of Scientology v. Sweden*, App. No. 7805/77, 16 Eur. Comm'n H.R. Dec. & Rep. 68 (1979).

104 *Id.* at 68, 75.

105 *Id.* at 69.

106 *Id.*

statements of purported religious belief which appear as selling 'arguments' in advertisements of a purely commercial nature by a religious group."<sup>107</sup> Applying this general principle to the advertisement in question, the Commission determined that it constituted "more the manifestation of a desire to market goods for profit than the manifestation of a belief in practice, within the proper sense of that term."<sup>108</sup> The case did not, therefore, fall within the compass of Article 9, in the Commission's view.<sup>109</sup> Because it construed the advertisement as commercial activity, the Commission refrained from adjudicating the Church of Scientology's claims as ones for freedom of religious practice.<sup>110</sup>

The Commission instead resolved the application by evaluating it under Article 10.<sup>111</sup> As noted earlier, a state may interfere with free speech only if this interference is prescribed by law and necessary in a democratic society.<sup>112</sup> Claiming in *X. & Church of Scientology* that commercial speech deserves fewer protections than its noncommercial counterparts, the Commission applied the requirement of "necessity" less stringently than in other contexts.<sup>113</sup> The injunction could, therefore, be upheld on the ground that the court issuing it had found that "the advertisements were misleading and that it was important to safeguard the interests of consumers in matters of marketing activities by religious communities and especially in the present case where the consumer would be particularly susceptible to selling arguments."<sup>114</sup> Despite the fact that the advertisements were only distributed to members of the Church of Scientology, the Commission determined it suf-

107 *Id.* at 72.

108 *Id.*

109 *Id.* at 75.

110 Although dealing with commercial practice rather than speech, the ECHR case of *Cha'are Shalom ve Tsedek v. France*, 2000-VII Eur. Ct. H.R. 231, demonstrated a similar propensity for considering the commercial as potentially outside the purview of Article 9. In evaluating and rejecting the claims of a Jewish liturgical association of a right to perform ritual slaughter, the ECHR viewed France's assertion that "the applicant association's activity was essentially commercial, and only religious in an accessory way, since it mainly sought to supply meat from animals slaughtered by its ritual slaughterers which was certified '*glatt*', and that it could therefore not be considered a 'religious body'" as falling within the State's appropriate margin of appreciation. *See id.* at 256.

111 *X. & Church of Scientology*, App. No. 7805/77, 16 Eur. Comm'n H.R. Dec. & Rep. at 72.

112 *Id.*; *see also* note 91 and accompanying text.

113 For the Commission's and the ECHR's tendency to devalue commercial speech, *see supra* note 49 and accompanying text.

114 *X. & Church of Scientology*, App. No. 7805/77, 16 Eur. Comm'n H.R. Dec. & Rep. at 74.



ficient that the enjoining court had found that the notices were intended to stimulate interest in purchase of the E-Meter both within the Scientology community and more broadly.<sup>115</sup> Both consumers within the Church and outside of it were therefore construed as beneficiaries of the injunction. In this instance, the Commission first classified the activity in question as commercial and, therefore, not religious, then, because of its deference to state claims of necessity in restrictions on speech—and, in particular, commercial speech—viewed the State's actions as falling within the sphere of activity permitted by the European Convention.

The Commission's decision, furthermore, suggested a particular vision of the relationship between a religion and its current or potential adherents. Unlike the U.S. Supreme Court in *Ballard*, which eschewed the notion that religious institutions could be held accountable for misleading or fraudulent, and not just insincere, representations, the Commission viewed the State as acting within the legitimate bounds of its authority in policing the dissemination of religious assertions. Indeed, the Commission's implicit endorsement of the Swedish court's determination that state intervention was important "especially in the present case where the consumer would be particularly susceptible to selling arguments" indicates a willingness to view religious consumers as even more in need of protection than secular ones, who might presumably operate according to more of a rationalist instrumentalist logic.<sup>116</sup> This view insists upon the creation of value either objectively or by the religious institution itself, rather than in a negotiation among the founders, current members, and potential ones, and maintains the ability of a state to assess the presence or absence of that value.

The U.S. Supreme Court's treatment of the transaction involved in auditing provides an instructive contrast. In the 1989 case of *Hernandez v. Commissioner*,<sup>117</sup> the Court considered whether payments for auditing could be classified as "charitable contributions" within the meaning of that phrase in the Internal Revenue Code.<sup>118</sup> The Court's answer turned on whether a member of the Church of Scientology could be thought to have received consideration in return for his supposed contribution for auditing. If such a quid pro quo existed, Justice Marshall, writing for the Court, explained, the fees paid could

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115 *Id.* at 73.

116 *See id.* at 74.

117 490 U.S. 680 (1989).

118 *Id.* at 684–89.

hardly constitute charitable contributions.<sup>119</sup> The Scientologists, as well as Justices O'Connor and Scalia, in dissent, argued that analyzing transactions through the formalistic lens of a quid pro quo is inappropriate when the benefit received is of a religious nature.<sup>120</sup> On the surface, this debate bears some resemblance to the controversy between the majority and dissenters in the *Jones* cases; indeed, Justice Reed's dissent in *Murdock* relied heavily on the existence of a quid pro quo.<sup>121</sup> In the *Hernandez* case, however, the questions of how to determine whether value is religious or secular and what that value is assumed a much more central role in the opinions.

As Justice O'Connor emphasized through the example of partially deductible contributions—in which context the taxpayer is permitted to deduct the amount in excess of the value of the item or service received—it may be difficult to ascertain the value of a religious benefit;<sup>122</sup> hence, assessment of whether a quid pro quo has actually occurred depends entirely on whether the religious adherent does, in fact, place value upon the particular religious item or service and believe this value commensurate to the amount he or she has paid to the religious institution. The Court's response to this argument was, in part, to insist that even forcing courts to evaluate whether a benefit is religious or secular “might raise problems of entanglement between church and state.”<sup>123</sup> In *Hernandez*, the Court therefore both classified the transaction in question as a quid pro quo and, hence, commercial, and maintained a studied indifference as to the amount of the benefit obtained by those who procured auditing services and even as to whether the underlying benefit could be construed as religious or not.<sup>124</sup> Unlike the ECHR, the Supreme Court views the commercial and the religious as potentially coexisting; in such instances, however, commercial valuation might not be performed by the Court itself but thrown back upon the individual believer. The value of an activity that might be either religious or sec-

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119 *Id.* at 691–92.

120 *See id.* at 705–08 (O'Connor, J., dissenting).

121 *See supra* text accompanying note 81.

122 *Hernandez*, 490 U.S. at 705–07 (O'Connor, J., dissenting).

123 *Id.* at 694 (majority opinion). The Court also indicated that there might be some circumstances in which the government would assess the value of a religious benefit not by looking at the recipient but instead by examining the cost to the provider of furnishing it. *Id.* at 697–98 (“In cases where the economic value of a good or service is elusive—where, for example, no comparable good or service is sold in the marketplace—the IRS has eschewed benefit-focused valuation. Instead, it has often employed as an alternative method of valuation an inquiry into the cost (if any) to the donee of providing the good or service.”).

124 *See id.* at 691–93.

ular is, thus, demonstrated by the very fact of the adherent's sincere belief that he is receiving a benefit for which he is willing to pay.

#### CONCLUSION

In many—and perhaps an increasing number of—instances, religion overlaps with the commercial sphere and courts are obligated to determine whether or not to adopt an entirely hands-off approach simply because the specter of religion lurks on the horizon. Whereas the jurisprudence of the ECHR tends to accept its member states' separation of commercial elements out from the protections more generally accorded to religion, the U.S. Supreme Court has treated the two spheres as overlapping. To the extent that each court does consider religious transactions in terms of commercial relations, they also arrive at very different conceptions of the connection between a religious institution and the current or potential religious believer. While the ECHR seems more concerned with protecting others against the incursion of possibly misleading or offensive religious representations, the Supreme Court appears to view religious value as generated through a complex interaction between religious entities and individual adherents.