The Prosecution of Religious Fraud

Stephen Senn
The first amendment to the United States Constitution protects the religious freedom of individuals through its establishment and free exercise clauses. Should the government’s hands-off policy under the free exercise clause provide a protective blanket for fraudulent moneymaking schemes carried out in the name of religion? The author of this Article argues that protection of religious freedom can comfortably coexist with protection from religious fraud where courts employ a “sincerity test.” He concludes that with appropriate procedural safeguards, courts can use this test to distinguish sincere religious exercise from criminally fraudulent enterprise.

The question of how to calibrate the balance of power between the state and the individual is most bluntly presented when the state imposes criminal sanctions against an individual for doing that which the individual claims to have a right to do.1 The resulting conflict presents the issue of whether the state is acting legitimately, or from a different perspective, whether the individual’s activity is constitutionally protected. In the area of religious liberty, the free exercise clause of the first amendment2 expressly provides that in conflicts with the government, the individual is to have the upper hand.

This Article focuses on the criminal prosecution of religious fraud, arguing that those who commit the types of fraud discussed below merit no constitutional protection3 and should be prosecuted under a neutral application of the criminal fraud laws.4 The risk of punishing individuals who should be protected necessitates heightened proce-
This Article contends that the key to prosecution without persecution is accuracy in determining whether the religious beliefs of the accused are sincerely held.

I. THE REVEREND DODGER: A HYPOTHETICAL

Imagine the following hypothetical: Mr. Dodger, an aspiring confidence person, is contemplating the script of his first major swindle. His thoughts are guided by two primary concerns: high profitability and minimal risk of criminal prosecution—rational concerns of the utilitarian criminal mind. Dodger considers and rejects a Ponzi scheme, a real estate scam and an AIDS "cure" because of the high risk of prosecution.

Still searching for a scam, Dodger absent-mindedly switches from station to station with his television remote control. At the high end of the cable spectrum, a well-dressed gentleman relates his most recent conversation with God. Just that morning at 4:00 a.m., says this gentleman, he was awakened by a voice with an important new plan for humanity. Upset by the unfortunate lack of faith in the world, God had come to him with a plan to restore faith to the world. God's plan, the gentleman continues, is to generously reward the truly faithful, once they have adequately demonstrated their faith. A person with faith will believe that the faithful shall be rewarded. To obtain God's reward, the person need only provide God with adequate evidence of faith. That evidence consists of sending one hun-
dred dollars to this gentleman, who has selflessly and gladly offered his services to help the Lord carry out His new plan for humanity.

Dodger is impressed. He has seen press accounts of religious leaders who have built incredible financial empires, but he has never considered such a line of work for himself. Thinking the matter over, however, he decides it to be quite a good scam. The potential for profit seems enormous, and Dodger cannot recall anyone having been prosecuted for this sort of thing. As his swindle, he decides to attempt to persuade everyone with whom he can communicate, by whatever medium, that God wishes them to send money to him, the Reverend Dodger.

Whether Dodger proceeds as a mainstream protestant evangelist or as the oddly-garbed high prophet of a bizarre new cult is only tangentially relevant to the constitutional arguments presented below. The important point is that no sincere religious belief motivates Mr. Dodger's actions. His sole motivation is the hope of making money.

8. For a recent documentation of the vast amounts of money raised by religious leaders, see Turley, Laying Hands on Religious Racketeers: Applying Civil RICO to Fraudulent Religious Solicitation, 29 WM. & MARY L. REV. 441 (1988). Each year, an estimated two billion tax-deductible dollars go to religious fundraisers. Id. at 443. While this estimate is necessarily little more than a rough guess given the many local television and radio ministries, the top five televangelists alone raise over $500 million annually. Id. at 443 n.7.

The most noteworthy update to Turley's article is found in In re Heritage Village Church, 92 Bankr. 1000 (Bankr. D.S.C. 1988) (detailing the financial misdealings of James Bakker and his associates in their leadership of the Praise the Lord (PTL) ministry). Judge Rufus W. Reynolds' opinion provides a chart of the bonuses paid to PTL executives in the nine months before James Bakker's resignation from the ministry. During this nine-month period Tammy Faye Bakker received $335,000, David Taggart (vice-president of PTL and administrative assistant to Mr. Bakker) received $493,700, Richard Dortch (chief operation officer of PTL) received $453,010, and James Bakker (president and chair of the board of directors of PTL) received $2,229,305. Id. at 1004.

9. See Turley, supra note 8; see also Comment, Televangelism and the Federal Communications Commission: To Regulate or Retreat, 91 DICK. L. REV. 553, 556-58 (1986).


A 24-count indictment against James Bakker and Richard Dortch of the PTL was issued on Dec. 5, 1988. Marcus, Jim Bakker, Former Aides Are Indicted In PTL Case, Wash. Post, Dec. 6, 1988, at A1, col. 3; Smothers, Bakker And Ex-Aide Are Charged With Defrauding Donors To PTL, N.Y. Times, Dec. 6, 1988, at A1, col. 4. Mr. Dortch entered a plea agreement admitting to one count each of wire fraud and conspiracy. Following his plea for mercy, United States District Judge Robert Potter sentenced him to eight years in prison and a $200,000 fine. Patterson, Dortch gets 8 years in PTL case, St. Petersburg Times, Aug. 25, 1989, at A7, col. 1. On Oct. 24, 1989, Judge Potter sentenced Bakker to 45 years in prison and fined him $500,000. Schmich, Bakker gets 45 years and a fine of $500,000, Chicago Tribune, Oct. 25, 1989 at A1. Mr. Bakker's trial was well-covered by the media, which may help reduce the number of Dodgers in the future. See, e.g., Grimm, A torn ministry, and its leader, on trial, Miami Herald, Aug. 27, 1989, at A1, col. 1.
II. RELIGIOUS FRAUD IS NOT AND SHOULD NOT BE EXEMPT FROM CRIMINAL LIABILITY

Dodger’s plan clearly falls within the letter of the various criminal statutes prohibiting fraud.11 To implement his plan, Dodger will make innumerable false claims of his own faith and of the commands of God with the specific intent to defraud others. These facts meet the required elements of fraud,12 and since Dodger will almost certainly use the U.S. Postal Service to solicit funds, he will also violate the federal mail fraud statute.13

If Dodger also makes fraudulent claims of objectively secular fact, such as “All money raised will go to feed hungry children,” but the money instead goes only to Dodger’s pocket, prosecuting his case is much easier, as little room would exist for a claim of constitutional protection.14 Fraudulent claims of secular fact would clearly constitute unprotected fraud despite the religious context. These claims therefore would not be nearly as close to receiving constitutional protection as would fraudulent claims of religious belief. This Article gives the Dodgers of the world sufficient credit not to make fraudulent secular claims which may be embarrassingly disproved.15

11. See Fla. Stat. § 817.034 (3)(d) (1987) (“‘Scheme to defraud’ means a systematic, ongoing course of conduct with intent to obtain property from one or more persons by false or fraudulent pretenses, representations, or promises or willful misrepresentations of a future act.”); Utah Code Ann. § 76-10-1801 (1989) (“Communications fraud” defined as “any scheme or artifice to defraud another or to obtain from another money, property, or anything of value by means of false or fraudulent pretenses, representations, promises, or material omissions” in which the defrauder “communicates directly or indirectly with any person by any means for the purpose of executing or concealing the scheme or artifice.”).
12. See id. Dodger’s moneymaking scheme involves false pretenses, false representations, and false promises.
14. See, e.g., Cantwell v. Connecticut, 310 U.S. 296, 306 (1940) (“Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public. Certainly penal laws are available to punish such conduct.”); Schneider v. State, 308 U.S. 147, 164 (1939) (“[F]raudulent appeals may be made in the name of charity and religion . . . [and] may be denounced as offenses and punished by law.”).

Courts have almost uniformly allowed actions against fraudulent assertions regarding secular matters despite the religious context. See United States v. Snowden, 770 F.2d 393 (4th Cir. 1985), cert. denied, 474 U.S. 1011 (1986); United States v. Gering, 716 F.2d 615 (9th Cir. 1983); SEC v. World Radio Mission, Inc., 544 F.2d 535 (1st Cir. 1976); United States v. Carruthers, 152 F.2d 512 (7th Cir. 1945), cert. denied, 327 U.S. 787 (1946); People v. Le Grande, 309 N.Y. 420, 131 N.E.2d 712 (1956).

Even Justice Jackson, who in United States v. Ballard, 322 U.S. 78 (1944), argued for an outright prohibition of fraud charges based on lack of sincere religious belief, would allow criminal prosecution of one “making false representations on matters other than faith or experience, as for example if one represents that funds are being used to construct a church when in fact they are being used for personal purposes.” Id. at 95 (Jackson, J., concurring). For a discussion of Ballard, see infra text accompanying notes 31-41.
15. This should not suggest that prosecutors have been eager to bring charges against even
Although the laws prohibiting fraud clearly apply to Dodger, prosecution of any type of fraud in the religious context is uncommon.\textsuperscript{16} Although this rarity of prosecution may be due to the uniform law abiding behavior of religious leaders, it seems more likely that prosecutors are simply hesitant to bring such suits.\textsuperscript{17} To the extent that this hesitancy exists, it grants a de facto exemption from prosecution to those who perpetrate fraud on persons genuinely in search of spiritual guidance. Such an exemption creates a malevolent gap in the protections a state owes its citizens,\textsuperscript{18} and is contrary to the wise policies underlying the religion clauses of the first amendment.\textsuperscript{19}

A. The Victims

Although it is an unfortunately disparaging analogy, some insight on religious fraud may be found in the Marxist comparison of religion to opium.\textsuperscript{20} Religious faith serves to ease the pain and emptiness of this type of constitutionally unproblematic fraud. See Turley, \textit{supra} note 8, at 461-63 (documenting several allegations of this type of fraud which have not been prosecuted).\textsuperscript{16} See \textit{supra} note 10.

\textsuperscript{17} See Panel Discussion, \textit{Regulation of Alternative Religions By Law or Private Action: Can and Should We Regulate?}, 9 N.Y.U. REV. L. & SOC. CHANGE 109, 118 (1980). Professor Nathan Dershowitz commented:

\begin{quote}
Today there is no neutral application of law when it comes to religion. The law simply is not applied at all. When you say, therefore, "Let's apply the criminal law to these groups," it is a waste of time because it simply is not being done. If you saw somebody being kidnapped off the streets of New York City and you went up to a police officer and said, "That person was kidnapped by the Unification Church," the cop simply would not go after him. Now, that is what I think is part of the problem. The minute law enforcement officers are told a religious group is involved, they refuse to act. If you go into court, and claim that the activities that are engaged in by this group are the same as those of the Mafia, the difference in the application of the law is clear. I went down to Congress about a year and a half ago (before Jonestown) and the Congressmen just were not interested \textit{at all} in certain kinds of problems. As to what was happening in religion, they simply did not want to get involved.

What I am looking for is this neutral application of law which would require that religious groups have certain things investigated. I don't want to use religion as a shield that will allow these groups to engage in certain gross criminal activities; I think that is what is happening today. Certain gross criminal activities are being engaged in, and we are \textit{afraid} to investigate because we say it is religion. That cannot be justified in terms of the first amendment.
\end{quote}

\textit{Id.} (emphasis in original).

The FCC has also been criticized for its failure to enforce the law against religious programmers. See Comment, \textit{supra} note 9, at 558-74.\textsuperscript{18} Gospel Army v. City of Los Angeles, 27 Cal. 2d 232, 241, 163 P.2d 704, 714 (1945) ("The modern state owes and attempts to perform a duty to protect the public from those who seek for one purpose or another to obtain its money.").\textsuperscript{19} See infra text accompanying notes 25-29.

\textsuperscript{20} K. Marx, \textit{Introduction, Critique of the Hegelian Philosophy of Right} (1844), in \textbf{THE MARX-ENGELS READER} 12 (R. Tucker ed. 1972) ("Religion is the sigh of the oppressed creature, the feeling of a heartless world, just as it is the spirit of unspiritual conditions. It is the opium of the people.").
many in our society, and the more bleak one’s life, the more desperate the search for solace. Just as many turn to chemical sedation to escape a dismal reality, many others cope with the travails of this world by directing their attention to the next. Thus, those who most need the salve of religion become the easiest marks for Dodger, who begins his first radio sermon with that knowledge in mind. It starts like this:

The Lord has sent me here today to speak to you—especially those of you who have problems so overwhelming that you almost can’t cope. Demons surround you and have torn your lives apart so that you suffer pain greater than anyone should bear alone. I’ve come to tell you that you are not alone. The Lord knows of your pain and problems. He has shown you to me, and has commanded me to help you. The Lord has shown me a good, hard-working woman out there listening today who has been beaten and abused by her husband. She is too afraid to turn to anyone for help. I see, too, a blind man who worked with his hands to support himself for many years. This man is now tortured with arthritis. I see the mother of a very sick little boy; she is worried about the lack of money for medical care. . . .

Dodger continues to “see” other unfortunate characters derived from his imagination and his common sense understanding of the demographics of sorrow. The Reverend Dodger is calling to his flock.

This premise—that those whose current reality is more akin to hell will search the most urgently for paradise on earth—is even more relevant when considered in conjunction with the nature of the relationship between religious leaders and their followers. While much of the recent literature on this subject has focused on the extremely rigid controls allegedly employed by some of the newer religions, nearly all religious organizations are hierarchical entities in which a central figure proffers spiritual guidance and solicits the dependence and trust of those looking to that figure for spiritual leadership. The nature of the pastor-church member relationship merits some level of state supervision in order to deter unscrupulous religious leaders—who have power to exert inordinate influence over others and who tend to be

21. This is a standard formula of one televangelist who shall remain unnamed. See supra note 6; cf. International Soc’y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 437 (2d Cir. 1981) (“Devotees also on occasion ‘targeted’ their contributors, approaching those most likely to succumb to the pressure to contribute—young couples with small children, teenagers, handicapped individuals, and groups of retarded persons.”). For a study of the demographics of the televangelism audience, see Comment, supra note 9, at 555-56.

trusted without question—from unfairly and illegally using that influence to the detriment of others.  
Religious fraud, like medical fraud, often poses the greatest threat to those already under great emotional, financial, and/or physical stress. Moreover, these persons are defrauded by someone in whom they have placed confidence and trust, and to whom they have turned for guidance. The state’s failure to prosecute religious fraud denies protection to those who need it the most.

B. The Effect of Religious Fraud on Religion

Although current case law provides little support for any argument that a de facto exemption for religious fraud is an impermissible establishment of religion, the policies underlying the religion clauses are relevant. In Engle v. Vitale, the Court recognized that “a union

23. Pastor Carl Stevens was able to exploit such a position of trust in order to gain an overmastering power over Elizabeth Dovydenas, who later successfully sued for restitution on the basis of undue influence. See In re The Bible Speaks, 73 Bankr. 848 (Bankr. D. Mass. 1987), aff’d, 81 Bankr. 750 (D. Mass. 1988), aff’d in part, rev’d in part, 869 F.2d 628 (1st Cir.), cert. denied, 110 S. Ct. 67 (1989).

24. Of course, the upper classes are neither immune to, nor too smart to be taken in by, this type of crime. For example, Elizabeth Dovydenas was a 34-year-old college graduate worth $19 million when she fell under the spell of Pastor Carl Stevens. Id. at 850. Financially secure victims, however, are better able, at least financially, to rectify the situation once they realize they have been defrauded.

One may question whether victims of religious fraud do in fact suffer harm. If the victims believe they benefit themselves or others by sending money to Dodger, have they indeed been wronged? The reply is that they have been harmed just as surely as has a person who buys ostensibly genuine diamonds which turn out to be glass. Both victims give their money to a wrongdoer; their acts are grounded in belief that the fraudulent statements were, in fact, true. But for these lies, they would not have given their money. The “diamond” buyer may never discover the swindle, but a crime has nonetheless occurred. Dodger’s victims experience a very real monetary loss and have, in good faith, relied upon factual misrepresentations as to Dodger’s state of mind. No legal reason justifies a finding that this factual misrepresentation is any different than the factual misrepresentation of the glass as diamonds.

25. As an initial matter, the exercise of prosecutorial discretion is subject to surprisingly little judicial supervision. See, e.g., United States v. Sun Myung Moon, 718 F.2d 1210, 1229-30 (2d Cir. 1983), cert. denied, 466 U.S. 971 (1984). Even if a policy of nonprosecution of religious fraud could be demonstrated, the rationale of cases allowing states to reasonably accommodate religious practices would probably allow such a policy. See, e.g., Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987); Gillette v. United States, 401 U.S. 437, 453 (1971); Walz v. Tax Comm’r, 397 U.S. 664 (1970); Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975). These cases demonstrate the judicial rejection of the “neutral principles” approach upon which any establishment clause argument would be based. See generally P. Kurland, Religion and the Law (1962) (arguing that the constitution requires that religious groups be treated precisely the same as other groups). But see Scott v. Rosenberg, 702 F.2d 1263, 1272-73 (9th Cir. 1983) (suggesting that the Federal Communications Commission is constitutionally obligated to investigate allegations of fraud by religious broadcasters as readily as allegations against other licensees), cert. denied, 465 U.S. 1078 (1984).

of government and religion tends to destroy government and to degrade religion.”27 In this context, turning a blind eye to religious fraud can only result in the worst degradations of religion. Rational utilitarian criminals would be foolish to choose anything other than a religious scam, and may reasonably be expected to flock to this low-risk, high-profit variety of crime. One court reasoned that “the way of the confidence man would be easy if he could obtain money from the religious by willfully false protestations of belief and then, when brought to book, take refuge in the first amendment.”28 If the first amendment does provide such refuge, then the only surprising thing about the recent scandals involving American religious figures is that more have not come to light.29

The risk of further corrupting American religion, coupled with the need to protect society from unscrupulous, parasitic wrongdoers, militates strongly against allowing religious fraud to pass unpunished. However, the real threat that criminal prosecution of religious fraud may mask religious persecution of those who merit the protection of the free exercise clause must also be considered. In fact, some have argued that the risk of prosecution as persecution may be so great as to make the de facto exemption that this Article condemns a matter of constitutional necessity.30

27. Id. at 431.
29. One commentator points out:

With Americans spending an estimated $74 billion annually on charities worldwide, finding God can make extraordinarily good financial sense. State and federal officials readily admit that religious fraud is both profitable and virtually risk (and tax) free. “If I were a con man and wanted to make a lot of money,” a California state official remarked, “I’d set up [a] scam and call it religion. Then nobody can look at my books, and if people say I’m a crook, I’d just say, ‘Stay out of my business; you’re violating my rights under the First Amendment!”’

30. See United States v. Ballard, 322 U.S. 78, 95 (1944) (Jackson, J., dissenting) (“Prosecutions of this character easily could degenerate into religious persecution.”). Commentators have generally supported this view. See, e.g., Heins, “Other People’s Faiths”: The Scientology Litigation and the Justiciability of Religious Fraud, 9 HASTINGS CONST. L.Q. 153, 165 (1981). Heins does, however, recognize the societal costs that would flow from Justice Jackson’s rule:

The rejection of a sincerity test in religious fraud cases may well mean that classic charlatans, if they are careful to maintain a front of coherent religious doctrine and religious context when purveying their views, will continue, unabated by civil or criminal liability, to relieve spiritually impoverished or vulnerable Americans of substantial funds or even to impel them to alter their lives radically. The rule of religious caveat emptor is proper, however, because the First Amendment imports it into our constitutional law.

Id. at 189.
III. The Free Exercise Clause and Religious Fraud

_United States v. Ballard_ is the only case which has presented the Supreme Court with a criminal prosecution of religious fraud. Guy, Edna, and Douglas Ballard were leaders of the “I am” movement; their teachings included claims that Guy was the divine messenger of Saint Germain, that Guy had spoken with Jesus and would pass on His message to humanity, and that all three had various supernatural powers, including the power to heal. These claims formed the basis of a mail fraud prosecution against Edna and Douglas.

It is important to note that the Court expressly characterized the allegedly fraudulent statements as involving “respondents’ alleged religious doctrines of belief.” _Ballard_ does not involve objectively demonstrable falsehoods, such as false promises to use money raised for a certain purpose. The Ballards were smart enough (as is the Reverend Dodger) to avoid making such easily disproved claims.

The trial judge instructed the jury not to examine the truth or falsity of the Ballards’ claimed religious belief, but rather to determine only whether the defendants sincerely believed their claims; if the jury determined that the Ballards sincerely believed their claims, the jury was required to find the Ballards innocent. Justice Douglas’ majority opinion held that the trial judge acted properly in not allowing the jury to examine the verity of the Ballards’ doctrines. He wrote:

> The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to a 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.

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31. 322 U.S. 78 (1944).
32. _Id._ at 79-80.
33. Guy Ballard died before the charges were brought. _Id._ at 79.
34. _Id._
35. _See supra_ notes 14-15 and accompanying text.
36. _Ballard_, 322 U.S. at 81-82.
37. Judge Denman of the Ninth Circuit would have given the Ballards an opportunity to prove that they actually spoke with Jesus and Saint Germain. _See Ballard v. United States_, 138 F.2d 540, 546 (9th Cir. 1943) (Denman, J., concurring), _rev’d_, 322 U.S. 78 (1944). Of Judge Denman’s view, one commentator has written: “It is difficult to say whether or not [the concurring opinion] was written with tongue in cheek.” _Heins, supra_ note 30, at 162 n.40.
38. _Ballard_, 322 U.S. at 87. Inviting others to look at the issue from the perspective of potential criminal defendants, Justice Douglas also wrote:

> Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of
The Court thus rejected the Ninth Circuit's ruling that the truth of religious claims may go to the jury; however, the Supreme Court's ruling in Ballard does not expressly sanction the trial court's basing a conviction on lack of sincerity. This and other questions were remanded to the Ninth Circuit. As the Court has yet to reexamine the area of religious fraud, no definitive statement as to whether insincerity is an appropriate basis for a religious fraud conviction has been made.

Although the Supreme Court has not yet placed its imprimatur on religious sincerity testing in criminal religious fraud cases, lower courts have adopted this position. Moreover, courts have applied sincerity review in free exercise cases in a variety of noncriminal contexts. These include cases examining whether to grant a tax exemption, an exemption from school immunization programs, or protection of prisoners' religious practices. Other cases addressing mortals does not mean that they can be made suspect before the law. Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom.

Id. at 86-87.

PROSECUTION OF RELIGIOUS FRAUD

Religious sincerity include actions for unemployment benefits, defamation, child support, contempt of court, and civil fraud.

Ballard is commonly cited as precedent for sincerity testing—even by the Supreme Court. The widespread approval of sincerity testing evidenced by these civil cases indicates that determining religious sincerity is within the judicial competence. This approval is also strong authority for application of sincerity testing in the criminal context.

Moreover, unless courts adopt the outright ban on prosecution of religious fraud that Justice Jackson advocated in his Ballard dissent, sincerity testing seems to be the only constitutionally sound method of conviction. A ban on the prosecution of religious fraud would be undesirable, for several reasons discussed above. And in any case, why should Dodger be allowed a free exercise defense to a fraud prosecution? Sincerity testing, if accurately employed, results in no infringement of religious conduct or belief. Persons convicted of religious fraud have no cognizable complaint that their religious freedom was violated, where the court accurately finds that they have no sincere religious belief. Sham claims of religious faith are not entitled to first amendment protection.

49. See In re Jenison, 267 Minn. 136, 125 N.W.2d 588 (1963).
52. But see generally Heins, supra note 30.
54. See United States v. Lemon, 723 F.2d 922, 938 n.49 (D.C.Cir. 1983) ("Sincerity can be the only test, for any inquiry into the truth or falsity of beliefs is barred by the first amendment.").
55. See supra notes 18-29 and accompanying text.

In United States v. Seeger, 380 U.S. 163, 185 (1965), the Court recognized that "while the 'truth' of a belief is not open to question, there remains the significant question of whether it is 'truly held.' This is the threshold question of sincerity which must be resolved in every case. It is, of course, a question of fact . . . ."
A remaining argument in support of Justice Jackson’s recommended ban is that such a ban is necessary to avoid the risk of an erroneous finding of insincerity—that is, an outright ban is necessary to give religious practitioners some of the same “breathing space”\(^7\) that free speech practitioners enjoy.\(^5\) A criminal conviction based on an erroneous finding of religious insincerity would indeed work a substantial violation of the constitutional right to free exercise of religion. Pulling in the other direction, however, are the immeasurable costs which would flow from failing to prosecute religious fraud.\(^9\) Thus it is appropriate to critically examine how the courts may employ sincerity testing and how, in prosecuting religious fraud, procedures should be improved in order to lower the risk of error to a constitutionally acceptable level.

IV. THE MECHANICS OF PROSECUTING RELIGIOUS FRAUD

A defendant’s state of mind is as much a question of fact as any other type of factual determination a judge or jury must routinely make.\(^6\) However, since the fact finder is incapable of peering into another’s head to discover what lies therein, a defendant’s state of mind is rarely capable of being proved by direct evidence.\(^61\) For this reason, courts have readily allowed proof of mental state by indirect or circumstantial evidence.\(^62\)

As discussed above, however, whether the first amendment protects a religious fraud defendant depends on the outcome of this mental state determination. From this fact flow fundamental consti-


\(^{58}\) Heins, supra note 30, at 166-67.

\(^{59}\) See supra text accompanying notes 18-29.

\(^{60}\) See Edgington v. Fitzmaurice, L.R. 29 Ch. D. 459 (1885) (Lord Bowen). The court stated:

[T]he state of a man’s mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man’s mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man’s mind is, therefore, a misstatement of fact.

Id. at 483.

\(^{61}\) United States v. Prince, 496 F.2d 1289, 1293 (5th Cir. 1974), cert. denied, 419 U.S. 1107 (1975). The difficulty of proving a defendant’s insincerity will thus often be the cornerstone of the defense. Defense counsel must stress to the jury that the prosecution has the burden of proving mens rea to defraud and, consequently, has the burden of disproving that the defendant was instead motivated by religious belief. See, e.g., Orrick, Attorneys say Bakker betrayed, Tampa Tribune, Aug. 29, 1989, at A2, col. 6 (“Again and again [defense counsel] said the government will be unable to prove any criminal intent on Bakker’s part.”).

tutional safeguards. Accordingly, the constitution should similarly guide the procedures by which the defendant’s mental state is determined, thereby insuring that those who merit constitutional protection are not denied it by an incorrect finding of insincerity. Courts have routinely indicated that the determination of religious sincerity is a sensitive undertaking warranting extraordinary caution. The exercise of such caution must begin in the trial court and continue through appeal.

A. Responsibilities of the Trial Judge

In light of Ballard, the trial judge must not allow the search for sincerity to become a trial on the verity of the defendant’s claimed religious tenets. Admission of improper evidence and inappropriate prosecutorial comment are the primary threats to a fair trial on religious sincerity. In the Ballard trial, for example, the prosecutor compared the “ascended masters” of the “I am” movement to comic book characters. Any such attempt by the prosecutor to ridicule or question the religious principles claimed by the defendant not only directs the jury’s attention to the nonjusticiable issue of religious verity, but also panders to any majoritarian bias in the jury against a defendant claiming a nontraditional faith.

This risk of juror bias, especially against newer and more unusual faiths,

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63. See supra notes 52-56.
67. Juror bias was one of Justice Jackson’s primary concerns in his dissent in Ballard: "When one comes to trial which turns on any aspect of religious belief or representation, unbelievers among his judges are likely not to understand and are almost certain not to believe him." Ballard, 322 U.S. at 93 (1944) (Jackson, J., dissenting). "Prosecutions of this character easily could degenerate into religious persecution." Id. at 95.
68. See Lupu, supra note 65, at 954 ("The more unusual a claimant's religion, the easier it will be for decisionmakers to conclude, on the basis of an unarticulated view, that ‘no one could really believe this,’ that the claimant’s beliefs are not sincerely held."); Ogletree, Reverend Moon and the Black Hebrews: Constitutional Protection of a Defendant's Religion in Criminal Cases, 22 Harv. C.R.-C.L. L. Rev. 191 (1987). Professor Ogletree suggests that religious discrimination may be coupled with racial discrimination and notes that the Reverend Moon, during his prosecution for tax evasion, claimed to be a victim of both. Id. at 212 n.108; see also United States v. Sun Myung Moon, 718 F.2d 1210, 1217 (2d Cir. 1983), cert. denied, 466 U.S. 971 (1984).
as well as the risk of undue spectacle,\textsuperscript{69} necessitates carefullness in forming a jury for a religious fraud trial.\textsuperscript{70} If the defendant reasonably argues that no jury of laypersons would be competent to objectively adjudicate sincerity, either because of pervasive prejudice against the defendant or the faith, or because of particularly shocking religious practices, the defendant should be granted a bench trial.\textsuperscript{71} Although the Second Circuit has ruled that no right to a bench trial exists under these circumstances,\textsuperscript{72} its ruling has been persuasively criticized as failing to acknowledge the risk of religious persecution where an unpopular religious figure is brought before a jury.\textsuperscript{73} The logic of Ballard, that a potentially hostile jury should not be allowed to find a tenet of faith false,\textsuperscript{74} should also apply to prohibit a jury trial of a religious leader who reasonably fears juror bias against himself or his claimed beliefs.\textsuperscript{75} Protection from persecution lies at the heart of the religion clauses, and our nation's role in providing a refuge from religious persecution figures prominently in determining the scope of constitutional religious freedom.\textsuperscript{76} Therefore, if the defendant can make any reasonable showing of potential juror bias, the court should grant a bench trial. Similarly, if a jury trial is held, the judge should give deference to defense requests for for-cause dismissals.\textsuperscript{77}

\begin{itemize}
\item \textsuperscript{69} See Jeffers, 392 F.2d at 753. The court stated: \textit{We reverse the convictions and direct the entry of judgment of acquittal on all counts for the following reason: The spectacle presented to the jury—of a 67 year old eccentric purporting to have psychic powers, and his attractive 27 year old wife betting contributors' funds at the dog races—was so highly prejudicial that we cannot conclude that a fair trial was had}.
\item \textsuperscript{70} For example, in the prosecution of Reverend Moon, most of the jurors knew his name and had a negative view of his activities. Ogletree, supra note 68, at 192 n.9 (citing juror responses to questions on voir dire); see also Lupu, supra note 65, at 957-58. \textit{Id.}
\item \textsuperscript{71} See Jeffers v. United States, 392 F.2d 749, 753 (9th Cir. 1968) (determining that a jury should not hear a case involving disreputable religious practices); see also Ogletree, supra note 68, at 210 ("In cases involving long-term, widespread religious prejudice, however, such as that faced by Reverend Moon, waiver of a jury trial may be the only effective means available for protecting a defendant's first amendment rights.") (footnote omitted). \textit{Moon} exemplifies pervasive prejudice against the defendant and the religion. See Moon, 718 F.2d at 1210.
\item \textsuperscript{72} \textit{Moon}, 718 F.2d at 1217-18.
\item \textsuperscript{73} See Ogletree, supra note 68, at 209-13.
\item \textsuperscript{74} United States v. Ballard, 322 U.S. 78, 87 (1944).
\item \textsuperscript{75} Ogletree, supra note 68, at 209-13.
\item \textsuperscript{76} E.g., School Dist. v. Schempp, 374 U.S. 203, 214 (1963) ("Nothing but the most telling of personal experiences in religious persecution suffered by our forebears... could have planted our belief in liberty of religious opinion any more deeply in our heritage.") (citation omitted); Everson v. Board of Educ., 330 U.S. 1, 8 (1947) ("A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government-favored churches.").
\item \textsuperscript{77} In \textit{Moon}, the defendant's argument on appeal was weakened by the fact that his attor-
In a jury trial, a judge may reduce the risk of erroneous conviction by taking steps to assure that the jury focuses upon the crucial factor of sincerity. Two procedures should help a judge attain this goal. First, a judge's instructions should carefully limit the jury's inquiry to religious sincerity. Jurors must be admonished to set aside their personal religious beliefs and opinions regarding the defendant's claimed religion. The jury instructions set out in Ballard are sufficient in this regard. Second, a special verdict asking jurors whether the defendant "honestly and in good faith believes the statements upon which the fraud charges are based" would further reduce risks that the jury might depart from its constitutional limits.

Such procedures designed to minimize risk of error, combined with ample evidence of insincerity, should reduce to an acceptable level the danger of first amendment violation inherent in prosecuting alleged religious hucksters. Note, however, that a demonstration of insincerity had made no significant effort to challenge the seating of various jurors during voir dire. United States v. Sun Myung Moon, 718 F.2d 1210, 1219 (2d Cir. 1983), cert. denied, 466 U.S. 971 (1984). The court noted that failure to challenge is strong evidence that the defendant considered the jurors not biased, id., despite juror responses on voir dire, see supra note 70, and the defendant's arguments on appeal that he should have been granted a bench trial. The trial judge himself concluded that a bench trial would have been fairer for the Reverend Moon, noting on the record that if his discretion were not limited in the matter, he would have granted a nonjury trial. Ogletree, supra note 68, at 213 (citing Post-Trial Transcript at 26, Moon, 718 F.2d at 1210).

Because of the substantial weight the Second Circuit placed on the defense's failure to challenge jurors in Moon, defense counsel in cases involving similar facts should strenuously object to all jurors appearing to be biased against the defendant or the religion. Where this is done, and the denial of a bench trial is appealed, Moon will arguably be distinguishable. United States v. Ballard, 322 U.S. 78, 81-82 (1944).

In United States v. Rasheed, 663 F.2d 843, 847-48 (9th Cir. 1981), cert. denied, 454 U.S. 1157 (1982), the court recognized that the Constitution requires proof of insincerity for a conviction of religious fraud, and consequently held that the jury must have made such a determination. The court did not review the jury questions, but merely noted that sufficient evidence of deceit existed from which the jury could have found insincerity. Id. at 849. The court thereby papered over the possibility that the jury did not clearly focus its attention on the sincerity issue. Although the case record—which overwhelmingly indicated guilt—may have warranted the court's disregard, a special verdict finding of insincerity would have made the conviction considerably less suspect.

Because the evidence of sincerity will generally be circumstantial, see supra notes 60-62 and accompanying text, a court may find special instructions on circumstantial evidence advisable. Most states follow this procedure, but the federal courts do not; the modern trend appears to be away from such instruction. See generally, Note, Judicial Review of Criminal Convictions Based
ity requires that the factfinder draw inferences from circumstantial evidence which often may be inconclusive. The sufficiency of the evidence on the question of religious sincerity is of utmost importance for two reasons. First, the state must disprove sincerity beyond all reasonable doubt in order to prove the element of fraudulent intent. Second, because sincerity of belief determines whether the free exercise clause protects the defendant, the sincerity finding takes on the character of a "constitutional fact;" therefore, the trial judge should require a heightened evidentiary standard before allowing the jury to decide the issue. Motions for judgment of acquittal should be granted where the judge cannot conclude that the evidence reasonably and to a high degree of certainty disproves religious sincerity. It may also be advisable for purposes of appeal to require the judge to set forth in writing the reasons for denying such a motion, specifying the evidence which justifies allowing the question to go to the jury.

B. Review on Appeal

The usual appellate standard of review in criminal cases is to reverse the lower court decision only if no reasonable juror could have found guilt beyond a reasonable doubt, viewing the evidence in a light most favorable to the government. Unfortunately, this deferential standard has been applied in at least one religious fraud case. Where a criminal prosecution risks erroneous conviction within constitutionally

on Circumstantial Evidence, 6 VT. L. REV. 197 (1981) [hereinafter Note, Circumstantial Evidence].

83. See Loney v. Scurr, 474 F. Supp. 1186, 1196 (S.D. Iowa 1979); see also infra text accompanying notes 97-158 (discussing types of evidence relevant to insincerity).


85. Rasheed, 663 F.2d at 847-48.

86. See supra notes 52-56 and accompanying text.

87. Cf. Jacobellis v. Ohio, 378 U.S. 184, 187-88 (1964) (holding that the determination whether a work is obscene is not a factual judgment for a jury, but is an issue of constitutional law for the judge, which the appellate court must review de novo).


89. FED. R. CRIM. P. 29.


91. See United States v. Rasheed, 663 F.2d 843, 848-49 (9th Cir. 1981), cert. denied, 454 U.S. 1157 (1982). Based on this appellate standard, if one reasonable juror could have found the defendant guilty, the defendant loses on appeal. In light of first amendment protection and potential for religious bias, the standard for reversing a religious fraud conviction should be less onerous.
protected zones, the appellate courts have been and should be more generous in overturning questionable verdicts.\textsuperscript{92}

While a de novo review is probably unnecessary,\textsuperscript{93} the regular standard is insufficient. In this context, sincerity acts as a constitutional fact,\textsuperscript{94} so the appellate court should examine the record closely to determine whether sufficient evidence was introduced to make substantially doubtful any claims of religious sincerity.\textsuperscript{95} The types of evidence which might be expected are discussed in the next section.

The appellate court should also be sensitive to any claims that the trial court's factfinding process evinces flaws which could enhance the risk of an erroneous finding of insincerity. Appellate courts must scrupulously rule against improper evidence, improper argument, or jury bias in cases on appeal to ensure that such problems are carefully avoided in the trial courts. Adoption of the foregoing suggestions should help reduce the risk of erroneous conviction to a constitutionally tolerable level.

V. Evidence of Insincerity

Numerous cases in a variety of contexts examine the issue of religious sincerity.\textsuperscript{96} Types of evidence discussed in court opinions and

\textsuperscript{92} See, e.g., United States v. Spock, 416 F.2d 165, 172-73 (1st Cir. 1969) (holding that in the area of first amendment free speech, evidence of intent for conspiracy must be judged \textit{strictissimi juris}); Castro v. Superior Court, 9 Cal. App. 3d 675, 682, 88 Cal. Rptr. 500, 505-06 (Ct. App. 1971) (holding that a stricter evidentiary standard is needed where speech is concerned).

\textsuperscript{93} The argument that a de novo review is required for appeal of a religious fraud judgment has been rejected in a civil case, where the constitutional stakes are considerably lower. \textit{See} The Bible Speaks v. Dovydenas, 81 Bankr. 750, 757 (D. Mass. 1988), \textit{aff'd in part, rev'd in part}, 869 F.2d 628 (1st Cir.), \textit{cert. denied}, 110 S. Ct. 67 (1989).

\textsuperscript{94} It appears that the district court in \textit{The Bible Speaks} may have misread \textit{Bose Corp.} v. Consumers Union, 466 U.S. 485 (1984), the primary authority cited by appellants, which clearly states that in determining whether actual malice is present in a libel case, "[a]ppellate judges... must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity." \textit{Id.} at 514. The judge understood \textit{Bose Corp.} to apply only to questions of law. \textit{The Bible Speaks}, 81 Bankr. at 757-58. On appeal, the First Circuit ruled that \textit{Bose Corp.} was not applicable at all since Pastor Stevens' acts of undue influence were outside the protection of the first amendment. \textit{In re The Bible Speaks}, 869 F.2d 628, 630 (1st Cir.), \textit{cert. denied}, 110 S. Ct. 67 (1989).

\textsuperscript{95} A de novo standard appears inappropriate because demeanor evidence, which the appellate court is not competent to review, \textit{see Bose Corp.}, 466 U.S. at 501-02, is so important in ascertaining sincerity, \textit{see infra} note 126-28 and accompanying text.

\textsuperscript{96} \textit{See supra} notes 86-88 and accompanying text.
legal literature include: (a) actions inconsistent with professed beliefs; (b) the willingness to bear adverse consequences of the religious belief; (c) an alternative secular purpose; (d) the size and history of the religious organization; (e) the extent to which the claimed beliefs parallel traditional beliefs; (f) the intensity of the believer’s devotion; (g) the defendant’s testimony and statements relevant to the defendant’s religious sincerity; (h) whether the challenged tenet is part of an organized faith of which the defendant is a member; (i) the coexistence of secular fraud; (j) previous case law on the defendant, the religious organization, or the religious belief; and (k) evidence of the defendant’s attempts to cover up embarrassing or questionable activities.

The following subsections will discuss these categories of evidence and their strengths and weaknesses. While this evidentiary catalogue is directed to determining sincerity in a trial for criminal fraud, it should prove helpful in any case where the issue of sincerity is material.  

## A. Acts Inconsistent With Belief

Courts and commentators seem most comfortable with a finding of insincerity where the defendant’s behavior is substantially inconsis-

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97. Various noncriminal cases have dealt with the issue of religious fraud. See supra notes 43-50 and accompanying text.

98. *See Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 482 (2d Cir. 1985) (“[A]n adherent’s belief would not be ‘sincere’ if he acts in a manner inconsistent with that belief . . . .”) (quoting International Soc’y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 441 (2d Cir. 1981)), *aff’d*, 479 U.S. 60 (1986); *Hansel v. Purnell*, 1 F.2d 266, 271 (6th Cir.) (introducing evidence that Christian religious leader used position to debauch young girls), *cert. denied*, 266 U.S. 617 (1924); *New v. United States*, 245 F. 710, 713 (9th Cir.) (allowing evidence that defendant was “an habitual indulger in each and every of the sins and practices he pretended to condemn”), *cert. denied*, 246 U.S. 665 (1917); *Sherr v. Northport-East Northport Union Free School Dist.*, 672 F. Supp. 81, 96 (E.D.N.Y. 1987) (allowing a defendant’s testimony that “although he opposed any ‘intrusion’ into the body on religious grounds, he had had [his son] X-rayed when it was believed that the boy had broken his leg, allowed dentists to remove decay from cavities his children might have, and had his [sons] circumcised.”); *In re The Bible Speaks*, 73 Bankr. 848 (Bankr. D. Mass. 1987) (merchant claiming that scheduling his trial on Sabbath violated free exercise rights was not entitled to rescheduling since evidence showed he regularly did business on the Sabbath), *aff’d*, 81 Bankr. 750 (D. Mass. 1988), *aff’d in part, rev’d in part*, 869 F.2d 628 (1st Cir.), *cert. denied*, 110 S. Ct. 67 (1989); *Dobkin v. District of Columbia*, 194 A.2d 657, 659 (D.C. 1963).

99. Even scholars who argue for an outright ban on prosecution of religious fraud admit that evidence of acts inconsistent with belief is “less constitutionally troublesome.” Heins, *supra* note 30, at 185; see also Lupu, *supra* note 65, at 954; Riga, Religion, Sincerity, and the Free Exercise Clause, 25 CATH. LAW. 246, 260 (1980) (“Certainly the courts may accept extrinsic evidence on inconsistent words and actions of the claimant by the government’s own investigation and it would then be up to the claimant to explain them.”); Note, Role of Church and State, *supra* note 43, at 84; Note, Burdens on Free Exercise, *supra* note 56, at 1271-72; Note, Toward a Constitutional Definition of Religion, 91 HARV. L. REV. 1056, 1081-82 (1978) [hereinafter Note, Constitutional Definition of Religion].
tent with the requirements of the faith. Conversely, a showing that the defendant's lifestyle generally comports with the particular religious beliefs is strong evidence that the defendant sincerely holds these beliefs.100

However, two logical limitations on this type of evidence exist. First, acts occurring before the defendant claims to have adopted the belief will usually be irrelevant and should not be admitted.101 True conversions are possible, and those who claim a conversion should not be held accountable for sins of the past.102 Second, deviations from belief must be sufficiently substantial, in light of the circumstances, to indicate that the defendant does not sincerely hold the beliefs professed.103 Since minor deviations from religious guidelines are common among many who are still generally considered to be believers,104 courts should give little, if any, weight to evidence of a less than substantial disregard of religious principles.

B. Adverse Consequences of Religious Belief

A person who has submitted to great hardship rather than deviate from a professed religious doctrine is unlikely to be feigning belief.105

101. See Note, Role of Church and State, supra note 43, at 84 n.61 (arguing that comparisons of declared belief and actual behavior are inaccurate for recent converts who disavow past actions); see also Note, Burdens on Free Exercise, supra note 56, at 1272 n.82 (advancing the same proposition).
102. See Lupu, supra note 65, at 954; see also Gospel Army v. City of Los Angeles, 27 Cal. 2d 232, 163 P.2d 704 (1945) (Carter, J., dissenting), appeal dismissed, 331 U.S. 543 (1947). In his dissent, Justice Carter stated:

Religionists and reformers are often called from the gutter whence they return to make expiation for their wrongdoings by trying to save others from a like fate and to aid the redemption of those who may already have strayed. Forceful and effective work has been done by the reformed, turned reformer, and many of these people labor without affiliation with any recognized institution and without financial help other than that gleaned through solicitation.

Id. at 270, 163 P.2d at 725. However, where the "sins of the past" include prior instances of religious fraud, relevance outweighs the risk of prejudice and such evidence generally should be admitted. See infra note 150 and accompanying text.
103. In one case, a high school teacher sued the school board for docking his pay when he did not work on claimed holy days. The school board argued that because the teacher had worked on some of the holy days, his beliefs were not sincerely held. The trial court held that the financial pressure imposed by the school's docking the teacher's pay was sufficient to rebut any inference of insincerity. Philbrook v. Ansonia Bd. of Educ., 757 F.2d 476, 482 (2d Cir. 1985), aff'd, 749 U.S. 60 (1986); see also Loney v. Scurr, 474 F. Supp. 1186, 1195-96 (S.D. Iowa 1979).
104. Examples include occasional deviation from observance of the Sabbath or a kosher diet. Heins, supra note 30, at 185-86; Note, Constitutional Definition of Religion, supra note 99, at 1081 n.123.
105. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 643 (1943) (Black, and
Similarly, finding insincerity in beliefs which require a relatively spartan lifestyle and impose rigid requirements on adherents would be difficult. However, prosecution for fraud is not likely in this context since personal hardship would probably not figure prominently in fraud schemes. Dodger's goal is avoidance of hardship through the financial gains of his religious enterprise. Evidence of hardship is persuasive only where the claimant willfully chose subjection to the hardship and has accepted the hardship as a cost of being faithful to the belief.

Even if the defendant can show that certain acts were committed with a recognized risk of prosecution, it remains difficult to determine whether conscious exposure to prosecution is a "sincere act of conscience . . . or a calculated decision to risk occasional punishment as a cost of engaging in a highly profitable, and fraudulent, conduct." Where motivation is unclear, the length and extent of the hardship may be balanced against personal gain to determine whether calculated risk or sincere sacrifice motivated the behavior.

C. Alternative Secular Purpose

A common charge against alleged religious frauds is that the challenged acts do not arise from sincere religious belief, but rather are motivated by an alternative secular purpose. The alternative pur-

Douglas, JJ., concurring); Leahy v. District of Columbia, 646 F. Supp. 1372, 1376 (D.D.C. 1986), rev'd on other grounds, 833 F.2d 1046 (D.C. Cir. 1987); In re Jenison, 265 Minn. 96, 125 N.W.2d 588, 590 (1963); see also Heins, supra note 30, at 186-87 (cautioning against relying solely on this inquiry).

106. See International Soc'y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 442 (2d Cir. 1981) (noting the materially sparse lifestyles of Krishna devotees); United States v. Kahane, 396 F. Supp. 687, 703 (E.D.N.Y. 1975) (regarding a suit by the Rabbi Meier Kahane, now the leader of a radical political party in Israel, for a strict kosher diet which would be "repetitious and spartan") under prison conditions).

107. Barber, 650 F.2d at 442.

108. "A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation . . . if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief." Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

pose which should figure prominently in any religious fraud case is personal monetary gain through deception or fraud. The extent to which the defendant and his organization are devoted to fundraising rather than to other matters, the amount of funds raised, and the amount of money used primarily for the personal benefit of the defendant are all relevant to whether the defendant is motivated by personal gain. Therefore, if Dodger were prosecuted, the amount of money siphoned off to support his lifestyle would be important evidence of his alternative secular purpose.

D. Size and History of the Religious Organization

Courts occasionally refer to the size and history of the faith in order to ascertain the sincerity of an individual adherent. Information


Much of the testimony in the Jim Bakker trial was directed toward showing that Bakker’s motive arose from avarice rather than faith. The prosecuting Assistant United States Attorney, in his opening statement, said: “The motive was money. The motive was opulence. The motive was a lavish lifestyle most of you will not be able to identify with.” Orrick, Bakker’s motive money, court told, Tampa Tribune, Aug. 29, 1989, at A1, col. 1. Evidence of the financial motive included reports of complaints by Bakker that he did not live as opulently as other televangelists, and reports of his fleet of expensive automobiles and collection of homes. Baniskey, Testimony in Bakker’s trial focuses on lavish lifestyle, St. Petersburg Times, Aug. 30, 1989, at A3, col. 2. Witnesses testified about various incidents illustrative of Bakker’s obsession with money, such as confessions of fearing poverty and dreaming about wealth. The jury also heard testimony that Bakker raised the rent of his octogenarian parents, who lived at the PTL theme park, Heritage USA. Orrick, Ex-aide describes Bakker’s expensive exploits to court, Tampa Tribune, Aug. 30, 1989, at A4, col. 1.

110. For example, the Governing Policy of Finance of the Church of Scientology reads as follows:

GOVERNING POLICY

A. MAKE MONEY.
B. Buy more money made with allocations for expense (bean theory).

J. MAKE MONEY.
K. MAKE MORE MONEY.
L. MAKE OTHER PEOPLE PRODUCE SO AS TO MAKE MONEY.

A small sack of beans will produce a whole field of beans. Allocate only with that in mind and demand money be made.


During his tenure at PTL, Jim Bakker apparently paid close attention to and kept personal records of each day’s receipts. Orrick, supra note 109, at A1, col. 1.

111. See supra note 8 and accompanying text.

112. At least one commentator has argued that gross earnings of a religion should not be considered, on the unpersuasive ground that the “hierarchy of Catholicism or Christian Science” would disapprove. Heins, supra note 30, at 181. The Catholic church has not been immune from occurrences of fraud. See Turley, supra note 8, at 461 (discussing the Pallotine scandal).

113. See Mason v. General Brown Cent. School Dist., 851 F.2d 47, 52-53 (2d Cir. 1988);
about the defendant's religious group will ordinarily be presented to
the jury because it is relevant to a number of issues and is probably
necessary if the jury is to have an appropriate understanding of the
case. However, inferring insincerity from a religious group's size and
history appears constitutionally unsound; such an inference would be
detrimental to newer religious organizations which lack the pedigree
of more traditional religious groups. Therefore, the trial court may
decide it necessary to caution the jury that new and unorthodox reli-
gious beliefs must be given the same constitutional protection as the
more traditional faiths and that the jury should in no way infer guilt
from the fact that the religion was established by the defendant, or
that the faith has few adherents.

E. Extent of Parallel Between Challenged Beliefs and Traditional
Religious Beliefs

Some courts have suggested that where the beliefs claimed are far
removed from traditional notions of religious belief, such claims
could not possibly be held in good faith and therefore merit no first
amendment protection. For example, Chief Justice Burger stated in
Thomas v. Review Board of the Indiana Employment Security
Division that "[o]ne can, of course, imagine an asserted claim so
bizarre, so clearly nonreligious in motivation, as not to be entitled to
protection under the Free Exercise Clause . . . ." The factfinder
probably should have some power to infer insincerity from absurdly
ridiculous claims. However, such power carries some of the same

Theriault v. Silber, 453 F. Supp. 254, 259-60 (W.D. Tex.), appeal dismissed, 579 F.2d 302 (5th Cir. 1978), cert. denied, 440 U.S. 917 (1979); cf. Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that the Amish have convincingly demonstrated the sincerity of their beliefs by three centuries of existence as an identifiable religious sect).

114. Such information might include, for example, organizational plans demonstrating the means by which the act was perpetrated. Also, the prosecution may include conspiracy counts; evidence concerning the co-conspirators, who will likely be other members of the religious
group, should be allowed in order to show the conspiracy.

115. See Larson v. Valente, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over an-
other."); see also L. Tribe, supra note 56, at § 14-12.


117. Id. at 715.

118. For example, in Brown v. Pena, 441 F. Supp. 1382, 1385 (S.D. Fla. 1977), aff'd, 589 F.2d 1113 (5th Cir. 1979), the plaintiff claimed his religious creed required its adherents to eat
cat food. Judge King refused to accept that this claim was made in good faith.

In United States v. Kuch, 288 F. Supp. 439, 444-45 (D.D.C. 1968), one of the organization's
official church hymns was "Row, Row, Row Your Boat," and the church motto was "Victory
over Horseshit!" The church catechism, in the words of the court, was "full of goofy non-
sense."
risks as the previous category of evidence, i.e., bias against newer and unorthodox faiths.\textsuperscript{119} Unless the principles under consideration are pervasively silly in the extreme,\textsuperscript{120} the court should caution the jury to avoid bias against the defendant simply because his claimed beliefs are unique.

\textbf{F. Devotion and Intensity of Claimant's Faith}

Where the defendant can demonstrate rigid devotion to his faith, his belief is more likely to be sincerely held.\textsuperscript{121} For example, testimony that the defendant's conversation revolved primarily around religious themes, that he would commonly engage in lengthy prayer sessions, or that he would fast two days of each week indicates sincere religious belief.\textsuperscript{122}

Such evidence of sincerity (subject, of course, to a rebuttal by the prosecution that the activities were all part of the scheme to defraud) may be helpful for the defendant, but it would be improper for the prosecutor to introduce evidence that the defendant did not practice his beliefs with constant zeal. Such an approach would be analogous to holding that occasional churchgoers are not worthy of constitutional protection.\textsuperscript{123} Consequently, the intensity of the defendant's belief is an irrelevant inquiry.\textsuperscript{124} The religious fraud defendant, if he is to be constitutionally convicted, must be distinguished from one who is groping for, but not yet certain of, religious truth.\textsuperscript{125}

\begin{itemize}
\item \textsuperscript{119} See supra notes 113-15 and accompanying text.
\item \textsuperscript{120} Both \textit{Brown}, 441 F. Supp. at 1382, and \textit{Kuch}, 288 F. Supp. at 439, meet the "pervasively silly" test. See supra note 118 and accompanying text.
\item \textsuperscript{122} See \textit{Sherr}, 672 F. Supp. at 96 ("The Levys' conception of human existence and the physical world seems to pervade their whole way of life, including their eating habits and methods of combatting illness . . . .")
\item \textsuperscript{123} Cf. \textit{United States v. Ballard}, 322 U.S. 78, 93-94 (1944) (Jackson, J., dissenting). Justice Jackson stated:

\begin{quote}
And then I do not know what degree of skepticism or disbelief in a religious representation amounts to actionable fraud. James points out that "Faith means belief in something concerning which doubt is still theoretically possible." . . . It is hard in matters so mystical to say literally one is bound to believe the doctrine he teaches and even more difficult to say how far it is reliance upon a teacher's literal belief which induces followers to give him money.
\end{quote}

\textit{Id.} (quoting \textit{WILLIAM JAMES, The Will to Believe}, in \textit{COLLECTED ESSAYS AND REVIEWS} 90 (1920)).
\item \textsuperscript{124} Weiss, \textit{supra} note 40, at 600.
\item \textsuperscript{125} \textit{Id.}
G. Statements and Testimony of the Defendant

Statements of the defendant, both in and out of court, will generally be among the evidence considered. While the defendant’s testimony concerning the sincerity of his beliefs should be given great weight, the factfinder need not shrink from the possibility that this testimony is self-serving. Admissions by the defendant on the stand are rare, but may occur. The defendant’s demeanor during testimony will also be important in considering the weight to be given his testimony.

Out-of-court statements which indicate lack of sincerity will often constitute the state’s most convincing evidence. Also, the co-conspirator’s admission rule should permit into evidence statements by members of the defendant’s organization which might cast doubt on the defendant’s sincerity or indicate a secular motive.

H. Whether the Challenged Tenet is Part of an Organized Faith To Which the Defendant Belongs

The Supreme Court recently indicated that sincerity may be easily found where the challenged tenet is part of an established religion to which the claimant belongs. However, this case and others relying

126. United States v. Seeger, 380 U.S. 163, 184 (1965). It has been argued that the threat of perjury serves as a helpful deterrent to fraudulent claims for religious exemptions. Note, Constitutional Definition of Religion, supra note 99, at 1081. This argument is weaker but still applicable in the case of a criminal defendant, who has much more to risk than a civil defendant. Even in a civil case, the court may determine that religious figures are testifying less than honestly. See, e.g., In re The Bible Speaks, 73 Bankr. 848, 857 (Bankr. D. Mass. 1987) (finding the testimony of Pastor Carl Stevens “evasive and lacking in credibility” and in conflict with “undisputed documentary evidence.”), aff’d, 81 Bankr. 750 (D. Mass. 1988), aff’d in part, rev’d in part, 869 F.2d 628 (1st Cir.), cert. denied, 110 S. Ct. 67 (1989).


129. FED. R. EVID. 801(d)(2)(E)

130. In Founding Church of Scientology v. United States, 409 F.2d 1146, 1152 (D.C. Cir.), cert. denied, 396 U.S. 963 (1969), Judge Skelly Wright noted that early Scientology literature indicated that the movement’s increasingly religious orientation disturbed some of its members, who argued that the shifting orientation was merely an attempt to pull a legal cloak over the group’s activities.


Undoubtedly, membership in an organized religious denomination, especially one with a specific tenet forbidding members to work on Sunday, would simplify the problem
on this type of evidence were civil cases involving claims for religion-based exemptions.\textsuperscript{132} This type of evidence would seem less persuasive in the religious fraud context, since the defrauder could as easily choose to adopt a traditional denomination as invent a theology. Fraudulent schemes such as the one Dodger plans can take place in traditional as well as newer religions; therefore, the question of tenet orthodoxy does not seem particularly relevant to the issue of whether a criminal defendant's religious claims are sincere. Indeed, the success of Dodger's pitch may well depend on its resemblance to a popular mainstream faith.

\textbf{I. Coexistence of Secular Fraud}

A very strong case for insincerity exists where the evidence demonstrates that the defendant has also engaged in secular misrepresentations in the religious context.\textsuperscript{133} When the defendant has lied about matters other than his religious beliefs, it appears more likely that he is misrepresenting these claims as well.\textsuperscript{134} For example, evidence might include false claims of having authored various publications,\textsuperscript{135} false promises as to the use of solicited funds,\textsuperscript{136} and false representations of personal history, including birth,\textsuperscript{137} education,\textsuperscript{138} and wealth.\textsuperscript{139} In the trial against James Bakker,\textsuperscript{140} a former advertising copywriter for PTL testified about a desktop statue offered on the PTL television program as a bonus to lure $1,000 contributions.\textsuperscript{141} According to the


\textsuperscript{133} See United States v. Rasheed, 663 F.2d 843 (9th Cir. 1981) (defendant told his followers that church funds came from foreign investments, when in fact they were the proceeds of an ongoing Ponzi scheme), \textit{cert. denied}, 454 U.S. 1157 (1982).

\textsuperscript{134} \textit{E.g.}, New v. United States, 245 F. 710, 713 (9th Cir.), \textit{cert. denied}, 246 U.S. 665 (1917).

\textsuperscript{135} See \textit{id. at} 716.

\textsuperscript{136} See United States v. Ballard, 322 U.S. 78, 95 (1944) (Jackson, J., dissenting).

\textsuperscript{137} See United States v. Carruthers, 152 F.2d 512, 513 (7th Cir. 1945), \textit{cert. denied}, 327 U.S. 817 (1946).

\textsuperscript{138} See \textit{id.}; see also Christofferson v. Church of Scientology, 57 Or. App. 203, 229, 644 P.2d 577, 594 (Ct. App. 1982) (complaint charged that L. Ron Hubbard, the founder of the Scientology movement, falsely claimed to be an engineer and physicist with degrees from Princeton University, Sequoia University, and George Washington University), \textit{cert. denied}, 459 U.S. 1206 (1983).

\textsuperscript{139} See Carruthers, 152 F.2d at 513.

\textsuperscript{140} United States v. Bakker, Case No. 88-205 (W.D.N.C. 1988).

copywriter, viewers were told, "[m]any feel that if you were to purchase the David and Goliath Sculpture . . . it would cost over $1,000'" when, in fact, PTL paid about $10 each for the statues.142

In one situation, however, an inference of insincerity from the coexistence of secular fraud would not be warranted. In the recent case of Molko v. Holy Spirit Association for the Unification of World Christianity,143 the defendant members of the Unification Church argued that their secular misrepresentations were motivated by a belief in the doctrine of "Heavenly Deception"144 and that they had lied in order to give others "the opportunity to hear Reverend Moon's teachings."145 Although the lies concerned secular matters, they were rooted in sincere religious belief and thus protected by the first amendment.146 No inference of insincerity may arise where secular misrepresentations are motivated by sincere religious belief.

### J. Reference to Case Law

When examining the issue of sincerity, courts have looked to case law involving the religious organization,147 the defendant,148 and, to a lesser extent, the particular belief.149 Previous litigation involving the religious organization or defendant which disclosed evidence of fraud or insincerity indicates that insincerity may still be present. Although one previously involved in religious fraud may have been converted to sincere belief, prior fraud will still constitute strong evidence of an insincere state of mind, particularly if the prior occurrence involved similar claims and practices.150

142. Id. The statues were hollow and made of pseudo-pewter. As the Assistant U.S. Attorney prepared to hand one to the jury, "the sword fell from tiny David's hand." Id. at A4, col. 3.
144. Id. at 1114-15, 762 P.2d at 58, 252 Cal. Rptr. at 134.
145. Id.
146. Id.
150. Cf. Purnell, 1 F.2d at 273 (holding defendant's previous prosecution for debauchery within a claimed religious group relevant to sincerity of his beliefs when his cult committed similar acts).
K. Evidence of Concealment

A strong inference of fraud arises where the defendants are shown to have concealed material facts from their alleged victims. Such concealment may be demonstrated in a variety of ways, including evidence of falsified documents, evidence that the defendant commonly violated his religious teachings but concealed this fact from his followers, or evidence that expenditures of church funds were concealed from church members. For example, the higher echelon of the PTL Club maintained a separate, confidential bank account for the payment of the top executive officers so that none of the employees or contributors to PTL would know of the enormous sums of money being disbursed to the church leadership. Evidence used in the Bakker trial included testimony concerning the defendant's destruction of potentially incriminating documents, as well as the use of internal memos demonstrating calculated attempts to conceal ministry finances.

Similarly, other attempts by the defendant to avoid legal liability are indicative of bad faith dealings. In one case, the defendants made claims of divine monetary increases as a cover for a Ponzi scheme. The court found it relevant that the ministers were instructed not to use words which carry legal consequences, such as "promise," "guarantee," "investment," or "security." Such obvious attempts to avoid legal liability indicate that religious concerns probably were not the defendant's primary motivation.

VI. Conclusion

Those who attempt to use religion as a cloak to protect themselves from liability for criminal activities should not go unpunished. At the same time, great care must be exercised to insure that sincere believers are not prosecuted for legitimate religious practices.

158. Id.
This Article has attempted to demonstrate one way that this variety of crime may be prosecuted. The factfinder must focus on the question of the defendant’s sincerity. Some of the types of evidence which may help on this point have been discussed. At the same time, risks that prosecution might violate fundamental constitutional rights must be minimized by careful attention to trial procedure. These protections are vital, yet are not so demanding as to effectively block prosecution of the Reverend Dodger. While our national conscience should not tolerate the risk that even one sincere religious practitioner may have been erroneously convicted, an outright ban on such prosecutions is unnecessary. The societal costs of such a ban would be immeasurable and inevitable. Religious fraud can and should be prosecuted.

Finally, it seems appropriate to close with the sentiments of the Honorable Rufus W. Reynolds, United States Bankruptcy Judge, who presided over the bankruptcy proceedings of the PTL Club:

In conforming with the religious overtones of this case, this Court observes that James Bakker either overlooked or ignored parts of the Bible including I Timothy 6:10—“For the love of money is the root of all evil: which while some coveted after, they have erred from the faith and pierced themselves through with many sorrows.” Now, however, we must apply Galatians 6:7—“Be not deceived; God is not mocked: for whatsoever a man soweth, that shall he also reap.”

159. In re Heritage Village Church and Missionary Fellowship, Inc., 92 Bankr. 1000, 1022 (Bankr. D.S.C. 1988) (quoting 1 Timothy 6:10 and Galatians 6:7 (King James)).