of Tentative Decision, the judge wrote that the circumstances were unbelievable, the plaintiff was at fault for not successfully resisting, that one could infer she sought her supervisor's attentions and that the case wasted court time.

The decision was appealed on the ground that the judge's gender bias required setting aside his judgment. The

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Faulty Preconception

The court noted, for example, that the trial judge's demand for physical resistance ignored both the repeal of the California Penal Law's resistance requirement and *People v. Barnes*, 42 Cal. 3d 284, a 1986 case in which the California Supreme Court rejected the notion that failure to resist equals consent. That case described why many women do not fight back—in particular, fear of serious physical injury apart from the rape and a psychological state called "frozen fright" that renders the victim totally passive.

The court of appeals found that the trial lacked the most basic requirement of due process, "the opportunity to be

...gender bias in th... by the California Cour... *Catchpole* is not unique. I... cases, judges have relied ... reotypes, misjudged wom... because of their own lack ... ing of the different social ... realities of women's and m... ialized violence against ... jected emotions about th... into their decisions. The o... pect of *Catchpole* was tha... so blatant and manifeste... pects of gender bias.

The most insidious cas... which judicial demeanor ... but the opinion betrays a ... derstanding of the realiti...

CIVIL LIBERTIES *By Harvey A. Silverglate*

'Free Exercise' Revisited

DAVID KORESH was not the first self-appointed messiah—nor is he likely to be the last—to appear on the American scene and convince government agencies that he, his beliefs and his followers pose a threat to the public weal. Such figures, and the seemingly odd sects surrounding them (detractors call them "cults"), are nothing new in this country; the phenomenon has been with us since before the beginning of the Republic. Indeed, the Constitution sought to protect them from the start with the free exercise of religion clause of the First Amendment.

It seems that every few years we need to be reminded that under the First Amendment there is no such thing as a heretical religion. All religious beliefs and a wide variety of religious practices, no matter how far off the beaten path, are treated equally in the eyes of the law. This fundamental principle appears to have been lost in the epic and tragic struggle between Mr. Koresh's Branch Davidians and the FBI and Bureau of Alcohol, Tobacco and Firearms, as well as in the subsequent investigations.

In two recently published books—"Why Waco?" by Profs. James D. Tabor and Eugene V. Gallagher, and "The Ashes of Waco," by Texas journalist Dick J. Reavis—the authors turn the debate back to basics. They raise the question of why the ATF targeted David Koresh and the Davidians in the first place, putting less emphasis on the wisdom of the feds' tactical decisions. They take seriously the content and implications of Mr. Koresh's theology and eschatology, which virtually assured that the federal assault would lead to disaster.

[SEE 'WACO' PAGE A22]

Mr. Silverglate is a bimonthly NLJ columnist and a partner at the Boston firm of Silverglate & Good.

The Fi... Also Ap...

By Eric M. Freedm...

AN OUT-OF-CO... persuade the ... criminal defen... cent victim of ... ernment prose... ercise of First Amendme... true whether the case re... Bobby Seale, an Oliv... North or an O.J. Simpson...

But woe betide t... defense lawyer who sa... as Bruce Cutler did, "In m... opinion, the federal g... ernment has thrown t... Constitution out the wi... dow when it comes to [m... client]." That stateme...

Mr. Freedman is a professor of constitution... law at Hofstra University... School of Law.

National Law Journal - 9/11/95 p. A21

One Man's Cult Is Another's Religion

['WACO' FROM PAGE A21]

The authors make clear their view that much blame for the tragedy at Waco belongs to the various "anti-cult" groups which have helped foster an atmosphere that is intolerant of new, idiosyncratic religious sects. Government agencies have turned to groups such as the Cult Awareness Network, the American Family Foundation and the Council of Mind Abuse which have sought to have these sects tagged as "destructive cults" engaged in "mind control."

Religious leaders such as Mr. Koresh surely exercise enormous control over their followers. The unusual nature of the religious beliefs and practices at issue and the degree to which a charismatic leader exercises control over and demands obedience from his flock, however, do not distinguish these sects from mainline religions in any way that is relevant in assigning or withholding First Amendment protection.

Wrong Pretexts

In the final analysis, there was no more reason for these federal agencies to have targeted and laid siege to the Davidians than to any mainline Catholic, Protestant or Jewish community. (For those who are convinced that Mr. Koresh sexually abused minors within the community, such a problem, even if proven, was subject to local rather than federal jurisdiction. And even the most zealous supporter of federal law enforcement likely would concede that the claim the Davidians were in violation of federal firearms laws was a pretext to obtain jurisdiction over a seemingly dangerous "cult.")

If it was not evident at the time the First Amendment was adopted that the free exercise clause accords full constitutional protection to the most bizarre religious beliefs promulgated by a charismatic leader (though stopping short of physical coercion and threats of a nonspiritual variety), it became clear when the U.S. Supreme Court, in *U.S. v. Ballard*, 64 S.Ct. 882 (1944), turned aside the efforts of another federal agency—the postal authorities enforcing the mail fraud statute—to rid the nation of a dangerous "cult."

The Ballards had convinced their followers that they had "been selected as divine messengers" to bring the holy word of Saint Germain to mankind by means of the "I Am" religious movement. The indictment charged that the Ballards "well knew" their representations, including claims to cure incurable illnesses, to be "false." Justice William O. Douglas, writing for the court, said:

"The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect."

Justice Robert H. Jackson went even further. He pointed out that the state could not constitutionally "separate fancied [religious beliefs] from real ones, dreams from happenings, and hallucinations from true clairvoyance." He professed no illusions about the possible dangers of the control such leaders exercise: "But this is precisely the thing the Constitution puts beyond the reach of the prosecutor, for the price of freedom of religion is that we must put up with, and even pay for, a good deal of rubbish."

Many Precedents

In a case of mine, *Van Schaick v. Church of Scientology of California*, 535 F. Supp. 1125 (1982), the U.S. district court in Boston dismissed a claim brought by a disaffected former Scientologist that the church was guilty of fraud because it induced the plaintiff to labor for the church and turn her back on non-church relationships and activities.

Representing the church, I filed, in support of a motion to dismiss, a "mock" complaint that transmogrified the plaintiff's claims into claims implicating the cognate practices of the Roman Catholic Church (the judge's religion). The judge apparently recognized that the practices of Scientology, despite surface differences, were—from a constitutional perspective—essentially indistinguishable from those of mainline religions. In dismissing the counts, he wrote, "[These practices] are similar to the demands for single-minded loyalty and purpose that have characterized numerous religions, political, military and social movements over the ages."

In 1993 a unanimous Supreme Court invalidated an ordinance of the city of Hialeah, Fla., that targeted animal sacrifice as it was practiced by a local sect. Justice Anthony M. Kennedy, writing for the court in *Church of the Lukumi Babalu Aye Inc. v. Hialeah*, 113 S. Ct. 2217 (1993), held that outlawing animal sacrifice as a means of thwarting the sect's religious practices violated the "fundamental nonpersecution principle of the First Amendment." Thus, even the oddest rituals were to be protected. As the court said in an earlier case, *Thomas v. Review Board*, 101 S. Ct. 1425 (1981), "religious beliefs need not be acceptable, logical, consistent or comprehensible to others in order to merit First Amendment protection."

Had both the ATF and FBI looked to prior cases concerning the scope of protected religious beliefs and practices, they might have been more inclined to leave the Branch Davidians alone, thereby averting a major tragedy, the reverberations of which are still being felt and are likely to be felt for years to come. NLJ