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Scarlet Letter Lawsuits: Private Affairs and Public Judgments

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ARTICLE

SCARLET LETTER LAWSUITS: PRIVATE AFFAIRS AND PUBLIC JUDGMENTS

LYNN BUZZARD*

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I. INTRODUCTION

It has all the ingredients of a Hollywood epic: sex, religion and law packaged into a tense drama of authority and power in a dusty town. Here are raw defiance and a nagging church; the social outcast against entrenched power; hypocrisy and self-righteousness. Hawthorne’s *Scarlet Letter*¹ and Hester Prynne have nothing on this tale. But it’s all true!

Marian Guinn had been more than a casual member of the 125-member Church of Christ of Collinsville, Oklahoma, a small town of 2,200. Members of the church, including one of the defendants, Elder Ron Witten, had assisted her in moving to Collinsville with her children. The church had given her a car on one occasion,

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¹ N. HAWTHORNE, THE SCARLET LETTER (1860).
set up an account for gasoline, and provided babysitters while she studied for her graduate equivalency diploma. When she completed those studies, the church threw a party for her. It did the same when she graduated from Tulsa Junior College.

In 1980, when the three elders heard reports that she was having an affair with then-Mayor Pat Sharp, they confronted her. In Collinsville, secrets were perhaps hard to keep, and Marian admitted that there were rumors about town concerning her and Sharp. Sharp's former wife later suggested Marian was partly to blame for the breakup of her marriage.

In the summer of 1981, when the elders heard further reports of an ongoing affair, they insisted she meet with them. They prayed with her and urged her to break off the relationship. Finally, after a stormy confrontation, church leaders warned her in a letter of September 21, 1981.

Dear Sister Marian:
It is with tremendous concern for your soul and the welfare of the Lord's church that we exhort you to consider the impact of the results of the course you have elected to pursue. We have and will continue to follow the instructions set forth in the Scriptures in dealing with matters of church discipline. The Lord set forth the procedure in Matthew 18:15-17. We have confronted you personally . . . however to date you have not responded, so you leave us no alternative but to 'tell it to the church'. . . . It is the prayerful desire of the entire body of Christ that you correct this serious matter and avert the 'withdrawing of fellowship' of the saints.²

Marian declared it was "none of their business." On September 24, she wrote to the church:

I do not want my name mentioned before the church except to tell them I withdraw my membership immediately! I have never accepted your doctrine and never will. Anything I told was in confidence and not meant for anyone else to hear. You have no right to get up and say anything against me in church . . . . I have no choice but to attend another church, another denomination where men do not set themselves up as judges for God. He does his own judging.³

On September 27, the church read to the members of the con-

3. Id., Plaintiff's Brief in Response to Defendant's Motion for Summary Judgment.
gregation a letter asking them to contact Marian about the condition of her soul and giving her until October 4 to repent. On October 5, 1981, and in a subsequent letter to the members, the church noted Scriptures they believed Marian had violated, removed her name from the rolls, and called on members to “continue to pray on her behalf and to contact her for purposes of encouragement and exhortation.” Then the church forwarded the letter to four sister congregations in the immediate area with which the church had a close relationship.

Miss Guinn responded by filing suit against the church and its three elders, Ron Witten, Allan Cash, and Ted Moody. The complaint claimed that the church’s “public” discipline and dismissal of her was an “invasion of privacy” and that these revelations were “highly offensive and of no legitimate interest” to those informed. All of this, she alleged, “permanently injured and damaged . . . her good name and reputation.” Furthermore, she alleged that the “extreme and outrageous conduct” of the defendants “recklessly caused severe emotional distress.” The amended complaint concluded that the “defendants should be punished therefore and made an example to others.”

The Oklahoma jury concurred and awarded her $205,000 actual damages and $185,000 punitive damages. Marian was not alone in seeking legal recourse for church discipline. Similar cases were soon filed across the country, suggesting that Guinn was not a mere aberration on the legal landscape but perhaps the sign of a new legal framework in which church discipline cases may be successfully pressed.

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4. Id., Plaintiff’s exhibit B.
5. Id., Plaintiff’s exhibit 4.
7. Id., amended complaint.
8. Id.
9. Id.
10. Id.
Collinsville did not invent church discipline or develop some aberrant view of Matthew 18. It has a long, if controversial, religious tradition. Exercising moral guardianship over corporate life that Elder Donald Phillips, a family counselor who undertook to counsel the plaintiff, "disclosed confidential, intimate, and embarrassing details of his sexual and marital life" and that the church "publicly released" this information and "publicly excommunicated him in church services." The complaint alleged such conduct was professional malpractice, a breach of fiduciary duty, and "outrageous conduct" resulting in emotional distress. Kelly added counts for reckless and careless negligence, invasion of privacy, and conspiracy. Kelly sought actual damages plus $5,000,000 for exemplary and punitive damages.

In Orange County, California, Jan Brown sued for $3,000,000 against officials of the Fairview Church of Christ in Garden Grove for publicly denouncing her divorce as "sinful behavior." Brown v. Fairview Church of Christ, No. 4277621 (Super. Ct. Orange County, Cal. filed Apr. 20, 1984). Pastor Ken Dart, the complaint alleged, read a letter on Jan. 22, 1984, saying that, "for so long as she refuses to repent, none of us should keep company or associate with her in any way that would suggest approval of these actions . . . ."

Pastor Grant Adkisson, other staff, and the deacons of the First Baptist Church of Pagosa Springs were the targets in Shive v. Adkisson, No. 84 CV 6646 (Denver County Ct., Colo. filed Sept. 6, 1983). The complaint alleged that the defendants had slandered the plaintiff, James Shive, before the congregation, accusing him of being a "heretic, deceiver, fornicator, coveter, idolator, liar, [and] disorderly." Other counts in the complaint alleged libel, invasion of privacy, and infliction of emotional distress by outrageous conduct in "wanton and reckless disregard" of the plaintiffs. Each of seventeen claims sought damages of $1,000,000.

In Santa Cruz, on October 14, 1984, Charles R. Roberson sued the Evangelical Orthodox Church, ten named church leaders, and 500 John Does in connection with an alleged public revelation of plaintiff's "confidential" confession of marital infidelity. Plaintiff was a former bishop of the Evangelical Orthodox Church. Roberson v. Evangelical Orthodox Church, No. 981129 (Super. Ct. Santa Cruz County, Cal. filed Oct. 15, 1984). The complaint is a shopping list of tort claims: invasion of privacy, breach of fiduciary duty, false imprisonment, emotional distress, conspiracy, interference with prospective economic advantage, and other charges. Roberson asked the court for $5,000,000 in general damages and $5,000,000 in punitive damages.

See also Hester v. Barnett, 723 S.W.2d 544 (Mo. App. 1987) (overturning in part a trial court's dismissal of action against a pastor grounded in claims of invasion of privacy, ministerial malpractice, and intentional infliction of emotional distress).

14. Matthew 18:15-17. This chapter from the Gospel of Matthew in the Holy Bible contains instructions from Jesus on how the church is to respond to members of the community who will not listen to the counsel of the church, including a three-step process frequently applied by churches involving first, private confrontation; second, confrontation with a small group; and finally, involving the whole church.

15. Despite the relative rarity of church discipline in major religious commu-
has been a central aspect of the church mission and identity. Marian Guinn insisted, however, that the church's act intruded into her privacy. She told the trial court that "[W]hat I do is between God and myself" and insisted that the elders had no right to "mess with someone else's life." Her attorney, Thomas Fraser, told the jury in closing arguments, "I demand the right, on behalf of Marian Guinn, to lead her life the way she chooses."

Whose business was her conduct? Did the court properly protect Marian's privacy against an intrusive, judgmental, arrogant, snooping cadre of moral busybodies? Or did the court invade and chill the church's proper freedom for the exercise of church concern over its common life? Is church discipline the business of the church or the court? More especially, should relatively new torts such as invasion of privacy and infliction of emotional distress be

...
marshalled against church discipline? Is the court about to force
the church out of the discipline business? Can the Amish shun an
errant brother? Can members silence comment on their conduct
by a timely withdrawal? Can a church expel members but be le-
gally required to keep quiet about why?

Church discipline legal issues are part of a larger debate over
government entanglement with religion and the scope of constitu-
tional protections for religion in the face of such regulatory activ-
ity. More centrally, however, church discipline cases reflect a
growing tendency for disgruntled members and others to seek judi-
cial recourse for their grievances against church and religious lead-
ers. There are a number of tort actions that members may assert
against churches and their religious leaders for their acts and
teachings. These include: actions for clergy malpractice in counsel-
ing contexts; parental actions for infliction of emotional distress

16. The Guinn case brought these religious tensions to the surface at a time
when there is a renewed interest in the whole issue of church discipline. See, e.g.,
D. Baker, Beyond Forgiveness: The Healing Touch of Church Discipline
(1984); Benaware, Mind Your Own Business, Moody Monthly, Jan. 1984, at 24-
27; Patterson, Discipline: The Backbone of the Church, Leadership, Winter,
1983, at 108-13; Stafford, The Tightrope: A Case Study in Church Discipline,
Leadership, Summer, 1984, at 40-48; Baker, The High Cost of Church Discipline,

17. See Paul v. Watchtower Bible and Tract Society of New York, Inc., 819
F.2d 875 (9th Cir. 1987) (affirming a district court ruling barring recovery in that
case on first amendment free exercise grounds).

18. The issue is far broader than rural Oklahoma fundamentalist churches. It
is bigger than merely local church autonomy. Noted theologian Martin Marty de-
clared in response to the intervention of the Oklahoma courts, "[t]his is going to
get mighty sticky. There's no telling where it's going to go." For Forrest Mont-
gomery of the National Association of Evangelicals, the issue was central: "What's
at stake is the churches' very existence." Green, Church Discipline: Can Courts
Pass Judgment?, The Register, Apr. 29, 1984, A 18, 19. Catholic discipline issues
have emerged with increasing frequency in recent years, especially in the light of
what the controversial priest Andrew Greeley has called the emergence of the "do
it yourself Catholic." Discord in the Church, Time, Feb. 4, 1985, at 54. Swiss theo-
logian Hans Kung, himself subject to discipline, complained that "a new phase of
Inquisition" has begun. Id. at 52. Notre Dame theologian Richard McBrien, chair-
man of the theology department, queried: "Are we back to book burnings, black-
listings, expulsion and even excommunications?" Id. at 52, 53.

19. See, e.g., Ripple, The Entanglement Test of the Religion Clauses—A
Ten Year Assessment, 27 UCLA L. Rev. 1195 (1980).

20. See, e.g., Nally v. Grace Community Church, 157 Cal. App. 3d 912, 204
Cal. Rptr. 303 (1984), decertified and hearing denied, Aug. 30, 1984. For com-
ment on clergy malpractice claims see Bergman, Is the Cloth Unraveling? A First
with regard to their children's adherence to a religious group; actions alleging fraud in the failure of religious groups to keep their promises; and actions by excommunicated members alleging interference with business relations.

The importance of developing a sound legal approach in church discipline cases is intensified by a recognition of the serious burden such suits place upon the exercise of religious beliefs. Tort damage awards often implicate fundamental constitutional rights and are, therefore, subject to constitutional scrutiny. The financial burdens that tort liability may create are potentially chilling and are thus particularly subject to constitutional review to ensure that free exercise is not being punished.

Such burdens are particularly felt by unpopular religious groups. Actions against such groups in recent years included false


See also Paul v. Watchtower Bible and Tract Society of New York, Inc., 819 F.2d 875 (9th Cir. 1987) (holding application of state tort law to churches may abridge free exercise rights of churches and members and that permitting tort recovery would have the same effect as making the act unlawful).
imprisonment,\textsuperscript{26} infliction of emotional distress,\textsuperscript{27} fraud,\textsuperscript{28} and brainwashing.\textsuperscript{29} States have shown a willingness to support parental concerns in regard to some activities of religious groups by adopting conservatorship statutes permitting the temporary custody of adults in order to ascertain whether the adult was subjected to impermissible mind control.\textsuperscript{30} The potential for jury verdicts in tort actions to reflect judgments about the religious groups' doctrines and styles poses further concerns for assuring adequate legal protections for churches in church discipline suits.

This article will review the legal issues related to church discipline which are raised by \textit{Guinn}. Part II will provide an overview of the general legal bases for church rights of internal control and discipline in associational and first amendment law. Part III will note the traditional limited scope of tort claims, and defenses to them, raised in church discipline cases. Part IV will note the newer claims grounded in the modern torts of invasion of privacy and infliction of emotional distress as represented by \textit{Guinn} in church discipline-related suits. Part V will suggest the rationale and bases for heightened judicial protection of churches in church discipline cases under both associational and first amendment law.


\textsuperscript{29} Orlando v. Alamo, 646 F.2d 1288 (8th Cir. 1981); Turner v. Unification Church, 602 F.2d 458 (1st Cir. 1979); Lewis v. Holy Spirit Ass'n for Unification of World Christianity, 589 F. Supp. 10 (D. Mass. 1983).

II. LEGAL SOURCES OF RIGHTS OF CHURCHES TO EXERCISE CHURCH DISCIPLINE

A. Rights of Association Include Rights to Control and Discipline Membership

Rights of association are at the core of the rights of churches to organize, engage in collective activities, and develop rules of organization and discipline consistent with their associational interests. These associational rights emerge both from notions of contract and from constitutional protections afforded associational relationships and expression. Though the Constitution does not specifically speak to the right to form an association, its protections of speech and assembly have been held to imply such a right. The Supreme Court stated that: "There is no longer any doubt the First and Fourteenth Amendments protect certain forms of orderly group activity. Thus, we have affirmed the right to engage in association for the advancement of beliefs and ideals."\(^{31}\)

The Constitution protects the rights of individuals to form associations to act in concert with others of like mind.\(^{32}\) Associational rights include the right to both intimate association and associational expressive activity.\(^{33}\) Such rights are entitled to strong protection against infringement. In *NAACP v. Alabama*, the Supreme Court stated that "[s]tate action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."\(^{34}\) Recent decisions have modified the expressive rights of an association to control its own membership where the association is not an intimate association marked by "relative smallness, a high degree of selectivity . . . and seclusion" but is a "large and basically un-

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32. The right of 'association,' like the right of 'belief,' is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means; association in that context is a form of expression or opinion; and while it is not expressly included in the First Amendment its existence is necessary in making express guarantees fully meaningful. *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).
33. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). Intimate associations have greater constitutional protections because they play a "critical role in the culture and traditions of the nation" and "foster diversity and act as critical barriers between the individual and the state." To protect them thus "safeguards the ability to define one's identity." *Id.* at 618-19.
selective group[].”

In most situations, church and religious associations would fall within the more highly protected classification devised by Roberts v. United States Jaycees. The rights of such protected associations are broad. They include the right to establish conditions of membership such as eligi-

bility and qualifications; and associations may impose whatever terms they choose, if not contrary to the law. The grant of or refusal to grant membership in a voluntary organization is “within the complete control of the association, and the courts cannot compel the admission of an individual into such an association.” Nor may one denied membership sue for damages for such exclusion, even where the exclusion may have been motivated by malice. 38

35. Roberts, 468 U.S. 609, 632. Justice O'Connor, dissenting, focused not on the size or intimacy of the group but on its purposes, permitting more interference where the purposes were commercial. On intimate association and the issue in Roberts, see Karst, Freedom of Intimate Association, 89 Yale L.J. 624 (1980); Linder, Freedom of Association after Roberts v. U.S. Jaycees, 82 Mich. L. Rev. 1878 (1984); and Raggi, An Independent Right to Freedom of Association, 12 Harv. C.R.-C.L. Rev. 1 (1977). Also, in Rotary Club of Duarte v. Board of Directors of Rotary International, 178 Cal. App. 3d 1035 (1986), the court reversed a trial court and held that injunctive relief barring the dismissal of a local Rotary Club from the international organization was proper. The court held that the Rotary Club was a business establishment subject to the Unruh Act barring sex discrimina-


Thus, associational rights include an inherent, internal legislative power that encompasses the right to establish its own binding governance.

It is well established that a voluntary association may, without direction or interference by the courts, draw up for its government and adopt rules, regulations and by-laws which will be controlling as to all questions of discipline, doctrine, or internal policy; and its right to interpret and administer such rules and regulations is as sacred as its right to make them.9

These associational rights also extend to the right to determine the basis and procedures for disciplinary practices within the association. An association has the “power to relieve itself of its discordant members” and thus the right to “establish by-laws providing for the expulsion of members transgressing their reasonable provisions.”40

Individuals who associate themselves may prescribe conditions upon which membership may be acquired, or upon which it may continue and may also prescribe rules of conduct for themselves during their membership, with penalties for their violation, and a tribunal and mode in which the offenses shall be determined and the penalty enforced.41

The appropriate tribunal set up by the association makes decisions under such rules. The decisions concerning internal disciplinary affairs are traditionally conclusive except in cases of “fraud, collusion, or arbitrariness.”42

39. 6 AM. JUR. 2D Associations and Clubs § 5 (1963). This power is not unlimited; but if the regulations of the association are not immoral, unreasonable, illegal, or in violation of a strong public policy, they will be held valid and binding on all members. This is true even if the effect of these rules is to limit freedoms individuals might otherwise have had were it not for their voluntary membership. See, e.g., North Dakota v. North Cent. Ass’n of College and Secondary Schools, 23 F. Supp. 694, aff’d, 99 F.2d 697 (7th Cir. 1938).


42. Harris v. Missouri Pac. R. Co., 1 F. Supp. 946, 949 (E.D. Ill. 1931), specifically citing decisions of church tribunals. See also Green v. Obergfeld, 121 F.2d 46, cert. denied, 314 U.S. 637 (1940), noting “[n]o judicial interference with intra-associational affairs . . . in the absence of special circumstances showing injustice or illegal action.” Id. at 55. See also 6 AM. JUR. 2D Associations and Clubs § 27 (1963). The powers of an association to provide for suspension and expulsion of members are inherent in the association itself, what some courts call the police power of an organization. One court referred to this right to expel members as
In *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, the Supreme Court applied these basic associational rights to religious bodies. In the area of church discipline, courts applying associational rights explicitly affirm the right of churches to promulgate rules that regulate the expulsion of members, and such rules are binding on all of their members. The Supreme Court in *Bouldin v. Alexander* declared "we have no power to revise or question ordinary acts of church discipline, or of exclusion from membership."

Thus, principles of associational rights provide a major source of church authority to develop standards of membership and practices and procedures for disciplining and expelling members. The right to form such associations is constitutionally protected, and the right to develop such internal norms and procedures arises both from constitutional principles and the implied consent of persons who affiliate with such associations to be bound by their procedures.

**B. Rights of Internal Control Assured by First Amendment’s Religion Clause**

In refraining from interference with church decisions, the courts stress not only associational law but also the general principles of religious liberty. The Supreme Court set the tone in 1871 when it declared:

> Whenever the questions of discipline, or of faith, or ecclesiastical rule, custom or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept these decisions as final, and binding on them . . . . The right to organize voluntary religious associations . . . and to create tribunals for the decision of controverted ques-

rooted in “a basic law of self-preservation.” Club members impliedly agreed to abide by the rules by joining. Lawrence v. Ridgewood Country Club, 635 S.W.2d 665 (Tex. Ct. App. 1982). *See Chaffe, The Internal Affairs of Associations Not for Profit, 43 Harv. L. Rev. 993 (1930).*

43. 344 U.S. 94 (1952).
45. 82 U.S. (15 Wall.) 131 (1872).
46. Id. at 139.
47. For a list of such cases in various jurisdictions, see Annotation, Suspension or Expulsion from Church or Religious Society and the Remedies therefor, 20 A.L.R.2d 421, 435 (1951).
tions of faith within the association, and for the ecclesiastical govern-
ment of all the individual members . . . is unquestioned. All
who united themselves to such a body do so with an implied con-
sent to this government, and are bound to submit to it. But it
would be a vain consent and would lead to the total subversion of
such religious bodies, if anyone aggrieved by one of their deci-
sions could appeal to the secular courts and have them reversed.
It is of the essence of these religious unions, and of their right to
establish tribunals . . . that those decisions should be binding in
all cases of ecclesiastical cognizance, subject only to such appeals
as the organism itself provides for. 48

The drafters of the Constitution centrally concerned them-
whose with the "core ideal of religious autonomy," the protection
of religious life from governmental interference. 49 While the
phrases "separation of church and state" and "wall of separation"
are not part of the Constitution, the images reflect a commitment
prohibiting improper intrusions into either sphere. Long before
Thomas Jefferson used the "wall of separation" image in a letter to
the Danbury Baptists, 50 Roger Williams used a similar image but
with a different connotation. For Williams, the wall was not so
much to keep the church out of the state where its moral influence
was critical but to keep the wilderness of the state from polluting
the garden of the church.

[W]hen they have opened a gap in the hedge or wall of separation
between the Garden of the Church and Wilderness of the world,
God hath ever broke down the wall itself, removed the candle-
stick, and made His garden a wilderness, as at this day. And that
therefore, if he e'er please to restore His garden and paradise
again, it must of necessity be walled in peculiarly unto Himself

50. The letter at 16 Writings of Thomas Jefferson, 281-82 (1903), became the
source for later Supreme Court use of that language. See Everson v. Board of
history in that case, Mark Howe declared that the "Court disdained the work of
the historian." M. Howe, The Garden and the Wilderness: Religion and Gov-
ernment in American Constitutional History 31, 34 (1965). Michael Malbin
spoke of "an incredibly flawed reading of the intent of the authors of the First
Amendment by the Court." M. Malbin, Religion and Politics: The Intentions
of the Authors of the First Amendment (1978). Edwin Corwin noted that
"[u]ndoubtedly the Court has a right to make history, but it does not have the
right to remake it." (emphasis added). Corwin, The Supreme Court as a Na-
C. The Autonomy Precedents: Church Property Cases

The notions of "separation of church and state" antedate modern church-state jurisprudence and the development of the analytical tools of "establishment" and "free exercise" since the 1950s. Though these concepts were not carefully delineated in the early church property cases, the courts generally refused to intervene in church affairs because of the First Amendment and utilized principles which seem founded in the same ideas later framed by the Court more specifically as "entanglement" or free exercise concerns. The key dynamic in early church property cases was the petitioning of courts by church factions seeking judicial intervention in administrative decisions that affected the control of property. The Court very early expressed incompetence to decide theological and doctrinal questions which were often at the core of such property questions.

In 1871, the Court decided Watson v. Jones, a seminal case involving judicial decisions about church affairs. A faction of the Walnut Street Presbyterian Church of Louisville, Kentucky, split from the General Assembly of the Presbyterian Church over disputes regarding slavery and the civil war. The local congregation argued that the parent denomination departed from the doctrine of the church and, hence, the local church was the true church entitled to the property. Kentucky courts agreed and held that, while this property was held in a trust for the parent church denomination, the "departure from doctrine" by the parent church denomination dissolved the trust so

51. R. Williams, A Letter of Mr. John Cotton in The Collected Writings of Roger Williams 392 (1963). For a discussion of Williams and Jefferson on "a wall of separation" see M. Howe, The Garden and the Wilderness (1965). In contrast, Jefferson saw the wall as chiefly protecting the state. For example, he would have barred clergy from holding public office, a policy attempted by Tennessee but struck down by the United States Supreme Court in McDonald v. Paty, 435 U.S. 618 (1978).

52. In Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976), the Court simply referred to the first and fourteenth amendments as barring review by the courts of church decisions.

53. 80 U.S. 679 (1871).

the local Kentuckians could have title to the property.\textsuperscript{55}

The United States Supreme Court rejected the "departure from doctrine" concept and declared the Court's theological incompetence.

The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect . . . . All who unite themselves to such a body [church/denomination] do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.\textsuperscript{56}

\textit{Watson v. Jones}\textsuperscript{57} established a principle of deference to hierarchical church decisions. Civil courts must accept as final and binding the decisions of church authorities in questions of "discipline, or of faith, or ecclesiastical rule, custom or law."\textsuperscript{58}

The \textit{Watson} Court grounded its decision in several principles relevant to church discipline cases today.\textsuperscript{59} First, the Court spoke of "implied consent," the notion that the parties agreed to such a governance, by stating: "All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it."\textsuperscript{60} This principle emphasizes the intent or agreement of the parties and relies on broad associational and contract law concepts. When persons voluntarily join such a group, they consent to the rules which govern that association.

Subsequent cases reiterate this consent or contract principle. Later Supreme Court cases cited the \textit{Watson} Court's "implied consent" and "bound to submit" declarations.\textsuperscript{61} Justice Brandeis in

\begin{itemize}
\item \textsuperscript{55} Watson v. Avery, --- Ky. (2 Bush) 332 (1869).
\item \textsuperscript{56} Watson v. Jones, 80 U.S. at 728-29.
\item \textsuperscript{57} 80 U.S. 679.
\item \textsuperscript{58} \textit{Id.} at 727.
\item \textsuperscript{59} See Ellman, \textit{supra} note 54, for a discussion of various underlying principles in the \textit{Watson} decision.
\item \textsuperscript{60} 80 U.S. at 729.
\item \textsuperscript{61} See Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 711 (1976).
\end{itemize}
Gonzalez v. Archbishop62 applied the contract principle in suggesting that "the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise."63

Second, the Watson Court grounded its decision in a type of subject-matter jurisdictional incompetence. This basis is a conviction of the impermissibility of any court adjudication of doctrinal matters. The deference is rooted not so much in the dispositiveness of consensual agreements but in a larger principle of deference based on the subject matter of religious doctrines. In one respect, this incompetence is a jurisdictional concept—a constitutional infirmity grounded in the highly intrusive character of any theological inquiry and decisionmaking, resulting in an engagement with religion that would later be denounced as "excessive entanglement."

Beyond that, however, a more practical component, that of a "lack of judicially discoverable and manageable standards,"64 exists. The courts speak of a sense of basic incompetence to deal with such theological questions.65 As the Watson Court stated, "[t]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."66 The Court’s reluctance to deal with such questions is not just a matter of respect for religion. It goes to the very question of competence to understand and interpret issues, even organizational questions, when they are infused with theological contexts. Chafee referred to this as the "dismal swamp" problem: the inevitable confusion and disorientation when courts try to understand and decide issues which involve a vocabulary, logic, and history about which they know nothing.67 Inquiry into religious doctrinal matters is "a forbidden domain,"68 and the

62. 280 U.S. 1 (1929).
63. Id. at 16 (citing Watson v. Jones, 80 U.S. 679 [1871]).
68. United States v. Ballard, 322 U.S. 78, 87 (1944). This deference exists notwithstanding the fact that, as Justice Jackson noted, "[t]he price of freedom of religion or of speech or of the press is that we must put up with, and even pay for,
Court consistently refutes such analysis.

The third factor in Watson's avoidance of intermeddling with church issues reflects a broader "jurisdictional" approach—a "strict deference" in which the Court recognizes "there is some overriding concern for religious autonomy." The Watson Court noted that examining the validity of ecclesiastical decrees "would deprive these bodies of the right of construing their own church laws, would . . . in effect, transfer to the civil courts . . . the decision of all ecclesiastical questions."

The courts frequently reiterate these principles of deference to the theological and doctrinal affairs of churches. In Kedroff v. St. Nicholas Cathedral, the Court affirmed a "hands-off" approach to any consideration of church doctrine and internal administrative affairs and gave its decision constitutional dimensions rooted in the free exercise clause. The Court struck down a New York law aimed at freeing the American Russian Orthodox Church's St. Nicholas Cathedral from Moscow's control. The issue was the validity of a New York statute that, in effect, gave control of the church property to an American-based hierarchy free of Moscow. The Court held the act improper. Citing Watson, it held that, since the matter was really one of religious doctrine, it was "strictly a matter for ecclesiastical government"; thus, any intrusion such as the legislature's was improper. The Court spoke of a "spirit of freedom for religious organizations, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."

At first blush, it might have seemed a simple property issue warranting the Court's involvement. But, as Justice Frankfurter noted, "St. Nicholas Cathedral is not just a piece of real estate . . . . What is at stake here is the power to exert religious authority."

Laurence Tribe noted the importance of the Kedroff Court's
recognition of the essentially doctrinal character of the real issue, even when the surface questions might seem legally justiciable, independent of religious questions. Additionally, Tribe noted the dangers of permitting dissidents to have a "judicial platform" from which to "air your religious differences with others and potentially win a favorable verdict." He warned of the dangers of permitting an "open season on churches." He concluded:

It is not only the sanctity of religious conscience in the abstract which has been of concern in these cases; it has also been the integrity of religious associations viewed as organic units . . . . Thus, the Supreme Court has recognized for nearly a quarter century that, whatever may be true of other private associations, religious organizations as spiritual bodies have rights which require distinct constitutional protection.

The Court expressed the same strict deference in *Serbian Eastern Orthodox Diocese v. Milivojevich,* which involved similar leadership struggles in the Serbian Orthodox Church. The Court extended protections from review to "disputes over church polity and church administration" and set a high wall when it declared it is:

the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria. Constitutional concepts of due process, involving secular notions of 'fundamental fairness' or impermissible objectives, are therefore hardly relevant . . . .

To allow a review of the criteria by which a court made its decision was "exactly the inquiry that the First Amendment prohibits."

77. Id. at 875.
78. Id. at 876.
79. 426 U.S. 696 (1976). In 1963, the mother church of the Serbian Orthodox Church in Belgrade suspended and defrocked Milivojevich. In ordering the bishop's reinstatement, the Illinois Supreme Court held that the prescribed church procedure was not followed and that the actions of the mother church had been arbitrary. The court stated these findings justified judicial interference and the setting aside of the official hierarchy's decision. The United States Supreme Court, however, held that the Illinois court engaged in an "impermissible rejection of the decisions" of the church and that this type of detailed review exceeded the minimal review possible by civil courts of ecclesiastical affairs. *Id.* at 708, 720.
80. Id. at 714-15.
81. Id. at 713.
In *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Church*, the Supreme Court again addressed this issue. This case involved a dispute alleging doctrinal departure involving two Georgia Presbyterian congregations that sought to withdraw from the Presbyterian Church in the United States. The Supreme Court reiterated the view that the first amendment barred the courts from interpreting and weighing doctrines, though it could utilize "neutral principles of law" in property disputes. The Court insisted that civil courts "must defer to the resolution of issues of religious doctrine or polity to the highest court of a hierarchical church organization."

These decisions reflect a broad principle of deference to churches in the internal discipline and life of the church. This judicial deference is rooted in a recognition that courts are improper forums for such debate. Involving the courts dangerously threatens the integrity of religious life and organizations.

D. Establishment Clause Limits on Church Discipline Claims

The general principles established in the autonomy-property cases continued to arise in later cases where, in great detail, the Court analyzed questions involving "establishment" and "free exercise" concerns. *Everson v. Board of Education* established the "separationist" tradition of the Court. Justice Hugo Black drew heavily on Jefferson's letter to the Danbury Baptists and declared the first amendment erected a "wall of separation between church and state" which must be "high and impregnable" so that not even the "slightest breach" could be approved. A year later in *McCollum v. Board of Education*, Justice Felix Frankfurter affirmed this separationist faith: "[W]e renew our conviction that we have staked the very existence of our country on the faith that complete

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83. Id. at 449.
84. Id. at 446. The Court did note that it would be permissible to use "neutral principles of law, developed for us in all property disputes" but noted that such was not required in this case. The concept of employing neutral principles was reaffirmed in *Jones v. Wolf*, 443 U.S. 595 (1979). The concept has drawn considerable critical comment. See, e.g., Note, *Jones v. Wolf: Neutral Principles Standards of Review for Intra-Church Disputes*, 13 Loy. of L.A.L. Rev. 109 (1979).
86. Id. at 18.
separation of church and state is best for the state and for religion. . . . 'good fences make good neighbors.'”

Over the next several years after *Everson*, the Court developed the “tripartite test” for determining whether or not there was an impermissible “establishment of religion.” The most relevant element of this test, known as the *Lemon* test, for the issue of judicially imposed civil liability for church discipline is the non-entanglement requirement. The basic idea of avoiding entanglement reflects a judgment shared by many of the founding fathers and expressed succinctly by Madison, who insisted that the national government “has not a shadow of right . . . to intermeddle with


89. In 1977, in *Wolman v. Walter*, 433 U.S. 229, 236 (1977), the Supreme Court summarized the requirements of the establishment clause: the statute must have a clear secular legislative purpose, a principal or primary effect that neither advances nor inhibits religion, and it must not foster excessive government entanglement with religion. 433 U.S. at 231.


91. The non-entanglement requirement may, as Laurence Tribe suggests, just be another way of looking at the same information one analyzes when exploring whether there is an impermissible effect of inhibiting or aiding religion. That is, has the conduct of government created a relationship which has an impermissible effect? Some commentators have criticized the application of government regulation to organizations such as churches as posing “establishment” claims under the entanglement clause. They insist that the place to root or ground any exceptions is in the free exercise clause. D. Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right of Church Autonomy*, 81 Col. L. Rev. 1373 (1981). Others insist that free exercise protections apply only to individuals because only they have consciences which can be coerced, and all other protections, such as those afforded a church, must be found precisely in the non-entanglement prohibitions of the establishment clause. See *Esbeck*, *Establishment Clause Limits on Government Interference with Religious Organizations*, 41 Wash. & Lee L. Rev. 347 (1984). Seemingly, a better principled argument is that collectivities have free exercise rights as well. Further, any confinement of free exercise to individuals would seem to reflect more of a modern preoccupation with individualism than any realistic or historic sense of the character of religion or the development of conscience.
religion."  

The Supreme Court first formally announced the non-entanglement principle in *Walz v. Tax Commission.* In upholding a tax exemption for a religious organization, the Court noted that the exemption was permissible in part because non-taxation permitted a lesser degree of entanglement between government and religion. In *Lemon,* the Court affirmed the excessive entanglement principle and made it the third prong of the tripartite test. There are several different kinds of impermissible entanglements. They are the doctrinal, administrative, and political.

A frequent concern of the Court is entanglement in the context of excessive government surveillance or oversight over the management affairs of religious organizations and the desirability of both government and religion to be "left free of the other within its respective sphere." Surely a troublesome form of entanglement would be any governmental attempt to resolve internal reli-

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96. The *Lemon* Court spoke of the dangers of comprehensive, discriminating, and continuing surveillance of the programs, use of funds, and accounting by churches and religious groups whenever federal aid goes to religious schools. Such surveillance involves the government in the kind of review and monitoring which are anathema to the Constitution. Lemon v. Kurtzman, 403 U.S. at 619. In *Walz,* the concurring justices noted that it was critical to avoid contexts where there was any "governmental evaluation" of religious practices, "state investigation into church operations," 397 U.S. at 694 (Brennan, J., concurring), or any involvement of government in "difficult classifications of what is or is not religious." Id. at 698 (Harlan, J., concurring).
97. The Court has referred to political divisiveness created by state involvement with religious belief and practice as a "warning signal not to be ignored." Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756, 797-98 (1973).
gious disputes. Laurence Tribe insists "the form of entanglement the Supreme Court deems most subversive of first amendment values is that which involves government not only in the apparatus of religion but in its very spirit—in its decision on core matters of belief and ritual."

While the concept of entanglement initially developed in financial "aid" cases, it clearly applies to "regulation" cases as well. If entanglement bars "aid" on the grounds of a constitutionally intolerable mixing of religion and government, such arguments would seem equally appropriate in cases of excessive governmental regulatory action. The courts increasingly use the doctrine where the issue is the permissible scope of government controls and when such controls create precisely the kind of intrusion barred as excessive. It is in this context that the doctrine argues strongly for court deference to the disciplinary, doctrinal, and instructional aspects of the church's life. Courts should not involve themselves in questions such as: when the members of a church may be advised of disciplinary action taken against a member or former member or what internal procedures are appropriate in processing the withdrawal of a member under discipline. Allowing a court to decide issues relating to church discipline is precisely the kind of excessive entanglement that the court arguably should avoid.

Lower courts have recognized the dangers of such interference and consistently resisted intrusion into such internal affairs by recognizing that "in matters purely religious or ecclesiastical, the civil courts have no jurisdiction." The Nebraska Supreme Court asserted that religious freedom itself would not survive very long if members, disgruntled about "some matter of religious faith or church polity, could successfully appeal to the secular courts for redress."

E. Free Exercise, Church Autonomy, and Church Discipline

"[A] right to church autonomy under the free exercise clause focuses on the real issues at stake. The right is the right of churches to make for themselves the decisions that arise in the course of running their institutions."

100. L. Tribe, supra note 49, at 870.
103. Laycock, supra note 91, at 1394.
emerge in terms both of individuals and of group contexts or communal interests. Many, perhaps most, religious exercises take place in the context of communities of faith. Free exercise rights ought to include the rights of these communities to carry out their lives of worship, discipline, and management without interference from the government.

In *Cantwell v. Connecticut*, *West Virginia State Board of Education v. Barnette*, *Sherbert v. Verner*, and *Wisconsin v. Yoder*, the Court developed strong commitments to free exercise protections. The Court insisted that, as Chief Justice Burger stated in *Yoder*:

> [I]t must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause . . . [O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.

A process of free exercise analysis resulted from these cases. When there is a showing of a substantial burden on the exercise of a sincerely held religious belief, such burdens must be justified by compelling state interests and represent the least intrusive means.

Clearly, not every claim to free exercise will prevail. There are state interests that will overcome the right of free exercise. To
contend that government intrusion under the facts of present church discipline cases is impermissible is not to assert that the church is totally immune from public accountability regardless of what it does. There are compelling interests which can overcome the heavy presumption of non-interference. Should a church claim the right to beat sinners into repentance or lock them up until they have a repentant heart, the state’s interest would prevail and the church would be subject to the appropriate criminal penalties and civil remedies. In such cases the state’s interests are expressed through the specificity, clarity, and legislative processes underlying its criminal law and are not merely the product of individualized judgment by jurors or judges.

III. TRADITIONALLY LIMITED SCOPE OF CHALLENGES TO CHURCH DISCIPLINE

A. Procedural Challenges in Church Discipline Contexts

The strong commitments in the area of associational rights, however, do not completely bar challenges to church disciplinary proceedings. One of the major grounds for challenging dismissals from membership is the challenge not to the right of the association to control its membership but to the process that the association/church uses. In many cases, challenges on procedural grounds are the only ways in which the actual action of the church are voided and members reinstated.111

These issues of procedure in church discipline cases deal, for example, with whether the church gave proper notice to the person(s) concerning the charges or the meetings to consider charges. The cases also deal with whether there was an opportunity for a hearing, or whether the proper body (e.g., deacons, elders, congregation) in the church made the decision.

In In re Galilee Baptist Church,112 the court set forth the lim-

unsuccessfully asserted a free exercise right to violate federal laws prohibiting polygamy because his practices were rooted in religious convictions. The Court concluded: "Laws are made for the government of actions, and while they cannot interfere with mere religious belief or opinion, they may [interfere] with practices." Id. at 166.

111. For a general overview of issues and cases associated with challenges to expulsions, see 66 AM. JUR. 2D Religious Societies § 12 (1973) and Annotation, supra note 47.

112. 186 So. 2d 102 (Ala. 1966). This disagreement included the dismissal of the pastor and removal of certain members from leadership positions with each
ited basis for a procedural appeal and concluded:

Spiritualities are beyond the reach of temporal courts, and a pastor may be deposed by a majority of the members at a congregational meeting at any time, so far as the civil courts are concerned, subject only to inquiry by the courts as to whether the church, or its appointed tribunal has proceeded according to the law of the church.\textsuperscript{113}

The usual form of such a challenge alleges that the association did not follow its own rules and procedures.\textsuperscript{114} In these situations, the courts engage in a limited review to determine whether the expelling organization acted in accordance with its own regulations.\textsuperscript{115}

\begin{footnotesize}
\begin{enumerate}
\item[113.] Id. at 106.
\item[114.] On such grounds, complaints successfully challenged dismissals on the basis that the dismissal was by an authority not properly delegated such powers: Burke v. Roper, 79 Ala. 138 (1885) (dismissed by the pastor in a congregational church); Hatfield v. De Long, 156 Ind. 207, 59 N.E. 483 (1901) (improperly constituted tribunals); Keith v. Howard, 24 Pick. 292 (Mass. 1836) (unauthorized committee revising the church constitution); Briscoe v. Williams, 192 S.W.2d 643 (Mo. App. 1946) (Court declared that an expelled member "has a right to be heard . . . on the question where unauthorized persons have usurped control of the church tribunal" and where specific church procedures regarding procedures such as notice have not been observed. Id. at 646). In David v. Carter, 222 S.W.2d 900 (Tex. Civ. App. 1949), the court found a "radical departure from accepted customs and rules of organization" when it reviewed the expulsion of a member without previous notice of the time, place, and purpose of the meeting. Id. at 906. In Taylor v. Jackson, 273 F. 345 (D.C. 1921) (Baptist church), the court reversed several expulsions based on insufficiency of notice and service of copy of charges as required by the rules of the denomination. In Longmeyer v. Payne, 205 S.W.2d 263 (Mo. App. 1947), the court reversed expulsions where there was no notice or opportunity to be heard as required by church rules. In Randolph v. First Baptist Church, 53 Ohio Op. 288, 120 N.E.2d 485 (1954), the court invalidated an expulsion since the pastor, in announcing a meeting to deal with members who had opposed the advancement of the church's program, had failed to note that plaintiff was the one referred to; and plaintiff had not been given notice of the charges against her before the trial. The court noted that, although a church is autonomous and the minority must submit to the majority, it does not follow that the church can expel members with utter disregard of constitutional provisions regarding expulsion of members. Id. at 497.

\item[115.] Brown v. Mt. Olive Baptist Church, 255 Iowa 857, 124 N.W.2d 445 (1963). Courts have traditionally been reluctant, however, to interfere even when there are irregularities. In Mt. Olive Primitive Baptist Church v. Patrick, 252 Ala. 672, 42 So. 2d 617 (1949), the Alabama Supreme Court refused to intervene in a dismissal of members without notice, arguing that to do so would be "treading on
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When the church has, at most, minimal formal procedures, the disgruntled parties usually allege that the procedures were improper because of their basic unfairness, or "natural justice." In *Rock Dell Norwegian Evangelical Lutheran Congregation v. Mommsen*, the court held that an expulsion without any notice, any formal charges, or any opportunity to be heard was void even though the church's own rules had no requirements of notice or hearings. Other jurisdictions have handed down similar decisions based on concepts of natural justice. These courts speak of a presumption of such requirements. Other courts reject the application of any such natural justice concepts.

Courts are reluctant, however, to inquire too deeply into the procedural aspects of associational rights when they involve churches because the constitutional protections of religion complicate any judicial involvement. The Supreme Court in *Watson* indicated its reluctance to review "with minuteness and care" the most dangerous ground and invading a sanctuary." *Id.* at 619. The court concluded that "the church being independent, and not subject to higher powers, and being a law unto itself for its own procedures in religious matters, what it did towards the expulsion of petitioner was not unlawful, even if it was not politic and wise." *Id.*


117. One aspect of natural justice concepts that the courts also raise is whether or not one may challenge an expulsion on grounds of lack of good faith. *Brown v. Harris County Medical Soc'y*, 194 S.W. 1179 (Tex. Civ. App. 1917), citing earlier cases on associational rights including religious groups, affirmed the court for reviewing an expulsion to ascertain whether or not it was in good faith. Other courts have rejected any "good faith" exception, suggesting they have no jurisdiction to inquire into motives. *See, e.g., Clapp v. Krug*, 232 Ky. 303, 22 S.W.2d 1025 (1929).

118. *See In re Koch*, 257 N.Y. 318, 178 N.E. 545 (1931), holding a dismissal void where no adequate notice or opportunity to be heard existed. In a few cases, it has been alleged the by-laws themselves violated such principles of fairness. As with general associational law, corporate by-laws of religious bodies will control unless found to be "unreasonable, unadapted to the corporate purpose, or contrary or inconsistent with the laws of the state . . . ." *See also Fairchild v. Tillotson*, 118 Misc. 639, 195 N.Y.S. 39 (1922) (involving incorporated Christian Science church).

119. Examples of churches specifically indicating they would not assess whether an expulsion was violative of "natural justice" are *Partin v. Tucker*, 126 Fla. 817, 172 So. 89 (1937). *Compare* later Florida decision in *First Free Will Baptist Church, Inc. v. Franklin*, 148 Fla. 277, 4 So. 2d 390 (1941), implying a review for "arbitrariness" might be considered, *with Minton v. Leavell*, 297 S.W. 615 (Tex. Civ. App. 1927).

120. 80 U.S. (13 Wall.) 679 (1871).
usages, customs, laws, and organizations of religious denominations and thereby interfere with the rights and processes of such bodies in "construing their own church laws." 121 A further basis for such a reluctance to intervene is the court's lack of special knowledge of ecclesiastical matters. The ecclesiastical bodies themselves are the "best judges of their own law." 122

A few courts suggest that they would not review a church decision about membership on any grounds. In early cases, courts often applied a rule that prevented review of any expulsion unless some property or civil right was involved. 123 Because most courts did not find a right in mere membership, they declined to interfere. Such a rule led to a "hands off" posture rendering some unusual decisions, such as in Jenkins v. New Shiloh Baptist Church. 124

B. Claims Grounded in Defamation

"'It seems to me that you have played a con game with Mrs. Youngblood and that is what I call you is a Con-Man'; 'You have crooked ways,'" insisted board member C.G. Weeks to Rev. W.D. Joiner when the thirteen members of the Louisiana District Board of the United Pentecostal Church met to hear the allegations of misconduct brought by Rev. Ora Cripps Youngblood against Rev.

121. Id. at 733.
122. Numerous cases make this point. See Morris Street Baptist Church v. Dart, 67 S.C. 338, 45 S.E. 753 (1903).
123. Courts are divided on whether membership itself is such a right. The majority rule seems to be that it is not, although Texas and Nebraska courts have found that it is at least a "valuable right" and have intervened. Where, of course, the case also raises issues of rights to property or income, the "property or civil right" requirement is easily met.
124. 189 Md. 512, 56 A.2d 788 (1948). The church's constitution and book of discipline established various rules for church discipline actions. Yet the church ignored these provisions which included a requirement of an initial review of any contemplated discipline by pastors and deacons. The church did not provide notice of a pending expulsion action at a called meeting or opportunity for the plaintiff to be heard, and even non-members were allowed to vote. This violated the church's own rules. Yet the court still declined to interfere. Similarly, in Murr v. Maxwell, 232 S.W.2d 219 (Mo. App. 1950), the court refused to intervene in spite of allegations that procedures for calling proper business meetings were not followed, no testimony was received, and Matthew 18 was not observed. Hundley v. Collins, 131 Ala. 234, 243, 32 S. 575, 578 (1902) (warning interference would "open a door to untold evils" and deference is "consistent with principles of religious freedom").
Joiner concerning his business transactions with her. The board passed a resolution noting that the conduct of Joiner was "not right legally, morally or as a Christian and certainly not as a minister." They called on him to apologize for his actions; but, given his failure to do so and his disrespect for the board, they recommended that Rev. Joiner "be dropped from the ministerial fellowship of the United Pentecostal Church." Rev. Joiner responded by suing the thirteen members of the board for their action, alleging defamation. He also sued members of the board, including Weeks, for statements made at the meeting.

This case illustrates the potential for lawsuits against churches and church leaders in church discipline contexts based not on a challenge to the power of the church to dismiss its members but rather on an allegation that in dismissing its member the church and its leaders defamed the disciplined person. The most common tort actions in church discipline contexts are for libel or slander. Certainly many of the charges against persons in church discipline situations are damaging to their reputation and create the basis for the allegation of defamation during the course of the church discipline.

C. Limits on Defamation Actions

In addition to assertions of plaintiff's failure to prove the necessary elements such as "publication" or reputational injury, two

126. Id. at 103.
127. Id. at 101.
128. Id.
129. The plaintiff, if successful, will not be reinstated but will obtain a money judgment against the defendants who were directly involved in the defamatory communications (i.e., the persons who initiated the false charges or falsely testified). See Swafford v. Keaton, 29 Ga. App. 13, 113 S.E. 67 (1922); Whitaker v. Carter, 26 N.C. 461 (1844); and Dial v. Holter, 6 Ohio St. 228 (1856), in which the court rendered judgments against church members who brought false charges or were witnesses who falsely testified at expulsion trials or before investigators.
130. See Servatius v. Pichel, 34 Wis. 292 (1874).
131. The issue of whether there was "publication" is at issue in Guinn as well. The appellant's brief before the Oklahoma Supreme Court for the Collinsville Church of Christ argues that no publication of the statements was made on which to find an invasion of privacy. Counsel cited an early Missouri defamation case in which the court held there to be no publication when the pastor in church services read resolutions excommunicating a member and also made the resolutions available to church members. The Missouri court held that such communi-
“affirmative defenses” are important in church discipline defamation cases: the defenses of truth and qualified privilege. The defense of truth is absolute and creates substantial obstacles for litigants in actions arising out of church discipline contexts. The defense of truth curtails most suits arising out of church discipline contexts. Even where the charges prove to be false, the qualified privilege defense proves to be a significant limit on defamation claims. The privilege protects, under certain circumstances and between certain parties, defamatory statements. The scope of the qualified privilege outside the defamation context was a crucial issue in Guinn.

One frequently cited explanation of the scope of a qualified privilege in defamation notes the kinds of communications protected by this privilege as:

communications made in good faith upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty to a person having a corresponding interest of duty, although the duty be not a legal one, but of a moral or social character . . . and it arises from the necessity of full and unrestricted communication concerning a matter in which the parties have an interest or duty. 132

This definition embodies three critical elements: 1) good faith; 2) a legitimate interest or duty on the part of the communicator (the “duty” may be either legal or moral in nature); and 3) communication to one with a similar interest or duty. This qualified privilege is commonly found in communications between an employer and employee related to job responsibilities or among members of fraternal associations and labor organizations. 133

132. Southern Ice Co. v. Black, 136 Tenn. 391, 189 S.W. 861, 863 (1916). See 33 AM. JUR. Libel and Slander § 126 (1941). Oklahoma law would appear to concur. In Tuohy v. Halsey, 128 P. 126 (Okla. 1912), the Oklahoma Supreme Court declared that a qualified privilege “extends to all communications made bona fide upon a subject matter in which the party communicating has an interest, or in reference to which he has a duty to a person having a corresponding interest or duty, and to cases where the duty is not a legal one, but where it is of a moral or social character or imperfect obligation.” Id. at 128. For a similar North Carolina rule, see Ponder v. Cobb, 257 N.C. 281, 126 S.E.2d 67 (1962).

133. See Jones, Interest and Duty in Relation to Qualified Privilege, 22 MICH. L. REV. 441-44 (1924).
In *Joiner v. Weeks*, the court articulated the privilege and its rationale.

[The qualified privilege] arises from the social necessity of permitting full and unrestricted communication concerning a matter in which the parties have an interest or duty, without inhibiting free communication in such instances by the fear that the communicating party will be held liable in damages if the good faith communication turns out to be inaccurate.

Courts have recognized a qualified privilege in the context of church discipline proceedings. The *Restatement (Second) of Torts* notes common interests as they apply to religious groups.

The common interest of members of religious, charitable or other non-profit associations is recognized as sufficient to support a privilege for communication among themselves concerning the qualifications of the officers and members and their participation in the activities of the society. This is true whether the defamatory matter relates to alleged misconduct of some other member that makes him undesirable for continued membership, or the conduct of a prospective member....

One California case illustrates both the scope of the privilege and its limits. *Rev. A.L. Brewer and E.W. Fisher* brought an action for libel against the Second Baptist Church of Los Angeles, the pastor, and the chairman and secretary of the deacons. Brewer and others previously unsuccessfully sued the church to have an election set aside. The deacons and the pastor, upset with this, then voted to expel Brewer and his co-plaintiff from the church for their involvement in the lawsuit against the church. Two of the defendants drew up charges. The statement of charges noted the "vile spirit and utter disrespect for leadership" on the part of Brewer. It further stated that the plaintiffs "hurt the prestige and good name of the church" and concluded: "We finally charge that both


137. *Id.* at ___, 197 P.2d at 715.
of these men have by their unwarranted actions and downright falsehood revealed themselves as totally unworthy of the continued confidence, respect and fellowship of a great church which they have so grievously wronged."138 Brewer and Fisher were advised of the dismissal proceedings, and then the church voted to "withdraw the hand of fellowship."139

The church issued a press release reporting the action and provided an article on their actions for a newspaper, The National Baptist Voice. The article stated that the judge found as false the charges Brewer initially brought against the church in the dismissed lawsuit.140 Brewer and others then sued for defamation. The court had no problem finding the language defamatory. In fact, the court noted the "charges were designed to injure the plaintiffs' reputations in the church and to cause them to be shunned and avoided."141

The court then considered the claim of the church that it had a qualified privilege. The California Civil Code142 provided for such a privilege in language similar to that cited above. In applying the California rule, the court observed:

[O]rdinarily, the common interest of the members of a church in church matters is sufficient to give rise to a qualified privilege to communications between members on subjects relating to the church's interest . . . A privilege would exist . . . if the publication had been made without malice and the occasion had not been abused.143

The court proceeded to note, however, that this privilege could be lost in several ways: "$[1] by the publisher's lack of belief, or of reasonable grounds for belief, in the truth of the defamatory material, [2] by excessive publication, [3] by . . . an improper purpose, or [4] if the defendant goes beyond the group interest." In reviewing the development of the congregation's disputes, the court found "ample evidence in the record" to support the inference of ill will and malice by Pastor Henderson.145 The qualified privilege

138. Id. at ____, 197 P.2d at 716.
139. Id.
140. Id. The court dismissed plaintiffs' suit not because the charges were false but on other grounds, and therefore truth was not available as a defense.
141. Id. at ____, 197 P.2d at 717.
142. CAL. CIV. CODE § 47(3) (West 1982).
143. Brewer v. Second Baptist Church, 32 Cal. 2d at 791, 197 P.2d at 717.
144. Id. at ____, 197 P.2d at 717 (numbers added).
145. Id.
was lost, and the defendants were liable. The qualified privilege did not, the court concluded, give a "license to overdraw, exaggerate, or to color the facts."\textsuperscript{148}

\textit{Brewer} illustrates the requirement of "good faith." The privilege is lost if the defamer acts maliciously. The \textit{Brewer} court spoke of a motivation by any cause other than the desire to carry out church discipline in good faith. Certainly the parties must have, in regard to their statements, a reasonable belief in their truth.\textsuperscript{147} Cases also speak of ill will and an intention to injure the plaintiff in his profession, or an intention to injure the plaintiff's feelings and reputation.\textsuperscript{148} Courts also take note of such factors as the general tenor of the charges, coloring or exaggerating the facts, failure to state facts fully, vilification or extravagant language, and complete lack of knowledge of facts of a signed statement.\textsuperscript{149}

In \textit{Joiner v. Weeks},\textsuperscript{150} the issue also became one of whether a qualified privilege existed or whether it was lost because of lack of good faith. The court found that the meetings and proceedings of the church officials were in good faith and without malice. Additionally, the court found that its meetings were limited to the proper members of the board and its resolutions and discussions were not circulated to anyone without a legitimate interest.\textsuperscript{151}

\section*{D. Is the Church a Legitimate Community of Interest?}

The courts nearly universally hold that a legitimate common interest exists within the church to carry out its affairs which include the discipline of its members. "It is hard to imagine a more obvious example of common interest than that which is shared by the members of a church,"\textsuperscript{152} observed a New Hampshire court.

But how broad is this community? Is it the whole church, or only leaders? What about, as in \textit{Guinn}, sharing information with sister churches? Or publishing it in a newsletter? Such questions raise not simply legal issues but theological ones as well. It is possi-

\addcontentsline{toc}{section}{References}

\begin{enumerate}
\item \textsuperscript{146} Id. at \underline{\textsuperscript{147} Id. at }\underline{\textsuperscript{148} Id. \underline{\textsuperscript{149} Id. at }\underline{\textsuperscript{150} 383 So. 2d 101 (La. App. 1980). \underline{\textsuperscript{151} Citing Carter v. Catfish Cabin, 316 So. 2d 517 (La. App. 1975), citing Madison v. Bolton, 234 La. 997, 102 So. 2d 433 (1958). See also Bush v. Carrieri, 69 Wash. 2d 536, 540, 419 P.2d 132, 137 (1966), insisting that "good faith and reasonable conduct" are the touchstones of "any qualified privilege." \underline{\textsuperscript{152} Slocinski v. Radwan, 83 N.H. 501, 144 A. 787, 789 (1929). }

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ble to answer such questions only by entering the "dismal swamp" in order to understand and apply the governing structures and policy of the religious body. 153

What sort of information is of "legitimate common interest"? Again the question raises legal questions with theological overtones. Differences in church governance may well confuse courts unfamiliar with church structures and the theological convictions that may underpin them.

While the case law is generally old, the pattern seems to be to extend the privilege, once it is established, to a fairly broad range of communications and communicants. A frequently cited older case suggests that the privilege protects persons bringing charges, testifying, voting, or announcing a result if it is all in good faith and within the authority of the church. 154 Other cases hold that the privilege covers the words of a presiding officer within his line of duty, if he uttered them believing their truth and from a sense of duty, 155 and the words of members of church tribunals investigating charges. 156 One court held privileged the publication of charges in a denominational journal due to common interest, and the privilege was not lost by incidentally coming to the attention of non-members. 157 The privilege also covers recommendations by investigatory panels, 158 a pastor's reading of the sentence of expulsion to congregation, 159 a church member's charge with honest in-

153. Most religious groups arguably could ascertain the relevant body for church disciplinary procedures by applying neutral principles of law and reviewing church constitutions, bylaws, and prior practices. For example, in congregational churches such as the Church of Christ, ultimate authority may rest in the total congregation rather than an elected administrative unit such as a board of trustees or elders or presbyters who may have such authority in other church governance.


156. Kleizer v. Symmes, 40 Ind. 562 (1872).

157. Redgate v. Roush, 61 Kan. 480, 59 P. 1050 (1900); and Moyle v. Frantz, 267 App. Div. 423, 46 N.Y.S. 2d 667, aff'd 293 N.Y. 842, 59 N.E.2d 437 (1944) (Privilege remains intact so long as publication circulation limited to those interested in the affairs of the organization.).


tention of examining fitness for membership, and church members' letters to church officials with authority to act (such as to a bishop concerning a priest or to church deacons regarding the pastor or his wife).

These decisions seem to rest on the relationship of the communications to the regular or official administrative structures, systems, and bodies within the church that have duties in regard to investigation or discipline. In these cases, the "duty" is clearer, because it rests not simply on common interest but on identified responsibilities and structures. A few decisions apply the privilege when it is outside the normal, official disciplinary structures or procedures of the church, such as when church members discuss among themselves charges against members or a pastor. If the publication goes beyond the local church itself, it may no longer be privileged. However, not all publication beyond the church is beyond the purview of the privilege.

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162. Applying such a rule, in congregational churches where ultimate authority rests with the entire congregation, the whole church would have a legitimate common interest in any information relevant to disciplinary action. In a church with a governing board with final disciplinary authority, the community of interest arguably might be more limited.
163. One court held that slanderous words about a clergyman to another clergyman of the same denomination and to a church at which the slandered clergyman was preaching were not privileged even though the purpose was in the context of a controversy about whether the church ought to employ the clergyman. Ritchie v. Widdemer, 59 N.J.L. 290, 35 A. 825 (1896). Similarly, a letter by a minister to another minister and a ministerial association stating that a certain minister was unfit for the ministry was not privileged because the minister owed no duty to the association and had no interest in the removal of the minister. Shurtleff v. Parker, 130 Mass. 293 (1881). In Haynes v. Robertson, 190 Mo. App. 156, 175 S.W. 290 (1915), the court held that a member's slanderous statement about a minister who preached in the church as an evangelist but was not then a member or a pastor of the church was not privileged since there were no charges then existing in the church regarding the minister in question. Id. at 159, 175 S.W. at 293. In another case when members of the same church discussed another church member, the court held that there was no qualified privilege when no evidence of a duty upon members to give information about each other's character existed. Ballew v. Thompson, 259 S.W. 856, 857 (Mo. App. 1924).
164. In Redgate v. Rousch, 61 Kan. 480, 59 P. 1050 (1900), the elders of a Church of Christ in Wilmington, Kansas, found their pastor unfit and unworthy of his office. They published a notice in church papers distributed over a number of midwestern states, noting the unfitness of their preacher, charging him with
IV. CHURCH DISCIPLINE AND THE NEW TORTS

A. Church Discipline as Invasion of Privacy

The poorest man may in his cottage bid defiance to the Crown. It may be frail — its roof may leak — the wind may enter — but the King of England cannot enter — all his force dares not cross the threshold of the ruined tenement.

— William Pitt

In church discipline cases where the allegations regarding the plaintiff's conduct are true or in good faith, imaginative counsel seek to surmount the barriers of the defenses of truth and qualified privilege by bringing actions in the relatively new torts of invasion of privacy and infliction of emotional distress. The scope of these torts, the defenses to them, and the degree to which they are subject to free exercise and speech protective constitutional limits are still largely unknown. Counsel for plaintiffs turn to these actions hoping they can fit the facts within the developing principles of these claims.

When Marian Guinn's lawyers filed their suit against the Collinsville Church of Christ, they asserted:

That on or about the 27th day of September, 1981, the Defendants . . . give [sic] publicity to certain matters concerning the "insubordination," and indicating they did not consider him "worthy of the confidence of the brotherhood." Id. The Kansas Supreme Court held that "[i]f the statements were published in good faith, and in what was honestly deemed to be an official or moral duty toward other church members, and for the benefit and protection of the church organization at large . . . it is privileged and protected." Id. at 1050. The court concluded that "[i]f the plaintiff was unworthy . . . of his high calling, the defendants, interested in the welfare of the denomination throughout the land, would appear to have been justified in warning other members and congregations . . . ." Id. at 1051. The fact that others might have inadvertently seen it did not destroy the privilege. Id. Similarly, the publication by an association of ministers of their withdrawal of fellowship from a minister and a requirement that he show cause why he should not be dismissed was privileged even though it was in denominational papers reaching the general public. Shurtleff v. Stevens, 51 Vt. 501 (1879). Similarly, one court held that the reading of the charges to the whole congregation, even when non-members were present, was not to be so broad as to destroy the privilege. Landis v. Campbell, 79 Mo. 433 (1883). See also Herndon v. Melton, 249 N.C. 217, 105 S.E.2d 531 (1958) (Court granted nonsuit because a church investigator's official report, published in the official organ of the church, was qualifiedly privileged since there was no evidence of express or actual malice.).

private life of Plaintiff and did thereby invade her privacy . . . . That said matters were publicized to the congregation, members and attendants of the Church of Christ of Collinsville, Oklahoma. That the publication . . . was highly offensive and was not of legitimate concern to said persons or to the public.166

Other church discipline suits have alleged similar invasions.167 Did the Collinsville Church elders go beyond the realm of being moral guardians or "mere busybodies" into a legally cognizable arena of wrongs for which the law ought to provide a remedy? Did the congregation have no legitimate interest in the information disclosed to them?

1. The Legal Concept of Invasion of Privacy

Privacy may be an "imaginary luxury"168 in the modern world, but it remains so highly prized that we agree that "without privacy there is no individuality."169 The modern concept of invasion of

167. Guinn's attorney is not the only one to seek help in such allegations. James Shive in his suit alleged that the defendants . . . did give publicity to certain matters concerning the private life of James L. Shive and did thereby invade his privacy [and] that the publication . . . is and was highly offensive and was not of legitimate concern to said persons or to the public . . . and not of public record. Shive v. Adkisson, No. 84 CV 6646 (Denver County Ct., Colo., Oct. 1983).


In a related, but not church discipline case, O'Neil v. Schuckhardt, 112 Idaho 472, 733 P.2d 693 (1986), the court upheld an invasion of privacy claim against Fatima Crusade, a sect of the Latin Rite Church.

169. L. Young, LIFE AMONG the GIANTS 34 (1966), quoted in A. Westin, PRIVACY AND FREEDOM (1970). In a psychological sense, privacy is prized and essential. We all prize our individuality and privacy—our own zones of autonomy which can shelter our "ultimate secrets." Westin at 33. Westin suggests that the most serious threat to the individual's autonomy is the possibility that someone may penetrate the inner zone and learn his ultimate secrets . . . penetrating the individual's protective shell, his psychological armour, [which] would leave him naked to ridicule and shame and put him under the control of those who knew his secrets . . . . The individual's sense that it is he who decides when to go 'public' is a crucial aspect of his feeling of autonomy.
privacy owes its life to a Harvard law review article in 1890, which argued that there was a “right of privacy” which the law ought to recognize — a right “not arising from contract” or notions merely of private property but a right “as against the world.” The authors insisted on the necessity of some protection of privacy in the face of a press “overstepping . . . the obvious bounds of propriety and decency” with unseemly gossip resulting “in a lowering of social standards and of morality.” They concluded:

The principle which protected personal writings and all other productions of the intellect or of the emotions, is the right of privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts and to personal relation, domestic or otherwise.

Though the article did not institute a complete and immediate revolution, it was the foundation for legal thought that culminated in both legislative and judicial creation of a right to privacy. To-

Id. at 34. That seeking privacy can be destructive is equally well recognized. Karen Horney describes persons who seek an unnatural degree of privacy as one of the three major types of neurotics in our society. K. HOREN, OUR INNER CONFLICTS 76 (1959). See Fromm-Reghmann, Loneliness, 22 Psychiatry 2, 3 (1959).

170. Aspects of the legal protection of privacy have existed in western law and in our constitutional system from its inception. Justice Joseph Story noted that first amendment protections were intended to secure the rights of “private sentiment” and “private Judgment.” 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 591, 597, 600 (2d ed. 1851). The third amendment protects persons from the quartering of troops in their homes without permission. The object of the amendment was “to secure the perfect enjoyment of that great right of the common law, that a man's house shall be his own castle, privileged against all civil and military intrusion.” Id. at 608. Early common law in America also protected against eavesdropping. In 1831, a Pennsylvania judge, in upholding a charge against a man who watched a married woman through the window in her home and spread tales about her, commented: “Every man's house is his castle, where no man has a right to intrude for any purpose whatever. No man has a right to pry into your secrecy in your own house. . . . our families should be sacred from the intrusion of every person.” Commonwealth v. Lovett, 4 Clark 5 (Pa. 1831).


172. Id. at 196.

173. Id. at 213.

174. In the first case after publication that tested the concept of “rights to privacy,” a New York court faced a suit by a girl whose picture had been used in advertising without her permission. Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902). The trial court rendered a judgment for the girl, but
day the law recognizes this right to privacy and provides a legal civil remedy for its invasion. Such a right extends to individuals and, to some extent, to associations. The Supreme Court in Griswold v. Connecticut took an additional step in enunciating a constitutional doctrine of a right to privacy. The Court asserted that, under the fourteenth amendment's due process protections, a right to privacy was a fundamental right.

the highest court in New York reversed, declaring that "there is no precedent for such an action . . ." 64 N.E. at 443. The judge worried that, if such a principle were permitted, "the attempts to logically apply the principle will necessarily result . . . in litigation bordering on the absurd . . ." Id. The court suggested that if any such a right were to be asserted, it should come from the legislature. Id. The New York legislature responded in 1903 by enacting the first law protecting privacy, prohibiting for purposes of advertising or trade the use of any name, portrait, or picture of a living person without prior consent.

175. Courts, following an analysis by William Prosser, have identified four types of such invasions of privacy that provide a legal remedy: 1) an unauthorized appropriation of a person's name or likeness for commercial advantage; 2) acts of intrusion into the privacy of one's affairs or seclusion in a way that would be objectionable to a reasonable person; 3) putting a person into a false light; and 4) public disclosure of private facts about a person. Prosser, Privacy, 48 CALIF. L. REV. 383 (1960).

176. "[T]he interest protected by group privacy is the desire and need of people to come together, to exchange information, share feelings, make plans and act in concert to attain their objectives." E. BLOUSTEIN, INDIVIDUAL AND GROUP PRIVACY 125 (1978). The premise of giving up total privacy in the mutual sharing of the group is the expectation that what is shared there is not public. Such protections of group privacy may have very important implications for religious liberty. Protections of group privacy, including their mail lists and memberships, have been subject to several court tests. In NAACP v. Alabama, 357 U.S. 449 (1958), the Supreme Court struck down an Alabama statute that required the NAACP to provide the state with a list of its members, noting the potential for reprisals and "manifestations of public hostility." Id. at 462. In Buckley v. Valeo, 424 U.S. 1 (1976), the Court noted that "compelled disclosure . . . [of memberships] can seriously infringe on privacy of association and belief guaranteed by the First Amendment." Id. at 64.

177. 381 U.S. 479 (1965). The Court held that a Connecticut law forbidding the distribution of birth control information was a violation of a right to marital privacy. The opinion of the Court, written by Justice Douglas, spoke of zones of privacy created by various constitutional concepts. Id. at 485. Justice Goldberg declared that the right of privacy was "so rooted [in the traditions and conscience of our people] as to be ranked as fundamental" and insisted privacy was a fundamental personal liberty "retained by the people." Id. at 493, 499 (Goldberg, J., concurring), quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1933). Justice Stewart in his dissent agreed that the Connecticut law was "uncommonly silly" but declared he could "find no such general right of privacy" in the Constitution or prior decisions. Id. at 527, 530 (Stewart, J., dissenting).
In church discipline cases, the primary issue is whether the public disclosure of private facts constitutes an invasion of privacy. The *Restatement on the Law of Torts*, § 652 D, adopted by Oklahoma, summarizes the law:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that

(a) would be highly offensive to a reasonable person, and

(b) is not of legitimate concern to the public.

Church discipline claims asserting invasion of privacy often, as in *Guinn*, additionally assert that the information disclosed was subject to an obligation of confidentiality. The assertion of a breach of confidentiality raises a separate, though related, tort claim from invasion of privacy, because it is grounded in a negligence type breach of duty action. The plaintiffs asserted that the disclosure was wrongful because of the duty owed the plaintiffs, not because it revealed highly offensive private facts of no legitimate public interest. Such claims often emerge from the context of pastoral counseling which, as in *Kelly v. Christian Community Church* and in *Roberson v. Evangelical Orthodox Church,* was the alleged source of the information later revealed in church disciplinary proceedings. Where the only source of information later revealed in disciplinary proceedings was obtained in contexts where there were expectations of confidentiality, it does pose special problems. Where, however, as in *Guinn*, the information is not exclusively available through communications subject to confidentiality, then a claim grounded in breach of a duty to maintain confi--

178. Conceivably the intrusive type could also be an issue where church officials were investigating conduct, and it could emerge that a church in its publication created an impression which was false and objectionable.
183. Usual expectations of privacy in pastoral counseling settings might be overcome by clear notice and contrary practices that gave effective notice that not all communications would be accorded an absolute privilege. Some who insist biblical principles of church discipline require that, in the case of unrepentant persons, *Matthew* 18 will be followed in its command to “tell it to the church” and suggest such notice and practice.
fidences should not be entertained.184

2. Defenses Grounded in Challenging Plaintiff's Proof of Elements

In cases such as Guinn, defendants may well seek to demonstrate that plaintiffs did not show the requisite elements of the action. First, one can argue that, in Guinn, the facts revealed were public, not private, and that the church congregation was told nothing about Ms. Guinn that was not already public. Thus, there was no disclosure of private facts. Where the disclosure is about facts no longer private, there is no liability. "Therefore, to whatever degree and in whatever connection a man's life has ceased to be private . . . to that extent the protections of the right of privacy is withdrawn."185

Further, one might wonder whether in Guinn there was any public disclosure. Is there "public disclosure" in the limited disclosure to a church governing body? In the defamation contexts, some older cases held that there was no publication within the meaning of defamation law when information was conveyed only to the congregation.186 In Guinn, the church did not hold press conferences, issue general news releases, or expose Marian's story to the world. It is unclear whether information shared within an associational or church body is public. Indeed, at least in some cases

184. While expectations of confidentiality may be relevant in assessing invasion of privacy-type claims, it is not clear that in such contexts duties of pastors and church officials would not ever justify a disclosure of information obtained. Courts have held that duties may arise requiring disclosure of information where there are serious risks of harm to third persons. See, e.g., Tarasoff v. Regents, 17 Cal. 3d 425, 551 P.2d 334 (1976); cf. Bellah v. Greenson, 81 Cal. App. 3d 614; 146 Cal. Rptr. 535 (1978). In some situations, statutory duties may overcome confidentiality obligations, e.g., child abuse reporting statutes. Fiduciary duties to the church itself may in some circumstances warrant limited disclosure. See discussion in Illman, Confidentiality and the Law: The Church's Right to Discipline, 26 Presbyterian Journal, Dec. 1984, 9; W. Tiemann and J. Bush, The Right to Silence (1983).


186. Landis v. Campbell, 79 Mo. 433 (1833).
where officials have sought information from associations, the association's right to withhold the information was protected in part because it was no longer public. 187 Associational communications and records, especially in associations marked by what Justice Brennan described as "intimacy," would not normally be perceived as public. 188

However, if the court finds the requisite disclosure to the public of private facts, whether any communication to the congregation or other appropriate governing church body is nevertheless privileged depends to a large extent on whether a qualified privilege applies in invasion of privacy actions and what persons would be included within it.

In Guinn, two special factors produced additional privacy arguments. First, the plaintiff contended that whatever rights the church may have had to communicate information relevant to Marian's membership status were lost when she resigned, and any subsequent revelation was no longer protected and thus actionable as an invasion of privacy. Second, the complaint asserted that the revelation of the information to the sister churches was an unprivileged disclosure. 189

3. Is There a Qualified Privilege of Community of Legitimate Interest?

One of the most controverted aspects of Guinn is whether under Oklahoma law there exists a qualified privilege applicable to the communication of private facts similar to the privilege applicable in defamation actions. When the communication is in good faith, without actual malice, and between persons with a legitimate

189. Whether the disclosure of information to other churches regarding Ms. Guinn establishes an invasion of privacy depends on the same analysis as in the local church. If the qualified privilege applies, then the issue becomes whether there was a duty as between the communicants in regard to the information disclosed. In Redgate v. Rousch, 61 Kan. 480, 59 P. 1050 (1900), the Kansas Supreme Court held that defamatory statements printed in a church newspaper were protected by the qualified privilege "if published in good faith, and in what was honestly deemed to be an official or moral duty toward other church members, and for the benefit and protection of the church at large." Id. at 1050. A Vermont court held similarly when the withdrawal of fellowship from a minister was published in denominational papers reaching the general public. Shurtless v. Stevens, 51 Vt. 501, 31 Am. Rep. 698 (1879).
interest arising out of a duty or obligation, the communication is protected even if absent the privilege it would be actionable as an invasion of privacy. 90

Some states hold that such a privilege does exist. In Munsell v. Ideal Food Stores,91 the Kansas Supreme Court accepted the rule that "the right of privacy does not prohibit the communication of any matter though of a private nature, when the publication is made under circumstances which would render it a privileged communication according to the law of libel and slander."92 In a subsequent case, the Kansas Supreme Court concluded:

Concerning an action for invasion of privacy, based upon the communications of matters of a private nature, Munsell settled these principles—(1) a warranted invasion of privacy is not actionable, (2) communication or publication of a matter even of a private nature made under circumstances which would render it a privileged communication according to the law of libel and slander, will not support an action; and (3) generally, the issue whether a publication is qualifiedly privileged is a question of law to be determined by the court.93

Such a rule serves the public policy interests that led to its application in defamation contexts. If, under defamation law, good faith communications between persons with a legitimate interest are privileged, regardless of their truth, it seems incongruous to give them less protection when they are truthful and accurate.94 The policy reasons for recognizing that, first, information is essential among communities of interest, and that, second, such persons should not be intimidated in sharing relevant information because

90. Plaintiff's counsel argued in Guinn that the Oklahoma court should not recognize such a privilege and sought to discount cases relied on by the defendants. "The 'qualified privilege' of libel and slander should not be applied to the very different tort of invasion of privacy." Plaintiff's Brief in Response to Defendant's Motion for Summary Judgment, Guinn v. Collinsville Church of Christ (filed Aug. 27, 1982).


92. Id. at 1075.


94. Professor James McGoldrick suggested that the church might have been better off if it had made a clearly false statement about Guinn instead of a true one because the common law and constitutional limits of defamation actions are much clearer than the elusive torts of invasion of privacy and emotional distress. Telephone interview with James McGoldrick, Professor of Law, Pepperdine University School of Law.
of fear of civil tort liability, apply more so to privacy claims involving truthful revelations than to defamation actions. If the privilege does not apply under such circumstances, then good faith and accurate statements in disciplinary proceedings in all kinds of organizations will be conducted only at the risk of financial destruction of the association and its leadership.

The qualified privilege rests on two requirements. First, the parties must be proper, both having a legitimate interest resting on a duty (official or moral) in relation to the information. Second, focusing on the information itself, the information must be relevant to the interest or duty of the parties. Surely, the legitimacy of this communication is clear when the information is true.

The qualified privilege should most clearly apply in church discipline cases when the parties have a voluntary associational relationship, especially when the persons to whom the private information is revealed have associational duties of administering discipline in the association, and the information is relevant to such discipline as established by the church's own internal decisions. In Guinn, because the congregation was the highest church authority responsible for membership decisions, the revelation was not more extensive than required by those who had duties established by internal governance for such decisions. The qualified privilege in associational contexts has additional force and appropriateness because the "legitimate interest" aspect would seem to be buttressed by associational concepts of consent and waiver.

4. The Relevance of Resignation for Invasion of Privacy Defenses

"I do not want my name mentioned before the Church except to tell them that I withdraw my membership immediately . . . ." 195 Marian Guinn made this statement in a letter to the church on September 24, 1981, a few days before the church read its letter to the congregation on October 4, 1981, and took disciplinary action in withdrawing fellowship from her. The Guinn case's key legal issue on appeal may well be the legal relevance of her resignation. Courts may apply traditional associational rights principles to sustain broad rights of churches to practice church discipline consistent with their own rules and procedures among members. Courts, however, may be tempted to find that the resignation

of a member bars the church from any further disciplinary action because the basis for consent upon which such disciplinary rights of the association/church rest no longer exists. Some commentators take such a position. Indeed, the attorney for Marian Guinn argued:

[P]laintiff admits that within the context of church discipline, it may be possible for those in authority to carry on sufficient conversation to discipline the members according to the rules of the organization. However, plaintiff submits to the court that she was entitled to cease to associate with the organization; that she did so cease; and that any right which the members of said organization had to gossip about her and make known matters of her private life was thereby lost . . . . Any subsequent publication of private matters regarding [Marian Guinn] after the withdrawal were not privileged and were subject to action for invasion of privacy.

Marian had the right to withdraw her formal membership, and the withdrawal of membership was effective immediately upon notice to the church. One may not be compelled to belong to a voluntary association. The judge in Guinn so instructed the jury.

"You are instructed under the law, the plaintiff had the right to terminate her membership with the church upon communication of that fact to an authorized representative of the church at any time."

196. Ronald Flowers, grounding his perspective in voluntary associational concepts, declared: "They can discipline whoever is still within their fellowship. But they cannot discipline one who is no longer a member of their church." Flowers, Can Churches Discipline Their Members, 27 JOURNAL OF CHURCH AND STATE 483, 497 (1985). See also Comment, Religious Torts: Applying the Consent Doctrine as Definitional Balancing, 19 U.C. DAVIS L. REV. 949 (1985) ("the consent-based standard also should not apply to tortious acts committed by a religious group after a member withdraws from the group").


198. The church asserted a theological belief that one could not unilaterally withdraw from the church. That belief may have some legal relevance in assessing its internal responses to Marian's withdrawal and justify the church's feeling that the matter had not been fully concluded. However, it does not bind Marian's legal relationship to the church.

199. The judge in Guinn seemed to give some special significance to the resignation as if it were a key element in assessing liability, and yet neither he nor the jury limited damages to events after the resignation. If Marian's resignation were the decisive point after which the privilege to disclose private facts was lost, then presumably damages would be appropriate only for invasions of privacy or
This instruction is consistent with associational law which provides for such unilateral resignation effective immediately without any required action by the association. An association may set forth reasonable procedures governing the manner of resignation or withdrawal. However, associations may not create by-laws that allow associations to deny or reject attempted resignations either by affirmative rejection or refusal to act on a letter of resignation. Such provisions are invalid on the grounds that they are unreasonable and arbitrary. However, a member's right to resign and the fact of resignation ought not to end the inquiry into the rights of the church to carry out its own internal administrative, disciplinary, and educative processes. The legitimacy of the church's continued disciplinary procedures is grounded in several factors.

First, the church has rights independent of a member's rights; merely because a member resigns, the church should not be totally barred from carrying out its own internal processes for "withdrawing fellowship" from the spiritual community. The church's internal, theologically grounded procedures for terminating a member's relationship are important associational and religious rights that should not be summarily suspended by a member's withdrawal. The church must take a variety of steps when a member resigns. Some of these steps are administrative, but others may relate to theological and religious traditions that formalize the withdrawal.

other tortious acts after the resignation—but no such limits were imposed on the jury.

200. See, e.g., Trustees of Pencader Presbyterian Church v. Gibson, 22 A.2d 782 (Del. 1941); Church of God v. Finney, 344 Ill. App. 598, 101 N.E.2d 856 (1951); Fuchs v. Meisel, 102 Mich. 357, 60 N.W. 773 (1894). In Gibson, the court stated that "it is incontestable so far as the individual defendants are concerned. Their right, individually or collectively, to withdraw themselves from the Parent Church is protected to the fullest extent by the Constitution of this State." Gibson at 790; Katz v. Singerman, 241 La. 103, 127 So. 2d 515 (1961). In Brady v. Reiner, 157 W. Va. 10, 198 S.E.2d 812 (1973), "[t]he Civil Courts freely recognize and affirm the right of any individual or group to leave, abandon or separate from membership in a church." Id. at 845. Interestingly, one court upheld a professional society's bylaw regulation that a resignation made when the person was under charges was not effective. Ewald v. Medical Soc'y, 144 App. Div. 82, 128 N.Y.S. 886 (1911).


202. ROBERT'S RULES OF ORDER, NEWLY REVISED § 60 (1981) does suggest, however, that an association does not have an obligation to accept a resignation from a member when the member is in the midst of a disciplinary proceeding.
In some religious traditions, there may be ceremonies which symbolize the community's sense of loss or tragedy.

To hold that the resignation bars further comment within an association regarding its relationship to the resigned member could produce bizarre results. Would not the Pope be surprised to learn that after Henry VIII resigned from the church the Pope was barred from commenting on or excommunicating Henry for his adulterous affair? Would it not seem strange to contend that the California Bar Association was barred from taking further disciplinary action or expressing its views on Nixon's conduct merely because he had resigned from the Bar before they had an opportunity to issue statements or take formal action? Should the Boy Scouts be precluded from advising council leaders regarding a troop leader who had been caught in immoral conduct merely because, having been found out, the scout leader resigned a few hours before the scheduled meeting? Do remaining members of an association have a legitimate need for information clarifying the reason for the departure or the nature of their relationship with the former member?

Part of the confusion regarding the legitimacy of church disciplinary proceedings in the context of a withdrawn member results from essentially theological misunderstandings about the purposes and functions of church disciplinary practices. The biblical basis for discipline is not exclusively oriented toward the disciplined party. Church discipline is not simply a process of expulsion of unwanted members. If that was all that was involved, then indeed a nice, quiet resignation would seem adequate, and all else might be labeled as sheer spite. But the disciplined person is not the only actor or focus. In fact, often a person under discipline will remove himself or herself from direct contact with the church. What is said to the congregation or elders is not chiefly for the disciplined party but for those who remain. Of course, an aspect of discipline is to encourage the sinner to face the consequences of his/her conduct and to invite repentance and restoration. However, it also serves other purposes such as: 1) advising the members of what has happened within their community in which they have a continuing spiritual and communal investment; 2) identifying the responsibilities and duties of the members toward the disciplined person, including perhaps duties to pray for the other person, to encourage them to amend their conduct, or, perhaps, in some cases, to avoid certain dealings with them (e.g., shunning); and 3) reminding the remaining members of the moral or theological commitments of
the community and the consequences of those who choose to reject those values and commitments. These are equally critical aspects of church discipline that go beyond the formalities of dismissals and expulsions.

Second, at least in contexts factually similar to Guinn, the church or member may unilaterally terminate one's membership, but termination may not easily extinguish the relationship and its impact on the community. The relationship between the church and a member was close and continuous. However, the pending disciplinary procedures strained that relationship, and the member resigned. Must the church be silent about the events, legally limited to telling the governing officials of the church that she resigned? Certainly in any human or psychological sense, the resignation in and of itself does not fully terminate all elements of the relationship of that person's conduct to the community from which he/she has resigned. Just as a dissolution of a corporation requires certain acts to "wrap up" its affairs, so does the termination of a membership relationship. Membership in a church community often involves very close, perhaps intimate, relationships. Marian Guinn's relationship to the Collinsville church had been such a relationship. It would seem strange to suggest that the church must in its formal acts nearly pretend that she did not exist. To do so would be a serious denial of the character of a church community.

Third, consent principles may apply in sustaining the rights of the church. To the extent that such procedures are a sort of "ending" of the relationship and an aspect of regular membership termination procedures, it may be that the withdrawing member consented to such associational practices when he or she joined. The court acknowledged the incongruity of permitting a timely resignation to halt disciplinary processes in Ewald v. Medical Society. In Ewald, a society member sought to bar further disciplinary proceedings by resigning. The court held that such a resignation was ineffective in the face of a bylaw of the society that required that resignations be accepted and further provided that resignation would not be effective for one "under charges." The court declared:

It seems plain, therefore, that a member on his admission to the society assumes an obligation . . . and that a breach of that obligation in any respect involves a violation of duty to the society . . . . The plaintiff agreed . . . to submit to the discipline of the Society for any act unfavorably 'affecting the character, dignity or

203. 44 App. Div. 82, 128 N.Y.S. 886.
interest of the medical profession or of the Society.' The bylaws, rules and regulations of the Society would have no sanction if its discipline could be evaded by resignation. Whereupon it follows . . . that the Society had the power to pass the by-law that no member should be permitted to resign under charges.\(^{204}\)

While consent has been withdrawn as to acts which might compel the member to some action, it is uncertain that the withdrawal of voluntary membership must, standing alone, negate a prior consent to identify with an association that applied certain procedures in withdrawing fellowship from members. This is especially clear in cases such as \textit{Guinn}, where Marian voluntarily joined a church that had a theology and practice that included such convictions about membership. She should not be able to complain about the processes of dealing with the termination of members of an organization that she voluntarily joined. She arguably waived a right to complain of practices to which she voluntarily submitted.

Fourth, the particular facts in \textit{Guinn} warrant the legitimacy of the proceedings there, notwithstanding the resignation. When the resignation occurs long before any contemplated church disciplinary action, the relationship may have become so negligible and tenuous that statements in the church regarding the person's life are no longer of any legitimate interest to the members. The members may be curious, but the requisite relationship and impact from the relationship that makes that interest legitimate are absent. Courts in such cases might find an invasion of privacy, a type of intrusive meddling. That is hardly the case in \textit{Guinn} or in most church discipline cases.

In \textit{Guinn}, the resignation occurred just days before the final church action and long after the beginning of initial disciplinary processes. Marian seemingly intended to preempt the pending discipline. Marian's resignation did not simply formalize the creation of a non-relationship. Marian was an active member of the church, and even in recent times, the relationship was persistent. Furthermore, in \textit{Guinn} and similar situations, the actual conduct subject to disclosure occurred during membership, not after resignation. While this is not a conclusive factor, it supports the argument that there may be a legitimate interest in such information and weakens the argument that the resignation somehow bars any disclosure.

\(^{204}\) \textit{Id. at \textendash,} 128 N.Y.S. at 891, 892. \textit{See supra} note 202.
The error of grounding the continuing disciplinary rights solely in formal membership is the assumption that such church rights rest solely on consent grounds. Consent is certainly relevant and, where it exists, may be dispositive. It is not, however, the only basis for rights to share information within a closed community. A further basis of such rights is at the core of the qualified privilege concept—relevant information and legitimate interest. Such concepts are broader than consent. Here, the inquiry is not merely whether the member or former member assented to any disclosure but whether the disclosure is of legitimate interest to those persons to whom communication is made because of some duty or responsibility. Membership is not irrelevant to those issues of legitimacy of interest and relevance of information, but it is not dispositive. It may well affect the scope and nature of any disclosure but not totally silence the church.

The law should recognize a continuing right of a church to engage in limited disciplinary acts including the communication of necessary and relevant facts because of the independent legitimate interests of the remaining members. The key is whether there is a legitimate interest that preserves the privilege to share private facts in spite of the resignation. When assessing whether there is a legitimate interest, a far more functional test than mere formal membership is whether, weighing all the factors, the body from which the party resigned has a continuing legitimate interest in the information. Included among those factors are the following:

1. The nature of the present relationships between the person and the church, including any resignation, its timing, and the prior nature of relationships that affect the present associational and religious interests;
2. the nature of the conduct that was the occasion of the discipline and its present impact on the organization and/or its members;
3. when the supposed private facts (usually conduct) took place relative to the time of membership and resignation—that is, whether the conduct occurred during the period in which there was a clear privilege based on membership;
4. the necessity, for purposes of the internal affairs of the church, both spiritual and administrative, for the persons to whom information would be disclosed to be informed of otherwise private facts; and
5. the actual or reasonable expectations regarding church disciplinary practices created by its doctrine and practice and the extent of the disciplined person's implied or actual acceptance of those
beliefs and practices by virtue of that person's membership status and participation in the community.

The use of such a set of factors in assessing the scope of permissible disciplinary action, even where persons have resigned, will give more appropriate recognition to the human realities of relationships. The factors will also give appropriate weight to the legitimate interests of the church and recognize the legal relevance of the resignation on both the nature and the scope of any disclosure of arguably private information.

B. Church Discipline as the Infliction of Emotional Distress

But what if, contrary to what is now so generally assumed, shame is natural to man? . . . What if it is shamelessness that is unnatural? A sense of shame is a lovely sign in a man. Whoever has a sense of shame will not sin so quickly; but whoever shows no sense of shame in his visage, his father surely never stood on Mount Sinai. — Talmud

If invasion of privacy claims seem amenable to use in church discipline contexts, claims for infliction of emotional distress are attractive for precisely the same reasons. Truth is no defense and the tort's parameters are sufficiently ill-defined to enable the litigator to attempt to bring a church discipline case within its orbit. Marian Guinn's complaint alleged that "the publication of statements about the plaintiff . . . was conduct which was and is extreme and outrageous and which intentionally and recklessly caused severe emotional distress to plaintiff." Guinn's progeny similarly assert emotional distress claims.

208. James Shive's fourteenth claim for relief alleges that the publication "was and is extreme and outrageous" (emphasis added here and in following references in this footnote) which "intentionally and recklessly caused severe emotional distress." John R. Kelly alleged the actions of the defendants "constitute outrageous conduct which is not privileged and was likely to cause plaintiff emotional distress." Charles Roberson complained that the actions of the defendants "constitute outrageous conduct which is not privileged and was likely to cause plaintiff emotional distress" and that the acts of defendants "were willful, fraudulent, malicious, and oppressive, and . . . with the intent to vex, annoy, harass
Courts have been slow to recognize claims for the infliction of emotional distress because of concern over problems of proof of emotional or mental distress and because of the dangers of malicious and frivolous suits. Prosser endorsed early objections that the tort was "too subtle and speculative" and failed to specify the character of the injury.²⁰⁹ He observed that the action was "so evanescent, intangible, peculiar and variable with the individual as to be beyond prediction or anticipation."²¹⁰ As a Comment to the Restatement (Second) of Torts noted, "there is no occasion for the law to intervene in every case where some one's feelings are hurt."²¹¹

The case which "broke through the shackles of the older law" was Wilkinson v. Downton, in which a practical joker told a woman that her husband had been in an accident and broken both legs.²¹² He told her that she was to go at once in a cab with two pillows to bring him home. The shock to her nervous system produced serious and permanent physical consequences. In the light of the facts of this case, "the enormity of the outrage overthrew the settled rule of law."²¹³

Increasingly, courts provide remedies under certain narrow conditions. Where the defendant's acts are so "outrageous" as to overcome the reluctance to entertain such claims and the victim suffered severe emotional distress, courts provide remedies.²¹⁴

and injure plaintiff and in fact did cause plaintiff to suffer fright, nervousness, grief, anxiety, embarrassment, apprehension, and terror . . . .”

²¹⁰. Id. at 42. An early influential article on the subject was Magruder, Mental and Emotional Disturbance in the Law of Torts, 49 HARV. L. REV. 1033 (1936). It noted concern about opening up a wide vista of litigation in the field of "bad manners."
²¹¹. RESTATEMENT (SECOND) OF TORTS § 46 comment d (1965). The Oklahoma Supreme Court declared in Munley v. ISC Fin. House, Inc., that 

"[t]here is simply no room in the framework of our society for permitting one party to sue on the event of every intrusion into the psychic tranquility of an individual.” 584 P.2d 1336, 1338 (Okla. 1978).
²¹³. Prosser, supra note 209.
²¹⁴. The early cases finding liability for infliction of emotional distress illustrate the kind of conduct normally required: the decoying of a woman suspected of insanity to a hospital by a concocted tale of an injured husband and child, Savage v. Boies, 77 Ariz. 355, 272 P.2d 349 (1954); spreading false rumors of a son's hanging himself, Bielitski v. Obadiak, 60 Dom. L. Rep. 494 (1921); bringing a mob to the plaintiff's door with a threat to lynch him unless he left town, Wilson v. Wilkins, 181 Ark. 137, 25 S.W.2d 428 (1930); packaging and delivering a
In Oklahoma, courts recognized a cause of action for infliction of emotional distress. In *Breeden v. League Services Corp.*, the court adopted the *Restatement (Second) of Torts*’ statement of the law regarding the infliction of emotional distress which states:

§ 46 Outrageous Conduct Causing Emotional Distress

(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

Comment d to that section provides in part:

Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which a recitation of the facts of an average member of the community would arouse his resentment against the actor, and lead him to exclaim, ‘Outrageous!’

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The courts also find liability in cases involving extreme and harassing methods employed by bill collectors, insurance adjusters, and similar creditors. In many states, the plaintiff need not show extreme and outrageous conduct to prevail against bill collectors. Even negligence may suffice in some states. For an analysis of these cases see Note, *Intentional Infliction of Mental Distress in the Debtor-Creditor Relationship*, 37 ALB. L. REV. 797 (1973).

In one Louisiana case, the defendants buried a “pot of gold” for an eccentric and mentally infirm old maid to “find” and when she did they escorted her in triumph to city hall where she opened it in the midst of public humiliation. Nickerson v. Hodges, 146 La. 735, 84 So. 37 (1920).

While the Oklahoma cases finding liability for emotional distress are relatively few, they illustrate the nature of the action. In Reeves v. Melton, 518 P.2d 57 (Okla. App. 1974), the defendant, alleging non-payment on a television set, had threatened to kill the dogs at the plaintiff’s house and banged on all doors and windows while lunging at the front door trying to break in. In Bennett v. City Nat’l Bank and Trust Co., 549 P.2d 393 (Okla. App. 1975), a bank officer threatened to ruin the plaintiff’s credit and made threatening phone calls over a debt of the plaintiff’s son. In Floyd v. Dodson, 55 O.B.J. 44 at 2480 (Nov. 27, 1984), the Oklahoma Court of Appeals found sufficiently outrageous a threat to release nude photographs and tapes of lovemaking unless a lien was released.


1. The “Extreme and Outrageous” Requirement and Guinn

The plaintiff must show not only severe emotional distress but also distress arising from acts of the defendant that are “extreme” and “outrageous,” “beyond all bounds of decency” so as to be regarded as “atrocious” and “utterly intolerable.” Counsel for Guinn attempted to demonstrate that this standard was met, and apparently the jury found that the elders’ persistence in “going forward” after Marian told them that she did not want to consult with them was extreme and outrageous. Counsel cited newspaper letters attacking the church as evidence of the outrage of the community.

On the extreme and outrageous issue, another central issue in Guinn and similar discipline cases is an issue with constitutional dimensions (this aspect is discussed in Part V). One must prove that the elders’ action was extreme and outrageous for liability to exist. But what is the standard? Was the belief of the church about the immorality of Guinn’s sexual conduct outrageous? Was it their insistence she would be disciplined if she did not cease such conduct? Is it “extreme and outrageous” for a church to advise its members of the dismissal of another person and the reasons for that action? Is it beyond the “bounds of decency” for a church to hold the view (and practice consistent with it) that the body of believers have obligations toward one another including those of correction and discipline? A recent decision of the Ninth Circuit recognized the danger of permitting tort liabilities grounded on violating a person’s sensibilities. In a case involving a suit against a church member for “shunning” a previous member, the court noted that “offense to someone’s sensibilities resulting from religious conduct is simply not actionable in tort. Without society’s tolerance of offenses to sensibility, the protection of religious differences mandated by the first amendment would be

218. Counsel for Collinsville Church of Christ elders argued that, where the publication allegedly creating the emotional distress arises in the context of a qualified privilege, it cannot be “outrageous in character,” citing Breeden, 575 P.2d 1374 (Okla. 1978), for the proposition that reasonable persons would disagree as to whether or not conduct was outrageous, where the standard for proof for outrageousness has not been met. The very existence of the privilege negates the required degree of “utter intolerableness” which is the basis for emotional distress actions.

219. The constitutional dangers of the “outrage” test are discussed below.

While a standard requiring that a jury find conduct outrageous before triggering liability seems to be protective, in the context of unpopular ideas or groups the requirement may not act as a filter at all. In religious liberty contexts, permitting jury discretion in such matters may invite decisions that are mere reflections of religious hostility. May a jury, applying its own notions of appropriate religion, label as "outrageous" acts of a church consistent with a major biblical and theological tradition? "Outrageousness" too easily becomes a cultural judgment of the court or jury of the desirability or wisdom of the church's doctrines and practices rather than an assessment of whether or not such acts warrant civil liability. The Guinn court failed to provide effective guidance to the jury in assessing the outrageousness and thus opened the door for definitions grounded on prejudice, not within the established legal framework established for such actions.

2. Causation and Guinn

The plaintiff must further show that the actions of the defendant were the cause of the harm, the mental distress. In the chain of causation, the church may be a proximate cause of the emotional distress, but the church is likely to ask, in a psychological and moral frame of reference, whether its acts are the real cause of the plaintiff's distress or not. Is it the action of the church or the conduct of the parties themselves? The defendant churches are likely to agree with sociologist Helen Lynd's suggestion that the "public exposure of even a private part of one's physical or mental character could not in itself have brought about shame unless one had already felt within oneself, not only dislike, but shame for these traits." 222

Unlike most typical emotional distress cases, the conduct of the church does not produce the distress. These cases do not involve a malicious, evil actor taunting and threatening the innocent plaintiff, putting that person in fear. The plaintiff's conduct is the central basis of the distress. The defendant told the truth. Putting persons in jeopardy of civil judgments for speaking truthfully about the moral conduct of fellow associational members could pose serious threats to religious liberty. In an earlier age, if a liberal "infliction of emotional distress" rule such as this had been

221. Id. at 883.
available, it could have dispensed with the necessity of prisons to silence prophets who condemned immorality and injustice.

3. Emotional Distress and Guinn

While Prosser suggests that emotional distress “includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, anger, embarrassment, chagrin, disappointment, worry and nausea,” the severity of such distress must be shown. “The emotional distress must in fact exist, and it must be severe.” Whether persons subject to church discipline suffer severe emotional distress raises both definitional and proof problems, but churches may choose not to contest the existence of emotional distress. They may even choose to acknowledge their hope that the disciplined person has what they believe is an appropriate sense of shame or guilt hopefully leading to confession and renewal. Churches may argue that, while there is a destructive kind of emotional distress, in some respects, shame and emotional distress can be a gift, a “mark of our humanity.” Shame is a sign of our moral accountability, a gift of our conscience, and an incident of our humanity.

223. W. PROSSER, INSULT AND OUTRAGE, supra note 209, at 43.
225. SCHNEIDER, supra note 206, at ix. Schneider rejects those who would “dismiss [shame] as a mechanism that is crippling or inhibiting” or an “obstacle to be overcome.” He insists rather that “[s]hame raises consciousness. Shame is the partner of value awareness.” Id. at xiii-xv. “Such feelings [of shame] can be overridden, discounted or ignored only at a marked cost both to the individual and to society.” Id. at xviii.

The aspect of self-discovery in shame is illustrated in the observation of Kurt Riezler:

You are confronted with your own meanness. Your image of yourself is broken. You despise yourself. You will hate the man who puts you to shame. This hate is the most bitter of all, the most difficult to heal. It has the longest memory. Shame burns. Perhaps decades later you will suddenly remember and blush.

Shame and Awe, MAN: MUTABLE AND IMMUTABLE 202 (1951).

Helen Merrell Lynd makes the same arresting point: “Shame interrupts any unquestioning, unaware sense of ourselves . . . . Fully faced, shame may become not primarily something to be covered, but a positive experience of revelation.” LYND, ON SHAME AND THE SEARCH FOR IDENTITY 20 (1958).

226. For a view that shame is destructive, see K. MILLET, The Shame is Over, Ms., Jan. 1975, at 27-29, insisting that shame is the “absolute confirmation of 'older notions and values and moralities.'” Fritz Perls, the founder of Gestalt Therapy, declared: “I have called shame and embarrassment Quislings of the or-
The new torts of invasion of privacy and infliction of emotional distress have, at least in *Guinn*, proved effective legal tools for obtaining judgments against churches in discipline contexts. This is true notwithstanding the traditional protections of churches found in associational and general religious liberty principles of deference to church authorities. Significant claims may be made within traditional tort defenses that the burden of proof in such claims was not adequately met. Additionally, claims could be made that the judgment in *Guinn* misapplied legal rules of qualified privilege, inappropriately weighed the legal significance of Marian's resignation, and failed to assist in a finding of extreme and outrageous conduct. However, the larger issue is the extent to which such tort actions pose threats to constitutional rights of speech and religion and threaten the vitality and integrity of religious communities.

V. CONSTITUTIONAL LIMITS TO LIABILITY FOR CHURCH DISCIPLINE

In preceding sections this article noted the "broad rule of civil deference" that has governed judicial intrusion into the internal affairs of churches, a rule grounded in both the establishment and free exercise clauses of the first amendment. Also, principles derived from rights of association have supported church autonomy. As previously noted, in a traditional tort action such as defamation which is often alleged in church discipline cases, the defenses of truth and qualified privilege provide substantial defenses for church defendants usually without any overlay of additional constitutional protections.

However, in the context of the newer torts of invasion of privacy and infliction of emotional distress, cases such as *Guinn* create tensions in applying traditional tort law. Additionally, these cases cause problems in assessing the scope of special constitu-

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Vladimir Soloviev, the Russian 19th century philosopher, declared "[t]he feeling of shame is a fact which absolutely distinguishes man from all lower nature . . . [It] is the true spiritual root of all human good and the distinctive characteristic of man as a moral being." *The Justification of the Good* (N. A. Duddington trans. 1918), cited by Schneider, supra note 206, at 5. See Marin, *The New Narcissism*, Harpers, Oct. 1975, at 17.

228. See supra notes 49-84 and accompanying text.
229. See supra notes 49-83 and accompanying text.
tional limits to the imposition of liability where fundamental rights such as free exercise are arguably at issue. The application of these newer torts implicates constitutional liberties of religious expression of speech. As *New York Times v. Sullivan*\(^{230}\) established, the state's providing its courts for the enforcement of civil claims and damages, including punitive damages, constitutes the requisite state action to raise constitutional limits. If *New York Times* stands in part for the principle that the potential chilling effect of tort liabilities on the exercise of fundamental speech rights is sufficient to require judicially imposed limits or liabilities, then the same concern is appropriate where jury-imposed tort liabilities, including punitive damages, chill the exercise of religious rights.

The article now turns to these questions of the specific application of free exercise rights in the context of the new tort claims.\(^{231}\)

A. Religion Clause Defenses and Analyses

The first amendment protection of free exercise of religion is the most substantial constitutional liberty implicated by state-enabled tort claims against churches in church discipline contexts. There is a three-step analytical process when free exercise claims are at issue.\(^{232}\) This analysis must be applied to the practices of the church in church discipline cases. First, does the civil court's involvement in enforcing tort judgments against churches for acts carrying out their religiously motivated disciplinary practices constitute a burden on a sincerely held religious belief?

The sincerity of the religious belief involved in the practices of church discipline, such as in *Guinn*, is beyond challenge. These practices that are perceived as rooted in biblical commands\(^{233}\) have a long tradition in Christian history and within the ecclesiastical traditions of most denominations,\(^{234}\) including the Church of


\(^{231}\) The protections of free exercise of religion are urgent in a society that is becoming increasingly pluralistic and in which the regulation of life by government at many levels is growing. The preservation of a vital segment for religious life is critical not only to protect the vitality of religion and of individual conscience. It is critical also because there are sound public policy grounds for recognizing the value of a strong moral and prophetic voice in society, a voice that at times will speak against the culture, even the government itself.

\(^{232}\) See *supra* notes 103-109 and accompanying text.

\(^{233}\) Chiefly, *Matthew* 18.

\(^{234}\) The relevance of the fact that a belief is shared by the religious commu-
Christ. Indeed, churches are likely to view such biblically mandated practices as central to their moral and spiritual integrity. To the extent that the centrality of the practices to their religious beliefs is perceived as having independent relevance in assessing the burdensomeness of a state’s action, the fact that the disciplinary practices relate to the church’s sense of integrity and biblical faithfulness indicates that its disciplinary beliefs are not a mere minor doctrinal or controverted practice within the religious community. Neither the validity, nor the reasonableness of the belief, is relevant or a proper subject of judicial inquiry.

Does the imposition of potential tort liability on persons or churches burden the exercise of their spiritual convictions? It hardly seems otherwise. To require that church elders and pastors exercise church discipline consistent with their religious faith and practices only at the risk of substantial, if not catastrophic, civil liability certainly burdens the exercise of their religion. It creates the type of conflict the United States Supreme Court found burdensome in *Sherbert v. Verner.* The Court found a legally cognizable burden when the state forced a choice between following the

235. In *Wisconsin v. Yoder,* 406 U.S. 205 (1972), the Court seemed to note not only the sincerity of the Amish practices but also the centrality of those practices to the very nature of the religious community and the consequences of infringements. The Court cited testimony about “great psychological harm to Amish children” and the likelihood that the conflicts would “ultimately result in the destruction of the Old Order Amish church community as it exists in the United States today.” 406 U.S. at 212. The Court noted that the beliefs were not “merely a matter of personal preference, but . . . of deep religious conviction . . .” 406 U.S. at 216. See also *People v. Woody,* 61 Cal. 2d 716, 40 Cal. Rptr. 69, 394 P.2d 813 (1964), where the California Supreme Court weighed the centrality of the belief in the use of peyote in upholding a free exercise claim and distinguishing it on centrality grounds from *Reynolds v. United States.* *Id.*, 394 P.2d at 820.


precepts of one's religion and subjecting one's self to state supported financial liabilities or foregoing such religious duties to minimize risks of liability.\textsuperscript{238} Seen in the church property cases, the mere fact that the form of the legal action is in tort does not negate the essentially religious character of the issue.\textsuperscript{239} An action is no less a potential intrusion into the affairs of religion because it is a "tort" claim. This is supported by the "property ownership" claims in the ecclesiastical disputes that led to the autonomy decisions beginning with Watson.\textsuperscript{240} Nor does the facially neutral form of the government's action preclude consideration of its undue burden on the free exercise of religion.\textsuperscript{241}

The Ninth Circuit recently articulated and found dispositive this position in \textit{Paul v. Watchman Bible and Tract Society of New York, Inc.}\textsuperscript{242} The court held that:

state laws whether statutory or common law, including tort rules, constitute state action . . . [C]learly the application of tort law to activities of a church or its adherents in their furtherance of their religious beliefs is an exercise of state power. When the imposition of liability would result in the abridgement of the right of free exercise of religious beliefs, recovery in tort is barred.\textsuperscript{243}

The court assessed the religious liberty interest and concluded that the defendant church possessed, under Washington law, an "affirmative defense of privilege."\textsuperscript{244} Even if shunning were tortious conduct, this defense of privilege is grounded in rights of free exercise; thus "the guarantee of the free exercise of religion would provide that it is, nonetheless, privileged conduct."\textsuperscript{245}

Second, is there a compelling state interest that justifies this burden or intrusion? The Supreme Court established that certain state interests may be sufficiently compelling to warrant intrusion on religious practices as opposed to mere belief.\textsuperscript{246} However, the

\textsuperscript{238} \textit{Id.} at 404.
\textsuperscript{239} L. TRIBE, \textit{supra} note 49, at 875.
\textsuperscript{240} Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871).
\textsuperscript{241} Wisconsin v. Yoder, 406 U.S. at 220.
\textsuperscript{242} 819 F.2d 875 (9th Cir. 1987).
\textsuperscript{243} \textit{Id.} at 880.
\textsuperscript{244} \textit{Id.} at 879.
\textsuperscript{245} \textit{Id.} at 879.
\textsuperscript{246} "Conduct remains subject to regulation for the protection of society." Reynolds v. United States, 98 U.S. 145 (1878); Thomas v. Review Bd., 450 U.S. at 718 ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest.") \textit{See also}
interests must go beyond a "showing merely of a rational relationship to some colorable state interest." "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation."247

The interest of the state and the value of the rights of religious expression must be weighed in the balance. Does the church's action in Guinn, as the plaintiffs allege, involve such an outrage against the conscience of civilized society that the state must act? Is there a substantial, paramount state interest in awarding a punitive damage award to Marian Guinn for the truthful revelations of her moral conduct to her former church that compels the overriding of the church's religious practices? In the balancing process, what weight should be given to the internal disciplinary proceedings of the church (which include the formal "withdrawal of fellowship" from a member or former member and the announcement to the remaining members of the facts behind the action taken)? Does the state's interest in enabling punitive damage awards for persons in privacy and emotional distress actions weigh so heavily that the rights of these churches to these limited, internal actions are overcome? Clearly, the potential damage to the exercise of sincerely held religious beliefs is substantial. Balanced against such potential damage is the right of a former member not to have church governing officials aware of the basis for her changed relationship with the church nor to be advised by the church regarding their spiritual relationship to her.

The Guinn court rejected the free exercise grounded defenses, finding a compelling interest. The reason rests, perhaps, in the inevitable cultural character of the compelling interest analysis. The danger lurks not in courts' analytical processes, but rather in the elasticity of the concept of "compelling state interests." Although it is an essential concept, a threat to religious liberty exists because the "compelling" definition is largely a factor defined sociologically and politically. Such "compelling interests" are inevitably products and conclusions of a society, or even more precariously, a jury. As the values of a society are shaped by culture's evolving ideologies, so are "compelling interests." "Compelling" is an evolutionary and

Braunfield v. Brown, 366 U.S. 599, 603 ("[E]ven when the action is in accord with one's religious convictions [it] is not totally free from legislative restrictions.")

slippery category. The very presence of the state in an arena is initially unlikely to create an "interest" which soon may be discovered to be "compelling." The danger is that free exercise of religion, always weighed against such compelling interests, may be contingent upon and vulnerable to the vagaries of a given age's visions. It may be swallowed up in a sea of compelling state interests. Many "ideas" and practices of religious communities, if submitted to juries, may be overwhelmed by compelling interests when assessed in the weighted scales of contemporary social or moral values. Religion must be allowed to be counter-cultural, out of step with society. Otherwise religion is forced to mirror society, to be a lackey of the Zeitgeist. The prophetic and moral witness of religion would be lost in a culture in which religion must conform to cultural values. The result would surely be a "state church" of the type precisely rejected by constitutional prohibitions against the establishment of religion. Justice Powell voiced his concern about religion being forced to stay in step with government or public policy in Bob Jones University v. United States. He noted the danger of any concept of qualification for tax exemption that required groups to reflect public policy would replace a constitutional perspective that recognizes that society is best served by a wide-open debate permitting ridiculous and offensive notions in the marketplace of ideas.

In the context of weighing the competing values of a church's

248. An illustration would be in the area of education where, at the founding of the nation, education was hardly an interest at all, much less a "compelling interest" of the state. Most education was religious, and all education was private. Gradually, the states became involved; and over a century, states became the main source of education establishing standards they now often seek to impose on all education whether public or private. Courts today acknowledge with hardly a blink a "compelling interest" of the state in education. This illustrates how, in a relatively short time, an arena totally outside the purview of government can become almost the monopoly of government, swallowing up the interests of others and overwhelming them.

249. In the Soviet Union, for example, freedom of religion is theoretically protected, but a Soviet version of compelling state interests constantly overwhelms its exercise.

250. Tribe suggests that the same problem of jury insensitivity to divergent religious belief would exist if courts permitted much inquiry into the issue of sincerity of religious belief. "[T]he very rights ostensibly protected by the free exercise clause might well be jeopardized by any but the most minimal inquiry into sincerity." L. Tribe, supra note 49, at 861.


252. Id. at 609 (Powell, J., concurring).
commitment to enforcing church discipline of sexual misconduct, the cultural factor may well act as a thumb on the scales. Contemporary culture's notions of "limited liability" in relationships and "freedom without responsibility,"\textsuperscript{253} its "confusion and apathy in the matter of moral values,"\textsuperscript{254} and its ideological "hostility to discipline,"\textsuperscript{255} obviously will result in a society and a jury that will find it difficult to appreciate a disciplinary church. The same can be said for contemporary culture's denial of real guilt,\textsuperscript{256} its rejection of categories of "good" and "bad,"\textsuperscript{257} suspicion about the necessity and healthiness of confession,\textsuperscript{258} its "secularization" of the "management of the problem of guilt,"\textsuperscript{259} and its perception of the inappropriateness of moral confrontation.\textsuperscript{260}

B. Constitutional Limits on Jury Discretion

\textit{Guinn} demonstrates the vulnerability of constitutionally protected rights in the face of public sentiment. Submitting the balancing of rights to juries in cases such as \textit{Guinn} is certain to result in the sort of prejudicial damage awards that were seen in the cases which led to \textit{New York Times v. Sullivan}.\textsuperscript{261} In \textit{New York Times}, the Court imposed limits on the jurors with heightened thresholds of misconduct and rules to ensure that damage awards were not likely to cripple the exercise of rights. In effect, the Court imposed judicial limits as civil liberties damage control against jury prejudice. Precisely such limiting rules equally apply in the context of liability for invasions of privacy and infliction of emotional distress.

Judicial policing of jury processes is especially appropriate when liability, associated with the exercise of some fundamental

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rights, rests in part on a jury's judgment of the social acceptability of certain conduct. In weighing liability for infliction of emotional distress, the Guinn jury's task was to assess whether the plaintiff's conduct was outrageous. But in the context of protected rights such as free speech, free press, and free exercise, juries must be bound by careful judicial principles lest popularity or acceptability become a prerequisite for the protection of expression. Certainly, if community outrage is a sufficient basis for restricting the exercise of fundamental rights, social justice, human rights, and religious liberty would be in serious jeopardy. If religion is to be judged by contemporary moral standards, then many faiths would be seen as out of step, archaic, and then perhaps as outrageous. The Guinn decision reflects the dangers in turning to juries to assess the appropriateness of religious doctrines and moral assessments. Individual rights should not be indiscriminately subject to ad hoc jury determinations. People have at various points in history been outraged by integration, civil rights, and even democracy. Outrage alone cannot be a basis, especially when fundamental rights such as speech or religion are involved.

In the arena of constitutional protections of speech, courts have recognized the constitutional impermissibility of allowing unpopularity or mere offensiveness to silence expression. Speech cannot be barred merely because it creates emotional reactions. Indeed, the Supreme Court recognized that vigorous and effective public discourse often includes the offensive. Juries, however, are simply not very tolerant of unpopular ideas. The problems of unfettered jury discretion in church discipline cases could be resolved by applying constitutionally grounded and judicially en-

262. In Oklahoma, as set forth by the Oklahoma Supreme Court in Breeden, 575 P.2d 1374, 1377 (Okla. 1978), it is the court's, not the jury's, task to first "determine whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery." Importantly, only where reasonable persons could disagree should the issue be given to the jury. Where the court has the duty of first finding that at least some reasonable persons might hold the conduct was sufficiently outrageous, the court can prevent vindictive juries from using their powers to punish merely unpopular ideas. The role of the courts is not simply to provide a vehicle for prejudice through civil suits but to assure that any alleged conduct could reasonably be found to be legally sufficiently extreme and outrageous.


264. Terminiello v. Chicago, 337 U.S. 1, 4 (1949) (barring conviction based on speech which "involves a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger"). 337 U.S. at 4).
forced standards, much as are required by *New York Times* in def-
amation cases. Commentators advocate precisely such a "definitional," as opposed to "ad hoc," standard as reducing the "impact of popular sentiment" and "lessen[ing] the chilling effect on expression by increasing certainty over what was actionable."  

C. Constitutionally Grounded Limits on Punitive Damages

The *Guinn* decision reinforces the need for constitutionally grounded judicial guidance over the availability of punitive damage awards. *Guinn* is not unique in reflecting a jury's willingness to render substantial punitive damage awards against unpopular religious defendants. In Oregon, a jury awarded two million dollars in favor of a woman who withdrew from the Church of Scientology alleging fraud in the church's promises of a better life for her. That decision was overturned. In 1985, a jury again awarded the plaintiff money damages, this time thirty-nine million dollars. On July 22, 1986, a California jury awarded thirty million dollars to Larry Wollershiem, a former member of the Church of Scientology, on his claim that he did not obtain the promised spiritual powers. Interviews with jurors in the "clergy malpractice" suit against John MacArthur and Grace Community Church reportedly showed that some jurors sided with the plaintiffs because they felt the church was too narrow or strict. A United States

266. Comment, Religious Torts: Applying the Consent Doctrine as Defini-
tional Balancing, supra note 196, at 973. The author of the comment concludes, "Applying a definitional balancing standard would similarly protect first amend-
ment interests in religious tort cases because they present comparable problems of public influencing and chilling." Id. at 973. See also M. Nimmer, Nimmer on Freedom of Speech: A Treatise on the First Amendment § 2, at 17 (1984).
269. No. A77 04 05184 (Or. Cir. Ct., Multnomah County July 19, 1985).
272. Reported in conversations with Sam Ericsson, counsel to Grace Commu-
district court jury awarded $138,000 to a man who alleged that two Transcendental Meditation organizations falsely promised he could fly.\textsuperscript{273} Such judgments by jurors reflect the dangers of allowing them to determine the liberties of conscience and religious life. These liberties must flourish not only when popularly hailed but also when rejected. In \textit{Gertz v. Robert Welch, Inc.}, the Court noted that traditional tort rules relating to the scope and nature of damages impermissibly gave juries uncontrolled discretion to award damages unrelated to actual injuries thereby permitting the selective punishment of unpopular views.\textsuperscript{274}

Courts have increasingly recognized constitutional limits on state laws creating liability and imposing damages in privacy actions, especially in situations of reporting about the "private" lives of public officials or public figures. These limits have been most stringent in rules relating to punitive damage awards because of the chilling effect such financial penalties may create. The limits arise because of the constitutional commitment to an "uninhibited, robust, and wide-open"\textsuperscript{275} discussion on public issues. In defamation actions, public figures may succeed only when they can show actual malice or a reckless disregard of truth.\textsuperscript{276} The central concern in \textit{New York Times} was the chilling effect\textsuperscript{277} not only of actual liability, but also of potential liability. That such punitive damage claims and awards often exceed the total assets of the defendant church reinforces the danger of making churches liable for such damages on the basis of rather unclear and amorphous standards.

\section*{VI. Conclusion}

Principles of individual and collective rights of association


\textsuperscript{274} \textit{Gertz}, 418 U.S. at 349.

\textsuperscript{275} \textit{New York Times} v. Sullivan, 376 U.S. at 270.

\textsuperscript{276} \textit{Id.} at 279-80.

generally provide religious associations with substantial rights to govern their own internal affairs including the admission and dismissal of members. In the case of religious associations, principles of church autonomy and deference to church affairs, and the more specific prohibitions against excessive entanglement or infringement on free exercise absent a compelling state interest, provide additional protections (grounded on constitutional principles) for religious communities in their self-governance. These principles reflect sound policy and assure both religious liberty and the integrity of religious associations against unwarranted or excessive state intrusion which breaches the wall of separation. This deference, except under the most compelling circumstances, is sound policy, particularly when an intrusion would impose restraints and controls on the internal and doctrinal affairs of religious bodies. Professor Laycock correctly noted that such principles are most commanding when they touch the internal affairs of the church and relationships among voluntary members.278

These principles of deference, primarily established in property disputes, are derived from the first amendment prohibitions of the establishment clause and guarantees of free exercise. Because these principles are grounded in basic constitutional principles, they are equally applicable in tort actions. In defamation actions against religious associations, traditional tort defenses of truth and qualified privilege provided appropriate limits on tort actions in the context of defamation actions which impact freedom of speech. However, the more recent tort actions of invasion of privacy and infliction of emotional distress may, as Guinn illustrates, pose serious threats to the autonomy of religious communities to govern their own internal affairs consistent with their religious convictions. The failure of courts to fence such actions within carefully defined constitutional parameters may result in serious erosions of the protections of religious liberty. The potential for unbridled jury discretion reflective of prejudice and for excessive punitive damage awards against unpopular religious bodies requires careful judicial management of such tort actions as recognized in the defa-

278. Laycock, supra note 91, at 1403. Suggesting tests for autonomy, Laycock notes the case for autonomy is strongest when the matter is internal, the religious aspect of the issue is intense, and the threat of regulation (by prohibition or incentives) would substantially encourage abandonment of a religious practice (as opposed to state involvement which might only make such activities somewhat more expensive).
mation area in *New York Times v. Sullivan*.279 Such proper judicial control will not bar recovery in deserving cases but will assure that such tort actions do not become vehicles for either indirect control of internal church affairs or unwarranted and intrusive financial penalties against unpopular religious beliefs, assessed by unsympathetic juries in favor of disgruntled plaintiffs. While the *Guinn* trial court decision properly may be reversed based solely on the application of recognized tort defenses, the fundamental constitutional issues raised by the decision should not be ignored by the appellate courts.