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CHURCH DISCIPLINE ON TRIAL: RELIGIOUS FREEDOM VERSUS INDIVIDUAL PRIVACY

I. INTRODUCTION

Traditionally, under the common law of defamation, churches were free to practice church discipline¹ without fear of litigation. The churches were protected by a qualified privilege² and were able to use truth as a defense.³ However, in the recent case of *Marian Guinn v. The Church of Christ of Collinsville, Oklahoma*,⁴ the plaintiff challenged church discipline as a tortious invasion of individual privacy. The result was a jury verdict for the plaintiff⁵ and a new basis for tort claims against churches that report even true private facts during church discipline proceedings.⁶ Attorneys across the country have filed actions against churches⁷ replacing defamation

1. Church discipline refers to a church governmental process whereby churches deal with members who violate the church's moral code. Church discipline involves confronting, reproofing, and ultimately excluding such a person from the church if their conduct is not returned to doctrinal conformity. This procedure has its beginning in early Christian church history and continues today based on adherence to many of the same principles. Churches may vary in their interpretation and application of church discipline procedure. A general overview will be provided to delineate the basic principles which churches follow to practice church discipline. See *infra* text accompanying notes 13-31.

The goal of church discipline is twofold:

- 1) Correction and restoration of the erring member
- 2) Deterrence of similar conduct by other members of the congregation

W. Goode, Seminar on Church Discipline 26 (May 16, 1981) (unpublished manuscript available from Faith Baptist Counseling Ministries, Faith Baptist Church, Lafayette, Indiana, providing a Baptist view of this subject). For a Congregational view of the subject, see D. WRAY, *BIBLICAL CHURCH DISCIPLINE* (1978). For a Mennonite view, see M. TESCHKE, *DISCIPLINING THE BROTHER* (1972).

2. "In the law of libel and slander, [a qualified privilege is] the same as conditional privilege. 'Absolute privilege' renders defendant absolutely immune from civil liability for his defamatory statements, while 'qualified privilege' protects defendant from liability only if he uttered defamatory statements without actual malice." BLACK'S LAW DICTIONARY 1117 (5th ed. 1979), citing *Martinez v. Cardwell*, 25 Ariz. App. 253, 542 P.2d 1133, 1135 (1975).

3. "One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true." RESTATEMENT (SECOND) OF TORTS § 581A (1977).

4. No. CT-81-929 (Dist. Ct. in and for Tulsa County, State of Oklahoma, March 1984), *appeal docketed*, No. 62154 (Okla. Sup. Ct., Jan. 1985).

5. Ranii, *Church Discipline Goes to Court*, 7 NAT'L L.J. 30 (1985).

6. See *infra* text accompanying notes 100-01.

7. Cases involving similar actions include: Church of Christ, Garden Grove, California; Church of Christ, Memphis, Tennessee; Christian Community Church, Santa Clara, California; Christian Community Church, San Jose, California; and Central Baptist Church, Philadelphia, Pennsylvania.

claims with allegations of tortious invasion of privacy.⁸ As a result, the churches' first amendment freedoms of religion are under attack.⁹

Just how far courts should go to protect the right of privacy is the vital issue involved in church discipline cases. Church discipline is a procedure whereby churches deal with members who violate the church's moral code.¹⁰ This procedure involves confronting, reproofing, and ultimately excluding persons from the church when necessary. In the process, private facts about the offending party's conduct may be disclosed.¹¹ The tort action for invasion of privacy exists to protect an individual's peace of mind which includes the right not to have private embarrassing facts published even if such facts are true.¹² For a church to publish private information during church discipline proceedings is therefore an invasion of privacy, but arguably, the free exercise of religion would dictate that such church discipline communications must be protected.

An examination of the reasons why church discipline proceedings deserve greater protection than currently afforded under the tort law of privacy must begin with an historical review of the procedure of church discipline as a religious practice, followed by an analysis of church discipline procedure as it relates to the law. Then, a review of the *Guinn* case will illustrate the inadequacies of privacy law to protect the church's first amendment freedoms of religion. Finally, this note will consider four possible resolutions to restore a level of adequate protection.

J. McGoldrick, Jr., *Marian Guinn v. The Collinsville, Oklahoma Church of Christ* 8, 9 (n.d.) (unpublished manuscript). See Ranii, *supra* note 5, at 30 (Ranii notes that the *Guinn* decision has been a catalyst for filing new church discipline cases across the country). See also Jane Murray v. The Church of Christ Northside, No. 15420 (In the Dist. Ct. Val Verde County Texas, July 1985) (settled out of court).

It should be noted at this point that the legal issues involved in church discipline litigation closely parallel the issues raised by lawsuits involving spiritual counselors and clergymen. Therefore, although the discussion in this note is limited to church discipline cases, the ramifications of such lawsuits will have a much broader impact on the overall area of church-state relations. See generally Ericsson, *Clergyman Malpractice: Ramifications of a New Theory*, 16 VAL. U.L. REV. 163 (1981); Note, *Intentional Infliction of Emotional Distress by Spiritual Counselors: Can Outrageous Conduct Be "Free Exercise"?*, 84 MICH. L. REV. 1296 (1986).

8. See *infra* note 66.

9. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. See also *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (establishment clause applied to the states); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (free exercise applied to the states).

10. See *supra* note 1.

11. See *infra* text accompanying notes 22-23.

12. See *infra* text accompanying notes 77-81.

II. CHURCH DISCIPLINE

An individual, upon joining a religious association, does so with an implied consent to be bound by the procedures governing that association.¹³ He thereby limits his own freedom in exchange for the benefits derived from becoming a part of a religious body. Church discipline is a governing procedure used by some churches to deal with members who violate the church's moral code. Therefore, when church discipline is exercised, the church is merely requiring the offending party to abide by the doctrine that governs the entire congregation.¹⁴

Churches exercise public church discipline, including exclusion of persons from the congregation, for private as well as public offenses¹⁵ that threaten to jeopardize the church's ministry to the surrounding community.¹⁶ The actual exclusion of a person from the congregation is never for the person's initial failure to conform to the church's moral code. Rather, exclusion results when the offending party, following the offense, refuses to alter his behavior to bring his conduct back into conformance with the church's code.¹⁷ In the case of a public offense, a person's failure to reform his behavior and publicly admit his misconduct before the congregation triggers exclusion.¹⁸

The doctrinal basis for church discipline procedure is found in the Bible.¹⁹ Three distinct steps are involved.²⁰ The first step begins when a member offends another member by conduct contrary to the church's moral code. The party who was offended is responsible for going to the offending party privately and confronting him about his offensive behavior. Such a confrontation should involve a clear violation of the church's moral code, not merely an incidental or speculative matter. The purpose of this confrontation is to bring about a change in conduct on the part of the offending member, such that he again conforms to the moral code of the church. If the offensive conduct is stopped, no justification exists for making the of-

13. See *Watson v. Jones*, 80 U.S. (13 Wall.) 666, 676 (1871) (implied consent to submit to ecclesiastical government upon joining). See *infra* text accompanying note 36.

14. "It is 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." *Watson*, 80 U.S. (13 Wall.) at 676-77.

15. Generally the procedure of church discipline begins with a private offense but results in disclosure of the misconduct to the entire congregation when necessary. Goode, *supra* note 1, at 24.

16. When churches do not solve problems they will not be perceived as being effective in serving their community, and they will not prosper. See *id.* at 5.

17. *Id.* at 10.

18. *Id.* at 24. See *infra* text accompanying note 30.

19. *Matthew* 18:15-17.

20. See generally Goode, *supra* note 1, at 20-24.

fense known to other members of the congregation. Depending upon the offending member's response, the party who is offended can repeat this step numerous times before additional steps are taken.

The party who is offended initiates the second step only upon a failure by the offending party to respond to the private confrontation in step one. Step two involves confronting the offending party semi-privately with one or two other members of the church. The purpose behind step two is to solicit the aid of other members to bring about the desired change in behavior in the offending member. As with step one, nothing limits the second step to a single visit or meeting. The small group confronting the offending party may attempt several times to bring about the desired behavioral change.

At this stage of the procedure, the group of two or three members will generally remind the offending member that the entire congregation will be informed upon a failure by the offending party to respond and change his conduct. This communication allows the offending member an opportunity to deal with the problem prior to disclosure to the congregation. Although, it is true that the offending party has no other option but to alter his behavior in order for the matter to remain private, that individual has agreed to abide by the church's doctrine when he joined the congregation.²¹

Church doctrine does not merely recommend this second step but rather requires it as a duty.²² Once the member who was offended has initiated the procedure, he has a duty to follow through with each step for the benefit of the offending party, as well as the entire congregation. If necessary, the group must proceed to step three.

Step three is the final step in the church discipline procedure and is only necessary when steps one and two have failed. This final step involves notifying the congregation of the offensive conduct and if necessary later voting to exclude the offending party from the religious body. The initial reason for telling the congregation is to enlist the aid of the church in order to bring about the desired change in conduct in the offending party. Generally, the church leadership will inform the congregation that some offensive conduct, contrary to the church's doctrinal code, has occurred. The leadership will allow a period of time, usually a week or more, for individual members of the congregation to use whatever influence they might have to confront the offending party.

Assuming that no change in conduct results, the church leadership will make a second announcement, prior to voting by the governing body, to exclude the violating party. The purpose of the second announcement is to disclose sufficient details with regard to the offending party's conduct in

21. *Watson v. Jones*, 80 U.S. (13 Wall.) 666, 676 (1871).

22. *Goode*, *supra* note 1, at 1-2.

order to make clear to the congregation that a violation of the church's moral code has in fact taken place.²³ Following this disclosure, the congregation will vote on whether or not to exclude the offending party from the church until such time as that party changes his conduct to conform with the church's doctrinal code.²⁴ Upon exclusion, if such a change occurs, the church must receive that person back into the congregation if the excluded party so desires.²⁵

Several important matters need highlighting with regard to the church discipline procedure. First, the offending party is not given the option simply to "quit" the congregation at any point in the procedure.²⁶ The church acting through one member, then a small group, and finally as an entire congregation has no basis for setting aside the doctrinal procedure simply because an offending party chooses to avoid the consequences of the discipline process. To allow such an option would undermine the duty involved. The congregation has a duty not to curtail the process of restoring the offending member short of providing that individual every opportunity to change his conduct prior to exclusion.

Secondly, making a critical doctrinal distinction is important with regard to membership. Many churches espouse the religious belief that when a person becomes a Christian, that person is spiritually incorporated into the Body of Christ.²⁷ As such, he becomes a member of "The Church"

23. Goode, *supra* note 1, at 1-2. General precautions taken at this point in the procedure include:

- 1) No matter will be disclosed unless prior steps have been followed.
- 2) No information should be disclosed unnecessarily, only what is necessary to the congregational action.
- 3) No information concerning parties not under discussion should be heard.
- 4) No member may be excluded where genuine evidence of change is found. *Id.* at 24, 33.

24. Goode, *supra* note 1, at 24, 33.

[I]ndividuals functioning in an interdependent society need to be informed about those with whom they interact (even when information comes from non-family members or from those without other special relationships). They need this information at least as much as they need to know of the character of public officials and public figures.

Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 U.C.L.A. L. REV. 915, 941 (1978) (citation omitted). See also H. ROBERTS, ROBERTS RULES OF ORDER REVISED 303, 304 (1971) (voting procedures).

25. Goode, *supra* note 1, at 24, 33.

26. Goode, *supra* note 1, at 23. The congregation has a duty to consistently apply discipline procedures so that each member is given the same fair treatment. To abandon church discipline procedures once initiated because the member "quits" would be contrary to the goal of restoration and would undermine the effectiveness of disciplining a member.

27. 1 *Corinthians* 12:12-27.

Withdrawal of fellowship is different from withdrawal of a member. The appellant church teaches the belief that once a person becomes a member, that person cannot withdraw his or her membership (T. 376/11). As in a family, once a person is born into a family, the person remains a member for life. The church has no provision for expulsion

which includes all Christians both living and dead. This membership is separate and distinct from joining a local church congregation. The process of church discipline is not aimed at a person's membership in "The Church," and in fact, when the congregation disciplines a person, it still considers such an individual to be a Christian, although the group has excluded him from their number. This explains why a local church must admit a person back into the congregation when there is a sincere change in conduct following exclusion.²⁸ Because of this doctrinal distinction, many church groups would refer to the exclusion from membership resulting from discipline as "dis-fellowshipping."²⁹

Finally, one exception to the three-step procedure outlined above is the requirement that offenses which are committed publicly must be dealt with publicly.³⁰ Normally, churches will tend to use the three-step procedure whenever possible so as to avoid exposing faults unnecessarily, even in cases where the church receives rumors and complaints about the offending member's conduct from non-church members in the community.³¹ The preceding review of church discipline, as a religious practice, lays the foundation for examining this church doctrinal practice as it relates to the law.

III. CHURCH DISCIPLINE AS IT RELATES TO THE LAW

Tort law and constitutional law interact in a delicate balance to protect the first amendment freedoms of religion involved in church discipline practice. Changes in tort law have altered that balance and created a legal environment which is far less protective of this vital church government procedure. Legal issues of subject matter jurisdiction, defamation law, invasion of privacy, the state action doctrine, and the religion clauses of the first amendment are all pertinent to understanding suits arising out of church

(T. 377/12).

Brief for Appellant at 5, *The Church of Christ of Collinsville, Oklahoma v. Marian Guinn*, No. 62154 (Okla. Sup. Ct. 1985). [hereinafter Brief-A].

28. Goode, *supra* note 1, at 24, 33 (the goal after exclusion is still restoration).

29. Brief-A, *supra* note 27, at 5.

30. Goode, *supra* note 1, at 24. See also *Galatians* 2:11-14. The local church government itself decides when an offense is public. Examples of public offenses would be public drunkenness or incarceration for shoplifting. See Goode, *supra* note 1, at 9.

31. Goode, *supra* note 1, at 24. Marian Guinn acknowledged at trial that her affair was rumored around the small town (T. 147/22-24). Brief-A, *supra* note 27, at 8-9. With regard to the requirements for a violation of privacy, "the facts disclosed to the public must be private facts, and not public ones. Certainly no one can complain when publicity is given to information about him which he himself leaves open to the public eye." Prosser, *Privacy*, 48 CALIF. L. REV. 383, 394 (1960). *Contra* Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 960 (1968) (author notes that some privacy cases allow the defendant to incur liability for disclosing to a larger segment of the public that which was already known to a smaller public segment).

discipline proceedings.

A. Subject Matter Jurisdiction

As early as 1871, the United States Supreme Court declared that civil courts may not exercise jurisdiction where the subject matter of a dispute was strictly "ecclesiastical in nature."³² The Court, in *Watson v. Jones*,³³ defined the phrase "ecclesiastical in nature" to mean a matter concerning "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them."³⁴ The Court's underlying rationale was that the inquiry by civil courts into such matters would require excessive and impermissible government entanglement with religion.³⁵ Furthermore, the Court noted that per-

32. [I]t is a very different thing where a subject-matter of dispute, strictly and purely ecclesiastical in its character—a matter over which the civil courts exercise no jurisdiction—a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them—becomes the subject of its action. It may be said here, also, that no jurisdiction has been conferred on the tribunal to try the particular case before it, or that, in its judgment, it exceeds the powers conferred upon it, or that the laws of the church do not authorize the particular form of proceeding adopted; and, in a sense often used in the courts, all of those may be said to be questions of jurisdiction. But it is easy to see that if the civil courts are to inquire into all these matters, the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination may, and must, be examined into with minuteness and care, for they would become, in almost every case, the criteria by which the validity of the ecclesiastical decree would be determined in the civil court.

Watson v. Jones, 80 U.S. (13 Wall.) 666, 678 (1871).

33. *Id.*

34. *Id.*

35. *Id.*

[T]he 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 decisions on core matters of belief and ritual. Indeed, the Supreme Court recognized long ago that it 'would lead to the total subversion of . . . religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed.' Thus, American courts—both state and federal—have uniformly held that, 'in matters purely religious or ecclesiastical, the civil courts have no jurisdiction' and have uniformly recognized that religious freedom 'would not long survive' if church members unsatisfied about 'some matter of religious faith or church polity, could successfully appeal to the secular courts for redress.'

Only in part do such pronouncements reflect a desire to preserve the autonomy and self-government of religious organizations; even more deeply, they reflect a conviction that government must never take sides on religious matters, a conviction 'requiring on the part of all organs of government a strict neutrality toward theological questions.' At the very heart of first amendment theory is the proposition that '[t]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.' It follows that the most clearly forbidden entanglement between church and state is the entanglement that occurs when institutions of civil government attempt to discover religious error

sons who unite with a church do so with implied consent to submit to and be bound by the church's governing body.³⁶

The principle of prohibiting court jurisdiction for ecclesiastical matters arose out of disputes among members over church property.³⁷ Even in a church property dispute, the Court has held that the decision of the church tribunal is conclusive where questions of religious doctrine and practice are involved in resolving the case.³⁸ In later decisions, the Court has allowed civil courts to apply neutral principles of law to resolve church property disputes where the court was not forced to decide questions of doctrine or practice in the process.³⁹

A series of cases has affirmed the general principle that civil courts are forbidden from deciding ecclesiastical questions.⁴⁰ The Court more recently applied this principle in *Serbian Orthodox Diocese v. Milivojevich*.⁴¹ *Milivojevich* involved a dispute over church government control of a diocese. The Court held that the Illinois Supreme Court had unconstitutionally interfered with religious freedom by interposing its judgment into ecclesiastical matters.⁴² However, the prohibition against deciding ecclesiastical issues is not absolute. On very rare occasions involving church doctrinal matters, the Court has declared illegal certain conduct based on religious

by legal process, or to promulgate religious truth by legal decree.

L. TRIBE., *AMERICAN CONSTITUTIONAL LAW* 870-71 (1978) (citation omitted).

36. *Watson*, 80 U.S. (13 Wall.) at 676.

37. *See, e.g., Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713 (1976) (affirming the general rule that religious controversies are not the proper subject of civil court inquiry).

38. *Watson*, 80 U.S. (13 Wall.) at 678. In this church property dispute, the Court deferred to the religious tribunal to avoid deciding theological doctrinal matters.

39. "Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property. And there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded." *Presbyterian Church v. Hull Church*, 393 U.S. 440, 449 (1969). *See also Jones v. Wolf*, 443 U.S. 595 (1979) (affirming the "neutral principles" of property law rule). Commenting on *Presbyterian Church v. Hull Church*:

Secular authorities may not resolve civil disputes that engage them 'in the forbidden process of interpreting and weighing church doctrine.' [*Presbyterian*, 393 U.S. at 451].

Once it is conceded that first amendment values are unacceptably compromised when civil courts undertake to settle religious issues, it becomes clear that allowing a legal determination about property or some other secular matter to turn on a court's answer to a religious question represents a path fraught with peril: that path is one along which unsatisfied former believers could drag the civil courts into the theological thicket. . . .

L. TRIBE, *supra* note 35, at 874-75.

40. *See, e.g., Presbyterian*, 393 U.S. at 449; *Abington School Dist. v. Schempp*, 374 U.S. 203, 243 (1963). All organs of government should follow a strict neutrality toward theological questions. *Id.*

41. *Milivojevich*, 426 U.S. at 713.

42. *Id.* at 696.

beliefs.⁴³ In each case the state raised an overriding interest to warrant government interference.⁴⁴

In recent cases of church discipline,⁴⁵ state courts have not agreed as to whether the general principal in *Watson*, prohibiting civil courts from assuming jurisdiction over ecclesiastical matters, including church discipline, should preclude jurisdiction where significant personal rights are in the balance, and government appears to be simply providing a forum to resolve such disputes.⁴⁶ The common law did not provide churches with an absolute immunity from tortious actions involving religious communications during church discipline proceedings.⁴⁷ Even though civil courts have historically assumed jurisdiction over church related questions involving personal rights under tort law, until recently the common law precluded from adjudication the kind of actions currently being raised in state courts.⁴⁸ A comparison of defamation law and tortious invasion of privacy, as each relates to church discipline communications, will demonstrate why this statement is true.

B. Causes of Action Utilized in Church Discipline Suits

Developments in tort law have created a framework very different from

43. See, e.g., *Bowen v. Roy*, 106 S. Ct. 2147 (1986) (requiring an American Indian to furnish a social security number in order to receive AFDC benefits); *Goldman v. Weinberger*, 106 S. Ct. 1310 (1986) (ordering an orthodox Jew and ordained rabbi not to wear a yarmulke while on duty and in uniform as a commissioned officer in the Air Force); *Bob Jones University v. United States*, 461 U.S. 574 (1983) (denying tax exempt status to a racially restrictive religious school); *United States v. Lee*, 455 U.S. 252 (1982) (refusing to exempt Amish employers from paying social security taxes); *Reynolds v. United States*, 98 U.S. 145 (1878) (outlawing polygamy).

44. The First Amendment Language that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise . . .' historically has stood for the strict prohibition of governmental interference in ecclesiastical matters. Only on rare occasions where there existed a compelling governmental interest in the regulation of public health, safety, and general welfare have the courts ventured into this protected area. Such incursions have been cautiously made so as not to interfere with the doctrinal beliefs and internal decisions of the religious society. Thus, the law is clear: civil courts are barred by the First Amendment from determining ecclesiastical questions. *Simpson v. Wells Lamont Corp.*, 494 F.2d 490, 493 (5th Cir. 1974) (citation omitted).

45. See, e.g., *Chavis v. Rowe*, 93 N.J. 103, 459 A.2d 674, 679 (1983). *Chavis* involved church discipline of a deacon. The court held that civil court scrutiny of Biblical injunctions was beyond the authority of the court. "[I]nsinuations by civil courts into the customs and usages of the by-laws and the constitution, into the administration and the polity of the church in the hope of uncovering clues to the correct disciplinary procedures, threatens the freedom of religious institutions from secular entanglement." *Id.*; *Marian Guinn v. The Church of Christ of Collinsville, Oklahoma*, No. Ct-81-929 (Dist. Ct. in and for Tulsa County, State of Oklahoma, March 1984) (plaintiff wins on the merits \$390,000).

46. See *infra* note 109 and accompanying text.

47. See *infra* text accompanying notes 55-58.

48. See *infra* text accompanying notes 55-61.

the traditional common law,⁴⁹ where church discipline proceedings were actionable under a defamation theory only upon a showing of malice.⁵⁰ The only protections afforded defamatory church discipline communications were common law defenses and privileges.⁵¹ Upon removing such protections, speech that occurs in the course of church discipline will not be shielded from liability.⁵²

1. Defamation Law

Through the development of the law of defamation, various privileges and defenses evolved which shield churches from suit when involved in disciplinary proceedings including a conditional privilege,⁵³ as well as an absolute defense of truth.⁵⁴ A qualified privilege protects communications which arise from spiritual and moral obligations and which church rules authorize or even require.⁵⁵ The privilege applies to members as well as to ministers and to officers⁵⁶ and generally requires that the defendant make good-faith statements.⁵⁷ A showing on the part of the plaintiff that such communications were made with malice removes the privilege and makes the defamatory words actionable.⁵⁸

49. Under the common law, actions against church discipline communications arose under the law of defamation. Defamation: "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." RESTATEMENT (SECOND) OF TORTS § 559 (1977). "The meaning of a communication is that which the recipient correctly, or mistakenly but reasonably understands that it was intended to express." *Id.* at § 563.

50. 50 AM. JUR. 2D *Libel and Slander* §§ 208-209 (1970).

51. RESTATEMENT (SECOND) OF TORTS §§ 581A(d), 596(e) (1977) (Truth Defense & Qualified Privilege: Common Interest). *See also* 50 AM. JUR. 2D *Libel and Slander* §§ 208-209 (1970); W. PROSSER & W. KEETON, PROSSER AND KEETON ON TORTS 830, n.57 (W. Keeton 5th ed. 1984).

52. *See infra* text accompanying note 100.

53. *See supra* notes 2, 51.

54. *See supra* note 51.

55. § 208. *Religious and church matters.*

It is firmly established that conditional privilege attaches to communications between church members and authorities in respect of organizational and administrative matters, and as to church matters which are of mutual interest and concern, or which are authorized or required by church rules. . . .

50 AM. JUR. 2D *Libel and Slander* § 208 (1970) (citation omitted).

§ 209. *Expulsion and disciplinary proceedings.*

Conditional privilege as to statements made during the course of disciplinary and expulsion proceedings of course has its limitations, and in some cases such statements are actionable. To be privileged, the communication must have been made pursuant to a duty. . . .

Id. at § 209 (citation omitted).

56. *Id.*

57. *Id.* (good faith—believing his statements to be true).

58. Malice vitiates any privilege existing with respect to expulsion or disciplinary proceedings. Such malice has been said to consist in motivation by any cause other than the desire to carry out church discipline in good faith, or, according to some cases, in the use

Thus, a common law qualified privilege meant that the church or its members accused of defamation would not be liable without a showing of malice.⁵⁹ Malice has proven to be a very difficult standard to define.⁶⁰ As applied to defamatory speech, malice generally means publishing the *false* statement in a wrong state of mind.⁶¹ Whether defined as wrong motive, ill will, or something else, in conjunction with a defense of truth, malice has proven to be an adequate protection against church discipline litigation in the past.

The constitutional holdings in *Gertz v. Robert Welch, Inc.*,⁶² and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,⁶³ have modified this strict common law approach.⁶⁴ Common law malice is no longer treated as sufficient to constitute abuse of a conditional privilege. Instead, knowledge of falsity or reckless disregard of truth is necessary for this purpose.⁶⁵ So, for a *false* statement the standard under a qualified privilege is actual malice. This constitutional standard affords speech a slightly greater protection than under the malice standard of common law. Courts might never apply this actual malice standard, however, because the tort action for invasion of privacy is supplanting defamation law.

2. Invasion of Privacy

Invasion of privacy is replacing defamation as the cause of action in many claims including church discipline.⁶⁶ Critical, therefore, are the paral-

of expulsion proceedings as a pretense. In some cases it is shown by proof of hatred or ill will toward the plaintiff, or of an intent to injure him in his profession or to injure his feelings and reputation. Also, it may be shown by overdrawn, exaggerating, or coloring the facts in the charges and by failure to state them fully and fairly.

50 AM. JUR. 2D *Libel and Slander* § 209 (1970) (citation omitted). See *First Baptist Church of Glen Este v. Ohio*, 591 F. Supp. 676, 683 (S.D. Ohio 1983) (church discipline in bad faith may be subject to civil court inquiry). See also RESTATEMENT (SECOND) OF TORTS §§ 580B(1), 596(b), and Special Note prior to § 593 (1977). The Restatement assumes that publishing a statement with lack of reasonable ground to believe in its truth, one of the ways of showing abuse of privilege or common law malice, is equivalent to negligence. *Id.* See *infra* text accompanying notes 59-61. See generally W. PROSSER & W. KEETON, *supra* note 51, at 833-35 (for general discussion of malice standard).

59. See *supra* notes 51 (Qualified Privilege), 58.

60. See generally W. PROSSER & W. KEETON, *supra* note 51, at 833-35 (discussing the concept of common law malice).

61. *Id.* at 833.

62. 418 U.S. 323 (1974).

63. 105 S. Ct. 2939 (1985).

64. RESTATEMENT (SECOND) OF TORTS §§ 596(b) (e), 600 (1977).

65. *Id.* See *supra* note 58.

66. . . . Dean Wade, following up a Prosser suggestion, . . . argued that privacy now overlaps defamation to a significant degree, and predicted that we may well see the right of privacy gradually replace the torts of libel and slander, a development of the law he would applaud.

lels and important distinctions in this relatively new tort field as compared with defamation law. To understand privacy law as it exists today, especially in relation to church discipline, will require examination of its evolution in the common law⁶⁷ as well as analysis of the constitutional holdings of the United States Supreme Court on this subject.⁶⁸

Invasion of privacy evolved fairly recently as a tort action in the common law when compared to defamation.⁶⁹ At its inception, invasion of privacy focused on defamatory speech in the news media⁷⁰ that disclosed private facts.⁷¹ Later, Prosser defined invasion of privacy as it subsequently developed into four distinct and separate claims.⁷² The four categories include: (1) intrusion upon the plaintiff's seclusion or solitude or into his private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity which places the plaintiff in a false light in the public

The mysterious way in which the common law grows and changes has never found better illustration than in the current tendency of privacy actions to move into the traditional field of defamation. Warren and Brandeis, despite their tributes to the 'eternal youth of the common law,' would have been astonished to learn that the precedent they launched would grow so that today, in Dean Wade's wording, 'the great majority of defamation actions can now be brought for the invasion of the right of privacy . . .'

Dean Wade further argues that use of privacy permits defamation at last to recover from what Pollock called 'its going wrong at the outset,' that is, treating the matter as injury to reputation rather than to feelings; that it permits the use of a 'negligence calculus' structure rather than the rigid prima facie case-privilege structure of defamation; that it permits escape from the arbitrariness of the libel-slander distinction; and that it will permit a more flexible and candid appraisal of the free-speech issues involved in defamation cases. . . .

But if the colonization of defamation by privacy does take place, it will only be because by the use of a fiction the courts have turned at last to the reform of the law of defamation. It will not be because they have perceived that logically defamation is subsumed in privacy. They will simply be calling false statements by a new name.

Kalven, *Privacy in Tort Law - Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 328, 339, 341 (1966) (citing Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960); Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093, 1121 (1962)) (citation omitted).

67. See *infra* text accompanying note 69-73.

68. See *infra* text accompanying notes 85-98.

69. See *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905). *Pavesich* was the leading case in the development of the right to privacy. Prosser, *supra* note 31, at 386.

70. Kalven alludes to the fact that privacy developed around the disclosure of private facts to the news media. Kalven, *supra* note 66, at 333. Only recently has the action grown to include non-media disclosures. See *infra* note 98.

71. See Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). The Warren and Brandeis article arose out of personal annoyance from the press. *Id.*

72. Prosser, *supra* note 31, at 389. See also *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 571-72 & nn.7-8 (1977) (the Court relied on Prosser's four branches of privacy).

eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness.⁷³ As related to speech, the claims for tortious invasion of privacy overlap defamation law.

Though similar to defamation, the new privacy tort should not supplant defamation law. With the introduction of the right of privacy, the authors of this new tort recommended several limitations to distinguish privacy actions from defamation claims.⁷⁴ The most critical limitation related to speech was that communications, privileged under defamation law, would not be prohibited under a claim for invasion of privacy. In reality, however,

73. Prosser, *supra* note 31, at 389.

74. Warren and Brandeis recommended the following guidelines:

- 1) Privacy would not prohibit publication of matter of general or public interest.
- 2) Privacy would not prohibit communications rendered privileged under the law of slander and libel.
- 3) No redress would be available for invasion of privacy by oral publication in the absence of special damages.
- 4) The right of privacy ceases upon publication of the facts by the individual, or with his consent.
- 5) Truth is no defense.
- 6) Absence of malice is no defense.

Warren & Brandeis, *supra* note 97, at 214-19. See also Prosser, *supra* note 31, at 383-84 (recognizing Warren and Brandeis as co-authors of the new tort).

. . . [T]he public disclosure of an embarrassing private fact should be without first amendment protection only if the disclosure is embarrassing but not defamatory. If a disclosure adversely affects the subject's reputation, then the policy reasons which support the right of speech when reputations are attacked outweigh the privacy consideration.

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Moreover, if a particular statement not only constitutes an invasion of privacy but also injures the subject's reputation and is therefore *prima facie* defamatory (subject to the defense of truth), then the Times definitional balance for defamation should be applicable. If the first amendment protects such defamatory statements, the right to make them may not be abridged under state law even if the state law gives a 'privacy' rather than a 'defamation' label to such abridgment. As 'libel can claim no talismanic immunity from constitutional limitations,' neither can the talisman of 'privacy' vitiate the constitutional protection for speech values contained in defamatory speech, even if that same speech also invades privacy. This may seem to lead to an odd result. That is, one may obtain judicial redress if a statement merely invades one's privacy, but if it goes farther and both invades privacy and is detrimental to reputation, then (at least if one is a public figure) he may be precluded by the first amendment from a judicial remedy. But such a result is not so odd as might at first appear. If a reputation-injuring statement contains speech values not to be found in a privacy-invading statement, those values remain even if the statement combines reputation injuring and privacy-invading elements. The defense of such values justifies weighing the definitional balance so as to afford first amendment protection where the speech combines both such elements.

Nimmer, *supra* note 31, at 960, 964-65 (citation omitted). The U.S. Supreme Court has recognized the Warren and Brandeis limitation to privacy as applied to communications rendered privileged under slander and libel. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 493 (1975). See generally W. PROSSER & W. KEETON, *supra* note 51, at 868.

actions for invasion of privacy are replacing defamation claims.⁷⁵

Claims for invasion of privacy are supplanting defamation claims largely because courts are not applying, to suits for invasion of privacy, the protections for speech which developed within the law of defamation.⁷⁶ There are at least two reasons courts are reluctant to apply defamation protections to privacy actions affecting speech. First, unlike defamation, which protects a person's reputation,⁷⁷ the right to privacy as it involves speech primarily aims at protecting a person's right not to have private information disclosed whether or not that information is defamatory and whether or not that information is true.⁷⁸ Actions for privacy protect the individual's peace of mind, not just his reputation,⁷⁹ and unlike defamation the injury from an invasion of privacy arises from the mere publication which more speech will not remedy.⁸⁰ Therefore, courts are not automatically applying traditional defamation privileges and defenses to corresponding privacy claims.⁸¹

75. See *infra* text accompanying notes 76-82.

76. See *infra* text accompanying notes 77-82.

77. See *supra* note 49.

78. Nimmer, *supra* note 31, at 958. Injury from invasion of privacy arises from mere publication, and further speech cannot remedy the injury. *Id.* at 961.

79. Beginning with Sir Frederick Pollock, a number of authors and scholars have agreed that "the law of defamation went wrong from the beginning in making the damage and not the insult the cause of action." F. POLLOCK, *TORTS* 181 (15th ed. 1951). See Wade, *infra* note 82. Such persons see the supplanting of defamation by privacy as rectifying that problem because of the focus of privacy on protection of a person's feelings (and general peace of mind) as opposed to reputation requiring damage in fact. *Id.* But see Kalven, *supra* note 66, at 340-41, (Kalven criticizes the supplanting of defamation law by privacy and suggests that Pollock was wrong).

80. Nimmer, *supra* note 31, at 961.

81. See *supra* note 79. The same reasoning has produced an unwillingness to apply a truth defense as well to an action of privacy. See Warren & Brandeis, *supra* note 74. One minor exception is in the case of a "false light" privacy action where one basic issue is whether the embarrassing information disclosed was false. Prosser, *supra* note 31, at 419. Prosser recognizes that the loss of truth as a defense in privacy is a critical element to holding defendants liable for entirely accurate statements of true facts. *Id.* at 422. *Accord* Munsell v. Ideal Food Stores, 208 Kan. 909, 494 P.2d 1063, 1073 (1972) (recognizing a truth defense for privacy).

This is perhaps the place to pause to reflect on the rule that truth is a defense in defamation. Although the rule has considerable venerability, there has been some controversy over its policy in recent years. There have been articles urging that truth as a defense be qualified, and about ten jurisdictions have by statute made moves in this direction. What is arresting here is that none of the critics argue for more than a change that would make truth a defense only if uttered with good motives. If we come at the matter from the angle of defamation, liability for disclosing a truth about the plaintiff would at most be actionable only if the defendant published with bad motives. If this is as far as we have been willing to go in defamation, where the disclosure is negative enough to injure reputation, why do we expand the liability rule when we come at the grievance as an invasion of privacy? If privacy were to have been made consistent with the old tort of defamation, it would have been a stringent form of intentional tort requiring something

Second, there has been a movement in tort law to see the law of defamation simplified. The introduction of new torts such as privacy and intentional infliction of emotional distress has been a convenient avenue to bring about this change.⁸² when proving unreasonable or unwarranted invasion of privacy, conflicting interests, like speech concerns, are open to the court. The court must see that each interest is given adequate consideration. The vital interests in freedom of speech, which were *safeguarded* by some of the rigid rules of the law of defamation,⁸³ are now no longer afforded such protection. The development of the law of privacy has radically departed from the limits and protections found within the law of defamation⁸⁴ to shield

akin to ill will. Perhaps as Dean Wade suggests it is the old that should conform to the new; defamation should now be made consistent with privacy. But in any event the strained relationship of truth in privacy to truth in defamation is one more indication that the law has been oddly indifferent to working out any serious definition of the newer tort. Kalven, *supra* note 66, at 335 (citation omitted).

82. [T]he great majority of defamation actions can now be brought for invasion of the right of privacy and . . . many of the restrictions and limitations of libel and slander can be avoided.

. . . The penetration of the law of privacy into this field affords a splendid opportunity for reform of the traditional law regarding the actionability of language which harms an individual's peace of mind or his reputation.

. . . If the law of privacy then absorbs the law of defamation, it will merely afford a complete 'unfolding' of the idea or principle behind that law. Indeed, there is a real reason to conclude that the principle behind the law of privacy is much broader than the idea of privacy itself, and that the whole law of privacy will become a part of the larger tort of intentional infliction of mental suffering. That tort would then absorb established torts like assault and defamation and invasion of the right of privacy and join them together with other innumerate torts to constitute a single, integrated system of protecting plaintiff's peace of mind against acts of the defendant intended to disturb it.

Wade, *supra* note 66, at 1121-22, 1124-25. Kalven is extremely critical of Mr. Wade's analysis and the action for privacy in general. He contends that applying the qualified privileges of defamation law to privacy as recommended by Warren and Brandeis and others would all but eliminate the action for invasion of privacy for disclosure of private facts. Kalven, *supra* note 66, at 335 n.56, 336-37, 341.

83. Wade contends that using a "negligence approach" (negligence calculus) as opposed to a system of qualified privileges is appropriate. He sees this as a way to avoid the confusion of defamation law. He argues that when first amendment freedoms (especially speech) are weighed in the balance against privacy interests, those freedoms will be adequately protected. In order to support his argument, he warns that special care needs to be given to protecting speech interests, and he suggests that the court decide this matter as a question of law to assure *proper* and *adequate* protection. Wade, *supra* note 66, at 1113-15, 1122-24.

84. Prosser, concerned over what he observed happening, gave a strong warning:

It is evident from the foregoing that, by the use of a single word supplied by Warren and Brandeis, the courts have created an independent basis of liability, which is a complex of four distinct and only loosely related torts; and that this has been expanded by slow degrees to invade, overlap, and encroach upon a number of other fields. So far as appears from the decisions, the process has gone on without any plan, without much realization of what is happening or its significance, and without any consideration of its dangers. They are nonetheless sufficiently obvious, and not to be overlooked.

what society has considered valuable speech. The result is that mere negligence is becoming the standard for tort liability in actions involving speech.

The United States Supreme Court has yet to define the constitutional limits of protection for speech as it occurs in tortious invasion of privacy actions. The extent to which the *New York Times v. Sullivan*,⁸⁵ *Gertz*, and *Dun and Bradstreet* holdings apply to privacy actions is far from clear. Prior to *Gertz*, the Court in *Time, Inc. v. Hill*⁸⁶ applied the actual malice standard of *New York Times* to a privacy action involving the publication of an erroneous but not defamatory report about a private family involved in a newsworthy incident.⁸⁷ The Court in *Hill* specifically noted that "[t]he risk of such exposure is an essential incident of life in a society which places a primary value on freedom of speech and press."⁸⁸ Therefore, the constitutional protections for speech are the basis on which the Court required a showing of actual malice in this "false light" privacy action.⁸⁹

Later, in *Rosenbloom v. Metromedia, Inc.*,⁹⁰ the Court held that the *New York Times* standard must be applied to all defamatory statements of general or public interest. The Court in *Gertz* repudiated this idea, however, drawing a distinction between public and private plaintiffs, and requir-

One cannot fail to be aware, in reading privacy cases, of the extent to which defenses, limitations and safeguards established for the protection of the defendant in other tort fields have been jettisoned, disregarded, or ignored. Taking intrusion first, the gist of the wrong is clearly the intentional infliction of mental distress, which is now in itself a recognized basis of tort liability. Where such mental disturbance stands on its own feet, the courts have insisted upon extreme outrage, rejecting all liability for trivialities, and upon genuine and serious mental harm, attested by physical illness, or by the circumstances of the case. But once 'privacy' gets into the picture, and the fact of intrusion is added, such guarantees apparently are no longer required. No doubt the cases thus far have been sufficiently extreme; but the question may well be raised whether there are not some limits, and whether, for example, a lady who insists upon sun-bathing in the nude in her own back yard should really have a cause of action for her humiliation when the neighbors examine her with appreciation and binoculars.

The public disclosure of private facts, and putting the plaintiff in a false light in the public eye, both concern the interest in reputation, and move into the field occupied by defamation. Here, as a result of some centuries of conflict, there have been jealous safeguards thrown about the freedom of speech and of the press, which are now turned on the left flank. Gone is the defense of truth, and the defendant is held liable for the publication of entirely accurate statements of fact, without any wrongful motive . . . it is high time that we realize what we are doing, and give some consideration to the question of where, *if anywhere*, we are to call a halt.

Prosser, *supra* note 31, at 422-23 (citation omitted) (emphasis added).

85. 376 U.S. 254 (1964).

86. 385 U.S. 374 (1967).

87. *Id.* at 384-86. (this privacy action was a "false light" action).

88. *Id.* at 388.

89. See *supra* text accompanying notes 72-73.

90. 403 U.S. 29, 43, 44 (1971). Some states including Indiana reject *Gertz* and follow *Rosenbloom* for private plaintiffs.

ing a lesser standard of proof for private plaintiffs even when the publication is of general public concern.⁹¹ *Dun & Bradstreet* advanced this trend when the Court held that a showing of less than actual malice would suffice for a private individual when the speech involved was not of public concern.⁹² Therefore, in spite of the holding in *Hill*, it would now be reasonable to assume that negligence would be the standard of proof in a "false light" privacy action brought by a private plaintiff.⁹³

The Supreme Court has yet to define what constitutional limits the first amendment places on the violation of the plaintiff's privacy by the accurate disclosure of embarrassing private facts. In *Cox Broadcasting Corp. v. Cohn*,⁹⁴ the Court held that accurate disclosure of information, previously released to the public in official court records, did not constitute an actionable privacy claim.⁹⁵ The Court emphasized, however, that it was not deciding the issue of whether similar disclosure of facts *not* previously released would be actionable.⁹⁶ Much more important, both *Hill* and *Cohn* involved media defendants, not church officers and congregations.⁹⁷ Only recently have plaintiffs raised privacy claims against private non-media defendants.⁹⁸

The lack of definition in the privacy tort⁹⁹ and the reluctance to carry over speech protections from defamation law, in spite of warnings to do so even by strong proponents of the new privacy actions,¹⁰⁰ have created a unique situation. A framework of legal principles now exists wherein a private defendant without any wrongful motive can be held liable for simply publishing accurate statements of embarrassing facts during a church discipline proceeding. The plaintiff need only prove negligence. Under defama-

91. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346, 348-50 (1974).

92. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2946 (1985).

93. This would be an application of *Gertz* and *Dun & Bradstreet* to privacy. However, in *Gertz* the Court specifically declined to decide this question, so *Hill* remains good law. *Gertz*, 418 U.S. at 348.

94. 420 U.S. 469, 491 (1975) (involved broadcasting the name of a rape victim already released through court records to the public).

95. *Id.* at 496.

96. *Id.* at 491.

97. *Id.* at 469. See also *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

98. Whether the Court will use a more or less deferential standard with private non-media defendants, like churches, is yet an unanswered question.

99. *Kalven*, *supra* note 66, at 333-39. *Kalven* in his criticism of privacy as an action focuses on the lack of definition in general with this tort. He claims there is no definition of what constitutes a prima facie case, no definition of how damages should be measured, no definition of whether the basis for liability is limited to intentional invasions, etc. His conclusion is that the application of defamation qualified privileges to privacy actions for disclosure of private facts would virtually swallow up this new tort, and this gives the proponents for privacy a strong incentive to argue against applying the privileges. *Id.*

100. See *supra* notes 74, 84.

tion law, a qualified privilege would protect the same statements if *false*, and actual malice would be the standard.¹⁰¹ In other words, the church might be better off to accidentally disclose false information, to which defamation law protections could apply, rather than accurately publishing true facts. The impact of this inequity in tort law upon first amendment freedoms is aggravated by the application of other legal principles.

C. State Action

The constitutional law doctrine of state action is based upon the fact that nearly every freedom guaranteed by the constitution is protected only against interference by government, not by private individuals.¹⁰² For example, though the actions of a party adversely affect another's first amendment rights, if no state action is involved, the issue simply is not raised to the level of a constitutional cause of action. The application of this principle to church discipline cases is very critical.

The importance of how state action is defined can be seen by the following illustration. Assume that Congress drafted legislation prohibiting the use of qualified privileges by churches in defamation suits involving church discipline. Because direct legislative action has proceeded any challenge of such a law, the governmental involvement required to show state action is apparent.

Since such legislation would *directly* impact on first amendment freedoms of religion,¹⁰³ government must meet the rigid tests established by the Supreme Court for violating such freedoms in order to validate this statute.¹⁰⁴ Some of the more obvious effects of this legislation would be interference with religious practices,¹⁰⁵ content-based chilling of religious speech,¹⁰⁶ and a risk of self-censorship by the churches arising out of gov-

101. See *supra* text accompanying note 65.

102. L. TRIBE, *supra* note 35, at 1147; J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 421 (3rd ed. 1986).

103. See *supra* note 9.

104. The Court outlined a "strict scrutiny" balancing approach for validating government actions impacting the free exercise clause of the first amendment. This test requires government to show a compelling government interest which cannot be accomplished in a manner less restrictive of religious freedom. *Sherbert v. Verner*, 374 U.S. 398 (1963). The Court outlined a "three-prong" test for validating government actions impacting the establishment clause of the first amendment. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

105. L. TRIBE, *supra* note 35.

106. "Chilling effect doctrine. In constitutional law, any law or practice which has the effect of seriously discouraging the exercise of a constitutional right." BLACK'S LAW DICTIONARY 217 (rev. 5th ed. 1979). See also D. Baker, *The High Cost of Church Discipline*, 31 *Eternity* (magazine) (Sept. 1984). Commenting on *Guinn*, this religious periodical circulated among churches that practice church discipline, gave the "chilling" warning: "If ever an accusation is made public, it should be prepared with the help of *competent* legal counsel. Court

ernment determination of what constitutes proper religious association and doctrine.¹⁰⁷ In addition, government would be discriminating against religious groups that practice church discipline in favor of groups which do not follow this doctrine.¹⁰⁸ Therefore, even a cursory examination indicates that such government infringement of first amendment freedoms would not likely be found constitutional.

By extending justiciability to tort actions for invasion of privacy where defamation common law protections do not apply, the government through the judicial branch has *indirectly* produced the same results as the hypothetical legislative act described above. The problem, however, with drawing this comparison is that the state action, so obvious upon congressional action, is not readily seen with indirect judicial action. The role of the court in a church discipline case arguably only involves providing a neutral forum for private parties to resolve disputes, and the necessary state action required to raise a constitutional cause of action is difficult to show.¹⁰⁹ Yet, by opening a forum to adjudicate previously nonjusticiable matters, the judiciary's action has created a conduit for chilling first amendment freedoms, and such action, like corresponding legislative action, should constitute state action.

The Supreme Court has recently indicated a reluctance to extend the

action is an *ever-increasing* possibility." *Id.* (emphasis added).

107. Prosser alludes to the fact that by allowing privacy to supplant defamation law, courts are accepting a power of censorship which did not exist under the law of defamation. He notes that this change is taking place almost without remark. Prosser, *supra* note 31, at 423.

108. The Court forbids such preference by government as a violation of the establishment clause. See *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947).

109. Existence of a state law allowing legitimate action by a private person will not give rise to "state action" when the private party takes action under the law. There must be some *non-neutral* involvement by government in the otherwise private activity. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 102 at 435. Note: Timing is very critical when the judiciary is the potential state actor. Tribe notes the fact that common law, particularly defamation and privacy law, has been recognized by the Supreme Court as state action when applied to a private dispute in *New York Times*. See L. TRIBE *supra* note 35, at 1167-71.

Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of *speech* and press. It matters not that the law has been applied in a *civil* action and that it is *common law* only. . . . The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.

New York Times v. Sullivan, 376 U.S. 254, 265 (1964) (emphasis added). Thus, the same judicial action which will not likely be recognized as "state action" to *preclude* church discipline litigation would very likely be found to constitute state action following court action. See *First Baptist Church of Glen Este v. Ohio*, 591 F. Supp. 676, 677 (S.D. Ohio 1983) (where a federal district court recognized state action by the judiciary *following* state court proceedings).

doctrine of state action.¹¹⁰ Especially, where the judiciary plays the role of the state actor, the Court has very narrowly defined the scope of state action. In *Evans v. Abney*,¹¹¹ the Court found no state action to support a constitutional claim where the state court simply applied valid state law to a private trust dispute.¹¹² Therefore, even though the Court might recognize state action on the part of the judiciary in church discipline cases, there is some indication that the Court will not.

D. Freedom of Religion

If the Court were to recognize state action in church discipline cases, the church would raise constitutional challenges based upon the religion clauses of the first amendment.¹¹³ In *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*,¹¹⁴ a religious school sought to enjoin state action of the Ohio Civil Rights Commission by suing in federal court. Even though the case only involved administrative proceedings, judicial in nature, the Court assumed state action,¹¹⁵ but unlike church discipline cases, the state action involved was pursuant to a state statute.¹¹⁶ Despite this difference, the constitutional claims raised in *Dayton*, based upon the establishment and free exercise clauses of the first amendment, are strikingly similar to the constitutional issues in church discipline litigation.¹¹⁷ Therefore, an examination of the analysis involved in evaluating constitutional claims arising under the religion clauses will illustrate the basis for protecting church discipline and also emphasize the seriousness of eroding that protection.

1. Free Exercise Clause

The free exercise clause forbids outlawing any religious belief.¹¹⁸ Legal

110. See, e.g., *Blum v. Yaretsky*, 457 U.S. 991 (1982) (the Court found no state action where nursing home transfers, without prior notice or opportunity to be heard, were tightly circumscribed by state rules); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (the Court found no state action in the operation of a private school whose income was derived primarily from public grants).

111. 396 U.S. 435 (1970) (the Court upheld a state court decision terminating a trust and allowing land to revert to use for a racially restrictive park).

112. *Id.* at 439-43.

113. See *supra* note 9.

114. 106 S. Ct. 2718 (1986).

115. *Id.* at 2719-20.

116. *Id.*

117. For a thorough analysis of the claims in *Dayton*, based upon the religion clauses, see the district court and the Sixth Circuit Court of Appeals decisions. 766 F.2d 932 (6th Cir. 1985), *rev'd*, 106 S. Ct. 2718 (1986); 578 F. Supp. 1004 (S.D. Ohio 1984), *rev'd*, 766 F.2d 932 (6th Cir. 1985).

118. See *supra* note 9. See also *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940).

The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment

problems usually arise not with regard to a belief itself but with conduct in furtherance of a belief.¹¹⁹ State interference can take the form of government action which burdens or prohibits conduct required by a religious belief or government action which requires conduct contrary to a belief.¹²⁰

The United States Supreme Court has established strict standards for determining what constitutes interference with free exercise of religion. *Sherbert v. Verner*¹²¹ illustrates the Court's "strict scrutiny" balancing approach.¹²² This approach requires the state to show that a compelling government interest is at stake that cannot be accomplished in a manner less restrictive of religious freedom.¹²³ The Court has designed this standard to prevent any unnecessary interference with religious free exercise.

Traditionally, the Court has been very protective of religious conduct. In *Wisconsin v. Yoder*,¹²⁴ for instance, the Court indicated that where significant religious freedom is at issue, if granting an exemption will allow the state to almost fully achieve its goals, then the state should be required to grant such an exemption, even where the state's interest is otherwise compelling. In fact, only state interests of the highest order can overbalance

has rendered the legislatures of the states as incompetent as Congress to enact such laws. The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus, the Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.

Id. See also *Watson v. Jones*, 80 U.S. (13 Wall.) 666, 676 (1871).

In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.

Id.

119. *Cantwell*, 310 U.S. at 303-04.

120. See *supra* note 43. See also *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (granting an exemption to the Amish for compulsory education for their children); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (striking a regulation requiring a Jehovah Witness to salute the flag); *Thomas v. Review Bd. Ind. Employment Sec. Div.*, 450 U.S. 707 (1981) (Jehovah Witness challenges regulation that denies unemployment benefits because he refused to work in a munitions factory).

121. 374 U.S. 398 (1963) (involving a Seventh Day Adventist who was refused unemployment compensation when she was fired for refusing to work on Saturdays; the Court held this denial unconstitutional).

122. *Id.* at 406-07.

123. *Id.*

124. 406 U.S. 205, 215, 236 (1972) (exemption from compulsory education beyond 8th grade for the Amish).

legitimate free exercise of religion.¹²⁵ In each case, where religious free exercise was allowed to be so burdened, the state advanced overriding government interests in order to justify the interference.¹²⁶

The Court's standard can be applied to the competing interests in church discipline litigation. The state has a legitimate interest in preventing tortious conduct, including invasions of privacy, by allowing citizens of the state to bring damage actions based on common law tort claims against persons or groups that violate individual rights.¹²⁷ The counter-balancing interest involves prevention of a significant interference with conduct in furtherance of religious beliefs.¹²⁸ Applying the *Sherbert* test, the state bears the burden of showing that its interest is compelling and that no less restrictive means are available to avoid interference with sincere religious practice.¹²⁹

The United States Supreme Court has placed a heavy burden upon any state seeking to infringe freedoms under the first amendment. In *West Virginia State Bd. of Educ. v. Barnette*,¹³⁰ the Court held that these freedoms cannot be infringed on slender grounds but are "susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect."¹³¹ Recently, in the area of restrictions on religious freedoms, the Court has recognized such interests as preventing racial discrimination in education¹³² or sexual discrimination in employment¹³³ as the type of state interests which could warrant burdening religious free exercise. By contrast, tortious invasion of privacy is not prohibited by federal statute, and individuals have only recently challenged church disciplinary procedures.¹³⁴ More significantly, in both *Bob Jones Univ. v. United States*.¹³⁵ and *Dayton*¹³⁶ the Court was dealing with religious schools, not

125. *Id.* at 215.

126. *See Simpson v. Wells Lamont Corp.*, 494 F.2d 490, 493 (5th Cir. 1974) (generally to be overriding the interest must be a strong health, safety, or welfare interest, and granting an exemption would significantly impair the government's achievement of its goals).

127. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 487, 494-95 (1975).

128. *See supra* text accompanying notes 121-23.

129. *Id.*

130. 319 U.S. 624, 642 (1943).

If there is a fixed star in our constitutional constellation, it is that no official high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

Id.

131. *Id.* at 639.

132. *See Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

133. *See Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 106 S. Ct. 2718 (1986).

134. *See supra* notes 4, 5 and accompanying text.

135. *Bob Jones*, 461 U.S. at 574.

matters of church administration and government as in the case of church discipline.

Where religious practices themselves conflict with public interests, the Court has noted that making accommodation between the religious practice and state authority is a particularly delicate task. In *Braunfeld v. Brown*,¹³⁷ the Court explained that such accommodation must be a chief consideration because resolution in favor of the state leaves the opposing party a choice of abandoning a personal religious practice or facing prosecution.¹³⁸ Therefore, as would be the case with church discipline, the Court is reluctant to interfere with religious conduct under such circumstances even when the state interest is otherwise compelling.

Not only must the state show that the interest of prohibiting the disclosure of private matters within the limited confines of church government is compelling, the state must further show that the state's interests cannot be substantially achieved through less drastic means than the permanent prohibition of first amendment rights.¹³⁹ The very fact that up until recently churches were protected by common law immunities and defenses indicates that less drastic alternatives are available.¹⁴⁰ Even where the Court was dealing with the compelling state interest of prohibiting racial prejudice in education and the religious party was a school and not a church, the Court only removed tax benefits, leaving Bob Jones University free to practice its religious beliefs free of state intervention.¹⁴¹ Therefore, in church discipline cases where churches are faced with the options of abandoning their religious beliefs or practicing them at grave risk of financially disastrous damage claims,¹⁴² the state will be hard pressed to avoid the accommodation approach of the Supreme Court.

Finally, where a private individual voluntarily joins a religious body, agreeing to submit to and be protected by that organization's rules and procedures, to allow such a person to later sue the church, because the rules were consistently applied to that person in a manner the party believed to be inappropriate, would be inconsistent with principles laid down by the

136. *Dayton*, 106 S. Ct. at 2718.

137. 366 U.S. 599 (1961) (upheld the application of a state Sunday closing law to orthodox Jews; the Court distinguished between regulating a secular activity, i.e. being a merchant on Sunday, and regulating actual religious practices).

138. *Id.* at 605.

139. *See supra* text accompanying notes 121-23. *See also* *Minersville School Dist. v. Gobotis*, 310 U.S. 586, 594 (1940) (overruled in *Barnette*) ("in safeguarding conscience we are dealing with interests so subtle and so dear, every possible leeway should be given to the claims of religious faith").

140. *See supra* text accompanying notes 1-3.

141. *Bob Jones Univ. v. United States*, 461 U.S. 574, 603-04 (1983).

142. *See infra* text accompanying notes 182-83 (example of damages awarded).

Court.¹⁴³ In *Watson*,¹⁴⁴ the Court stated that persons who join religious bodies submit to their authority, voluntarily limiting their personal rights by joining the assembly. Therefore, the state's interest in protecting individual rights of privacy in church discipline tort actions, especially where the person has knowingly waived certain rights upon becoming a church member, should give way to or at least accommodate the church's rights to free exercise.

2. Establishment Clause

Unlike the free exercise clause, the establishment clause does not exist primarily to guarantee one's right to exercise his beliefs, but rather to guarantee that the government will not prefer any one religious denomination or group at the expense of another.¹⁴⁵ The modern test used by the United States Supreme Court to evaluate establishment clause claims is a three-pronged test outlined in *Lemon v. Kurtzman*.¹⁴⁶ First, the action taken by the government, whether statutory or otherwise, must have a clear secular purpose.¹⁴⁷ Second, the principal or primary effect of the government action must neither advance nor inhibit religion.¹⁴⁸ Finally, the restriction must not foster an excessive government entanglement with religion.¹⁴⁹

Applying the *Lemon* test to tort actions raised against church discipline reveals some difficulties with the government restrictions imposed. The state's interest in preventing tortious invasions of privacy has an obvious secular purpose. The primary effect, however, of such restrictions on religious bodies that practice congregational type government is to gravely inhibit religious practice. Churches are forced to exercise what they recognize to be Biblical duties at the risk of excessive tort liability¹⁵⁰ and possibly face the permanent loss of first amendment rights.¹⁵¹ Such a result would effectively be a state punishment of religious practice tending to prefer religious

143. See *supra* text accompanying note 36. See generally Note, *supra* note 7, at 1319.

144. 80 U.S. (13 Wall.) 666, 676 (1871).

145. *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947).

146. 403 U.S. 602 (1971) (this case dealt with the issue of supplements to salaries of teachers of secular subjects in nonpublic elementary schools. The Court held this to be a violation of the establishment clause and defined a three-prong test).

147. *Id.* at 612 (the purpose for the government action must be secular, not religious, or anti-religious).

148. *Id.* at 612 (the foremost effect must not be on religion, i.e. impact on religion must be incidental).

149. *Id.* at 613 (an example of entanglement would be government having to monitor the religious activities to assure compliance with some regulation).

150. See *supra* text accompanying notes 19, 22. See also *infra* note 183 (one of the problems with privacy actions supplanting defamation actions is the tendency to award excessive damages). See also *Baker supra* note 106 (at least as perceived by those who are at risk, the possibility of liability is increasing).

151. See *Dayton Christian Schools v. Ohio Civil Rights Comm'n*, 766 F.2d 932, 951-52, 962 (6th Cir. 1985), *rev'd*, 106 S. Ct. 2718 (1986).

denominations that do not practice church discipline.¹⁵² Therefore, the primary effect of the government restriction is a chilling of religious speech and possible self-censorship among groups which do discipline their members.¹⁵³

Finally, the government restrictions inherent in church discipline litigation foster excessive government entanglement with religion.¹⁵⁴ In assessing the entanglement involved in an establishment clause claim, courts look to several factors: the type of institution being restricted, the nature of the burden placed upon that institution, and the resulting church-state relationship.¹⁵⁵ In church discipline cases, the institution affected is the church congregation itself which exists for the sole purpose of religious practice.¹⁵⁶ The burden imposed affects the very governance and administration of the local congregation.¹⁵⁷ The resulting relationship places the church and state at odds over determining who is a church member and what duties a congregation has to its members,¹⁵⁸ both purely doctrinal matters. The Court has stated that “[t]he prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of constitutional guarantees against religious establishment.”¹⁵⁹ Therefore, to deny churches the right to practice church discipline in good faith without state intervention fails the *Lemon* test on two prongs and places the government in the prohibited position of preferring certain religious groups over others.

Thus, analysis under the religion clauses of the first amendment leads to the conclusion that the current inequitable framework of tort law¹⁶⁰ is a vehicle for chilling first amendment freedoms of religion. Issues which were previously barred from civil court jurisdiction are now before the courts. The *Guinn* case, on appeal in Oklahoma, is exemplary of the type of litiga-

152. *Id.* at 949, 952, 962 (this is largely due to the coercive nature of the state interference). *See also* *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947) (such punishment and preferences forbidden). *See also* Brief-A, *supra* note 27, at 14 (appellants contend that the judgment in *Guinn* was in fact a punishment of religious practice and serves to “cure” others from similar exercises). *See also* *Baker*, *supra* note 106, at 30, 31 (interview with S. Ericsson, director of the Center for Law and Religious Freedom in Washington D.C., a ministry of the Christian Legal Society; Commenting on *Guinn*: “the court in Oklahoma said: conform your practice or it’s going to cost you \$390,000”).

153. *See supra* notes 106-07.

154. *See Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971).

155. *Id.* at 615.

156. *See supra* text accompanying notes 32-35.

157. *Id.* *See also infra* text accompanying notes 212-15.

158. *See supra* text accompanying notes 32-35. *See also infra* text accompanying notes 198-200.

159. *See New York v. Cathedral Academy*, 434 U.S. 125, 133 (1977). *See also* L. TRIBE, *supra* note 35.

160. *See supra* text accompanying notes 99-101.

tion that the change in tort law is producing. A close look at *Guinn* will illustrate the legal principles at work in church discipline cases.

IV. ANALYZING CHURCH DISCIPLINE ON TRIAL

A. *Factual Setting in Guinn*

Collinsville Church of Christ is an autonomous church operating under a congregational type of government with three Elders appointed by the congregation as overseers.¹⁶¹ The church has no written constitution, using the Bible as the sole authority for faith and practice.¹⁶² Although independent, the church maintains close associations with neighboring Churches of Christ, some of which they helped found.¹⁶³ Because of their common interest in deterring member misconduct, the neighboring churches inform one another of disciplinary proceedings. It is commonplace for an individual attending one local congregation to transfer association to a neighboring church.¹⁶⁴

Membership in the Collinsville Church of Christ is accomplished by joining voluntarily.¹⁶⁵ Becoming a member, also entails acceptance and practice of the church's moral code, which defines behavior for which disciplinary action is taken.¹⁶⁶ Discipline with regard to sexual misconduct precipitated the *Guinn* lawsuit.¹⁶⁷

Marian Guinn voluntarily joined the Collinsville Church of Christ.¹⁶⁸ She was familiar with the disciplinary procedure of the church and had witnessed withdrawal of fellowship prior to her own discipline.¹⁶⁹ She recognized that sexual misconduct was a disciplinary matter.¹⁷⁰

While a member of the church, Guinn allegedly became involved in sexual misconduct.¹⁷¹ As admitted by Guinn, this relationship was rumored in the town.¹⁷² The Elders began disciplinary procedures, confronting Guinn on numerous occasions.¹⁷³ At the point that the Elders informed Guinn that

161. Brief-A, *supra* note 27, at 2 (T. 368/13), 3 (T. 267/12-19).

162. *Id.* at 2 (T. 368/15).

163. *Id.* at 3 (T. 265; T. 264/17; T. 269/23; T. 270/24).

164. *Id.* at 3 (T. 270/21; T. 270/15).

165. *Id.* at 4 (T. 372/10).

166. *Id.* at 4, 5 (T. 381/5). See *supra* notes 13-31 (for description of procedure). The church uses only the Bible to define its rules and procedures. See *infra* note 177.

167. Brief-A, *supra* note 27, at 9 (T. 43/15).

168. *Id.* at 6 (T. 271/14).

169. Guinn was familiar with the church's rules, and the underlying duties and goals of discipline, and she had witnessed prior disciplinary proceedings. *Id.* at 7 (T. 164/7).

170. *Id.* at 7 (T. 165/7; T. 43/10).

171. *Id.* at 8 (T. 147/15).

172. *Id.* at 8 (T. 147/22-24).

173. *Id.* at 8 (T. 280/4-281/12; T. 173/6).

failure to alter her behavior would result in disclosure of the misconduct to the congregation, she contacted an attorney.¹⁷⁴ The attorney drafted and mailed a letter to the church threatening legal action if the church pursued its discipline process, and Guinn sent a letter withdrawing her membership.¹⁷⁵

Having no authority for curtailing their disciplinary procedure, the Elders announced to the congregation that Guinn was in violation of the doctrinal code.¹⁷⁶ Later, when the congregation's efforts to influence Guinn's conduct were unsuccessful, the Elders disclosed information regarding the actual violation prior to the congregation voting to withdraw fellowship.¹⁷⁷ The entire congregation proceeded to vote and withdraw fellowship, and as was customary, they notified four neighboring churches of the disciplinary actions.¹⁷⁸

Guinn sued the church and its Elders for defamation.¹⁷⁹ Since the facts disclosed were true,¹⁸⁰ the church's actions were shielded by a truth defense and a qualified privilege, so the complaint was amended. Guinn amended the complaint to include invasion of privacy claims, both for intrusion into seclusion and disclosure of private facts, and another claim for intentional infliction of emotional distress.¹⁸¹

The case went to trial on the merits of the tort claims. The jury found the defendants guilty on all three counts.¹⁸² The court awarded compensatory damages of \$205,000 and punitive damages of \$185,000.¹⁸³ The case is currently on appeal to the Oklahoma Supreme Court,¹⁸⁴ and the primary issues on appeal are claims that the church's constitutional freedoms are

174. *Id.* at 11 (T. 93/10).

175. *Id.* See *infra* text accompanying notes 198-202.

176. Brief-A, *supra* note 27, at 11.

177. A letter was read in church identifying and reading the Scriptures violated and the Scriptures stating the applicable discipline. *Id.*

178. *Id.*

179. *Id.* at 12.

180. *Id.*

181. *Id.* See also Brief for Appellee at 10, *The Church of Christ of Collinsville, Oklahoma v. Marian Guinn*, No. 62154 (Okla. Sup. Ct. 1985) [hereinafter Brief-B].

182. Brief-B, *supra* note 181, at 9.

183. *Id.* at 10. Because of overlap, the only damages actually awarded were for disclosure of private facts. Mr. Wade who strongly supports the "negligence approach" to privacy reprimands courts for awarding excessive damages. He bases this concern on the fact that courts should not allow both a privacy and a defamation claim in the same action. He contends that if both can be claimed, then for the sake of protecting speech, defamation should be the only claim with its qualified privileges. Courts are not following this approach. In *Guinn*, just the opposite occurred, and the "negligence approach" resulted in another large recovery. See generally Wade, *supra* note 66, at 1123.

184. Brief-A, *supra* note 27.

being violated.¹⁸⁵

B. Application of Legal Principles

Church discipline litigation exemplifies the type of lawsuit which fits into the framework of modern privacy law establishing liability for speech and conduct, previously not actionable under defamation law.¹⁸⁶ The facts in *Guinn* typify the trend in tort law to use a privacy action under circumstances which render speech a privileged communication according to the law of defamation.¹⁸⁷ This is precisely the result that the authors of privacy as an independent tort warned against.¹⁸⁸

Invasion of privacy is supplanting defamation claims involving church discipline primarily because the protections for speech and conduct under defamation law do not apply when the action is labeled invasion of privacy.¹⁸⁹ With *Guinn*, the reluctance to apply defamation protections to invasion of privacy, even where the original complaint was for defamation, is reflected throughout the court and trial records.¹⁹⁰ Such a result is indicative of the problem developed earlier,¹⁹¹ showing that a negligence standard will not afford speech adequate protection under a privacy claim.

Previously, under a common law malice standard and presently under the stricter standard of actual malice,¹⁹² defamation law protects a church when practicing its discipline procedure in good faith. Only when the church violates the intent of church discipline and abuses the use of this doctrinal practice can church communications be actionable.¹⁹³ The balance here, protecting the concerns of the church as well as the individual member who could be hurt by abuse of the doctrine, is equitable.¹⁹⁴

With negligence as the standard, however, in a suit for invasion of privacy no such balance exists. An individual can join the religious body voluntarily agreeing to abide by the doctrinal tenets¹⁹⁵ and later in a dispute

185. *Id.* at 13-14.

186. *See supra* text accompanying notes 99-101.

187. *See supra* note 66 and accompanying text.

188. *See supra* note 74.

189. *See supra* notes 82, 84.

190. Brief-A, *supra* note 27, at 54-60. *See generally* Wade, *supra* note 66, at 1112 (question of privileges).

191. *See supra* text accompanying notes 83-84. The question of excessive publication raised by the letter sent to the neighboring churches in *Guinn* is subsumed in this issue and would be covered by a qualified privilege. *See* 50 AM. JUR. 2D *Libel and Slander* § 208 (1970).

192. *See supra* text accompanying notes 59-65.

193. *See* 50 AM. JUR. 2D *Libel and Slander* §§ 208-209 (1970).

194. *See infra* text accompanying notes 195-96.

195. *See supra* text accompanying notes 165-66.

situation sue the church for following the rules. Abuse of church discipline need not occur. The liability now arises out of the mere practice of church doctrine in good faith, because negligence requires no showing of intent or abuse of a privilege.¹⁹⁶

The letter of withdrawal sent to the church provides the avenue for finding proof of negligence in *Guinn*. This letter proves to be the key for the entire case, allowing the result of liability for disclosing entirely accurate statements of fact without a wrongful motive.¹⁹⁷ The *Guinn* court's analysis to show negligence illustrates the danger of allowing civil courts to decide ecclesiastical questions.

The trial court ruled that with the delivery of the withdrawal letter, plaintiff *ceased* to be a member of the church.¹⁹⁸ This ruling was supported by the argument that a person is only subject to the procedures of the church as long as he is a member.¹⁹⁹ The conclusion reached by the trial court was that the church acted unreasonably, disclosing the facts of the misconduct after receiving the letter.²⁰⁰

In its simplicity, this logic seems to be persuasive, but a closer examination indicates that it ignores the basic reason why the common law treated church communication as privileged communication.²⁰¹ The aim of the common law was to insure that church discipline matters would not be justiciable except when abuse was present. The mere formality of a letter of

196. It is here, however, that one disposed to alarm might express the greatest concern over where privacy may be going. The question may well be raised, and apparently still is unanswered, whether this branch of the tort is not capable of swallowing up and engulfing the whole law of public defamation; and whether there is any false libel printed, for example, in a newspaper, which cannot be redressed upon the alternative ground. If that turns out to be the case, it may well be asked, what of the numerous restrictions and limitations which have hedged defamation about for many years, in the interest of freedom of the press and the discouragement of trivial and extortionate claims? Are they of so little consequence that they may be circumvented; in so casual and cavalier a fashion?

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This is not to say that the developments in the law of privacy are wrong. Undoubtedly they have been supported by genuine public demand and lively public feeling, and made necessary by real abuses on the part of defendants who have brought it all upon themselves. It is to say rather that it is high time that we realize what we are doing, and give some consideration to the question of where, if anywhere, we are to call a halt.

Prosser, *supra* note 31, at 401, 423. See also *supra* note 84.

197. See *supra* note 84.

198. Brief-B, *supra* note 181, at 19 (T. 482-483) (emphasis added).

199. *Id.* at 18-21.

200. "The issue in this case is not one of freedom of religion, but rather the rights of members of a religious group to sanction both members and *non-members*." *Id.* at 23, 27-28 (emphasis added); herein lies Appellee's argument on appeal.

201. As will be discussed, the trial court could not reach this decision without judging theological doctrine and dictating what is proper. See *infra* text accompanying notes 205-22. See also *Watson v. Jones*, 80 U.S. (13 Wall.) 666, 678 (1871).

withdrawal does not make this case any less a religious issue.²⁰² Critical, however, is the fact that the difficulty of establishing state action could jeopardize any constitutional claim raised for violation of religious free exercise.²⁰³ As shown earlier, the stringent standards established by the United States Supreme Court for interfering with religious freedom should not be so easily avoided.²⁰⁴ Nevertheless, eliminating the equitable balance of the common law protections made purely ecclesiastical questions vulnerable to civil court jurisdiction in *Guinn*.

The "right to quit" and stop the disciplinary procedure is an argument built around property cases²⁰⁵ where people leave a church and then try to determine what the remaining membership can or cannot do with the church property. The argument is not supported by church discipline cases because church discipline has traditionally been privileged speech,²⁰⁶ and civil courts do not have jurisdiction to decide strict ecclesiastical matters.²⁰⁷ Even in church property disputes, the person leaving the church must abide by the decisions of the religious tribunal²⁰⁸ and cannot dictate to the remaining members how they can use the property.²⁰⁹

Church discipline litigation does not involve a property dispute, and even though the claim involves an invasion of privacy, the court is forced to decide questions of religious doctrine and practice as well.²¹⁰ In *Guinn*, the

202. See *supra* notes 39, 201. Citing II THE WRITINGS OF JAMES MADISON 183-91 (G. Hunt ed. 1901), Tribe notes that "James Madison labeled the suggestion that 'the Civil Magistrate is a competent Judge of Religious truth' an 'arrogant pretension falsified by contradictory opinion of Rulers in all ages' ". L. TRIBE, *supra* note 35, at 871.

203. See *supra* note 109.

204. See *supra* note 104 and accompanying text.

205. The following cases, all church property disputes, are cited by Appellee in support of the withdrawal of membership argument on appeal: Brief-B, *supra* note 180, at 19-21: Trett v. Lambeth, 195 S.W.2d 524 (Mo. App. 1946); Katz v. Singerman, 127 So. 2d 515 (La. 1961); Brady v. Reiner, 198 S.E.2d 812 (W. Va. App. 1973); Fuchs v. Meisel, 60 N.W. 773 (Mich. 1894); Church of God of Decatur v. Finney, 101 N.E.2d 856 (Ill. App. 1951); Trustees of Pencader Presbyterian Church V. Gibson, 22 A.2d 782 (Del. 1941); Saint John's Greek Catholic Church v. Fedak, 213 A.2d 651 (N.J. 1965). The underlying question at issue is whether courts will use a negligence standard or an actual malice standard to decide church discipline cases. Appellee in *Guinn* contends that the letter of withdrawal eliminates any first amendment religion concerns and leaves a simple tort privacy action. Appellee further contends that defamation's qualified privilege does not apply to privacy (thereby avoiding first amendment speech protections), and that negligence is an appropriate standard. Thus, the withdrawal of membership argument is central to achieving the desired result. See *supra* note 84.

206. See *supra* note 51 and accompanying text.

207. *Watson v. Jones*, 80 U.S. (13 Wall.) 666, 678 (1871).

208. *Id.* at 675-76. Congregational groups rule themselves by majority rule. *Id.* See also *First Baptist Church of Glen Este v. Ohio*, 591 F. Supp. 676, 683 (S.D. Ohio 1983).

209. 80 U.S. (13 Wall.) at 675-76.

210. See *infra* text accompanying notes 211-22. See also L. TRIBE, *supra* note 39.

church, upon receipt of the letter, did nothing more than follow its Biblically-mandated procedure,²¹¹ acting without malice or actual malice.²¹² The church's doctrine does not allow for aborting the disciplinary procedure short of the complete process upon receipt of a letter threatening legal action.²¹³ In fact, changing the church's disciplinary procedure in this manner would involve voting to accept a different doctrinal position.²¹⁴ Furthermore, such a change would still require disclosure of the underlying facts.²¹⁵

The likelihood of a church or any assembly adopting a disciplinary procedure where the offending party controls when and how the procedure will operate is very slight.²¹⁶ To do so would undermine the overall purpose of

211. See *supra* text accompanying notes 19-25.

212. See *supra* text accompanying notes 59-65.

213. See *supra* text accompanying notes 19-25.

214. Congregational government cannot function without congregational action. To change a doctrinal position would require complete disclosure of the underlying basis prior to voting. See *supra* text accompanying note 26.

215. See *supra* note 214.

216. ROBERTS RULES OF ORDER defines the disciplinary procedures followed by most religious and other associational groups:

§ 72. *The Right of a Deliberative Assembly to Punish its Members.* A deliberative assembly has the inherent right to make and enforce its own laws and punish an offender, the extreme penalty, however, being expulsion from its own body. When expelled, if the assembly is a permanent society, it has the right, for its own protection, to give public notice that the person has ceased to be a member of that society.

But it has no right to go beyond what is necessary for self-protection and publish the charges against the member. . . .

§ 74. *Rights of Ecclesiastical Tribunals.* Many of our deliberative assemblies are ecclesiastical bodies, and it is important to know how much respect will be paid to their decisions by the civil courts.

'. . . .
'Where a church is of a strictly congregational or independent organization, and the property held by it has no trust attached to it, its right to the use of the property must be determined by the ordinary principles which govern ordinary associations.

'Where the local congregation is itself a member of a much larger and more important religious organization and is under its government and control and is bound by its orders and judgments, its decisions are final and binding on legal tribunals.

'Courts having no ecclesiastical jurisdiction, cannot revise or question ordinary acts of church discipline; their only judicial power arises from the conflicting claims of the parties to the church property and the use of it.' [citing *Watson v. Jones*, 80 U.S. (13 Wall.) 666 (1871)].

But while the civil courts have no ecclesiastical jurisdiction, and cannot revise or question ordinary acts of church discipline, they do have jurisdiction where there are conflicting claims to church property. . . .

§ 75. *Trial of Members of Societies.* Every deliberative assembly, having the right to purify its own body, must therefore have the right to investigate the character of its members. . . .

When the charge is against the member's character, it is usually referred to a committee of investigation or discipline, or to some standing committee, to report upon. . . .

. . . [T]he committee investigates the matter and reports to the society. This report

the disciplinary procedure.²¹⁷ Each time the church attempted to discipline with a goal of restoration, the erring member could "withdraw" membership and threaten legal action.²¹⁸ This would prevent the church from being personally involved in the private lives of its members and effectively eliminate church discipline as a method of influencing the conduct of church members.²¹⁹

Upon joining a congregational church that practices church discipline, an individual limits his own freedom in exchange for the benefits of becoming a part of a religious association²²⁰ that personally cares for and attends to the needs of its members. Such an individual does not join the church to alter or prohibit its doctrinal practice. To allow a member to later sue the church for fulfilling what it promised to do is gravely inequitable. To allow the judiciary branch of state government in cooperation with a private individual to censor religious speech and chill first amendment freedoms in a way that would be unconstitutional if accomplished directly is cause for concern.²²¹ Yet, allowing civil courts, in the process of deciding claims for tortious invasion of individual privacy, to dictate what is right doctrine in a

need not go into details, but should contain its recommendations as to what action the society should take, and should usually close with resolutions covering the case, so that there is no need for any one to offer any additional resolutions upon it. The ordinary resolutions, where the member is recommended to be expelled, are (1) to fix the time to which the society shall adjourn; and (2) to instruct the clerk to cite the member to appear before the society at this adjourned meeting to show cause why he should not be expelled, upon the following charges which should then be given.

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At the appointed meeting what may be called the trial takes place. Frequently the only evidence required against the member is the report of the committee. . . . When the evidence is all in, the accused should retire from the room, and the society deliberate upon the question, and finally act by a vote upon the question of expulsion, or other punishment proposed.

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The moral conviction of the trust of the charge is all that is necessary in an ecclesiastical or other deliberative body to find the accused guilty of the charges.

H. ROBERTS, *supra* note 24, at Art. XIII §§ 72-75.

217. The church would effectively be controlled by one individual rather than congregational majority rule.

218. *See supra* text accompanying notes 174-75.

219. *See supra* text accompanying notes 13-25. McGoldrick notes that religion by its very nature invades the most private areas of human existence. To deal with matters as vital as one's eternal salvation a church must have the right to be personally involved, and caring about its members. The tension between trying to reach a wayward member and the alleged torts is obvious: Attempting to reclaim a long-term member through use of Scriptures, and fervent dialogue is intrusive. To persist in the face of rebuff is emotionally stressful. Seeking to bring influence through prayer and persuasion by revealing private information to a congregation affects privacy; but the business of churches is to be involved in the subjects that touch people most deeply. *See* McGoldrick, *supra* note 7, at 14-15.

220. McGoldrick, *supra* note 7, at 14-15.

221. *See supra* text accompanying notes 103-09.

theological controversy produces that very result. More important, such censoring of speech interests has practically gone unnoticed.²²² A just resolution to the problems raised in church discipline litigation cannot require such violence to constitutional freedoms.

IV. SUGGESTED RESOLUTIONS

The concerns of Prosser and others,²²³ as played out in church discipline lawsuits, prove to be prophetic. The law of privacy does not adequately protect the church's vital first amendment rights. No simple solution will satisfy the competing concerns of religious free exercise and individual privacy raised by church discipline matters.²²⁴ There are several approaches that could offer solutions although each presents problems.

A. *Extension of Common Law Defamation Privileges to New Torts*

One possible solution would be to extend the common law qualified privilege for church discipline to new torts involving speech, including privacy and intentional infliction of emotional distress.²²⁵ Actual malice would be the logical standard for abuse following the example of defamation law.²²⁶ This proposal's advantages include the fact that historically those privileges effectively precluded litigating internal church matters,²²⁷ while at the same time allowing for a legitimate claim when church discipline was abused and practiced with malice.²²⁸ In order for this approach to accommodate the needs of a plaintiff in a privacy action, courts would need to interpret the standard of reckless disregard of truth to include the reckless disclosure of true facts to persons with no legitimate reason to know.²²⁹

222. See *supra* note 107.

223. See *supra* notes 84, 196.

224. See generally J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 102, at 448-50. (discussing a balancing approach to state action issues involving conflicts of rights; a ruling on state action is in fact a decision on the merits).

225. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 493 (1975). The Supreme Court recognized the limitation of Warren and Brandeis on privacy actions for communications rendered privileged under slander and libel: "The Warren and Brandeis article, . . . noted that the proposed new right would be limited in the same manner as actions for libel and slander where such a publication was privileged communication." The Court applied that limitation to privileged reporting of court records in *Cohn. Id.* Nimmer argues that the reasons that support the protection of speech when reputations are attacked always outweigh the privacy considerations and, therefore, only when disclosure is embarrassing but not defamatory should speech be more severely restricted. See Nimmer, *supra* note 31, at 960, 963-65. See generally W. PROSSER & W. KEETON, *supra* note 51, at 868; Kalven, *supra* note 66, at 341.

226. RESTATEMENT (SECOND) OF TORTS §§ 596(b) (e), 652 G(a) (1977).

227. See *supra* notes 1-3 and accompanying text.

228. See *supra* note 58.

229. Thus, abuse of the privilege by excessive publication would be covered by the stan-

The major disadvantage to this approach is that privacy and intentional infliction of emotional distress have not carried qualified privileges as a rule. Encumbering these new torts with what has been a confusing system of privileges in defamation law is hard to justify.²³⁰ Most likely, many states will not follow such an approach for this reason, and an inconsistent treatment of first amendment freedoms in church discipline cases will probably continue,²³¹ hardly a desirable solution.²³²

B. Application of New York Times Actual Malice Standard to Church Discipline

A second approach, similar to the first, would be an application of the actual malice standard to privacy actions for church discipline.²³³ Such a resolution will ultimately require a Supreme Court decision to effect a permanent change.²³⁴ This approach could eliminate the need for a qualified privilege altogether.²³⁵ Such a suggestion involves an exception to the framework currently applied by the courts to protect defamatory speech.²³⁶

dard. See generally W. PROSSER & W. KEETON, *supra* note 51, at 833 (privileged to publish it to any person who reasonably has a duty, interest, or authority in connection with the matter).

230. Wade, *supra* note 66, at 1113, 1121, 1123-24. Wade emphasizes this problem and suggests that the confusion is a serious reason why privacy is supplanting defamation law. In fact, he suggests that intentional infliction of emotional distress will ultimately absorb defamation, assault, privacy, etc. and thereby constitute one system aimed at protecting plaintiff's peace of mind. *Id.* See also W. PROSSER & W. KEETON, *supra* note 51, at § 111.

231. See *supra* text accompanying notes 45-46.

232. To leave churches in a position where vital religious practices are subject to catastrophic tort liability will only breed litigation.

233. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

234. Extending the constitutional protection for defamatory speech will depend on a Supreme Court ruling to that effect. See *supra* text accompanying note 96.

235. Even within the law of defamation, qualified privileges have not been eliminated with newly defined constitutional protections of defamatory speech:

The qualified privilege structure has not been automatically abrogated as a consequence of the constitutional privilege for two reasons. First, the common law rules related to how and when a qualified privilege can be abused in a way that will subject the publisher to liability are not the same as those related to the constitutional privilege. Second, the constitutional privilege has not been held to extend to many situations where a qualified privilege would be recognized. This would be especially so with respect to private publications of defamatory statements about private individuals to further and vindicate private interests. The complex qualified privileges structure pertains primarily to this type of defamatory publication.

W. PROSSER & W. KEETON, *supra* note 51, at 825.

236. In *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964), the Court defined defamatory speech as first amendment speech with limited constitutional protection. More recently, in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347, 350 (1974) the Court held that strict liability is unconstitutional for all defamatory speech and noted that the state interest could justify a negligence standard for private defamation actions.

According to *New York Times*, 376 U.S. at 279-80, public officials and figures must prove

The law would simply afford greater protection to speech during disciplinary proceedings. Speech, which would otherwise constitute an invasion of privacy and might only require a showing of negligence²³⁷ by the plaintiff, would now require the plaintiff to show that the church disclosed information knowing it was false or with reckless disregard for whether it was true.²³⁸

Legitimate justifications exist for affording greater constitutional protection to church speech.²³⁹ First, there is the traditional reason that the speech of churches has inherent value for society.²⁴⁰ Second, the likelihood of chilling speech and self-censorship is far greater with a group than with an individual.²⁴¹ Finally, such an exception would provide the necessary balance to preclude civil courts from adjudicating theological questions²⁴² and yet provide a forum for the plaintiff in cases of actual malice.

At least two criticisms exist for this proposed solution. First, actual malice is a slightly more protective standard than common law malice which required malice in an ordinary sense as compared to knowledge of falsity or reckless disregard of the truth.²⁴³ For *false* statements, however, defamation law now affords an actual malice standard²⁴⁴ plus a truth defense.²⁴⁵ *True* statements, which if false would be defamatory, warrant the equal protection of an actual malice standard.

Second, critics can claim that such a new application of actual malice

actual malice to recover in a suit for defamation. When a private individual sues for defamation, if the speech is of public concern, the Court in *Gertz v. Robert Welch Inc.*, 418 U.S. 323, 348-50 (1974) held that the plaintiff might only need to show negligence to recover compensatory damages, and actual malice to recover punitive or presumed damages. However, if the speech is not of public concern, the Court in *Dun & Bradstreet* held that a showing of less than actual malice would suffice for recovery of all damages. Most likely, under this analysis the standard of proof would be negligence for a private plaintiff in a church discipline action where the information disclosed is not of public concern, assuming the Court would even analyze a privacy action under the above reasoning. *See also Philadelphia Newspapers, Inc. v. Hepps*, 106 S. Ct. 1558 (1986) (recent opinion dealing with this subject involving a media defendant).

237. *See supra* note 236.

238. *See supra* note 236. (i.e. apply the actual malice standard of *New York Times*).

239. *See infra* notes 240-42 and accompanying text.

240. *E.g.*, *United States v. Ballard*, 322 U.S. 78, 86-87 (1944). *See also* RESTATEMENT (SECOND) OF TORTS § 596(b), § 596(e) (1977).

241. *See supra* notes 106-07. The Court in establishing a negligence standard for disclosure of information which is not of public concern regarding a private plaintiff noted that one reason was the absence of a concern of self-censorship. Such is not the case with a private organization like a church. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2946 (1985). *See generally* Shiffrin, *supra* note 24, at 941, 942, 961.

242. *Watson v. Jones*, 80 U.S. (13 Wall.) 666, 678 (1871).

243. *Dun & Bradstreet*, 105 S. Ct. at 2946 n.7. (distinguishes the two).

244. *See supra* text accompanying note 65.

245. *See supra* text accompanying note 54.

is little more than extending to a new privacy action the Supreme Court's prior application of actual malice in a "false light" case.²⁴⁶ In *Hill*, the Court did apply actual malice to one category of privacy suit,²⁴⁷ but the Court's holding has received much criticism.²⁴⁸ Furthermore, subsequent decisions by the Court²⁴⁹ tend to make the *Hill* decision highly questionable. The Court's reluctance to extend the actual malice standard to other tort actions involving speech will probably preclude this solution.²⁵⁰

C. Define Church Discipline as Non-Justiciable

A third approach would be to preclude church discipline litigation altogether by defining such actions as non-justiciable.²⁵¹ A dictate from Congress or the Supreme Court could accomplish this result. The justification would be that unlike property cases involving churches, courts cannot apply neutral principles of law in church discipline cases, and excessive and impermissible government entanglement with religion is the inevitable result.²⁵² Therefore, state and federal courts would always lack subject matter jurisdiction to hear such disputes deferring to the religious tribunals overseeing church differences.²⁵³

One criticism for this approach is that it ignores the underlying reason why the common law applied only a conditional rather than an absolute privilege to church discipline proceedings.²⁵⁴ Churches should not be overly protected. An absolute legal shield would encourage abuses going far be-

246. *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

247. *Id.*

248. Many believe that actual malice is an inappropriate standard for privacy actions because more speech will not suffice as a remedy as with defamation. *E.g.*, Nimmer, *supra* note 31, at 956-65. Nimmer criticizes the Court's application of actual malice in *Hill*. His contention is that privacy actions can exist totally without any corresponding defamation claims. He believes that if a certain offense is actionable as privacy *and* defamation that the speech interests should cause the defamation claim to win over privacy and actual malice should then be applied. *Id.*

249. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 Ct. 2939 (1985).

250. *See, e.g.*, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975); *Gertz*, 418 U.S. at 348.

251. *Watson v. Jones*, 80 U.S. (13 Wall.) 666, 678 (1871). *See also Joiner v. Weeks*, 383 So. 2d 101, 106 (La. App. 1980) (ecclesiastical proceedings disciplining minister dismissed for lack of jurisdiction).

252. The justification requires recognizing that even though the "neutral principles" rule would rationally apply where personal instead of property issues are in dispute, since church discipline is an actual doctrinal practice, to decide questions regarding its application where *no malice* is involved is to invariably define proper doctrine. Thus, these church discipline quarrels will always be non-justiciable for lack of subject matter jurisdiction. *See supra* note 39.

253. *See supra* note 39.

254. Wade notes that conditional privileges allow liability where the privileged conduct is exceeded or abused. Wade, *supra* note 66, at 1112. *See also supra* note 252 (no malice).

yond protecting speech which is useful to society. Protecting the rights of individuals as well as churches requires a unique balance where neither party is given absolute immunity to do whatever they please.

Two other criticisms can be made regarding this recommended solution. With the broad definition the United States Supreme Court has given to religion,²⁵⁵ to define what constitutes religious disciplinary proceedings will present an entanglement problem under the establishment clause.²⁵⁶ More significantly, case law indicates²⁵⁷ that the necessary limitations to jurisdiction already exist subject to the provisions for tort actions. The underlying problem is not so much a matter of justiciability but rather inadequate protections for speech under privacy law. What is needed is for courts to recognize the state action involved in church discipline cases and weigh the free exercise values as part of any invasion of privacy action arising out of church government proceedings.²⁵⁸ To attempt to remedy the problem by eliminating jurisdiction altogether would be an absolutist approach²⁵⁹ to protection for first amendment rights and would create more problems than such an approach could rectify.

D. Use Federal Statutes to Prevent Interference with Federal Constitutional Rights

The constitutional draftsmen originally designed the Bill of Rights to be a limitation on actions by federal government impacting on individual rights.²⁶⁰ Through the due process clause of the fourteenth amendment²⁶¹ the same rights are substantially protected against state interference.²⁶² Section five²⁶³ of the fourteenth amendment explicitly grants Congress the power to enforce that amendment by appropriate legislation.

255. See *United States v. Seeger*, 380 U.S. 163 (1965) (non theistic sincere beliefs qualify); *Torcaso v. Watkins*, 367 U.S. 488 (1961) (religion need not be theistic and need not recognize a Supreme Being).

256. The problem arises when the state defines certain religious practices as absolutely protected, preferring them over other theistic or non-theistic practices. See *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947).

257. *Presbyterian Church v. Hull Church*, 393 U.S. 440, 449 (1969); *Abington School Dist. v. Schempp*, 374 U.S. 203, 243 (1963).

258. See *supra* text accompanying notes 113-44.

259. Protecting speech whatever the cost.

260. *Barron v. Baltimore*, 32 U.S. 243 (1833).

261. "Nor shall any State deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend XIV.

262. The Court rejects the argument that the fourteenth amendment incorporates all of the Bill of Rights. The Court follows instead a principle of selective incorporation based on each right in question. See *Adamson v. California*, 332 U.S. 46 (1947).

263. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend XIV § 5.

Congress has enacted statutes including 42 U.S.C. sections 1983 and 1985²⁶⁴ to enforce the fourteenth amendment, proscribing conduct which is construed to be state action.²⁶⁵ Sections 1983 and 1985 exist to protect federal rights from interference by state government and in some cases private individuals.²⁶⁶ Therefore, federal statutes could afford a means for protecting the constitutional rights allegedly being violated through church discipline litigation in state courts.

1. Section 1983 as It Applies to Church Discipline

A party can raise a section 1983 cause of action in federal or state court.²⁶⁷ For church discipline litigation, a church could sue in federal court

264. 42 USC § 1983 (1982) reads as follows:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1985(3) (1982) reads as follows:

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property, on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators. (R.S. § 1980).

265. L. TRIBE, *supra* note 35, at 1147 (discussing state action).

266. The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'

Mitchum v. Foster, 407 U.S. 225, 242 (1972). Section 1985 and § 1983 of the Civil Rights Act are directed at the maladministration, neglect and disregard of laws by state and local officials, and have purpose of providing a federal remedy for deprivation of federally guaranteed rights. Huey v. Barloga, 277 F. Supp. 864, 867 (1967).

267. See S. NAHMUD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION §§ 1.09, 1.12 (1979 & Supp. 1985).

for equitable relief as well as damages.²⁶⁸ Such a countersuit would enjoin the state agent, in this case the state court judge,²⁶⁹ from trying the case infringing upon first amendment rights. Also, the injured party could seek damages from the private party(s) acting in concert with the state agent.²⁷⁰ In state court, the action would be a counterclaim seeking damages from the private party involved.²⁷¹

Whether raised in federal or state court, a section 1983 cause of action must overcome a number of legal hurdles to succeed. First, raising such an action requires the injured party to show that a private individual acting under color of state law committed actions resulting in the infringement of rights.²⁷² Second, even if the action is under color of state law, the private party might be covered by a qualified immunity.²⁷³ Finally, for federal court the utility of section 1983 has been substantially undermined by several complex doctrines whereby federal courts can avoid granting relief without a decision on the merits.²⁷⁴ Each of these barriers poses serious questions about the utility of using a section 1983 action in church discipline litigation.

Technically, section 1983 does not require a showing of state action but only requires the injured party to show that the person violating federal rights was acting under color of state law.²⁷⁵ However, whenever section 1983 is used to enforce constitutional rights which themselves depend on state action for violation, the section 1983 action assumes the requirement of showing state action.²⁷⁶ Therefore, to use section 1983 in church discipline cases to enforce first amendment rights, the injured party will need to show state action.²⁷⁷

268. S. NAHMOD, *supra* note 267 §§ 4.01-4.13, 5.01-5.17; 42 U.S.C.A. § 1985 (notes 267, 269) (1981 & Supp. 1986).

269. *See supra* text accompanying notes 103-09. The agent acting on behalf of the state in church discipline procedures is the state court judge. *See Pulliam v. Allen*, 466 U.S. 522 (1984) (where the Court held that judicial immunity is not a bar to prospective injunctive relief against a judicial officer). *See also* *First Baptist Church of Glen Este v. Ohio*, 591 F. Supp. 676 (S.D. Ohio 1983) (where a federal court granted prospective equitable relief over a state court's adjudication of church disciplinary proceedings).

270. The state agent, the judge is immune from suit for damages. *See S. NAHMOD supra* 267, at §§ 4.01-4.13, 7.06-7.09.

271. *Jane Murray v. The Church of Christ Northside*, No. 15420 (In the Dist. Ct. Val Verde County Texas, July 1985). *See infra* text accompanying note 279.

272. *See supra* note 264.

273. *See infra* text accompanying notes 282-83.

274. *See infra* note 285 and accompanying text.

275. *See supra* note 264.

276. *See Carpenters v. Scott*, 463 U.S. 825, 833 (1983). The argument the Court makes for § 1985(3) is equally applicable to § 1983 since § 1983 also provides no substantive rights itself, but rather looks in this case to the first amendment which restrains only official conduct (i.e. state action).

277. *Id.*

One example of how state action might be shown in a church discipline dispute would be to show a conspiratorial aspect.²⁷⁸ In *Jane Murray v. The Church of Christ Northside*,²⁷⁹ as part of a counterclaim in a church discipline lawsuit, counsel raised an issue of conspiracy. According to the pleadings, Murray's attorney allegedly solicited the client, encouraging her to sue the church.²⁸⁰ Bringing the lawsuit against the church in a Texas state court allegedly established the involvement²⁸¹ by the state in the conspiratorial action, thereby meeting the requirement of showing state action.

Assuming that the injured party can meet the state action requirement, the question of a qualified immunity to cover the private party acting in concert with the state actor arises. In *Lugar v. Edmundson Oil Co.*,²⁸² Justice White in dicta noted that good faith reliance upon the constitutionality of state law might qualify the private party for immunity from damages.²⁸³ In church discipline litigation this could mean that the disciplined church member suing under a state tort action for invasion of privacy would be shielded from a damage action raised by the church attempting to enforce first amendment rights under section 1983. Therefore, the church might be left with no recourse but to seek injunctive relief in federal court against the state court proceeding.²⁸⁴

The most serious limit to using section 1983 in a church discipline dispute is the ease with which federal courts can avoid granting such relief.²⁸⁵

278. See *Dennis v. Sparks*, 449 U.S. 24 (1980) (the Supreme Court held that a private defendant acts under color of state law when conspiring with an absolutely immune judge).

279. No. 15420. (In the Dist. Ct. Val Verde County, Texas, July 1985). This church discipline case like *Guinn* involved a member dis-fellowshipped based on sexual misconduct. The church counterclaimed citing three causes of action: breach of contract, § 1985, and § 1983. The case was settled on the counterclaim on July 31, 1985, with the offending church member paying the church \$4500 upon dismissing her suit. *Id.* See also 2 THE RUTHERFORD INSTITUTE 14 (No. 4 Sept./Oct. 1985). See also First Amended Original Answer and Counterclaim of the Church of Christ Northside, et al No. 15420 in the Dist. Ct. Val Verde County, Texas, at 6-11 [hereinafter Counterclaim].

280. Counterclaim, *supra* note 279, at 7.

281. State action can be shown through entanglement by the state in the challenged conduct. See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972). State action can also be shown by joint participation by the state in the challenged conduct. See *Lugar v. Edmundson Oil Co.*, 457 U.S. 922, 923 (1982) (the Court found state action without a conspiracy where a debtor's property was seized through a pre-judgment attachment proceeding). *But see Lugar*, 457 U.S. at 939 n.21.

282. 457 U.S. 922 (1982).

283. *Id.* at 942 n.23.

284. See *supra* text accompanying notes 267-69.

285. Numerous abstention and preclusion doctrines severely limit accessibility to federal court when a state court proceeding is already pending. See *Younger v. Harris*, 401 U.S. 37 (1971) (federal courts use the *Younger* rule to show deference to state court proceedings. This rule requires federal courts to refrain from injunctive proceedings where a state action is already pending and the defendant seeks to stop the proceeding by a federal court injunction or

In *Dayton*, the Court was faced with the very same free exercise and establishment clause issues that lie at the heart of church discipline actions.²⁸⁶ The Court held that the district court had erred by not abstaining under *Younger v. Harris*, where an important state issue was involved and a state court forum would provide an adequate opportunity to raise federal constitutional claims.²⁸⁷ Following *Dayton*, federal court intervention in a church discipline proceeding will likely only occur where a state court blatantly ignores federal constitutional claims. Therefore, a church will most likely be forced to raise any section 1983 action as a counterclaim in state court in an effort to stop church discipline litigation before full adjudication in state court.

2. Section 1985 As it Applies to Church Discipline

The same barriers face a section 1985 cause of action in federal court. Therefore, the church will likely raise a section 1985 action as a counterclaim in state court. Such an action will seek damages against the private party defendants.²⁸⁸ The requirements for raising such an action are somewhat different than a section 1983 action and, therefore, may better suit the facts in a particular church discipline case.

To counterclaim in a church discipline case on the grounds of free exercise, section 1985(3) requires that the defendant prove there is some state involvement. In *Carpenters v. Scott*,²⁸⁹ the Court held that an alleged conspiracy to infringe first or fourteenth amendment rights is not a violation of section 1985(3) unless the state is involved in the conspiracy or the purpose of the conspiracy is to influence state actions.²⁹⁰ Therefore, the same considerations required to show state action for section 1983 will be necessary to apply section 1985(3) in a church discipline suit.²⁹¹

Other critical aspects to a section 1985 action are the conspiratorial requirement and the requirement of class-based, invidiously discriminatory

declaratory judgment). See also *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941) (the *Pullman* doctrine requires a federal court to abstain temporarily from accepting jurisdiction over a federal constitutional claim which may be resolved by the state court adjudication of an unsettled question of state law in a pending state proceeding). See also *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 106 S. Ct. 2718 (1986).

286. *Dayton*, 106 S. Ct. at 2719.

287. *Id.* at 2719-20. See also *First Baptist Church of Glen Este v. Ohio*, 591 F. Supp. 676, 677 (S.D. Ohio 1983) (where a federal district court abstained in a § 1983 action from intervening in on-going state court proceedings involving adjudication of church disciplinary proceedings).

288. 42 U.S.C.A. § 1985 (note 269) (1981 & Supp. 1986).

289. 463 U.S. 825 (1983).

290. *Id.* at 833.

291. See *supra* text accompanying notes 275-81.

animus.²⁹² First of all, two or more persons *must* conspire to deprive the injured party of federally protected rights.²⁹³ Therefore, proving conspiracy in a church discipline action will determine the utility of the section 1985 counterclaim.²⁹⁴ Furthermore, case law consistently requires class-based, invidiously discriminatory animus in order to establish a violation of this section.²⁹⁵ Therefore, a church must prove that animosity toward the religious body based on its beliefs was the motivation behind the concerted efforts to deprive the church of religious free exercise.

One unique advantage to the approach of using federal civil rights statutes as a means of protecting first amendment freedoms is that new torts like invasion of privacy would not need to be burdened by the cumbersome and confusing common law privilege schemes.²⁹⁶ The question of whether or not such statutory counterclaims will survive in the courts is yet to be answered. In the meantime, churches that practice church discipline must face the reality of an ever-increasing risk of litigation because no adequate remedy now exists to protect vital constitutional freedoms.²⁹⁷

V. CONCLUSION

Under the common law of defamation, churches were free to practice church discipline without fear of litigation protected by a qualified privilege and truth as a defense. Changes in tort law have created a framework of legal principles where religious speech is being censored and first amendment freedoms are being chilled. Churches that practice traditional procedures of church discipline in a congregational setting without any wrongful motive are subject to excessive liability under actions for tortious invasion of privacy. The key issue is how far courts should go to protect the right of privacy.

Religious free exercise dictates that communications carried on by churches during church discipline proceedings deserve more protection than

292. 42 U.S.C. § 1985(3) (1982).

293. *Id.*

294. *Jane Murray v. The Church of Christ Northside*, No. 15420 (In the Dist. Ct. Val Verde County Texas, July 1985). In *Murray*, the attorney allegedly solicited Jane Murray and encouraged her to sue the church. Counsel for the church alleged that the conduct of the co-conspirators was motivated by nonracial class-based animosity toward the church and its Elders because of their religious affiliation, beliefs, tenets, practices and because of their exercise of those beliefs. See Counterclaim, *supra* note 279, at 10.

295. See 42 U.S.C.A. § 1985 (note 37) (1981 & Supp. 1986). See also *Carpenters v. Scott*, 463 U.S. 825, 834-39 (1983); *Scott v. Moore*, 640 F.2d 708, 719 (1981) (§ 1985 is not restricted to racial discrimination. It can include a conspiracy motivated by nonracial class animus).

296. See *supra* text accompanying note 230.

297. *Baker*, *supra* note 106.

currently afforded under the tort law of privacy. Several approaches could rectify the inadequate protection of privacy law. Courts could apply the privileges of defamation law to invasion of privacy. Congress or the Supreme Court could act to make such church matters non-justiciable. The Supreme Court could expand the constitutional protections for defamatory speech to cover speech in actions for invasion of individual privacy. Finally, churches might be able to counterclaim based on federal statutes to raise constitutional issues. For the present, however, some churches possess federal constitutional rights which are nominal, lacking sufficient protection to allow their exercise without grave risk of litigation.

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