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# A CONSTITUTIONAL BALANCING IN NEED OF ADJUSTMENT: ON DEFAMATION, BREACHES OF CONFIDENTIALITY, AND THE CHURCH

MARK P. STRASSER\*

## INTRODUCTION

Religious disputes arise in a variety of contexts. Sometimes, parties within a religious organization disagree about who has the most accurate interpretation of religious doctrine;<sup>1</sup> at other times, congregants disagree about who should lead the congregation;<sup>2</sup> at another church, a member believes that he or she has been harmed by other congregants or, perhaps, by the church's spiritual leaders.<sup>3</sup> Some of these religious disputes between religious parties are settled internally. On occasion, however, at least one of the parties to a religious dispute seeks satisfaction in a civil court, raising the important issue of determining under what conditions, if any, the civil courts may hear disputes involving religious parties.

The jurisprudence is well-settled with respect to the principle that civil courts cannot decide certain kinds of religious disputes, such as which party is correctly interpreting religious doctrine.<sup>4</sup> Yet, the

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1. See *infra* notes 9–23 and accompanying text.

2. See *infra* notes 49–63 and accompanying text.

3. See *infra* Part II.B.1.

4. See e.g., *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727 (1871) (“In this class of cases [involving the interpretation of religious doctrine] we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.”).

jurisprudence is unsettled in other areas. For example, state courts still disagree about whether they may decide cases based on allegations that a religious leader has defamed or revealed the private confidence of a congregant.<sup>5</sup> Some courts have cited the constitutional limitations of the court in declining to hear these cases.<sup>6</sup> Still others have developed approaches taking into account both the constitutional limitations on the courts and the dignitary interests adversely impacted by the public dissemination of statements that are knowingly false or that reveal private, embarrassing information.<sup>7</sup> Regrettably, there is no consensus on where the relevant dividing lines should be drawn.

This Article discusses the conditions under which suits against religious parties for defamation or for the publication of private facts are justiciable. The Supreme Court has not yet addressed the particular issues raised here, and the lower courts addressing these issues have adopted a variety of approaches ranging from a fairly narrow limitation on defamation or publication claims to a robust limitation that immunizes a whole host of otherwise tortious practices from civil review.

Analysis proceeds in two parts. Part I of this Article discusses the developing jurisprudence regarding the conditions under which civil courts can hear disputes involving religious parties. Part II then examines the varying approaches adopted by courts when deciding which defamation and invasion of privacy cases are justiciable. The Article concludes by offering suggestions about how to best protect important individual dignitary interests implicated in such cases while also respecting the constitutional limitations imposed on civil courts hearing suits involving religious parties.

#### I. THE SUPREME COURT'S DISCUSSION OF THE LIMITATIONS ON CIVIL COURTS HEARING DISPUTES INVOLVING RELIGIOUS PARTIES

The Supreme Court long ago began addressing the conditions under which civil courts can hear disputes involving religious parties.<sup>8</sup> The cases have involved a variety of contexts, and the Court has often

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5. See *infra* Part II.B.

6. See *infra* notes 246–258 and accompany text.

7. See *infra* notes 235–245, 280–296 and accompanying text.

8. The Court's earliest decision with regard to disputes involving religious parties was *Watson v. Jones*, discussed *infra* in Part I.A.

(but not always) offered a nuanced view balancing competing interests. Generally, while the Court has held that civil courts cannot decide theological disputes or decide which religious leader best serves the interests of their religious institutions, the Court has permitted civil courts to hear cases involving religious parties in limited secular contexts.

### *A. Property Disputes*

The Court has heard cases where the parties disagreed about who rightfully represented the church and thus who rightfully owned church property. For example, *Watson v. Jones*<sup>9</sup> involved a dispute between a local church and the hierarchical church of which it was a part. The majority of the church leaders of a local Louisville church were pro-slavery, while a majority of the members of the hierarchical church were anti-slavery.<sup>10</sup> The views of the latter group coincided with those of the hierarchical church.<sup>11</sup>

The question before the Court was which group constituted the local church<sup>12</sup> and thus had the right to use the church and church property.<sup>13</sup> First, the Court explained that this was both a schism between members of the local church<sup>14</sup> as well as a division between certain members of the local church and the hierarchical church.<sup>15</sup> The hierarchical church had already decided which faction within the local

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9. 80 U.S. (13 Wall.) 679 (1871).

10. *See id.* at 691–93.

11. *Id.* at 690–91 (“[T]he General Assembly of the Presbyterian Church at its annual meetings expressed in Declaratory Statements or Resolutions, its sense of the obligation of all good citizens to support the Federal government in that struggle; and when, by the proclamation of President Lincoln, emancipation of the slaves of the States in insurrection was announced, that body also expressed views favorable to emancipation, and adverse to the institution of slavery.”).

12. *Id.* at 692 (“In January, 1866, the congregation of the Walnut Street Church became divided in the manner stated above, each asserting that *it* constituted the church.”).

13. *Id.* at 681 (“This was a litigation which grew out of certain disturbances . . . and which resulted in a division of its members into two distinct bodies, each claiming the exclusive use of the property held and owned by that local church.”).

14. *Id.* at 717 (“This *is* a case of a division or schism in the church.”).

15. *See id.* at 726.

church was entitled to use the facilities,<sup>16</sup> and the Court had to decide whether to enforce the hierarchical church's decision about who constituted the church.

The *Watson* Court explained that “whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them . . . .”<sup>17</sup> In other words, the Court held that the Constitution requires civil courts to defer to religious authorities with respect to the proper interpretation of religious beliefs and practices,<sup>18</sup> including the correct doctrinal determination regarding the permissibility of slavery.<sup>19</sup> A policy of deference permits the state to remain neutral among competing religious beliefs and practices, and does not put the state in the position of choosing one religious view over another. Courts must maintain neutrality because “the law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.”<sup>20</sup>

The *Watson* Court then turned to when secular courts would have jurisdiction over seemingly religious disputes. For example, “if the General Assembly of the Presbyterian Church should undertake to try one of its members for murder, and punish him with death or imprisonment, its sentence would be of no validity in a civil court or anywhere else.”<sup>21</sup> By the same token, if the Presbyterian Assembly “should . . . entertain jurisdiction as between [two members] as to their

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16. See *id.* at 692–93 (“On the 1st of June, 1867, the Presbytery and Synod recognized by *Watson and his party*, were declared by the General Assembly to be ‘in no sense a true and lawful Synod and Presbytery in connection with and under the care and authority of the General Assembly of the Presbyterian Church in the United States of America;’ and were permanently excluded from connection with or representation in the Assembly. By the same resolution the Synod and Presbytery adhered to by those whom *Watson and his party* opposed were declared to be the true and lawful Presbytery of Louisville, and Synod of Kentucky.”).

17. *Id.* at 727.

18. See Mark A. Hicks, Comment, *The Art of Ecclesiastical War: Using the Legal System to Resolve Church Disputes*, 6 LIBERTY U. L. REV. 531, 551–52 (2012) (“The hierarchical deference approach, which was created by the Supreme Court in *Watson v. Jones*, requires courts to defer to hierarchical organizations in respect to religious matters.”).

19. See *Watson*, 80 U.S. (13 Wall.) at 727.

20. *Id.* at 728.

21. *Id.* at 733.

individual right to property, real or personal, the right in no sense depending on ecclesiastical questions, its decision would be utterly disregarded by any civil court where it might be set up.”<sup>22</sup>

Thus, civil courts could quite properly exercise jurisdiction over a property dispute whose resolution did not in any way depend upon the resolution of a religious controversy. However, courts should not attempt to resolve issues requiring an authoritative interpretation of a particular religious belief or practice. As the *Watson* Court noted, “it is easy to see that if the civil courts are to inquire into . . . the doctrinal theology, the usages and customs, [this in effect] . . . would deprive [ecclesiastical] bodies of the right of construing their own church laws.”<sup>23</sup>

Consider *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*,<sup>24</sup> another case in which two local churches decided to sever their relations with the hierarchical church.<sup>25</sup> The local churches claimed that the hierarchical church was departing from “the doctrine and practice in force at the time of affiliation.”<sup>26</sup> The jury deciding whether the local or hierarchical church owned the contested lands was told that “Georgia law implies a trust of local church property for the benefit of the general church on the sole condition that the general church adhere to its tenets of faith and practice existing at the time of affiliation by the local churches.”<sup>27</sup> Thus, Georgia law reserved local church property for the hierarchical church only if the hierarchical church did not betray the principles that had induced the local church’s affiliation in the first place.<sup>28</sup>

If indeed local church property is held in trust for the hierarchical church only if the hierarchical church has remained true to its principles, then someone must decide whether the hierarchical church has in fact remained true to its principles. Georgia law entrusted that duty to the jury as the trier of fact, who were told to decide “whether the actions of the general church ‘amount to a fundamental or substantial abandonment of the original tenets and doctrines of the (general church),

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22. *Id.*

23. *Id.*

24. 393 U.S. 440 (1969).

25. *Id.* at 442.

26. *Id.*

27. *Id.* at 443.

28. *Id.*

so that the new tenets and doctrines are utterly variant from the purposes for which the (general church) was founded.”<sup>29</sup> In this particular case, the jury found for the local churches,<sup>30</sup> a decision affirmed by the Georgia Supreme Court.<sup>31</sup>

The United States Supreme Court reversed.<sup>32</sup> Citing *Watson* with approval,<sup>33</sup> the Court explained that “the civil courts [have] no role in determining ecclesiastical questions in the process of resolving property disputes.”<sup>34</sup> However, the Court was not suggesting that civil courts should therefore decline jurisdiction whenever church property is at issue. Rather, “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.”<sup>35</sup>

The Court had an opportunity to develop the neutral principles of law approach more fully in another case arising out of Georgia. In *Jones v. Wolf*,<sup>36</sup> the Court addressed “a dispute over the ownership of church property following a schism in a local church affiliated with a hierarchical church organization.”<sup>37</sup> The *Wolf* Court held that there was “little doubt about the general authority of civil courts to resolve this question” because the “State has an obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively.”<sup>38</sup> Nonetheless, there are certain constitutional limitations imposed on the courts; for example, “the First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice.”<sup>39</sup> Such a limitation entails that “civil courts defer

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29. *Id.* at 443–44.

30. *Id.* at 440.

31. *Id.* at 444.

32. *Id.*

33. *Id.* at 452.

34. *Id.* at 447.

35. *Id.* at 449.

36. 443 U.S. 595 (1979).

37. *Id.* at 597.

38. *Id.* at 602 (citing in part to *Presbyterian Church*, 393 U.S. 440, 445 (1969)).

39. *Id.* (citing *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 710 (1976); *Md. & Va. Churches v. Sharpsburg Church*, 396 U.S. 367, 368 (1970); *Presbyterian Church*, 393 U.S. at 449).

to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization.”<sup>40</sup> The Court further held (1) that these principles were consistent with a “‘neutral principals of law’ approach” and (2) that, as long as the above mentioned limitations were observed, “the First Amendment does not dictate that a state must follow a particular method of resolving church property disputes.”<sup>41</sup>

The *Wolf* Court was aware that application of the neutral principles of law approach might pose some difficulty.<sup>42</sup> For example, Georgia law required that church documents be examined “for language of trust in favor of the general church.”<sup>43</sup> The Court cautioned that “a civil court must take special care to scrutinize the document in purely secular terms, and not to rely on religious precepts in determining whether the document indicates that the parties have intended to create a trust.”<sup>44</sup> Further, in a case in which it was necessary for religious terms to be interpreted, “the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body.”<sup>45</sup>

Yet, the Court’s recognition that applying neutral principles would sometimes be difficult was not meant to suggest that civil courts should simply defer to religious authorities. The *Wolf* Court expressly rejected that “the First Amendment requires the States to adopt a rule of compulsory deference to religious authority in resolving church property disputes, even where no issue of doctrinal controversy is involved.”<sup>46</sup> Instead, civil courts can make their own judgments about the controversy

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40. *Id.* (citing *Milivojevich*, 426 U.S. at 724–25; *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733–34 (1872)).

41. *Id.* at 602–03.

42. *Id.* at 604 (“This is not to say that the application of the neutral-principles approach is wholly free of difficulty.”).

43. *Id.*

44. *Id.*

45. *Id.* (citing *Milivojevich*, 426 U.S. at 709); see also Omar T. Mohammedi, *Sharia-Compliant Wills: Principles, Recognition, and Enforcement*, 57 N.Y.L. SCH. L. REV. 259, 272 (2013) (“[T]he ‘neutral principles’ approach applied by the Supreme Court in *Jones v. Wolf* prohibits courts from becoming involved in disagreements over religious doctrine, but allows courts to examine undisputed points of religious doctrine.”).

46. *Wolf*, 443 U.S. at 605.



at issue, as long as those courts are careful to make only secular judgments.<sup>47</sup>

*B. The Installation of Religious Leaders*

The Court has examined several cases where individuals sought help from civil courts because they believed that they had wrongly been denied a church leadership position. At issue in *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*<sup>48</sup> was the identity of the individual who had the right to occupy and use the St. Nicholas Cathedral in New York.<sup>49</sup> Leonty, “the Metropolitan of All America and Canada, the Archbishop of New York,” was elected to “his ecclesiastical office” by a convention of representatives of American churches.<sup>50</sup> Leonty claimed the right to occupy and use St. Nicholas Cathedral by virtue of that election.<sup>51</sup> In contrast, Benjamin Fedchenkoff based his right to the use and possession of the Cathedral “on an appointment in 1934 by the Supreme Church Authority of the Russian Orthodox Church . . . as Archbishop of the Archdiocese of North America and the Aleutian Islands.”<sup>52</sup> Thus, the two men both claimed to be the Archbishop entitled to the occupation and use of the New York cathedral, one as appointed by a convention of American churches and one as appointed by the Church’s supreme authority in Russia.

The New York Court of Appeals held that “the prelate appointed by the Moscow ecclesiastical authorities was not entitled to the Cathedral” in light of a New York law that transferred ownership of the Cathedral and other churches from “the central governing hierarchy of

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47. See Douglas Laycock, *Hosanna-Tabor and the Ministerial Exception*, 35 HARV. J.L. & PUB. POL’Y 839, 853 (2012) (citations omitted) (“In *Jones v. Wolf*, in 1979, the Court held that civil courts could decide a church property dispute on the basis of the church’s secular documents and neutral principles of law, even if the court reached a result opposite to that of the highest church authorities.”).

48. 344 U.S. 94 (1952).

49. *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 96 (1952).

50. See *id.* at 96, n.1.

51. See *id.* at 96 (discussing the “claimed right of the corporation [of the Russian Orthodox Church] to use and occupancy for the archbishop chosen by the American churches”).

52. *Id.*

the Russian Orthodox Church, the Patriarch of Moscow and the Holy Synod” to the American branch of the Russian Orthodox Church.<sup>53</sup> The *Kedroff* Court held that the law transferring ownership to American branches was invalid as a violation of constitutional guarantees.<sup>54</sup>

The reasoning of the New York Court of Appeals is important to consider. The New York Court of Appeals had previously upheld the New York law<sup>55</sup> “on the theory that [the Russian Church in America] would most faithfully carry out the purposes of the religious trust.”<sup>56</sup> In enacting the law, the New York Legislature had been concerned that a church headquartered in Moscow might be controlled or influenced by the communist regime, and the New York Court of Appeals supported this rationale.<sup>57</sup> However, the United States Supreme Court explained that because the Russian Orthodox Church had “no schism over faith or doctrine” with regard to who controlled the Russian Orthodox Church in America, the lower courts erred by favoring the policies of the New York Legislature over the religious doctrine of the Russian Orthodox Church.<sup>58</sup>

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53. *Id.* at 97, 107.

54. *Id.* at 107.

55. *Saint Nicholas Cathedral of Russian Orthodox Church in N. Am. v. Kedroff*, 96 N.E.2d 56, 74 (N.Y. 1950).

56. *Kedroff*, 344 U.S. at 109.

57. 96 N.E.2d at 74 (“On the basis of these facts, and the facts stated *supra* and no doubt other facts we know not of, our Legislature concluded that the Moscow Patriarchate was no longer capable of functioning as a true religious body, but had become a tool of the Soviet Government primarily designed to implement its foreign policy.”); *see also* Victor E. Schwartz & Christopher E. Appel, *The Church Autonomy Doctrine: Where Tort Law Should Step Aside*, 80 U. CIN. L. REV. 431, 449 (2011) (discussing the New York law at issue in *Kedroff* as one which “had emerged from legitimate concerns that the church’s hierarchy in Moscow was controlled by the Communist regime”); Christopher Charles Johnson, *The Fractured Catholic Church: Why Civil Courts Would Defer to the Governing Body of the Episcopal Church in Cases of Diocesan Departure*, 4 CHARLESTON L. REV. 829, 843 (2010) (referring to the New York law at issue in *Kedroff* as “a Cold War New York statute aimed at fighting communism within the American branch of the Russian Orthodox Church” and the New York courts’ decisions upholding this law as “a neutral attempt to ferret out communist infiltration of an American church”).

58. *Kedroff*, 344 U.S. at 120; *see also* Mark Strasser, *When Churches Divide: On Neutrality, Deference, and Unpredictability*, 32 Hamline L. Rev. 427, 450 (2009) (“[T]he *Kedroff* Court suggested that the civil courts have a very limited role to play when adjudicating property disputes between religious parties, and that role does not

The *Kedroff* Court made clear that “when the property right follows as an incident from decisions of the church custom or law on ecclesiastical issues, the church rule controls.”<sup>59</sup>

*Kedroff* protects the right of religious institutions to choose their own clergy. Such a choice has “federal constitutional protection as a part of the free exercise of religion against state interference.”<sup>60</sup> That said, however, the *Kedroff* Court expressly noted that such protection attaches only “where no improper methods of choice are proven.”<sup>61</sup>

Just as civil courts must defer on matters of religious substantive law, civil courts must defer to religious courts when seeking to determine the procedural protections offered under religious law. In *Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevic*,<sup>62</sup> the Illinois Supreme Court had held that church proceedings regarding a Bishop’s defrocking “were procedurally and substantively defective under the internal regulations of the Mother Church and were therefore arbitrary and invalid.”<sup>63</sup> However, the United States Supreme Court reversed, holding that “the inquiries made by the Illinois Supreme Court into matters of ecclesiastical cognizance and polity and the court’s actions pursuant thereto contravened the First and Fourteenth Amendments.”<sup>64</sup> Basically, the Illinois court offered an authoritative interpretation of the due process protections guaranteed under religious law, and found that those guarantees had been violated. The *Milivojevic* Court further explained that:

[W]here resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth

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include the ability to determine which entity was remaining true to religious doctrine.”).

59. *Kedroff*, 344 U.S. at 120–21.

60. *Id.* at 116.

61. *Id.*; see also Mark Strasser, *Making the Anomalous Even More Anomalous: On Hosanna-Tabor, the Ministerial Exception, and the Constitution*, 19 VA. J. SOC. POL’Y & L. 400, 414 (2012) (citations omitted) (“Yet, even *Kedroff* includes an important qualification with respect to something as central as the choice of clergy, namely, that such decisions must not be disturbed by the state ‘where no improper methods of choice are proven.’”).

62. 426 U.S. 696 (1976).

63. *Id.* at 698.

64. *Id.*

Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them.<sup>65</sup>

Because the Illinois Supreme Court had rejected the religious judiciary's determination that defrocking of the Bishop had respected due process guarantees, the United States Supreme Court reversed.<sup>66</sup>

Yet, it is important not to overstate the *Milivojevich* holding. The Court struck down the Illinois Supreme Court's rejection of an interpretation of religious law offered by religious authorities, where the Illinois court had instead substituted its own interpretation of religious law. Civil courts simply do not have the expertise to second-guess religious authorities about the proper interpretation of religious belief and practice. Such a prohibition does not mean that civil courts cannot second-guess religious authorities about whether civil law has been violated.<sup>67</sup> On the contrary, the jurisprudence established by *Wolf*, *Milivojevich*, and the various cases discussed above is that that civil courts must not decide religious issues but can decide civil issues, even in cases involving religious parties.<sup>68</sup> A separate issue is whether the Court's recent decision in *Hosanna-Tabor Evangelical Lutheran Church*

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65. *Id.* at 709 (citing *Md. & Va. Churches v. Sharpsburg Church*, 396 U.S. 367, 369 (1970) (Brennan, J., concurring)).

66. *Id.* at 698.

67. See Strasser, *supra* note 61, at 418 ("While the federal courts are not to decide ecclesiastical matters, they are permitted to use neutral principles of law to resolve church disputes."). Some commentators seem not to appreciate this point. See, e.g., Ryan W. Jaziri, Note, *Fixing a Crack in the Wall of Separation: Why the Religion Clauses Preclude Adjudication of Sexual Harassment Claims Brought by Ministers*, 45 NEW ENG. L. REV. 719, 741 (2011) ("At a minimum, where a religious organization has a formal governing procedure for resolving sexual harassment disputes, civil courts must accept their decisions as final under *Watson* and *Milivojevich*.").

68. See Strasser, *supra* note 61, at 426 ("The cases in which church property was not at issue also suggest that the courts can play an active role in assuring that generally applicable laws are enforced, as long as those laws do not target religion. While none of these cases suggest that the courts should be making decisions about theology, they do suggest that religious institutions are not immune from generally applicable laws including non-discrimination laws, as long as the basis of the law is not religious in nature.").

*and School v. E.E.O.C.*<sup>69</sup> has modified the existing jurisprudence to offer much more robust immunity for religious institutions.<sup>70</sup>

*Milivojevich* reinforced two distinct prongs of the jurisprudence: (1) civil courts are not to dictate the authoritative interpretation of religious beliefs, customs, or policies, and (2) civil courts are not to determine who should lead religious groups.<sup>71</sup> The latter mandate was reaffirmed in *Hosanna-Tabor*, where the Court explained that “[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so . . . interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.”<sup>72</sup>

*Hosanna-Tabor* involved a minister’s suit for wrongful termination of employment.<sup>73</sup> The Court reasoned that an award of tort damages “would operate as a penalty on the Church for terminating an unwanted minister, and would be no less prohibited by the First Amendment than an order overturning the termination.”<sup>74</sup> The Court further held that because the Church’s decision to fire a minister “is the church’s alone,” whether or not “it is made for a religious reason,” the Church could not be subjected to tort liability for such an employment decision.<sup>75</sup>

The *Hosanna-Tabor* Court addressed a very narrow issue—“an employment discrimination suit brought on behalf of a minister, challenging her church’s decision to fire her.”<sup>76</sup> But at the same time, the Court expressly refused to address whether the Constitution “bars other

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69. 565 U.S. \_\_\_, 132 S. Ct. 694 (2012).

70. See Strasser, *supra* note 61, at 448 (“Some courts will read *Hosanna-Tabor* narrowly as only applying to certain employment actions, while other courts will read it as providing a broad-based immunity for religious institutions, even though such a broad-based immunity lacks grounding in past jurisprudence.”). For further discussion of *Hosanna-Tabor*, see *infra* notes 72–77 and accompanying text.

71. See *supra* notes 62–70 and accompanying text.

72. *Hosanna-Tabor*, 565 U.S. at \_\_\_, 132 S. Ct. at 706.

73. *Id.* at \_\_\_, 132 S. Ct. at 709 (“Perich continues to seek frontpay in lieu of reinstatement, backpay, compensatory and punitive damages, and attorney’s fees.”).

74. *Id.*

75. *Id.* (“Because Perich was a minister within the meaning of the exception, the First Amendment requires dismissal of this employment discrimination suit against her religious employer.”).

76. *Id.* at \_\_\_, 132 S. Ct. at 710.

types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers.”<sup>77</sup> Thus, the *Hosanna-Tabor* Court did not address the issue of concern here—whether or to what extent the Constitution bars suits against religious leaders for defamation or invasion of privacy. Lower courts have been have long attempted to address that issue but have thus far been unable to reach a consensus about the conditions under which such suits may proceed.

## II. ACTIONS ALLEGING DEFAMATION OR INVASION OF PRIVACY

Over the past several decades, lower courts have addressed the conditions under which tort actions could be brought against religious leaders for defamation or publication of private facts. Depending upon the jurisdiction, factors that have played a role in whether such suits could proceed include: (1) whether the injured individual was a member of the congregation,<sup>78</sup> (2) whether the allegedly injurious statement had a religious rather than secular meaning,<sup>79</sup> (3) whether there was a religious duty to make the public statement,<sup>80</sup> and (4) the identity of the audience hearing the statement.<sup>81</sup> However, courts have not yet agreed on a uniform approach, leading to inconsistent results and a jurisprudence without a firm foundation.

### A. Suits by Members of the Clergy

Several cases involve suits by members of the clergy claiming defamation or wrongful publication of private facts. Decisions have varied greatly with respect to the conditions, if any, under which clergy may bring such suits. Courts have also been unable to offer a principled foundation upon which some consensus can be reached. While courts have agreed, and will continue to agree, about the proper resolution of certain kinds of cases, they have made little headway in forming a

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77. *Id.*

78. *See* *Smith v. Calgary Christian Church*, 614 N.W.2d 590 (Mich. 2000); *Guinn v. Church of Christ of Collinsville*, 775 P.2d 766 (Okla. 1989).

79. *See* *Snyder v. Evangelical Orthodox Church*, 216 Cal. App. 3d 297 (Cal. Ct. App. 1989).

80. *See* *Westbrook v. Penley*, 231 S.W.3d 389 (Tex. 2007).

81. *See* *Guinn*, 775 P.2d 766.

jurisprudence that provides both consistency and fairness across a wide range of cases.

In *Alberts v. Devine*,<sup>82</sup> the Supreme Judicial Court of Massachusetts examined whether religious leaders were potentially liable for inducing a psychiatrist to reveal confidential information about a patient.<sup>83</sup> William Alberts, a minister, consulted a psychiatrist, Donald Devine, with the understanding that their discussion would be confidential.<sup>84</sup> Devine disclosed information to Bishop Carroll, or to his representative, about Alberts's diagnosis.<sup>85</sup> Carroll and the District Superintendent of the Conference, Barclay, communicated that information to numerous third parties.<sup>86</sup> Further, Carroll allegedly publicly express his belief, based on "competent consultation," that Alberts "was mentally ill and therefore unappointable."<sup>87</sup> Alberts was not reappointed as a minister of a church, allegedly as a result of these disclosures, thereby incurring "considerable loss of earning capacity and other financial losses, damage to his reputation, and great mental anguish requiring medical treatment."<sup>88</sup>

One issue was whether Devine was potentially liable for divulging privileged information.<sup>89</sup> A different issue of more relevance here was whether Alberts's superiors could be held liable for inducing a physician to reveal confidential information.<sup>90</sup> Holding that liability could be imposed against the religious leaders who had convinced the

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82. 479 N.E.2d 113 (Mass. 1985).

83. *Id.* at 113 ("Church minister brought action against his psychiatrist and two of his clerical superiors alleging that superiors had induced psychiatrist to disclose confidential information and had used that information to cause minister not to be reappointed.").

84. *Id.* at 116.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *See id.* at 118 (citing *Humphers v. First Interstate Bank*, 696 P.2d 527 (Or. 1985)) ("The Supreme Court of Oregon has recently held that a patient in that State has a civil right of recovery if a physician discloses without privilege confidential information obtained from the patient in the course of the physician-patient relationship. . . . Patients in Massachusetts deserve no less protection.").

90. *See id.* at 121 (describing the conditions under which an individual who "induces a physician wrongfully to disclose information about a patient, may be held liable to the patient for the damages that flow from that disclosure").

psychiatrist to reveal confidential information, the court explained that it was adopting “an application of the general rule that a plaintiff may hold liable one who intentionally induces another to commit any tortious act that results in damage to the plaintiff.”<sup>91</sup>

At issue here was whether the First Amendment immunized the actions of Alberts’s supervisors, who allegedly had a religious “duty to obtain information about Alberts’s mental and emotional well-being . . . .”<sup>92</sup> Further, there was an additional element to consider. As the Massachusetts court recognized, “the First Amendment prohibits civil courts from intervening in disputes concerning religious doctrine, discipline, faith, or internal organization.”<sup>93</sup> But if the courts were precluded from examining the internal governance structure, including whether Alberts would have been reappointed but for the wrongful disclosure of confidential information, then there would have been no way to establish that the economic harm associated with his non-reappointment had been caused by the breach of confidentiality.<sup>94</sup>

The *Alberts* court rejected that the church leaders were immune from suit,<sup>95</sup> reasoning that a “controversy concerning whether a church rule grants religious superiors the civil right to induce a psychiatrist to violate the duty of silence that he owes to a patient, who happens to be a minister, is not a dispute about religious faith or doctrine nor about church discipline or internal organization.”<sup>96</sup> The court’s point needs to be analyzed. Certainly, there may be a church rule imposing a *religious* duty on religious superiors to find out all they can about someone who wishes to be reappointed to the ministry, and whether such a religious duty exists is not a matter for the civil courts to determine.<sup>97</sup> However, a

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91. *Id.* (citing *inter alia* *Nelson v. Nason*, 177 N.E.2d 887 (Mass. 1961)).

92. *Id.* at 122.

93. *Id.* (citing *Jones v. Wolf*, 443 U.S. 595, 602 (1979)).

94. *See id.* (noting the defendants’ argument that “the principle enunciated in the cases cited above precludes judicial inquiry into the merit of Alberts’s claims against them and into the process by which the members of the church voted to retire Alberts”).

95. *See id.* (disagreeing with the defendants’ First Amendment preclusion argument).

96. *Id.*

97. *Id.* (citing *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952)) (“It is clear that the assessment of an individual’s qualifications to be a minister, and the



separate issue is whether the existence of such a religious duty translates into the existence of a civil right or, perhaps more felicitously, an immunity from suit for fulfilling that religious obligation. The latter issue is not itself a matter of faith, doctrine, or discipline, and thus is appropriately a matter for the civil court to decide, especially if there are important secular interests served by imposing tort liability in such a case.<sup>98</sup>

The Massachusetts court noted that a law “regulat[ing] or prevent[ing] religiously motivated conduct does not violate the First Amendment if the State’s interest in the law’s enforcement outweighs the burden that the law imposes on the free exercise of religion.”<sup>99</sup> Basically, the court made two points: (1) the existence of a religious duty does not automatically translate into either a civil duty or an immunity from civil liability for fulfilling one’s religious duty; and (2) whether the civil law can impose a burden on the fulfillment of religious duties depends on the importance of the implicated secular interests in discouraging individuals from performing the actions that would constitute fulfilling the duties at issue.<sup>100</sup>

The *Alberts* court also suggested that internal governance protections are not triggered by a “controversy concerning the causal connection between a psychiatrist’s disclosure of confidential information and a minister’s failure to gain reappointment . . . .”<sup>101</sup> But it is hard to see why that is so. Exactly what was at issue was the causal role played by the wrongfully divulged information in the decision not to reappoint *Alberts*, and that issue could not be resolved without delving into the process by which the reappointment decision was made. Suppose that *Alberts* would not have been reappointed in any event because of an overwhelming need to appoint someone with a fresh doctrinal perspective. In that event, the causal connection between the wrongful conduct and the denial of *Alberts*’s reappointment could not be established.

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appointment and retirement of ministers, are ecclesiastical matters entitled to constitutional protection against judicial or other State interference.”).

98. *See id.*

99. *See id.* at 123.

100. *See id.*

101. *See id.* at 122.

The *Alberts* court reasoned that “the First Amendment does not bar judicial inquiry into the church’s proceedings culminating in Alberts’s failure to gain reappointment.”<sup>102</sup> While it is unclear whether the *Alberts* court was accurately describing the jurisprudence prevailing at the time,<sup>103</sup> it is quite unlikely that such a view would pass constitutional muster today. *Hosanna-Tabor* suggests that courts are precluded from examining internal decision-making regarding ministerial employment. But unless courts are able to do so, it is difficult to understand how Alberts would be able to establish that the breach of confidentiality had in fact caused his not being reappointed, the *Alberts* court’s rejection of that argument notwithstanding.<sup>104</sup>

While the *Alberts* decision is still cited with approval,<sup>105</sup> a number of different aspects of the opinion should not be conflated, especially if one wishes to consider how a case like *Alberts* might be decided now. Consider a hypothetical case involving a minister, Balberts, who had been denied reappointment after her psychiatrist had divulged confidential information. Balberts might well have suffered compensable harm.<sup>106</sup> That is true, even if examining the internal processes of the

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102. *Id.* at 123.

103. Certiorari was denied in *Carroll v. Alberts*, 474 U.S. 1013 (1985) (mem.).

104. *Cf.* *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 565 U.S. \_\_\_, \_\_\_, 132 S. Ct. 694, 709 (quoting *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 119 (1952)) (“The purpose of the exception is not to safeguard a church’s decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful—a matter ‘strictly ecclesiastical,’—is the church’s alone.”).

105. *Heard v. Johnson*, 810 A.2d 871, 883 (D.C. 2002) (citing *Alberts*, 479 N.E.2d 113) (“Nor may a church seek confidential medical information from a pastor’s psychiatrist in making a reappointment determination as to that pastor.” citing *Alberts*, 479 N.E.2d 113); *Leary v. Geoghan*, No. 990371, 2000 WL 1473579, at \*2 (Mass. Super. June 28, 2000) (citing *Emp’t Div., Dep’t of Res. v. Smith*, 494 U.S. 872 (1990); *Alberts*, 479 N.E.2d at 122–23) (“[T]he fact that religious doctrine justifies conduct does not always and necessarily immunize that conduct from the sanction of civil law.”); *Tidman v. Salvation Army*, No. 01-A-01-9708-CV00380, 1998 WL 391765, at \*6 (Tenn. App. July 15, 1998) (citing *Alberts*, 479 N.E.2d 113) (“[T]he court held that inducing a physician to breach his patient’s confidence and divulge information to that patient’s church superiors did not enjoy First Amendment protection.”).

106. *Cf.* Jeffrey Shulman, *The Outrageous God: Emotional Distress, Tort Liability, and the Limits of Religious Advocacy*, 113 PENN ST. L. REV. 381, 397 (Fall

church to determine whether she would have been reappointed had there been no disclosure would be precluded under the current interpretation of constitutional guarantees.

Even if unable to sue for lost income, Balberts might be able to sue for emotional harm caused by the breach of confidentiality.<sup>107</sup> In addition, she might be able to sue for other harms as well. For example, the betrayal of confidence by her psychiatrist might adversely impact Balberts's ability to get well because she might find it difficult, if not impossible, to trust any therapist, thereby undermining the efficacy of the treatment that she would need to recover.<sup>108</sup> Depending upon the circumstances and the harms caused, punitive damages might be available as well.<sup>109</sup> All of these harms could be asserted without requiring an examination of the internal processes by which the reappointment decision had been made.

*Marshall v. Munro*<sup>110</sup> involved a claim by an ordained minister, Samuel Marshall, that he had been defamed by a religious leader, Neil Munro,<sup>111</sup> when Munro suggested that Marshall was not suitable as a pastor because Marshall "was divorced, was dishonest, was unable to

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2008) ("The *Alberts* court held, correctly in my view, that even if a rule imposed upon church authorities a duty to secure confidential medical information, the First Amendment does not preclude the imposition of liability for violations of physician-patient confidentiality.").

107. See *Gracey v. Eaker*, 837 So. 2d 348, 356 (Fla. 2002) ("[W]e can envision few occurrences more likely to result in emotional distress than having one's psychotherapist reveal without authorization or justification the most confidential details of one's life.").

108. See, e.g., *Burger v. Blair Med. Assocs., Inc.*, 964 A.2d 374, 380 (Pa. 2009) ("The harm arising from a breach [of the physician-patient relationship] entails not only the mental suffering due to exposure of private information, but also subsumes an erosion of an essential, confidential relationship between the health care services provider and the patient.").

109. Cf. *Randi v. Long Island Surgi-Ctr.*, 842 N.Y.S.2d 558, 565 (N.Y. App. Div. 2007) ("We decline to hold that, as a matter of law, the callous, reckless, or grossly negligent disregard of an individual's right to the privacy and confidentiality of sensitive medical information—a right protected by the declared public policy of this State (see Public Health Law § 2803-c[1], [3][f])—cannot be sufficiently reprehensible and morally culpable to support an award of exemplary damages . . .").

110. 845 P.2d 424 (Alaska 1993).

111. *Id.* at 425 ("Munro is the Executive Presbyter of the Presbytery of Yukon, Synod of Alaska Northwest, Presbyterian Church (USA).").

perform pastoral duties due to throat surgery, and had made an improper advance to a member of the Anchorage congregation.”<sup>112</sup> One of Munro’s duties was to respond to inquiries from other churches that were conducting searches for new pastors.<sup>113</sup> Because he had simply been performing his religious duty to respond to a church’s inquiry about Marshall, Munro claimed that civil authorities were precluded from deciding whether his comments about Marshall were actionable.<sup>114</sup>

While accepting that “employment disputes within churches are core ecclesiastical concerns outside the jurisdiction of civil courts,”<sup>115</sup> the Alaska Supreme Court rejected Munro’s assertion that the underlying dispute was simply about whether Marshall was qualified to be a pastor and hence was not appropriately considered by the court.<sup>116</sup> The court reasoned that there was no need for the civil courts to determine whether Marshall was a suitable pastor. Instead, the court would simply have to determine whether Munro had “actually said: 1) Marshall was divorced; 2) Marshall was dishonest; 3) Marshall had throat surgery disabling him as a pastor; and 4) Marshall made improper advances to a member of the congregation.”<sup>117</sup> Even if Munro had made these statements that would not end the matter because Munro might still have a defense. The court noted that if “Munro raises the defenses of truth and of privilege, the court need only determine if the facts stated were true and if Munro made the statements with malice (a reckless disregard for the truth or falsity).”<sup>118</sup>

Although “employment disputes within churches are core ecclesiastical concerns outside the jurisdiction of civil courts,”<sup>119</sup> there

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112. *Id.*

113. *See id.*

114. *Id.* at 427 (“Munro notes his official church duties require him to respond to inquiries from other churches which are considering ‘calling’ a particular pastor. Munro states that the Book of Order requires a pastor to be responsible for a quality of life and relationships that commend the gospel to all persons. He argues that these religious factors show this case is intertwined with ecclesiastical duties and warrant the court’s refusal to become involved.”).

115. *Id.* at 427 (footnote omitted).

116. *See id.* at 428 (“Munro’s attempt to characterize the dispute as being over Marshall’s qualifications as a pastor is unpersuasive.”).

117. *Id.*

118. *Id.* (footnotes omitted).

119. *Id.* at 427.

were a few reasons that this case did not seem to fall into the standard category of church employment disputes making it beyond the reach of the civil courts. First, Marshall had already been extended a contract,<sup>120</sup> so there was no need to examine the internal workings of the church to make a judgment about whether he was qualified to be a minister there. Second, Marshall had been told expressly that the contract was being rescinded because of Munro's derogatory comments,<sup>121</sup> obviating the need to delve into the internal governance procedures of the church to figure out the cause of the rescission. Finally, Marshall was not suing the church for breaking the contract; rather, he was suing Munro for the latter's allegedly malicious interference with an existing contract.<sup>122</sup>

The Alaska court did not offer a chronology of events.<sup>123</sup> For example, it is unclear whether Munro was asked for his opinion about Marshall's qualifications and, if so, whether that request was made before or after the employment agreement between Marshall and the church had been reached.<sup>124</sup> Munro testified that "his official church duties require him to respond to inquiries from other churches which are considering 'calling' a particular pastor,"<sup>125</sup> which at least suggests that he had received a call about Marshall before the church had extended the offer. On the other hand, Marshall was suing for defamation and intentional interference with contract,<sup>126</sup> which suggests that Munro already knew that the contract had been made when offering his assessment of Marshall's qualifications.

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120. *Id.* at 425 ("He accepted a position with the Hillwood Presbyterian Church of Nashville, Tennessee.").

121. *Id.* ("When Marshall presented himself to begin his employment, he was notified that because of derogatory information received from Munro, the church would not hire him as Pastor.").

122. *Id.* at 427 ("Marshall argues that . . . this case concerns . . . interference with contract.").

123. *See id.* at 424.

124. *Id.* at 425 ("Marshall . . . accepted a position with the Hillwood Presbyterian Church of Nashville, Tennessee. When Marshall presented himself to begin his employment, he was notified that because of derogatory information received from Munro, the church would not hire him as Pastor.").

125. *Id.* at 427.

126. *Id.* at 428 ("[T]he claims of defamation and interference with contract should not have been dismissed by the superior court.").

To be successful in his intentional interference with contract claim, Marshall would have to show:

- 1) a contract existed;
- 2) Munro knew of, and intended to interfere with the contract;
- 3) Munro did in fact interfere with the contract; and
- 4) Munro's interference caused Marshall's damages.<sup>127</sup>

This suggests that Marshall believed Munro already knew that the contract had been made, not that Munro's advice was being sought to help the church decide whether to hire Marshall. It seems clear that this was not the usual case where Munro had been asked his opinion by a church considering whether to call a particular pastor.

The trial court found that Munro had made the comments while performing his duty,<sup>128</sup> so those comments were presumably made in response to a request from the church. Perhaps the church had contracted with Marshall, but then had consulted Munro just to make sure that it had not made a mistake. If the church sought Munro's advice after explaining that the contract had already been offered and accepted, then Munro would have known of the existing contract and would not merely have been advising the church about the advisability of offering Marshall a contract. Prior existence of the contract notwithstanding, Munro had a conditional privilege to advise the church about Marshall.<sup>129</sup> However, that privilege would be waived if Munro knowingly and maliciously defamed Marshall.<sup>130</sup>

The defamation claim was to be analyzed in the following way: "The court needs to determine only if Munro actually said: 1) Marshall was divorced; 2) Marshall was dishonest; 3) Marshall had throat surgery disabling him as a pastor; and 4) Marshall made improper advances to a

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127. *Id.* (citing *Ran Corp. v. Hudesman*, 823 P.2d 646, 648 (Alaska 1991)).

128. *Id.* ("Judge Katz found Munro acted in the course of his duty.")

129. *Id.* at 429 ("Munro made his remarks while acting in the course of his duty . . . [which] provides Munro with a conditional privilege . . .").

130. *See id.* (citing Restatement (Second) of Torts §§ 596 cmt. e and 599-605A (1977) (noting that the "conditional privilege . . . is waived if Marshall can prove that Munro acted with actual malice")); *see also* *Tubra v. Cooke*, 225 P.3d 862, 873 (Or. Ct. App. 2010) (citing *Lewis v. Carson Oil Co.*, 127 P.3d 1207, 1210 (Or. Ct. App. 2006)) ("The burden then falls on the plaintiff to prove that the qualified privilege was abused—that is, that the defendant did not believe the statement to be true or lacked reasonable grounds for believing that it was true, or that the statement was made for a purpose outside the scope of the privilege.").

member of the congregation.”<sup>131</sup> If it could be proven that those assertions were made, then “the court need only determine if the facts stated were true and if Munro made the statements with malice (a reckless disregard for the truth or falsity).”<sup>132</sup> The Alaska Supreme Court explained that the defamation claim could be addressed without the trial court needing “to determine if Marshall was qualified to be a pastor or what those qualifications may be.”<sup>133</sup>

Munro continued to assert at trial that Marshall was divorced,<sup>134</sup> which seems surprising unless Munro had a copy of a record to that effect.<sup>135</sup> If Munro had been able to locate a divorce record, then it would have been surprising that Marshall was still claiming never to have been divorced. Assuming that Munro had not been able to locate such a record, his continuing to maintain that Marshall was divorced suggests that Munro subjectively believed that Marshall had divorced, even if there was no reasonable basis for such a belief.

Some courts have found *Marshall* not only unpersuasive but “internally inconsistent.”<sup>136</sup> Presumably, that is because the *Marshall* court both recognized that civil courts are constitutionally barred from

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131. *Marshall*, 845 P.2d at 428.

132. *Id.*

133. *Id.*; see also Chad Olsen, *In the Twenty-First Century's Marketplace of Ideas, Will Religious Speech Continue to Be Welcome?: Religious Speech as Grounds for Defamation*, 37 TEX. TECH L. REV. 497, 524 (2005) (footnote omitted) (“The court held that the plaintiff’s claim for defamation was improperly dismissed because the court did not need to involve itself in religious doctrine to resolve the plaintiff’s defamation claim.”); see also Arthur Gross Schaefer & Darren Levine, *No Sanctuary from the Law: Legal Issues Facing Clergy*, 30 LOY. L.A. L. REV. 177, 204 (1996) (footnote omitted) (“Clergy can be held personally responsible for their defamatory comments that injure a person’s reputation.”).

134. *Marshall*, 845 P.2d at 428 n.3 (“Munro maintains that Marshall was in fact divorced.”).

135. *Cf. Brown v. Gallia Cnty. Bureau of Vital Statistics*, No. 96CA3, 1996 WL 689759, at \*1 (Ohio Ct. App. Nov. 26, 1996) (footnote omitted) (“[A]n examination of the records maintained by the state of West Virginia, the Department of Health and Human Resources, Bureau of Public Health, Vital Registration Office failed to uncover any record of a divorce between Treva and Gary during the years 1980 to 1994. Moreover, the clerk for the Jackson County Circuit Court in Ripley, West Virginia, likewise failed to locate any record of a divorce between Treva and Gary ever having been filed in that county.”).

136. *Yaggie v. Ind.-Ky. Synod Evangelical Lutheran Church in Am.*, 860 F. Supp. 1194, 1199 (W.D. Ky. 1994).

delving into the process by which churches decide whether or not to hire clergy,<sup>137</sup> but nonetheless permitted the interference with contract claim to proceed.<sup>138</sup>

Yet, the *Marshall* position was not internally inconsistent depending upon the proper construction of the constitutional limitation on court examinations of internal church governance processes. In *Marshall*, the church had volunteered that Munro's comments had been the reason that Marshall's contract had been rescinded.<sup>139</sup> Accordingly, the court did not need to undertake its own examination of the church's internal processes. Further, because *Marshall* was not suing the church in any event, permitting this suit to go forward would not implicate the kinds of concerns that might be raised were the church itself subject to tort liability for its employment practices.<sup>140</sup>

That said, the court's confidence that it would be unnecessary to examine the internal workings of the church may have been misplaced. Suppose, for example, that a different member of the church had claimed that the contract was rescinded because members of the church had had second thoughts about having Marshall as their minister, and that those second thoughts were not entirely based on Munro's comments. In that event, the trier of fact would seem to be getting dangerously close to an examination of church governance, which *Hosanna-Tabor* precludes.<sup>141</sup>

Even if there was no conflicting testimony regarding why the church had had a change of heart, permitting liability to be imposed in this case might raise another difficulty. Those within a church hierarchy asked their views about a particular individual's suitability as a minister might be more circumspect if they feared that they were potentially liable for their comments. However, the court noted that those asked for their assessment of a particular individual still enjoyed a conditional privilege,

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137. *Marshall*, 845 P.2d at 427 (“[E]mployment disputes within churches are core ecclesiastical concerns outside the jurisdiction of civil courts.”).

138. *See id.* at 428 (“[T]he claims of defamation and interference with contract should not have been dismissed by the superior court.”).

139. *Id.* at 425 (“When Marshall presented himself to begin his employment, he was notified that because of derogatory information received from Munro, the church would not hire him as Pastor.”).

140. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. \_\_\_, \_\_\_, 132 S. Ct. 694, 709 (“Perich continues to seek frontpay in lieu of reinstatement, backpay, compensatory and punitive damages, and attorney's fees.”).

141. *See supra* notes 72–77 and accompanying text.



and their comments would be protected unless they were made recklessly or with knowledge of their falsity.<sup>142</sup>

Other cases have also involved misstatements about a minister, thereby (likely) resulting in his being denied employment. In *Drevlow v. Lutheran Church, Missouri Synod*,<sup>143</sup> the United States Court of Appeals for the Eighth Circuit considered whether a Synod could be sued for its allegedly defamatory statements about a minister, Drevlow, who was an ordained minister within the Synod.<sup>144</sup>

One of the services performed by the Synod was to maintain personal information files on ministers so that churches seeking to hire pastors would have a resource to help those churches in their decision-making.<sup>145</sup> “Without consulting Drevlow or verifying the accuracy of its information, the Synod placed a document in [his] file [falsely] stating that his spouse had previously been married.”<sup>146</sup>

Drevlow claimed that because churches would not hire someone if his “personal file show[ed] that his spouse ha[d] been divorced, the Synod [had] effectively precluded him from being hired.”<sup>147</sup> He noted that notwithstanding his being established in his profession and notwithstanding that “over three hundred churches were in need of a pastor,” he was unable to secure employment.<sup>148</sup> He further explained that he received an offer and became a pastor once the false information was removed from his file.<sup>149</sup>

In addition to damages for harm to his reputation, Drevlow sought compensation for his lost income for the period during which false information had circulated about his spouse.<sup>150</sup> However, the Synod argued that it would be impossible for him to show lost employment because that would involve the court’s delving into his marketability as a

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142. *Marshall*, 845 P.2d at 428 (“Marshall must also show that the statements were not privileged or justified.”).

143. 991 F.2d 468 (8th Cir. 1993).

144. *Id.* at 469.

145. *Id.*

146. *Id.*

147. *Id.* at 470.

148. *Id.*

149. *Id.* at 472.

150. *Id.* at 470 (“He seeks damages for his loss of income during the time that the Synod circulated the false information about his spouse and for his loss of public confidence and social intercourse.”).

pastor,<sup>151</sup> notwithstanding that he was on the list of “eligible ministers.”<sup>152</sup> The court remanded the case, cautioning the district court that it “must exercise care to ensure that the evidence presented at trial is of a secular nature.”<sup>153</sup> The Eighth Circuit explained that if the “matter cannot be resolved without interpreting religious procedures or beliefs, the district court should reconsider the Synod’s motion to dismiss.”<sup>154</sup>

At least one question would be whether Drevlow would have to identify the particular church that would have hired him had the false information not been wrongly included in his file. Because Drevlow would be barred from examining internal processes of individual congregations deciding whether to hire a particular minister, it would be very difficult, if not impossible, to show that he in fact would have been hired but for that false information. The Eighth Circuit did not address whether Drevlow would be permitted to argue that he was more likely than not wrongly precluded from getting a job at one of the three hundred churches looking for a pastor,<sup>155</sup> and should be compensated by computing the average salary at those churches that had been looking for a pastor (assuming that the salary information itself was available).

A different issue was whether Drevlow could recover for reputational harms. Courts have noted that statements that would not be defamatory if expressed about a lay individual might nonetheless be defamatory if expressed about a minister.<sup>156</sup> Further, there would be no need in a defamation action to examine internal church procedures and beliefs to determine whether his having been falsely accused of having married a divorcee was defamatory.<sup>157</sup> Thus, it might seem that someone

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151. *Id.* at 471 (“The Synod argues, however, that the First Amendment precludes Drevlow from proving at trial that this false information kept him from obtaining employment as a pastor. According to the Synod, any assessment of Drevlow’s claim for loss of income would necessitate a forbidden inquiry into Drevlow’s marketability as a pastor.”).

152. *Id.* at 472.

153. *Id.*

154. *Id.*

155. *Id.* at 470.

156. *E.g.*, *Murphy v. Harty*, 393 P.2d 206, 214 (Or. 1964) (citations omitted) (“It is accepted doctrine, however, that words may be actionable when used with respect to a clergyman although the same words would not be actionable if used of others . . .”).

157. *See id.*

like Drevlow could recover damages for such a false allegation, even if he could not recover for the economic damages associated with his never having been hired during the period such allegations were published.

Yet, courts have sometimes suggested that ministers may be barred from bringing a defamation action against a Synod.<sup>158</sup> For example, *Farley v. Wisconsin Evangelical Lutheran Synod*,<sup>159</sup> the plaintiff-minister argued that “resolution of his defamation claim would implicate no concern expressed in the First Amendment because an inquiry into the dispute requires no examination of church procedures or ecclesiastical decisions.”<sup>160</sup> The Wisconsin District Court rejected that contention,<sup>161</sup> although the court did suggest that “factual scenarios might exist where resolution of a defamation action against a religious organization would not require the court to undertake an inquiry in violation of the First Amendment.”<sup>162</sup>

Numerous courts have recognized the importance of preventing the state from interfering in the choice of clergy, and there is strong support in the Supreme Court’s jurisprudence suggesting that the First Amendment bars the state from deterring who will lead a church. However, courts have interpreted the bar on the state’s deciding ecclesiastical matters much too broadly, greatly exceeding the limitations imposed by the Constitution.

Consider *Downs v. Roman Catholic Archbishop of Baltimore*,<sup>163</sup> which involved a claim by Stephen Downs that his having been defamed

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158. See *Farley v. Wis. Evangelical Lutheran Synod*, 821 F. Supp. 1286 (D. Minn. 1993) (dismissing a defamation claim brought by a minister against Synod on First Amendment grounds); *Yaggie v. Ind.-Ky. Synod Evangelical Lutheran Church in Am.*, 860 F. Supp. 1194 (W.D. Ky. 1994) (holding that the First Amendment precludes a defamation suit by a minister against Synod). By the same token, some courts have rejected that a defamation action can be brought against other religious parties. See, e.g., *Jackson v. Presbytery of Susquehanna Valley*, 686 N.Y.S.2d 273, 274 (N.Y. Sup. Ct. 1999) (holding that there was no subject matter jurisdiction in “a defamation action brought by a Presbyterian Minister against a Presbytery, a church and four other Presbyterian Ministers”).

159. 821 F. Supp. 1286 (D. Minn. 1993).

160. *Farley*, 821 F. Supp. at 1290.

161. *Id.* (“The court determines that such an inquiry would implicate the concerns expressed in the First Amendment. Based on that determination, the court concludes that it has no jurisdiction over this matter.”).

162. *Id.*

163. 683 A.2d 808 (Md. Ct. Spe. App. 1996).

caused him to be denied ordination.<sup>164</sup> Allegedly, Reverend John Wielebski “made and published false and defamatory statements respecting the Plaintiff’s honesty, reliability, integrity and morality, specifically, asserting sexually motivated conduct toward certain staff members of St. Patrick’s Parish in Cumberland, Maryland.”<sup>165</sup> Downs further alleged that “the other defendants repeated and republished ‘said defamatory allegations’ with knowledge of their falsity and ‘with the intent to harm the Plaintiff’s chances for ordination to the priesthood.’”<sup>166</sup>

The court noted that appellant had not informed the court “of the exact language—the precise statement—made by any of the defendants.”<sup>167</sup> For example, the court could not tell “what conduct was alleged or whether, if committed, it would have been unlawful.”<sup>168</sup> Yet, the Maryland Court of Appeals’ subsequent analysis made clear that the court was not focused on whether the conduct of which Downs had been accused violated the law. Instead, the court noted that it “is apparent from these allegations, and the inferences that must necessarily be drawn from them, that the very heart of the action is a decision by appellant’s clerical supervisors to prevent him from becoming a priest.”<sup>169</sup> Because the defamatory statements “evidenc[ed] a determination on their part—whether valid and fair or invalid and unfair—that appellant was not a suitable candidate for the priesthood,”<sup>170</sup> the court believed the statements were protected. “That the offensive conduct was so directed is what brings this case squarely within the protective ambit of the First Amendment.”<sup>171</sup> But this suggests that the speech was protected regardless of whether or not the alleged actions were criminal. This is an amazingly broad conferral of immunity because it suggests that as long as the aim is to speak about the individual’s alleged qualifications to be a member of the ministry, the comments will be immune from tort

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164. *Id.* at 810.

165. *Id.* (internal quotation marks omitted).

166. *Id.*

167. *Id.* at 813.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

damages— even if the charges are known to be false and made maliciously.

The *Downs* court suggested that “the allegedly defamatory statements were made in the context of a conclusion by the Church hierarchy that appellant was not suitable to be a priest.”<sup>172</sup> The court did not discuss whether anyone outside of the Church hierarchy heard the statements, although the plaintiff had asserted that he had “learned from an individual who wishe[d] to remain anonymous that the defendant” Reverend Wielebski had made defamatory comments about him.<sup>173</sup> Presumably, it was that same unnamed informant who had reported that the other defendants had “repeated and republished”<sup>174</sup> those defamatory statements with knowledge of their falsity. But if the individual reporting the conversations was not a member of the church hierarchy, then the statements about Downs might have lost their immunity— even if they in fact were about his suitability as a priest.

By the same token, the court did not discuss whether the allegedly defamatory comments were only made in the context of discussions about whether Downs should be ordained or, instead, were made in a variety of contexts. Allegedly, there were several meetings during which these comments were stated or repeated.<sup>175</sup> But stating or repeating defamatory comments outside of the context of a discussion about Down’s suitability for ordination would be the basis for damages rather than for immunity.

Consider *Ogugua v. Archdiocese of Omaha*,<sup>176</sup> which involved, *inter alia*, a defamation claim after an email was allegedly sent to the parishioners at the Saint Vincent De Paul Church stating that the plaintiff has been “reassigned to another church due to ‘serious concerns . . . [resulting from] meetings with Father Kampschneider and Father Bart throughout the past year.’”<sup>177</sup> Citing *Drevlow*<sup>178</sup> and distinguishing

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172. *Id.*

173. *Id.* at 810.

174. *Id.*

175. *Id.*

176. No. 8:07CV471, 2008 WL 818935 (D. Neb. Mar. 24, 2008).

177. *Id.* at \* 1.

178. *Id.* at \*5 (citing *Drevlow v. Lutheran Church, Missouri Synod*, 991 F.2d 468 (8th Cir. 1993)).

*Downs*,<sup>179</sup> the district court noted that the allegedly defamatory statements made in this case were not only made in an appointment or retention process within the church.<sup>180</sup> Rather, in refusing to dismiss the case,<sup>181</sup> the *Ogugua* court suggested that it would revisit the First Amendment concerns if it turned out that the allegations of defamation could not be assessed without becoming entangled in matters involving religious doctrine or practice.<sup>182</sup>

In *Cha v. Korean Presbyterian Church of Washington*,<sup>183</sup> a former pastor of a church sued certain senior members of the congregation for defamation. Cha and various church members believed that “an independent auditor should be retained to review the financial records of the church, the Sejong Korean School, and the Washington Theological Seminary,”<sup>184</sup> at least in part, because some of the congregants “suspected ‘that certain Church members and Church leaders had participated in financial impropriety with regard to funds belonging to the Church, the Sejong Korean School and the [Washington Theological Seminary].’”<sup>185</sup> Cha testified that he was later informed that “his future employment at the Church was in jeopardy if he did not cease his advocacy of full disclosure of the Church’s financial records.”<sup>186</sup> A few months later, during a meeting of the church’s deacons, Cha was accused of having borrowed more than \$100,000 from the Church without repaying the loan, although there apparently was no proof to back up such an allegation.<sup>187</sup>

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179. *Id.* at \*4 (citing *Downs v. Roman Catholic Archbishop of Baltimore*, 683 A.2d 808 (Md. Ct. Spec. App. 1996)).

180. *See id.* at \*4–5 (“As *Ogugua* notes, however, [*Downs*] involved defamation claims based on the defendants’ statements questioning the plaintiffs’ fitness to serve as members of the clergy. The courts concluded that judicial inquiry into the selection or retention process for clergy would be impermissible under the First Amendment.”).

181. *Id.* at \*4 (“At this stage of the proceedings, *Ogugua* has met his burden of demonstrating that jurisdiction is proper.”).

182. *Id.* at \*5 (“If further proceedings reveal that this matter cannot be resolved without interpreting religious procedures or beliefs, this Court will entertain the appropriate motion at such time.”).

183. 553 S.E.2d 511 (Va. 2001).

184. *Id.* at 513.

185. *Id.*

186. *Id.*

187. *Id.*

The court understood that the allegation, if untrue, would be defamatory because defamatory words are actionable if they “impute to a person unfitness to perform the duties of an office or employment of profit, or want of integrity in the discharge of the duties of such an office or employment”<sup>188</sup> or if they “prejudice such person in his or her profession or trade.”<sup>189</sup> However, the court believed that “the plaintiff’s allegations of defamation against the individual defendants cannot be considered in isolation, separate and apart from the church’s decision to terminate his employment.”<sup>190</sup> Here, too, “[t]he individual defendants who purportedly uttered defamatory remarks about the plaintiff were church officials who attended meetings of the church’s governing bodies that had been convened for the purpose of discussing certain accusations against the plaintiff.”<sup>191</sup> However, the court noted that if a civil court were to exercise jurisdiction over such a case, “the court would be compelled to consider the church’s doctrine and beliefs because such matters would undoubtedly affect the plaintiff’s fitness to perform pastoral duties and whether the plaintiff had been prejudiced in his profession.”<sup>192</sup> But it is not clear why that is so. If there were damages even excluding the lost income due to Cha’s having been fired, then there would have been no need to examine church doctrine and beliefs to see whether the firing was justified.<sup>193</sup>

While the *Cha* court noted that those making the comments belonged to the church hierarchy,<sup>194</sup> the court’s justification would immunize defamatory statements related to a pastor’s fitness to serve—even if the individuals making the comments were not members of the church hierarchy. But even discussions about public officials in the performance of their official duties can be the basis for defamation

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188. *Id.* at 516 (citing *Perk v. Vector Res. Grp. Ltd.*, 485 S.E.2d 140, 144 (Va. 1997)).

189. *Id.* (citing *Perk*, 485 S.E.2d at 144).

190. *Id.*

191. *Id.*

192. *Id.*

193. *See supra* notes 105–09 and accompanying text (discussing the defamation damages that might be awarded to a minister excluding the lost income resulting from the minister having been fired).

194. *Id.* at 513 (“During a meeting of the church’s deacons . . . defendant Do Sik Ko [made allegedly defamatory remarks] ‘to the [p]laintiff and the entire meeting of Deacons.’”).

damages under some circumstances,<sup>195</sup> and it is not at all clear that the Constitution imposes a tougher standard for ministers.

In *Duncan v. Peterson*,<sup>196</sup> a minister, Richard Duncan, sued Erwin Lutzer, the senior pastor at Duncan's former church for false light invasion of privacy.<sup>197</sup> Peterson had sent a bundle of letters to board members at Hope Church, a church that Duncan founded.<sup>198</sup> Duncan was accused, *inter alia*, of having an improper relationship with a divorced single woman and misusing alcohol.<sup>199</sup> Duncan's wife had filed for divorce,<sup>200</sup> and his children's guardian ad litem had shown him a copy of the letter containing these allegations even before Duncan had received his own copy.<sup>201</sup>

The Moody Church ordained Duncan,<sup>202</sup> and decided to rescind its licensing and ordination based on the charges that had been made against Duncan.<sup>203</sup> The defendant had argued that the First Amendment "precludes the judiciary from involving itself in matters within the church, including the Moody Church's decision to revoke plaintiff's ordination and its conduct of disseminating the letters regarding the revocation of plaintiff's ordination."<sup>204</sup> However, the court reasoned that the First Amendment "provides that civil courts may not determine the correctness of interpretations of canonical text or some decisions relating

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195. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) ("The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.").

196. 947 N.E.2d 305 (Ill. App. Ct. 2011).

197. See *id.* at 309.

198. *Id.*

199. *Id.* at 310.

200. *Id.* at 309.

201. See *id.* at 311 ("Before plaintiff received his own copy of the . . . letter, his children's guardian ad litem showed him a copy of the letter at a dissolution proceeding.").

202. *Id.* at 309 ("In 1989, plaintiff was ordained as a minister by the Moody Church.").

203. *Id.* at 310.

204. *Id.* at 311–12.



to government of the religious polity; rather, courts must accept as given whatever the religious entity decides.”<sup>205</sup>

At issue here, however, was “whether defendant invaded plaintiff’s privacy by placing him in a false light when defendant disseminated to individuals who were not members of the Moody Church a bundle of letters regarding plaintiff’s conduct.”<sup>206</sup> Because the allegations were made to individuals who were not part of the Church, “the letters were not transmitted only within the Moody Church, [and] the subject matter of the dispute does not concern matters internal to the Moody Church.”<sup>207</sup> Arguably, interchurch communications might be protected depending upon the relationship between the churches. Here, however, because “the Moody Church has no authority over Hope Church . . . the dissemination of the letters at issue was not an internal procedure of the Moody Church.”<sup>208</sup>

A different question was raised, namely, whether the opinions articulated in the documents were themselves religious opinion and thus protected.<sup>209</sup> However, the court reasoned that the allegations were stated as fact and not as opinion.<sup>210</sup> Further, even if it might have been believed that there was a conditional privilege to report these allegations, the jury had found below that these allegations were made with knowledge of their falsity or with a reckless disregard for their truth.<sup>211</sup> The *Duncan* court recognized that false statements made with actual malice might be actionable even if they spoke to a minister’s qualifications to serve.<sup>212</sup>

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205. *Id.* at 312 (citing *Serbian East. Orthodox Diocese for the U.S. of Am. & Canada v. Milivojevich*, 426 U.S. 696, 709 (1976)).

206. *Id.* at 313.

207. *Id.*

208. *Id.* at 314.

209. *Id.* (“[D]efendant asserts that, because the contents of the letter are religious opinions and cannot be proved false, no false-light-invasion-of-privacy claim can be sustained, no matter how derogatory the contents of the letters might be.”).

210. *Id.* at 314–15 (“The April 23, 2000, letter stated all accusations contained within it as fact, not as opinion.”).

211. *Id.* at 316 (“[T]he jury found that, when the letters were sent, defendant knew that they contained false statements or he acted in reckless disregard for whether any statements were false.”).

212. *See id.* at 314, 319 (affirming trial court damage award to minister who claimed false light invasion of privacy, where the ecclesiastical abstention doctrine was found not to apply).

Among the issues in *Bilbrey v. Myers*<sup>213</sup> was a claim by Darrel Bilbrey that he had been defamed by David Myers, his pastor.<sup>214</sup> Bilbrey and Myers had a business and personal relationship outside the church.<sup>215</sup> Myers sponsored Bilbrey to become a minister.<sup>216</sup> At one point, Bilbrey confided to Myers that as a teenager he had been called a faggot by an authority figure.<sup>217</sup> On a different occasion, Myers asked Bilbrey if he was gay.<sup>218</sup> Bilbrey responded in the negative.<sup>219</sup> The relationship between the two men later deteriorated.<sup>220</sup>

On several occasions, Myers told members of the church that Bilbrey was gay,<sup>221</sup> including the father of Bilbrey's fiancée.<sup>222</sup> Myers suggested that Bilbrey call off his marriage and move out of state.<sup>223</sup> Bilbrey did the latter, attempting to transfer his pastor's license from Florida to Michigan.<sup>224</sup> After Bilbrey had moved, Myers told Bilbrey's new pastor that Bilbrey was gay.<sup>225</sup> The court explained that although some courts "refuse to adjudicate most tort claims against religious institutions, finding such claims barred because the conduct giving rise to the claim is inextricably entangled with church polity and administration,"<sup>226</sup> many courts:

have adopted a narrower view of the doctrine and hold that the rights guaranteed by the First Amendment are not violated if the tort claims can be resolved through the application of 'neutral principles' of tort law, particularly where there is

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213. 91 So. 3d 887 (Fla. Dist. Ct. App. 2012).

214. *See id.* at 889.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.* at 891 (citing *Ind. Area Found. of the United Methodist Church, Inc. v. Snyder*, 953 N.E.2d 1174 (Ind. Ct. App. 2011)).

no allegation that the conduct in question was part of a sincerely held religious belief or practice.<sup>227</sup>

The court went on to explain that the “First Amendment does not grant Myers . . . carte blanche to defame church members and ex-members.”<sup>228</sup> The court suggested that “the statement that a person is a homosexual [is] potentially defamatory outside the context of any religious doctrine or practice,”<sup>229</sup> and held that Bilbey’s defamation “can be adjudicated without implicating the First Amendment and was improperly dismissed on the basis of the church autonomy doctrine.”<sup>230</sup>

Bracketing whether allegations of an individual’s having a same-sex orientation are defamatory,<sup>231</sup> one of the points made by the *Bilbey* court was that the clergy should not be thought immune from suit for their defamatory comments about current or former church members. Here, the court was following the reasoning of a different Florida appellate court. In *House of God Which Is the Church of the Living God, the Pillar and Ground of the Truth Without Controversy, Inc. v. White*,<sup>232</sup> a parishioner, Ashanta White, sued her church and pastor after her pastor, Semmie Taylor, “called her a ‘slut’ while standing at the church altar in front of other clergy and parishioners.”<sup>233</sup> The appellate court dismissed the action against the church but not against the pastor.<sup>234</sup>

The courts seem to have adopted the following approach even with respect to knowingly false allegations involving the clergy. If those statements were not made within the church, then liability may be imposed if a conditional privilege can be defeated because the false statements were made with actual malice. However, if those statements were made within the context of internal church deliberations about whether to hire or retain a minister, civil courts are precluded from

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227. *Id.* (citing *Malicki v. Doe*, 814 So. 2d 347, 358 (Fla. 2002)).

228. *Id.* at 892.

229. *Id.*

230. *Id.* (citing *House of God Which is the Church of the Living God, the Pillar and Ground of the Truth Without Controversy, Inc. v. White*, 792 So. 2d 491, 495 (Fla. Dist. Ct. App. 2001)).

231. *See Davis v. Fred’s Appliance, Inc.*, 287 P.3d 51, 61 (Wash. Ct. App. 2012) (“[I]mputation of homosexuality is not defamatory per se.”).

232. 792 So. 2d 491 (Fla. Dist. Ct. App. 2001).

233. *Id.* at 492.

234. *Id.* at 495.

entering the fray, even assuming that the comments at issue involved purely secular matters and were intentional fabrications.

Civil courts must defer with respect to interpretation of religious matters. However, according immunity to false and malicious comments that might speak to a pastor's suitability is neither constitutionally mandated nor good public policy. While it is fair to suggest that discussion as a general matter should not be chilled when matters concerning the appointment of spiritual leaders is at issue, malicious falsehoods should not be protected.

A separate issue involves damages. In almost all cases, it will be too difficult to tell whether even defamatory comments were the cause of a minister not being hired or rehired. But that difficulty goes to whether economic damages can be assessed rather than to whether a particular cause of action is justiciable. A minister can be harmed by defamatory comments even bracketing his loss of employment, just as a parishioner can be harmed by defamatory comments. Indeed, in considering what kinds of damages might be awarded to a defamed minister, it may be helpful to consider the approaches taken in cases involving allegations by parishioners of defamation or publication of private facts.

#### *B. Suits by Current and Former Congregants*

In several cases, current or former parishioners have sued for defamation or for publication of private facts. In the defamation cases, the courts have considered whether the allegedly false information was expressed for a religious purpose or was too closely aligned with church governance. In the publication of private facts cases, the courts take a number of approaches, including an actual or implied consent model, where the parishioner is assumed to have consented to public humiliation as an appropriate punishment for wrongdoing. At other times, the courts focus on whether the expressions were made for a religious purpose, and then try to balance the burdens on religious exercise with the harms to the individual. While some courts have struck a reasonable balance weighing the competing interests, other courts have afforded overbroad immunity to statements that simply should not be immunized.

### 1. Defamation of Current or Past Congregants

The cases involving defamation of congregants have involved a variety of scenarios and have not yielded a clear approach. Courts may focus on the breadth of the audience, the context in which the charge was uttered, and the degree to which the allegation requires an interpretation of religious doctrine. However, because courts differ so much about which factors are important and how much weight the factors should be given, the current jurisprudence cannot consistently protect anyone's interests.

In *Brewer v. Second Baptist Church of Los Angeles*,<sup>235</sup> the California Supreme Court discussed the merits of a defamation action brought by two former members of the congregation.<sup>236</sup> Charges had been leveled in front of the congregation that Reverend A. L. Brewer and Mr. Eugene Fisher were "willing to lie in order to injure their church,"<sup>237</sup> and each was accused of being "associated with one who, 'under the role of a minister of Jesus, is one of Satan's choicest tools.'"<sup>238</sup> The court noted that "[t]he charges were designed to injure plaintiffs' reputations in the church and to cause them to be shunned and avoided [and that the] . . . language was aptly chosen for this purpose."<sup>239</sup>

The jury found that the charges were false, a finding upheld on appeal.<sup>240</sup> The California Supreme Court noted that "[o]rdinarily, the common interest of the members of a church in church matters is sufficient to give rise to a qualified privilege to communications between members on subjects relating to the church's interest."<sup>241</sup> However, that conditional privilege is defeated if it can be established that the false charges were maliciously motivated or had no reasonable basis in fact.<sup>242</sup>

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235. 197 P.2d 713 (Cal. 1948) (en banc).

236. *Id.* at 715.

237. *Id.* at 717.

238. *Id.*

239. *Id.*

240. *Id.* ("The evidence was sufficient to warrant the jury's concluding that the charges were false.").

241. *Id.* (citing *Slocinski v. Radwan*, 144 A. 787 (N.H. 1929)).

242. *Id.* at 718 ("The question then is whether the evidence is sufficient to support the implied finding of the jury that defendants were motivated by a malicious or other improper motive or published their charges without reasonable grounds for believing them.").

The court upheld the verdicts against Reverend J. Raymond Henderson, the pastor of the church, and John Hilton and R. A. Hudson, the chairman and secretary of the board of deacons respectively.<sup>243</sup>

In *Brewer*, the membership had “voted to withdraw ‘the hand of fellowship’ from plaintiffs and expel them from the church,”<sup>244</sup> after the charges had been read, which means that the defamatory statements had been made while the individuals were still members of the church. *Brewer* suggests that defamatory comments made about current church members are not immunized from review, although one of the issues dividing courts has been whether the timing of the alleged defamatory publication might immunize a religious speaker from suit.<sup>245</sup>

In *Schoenhals v. Mains*,<sup>246</sup> a couple sued a pastor and church for defamation.<sup>247</sup> In August 1988, Larry Schoenhals “executed a guaranty to [a bank] for the payment of . . . certain church debts, liabilities, and obligations of the Church.”<sup>248</sup> A little over a year later, he was “notified that the church had been late in making several payments.”<sup>249</sup> At that point, the couple discontinued their contact with the church and retained an attorney, although they never informed the church of their intent to end their membership.<sup>250</sup> The Schoenhals’ attorney sent a letter to the

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243. *See id.* at 715.

244. *Id.*

245. *Compare* Paul v. Watchtower Bible & Tract Soc’y of New York, Inc., 819 F.2d 875, 883 (9th Cir. 1987) (“Providing the Church with a defense to tort is particularly appropriate here because Paul is a former Church member. Courts generally do not scrutinize closely the relationship among members (or former members) of a church. Churches are afforded great latitude when they impose discipline on members or former members.”) *with* Hadnot v. Shaw, 826 P.2d 978, 987–88 (Okla. 1992) (“Parishioners admit that at no time during or after the proceedings at issue did they withdraw their Church membership. Thus the Church retained full subject matter and personal jurisdiction to adjudicate the two disciplinary cases against the parishioners. Upon excommunication, and while a parishioner remains under the church discipline, the ecclesiastical tribunal impliedly relinquishes the power of judicature over the parishioner for any other or future conduct, yet retains cognizance over the previously adjudicated matter for the purpose of implementing any extant ecclesiastical sanction.” (emphasis added)).

246. 504 N.W.2d 233 (Minn. Ct. App. 1993).

247. *Id.* at 234.

248. *Id.*

249. *Id.*

250. *Id.*

pastor of the church, Ronald Mains, asking that the Schoenhals be released from their guaranty.<sup>251</sup>

A month and a half after receipt of the letter requesting release, the pastor read a letter to the congregation in which he set out the following reasons for the termination of their memberships:

1. A lack of financial stewardship with consistency and faithful tithing and offering over a given period of time.
2. A desire on your part to consistently create division, animosity and strife in the fellowship.
3. Direct fabrication of lies with the intent to hurt the reputation and the establishment of Faith Tabernacle of Truth Church and congregation.
4. Backbiting, railing accusations, division, lying, are some of the most serious sins found in the Bible. Where, by all appearances and related conversations, you have fallen into all of the categories.<sup>252</sup>

The court noted that “[w]hile Mains’ statement that the Schoenhals had engaged in ‘[d]irect fabrication of lies with the intent to hurt the reputation and the establishment’ of the Church appears unrelated to church doctrine on its face, the statement nevertheless relates to the Church’s reasons and motives for terminating the Schoenhals’ membership.”<sup>253</sup> Because “the Schoenhals’ claim clearly involves an internal conflict within the Church,”<sup>254</sup> the court’s delving into such matters for purposes of determining whether defamation damages should be awarded was “precluded by the First Amendment.”<sup>255</sup>

*Schoenhals* affords robust immunity to religious organizations. At issue here was not the “freedom of a religious organization to select its ministers”<sup>256</sup> or “a religious group’s right to shape its own faith and mission through its appointments.”<sup>257</sup> Nor did it involve “extensive

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251. *Id.*

252. *Id.* at 234.

253. *Id.* at 236.

254. *Id.*

255. *Id.*

256. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. \_\_\_, \_\_\_, 132 S. Ct. 694, 705 (2012).

257. *Id.* at 706.

inquiry by civil courts into religious law and polity.”<sup>258</sup> Instead, at issue were allegedly defamatory statements about a founding member of a church. If immunity is afforded whenever there is an internal division about anything related to the church, then leaders of religious organizations have been afforded broad immunity to defame congregants who challenge their administration. Certainly, *Brewer* would have been decided differently had California followed the rule suggested by the *Schoenhals* court.<sup>259</sup>

In *First United Church, Inc. v. Udofia*,<sup>260</sup> two former members of a church and four non-members brought suit against several church members for defamation.<sup>261</sup> At a New Year’s Eve church service, the defendants allegedly “intentionally and maliciously announced, or instigated an announcement, to the congregation that each of the plaintiffs ‘was a witch and had practiced evil deeds upon family and fellow Church members.’”<sup>262</sup> The evil deeds were alleged to include “practicing witchcraft, acts of bodily harm, thievery, causing infertility, stealing United States government files to harm a fellow member, and child abuse.”<sup>263</sup> The Georgia appellate court reasoned that the trial court had jurisdiction to hear this case because the plaintiffs “sought a civil remedy for a civil wrong, the violation of their civil right not to be publicly slandered, and this required no entanglement with the internal affairs of a religious organization.”<sup>264</sup> However, the trial court could only consider the harm caused by certain allegedly defamatory statements—child abuse, thievery, inflicting bodily harm, and stealing government documents—because those violated Georgia law.<sup>265</sup> A false accusation of lawbreaking constitutes slander<sup>266</sup> and would not be protected.<sup>267</sup> The

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258. *Serbian Eastern Orthodox Diocese for the U.S. of Am. & Canada v. Milivojevich*, 426 U.S. 696, 709 (1976).

259. *See supra* notes 235–45 and accompanying text.

260. 479 S.E.2d 146 (Ga. Ct. App. 1996).

261. *Id.* at 148.

262. *Id.*

263. *Id.*

264. *Id.* at 149.

265. *See id.* (“Child abuse, inflicting bodily harm, thievery, and stealing government files constitute crimes under the law of Georgia.”).

266. *See id.* (“To falsely accuse one of committing a crime constitutes the tort of slander.” (citing GA. CODE ANN. § 51-5-4(a)(2) (West 2013))).



appellate court explained that, “as to all charges against plaintiffs except that they were witches and practiced witchcraft, the complaint stated a cause of action which the court was competent to adjudicate.”<sup>268</sup> However, because the witchcraft charges “related to religious faith, belief, and practice,”<sup>269</sup> they could not be considered by the civil courts.

The *Udofia* court did not expressly discuss one of the ramifications of its decision; namely, that the plaintiffs’ remedy would be severely limited. The plaintiffs had argued “the accusations have subjected them to ridicule, contempt, and ostracism among the Nigerian community in Atlanta and in their home states in Nigeria, resulting in some instances in substantial business losses.”<sup>270</sup> But the court’s ruling meant that the very accusations causing the damage could not be the basis for recovery.

The Georgia appellate court noted that the plaintiffs considered the “statements that they are witches and practice witchcraft” to be “civilly slanderous.”<sup>271</sup> However, because truth is a defense, the Georgia court explained that to “try the truth of such charges would harken back to the early days of this nation’s life, when the treachery of witchcraft trials blackened judicial dockets.”<sup>272</sup> Rather than permit the truth of a witchcraft charge to be adjudicated, the court reasoned that it would be better to make such a charge immune from suit.<sup>273</sup>

The trial court had “rejected the challenge to subject matter jurisdiction,”<sup>274</sup> reasoning that “the statements . . . [were] not strictly an ecclesiastical matter.”<sup>275</sup> However, the appellate court offered the following direction to the trial court: “To the extent that damages were bottomed on slander for charging plaintiffs with being witches and practicing witchcraft, it was error. To the extent that damages were founded on charges of crime, it was not error.”<sup>276</sup>

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267. *See id.* (“[Slander] is not protected by the doctrine of separation of church and state by utterance as testimony during the course of a church service.”).

268. *Id.*

269. *Id.*

270. *Id.* at 148.

271. *Id.* at 149.

272. *Id.*

273. *See id.* at 149.

274. *Id.* at 150.

275. *Id.* (citation omitted) (alterations in original).

276. *Id.*

Suppose, however, that the plaintiffs had been accused of committing crimes *through the use of witchcraft*. While the appellate court did not say expressly what the trial court should do in that event, the very possibility that such an allegation would require a trial on the merits would likely force the court to deny subject matter jurisdiction.<sup>277</sup>

*Udofia* is helpfully contrasted with *Brewer*.<sup>278</sup> Had the California Supreme Court employed the *Udofia* analysis, it would presumably have denied recovery because being in league with Satan would have religious overtones and would hearken back to regrettable trials of earlier days.

There is an additional difficulty posed in *Udofia*, which is highlighted by comparing *Schoenhals* and *Udofia*. The *Schoenhals* court precluded recovery because “an internal conflict within the Church”<sup>279</sup> was at issue. But *Udofia* involved either former members of the church or individuals who had never been members of the church, and they were unable to recover for the most serious reputational harms that they suffered, notwithstanding their lack of an existing connection to the church where they were defamed.

At issue in *Kleibenstein v. Iowa Conference of the United Methodist Church*<sup>280</sup> were allegedly defamatory comments made about parishioner Jane Kleibenstein by United Methodist Church district superintendent Jerrold Swinton (who was also an ordained minister).<sup>281</sup> Swinton had attended church services at Shell Rock United Methodist Church after hearing reports of strife within the congregation.<sup>282</sup> Swinton then wrote a letter that was mailed to members of the congregation as well as to other people living in the Shell Rock community.<sup>283</sup>

In that letter, Swinton said that he “was in despair when Jane Kliebenstein made an effort to whisper scornfully to me that this pastor must leave Shell Rock.”<sup>284</sup> He continued, “When will you stop the blaming, negative and unhappy persons among you from tearing down

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277. *Id.* at 149 (suggesting that the court would not have subject matter jurisdiction over a trial involving an allegation of the practice of witchcraft).

278. 197 P. 2d 713 (Cal. 1948) (en banc).

279. *Schoenhals v. Mains*, 504 N.W.2d 233, 236 (Minn. Ct. App. 1993).

280. 663 N.W.2d 404 (Iowa 2003).

281. *See id.* at 405.

282. *Id.*

283. *See id.*

284. *Id.*

the spirit of Jesus Christ among you? . . . You know whether a person has the spirit of Jesus or Satan by their fruits.”<sup>285</sup> Finally, he suggested that “[w]hen the congregation of Shell Rock is ready to acknowledge they allowed the spirit of Satan to work in their midst, express some contrition and seek help—then help will come.”<sup>286</sup>

Kleibenstein sued, claiming that “the letter falsely attacked [her] ‘integrity and moral character,’ causing damage to her reputation in the community.”<sup>287</sup> While the defendants conceded that “Swinton’s statement about the ‘spirit of Satan’ referred to Jane Kliebenstein,”<sup>288</sup> they argued that “the phrase is a ‘purely ecclesiastical term, deriving its meaning from religious dogma’ thereby preventing the court from adjudicating its impact in the context of a civil suit for defamation.”<sup>289</sup>

The Iowa Supreme Court noted that the defamation claim would have been dismissed “had the matter been divulged solely to the members of Shell Rock UMC,”<sup>290</sup> explaining that “communications between members of a religious organization concerning the conduct of other members or officers in their capacity as such are qualifiedly privileged.”<sup>291</sup> Here, the Iowa court suggests that comments made within the religious organization about officers have a *qualified* privilege. Such comments might be actionable if false and made with actual malice, although the court implied that the qualified privilege would likely not have been lost in this case.

Swinton’s comments were not protected by a qualified privilege because they were so widely disseminated. The “fact that Swinton’s communication about Jane was published outside the congregation weakens this ecclesiastical shield”<sup>292</sup> for two distinct reasons. First, otherwise privileged communications might lose that status “upon proof of excess publication or publication ‘beyond the group interest.’”<sup>293</sup> Second, the court reasoned that “if publication solely to church members

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285. *Id.*

286. *Id.*

287. *Id.* at 405–06.

288. *Id.* at 406.

289. *Id.*

290. *Id.*

291. *Id.* at 407 (citing Am. Jur. 2d *Libel and Slander* § 340, at 633 (1995)).

292. *Id.*

293. *Id.* (citing *Brewer v. Second Baptist Church of Los Angeles*, 197 P.2d 713, 717 (Cal. 1948) (en banc)).

justifies ecclesiastical status for otherwise defamatory communications, proof of publication to *non-church* members arguably supports the opposite conclusion.”<sup>294</sup>

If it were true that the term “spirit of Satan” could only be understood in theological terms, then it presumably would not matter whether non-members of the congregation were apprised of the charge because, as defendants argued, “in order to determine whether the term ‘spirit of Satan’ is defamatory—or truthful—as applied to Kliebenstein, a factfinder would necessarily be required to study and interpret church theology and beliefs concerning Satan.”<sup>295</sup> The Iowa Supreme Court disagreed because such a term “carries a common, and largely unflattering, secular meaning.”<sup>296</sup>

Courts thus examine a number of factors when analyzing whether a religious leader’s defamatory comments are actionable. The courts will consider whether the allegedly defamed individual had a connection to the religious institution about which the allegations were made, and whether the statements had a secular meaning. However, the courts do not weigh these considerations in the same way, which means that defamatory statements about a current or former member of a church might be actionable in one jurisdiction but not in another.

*Bowie v. Murphy*<sup>297</sup> makes interpreting the relevant jurisprudence even more confusing. The issues are complicated because they involved an angry division within a church about internal governance. James Murphy, Jr. was a pastor at Greater Little Zion Baptist Church.<sup>298</sup> There was some divisiveness under his leadership, and eventually a vote was scheduled to determine whether he would be retained.<sup>299</sup> Thornton, a Murphy supporter, attended the meeting during which the vote was to occur. Her intention was to “disrupt, intimidate, harass, and coerce congregation members who were trying to vote.”<sup>300</sup> David Bowie was a

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294. *Id.* (citing *Schoenhals v. Mains*, 504 N.W.2d 233, 236 (Minn. Ct. App. 1993)).

295. *Id.*

296. *Id.* at 407.

297. 624 S.E.2d 74 (Va. 2006).

298. *Id.* at 76.

299. *Id.*

300. *Id.*

deacon of the Church,<sup>301</sup> who “had been assigned to provide security to the voting area.”<sup>302</sup> Bowie saw Thornton, who had been “carrying a large camera in her right hand [and who had forcefully opened] the door to the voting area,”<sup>303</sup> standing there “taking pictures and writing down the names of poll workers, voters, and staffers.”<sup>304</sup> Bowie went up to Thornton to ask her what she was doing, although Thornton had apparently not heard him because of all of the noise.<sup>305</sup> He then “gently touched the right shoulder of Thornton in order to gain her attention and again called her by name.”<sup>306</sup> Thornton “looked back over her right shoulder, realized it was Bowie, . . . cursed him, [and] . . . then attempted to strike Bowie with the camera she held in her right hand.”<sup>307</sup> Bowie grabbed her wrist to defend himself.<sup>308</sup> Once he released her wrist and “verbally tried to calm her,”<sup>309</sup> she “put the camera in her left hand and struck Bowie in the chest with her right hand.”<sup>310</sup>

At this point, Bowie called the police who, upon their arrival, took statements from various people.<sup>311</sup> Allegedly, “Thornton ‘willfully, falsely, and with malice’ told police and Church members, including Murphy, that Bowie had assaulted her.”<sup>312</sup> In addition, it was alleged that she “solicited others who were not witnesses to the incident to provide false information and statements to the Fairfax County police.”<sup>313</sup>

A little over a week later, Murphy called a church meeting while Bowie was on vacation.<sup>314</sup> At the meeting, Murphy told the congregation that Bowie had assaulted Thornton,<sup>315</sup> and Murphy later repeated that

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301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.* at 76–77.

314. *See id.* at 76–77 (The vote occurred on June 21, and the meeting was called on July 1).

315. *Id.* at 77.

accusation in a letter to the congregation.<sup>316</sup> Murphy then “called for a motion to have Bowie dismissed as a deacon and to have Bowie’s church membership demoted from ‘full’ status to ‘watch care.’”<sup>317</sup> Such a motion was indeed made and seconded based on Murphy’s accusation of assault.<sup>318</sup> Bowie sued for defamation, claiming that the assault accusations against him “were made with knowledge of the falsity of the allegation or reckless disregard for the truth.”<sup>319</sup>

One of the issues before the Virginia Supreme Court was whether Bowie’s claim was barred by the court’s decision in *Cha v. Korean Presbyterian Church of Washington*.<sup>320</sup> The court reaffirmed that defamation claims cannot be addressed if doing so “would necessarily involve issues of church governance.”<sup>321</sup> The court explained that in *Cha*, “the plaintiff’s defamation claims were so connected to his wrongful termination claim as to mix with ‘ecclesiastical decisions regarding the appointment and removal’ of church officials.”<sup>322</sup> In contrast, “Bowie’s defamation claims arise solely from allegations made by the defendants that Bowie perpetrated an assault.”<sup>323</sup> The Virginia Supreme Court reasoned that the “circuit court can evaluate these statements for their veracity and the impact they had on Bowie’s reputation the same as if the statements were made in any other, non-religious context.”<sup>324</sup>

But if this were the test, then many of the statements that have been held non-defamatory because made in a religious setting should be held a potential basis of liability. The court understood that “some of the allegedly defamatory statements were made at a church meeting in which Bowie’s status as deacon was the primary issue.”<sup>325</sup> However, the court

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316. *Id.*

317. *Id.*

318. *Id.* (“Vivian Pace made the motion based on Bowie’s ‘alleged assault’ of Thornton. LaJuanna Russell seconded the motion ‘on the same basis.’”).

319. *Id.*

320. *Id.* at 78 (“We granted Bowie this appeal limited to the issues whether the circuit court erred in its October 21, 2004 ruling that Bowie’s defamation claims are barred by our decision in *Cha*.”). For a discussion of *Cha*, see *supra* notes 183–95 and accompanying text.

321. *Id.*

322. *Id.* at 79.

323. *Id.*

324. *Id.*

325. *Id.*

reasoned that “Bowie pled his defamation claims in such a manner that the circuit court, unlike the trial court in *Cha*, can consider them in isolation, separate and apart from the church governance issue involved in Bowie’s status as a deacon.”<sup>326</sup> Basically, the Virginia Supreme Court reasoned that the defamation issue could be addressed “because the claims can be decided without addressing issues of faith and doctrine, [i.e.,] . . . the circuit court need not become involved with the underlying dispute among the congregation of the church regarding Murphy as pastor.”<sup>327</sup>

The Virginia Supreme Court’s point that the claims could be addressed without considering matters of faith and doctrine was accurate.<sup>328</sup> However, that was also true in *Cha*, where the pastor was accused of having received a loan and then not having paid the money back.<sup>329</sup> Indeed, in many of these cases, although the defamatory statements were made during a service or during a meeting in which church matters were being discussed, the statements themselves could be assessed without intruding on religious matters.<sup>330</sup>

The Virginia Supreme Court noted that “some of the allegedly defamatory statements were made at a church meeting in which Bowie’s status as deacon was the primary issue.”<sup>331</sup> It might be thought, then, that the reason that this cause of action could proceed was that some of the comments were not made at the meeting. Yet, this does not provide a plausible explanation of the court’s holding. As Justice Agee points out in his concurring and dissenting opinion, the defamation actions against Pace and Russell were based on their actions during the meeting at which Bowie’s continuing as deacon was the primary issue.<sup>332</sup> But such a meeting was focused on church governance, so the court clearly was not

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326. *Id.*

327. *Id.* at 80.

328. *See supra* note 162.

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

330. *See, e.g., supra* notes 213–231 (discussing sexual orientation allegations), 232–234 (discussing promiscuity allegations).

331. *Bowie*, 624 S.E.2d at 79 (emphasis added).

332. *Id.* at 81 (Agee, J., concurring in part and dissenting in part) (“Bowie identifies the act of defamation, as to both women [Pace and Russell], to be their ‘recommendations’ regarding his office as Deacon and change in his church membership status ‘in a reckless disregard for the truth.’”).

accepting that internal church governance procedures were immune from review if the statements at issue were of a purely secular nature.

## 2. Publication of Private Facts

Sometimes, the cause of action against the church official involves a breach of a promise not to reveal the information publicly. In these cases, a number of factors are discussed including whether the plaintiff had impliedly consented to the publication, and whether the plaintiff was a member of the congregation at the time of the publication. Jurisdictions vary with respect to the immunity that they are willing to confer for breaches of confidentiality by religious leaders, and some jurisdictions offer such robust immunity that parishioners would be aghast if they knew the degree to which their most private secrets could be communicated to the world with impunity, good public policy to the contrary notwithstanding.<sup>333</sup>

*Snyder v. Evangelical Orthodox Church*<sup>334</sup> involved the public dissemination of private information to a congregation, despite a church official's promise not to do so.<sup>335</sup> Charles Roberson, a bishop, and Claudia Snyder were both members of the same church, the Santa Cruz Dioceses of the Evangelical Orthodox Church.<sup>336</sup> They had an extramarital affair, and both confessed to Warren Hardenbrook,<sup>337</sup> who was the Diocesan Bishop for the Santa Cruz Dioceses.<sup>338</sup> After informing the congregation of the affair, Hardenbrook excommunicated Roberson.<sup>339</sup> Snyder then sought counseling from Nixon, a marriage

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333. See *Alexander v. Culp*, 705 N.E.2d 378, 382 (Ohio Ct. App. 1997) (“Public policy supports an action for breach of confidentiality by a minister. There is a public policy in favor of encouraging a person to seek religious counseling. People expect their disclosures to clergy members to be kept confidential.”).

334. 216 Cal. App. 3d 297 (Cal. Ct. App. 1989).

335. *Id.* at 302 (“Despite promises of confidentiality, Snyder alleges Nixon divulged information from this meeting to the church Board of Elders and to the other respondents. The church then communicated this information to all church members.”).

336. See *id.* at 301.

337. See *id.* at 302.

338. See *id.*

339. *Id.*



counselor.<sup>340</sup> Allegedly, Nixon then revealed the contents of their conversations to the church elders, who revealed this information to the congregation.<sup>341</sup>

The *Snyder* court set out the test that should have been used to determine whether the public revelation of private confidences was actionable: "A court must first ask two preliminary questions: Is this a religion, and does the course of conduct alleged qualify as a religious expression?"<sup>342</sup> That a religion was involved was not in dispute.<sup>343</sup> However, it was unclear whether the course of conduct at issue (revelation of confidential information) itself qualified as religious expression.<sup>344</sup> The court explained that it simply could not tell from the record whether religious doctrine required that confessions be revealed under certain circumstances and, if so, what those circumstances were.<sup>345</sup>

Even if it could be shown that the revelation of private confidences was required or, at least, that there was a "religious purpose for the disclosure of appellants' confidential communications,"<sup>346</sup> that would not end the matter. A separate question was whether "the interests that are invaded by respondents' religious practices are of sufficiently significant interest to the state to warrant the application of tort liability."<sup>347</sup> The court explained that a tort claim will "survive a motion to dismiss if the state's interests are significant, and no less restrictive burden than the possibility of eventual tort liability is available."<sup>348</sup>

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340. *Id.*

341. *Id.*

342. *Id.* at 306 (citing *Molko v. Holy Spirit Ass'n*, 762 P.2d 46, 56-57 (Cal. 1988)).

343. *See id.* at 307.

344. *Id.* ("It does not appear from the record, however, that the second preliminary question—whether respondents' course of conduct qualified as a religious expression—was ever asked.")

345. *Id.* (explaining that there was nothing in the record speaking to "whether it is a canon of respondents' belief that confessions (penitential or not) are revealed to the congregation unless the offender repents; whether it is church practice for the substance of a confession to be shared among church officials; or whether it is consistent with church doctrine to reveal the substance of a confession to anyone outside the church, and if so, under what circumstances").

346. *Id.* at 310.

347. *Id.* at 308.

348. *Id.* at 310 (citing *Molko v. Holy Spirit Ass'n*, 762 P.2d 46 (Cal. 1988)).

The *Snyder* court held that “on a motion to dismiss for lack of jurisdiction, it is insufficient for respondents to no more than generally allege, as a substantive defense to tort liability, that their conduct was religious in nature.”<sup>349</sup> Here, the court was trying to walk a tightrope. On one hand, it was “mindful that civil courts must abstain from resolving disputes which turn on extensive inquiry into ‘religious law and polity.’”<sup>350</sup> On the other hand, it rejected the notion that a policy of “strict deference”<sup>351</sup> was appropriate.

Yet, it is somewhat difficult to tell what the court wanted or needed to know. Would it matter whether doctrine permitted, rather than required, privileged information to be divulged if the parishioner was unrepentant? Suppose that there was conflicting testimony about whether doctrine required, permitted, or prohibited such a revelation. This is exactly the kind of dispute that the court should refrain from deciding.

An additional difficulty in this case was that there were two breaches of confidentiality alleged in this case, one by Bishop Hardenbrook and the other by a family therapist.<sup>352</sup> It may well be that different rules would govern the revelations in these two different scenarios.

Suppose that a religion holds that information conveyed in a confessional cannot be divulged.<sup>353</sup> In that event, publication of information conveyed in therapy might be permissible even if publication of information conveyed in a confessional would not be permissible.<sup>354</sup> On the other hand, there might be additional public policy

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349. *Id.* at 310.

350. *Id.* at 310 (citing *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976)).

351. *Id.*

352. *Id.* at 302.

353. *Cf.* Anthony Cardinal Bevilacqua, *Confidentiality Obligation of Clergy from the Perspective of Roman Catholic Priests*, 29 LOY. L.A. L. REV. 1733, 1745 (1996) (“[T]he age old commitment of the Roman Catholic Church to the inviolability of the confessional secret is no less firm today.”); R. Michael Cassidy, *Sharing Sacred Secrets: Is It (Past) Time for a Dangerous Person Exception to the Clergy-Penitent Privilege?* 44 WM. & MARY L. REV. 1627, 1695–96 (2003) (“Canon law declares the seal of the confessional inviolable, and mandates that matters revealed *attendant* to a confession may not be disclosed under any circumstances.” (emphasis added)).

354. *Cf.* Cassidy, *supra* note 353, at 1721 n.455 (“Roman Catholic priests who learn about a parishioner’s dangerous intentions in a spiritual counseling session

considerations to preclude public dissemination of communications with a therapist. Assuming that there was no threat of harm to another,<sup>355</sup> a therapist might be liable for making the contents of privileged discussions public, and a third party who had induced the therapist to breach confidentiality might also be liable.<sup>356</sup>

In *Snyder*, there was no discussion of whether the therapist volunteered the confidential information or, instead, had been induced to do so.<sup>357</sup> Even if the therapist had not been induced to reveal the confidential information, a separate issue would be whether a member of the clergy republishing what he knew had been confidential might be liable for doing so.<sup>358</sup> Perhaps the *Snyder* court's requiring the defendants to do more than merely generally allege that "their conduct was religious in nature"<sup>359</sup> would have some benefit,<sup>360</sup> although it would not be surprising for the defendants to assert with some specificity some of the religious benefits that might accrue from the revelation at issue.

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outside of the confessional are treated exactly like ministers of other religions; that is, the communication is not privileged, and the priest can be compelled to reveal it.").

355. See Ileana Dominguez-Urban, *The Messenger as the Medium of Communication: The Use of Interpreters in Mediation*, 1997 J. DISP. RESOL. 1, 33 n.189 (1997) ("[I]t is widely understood that even when there is a well-recognized confidential relation, confidentiality must give way when it is necessary to prevent bodily harm to another.").

356. See Peter A. Winn, *Confidentiality in Cyberspace: The HIPAA Privacy Rules and the Common Law*, 33 RUTGERS L.J. 617, 662-63 (2002) (discussing cases in which therapists and third parties were held liable for the breach of confidentiality).

357. In *Alberts*, an important element was that the minister's superiors had induced the therapist to breach. See *Alberts v. Devine*, 479 N.E.2d 113, 121 (Mass. 1985).

358. See Lisa M. Austin, *Privacy and Private Law: The Dilemma of Justification*, 55 MCGILL L.J. 165, 180 (2010) (discussing liability "where a third party discloses information he has received from someone who he knows is under a duty of confidence").

359. *Snyder v. Evangelical Orthodox Church*, 216 Cal. App. 3d 297, 310 (Cal. Ct. App. 1989).

360. See Paul T. Hayden, *Religiously Motivated "Outrageous" Conduct: Intentional Infliction of Emotional Distress as a Weapon Against "Other People's Faiths,"* 34 WM. & MARY L. REV. 579, 661 (1993) ("In *Snyder*, the court was clearly right to force defendants to identify more particularly whether the purportedly tortious conduct was religiously motivated.").

Discussions of individuals' failings and of pitfalls that should be avoided would seem to be exactly the kinds of discussion that would have religious value.<sup>361</sup> Further, such an announcement might be made to alert the congregation so that they would not consort with a sinner and, perhaps, be led into sin.<sup>362</sup>

*Guinn v. Church of Christ of Collinsville*<sup>363</sup> involved the question of whether tort damages could be awarded as a result of a church's public humiliation of an individual who had already withdrawn from church membership.<sup>364</sup> In 1974, Marian Guinn became a member of the Collinsville Church of Christ.<sup>365</sup> In 1980, the Church Elders confronted Guinn about a rumor that she was having an extramarital affair with a man from Collinsville who was not a member of the Church of Christ (and not her husband).<sup>366</sup> Guinn admitted that she was having an affair.<sup>367</sup>

On September 21, 1981, Guinn received a letter advising her that if she did not repent, the withdrawal of fellowship process would begin.<sup>368</sup> On September 25, 1981, Guinn wrote a letter to the Elders asking them to tell the congregation only that her membership had been withdrawn.<sup>369</sup> On September 27, the Elders ignored her request and read to the congregation the contents of their September 21 letter to Guinn.<sup>370</sup> They urged the congregation to contact Guinn and urge her to repent and to return to the Church.<sup>371</sup> They also told the congregation that if Guinn did not repent, the particular scripture that Guinn had violated would be read aloud to the church at the next service.<sup>372</sup>

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361. See Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 326 (1983) ("Christianity, which has strongly influenced Anglo-American law, often seemed to value public exposure of an individual's faults and weaknesses as a way to stimulate better behavior in others . . .").

362. See *Snyder*, 216 Cal. App. 3d at 302 ("As a result of this conduct, appellants were shunned by friends, family and members of the congregation.").

363. 775 P.2d 766 (Okla. 1989).

364. See *id.* at 769, 776.

365. *Id.* at 767.

366. *Id.*

367. *Id.* at 768.

368. *Id.*

369. *Id.*

370. *Id.* at 768-69.

371. *Id.* at 769.

372. *Id.*

During the following week, Guinn met with one of the Elders to persuade him to refrain from divulging facts about her private life to the congregation.<sup>373</sup> The Elder informed her that “withdrawing membership from the Church of Christ was not only doctrinally impossible but it could not halt the disciplinary sanction being carried out against her.”<sup>374</sup> It was a tenet of the faith that “all its members are a family.”<sup>375</sup> Just as “one can be born into a family but can never truly withdraw from it[, a] Church of Christ member can voluntarily join the church’s flock but cannot then disassociate oneself from it.”<sup>376</sup> On October 4, Guinn “was publicly branded a fornicator when the scriptures she had violated were recited to the Collinsville Church of Christ congregation . . . .”<sup>377</sup> In addition, as “part of the disciplinary process the same information about Parishioner’s transgressions was sent to four other area Church of Christ congregations to be read aloud during services.”<sup>378</sup> Guinn sued for invasion of privacy.<sup>379</sup>

The Oklahoma Supreme Court reasoned that while Guinn was still a member of the congregation, her “willing submission to the Church of Christ’s dogma, and the Elders’ reliance on that submission, collectively shielded the church’s prewithdrawal, religiously-motivated discipline from scrutiny through secular judicature.”<sup>380</sup> However, a separate issue was whether the church was immune from liability for its punishment of her even after she had withdrawn from the church.<sup>381</sup> The court reasoned that when Guinn “later removed herself from membership, Parishioner withdrew her consent, depriving the Church of the power actively to monitor her spiritual life through overt disciplinary acts.”<sup>382</sup> In addition, the court denied that the church had a conditional privilege to inform the congregants about her private affairs, distinguishing Guinn from a current or prospective member.<sup>383</sup> “Because

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373. *Id.*

374. *Id.* (emphasis omitted).

375. *Id.* (emphasis omitted).

376. *Id.* (emphasis omitted).

377. *Id.*

378. *Id.*

379. *Id.*

380. *Id.* at 774.

381. *See id.* at 779.

382. *Id.*

383. *Id.* at 784.

Parishioner was neither a 'present' nor a 'prospective' church member at the time of the Elders' publication, the members of the Collinsville congregation did not share the sort of 'common interest' in Parishioner's behavior that would render the occasion of the publication 'privileged.'"<sup>384</sup>

*Guinn* highlights a number of issues. First, it is questionable that an individual who is a member of a congregation thereby consents to a public airing of very private information to the entire congregation. An individual who consults a lawyer to prevent such a public revelation should not be construed as consenting to such a revelation.<sup>385</sup> Even were it plausible to think that by being a member one consented to the discipline imposed by the church or, perhaps, involved a waiver to object to discipline imposed by the church,<sup>386</sup> as long as it did not involve physical harm,<sup>387</sup> it would be difficult to assume continuing consent to such discipline once one ceased to be a member of that church.<sup>388</sup>

A separate issue involves the audience who receives the relevant information. The public branding of *Guinn* as a fornicator occurred not only in the church of which she had formerly been a member but in other congregations as well.<sup>389</sup> This not only increases her harm, but also undercuts the argument that the public branding was in the common

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384. *Id.* at 785.

385. *Cf. id.* at 768 ("On September 24 her lawyer sent the Elders a letter and advised them not to expose Parishioner's private life to the Collinsville congregation which comprised approximately five percent of the town's population.").

386. *See id.* at 774 ("Parishioner's willing submission to the Church of Christ's dogma, and the Elders' reliance on that submission, collectively shielded the church's prewithdrawal, religiously-motivated discipline from scrutiny through secular judicature.").

387. *See id.* at 775 ("Although we acknowledge that there may be some religiously motivated, consensual acts which could constitute a threat to the public safety, peace or order great enough to fall *dehors* First Amendment protection, we hold that, on the record of this case, the Elders' prewithdrawal acts are shielded from scrutiny by secular judicature.").

388. *See id.* at 779 ("Parishioner withdrew her consent, depriving the Church of the power actively to monitor her spiritual life through overt disciplinary acts.").

389. *Id.* at 769 ("As part of the disciplinary process the same information about Parishioner's transgressions was sent to four other area Church of Christ congregations to be read aloud during services.").

interest of a particular congregation with respect to its own membership.<sup>390</sup>

In *Smith v. Calvary Christian Church*,<sup>391</sup> the Michigan Supreme Court examined whether an individual having withdrawn from a church would make the church potentially liable for having publicly divulged private facts about the individual, namely, that he had consorted with prostitutes.<sup>392</sup> One confusing element of the case was that although the plaintiff, David Smith, had “submitted a letter withdrawing his formal membership in the church,”<sup>393</sup> he had nonetheless remained involved with the church.<sup>394</sup>

When the plaintiff first accepted membership in the church, he specifically consented “not to cause division within the church . . . and to accept discipline imposed by the church.”<sup>395</sup> Presumably, the court believed consenting to discipline included anything that the church believed acceptable, including divulging embarrassing private facts about the individual’s past.

The *Smith* court reasoned that because the plaintiff had not completely withdrawn from the church—he had attended church on the very day that his private past was revealed—he had not withdrawn from the church sufficiently to be thought to have withdrawn his consent.<sup>396</sup> The Michigan court explained: “Under tort law principles, a person who consents to another’s conduct cannot bring a tort claim for the harm that follows from that conduct.”<sup>397</sup> The court suggested that plaintiff’s “active engagement with the church indicated his continuing consent,”<sup>398</sup> and held that “the church’s actions disciplining plaintiff were not tortious.”<sup>399</sup>

It is of course true that plaintiffs cannot consent to some things, e.g., because they are prohibited by law. The Michigan court commented that a “more difficult question would be presented if the circumstances of

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390. See *supra* notes 290–94 and accompanying text (discussing how overbroad publication undercuts the immunity that might otherwise be available).

391. 614 N.W.2d 590 (Mich. 2000).

392. See *id.* at 591.

393. *Id.*

394. *Id.*

395. *Id.* (emphasis added).

396. *Id.* at 594.

397. *Id.*

398. *Id.* at 595.

399. *Id.*

the discipline were different, for example, if the discipline was in violation of the Michigan Penal Code.” However, one might wonder why that would be difficult, since one would assume that such consent would be held void as against public policy.

The Michigan Supreme Court claimed that “consent is the relevant consideration.”<sup>400</sup> If that were so, then one might expect a fact-intensive inquiry where the trier of fact would weigh whether the plaintiff subjectively consented to continued discipline, e.g., by examining the statements that he made or other evidence. Or, the trier of fact might examine whether the plaintiff might have been (objectively) understood to have consented, e.g., by considering both that he had formally withdrawn and that he had nonetheless shown up at a meeting where he knew that he would be discussed. Perhaps the latter should be thought to indicate that he considered himself still part of the church. Or, perhaps, he was merely showing up to defend himself against what he perceived to be inappropriate action.<sup>401</sup> Instead, the Michigan Supreme Court held *as a matter of law* that Smith consented to this discipline, because “reasonable minds cannot disagree that plaintiff consented to the church’s practices, and manifested his continuing consent by remaining actively engaged with the church.”<sup>402</sup>

The court’s claim that reasonable minds could not disagree about whether Smith continued to consent is simply false. Perhaps he did not consent, but he thought that the information about him would not be revealed if he were present.<sup>403</sup> Perhaps he went there as an outsider who wished to educate the congregation about the “correct” interpretation of

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400. *Id.* at 594.

401. See Lloyd G. Grandy II, *Thou Shalt Not Leave Thy Church: So Sayeth the Michigan Supreme Court in Smith v. Calvary Christian Church*, 6 T.M. COOLEY J. PRAC. & CLINICAL L. 47, 49 (2003) (“The day for the marking was set for December 8, 1996. The pastor went to Mr. Smith’s wife and family, cautioned them about what was to occur, and advised them not to be present on that day . . . . Mr. Smith attended the church and was present while the pastor proceeded with the marking . . . .”).

402. See *Smith v. Calvary Christian Church*, 614 N.W.2d 590, 595 (Mich. 2000).

403. Grandy, *supra* note 401, at 64 (hypothesizing that Smith “was simply trying to dodge the discipline of the church”).



religious doctrine.<sup>404</sup> Perhaps he did consent to discipline. In short, a reasonable person might have reached any of a number of conclusions about whether Smith still consented to the church's imposing discipline on him.

Holding that Smith had consented as a matter of law was bad enough, but the *Smith* court offered additional reasons for congregants to worry about the kinds of actions that might be taken against them. For example, the Michigan Supreme Court referred to *Guinn*,<sup>405</sup> commenting that "[h]ad the church taken its action toward a person more comparable to the plaintiff in *Guinn*, a more difficult question would be presented."<sup>406</sup> So, too, the court commented that "a more difficult question would be presented if the circumstances of the discipline were different, for example, if the discipline was in violation of the Michigan Penal Code."<sup>407</sup> But if it is merely a more difficult question when the church's discipline is in violation of law or imposed on individuals who are not members of the church, then the possible immunity extended to the church may well be much too broad and must be revisited.

The *Smith* court worried that "[a]llowing a person who was a member of a religious body or consented to such a body's practices to escape discipline for actions that occurred during the period of membership or consent by severing ties to that body could undermine the efficacy of the body's disciplinary practices toward its remaining members."<sup>408</sup> While that may be so, courts should not pretend that consent has been given to a practice when a much different rationale is at work. Further, if the test is whether the efficacy of the church's disciplinary practices towards its members might be made less efficacious if immunity is not accorded, then a whole host of church practices might be immunized for fear that otherwise the effectiveness of the church's discipline might be undermined.

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404. See *Smith*, 614 N.W.2d at 594 ("[H]e was present and participating in a doctrinal dispute in the church on the day he was marked."). The court implied that one of the reasons that he could not sue the church was that he had attempted to change their beliefs. See *id.* (noting that Smith had "attempted to influence the church's congregation, even on the very day he was being marked").

405. *Id.* at 593–95. For a discussion of *Guinn*, see *supra* notes 363–90 and accompanying text.

406. *Smith*, 614 N.W.2d at 595.

407. *Id.*

408. *Id.* at 594 n.11.

In *Westbrook v. Penley*,<sup>409</sup> the Texas Supreme Court addressed whether a pastor, who was also a licensed professional marriage counselor, was liable for revealing information learned from a former congregant during secular counseling.<sup>410</sup> Peggy Lee Penley had received marriage counseling from Westbrook, a licensed professional marriage counselor.<sup>411</sup> Later, Penley and Westbrook helped form a new church, CrossLand Community Bible Church, and Westbrook was elected pastor.<sup>412</sup> After Penley had separated from her husband, she and her husband received counseling at Westbrook's home, where couples from the church discussed ways to improve their marriages.<sup>413</sup> Penley testified that the Bible was not discussed at these meetings and she considered them a continuation of the secular counseling she had previously received from Westbrook.<sup>414</sup>

One marital counseling session that Penley and her husband attended turned out not to have any other couples attending.<sup>415</sup> During a break, Penley spoke separately with Westbrook and informed him both that she was going to divorce her husband and that she had engaged in an extramarital sexual relationship.<sup>416</sup> Westbrook recommended an attorney but also discussed the church discipline that would be required as a result of her extramarital relationship.<sup>417</sup> She told him that she was resigning from the church.<sup>418</sup> Thereafter, Westbrook wrote a letter to the congregation explaining that "Penley intended to divorce her husband, there was no biblical basis for the divorce, she had engaged in a 'biblically inappropriate' relationship with another man, and she had rejected efforts to bring her to repentance and reconciliation."<sup>419</sup> In addition, the letter "encouraged the congregation to 'break fellowship' with Penley in order to obtain her repentance and restoration to the

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409. 231 S.W.3d 389 (Tex. 2007).

410. *Id.* at 391 ("[W]e presume the counseling at issue was purely secular in nature as Penley claims.").

411. *Id.* at 392.

412. *Id.*

413. *Id.* at 393.

414. *Id.*

415. *Id.*

416. *Id.*

417. *Id.*

418. *Id.*

419. *Id.*

church body,<sup>420</sup> although the letter encouraged the members of the congregation not to divulge any of this information to non-members.<sup>421</sup>

Penley sued Westbrook for defamation, negligence, and breach of fiduciary duty.<sup>422</sup> All claims were dismissed by the trial court.<sup>423</sup> The appellate court affirmed with respect to all causes of action except the professional negligence claim, “which it held concerned Westbrook’s role as Penley’s secular professional counselor and did not invoke First Amendment concerns.”<sup>424</sup>

Penley argued that “Westbrook’s breach of [the] secular duty to maintain confidentiality . . . caused her injury.”<sup>425</sup> She urged the court “to apply the neutral-principles approach to her professional-negligence claim, contending her claim can be resolved under neutral tort principles without resorting to or infringing upon religious doctrine.”<sup>426</sup> But, the court explained, a “church’s decision to discipline members for conduct considered outside of the church’s moral code is an inherently religious function with which civil courts should not generally interfere.”<sup>427</sup>

Yet, the court’s reasoning that churches should be free to discipline their members did not seem applicable in a case in which the plaintiff was no longer a member of the church when the discipline was applied.<sup>428</sup> That she was a former member did not seem relevant to the court because “Penley’s voluntary forfeiture of her membership did not, in CrossLand’s or Westbrook’s view, forestall the church’s duty under its constitution to ‘tell it to the church’ and admonish church members to ‘break fellowship with [Penley].’”<sup>429</sup> The court did not discuss whether the same rationale would permit congregants to reveal private confidences or defame individuals who had never been members of the

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420. *Id.*

421. *Id.*

422. *Id.* at 394.

423. *Id.*

424. *Id.*

425. *Id.* at 396.

426. *Id.* at 399.

427. *Id.* (citing *Watson v. Jones*, 80 U.S. (Wall. 13) 679, 727 (1871)).

428. Jana R. McCreary, *Tell Me No Secrets: Sharing, Discipline, and the Clash of Ecclesiastical Abstinence and Psychotherapeutic Confidentiality*, 29 QUINNIPIAC L. REV. 77, 83 (2011) (“In spite of Penley’s resignation, Westbrook proceeded with CCBC’s disciplinary process.”).

429. *Westbrook v. Penley*, 231 S.W.3d 389, 404. (Tex. 2007).

church as long as the congregants believed it their religious duty to spread the truth.

#### CONCLUSION

The United States Supreme Court has long recognized that civil courts lack the competence to decide religious questions, such as the proper interpretation of religious doctrine, policy, or practice.<sup>430</sup> The civil courts are also precluded from deciding who is best qualified to be chosen as a religious leader.<sup>431</sup> However, that doctrine has been overextended to immunize defamation or the publication of private facts merely because this conduct involves a minister. The kinds of consideration that should defeat an assertion of qualified immunity, e.g., that a false assertion made with malice had no reasonable basis in fact, should defeat an immunity claim even when the assertion is made within a religious institution. Assessment of damages is a separate matter, and it may well be too difficult to tell in certain cases whether defamatory allegations in fact caused someone not to be hired or rehired. Nonetheless, knowing and malicious defamation should not be countenanced even in the religious context.

So, too, a knowing breach of confidentiality about a minister should not be countenanced, absent the kind of justification that normally excuses or requires a breach of confidentiality. Whether tort damages should be awarded for a breach is a civil rather than religious question, and confidentiality breaches should not be immunized merely because they are authorized under religious doctrine.

Defamation and publication of private facts jurisprudence also needs revision when the harmed party is a current or former parishioner. One should not be presumed to consent to defamation or to a breach of confidentiality merely by virtue of being a member of a congregation, and one's being a former member of a congregation certainly does not provide the basis for such an assumption. Precisely because religious doctrines can vary widely, the fact that such practices might be religiously authorized should not provide a complete defense to such actions. Courts must stop pretending that the Constitution requires

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430. *See supra* notes 4–8 and accompanying text.

431. *See id.*

affording immunity to public humiliation and character assassination—providing such immunity does not promote the interests of religious institutions, their members, or the public at large.