

FREE EXERCISE CLAUSE? WHETHER EXORCISM CAN SURVIVE THE SUPREME COURT’S “SMITH NEUTRALITY”

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INTRODUCTION

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”¹

Since colonial times, American legislatures and courts have managed the church–state relationship in various distinct manners.² Colonists who

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¹ U.S. CONST. amend. I.

² See generally WILLIAM NESSEL, FIRST AMENDMENT FREEDOMS, PAPAL PRONOUNCEMENTS AND CONCORDAT PRACTICE 1–2 (1961) (discussing how the thirteen colonies varied in religiosity and in their approaches to official religions; with regards to establishing a state religion, state practices ranged

fled religious persecution abroad considered freedom from governmental interference with matters of faith a fundamental right that was jealously guarded and often codified. When the First Congress set out to enshrine Americans' most important liberties, religious freedom was a top priority, and the two religion clauses ultimately included in the First Amendment were the fruit of its labors.³

Since their passage, the religion clauses have provided Americans with both negative and positive rights, and the extent of these rights has ebbed and flowed in response to societal demands and U.S. Supreme Court composition.⁴ Over the last two decades, the Court has returned to a narrow interpretation of the Free Exercise Clause, only striking down laws that specifically target religious practices.⁵

The 2008 *Pleasant Glade Assembly of God v. Schubert*⁶ decision stands in stark contrast to this ebb in free exercise protection. In *Pleasant Glade*, the Texas Supreme Court relied on the U.S. Constitution's Free Exercise Clause to decline jurisdiction over a controversy that pitted a church member against the congregants that conducted an exorcism on her.⁷

The plaintiff, Laura Schubert, was a seventeen-year-old, active member of the Pleasant Glade Assembly of God Church⁸ in Colleyville, a suburb of Fort Worth, Texas.⁹ The dispute arose when, on two separate occasions over the course of four days, the church pastor and numerous congregants

from establishing the Church of England, to implementing Puritan establishments, to forbidding the establishment of any official religion).

³ See PETER K. ROFES, THE RELIGION GUARANTEES: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 19 (2005) ("The First Congress labored hard to ensure that religious liberty would be protected at the national level.").

⁴ Steven K. Green, *A Second-Class Constitutional Right? Free Exercise and the Current State of Religious Freedom in the United States: Religious Liberty as a Positive and Negative Right*, 70 ALB. L. REV. 1453, 1455–56 (2007); see also the discussion *infra* Part II.C regarding the development of U.S. Supreme Court free exercise jurisprudence.

⁵ See *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 886 n.3 (1990) (holding that "generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice" are valid); see, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524 (1993) (invalidating a city ordinance banning animal sacrifice because it targeted practices of the Santeria religion and thus was not neutral).

⁶ 264 S.W.3d 1 (Tex. 2008), *cert. denied*, 129 S. Ct. 1003 (Jan. 21, 2009).

⁷ *Id.* at 13. Note that the Texas Supreme Court did not rely on the Texas Constitution's version of the Free Exercise Clause, so the court was bound by U.S. Supreme Court Free Exercise Clause precedent.

⁸ The Assembly of God is one of the largest Pentecostal denominations in the United States claiming 2,836,174 adherents, 12,311 churches, and 33,622 ministers in 2007. Brief History of the Assemblies of God, <http://ag.org/top/About/History/index.cfm> (last visited June 15, 2010). Worldwide, it is the largest Pentecostal denomination, with 51 million members and adherents. The Assemblies of God: Our Position in the Christian Community, <http://ag.org/top/About/fellowship.cfm> (last visited June 15, 2010).

⁹ Associated Press, *Texas High Court Rules Exorcism Protected by Law*, USATODAY.COM, June 30, 2008, http://www.usatoday.com/news/nation/2008-06-30-exorcism-texas_N.htm.

subjected Schubert to the “laying on of hands” practice.¹⁰ The “laying on of hands,” meant to exorcise demons from a possessed individual, involves restraining the possessed subject on the ground while praying, singing, and conducting various other religious acts over the person.¹¹ Schubert claimed that the two exorcisms caused her severe emotional and psychological damage.¹² She and her parents sued the Pleasant Glade Assembly of God Church, the pastor, and numerous congregants for various torts including negligence, the intentional infliction of emotional distress (IIED), false imprisonment, assault, and battery.¹³ A jury found the defendants liable for assault, battery, and false imprisonment, and awarded Schubert \$300,000 in compensatory damages, which was reduced to \$178,000 on appeal.¹⁴

Utilizing the doctrine of judicial abstention from religious questions, the Texas Supreme Court reversed the jury finding and dismissed the case, concluding that “the case, as tried, present[ed] an ecclesiastical dispute over religious conduct that would unconstitutionally entangle the court in matters of church doctrine.”¹⁵ Though the majority acknowledged that it could “im-

¹⁰ See *Pleasant Glade*, 264 S.W.3d at 4–6.

¹¹ *Id.* at 10–11.

¹² *Id.* at 8.

¹³ This Note does not address two ancillary issues implicated by the *Pleasant Glade* opinion. First, Schubert was a minor when the exorcisms occurred. The court does not address this fact, though language in the opinion suggests that the court treats the plaintiff as an adult. The court mentions that when the exorcisms occurred, the plaintiff was caring for herself and her two younger siblings while her parents were out of town. *Id.* at 3. As discussed in Part III.C, the court implies that the plaintiff consented to the exorcisms as a member of Pleasant Glade, and as such the exorcisms were not conducted against her will. Treating seventeen-year-old adolescents as adults, though not universally accepted, is not uncommon. See generally ROGER J.R. LEVESQUE, NOT BY FAITH ALONE: RELIGION, LAW, AND ADOLESCENCE 3–4 (2002) (stating that some courts treat religious adolescents in the same way they treat “fully mature adults, assuming that teens are competent to make decisions, accountable for their choices, and entitled to no special accommodations”).

Considering that Schubert was seventeen years old, that she was mature enough care for her siblings while her parents were away, and that the Texas Supreme Court treated her as capable of consenting to religious practices, this Note does not interpret the decision as protecting religious institutions from liability for torts committed against minors. However, it does suggest that the court should have explicitly stated that it treated the plaintiff as a consenting adult, and that the ruling should not be extended to protect exorcisms conducted on younger children without parental consent. See the discussion *infra* Part IV.B.

Second, this Note does not address whether Pleasant Glade was judicially estopped from claiming First Amendment protection. The first part of the court’s opinion held that the church was not estopped from raising a First Amendment defense for three reasons: “(1) the asserted inconsistency did not arise in a prior proceeding, but in this same case; (2) the church did not gain any advantage from the asserted inconsistency; and . . . (3) the church has consistently asserted its First Amendment rights throughout this case . . .” *Pleasant Glade*, 264 S.W.3d at 6.

¹⁴ *Pleasant Glade v. Schubert*, 174 S.W.3d 388, 394 (Tex. App. 2005). The amount was reduced because the special damages for Schubert’s loss of earning capacity were not foreseeable. *Id.* at 398–99.

¹⁵ *Pleasant Glade*, 264 S.W.3d at 2. For more information on the doctrine of judicial abstention from religious questions, see generally Scott C. Idleman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 IND. L.J. 219, 219 (2000) (“The First Amendment prohibits the

agine circumstances under which an adherent might have a claim for compensable emotional damages as a consequence of religiously motivated conduct,¹⁶ the decision has been criticized for granting sweeping immunity to religious actors.¹⁷

Criticism of the *Pleasant Glade* decision stems from the widely held view that while the Free Exercise Clause fully protects religious beliefs, it provides less protection when beliefs are manifested in physical action, particularly when the action results in injury to an unconsenting third party.¹⁸ As such, religious acts resulting in physical harm are often placed beyond the purview of First Amendment protection.¹⁹

Due to the physical and involuntary nature of exorcism, one might intuit that the practice is ineligible for First Amendment protection and that its practitioners could be held liable under secular tort law.²⁰ Current U.S. Supreme Court precedent seems to support this view, particularly the 1990 decision in *Employment Division, Department of Human Resources of Oregon v. Smith*²¹ which established that generally applicable state laws (such as false imprisonment) should be applied without regard to any incidental burden they might have on a particular religious practice.²²

Despite this “*Smith* neutrality” doctrine and the involuntary, physical nature of the exorcism conducted on Schubert, the *Pleasant Glade* court determined that the Free Exercise Clause deprived it of jurisdiction over the controversy.²³ Though much scholarship has been devoted to the Free Exercise Clause and “*Smith* neutrality,” shielding religious actors from liability for an established practice like exorcism has not been addressed. Perhaps this lack of attention stems from the assumption that religious entities cannot be immunized against liability for harming their devotees. *Pleasant Glade*, however, suggests that exorcism might be an exception to this generally accepted view.

adjudication of legal actions that directly or derivatively require the resolution of religious questions, such as disputes over theological doctrine, scriptural interpretation, or ecclesiastical law.”).

¹⁶ *Pleasant Glade*, 264 S.W.3d at 12.

¹⁷ *Id.* at 13 (Jefferson, J., dissenting) (“After today, a tortfeasor need merely allege a religious motive to deprive a Texas court of jurisdiction to compensate his fellow congregant for emotional damages.”).

¹⁸ See the discussion *infra* Part II.C.1 regarding the distinction between protection of religious belief versus action and for examples of physical acts committed by religious actors that have not been protected by the Free Exercise Clause.

¹⁹ See generally 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION 309 (2006) (“A religious group has no privilege to inflict physical injury or restrain a member physically from leaving.”).

²⁰ See *id.*

²¹ 494 U.S. 872, 878–79 (1990) (“We have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law.”).

²² For a discussion of *Smith*, see *infra* Part II.C.3.

²³ *Pleasant Glade v. Schubert*, 264 S.W.3d 1, 13 (Tex. 2008), *cert. denied*, 129 S. Ct. 1003 (Jan. 21, 2009).

This Note brings into focus the motives that drove the Texas Supreme Court to dismiss *Pleasant Glade*. These include the court's implicit belief that exorcism is worth protecting, the unique flexibility judges have to formulate common law torts, and the role of consent. This Note suggests that the majority missed an opportunity future courts should take—to better formulate free exercise rulings. Courts can accomplish this by relying on state-level religious freedom restoration acts instead of the Federal Constitution's Free Exercise Clause, drawing a line where liability would attach, and limiting punitive damages. While the outcome in *Pleasant Glade* has proved controversial, future courts can use this modified holding to protect religious freedoms without sacrificing public safety, and also to invite the political branches to address controversial religious practices by statute.

Part I of this Note describes the facts in *Pleasant Glade*. Part II provides a historical overview of Free Exercise Clause jurisprudence, which acts as a backdrop to the counterintuitive result in *Pleasant Glade*. Part III explores the *Pleasant Glade* court's reasoning by bringing into sharp relief the assumptions and doctrines underlying the decision. Finally, Part IV suggests a better way for courts to balance religious freedoms with public safety.

I. WHAT HAPPENED AT THE PLEASANT GLADE ASSEMBLY OF GOD CHURCH?

The *Pleasant Glade* decision reversed both jury and appellate court determinations in favor of the plaintiff and dismissed the case.²⁴ The controversy stemmed from two incidents where Pleasant Glade leaders and congregants performed the “laying on of hands” on Schubert, though the parties disputed the facts surrounding each event.²⁵

In 1996, Schubert, then seventeen, spent much of a June weekend at her family's church participating in various religious activities.²⁶ On Friday June 7th, one of her fellow youth group members told the group that he saw a demon near the church's sanctuary.²⁷ In response, the youth minister led the group in an all night “spirited effort . . . to cast out the demons” and “anoint” the church.²⁸ Despite lack of sleep, the youth group ran a church garage sale the next morning, and on Sunday, Schubert attended multiple religious services.²⁹

That evening, the plaintiff collapsed, and congregants immediately took her to another room where they conducted the “laying on of hands” by

²⁴ *Id.* at 1.

²⁵ *Id.* at 3.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

holding her down with her hands across her chest and praying over her while she struggled to free herself.³⁰ She was released after she calmed down and complied with the group's request that she say the name "Jesus."³¹ Schubert's collapse may have resulted from exhaustion and lack of food, and she claimed she was held against her will despite demanding release and struggling to free herself.³² The congregants claimed she exhibited signs of religious distress because she was foaming at the mouth and convulsing.³³

Despite the experience, the plaintiff returned to the church multiple times on Monday and Tuesday and continued to participate in church-related activities.³⁴ Congregants testified that on Wednesday Schubert collapsed again and began exhibiting the same distressed behavior that precipitated the previous exorcism.³⁵ The plaintiff claimed she assumed the fetal position because she wanted to be left alone.³⁶ The congregants summoned the church's senior pastor, and they again held the plaintiff down on the ground while playing "pacifying music" and reciting prayers over her.³⁷

After these two events, the plaintiff's father, an Assembly of God pastor and missionary, met with the senior pastor to discuss the incidents and clarify church theological doctrine on exorcism.³⁸ From the record, the Assembly of God's stance on demonic possession and exorcism is unclear. Although the senior pastor assured the plaintiff's father that he did not believe Christians could be possessed by demons,³⁹ an official church document noted by the Texas Supreme Court majority stated that the church believed "in the literal teachings of the Bible with respect to spirits, demons, demon possession, and the 'casting out' of demons."⁴⁰ Despite this conflict in the record, the "laying on of hands" is indeed recognized as a practice central to Assembly of God beliefs.⁴¹

A few days after his consultation with church leadership, the plaintiff's father told the church that Schubert was having nightmares about demons;

³⁰ *Id.* at 3–4.

³¹ *Id.* at 4.

³² *Id.* at 3–4.

³³ *Id.* at 3.

³⁴ *Id.* at 4.

³⁵ *Id.*

³⁶ *Id.* At a youth meeting that day, the plaintiff "balled up" in a corner when the youth minister told the group to find a place to pray. When approached, the plaintiff told the other youth to leave her alone, though it is unclear why. *In re Pleasant Glade Assembly of God*, 991 S.W.2d 85, 87 (Tex. App. 1998).

³⁷ *Pleasant Glade*, 264 S.W.3d at 4.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 3.

⁴¹ See *Laying on of Hands and Anointing the Sick with Oil*, http://ag.org/top/Beliefs/gendoct_12_sick.cfm (last visited June 15, 2010).

shortly thereafter, the Schubert family left the church.⁴² Medical professionals examined the plaintiff over the course of the following months and documented her symptoms, which included “angry outbursts, weight loss, sleeplessness, nightmares, hallucinations, self-mutilation, fear of abandonment, and agoraphobia.”⁴³ The plaintiff dropped out of her senior year of high school and abandoned her plans to pursue a religious education and missionary work.⁴⁴ By November, five months after the exorcisms, she was diagnosed with traumatic stress disorder associated with the physical restraints, was classified as disabled, and began receiving monthly Social Security disability checks.⁴⁵ The plaintiff and her parents subsequently filed suit.⁴⁶

II. JUDICIAL INTERPRETATIONS OF THE FREE EXERCISE CLAUSE

“There is one condition attached to all exercises of freedom: that the use of the freedom will not breach minimal responsibilities owed to the larger society as those responsibilities are embodied in legitimate laws.”⁴⁷

The question presented to the Texas Supreme Court in *Pleasant Glade* was whether religious actors could be held liable for conducting a religious exercise on a church member when the exercise clearly satisfied the elements of a secular intentional tort. U.S. courts have developed a complex and nuanced body of free exercise jurisprudence relating to the application of secular laws to religious actors, and the evolution of this doctrine sheds light on the unspoken reasons the Texas Supreme Court used the U.S. Constitution’s First Amendment to decline jurisdiction. This Part explores the prohibition on adjudicating religious questions, the principle of church autonomy, and the U.S. Supreme Court’s treatment of the intersection between the Free Exercise Clause and secular laws.

The prohibition on adjudicating religious questions and the principle of church autonomy both require courts to decline jurisdiction over religious actors in certain circumstances. In addition to these specific doctrines, a line of cases beginning in 1878 shows the evolution of the U.S. Supreme Court’s willingness to apply secular laws to religious actors. The most recent cases demonstrate the Court’s increasing reluctance to exempt religious entities from facially neutral laws. The result in *Pleasant Glade* stands in stark contrast to this recent development.

⁴² *Pleasant Glade*, 264 S.W.3d at 4.

⁴³ *Id.*

⁴⁴ *Id.* at 5.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Angela C. Carmella, *The Protection of Children and Young People: Catholic and Constitutional Visions of Responsible Freedom*, 44 B.C. L. REV. 1031, 1044 (2003).

A. *Prohibition on Adjudicating Religious Questions*

The crux of the *Pleasant Glade* majority opinion is that allowing exorcism to expose a church to liability would require the court to address questions of religious doctrine.⁴⁸ Since the beginning of free exercise jurisprudence, courts have recognized that even neutral laws of general applicability can require courts to address constitutionally impermissible questions when applied to religious defendants.⁴⁹ The proscription on addressing these questions derives from three lines of cases prohibiting courts from (1) adjudicating the legitimacy of a religious belief, (2) interpreting religious doctrine or texts, or (3) deciding issues of internal church governance.⁵⁰ In these cases, courts are required to defer to the highest religious tribunal with jurisdiction over the matter.⁵¹ When courts are precluded from addressing a religious issue, they turn to doctrines such as jurisdiction, non-judiciability, abstention, or an evidentiary bar to dispose of the matter.⁵²

Alternatively, when public policy demands it, courts can circumvent the bar on religious questions by finding that the issue falls under a categorical exemption to the First Amendment, despite the fact that the conduct at issue may still be religious.⁵³ Categorical exemptions allow courts to retain jurisdiction by placing the religious actions outside the scope of free exercise protection.⁵⁴ Exemptions are often found where religiously motivated conduct affects third parties not sufficiently related to the religious institution,⁵⁵ occurs outside of the parameters of the religious institution,⁵⁶ is an intentional tort,⁵⁷ or involves fraud.⁵⁸ Categorical exemptions, however, can

⁴⁸ See *Pleasant Glade*, 264 S.W.3d at 13 (“Here, the psychological effect of church belief in demons and the appropriateness of its belief in ‘laying hands’ are at issue. Because providing a remedy for the very real, but religiously motivated emotional distress in this case would require us to take sides in what is essentially a religious controversy, we cannot resolve that dispute.”).

⁴⁹ See the discussion *infra* Part II.C.1 for examples of where laws can burden religious actions.

⁵⁰ See, e.g., *Burgess v. Rock Creek Baptist Church*, 734 F. Supp. 30, 34 (D.D.C. 1990) (holding that the Free Exercise Clause precluded the court from reviewing the fairness or correctness of a church’s decision to terminate the plaintiff’s membership); *Grunwald v. Bornfreund*, 696 F. Supp. 838, 840–41 (E.D.N.Y. 1988) (refusing to prevent a church’s governing body from excommunicating the plaintiff because the harm was not something the court could adjudicate).

⁵¹ *Idleman*, *supra* note 15, at 221–23.

⁵² See *id.* at 225–26.

⁵³ *Id.* at 264–66.

⁵⁴ See *H.R.B. v. J.L.G.*, 913 S.W.2d 92, 98 (Mo. Ct. App. 1995) (holding that alleged wrongdoing outside the tenets of the religion, notwithstanding a religious pretext, is actionable).

⁵⁵ *Idleman*, *supra* note 15, at 264–65; see also Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. REV. 1099, 1211 (“The sole question before the courts in the third-party harm cases is whether the religious group or individual took illegal action that caused harm and whether the law is generally applicable and neutral toward all who took similar actions.”).

⁵⁶ *Idleman*, *supra* note 15, at 265.

⁵⁷ *Id.* at 266.

⁵⁸ *Id.*

be problematic because “to determine whether conduct is or is not consistent with the tenets of the religion, even at the extremes, is itself to violate the prohibition against judicial interpretation of religious doctrine.”⁵⁹

Courts can also adjudicate disputes stemming from religious conduct if they deem the religious issue inconsequential to the dispute.⁶⁰ In these cases, although the action involves an exercise of religion, it does not result in a “waiver of secular rights [since the religious nature is] incidental at best.”⁶¹ Trials for such cases proceed without reference to the religious nature of the acts.⁶²

B. Church Autonomy

The Free Exercise Clause, in addition to prohibiting courts from adjudicating religious questions, has also been interpreted as requiring courts to recognize and refrain from interfering with areas of church autonomy. Courts have consistently declined jurisdiction over causes of action related to the issue of church autonomy over internal affairs—actions that often involve religious disciplinary measures.⁶³

A line of cases related to shunning, where church leaders direct members to cease all contact with a former or disgraced member, demonstrates this principle. Shunning raises questions about church autonomy because under secular law the acts could be classified as defamation, IIED, or other torts.⁶⁴ The shunning cases support the proposition that the Free Exercise Clause allows religious institutions to define their own “doctrine, membership, organization, and internal requirements without state interference.”⁶⁵

⁵⁹ *Id.* at 262 (“Illustrative is one court’s holding that ‘if the alleged wrongdoing was clearly outside the tenets of the religion, notwithstanding its religious pretext, then it is actionable.’”).

⁶⁰ For example, the dissent in *Pleasant Glade* stated that the trial court’s holding for the plaintiff should stand because “no religious beliefs [would have been] implicated by awarding Schubert mental anguish damages suffered as a result of her false imprisonment.” *Pleasant Glade v. Schubert*, 264 S.W.3d 1, 19 n.9 (Tex. 2008) (Jefferson, J., dissenting), *cert. denied*, 129 S. Ct. 1003 (Jan. 21, 2009).

⁶¹ *Welter v. Seton Hall Univ.*, 608 A.2d 206, 217 (N.J. 1992).

⁶² For example, the *Pleasant Glade* jury “heard almost nothing about religion during the trial due to the trial court’s diligent attempt to circumvent First Amendment problems . . . [by making sure] neither side introduce[d] religion as a reason for [Schubert’s] restraint.” *Pleasant Glade*, 264 S.W.3d at 18 (Jefferson, J., dissenting).

⁶³ See generally Hamilton, *supra* note 55, at 1190–91 (discussing “solely ecclesiastical” disputes but arguing that courts did not intend this doctrine to exempt religious institutions from liability for illegal behavior).

⁶⁴ See, e.g., *Serbian E. Orthodox Diocese for the U.S. and Can. v. Milivojevich*, 426 U.S. 696, 708–09 (1976) (finding that courts must accept the ecclesiastical decisions of church tribunals); *Burgess v. Rock Creek Baptist Church*, 734 F. Supp. 30, 34 (D.D.C. 1990) (holding that a church could not be held liable for expelling a member because it was not a secular concern).

⁶⁵ Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1464–65 (1990); *contra* *Bear v. Reformed Mennonite Church*, 341 A.2d 105, 107–08 (Pa. 1975) (granting a favorable decision for the plaintiff who was shunned).

The *Pleasant Glade* majority relied on one of these cases for the proposition that the First Amendment can immunize religious entities for acts that might otherwise lead to liability under secular tort law, particularly when the harms caused are emotional or intangible.⁶⁶ In *Paul v. Watchtower Bible and Tract Society of New York*, a group of Jehovah's Witnesses shunned the plaintiff, Janice Paul, upon her voluntary withdrawal from the church.⁶⁷ Paul sued for defamation, invasion of privacy, fraud, and IIED.⁶⁸ The district court granted summary judgment for the church, and the Ninth Circuit affirmed, holding that shunning did not "constitute a sufficient threat to the peace, safety, or morality of the community as to warrant state intervention."⁶⁹ The court protected shunning because imposing liability for the act would make it "unlawful," which in turn would force the Jehovah's Witnesses to "abandon part of [their] religious teachings."⁷⁰ The Ninth Circuit went so far as to establish that "[i]ntangible or emotional harms" cannot lead to tort liability for members of religious groups because to hold otherwise would render First Amendment protections "meaningless."⁷¹

Courts are generally wary of holding religious actors liable for intangible harms to voluntary members of a religious group when the causes of action include secular standards such as outrageousness or unreasonableness.⁷² For example, liability for IIED can only be found where the "recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'"⁷³

Because liability for IIED is based on the views of an "average member of the community," it risks allowing juries to punish unpopular or foreign religious practices.⁷⁴ Thus, courts have exempted religious groups (or

⁶⁶ *Pleasant Glade*, 264 S.W.3d at 8 (citing *Paul v. Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 819 F.2d 875 (9th Cir. 1987), cert. denied, 484 U.S. 926 (1987)).

⁶⁷ 819 F.2d at 876–77.

⁶⁸ *Id.*

⁶⁹ *Id.* at 883. Though the compelling interest test is no longer used at the federal level for most inquiries, it is still used at the state level in states like Texas that adopted a state version of the Religious Freedom Restoration Act (RFRA). See TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001–110.012. (Vernon 2005). See the discussion *infra* Part IV.A about the Texas RFRA.

⁷⁰ *Watchtower*, 819 F.2d at 881.

⁷¹ *Id.* at 883.

⁷² See generally Idleman, *supra* note 15, at 231 ("Yet another concern . . . arises where a court attempts to subject a church's or cleric's conduct to an 'objective' standard of care In these cases, the court's ultimate determination may be tantamount to a state imprimatur—an official pronouncement on what is, and what is not, a reasonable interpretation and expression of the religious tradition in question."); see also 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, 603 (1993) (discussing the problems raised by the "reasonable man" standard for negligence).

⁷³ RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

⁷⁴ Hayden, *supra* note 72, at 594.

provided an explicit constitutional defense) to proscribe liability in these types of cases.⁷⁵

C. Supreme Court Approaches to Applying General Laws to Religious Actors

When it declined jurisdiction, the *Pleasant Glade* court hinted that it was justified by the doctrine of church autonomy and the prohibition on adjudicating religious questions.⁷⁶ In addition to these doctrines, the *Pleasant Glade* court relied on various U.S. Supreme Court decisions indicating unwillingness to apply secular laws to religious actors.⁷⁷ A line of cases beginning in 1878 shows how the Supreme Court's free exercise jurisprudence has evolved. The most recent cases demonstrate that the Court is increasingly reluctant to exempt religious entities from facially neutral laws, a position which stands in stark contrast to the outcome in *Pleasant Glade*.

1. *The Religious Belief Versus Religious Action Standard.*—Supreme Court free exercise jurisprudence is commonly thought to have originated with *Reynolds v. United States*, the 1878 polygamy case in which the Court first differentiated between religious belief and religious action.⁷⁸ At issue was whether a trial judge erred in his failure to instruct the jury to acquit the defendant of violating antipolygamy laws if they found the violation was the result of his sincere religious beliefs.⁷⁹ Despite the fact that the defendant's practice of polygamy was based on deeply held religious beliefs, the Supreme Court upheld the trial judge's decision to deny the jury instruction, noting that the antipolygamy law served a valid societal interest and that

⁷⁵ See generally Idleman, *supra* note 15, at 231. Note that neither the *Pleasant Glade* lower court nor the dissent argued that the plaintiff's cause of action for IIED should go forward because the plaintiff's IIED injuries were too intangible. See *Pleasant Glade v. Schubert*, 264 S.W.3d 1, 17–18 (Tex. 2008) (Jefferson, J., dissenting), *cert. denied*, 129 S. Ct. 1003 (Jan. 21, 2009). The dissent did however argue that the false imprisonment claim should have been adjudicated because its elements did not contain anything equivalent to outrageousness or reasonableness. *Id.* at 18.

⁷⁶ See 264 S.W.3d at 2 (“[T]he case, as tried, presents an ecclesiastical dispute over religious conduct that would unconstitutionally entangle the court in matters of church doctrine . . .”).

⁷⁷ See, e.g., *id.* at 9 (citing *Cantwell v. Connecticut*, 310 U.S. 296 (1940)); *id.* at 11 (citing *United States v. Ballard*, 322 U.S. 78, 86–88 (1944)); *Serbian E. Orthodox Diocese for the U.S. and Can. v. Milivojevic*, 426 U.S. 696, 708–09 (1976).

⁷⁸ 98 U.S. 145, 166 (1878); see also JULIA K. STRONKS, LAW, RELIGION, AND PUBLIC POLICY: A COMMENTARY ON FIRST AMENDMENT JURISPRUDENCE 23 (2002).

Note that the limit on protection of religious action is supported by state practice before, during, and after the Federal Constitution's ratification. For an exploration of the philosophical, political, and religious movements in colonial America that led to the creation and implementation of the Free Exercise Clause, see generally McConnell, *supra* note 65, at 1421–73.

Nine early state constitutions limited free exercise protections to “peaceable” actions that did not interfere with the state's interest in “peace” or “safety.” See *id.* at 1461. However, religious action was usually granted some protection. For examples see GREENAWALT, *supra* note 19, at 17–18.

⁷⁹ *Reynolds*, 98 U.S. at 161–62.

conflicting religious beliefs did not excuse compliance with it.⁸⁰ The Court noted that while laws could not “interfere with mere religious belief and opinions, they may with practices,”⁸¹ and that an alternative outcome would have dire consequences for society.⁸² The *Reynolds* distinction between religious belief and religious action based on that belief marks the baseline for the Court’s free exercise jurisprudence.⁸³

2. *Strict Scrutiny: The Compelling Interest Standard.*—The *Reynolds* belief–action doctrine was refined in *Cantwell v. Connecticut* where the Court applied a more exacting standard to protect religious actors from liability under secular law.⁸⁴ At issue in *Cantwell* was whether two Jehovah’s Witnesses could play religious music in their door-to-door proselytizing, an act that secular law criminalized as unauthorized solicitation and disturbing the peace.⁸⁵ The Court noted that two First Amendment rights were at issue—free exercise and freedom of speech.⁸⁶ These First Amendment interests, the Court stated, should be accorded the same consideration as society’s interest in public order, so there must be a clear danger to “a substantial interest of the State” to infringe them.⁸⁷ The Court instituted a test balancing First Amendment rights against a substantial state interest.⁸⁸ Under this heightened standard, the Court found that the defendants’ actions did not present enough of a public danger to warrant infringing their religious rights.⁸⁹

Twenty-three years after *Cantwell*, the Warren Court continued to raise the level of scrutiny afforded in Free Exercise cases. The seminal case, *Sherbert v. Verner*, marked the first application of true strict scrutiny to a free exercise controversy.⁹⁰ The *Sherbert* Court held that a state could not

⁸⁰ *Id.* at 166 (“[I]t is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.”); see also CATHARINE COOKSON, REGULATING RELIGION: THE COURTS AND THE FREE EXERCISE CLAUSE 7 (2001).

⁸¹ *Reynolds*, 98 U.S. at 166.

⁸² *Id.* at 167 (“[To permit a religious exception] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.”).

⁸³ BRUCE T. MURRAY, RELIGIOUS LIBERTY IN AMERICA: THE FIRST AMENDMENT IN HISTORICAL AND CONTEMPORARY PERSPECTIVE 145 (2008); see, e.g., *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940) (“[Religious acts remain] subject to regulation for the protection of society.”).

⁸⁴ See *Cantwell*, 310 U.S. at 311 (requiring that “a statute [must be] narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State” in order for it to constitutionally infringe First Amendment freedoms).

⁸⁵ *Id.* at 309.

⁸⁶ *Id.*

⁸⁷ *Id.* at 311.

⁸⁸ *Id.*

⁸⁹ *Id.*; see also COOKSON, *supra* note 80, at 13.

⁹⁰ 374 U.S. 398, 410 (1963); see Michael W. McConnell, *Religious Participation in Public Programs: Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 127 (1992).

deny an individual unemployment compensation for refusing to work on Saturdays for religious reasons.⁹¹ The plaintiff's "ineligibility for benefits derive[d] solely from the practice of her religion," according to the Court, and "the pressure upon her to forego [practicing her Sabbath was] unmistakable."⁹² In the face of such interference with religious exercise, the Court stated that the law must have been passed to address a "compelling" or "paramount" state interest that could not be adequately served by narrower means.⁹³ The *Sherbert* "compelling interest" test would later be rejected for use in most First Amendment inquiries by Justice Scalia in the modern case, *Employment Division, Department of Human Resources of Oregon v. Smith*.⁹⁴

The Burger Court continued to apply strict scrutiny in free exercise controversies. For example, *Wisconsin v. Yoder* addressed whether the Amish had to comply with mandatory state education laws that required schooling children through high school when Amish religious beliefs mandated that children leave school and enter vocational training in the community after the eighth grade.⁹⁵ The Court rejected the argument that the Amish educational structure fell outside the purview of First Amendment protection and ruled that Wisconsin's interest in education was not compelling enough to trump the Amish's deeply-rooted religious practices.⁹⁶ The Court placed importance on the fact that compelling the Amish to school their children through high school threatened to undermine the entire Amish community and its religious beliefs.⁹⁷ However, the Court reiterated that religious action was still subject to regulations aimed at compelling state interests in the public "health, safety, and general welfare."⁹⁸

In some ways, cases like *Sherbert* and *Yoder* under the Warren and Burger Courts marked the height of free exercise protection for religious actors,⁹⁹ but during the 1980s the Court increasingly disfavored application of *Sherbert* strict scrutiny.¹⁰⁰ For example, in *Goldman v. Weinberger* the

⁹¹ 374 U.S. at 410.

⁹² *Id.* at 404.

⁹³ *Id.* at 406–07 ("[I]t would plainly be incumbent upon the [state] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights.").

⁹⁴ 494 U.S. 872, 886 (1990); see the discussion *infra* Part II.C.3 regarding the *Smith* decision.

⁹⁵ 406 U.S. 205, 215–16 (1972).

⁹⁶ *Id.* at 221–22.

⁹⁷ *Id.* at 218, 227.

⁹⁸ *Id.* at 219–20.

⁹⁹ *But cf.* McConnell, *supra* note 90, at 127–28 (arguing that the strict scrutiny "doctrine was supportive, but its enforcement was half-hearted or worse").

¹⁰⁰ See *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 883 (1990) ("In recent years we have abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all."); Shea Sisk Wellford, *Tort Actions Against Churches—What Protections Does the First Amendment Provide?*, 25 U. MEM. L. REV. 193, 202–03 (1994) ("In the 1980s, the Supreme Court adhered to the compelling interest test in name, but applied it leniently and found it easily met.").

Court held that the government's interest in military uniformity justified a policy that prevented an Orthodox Jewish Air Force officer from wearing his yarmulke indoors.¹⁰¹ As the 1990s approached, the tide in free exercise protection was turning.

3. *A Major Shift: "Smith Neutrality."*—The ebb in free exercise protection culminated in the 1990 case *Employment Division, Department of Human Resources of Oregon v. Smith*, which did away with strict scrutiny for most free exercise challenges.¹⁰² *Smith* held that "generally applicable, religion-neutral laws" did not need to be justified by a compelling government interest, regardless of any burden they might place on a religious practice or group.¹⁰³ This "*Smith* neutrality," which largely remains in effect today,¹⁰⁴ means that religious actors are not immune from tort liability under secular laws or regulations whether or not they are justified by a compelling governmental interest.¹⁰⁵

In *Smith*, the Court upheld a criminal drug law banning peyote use despite the burden it placed on Native American Church members who used peyote in a sacramental manner.¹⁰⁶ The case arose when two men fired for using peyote for religious reasons were denied unemployment benefits by the state because peyote possession violated state law.¹⁰⁷ The Court reasoned that "neutral, generally applicable" laws could be applied to "religiously motivated action" without violating the Free Exercise Clause.¹⁰⁸ Furthermore, because individuals have no right to violate religion-neutral laws (laws that do not target a religious practice on their face), the government does not have to assert a compelling interest in order to justify the law, even if it incidentally burdens a religious practice.¹⁰⁹

¹⁰¹ 475 U.S. 503, 509–10 (1986); Wellford, *supra* note 100, at 203–04.

¹⁰² 494 U.S. at 883–86; see JESSE H. CHOPER, *SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES* 54–55 (1995). Note that this was the second time the *Smith* controversy reached the U.S. Supreme Court. See *Employment Div., Dep't of Human Res. of Or. v. Smith*, 485 U.S. 660 (1988). The Court remanded the first case so the Oregon Supreme Court could determine whether the defendants' sacramental use of peyote was proscribed by Oregon law; the Oregon court found that it was. *Smith*, 494 U.S. at 875–76.

¹⁰³ *Smith*, 494 U.S. at 886 n.3; see also Idleman, *supra* note 15, at 252.

¹⁰⁴ See the discussion *infra* note 125 regarding the Religious Land Use and Institutionalized Persons Act, which reinstated the compelling interest test in the land use and institutionalized persons contexts.

¹⁰⁵ *Smith*, 494 U.S. at 885–86 & n.3; see generally Idleman, *supra* note 15, at 253–54 (arguing that although "*Smith* neutrality" could result in governmental aid to religious institutions, in the tort context defendants would be exposed to "the same adjudicatory processes as their nonreligious counterparts").

¹⁰⁶ 494 U.S. at 890.

¹⁰⁷ *Id.* at 872.

¹⁰⁸ *Id.* at 881. The Court said that "[i]t is a permissible reading of the [First Amendment] . . . to say that if prohibiting the exercise of religion . . . is not the object of the [regulation] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Id.* at 878.

¹⁰⁹ *Id.* at 879, 883–84, 886 & n.3.

Writing for the majority, Justice Scalia distinguished civil laws from criminal laws that burden religion, noting that the compelling interest test had never been used to invalidate criminal laws such as the one at issue in *Smith*.¹¹⁰ The Court held that going forward the test would be “inapplicable” to challenges against general criminal laws, though it might continue to apply in the narrow area of governmental denial of unemployment compensation.¹¹¹

Another type of controversy subject to greater scrutiny is a “hybrid” case where additional constitutional freedoms beyond free exercise are implicated, such as the free speech right in *Cantwell* or the parental interest in *Yoder*.¹¹² Applying the heightened standard to criminal laws in nonhybrid cases such as *Smith*, however, would create “a private right to ignore generally applicable laws—a constitutional anomaly.”¹¹³

Though the Court upheld the state criminal drug law in *Smith*, dicta stressed that the political branches remained free to exempt religious actors and entities, and were in fact more suited for the task.¹¹⁴ Such legislative exemptions, if narrowly tailored to a specific religious practice, would be constitutionally valid.¹¹⁵

In her *Smith* concurrence, Justice O’Connor doubted whether the political branches were up to the task because under the new scheme the judicial system would not be able to invalidate laws in all but the most “extreme and hypothetical situation in which a state directly targets a religious practice.”¹¹⁶ This, she said, would only provide the bare minimum of protection

¹¹⁰ *Id.* at 884–85. Justice Scalia used the balancing test formulation from *Sherbert v. Verner*, which required “governmental actions that substantially burden a religious practice [to] be justified by a compelling governmental interest.” *Id.* at 882–83; see *Sherbert v. Verner*, 374 U.S. 398, 402–03 (1963).

¹¹¹ *Smith*, 494 U.S. at 883–85. Justice Scalia distinguished governmental denial of unemployment benefits because it involves a state-created “system of individual exemptions, [and a state] may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.” *Id.* at 884 (quoting *Bowen v. Roy*, 476 U.S. 693, 708 (1986)).

¹¹² *Id.* at 881–82; see also Wellford, *supra* note 100, at 205 n.68 (citing hybrid cases in which lower courts have or have not implemented “*Smith* neutrality”).

¹¹³ *Smith*, 494 U.S. at 885–86.

¹¹⁴ *Id.* at 890; see generally STRONKS, *supra* note 78, at 24 (“[S]tate or federal legislators [can] exercise sensitivity to religious groups and create exemptions from the law which accommodate the beliefs. Communion services were exempt from the Prohibition laws of the early twentieth century; some states exempt peyote use from illegal drug prosecutions. However, when the legislators refuse to accommodate religious beliefs, and individuals ‘conscientiously object’ to the law, the courts step in to determine whether or not the state has the Constitutional obligation to exempt the religious objector from the law.”).

¹¹⁵ See generally Hamilton, *supra* note 55, at 1214 (“The legislature is the entity that is institutionally competent to hear the concerns of burdened religious entities and to make the determination whether relieving them of obligations to a particular law is consistent with the public good.”).

¹¹⁶ 494 U.S. at 894 (O’Connor, J., concurring).

that might already be provided by the Fourteenth Amendment's Equal Protection Clause.¹¹⁷

Despite Justice O'Connor's misgivings, the Oregon legislature responded to the *Smith* decision by adding an affirmative defense to the disputed drug statute for use of peyote "[i]n connection with the good faith practice of a religious belief."¹¹⁸

The Oregon legislature was not the only political branch to respond to the controversial decision. Following *Smith*, a national uproar about the erosion of free exercise protections led Congress to reinstate the compelling interest standard with passage of the Religious Freedom Restoration Act (RFRA) in 1993.¹¹⁹ The RFRA required laws that burdened religious actors to be justified by a compelling state interest and to employ the least restrictive means of furthering that interest.¹²⁰

However, the revival of the heightened standard was short-lived. Four years later, in *City of Boerne v. Flores*, the U.S. Supreme Court confirmed the death of strict scrutiny by invalidating the RFRA.¹²¹ In *Boerne*, the Court deemed the RFRA unconstitutional as applied to state and local acts because it exceeded Congress's authority under the Fourteenth Amendment's Enforcement Clause and violated separation of powers.¹²² Instead of enforcing First Amendment rights as required by Section 5 of the Fourteenth Amendment, the RFRA attempted to *redefine* them, a task delegated to the Court alone and mandated by the Constitution.¹²³

Under the post-*Boerne* "*Smith* neutrality" standard, "[t]he most coherent reading of the Supreme Court's Religion Clause cases shows that there is no defensible rule that would permit a religious defense to laws that govern conduct injuring third parties."¹²⁴ "*Smith* neutrality," therefore, was in

¹¹⁷ *Id.*; see, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523, 533–34 (1993) (invalidating a city ordinance banning animal sacrifice as unconstitutional because it targeted practices of the Santeria religion and thus was not neutral).

¹¹⁸ OR. REV. STAT. § 475.840(4)(a) (2007). The peyote use also must be "directly associated with a religious practice; and . . . [i]n a manner that is not dangerous to the health of the user or others who are in the proximity of the user." *Id.* § 475.840(4)(b)–(c).

¹¹⁹ Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103–141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by City of Boerne v. Flores*, 521 U.S. 507 (1997); see ROFES, *supra* note 3, at 157–59.

¹²⁰ RFRA § 3(b).

¹²¹ 521 U.S. at 511.

¹²² *Id.* at 519, 536.

¹²³ *Id.* at 519 ("The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is.").

¹²⁴ Hamilton, *supra* note 55, at 1109. Additionally, under this interpretation, courts have their hands tied:

If a legitimate legislature has duly enacted a law that makes certain conduct illegal because it harms particular individuals or the public as a whole, that determination cannot be overturned in

effect when the Texas Supreme Court considered the free exercise defense in *Pleasant Glade*.¹²⁵

III. WHAT WAS THE *PLEASANT GLADE* COURT THINKING?

Despite the limitations placed on First Amendment defenses by *Smith* and *Boerne*, the Texas Supreme Court declined jurisdiction over the “laying on of hands” controversy based on the religious question and church autonomy doctrines.¹²⁶ This Note argues that underlying the *Pleasant Glade* ruling is the court’s reliance on three assumptions: first, that exorcism is a practice worth protecting; second, that judges can develop and advance tort standards; and third, that individuals—like Laura Schubert—can consent to otherwise tortious acts when they join a religious group. Based on these theories, the Texas Supreme Court avoided adjudicating tort claims against religious actors contrary to the mandate of “*Smith* neutrality.”

A. *Exorcism Is Worth Protecting*

“[T]esting and emotional stress have often been regarded as necessary steps for spiritual growth.”¹²⁷

This Note asserts that the outcome in *Pleasant Glade* is in part a reflection of the Texas Supreme Court’s belief that exorcism is a practice worth protecting. Whether warranted by the lack of danger posed by exorcism, or by the implications an alternate finding would have for other religious practices, the majority hinted at its motives when it stated that holding the church liable would lead to an “unconstitutional chilling effect” on the church and its members.¹²⁸ A “chilling effect” would be troubling because the “laying on of hands” ritual was “part of the church’s belief system and accepted as such by its adherents.”¹²⁹

The Texas Supreme Court may have feared the “unconstitutional chilling effect” would result in the end of exorcisms. Traditionally, exorcism is a physical act that involves holding down an individual who may respond

the courts by claims that the motivation for the illegal conduct was religious. Nor can it be overturned based on the contention that the religious institution is naturally autonomous from the law. *Id.* at 1109–10.

¹²⁵ Note that, in 2000, Congress responded to *Boerne* with passage of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc (2006). The RLUIPA reinstated the compelling interest test in the narrow contexts of land use and institutionalized persons when federal funds or interstate or international commerce were involved. *Id.* The Court upheld the RLUIPA in 2005. *Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005).

¹²⁶ *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d 1, 2 (Tex. 2008), *cert. denied*, 129 S. Ct. 1003 (Jan. 21, 2009) (“[T]he case, as tried, presents an ecclesiastical dispute over religious conduct that would unconstitutionally entangle the court in matters of church doctrine . . .”).

¹²⁷ GREENAWALT, *supra* note 19, at 308.

¹²⁸ *Pleasant Glade*, 264 S.W.3d at 10 (internal quotation marks omitted).

¹²⁹ *Id.* at 12–13.

with “spiritual, psychic, and usually physical” opposition.¹³⁰ The physical nature of exorcism and expected resistance by the purportedly possessed person seem to satisfy the elements of false imprisonment.¹³¹ A different finding in *Pleasant Glade* could have led religious groups who practice exorcism to either stop the practice out of fear of liability, or continue performing exorcisms and risk insolvency from compensating disgruntled members.¹³²

In addition to exorcism’s potential extinction, the Texas Supreme Court explicitly recognized the practice’s basis in sincere religious beliefs, and may have taken into account that an inquiry into those beliefs was impermissible in a pluralistic society that is among the most religious in the world.¹³³ For certain religious denominations, exorcism is a part of the “general Ministry of Healing of the Church,” considered by some as fundamental to faith as the practice of baptism or marriage.¹³⁴ There are numerous Christian bases for exorcism, including the Gospels of Matthew, Mark, and Luke,¹³⁵ and exorcism practitioners generally believe “that there is a principle of evil present in the Universe of Today [Practitioners] believe that this creature can infect the Spiritual nature of man.”¹³⁶

¹³⁰ DOUGLAS HOWELL-EVERSON, A HANDBOOK FOR CHRISTIAN EXORCISTS 175 (1982); see also GRAHAM DOW, THOSE TIREDSOME INTRUDERS: SHARING EXPERIENCE IN THE MINISTRY OF DELIVERANCE 8 (1990) (“Driving out spirits is part of the liberation of people from Satan’s rule and a power struggle is involved[.]”).

¹³¹ Under Texas law, the elements of false imprisonment are: “(1) willful detention; (2) without consent; and (3) without authority of law.” *Pleasant Glade*, 264 S.W.3d at 16 n.3 (Jefferson, J., dissenting) (quoting *Wal-Mart Stores, Inc. v. Rodriguez*, 92 S.W.3d 502, 506 (Tex. 2002)).

¹³² See the discussion *infra* note 181 and accompanying text regarding the possible outcomes.

¹³³ Americans are very religious. See Stephen M. Feldman, *Critical Questions in Law and Religion: An Introduction*, in LAW AND RELIGION: A CRITICAL ANTHOLOGY 2 (Stephen M. Feldman ed., 2000) (“America remains more religious than any other Western industrialized nation.”). When asked about the importance of God in one’s life, the average American response of “eight” on a scale of one to ten ranked second highest in the world. Hayden, *supra* note 72, at 595 (quoting GARRY WILLS, UNDER GOD: RELIGION AND AMERICAN POLITICS 16 (1990)). Nine out of ten Americans say they have never doubted the existence of God, and thirty-seven percent believe in a “personal devil.” *Id.*

¹³⁴ HOWELL-EVERSON, *supra* note 130, at 1. Christian denominations that recognize exorcism include the Roman Catholic Church and the Church of England; see also the discussion *infra* note 177 regarding practices in the Roman Catholic Church and in the Church of England; John L. Allen, Jr., *Exorcism: To Hell, and Back*, NAT’L CATH. REP., Sept. 1, 2000, available at http://findarticles.com/p/articles/mi_m1141/is_38_36/ai_65344585/ (discussing tension over whether lay people “coming out of the charismatic renewal” should be able to participate in exorcisms); Stafford Betty, *The Growing Evidence for “Demonic Possession”: What Should Psychiatry’s Response Be?*, 44 J. RELIGION & HEALTH 13, 13 (2005) (“[T]here is no place in the world where [exorcisms] are unknown.”).

¹³⁵ See generally DOW, *supra* note 130, at 7 (“[T]he first disciples were given instructions to cast out the spirits and heal every disease The impression . . . is that dealing with evil spirits is as common as dealing with sickness . . . and that the ministry of deliverance can be handled by all Christian disciples acting with Christ’s authority.” (internal citations omitted)).

¹³⁶ HOWELL-EVERSON, *supra* note 130, at 2.

This belief in demons and possession is the religious doctrine the Texas Supreme Court declined to review.¹³⁷ Whether the court believed that exorcism itself was important or simply that the risk of an alternate finding outweighed the potential harm from exorcism in a religious, pluralistic society, the result clearly weighed in favor of exorcism and its practitioners.

B. Judges Can Adjust Tort Law

“All law responds somewhat to the gravitational pull of legal notions extraneous to the particular area of concern.”¹³⁸

Once the *Pleasant Glade* majority decided against finding liability in the controversy, it may have relied on the unique role of the judiciary in formulating tort law and protecting minorities to dismiss the case. When tort standards lead to unjust results, judges can and do adjust common law standards,¹³⁹ and the *Pleasant Glade* majority appeared to embrace this role as caretaker of the common law when it declined jurisdiction over the “laying on of hands” controversy.

Tort law affords judges, who develop the common law, flexibility in the standards they apply to individual disputes.¹⁴⁰ Because tort law “accommodate[s] majoritarian notions of right and wrong,”¹⁴¹ it is the unique role of the judiciary to protect minority viewpoints when necessary to avoid “allow[ing] majoritarianism to ride roughshod over unpopular or minority rights and beliefs, the protection of which is an important societal value.”¹⁴²

The application of tort law to religious entities can be problematic because, in many ways, “tort law and freedom of religion are . . . diametrically opposed.”¹⁴³ While tort law aims to punish antisocial acts, freedom of religion strives to protect minority groups that outsiders might disapprove of as antisocial.¹⁴⁴ Within the context of its unique role in forming the common law, the *Pleasant Glade* court had to balance these concerns. In dismissing the case, the court may have taken into account the fact that despite the overall size of the Assembly of God Church, its members nevertheless remained a minority population in Texas.¹⁴⁵

¹³⁷ See *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d 1, 12–13 (Tex. 2008), cert. denied, 129 S. Ct. 1003 (Jan. 21, 2009).

¹³⁸ GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW 46 (1985).

¹³⁹ Hayden, *supra* note 72, at 582–83.

¹⁴⁰ GREENAWALT, *supra* note 19, at 290–91.

¹⁴¹ Hayden, *supra* note 72, at 584.

¹⁴² *Id.* at 586.

¹⁴³ See *id.* at 597–98.

¹⁴⁴ *Id.*

¹⁴⁵ See John C. Green et al., *The Soul of the South: Religion and Southern Politics at the Millennium*, in THE NEW POLITICS OF THE OLD SOUTH 283, 287 (Charles S. Bullock III & Mark J. Rozell eds., 2d ed. 2003) (noting that as of the year 2000 high-commitment evangelicals made up at most twenty-

The majority's perceived role for itself in *Pleasant Glade* differed from that adopted by the trial and appellate courts. Whereas the trial court in *Pleasant Glade* kept the jury from hearing any religious testimony at the direction of the appellate court (and *Smith*),¹⁴⁶ the Texas Supreme Court majority quickly dismissed *Smith* as inapplicable to the dispute.¹⁴⁷ The majority was unwilling to apply tort law to the church because though elements of torts are “defined by secular principles without regard to religion, it does not necessarily follow that application of those principles to impose civil tort liability would not run afoul of protections the [C]onstitution affords to a church's right to construe and administer church doctrine.”¹⁴⁸ Though “*Smith* neutrality” seems to mandate the application of secular tort law to Laura Schubert's claims of false imprisonment, the *Pleasant Glade* majority employed its unique role in the development of tort law and protection of minority groups to reverse the jury finding, decline jurisdiction, and preclude liability for the church.

C. Consent

In addition to the Texas Supreme Court's perceived role as protector of minorities, another justification for disposing of the *Pleasant Glade* case was that Laura Schubert impliedly consented to the “laying on of hands.”¹⁴⁹ Consent vitiates liability for false imprisonment in Texas because the tort requires willful detention, *without consent*, and without authority of law.¹⁵⁰

five percent of southern religious groups). The Assembly of God would be a subset of this group. However, it is not clear how widespread the practice of exorcism is in other religious groups in Texas.

¹⁴⁶ See *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d 1, 18 (Tex. 2008) (Jefferson, J., dissenting), *cert. denied*, 129 S. Ct. 1003 (Jan. 21, 2009).

¹⁴⁷ The majority acknowledged Justice Green's dissenting statement that *Smith* required cases to be decided “according to neutral principles of tort law . . . [i]f a plaintiff's case can be made without relying on religious doctrine,” but responded that Schubert's claims did “involve church beliefs on demonic possession and how discussion about demons at the church affected Laura emotionally and psychologically.” *Id.* at 11 (quoting *id.* at 23 (Green, J., dissenting)) (internal quotation marks omitted, alteration in original).

¹⁴⁸ *Id.* at 10 (citing *Westbrook v. Penley*, 231 S.W.3d 389, 400 (Tex. 2007)); see, e.g., *United Kosh-er Butcher's Ass'n v. Associated Synagogues of Greater Boston, Inc.*, 211 N.E.2d 332, 334 (Mass. 1965) (“Phrasing the issue raised . . . in terms of whether the controversy is ‘primarily’ or ‘largely’ a religious one can be misleading. . . . [J]udicial intervention is determined by the nature of the central issue to be resolved, and not by the incidental or consequential results of the decision.”).

¹⁴⁹ See generally Hayden, *supra* note 72, at 650. Hayden discusses the strengths of a theory of consent, as applied to religiously-motivated torts, where voluntary membership status alone establishes consent. He argues that this theory makes sense because it rings true with common sense, it derives from the freedom to exercise (or not exercise) religion freely, and it relates to other legal norms for close-knit communities. *Id.* at 650–52. However, he ultimately dismisses the consent theory as defective because in the end it relies on a judicial determination of religious questions, and rests on an assumption that “passive” discipline is acceptable while “active” discipline is not. *Id.* at 652–53.

¹⁵⁰ See *Pleasant Glade*, 264 S.W.3d at 16 n.3. (Jefferson, J., dissenting) (quoting *Wal-Mart Stores, Inc. v. Rodriguez*, 92 S.W.3d 502, 506 (Tex. 2002)).

Courts distinguish between torts committed against members of a religious organization and those committed against nonmembers.¹⁵¹ Generally, when an individual joins a religious group they consent to the practices of that group, though the practices might be considered tortious in the secular world.¹⁵² When this is the case, the First Amendment bars liability for adhering to those practices *unless* the consent was vitiated by either fraud¹⁵³ or coercion¹⁵⁴ in joining or remaining a member of the religious group.¹⁵⁵ When either fraud or coercion is present, the plaintiff's First Amendment right *not* to believe comes into play and the plaintiff can withdraw her consent.¹⁵⁶

For example, in *Guinn v. Church of Christ of Collinsville*, the Oklahoma Supreme Court held that a church had no right to commit a tort against a former member.¹⁵⁷ Church elders told the congregation that the plaintiff engaged in fornication before she resigned from the church.¹⁵⁸ The court held that the doctrine of church autonomy did not apply because the case did not rest on a question of church doctrine or policy.¹⁵⁹ Rather, the church violated the plaintiff's freedom to withdraw from worship.¹⁶⁰ Despite the fact that the plaintiff consented to the church's procedures, she withdrew consent by abandoning her church membership, after which the church could be held liable.¹⁶¹ On the other hand, courts have also held that consent can

¹⁵¹ See generally Hamilton, *supra* note 55, at 1114–16 (arguing that where religious conduct, as opposed to belief, harms third parties, “the religious institution’s arguments for freedom from the law are at their lowest ebb,” and the action can be regulated).

¹⁵² See the discussion *supra* Part II.B regarding the shunning cases in which courts find consent to an otherwise tortious act. See, e.g., *Westbrook*, 231 S.W.3d at 399 (“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.”).

¹⁵³ See, e.g., *Molko v. Holy Spirit Ass’n for the Unification of World Christianity*, 762 P.2d 46, 60 (Cal. 1988) (holding that the plaintiffs’ assertion that they were fraudulently induced to join the Unification Church did not challenge the truth of the church’s beliefs, and therefore that any burden on religious practice was justified by the state’s interest in protecting the public from fraudulently being placed into an atmosphere of coercive persuasion).

¹⁵⁴ See, e.g., *Wollersheim v. Church of Scientology of Cal.*, 260 Cal. Rptr. 331, 341–43 (Cal. Ct. App. 1989), *cert. denied*, 510 U.S. 1176 (1994) (holding that a church’s plan to ruin the plaintiff financially as retribution for leaving the church was not protected by the First Amendment because it involved coercion, even if it was a religious practice).

¹⁵⁵ Hayden, *supra* note 72, at 650.

¹⁵⁶ *Id.*

¹⁵⁷ 775 P.2d 766, 786 (Okla. 1989).

¹⁵⁸ *Id.* at 768–69. The church claimed that the practice encouraged dissidents to repent and return to the church, and urged current members to remain free from sin. *Id.* at 768 n.2.

¹⁵⁹ *Id.* at 773.

¹⁶⁰ *Id.* at 776–77.

¹⁶¹ *Id.* at 778. However, only three years later the same court held that a religious group is entitled to privilege even where its disciplinary action occurs after excommunication so long as the action is mere implementation of a *previously pronounced* sanction which was validly exercised. See *Hadnot v. Shaw*, 826 P.2d 978, 987 (Okla. 1992) (“The church privilege extends . . . to activities or communications which occurred *after excommunication* if these may be termed as mere implementation of pre-

endure even if a member leaves because members “should not have to forego . . . [a] vital religious practice so that individual dissidents will have maximum freedom of choice at a particular moment.”¹⁶²

The *Pleasant Glade* majority invoked implied consent when it declined jurisdiction over exorcism, a practice “to which the [Assembly of God] church members adhere.”¹⁶³ The court stated that practices disapproved of by the general population are “entitled to greater latitude when applied to an adherent within the church,” and that the “laying on of hands” was “to be expected and [is] accepted by those in the church.”¹⁶⁴ Making such a determination as to Schubert effectively threw out the jury’s factual finding that she did not consent—a finding the church had not even challenged.¹⁶⁵ Nevertheless, by going out of its way to presume Schubert impliedly consented to the exorcism by joining the church, the court was again able to find grounds to avoid applying “*Smith* neutrality” to the practice.

IV. A BETTER WAY

Unlike legislative exemptions which can be revisited and repealed, *Pleasant Glade* may continue to influence future cases despite later decisions limiting or criticizing its reasoning for granting sweeping immunity to religious actors.¹⁶⁶ To prevent the decision from being used by tortfeasors only tangentially motivated by religious belief and to encourage those who practice exorcism and similar activities to take precautions, the decision’s scope should be clearly defined and limited to a narrow set of facts. This Part explores how the *Pleasant Glade* decision could have been improved and how future courts should approach the issue. First, the decision should have relied upon the Texas Religious Freedom Restoration Act instead of the First Amendment’s Free Exercise Clause. Second, the decision should have delineated clearly when an act such as exorcism can lead to liability. Third, future decisions that find liability can limit or eliminate punitive damages to encourage precautions while preventing the extinction of the religious practice.

viously pronounced ecclesiastical sanction which was valid when exercised—i.e., that it was declared when Church jurisdiction existed.” (footnotes omitted).

¹⁶² GREENAWALT, *supra* note 19, at 295.

¹⁶³ *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d 1, 10 (Tex. 2008), *cert. denied*, 129 S. Ct. 1003 (Jan. 21, 2009).

¹⁶⁴ *Id.* at 12–13. Recall that the court apparently considered the plaintiff able to consent although she was only seventeen when the exorcisms occurred. See the discussion *supra* note 13.

¹⁶⁵ *Id.* at 20 (Jefferson, J., dissenting).

¹⁶⁶ See Hamilton, *supra* note 55, at 1200. This is especially true since the U.S. Supreme Court denied certiorari. *Schubert v. Pleasant Glade Assembly of God*, 129 S. Ct. 1003 (Jan. 21, 2009).

A. Use the Texas RFRA

First, the *Pleasant Glade* court could have relied on the Texas Religious Freedom Restoration Act (Texas RFRA)¹⁶⁷ to hold the church not liable. The Texas RFRA, like all RFRAs, was the state legislature's attempt to preserve the "compelling interest" test after *Boerne*, which invalidated only the federal RFRA.¹⁶⁸ Despite *Boerne*, states remain free to enact such laws and may make them "more protective than federal law."¹⁶⁹ Thus, under the Texas RFRA, any "substantial[] burden" on a religious exercise must be "in furtherance of a compelling governmental interest" and "the least restrictive means of furthering that interest."¹⁷⁰

Using the Texas RFRA, the Texas Supreme Court could have balanced the state's interest in protecting residents from intentional torts against the church's right to conduct exorcisms on its members. Relying on Texas law would have restricted the decision to a narrower and more appropriate application, avoided creating federal constitutional precedent,¹⁷¹ and acted as a call-to-action for the legislature to address the issue of exorcism and either grant or deny a legislative exemption.

B. Draw a Line

This Note argues that the exorcism at issue in *Pleasant Glade* came very close to the "line" where an exorcism should result in liability and that the implicit assumptions throughout the decision, if made more explicit, could have formulated a more nuanced opinion that would encourage religious actors to take precautions, protect the public safety, and still preserve First Amendment freedoms.

Though courts often leave decisions open for interpretation, one could argue that the *Pleasant Glade* majority's reasoning was so broad that, as the dissent lamented, "a tortfeasor need merely allege a religious motive to deprive a Texas court of jurisdiction to compensate his fellow congregant for emotional damages."¹⁷² While in reality the *Pleasant Glade* decision might

¹⁶⁷ TEX. CIV. PRAC. & REM. CODE ANN. § 110 (Vernon 1999).

¹⁶⁸ *Scott v. State*, 80 S.W.3d 184, 193 (Tex. App. 2002); see also the discussion *supra* Part II.C.3 regarding *City of Boerne v. Flores*, 521 U.S. 507 (1997).

¹⁶⁹ See *Scott*, 80 S.W.3d at 193 n.4; *Hulit v. State*, 982 S.W.2d 431, 437 n.11 (Tex. Crim. App. 1998) (quoting Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 179 (1984)).

¹⁷⁰ TEX. CIV. PRAC. & REM. CODE ANN. § 110.003(a)–(b)(2) (Vernon 1999).

¹⁷¹ That courts should avoid making constitutional rulings when possible is one of the classic axioms of the avoidance principle. See *Clark v. Martinez*, 543 U.S. 371, 381–82 (2005); Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1948–49 (1997) ("For example, courts should decide an antecedent statutory issue, even one waived by the parties, if its resolution could preclude a constitutional claim.").

¹⁷² *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d 1, 13 (Tex. 2008) (Jefferson, J., dissenting), *cert. denied*, 129 S. Ct. 1003 (Jan. 21, 2009).

be unlikely to preclude liability for a broad range of otherwise tortious acts, this Note asserts that future decisions can avoid this danger.

Though the majority acknowledged that it could “imagine circumstances under which an adherent might have a claim for compensable emotional damages as a consequence of religiously motivated conduct,”¹⁷³ it did not expound on what such a case might look like. The opinion implied that liability might arise when a plaintiff is not a member of a religious group (and therefore did not consent to its practices),¹⁷⁴ or when physical harms are proven.¹⁷⁵ If made explicit, these conceptions of when liability should occur, along with others, can better incentivize religious groups to take precautions while preserving their religious freedoms and the public’s safety.

For example, future courts should find liability results from, but need not be limited to: exorcisms conducted on a nonmember without consent; those conducted on a minor without parental consent; and those resulting in any substantial physical injury regardless of consent. At the very least, the court should have made explicit that it was treating the seventeen-year-old plaintiff in *Pleasant Glade* as an adult capable of consenting—and impliedly consenting at that—to church practices.¹⁷⁶ The *Pleasant Glade* decision should not be the basis for allowing exorcisms to be conducted on children without parental consent.

That a “safe” line can be drawn to preserve exorcism without granting sweeping immunity is supported by the existence of religious guidelines for exorcisms. In response to increasing secular scrutiny and a better understanding of mental illness, certain denominations have developed precautionary practices for exorcism. For example, a handbook for Christian exorcists suggests that medical doctors or psychiatrists should accompany exorcists, and that all mental and physical states that can be confused with demonic possession should be ruled out.¹⁷⁷

¹⁷³ *Id.* at 12.

¹⁷⁴ The Texas Supreme Court concluded that the religious practices at issue in *Pleasant Glade* were “part of the church’s belief system and accepted as such by its adherents.” *Id.* at 12–13. However, some of the testimony in the record seems to contradict the foreseeability of and implied consent to exorcism. *Id.* at 4 (noting that the senior pastor told the plaintiff’s father and the youth group that neither he nor his wife “believe[d] that Christians can be demon possessed”).

¹⁷⁵ The *Pleasant Glade* majority was influenced by the “intangible” nature of Laura Schubert’s injuries. *Id.* at 8–9. See also the discussion *supra* Part II.B regarding the tendency of courts to protect religious actions that cause only emotional harms.

¹⁷⁶ See the discussion *supra* note 13 regarding the treatment of minors.

¹⁷⁷ HOWELL-EVERSON, *supra* note 130, at 56–57 (describing ailments that can be confused with possession or subjection including epilepsy, autism, senility, dementia, hypothermia, brain tumors, syphilis, and a host of other conditions). Roman Catholic exorcism rules direct specially appointed exorcists to “not believe too readily that a person is possessed by an evil spirit; but he ought to ascertain the signs by which a person possessed can be distinguished from one who is suffering from some illness, especially one of a psychological nature.” The Roman Ritual, Part XIII, Ch. 1, 3 (1952), <http://www.ewtn.com/library/prayer/roman2.txt> (last visited June 15, 2010). The Church of England uses “practices that normalize, medicalize, bureaucratize, and rationalize exorcism . . . that stress the impor-

While courts cannot constitutionally mandate a handbook, or question whether a religious practitioner complied with a standard of care ordinary to that type of religious practitioner (such as that in a handbook),¹⁷⁸ the development of precautionary practices suggests that exorcism can exist in today's secular world without threatening the public safety.

C. *Limit Punitive Damages*

As an alternative to delineating when exorcism will lead to liability, this Note argues that future courts could allow secular claims against religious actors, but limit or eliminate the availability of punitive damages in cases involving religious practices such as exorcism. For the most egregious cases, such as those involving physical injury or third parties, punitive damages would still be permissible and criminal statutes might come into play.

The jury did not award Laura Schubert punitive damages,¹⁷⁹ but the *Pleasant Glade* majority may have feared that allowing the jury verdict to stand would lead to crushing liability for future religious defendants in similar cases—not just the most egregious ones. This is apparent in the court's apprehension about an “unconstitutional chilling effect”¹⁸⁰ that could lead to abandonment of the practice or the destruction of a church when its liabilities exceed its assets.¹⁸¹

The availability of punitive damages in future exorcism cases is also troubling because juries have been known to punish unpopular religions with large plaintiff awards, particularly where intangible harms such as emotional injuries are claimed.¹⁸² Additionally, excessive punitive damages

tance of selfrestraint, particularly in regard to touching the body.” Neal Milner, *Giving the Devil His Due Process: Exorcism in the Church of England*, 15 J. CONTEMP. RELIGION 247, 249 (2000).

¹⁷⁸ See, e.g., *Baumgartner v. First Church of Christ, Scientist*, 490 N.E.2d 1319, 1323–25 (Ill. App. Ct. 1986) (holding that a religious healing practitioner could not be sued for malpractice because the proper inquiry would require the court to determine whether “certain religious conduct conform[ed] to the standards of a particular religious group”); but c.f. *Lundman v. McKown*, 530 N.W.2d 807, 813–15, 817–18 (Minn. Ct. App. 1995), cert. denied, 516 U.S. 1099 (1996) (upholding a jury's award of compensatory damages in a wrongful death suit against the Christian Science Church and one of its nurses).

¹⁷⁹ *Pleasant Glade*, 264 S.W.3d at 5–6.

¹⁸⁰ *Id.* at 10.

¹⁸¹ See Wellford, *supra* note 100, at 231 (asserting that punitive damages should not be allowed when a church “acts in accordance with its doctrines” because the deterrent power of punitive damages will force the church to abandon the practice or risk insolvency); see also *Guinn v. Church of Christ of Collinsville*, 775 P.2d 766, 791–92 (Okla. 1989) (Wilson, J., dissenting) (arguing that punitive damages should only be awarded if the court finds that the church acted with malice, which “must be measured [by] whether the conduct of the defendant exceeded the scope of the doctrinal tenets of the church”).

¹⁸² See Hayden, *supra* note 72, at 616–17. Though Hayden finds that many verdicts against unpopular religions have been overturned upon appellate review, he still argues that limiting plaintiffs to pecuniary losses might be more appropriate. *Id.* at 616–17, 666.

can violate due process.¹⁸³ Since punitive damages can be unpredictable in areas such as the intentional infliction of emotional distress, the *Pleasant Glade* court may have deemed such uncertainty impermissible when religious freedoms were at issue.¹⁸⁴

Furthermore, punitive damages “are governed by common law principles,” and much like the judiciary’s unique role in forming tort law, the “[j]udicial development of common law legal principles . . . is a proper exercise of a power traditionally exercised by the judiciary.”¹⁸⁵ Thus, future courts could implement this alternative of allowing secular claims to go forward on all exorcism cases but ensure that punitive damages would be limited to the most egregious instances. This would protect religious practitioners from a “chilling effect,” encourage the adoption of appropriate precautions, and signal legislatures to address the issue by statute, resulting in either a formal limit on punitive damages or an explicit rejection of the protection for religious actors.¹⁸⁶

V. CONCLUSION

The *Pleasant Glade* holding represents one court’s determination based on a narrow set of facts and is supported by both the prohibition on adjudication of religious questions and the church autonomy principle. In spite of the broad scope of the U.S. Supreme Court’s “*Smith* neutrality,” the current system still affords judges avenues to protect religious actions, such as state RFRA and judicial flexibility in protecting minority groups and limiting tort law and punitive damages. Furthermore, the exercise of judicial discretion in these arenas can act as a call to state political branches to either validate or reject the judicial actions by statute.

In some ways, *Pleasant Glade* permits the cycle of judicial and political balancing to continue. Despite the fact that the Texas Supreme Court has been criticized for ignoring “*Smith* neutrality,” the *Smith* Court sought to leave religious exemptions to the political branches, so in a way *Pleasant*

¹⁸³ See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (stating that “in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process”); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562 (1996) (“The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a ‘grossly excessive’ punishment on a tortfeasor.”) (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 454 (1993) (and cases cited) (internal quotation marks omitted)).

¹⁸⁴ See generally *Hayden*, *supra* note 72, at 580–81 (“[L]imits on damages available to one who proves [intentional infliction of emotional distress] are also ill defined; general damages are available, ostensibly as compensation, yet not measured by actual pecuniary loss. Punitive damages are also available virtually any time the tort itself is established . . .” (footnote omitted)).

¹⁸⁵ *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 383 (Cal. Ct. App. 1981).

¹⁸⁶ See generally *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2622–23 (2008) (giving examples of various state approaches to punitive damages, ranging from Nebraska’s full ban on punitive damages on state constitutional grounds to other states’ allowance of punitive damages only where authorized by state statute).

Glade might lead to the result ultimately desired by the *Smith* majority. In the end, the Texas Supreme Court sent a message that the “constitutional guarantee of the free exercise of religion requires that society tolerate the type of harms suffered by [some] as a price well worth paying to safeguard the right of religious difference that all citizens enjoy.”¹⁸⁷

The evolution of precautionary practices for exorcism suggests that certain religious institutions have responded to the potential liabilities presented by their ancient ritual. While the Texas Supreme Court failed to encourage such behavior by granting a sweeping exemption, future courts presented with similar issues can promote progression of the standard of care by properly limiting their holdings and avoiding such exemptions. This approach has the potential to protect the public and encourage safer religious practices while preserving the religious freedoms that Americans have held dear since the Nation’s founding.

¹⁸⁷ Paul v. Watchtower Bible & Tract Soc’y of N.Y., Inc., 819 F.2d 875, 884 (9th Cir. 1987), *cert. denied*, 484 U.S. 926 (1987).

