# DEVELOPMENTS IN LIABILITY THEORIES AND DEFENSES

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Several months ago the General Counsel posed an interesting and devilishly complex question, *"Why don't courts take constitutional claims and defenses seriously?"*

Litigators with experience in the field of religious liberty believe that courts do not *seem* to take religious liberty claims and defenses very seriously; however, it is difficult to know why. To be sure, the anecdotal evidence is certainly there, not only in the reported cases, but also in the actual courtroom experiences of those who attempt to raise religious liberty claims and defenses. In one Texas tort case, a trial court judge stated that she would not permit the Church "to hide behind the first amendment;" in a Maryland case a number of years ago, I was asked by a State trial court judge what the federal constitution had to do with the issues being litigated. These anecdotes affirm the existence of a problem, but do not convey much information. Selected members of the law faculty at the Catholic University of America agreed to analyze the issue and to look carefully at each component part.[1] The result is the following discussion.

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[1] Providing even a partial answer to the question "Why don't courts take constitutional claims and defenses seriously?" required a highly sophisticated exercise in case analysis. Input of faculty who specialize in torts, evidence, insurance, professional responsibility, canon law, trial practice, appellate advocacy, and first amendment law was required in order to construct the charts which illustrate the substantive points made here. Their input was invaluable, not only because of its substantive content, but also because it highlights both the multidisciplinary nature

Courts *do* in fact take most First Amendment claims and defenses seriously; however, litigators often do not provide the courts with a record which will support the outcome their clients desire. As might be expected given the case law, courts are skeptical about broad-based immunity claims based upon the first (or any other) constitutional amendment. Constitutional claims are rejected in three basic instances: 1) when the law is hostile; 2) when the lawyer defaults in the pleading, proof, or argument of the claim; or 3) when the lawyer does not understand unsettled or developing law well enough to analyze, plead, or prove the case.

The nature of constitutional litigation often requires litigators to seek some help from experts in the disciplines relevant to the substantive law being litigated. Without such assistance, a litigator may not know what points are worth litigating. "God doesn't expect you to do this work alone and neither should we."[2] The faculty at the Catholic University of America's two schools of law, the Columbus School of Law and the Department of Canon Law, stand ready to provide assistance.

Because there is a direct relationship between effective representation and the state of the law governing the free exercise of religion, the first part of this paper will explore the relationship of constitutional theory to the litigation of constitutional claims in tort cases. Lawyers cannot adequately plead or prove constitutional claims and defenses without understanding how the elements of a constitutional claim are related to the underlying tort claim. Part two will focus on the elements of a viable First Amendment claim or defense utilizing charts (appended) to relate the elements of specific tort claims to the burden borne by those seeking to establish affirmative constitutional claims or de-

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of litigation practice and the need of litigators to solicit expert legal advice that law faculties associated with religious institutions can provide. I would like to acknowledge the input of the following Professors at the Columbus School of Law: Michael Noone (Torts), Urban Lester (Trial Advocacy, Case Analysis, and Litigation Planning), Leah Wortham (Professional Responsibility and Insurance), Fred Bennett (Effective Assistance of Counsel), Antonio Perez (Contracts), and Louis Barracato (Evidence). I would also like to express my appreciation to our former Dean, Ralph J. Rohner, whose moral and tangible support helped bring this project to completion, and to my research assistant, Laura Robinson, for her long hours and thorough research.

[2] Fr. Robert Kennedy, CUA Canon Law Department, Address at the National Diocesan Attorneys Association Meeting (transcript available in Department of Canon Law Library, Catholic University of America).

fenses. Part three will analyze the First Amendment in a tort context. Part four of this paper will conclude with a rather obvious, but vital, piece of advice: *Attorneys should litigate every point worth litigating.*

## I. RELATING CONSTITUTIONAL THEORY TO THE LITIGATION OF A CONSTITUTIONAL CASE

Just how seriously do the courts take religious liberty claims? A careful review of federal case law indicates that the courts have never been ardent champions of religious liberty. At least since the Mormon polygamy cases,[3] the United States Supreme Court has consistently taken the position that the religious motivation or purpose of an individual's behavior does not immunize him from the regulatory power of the state.[4] In *The Late Corporation of the Church of Jesus Christ of Latter Day Saints v. United States*,[5] Justice Bradley asserted the point bluntly: "The State has a perfect right to prohibit ... all ... open offenses against the enlightened sentiment of mankind, notwithstanding the pretense of religious conviction by which they may be advocated and practiced."[6]

A series of cases beginning in 1963 with *Sherbert v. Verner*,[7] and ending in 1990 with *Employment Division v. Smith*,[8] led most litigators and scholars to conclude that the concept of religious liberty is, or should be, roughly analogous to individual liberty and autonomy rights recognized in other contexts.[9] That

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[3] *See* Reynolds v. United States, 98 U.S. 145, 167 (1879) (holding that Mormons are not immunized from bigamy statute).

[4] *Id.*

[5] 136 U.S. 1 (1890).

[6] *Id.* at 50 (citations omitted).

[7] 374 U.S. 398 (1963).

[8] Employment Div. Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990). In response to *Employment Div.*, Congress enacted The Religious Freedom Restoration Act, 42 U.S.C.A. § 2000 bb-1 (1996), which essentially mandates that the courts use a strict scrutiny standard of review in religious liberty cases. *Id.* The constitutional validity of the Act has been challenged on separation of powers grounds, with the courts divided as to the outcome. Recently, the Supreme Court has decided to hear issues. *See* Flores v. City of Boerne, Texas, 73 F.3d 1352 (5th Cir. 1996) (holding that RFRA and strict scutiny standard do not violate separation of powers), *cert. granted*, 65 U.S.L.W. 3282 (1996); *see also In re* Tessier, 190 B.R. 396 (Bankr. D.Mont. 1995) (holding that RFRA violates separation of powers).

[9] Professor Laurence Tribe, for example, subsumes religious freedom into the general topic of rights of "privacy and autonomy." *See* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW (Foundation Press, 2d ed. 1988).

approach, however, was at best highly selective. Most religious liberty claims, except those arising in the unemployment compensation context, were unsuccessful, notwithstanding the broad language used by the Court to describe the nature of free exercise rights.[10]

In *Employment Division v. Smith*, however, the Court held that it was not a violation of the Free Exercise Clause to deny unemployment compensation for job-related misconduct in cases where the conduct involved was a violation of a criminal statute.[11] In *Smith*, the individuals involved were counselors at a drug-rehabilitation facility who had promised not to use drugs.[12] Notwithstanding that promise, they used peyote in a Native American Church religious ritual and, as a result, were fired.[13] They claimed unemployment compensation, but were refused.[14]

The Oregon Supreme Court held that while the Oregon Constitution's guarantee of religious liberty did not protect them from the reach of the State's drug laws, the Free Exercise Clause of the First Amendment required the State to provide unemployment compensation.[15] The United States Supreme Court granted certiorari, but initially remanded the case for a decision on the legality of drug use in religious ceremonies under the Oregon state drug law.[16] Once the Oregon Supreme Court held that religiously motivated drug use was illegal under the state's drug laws, the United States Supreme Court again granted certiorari and rejected the argument that unemployment compensation must be provided according to the Free Exercise Clause.[17]

Counsel for Messrs. Smith and Black phrased the question presented under the First Amendment as follows:

> Does the Free Exercise Clause of the first amendment to the United States Constitution protect a person's religiously motivated use of peyote from the reach of a state's general criminal

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[10] Judge John Noonan of the United States Court of Appeals for the Ninth Circuit has provided a comprehensive list of free exercise cases and their outcomes in the Supreme Court and the federal courts of appeal which is current to September 1988. Equal Employment Opportunity Comm'n v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 625-29 (9th Cir. 1988) (Noonan, J. dissenting).

[11] *Employment Div.*, 494 U.S. at 890.

[12] *Id.* at 874.

[13] *Id.*

[14] *Id.*

[15] Smith v. Employment Div., 721 P. 2d 445, 448-51 (Or. 1986).

[16] *Employment Div.*, 485 U.S. 660, 671-674 (1988).

[17] Smith v. Employment Div., 763 P. 2d 146, 148 (1988) (per curiam).

law prohibition?[18]

The logic of their defense was that: 1) both Smith and Black are members of the Native American Church; 2) the Native American Church is a *bona fide* religious group; 3) peyote is a "sacramental" substance utilized in the rituals of the Native American Church; and 4) Smith and Black's use of peyote during the course of Native American Church rituals was religiously motivated, and was a central aspect of their faith experience.[19] They thus concluded that the Free Exercise Clause of the First Amendment immunizes their conduct from the reach of the state's generally applicable laws, even though peyote use was prohibited by Oregon's criminal law and the use of such substances was considered, by the employer and the state, to be job-related misconduct under the state's generally applicable unemployment compensation laws.[20]

For a number of reasons (not least of which is clarity of hindsight), this strategy was doomed to fail.[21] Counsel for Messrs. Smith and Black made a significant error by failing to recognize that most parties raising free exercise claims *lost* whenever the state was able to articulate an important state interest which supported the regulation of the conduct at issue, and, somehow, counsel erroneously concluded that by arguing that the religious interest was *important enough* to the individuals involved, they could win their case. Justice Scalia's opinion for the Court in *Smith* leaves no doubt that religious liberty and individual autonomy are not the same:

> [T]he "exercise of religion" often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. It would be true, we think (though no case of ours has involved the point), that a State would be "prohibiting the free exercise [of

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[18] Petition for Writ of Certiorari, Employment Div. v. Smith, (No. 88-1213) at i.

[19] *Id.*

[20] *Id.*

[21] *Compare* Michael McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1120-24 (1990) (arguing *Smith* was inconsistent with Court's prior free exercise jurisprudence) *with* Gerard V. Bradley, *Beguilded: Free Exercise Exemptions and the Siren Song of Liberalism,* 20 HOFSTRA L. REV. 245, 246-48 (1991) (disagreeing with McConnell and stating that *Smith* was consistent with Court's prior jurisprudence).

> religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of "statues that are to be used for worship purposes," or to prohibit bowing down before a golden calf.
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> Respondents in the present case, however, seek to carry the meaning of "prohibiting the free exercise [of religion]" one large step further. They contend that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons. They assert, in other words, that "prohibiting the free exercise [of religion]" includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires). As a textual matter, we do not think the words must be given that meaning ....
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> We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition ....[22]

The state, in other words, is free to regulate conduct as long as it does not target religion for discriminatory treatment.[23] If the field of law involved are those (*e.g.*, torts, antitrust, property, tax, *etc.*) that are entirely neutral in their general application, religious exemptions are not constitutionally required.[24]

Not surprisingly, this holding made *Smith* controversial. It was, however, predictable. Almost ten years before *Smith* was decided, Justice John Paul Stevens stated, "[I]t is the *objector* who must shoulder the burden of demonstrating that there is a unique reason for allowing him a special exemption from a valid law of general applicability."[25] Every litigator involved in a religious liberty claim or defense should remember this point.

But what does this mean in practice? Simply that notwithstanding the enactment of the Religious Freedom Restoration

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[22] *Employment Div.*, 494 U.S. at 877-79.
[23] *Id.* at 881-82.
[24] *Id.*
[25] United States v. Lee, 455 U.S. 252, 262 (1982) (Stevens, J. concurring) (emphasis added).

Act[26] [RFRA], the *constitutional*, as opposed to statutory, law of religious liberty requires counsel for the *believer* to shoulder the burden of proving why an exemption from generally applicable legal principles is required by the First Amendment.[27]

## II. MAKING A CASE FOR THE APPLICABILITY OF THE FIRST AMENDMENT

Justice Stevens' position underscores the truism that a viable "First Amendment"[28] claim, like any other legal claim or defense, rests on a clearly articulated set of facts. Regardless of the nature of the constitutional claim,[29] or the nature of the case in which it will be utilized,[30] the proponent bears the initial burden of demonstrating: 1) the nature of the protected conduct which is alleged to be affected by the government's actions, and 2) the nature *and degree* of the regulatory effect, or burden, on the conduct alleged to be protected.

Because the focus of the inquiry is the manner in which government policies or actions inhibit the exercise of First Amendment rights, the advocate must have a clear sense of the opposing party's substantive legal theory before making an attempt to formulate a responsive claim or defense based on the Constitution. Is the case one which sounds in tort, contract, agency, antitrust, or concepts of fiduciary duty? Does the constitutional claim operate as an affirmative defense, or does it negate one of the elements of the cause of action? Without a working knowledge of the elements of each cause in the opposition's case, the advocate will not be able to formulate a coherent strategy for adducing the constitutional facts necessary to prove

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[26] 42 U.S.C. § 2000bb (1994).

[27] Church of Lukumi Babalue Aye, Inc. v. City of Hialeah, 508 U.S. 520, 523 (1992) (reaffirming *Smith*).

[28] The term "First Amendment claim or defense" is used here in a generic sense to refer to any religious freedom claim, not simply those which are based on the First Amendment to the Constitution of the United States.

[29] This includes claims arising under the Speech and Press, Free Exercise, Peaceable Assembly, and Petition Clauses. The only exception appears to be the Establishment Clause.

[30] Examples might include, among others, a declaratory judgment action alleging that a zoning rule "as applied" violates the First Amendment, a "free exercise" defense to the recognition of a "pastoral malpractice" cause of action, or a statutory claim under RFRA.

that the Constitution controls the outcome.

## III. THE FIRST AMENDMENT IN A TORT CONTEXT

### *A. Defining a "Tort"*

A tort is either an intentional act which causes damage to a legally protected interest, or the breach of a legal duty which is the proximate cause of harm to a legitimate interest of another.[31] The *Restatement (Second) of Torts* defines a "duty" as a legal requirement "that the actor is required to conduct himself in a particular manner at the risk that if he does not do so he becomes subject to liability to another to whom the duty is owed ...."[32] Although the focus of tort litigation is the action or omission by individuals alleged to be acting for the church, the court is itself an "actor required [by the First Amendment] to conduct [it]self in a particular manner."[33] Thus, it is important that a trial court hearing a case featuring a constitutional defense be put on notice as early as possible that the First Amendment may be relevant, not only to the defense of the church or religiously motivated actor charged with tortuous conduct, but also to the conduct of the litigation by the court and opposing counsel.

The task of the advocate is to lay a factual predicate for an argument that either the conduct of the inquiry, including discovery, or the nature of the duty or standard of care to be imposed on the church violates the First Amendment. Consider the following illustrative case:

> Peter Penitent had suffered for years from bouts of deep depression, but had (over the objections of his wife) neglected to seek "professional" help. His only counselor was his confessor, Fr. Damien, who had warned Peter, in the strongest of terms, that suicide is a grave sin, and that Peter had a moral obligation to himself and to his family to seek professional help. Though he could easily have done so, Fr. Damien made no attempt to provide specific referrals, nor did he make any attempt to "condition" absolution on Peter's willingness to seek treatment. About six months ago, Peter sought treatment from a psychiatrist and was informed that he had suffered "needlessly" for all these years. He has now filed suit against Fr. Damien for clergy

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[31] BLACK'S LAW DICTIONARY 1489 (6th ed. 1990).
[32] RESTATEMENT (SECOND) OF TORTS § 4 (1965).
[33] *Id.*

malpractice, breach of fiduciary duty, and negligent infliction of emotional distress.

The relevant facts necessary to prove Father Damien's First Amendment claim that Penitent's lawsuit and legal theory constitute a grave threat to the Father's right to hear confessions and offer spiritual advice to penitents are, for example: that discovery will inevitably require testimony concerning matters covered by priest-penitent privilege; that reaching any decision concerning at least the negative claims will necessarily involve taking testimony on the standard of care for a *reasonably prudent confessor* and will inevitably require a civil court to decide questions of religious doctrine; that Father Damien's conduct in the confessional cannot be considered *unreasonable* without some examination of the practices of other priests in the community; that the duty undertaken by a confessor—and understood by a penitent—is defined by specific provisions of Canon Law and a clearly articulated theology of the Sacrament of Reconciliation; and that if expert testimony on disputed issues of care will be required, it is inevitable that disputes over their qualifications will require the court to resolve disputed points of theological doctrine and religious credibility.

*B. The Nature of the Interests Involved in Tort Litigation*

The assertion of First Amendment principles in tort litigation requires the litigator to have a clear understanding of tort theory. When a First Amendment claim or defense is at issue, there are at least *three* sets of interests involved: 1) the tort interests of the plaintiff; 2) the First Amendment interests of the defendant; and 3) the regulatory interests of the state.

Tort policies, like other forms of generally applicable government regulation, are constitutional if rationally related to an otherwise legitimate state interest. The damage caused by intentional or negligent torts is a social and economic problem within the power of government to regulate. The regulatory interests of the state, therefore, are entitled to a presumption of constitutionality. The task of the litigator is to rebut that presumption.

A First Amendment claim or defense seeks to negate the usual presumption of constitutionality, and to place the burden of proving the nature and legitimacy of the regulatory interest squarely on the state. In theory, such a defense concedes that a

state's interest in the enforcement of its tort policies is a strong one. Such a defense also asserts, however, that the Constitution requires First Amendment liberties to be taken into account in the formulation and enforcement of those policies.

Although torts is generally viewed as a field where religious liberty is not, or should not be, an issue, there is strong support in the case law for arguing that the First Amendment limits the state's regulatory interests in tort cases. These cases, however, are not directly on point.

Part of the reason why a well-developed theory does not exist for the application of religious liberty principles in the tort context relates to the doctrine of charitable immunity.[34] For many years, charitable immunity was a complete defense to tort claims against the church or its associated charitable activities. Therefore, litigation against the church simply did not proceed beyond the pleading stage. Charitable immunity thus guaranteed that neither the discovery and litigation of the cause, nor the definition of the tort, could intrude upon religious freedom.

The press and media, on the other hand, had no such immunity, and have long argued that large damage awards and intrusive discovery orders can have a *chilling effect* on freedom of speech and press. As a result, journalists and media advocacy groups, such as the Reporters' Committee for Freedom of the Press, have made a sustained and concerted effort to support the chilling effect proposition whenever and wherever they believe freedom of the press is threatened by tort claims. Indeed, they do not permit their colleagues to litigate alone. They provide support for reporters and small newspapers, support research, sponsor conferences and research by academic fellows and stu-

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[34] *See generally* Daniel A. Barfield, Note, *Better to Give Than to Receive: Should Nonprofit Corporations and Charities Pay Punitive Damages?*, 29 VAL. U. L. REV. 1193 (1995) (explaining recent trends extending charitable immunity doctrine and reasons why charitable organizations should not be burdened with punitive damages); Kimberly A. Davison, Note, Cox v. The Evergreen Church: *Liability Issues of the Unincorporated Association, Is It Time for the Legislature to Step In?*, 46 BAYLOR L. REV. 231 (1994) (explaining importance of charitable immunity as applied to unincorporated associations facing tort liability); Developments in the Law—Nonprofit Corporations, VI. *Special Treatment and Tort Law*, 105 HARV. L. REV. 1579, 1677 (1992) (tracing recent developments in area of charitable immunity in both case law and legislative action); Charles Robert Tremper, *Compensation for Harm From Charitable Activity*, 76 CORNELL L. REV. 401 (1991) (criticizing moves by states to reduce charitable immunity protections and proposing reforms through adoption of new "Charitable Redress System").

dent interns, award prizes for student writing competitions, and participate in sophisticated strategies to sensitize both legislatures and courts to the need for free and unfettered freedom of speech and press. This effort may be seen in a long series of cases which begins with *New York Times v. Sullivan.*[35] Even though it has taken years to integrate Speech and Press Clause defenses into the fabric of tort law,[36] constitutional claims and defenses which seek to limit tort-style regulation of editorial judgments are taken *very* seriously by courts and commentators.[37]

Advocacy for the Church must follow a similar pattern. Developing the exact parameters of religious liberty in the tort context will likely take years. As in the case of the press, legislation will likely be needed to "fill in" when the courts refuse to provide the necessary degree of protection. Nevertheless, the process begins with counsel and client. If *attorneys* do not take constitutional claims and defenses seriously and advise their clients accordingly, the courts cannot be expected to take them seriously either.

### *C. What Kind of State Conduct "Violates" the First Amendment?*

Tort litigation involves two forms of state action: 1) procedural (the conduct of litigation generally, including discovery); and 2) substantive (the definition and application of law, both common and statutory). Much has been written on the relationship of the Establishment and Free Exercise Clauses of the First Amendment, and the preferred position of freedom of religion in the constitutional hierarchy of rights. However, the advocate who seeks to raise a Free Exercise or Establishment Clause defense must understand clearly that the Supreme Court has consistently given both clauses a narrow construction when used as a shield against governmental power.

> To say that a person's right to free exercise has been burdened, of course, does not mean that he has an absolute right to engage

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[35] 376 U.S. 254 (1964).

[36] *See generally* David M. Rabban, *The First Amendment in its Forgotten Years*, 90 YALE L. J. 514 (1981) (discussing historical significance of lack of development of First Amendment law from passage of the Sedition Act of 1798 until Espionage Act of 1917).

[37] This does not mean that they are always accepted. *See, e.g.*, Metro Broadcasting v. F.C.C., 497 U.S. 872, 894 (1990) (addressing constitutionality of minority preference rules in award of broadcast licenses).

> in the conduct. Under our established First Amendment jurisprudence, we have recognized that the freedom to act, unlike the freedom to believe, cannot be absolute.[38]

The case law that has developed since *Employment Division v. Smith* requires an attorney proposing either an affirmative claim or defense resembling a free exercise claim to bear the burden of establishing a *prima facie* case. The attorney must show that recognition of the plaintiff's action, or the conduct of the litigation and discovery involved, will result in any of the following: 1) intentional discrimination against either religion in general, or against specific religious groups; 2) acts which have as their primary purpose [or effect] "advancing" or "inhibiting" religion; 3) or acts which "excessively entangle" the state in religious matters.

Since tort litigation necessarily involves the elaboration of legal duties, the First Amendment inquiry must focus on the nature of the duty to be imposed as a matter of tort law and the degree to which the imposition of that duty on churches, clergy, or religious workers engaged in religious activities inhibits or burdens the free exercise of religion.

The same points hold true with respect to the procedure which governs all litigation: no religious liberty claim can be made without a factual showing of the manner in which the particular request will violate the state's duty to avoid excessive entanglement in religious matters or discrimination. After *Employment Division v. Smith*, a mere assertion or demonstration that State action substantially burdens the free exercise of religion is insufficient to state a claim under the Free Exercise Clause.[39]

1. Intentional Discrimination

Because intentional discrimination is the basis of all legal distinctions, the Supreme Court has never held that discrimination alone renders a policy invalid. The court will examine the reasons which support the distinction, and will uphold the policy unless there is no rational relation between the policy and the goal it seeks to accomplish.

Intentional discrimination on the basis of a suspect classifi-

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[38] *Employment Div.*, 494 U.S. at 894.

[39] It may, however, be enough to sustain a claim under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (1994), or its state law counterparts.

cation, such as race or citizenship status, however, is another matter. Because the classification is presumed to be irrational, a *prima facie* case involving a suspect classification will result in a presumption that the law or policy is invalid. At that point, the burden of proving the *validity* of the policy shifts to the state, which must demonstrate that the policy is supported by a compelling state interest, *and* that the policy is necessary to effectuate that interest.

The United States Supreme Court has developed a number of complex, and seemingly inconsistent, rules on the issue of religious discrimination. In *Church of Likumi Babalue Aye v. City of Hialeah,*[40] for example, the Supreme Court invalidated a local ordinance prohibiting animal sacrifice on the grounds that it was aimed at eliminating the religious practices of the Santeria cult.[41] It has also invalidated tax exemptions expressly reserved for religious publications,[42] and the creation of a special school district designed to eliminate the hostile public school environment facing a group of Satmarer Hasidic Jewish children.[43] In each of these cases, the central holding appears to be that religious discrimination is forbidden.

A closer examination of these cases indicates that the Court is deeply divided over the relationship of non-discrimination principles with respect to the issue of religious liberty.[44] One faction within the Court views religious discrimination as generally forbidden, but permits the legislature through the Free Exercise Clause to make exceptions designed to accommodate religious liberty. Another faction apparently holds that the Establishment Clause may *require* intentional discrimination on the basis of religion or religious viewpoint, and that such discrimination should be permitted where government is making a

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[40] 508 U.S. 520 (1992).

[41] *Id.* at 523.

[42] Texas Monthly v. Bullock, 489 U.S. 1 (1989).

[43] Bd. of Educ. of the Kiryas Joel Village School District v. Grumet, 114 S.Ct. 2481 (1994).

[44] *See* Gerard Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine that has Gone of Itself*, 37 CASE W. RES. L. REV. 674, 743 (1987) (analyzing Constitutional debate over religious tests to demonstrate overall lack of decisiveness regarding religious liberties); *see also* Robert A. Destro, *"By What Right?": The Sources and Limits of Federal Court and Congressional Jurisdiction Over Matters "Touching Religion,"* 29 INDIANA L. REV. 1, 19-21 (1996) (discussing deep divisions among Supreme Court justices as to the appropriate religious liberties review of Texas Monthly v. Bullock).

good faith effort to avoid Establishment Clause controversies,[45] or where it is attempting to accommodate the interests of religious minorities.[46]

### 2. Acts Which "Excessively Entangle" the State in Religious Affairs

There are three basic types of entanglement which have received the attention of courts and commentators: 1) administra-

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[45] *See, e.g.*, Rosenberger v. Rector and Visitors of the University of Virginia, 115 S. Ct. 2510 (1995) (holding that University of Virginia cannot refuse funding for Catholic student group publication by arguing that such funding would violate Establishment Clause); Capitol Square Review and Advisory Bd. v. Pinette, 115 S. Ct. 2440 (1995) (holding that state cannot hide behind Establishment Clause in order to prevent Klu Klux Klan from displaying cross in public along side similar displays from other groups); Zobrest v. Catalina Foothills School Dist., 113 S. Ct. 2462 (1993) (upholding requirement that state pay salary of sign language translator needed by hearing impaired student enrolled in Catholic high school); Texas Monthly v. Bullock, 489 U.S. 1 (1989) (holding that state sales tax exemption for religious publications violate Establishment Clause).

[46] *See Employment Div.*, 494 U.S. at 919 (Brennan & Marshall, JJ., dissenting); *id.* at 902-03 (O'Connor, J., concurring in the judgment). Justice O'Connor's "endorsement" analysis focuses almost exclusively on the impact of perceived endorsement of religion on the most discrete and insular members of the political community, but stops short of creating what might be termed a "dissenter's veto" by imposing an "objective observer" standard. However, the specific criteria the "objective observer" is permitted to take into account remains unclear. Justice Kennedy, for example, has noted that "[a]lthough Justice O'Connor disavows Justice Blackmun's suggestion that the minority or majority status of a religion is relevant to the question whether government recognition constitutes a forbidden endorsement ... the very nature of the endorsement test, with its emphasis on the feelings of the objective observer, easily lends itself to this type of inquiry." County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 677 (1989) (Kennedy, J. concurring in part and dissenting in part) (citations omitted). Justice O'Connor herself has indicated that questions of this sort require sensitive judicial inquiries into "social fact." *See* Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 348 (1987) (O'Connor, J. concurring in the judgment). The minority or majority status of the religion would certainly be *relevant* to such an inquiry even if, in the end, it was not determinative.

Alone among the Justices, Justice Stevens does not appear to be particularly sympathetic to the claims of religious minorities. Not only has he consistently questioned both the under and over inclusiveness of the Court's definition of the term "minority," *see* Fullilove v. Klutznick, 448 U.S. 448, 552-553 (1980), he has made it clear that government endorsement of religion, or lack of neutrality when faced with "partisan ideology" (which, for him, includes religion), should be the Court's primary concern. *See* Bd. of Educ. of the Westside Community Sch. v. Mergens, 496 U.S. 226, 287-89 (1990) (Stevens, J. dissenting). On occasion, this may mean no accommodation for religion at all. *See* Goldman v. Weinberger, 475 U.S. 503, 513 n.6 (1986) (Stevens, White, and Powell, JJ. concurring in the judgment).

tive entanglement, such as oversight of church or church-school use of state moneys, or of the content of the speech of state-supported teachers placed in parochial schools; 2) doctrinal entanglement, such as utilizing courts to decide matters of doctrine, for instance 'Which church factions claiming the property are the *true believers*?'; and 3) political entanglement, such as excessive church involvement in political affairs.

The task of counsel for the church, clergy, or pastoral worker is to argue that the First Amendment protects the discretion of each to practice the tenets and rituals of their faith without fear that the State will seek to intervene whenever individuals allege that religiously motivated conduct has caused harm. Thus, only the first two types of entanglement are relevant here.[47]

To the extent that a civil court's process involves extensive examination and discovery of the administrative and structural aspects of church operations, the discovery process may itself arguably constitute administrative entanglement. Courts, however, have not been particularly sympathetic to such claims. Rather, evidence that the litigants intend to utilize civil discovery rules, which are rules of general applicability, in a manner which unconstitutionally intrudes upon the exercise of religious beliefs is required.[48]

Counsel must, therefore, be prepared to demonstrate *how* compliance with discovery requests will impose an unconstitutional burden on religious belief or action. A good example is provided by the "Illustrative Case of Peter Penitent" set out above. Generally, it may be impossible to determine what a reasonably prudent confessor does, or should be doing, without extensive discovery concerning: 1) the training of priests and seminarians; 2) the theology of the Sacrament; 3) what confessors actually *do* in the confessional; and 4) how other confessors handle similar cases. Extensive consideration of any one of these topics would bring the relevance of the First Amendment into sharp focus.

Preservation of the integrity of the sacramental relationship

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[47] The last item, political entanglement, is largely a dead letter, having been a "make-weight" argument in a number of school finance and abortion-related cases. *See* Roemer v. Bd. of Pub. Works of Maryland, 426 U.S. 736 (1976) (holding that state funds for private colleges and universities may be awarded to religious institutions for secular functions).

[48] *See* National Conference of Catholic Bishops v. Bell, 490 F. Supp. 734 (D.D.C. 1980).

established in a priest-penitent communication is the critical component of the free exercise clause of both confessor and penitent. The effective litigator will thus need to know whether the jurisdiction recognizes a priest-penitent privilege, who holds it, and whether or not the protection it offers is subject to any exceptions.

In all cases where litigants seek to breach the secrecy of the confessional, the initial inquiry would focus on the nature and identity of the interests at stake as understood by the Church and the parties. Reference to the Code of Canon Law and to relevant Church documents would be critical to establishing both the sacramental nature of the relationship and the religious obligations that bind confessor's actions prior to, during, and after the sacrament is administered. Once that foundation has been set, attention shifts to the specifics of the civil law which governs the relationship.

If the privilege conferred by common law or statute is held by both confessor and penitent, there are *legal* grounds for arguing that nothing in this line of inquiry could lead to the discovery of relevant evidence, regardless of the identity of the party seeking to intrude upon the secrets of the confessional. Where either party to the sacramental relationship can assert the privilege, the constitutional claims need not be reached at all.

If, by contrast, the privilege can be waived by the penitent and the confessor can be called to testify, the litigator must be prepared to make a case under the First Amendment, its state constitutional analogue, or both. To the extent that the purpose of the priest-penitent privilege under common and statutory law is to protect the religious freedom of the *penitent*, evidence concerning the canonical relationship between confessor and penitent would support a claim that the religious freedom of confessors is implicated as well. A deposition question to Father Damien seeking his recollection of conversations during which Peter Penitent sought the Sacrament of Reconciliation would undoubtedly burden Father Damien's free exercise rights, and Canon law makes it clear that his religious obligation in such a setting is not contingent on any act of the penitent. Differential treatment of penitent and confessor in such a setting raises questions of intentional discrimination among believers, and raises many of the same questions considered and resolved in

*Church of Lukumi Babalue, Inc. v. City of Hialeah.*[49]

A subpoena seeking to establish the standard of care among confessors in the community, or an interrogatory which requires the Church to identify experts who can testify on the nature, content, and fine points of church doctrine, however, would raise a very different set of issues: the power of courts to decide disputed issues of religious ritual or doctrine. Since civil courts may not decide such controversies,[50] discovery would be inappropriate because none of the facts to be discovered would be relevant to the decision or proof of a justiciable claim.

### 3. Acts Which Have as Their Primary Purpose [or Effect] "Advancing" or "Inhibiting" Religion

The advance or inhibit formula is the second element of the three-pronged test for compliance with the Establishment Clause enunciated by the Supreme Court in *Lemon v. Kurtzman.*[51] It has been used repeatedly by the Court to invalidate laws which are said to advance religion when they provide tangible support for children attending church-related schools. It has rarely, if ever, been utilized by individuals or institutions seeking to invalidate a law on the grounds that such law's primary effect is to inhibit the practice of their religion.

As a result, cases involving inhibition of religion are litigated under the far less stringent rules governing the Free Exercise Clause. Nevertheless, *Lemon v. Kurtzman*'s second prong does contain some important elements for litigators to remember. For example, a judicial holding that Expert A's views on the duties of a priest to a penitent are more credible than Expert B's may not inhibit anyone's religious freedom, but it would directly involve a judicial holding which advances Expert A's theological or doctrinal views at the expense of Expert B's. Since the essence of an Establishment Clause claim is proof that the government has established an official position on a matter of faith or doctrine, the entire inquiry (or "battle of experts") is problem-

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[49] 508 U.S. 520 (1992).

[50] *See infra* note 54.

[51] 403 U.S. 602 (1971). The "Lemon test" is stated as follows: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster 'an excessive government entanglement with religion.'" *Id.* at 612-13 (citations omitted).

atic under the First Amendment *ab initio*. It may also be problematic as "junk theology" under Rule 703 of the Federal Rules of Evidence.[52]

## IV. THE NATURE OF THE LITIGATOR'S TASK

### *A. Articulating the Distinction Between the Church's Religious and Secular Activities*

Lawyers generally perceive constitutional law as relatively theoretical and different in many ways from "real law." Perhaps because of the way constitutional law is taught in law schools, the tendency of many is to focus on *policy*; that is, what it is or should be, rather than upon the application of the developed principles to actual cases.

A policy-oriented attitude among lawyers who devote a considerable amount of time to representing churches and church-related institutions is dangerous. To focus on broad generalizations concerning what the law is—or worse, what the client or lawyer would like to it be—is to risk missing the important details which go into getting law made correctly in the first place. The litigator works with existing law and must determine from the beginning whether the case being proposed or litigated involves a routine application of existing principles, or the need to stretch such principles to accommodate his or her client's position.

The Church exists in the modern world, but it is not *of* the world. Although, for that very reason, direct regulation of the Church is problematic, the courts are not sympathetic to broadly-based immunity claims. Lawyers who represent the Church must relate to the court that the cumulative effect of both direct and indirect government regulation has made the Church into a regulated industry.

Education and health care are big business and are heavily regulated. That the church is a major provider of both makes a difference only at the margins. Social work and counseling are now regulated professional activities. Clergy malpractice claims are simply a reflection of that trend. Indeed, increasingly pervasive health, safety, zoning, tax, and civil rights laws can make even a proposed Boy Scout pancake breakfast in the church hall

[52] *See* Daubert v. Merrell Dow Pharmaceuticals, Inc., 507 U.S. 904 (1993).

an occasion for a confrontation with what Justice Anthony Kennedy has called "the modern administrative state."[53]

The tendency of government regulators and opposing counsel in such a setting is to try to distinguish those activities that are at the core of the Church's religious activities from those that are secular. But this is often a difficult task which the courts are reluctant to undertake. As a result, there is a growing tendency among judges and in the plaintiffs' bar to view the Church as a group of people engaged in secular activities for religious reasons. While this is an important development, it only exacerbates the problem. Tort law is a potent regulatory device which can be brought to bear on the activities of the Church and its subsidiary organizations. Once an activity has been defined as secular, but religiously-motivated, it is, like most other endeavors, subject to both direct and indirect regulation in the public interest.

### *B. Converting the Sacred into the Secular: "Neutral Principles of Law" and Avoidance Pleading*

#### 1. The Need to Make the Connection Between Fact and Theory

In states where charitable immunity has been abolished by statute or judicial decree, the preliminary question for a court deciding a tort claim against a church is whether the concept of religious liberty will, or should, serve as a source of immunity. Such a question cannot be decided in the abstract. To formulate a rule of decision, the court needs both a careful analysis of applicable federal and state constitutional principles, and a factual record which clearly demonstrates why those principles are relevant.

At the federal level, the case law demonstrates that since the late nineteenth century, broad-based regulatory immunity for religiously motivated conduct does not exist. Even under the state case law which rejects the narrow vision of religious liberty articulated by the United States Supreme Court in *Employment Division v. Smith*, immunity for religiously motivated conduct does not exist when the state's interest can be characterized as compelling.

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[53] *County of Allegheny*, 492 U.S. at 657 (1989) (Kennedy, White, & Scalia, JJ., concurring and dissenting).

In practical terms, the relationship of tort law to religious liberty presents two basic questions: 1) Why should clergy, the religious, or others who minister to the public in the name of religion be immune from tort liability when others can be sued for the same, or similar, conduct when it occurs in a non-religious setting? and 2) Is there some way to accommodate legitimate religious liberty claims within the general framework of tort law?

To answer these questions, the concept known as "Neutral Principles of Law"[54] has emerged. Developed in the context of disputes over the ownership of church property, where each of the warring factions claims the mantle of the true church, the neutral principles approach is a device civil courts use to avoid resolution of doctrinal disputes. In such property cases, it is often possible to rely on neutral legal documents, such as deeds and articles of incorporation, to determine the ownership, disposition, or control issues which divide a congregation. A tort case which rests on a claim that there has been ministerial or priestly misconduct during the course of religious ministry is an intra-church dispute as well, but the legal and constitutional aspects of the controversy are not so easily avoided as in property cases. Attempts by the state to set standards of ministerial and religious conduct raise religious liberty concerns which are just as problematic as attempts by a court to declare which faction in a property dispute is most faithful to church doctrine.

Since it is impossible to avoid all doctrinal disputes by the simple expedient of referring to a neutral document or principle, a debate has arisen in constitutional circles over the nature of the neutral principles doctrine itself. Is it simply one of a number of alternative approaches to deciding cases involving intra-church disputes permitted by the Free Exercise Clause, or a rule of law which is mandated by the Establishment Clause?

The distinction is an important one. The view that neutral principles is an approach which helps courts avoid decisions on issues of faith or doctrine is fully consistent with the strictest reading of the Supreme Court's religious liberty jurisprudence. In this view, neutral principles of law are utilized to examine the facts of the case at bar to determine which issues are "secular"

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[54] The phrase gained currency in the Supreme Court's treatment of property disputes in *Jones v. Wolf*, 443 U.S. 595, 604-06 (1979). For an extensive discussion of the concept, see MICHAEL S. ARIENS & ROBERT A. DESTRO, RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY 507-517 (1996).

and which appear to be "religious." By segregating the issues, courts can limit their jurisdiction to civil matters and pressure churches to organize their affairs in a manner which leads to internal resolution of doctrinal disputes.

A more problematic reading of the neutral principles doctrine is that civil courts can, and should, resolve intra-church disputes by assuming that the issues in dispute are no different than those issues concerning any other intra-organizational dispute. In this view, neutral principles are utilized to resolve the controversy itself, rather than to determine the limits of the court's jurisdiction over the issues.

*Moses v. Diocese of Colorado*[55] is one of the leading cases on the application of the First Amendment in a tort context, and one of the best examples of how *not* to apply the neutral principles doctrine. In *Moses*, the Colorado Supreme Court stated that a court "should analyze legal issues that arise out of church organizations in the same manner as [it] would analyze those issues if they arose out of any other corporation or voluntary association," and makes the rather unexceptionable statement that "[a]pplication of a secular standard to secular conduct that is tortuous is not prohibited by the Constitution."[56]

If the Colorado Supreme Court's holding were simply that neutral principles mean that courts should engage in a searching inquiry designed to differentiate between "religious" and "secular" conduct, and then should apply secular standards only to secular conduct, *Moses* would have presented a good opportunity to explore what principles should be utilized to draw that critical distinction.

Unfortunately, that is not the holding of *Moses*. The Colorado Supreme Court reaffirmed its prior holding that clergy malpractice and breach of fiduciary duty by a minister are not merely different names for the same tort[57] by stating that "counseling" is secular conduct, even if it does have significant religious components.[58]

This application of the neutral principles doctrine is problematic for several reasons. Although there are numerous cases which seek to define the terms "religion" or "religious," courts

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[55] 863 P.2d 310 (Colo. 1993), *cert. denied*, 114 S.Ct. 2153 (1994).
[56] *Moses*, 863 P.2d at 320.
[57] Destefano v. Grabrian, 763 P.2d 275 (Colo. 1988).
[58] *See Moses*, 863 P.2d at 321.

and commentators agree that judges have no business deciding religious questions.[59] As a result, virtually all the reported cases decide the question by asking whether or not the conduct or organization in question looks religious.[60] More to the point, there is virtually no case law or commentary which explains the meaning of the term *secular*. In practice, secular means not religious.

Thus, while it is true that "[a]pplication of a secular standard to secular conduct that is tortuous is not prohibited by the Constitution,"[61] the only neutral principles which can tell a court how to separate the religious and secular components of inherently religious conduct or relationships, such as the priest-penitent relationship, are: 1) the intent of the parties; 2) the character and setting of their relationship; and 3) the content of the evidence necessary to establish the claims and defenses in the case.

Defense counsel should not permit opposing counsel, or the court, to characterize religious conduct as secular without making a record which demonstrates beyond cavil that the characterization is wrong. Pastoral counseling and the Sacrament of Confession do not become mere counseling by judicial fiat, nor does the canonical relationship between priest and bishop become a simple agency relationship because there is some degree of supervision. If the act of ordination is hiring and the laying-on of hands or baptism is merely a touching, the neutral principles doctrine has ceased to function as a mechanism to protect First Amendment rights.[62] It has instead become a mechanism for permitting the state to supervise the internal operations of

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[59] *See* Watson v. Jones, 80 U.S. 679, 727 (1871) ("Whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of [the] church judiciaries to which the matter has been carried, the legal tribunals must accept such decisions as final, and binding.").

[60] A related problem arises in courts defining—or trying to define—what is a "church." *See* BRUCE R. HOPKINS, THE LAW OF TAX-EXEMPT ORGANIZATIONS (6th ed. 1992), quoting, Found. of Human Understanding v. Comm'r, 88 T.C. 1341, 1356-57 (1987) ("We can only approach this question with care for all of us are burdened with the baggage of our own unique beliefs and perspectives.").

[61] *Moses*, 863 P.2d at 320.

[62] Controversies charging "wrongful baptism" are not unknown. *See Suit Filed Over Girl's Baptism*, ROCKY MOUNTAIN NEWS, Oct. 4, 1995, at 19A (reporting how a six year old girl was lured to baptism by believing she was attending carnival). Virginia prison authorities recently denied a condemned prisoner the right to be re-baptized on the grounds that "once is enough." *See* David Cox, *Baptism: Salvation is Not a Matter of State*, ROANAKE TIMES & WORLD NEWS, Feb. 15, 1995, at A11.

the church.

Cases following *Moses* have put immense pressure on the advocate to be precise in pleading and motion practice because neither tort nor First Amendment claims can be litigated in the abstract. Plaintiffs' attorneys engage in precision pleading when they plead alternative theories based on a common set of facts. Defense counsel must be prepared to do the same.

The charts which follow as an addendum look at a number of tort theories which have been asserted against churches. As these charts illustrate, finding the dividing line between the sacred and the secular can be a complicated task, but the litigator who seeks to establish a First Amendment claim or defense assumes the burden of proving every element of that claim. *Moses* teaches that judges no longer assume that the church is entitled to special treatment. In fact, it goes further, and mandates that courts should assume precisely the opposite: that when there are secular consequences, the church is engaged in secular conduct. The job of defense counsel is to rebut that presumption.

2. The Nature and Importance of Constitutional Facts

Constitutional claims are not so different from claims based on other legal theories. Like tort, property, agency and other legal or equitable claims, a constitutional claim or defense has both factual and theoretical components. The theory tells us what the law is trying to accomplish and determines what facts are relevant. Theory cannot, however, determine what facts are controlling in constitutional litigation.

A constitutional fact is a predicate, foundation, or element which must be established before a constitutional principle applies.[63] Like any other adjudicative fact[64] in dispute, a constitutional fact must be litigated, but the close relationship between

[63] Professor David Faigman has defined "constitutional fact-finding" as the study of "those facts identified as being relevant either to the establishment of a constitutional rule or reviewable under an established constitutional rule." David L. Faigman, *"Normative Constitutional Fact-Finding:" Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 546 n.18 (1991).

[64] There are three basic types of "facts" relevant to legal decision-making: 1) "legislative facts", which inform the making or changing of rules (e.g., the social cost of changing a given rule of law); 2)"adjudicative facts", which relate to a disputed point between parties in a case before the court (e.g., the amount of damages in a breach of contract); and 3) "social-framework facts", which form the background or framework in which a given case is set.

constitutional theory and fact often makes it difficult to determine whether a particular question will be viewed by the court as a question of law or a question of fact.

In *Bose Corp. v. Consumers' Union*,[65] the United States Supreme Court indicated that:

> A finding of fact in some cases is inseparable from the principles through which it was deduced. At some point, the reasoning by which a fact is "found" crosses the line between application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment. Where the line is drawn varies according to the nature of the substantive law at issue. Regarding certain largely factual questions in some areas of the law, the stakes—in terms of impact on future cases and future conduct—are too great to entrust them finally to the judgment of the trier of fact.[66]

The significance of this observation in First Amendment litigation can only be deduced through a careful reading of the Court's First Amendment cases—including those arising under the Speech and Press, Peaceable Assembly, and Petition Clauses. In Free Exercise cases, for example, a factual showing that there is some degree of entanglement between church and state is treated as a question of adjudicative fact. In *Employment Division v. Smith,* the Court held that the Free Exercise Clause is not violated unless the government intended to impose a burden on the exercise of religion.[67] The constitutional facts to be adduced are whether the entanglement actually burdens the exercise of religion, and whether the government intended such entanglement to do so. A showing that it was merely incidental to an otherwise neutral policy will not be sufficient.[68] The case law under the Speech and Press Clause has similar characteristics.[69]

In Establishment Clause cases, by contrast, a finding that a government policy will lead to an excessive entanglement between church and state is not a finding of constitutional fact, it

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[65] 466 U.S. 485 (1984).
[66] *Id.* at 501 n. 17.
[67] *Employment Div.*, 494 U.S. at 872.
[68] *Id.* at 878.
[69] *See* Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983).

is a conclusion of law. In some cases, an entanglement between church and state can be *legally* excessive without causing a burden on the religious freedom of the parties because the actual interaction between church and state is of a routine nature; in others, the same conduct is forbidden.[70] This is so because the three-pronged test of *Lemon v. Kurtzman* operates primarily as a rule of law, rather than as a blueprint for fact-finding.

### *C. Good Lawyering and the Demise of the "Clergy Malpractice" Theory*

A good litigator will not plead, or attempt to prove, a case which goes either to the heart of constitutionally protected interests or challenges long-standing case law unless the litigator feels that the case law will allow a frontal attack. The best example in the free exercise context is the attempt by the plaintiffs' bar to urge recognition of the tort of clergy malpractice.

The theory behind clergy malpractice is that a member of the clergy undertakes certain duties when serving in a sacerdotal or counseling position. Rejected on First Amendment grounds by all courts considering it,[71] it seems fairly clear that the reason the courts have been so hostile to recognizing clergy malpractice is because of the obvious impact on First Amendment rights.

This teaches us two important lessons. First, courts take *clearly-articulated* First Amendment claims based on the Religion Clause just as seriously as they do clearly-articulated First Amendment claims based on the Speech and Press Clause. Second, and by far the most important, religious liberty was, and is, perceived to be such a *weak* claim or defense that the plaintiffs' bar had no trouble pleading a tort theory which is so clearly at odds with religious liberty. That the plaintiffs' bar felt that a frontal attack could succeed should have been a signal to defense counsel who represent clients with religious liberty interests.

Plaintiffs plead multiple and duplicative claims in order to

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[70] *Compare, e.g.*, Jimmy Swaggart Ministries v. Bd. of Equalization of California, 493 U.S. 378 (1990) (stating that reporting, auditing, and collecting of sales tax receipts does not foster "excessive entanglement") *with* Lemon v. Kurtzman, 403 U.S. 602 (1971) (auditing school teacher performance and school aid funds fosters "excessive entanglement").

[71] No court has ever endorsed "clergy malpractice." *See* Mark Chopko, *Ascending Liability of Religious Entities for the Actions of Others*, 17 AM. J. TRIAL ADV. 189, 335-36 & nn.212-219 (1993) (collecting cases).

restate the same cause of action in a number of different ways; to assure that all bases under state law are covered; to guarantee that the jury hears the facts thought to be damaging over and over again; and to reach the deep pocket. Given the rejection of clergy malpractice theory, a plaintiff's lawyer who does not attempt to avoid those holdings through creative pleading is wasting the client's money.

Defense counsel who plead undifferentiated First Amendment defenses because they do not understand the relationship between First Amendment and tort theory are also wasting their clients' money. The case law makes it clear that First Amendment theory is relatively undeveloped in the tort context, and the tendency of courts hearing tort cases is to provide a remedy when the law appears to support recovery. Since most clergy malpractice claims do involve outrageous conduct on the part of the clergy and other religious workers, it should not have been surprising, either as a matter of litigation theory, tort practice, or constitutional law, that plaintiffs would seek to avoid the constitutional issues by pleading in the alternative. The question for defense counsel is why they are permitted to get away with it.

### *D. Hard Cases Make Bad Law. Bad Lawyering Makes it Even Worse*

*Moses* is a good example of the way in which undeveloped constitutional theory, a bad set of facts, and a lack of effective representation on the part of diocesan counsel combine to produce bad law.

The plaintiff in *Moses* was an adult woman who had developed multiple personalities as a result of sexual abuse as a child.[72] She sought spiritual counseling from her priest, who knew that her history of mental problems was related to childhood sexual abuse.[73] Sessions included discussions, prayer, and "hugs" which eventually led to sex.[74] When her family learned of the sexual activity, they complained to the head pastor, who failed to take action.[75] The family then went to the Bishop.[76]

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[72] *Moses*, 863 P.2d at 315.
[73] *Id.* at 316.
[74] *Id.*
[75] *Id.* at 316-17.
[76] *Moses*, 863 P.2d at 317.

The Bishop met with the offending priest, sought to ascertain the facts, warned him not to involve himself in an affair with a parishioner again, and suggested that he should seek professional counseling.[77] Although he approved a transfer of the offending priest to a parish in Colorado Springs without informing the new parish of what had occurred, he did warn the priest to refrain from similar misconduct.[78] The priest was also told to inform the Bishop immediately if there were any possibility of the priest becoming involved in an affair with a member of his new parish.[79]

The Bishop also took steps to counsel the plaintiff in the case.[80] The record indicated that the plaintiff "was terrified about the loss of her salvation and feared having to meet with the Bishop."[81] When they met, she "described her past ... and explained that she had an intimate sexual relationship with Father Robinson. [She] discussed her fear of not having salvation because of her acts and Bishop Frey granted [her] absolution."[82]

The theory of the plaintiff's case against the Bishop and the Episcopal Diocese was that the Bishop's conduct was a breach of fiduciary duty; that he had negligently hired and supervised the priest and pastor; and that the Diocese was vicariously liable for the acts of its priests.[83] Since there is no question that the priest's behavior was inappropriate, and little doubt that the plaintiff was damaged by the affair, it was not surprising that the offending priest declared bankruptcy and was removed from the case.[84] For the Episcopal Diocese, however, the questions presented were different. A Bishop who counsels with a member of his flock and grants her absolution is not just another counselor with a deeper pocket. The issue presented is one of legal versus religious *duty* and of the right of a civil court to determine which shall prevail. Significantly, it was on this very point that the defense counsel failed to represent the Episcopal Diocese of Colorado effectively.

The controlling Colorado precedent at the time *Moses* was

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[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Moses*, 863 P.2d at 317-18.
[81] *Id.* at 318.
[82] *Id.*
[83] *Id.*
[84] *Moses*, 863 P.2d at 318.

litigated was *Destefano v. Grabrian.*[85] In *Destefano*, the Colorado Supreme Court rejected clergy malpractice as a viable theory of recovery for tortuous conduct which occurs in a pastoral setting, but its analysis made two significant points which should have been critical to the defensive strategy in *Moses*: 1) "that a cause of action for breach of fiduciary duty [is] separate and distinct from a claim of clergy malpractice,"[86] and 2) that the First Amendment does not confer blanket immunity upon the clergy from claims that a member of the clergy has breached a legal duty to a member of the congregation.[87]

Notwithstanding the clear holdings of *Destefano* that a diocese *can* be held liable under theories of breach of fiduciary duty, negligent supervision, and vicarious liability, the Colorado Supreme Court noted that "[t]he defendants' only argument at trial regarding the First Amendment was ... that any evidence of church law or discipline should not be admitted. *[They] did not argue ... that the First Amendment forbids claims of breach of fiduciary duty, negligent hiring and supervision and vicarious liability against a religious organization.*"[88] On appeal, the defendant's argument was that *Destefano* should be overruled because "claims of breach of fiduciary duty and clergy malpractice are merely different names for professional liability."[89]

There were several problems that contributed to the development of the extraordinarily bad precedent that *Moses* has become. The most obvious is the failure to preserve *all* relevant constitutional claims at the trial level, for the case law is clear that, unless claims are preserved, they will be deemed waived on appeal.[90] More serious were the rote readings of the governing

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[85] 763 P.2d 275 (Colo. 1988).

[86] *Moses*, 863 P.2d at 321 n. 13.

[87] *Destefano*, 763 P.2d at 283-84.

[88] *Moses*, 863 P.2d at 319 n. 10 (emphasis added).

[89] *Id.* at 321.

[90] The court noted that the "First Amendment issues raised on appeal were not properly preserved in the trial court," but that "it is within our discretion to review the First Amendment defenses." *Id.* at 319. The court then reminded counsel that:

> We have consistently held, with few exceptions, issues not raised in the trial court cannot form the basis of an appeal. *See, e.g.*, Paine, Webber, Jackson & Curtis, Inc. v. Adams, 718 P.2d 508, 513 (Colo. 1986) (recognizing that appellate challenges to issues that do not call into question trial court's subject matter jurisdiction and that are not raised in trial court are waived and will not be reviewed for first time on appeal). The fact that the non-preserved issue involves questions of constitutional analysis, interpretation, or application is not dispositive of whether we will address

case law. This led counsel to condemn the introduction of evidence regarding church law and discipline without first considering whether it might play a useful role in the litigation. Each of these lapses in good trial practice led to the lack of an adequate trial record supporting the First Amendment claims and defenses that *were* relevant to the case.

The burden of proving that the First Amendment was relevant not only to the defense of the alleged torts, but also to the conduct of discovery, the admission of evidence, and the conduct of the trial was on the *defense*. The facts in *Moses* demonstrated that the conduct which formed the basis of the complaint against the Bishop and the Diocese involved at least three relationships which the state has little competence to regulate: 1) the content and conduct of priest-penitent conversations; 2) the canonical relationship between and among Bishops and the priests of the Episcopal Church; and 3) canonical or other doctrinal criteria for ordination and retention in that denomination. It seems, however, that counsel did not make the connection between the tort and constitutional claims. Their argument that "claims of breach of fiduciary duty and clergy malpractice are merely different names for professional liability,"[91] while correct, both begged the question and conceded that a Bishop was, in fact, just another "professional."

*Destefano* held that while the elements of these causes of action are similar, the torts address different regulatory interests.[92] It would not have been inconsistent with *Destefano* to conduct the trial in *Moses* in a manner which sought to explore the *precise* nature of those regulatory interests, and how they intruded on the self-governing nature of the Episcopal Church. Had defense counsel done so, the effect would have been to argue what might be considered the broad claim "that the First Amendment forbids claims of breach of fiduciary duty, negligent hiring and supervision, and vicarious liability against a religious organization." Where the record supports such an argument, there is no legal or ethical problem for arguing for a change in the law.

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the issue on appeal. *See, e.g.*, Massey v. People, 656 P.2d 658, 662 (Colo. 1982) (declining to address a constitutional argument on appeal that was not presented for determination by the trial court).

*Id.* at 319 n. 10.

[91] *Moses*, 863 P.2d at 321.

[92] *Destefano*, 763 P.2d at 284-86.

Had counsel not wished to go so far, the same kind of showing could have been made on the facts of the case in *Moses* itself. Had counsel argued the much narrower assertion that the First Amendment forbids the entry of judgment against either the Bishop or the Diocese on the unique facts of *Moses* because it involved priest-penitent and other intra-church matters, a factual predicate might have been established for the First Amendment claim. But neither argument was made. The Colorado Supreme Court rejected the First Amendment defense in *Moses* not because it is hostile to religious liberty claims, but because those claims were neither proved nor argued.

*Moses* is undoubtedly a hard case on both the facts and the law, and it is easy for a law professor sitting a thousand miles and several years distant from the actual trial to second-guess counsel's actions. But it was the Colorado Supreme Court, not a law professor, who pointed out that counsel did not make the necessary arguments at the trial court level.[93] *Moses* does make bad law, and counsel is partially responsible for it.

Counsel is not, however, primarily responsible for the bad law which is actually made in a case. The Colorado Supreme Court must also take some responsibility for that development. The Colorado Supreme Court obviously takes religious liberty claims and defenses seriously, for had *Moses* involved a claimant other than the church, it is doubtful that the Colorado Supreme Court would have entertained *any* arguments not preserved below. But because it *did* take religious freedom, in the abstract, seriously, the court allowed counsel for the defense to make a bad argument, unsupported by anything in the record below.

This was a mistake. Constitutional arguments unsupported by a factual record are worse than useless; they are dangerous. Courts should not rule on them. Had the Colorado Supreme Court simply applied the neutral principle that constitutional rights not briefed or argued below are waived on appeal, *Moses* would have made no law at all. From a doctrinal standpoint, that would have been the best result.

## CONCLUSION

Constitutional litigation is a complex undertaking. Litigators cannot possibly hope to convince the courts that religious

[93] *Moses*, 863 P.2d at 318-19.

liberty principles should limit the state's ability to impose tort liability for religious activities gone awry without careful attention to theoretical and factual detail.

Unfortunately, the typical litigation firm has neither the time nor the resources to undertake such representation alone. Nor should it. Counsel who represent the media would never consider such a course of action; neither should counsel for the Church. Experts are available to advise on theory, case analysis, briefs and arguments, discovery, and appellate strategy. They can also be pressed into service to write *amicus* briefs and argue complex issues on appeal.

The Catholic University of America is, or should be, the place where counsel for the Church can come to test their theories, and to get some sophisticated research done. The University would not have an Interdisciplinary Program in Law and Religion if it did not believe it had something to offer. "God does not expect you to do it alone, and neither should we."[94]

[94] Fr. Robert Kennedy, *supra* note 2.

## TORT CLAIM TYPES & PROOF OF "CONSTITUTIONAL FACTS" RELEVANT TO FIRST AMENDMENT CLAIMS

| TORT CLAIM TYPE | "TARGET" ELEMENT(S) | "PROOF OF FACTS" ON WHICH FIRST AMENDMENT CLAIM OR DEFENSE IS PREDICATED |
|---|---|---|
| INTENTIONAL TORTS<br><br>(Battery, Infliction of Emotional Distress, Fraud) | 1) Examine Issues of Consent or Privilege.<br><br>2) Examine nature or elements of specific religious practices which give rise to the allegations. | 1) Develop facts which negate elements of tort (*e.g.*, battery as an "unconsented, offensive touching").<br><br>2) Proof that the act is a component of a religious ritual (*e.g.*, no Baptism without getting wet; no ordination without laying on of hands; no absolution without some sort of "counsel" or "penance"). The degree to which it is a "critical" component of that ritual would also be relevant and useful, though it would not be controlling. |
| NEGLIGENCE | 1) Standard of Care (Nature of Duty Alleged). | 1) Proof that the duty asserted cannot be enforced without setting "secular" standards of care for religious practices. For example: driving a van would not raise any questions of a "religious" nature, but imposing a duty of care upon confessors to recognize and refer suicidal penitents to others "qualified" to "treat" them would change the very nature of the priest/penitent relationship and the nature of the sacrament itself. |
| MALPRACTICE CLAIMS<br>CLERGY MALPRACTICE | 1) Attempt by state to set "professional" standard of care for clergy. | 1) Proof that setting a standard of care will inevitably involve judicial "entanglement" in matters of religious doctrine. *E.g.*, What are the criteria for a "reasonably prudent Catholic confessor?" |
| PASTORAL MALPRACTICE | 1) Attempt by State to set "professional" standard of care for an inherently religious activity.<br><br>2) Attempt by State to distinguish between the pastoral activities of a member of the "clergy" and a lay person who ministers to the spiritual needs of the faithful. | 1) Proof that the standard of care for a "competent" cleric is inherently bound up in doctrinal questions. *E.g.*, What are the doctrinal sources for training a pastoral counselor? What do they require?<br><br>2) Proof of the doctrinal basis—or lack thereof—for a distinction between "clergy" and "pastoral" ministry. *E.g.*, How does "pastoral" counseling differ from "clergy" counseling, if at all? How does it differ, if at all, from social work or psychological counseling? |
| PROFESSIONAL MALPRACTICE | 1) Attempt by State to define clerical functions as "professional," and thus subject to regulation. | 1) Proof that the relationship between the "counselor" and "client" was inherently "religious," and that all parties to the transactions in question understood that the very purpose of the alleged "professional" relationship was religious. (*See* "CLERGY MALPRACTICE"). |

| TORT CLAIM TYPE | "TARGET" ELEMENT(S) | "PROOF OF FACTS" RELEVANT TO FIRST AMENDMENT CLAIM OR DEFENSE |
|---|---|---|
| BREACH OF FIDUCIARY DUTY | 1) Examine Manner & Elements of Creation. | 1) Proof that the claim is functionally identical to one of "clergy malpractice." *i.e.* Why does a pastoral or clergy relation count as a "fiduciary" one? How, if at all, does such a relationship differ from a "secular" fiduciary relationship? |
| | 2) Examine Intent of the Parties Respecting Religious Elements. | 2) Proof that parties intended the creation of a relationship which was inherently religious in both nature and content. |
| | 3) Attempt by State to "recharacterize" tort which is in all relevant respects, the functional equivalent of a "breach of religious duty." | 3) Introduce evidence concerning specific religious duties/practices and proof that claim cannot be entertained without considering the "substance," "value," or "property" of the religious elements of the relationship. |
| NEGLIGENT HIRING | 1) Attempt by the State to examine, and then define, the nature of bishop-priest relationship. | 1) Evidence on requirements of canon law to set the stage for proof that the judicial inquiry will inevitably become entangled in doctrinal questions. |
| | 2) Attempt by State to inquire into the substance of, and judge the adequacy of, standards for selection and ordination of priests. | 2) Evidence on the "religious" elements guiding episcopal decision-making regarding ordination. (*e.g.*, is Ordination "hiring," or is "hiring" accomplished only upon "assignment?") |
| | 3) Attempt by State to either control or dictate content of training norms/guidelines for priestly formation. | 3) Evidence on the religious elements of priestly formation. Sets stage for holding that secular standards can be imposed on process of priestly formation, including prescriptions regarding the content of seminary training. |
| | 4) Attempt by State to redefine the canonical norms of privilege and confidence in bishop-priest relationships. | 4) Proof concerning the canonical relationship between bishop and priest. To the extent possible, demonstrate applicability of priest-penitent privilege in this relationship. Evidence to support a holding that the religious and discretionary elements make the relationship between the bishop and priests "more than" a simple employee/superior relationship. |
| | 5) Attempt by the State to exert secular control of episcopal discretion and confidentiality with respect to matters learned in bishop-priest relationship. | 5) Demonstrate that there are mixed questions of fact and doctrine which need to be resolved concerning priestly discretion in the matter of absolution, guidance of penitents, and the "external" use of priest/penitent information. |

| TORT CLAIM TYPE | "TARGET" ELEMENT(S) | "PROOF OF FACTS" RELEVANT TO FIRST AMENDMENT CLAIM OR DEFENSE |
|---|---|---|
| NEGLIGENT SUPERVISION | 1) Attempt by the state to define the nature of bishop-priest relationship in a manner contrary to canonical understanding. | 1) Produce evidence on priest-penitent issues, including canonical norms governing control of priestly or pastoral discretion and disclosure of privileged information to those not privileged to receive it. |
| | 2) Attempt by state to mandate secular standards for review, supervision, & termination of priests or religious. | 2) Produce facts concerning the requirements of Canon Law or doctrine. *E.g.*, Illustrate the canonical differences between the following concepts: simple reassignment, removal of priestly faculties, laicization, expulsion from an order or diocese, excommunication. |
| | 3) Attempt by State to ignore the degree to which canon law vests individual clerics with discretion in priest/penitent or "counseling" relationships. | 3) Evidence tending to show that the actual scope of the bishop's "supervisory" authority. *i.e.* That a bishop does not, and cannot, as a matter of both canon law and practice, "supervise" the daily affairs of a priest as he performs his clerical functions. |
| | 4) Attempt by State to restrict episcopal discretion respecting absolution and guidance of priest or religious penitents. | 4) See above: "To what extent must a bishop condition the the exercise of his religious discretion over absolution so as to exert "control" over the penitent?" |
| | 5) Attempt by State to breach canonically mandated norms of confidentiality and privilege. | 5) Evidence on canonical norms concerning confidentiality. |
| | 6) Attempt by State to limit first amendment claims to "religious" or "clerics," rather than all those performing "religious" (sacerdotal) functions. | 6) Lay factual predicate for assertion that setting secular standards for "supervision" discriminates intentionally among religions by drawing an illicit distinction between those whom the State considers to be "ministers," and those who hold positions deemed by the State to be a position of lesser significance in the Church. [*i.e.* a preference for a hierarachical model] Evidence can be produced to demonstrate: 1) the lack of a factual predicate for such a distinction in a given faith; and 2) the manner in which such a distinction inhibits the actual practice of the "religious" duties of the person engaged in "pastoral" functions. |