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-NOTE-

"LAY A HAND ON ME, BROTHER": WHY DEFINITIONAL BALANCING AND CONSENT DOCTRINE SHOULD APPLY TO THE RELIGIOUS FALSE IMPRISONMENT AND ASSAULT CLAIMS IN PLEASANT GLADE ASSEMBLY OF GOD V. SCHUBERT

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I. INTRODUCTION

Imagine you're a Christian church leader. Every time a new person desires to join the fellowship, the church holds a new member class to explain the church's beliefs and doctrines. One of those beliefs is that demons can possess people and the laying on of hands and prayer will rid the person of the presence. When the member completes the class, he or she is officially a member. As the member attends the church regularly, he or she sees the practice of laying on of hands. Those who are demonically possessed often resist help and fight back. The new members continue to attend the church. As time goes on, the new member claims to see demons and finds themselves as recipients of the practice of laying on of hands. The new member finds this practice offensive and alleges that they were falsely imprisoned and assaulted. The new member sues you.[1]

In 1 Corinthians, St. Paul poses the following question to the local church: When one of you has a grievance against another, does he dare go to law before the unrighteous instead of the saints?[2] Paul answers the question for them. He emphatically points out that believers of Christ

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[1] This hypothetical is loosely based on the main case of this article, *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d 1 (Tex. 2008).

[2] 1 *Corinthians* 6:1.

should never go to secular courts for dispute resolutions.[3] Christians suing Christians for perceived wrongs presents a difficult problem amongst the body of believers. It creates division and confusion, two things a church should desperately avoid.[4] The church is placed in the awkward position of defending its actions to a system that wants to avoid dealing with their beliefs in the first place.[5]

Courts have taken a widely diverging point of view on torts committed by religious entities.[6] Today, members suing churches are commonplace. Members have sued for excommunication,[7] fraud,[8] professional negligence,[9] and intentional infliction of emotional distress.[10] Courts often struggle with which analysis fits each type of tort. Some have implemented tort law's consent doctrine, neutral principles of property law, or an ad hoc analysis.

In *Pleasant Glade Assembly of God v. Schubert*, a seventeen-year-old girl sued her former church for allegedly performing exorcisms[11] on her person without her consent.[12] She

[3] 1 *Corinthians* 6:2-4.
[4] "For God is not the author of confusion, but of peace, as in all churches of the saints." 1 *Corinthians* 14:33; *see also James* 3:16.
[5] Courts do not want to risk entangling themselves in ecclesiastical affairs as to who got it right. "[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation." Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707, 716 (1981).
[6] Religious institutions cannot perform intentional torts on their members simply based on their religious beliefs. "We do not mean to imply that 'under the cloak of religion, persons may, with impunity, commit intentional torts upon their religious adherents.'" *Schubert*, 264 S.W.3d at 12 (quoting Cantwell v. Connecticut, 310 U.S. 296, 306 (1940)).
[7] Members have sued churches for shunning them after they have violated a religious mandate. Jehovah's Witnesses have come under fire for this practice in Paul v. Watchtower Bible & Tract Soc'y of New York, Inc., 819 F.2d 875 (9th Cir. 1987). Many religions/denominations practice some form of shunning, disfellowship, or excommunication. *See, e.g.*,Leob v. Geronemus, 66 So.2d 241 (Fla. 1953) (Jews); Carter v. Papineau, 111 N.E. 358 (Mass. 1916) (Catholics); Lide v. Miller, 573 S.W. 2d 614 (Tex. App. 1978) (Churches of Christ).
[8] *See* Tilton v. Marshall, 925 S.W.2d 672 (Tex. 1996) (alleging fraudulent misrepresentation from a televangelist who stated he would personally pray over received prayer requests if money was sent in).
[9] *See* Strock v. Pressnell, 527 N.E.2d 1235, 1237 (Ohio 1988) (Pastor who counseled married couple had an affair with the wife).
[10] In *Molko*, deceptive recruitment techniques formed a basis for a claim of intentional infliction of emotional distress. Molko v. Holy Spirit Assn., 762 P.2d 46, 64 (Cal. 1988). However, in *Schubert*, this article's focus, the Texas Supreme Court found that intentional infliction of emotional distress was a shaky leg to stand on. Adjudicating the claim for intentional infliction of emotional distress "would necessarily require an inquiry into the truth or falsity of religious beliefs that is forbidden by the Constitution." *Schubert*, 264 S.W.3d at 20 (quoting Tilton v. Marshall, 925 S.W.2d 672, 682 (Tex. 1996)).
[11] Exorcisms have been defined as "any rite or ceremony the purpose of which is, or purports to be, to rid an individual of a menacing or oppressive condition or thing." Heather Payne & Norman Doe, *Public Health and the Limits of Religious Freedom*, 19 EMORY INT'L L. REV. 539, 548 (Summer 2005).

claimed intentional infliction of emotional distress (hereinafter IIED), false imprisonment, and assault.[13] The Texas Supreme Court held that her claims were barred[14] by the Free Exercise Clause of the First Amendment.[15] The court also found the Texas equivalent inapplicable, which reads:

> All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent. No human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship. But it shall be the duty of the Legislature to pass such laws as may be necessary to protect equally every religious denomination in the peaceable enjoyment of its own mode of public worship.[16]

The Court found that the plaintiff's psychological/emotional claims, such as intentional infliction of emotional distress, were inextricably linked to her physical ones, such as false imprisonment and assault.[17] The majority appeared to hint at its preference for the consent doctrine.[18] The three dissenters, in a somewhat scolding opinion, held that *Schubert*'s claims could have been decided on neutral principles of law.[19] Now, the media has caught on to the interpretive struggle.[20] Indeed, the case may have proven to be too controversial, as it was denied certiorari before the United States Supreme Court in January 2009.[21]

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[12] *See Schubert*, 264 S.W.3d at 5.
[13] *Id.* at 50.
[14] *Id.* at 5.
[15] The Free Exercise Clause of the First Amendment reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I.
[16] TEX. CONST. art. I, § 6.
[17] *See Schubert*, 264 S.W.3d at 5.
[18] The majority determined that the basis of the false imprisonment and assault claims was the church practice of "laying on of hands." They argued that if the doctrine was widely accepted by congregants, then the claim was invalid. *Id.* at 12-13.
[19] *Id.* at 13-25. Chief Justice Jefferson noted that the application of a secular standard to secular conduct that is tortious is not unconstitutional. *Id.* at 19. Justice Green did not think Texas common law conflicted with the Free Exercise Clause, so neutral tort law principles were acceptable in *Schubert*. *Id.* at 23 (Green, J., dissenting). The last dissenter, Justice Johnson, joined the Chief Justice's application of a secular standard. *Id.* (Johnson, J., dissenting).
[20] *Schubert* has been followed since its appellate decision by some media outlets. *See Texas High Court: Exorcism Protected by Law*, USA Today, June 28, 2008, *available at* http://www.usatoday.com/news/nation/2008-06-28-exorcism_N.htm. Another exorcism case made headlines when a young autistic boy was exorcised and it ended fatally. *See Court Hears 'Exorcism' Death Case*, BBC News, July 8, 2004, *available at* http://news.bbc.co.uk/2/hi/americas/3877421.stm. Further examples of exorcism cases around the world are

By allowing intentional tort claims to proceed, courts are already requiring many Christian churches to violate a tenet of their faith: going to secular courts for justice.[22] Understandably, courts are not deeply concerned with protecting an adherent from violating their faith.[23] However, a consistent balance must be stricken between the rights of individuals to be free from harm, and the rights of individuals to practice their beliefs. Until legislation more accurately aims to stop exorcisms or laying on of hands, the courts should not delve too deeply into physical torts, like false imprisonment and assault, unless consent is refuted adequately.[24] Instead, the claims should be investigated if no arguably religious reason is attached to the conduct at issue. This comment will posit that the balance can be maintained through mixing elements of tort law's consent doctrine and defamation law's definitional balancing standard. The new standard will support the concept that religious freedom is a choice,[25] one that the courts should honor as long as it does not interfere with public health and/or safety.[26]

Further, this article argues that the majority opinion in *Schubert* partially used the appropriate test, the consent doctrine analysis, but did not apply it properly to the facts of the case. Part I will discuss the three main theories behind religious tort cases: consent doctrine, ad hoc analysis, and neutral law principles. Part II will discuss *Schubert*'s facts, procedural history, holding, and dissent. Part III will apply the three theories to facts of *Schubert*. And lastly, Part IV will discuss a definitional balancing approach using standards from defamation law that

followed by religion blogs. *See* RELIGION NEWS BLOG, http://www.religionnewsblog.com/category/exorcism (last visited Feb. 26, 2010).

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

[22] 1 *Corinthians* 6:1.

[23] *Thomas*, 450 U.S. at 716.

[24] Payne, *supra* note 11, at 548. The U.K. has legislation that criminalizes exorcism performed on persons under 16 years of age. *Id.* Laws may limit the right to religious exercise if doing so "[m]ay result in harm to the health of those not involved in the religious activity in question." *Id.* at 554-55. *See also* House of Commons -- Exorcism of Children (Prohibition) Bill, http://www.parliament.the-stationery-office.co.uk/pa/cm200001/cmbills/033/2001033.htm#1 (last visited December 31, 2008).

[25] At least one court has accepted that religious beliefs and practices are personal choices. *See* Guinn v. Church of Christ of Collinsville, 775 P.2d 766 (Okla. 1989). The court recognized this affirmative choice when it stated that, "[P]eople may freely consent to being spiritually governed by an established set of ecclesiastical tenets defined and carried out by those chosen to interpret and impose them." *Id.* at 774; *see also* Richard Delgado, *Cults and Conversion: the Case for Informed Consent*, 16 GA. L. REV. 533 (1982). Delgado writes that the legal system, "has always required that religions treat each person *as though* commitment to membership is an affirmative act that is his or hers alone to make." *Id.* at 541.

[26] *See Schubert*, 264 S.W.3d at 12. Both the majority and dissenting opinions in *Schubert* recognized that religiously motivated torts that were actionable tended to violate public health, safety, and good order. *Id.* at 12, 20. *See also Tilton*, 925 S.W.2d at 677.

balances the state's interest in protecting their citizens from harm and the right to free exercise of one's religion. This section will also combine the consent doctrine with definitional balancing and apply it to *Schubert*.

II. THE THREE THEORIES OF RELIGIOUS TORT ANALYSIS

The Supreme Court's landmark religious freedom decision in *Reynolds v. United States*[27] made a distinction between the right to believe in something inexplicable and the right to act on those beliefs.[28] The right to believe something may be absolute, but the right to act on those beliefs is more limited. In *Cantwell v. Connecticut*,[29] Justice Roberts made the famous statement that, "[T]he Amendment embraces two concepts, – freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."[30] Ever since, courts have struggled to implement a workable test for Free Exercise suits. The following entails a description of the most common tests used, consent doctrine, ad hoc free exercise, and neutral principles. Each test's elements and application will be explored.

A. Consent Doctrine

Consent doctrine is a form of definitional balancing between government and individual interests to create a rule of law.[31] As such, it differs from ad hoc analysis because it does not base the holding on the particular circumstances of the case. Instead, a rule of law is generated for the present case, as well as for future ones.[32] Consent doctrine more specifically bars recovery to persons who willingly engage in dangerous conduct.[33] The Supreme Court has

[27] 98 U.S. 145 (1878).
[28] "Laws are made for the government of actions, and while they cannot interfere with religious belief and opinions, they may with practices." *Id.* at 166.
[29] 310 U.S. 296 (1940).
[30] *Id.* at 303-304.
[31] Richard L. Cupp, *Religious Torts: Applying the Consent Doctrine as Definitional Balancing*, 19 U.C. DAVIS L. REV. 949, 971-72 (1986). Definitional balancing is a term of art from defamation law started by Professor Nimmer. *Id.*; *see generally* Daryl L. Wiesen, *Following the Lead of Defamation: A Definitional Balancing Approach to Religious Torts*, 105 YALE L.J. 291 (1995). Consent doctrine comes from the law of torts. *See* PROSSER AND KEETON ON THE LAW OF TORTS 113 (W. Page Keeton et al. eds., 5th ed. 1984).
[32] Cupp, *supra* note 31, at 972.
[33] *See* PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 31.

recognized the consent doctrine in a church property dispute in *Watson v. Jones*.[34] There, the Court reasoned that

> [t]he right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an *implied consent* to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed.[35] (emphasis added).

The consent doctrine operates under a similar understanding. If a person affirmatively chooses to join a religious group, he or she impliedly consents to its practices.[36]

The purpose of the consent doctrine is to give greater deference to the persons engaging in certain forms of conduct. They cannot recover for conduct they intentionally, either explicitly or impliedly, consented to. Richard Cupp proposed that voluntary membership in a religious group would create a rebuttable presumption that an individual consented to the group's conduct.[37] First, the defense must try to prove that the plaintiff was a member at the time of the tort and that the defendant's conduct was religiously motivated.[38]

It would then be the plaintiff's burden to show lack of consent or other negating factors such as age or mental incapacity.[39] In terms of age, the plaintiff would have to show that she did not consent because of her age or that no reasonable person would believe she affirmed

[34] 80 U.S. 679 (1872).
[35] *Id.* at 728-29. *See also Guinn*, 775 P.2d at 775-77 (holding a First Amendment defense is reliant on the plaintiff's consent).
[36] Cupp, *supra* note 31, at 975.
[37] *Id.* at 975.
[38] *Id.* at 976. To prove membership, courts do not have to get into whether or not the member made a sincere commitment. *Id.* at 979. The facts of the case can lend to whether or not the plaintiff was a regular member through church records (tithing) active involvement, (regular attendance, ministerial involvement), or any other factors that lend credence to membership. To prove that the religious defendant's conduct was religiously motivated, Cupp suggested an "arguably religious" standard. To meet this standard, courts look at whether or not the conduct is arguably religious or patently frivolous. *Id.* at 951, 979; *see also Thomas*, 450 U.S. at 715; *Schubert*, 264 S.W.3d at 25-26.
[39] Cupp, *supra* note 31, at 979-80. Age or minority status is a fact question. *Id.* at 979. Minors are of age when they can weigh the risks and benefits involved in the potentially tortious conduct. *Id.* Additional factors to consider are intelligence level, training, maturity, and other factors. *Id.* at 980.

membership as an adult.[40] If the plaintiff can prove this, then the case would proceed. A plaintiff could also show that the conduct was beyond anything she consented to through her membership role. Consent doctrine is about reasonableness and courts are looking to see if a reasonable person would think the member consented. "If the conduct differs drastically from conduct a church member would normally expect, and the member/plaintiff did not affirm the conduct, she probably could prove that it exceeded her consent."[41] Another negating factor includes fraud in obtaining consent.[42] Withholding pertinent information about religious practices is fraud, and therefore nonconsensual. The plaintiff would have to show she did not know of the tortious doctrine/practice under a reasonableness standard.[43]

Shifting the burden reduces ad hoc analyses and makes recovery more difficult.[44] It helps to protect the right to free exercise and gives more autonomy to plaintiffs who have been injured by that right.[45] Consent doctrine would not normally apply to nonmembers.[46] The entire premise of consent doctrine is that voluntary membership is tantamount to consent because the person affirmatively chose and took steps to become a part of the fellowship. Consent doctrine similarly does not apply to members who withdrew from the membership before the tort occurred.[47]

Places of worship should not bear the burden of showing some kind of informed consent, especially since many of these institutions have new member classes or written constitutions.[48]

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[40] *Id.* at 980. Richard Cupp has argued that adults who joined fellowships as a child should be held under a reasonable person standard to see if they did anything that affirmed their consent as an adult. *Id.* at 981. "The defendant is entitled to rely upon what any reasonable man would from the plaintiff's conduct." *See* PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 31. As for mental incapacity, the burden would be on the plaintiff to show a lack of consent and would be entitled to recovery. Cupp, *supra* note 31, at 980.

[41] *Id.* at 981.

[42] *Id.* at 982.

[43] *Id.* at 983.

[44] *Id.* at 975.

[45] Richard Cupp asserts that the Government's interest in the plaintiff's tort recovery is reduced if they voluntarily consented to the conduct. *Id.*

[46] *Id.* at 977. However, if the suit is brought by nonmember parents, one cannot say they consented to the tort of the child, as in *Nally v. Grace Cmty. Church*, 157 Cal. App. 3d 912 (1984) (nonmember parents brought suit against the pastor for IIED alleging his counseling led to their son's suicide). Still, if the son consented to the counseling, the parents should not recover.

[47] Courts are protective of a person's right to terminate their membership as in *First Protestant Reformed Church v. DeWolf*, 75 N.W.2d 19, 23 (Mich. 1956) (finding that unhappy members of the Protestant Reformed Church could withdraw from the fellowship).

[48] *See DeWolf*, 75 N.W.2d at 21; *see also* Cupp, *supra* note 31, at 983.

Further, having that burden would allow unnecessary government intrusion into conversion practices and diminish individual autonomy.[49]

B. Ad Hoc Free Exercise

Ad Hoc Free Exercise analysis decides issues on a case-by-case basis.[50] The initial ad hoc test came from *Sherbert* in the form of three questions: (1) Was the conduct based on a sincere religious belief, (2) Does the regulation impose a substantial burden on free exercise, and (3) If so, does a compelling state interest justify the infringement?[51] *Sherbert* involved a woman who was denied unemployment benefits because she refused to work on Saturdays, a holy day in her belief. The Supreme Court found that the first two prongs of the test were met in that her belief was sincere (Saturday worship is commonly known) and the regulation imposed a substantial burden because she was unable to find work.[52] In *Sherbert*, South Carolina argued that they denied benefits to a Jehovah's Witness unwilling to work on Saturdays so as to avoid unemployment fraud.[53] However, the Supreme Court found that this was not a compelling enough reason to deny her the benefits available to others.[54]

Yet, in another case, the opposite result was found for an arguably less compelling interest. In *Goldman*, a Jewish military member wore a yarmulke, which was in violation of the military dress code.[55] The government's "compelling" interest was in military uniformity.[56] The Supreme Court employed a test, not in keeping with *Sherbert*, and found that the military's interest in uniformity was sufficient.[57] Even with the lower standard of review, the wearing of a yarmulke does not seem to impose on the uniformity of military personnel to that great an extent.

[49] Cupp, *supra* note 31, at 983.
[50] Cupp, *supra* note 31, at 964.
[51] Wiesen, *supra* note 31, at 295-96. The first major case of free exercise analysis was *Sherbert v. Verner*, 374 U.S. 398, 399 (1963). This test is also commonly referred to as the compelling interest test. *See* Cupp, *supra* note 31, at 965. *See also infra* notes 64-66 (discussing the evolution of the compelling interest test in light of *Smith*, RFRA, and *Boerne*).
[52] *Sherbert*, 374 U.S. at 399, 403-04.
[53] *Id.* at 407.
[54] *Id.*
[55] Goldman v. Weinberger, 475 U.S. 503, 506 (1986).
[56] *Id.* at 507, 508.
[57] *Id.* at 507. Military cases are given a more deferential review according to the Supreme Court.

The strength of the ad hoc analysis was its ability to be flexible under any factual situation.[58] However, its weakness was that it was susceptible to popular sentiments regarding a particular religious practice, and became a way to pass judgment on the validity of the practice. Consider an indoctrination case against a little-understood and widely disliked religious sect. Judges could be susceptible to the local rancor against the religious defendant.[59] Moreover, it creates a chilling effect of religious practices.[60] Chilling effects keep religious adherents from practicing even minute beliefs because the religious establishment was penalized for performing it. For example, ad hoc did not define actionable proselytizing.[61] As a result, religious defendants can only protect themselves by not proselytizing.[62] Lastly, it was so flexible that it created no rule of law for future cases.[63]

Employment Division v. Smith expressly rejected the *Sherbert* test in cases where "generally applicable prohibitions of socially harmful conduct" arise.[64] Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA)[65] in an effort to reinstate the *Sherbert* compelling interest test. In 1997, *Boerne* declared RFRA unconstitutional under §5 of the

[58] Cupp, *supra* note 31, at 967.
[59] *Id.* at 968. Cupp cites Professor Nimmer for the proposition that "unusual judicial courage" would be necessary to preside fairly over cases involving First Amendment rights. *Id.*
[60] This language was taken in part from *Westbrook v. Penley*, 231 S.W.3d 389, 398, 400, 402 (Tex. 2007), a case used for the same premise by the *Schubert* majority. A chilling effect does not tell future litigants what behavior is inappropriate and they overcompensate by not engaging in even protected behavior because of the lack of judicial clarity.

The chilling effect usually appears in one of three ways: as unbridled discretion, vagueness, or overbreadth. *See* Cupp, *supra* note 31, at 970. Unbridled discretion involves discretion to limit their exercise to an individual or group of individuals. *See* Walker v. City of Birmingham, 388 U.S. 307, 344-345 (1967). Vagueness means that it is unclear as to who the law applies to and when it is to be applied. The doctrine "forbids wholesale legislative delegation of lawmaking authority to the courts . . . It requires that . . . ordinarily legislative crime definition be meaningfully precise – or at least that it not be meaninglessly indefinite." *See* John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 189, 196 (1985). Overbreadth means the law encompasses even legal conduct in an effort to reach illegal conduct. *See Walker*, 388 U.S. at 344-345.
[61] Proselytizing involves conduct aimed at teaching others about one's religion (canvassing, distributing literature, or preaching). *See* Howard O. Hunter & Polly J. Price, *Regulation of Religious Proselytism in the United States*, 2001 B.Y.U. L. REV. 537, 539 (2001).
[62] Cupp argues this point in the context of religious counseling. Cupp, *supra* note 31, at 970. In *Nally*, the pastor stated counseling would have to stop if liability was the end result thereof. *Id.* at 970, n.93.
[63] *See supra* notes 31-32.
[64] 494 U.S. 872, 885 (1990). *Smith* concerned the intersection between Oregon criminalizing peyote use and its use in Native American religious ceremonies. *Id.* at 875. The *Smith* court threw out the compelling interest test from *Sherbert* because they found it inapplicable when the law at issue was facially neutral and generally applicable. When applying its new principle, the Court found the peyote law to be a neutral one that did not unconstitutionally impact Native American religion. *Id.* at 885; *see also Schubert*, 264 S.W.3d at 52.
[65] 42 U.S.C.A. § 2000bb(b) (West Supp. 1994).

Fourteenth Amendment.[66] This reinstated the neutral approach designated in *Smith*. As of *Boerne*, the compelling interest test is void.

C. Neutral Principles

Neutral principles of law usually come from the laws of property and tort . To avoid excessive entanglement, a test has been formulated in the property context. "The United States Supreme Court has adopted a two-pronged analysis in intrachurch disputes involving property. [Courts] may employ 'neutral principles of law, developed for use in all property disputes . . . *unless* this determination depends on the resolution of an ecclesiastical controversy over religious doctrine, practice or polity.'"[67] Therefore, courts may take jurisdiction of a religious case if it's absolutely clear that the religious components can be severed.

In *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*,[68] the court applied the principle because it was a dispute over church property.[69] The Court never fully explained what neutral principles were, but advocated litigants to frame the issues in such a way where they did not have to "resolv[e] underlying controversies over religious doctrine".[70]

The Supreme Court became further divided in *Jones v. Wolf*. The dissent, Justice Powell, noted that the neutral principles approach would increase church dispute litigation.[71] Justice Powell argued that disputes typically arose over doctrinal disagreements, so the best way to avoid Free Exercise issues was to leave the decision-making to the church's highest authority.[72] Justice Powell criticized the use of neutral principles even in the property context. Quoting language from *Watson v. Jones*, he stated that the members chose to join the organization and by doing so, submitted to its decisions.[73]

Courts struggle to parcel the ecclesiastical from what that can be litigated neutrally. Most of the precedents using neutral principles arise in a property dispute context. However, some

[66] City of Boerne v. Flores, 521 U.S. 507, 536 (1997).
[67] Concord Christian Ctr v. Open Bible Standard Churches, 132 Cal. App. 4th 1396, 1411 (Cal. Ct. App. 2005).
[68] 393 U.S. 440 (1969).
[69] The Supreme Court held that "there are neutral principles of law, developed for use in all property disputes" to resolve the church dispute. *Id.* at 449; *see also* Jones v. Wolf, 443 U.S. 595, 602-06 (1979).
[70] *Presbyterian*, 393 U.S. at 449.
[71] Wolf, 443 U.S. at 611 (Powell, J., dissenting).
[72] *Id.* at 616, 617-18.
[73] *Id.* at 617.

don't involve property at all, but are rooted in tort. Even cases that appear to be good candidates for neutral application may be fraught just the same with ecclesiastical undertones.[74] In *Milivojevich*, an archbishop was defrocked and he sued the church for violating their internal guidelines for terminating employment. At first blush, it appears that using the guidelines as a sort of contract, would allow for judicial review. The Illinois Supreme Court, under a neutral principles approach, construed the discharge as "arbitrary" by relying on the Church's internal guidelines.[75] The United States Supreme Court reversed stating that the Church's highest authority dealt with the qualifications of their priests, and courts could not interfere.[76]

When *Smith* came along, the analysis changed dramatically. The Supreme Court held that a facially neutral and valid law of general applicability is constitutional.[77] They reaffirmed this holding in *Boerne*.[78] In *Boerne*, a Catholic church wanted to expand their building in an area governed by an ordinance protecting historic sites.[79] The Church challenged that, under the Religious Freedom Restoration Act (RFRA), the zoning act was an infringement against their right to free exercise.[80] The Court determined that RFRA did not preclude municipal authorities from enacting an ordinance governing historic preservation that prevented the church from expanding.[81] Rather, RFRA was an unconstitutional extension of Congress' § 5 powers under the Fourteenth Amendment.[82] *Boerne* has been superseded by the Religious Land Use and Protected Persons Act (RLUIPA).[83]

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[74] Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 709 (1976) ("Even when rival church factions seek resolution of a church property dispute in the civil courts there is substantial danger that the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs.").
[75] *Id.* at 698.
[76] *Id.*
[77] *Smith*, 494 U.S. at 879.
[78] 521 U.S. 507 (1996).
[79] *Id.* at 512.
[80] *Id.*
[81] *Id.* at 511.
[82] *Id.* at 536.
[83] Pub. L. 106-274, 114 Stat. 803 (2000) (codified at 42 U.S.C. §§ 2000cc to 2000cc-5). The statute protects religious land use, the fact at issue in *Boerne*.

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution--

RLUIPA falls in line with the kinds of cases that worked well with the neutral principle approach: property cases. RLUIPA is a far cry from the facts at issue in *Schubert*. Justice O'Connor's concurrence in *Smith* cautioned against using neutral laws as the gauge by which to resolve a Free Exercise issue. She stated that, "The First Amendment . . . does not distinguish between laws that are generally applicable and laws that target particular religious practices."[84]

Neutral principles can work in the intentional tort context, but it takes some doing. For instance, in *Rashedi v. General Board of the Church of the Nazarene*, a woman sued a church for negligent hiring, negligent supervision, and negligent retention of a pastor who seduced and defrauded her out of a large sum of money.[85] The court held that neutral principles of tort could be applied to the claims because of *Smith*'s groundbreaking analysis that generally applicable laws are binding on religious adherents.[86] Neutral principles of tort worked here, because a court could determine whether a church knew or should have known that the pastor had a history of seducing parishioners.

Under a similar employment context, in *Sanders v. Baucum*, the District Court of Texas grappled with a professional negligence suit against a pastor. The pastor entered into secular counseling sessions with two members, which later on became sexual in nature.[87] The members sued for counseling malpractice, breach of fiduciary duty, and IIED.[88] The court reviewed the jury verdict in favor of the members to conclude that, "The charge asked [the jury] to determine whether Baucum was liable for counseling malpractice and whether he breached fiduciary duties owed to the Plaintiffs as a result of the secular counseling relationships, both of which are questions which turn on neutral principles of tort law."[89]

(A) is in furtherance of a compelling governmental interest; and
(B) is the least restrictive means of furthering that compelling governmental interest.

[84] *Smith*, 494 U.S. 872, 894 (1990) (O'Connor, J., concurring). She noted that the First Amendment was partially designed to protect religious minorities whose beliefs were met with antagonism. *Id.* at 902.
[85] Rashedi v. Gen. Bd. of Church of the Nazarene, 54 P.3d 349, 351 (Ariz. Ct. App. 2002).
[86] "Because religious organizations are part of the civil community, they are subject to societal rules governing property rights, torts, and criminal conduct. The First Amendment does not excuse individuals or religious groups from complying with valid neutral laws." *Rashedi*, 54 P.3d at 353.
[87] Sanders v. Baucum, 929 F. Supp. 1028, 1031-32 (D. Tex. 1996).
[88] *Id.* at 1032.
[89] *Id*. at 1038.

Neutral principles fair better in these types of cases because the conduct is not related to any religious doctrine or religious motivation.[90] Cases that use the neutral approach outside the property context tend to involve clergy abuse (sexual abuse or clergy malpractice in counseling) or employment fact patterns.[91] As evidenced in *Sanders*, these torts have arguably no religious motivation for the tort in the first place, and the religious defendants never argued that they did. The *Schubert* case does not fit into these fact patterns. Engaging in a sexual relationship with a counselee is not related to a religious objective, especially when the counseling was for secular purposes. *Schubert* defies this premise because the tort involved was based on a religious practice known to the Plaintiff.

Even when considering *Smith*, *Boerne*, and RLUIPA, they are all about the *State* infringing on Free Exercise, not private persons. Neutral principles of law turn out quite differently in a physical tort context between private parties. Courts must struggle to see if the law is neutral and generally applicable, and that the conduct is divorced from a religious objective. Judging from these cases, neutral principles work best in the property and professional misconduct context. Cases with intentional torts stemming from religious exercise require more protections than neutral principles can offer.

II. THE EVOLUTION OF *PLEASANT GLADE ASSEMBLY OF GOD V. SCHUBERT*

A. Statement of the Case

The issue before the court in *Schubert* was whether the church's practice of "laying hands" was entitled to First Amendment protection.[92] The *Schubert* case arises out of two incidents that happened within less than a week. On a Friday, Laura Schubert, then seventeen, was left at home with her siblings while her parents were away.[93] The siblings went to church for a youth group activity.[94] One of the youths stated they saw a demon, and the youth leader

[90] Cupp, *supra* note 31, at 977.
[91] *See* Patton v. Jones, 212 S.W.3d 541 (Tex. Ct. App. 2006) (clergy employment); *supra* notes 87-89 (clergy malpractice); Malicki v. Doe, 814 So. 2d 347 (Fla. 2002) (clergy sex abuse).
[92] *See Schubert*, 264 S.W.3d at 8. "Laying on of hands" is a biblical doctrine consisting of laying hands upon a person believed to be under spiritual influence and anointing them with oil to combat malicious forces. The practice is accompanied with prayer. *Id.* at 10.
[93] *Id.* at 3.
[94] *Id.*

asked the group to pray and anoint the sanctuary with oil in an effort to remove the presence.[95] The process took them into the early Saturday morning and the group was sent home.[96]

During Sunday's morning service, the siblings prayed at the altar.[97] Laura's brother became "slain in the spirit"[98] and was prayed over by other members.[99] The siblings returned to an evening service where Laura then collapsed.[100] Some members took Laura aside, laid hands on her, and prayed.[101] It is at this point the church and Laura diverge as to what occurred next. Laura testified that her arms were forcibly held even though she demanded to be released.[102] According to the members present, Laura was in a state of distress whereby she grit her teeth, clenched her fists, foamed at the mouth, made guttural noises, kicked, and hallucinated.[103] Both sides disagree as to whether these behaviors were a cause or result of the injuries Laura suffered.[104] Laura stated that the Devil and demons were after her.[105] She was eventually let go after saying the name "Jesus".[106]

The next two days passed with no problems and Laura continued attending youth group activities.[107] On Wednesday at another youth service, Laura went into a fetal position to be alone.[108] Members mistook her posture and Laura claimed they proceeded to hold her down in a "spread eagle" position.[109] The senior pastor was summoned whereupon he played soothing music, laid hands on her head, and prayed.[110] It was during this incident where Laura's physical

[95] *Id.*; *see also supra* text accompanying note 11.
[96] *Schubert*, 264 S.W.3d at 3.
[97] *Id.*
[98] To be "slain in the Spirit" is an experience whereby a person falls into a semi-conscious state and may have to lie down. *Id.* at n.2. It is a common phenomenon of faith healing religious communities. In some places of worship, an usher follows the leader around and catches those who become slain in the Spirit. *See* Will Harper, *Touched by God*, *available at* http://metroactive.com/papers/metro/10.09.97/cover/god-9741.html.
[99] *Schubert*, 264 S.W.3d at 3. Prayer is a point of fraud in some cases. *See generally* Nicholas Barborak, *Saving the World, One Cadillac at a Time; What can be Done When a Religious or Charitable Organization Commits Solicitation Fraud?*, 33 AKRON L. REV. 577 (2000).
[100] *Schubert*, 264 S.W.3d at 3.
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.* at 4.
[106] *Schubert*, 264 S.W.3d at 4.
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.*

injuries manifested. Laura had carpet burns, scrapes, and bruises on her wrists and shoulders.[111] Someone called her parents and they took her home, unaware of the events that transpired.[112]

After some debate as to whether the church was following correct doctrine during the two nights in question, the Schuberts left the church.[113] Laura's injuries were both psychological and physical. Recorded symptoms included hallucinations, weight loss, nightmares, self-mutilation, and depression.[114] She dropped out of her senior year and decided not to attend Bible College.[115] Eventually, she was diagnosed with post-traumatic stress disorder, which was attributed to the two incidents.[116] The Schuberts sued Pleasant Glade for a variety of torts: negligence, gross negligence, professional negligence, IIED, false imprisonment, assault, battery, loss of consortium, and child abuse.[117]

B. Procedural History

Pleasant Glade moved to dismiss the suit on Free Exercise[118] grounds, which the trial court denied.[119] The appellate court reversed and granted the church their First Amendment motion against the religious portion of Laura's claims, meaning IIED.[120] The only claims remaining at that point were false imprisonment[121] and assault,[122] which the church did not seek protection from.[123] The remaining claims proceeded to trial and a jury found in favor of

[111] *Id.*
[112] *Schubert*, 264 S.W.3d at 4.
[113] *Id.*
[114] *Id.*
[115] *Id.* at 5.
[116] *Id.* The church members attributed Laura's symptoms to missionary trips to Africa taken with her parents. Br. on the Merits for Pet'rs at 3, McCuthchen v. Schubert, No. 05-0916 (Tex. App. 2008).
[117] She further alleged "mental, emotional and psychological injuries including physical pain, mental anguish, fear, humiliation, embarrassment, physical and emotional distress, post-traumatic stress disorder[,] and loss of employment." *Schubert*, 264 S.W.3d at 5.
[118] *See supra* note 15.
[119] *See Schubert*, 264 S.W.3d at 9.
[120] *Id.*
[121] In Texas, false imprisonment is defined as willful detention, without consent, and without authority of law. Wal-Mart Stores, Inc. v. Rodriguez, 92 S.W.3d 502, 506 (Tex. 2002).
[122] In Texas, the definition of criminal and civil assault is the same. It is defined as (1) intentionally, knowingly, or recklessly causes bodily injury to another; or (2) intentionally or knowingly threatens another with imminent bodily injury; or (3) intentionally or knowingly causes physical contact with another when he or she knows or should reasonably believe that the other will regard the contact as offensive or provocative. TEX. PENAL CODE ANN. § 22.01 (Vernon 2007).
[123] *See Schubert*, 264 S.W.3d at 5.

Laura.[124] She was awarded $300,000 in damages,[125] including loss of earning capacity.[126] The appellate court removed the lost earning capacity as too speculative, but otherwise affirmed the award and judgment.[127] The appellate opinion focused on judicial estoppel where they held the church could not assert a constitutional defense over the last two claims, false imprisonment and assault, because they took a contrary position in the previous trial by agreeing that Laura's physical claims could go forward.[128] The church appealed to the Texas Supreme Court.

C. Holding

In a 6-3 decision, the Texas Supreme Court reversed the appellate decision on two issues: judicial estoppel and the First Amendment defense.[129] After finding that Pleasant Glade could in fact proceed on their First Amendment defense against Laura's physical injuries, the court looked to whether or not Laura's claim was barred in light of that defense.[130] The court implemented a mixture of ad hoc free exercise analysis and consent doctrine. The church conceded that the First Amendment did not make it immune against Laura's physical claims.[131] However, the church asserted that Laura's suit was merely about differences of opinion regarding the doctrine of the laying on of hands, and the belief was constitutionally protected. [132] The Texas Supreme Court agreed, finding that Laura's psychological claims were too intertwined with her physical claims, and tended to dominate the trial.[133]

[124] *Id.*
[125] *See generally* 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. 580 (1993). Hayden finds that damages in religious tort cases rarely have anything to do with compensating the victim, but rather to punish the religious institution. *Id.* at 592-93.
[126] *See* Schubert, 264 S.W.3d at 5.
[127] *Id.* at 6.
[128] *Id.*
[129] *Id.* at 2.
[130] *Id.* at 8. The Texas Supreme Court vacated the appellate decision of judicial estoppel for three reasons: (1) the asserted inconsistency did not arise in a former proceeding, (2) the church did not gain any advantage from the asserted inconsistency, and (3) the church has consistently asserted its First Amendment rights throughout the case and prior mandamus proceeding. *Id.* at 6.
[131] *Id.* at 5. Pleasant Glade did not include the claims of false imprisonment and assault in its request for relief. *Id.*
[132] *Id.*
[133] *Id.* at 9.

The court supported its findings in light of certain facts that Laura testified to. Laura recalled being tended to by members of the church during the ordeal.[134] Strangely enough, despite the physical nature of the ordeal, Laura did not complain of any physical injury resulting from the Wednesday night service.[135] At trial, the medical proof consisted entirely of psychological injury.[136] In light of the dismissal of intentional infliction of emotional distress, the psychological nature of the medical proof should not have been admitted.[137] Even Laura's expert could not separate her psychological and physical injuries.[138]

The court rejected Laura's IIED claim because it would have required an inquiry into the truth or falsity of Pleasant Glade's beliefs. Under *Cantwell v. Connecticut*, the Supreme Court held that intangible harms without more could not serve as a tort claim against a religion's practices.[139] The *Schubert* court did not think the IIED claim, without more, was valid using *Cantwell*'s analysis. The majority supported *Cantwell* with *Westbrook v. Penley*.[140] In *Westbrook*, the Texas Supreme Court held that torts may be defined by secular principles, but the application could create legal conflicts with constitutional protections.[141] This point led to a discussion, and a rebuttal to the dissent, of the effects of Laura's claim proceeding to trial. The majority's most compelling argument was that Laura's claim would create an unconstitutional "chilling effect" against free exercise.[142] According to church doctrine, when congregants are "slain in the spirit"[143] the church will "lay hands" in an effort to relieve the member.[144] The

[134] *Id.* at 8.
[135] *Id.* at 8-9.
[136] *Id.* at 9.
[137] Justice Medina, the author of the majority opinion, wrote that Laura presented her claims in such a manner that differed in no substantial way from how it would have been presented had the IIED claim remained. *Id.* However, Texas does allow recovery for mental anguish as a result of false imprisonment. *Id.* at 16.
[138] *Id.* at 9.
[139] 310 U.S. at 309.
[140] 231 S.W.3d 389 (Tex. 2007).
[141] *Id.* at 397. In *Westbrook*, the elements of a common law tort may possibly be defined by secular principles without referencing religion, but implementing those principles is another matter entirely if imposing tort liability would violate constitutional protections to administer church doctrine. *Id.* at 400.
[142] *Id.* at 10. This language was taken in part from *Westbrook v. Penley*. *See supra* note 60 on chilling effects.
[143] *Supra* note 98. Consider a biblical example of the phenomenon. St. John described his experience when meeting Christ in this way: "And when I saw Him, I fell at His feet as dead." *Revelation* 1:17a.
[144] *See Schubert*, 264 S.W.3d at 10.

laying on of hands happened with regularity at Pleasant Glade and Laura's claim would keep the church from engaging in this activity.[145]

Secondly, the court also wanted to differentiate religious torts where "under the cloak of religion, persons may, with impunity commit intentional torts upon their religious adherents."[146] The cases that the court distinguished involved tortious conduct that had no religious purpose.[147] The last two arguments were a mixed bag of consent doctrine and concern for public order. The court would only become concerned if the conduct alleged was subversive to the public welfare.[148] Pleasant Glade's conduct did not rise to this level because Laura impliedly consented to the conduct by being a member of the church.[149] The practice of laying of hands and the belief in demons are a part of the church's doctrine and accepted by the members.[150] It is here that the beginnings of a consent doctrine analysis appear. The court added that religious practices that offend believers are held to a less stringent standard than the standard for non-believers who don't attend a place of worship.[151] Consequently, Laura's membership automatically placed her claim under a less rigorous standard of review, and the claim ultimately failed.

[145] *Id.* at 13.
[146] *See generally* Bowie v. Murphy, 624 S.E.2d 74, 79-80 (Va. 2006) (Deacon was falsely accused of assaulting a congregant); Jones v. Trane, 591 N.Y.S.2d 927, 931 (N.Y. Sup. Ct. 1992) (priest's sexual misconduct); *Strock*, 527 N.E.2d at 1237; Christofferson v. Church of Scientology of Portland, 644 P.2d 577 (Or. Ct. App. 1982) (fraudulent misrepresentation).
[147] *Supra* note 37. In *Jones*, the priest's sexual misconduct had no relation to his religious duties. *See Jones*, 591 N.Y.S.2d at 931; *see also* Lee W. Brooks, Note, *Intentional Infliction of Emotional Distress by Spiritual Counselors: Can Outrageous Conduct be 'Free Exercise'?*, 84 MICH. L. REV. 1296, 1302 (1986) ("In the spiritual counseling context, the free exercise clause is relevant only if the defendant can show that the conduct that allegedly caused plaintiff's distress was in fact 'part of the beliefs and practices' of the religious group.") Similarly, in *Strock*, the pastor's religious beliefs were not the basis for his affair with his congregant. *Strock*, 527 N.E.2d at 1238.
[148] "Moreover, religious practices that threaten the public's health, safety, or general welfare cannot be tolerated as protected religious belief." *Schubert*, 264 S.W.3d at 12 (*quoting* Tilton, 925 S.W.2d at 677).
[149] Quoting *Guinn*, the court reasoned that, "[P]eople may freely consent to being spiritually governed by an established set of ecclesiastical tenets defined and carried out by those chosen to interpret and impose them." 775 P.2d at 774.
[150] *See Schubert*, 264 S.W.3d at 12-13.
[151] *Id.* at 12. For additional text regarding differing standards for congregants and non-believers, see *Smith v. Calvary Christian Church*, 614 N.W.2d 590 (Mich. 2000). The court in *Calvary* analyzed the plaintiff's behavior and found that he manifested consent in several different ways, including putting in writing that he would accept the church's laws. *Calvary*, 614 N.W.2d at 593.

D. The Dissenters

The dissent, Chief Justice Jefferson, and Justices Green and Johnson, found that contrary to the majority's opinion, their holding allowed religious tortfeasors to hide tortious conduct "under the cloak of religion."[152] Each wrote his own dissenting opinion, with the Chief Justice writing the largest. Justice Jefferson's approach to the issue was mostly procedural.[153] He would not disturb many of the trial or appellate court's findings because Pleasant Glade did not appeal most of the findings.[154] Rather, the Chief Justice gave greater deference to the trial court's findings. He argued that his court failed to realize that the jury awarded Laura for mental anguish; as well as for physical injuries.[155] Moreover, the jury heard very little concerning religion at the trial once the "religious claims" were dismissed.[156] For instance, the record did not disclose that physical restraint was a part of any established religious practice at Pleasant Glade.[157]

Additionally, Texas courts had long held that claims relating to bodily injury are compensable, even if there are no physical injuries.[158] The crux of his argument was that the

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[152] *See Schubert*, 264 S.W.3d at 12, 15.

[153] Chief Justice Jefferson additionally relied on the Texas Rules of Civil Procedure to argue several ideas. First, Pleasant Glade's First Amendment defense would have been treated as an affirmative defense. *Id.* at 21. *See also* TEX. R. CIV. P. 94. Second, he would have charged the jury to award damages as if a secular actor had done the tort. *Id*. at 21. Jefferson argued that juries are consistently asked to exclude certain sources of injury when deciding damages. *Id.* Third, since Pleasant Glade did not ask for such a jury instruction, they were precluded from relief. *Id.* at 2. *See, e.g.*, TEX. R. CIV. P. 274, 278.

[154] For instance, the Chief Justice stated that the majority made reference to implied consent on Laura's part. However, consent is an element of false imprisonment and a question of fact that belonged to the jury. *Id.* at 20. The jury found that there was no consent to the restraint and Pleasant Glade did not appeal this finding to either court. *Id.*

[155] *Id.* at 15-16. Laura testified that her injuries were emotional *and* physical. *Id.* The jury awarded her for both types and Pleasant Glade did not ask for the damages to be separated. *Id.*

[156] *Id.* at 18. The jury did not hear any testimony on Pleasant Glade's beliefs. *Id.*, at 18 n.5.

[157] *Id.* at 15. This may not be altogether factual. The practice of the laying on of hands appears to be a physical restraint of some kind, based on the senior pastor's supporting affidavit. "This type of activity [laying hands] happens on a regular basis in our church, since we believe in the physical conduct of laying hands on persons in order to pray for them." *Id.* at 10. However, this is dispositive for the Chief Justice. Even if Pleasant Glade's doctrine required restraint, the First Amendment would provide no defense. *Id.* at 19. He relies on Pleasant Glade's mandamus petition where they conceded that Laura's claims were secular bodily injury torts. *Id.* at 20.

[158] *Id.* at 16; *see also* Davidson v. Lee, 139 S.W. 904, 907 (Tex. Civ. App. 1911). *Davidson* supports the proposition that physical injuries are not an *essential* element of false imprisonment. Additionally, Texas courts have allowed mental anguish recovery resulting from false imprisonment. *See* Dillard Dep't Stores, Inc. v. Silva, 148 S.W.3d 370, 372 (Tex. 2004). "Mental suffering caused by a false imprisonment, including humiliation, shame, fright, and anguish, is also compensable, regardless of whether any physical harm was inflicted on the plaintiff." 20-331 WILLIAM V. DORSANEO III, TEXAS LITIGATION GUIDE § 331.06 (2007). Laura did in fact suffer physical injuries as well. *Schubert*, 264 S.W.3d at 4.

torts of false imprisonment and assault were neutral laws of general applicability, much like the peyote criminal law in *Smith*.[159] The majority erred, in his opinion, by doing exactly what they claimed they were not doing: delving into religious doctrine.[160] The Chief Justice proceeded to tear apart the majority's use of precedent as irrelevant in light of *Smith*, RFRA, and *Boerne*.[161] According to Jefferson, the majority used cases that were no longer relevant once *Boerne* was decided.[162] One case heavily relied upon by the majority was *Tilton v. Marshall*. However, Chief Justice Jefferson pointed out that *Tilton* was unreliable, because it was decided before RFRA was declared unconstitutional as applied to the States.[163]

Jefferson also attacked the majority's use of *Cantwell* and *Westbrook*. *Cantwell* cautioned that no assault or threat of such would shield religious organizations from liability.[164] Similarly, *Westbrook* based its holding on the fact that the conduct at issue was not intentional or endangered the plaintiff's or the public's health or safety.[165] *Sands v. Living Word Fellowship*[166] was used by the majority for the same premise that tortious religious conduct could not subvert

[159] Chief Justice Jefferson quotes *Smith*, 494 U.S. at 879. The other dissenters affirmed their support of this form of analysis. They implored courts to risk the neutral principles approach if the religious and the secular could be separated. *Schubert*, 264 S.W.3d at 22-23.

[160] Jefferson found the majority's reasoning to be paradoxical. The majority, against *Smith*'s warning, ". . . engages in the unconstitutional conduct it purports to avoid: deciding issues of religious doctrine." *See Schubert*, 264 S.W.3d at 19, n.7. *See also Smith*, 494 U.S. at 887.

[161] Free exercise analysis took a dramatic turn after *Smith*. *Sherbert* was the origin of the compelling interest test, which called for "any incidental burden on the free exercise of . . . religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate.'" *Sherbert*, 374 U.S. at 403; *see also Smith*, 494 U.S. at 875. *Smith* expressly rejected the *Sherbert* test in cases where "generally applicable prohibitions of socially harmful conduct" arise. *Smith*, 494 U.S. at 885. *See also Schubert*, 264 S.W.3d at 20.

[162] "[I]t is not surprising that the Court cites no case holding that the First Amendment bars claims for emotional damages arising from assault, battery, false imprisonment, or similar torts." *Schubert*, 264 S.W.3d at 17.

[163] "Although the Court cites *Tilton* for support, *Tilton* did not consider the application of *Smith* because *Tilton* was decided before the RFRA was held to be beyond Congress's legislative authority to enact with respect to the states in *City of Boerne v. Flores* . . ." *Id.* at 19, n.8.

[164] *Id.* at 17. *Cantwell* concerned Jehovah Witnessess distributing religious materials who were arrested for unlawful soliciting and breaches of the peace. 310 U.S. at 301-02. The Court found that no assault or threat of such had taken place. *Id.* at 310.

[165] *See Schubert*, 264 S.W.3d at 17. In *Westbrook*, a congregant sued the pastor after the congregation was told to shun the congregant for engaging in a "biblically inappropriate" relationship. *Westbrook*, 231 S.W.3d at 391. The congregant alleged the pastor learned the information in a secular marriage counseling session, and should not have disseminated that information. *Id.* If it is to be noted, when the congregant applied for membership, she expressly stated she would abide by the church's constitution. The constitution included clauses on shunning unrepentant congregants. *Id.* at 392-93.

[166] 34 P.3d 955 (Alaska 2001).

public safety and order.[167] Jefferson could not understand how the majority could find that Pleasant Glade's conduct had not stepped far beyond the express boundaries these cases defined.

To a certain degree, Justice Jefferson conceded that adherents often impliedly consent to various faith-based practices.[168] However, consent is a question of fact, and the majority broadly treated church membership as a bar to liability.[169] Justice Green found that the majority made the entire case about sanctioning voluntary religious practices.[170] He stated that courts should implement neutral principles despite the difficulty in application.[171] The last dissenter, Justice Johnson, echoed the Chief Justice by noting that Laura's claims included physical injuries.[172] Further, the church never claimed that laying of hands requires forcefully and physically holding a person down for extended periods of time.[173] As such, the First Amendment defense was unnecessary.

The neutral principle approach was the dissenters' solution to the case, because laws against false imprisonment and assault are neutral laws that all citizens can abide by. Furthermore, civil and criminal liability for false imprisonment and assault protect the public health, safety, and general welfare.[174]

The diverging views and forms of analyses in the *Schubert* case are readily apparent from the two opinions. While the majority's opinion hints at the consent doctrine approach, the dissent advocates for a neutral principles approach. There are two reasons for this discrepancy. One problem is that Laura's claims of false imprisonment and assault do not fit neatly into the

[167] *See Schubert*, 264 S.W.3d at 20.
[168] Water baptism was used as an example of consensual religious activities. *Id.* One can imagine many more examples, including those cases where adherents consent in written form. *See, e.g.*, *Calvary*, 614 N.W.2d at 593.
[169] *See Schubert*, 264 S.W.3d at 20.
[170] Justice Green finds the majority's analysis on this point moot. If Laura had consented to the laying on of hands, her claims would have been defeated. However, consent is a question of fact for the jury, and they held that she did not consent. *Id.* at 23, n.1.
[171] In Justice Green's opinion, neutral tort principles more than made up for occasional problems in application. *Id.* at 23.
[172] "Not only was there direct evidence of physical injury and pain from the restraints, but it was within the knowledge of the jurors . . .". *Id.* at 25.
[173] *Id.* at 24. The senior pastor stated in his affidavit that he did not hold Laura down or hold her against her will, nor directed others to do so. Justice Green took this to mean that laying on of hands doesn't require holding anyone down.
[174] Both the majority and dissenting opinions used this language to emphasize their contrasting arguments. The majority drew this language again from *Tilton* by way of *Sherbert*. The majority did not think Pleasant Glade's conduct met the *Tilton*/*Sherbert* standard, but the dissent did. "In *Smith*, however, the Court expressly rejected the application of *Sherbert*, which developed out of an unemployment compensation case, to 'generally applicable prohibitions of socially harmful conduct.'" *Id.* at 20.

neutral principle paradigm, because the conduct was religiously motivated. Neutral principles cases often come down to whether or not the conduct has anything to do with religion. Secondly, the consent doctrine is used as an absolute bar to liability. Consent must still be proven if the adherent may have been fellowshipping at a church, but was unaware of the practice. This tension exacerbates the unpredictability of religious tort claims.[175] Ultimately, the pseudo-consent doctrine won out, but it's not enough to protect religious entities and injured congregants if it's not applied properly.

IV. *SCHUBERT*'S FIT: THE THREE DOCTRINES IN APPLICATION

A. Consent Doctrine

Consent Doctrine appears problematic when applied to intentional physical torts like false imprisonment and assault. However, the Restatement Second of Torts has proffered that criminal conduct which was consented to should bar even civil recovery.[176] This approach has been adopted by a minority of jurisdictions.[177]

Using the approach suggested by Richard Cupp, the analysis would begin as follows: Laura's membership would create a rebuttable presumption that she consents to Pleasant Glade's doctrine. Pleasant Glade must then prove that Laura was a member at the time of the tort and that the church's conduct was religiously motivated. For the first point, Laura was in fact a member of Pleasant Glade. She attended youth events regularly.[178] When she was prayed over, Laura was attending a church function. Secondly, Pleasant Glade began to pray over Laura because she appeared in distress. They proceeded to lay hands on Laura which shows the church's conduct was religiously motivated.[179]

Next, the burden would shift to Laura to show lack of consent. Laura claims she was kicking, screaming, and crying as the church prayed over her. The church perceived this as demonic possession. This is too shaky a leg to stand on, so perhaps she could argue her minority to prove lack of consent. In such a case, the plaintiff would have to show that she did not

[175] *See generally*, Wiesen, *supra* note 31.
[176] PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 31, at 122-24; RESTATEMENT (SECOND) OF TORTS § 892 c(1) (1977).
[177] Cupp, *supra* note 31, at 984, n.183.
[178] *Schubert*, 264 S.W.3d at 2.
[179] *Id.* at 4.

consent because of her age or that no reasonable person would believe she affirmed membership as an adult. Since she was seventeen, Texas law may find that Laura was old enough to refuse prayer.[180] According to the facts, on the second night of Laura's attendance, a male member put his arms around Laura and asked if she was ok and she asked to be left alone.[181] This indicates a lack of consent to being touched. Even though the record does not reflect how many people touched Laura, the amount and relative sizes of each factor in to show lack of consent.

There still remains the problem that this was an activity that occurred with regularity at Pleasant Glade. Laura was aware of the practice of laying on of hands because her father was a minister of the Assemblies of God (Pleasant Glade's affiliation) and she attended Pleasant Glade with her family.[182] She spoke of demons coming after her. This indicates knowledge of the church's position on demons.[183] As such, Laura would have to show that Pleasant Glade's conduct exceeded her consent.

Using the reasonableness standard, the question becomes whether the conduct differed drastically from what she would expect. Laura would have to produce evidence of prior observations of hands being laid on other members and that it was nothing like what happened to her. If she could show this, she should prevail. If not, under this standard, she would lose because her membership cuts off her lack of consent (unless her age, 17, would mean she couldn't consent to the church's doctrine in the first place). This is highly unlikely since Laura's brother was prayed over earlier in the day and her independent choice to attend the church while her parents were away evidence an understanding and implicit consent to the church's practices.[184]

To answer the question of whether Laura was falsely imprisoned and assaulted requires too much delving into the religious beliefs of Pleasant Glade. As such, the church would be vindicated under this analysis.

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[180] Texas, as do many other jurisdictions, consider the age of the victim of the alleged tort when conducting their analysis. "[W]hether a person 'could voluntarily have terminated' . . . or whether 'she was so overawed and intimidated' by another's threats that she was not able to exercise her free will, the jury is 'at liberty to consider not only the actual words spoken but the relative *size, age* . . . of the participants." H.E. Butt Grocery Co. v. Saldivar, 752 S.W.2d 701, 703 (Tex. Ct. App. 1988) (emphasis added).

[181] *Id.* at 15.

[182] *Id.* at 4.

[183] *Id.* at 3. The senior pastor noted that those who exhibit signs that evidence a presence, could be manifesting various causes like faking, responding to the Holy Spirit, evil spirits at war, or emotional issues. *Id.* at 11.

[184] *Id.* at 4.

B. Ad Hoc Analysis

Since the compelling interest test has been overturned by *Boerne*, the approach would not be used in *Schubert*. Even though *Boerne* was superseded by RLUIPA, the statute is of no effect to the facts of this case.

C. Neutral Principles

Under the Neutral Principles approach, *Schubert* would come out quite differently. First, the ecclesiastical issues would have to be severed from the secular, if at all possible. The two claims at issue, false imprisonment and assault, are neutral laws. However, the facts of *Schubert* do not fit the typical paradigm and mold of neutral principles cases. *Schubert* does not involve negligent employment, clergy malpractice, or sexual abuse. Pleasant Glade's conduct was religiously motivated. The practice, laying hands, requires holding a person down to some degree.[185] Additionally, Laura herself stated that she thought she saw demons and such as she was being prayed over.[186] Her visions and strange behavior are what led to the church laying hands in the first place.

One could simply ask if Laura was falsely imprisoned[187] or assaulted[188] by the church members without considering the religious context in which the torts occurred. The trial court took this approach.[189] However, this approach fails to take into account that someone who is under the influence of what they stated was a demonic power cannot be said to have not consented to being prayed over. One can imagine that if someone is demon-possessed, then the oppressive force is not in the business of wanting to be released from its host. This is not a case where the tortfeasor willfully detains someone to prevent their escape.[190] Rather, Laura is contesting a religious doctrine about praying over people who are in distress and want to stay

[185] *Id.* at 10. The church explained that, "[W]e believe in the physical conduct of laying hands on persons in order to pray for them."
[186] *Id.* at 3.
[187] *See Walmart Stores, Inc*., 92 S.W.3d at 506.
[188] *See* TEX. PENAL CODE ANN. §22.01 (Vernon 2007).
[189] Schubert, 264 S.W.3d at 18.
[190] *See, e.g.*, Big B, Inc. v. Cottingham, 634 So. 2d 999 (Ala. 1993) (finding the store manager liable for false imprisonment when he blocked the only means of escape and demanded sexual favors).

that way. It is not as if she was trying to exit the church and the congregants held her down to prevent her departure.

In Texas, false imprisonment is defined as willful detention, without consent, and without authority of law. Pleasant Glade had no authority to hold Laura, even if for her spiritual well-being. They did detain her for hours, and she claims it was without her consent. The consent issue remains a thorny one under this analysis. Even if the religious content is removed, the jury is left to determine whether the church should have known she did not want this practice performed.

Assault is defined is intentionally or knowingly causes physical contact with another when he or she knows or should reasonably believe that the other will regard the contact as offensive or provocative.[191] Under *Schubert*'s facts, Pleasant Glade should have reasonably believed that Laura would regard the contact as offensive. Someone under self-titled demon-possession would certainly fit this description. What this approach would posit is that the church do nothing, and possibly allow her to hurt herself. More importantly, it asks the church to ignore a command of their faith when congregants are in distress. Neutral principles chill the church's practices. Under these facts, and the neutral approach, Pleasant Glade would be liable.

V. DEFINITIONAL BALANCING APPROACH WITH CONSENT DOCTRINE

A. Actual Malice Standard

Professor Daryl Wiesen proposed a definitional balancing approach reminiscent of defamation law in order to provide greater protections to religious entities. His approach focused entirely on IIED.[192] IIED is not relevant for the purposes of *Schubert* because it was thrown out and Wiesen's approach will work for the false imprisonment and assault claims that were at issue.[193]

Actual malice was established in *New York Times v. Sullivan*. In *Sullivan*, the Supreme Court defined malice as "[W]ith knowledge that it was false or with reckless disregard of

[191] TEX. PENAL CODE ANN. §22.01 (Vernon 2007).
[192] Wiesen, *supra* note 31, at 292.
[193] The defendant church in *Schubert* alluded to First Amendment malice defense before the appellate court whereby they argued that malice should be proven through clear and convincing evidence. Pleasant Glade Assembly of God v. Schubert, 174 S.W.3d 388, 392, 405-06 (Tex. App. 2005).

whether it was false or not."[194] Seeing that this definition begs the court to intervene in ecclesiastical matters, Wiesen balanced it with *Ballard*'s[195] prohibition against courts determining whether an individual truly believed a religious claim.[196]

The final outcome proposed a more stringent form on common law malice: "[T]he conduct must not have been motivated by hostility toward the plaintiff or by a desire to benefit the group or a member of it at the plaintiff's expense."[197] The proposed solution works best because it mirrors an established standard (malice in defamation law), [198] courts have alluded to it in religious cases,[199] and it balances the litigants' interests squarely.

Since First Amendment rights are so highly protected, Daryl Wiesen suggested that the standard of proof should be clear and convincing evidence.[200] The burden rests solely on the plaintiff, as in defamation law, to prove all the elements of the cause of action.[201] As for remedies, the major concern for religious entities is the chilling of their free exercise. Wiesen suggested limiting punitive damages.[202]

On the other hand, if a plaintiff can prove that they were falsely imprisoned and/or assaulted using the malice standard proposed, compensatory damages may not be enough. No one seeks to punish religious entities for having unpopular beliefs and practices. However, if the plaintiff can prove all the elements, then punitive damages may be necessary to send the message that religious conduct cannot be used to physically punish or harm others. The element of damages would most likely emerge as a problem for non-traditional religions that use some form of deception to increase their numbers.[203] In the interests of free exercise, damages should be

[194] New York Times v. Sullivan, 376 U.S. 254, 280 (1964).
[195] United States v. Ballard, 322 U.S. 78, 86 (1944).
[196] Wiesen, *supra* note 31, at 318.
[197] *Id.*
[198] *Sullivan*, 376 U.S. at 280.
[199] *See Guinn*, 775 P.2d at 791-92 (Wilson, J., dissenting in part and concurring in part). "In First Amendment religious freedom cases punitive damages may not be imposed upon defendants unless evidence of actual or implied malice is tendered to support the claim." *Id.*
[200] Wiesen, *supra* note 31, at 319. Wiesen described it as placing "a thumb on the scale in favor of the free exercise of religion." *Id.*
[201] *Id.* at 320.
[202] *Id.* at 321.
[203] *See* George v. Int'l Soc'y for Krishna Consciousness, 4 Cal. Rptr. 2d 473 (Cal. App. 1992). In *George*, a young girl claimed false imprisonment against the Hare Krishna religion because they brainwashed her into staying. *Id.* at 478. She initially received a large punitive damages award. *Id.*

limited to compensatory only so as not to subject unpopular and misunderstood religious practices to biased scrutiny.

B. Mixing Definitional Balancing with Consent Doctrine

The standard may initially seem very strict on plaintiffs, but it is workable.[204] The standard proposed here would use a modified version of the malice standard proposed by Wiesen, and combine it with the implied consent of being a member from Cupp's analysis. The plaintiff would have to prove each element of their claim(s) and common law malice by clear and convincing evidence. First, Laura would have to prove malice against Pleasant Glade. Second, she would have to prove the elements of false imprisonment and assault. The presumption of consent would be applied (due to her membership), so she would have to rebut it under both torts (with some consent-negating factor). Damages would be limited to only compensatory so Pleasant Glade's practice is not chilled.

C. Applying the New Approach to Schubert

Firstly, this case should survive summary judgment. The analysis would begin by asking Laura to prove all the elements of the malice standard. The standard, to reiterate, states that the conduct cannot have been motivated by hostility toward the plaintiff or by a desire to benefit the group or a member of it at the plaintiff's expense. There does not appear to be any in *Schubert*, especially not enough to rise to the level of clear and convincing. Laura would have to show that Pleasant Glade was motivated by hostility towards her, or a desire to benefit the group at her expense. Hostility may be hard to show, because the church provided soothing music and walked with her. However, Laura may be able to proffer some evidence that there was a desire to benefit the group at her expense. The second time she was held, she claimed the pastor directed the youths to restrain her.

Second, the torts of false imprisonment and assault would be analyzed. For false imprisonment, under the new standard, clear and convincing evidence, Laura would have to

[204] *Wiesen*, *supra* note 31, at 323. Daryl Wiesen applied his standard to *Wollersheim v. Church of Scientology*, 260 Cal. Rptr. 331 (Cal. Ct. App. 1989), *cert. denied*, 495 U.S. 910 (1990). In his example, the church defendant did exhibit evidence of malice because they attempted to financially damage the plaintiff when he wished to leave the church.

show she was willfully detained without her consent and without authority of law. There is enough evidence to raise a question to the jury that she was falsely imprisoned. The church will assert that the evidentiary record showed that she was able to get up and move around. Further, under the consent presumption, listening to the pastor edicts and engaging in this practice is at church discretion. The record disclosed that saying "Jesus" would have ceased the laying on of hands. If Laura wanted to be left alone, she could have said this early on or faked being calm.[205] Laura's claim would fail unless she could show that her minority or another consent negating factor trumps the presumption. Nevertheless, given her age, and the amount of people surrounding her, Laura could succeed on a false imprisonment claim.

As for assault, Laura would have to show that Pleasant Glade (1) intentionally, knowingly, or recklessly caused bodily injury to her; or (2) intentionally or knowingly threatened her with imminent bodily injury; or (3) intentionally or knowingly caused physical contact with her when they knew or should reasonably have believed that she would regard the contact as offensive or provocative.[206]

Texas has adopted the Model Penal Code (MPC).[207] The use of intentionally, knowingly, or recklessly is defined by the MPC. Intentionally means " . . . [W]ith respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result."[208] Knowingly means "[a] person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result."[209] Lastly, recklessly means the defendant

> . . . is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.[210]

[205] In *Johnson*, it came down to a matter of choice. An employee sued for false imprisonment because she was suspected of theft and asked to wait in an office for her manager to question her. *See* Randall's Food Mkts. v. Johnson, 891 S.W.2d 640, 643 (Tex. 1995). The court found that she was able to leave the room twice without problems and was given an option to stay in the room or work on a volunteer project. *Id.* at 645.
[206] TEX. PENAL CODE ANN. § 22.01
[207] Giesberg v. State, 984 S.W.2d 245, 246 (Tex. Crim. App. 1998).
[208] TEX. PENAL CODE ANN. § 6.03(a) (Vernon 2007).
[209] TEX. PENAL CODE ANN. § 6.03(b) (Vernon 2007).
[210] TEX. PENAL CODE ANN. § 6.03 (c) (Vernon 2007).

Bodily injury in Texas is "physical pain, illness, or any impairment of physical condition."[211]

Under the first definition for assault, the record does not support that Pleasant Glade intended to cause bodily injury to Laura, but it may show that they had knowledge that she would be hurt. She did sustain carpet burns (a type of physical pain), but it is uncertain if they were apparent at the time. A showing for recklessness would be similarly difficult to show through clear and convincing evidence. Laura said she was screaming, crying, and kicking to be let go. However, the evidence also showed that Laura recalled being cared for by the defendants. They gave her water, walked around with her, and held cold compresses to her head.[212] Recklessness implies knowing something could go wrong, but ignoring the risk. The church's actions don't appear to be a gross deviation, and this definition would not be viable.

Under the second definition of assault, imminency in Texas is described as a type of present harm, not future or conditional.[213] Laura admitted that she feared the group was going to break her legs, which is evidence of present harm.[214] However, it is safe to say that Pleasant Glade did not intend to cause this harm. As for knowledge, the injury she sustained were carpet burns. Did they know this would happen? It is arguable under the standard and Laura may be able to pursue this definition. If all it would have taken for them to desist was to hear Laura say "Jesus," then this can be offered in support of knowledge.

As for the third assault definition, Laura could not show through clear and convincing evidence that Pleasant Glade intentionally or knowingly caused physical contact with her when they knew or should reasonably have believed that she would regard the contact as offensive or provocative. Considering the spiritual context of this case, it would be difficult to argue that Laura, who claimed to be seeing demons, gave the impression that laying on of hands while praying would be regarded as offensive or provocative. Laura could argue that she wanted to be left alone to begin with, but again, this would divorce Pleasant Glade's understanding of her spiritual situation and why they acted. In their eyes, those who are possessed, or under spiritual attack, are not speaking for themselves.

[211] TEX. PENAL CODE ANN. § 1.07(a)(8) (Vernon 2007).
[212] *Schubert*, 264 S.W.3d at 8.
[213] Devine v. State, 786 S.W.2d 268, 270 (Tex. Crim. App. 1989).
[214] *See Schubert*, 264 S.W.3d at 15.

The practice at issue here was done with regularity, so there was no known risk at this point. The church had a right to think Laura understood what they were doing as a consequence of her consistent membership. The facts available do not rise to the level of clear and convincing that the church assaulted Laura under any of the variant definitions or forms (intentionally, knowingly, or recklessly). The church could proffer her implied consent as a defense, which would have to be successfully rebutted to succeed on this claim.

If Laura had proven all the elements of all of her claims by clear and convincing evidence, then her damages would only be compensatory. She would recover for any physical injuries and ascertainable emotional injuries. No punitive damages would be available, because Pleasant Glade's motivation was religious in nature. Compensatory damages protect their right to continue the practice of laying on of hands.

Unlike neutral principles, the definitional balancing and consent approach allows the factfinder to consider the context. Under the proposed standard, Laura's claims are put in proper perspective because the jury would understand the religious context of the injuries without having to consider the depth or sincerity of those beliefs. Instead, it becomes a matter of what a reasonable person would have understood to be going on. While the dissent urged courts to dissect the religious from the secular, without the religious context, the case makes no sense. Also, it unfairly penalizes Pleasant Glade despite the fact that they did not use a First Amendment defense to the physical claims.

There is still the problem of whether the practice of laying on of hands is subversive to public health and good order. If so, the jury has quite a task before them. The *Schubert* jury found that Laura did not consent, but they had no religious context. The court tried to simply make it about a girl, who had psychological problems to begin with, crying that she did not want to be touched. Naturally, the jury would come to their conclusion. However, under the new standard, consent and a heightened burden of proof is the deal breaker for this issue. As Texas law shows, dangerous, or quasi-dangerous, actions that are consented to cannot be litigated under a tort theory.

VI. CONCLUSION

It may seem that the best way for a church to protect themselves is to simply ask the member if they desire to be prayed over when they appear distressed. However, one cannot ask religious entities to stop and ask everyone if they can do something just to avoid being sued. The assumption of understanding should come through continual membership, as long as the congregant is put on notice. The facts of *Schubert* are difficult, but it would be best to decide the case based on definitional balancing and consent doctrine.

The proposed standard makes the presumption of consent the starting point so that complainants can offer evidence to refute it. The evidence used should incorporate the malice standard by asking if the group was to benefit at the complainant's expense or the conduct was not motivated by hostility toward the plaintiff. Additionally, the standard incorporates the religious atmosphere of these cases so religious defendants are not unfairly punished for unpopular or misunderstood beliefs.

The purpose of this article is not to state that all religious tort cases should be decided by using the approach advocated (although it may work in other contexts). Rather, the combined definitional balancing and consent doctrine approach appears most suitable and workable in physical tort contexts, because it appropriately balances the interests of both litigants: the plaintiff's need to be made whole and the defendant's desire to freely exercise religious beliefs. Lastly, this approach increases protections and balances a state's interest in the public's health with an individual's right to free exercise by putting the onus on aggrieved plaintiffs to show a lack of consent. *Schubert* was a case about First Amendment rights; rights that are highly protected by all three branches of government. As such, these rights are entitled to greater protections using the proposed standard.