RIGHTEOUS TORTS: *PLEASANT GLADE ASSEMBLY OF GOD V. SCHUBERT* AND THE FREE EXERCISE DEFENSE IN TEXAS

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I. INTRODUCTION

Conflict between the laws of man and the laws of God is inevitable in any society that protects religious liberty. Individuals faced with the unenviable choice between what the laws require and what their faith commands often turn to the courts, arguing that the Free Exercise Clause of the First Amendment protects their religious practices. Actors motivated by sincere belief have frequently sought to evade what the laws otherwise require, and, in resolving these claims, the courts must decide between virtues of order and safety and the cherished ideal of religious liberty.

The Texas Supreme Court confronted the conflict between tort law and free exercise of religion in *Pleasant Glade Assembly of God v. Schubert*.[1] The court held that tortfeasors can avoid liability for religiously motivated conduct if the victim only suffers emotional harm.[2] The court based its opinion on the Free Exercise Clause, claiming that the adjudication of the dispute would entangle the judiciary in theological controversies.[3] Thus, as long as a tortfeasor is motivated by sincere religious belief and only causes psychological or emotional injuries, he is free to engage in tortious conduct without any meaningful consequences.

The First Amendment does not require this harsh result. The U.S. Supreme Court has held that the Free Exercise Clause does not "relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes)

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[1] 264 S.W.3d 1, 2 (Tex. 2008).

[2] *See id.* at 9 (stating that "intangible, psychological injury, without more, cannot ordinarily serve as a basis for a tort claim against a church or its members for its religious practices"); *Id.* at 13 (Jefferson, C.J., dissenting).

[3] *Id.* at 9 (majority opinion).

conduct that his religion prescribes (or proscribes).'"[4] Because most tort laws regulate conduct objectively and impose the same standards on all individuals, the Free Exercise Clause generally should not act as a defense to tort liability. The Clause should only bar those claims which allow the jury to consider and assess the underlying religious belief while determining liability or awarding damages.

This Note will critically analyze the Texas Supreme Court's decision in *Schubert* and will suggest a method of applying tort laws to religious conduct consistent with the First Amendment. Part II begins with a review of the U.S. Supreme Court's evolving free exercise jurisprudence. Part III discusses the use of the Free Exercise Clause as a defense to tort causes of action and how the Texas courts have applied the defense. Part IV analyzes *Schubert* and suggests a method of applying tort laws to religiously motivated conduct while protecting the tortfeasors' freedom of belief.

II. OVERVIEW AND HISTORY OF SUPREME COURT FREE EXERCISE JURISPRUDENCE

In its pertinent part, the First Amendment provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . ."[5] The proper relationship between church and state was a special concern of the Framers[6], as it has been for most political thinkers. For instance, John Locke "esteem[ed] it above all things necessary to distinguish exactly the business of civil government from that of religion and to settle the just bounds that lie between one and the other."[7] In determining those "just bounds," the U.S. Supreme Court's interpretation of the Free Exercise Clause has evolved over the last half-century. The Court formerly held that the Constitution forbade incidental burdens on the exercise of religion. Today, however, it is unwilling to require exceptions to neutral laws of general applicability.

[4] Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990) (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)).

[5] U.S. CONST. amend. I.

[6] *See* Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 26 (1947) (Jackson, J., dissenting) (stating that religious freedom "was first in the Bill of Rights because it was first in the forefather's minds").

[7] John Locke, *A Letter Concerning Toleration*, *in* 35 GREAT BOOKS OF THE WESTERN WORLD 2 (Hutchins ed., 1952).

A. Historical Understanding

As historically interpreted, the Free Exercise Clause did not excuse compliance with conduct regulations because, although the right to believe was absolutely protected, the right to engage in religious conduct was not (belief-action dichotomy). The Court first adopted the belief-action dichotomy in *Reynolds v. United States*.[8] Reynolds, a member of the Church of Jesus Christ of Latter-Day Saints, sought to avoid criminal punishment for bigamy because his faith required him to have multiple wives.[9] The Court rejected the free exercise defense, stating that the state "was left free to reach actions which were in violation of social duties or subversive of good order."[10] The First Amendment only prohibited the state from interfering with religious beliefs and opinions.[11] Individuals were not entitled to an exception to generally applicable laws merely because they acted pursuant to religious convictions.

The belief-action dichotomy guided the Court's free exercise decisions for the first half of the twentieth century,[12] including the seminal case of *Cantwell v. Connecticut*.[13] Cantwell, a Jehovah's Witness, was proselytizing in a heavily Catholic neighborhood, passing out literature, and playing phonographic records critical of the Catholic Church.[14] After his statements provoked the residents' anger, he was arrested for violating a registration statute and for breach of the peace.[15] Applying the Free Exercise Clause to the states, the Court confirmed that "the Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be."[16] The state could regulate conduct so long as it did not unduly infringe upon religious

[8] 98 U.S. 145 (1878).

[9] *Id.* at 161–62.

[10] *Id.* at 164.

[11] *Id.*

[12] *See, e.g.*, Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 595 (1940), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245, 262 (1934); Davis v. Beason, 133 U.S. 333, 348 n.1 (1890), *abrogated by* Romer v. Evans, 517 U.S. 620 (1996); Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 50 (1890).

[13] 310 U.S. 296 (1940).

[14] *Id.* at 301.

[15] *Id.* at 302–03.

[16] *Id.* at 303–04.

liberty, such as impeding the right to preach or promulgate belief.[17] Consequently, the Court overturned Cantwell's conviction for breach of the peace.[18] Cantwell's communications, although offensive, were an appropriate means of persuasion and did not incite physical violence.[19] Therefore, the Court historically interpreted the Free Exercise Clause as protecting the right to communicate belief but not requiring exceptions to laws that preserved the public safety, peace, or order.[20]

B. Sherbert *Balancing Test*

The Warren and Burger Courts, however, interpreted the Free Exercise Clause broadly, requiring additional protection of religiously motivated conduct. The Court's analysis in *Sherbert v. Verner*,[21] which set out a three-part ad hoc balancing test,[22] governed free exercise claims during this period. The *Sherbert* test first requires the court to consider whether sincere religious belief motivated the conduct.[23] The Free Exercise Clause does not protect acts inspired by secular considerations, regardless of how laudable and virtuous they may be.[24] Second, the court must consider whether the conduct regulation unduly burdens the free exercise of religion.[25] Under the *Sherbert* analysis, the Free Exercise Clause protects against direct and indirect interference with religious practices.[26] A neutral law of general applicability imposes an indirect burden on religion if it has a coercive effect, "putting substantial pressure on an adherent to modify his behavior and to violate his beliefs . . . ."[27] Third, if the law does burden free exercise, the court must determine if the law is justified by a compelling state interest that could not be achieved by granting an exception for the religiously motivated conduct.[28] "Only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise

[17] *Id.* at 304.

[18] *Id.*

[19] *Id.* at 310–11.

[20] *See* Sherbert v. Verner, 374 U.S. 398, 403 (1962).

[21] *See generally id.*

[22] *Id.* at 403.

[23] Wisconsin v. Yoder, 406 U.S. 205, 215–16 (1972).

[24] *Id.*

[25] *Sherbert*, 374 U.S. at 403.

[26] *Id.* at 403–04.

[27] Thomas v. Review Bd., 450 U.S. 707, 718 (1981).

[28] *Sherbert*, 374 U.S. at 406.

of religion."[29] The *Sherbert* balancing test, which used a strict scrutiny standard, provided heightened protection for religiously motivated conduct.[30]

In application, the *Sherbert* balancing test frequently allowed religiously motivated actors to evade the requirements of generally applicable laws. For example, Sherbert, a Seventh-Day Adventist, was fired by her employer for refusing to work on Saturday, her Sabbath.[31] She was subsequently denied unemployment benefits because she refused to accept other available employment that would also require work on Saturday.[32] The Court held that the denial of benefits violated the Free Exercise Clause because it placed substantial pressure on Sherbert to forego her religious practice of resting on the Sabbath.[33] But, had Sherbert engaged in identical behavior (declining work) for secular reasons (such as inability to find childcare), she would not be able to receive any assistance.[34] Similarly, in *Wisconsin v. Yoder*, Amish parents refused to send their children to public school after the children had completed the eighth grade.[35] The parents were convicted of violating Wisconsin's compulsory education laws and charged a nominal fine.[36] The Court overturned the convictions on free exercise grounds.[37] However, the parents would have been convicted if they had refused to send their children to school because of secular considerations, such as disagreements with the curriculum or general hostility to formal education. Thus, under the *Sherbert* test, the state was often required to treat religiously motivated actors more favorably than other actors, even if the underlying conduct was identical.

C. Employment Division v. Smith

In *Employment Division v. Smith*,[38] the U.S. Supreme Court significantly changed the free exercise jurisprudence, refusing to apply

[29] *Yoder*, 406 U.S. at 215.

[30] *Sherbert*, 374 U.S. at 405–10.

[31] *Id.* at 399.

[32] *Id.* at 404.

[33] *Id.* at 404.

[34] *See id*. at 422 (Harlan, J., dissenting).

[35] 406 U.S. 205, 207 (1972).

[36] *Id.* at 208.

[37] *Id.* at 219.

[38] Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

Sherbert and returning to the belief-action dichotomy. *Smith* involved two members of the Native American Church who were fired from their jobs after ingesting peyote at a church ceremony.[39] When they were denied unemployment benefits due to the work-related misconduct, they sued and argued that the denial violated the First Amendment.[40] A divided Court upheld the denial, holding that the religious convictions did not justify evasion of generally applicable criminal law.[41] The Court refused to apply the *Sherbert* balancing test, claiming that requiring the government to show a compelling interest whenever it regulated religiously motivated conduct "contradicts both constitutional tradition and common sense."[42]

The framework established in *Smith* is substantially similar to the belief-action dichotomy used in the Court's earliest free exercise decisions. In *Smith*, the Court confirmed that the First Amendment forbids the state from interfering with the freedom of belief.[43] The state cannot force individuals to affirm their faith in any belief nor can it judge the veracity of religious beliefs and punish those it deems to be false.[44] The Constitution also prohibits the state from imposing unique burdens based on religions or using its authority to decide doctrinal disputes.[45] However, religious beliefs do not excuse the individual from complying with neutral laws of general applicability regulating conduct.[46] A law is neutral and generally applicable so long as the law does not: (1) discriminate against some or all religious beliefs; (2) regulate practices because they are committed for religious reasons; or (3) selectively impose burdens only on religiously motivated conduct.[47] If these requirements are satisfied, even laws that indirectly burden religion by coercing the adherent to modify his practices do not violate the Free Exercise Clause.[48]

While not overruling its prior decisions, the Court dramatically limited

[39] *Id.* at 874.

[40] *Id.*

[41] *Id.* at 882.

[42] *Id.* at 885.

[43] *Id.*

[44] *Id.* at 877.

[45] *Id.*

[46] *Id.* at 878–79.

[47] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532, 542–43 (1993). Justice Scalia proposes a different characterization of the "neutral" and "generally applicable" requirements. *Id.* at 557 (Scalia, J., concurring).

[48] *Id.* at 531 (majority opinion).

their applicability. The Court distinguished *Sherbert* on the ground that the law at issue (unemployment compensation programs) involved individualized determinations and exemptions.[49] It declined to extend the balancing test to general prohibitions of socially harmful conduct.[50] Furthermore, the Court claimed that other cases which mandated exceptions for religiously motivated acts, such as *Cantwell* and *Yoder*, were actually "hybrid" claims.[51] These cases implicated the Free Exercise Clause and another constitutional right; the cumulative effect of these interests triggered heightened protection.[52] *Cantwell* implicated freedom of speech and press in addition to free exercise of religion; *Yoder* included the right of parents to control the education of their children.[53]

Despite the efforts of Congress, *Smith* remains the controlling interpretation of the Free Exercise Clause. Congress considered *Smith* insufficiently protective of religious liberty and enacted the Religious Freedom Restoration Act (RFRA)[54] in response. The stated purpose of the RFRA was to restore the *Sherbert* balancing test and the compelling state interest standard.[55] Additionally, the RFRA required the state to demonstrate that the burden on religion was the least restrictive means of furthering the compelling government interest.[56] However, the Court held that the RFRA was not a proper exercise of Congress's power to enforce the provisions of the Fourteenth Amendment and was unconstitutional.[57] Thus, *Smith* remains the controlling interpretation of the Free Exercise Clause.[58]

[49] *Smith*, 494 U.S. at 884.

[50] *Id.* at 885.

[51] *Id.* at 881.

[52] *Id.*; *see* Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise:* Smith, Lukumi, *and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 858 (2001).

[53] *Smith*, 494 U.S. at 881.

[54] Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (2000)), *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

[55] *Id.* § 2000bb(b)(1).

[56] *Id.* § 2000bb-1.

[57] City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

[58] *Id.*

III. RELIGIOUS TORTS AND *SCHUBERT*

A. Religious Torts Generally

The state may infringe upon the free exercise of religion by imposing a criminal penalty or civil liability. Direct government action designed to suppress religious belief or practice is undoubtedly unconstitutional and consequently rare.[59] Moreover, the courts can infringe upon First Amendment rights by awarding damages in civil lawsuits.[60] As the Supreme Court has recognized, "State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute."[61]

In religious tort cases, defendants often argue that adjudication of the claims violates the Free Exercise Clause.[62] A religious tort claim is one in which sincere religious belief mandated or motivated the tortious conduct. The defendants in these cases claim the omnipresent specter of large damage awards would deter acts required by their faith.[63] They also emphasize the stigma of having their religious practices deemed unlawful.[64]

However, the courts have not provided clear guidance as to when, if ever, the Free Exercise Clause prohibits religious tort claims. Because the majority of cases were decided before *Smith*, the courts have generally applied the *Sherbert* balancing test.[65] This ad hoc approach, requiring an assessment of religious burdens and compelling state interests, has lead to inconsistent rulings in similar cases.[66] For instance, the Ninth Circuit held that the Free Exercise Clause prevented ex-members of a religious group from pursuing an intentional infliction of emotional distress claim arising

[59] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 523 (1993) (citing McDaniel v. Paty, 435 U.S. 618 (1978); Fowler v. Rhode Island, 345 U.S. 67 (1953)).

[60] N.Y. Times v. Sullivan, 376 U.S. 254, 279 (1964); *see also* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 463 (1958) ("It is not of moment that the State here has acted solely through its judicial branch, for whether legislative or judicial, it is still the application of state power which we are asked to scrutinize.").

[61] BMW of N. Am. v. Gore, 517 U.S. 559, 572 n.17 (1996).

[62] Alan Stephens, Annotation, *Free Exercise of Religion Clause of First Amendment as Defense to Tort Liability*, 93 A.L.R. FED. 754 (1989).

[63] *See* Paul v. Watchtower Bible & Tract Soc'y of N.Y., Inc., 819 F.2d 875, 881 (9th Cir. 1987).

[64] *See id.*

[65] *See* Daryl Wiesen, *Following the Lead of Defamation: A Definitional Balancing Approach to Religious Torts*, 105 YALE L.J. 291, 296–97 (1995).

[66] *Id.* at 298–300.

from the group's disciplinary measures.[67] The Oklahoma Supreme Court, however, allowed an ex-member to pursue a similar cause of action.[68] Furthermore, other courts have avoided addressing the free exercise issues by characterizing the tortious conduct as secular.[69] In these cases, the tortfeasor held a religious role or position, such as minister or counselor, but the courts described the conduct as driven by personal choices instead of religious dogma.[70]

B. Religious Torts and the Free Exercise Defense in Texas

The Texas Supreme Court has interpreted the Free Exercise Clause as providing a broad defense to tort actions based on religiously motivated conduct.[71] Although the court has stated that the Free Exercise Clause does not bar adjudication of all claims involving religion,[72] the court has been reluctant to permit civil liability that would pressure an adherent to alter or abandon his religious practices. As laudable as the Texas Supreme Court's motives may be, its rulings require what the First Amendment does not.

The court first addressed the issue of religious torts in *Tilton v. Marshall*.[73] Tilton, a televangelist, promised to personally pray over all of

[67] *Paul*, 819 F.2d at 876.

[68] Guinn v. Church of Christ, 775 P.2d 766, 781 (Okla. 1989).

[69] Sanders v. Casa View Baptist Church, 134 F.3d 331, 337 (5th Cir. 1998); Daush v. Ryske, 52 F.3d 1425, 1433 (7th Cir. 1994); Bear Valley Church of Christ v. DeBose, 928 P.2d 1315, 1323 (Colo. 1996).

[70] *Sanders*, 134 F.3d at 337; *Daush*, 52 F.3d at 1433; *Bear Valley Church of Christ*, 928 P.2d at 1323.

[71] The courts have been inconsistent as to the Free Exercise Clause's legal operation in religious tort cases, with some courts treating it as an affirmative defense and others treating it as a limit on the courts' subject matter jurisdiction. *See* Westbrook v. Penley, 231 S.W.3d 289, 394 n.3 (Tex. 2007). The Texas Supreme Court initially appeared to consider the Clause as an affirmative defense. *See* Tilton v. Marshall, 925 S.W.2d 672 (Tex. 1996) ("[W]hen a plaintiff's suit implicates a defendant's free exercise rights, the defendant may assert the First Amendment as an affirmative defense to the claims against him."). However, Texas courts now apparently treat the Clause as a subject matter jurisdiction bar. *See* Pleasant Grove Assembly of God v. Schubert, 264 S.W.3d 1, 13 (Tex. 2008) (holding that the plaintiff "failed to state a cognizable secular claim" and dismissing the case); *Westbrook*, 231 S.W.3d at 394 ("Lack of jurisdiction may be raised by a plea to jurisdiction when religious-liberty grounds form the basis for the jurisdictional challenge."); *In re* Godwin, 293 S.W.3d 742, 747 (Tex. App.—San Antonio 2009, pet. denied). For convenience, this Note refers to the Free Exercise Clause as a defense in religious tort cases.

[72] *Schubert*, 264 S.W.3d at 12.

[73] 925 S.W.2d 672 (Tex. 1996).

his viewers' prayer requests and tithes.[74] Tilton claimed that his prayers would induce God's blessings to flow to those who sent in requests and donations.[75] Disenchanted believers later sued Tilton for fraud and intentional infliction of emotional distress (IIED).[76] Applying the RFRA and the *Sherbert* balancing test,[77] the court held that the Free Exercise Clause barred the majority of the plaintiffs' claims.[78] The court stated that the Clause barred fraud claims if the allegedly fraudulent statement was a representation of religious doctrine or belief.[79] A fraud claim necessarily requires a false statement, and "the truth or falsity of a religious representation is beyond the scope of judicial inquiry."[80] Similarly, the court held that the Free Exercise Clause prohibited adjudication of the IIED claim. An element of IIED is outrageous conduct, and the court concluded that no conscientious fact finder could make a determination as to outrageous conduct without considering the truth or falsity of the underlying religious beliefs.[81] The outrageous nature of the expressions would be "aggravated by being false or mitigated by being true."[82]

The court next addressed the free exercise defense in *Westbrook v. Penley*.[83] Distressed by her marital problems, Penley participated in counseling sessions with her pastor, Westbrook.[84] During a session, she confessed to an extramarital sexual relationship, which Westbrook disclosed in a letter to the church congregation.[85] The letter also contained the church's disciplinary process and encouraged the church members to "break fellowship" with Penley to persuade her to repent.[86] Penley later sued for professional negligence.[87] The Texas Supreme Court unanimously

[74] *Id.* at 676.

[75] *Id.* at 676 n.3; *id*. at 688 (Hecht, J., concurring in part and dissenting in part).

[76] *Id.* at 676 (majority opinion).

[77] *Id.* at 676 n.5, 677–78.

[78] *Id.* at 679–80.

[79] *Id.* at 678.

[80] *Id.* at 678–79.

[81] *Id.* at 682.

[82] *Id.* at 681.

[83] 231 S.W.3d 389 (Tex. 2007).

[84] *Id.* at 392.

[85] *Id.* at 393.

[86] *Id.*

[87] *Id.* at 394.

held that the Free Exercise Clause barred adjudication of the claim.[88] The court reasoned that churches have broad autonomy in managing their internal affairs.[89] Penley's claim of professional negligence could not be isolated from the church's disciplinary process, and the court claimed that the imposition of damages would deprive the church of the right to administer its own laws.[90] The court held that it lacked jurisdiction to decide questions of church governance and dismissed the case.[91] Thus, the Free Exercise Clause prohibits the courts from hearing tort causes of action which would interfere with church autonomy.[92]

C. Pleasant Glade Assembly of God v. Schubert

The Texas Supreme Court extended the free exercise defense in *Pleasant Glade Assembly of God v. Schubert*.[93] The Pleasant Glade Assembly of God is a Pentecostal church; its members believe that the Bible is literally true and that spiritual forces, including demons, can affect temporal bodies.[94] Believing Laura Schubert, a seventeen-year-old church member, to be possessed, church members and clergy "laid hands" on her and prayed, forcibly holding her down for several hours despite her pleas to be released.[95] Schubert suffered minor physical injuries, such as carpet burns, a scrape on her back, and bruising on her shoulders and wrists.[96] However, her emotional injuries were much more severe.[97] Plagued by nightmares, Schubert had difficulty sleeping and began to hallucinate.[98]

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[88] *Id.* at 405.

[89] *Id.* at 397.

[90] *Id.* at 400.

[91] *Id.* at 405.

[92] Courts have distinguished between government actions which interfere with an individual's religiously motivated actions and those actions which interfere with a church's ability to manage its internal affairs, holding that *Smith* does not apply to the latter category. *See* Combs v. Cent. Tex. Annual Conference of the United Methodist Church, 173 F.3d 343, 349 (5th Cir. 1999); EEOC v. Catholic Univ. of Am., 83 F.3d 455, 463 (D.C. Cir. 1996); *cf.* Smith v. O'Connell, 986 F. Supp. 73, 80 (D.R.I. 1997) (holding that neutral and generally applicable laws could be applied to church's management of internal affairs.).

[93] 264 S.W.3d 1 (Tex. 2008).

[94] *Id.* at 3 n.1.

[95] *Id.* at 3–4. Schubert was restrained by church members on two occasions, on Sunday evening and on the following Wednesday.

[96] *Id.* at 4.

[97] *See id.* at 4–5.

[98] *Id.*

Sinking into depression, she became suicidal.[99] After she was diagnosed with post-traumatic stress disorder, Schubert sued the church and its members for false imprisonment and assault.[100] At trial, the jury found in favor of Schubert and awarded damages for pain and suffering, lost earning capacity, and medical expenses.[101]

The Texas Supreme Court reversed and dismissed for lack of jurisdiction, holding that adjudication of the tort claims violated the Free Exercise Clause.[102] The court based its opinion on three contentions. First, the court stated that the nature of the harm would make the defendants' religious beliefs an issue.[103] Although Schubert had suffered physical injuries, the trial focused on how the events affected her psychologically.[104] Because the religious beliefs were entangled with the tort claim, consideration of the emotional injuries would embroil the court in an assessment of religious beliefs.[105] The court analogized the claim to an IIED cause of action.[106] Second, the court argued that, even if the case could be tried without reference to religion, imposing civil liability would have an unconstitutional "chilling effect."[107] The court argued that forcing church members to pay damages for religious activity would coerce them to "abandon core principles of [their] religious belief."[108] Third, the court stated that the religious practices are entitled to greater protection when applied to an adherent. Members of a religious group impliedly consent to the group's practices that are usually safe and frequently occur.[109] "That a particular member may find the practice emotionally disturbing and non-consensual when applied to her does not transform the dispute into a secular

[99] *Id.* at 5.

[100] *Id*. Schubert also sued for negligence, gross negligence, professional negligence, IIED, battery, loss of consortium, and child abuse. In a mandamus proceeding, the court of appeals held that the Free Exercise Clause barred these claims. *Id*.; *In re* Pleasant Glade Assembly of God, 991 S.W.2d 85, 90 (Tex. App.—Fort Worth 1999, no pet.).

[101] *Schubert*, 264 S.W.3d at 5.

[102] *Id.* at 2.

[103] *Id.* at 9.

[104] *Id.* at 8–9.

[105] *Id.* at 11.

[106] *Id.* at 9.

[107] *Id.* at 10.

[108] *Id.*

[109] *Id.* at 12–13.

manner."[110] Therefore, *Schubert* allows a religiously motivated actor to avoid tort liability for emotional harms inflicted on a fellow congregant.[111]

IV. *SCHUBERT* AND *SMITH*

A. Analysis of Schubert

Schubert is fundamentally inconsistent with the U.S. Supreme Court's free exercise jurisprudence. Under *Smith*, religious exercise is permitted so long as it does not violate any neutral laws of general applicability governing conduct.[112] Tort laws regulate acts, not beliefs. They establish the rules of conduct and protect individuals from harm.[113] Imposition of liability typically does not require an examination of beliefs nor does liability impose any burden on the right to believe. Additionally, tort laws are neutral and generally applicable.[114] They do not discriminate against some or all religious beliefs nor do they selectively impose a greater burden on religiously motivated conduct.[115] They apply to all actors, religious and secular. If tort laws incidentally burden the exercise of religion, "it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs."[116] Therefore, the Free Exercise Clause does not generally require an exception to tort laws for religiously motivated conduct.

The rationale in *Schubert* for not applying generally applicable and neutral tort laws is unconvincing. First, the court begins in the wrong place, heavily relying on *Paul v. Watchtower Bible & Tract Society of New York*.[117] In *Paul*, the Ninth Circuit held that a former Jehovah's Witness could not bring an IIED claim against former congregants who had shunned

[110] *Id.* at 13.

[111] The U.S. Supreme Court denied Schubert's petition for a writ of certiorari. Schubert v. Pleasant Glade Assembly of God, 129 S. Ct. 1003 (2009).

[112] *See* City of Boerne v. Flores, 521 U.S. 507, 539 (1997) (Scalia, J., concurring).

[113] *See* Roberts v. Williamson, 111 S.W.3d 113, 118 (Tex. 2003).

[114] *See, e.g.*, Risenhoover v. England, 936 F. Supp. 392, 404 (W.D. Tex. 1996) (stating that "the Texas law of negligence is a law of general applicability," which did not impose any unique burdens on members of the press).

[115] *See* Church of the Likumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532, 542–43 (1993).

[116] *Boerne*, 521 U.S. at 535.

[117] *See* Pleasant Glade Assembly of God v. Schubert, 264 S.W.3d 1, 8 (Tex. 2008).

her.[118] The *Paul* court based its opinion on the *Sherbert* balancing test, which prohibited any indirect burdens on free exercise unless justified by a compelling state interest.[119] However, under *Smith*, religiously motivated conduct does not enjoy such heightened protection; incidental burdens on religious exercise are no longer constitutionally fatal.[120] The Texas Supreme Court failed to address the significant change in standards. In addition, *Paul* did not involve an intentional tort claim; it addressed an IIED claim,[121] which raises unique concerns in the free exercise context.[122]

Indeed, the court's failure to distinguish between IIED claims and intentional tort claims weakens its argument. According to the court, the similarities between Schubert's claim and a possible IIED claim were too close for comfort.[123] The court was concerned that adjudication of the claims would entangle the judiciary in a theological dispute regarding the propriety of casting demons out of a believer.[124] However, the court failed to recognize that, unlike an IIED claim, a false imprisonment cause of action does not provide a mechanism for assessing the defendant's religious beliefs. The key distinction between the two claims is the IIED element of outrageous conduct. As the court noted in *Tilton*, considering outrageousness is a subjective inquiry, which allows the jurors to consider the motivation behind the act.[125] This constitutional concern is not present in false imprisonment, because motivation is irrelevant to that claim.[126] The jurors do not have to assess the conduct and attach a subjective label. They only have to find that the requisite conduct occurred. Therefore, the courts

[118] Paul v. Watchtower Bible & Tract Soc'y of N.Y., Inc., 819 F.2d 875, 876 (9th Cir. 1987).

[119] *See id.* at 882.

[120] *Church of the Lukumi Babalu Aye*, 508 U.S. at 531.

[121] *See Paul*, 819 F.2d at 879.

[122] *See infra* text accompanying notes 154–64.

[123] Pleasant Glade Assembly of God v. Schubert, 264 S.W.3d 1, 9 (2008) (arguing that Schubert's case "was not significantly different from what she would have presented under her claim of intentional infliction of emotional distress").

[124] *Id.* at 13. The dispute of whether a believer could be possessed did form the basis of some of Schubert's original claims, which were dismissed following the mandamus proceeding. *In re* Pleasant Glade Assembly of God, 991 S.W.2d 85, 89–90 (Tex. App.—Fort Worth 1998, no pet.). Additionally, the trial court took careful steps to avoid the religious controversy. *See* Pleasant Glade Assembly of God v. Schubert, 174 S.W.3d 388, 406 n.78 (Tex. App.—Forth Worth 2005), *rev'd*, 264 S.W.3d 1 (Tex. 2008).

[125] Tilton v. Marshall, 925 S.W.2d 672, 681 (Tex. 1996).

[126] Whirl v. Kern, 407 F.2d 781, 794 (5th Cir. 1968) (applying Texas law) ("Good faith may clear the conscience but it does not redeem or purge the act.").

could adjudicate Schubert's claim without taking sides in a doctrinal dispute.

The court's argument that imposing civil liability would have an unconstitutional "chilling effect" is also unpersuasive. Deterring wrongful conduct is admittedly a fundamental purpose of tort law.[127] Tort liability may put pressure on adherents to modify or abandon their practices, creating the "chilling effect" that the court feared.[128] However, such pressure is not a constitutional infirmity.[129] The state's ability to regulate conduct does not depend "on measuring the effects of a governmental action on a religious objector's spiritual development."[130] For instance, the criminalization of peyote certainly put pressure on members of the Native American Church to forego ingesting the hallucinogen, "the essential ritual of their religion."[131] Nevertheless, the Court found no constitutional violation in *Smith*.[132] Similarly, the criminalization of bigamy and the revocation of the Church of Jesus Christ of Latter Day Saints' charter and the seizure of its land for supporting bigamy likely affected the church's decision to forbid plural marriages.[133] Nevertheless, the Court upheld these actions. Thus, holding the church liable in *Schubert* could have deterred its members from "laying hands" on unwilling parishioners, but the discouragement alone does not violate the Free Exercise Clause.

Finally, although the courts hesitate to resolve disputes between a religious group and a member,[134] the grounds for abstention are not present in *Schubert*. The First Amendment prohibits the courts from resolving theological disputes; the courts must defer to the group's decisions on

[127] *See* Roberts v. Williamson, 111 S.W.3d 113, 118 (Tex. 2003).

[128] *See id.*

[129] The Court implicitly rejected this argument in *Smith*. *See* Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 897 (1990) (O'Connor, J., concurring in judgment).

[130] *Id.* at 885 (majority opinion) (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988)).

[131] *Id.* at 919 (Blackmun, J., dissenting).

[132] *Id.* at 890 (majority opinion).

[133] *See generally* Reynolds v. United States, 98 U.S. 145 (1878); Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 6–8 (1890). *See also* RONALD B. FLOWERS, MELISSA ROGERS & STEVEN K. GREEN, RELIGIOUS FREEDOM AND THE SUPREME COURT 102 (2008).

[134] *See* Prince v. Massachusetts, 321 U.S. 158, 177 (1944) (Jackson, J., dissenting) ("Religious activities which concern only members of the faith are and ought to be free—as nearly absolutely free as anything can be.").

issues of discipline, faith, and ecclesiastical law.[135] Schubert, however, did not sue on the basis that "laying hands" on her was inconsistent with church beliefs.[136] Instead, she claimed that the actions, regardless of whether they complied with church doctrine, were a tortious invasion of her bodily integrity.[137] While Schubert's claim was an intra-organizational dispute, it was not beyond the scope of judicial inquiry.[138]

In addition, the other basis for abstention, the implied consent of the member, is not present in *Schubert*. A member of a religious group impliedly consents to the group's internal governance, religious practices, and resolution of religious matters.[139] However, a member retains the ability to withdraw his consent, and, after he has done so, the group may not apply its practices to that member.[140] "[T]he First Amendment will not shield a church from civil liability for imposing its will . . . upon an individual who has not consented . . . ."[141] Moreover, to prove false imprisonment, the plaintiff must show that the detention was without consent.[142] Consent is also a defense to an assault cause of action.[143] In *Schubert*, the jury found that Schubert did not consent to being held down while the church members "laid hands" upon her and prayed for her.[144] In the absence of implied consent, the court had no basis for deferring to the church.

Therefore, *Schubert* is inconsistent with the Free Exercise Clause. Religious motivation does not relieve an individual from obedience to a

[135] Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 709 (1976); Watson v. Jones, 80 U.S. (13 Wall.) 679, 728–29 (1872).

[136] *See supra* note 124.

[137] Pleasant Glade Assembly of God v. Schubert, 264 S.W.3d 1 (Tex. 2008).

[138] Guinn v. Church of Christ, 775 P.2d 766, 773 (Okla. 1989).

[139] *See* Gonzales v. Roman Catholic Archbishop of Manilla, 280 U.S. 1, 16–17 (1929) (explaining that decisions made by church authorities are final because "the parties in interest made them so by contract or otherwise").

[140] *Guinn*, 775 P.2d at 779.

[141] *Id.* at 781.

[142] Wal-Mart Stores v. Rodriguez, 92 S.W.3d 502, 506 (Tex. 2002); Sears, Roebuck & Co. v. Castillo, 693 S.W.2d 374, 375 (Tex. 1985).

[143] Perkins v. Nail, 37 S.W.2d 211, 212 (Tex. Civ. App.—Eastland 1931, writ ref'd) ("[A] person may not court or invite injury to his person and recover damages for injuries thus incurred.").

[144] Pleasant Glade Assembly of God v. Schubert, 264 S.W.3d 1, 23 n.1 (Tex. 2008) (Green, J., dissenting).

neutral law of general applicability.[145] Nevertheless, *Schubert* mandates an exception to tort law when the tortious conduct is grounded in religious faith and only injures the victim psychologically. *Schubert*'s holding–"a private right to ignore generally applicable laws–is a constitutional anomaly."[146]

B. Religious Torts, the Free Exercise Defense, and Smith

Generally, tort law should apply to conduct motivated by religious belief. Because the Free Exercise Clause does not require exceptions for religiously motivated conduct, the Clause is usually not a defense to civil liability. However, the application of neutral tort laws is only the beginning of the analysis. As the Texas Supreme Court has correctly observed, application of neutral principles can infringe on First Amendment rights.[147] The courts cannot hear claims or award damages which would infringe upon the defendant's inviolable freedom of belief.[148]

1. Tort Causes of Action

The Free Exercise Clause should act as a defense to tort causes of action which allow the fact-finder to assess the merits of the underlying religious belief. In addition to claims necessarily requiring an examination of belief, the First Amendment should also bar claims presenting an unacceptable risk of liability based on evaluation of belief and not an evenhanded application of the law.

For instance, a fraud or defamation claim would interfere with the freedom of belief. Both causes of action require the plaintiff to establish that the defendant's statement was false.[149] If the plaintiff sued for fraud or defamation based on an expression of religious belief, the courts would necessarily have to determine the veracity of the statement. However, the

[145] Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 878–79 (1990); Minersville Sch. Dist., Bd. of Educ. v. Gobitis, 310 U.S. 586, 594–95 (1940), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[146] *See Smith*, 494 U.S. at 886.

[147] Westbrook v. Penley, 231 S.W.3d 389, 400 (Tex. 2007).

[148] *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[149] WFAA-TV, Inc. v. McLemore, 978 S.W.2d 568, 571 (Tex. 1998); Wilson v. Jones, 45 S.W.2d 572, 574 (Tex. Comm'n App. 1932, holding approved); Brown v. Swett & Crawford of Tex., Inc., 178 S.W.3d 373, 383 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (stating that the plaintiff must establish that the defendant's "statements contained false, defamatory facts").

First Amendment forbids such inquiries. "Freedom of thought, which includes freedom of religious beliefs, is basic in the society of free men . . . . Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs."[150] Therefore, the Free Exercise Clause should act as a defense to a tort claim that would require the courts to determine the veracity of an expression of religious faith.[151]

Furthermore, intentional infliction of emotional distress (IIED) claims raise serious constitutional concerns. An IIED cause of action consists of four essential elements. A defendant is liable if: (1) the defendant acted intentionally or recklessly; (2) the defendant's conduct is extreme or outrageous; (3) the defendant's conduct caused the plaintiff's emotional distress; and (4) such emotional distress was severe.[152] However, practically, the tort is reduced to the single issue of outrageous conduct.[153] Outrageous conduct is evidence that the plaintiff suffered severe emotional distress; only a minority of states requires the plaintiff to present any other evidence of psychological harm.[154] The jurors can also infer the requisite mental state (i.e., intent) from the outrageous nature of the conduct.[155] Thus, the plaintiff can prove all the elements of an IIED claim by showing that the defendant acted outrageously.[156]

In addition to being the essential element in an IIED claim, outrageousness is also the most imprecise and subjective. Conduct is outrageous if it is "so extreme in degree as to go beyond all possible bounds of human decency, and to be regarded as atrocious and utterly intolerable in the civilized community."[157] In other words, a recitation of the facts would lead an average member of the community to exclaim, "Outrageous!"[158]

[150] United States v. Ballard, 322 U.S. 78, 86 (1944); Tilton v. Marshall, 925 S.W.2d 672, 679 (Tex. 1996).

[151] Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 877 (1990).

[152] Twyman v. Twyman, 855 S.W.2d 619, 621–22 (Tex. 1993) (adopting IIED as set out by the Restatement of Torts § 46).

[153] Paul T. Hayden, *Religiously Motivated "Outrageous" Conduct: Intentional Infliction of Emotional Distress as a Weapon Against "Other People's Faiths,"* 34 WM. & MARY L. REV. 579, 590–92 (1993); *see* Wiesen, *supra* note 65, at 294.

[154] Miller v. Willbanks, 8 S.W.3d 607, 613 (Tenn. 1999).

[155] *Twyman*, 855 S.W.2d at 623.

[156] *See* Wiesen, *supra* note 65, at 294.

[157] *Twyman*, 855 S.W.2d at 621 (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965)).

[158] RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

This standard, if it can be described as such, provides no guidance to the jury. It suggests that the juror should declare conduct outrageous if he is personally troubled, offended, or infuriated by the conduct. As the U.S. Supreme Court has noted in a similar context, outrageousness "has an inherent subjectiveness about it which would allow the jury to impose liability on the basis of the jurors' tastes and views . . . ."[159]

Because liability often turns upon the jury's subjective judgment, IIED claims in religious tort cases violate the Free Exercise Clause. In assessing outrageousness, the jury will inevitably consider the defendant's motivations.[160] What may seem sensible and appropriate to a juror who agrees with those motivations will seem extreme and shocking to a juror who does not. The jury's decision as to outrageous conduct infringes upon the freedom of belief, because tort liability will often turn on whether that belief (i.e., the defendant's motivation) is understandable and acceptable to the jury. Jurors will rarely characterize conduct motivated by mainstream religious beliefs as outrageous, but minority religions, whose beliefs are seen as strange or illegitimate, will have considerable difficulties defending their practices.[161] Indeed, many findings of outrageous conduct have been premised on the fact that the conduct was not common among religious groups.[162] Thus, because of the subjective nature of the inquiry, adjudication of IIED claims violates the Free Exercise Clause.

2. Damages

In addition to specific tort causes of action, an award of damages for intangible harms may implicate free exercise concerns. Plaintiffs can recover for mental anguish in an intentional tort claim. But, in religious torts, the spiritual context, produced by the defendant's religious beliefs and teachings, may be responsible for some of the emotional injuries. Because awarding damages for harms caused by religious nature of the tort would violate the freedom of belief, the courts must separate the religious harms from the secular.

Generally, a plaintiff may recover damages for mental or emotional pain and anguish caused by common law torts involving intentional or malicious

[159] Hustler Magazine v. Falwell, 485 U.S. 46, 55 (1988).

[160] Tilton v. Marshall, 925 S.W.2d 672, 681 (Tex. 1996).

[161] Hayden, *supra* note 153, at 604.

[162] *Id.* at 635.

conduct.[163] Because the defendant's culpability justifies liability for unintended consequences,[164] the plaintiff may recover mental anguish damages even in the absence of significant physical injury.[165] However, emotional harm is difficult to establish conclusively. The plaintiff can show emotional harm by introducing evidence of the "nature, duration, and severity of [his] mental anguish, thus establishing a substantial disruption in the plaintiff's daily routine."[166] But, because the damages are impossible to quantify, the courts defer to the conclusions of the fact-finder.[167]

However, in religious tort claims, the emotional harm to the plaintiff may not be a result of the tortious conduct but instead due to the religious nature of the experience. Torts do not occur in a vacuum. When torts are committed by a religious actor or in a religious atmosphere, the context may aggravate the injury. For instance, Schubert testified about her fear and anxiety during the events, stating that she was in pain, had difficulty breathing, and feared that her leg might be broken or she might die.[168] However, Schubert's father testified that his daughter had terrible nightmares and feared a demon was nearby.[169] At trial, another expert testified that Schubert's experience impeded her ability to trust religious leaders.[170] From this evidence, it is fair to conclude that Schubert's severe emotional injuries were caused, at least in part, not by the church members holding her down against her will, but instead by the belief that she was (or could be) affected by a malevolent spiritual force.

However, imposing civil liability on religious groups for emotional harms caused by the group's doctrines and teachings would infringe upon the group's freedom of belief. The Free Exercise Clause protects the freedom of worship and dissemination of religious opinions.[171] In

[163] City of Tyler v. Likes, 962 S.W.2d 489, 495 (Tex. 1997).

[164] *Id.* (citing RESTATEMENT (SECOND) OF TORTS §§ 435B, 502(2) (1965)).

[165] *See* Fisher v. Carrousel Motor Hotel, Inc., 424 S.W.2d 627, 630 (Tex. 1967) (awarding mental anguish damages for an assault which caused no physical injuries); Wal-Mart Stores v. Cockrell, 61 S.W.3d 774, 781 (Tex. App.—Corpus Christi 2001, no pet.) (upholding a $300,000 damages award for mental anguish caused by a false imprisonment).

[166] Parkway Co. v. Woodruff, 901 S.W.2d 434, 444 (Tex. 1995).

[167] Conley v. Driver, 175 S.W.3d 882, 885 (Tex. App—Texarkana 2005, pet. denied).

[168] Pleasant Glade Assembly of God v. Schubert, 264 S.W.3d 1, 8 (Tex. 2008); *Id*. at 24 (Johnson, J., dissenting).

[169] *Id.* at 4 (majority opinion).

[170] *Id.* at 5.

[171] *See* Cantwell v. Connecticut, 310 U.S. 296, 308 (1940) ("[S]tate may not unduly suppress

Minersville School District v. Gobitis, the Court embraced the belief-action dichotomy but clearly stated that the promulgation of religious beliefs was protected:

> Government may not interfere with organized or individual expression of belief or disbelief. Propagation of belief—or even of disbelief—in the supernatural is protected, whether in the church or chapel, mosque or synagogue, tabernacle, or meeting-house. Likewise the Constitution assures generous immunity to the individual from imposition of penalties for offending, in the course of his own religious activities, the religious views of others . . . .[172]

A damage award for adverse emotional reaction to religious beliefs and teaching would violate the Free Exercise Clause. The daunting prospect of liability would induce religious groups to dilute their doctrines to a bland and inoffensive version that could not possibly ever cause any psychological disturbance. Furthermore, groups would conduct its efforts to share its faith with less zeal if the courts could award offended prospects money judgments. Therefore, the courts may not award damages for mental anguish caused by the religious beliefs and teachings.

Because the plaintiff may recover damages for intangible injuries caused by the tortious conduct but not the injuries arising out of the religious context, division of religious and secular harms is necessary. In their dissenting opinions in *Schubert*, Chief Justice Jefferson and Justice Johnson each proposed a method of separating harms. Chief Justice Jefferson advocated using the Free Exercise Clause as an affirmative defense.[173] The court would instruct the jury to award damages as if the tort was committed in a secular setting.[174] If the trial did not reference religious issues, making the instruction confusing or prejudicial, the trial court could

free communication of views, religious or other . . . ."); Fowler v. Rhode Island, 345 U.S. 67, 70 (1953) (stating that the courts are not competent to regulate or control the sermons delivered at religious meetings). *See also* Hustler Magazine Co. v. Falwell, 485 U.S. 46, 55 (1988) (emphasizing the Court's "long standing refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience").

[172] Minnersville Sch. Dist., Bd. of Educ. v. Gobitis, 310 U.S. 586, 593 (1940), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[173] *Schubert*, 264 S.W.3d at 21 (Jefferson, C.J., dissenting).

[174] *Id.*

instruct the jury on proximate cause.[175] However, Justice Johnson argued that the trial court should determine the damages caused by the religious beliefs and teachings as a matter of law.[176]

Having the trial court determine causation of emotional harms is the better method. As Justice Johnson's dissent notes, requiring the jury to decide the issue is ultimately unworkable.[177] To answer questions of causation, the parties would have to apprise the jury of the defendant's religious beliefs.[178] The court would then grant the jury a wide degree of discretion to award damages that are difficult to quantify and inherently subjective.[179] The concern in submitting these issues to the jury is the same concern present in an IIED claim, namely, that the jurors' own subjective judgments about the defendant's religious beliefs will influence the damage award. Moreover, allowing the trial court to make this decision provides insulation. The jury would not hear any evidence of religious belief or faith, leaving them to consider whether the tortious conduct occurred.

Furthermore, although the court's inquiry involves religious belief, determination of which harms were caused by the religious nature of the tortious conduct does not violate the Free Exercise Clause. A court can resolve disputes involving religious issues without violating the First Amendment.[180] In these cases, the court would be resolving the ambiguities of causation—not resolving a theological dispute or evaluating the beliefs at issue. Furthermore, the trial court's role in deciding causation of emotional harms is not novel. "Distress is a personal injury familiar in the law . . . ."[181] Courts routinely allow parties to submit evidence which tends to show that events other than the defendant's conduct caused the plaintiff's emotional harm.[182] For instance, the defendants in *Schubert* argued unsuccessfully that Schubert's traumatic childhood experiences caused her

[175] *Id.*

[176] *Id.* at 25 (Johnson, J., dissenting).

[177] *Id.*

[178] *Id.*

[179] Conley v. Driver, 175 S.W.3d 882, 885 (Tex. App.—Texarkana 2005, pet. denied).

[180] *See* Jones v. Wolf, 443 U.S. 595, 603 (1979) (holding that the state may use neutral principles of law to resolve church property disputes provided that the courts do not involve themselves in religious controversies).

[181] Carey v. Piphus, 435 U.S. 247, 263 (1978).

[182] *See* Richter v. Plains Nat'l Bank, 479 S.W.2d 95, 98 (Tex. Civ. App.—Eastland 1972), *writ ref'd n.r.e.*, 487 S.W.2d 704 (Tex. 1972).

mental anguish.[183] Thus, the trial court does not violate the Free Exercise Clause by deciding whether the tortious conduct or the religious beliefs and practices caused the plaintiff's emotional harm.

Admittedly, some difficulties in determining causation are inevitable. The alternative rule, however, would allow the defendant to use his religious beliefs to evade tort laws, denying compensation to the victims. Such a rule clearly would be inconsistent with *Smith*.[184] The proposed solution, however, harmonizes with the U.S. Supreme Court's free exercise jurisprudence. Allowing the trial courts to determine causation is consistent with the law of torts, which only compensates for injuries caused by the tortious acts. The proposed method also adequately protects the defendant's freedom of belief by preventing the jury from abusing their discretion in awarding damages for mental anguish. Although the task may be difficult occasionally, having the court determine causation is a workable solution.

V. CONCLUSIONS

"The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church, and the inviolable citadel of the individual heart and mind."[185] Acknowledging the significance of belief and devotion in American life, the courts continue to struggle when defining the proper relationship between religion and the state.[186] The importance of faith, however, cannot justify acts which deprive other individuals of their own rights. The Texas Supreme Court's decision in *Schubert* does exactly that by preventing a tort victim from recovering for emotional distress caused by religiously motivated conduct. The Free Exercise Clause, as interpreted in *Smith*, does not require that the victim be left without a remedy. Instead, the neutral and generally applicable tort laws can and should govern even conduct rooted in faith.

[183] *See* Pleasant Glade Assembly of God v. Schubert, 174 S.W.3d 388, 400 (Tex. App.—Fort Worth 2005), *rev'd*, 264 S.W.3d 1 (Tex. 2008).

[184] Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990).

[185] Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 226 (1963).

[186] *See, e.g.*, Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1139–40 (2009) (Scalia, J., concurring); *Id.* at 1141 (Souter, J., concurring in judgment).