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Protecting individual religious and civil rights and the rights of religious self-autonomy have caused conflict since the beginning of our country's history. The first amendment has provided the Constitutional parameters for this conflict. The free exercise and establishment clauses have strong foundations in the social and political history of the United States. Both clauses have goals of religious independence from civil intervention.

The issue presented in this note is whether individual rights protected under the civil laws of the United States or the religious authority recognized by the religion clauses should prevail when they are in conflict. Guinn v. Collinsville Church of Christ explores new frontiers in this dispute while attempting to balance the rights in question. The Guinn court held that while a person consents to church membership, church disciplinary procedures are immune from civil adjudication. But once a church member withdraws from membership, the rights of the individual will prevail whether the acts were done before or after the withdrawal. The better rule would be to recognize the member’s right to withdraw membership and deny the church jurisdiction over future actions (postwithdrawal acts), but allow the church to continue its jurisdiction over acts performed while the person was a member (prewithdrawal acts).

This note will discuss the development of religious liberty and tort claims, especially invasion of privacy and intentional infliction of mental distress. This note will also discuss how Guinn further delineates the boundaries between tortious and nontortious behavior in relation to church discipline and activities. Finally, alternatives in the balancing equation will be considered.

Development of Autonomy for Religious Organizations

As one writer stated, “Both the text of the first amendment and the very nature of democratic pluralism in Western political theory provide strong arguments for the judicial recognition of a sphere of autonomy for religious organizations.” Various religious groups, seeking to avoid religious perse-

2. Id. at 1031.
4. Guinn, 775 P.2d at 774.
5. Id. at 779.
cution in Europe, spearheaded the formation of some colonies in America. Religious freedom was a central theme in many early Americans’ exodus from Europe to America.7 Yet, as the United States was formed, these colonial governments gradually separated the civil governing authority from religious authority.8 The first amendment of the Constitution of the United States was adopted to protect this separate religious authority.9 Although the history is unclear, the colonial governments separated civil and religious authority, but wanted to ensure religious authority was left to the people and their religious groups.10

The fourteenth amendment ensures that the first amendment prohibitions apply to any state action that abridges religious freedom.11 As stated by the Oklahoma Supreme Court in Guinn, “At its core the First Amendment shields and protects religious liberties of citizens from both state and federal governmental interference. . . .”12

**Supreme Court Rulings Regarding Religious Rights**

The United States Supreme Court has developed different rules for testing the constitutionality of various causes of action. If governmental intervention impairs religious freedom, the Court balances what must be a compelling governmental interest against the asserted first amendment rights.13 The compelling governmental interest prevails only when there is a clear and present danger of riot, disorder, interference with traffic upon the public streets or any other immediate threat to public safety, peace or order.14

One of the first Supreme Court cases to discuss the role of civil courts in matters relating to church authority, *Watson v. Jones*,15 decided who had the authority to decide matters of religious doctrine, discipline and church order. The Court held that civil courts have no jurisdiction over purely ecclesiastical matters.16 The Court stated that “whenever the questions of discipline or of faith, or ecclesiastical rule, custom or law have been decided by . . . church judicatories . . . the legal tribunals must accept such decisions as final, and as binding on them.”17

8. Id. at 770.
9. Id. The first amendment to the United States Constitution states:
   Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
U.S. CONST. amend. I.
10. CONSTITUTIONAL LAW at 1032.
14. Cantwell, 310 U.S. at 308. These factors are commonly referred to as activities that threaten “public safety, peace, or order.” Sherbert, 374 U.S. at 403.
15. 80 U.S. (13 Wall.) 679, 680 (1871).
16. Id.
17. Id. at 727.
The *Watson* Court gave three reasons for the separation of civil and ecclesiastical matters: (1) civil judges are not as well prepared to resolve questions concerning religious doctrine as ecclesiastical authorities; (2) members of religious organizations have voluntarily joined the general church body, thus giving implied consent to church governance; and (3) our government was designed to severely limit civil encroachment into the affairs of religious organizations.\(^{18}\)

In the past, the Supreme Court has allowed marginal civil court review in religious disputes involving "fraud, collusion, or arbitrariness."\(^{19}\) Although the arbitrariness exception has been held unconstitutional,\(^{20}\) the fraud and collusion exceptions have been used often when fraudulent actions were used against others in a religious group.\(^{21}\)

In *Everson v. Board of Education*,\(^{22}\) the Supreme Court created a presumption in favor of religion when a conflict with state action occurs. The Court stated that the wall between church and state "must be kept high and impregnable."\(^{23}\)

In *Lemon v. Kurtzman*,\(^{24}\) the Supreme Court established a method for preventing states from infringing on the establishment clause. Although the

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18. The *Guinn* court summarized this policy of legal abstention in ecclesiastical matters as follows:

If members of religious organizations could freely pursue their doctrinal grievances in civil courts, or legislatures could pass laws to inhibit or enhance religious activities, ecclesiastical liberty would be subjected to governmental interference and the "unmolested and unobstructed" development of opinion and belief which the First Amendment shield was designed to foster could be secularly undermined.

*Guinn*, 775 P.2d at 772.


20. In Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976), the Court called the arbitrariness exception inconsistent with constitutional mandate.

21. In Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976), however, the Court did not specify how the remaining two are to be applied. In *Milivojevich*, a bishop of the American-Canadian diocese of the Serbian Eastern Orthodox Church was removed from office during a reorganization of the Church. The organization also affected the control of church property. The Illinois Supreme Court held for the defrocked bishop, ruling that the removal was arbitrary. See Serbian E. Orthodox Diocese v. Milivojevich, 328 N.E.2d 268 (Ill. 1975). The Supreme Court reversed and remanded on grounds that the arbitrariness of the removal involved primarily religious issues of "discipline, faith, internal organization, or ecclesiastical rule, custom or law." 426 U.S. at 713. Even though the dispute involved church property, the Court held the case was essentially ecclesiastical in nature and not for civil adjudication. 426 U.S. at 720.

In Bouldin v. Alexander, 82 U.S. (15 Wall.) 131 (1872), the Court considered whether expulsion of certain church members was truly an act of the church or an act of a minority group of members who had no authority to excommunicate others. The Court held the action by the minority was without authority, thus inoperative. *Id.* at 140. The Court, however, acknowledged it had no authority to question ordinary acts of church discipline or membership. The Court further distinguished its ability to determine whether or not an ecclesiastical body claiming authority was making a false claim concerning that authority through fraud or collusion.

22. 330 U.S. 1, 18 (1946).

23. *Id.*

Lack of a statute renders the first two points of the Lemon test moot,25 the excessive government entanglement prong should still be considered. The entanglement analysis seems simply to be a balancing of religious and governmental interests.26 State laws, whether statutory or common law, including tort rules, constitute state action which is subject to the constraints of the first amendment.27

The Facts and Trial Court Decision in Quinn

The plaintiff, Marian Guinn, and her children moved to Collinsville, Oklahoma in 1974. She joined the Collinsville Church of Christ and attended services while the congregation extended financial, emotional and spiritual help to her.28 In 1980, defendants Ron Whitten, Ted Moody and Allen Cash (the "Elders") confronted Guinn with a rumor that she was having sexual relations with Pat Sharp. According to the Elders, they investigated this rumor to uphold church doctrine which requires that they confront and discuss problems with any member who is "having trouble."29 When Guinn was confronted with the church's prohibition against fornication, she confirmed the truth of the rumor.

The church's code of ethics follows the disciplinary procedure set forth in Matthew 18:13-17.30 The Elders carried out the Biblically-mandated dis-

25. The Lemon test consists of three prongs:
   (1) the statute must have a secular legislative purpose;
   (2) its principal or primary effect must be one that neither advances nor inhibits religion; and
   (3) the statute must not foster an excessive government entanglement with religion. Id. at 612-13.
26. Constitutional Law at 1031 (there is a natural conflict between the two interests that requires the court to choose between the competing values).
28. The Appellants Brief listed some of the financial and material aid Guinn and her family received after joining the church: (1) rides to night school to obtain her general education diploma ("GED"); (2) gifts of two used cars; (3) car insurance payments; (4) payment of her gas expenses; (5) payment of car repairs after an accident; (6) babysitting services by members so she could study; (7) a graduation party and gift after she obtained her GED; (8) another party and cash gift after her graduation from junior college; (9) clothing for her family; and (10) food from the church pantry. Appellant's Brief in Chief at 6, Guinn v. Collinsville Church of Christ, 775 P.2d 766 (Okla. 1989) [hereinafter Appellant's Brief].
29. The Church of Christ follows a literal interpretation of the Bible which serves as the church's sole source of moral, religious and ethical guidance. Guinn, 775 P.2d at 768.
30. Matthew 18:13-17 (King James) states:
   And if so be that he find it, verily I say unto you, he rejoiceth more of that sheep, than of the ninety and nine which went not astray.
   Even so it is not the will of your Father which is in heaven, that one of these little ones should perish.
   Moreover, if thy brother shall trespass against thee, go and tell him his fault between thee and him alone, if he shall hear thee, thou has gained thy brother.
   But if he will not hear thee, then take with thee one or two more, in that the mouth of two or three witnesses every word may be established.
   And if he shall neglect to hear them, tell it unto the church; but if he neglect to hear the church, let him be unto thee as a heathen man and a publican.
ciplinary procedure in three “meetings” with Guinn. First, they approached Guinn and her children in a laundromat and requested that she appear before the church and repent. Next, the Elders called her from the church and told her that if she did not come to the church, they would come to her house. Guinn came to the church and was told to stop seeing her lover. She agreed because the relationship was deteriorating.

The final meeting was in the driveway outside Guinn’s house. The Elders approached her and stated if she did not appear before the congregation and repent, the members would “withdraw fellowship” from her.31 A few days later, the Elders sent a letter confirming this procedure.

When Guinn realized that the Elders intended to inform the congregation of her sexual involvement with Sharp, she had her attorney advise the Elders not to expose Guinn’s private life to the congregation. Guinn also wrote the Elders, asking them not to mention her name in church except to tell the congregation that she had withdrawn from membership.

The Elders ignored both requests and read their letter to Guinn to the congregation. They advised the congregation to contact Guinn and to lovingly encourage her to repent and return to the Church. The Elders also told the congregation that should their attempts fail, the violated scriptures would be read aloud at the next service and withdrawal of fellowship proceedings would begin.

Guinn met with one of the Elders and again asked that the information be kept from the congregation. The Elder told her that withdrawing from membership in the Church of Christ was not only doctrinally impossible, but also would not stop the church’s disciplinary sanction against her.32

Subsequently, the pastor read the scriptures that Guinn had violated to the congregation. In accordance with the church’s disciplinary process, the church sent the same information to four other area Church of Christ congregations to be read aloud during services. The Collinsville Church of Christ sponsored the other four congregations.

Guinn brought an action against the church claiming intentional infliction of emotional distress (“outrage”) and invasion of privacy (“publication of private facts”).33 Guinn claimed the Elders unreasonably publicized her

31. Withdrawal of fellowship is a disciplinary procedure by the congregation. When a member has violated the church code of ethics and refuses to repent, the elders read the violated Biblical scriptures to the congregation. The congregation then withdraws fellowship by refusing to acknowledge the person. The church believes this serves two purposes. First, it causes the transgressor to feel lonely and thus desire repentance and fellowship with other members. Second, it ensures that the church and members continue to be free from sin and serve the Lord. Guinn, 775 P.2d at 768 n.2.

32. The Church of Christ believes that all its members are a family. One can be born into the family, but can never truly withdraw from it. The church believes one can voluntarily join the church’s flock, but cannot then disassociate oneself from it. Guinn, 775 P.2d at 769.

33. The Elders’ commission of the tort of outrage or intentional infliction of emotional distress was found to have caused her severe emotional distress and shock, especially because the Elders publicized the parishioner’s conduct in the presence of her minor children. The invasion of privacy claim involved two theories: (1) unjust intrusion upon her seclusion; and (2) publication of private facts with intent to damage her reputation and expose her to public
private life to the Church of Christ congregations. The disciplinary measures listed in her complaint included church actions before and after she had resigned her membership (prewithdrawal and postwithdrawal acts). The Elders moved for summary judgment, but the trial court submitted the case to the jury which awarded Guinn actual and punitive damages.

The Oklahoma Supreme Court Decision - Disciplinary Actions Against Guinn Before She Withdrew Membership Did Not Justify State Interference.

The Oklahoma Supreme Court reversed the trial court's denial of summary judgment for actions taken by the Elders while Guinn was still a member of the church. The court held that, generally, no civil cause of action can be brought against religious authorities for disciplinary actions while a person is a member of that religious group. The court noted that Guinn was aware of the withdrawal of fellowship procedure and knew what it entailed because she had witnessed a previous procedure.

The court held that civil adjudication of disciplinary procedures conducted while the person was a member of the church was a burden on the free exercise of religion. The court used the test established in Cantwell v. State of Connecticut and Sherbert v. Verner and found that the Church of Christ's doctrines posed no serious threat to public safety, health or welfare.

The court stated that under the first amendment, individuals may freely consent to be spiritually governed by rules determined and enforced by those chosen as religious leaders. The court followed the implied consent theory established in Watson that stated that once a member joins a church, the member consents to the authority of that religious body. Guinn's submission to church authority and the Elders' reliance on that submission "collectively shielded the church's prewithdrawal, religiously-motivated dis-

contempt. Guinn originally sought damages for defamation but dropped the cause of action due to a defense of truth. Guinn, 775 P.2d at 769 n.3.

34. Guinn also claimed the religious disciplinary measures were highly offensive, unreasonable and intrusive. Id. at 769.

35. The parties stipulated that the Elders were at all times acting as agents of the Church of Christ corporation. Judgment was levied against the Elders and the Collinsville Church of Christ. The jury awarded $205,000 in actual and $185,000 in punitive damages. The court then added $44,737 in prejudgment interest. Id.

36. Id. at 775.
37. Id. at 774.
38. Id. at 768 n.2.
39. Id. at 774.
40. 310 U.S. 296, 303 (1940).
42. Guinn, 775 P.2d at 774.
43. Id.
44. 80 U.S. (13 Wall.) 679, 727 (1871).
discipline from scrutiny through secular judicature." Because the trial court did not allocate the award of damages between prewithdrawal acts and postwithdrawal acts, the supreme court remanded the case for a determination consistent with its ruling.

Withdrawal of Church Membership Removes Church Jurisdiction

The Elders defended actions taken after Guinn left the church on the grounds that there is no doctrinal provision for withdrawal of membership. According to their beliefs, a member remains part of the Christian family for life. The Elders asserted that the court’s determination—that Guinn had effectively withdrawn her membership and consent to church doctrine—was a usurpation of their religious doctrine. The Elders argued that the court’s recognition of Guinn’s withdrawal was an example of the civil encroachment into theological doctrine that courts have specifically tried to avoid.

However, the first amendment protects individuals’ right to worship as they choose, not as a religious denomination determines. Inherent in the right to worship is the right not to worship. Failure to recognize a right to withdrawal would permanently tie individuals to one religious faith regardless of their beliefs.

In his dissent Justice Hodges, joined by Justice Simms, found that joining a church necessitates finding a prohibition of legal actions against the church following doctrinal beliefs, even after the member withdraws. The dissent stated: “This Court’s review of the Church’s doctrine of lifetime membership and moral discipline is precisely the kind of action the Constitution forbids.” Furthermore, the dissent noted that a member can withdraw membership anytime the member chooses, but “the Elders of the Church may after [the member’s] withdrawal continue to believe that [the member] is a member for life and invoke their disciplinary actions against [the member] in conformity with their tenets and doctrines.”

The majority decision, on the other hand, recognized an individual’s right of self-determination. If the court ignored a member’s right to withdraw, the courts would violate the free exercise clause by elevating a church’s

45. Guinn, 775 P.2d at 774.
46. Id. at 775. The court noted that there may be some religiously motivated, consensual acts which could constitute a threat to public safety, peace or order great enough to require civil court action. The record, however, showed no such factors, and Guinn could not possibly recover on retrial for prewithdrawal acts. Id.
47. Id. at 776.
48. See supra notes 4-22 and accompanying text.
49. Guinn, 775 P.2d at 794, 796 (Hodges, J., dissenting).
50. Id.
51. Justice Kauger disagreed with the majority opinion’s holding that the trial court should have granted the defendant’s motion for summary judgment for prewithdrawal acts. She held that, although a presumption exists that Guinn consented to all church doctrine, it should be rebuttable. Therefore, the court should not have directed a motion for summary judgment, but remanded for further proceedings. Id. at 787.
52. Id. at 796 (Hodges, J., dissenting).
authority over the individual's freedom of self-determination. This elevation of church authority would permanently establish a religion for that individual.

The Elders further asserted that because disciplinary proceedings against Guinn had already begun, her withdrawal could not hinder the church proceedings under the first amendment. However, the court ruled that just as freedom to worship is protected by the first amendment, so also is the liberty to “recede from one's religious allegiance.”

Both the majority decision and the dissent of Justice Wilson discussed the requirements for withdrawal of membership. The majority seemed to require a formal written withdrawal before a parishioner is relieved from the authority of a religious organization. The majority stated that Guinn's withdrawal was “effective not later than upon the Elders' receipt of her resignation letter.” Justice Wilson, however, argued that the withdrawal was effective once it was orally given and that no written resignation was required. But whether the withdrawal was effective when orally given to the Elders or upon receipt of the written resignation, the majority of the court nevertheless held that, upon withdrawal, Guinn had a cause of action against the Elders and the church.

Church Acts After Guinn Withdrew - Were They Outside the Purview of First Amendment Protection?

The court held that after Guinn unequivocally withdrew her membership, the “exposure of her private life, done without her consent, was unprotected by the first amendment.” The Elders and church argued that the trial court's actions violated not only the first amendment, but also Oklahoma's constitutional guaranty of religious liberty. The majority did not specifically address the state religious liberty issue.

The Guinn court, relying on statements in Madsen v. Erwin, held that first amendment protection does not extend to all religiously motivated practices. In Madsen, the Massachusetts Supreme Court stated that clergymen may not use the first amendment as a shield to defame a person, intentionally inflict serious emotional harm on a parishioner or commit other torts. However, in Madsen, the court did not allow damages.

54. Guinn, 775 P.2d at 777 n.43.
55. Id. at 791 (Wilson, J., dissenting).
56. Id. at 778.
57. Id.
58. OKLA. CONST. art. 1, § 2, cited in Appellant's Brief at 41.
59. Justice Kauger addressed the Oklahoma constitutional guaranty of religious liberty of article 1, section 2 and stated that she would have specifically affirmed the jury verdict on this provision. Guinn, 775 P.2d at 788 (Kauger, J., dissenting).
60. 481 N.E.2d 1160 (Mass. 1985).
61. Id. at 1167.
Madsen, a church member and employee, brought suit against the First Church of Christ, Scientist of Boston for wrongful discharge and various other torts allegedly committed when she was fired from her job at the Christian Science Monitor. She alleged that her employment was terminated because of her sexual preferences and her refusal to seek healing from the church. The Madsen court followed the theory of ecclesiastical abstention developed by the United States Supreme Court in Serbian Eastern Orthodox Dioceses, v. Milivojevich62 and held that the church's decision to terminate her employment was a religious decision which the court could not constitutionally adjudicate.63

The Elders contended that the information was revealed to the Collinsville congregation in the context of a sermon. The United States Supreme Court, in Fowler v. Rhode Island,64 specifically held that the contents of a sermon are not within the jurisdiction of civil courts because to approve or regulate a sermon would prefer one religion over another, and therefore, the Court should abstain from such matters.65 Furthermore, in Simpson v. Wells-Lamont Corp.,66 the Fifth Circuit held that statements made in church are not actionable in civil cases.67 Although not explicitly stated, the Guinn court did not find these two cases to be controlling.

The Guinn court distinguished a Ninth Circuit decision that was based on similar facts. In Paul v. Watchtower Bible & Tract Society of New York,68 a Jehovah's Witness became disillusioned with the church and was warned of the potential sanction of "disfellowship"69 for failing to accept church practices. The member submitted a written withdrawal of membership and moved to another state. Several years later when she visited her old neighborhood, her Jehovah's Witness friends would not speak to her because the church had instructed them to shun70 all "withdrawn" members.

Paul sued the church claiming that the church had defamed her, caused her severe emotional distress and invaded her privacy. Following the trial court's ruling for the defendants, the Ninth Circuit noted that while the shunning was intentional, it was not "malum in se."71 The court noted that

62. 426 U.S. 696 (1976), reh'g denied, 429 U.S. 873 (1976). The Madsen Court, recognizing civil jurisdiction in some limited instances, did allow the plaintiff to replead her remaining tort claims against the church.
63. Madsen, 481 N.E.2d at 1166.
64. 345 U.S. 67 (1953).
65. Id. at 70.
66. 494 F.2d 490 (5th Cir. 1974).
67. Id. at 492. The dismissed minister brought a civil action based in tort. The federal district court entered a motion for summary judgment for the defendants and was affirmed by the Fifth Circuit. The Fifth Circuit Court of Appeals stated that "the church is a sanctuary, if one exists anywhere, immune from the rule or subjection to the authority of the civil courts, either state or federal, by virtue of the First Amendment." 494 F.2d at 493.
68. 819 F.2d 875 (9th Cir. 1987), cert. denied, 108 S. Ct. 289 (1987).
69. "Disfellowshipped persons" are simply former members who have been excommunicated from the church.
70. Shunning is defined as: "To avoid deliberately and especially habitually." WEBSTER'S NEW COLLEGIATE DICTIONARY 1092 (1987).
71. 819 F.2d at 878.
shunning is not illegal per se in the state of Washington, but could impede three general state-protected interests. The court held that the defendant church possessed an affirmative defense of privilege that permitted the church to engage in shunning pursuant to its religious beliefs without suffering tort liability. Therefore, the court recognized the acts as tortious, but allowed a defense of privilege.

The *Paul* court held that the imposition of tort damages on the Jehovah’s Witnesses for engaging in the religious practice of shunning would constitute a direct burden on religion. The court, quoting *Langford v. United States*, stated that permitting prosecution of a tort, while not criminalizing the conduct, would make shunning an “unlawful act.” Therefore, imposing tort liability for shunning would “have the same effect as prohibiting the practice and would compel the church to abandon part of its religious teachings.”

The *Paul* court also cited *Sherbert v. Verner* which expressed disapproval of state action which imposed a fine against “appellant for her Saturday worship.” In *Sherbert*, what the Court termed a “fine” was only a denial of public benefits; in *Guinn*, the “fine” amounts to actual money damages. The doctrinal development after *Sherbert* distinguished regulations that directly burden religion and regulations that only indirectly burden religion. Although the shunning occurred after Paul had withdrawn her membership, the court made no distinction between the church’s prewithdrawal acts and postwithdrawal acts.

In *Paul*, the court held that shunning did not constitute a sufficient threat to the peace, safety, or morality of the community as to warrant state intervention. “Only in extreme and unusual cases has the imposition of a

72. The court noted that certain interests protected by the state might be invaded when shunning occurs. 819 F.2d at 878. See also *Bear v. Reformed Mennonite Church*, 341 A.2d 105, 107 (Pa. 1975) (court stating that shunning could interfere with state concerns such as the maintenance of marriage and family relationships, alienation of affection and result in the tortious interference with a business relationship).

73. *Paul*, 819 F.2d at 879.

74. This approach was used instead of negating the plaintiff’s cause of action itself, *i.e.*, ruling that the conduct in question was not tortious. *Id.*

75. The court ruled that the Washington and United States constitutions were identical and based its conclusion on both. *Id.* at 879-80.

76. 101 U.S. 341, 345 (1879).

77. *Paul*, 819 F.2d at 881.

78. *Id.*


80. *Paul*, 819 F.2d at 882.

81. *Id.*

82. The *Paul* court found that the direct/indirect distinction of determining religious burden was not determinative. The court, instead, looked at the effect of the regulation on the free exercise of religion. *Id.* at 882 n.6.

83. The *Guinn* court specifically noted its displeasure with the *Paul* court’s failure to distinguish the two categories of acts. 775 F.2d at 781. The *Paul* court stated churches are afforded great latitude “when they impose discipline on members or former members.” 819 F.2d at 883 (emphasis added).

84. *Id.*
direct burden on religion been upheld . . . Offense to someone’s sensibilities resulting from religious conduct is simply not actionable in tort.” 85 The dissenting opinion in Guinn followed the Paul holding that civil courts do not have jurisdiction over tort claims against religious organizations unless there is a substantial threat to public safety, peace or order.

Although the Guinn court stated that the Paul facts are “clearly distinguishable” from Guinn,86 distinguishing the two cases is difficult. The Guinn court characterized the Elders’ postresignation conduct in Paul as passive, while labeling church activities in Guinn more active and direct. However, an analysis of both churches’ activities reveals that the “shunning” and “disfellowshipping” procedures are similar.

Both are religiously-based disciplinary procedures instituted by the respective congregations.87 Once a member is found to have rejected church policy, the congregations begin a process of separating the church from the wayward member.88 Both procedures involve telling the congregations that the individual has chosen not to follow church doctrine, and that members should contact the wayward member to encourage acceptance of church doctrine. If the individual continues to reject church doctrine, members are told not to associate with the individual.

Furthermore, both procedures have dual purposes. First, the procedure pressures the member to repent and accept church doctrine because the separation creates a longing for the estranged friends. Second, the procedure serves as an example of the repercussions of not following church doctrine.

In Guinn, the court discussed several facts that could be considered distinguishing factors. However, none are very convincing. One distinction was that the congregation in Guinn informed the four other area Church of Christ congregations of Guinn’s activities.89 However, most churches consider other congregations merely other members of the same family of religious believers, so this distinction seems minute.90

Another claimed distinction was that the church in Paul passively excluded Paul and did nothing else.91 According to the Guinn court, the passive discipline was “vastly different” from the Guinn churches’ disciplinary procedures, which are designed to “control and involve.”92 Although some may consider shunning less threatening than the withdrawal of fellowship,

85. Id.
86. Guinn, 775 P.2d at 780.
87. Guinn, 775 P.2d at 793; Paul, 819 F.2d at 879.
88. Id.
89. The court left unanswered whether Guinn would have had a cause of action if the church had told the other congregations about her acts while she was still a member.
90. The congregational theory that all members are part of the same religious family might prevent a cause of action. Other facts important in the analysis would be that the other congregations had been sponsored by the Collinville Church of Christ. Also, Guinn and her children had received financial aid as well as spiritual aid, and it is not uncommon for people to seek financial aid from a church, eventually be kicked out, and then go to other neighboring congregations seeking financial handouts.
91. 775 P.2d at 780.
92. 775 P.2d at 781.
Paul felt her rights had been violated. Furthermore, the shunning that Paul received was just as emotionally traumatic as Guinn being labeled a fornicator. Some might consider shunning less offensive, but both torts made the victims feel wronged. In reality, there is little, if any, distinction between the two procedures.

**Religious Groups Should Continue to Have Jurisdiction Over Prewithdrawal Acts**

The distinction between prewithdrawal acts and postwithdrawal acts has merit. As discussed above, members negate their consent to church authority when they withdraw. Unfortunately, the Guinn decision interfered with religious jurisdiction in another way. An analogy to a criminal scenario is useful. If a person commits a crime in Oklahoma, that person, by moving his domicile to Texas, does not remove jurisdiction from Oklahoma. Oklahoma courts would continue to have jurisdiction. The Guinn decision gives individuals the ability to remove a religious matter from the jurisdiction of religious authorities when they could not do the same outside religious matters. The Guinn court was correct to hold that the church has jurisdiction over acts while the person is a member. However, the church should continue to have jurisdiction over acts committed before the member resigned, just as Oklahoma retains jurisdiction in the above hypothetical. As Oklahoma has a legitimate interest in adjudicating actions committed while the individual was in Oklahoma, the church continues to have an interest in actions committed by the individual while a member of the church, regardless of whether the individual remains a member.

As mentioned, there are three reasons for disciplinary procedures: (1) to encourage the member to repent by withholding the friendship of the congregation; (2) to help rid the church of the sin and serve as an example of church policy and discipline; and (3) to prevent the member from rejoining the membership before the member has repented. The third reason supports telling other congregations of the member's prewithdrawal actions. This prevents the member from merely switching congregations. The Guinn court imposed a burden on the church by preventing it from following church doctrine and achieving these goals.

Allowing the church continued jurisdiction over prewithdrawal actions even after members resign clearly leaves members free to choose and change their church affiliation. Once the member withdraws, the church, of course, would not have authority to discipline the member for acts done after withdrawal. However, the church should still have authority to adjudicate prewithdrawal acts. Because the church must be able to set an example for other members and also prevent the withdrawn member from coming back

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93. See supra notes 57-58 and accompanying text.
94. Guinn, 775 P.2d at 793; Paul, 819 F.2d at 879.
without repenting, clearly this solution is more effective in balancing the competing interests of the individual and the church.

The Guinn court discussed Redgate v. Roush\textsuperscript{95} in which a Church of Christ member, sometimes serving as pastor, sued the elders of a Wilmington, Kansas Church of Christ for defamation. The elders had withdrawn fellowship from him and circulated articles in the church paper warning of his unworthiness as a member and pastor because he had preached against church doctrine. The elders defended their decision to publish the article on the grounds that the information legitimately concerned their congregations.\textsuperscript{96} The Kansas Supreme Court held the Elders had a "qualified privilege" to communicate the reasons for the disciplinary proceedings because of the congregation's interest.\textsuperscript{97}

The Guinn court distinguished Redgate because Guinn was no longer a church member while the plaintiff in Redgate attempted to continue preaching as a member of the denomination. While Guinn's withdrawal is relevant, it should not be determinative because if the church could not discipline her for her prewithdrawal acts, nothing would stop her from rejoining in the future. Therefore, the Collinsville congregation was justified in notifying other nearby congregations.

It is important to note certain language in Redgate:

If . . . [Redgate] was unworthy or unfit to discharge the sacred functions of his high calling, the . . . [Elders], interested in the welfare of the denomination throughout the land, would appear to have been justified in warning other members and congregations of that organization to whom the plaintiff [Redgate] might offer his services as pastor.\textsuperscript{98}

One could attempt to distinguish the cases because Redgate involved a paid pastor. However, Guinn had obtained financial support and could do so again if her transgression were not publicized. Therefore, the similar financial dangers outweigh the distinction.

\textit{Were the Constitutional Rights of Free Speech and Freedom of Association Violated?}

Although not discussed in the Oklahoma Supreme Court's decision, the Elders and the Church argued that the trial court's decision violated their rights of free speech and association.\textsuperscript{99} In \textit{Widmar v. Vincent},\textsuperscript{100} the United States Supreme Court held that religious speech, including dissemination of

\begin{itemize}
\item \textsuperscript{95} 61 Kan. 480, 59 P. 1050 (1900).
\item \textsuperscript{96} Id. at 1051.
\item \textsuperscript{97} Id. at 1050.
\item \textsuperscript{98} Id. at 1051.
\item \textsuperscript{99} Appellant's Brief at 36; Reply Brief of Appellants at 22, Guinn v. Collinsville Church of Christ, 775 P.2d 766 (Okla. 1989).
\item \textsuperscript{100} 454 U.S. 263 (1981).
\end{itemize}
religious views and doctrine to nonbelievers, is constitutionally protected from governmental infringement.

In *Widmar*, the University of Missouri at Kansas City, a state-supported university, made its facilities generally available to registered student groups. The University, however, denied a registered student religious group's request to use the facilities. The denial was based on University regulations which prohibited the use of University facilities for religious worship or teaching.

Members of the group brought suit and alleged that the denial violated their rights of free exercise and speech. The Court ruled that the University regulations were not content-neutral and therefore invalid.\(^{101}\) Applying the *Lemon* test under the establishment clause, the Court found that the regulation inhibited religion.\(^{102}\)

The state must show a compelling governmental interest before limiting such speech.\(^{103}\) In *Widmar*, the Court held that the principle of separation of church and state was insufficient to justify governmental infringement of protected religious speech.\(^{104}\) Although not stating so specifically, the Oklahoma Supreme Court seemed to agree with this principle in regard to statements made before Guinn withdrew. However, the court's ruling that all speech after withdrawal can be tortious violates the *Widmar* holding. Furthermore, because the court allowed damages, especially punitive damages, the decision chills constitutionally protected speech.

The Supreme Court has recognized that the first and fourteenth amendments guarantee the freedom to associate for religious purposes.\(^{105}\) The Court also stated, in *Widmar*, that gathering to engage in religious worship is a form of association protected by the first amendment.\(^{106}\) The Elders and church argued that their conduct is protected because they would be unable to carry out disciplinary measures without the freedom to meet and associate.\(^{107}\) They argued the disciplinary meetings would be curtailed, if not halted, by churches being punished through actual and punitive damages.\(^{108}\) But after the *Guinn* decision, these disciplinary meetings would only be curtailed to the extent that they occur after a member has withdrawn membership. In summary, the *Guinn* decision seems to conflict with the *Widmar* holding that protects freedom of association and religious speech.

*Establishing the Tort of Invasion of Privacy - Publication of Private Facts*

Because the *Guinn* court found the postwithdrawal acts of the church outside first amendment protection, it allowed recovery for the tort of

\(^{101}\) Id. at 263.

\(^{102}\) Id.

\(^{103}\) Id.

\(^{104}\) Id. at 276.


\(^{107}\) Appellant's Brief at 39-40.

\(^{108}\) Id.
"outrage," also known as intentional infliction of emotional distress. The Guinn court also allowed recovery for the tort of "publication of private facts," an offspring of the tort of invasion of privacy.\textsuperscript{109} The elements of these torts are governed by Eddy \textit{v.} Brown\textsuperscript{110} and McCormack \textit{v.} Oklahoma Publishing Co.\textsuperscript{111} To prove publication of private facts, Guinn had to show that the Elders' statements (1) were highly offensive to a reasonable person, (2) contained private facts about parishioner's life, (3) were a public disclosure of private facts and (4) were not of legitimate concern to the Church of Christ congregation.\textsuperscript{112}

The Elders contended that Guinn failed to establish several elements. First, the Elders argued that there was no public disclosure because only members of the Church of Christ were told of Guinn's actions. Applying the definition of "publicity" as stated in Eddy,\textsuperscript{113} the Guinn court reasoned that "[t]his group of people constitutes, in many respects, Parishioner's public."\textsuperscript{114} However, the court's reasoning seems flawed because Guinn voluntarily joined this group and consented to its procedures which include disclosure to the members. The disclosure to the congregation should not be considered a "public" disclosure. Extensive discussion of this point is beyond the scope of this note.

The Elders also contended that Guinn did not establish that the statements were not of legitimate concern. The court cited Redgate and held that because Guinn had removed herself from the congregation and was no threat of adverse influence on the church, the information was of no legitimate concern to the congregation.\textsuperscript{115} However, the court's rationale ignores the second of the multiple purposes of church disciplinary procedures, that the church does have an interest in removing sin from the church and setting an example for other members.

\textit{Establishing the Tort of Intentional Infliction of Emotional Distress}

In Breeden \textit{v.} League Services Corp.,\textsuperscript{116} the Oklahoma Supreme Court adopted Section 46, Restatement (Second) of Torts ("Restatement (Sec-

\begin{itemize}
  \item \textsuperscript{109} Guinn, 775 P.2d at 782-83. \textit{See also Restatement (Second) of Torts} § 652B comment d (1977).
  \item \textsuperscript{110} 715 P.2d 74 (Okla. 1986).
  \item \textsuperscript{111} 613 P.2d 737 (Okla. 1980). This decision, as well as \textit{Eddy v. Brown}, governs invasion of privacy and intentional infliction of emotional distress claims.
  \item \textsuperscript{112} Guinn, 775 P.2d at 781.
  \item \textsuperscript{113} The court stated that:
    "Publicity" means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge . . . The difference is not one of the means of communication . . . [but] one of a communication that reaches, or is sure to reach the public.
  \item \textsuperscript{114} Guinn, 775 P.2d at 781.
  \item \textsuperscript{115} \textit{Id.} at 782.
  \item \textsuperscript{116} 575 P.2d 1374 (Okla. 1978).
\end{itemize}
ond)"

for the intentional infliction of emotional distress. The court stated: "Because of the fear of fictitious and or trivial claims . . . the law has been slow to afford independent protection to the interest of freedom from emotional distress standing alone." The Restatement requires extreme and outrageous conduct intentionally or recklessly causing severe emotional distress to another.

The Elders argued that there was no evidence to support a finding of extreme and outrageous conduct against Guinn. Considering Guinn admitted that the Elders were "kind" in every meeting, and the disciplinary procedure was doctrinally based, the court's decision to uphold the finding of intentional infliction of emotional distress was factually unsound. Although many people might not agree with the church's procedures, it is unlikely that many would say that the activities go beyond all decency in a civilized society. The Elders argued that the court's finding such factual information to be outrageous would be tantamount to eliminating a religious organization's ability to discipline its members or to enforce doctrinal standards.

There are several factors that seem to erode the court's finding that the church actions were sufficiently outrageous. First, worshippers have followed the practice of disfellowshipping or shunning since the time of Christ. Second, most Christian denominations have similar procedures. Third, both Guinn and Sharp admitted to the truth of the affair. Fourth, there are no other reasonable alternatives to telling the membership as a whole.

Of course, one could argue that there is no need for the church to mention her name or, at least, her actions. But failing to recognize the transgressions would defeat the church policy of disfellowshipping and encouraging of repentance. If church members are unaware of who is to be disfellowshipped, or what actions caused the disfellowshipping, the procedure will fail. The fifth factor that erodes the court's finding of outrageous Church actions is that Guinn had witnessed the withdrawal of fellowship procedure in the congregations before. Sixth, even before the church proceeding, the affair was common knowledge throughout the town. In summary, the existence of the numerous rational purposes for the church discipline should prevent the establishment of "outrageous conduct" as required for the tort of intentional infliction of mental distress.

117. Id. at 1376.
118. Restatement (Second) of Torts § 46 (1965). Comment d to Section 46 requires the conduct to be so extreme that it goes beyond all possible bounds of decency to be regarded atrocious and intolerable in a civilized community.
119. Appellant's Brief at 49.
122. The court did not specifically state how serious it considered the actions of informing the other congregations compared to informing the Collinsville congregation. The interesting question of how the jury, trial court and appellate courts would have treated the case if the other congregations had not been involved was left unanswered.
Qualified Privileges

The Elders argued that even if Guinn established the torts, there existed a qualified or conditional privilege that precluded liability. A qualified, privileged communication is one which is made in good faith upon a topic in which the party has an interest or a topic in which the party has a duty to a person with a corresponding duty or interest. The Restatement (Second) section 652G, specifically recognizes a qualified privilege to invasion of privacy. Section 596 of the Restatement (Second), and specifically comment e of 596, addresses the case at bar.

The Elders argued that all members of the church had a common interest in Guinn's activities. However, the court held that there was no conditional privilege because the congregation had no concern for the sins of a person who is no longer a member. However, this reasoning totally ignores the church's equally compelling need for a disciplinary process.

Are Punitive Damages Appropriate in Tort Actions Against Religious Organizations?

Even assuming that actual or consequential damages are appropriate for religious tortfeasors, punitive damages should not have been permitted. The Elders made a convincing argument that there was no evidence in the record to support a finding that the Elders were motivated by malice or an evil intent as required by Oklahoma statute. In Paul v. Watchtower Bible & Tract Society of New York, the Ninth Circuit specifically found that shunning was intentional, but not malem in se, and therefore denied punitive damages.

123. Guinn, 775 P.2d at 784.
124. Tuohy v. Halsey, 35 Okla. 61, 128 P. 126 (1912).
125. Restatement (Second) of Torts § 596 (1965), entitled "Common Interest," provides that:

An occasion makes a publication conditionally privileged if the circumstances lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that there is information that another sharing the common interest is entitled to know.

Comment e to section 596, entitled "Members of religious, fraternal and charitable associations," provides, in pertinent part, that:

The common interest of members of religious associations, whether incorporated or unincorporated . . . is recognized as sufficient to support a privilege for communications among themselves concerning the qualifications of the officers and members and their participation in the activities of the society. This is true whether the defamatory matter relates to alleged misconduct of some other member that makes him undesirable for continued membership, or the conduct of a prospective member. So too, the rule is applicable to communications between members and officers of the organization concerning the legitimate conduct of the activities for which it is organized.

Restatement (Second) of Torts § 596 comment e (1965) (emphasis added).
126. Guinn, 775 P.2d at 782.
128. See supra notes 68-86 and accompanying text.
In *Guinn*, the trial record clearly showed a doctrinally-based rationale for the Elders’ actions. Furthermore, Guinn admitted that the Elders acted with “kindness” during their meetings. The letter from the church to Guinn was also void of any malice toward Guinn and her family. As Justice Wilson stated in her dissent, all the evidence seemed to show that the Elders were acting in what they considered a scriptural disciplinary proceeding. “In first amendment religious freedom cases punitive damages may not be imposed upon defendants unless evidence of actual or implied malice is tendered.”

In *Wisconsin v. Yoder*, the United States Supreme Court stated that any redress, if permitted, must be the least burdensome possible. Punitive damages are extremely burdensome. Even if consequential damages are granted, the award of punitive damages violates this standard.

The award of punitive damages punishes believers for the exercise of religion and is obviously a deterrent to others. This deterrent is a major civil encroachment into religious affairs. Awarding punitive damages is a direct burden on religion and is contrary to the religion clauses which requires the government to maintain strict neutrality, neither aiding nor opposing religion. The Elders also argued that the punitive damage award constituted a prior restraint and had a chilling effect on free speech and religious practices which *Cantwell v. Connecticut* prohibited.

However, the *Guinn* court implicitly found these arguments unpersuasive and awarded the punitive damages determined by the jury.

**Conclusion**

The *Guinn* decision addresses a difficult situation of protecting individual rights while attempting to protect first amendment interests. The majority decision makes it clear that while persons are members of a religious organization, they are subject to that organization’s authority. However, once members withdraw, the religious body loses all jurisdiction, and the civil courts are free to adjudicate tort claims. This decision totally ignores both established precedent and the interests of the church.

A better approach would be to allow civil court jurisdiction over all postwithdrawal acts, but allow the religious organization to continue to adjudicate prewithdrawal acts even after the member has withdrawn. Because the person chose to join the religious body, these prewithdrawal acts were under the consensual authority of the religious body. The group has a legitimate right to practice doctrinally mandated disciplinary procedures that also serve the legitimate church objectives. This approach better balances

130. Appellant’s Brief at 63.
131. *Guinn*, 775 P.2d at 791 (Wilson, J., dissenting). Justice Wilson stated that the standard by which mens rea element must be measured is whether the conduct of the defendant exceeded the scope of the doctrinal tenets of the church. *Id.*
132. *Id.* at 791-92.
134. 310 U.S. 296 (1940).
the competing interests for two reasons. First, the individual continues to possess the right to choose a particular religion and the right to withdraw. Once membership is withdrawn, the religious body has no jurisdiction over future acts. Second, this approach leaves the religious organization free to practice its doctrine and fulfill religious discipline and beliefs. Adoption of this approach would protect the policies behind the first amendment and the rights of the individual.

Under the tort of publication of private facts, there was no public disclosure because the church members should not have been considered third persons constituting the "public," and the congregations had legitimate concerns. Under the tort of intentional infliction of emotional distress, the Elders' actions were not "outrageous" and beyond all bounds of decency. Therefore, damages should not have been awarded.

Guinn allowed punitive damages to be awarded against the church elders. Because there was no evidence of malice or an evil intent, punitive damages should not have been allowed. In addition, punitive damages violate every standard of neutrality under the establishment clause and are a substantial burden on religion.

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