Touro Law Review

Volume 29
Number 4 *Annual New York State Constitutional Issue*

Article 8

March 2014

Curtailing the First Amendment Protection to Discovery

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Cover Page Footnote
29-4

CURTAILING THE FIRST AMENDMENT PROTECTION TO DISCOVERY

SUPREME COURT OF NEW YORK
KINGS COUNTY

Krystal G. v. Roman Catholic Diocese of Brooklyn[1]
(decided October 14, 2011)

I. INTRODUCTION

Parents and natural guardians, Vivian G. and Juan F., on behalf of their daughter Krystal G., and in their individual capacities filed a suit against the Roman Catholic Diocese of Brooklyn, the parish, congregation, church, school ("Vincentian defendants"), and former pastor Joseph Agostino ("Agostino") for allegedly negligently hiring, retaining and supervising former assistant pastor "Cortez."[2] Defendant Agostino moved to dismiss the claims against him in a summary judgment motion.[3] However, the Supreme Court of Kings County denied the motion as premature.[4] In turn, on cross motion, the parents moved to compel defendant Cortez and the Vincentian defendants to provide certain requested discovery documents that the defendants alleged were protected by the "priest-penitent" privilege.[5]

The documents sought consisted of documented action taken

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[1] 933 N.Y.S.2d 515 (Sup. Ct. 2011).

[2] *Id.* at 519-22. Former assistant pastor Cortez, was also sued for alleged sexual assault and battery of the parents' daughter at school when she was twelve years old. *Id.* at 519.

[3] *Id.* at 525.

[4] *Id.* New York's Civil Practice Law and Rules, section 3212(f) authorizes denying a summary judgment motion if it appears from affidavits submitted in opposition that facts essential to justify opposition may exist but cannot yet be stated. N.Y. C.P.L.R. 3212 (McKinney 2009). Here, discovery had not yet taken place, and the parents' affidavit referenced discoverable materials, exclusively within Cortez's and the Vincentian defendants' control that could support the parents' contention that Agostino either knew or should have known of Cortez's propensity to act in the manner that caused the infant's injuries. *Krystal G.*, 933 N.Y.S.2d at 523.

[5] *Id.* at 519-22. The Vincentian defendants, on cross motion, "sought a protective order, governing confidential materials . . . limiting discovery and precluding the plaintiffs from inquiring into allegations of sexual assault by Agostino himself." *Id.* at 521.

by the school administration affirming Agostino's authorization of Cortez's presence at the school even though the school's administrators had undertaken action to remove Cortez from the school premises.[6] Specifically, the school's removal action was a direct result of an ongoing concern about Cortez's contact with the school children.[7]

The crux of the issue was whether the defendants' documents sought by the parents in discovery were privileged and thus precluded, due to the religious/spiritual considerations and the church doctrine, under the Free Exercise Clause and the Establishment Clause of the United States Constitution's First Amendment.[8]

The New York Supreme Court, Kings County correctly applied federal and New York case law in finding that the United States Constitution's First Amendment protection did not bar the parents' discovery of the defendants' documents.[9] This Note will explore a New York court trend of resolving controversies based on purely secular legal law, without also deciding intra-religious disputes or the use of religious dogma.

II. THE OPINION—*KRYSTAL G. V. ROMAN CATHOLIC DIOCESE OF BROOKLYN*

The court in *Krystal G.* reached its conclusion based on the application of three principles of law.[10] First, the court applied the three-prong *Lemon* test and stated that allowing the exchange of the documents requested would not foster excessive government entanglement.[11] Second, the court applied and relied upon the neutral principles of law doctrine and stated that courts can and must resolve such issues where neutral principles of law can be applied without establishing the church doctrine to resolve the dispute.[12] Specifically, because Krystal's claims embraced substantive law consisting of negligent supervision of a subordinate and physical contact with a child, the court found it could resolve the same without the use of religious

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[6] *Id.* at 520.

[7] *Id.*

[8] *Krystal G.*, 933 N.Y.S.2d at 526. These documents where self-described by the defendants as a "plan" and a "report" that contains "inter-priest communications related to Father Cortez's priestly duties and vocation." *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Krystal G.*, 933 N.Y.S.2d at 526.

dogma, thereby allowing discovery of the documents at issue.[13] Finally, balancing competing interests between the state discovery statutes and Krystal G.'s First Amendment privilege, the court found that the need for the parents' discovery demands outweighed the burden of the defendants to provide the documents.[14]

A. First Amendment: Free Exercise and Establishment Clauses

The First Amendment of the United States Constitution prohibits any "law respecting an establishment of religion, or prohibiting the free exercise thereof."[15] It embraces both the freedom to believe and the freedom to act.[16] While freedom to believe is absolute, the freedom to act is not.[17] Most importantly, intentional and criminally offensive conduct is not insulated from prosecution under the First Amendment.[18] Religious entities must be held accountable for their actions, "even if that conduct is carried out as part of the church's religious practices."[19] Furthermore, the purpose of the Establishment Clause is not to safeguard individual rights, but rather to serve as a structural restraint on governmental power from legislating or acting on any matter "respecting [the] establishment of religion."[20]

In a fairly recent decision, the Supreme Court in *Locke v. Davey*[21] acknowledged that although to a large extent the Establishment and the Free Exercise clauses are complementary to each other, there is often tension between these provisions.[22] The issue in *Locke* was whether the State of Washington's prohibition of the use of scholarships for "devotional studies" violated the Establishment

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[13] *Id.* at 527

[14] *Id.* at 526.

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

[16] Cantwell v. Connecticut, 310 U.S. 296, 303-05 (1940). While the First Amendment of the United States Constitution prohibits regulation of religious beliefs, conduct by a religious entity "remains subject to regulation for the protection of society." *Id.* at 304.

[17] *Id.* at 303-05.

[18] Kenneth R. v. Roman Catholic Diocese of Brooklyn, 654 N.Y.S.2d 791, 796 (App. Div. 2d Dep't 1997).

[19] Meroni v. Holy Spirit Ass'n for Unification of World Christianity, 506 N.Y.S.2d 174, 203 (App. Div. 2d Dep't 1986).

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

[21] 540 U.S. 712 (2004).

[22] *Id.* at 718. In a majority opinion, Chief Justice Rehnquist stated that the case involved "tension" and "the play in the joints" between the establishment and free exercise clauses. *Id.*

Clause.[23] Washington offered a program of giving scholarships to students who qualified, academically and financially, and who attended college in the state.[24] However, the program did not allow recipients to pursue a devotional theology degree.[25] Joshua Davey attended a private Christian college in Washington, and was a recipient of Washington's "promise scholarship" program.[26] When Davey sought to double major for business management and ministry, he was informed that he could not receive the promise scholarship if he pursued ministry.[27] Davey refused the aid and filed suit to challenge Washington's restriction, arguing that it violated the Free Exercise Clause of the First Amendment.[28]

In a 7-2 decision, the Supreme Court in *Davey* held that a state government could restrict its college scholarships as to prevent them from being used by those studying ministry.[29] The Court emphasized that while state governments may constitutionally allow the use of scholarship for ministry study purposes, it was not constitutionally required to do so.[30] The Court reasoned that denying Davey scholarship money to study ministry did not interfere with his free exercise of religion in any way, as he could still receive training to be a pastor, just without it being subsidized by the government.[31]

Thus, *Locke* illustrates that while the State may have the ability to provide aid for religious studies without creating excessive entanglement with religious doctrine, it may choose not to provide such aid without violating the Free Exercise Clause.[32]

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[23] *Id.* at 719.

[24] *Id.* at 715.

[25] *Locke*, 540 U.S. at 716.

[26] *Id.* at 717.

[27] *Id.*

[28] *Id.*

[29] *Id.* at 712 (majority opinion); *Locke*, 540 U.S. at 725 ("The State's interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden on Promise Scholars. If any room exists between the two Religion Clauses, it must be here. We need not venture further into this difficult area in order to uphold the Promise Scholarship Program as currently operated by the State of Washington.").

[30] *See id.* at 719 (indicating that Washington could, if it wanted, allow its scholarship assistance to study for the ministry).

[31] *Locke*, 540 U.S. at 720. *Locke* stands for the significance that government at all levels can choose how it wants to spend tax payers' money and the extent, if any, it wants to financially support religion, and that this choice is to be made by the political process and not the courts. *Id.*

[32] *Id.*

1. Avoiding Conflict with the Religion Clauses

In avoiding conflict with the religion clauses of the First Amendment, and in determining whether a statute is valid with respect to the Establishment Clause, the Supreme Court established a three-part test.[33] The three-part test was first established in *Lemon v. Kurtzman*.[34] The first prong of the *Lemon* test is the requirement that there be a secular purpose for a law.[35] The second prong requires that the principal or primary effect of a law must be one that neither advances nor prohibits religion.[36] The third prong forbids government actions that cause excessive entanglement with religion.[37] In determining whether the government entanglement is excessive, a court must examine the character and purposes of the institutions that are benefited, the nature of the aid the state provides, and the resulting relationship between the government and the religious authority.[38] Supreme Court cases have interpreted the third prong as involving some permissible level of entanglement.[39] The courts have held that entanglement must be excessive before it violates the Establishment Clause.[40]

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[33] Lemon v. Kurtzman, 403 U.S. 602 (1971).

[34] 403 U.S. 602 (1971).

[35] *Id.* at 612. The rationale for the first prong of the *Lemon* test is that the very essence of the establishment clause is to keep the government from acting to advance religion. *Id. See, e.g.*, Stone v. Graham, 449 U.S. 39, 41 (1980) (declaring unconstitutional a state law that required the Ten Commandments to be posted on the walls of every public school classroom, by concluding that the law had no secular legislative purpose, thus violating the establishment clause).

[36] *Lemon*, 403 U.S. at 612; Estate of Thorton v. Caldor, 472 U.S. 703 (1985). In *Thorton*, the Court used the second prong of the *Lemon* test to invalidate a Connecticut statute providing that no person may be required by an employer to work on his or her Sabbath. *Id.* at 710. The Court reasoned that the statute went beyond having an incidental or remote effect of advancing religion, rather it had a primary effect of impermissibly advancing a particular religious practice. *Id.*

[37] *Lemon*, 403 U.S. at 613.

[38] *Id.* at 615.

[39] *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 204, 232 (1997) (holding that New York City's Board of Education's program consisting of sending school teachers into parochial schools to provide remedial education to disadvantaged children did not violate the Establishment Clause).

[40] *Id.*; *see also*, Bowen v. Kendrick, 487 U.S. 589, 615 (1988) (finding no excessive entanglement where the government reviewed the adolescent counseling program set up by the religious institutions that are grantees, and monitored the program by periodic visits); Roemer v. Bd. of Pub. Works of Md., 426 U.S. 736, 766 (1976) (finding no excessive entanglement where state conducted annual audits to ensure that state grants to religious colleges were not used to teach religion).

In *Lemon*, the Court was faced with the issue of whether two state statutes that provided state aid to church-related educational institutions violated the First Amendment's Establishment Clause.[41] The Pennsylvania statute provided financial support for teacher salaries, textbooks, and instructional materials for secular subjects to non-public schools.[42] The Rhode Island statute provided direct supplemental salary payments to teachers in non-public elementary schools.[43] In a unanimous decision, the Court held that both statutes were unconstitutional under the religion clauses of the First Amendment because they were "promoting secular legislative purposes."[44] The Court reasoned that the statutes "involved excessive entanglement of state with church."[45]

The entanglement in the Pennsylvania statute was that in addition to providing direct aid to church schools, it also led to an intimate and continuing relationship between the church and the state.[46] This relationship arose from the state's scrutiny power to inspect and evaluate schools' financial records and to determine which expenditures were religious and which were secular.[47] The Court stated that this posed a danger of divisive political activity and possibility of progression toward the establishment of state churches and state religion.[48] The Court found entanglement in the Rhode Island statute because the aid constituted an integral part of the religious mission of the church, for two reasons.[49] First, the recipient teachers were under religious control and discipline.[50] Second, the aid provided involved comprehensive and continuing state surveillance to insure the recipient's obedience to the restrictions as to the courses that could be taught and the materials that could be used.[51]

In an attempt to provide a clearer standard for when a controversy could be resolved without the court having to decide intra-religious disputes, the Supreme Court subsequently revisited the

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41 *Lemon*, 403 U.S. at 625.
42 *Id.* at 620.
43 *Id.* at 615.
44 *Id.* at 603.
45 *Id.*
46 *Lemon*, 403 U.S. at 603.
47 *Id.*
48 *Id.*
49 *Id.*
50 *Id.*
51 *Lemon*, 403 U.S. at 603.

Lemon test one year later in *Wisconsin v. Yoder*.[52] *Yoder* involved three members of the Old Order Amish Religion that were prosecuted under a Wisconsin law that required all children to attend public school until the age of sixteen.[53] These defendants refused to send their children to public schools upon completion of eighth grade, arguing that high school attendance was contrary to their religious beliefs.[54] The Court prefaced the discussion of the First Amendment issue by stating that "to have the protection of the Religion Clauses, the claims must be rooted in religious belief."[55] With this philosophy as a back drop, the Court found that the values and programs of secondary school were "in sharp conflict with the fundamental mode of life mandated by the Amish religion," and that an additional one or two years of high school would not produce the benefits of public education cited by Wisconsin to justify the law.[56]

In an opinion by Chief Justice Burger, the Court held that the "First Amendment prevents a state from compelling Amish parents to cause their children, who have graduated from eighth grade, to attend formal high school to age sixteen."[57] Justice White, in a concurring opinion, stated that the administration of an exemption for the Amish people from the state's school-attendance laws would inevitably involve the kind of close scrutiny of religious practices that the First Amendment protects against.[58] However, relying on *Sherbert v. Verner*,[59] the court reasoned that such monitoring entanglement does not create a forbidden establishment of religion where it is essential to implement free exercise values, threatened by an otherwise neutral program instituted to foster some permissible, nonreligious state objective.[60]

Yoder, and cases that followed, created the potential for challenges by religious groups to a wide range of laws that conflict with

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[52] 406 U.S. 205 (1972).

[53] *Id.*

[54] *Id.*

[55] *Id.* at 215.

[56] *Id.* at 217.

[57] *Yoder*, 406 U.S. 205.

[58] *Id.* at 240.

[59] Sherbert v. Verner, 374 U.S. 398, 406 (1963) (finding denial of unemployment benefits unconstitutionally burdened plaintiff's free exercise by forcing a choice between abandoning Saturday religious practice or forfeiting benefits, but noting the statute excepted those worshipping on Sundays from having to make the same choice).

[60] *Yoder*, 406 U.S. at 240.

the principles of their faiths, because such laws impose penalties either for engaging in religiously motivated conduct or for refusing to engage in religiously prohibited conduct.[61]

However, in 1990, the Court reversed this course and sharply restricted the scope of the Free Exercise Clause's reach with respect to laws of general applicability in *Employment Division v. Smith*.[62] The Court considered the Constitutionality of Oregon's controlled substance law—which outlawed the use of peyote—as applied to members of the Native American Church, who ingested peyote for sacramental purposes.[63] *Smith* involved two drug counselors that were employed by a nonprofit company, which had a written policy requiring them to stay drug-free and alcohol-free as a condition for employment.[64] They used an illegal drug, peyote, as part of a Native American Church service, and were thereafter fired for engaging in work-related misconduct.[65] Though there was no dispute that their religious beliefs were sincerely held and that the Native American Church used peyote in its religious services, they were denied unemployment compensation by the State.[66] Following the denial, they argued that the First Amendment forbade the state from denying unemployment compensation when their underlying conduct was religiously motivated.[67]

The Court ruled 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 conduct that his religion prescribes."[68] In doing so, the Court declined to overrule prior cases[69] that had granted religious exemptions to general laws, but rather distinguished them on the ground that they involved a type of "hybrid situation" in which the free exercise right was combined with some other constitutional claim.[70]

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[61] *See, e.g.*, Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829, 834 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144 (1987); Thomas v. Review Bd., 450 U.S. 707, 717-18 (1981).

[62] 494 U.S. 872 (1990).

[63] *Id.* at 874.

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Smith*, 494 U.S. at 874.

[68] *Id.* at 879.

[69] *See, e.g.*, *Yoder*, 406 U.S. 205.

[70] *Smith*, 494 U.S. at 881-82.

The Court conceded that a law seeking "to ban such acts . . . only when they are engaged in for religious reasons, or only because of the religious belief that they display" would likely violate the Free Exercise Clause.[71] However, the Court insinuated that the plaintiffs here were seeking to carry the meaning of prohibiting the free exercise of religious one large step further, by claiming that prohibiting free exercise includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires).[72]

The court in *Krystal G.* also examined state precedent applying the *Lemon* test. For example, the court considered *Langford v. Roman Catholic Diocese of Brooklyn*.[73] In *Langford*, a woman brought tort claims against a clergyman and a diocese in connection with a sexual relationship that developed over the course of spiritual counseling.[74] The court in *Langford* dismissed the claim holding that any attempt to define the duty of care owed by a member of the clergy to a parishioner fosters excessive entanglement with religion.[75] The court reasoned that because the plaintiff sought religious and spiritual counseling from the defendant, any breach of the defendants' fiduciary duties could only be construed as clergy malpractice, thus necessitating adjudication of religious dogma—which is forbidden by the First Amendment.[76] However, in a dissenting opinion, Justice Miller disagreed with the majority's holding, stating that the First Amendment was not intended to protect the misconduct of clergy where examination of their conduct does not in fact require inquiry into intra-religious disputes.[77]

While the court in *Krystal G.* relied on the three-prong test established by the Supreme Court in *Lemon*, ultimately the court came to a different conclusion holding that "[t]he Free Exercise and Establishment Clauses of the United States Constitution's First Amendment do not preclude the exchange of any documents or items [sought by the parents]."[78] The court reasoned that it would not be

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[71] *Id.* at 877 (alteration in original).
[72] *Id.* at 878.
[73] 705 N.Y.S.2d 661 (App. Div. 2d Dep't 2000).
[74] *Id.* at 662.
[75] *Id.*
[76] *Id.* at 663.
[77] *Id.*
[78] *Krystal G.*, 933 N.Y.S.2d at 526 (alteration in original).

fostering "excessive governmental entanglement with religion" by granting the parents' discovery requests.[79]

Furthermore, while the court in *Krystal G.* applied the *Yoder* rule, it found the facts to be distinguishable.[80] Unlike in *Yoder* where the member's claims were rooted in the religious beliefs of the Amish, in *Krystal G.*, the claims were rooted in the tort claims of negligent supervision and retention.[81] Additionally, the First Amendment issue in *Krystal G.* arose only as a result of discovery requests, which is a procedural mechanism used to prove the underlying claims.[82] Thus, in contrast to *Yoder*, the claims in *Krystal G.* were not rooted in religious beliefs and the court could therefore resolve the controversy based on purely secular legal law.[83]

Finally, *Krystal G.* seems to fit perfectly under the *Smith* era of restricting the scope of the Free Exercise Clause's reach with respect to laws of general applicability. Specifically, it seems that *Krystal G.* manifests the same view as *Smith*—which is that defendants were seeking to carry the meaning of prohibiting the free exercise of religion one large step further by maintaining that their observance of the New York discovery statutes would require them to perform an act that their religious belief forbids.

Moreover, *Langford*, which refused to resolve the controversy before it by holding that any attempt to define the duty of care owed by a clergyman to his parishioner would foster excessive entanglement with religion, is also factually distinguishable from *Krystal G.*[84] One critical difference between *Langford* and *Krystal G.* is that in *Langford*, the plaintiff and defendant pastor were involved in religious counseling, whereas in *Krystal G.* no such relationship existed.[85] In addition, the claim in *Langford* would have involved defining the standard of care of the pastor, because it would have necessarily required a determination concerning the defendant's duties as a member of the clergy offering religious counseling to the plaintiff.[86] By contrast, in *Krystal G.*, the discovery sought would

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[79] *Id.*
[80] *Id.*
[81] *Id.* at.520.
[82] *Id.* at 526.
[83] *Krystal G.*, 933 N.Y.S.2d at 526.
[84] *Id.*
[85] *Id.*
[86] *Id.*

simply either prove or disprove the parents' claim of negligent retention, which would not facilitate any substantive determination of a religious dogma.[87]

B. Neutral Principles of Law Doctrine

In concluding that the First Amendment's Establishment Clause protection did not bar the plaintiffs' discovery, the court in *Krystal G.* also relied on the neutral principles of law doctrine, which provides that "courts can, and must, resolve issues where neutral principles of law . . . can be applied without establishing church doctrine to resolve the dispute."[88]

In coming to its conclusion, the court relied heavily on the United States Supreme Court decision in *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*.[89] The Supreme Court in *Presbyterian Church* was faced with resolving a property dispute that arose when two local churches attempted to withdraw from the national Presbyterian Church.[90] In an opinion by Justice Brennan, the Court held that courts can resolve internal church disputes over ownership of property only if the decision will entirely turn on secular legal principles, rather than require the courts to decide any issues of religious doctrine.[91] Thus, the Court stated that there are neutral principles of law, developed for use in all property disputes, which can be applied without "establishing" churches to which property is awarded.[92]

The court in *Krystal G.* also looked to New York precedent in applying the neutral principles of law doctrine.[93] In its first case dealing with the neutral principles of law doctrine, the New York Court of Appeals decided *First Presbyterian Church of Schenectady v. United Presbyterian Church of the United States*.[94] In *First Presbyterian Church of Schenectady*, at issue was whether the court may re-

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[87] *Id.* at 525.

[88] *Krystal G.*, 933 N.Y.S.2d at 526; Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449 (1969).

[89] 393 U.S. 440 (1969).

[90] *Id.* at 442.

[91] *See id.* at 449 ("[T]he Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over the religious doctrine.").

[92] *Id.*

[93] *Krystal G.*, 933 N.Y.S.2d at 526.

[94] 464 N.E.2d 454 (N.Y.1984).

solve a dispute between the parties, which arose when plaintiff ("First Church") withdrew from its denominational church organization because of a disagreement over the defendant's financial support of radical political groups and individuals, without violating the First Amendment's prohibition against excessive governmental entanglement.[95]

The plaintiff sought a declaration of its independence status and a permanent injunction preventing defendants from interfering with plaintiff's use and enjoyment of the local church property.[96] The New York Court of Appeals in *First Presbyterian Church of Schenectady* ruled that in making a neutral principles analysis, it is not sufficient to simply be able to identify relevant secular rules, but it is also necessary that there exist neutral facts on which to apply those rules.[97] Neutral facts consist of evidence from which courts may discern the objective intention of the parties, such as the language of deeds, the terms of a local church charter, state statutes governing the holding of church property and the like.[98] Finally, relying on the United States Supreme Court decision in *Presbyterian Church*, the court held that the "State has a legitimate interest in resolving property disputes, and . . . a civil court is a proper forum for that resolution."[99] Thus, courts may resolve church property disputes and as a result provide injunctive relief to plaintiffs in such actions without having to decide intra-religious disputes.[100]

The court in *Krystal G.* also relied on *Kelley v. Garuda*,[101] a more recent neutral principles of law case decided by the Appellate Division, Second Department. The court in *Kelley* also applied the Supreme Court's holding in *Presbyterian Church*,[102] finding that the First Amendment did not preclude the court from ruling on a dispute because the causes of action alleging trespass were essentially based on legal principles of corporate government and property that could in fact be resolved without the court having to decide intra-religious disputes precluded by the First Amendment.[103]

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[95] *Id.* at 457.
[96] *Id.*
[97] *Id.*
[98] *Id.* at 460-62.
[99] *First Presbyterian Church of Schenectady*, 464 N.E.2d at 462.
[100] *Id.*
[101] 827 N.Y.S.2d 293 (App. Div. 2d Dep't 2007).
[102] *Id.* at 294.
[103] *Id.* The court emphasized that defendants failed to establish that the court could not re-

Relying upon the Supreme Court's decision in *Presbyterian Church* and the New York Court of Appeals' decision in *Kelley*, in determining whether the neutral principles doctrine applied, the court in *Krystal G.* held that the First Amendment did not preclude the court from ruling on the dispute.[104] The court in *Krystal G.* reasoned that because the plaintiffs' claims involved negligent supervision and retention of a subordinate's physical contact with a child, the court was not required to resort to matters of religious dogma.[105] Rather, the court found that it could resolve the plaintiffs' claims by applying the secular rules of New York's procedural law, discovery statutes, and civil legal principles of torts.[106]

C. Balancing Competing Interests Test

Finally, in reaching its decision, the Supreme Court in *Krystal G.* also considered state precedent that applied a balancing of competing interests analysis.[107] The court in *Krystal G.* relied on a New York Court of Appeals case that first adopted the balancing of competing interest test, *Andon ex rel Andon v. 302-304 Mott Street Ass'n.*[108] In *Andon*, a mother brought an action on behalf of herself and her infant son, alleging that the infant's disabilities were caused by ingesting lead-based paint.[109] The defendant requested discovery of the mother's IQ to determine whether her son's cognitive disabilities were genetic.[110] The trial court granted the defendant's motion and the Appellate Division reversed.[111] The Appellate Division concluded that the information sought was not discoverable under CPLR 3121(a) because the mother's mental condition was not "in controversy."[112] The New York Court of Appeals affirmed, reasoning that

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solve the issues by applying neutral principles of law to analyze the deed to the property. *Id.*

[104] *Krystal G.*, 933 N.Y.S.2d at 526.

[105] *Id.* at 527.

[106] *Id.* Hence, the court held that there was no reason why the First Amendment's Establishment Clause should bar the plaintiff's discovery. *Id.*

[107] *Id.* at 526.

[108] 731 N.E.2d 589 (N.Y. 2000); *Krystal G.*, 933 N.Y.S.2d at 526.

[109] *Andon*, 731 N.E.2d 591.

[110] *Id.*

[111] *Id.* at 592.

[112] *Id.* at 593. The Appellate Division concluded that the burden of subjecting the plaintiff-mother to an IQ test outweighed any relevance her IQ would bear on the issue of causation. *Id.* at 596. The Court also noted that the mother's mental condition was not in dispute and that IQ results, while not confidential, are private. *Andon*, 94 N.Y.2d at 596.

under the competing interests test, the Appellate Division correctly considered the defendants' need for the information against its possible relevance, the burden of subjecting the mother to the test, and the potential for unfettered litigation on the issue of maternal IQ.[113]

New York favors open disclosure under the CPLR 3101.[114] New York's CPLR 3101(a) grants litigants a broad scope in discovering materials, allowing full disclosure of all matter that is material and necessary in the prosecution or defense of an action, regardless of burden of proof.[115] However, in an effort to afford litigants some protection from New York's broad discovery statute, the Court of Appeals held that competing interests must always be balanced.[116] The court stated that the discretionary balance of interests test requires the need of discovery to be weighed against any special burden to be borne by the opposing party.[117] The information sought to be discovered must be in controversy, must aid in the resolution of the question and must not unnecessarily broaden the scope of the litigation and invite extraneous inquiries.[118]

The court in *Krystal G.* applied the balancing test established in *Andon* in reaching its decision that the need for the parents' discovery demands essentially outweighed the burden of the defendants to provide the requested documents.[119] In exercising its discretion under the balance of interests test, the court reasoned that the documents requested were directly related to the controversy, as it would support the plaintiffs' contentions of the claims alleged.[120] The court stated that the discovery requests referenced material exclusively within the defendants' control that may support the parents' contention that Defendant Agostino either knew or should have known of former assistant pastor Cortez's propensity to act in the manner that

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[113] *Id.*

[114] *Id.* at 593.

[115] *See id.* ("What is 'material and necessary' is left to the sound discretion of the lower courts and includes any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason."); *see also Krystal G.*, 933 N.Y.S.2d at 526 (reciting and applying N.Y. CPLR 3101 (McKinney 2009)).

[116] *Andon*, 731 N.E.2d. at 593.

[117] *Id.*; *Krystal G.*, 933 N.Y.S.2d at 526.

[118] *Andon*, 731 N.E.2d. at 593-94.

[119] *Krystal G.*, 933 N.Y.S.2d at 526. The defendants maintained that they were afforded a privilege under the First Amendment, to bar inquiry within their confidential religion documents otherwise permissible under the New York State discovery statute. *Id.*

[120] *Id.* at 525.

caused Krystal G.'s and her parents' injuries.[121]

III. COMPARING FEDERAL AND NEW YORK STATE APPROACHES TO THE FIRST AMENDMENT'S RELIGION DOCTRINE

Both state and federal courts acknowledge constitutional limits on judicial involvement in religious doctrine cases, recognizing that courts are prohibited from resolving controversies which require considerations of intra-religious disputes.[122] The Supreme Court has held that on issues pertaining to religious concerns, courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity.[123] However, both state and federal courts have also established that courts are free to decide such disputes if they can do so without resolving the underlying controversies over religious doctrine, using the neutral principles of law approach.[124]

In attempting to draw a bright line rule between what is considered excessive entanglement with religious doctrine, federal and state courts have held that the First Amendment only proscribes courts from attempting to define the duty of care owed by a member of the clergy to a parishioner.[125] For example, in a Southern District Court of New York case, *Ehrens v. Lutheran Church-Missouri Synod*,[126] the court held that because it would be inappropriate and unconstitutional to determine whether the ecclesiastical authorities negligently supervised or retained a Reverend, it dismissed the case.[127] The court's rationale rested on the following:

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[121] *Id.*

[122] *Id.*

[123] *Presbyterian Church*, 393 U.S. 440; *see also* Avitzur v. Avitzur, 446 N.E.2d 136, 139 (N.Y. 1983) (holding nothing in the law or public policy prevents judicial recognition and enforcement of the secular terms of a religious marriage agreement); Jones v. Wolf, 443 U.S. 595, 602-04, 619 (1979) (holding that nothing in the law or public policy prevents judicial recognition and enforcement of the secular terms of a religious marriage agreement, including but not limited to issues concerning matters of discipline, faith, internal organization, ecclesiastical rule, or custom).

[124] *See, e.g.*, *Avitzur*, 446 N.E.2d at 138 ("The present case can be solely decided upon the application of neutral principles of contract law, without reference to any religious principle.").

[125] Ehrens v. Lutheran Church-Missouri Synod, 269 F. Supp. 2d 328, 332 (S.D.N.Y. 2003) (citing *Langford*, 705 N.Y.S.2d 661). Interestingly, both federal and state courts are split on the applicability of the duty of care. *Id.*

[126] 269 F. Supp. 2d 328.

[127] *Id.* at 332

> Any inquiry into the policies and practices of the Church Defendants in hiring or supervision their clergy raises some kind of First Amendment problems of entanglement . . . which might involve the Court in making sensitive judgments about the propriety of the Church Defendants' supervision in light of their religious beliefs. Insofar as concerns retention or supervision. The pastor of a Presbyterian church is not analogous to a common law employee. He may not demit his charge nor be removed by the session, without consent of the presbytery, functioning essentially as an ecclesiastical court. The traditional denominations each have their own intricate principles of governance, as to which the state has no rights of visitation.[128]

However, New York State precedent holds that under the doctrine of neutral legal principles of law, courts are able to decide some controversies so long as they can be resolved without the court also having to decide intra-religious disputes.[129] This principle was most recently depicted in the New York County Supreme Court case, *Vione v. Tewell*.[130] In *Vione*, a parishioner brought a breach of fiduciary duty and negligent retention and supervision action alleging that his former minister had an affair with his wife, while acting as the couple's marriage counselor.[131] The court was faced with the issue of whether the defendant's First Amendment rights would be violated if the court allowed the claims to go further.[132] The New York County Supreme Court held that the parishioner's claims could be decided in accordance with neutral principles of law without resort to religious tenets, policies, or procedures.[133] The court stated that breach of fiduciary duty and negligent hiring and retention are "well-defined bodies of civil law;" thus the First Amendment's religion clause did not bar the claims.[134]

While the court in *Krystal G.* failed to consider *Vione* in its

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[128] *Id*.

[129] *Presbyterian Church*, 393 U.S. 440, 449; Jones v. Trane, 591 N.Y.S.2d 927 (Sup. Ct. 1992).

[130] 820 N.Y.S.2d 682 (Sup. Ct. 2006).

[131] *Id.* at 684

[132] *Id.* at 685.

[133] *Id.*

[134] *Id.*

analysis, it would not have changed the outcome.[135] Rather, *Vione* exemplifies the New York State court trend of permitting claims to go forward based on a purely secular legal law analysis.[136]

One of the cases that the dissent in *Langford* discussed as having established the application of the neutral principles of law doctrine is a New York Court of Appeals case, *Avitzur v. Avitzur*.[137] In *Avitzur*, plaintiff and defendant were married in 1966 in a ceremony conducted in accordance with the Jewish tradition.[138] Prior to the ceremony, the parties signed a document known as "Ketubah," in which both parties agreed to recognize a rabbinical tribunal as having authority to counsel the couple in matters concerning their marriage.[139] In order for a couple to be considered divorced pursuant to the Jewish law, they both have to appear in the rabbinical tribunal to obtain a Jewish divorce decree, known as a "Get."[140] The couple was granted a civil divorce upon the grounds of cruel and inhuman treatment.[141] Notwithstanding this civil divorce, the wife was not considered divorced and could not remarry pursuant to Jewish law, until the "Get" divorce was granted.[142]

After the defendant refused to appear, the plaintiff brought an action seeking an order compelling defendant's specific performance of the Ketubah.[143] The defendant moved to dismiss upon the grounds that the document constituted a liturgical agreement, and was therefore unenforceable by the State due to the First Amendment clauses.[144] The Court of Appeals held, in an opinion authored by Judge Wachtler, that nothing in law or public policy prevents judicial

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[135] *Krystal G.*, 933 N.Y.S.2d at 526; *Vione*, 820 N.Y.S.2d at 685. This is because *Vione* also applied the neutral principles of law doctrine in resolving the negligent hiring and retention claims, thereby rendering the First Amendment religious clause protection inapplicable. *Id.*

[136] *Vione*, 820 N.Y.S.2d at 685; *Langford*, 705 N.Y.S.2d at 663 (Miller, J., dissenting) (pointing out that the majority's holding "that any attempt to define duty of care owed by a member of the clergy to a parishioner fosters excessive entanglement with religion" is inconsistent with precedent firmly established in New York).

[137] 446 N.E.2d 136 (1983).

[138] *Id.* at 137.

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *Avitzur*, 446 N.E.2d at 137.

[143] *Id.* Ketubah is a marriage contract. *Id.* The requirement that the parties appear before the tribunal in order for both arties to be considered divorced, pursuant to Jewish law comes from a clause in the Ketubah. *Id.*

[144] *Id.* at 137.

recognition and enforcement of the secular terms of a religious marriage agreement.[145] The court reasoned that the relief sought by plaintiff was simply to compel the defendant to perform a secular obligation to which he contractually bound himself.[146] Furthermore, the court went on to state that to the extent that an enforceable promise can be found by the application of neutral principles of contract law, plaintiff demonstrated entitlement to the relief sought.[147]

IV. CONCLUSION

The court in *Krystal G.* was correct in finding that the First Amendment did not bar the parents' discovery requests.[148] In rejecting the First Amendment claim, the court applied three principal tests: the *Lemon* test, the neutral principles of law doctrine, and balancing competing State interests test.[149]

In applying the *Lemon* test, the *Krystal G.* court adopted the view that while the state may not foster excessive governmental entanglement with religion, the First Amendment merely bars courts from defining the standard of care that a religious practitioner owes a congregant when providing spiritual guidance.[150] As an exception to this rule, the court also applied the neutral principles of law doctrine in an effort to allow the parents to pursue their claims of negligent supervision and retention.[151] Hence, the court concluded that "the Free Exercise and Establishment Clauses . . . do not preclude the exchange of any documents or items the [parents] seek," specifically because the parents' negligent supervision and retention claims could be decided on purely secular legal principles.[152] Finally, the court examined the balancing competing State interests test, ultimately deciding that the need for the parents' discovery demands essentially outweighed the burden of the Vincentian defendants to provide the

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145 *Avitzur*, 446 N.E.2d at 138-40.

146 *Id.*

147 *Id.* at 138. *But see id.* at 139 (Jones, J., dissenting) ("[T]hat to grant the relief plaintiff seeks in this action . . . would necessarily violate the constitutional prohibition against entanglement of our secular courts in matters of religious and ecclesiastical content.").

148 *Krystal G.*, 933 N.Y.S.2d at 526.

149 *Id.*

150 *Id.*

151 *Id.*

152 *Id.*

documents.[153]

The court's decision in *Krystal G.* is in accord with New York precedent, which has displayed a trend of allowing claims to go forward by applying purely secular legal law and thereby avoiding a collision with the First Amendment of the United States Constitution.

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[153] *Krystal G.*, 933 N.Y.S.2d at 526.

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